REPORTED CASES

IN

VOLUME XV

OHIO CIRCUIT COURT REPORTS.

AFFIRMED OR REVERSED, OR OTHERWISE DISPOSED OF IN THE SUPREME COURT OF OHIO.
(To January 1, 1899.)

[Where pages of the Bulletin are given without a star, the case is decided without report. Where a star is attached, the full text of the opinion of the supreme court is referred to.]

P. 14. Barnes v. State. Aff'd. by S. C. 39 B., 290.

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P. 94. Palmer, In Re. disbarment. See also first decision in same case. 9.C C., 55.

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REPORTS

— OF —

CASES ARGUED AND DETERMINED

— IN THE —

CIRCUIT COURTS OF OHIO.

VOLUME XV.

JANUARY 1, TO JUNE 30,

1898.

CARL G. JAHN, Editor.

COLUMBUS OHIO:
WEEKLY LAW BULLETIN, PRINT.
1898.

JUDGES OF THE

CIRCUIT COURT OF OHIO

From January 1st, 1898, to July 1st, 1898.)

CHAS. C. SHEARER, *Chief Justice*, Xenia, O.
Re-elected for the year 1898.

FIRST CIRCUIT.

JOSEPH COX, *Presiding Judge* ..... Cincinnati
JAMES M. SMITH, *Judge* ..... Lebanon
PETER F. SWING, *Judge* ..... Batavia

SECOND CIRCUIT.

CHAS. C. SHEARER, *Chief Justice* ..... Xenia
AUGUSTUS N. SUMMERS, *Judge* ..... Springfield
HARRISON WILSON, *Judge* ..... Sidney

THIRD CIRCUIT.

JAMES H. DAY, *Presiding Judge* ..... Celina
JAMES L. PRICE, *Judge* ..... Lima
CALEB H. NORRIS *Judge*, ... Marion

FOURTH CIRCUIT.

THOMAS CHERRINGTON, *Presiding Judge* ..... Ironton
DAVID A. RUSSELL, *Judge* ..... Pomeroy
HIRAM L. SIBLEY, *Judge* ..... Marietta

FIFTH CIRCUIT.

JOHN J. ADAMS, *Presiding Judge* ..... Zanesville
SILAS M. DOUGLASS, *Judge* ..... Mansfield
MARTIN L SMYSER, *Judge*, (appointed January 14, 1898, in place of Judge Pomerene, dec'd., to serve until qualification of successor to be elected at November election, 1898), ... Wooster

SIXTH CIRCUIT.

EDMUND B. KING *Presiding Judge* ..... Sandusky
GEORGE R. HAYNES, *Judge* ..... Toledo
ROBERT S. PARKER, *Judge* (Elected at November election, 1897, for unexpired term of Judge Scribner, dec'd., to Feby. 9, 1901, ... Bowling Green

SEVENTH CIRCUIT.

PETER A. LAUBIE, *Presiding Judge* ..... Salem
WILLIAM H. FRAZIER, *Judge* ..... Caldwell
JEROME B. BURROWS, *Judge* ..... Painesville

EIGHTH CIRCUIT.

JOHN C. HALE, *Presiding Judge* ..... Cleveland
ULYSSES L. MARVIN, *Judge* ..... Akron
HUGH J. CALDWELL, *Judge* ..... Cleveland

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REV. STATUTES OF OH

CONSIDERED.

IN MEMORIAM.

HON. JULIUS C. POMERENE.

Resolutions

By the Bar of Coshocton, Ohio, in memory of Judge JULIUS C. POMERENE, of Coshocton, one of the Judges of Circuit Court, Fifth Circuit.

Julius C. Pomerene, presiding judge of the circuit court in the fifth circuit of Ohio, having departed this life on the 23rd day of December, 1897, the members of the Bar of Coshocton county deem it their duty, and accept the sacred privilege to express in appropriate form and manner, their profound sorrow at his death.

To give expression of their high esteem for his faithful and eminent services as a jurist on the Bench, his honorable devotion to the profession of the law as a lawyer, as well as for his unsullied purity and uprightness of personal character, and his excellent endearing qualities of heart, and to record their affection for his memory, a meeting of the bar was held in the clerk's office in the court house in this city, Friday, December 24th, 1897.

After due organization, a committee was appointed to prepare and submit to the bar, a memorial and resolutions, upon the life and character of the deceased, consisting of Messrs. R. M. Vorhees, Samuel H. Nicholas, John M. Compton, E. W. James and J. D. Nicholas, which reported the following memorial and accompanying resolutions, which were adopted:

Julius C. Pomerene was born in Holmes county, Ohio, June 27th, 1835, and was of French and German lineage.

His early life was passed upon the farm. At the age of seventeen, he entered Mt. Union College at Alliance, Ohio, as a student, where he secured his literary education. He commenced the study of law in the office of Hoagland & Reed, of Millersburg, Ohio, at the age of twenty-two; later he entered the Ohio State and Union Law School of Cleveland, Ohio, from which he graduated with high honors in the year 1859. In November of the same year he began the practice of law at Coshocton, having formed a partnership with Colonel Josiah Given, now a member of the Supreme Court of Iowa. Col. Given entered the military service in 1861, at which time, Mr. Pomerene entered into a partnership with Benjamin S. Lee, and in the year 1868 the well known firm of Spangler & Pomerene was created, which continued until the year 1883.

In the year 1886 the law firm of J. C. &. W. R. Pomerene was formed, and continued until the senior member, Julius C., was elected Judge of the Circuit Court of Ohio, in the fifth circuit in 1892. He was the presiding judge at the time of his death.

Mr. Pomerene was married April 8th, 1862, to Miss Irene Perky, daughter of Dr. John Perky, of Hancock county, Ohio, who survives him. Of this marriage three children, two sons and one daughter were born. The eldest William R., became his business partner in 1886, and the two sons have succeeded to the practice of law under the firm-name of Pomerene & Pomerene, at Coshocton.

As his brethern at the bar, while we disapprove, as did our deceased brother, the fulsome eulogies too often lavished on the dead, we are glad and proud to say, that he was a pure man, both individually and professionally. His professional life was one of integrity, of honor, of fidelity to clients, of respect for the administration of justice. It is no disparagement to any member of our hard-worked profession to say that Judge Pomerene, throughout his long legal life

as a practitioner and after he went upon the bench, was a most untiring and indefatigable worker at the Bar and upon the Bench. His great industry and vigilance were rarely, if ever, excelled. He was controlled and guided in his practice as a lawyer and as judge upon the bench, by a stern love of justice between man and man. He had no enemy among his legal brethern, and his personal friends were numerous, and none knew him well but to respect him. He died full of years, and after a life of honor and usefulness in every position in which he was placed.

The members of the Bar of Coshocton county desire to express and record their high appreciation of the life and character of their deceased brother, and to make known to the surviving members of his family their unaffected sincere sympathy, and to spread upon the records of the court, this expression of their regard for his public services, and of the honor in which they hold his character as a citizen, a lawyer and a judge.

Resolved: That by the death of Judge Pomerene, his family has lost a most kind and loving husband and parent, the community of which he was a member, an upright and honored citizen, and the Bench and Bar of the state, an able and worthy representative.

Resolved: That this memorial and accompanying resolutions be published in the next volume of the Circuit Court Reports of this state, and be entered on the Journals of the Common Pleas and Circuit Courts of Coshocton county, and that a copy thereof be certified to the family of the deceased brother.

R. M. VORHEES,
S. A. M. NICHOLAS,
J. M. COMPTON,
E. W. JAMES,
JOHN. D. NICHOLAS,
Committee.

CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF OHIO.

(Sixth Circuit—Huron Co., O., Circuit Court—Oct. Term, 1897.)

Before King, Haynes and Parker, JJ.

THE WHEELING & LAKE ERIE R. R. CO. v. WILLIAM McLAUGHLIN et al.

Railroad—Damage to property "near to" R. R. track, but not abutting—

The owner of a Grist Mill and appurtenances, situate upon village lots abutting upon a street, may recover from a railroad company which occupies a part of such street with its tracks, damages resulting to such property from a diminution of the value thereof, caused by sparks, cinders, smoke or noise produced by the operation of locomotives while upon such track and within the limits of the street, if such place is near to his property, though it may not abut upon that part of the street so occupied by such track.

Same—

Second:—A point from three hundred to three hundred and fifty feet distant therefrom, may be "near to" such property, within the meaning of sec. 3283, of Rev. Stats.

Same—For what damages may be recovered—Injury other than that suffered by general public—

Third:—The owner of property so situated, cannot recover damages on account of any obstruction to the street caused by such tracks or by running cars and engines over the same which does not cause him injury different in character from that suffered by the general public, although his injury therefrom may be greater in degree; and the rule of the common law as to such injuries is not abrogated, or modified by said sec. 3283.

Error to the Court of Common Pleas of Huron county.

PER CURIAM.

Monroe street, in the village of Bellevue, has a northwesterly and southeasterly direction through the village and by the premises of the plaintiff. Railroad street runs north and south through the village, passing the premises of the plaintiff on the west, and intersecting Monroe street at the point where said premises are situated. Harrison street extends east and west through the village, intersecting, Railroad street at the point where plaintiff's premises are situated (passing on the north side thereof) and intersecting Monroe street a short distance west of Railroad street, the angle of the intersection being such as to cause thereat, a thoroughfare somewhat broader than either street at all points, and nearly as broad as both streets at the point where the defendant company's transfer track, hereinafter mentioned, crosses the same.

Plaintiff's premises consist of three angular shaped lots, all comprising less than an acre of land, namely, lots 126, 120 and 121, and the buildings thereon. The west front of lot 126 abuts upon Railroad street, and the northerly front upon Monroe street. The west front of lot 120 abuts upon Railroad street, the north front of lots 120 and 121 upon Harrison street, and the southerly front upon Monroe street. Lot121 joins lot 120 on the east. A grist mill, erected before plaintiff became the owner of the property, stands upon lot 126, and upon the other lots are situated certain cooper shops and structures appurtenant to said mill, the whole forming what is designated by the parties as the "Mill Plant" of the plaintiff.

Two main tracks of the M. S. & L. S. R. R. and one side track run east and west immediately south of said mill, the side track running very close to the mill, so that grain, flour, and other produce is conveniently transferred from the cars to the mill, and from the mill to the cars. All these tracks cross Monroe street a few feet south of the mill.

The main tracks of the N. Y., C. & St. L. R. R. and of the C.,S.& H. R. R. run north and south in Railroad street, immediately to the west of said mill. Railroad, street just north of Harrison street, is filled with the main and side tracks of the two railroads last mentioned to an extent that materially reduces the width thereof accessible for travel thereon for vehicles drawn by horses.

The main track of the defendant company crosses Monroe street and Railroad street in an easterly course from 250 to 300 feet north and northwesterly from plaintiff's mill, crossing Monroe at its intersection with Harrison, and running then west in Harrison.

Immediately south of said mill are two transfer tracks connecting the tracks of the C., S. & H. R. R. and the N. Y., C. & St. L. R. R. with the L. S. & M. S. R. R., said transfer tracks curving to the north and east passing within about one hundred feet of plaintiff's mill, and crossing Monroe street just east of said mill.

A track used to transfer cars from the track of the N.Y., C. & St. L. R R., starting from a point in Railroad street immediately west of plaintiff's mill, and curving to the north and east through and across lots 120 and 121, and joining the main track of defendant company just north and east of lot 121, was in operation when plaintiff became the owner of said mill and premises, and before this suit was commenced, but was taken up by defendant at plaintiff's request, shortly before defendant built the first track hereinafter described.

This gives the situation and condition of the mill and the premises in the vicinity at the time defendant built the additional tracks, on account of the building and using of which plaintiff complains, and the situation remaining the same with the exception of such additional tracks to the time of the commencement of this suit, and all but one or two of said tracks were so located and in use when plaintiff became the owner of said mill property.

In the use of these tracks many trains of cars drawn by locomotives passed along upon them daily; besides there was much running and switchiung of cars done thereon in the vicinity of said mill, with the usual incidents of smoke, cinders, noise, danger of fire, and dangers and inconveniences to those using said streets for travel or hauling in vehicles drawn by horses, or incident to allowing horses to stand in the vicinity of said mill while wagons to which they may have been hitched were being loaded or unloaded, or for any proper purpose.

In August, 1889, the defendant constructed a transfer track, leaving the north side of its main track at a point west of plaintiff's mill, curving to the northeast, crossing Monroe street about three hundred and thirty feet northwest of said mill, and connecting with the track of the N. Y., C. & St. L. R. R. in Railroad street. In October, 1893, the defendant constructed two additional transfer tracks, which have the same general direction and course as the transfer track last mentioned, but on either side and within ten feet thereof. No part of plaintiff's premises abuts upon Monroe street at the point where defendants' said transfer tracks cross said street, said lot on which the said mill is located being at the nearest point at least three hundred feet from the nearest of said tracks.

Upon the trial the plaintiff offered evidence tending to prove that said transfer tracks were constructed on a grade about five feet higher than that of Monroe street, as it then existed, at the point where said tracks crossed said street; and that the approaches thereto were so steep as to make it difficult to pass over said track with loaded wagons: but it appears from the evidence that not long thereafter the grade of said street was raised so as to obviate that difficulty, at least in a large degree. The plaintiff also claims that the railroad company in its operation of these tracks sometimes allowed cars to stand across a part of the street so as to

narrow the passageway sometimes down to fourteen, sixteen, or twenty feet.

The plaintiff claims that he purchased this property for use as a mill, and ever since its purchase has been using it for grinding different kinds of grain and buying the same and selling the product, and that a large part of his supplies are brought into the village of Bellevue from the west and northwest, and in order to reach the mill, the most convenient way was Monroe street, and if farmers or those drawing grain came in from the west or north, they would go along Monroe street, crossing these transfer tracks before reaching his mill. Plaintiff claims that the street was obstructed with these tracks; that those tracks were used to transfer cars and run engines upon; that there was considerable noise from the operation of trains on these tracks—and from all these causes traffic to and from his mill has fallen off and gone elsewhere: that the result has been that his property has depreciated one-half in value; and he offered considerable evidence tending to show all the above facts, and some evidence tending to show that there had been a depecriation in the value of his property because his business had fallen off, and that his business was dependent on this traffic from the north and west of the village. There was a claim that there was some smoke from engines operating on these tracks; it is doubtful whether that amounts to very much in the condition of the record as presented.

Numerous objections to the testimony occur all over the record which, we think, may be disposed of by determination of the question, whether the plaintiff is entitled to recover for the diminution in the value of his property occasioned by the fact that the traffic of his mill has been prevented or is changed from his mill to other markets, because of the inconvenience of crossing these tracks, and liability of horses to become frightened, and the dangers incident to traveling upon a railroad track, or crossng one

It is claimed that all this evidence was competent, because, under the provisions of the statute, sec. 3283, every company which lays a track upon any street, shall be responsible for injuries done thereby to private or public property lying upon or near to such ground; and if not entitled to recover under the statute, then upon the general principles of common law. It will be noticed that this statute relates to damages recoverable against a railroad company that has laid its track in a public street or other public ground by or under an agreement with the authority having control of the street; or in case of inability to agree, that the railroad company has appropriated the right to lay its track in such street. It has been intimated in argument that plaintiff would not come within the provisions of this statute, because no such agreement or appropriation has been shown in this case authorizing the railroad company to lay these tracks. We think from the condition of the record in this case, there being an entire absence of proof offered by either party to show any agreement, that it may be assumed that the railroad company laid these tracks in pursuance of such an agreement, either expressed or implied; and we think, if the plaintiff suffered the injuries complained of as a direct result of the construction of these tracks, and that the same are different in kind or character from those sustained or suffered by the general public—that the plaintiff would come within the provisions of this statute; and we are further inclined to hold that the phrase in the statute, "near to," as applicable to the plaintiff in this case, would authorize a recovery for certain injuries sustained by the construction of a railroad track across or in a public street, even though the property alleged to be injured does not abut upon the street at the place where the track is built along or across it.

Prior to the passage of this statute in its present form, a number of cases were decided in Ohio sustaining

the right of a private owner to recover damages for changes in the established grade of a public street by a municipal corporation in front of an improved lot or property. The most important of these are the cases of Crawford v. Delaware, 7 Ohio St., 459, Railway v. Cummingsville, 14 Ohio St., 523, and later the case of Railway Co. v. Lawrence, 38 Ohio St., 41; and in the case of the Eagle White Lead Co. v. Cincinnati, 1 Cin. S. C. 154, it is decided that the city is not liable for changing the grade of a street at a point near to, but not abutting the property of the plaintiff, and to the same effect is the doctrine laid down in the case of Jackson v. Jackson, 16 Ohio St., 163. It is claimed in argument that the rule established by these latter cases has been changed by the case of Railway v. Gardner, 45 Ohio St., 309, and in that connection we are also cited to the case of Shepherd v. B. & O. R. R. Co., 130 U. S. 426, Grafton v. B. & O. R. R, 21 Fed. Rep., 309.

We have carefully examined all these cases as well as all others cited and a great many not cited by counsel for either party. There is considerable conflict in the authorities outside of the state of Ohio, but among Ohio cases none that may notbe reconciled. It ought to be said here that we are referred to the case of Fliehman v. C., C., C. & St. L. Ry. Co., 27 Weekly Law Bulletin 302, and C., C., C. & St. L. v. Reeder, 6 C.C. Rep., 354. The case in the Bulletin was decided by the Superior Court of Cincinnati, and the opinion of the learned judge reviews at considerable length all the principal cases in Ohio as well as some elsewhere upon this question. Espcially does he refer to the case in 130 U. S. supra. In the 45 Ohio St. the only thing decided is that in an action by an owner of property abutting on a public street occupied by a railroad track, and which action is brought un-

der sec. 3283 for injury to property by the laying of the track, that it is competent to take into consideration evidence of substantial injury and loss of property (not common to the community at large), caused by smoke, noise, and sparks of fire occasioned by running locomotives and cars along the track in front of the property, but that cannot well decide such a case as we have here, and perhaps it has little, if any, bearing upon this question. The case referred to in the 27 Bulletin is one almost exactly like this. In that the court held that the owner could not maintain an action for damages to his property or land resulting from an occupancy of the street where such injury was caused, by inconveniences which were common to the public at large, and which did not directly affect property abutting upon the street at the place occupied by the railroad track. To the same effect is the holding in the 6th C. C. 354. It is said the case in the 130 U.S. is one similar to this, but an examination of it discloses that the facts were very different, and the holding of the court in that case is to the effect that the construction of the railroad track at the point and place where so constructed was a direct obstruction to the access of the plaintiff to his property from the street, although plaintiff's property in this case did not abut directly upon the street at the point where the railroad track was constructed, but was 25 feet away. Now, we think a careful examinaiton of these authorities will show that the plaintiff in the case before us as not entitled to recover the depreciation in the value of his property occasioned by the interference with the public travel on Monroe street, and which he claimed caused the public or his customers to cease coming to his mill with their products. The cessation in this business or impairment of it may have accrued from many reasons not disclosed; but assuming that his customers sought another market because of the inconvenience in crossing this railroad track or because they

feared their teams might become frightened and the teams or themselves injured from locomotives and cars running on these tracks, or because there was so much smoke or noise as to render the street at that point unpleasant to them, we think that plaintiff cannot require the railroad company to make up to him what he has lost through these causes; for while it may be true he has lost more than any other, it is equally true that any person who has been inconvenienced by these tracks or been compelled to seek another and a less valuable market for his product because of the inconvenience of this travel or its discomforts, would also have the same cause of complaint against the company based upon the same ground as the plaintiff, though it may be for a less amount, and hence the plaintiff's damages so sustained are of the same kind as those sustained by the community in general, although greater in amount. We think it clear from these authorities which we have cited, and many others that might be, that the plaintiff cannot recover in such case for damages so caused. In addition to the authorities referred to, the following cases might be cited, bearing upon this question sustaining our conclusion: Davis v. County Commissioners, 153 Mass., 218; Morgan v. D. M. & L. Ry., 64 Iowa, 589; Penna Co. for Ins. v. R. R, 151 Penn. State, 334; 9 vol. Am. & Eng. Enc. Law, p. 414, and authorities there cited.

There will be found a distinction between inconveniences that may arise from a partial obstruction in the street, and those arising from a complete obstruction of a public street. In some of the cases it is held where there is a complete abandonment of one end of a street requiring the plaintiff to go in another direction to get out from his property, he has a right of action. A case in 25 Mo. App., 527, is of that kind, and it is also held that if the obstruction cuts off a means of public access to his lot or property, the owner may have an action for damages, although such obstruction is not

in front of the lot. Wilder v. DeCou, 26 Minn., 10.

It follows, then, that the court erred in the admission of all evidence admitted in the case to show the depreciation in the value of this property occasioned by the loss of custom and the interference to public travel on Monroe street by the creation or the operation of these railroads across it, and equally that the court erred in its general charge to the jury, especially because the court has placed the case before the jury upon the theory that these obstructions at that point were an obstruction to the access of the plaintiff to his premises from the public street; and the court likewise erred in its refusal to give certain requests asked by the defendant below, especially requests Nos. 1, 4, 6, and 7. By this we do not mean to hold that the plaintiff may not have sustained damage by reason of the smoke, cinders, fire, or noise coming from the operation of these tracks upon this street, provided it may be shown somewhat approximately the amount of such damage directly attributable to the defendant and its operation of these tracks, and its cars thereon in crossing the street, and as distinguished from like inconveniences and nuisances occasioned by the numerous other railroad tracks at the other places where they are located in and about his mill.

We find no other errors in the record, and reverse the judgment on the grounds stated.

J. H. Tyler and *Jessie Vickery*, Attorneys for Plaintiff in Error.

G. T. Stewart and *Andrews Bros.*, Attorneys for Defendant in Error.

(First Circuit—Clermont Co., O., Circuit Court—Oct. Term, 1897).

Before Cox, Smith and Swing, JJ.

THE STATE OF OHIO EX REL. WELSH v. THE BOARD OF EDUCATION OF TATE TOWNSHIP.

Access to school by children—Bridge asked for—Insufficient averments in petition—

1. The petition in this case does not state a good cause of action against the defendants for the reason that it does not

allege facts which show that the improvement which it is sought to require the board of education to erect, was necessary for the comfort or convenience of any of the school district attending the public school therein.

Same—Discretion of Board in administrative functions not to be interfered with by court—

2. Even if it had appeared in the petition that such was the case, and there was any statute mandatory in its character, or which gave the right to the board of education to make such an improvement, (which is not the case), the decision of the question whether such an improvement should be made at all, or at any particular place, is one of the administrative functions of such board, and its discretion in the matter can not be controlled by the courts by a suit for mandamus.

Error to the Court of Common Pleas of Clermont county.

SMITH, J.

In this case it is assigned for error that the court of common pleas erred in sustaining the demurrer of the defendant below to the petition of the relator, and on failure to amend, in dismissing the action. Was there error in this ruling?

In substance the petition alleged, that the relator was a resident of sub-school district No. 2, Tate township, Clermont county, Ohio; the owner of real estate therein, and a tax payer therein. That he had a daughter thirteen years of age living with him and constituting a part of his family, and entitled to all the rights, privileges and conveniences provided for her by the school laws of the state and that the defendant is the duly organized and acting board of education of said Tate township.

The petition of the relator further avers that the defendant has failed, neglected and refused, and still refuses, though often requested so to do, to make provision necessary for the convenience and prosperity of the school now being taught in said sub-district, in this, to-wit: to provide any means of crossing Poplar creek, at the public road

crossing of said creek, near the school house in which school is taught in said sub-district, although said creek is impassable a part of the school year for the children of the relator and a number of other children of school age residing in said sub-district, who are compelled to cross said creek in order to attend said school; that there is no bridge, foot track, or other means provided for crossing said creek within said district, nor has there been any during the present school year, although a foot track, or other means of crossing has been, and still is necessary in order that the children of school age in said district may attend the public schools therein.

He further alleges that there is money in the treasury of the defendant to the credit of the fund out of which the expense of providing said crossing could be paid, sufficient for that purpose, and not otherwise appropriated.

Therefore he prayed that a writ of mandamus may issue requiring the board to provide a means of crossing the said creek, in said district, at the public road-crossing of said creek, near the school house in said sub-district, and for other relief.

Even if it be considered that in a proper case, and where it clearly appears that a board of education has failed and refused, on proper request, to make provision necessary for the comfort and convenience of the scholars (or part of them) in a particular district by the making of an improvement like that sought in this case, we are of the opinion that on the averments of this petition, a good cause of action is not stated. In the first place, it should appear that such an improvement is necessary, and this does not appear in this case. It is averred that said creek is impassable for a part of the school year, at the public road-crossing thereof, near the school house in question, but for how much of said school year does not appear. It may be only for an hour, a day, or a few days. It is

further averred that there is no bridge, foot track, or other means provided for crossing said creek within said district. For all that appears there may be already such a crossing outside of the district, and which would be just as convenient for the children who have to cross the stream as a bridge at the public crossing referred to. In the second place, we see no provision of the statute, mandatory in its character or otherwise, which requires or authorizes boards of education to make any such improvement, or give to it any power to erect a bridge over or along a public highway, or condemn the right to do so. But even if the petition contained facts which showed that the bridge at this point was necessary, and the law conferred upon the board of education the right to erect such structure at this point, we think the case of State ex rel. v. County Commissioners, vol. 49 Ohio St., 301, affirming the judgment of this court, shows that an action of this kind can not be maintained. It is there held, that "the expediency of the construction or repairs of a bridge under sec. 4938, Rev. Stats., rests in the administative discretion of the county commissioners, and such discretion can not be controlled by mandamus."

The principle decided in that case applies much more strongly to this. Sec. 4938, is much more mandatory in its terms requiring the commissioners to build and keep in repair all necessary bridges in the county on county roads, (and it was conceeded that the bridge there in controversy was a necessary one), than any statute providing for improvements for school houses, by boards of education. And yet the court held that the question whether a particular bridge shall be constructed by them, was for the determination of the commissioners, in the exercise of their administrative functions.

For these reasons the judgment of the court of common pleas will be affirmed.

Frazier & Hicks, for Plaintiff in Error.

Nichols, Pros. Atty., for Defendant in Error.

Barnes v. State of Ohio.

(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1897.)

Before King, Haynes and Parker, JJ.

LESLIE L. BARNES, v. THE STATE OF OHIO.

Perjury—What indictment need not aver—

1. In an indictment for perjury it is not necessary to allege;
   a. Whether the alleged false testimony was given orally or in writing.
   b. Such facts as will show that the same was material.

Same—Disposition of case—What evidence sufficient—

2. On the trial of such indictment, the state need not offer the journal entry to show the trial and disposition of the case in which the alleged false testimony was given, it having shown, by the records of the court, the pendency of such case, and by oral evidence, given without objection, the trial thereof.

Same—Materiality of false statement—

3. Evidence which might affect or influence a court or jury in a given case, is material to the issue therein.

Same—Materiality—

4. On the trial of one charged with perjury, it is not error to exclude evidence offered by him to show that the court did not consider the alleged false testimony in giving its judgment in such case.

Same—Materiality question of law—

5. Whether certain testimony is material to an issue on trial, is a question of law, and not of fact.

Error to the Court of Common Pleas of Lucas county.

KING, J.

This is a petition in error to reverse the judgment of the court of common pleas in an action in which the state of Ohio prosecuted Leslie L. Barnes for the crime of perjury. He was convicted in the court of common pleas, and sentenced to a term in the penitentiary, and it is claimed here that several errors occurred in that court in the course of his trial which were prejudicial to him, and for which the judgment should be reversed. Some of these I will notice later.

The indictment charged, in substance, that Barnes had testified in an action brought by him against his wife for

divorce; that he had no acquaintance with one Adams, alias Wight, before October 17, 1896; nor had he met him after November 13, 1896, more than four times; and that said statements under oath were false, and were material.

To this indictment the defendant pleaded not guilty. Shortly after, and at the same term of court, the case came on for trial. The jury disagreed, and at the following term it was again tried, and resulted in the verdict which this proceeding seeks to have set aside.

It is urged that this indictment is insufficient, because it does not aver whether the oath or the matter deposed and declared in the indictment was orally deposed, or in writing; and second, that there is no matter pleaded in the indictment which would show upon the face of it that the alleged false testimony given in the case referred to was material to the issues in that case; and third, it is said that the innuendoes are insufficient and are not connected with the matter pleaded. To the last of these I need only say that we do not think there is any material difficulty with the innuendoes, the objection mainly being to the innuendo which states that the statement made by him that he had not seen Myron Wight before he came to Barnes to rent a room, or came to his apartments to rent a room, does not sustain the innuendo that he meant thereby that he had not seen him before the 17th. day of October; but the allegations denying the truth of these statements in the indictment show that in both respects they were false. In other words, the statement that he had not seen him before he came to his apartment was false, and he had not seen him before the 17th. day of Oct., was likewise a false statement. So far as the indictment itself is concerned, in the absence of a motion to quash, or demurrer, we think it is sufficient to put the defendant on trial.

As to whether the indictment should have stated whether the words were orally deposed, or in writing, and whether

it is sufficient upon its face to show the materiality of the statements, and that the statements are material, it is, I think, sufficient to say that it is covered by sec. 6897, which I will read:

"Whoever, either verbally, or in writing, on oath lawfully administered, willfully and corruptly states a falsehood, as to any material matter, in a proceeding before any court, tribunal, or officer created by law, or in any manner in relation to which an oath is authorized by law, is guilty of perjury."

In that connection I will read sec. 7221:

"In an indictment for perjury, or for subornation of perjury, it shall be sufficient to set forth the substance of the offense charged, and before which court or authority the oath was taken, averring such court or authority to have full power to administer the oath, together with the proper averments to falsify the matter where the perjury is assigned, without setting forth any part of any record or proceeding, or the commission or authority of the court, or other authority, before which the perjury was committed."

The statute says that if he does this either verbally or in writing, or if the oath be as to any matter material in a proceeding—not necessarily a cause, but any proceeding—that it will be sufficient to allege generally what the matter was which is claimed to be false, and averring that it was false, without setting forth any part of the record. There would be some reason, perhaps, for saying whether it was verbal or in writing, but at the same time we are not prepared to hold, since the forms laid down in Wilson's Criminal Code do not put those words in, nor do they allege any facts which show upon the face of the indictment that the indictment itself was material. But on the matter of form we think the case of Dilcher v. The State, 39 Ohio St., 130, in which the indictment is set forth in full, is an authority to the effect that it is not necessary to allege either of those things. That was an indictment for testify-

ing falsely, and there is in that indictment no allegation that the words were verbal or in writing. There are no allegations of fact showing that they were material other than the single allegation that they were material. It is said that is a conclusion of law, but it is the language of the statute in that respect, and taking the statute which defines the crime in connection with the last statute which I read, and we think it is the intention of the legislature to say that it would not be necessary to set forth all these facts which would go to show why or wherein the testimony claimed to have been false, was material in the proceeding before the court. It will be noticed in the case in 39 Ohio St., that the indictment was almost in the language of the one in this case. The court say on page 134:

"It is not necessary to aver wherein the alleged false testimony was material; it is sufficient to allege generally that it was material, and the indictment need not charge more than is necessary to adequately express the offense. It is not necessary that the testimony upon which perjury can be predicated, must have the effect, if true, of establishing or deciding the matter in issue. It is sufficient if it has a legitimate bearing on that issue. If it tends, within the rules of law, to influence the court or jury in deciding the issue, it is material."

So we think the objections to the indictment cannot be sustained.

As I have said, the defendant pleaded not guilty, and went to trial, without making any motion or demurrer to the indictment. On the trial a number of witnesses were called on both sides to show that on the 13th. day of January, 1896, there was on trial in the court of common pleas of this county, Judge L. W. Morris presiding, a case of divorce and alimony in which the plaintiff in error was plaintiff and his wife at that time was the defendant. These witnesses were called, five of them for the state, and testified that they were present in court; that the case was called for

trial; that it was tried; that the plaintiff in error here was called as a witness; that he was sworn. One of them, perhaps, only testified to the fact that he was sworn, but the others all testified that he was called as a witness, and that he testified. And they proceed then to prove all these allegations of material facts contained in the indictment in the testimony of Mr. Barnes. No objection was made to any of that testimony by the defendant upon any grounds that are urged here, and in fact, no objection was made to any of the witnesses stating the fact that the case, naming it, was tried in the court of common pleas. The defense proceeded to introduce as many more witnesses, and they called at least five other witnesses, who testified that they were present in the same court room, before the same judge, and on the same day, and that they heard the testimony in the case on trial—that of Leslie L. Barnes v. Cora E. Barnes,—and that they heard the plaintiff in that case and the defendant in the criminal case, Barnes, testify. In addition to that, the state offered the petition and answer in the divorce case, also a copy of the appearance docket; but it did not offer the journal entry of the court—for a complete record had not been made—showing the trial or the disposition of the case of Barnes v. Barnes; and it is urged that the fact required to be proved in order to maintain the prosecution on this indictment, that the case of Barnes v. Barnes was then and there and in that court pending, and then and there and in that court tried, can only be proved by the records of the court of common pleas, and that there is no such record here. I think that part of the record admitted does not show the trial of the case of Barnes v. Barnes, in the court of common pleas, on the 13th of January, 1896; it does show, however, that such a case was commenced, and that it was pending in the court of common pleas a short time before; but it does not show what disposition was made of it. In the light of that record, then, the state

offered certain witnesses, and they, without objection, testified that that case was called for trial, and tried upon the testimony that was offered in the case, and decided by the court. And the defense offered as many more witnesses to prove the same fact. Now, upon error, can the plaintiff in error here avail himself of the objection that there was not offered evidence of record? We think not. We think if that was a pertinent objection, he should have made it at the time of the introduction of the state's testimony, or at least before he entered upon his defense; that he has waived it, if it be a pertinent objection; but we hardly think it is a pertinent objection in the light of the condition of this record. This case was shown by the records to have been pending in the court of common pleas shortly before the trial, the precise day it is not necessary to recite; as there was nothing in the record to show the disposition of it, the presumption would arise that it was still pending on the 13th day of January. The fact of the trial of that case before Judge Morris, it seems to us, could have been proved by witnesses orally—certainly proved by them if no objection was made to that class of testimony; and this record abundantly supports the fact, both on the part of the state and on the part of the defense; for these witnesses are asked, all of them, if they were present in the court of common pleas when the proceeding—using the precise word which is named in the statute, a "proceeding"—in which the case of Barnes v. Barnes was on trial or hearing before Judge Morris. They say it was. We do not think it would be a justifiable holding to say that with the record in that condition, showing absolutely the pendency of the case a short time before this trial, showing by witnesses offered here without objection, and on the part of the defense as well, its actual trial, that there is no proof here of a trial of that case on the 13th of January, 1896.

No question was made of that until the court came to charge the jury—and I may as well notice that at this point

—when the defendant's counsel requested the court to say to the jury that—

"As a matter of law that an essential element of the proof in this case is that the alleged false testimony was given in a cause on trial in the court of common pleas of Lucas county. Before the jury can so find, there must be sufficient evidence to that effect; and oral evidence that a trial was pending would not be sufficient. Such fact must be established by the journal or other record evidence; and unless such evidence was produced, the jury must acquit."

2. "The jury are instructed as a matter of law, that no legal or sufficient evidence has been offered in this case that the case of Leslie L. Barnes v. Cora E. Barnes was on trial at the time it is alleged in the indictment the alleged false testimony was given."

Those requests were made upon that point, and the court refused to give them. I have said, we do not think it was error for which this judgment should be reversed in refusing to give those requests as made.

Many questions have been argued bearing upon the materiality of these statements contained in the indictment. It is urged in the argument, that conceding that Barnes testified as alleged in the indictment, still it was not material. The case of Barnes v. Barnes was an action for divorce, and the allegation of the plaintiff in his petition was that his wife was guilty of adultery with one Adams; and the proof in the case tended to show that on a certain occasion in November Barnes went to his apartments or rooms in the Schmidt building in company with some other persons, and caught or found Adams, as he called him at that time and as he was then known, in a room with his wife in a position and situation that was at least compromising to her. On the trial he was asked about his acquaintance with Mr. Adams, perhaps on cross-examination, possibly in chief, or both, and he testified that the first time that he saw Mr. Adams was when he came to see him where

he was at work at the court house, and inquired of him for rooms, and he told him to go and see his wife at their apartments, and see whether she had any room that she would rent him; that that was on the 17th. of October, as fixed by the proof in the case. He testified further in that case, that he never had known Adams before. The state in this case offered evidence tending to show that Mr. Barnes had known Mr. Adams sometime before, and that Mr. Adams' real name was Myron Wight: that Barnes knew it; that he had associated with him before; that Barnes introduced Wight to his wife under the name of Adams, knowing that his name was Wight. Barnes also testified in the divorce case, it is claimed, that after this occasion when he had found Adams in his wife's room and then had expressed his dissatisfaction with the proceeding, he had had no other acquaintance with him other than that he had casually met him not exceeding four times. The state in this case offered evidence tending to show that he had met him frequently, and a great many more than four times; that he had dined with him; they had been together in a room which Mr. Barnes afterwards occupied, and that they were acquaintances. Now, as we have already held, it was unnecessary to set out all those things in the indictment to show it as material in the divorce case to inquire of Mr. Barnes to testify as to his acquaintance and relationship with this man; but it was upon the trial of the divorce case certainly pertinent to show the relations that existed between these men, and that regardless of whether the defendant in that case had in her answer alleged that this divorce was a matter of conspiracy between her husband and this man, or a matter of connivance, or a criminal matter, or anything of that sort. It was material for the court trying that case to have inquired of its own motion, and to have satisfied itself whether this man Wight, who came upon the witness stand and testified, and this man Barnes, who testified to those acts which pointed at least towards adultery, testified

to a transaction that was bona fide, without the consent and knowledge of the husband, or whether it was a thing he had some knowledge of, and which he had winked at. This was certainly material. Counsel might have inquired, and if they did not, the court might have inquired of him—for it was the duty of the court to ascertian whether the proceeding in divorce was prosecuted honorably and in good faith—as to these things. If Mr. Barnes on the witness stand, in answer to the question as to his acquaintance with this man Adams had said "I don't know him; I never saw him until October 17th," that of course precluded the necessity of making any further inquiry as to his acquaintanceship. If that was true, it was certainly material. As said in the 39 OhioSt., 134, it is sufficient if this testimony has a legitimate bearing on the issue—if it tends, within the rules of law, to influence the court or jury in deciding the issue, it is material. In that case it was alleged that a person was presumed to be dead, not having been seen for seven years, and upon the trial the witness who was charged with perjury testified that he had met him, that he had talked with him; that they met three or four times, and that they sat down and discussed matters, and that he knew the person alleged to be absent well, and they had frequent conversations during a period of some three or four days. The matter charged in the indictment was that he had said that he had met him three or four times, and the allegation was in denying that, that he had not met him several times, and did not have any mutual recognition, well knowing that the statements he made were false. It was alleged that they were not material. The question was whether the man was alive or not, not whether he met him three or four times, or where he met him. But the court said—

"The material inquiry in the Meigs county case, as shown by the evidence on the trial, was whether Martin was alive—whether he had been seen or heard from during the preced-

ing seven years. Stewart's testimony that he had seen him, without fixing time, place, or circumstances, might have been wholly insufficient. To corroborate and strengthen that statement he said he saw him, not once, in passing, a long time before, at a distance (that would leave room for a conclusion of mistaken identity), but several times, on two or three different days, at Deer Lodge, in September, 1880, that they had spoken together, and mutually recognized each other. The legitimate effect of each one of these statements was to strengthen his testimony as to the main fact, to make it impossible that he could be mistaken. Each one, was in that sense, and within the rule stated, material to the issue being tried, and being so material they were divisible, and perjury may be predicated on each."

We think that is clearly material. In the course of the trial it was sought to show by Judge Morris, having shown that he was the judge before whom the proceeding was had that the statement of Barnes on the trial of the divorce case did not affect his mind in rendering the decision which he did render, and that his judicial opinion and his judgment had been made up from other evidence in the case. That was objected to, and the court sustained the objection. We hardly see how that could have been competent. The only question to be determined—and that is to be determined partly by the court and partly by the jury—in this case was, whether the evidence in question might have affected the decision; and if it was material evidence, it follows as a matter of law that it might affect the decision, because no evidence is supposed to be admitted except it is material, and it is admitted only because it will affect the decision of the case. It only becomes material because it might affect the decision. That makes it material. So it was competent to inquire of Mr. Barnes if he had known Adams or Wight before; and if we should assume that the proof offered by the State in this case is correct, that Mr.

Barnes did know Wight before the time Barnes testified in the divorce case as his first acquaintance, and if Barnes had testified in that case as to all of his acquaintance with Mr. Wight, and had informed the court that he knew his real and true name was not Adams; that he knew it was Wight, and that he had taken him into his family with the knowledge that he had given a false name, it is quite certain that that would have been exceedingly material, and would probably have had some effect upon the opinion and decision of the court. But when Mr. Barnes said he didn't know him, and had never seen him before and had never seen him afterwards to have any acquaintance with him, after he had discovered his relations with his wife, that shut off, as I say, inquiry. It may be true that the divorce which was in fact granted in that action was not granted upon the testimony of Mr. Barnes, but upon other testimony which the court thought, under the circumstances, more credible; but if the theory of the state in this case could have been fully and clearly presented to the court in the divorce case, it may be that the court would not have granted the divorce at all. But whether the court would or would not, still it remains true that the relations of this man Wight were material to the issue tried in the divorce case, and that whether there was any answer filed or not. It would not be competent for the defense to show that the court would have decided the case in the same way whether Barnes testified as he did, or not. The court could not very well say what he would have done in the divorce case if Barnes had told what the State claimed here was the truth, because the court decided the case upon the testimony it had. This is all I need to say about the testimony in the case. It is claimed, that the defense were unnecessarily restricted in offering testimony; that they should have been allowed greater latitute. We do not discover in that anything to the prejudice of the defendant.

It is claimed that the charge is erroneous, because the court, among other things, left the question of the materiality of these statements to the jury. A careful reading of the charge does not indicate that the court did quite that. The court said to the jury, after discussing several things which it was necessary for them to find—

"If you are satisfied beyond a reasonable doubt that the statements alleged in the indictment, or any one or more of such statements, were so made by the defendant substantially as alleged, you will then consider and determine from the evidence whether or not such statement or statements were upon a matter that was material in the trial of the divorce case."

The court then proceeds to state what had been said with reference to the issue in the divorce case, and says:

" If, therefore, you find that upon the trial of the divorce case there was evidence that Myron Wight was the person described in the petition as George Adams, and that Wight, alias Adams, went to the rooms of Barnes in the Schmidt building to rent a room on the 17th day of October, 1896, then I say to you as a matter of law that the second, third, and fourth statements alleged to have been made by the defendant, if they were made, were each material statements, and were each upon a matter that was material to the issues in the divorce case."

And then he discusses that further, illustrating to the jury how it could be material, and says:

"And if you find that there was such evidence, then, as I have said, the second, third, and fourth alleged statements were each material statements, and the first alleged statement was material only in case it was made in immediate connection with the further statement that he was not acquainted with Wight before October 17, 1896, or in case it was made in answer to an inquiry as to how long he had known or been acquainted with Wight before said time."

"In determining whether or not the alleged testimony of the defendant on the trial of the divorce case was material, you are not to consider or determine whether such testimony

did or did not affect the result of that case. The question in this connection is not whether the alleged testimony of the defendant was deemed worthy or unworthy of consideration or belief, but the question is, was it pertinent to the issue, and upon a material matter?"

"I have given you the law upon that subject by which you must be governed in this case. You must accept and apply the law as given to you by the court."

It cannot be fairly said that the court left the question of the materiality of the statements to the jury. But if the court did, is the plaintiff in error prejudiced thereby? If these statements as a matter of law are material, so that a reviewing court can so hold, and the court ought to have said unequivocally that, if proved, they were material statements, then the defendant in error is not prejudiced by not saying that to the jury, but giving the defendant another opportunity by allowing the jury to find whether they were or not. But the fair reasoning of the court is that the statements were material.

These comprise the principal questions that have been discussed. We have come to the conclusion, from a careful reading of the record and an investigation of the authorities cited on both sides of the case, that there is no substantial prejudicial error in this case. Therefore the judgment of the court of common pleas will be affirmed.

L. M. Murphy & J. K. Hamilton, for Plaintiff in Error.

C. E. Summer, for Defendant in Error.

(First Circuit--Hamilton Co., O., Circuit Court—Nov. Term, 1897.)

Before Cox, Smith and Swing, JJ.

JONES v. PIPE COMPANY.

Employer and employe—Injury through defective machinery—Employment of man to inspect machinery—Fellow servant—What necessary to be shown to relieve employer of liability—

Where, in an action by an employe against his employer for damages for injury received by such employe through defects in the machinery, it appears that the machinery furnished was defective in the

particular claimed, and it was dangerous to use it in that condition, and the danger could, by reasonable care, have been discovered and guarded against, and that plaintiff was ignorant of the defect and it was not incumbent on him to examine as to this, and as a result of this the plaintiff received the injury, the case should be submitted to the jury on the question of negligence and liability of the employer, unless something else appeared which, as matter of law, deprived the plaintiff of his right to recover. And where it appears that the defendant had in its employ a man whose duty it was to inspect the machinery and have it in order, but there was no evidence that he was competent for that purpose, or that he was by his employers supposed to be such, or that he had ever examined this particular machine, then the injury thus happening would not be through the negligence of a fellow servant, and the employer would be liable, and the court would not be warranted in withdrawing the case from the jury, but the case should be submitted to the jury for determination.

Error to the Court of Common Pleas of Hamilton county.

SMITH, J.

The question in this case is, whether the trial court erred in withdrawing the evidence from the jury, and in directing a verdict for the defendant.

The petition alleged, in substance, that the defendant company was engaged in the manufacture of cast iron gas and water pipes, at its plant at Addyston, in this couny, in June, 1894; and that the plaintiff was then in the service of the company, engaged in running and operating a crane which was equipped by the defendant with a rack or trolley chain. That the defendant had wrongfully and negligently, equipped said crane which was then being operated by plaintiff, with an iron rack or trolley chain, which was defective, dangerous, unsafe, and liable to break; and wrongfully and negligently failed, neglected and refused, to furnish, provide and maintain about the said chain, wire covering, such as shoes, to protect the plaintiff from injury by the breaking of said chain while at his said work. Whereby and by means of the said negligence of the defendant, while

the plaintiff was engaged as aforesaid, in operating said crane, in June, 1893, the said rack or trolley chain, suddenly and without any notice or warning to the plaintiff, broke, and struck the plaintiff across the face, and severely injured him, causing him to lose the sight of one of his eyes. That he had no knowledge or means of knowledge, that the said rack or trolley chain was defective, dangerous, unsafe, and liable to break, and that he was wholly free from fault. He alleges that thereby he has suffered damages to the amount of $10,000, for which he asks a judgment.

The answer admits the corporate character of defendant, and that he was doing business as alleged, and that plaintiff at the time stated, was in its service, and denies all the other allegations of the petition.

At the trial of the case, the evidence offered by the plaintiff, certainly tended to show this state of fact—that in May, 1893, instead of June of that year, the plaintiff was in the service of the defendant company, and at the time of the injury, was in the same business in which he had been engaged by the company for a considerable period, in managing a crane which was used for hoisting or lowering the manufactured iron pipes. He was standing, as was usual, upon a platform, four or five feet from the ground. The chain which ran over the crane, supporting the load, was composed of links about half an inch in diameter. As he reached to stop the traveler, one of the links in this chain broke, and one end of the chain flew back and struck the plaintiff about the head and back, severely injuring one of his eyes. There was no evidence tending to show that the plaintiff was in any way negligent or careless in the performance of the duty imposed upon him, or that he acted in any way different from his usual way of managing the machinery, or in any respect was at fault. The evidence further tends to show that the defendant company had in its service, a man who did sometimes inspect the chains, but

there is no evidence tending to show that he had ever examined or inspected this particular chain which had been in use for about eight months. It was his duty, as was testified to, "to look after the chains, oiling and inspecting them, and the like of that." It was no part of the duty of the plaintiff to inspect this chain or machinery, and he had no knowledge of any defect in it.

Now, the foregoing is what the oral evidence tended to prove on the material question in the case, and the only additional evidence offered in regard thereto, was a link of the chain which broke, as testified to by the plaintiff, and which he says he took from the end of the part of the chain which struck him, a few minutes after he was injured, and which link was offered in evidence, and is attached to the bill of exceptions, certified to contain all of the evidence given in the case.

This link is about 3 inches in length, by, say, $2\frac{1}{2}$ inches in width, from out to out, and as has been said, is about $\frac{1}{2}$ an inch in diameter. It is broken at one of the ends. At the other end, the inside of the link is somewhat worn; but at the broken end, it was evidently very greatly worn, and it is clear, from an inspection of it, that prior to the breaking, but a very small part of the original thickness remained—probably not one-fourth of it—and the conclusion is irresistible from the appearance of the link, that the wearing away of the iron had been gradual, had for some time been worn three-fourths of the thickness, of the link, and it would seem that if a person having knowledge of such matters, had inspected the chain with any care, that he should have seen that it was greatly worn, and was unsafe and dangerous for the use and strain that would be upon it.

The question then is, was the trial court justified in holding, as a matter of law, that the plaintiff was not entitled to recover, or whether it was not his duty to submit the

case to the jury, under appropriate instructions, to determine whether, on the case made, the plaintiffs had a right to recover against the defendant.

The law of his state as to the liability of an employer to his employe, for injuries received by the latter while in the service of the former, from defective machinery furnished by the master, has been passed upon by our supreme court in several cases. In the case of Railroad Co. v. Webb, Admx., 12 Ohio St., 475, the syllabus states the law thus:

"In an action to recover of a railroad company for injuries received by a brakeman while in the service of the company, by reason of the breaking of the chain, and giving way of the brake while working it, owing to a defect therein, whereby he was thrown from the train and injured,

Held: 1. That it was the duty of the company to use all reasonable and ordinary care in providing safe and well equipped brakes for the brakeman, and that if the company in neglect of such duty has procured a defective and improper brake, and placed the brakeman to work the same without an opportunity to know such defect, and he was thereby injured, a right of action would thereupon arise against the company

2. That if the existence of such defect at the time of the accident was owing to the neglect of other operatives of the road supposed to be competent whose duty it was to have inspected said brake, but who neglected so to do, and negligently suffered the same to continue in use when not roadworthy, unknown to the company, it is not liable therefor, inasmuch as said delinquent inspector is to be regarded as a fellow servant of the brakeman in a common service."

In deciding the case Judge Sutliff, in speaking of the doctrine as to the liability of the company for injury produced by defective machinery, says:

"In the case of McGatrick v. Wason, 4 Ohio St., 566, this court held it to be a general rule, that an employer who provides the machinery and oversees and controls its operation, must see that it is suitable, and that if an injury to

the workman happen by reason of the defect, unknown to the latter, and which the employer by the use of ordinary care could have cured, such employer is liable for the injury. And in the case of R. R. v. Keary, 3 Ohio St., 202, it is said in such a case, 'the skill and care must be reasonable, and it is not reasonable when it does not furnish at least ordinary security against injury to others. If he, (the employer), is found wanting in this, and injury ensues, he has failed to perform his duty to his fellow men, and the right to receive and the duty to make reparation immediately arise"

—and there are other decisions to the same effect.

If, then, this machinery furnished to the plaintiff, was defective in the particular mentioned, and it was dangerous to use it in that condition, and the danger could, by the exercise of reasonable care, have been discovered, and guarded against, and the plaintiff was ignorant of the defect, and it was not incumbent upon him to examine as to this, and as a result of this the plaintiff received the injury as claimed, and the evidence, in our judgment, tended to show all of these facts, the case should have been submitted to the jury for its determination, unless there was something else in the case which, as a matter of law, deprived the plaintiff of a right to recover.

So far as we can see, (and this point was not referred to in the argument of the case), the only possible claim for this would be, that it came out in the evidence offered for the plaintiff, that the defendant company had in its employ, a man whose duty it was to inspect the machinery and have it in order, and who at some time had done things of that kind; but there was no evidence that he was a competent man for that purpose, or, that he was supposed by his employer to be such, or that he had ever examined this machinery or chain. If these things had all appeared, and the injury to plaintiff had resulted from this neglect of duty on the part of the inspector, without neglect of duty on the

part of the company, we suppose that the injury thus happening from the negligence of a fellow servant with plaintiff, the defendant company would not be liable. But these facts do not appear in the evidence, and not so appearing, we think the trial judge was not warranted in withdrawing the evidence from the jury and in directing a verdict for the defendant, and for this reason, the judgment will be reversed, and a new trial awarded.

Michie & Clore, Attorneys for Plaintiff in Error.

Paxton, Warrington & Boutet, Attorneys for Defendant in Error.

(Sixth Circuit—Wood Co., O., Circuit Court—October Term, 1897.)

Before King, Haynes, and Parker, JJ.

THE VILLAGE OF BRADNER, WOOD COUNTY, OHIO, v. GEORGE GRUNDETISCH.

Bill of exceptions in mayors' courts—

1. There is no statute conferring authority upon the Mayor of a municipal corporation to allow a period of ten days from and after the overruling of a motion for a new trial, as time in which to prepare, have allowed and file a bill of exceptions, setting forth the evidence and the rulings of the mayor thereon.

Same—Allowance of time to prepare—

2. The statute relating to bills of exceptions in civil cases before justices of the peace is not applicable to criminal cases in mayors' courts.

Error to the Court of Common Pleas of Wood county

KING, J.

The defendant in error was charged before the mayor of the village of Bradner, Ohio, with violating a village ordinance in respect to creating a disturbance; a jury empanneled, tried, convicted and sentenced, in pursuance of the terms of the ordinance. He prosecuted error in the court

of common pleas, and the court of common pleas reversed the judgment of the mayor, on grounds that do not appear in the entry, and the village prosecuted this proceeding in error to reverse the judgment of the court of common pleas reversing the judgment of the mayor.

The proceedings before the mayor, except those that occurred upon the trial, appear to have been in regular form. We do not find any error in those proceedings. Whatever error there may be, is to be found in the proceedings at the trial which appear by a bill of exceptions. In the court of common pleas a motion was made to strike that from the files, which was overruled, and the village excepted. The precise error complained of, does not appear in the journal entry, but we understand it was the refusal of the mayor to give certain charges that were requested on behalf of the defendant. As no error appears in the record excepting in the bill of exceptions, we are required to examine whether the bill of exceptions should be looked into. The record shows that at the time of the sentence, or very soon thereafter, a motion was made for a new trial, and overruled, and the mayor allowed the defendant ten days within which to prepare and file a bill of exceptions, and he did prepare and file a bill of exceptions which was allowed and signed by the mayor eight days after the judgment was entered, and the question is, whether the mayor had authority to allow that time and sign a bill of exceptions eight days after trial. It is said that he had, because the statute relating to the trial of civil cases before a justice of the peace, allows justices of the peace upon the overruling of a motion for a new trial, or in cases where a motion is not necessary, to allow that period after the trial, and to sign such bill of exceptions presented within such time; but there is no statute that we can discover which makes that provision applicable to criminal cases before a mayor. A mayor of an incorporated village has, under the statute found in the municipal code,

certain civil jurisdiction within the village over which he is mayor which is similar to that of a justice of the peace within a township, and the statute giving him that authority, provides that he shall have such criminal jurisdiction as is thereafter named in the statute.

Criminal cases before a court of common pleas are tried by indictment.

Section 7304, provides that,

"If a defendant feels himself aggrieved by any decision of the court, he may present his bill of exceptions thereto, which the court shall sign, and the same shall be made a part of the record, and have the same force and effect as in civil cases; if exceptions be taken to the decision of the court overruling a motion for a new trial because the verdict is not sustained by sufficient evidence, or is contrary to law, the bill of exceptions must contain all the evidence; and the taking of all bills of exceptions shall be governed by the rules established in civil cases."

There is also another statute applicable likewise in a probate court, and it gives the defendant, or party desiring a bill of exceptions, the same length of time and the right to take exceptions under the same rules as are laid down under the statute relating to civil practice, which is a period of fifty days within which a bill of exceptions may be allowed and filed and made a part of the record.

Obviously that part of the statute has no application to prosecutions before a mayor; so that the provisions of sec. 7304, are not applicable, because if they were, that would extend the time to fifty days. Now, as I have said, there is no statute making the provisions of the civil practice before a justice of the peace applicable to criminal prosecutions before a mayor. Under the statute relating to the criminal jurisdiction of the mayor, found in sec. 1826,

"He may summon a jury and try the accused, in an prosecution for the violation of an ordinance, where imprisonment is a part of the prescribed punishment, and the accused

does not waive a jury; and in such case, judgment shall be rendered in accordance with the verdict unless a new trial for sufficient cause is granted."

And in section 1823, it is provided that "he shall have final jurisdiction to hear and determine any prosecution for the violation of an ordinance of the corporation unless imprisonment is prescribed as part of the punishment."

In this case a jury was empaneled, and he was tried.

Section 1752 provides, that:

"Appeals may be taken from the decision of the mayor in civil cases, in the same manner as from justices of the peace. * * * A conviction under an ordinance of any municipal corporation may be reviewed by petition in error in the same manner and to the same extent as was heretofore permitted on writs of error and certiorari, and the judgment of affirmance or reversal may be reviewed in the same manner; and for this purpose a bill of exceptions may be taken, or a statement of facts embodied in the record on the application of any party; but no such petition shall be filed except by leave of the court or a judge thereof, and such court or judge has power to suspend the sentence as in criminal cases."

So that, while a bill of exceptions may be taken, or a statement of facts embodied in the record upon application of a party aggrieved, the proceedings in error are the same as those heretofore provided on writs of error, and in case of the Village of Bellefountaine v. Vassaux, 55 Ohio St. Rep., 323, as first published in 36 W. L. B., the court could not review the weight of the testimony before the mayor, holding that it was not allowed and could not be done in writs of error or writs of certiorari. Now, in proceedings for taking exceptions to the decision of the court in these cases, no statute authorizes a bill of exceptions to be taken after trial, because there was no time allowed for writing out exceptions. They must be taken at the time of the decision of the court, and reduced to writing and signed by the trial

judge; that was the statute, and that was the practice, and clearly, there is no provision of the statute giving a mayor authority to extend the time for preparing a bill of exceptions in the prosecution for a violation of an ordinance Defendant may except to his rulings upon evidence, and may except to the charge to the jury or the refusal to give charges requested, and those exceptions reduced to writing can be reviewed in a court of error; but a bill of exceptions cannot be allowed and made a part of the record if it was taken at a time after the trial. Several days were granted upon the application of the defendant below for taking this bill of exceptions, so we are satisfied that the court of common pleas erred in not striking the bill of exceptions from the files, and as the other proceedings are regular, the court erred in reversing the mayor.

The judgment of the court of common pleas reversing the judgment of the mayor, is reversed, and the judgment of the mayor affirmed.

Baldwin & Harrington, for Plaintiff.

Brown & Guernsey, for Defendant.

(Third Circuit—Defiance Co., O., Circuit Court, October 1896.)

Before Day, Price & Rohn, JJ.

ISABEL ENDLEY, v. ERASMUS T. ALDRICH, JOHN P. CAMERON AND THE BOARD OF COMMISSIONERS OF DEFIANCE COUNTY, OHIO.

Final order—

Under section 4452, Revised Statutes, as amended April 19, 1894, (91 Ohio Laws, page 160), the finding of the county commissioners determining the necessity of a ditch improvement, is such a final order and determination of the rights of the parties affected thereby, from which error will lie.

Petition in error—

In such case, a petition in error must be filed within six months from the date of such finding or determination of the

county commissioners, in order for the reviewing court to obtain jurisdiction of the subject matter of the proceeding of the county commissioners; otherwise, the petition in error should, on motion, be dismissed.

Error to the Court of Common Pleas of Defiance county.

ROHN, J.

This is a proceeding in error seeking to reverse the court below in sustaining the petition in error of the defendants, Messrs. Aldrich and Cameron, to the proceedings and orders of the Board of County Commissioners of Defiance county.

The record discloses, that on the 20th day of April, 1895, the plaintiff, Isabel Endley, filed her petition with the county auditor of Defiance county, asking for the construction of a certain ditch, and at the same time filed a bond in the sum of $100.00, conditioned according to the statute in such cases.

Accordingly, on the 22nd day of April, following, notice was duly served on the various lot and land owners to be affected by the proposed ditch; and on the 16th day of May, a hearing was had before the commissioners upon the petition laid before them, whereupon the following finding and order was made, viz:

"A copy of a petition for the improvement of a county ditch having been delivered to us by the county auditor, and it appearing to us that the proper bond has been filed with the auditor and by him approved, conditioned for the payment of all costs if the prayer of the petition be not allowed or be dismissed for any cause, we proceeded to fix the line of the improvement and determine whether the said improvement is necessary, or will be conducive to the public health, convenience and welfare, and we find that said improvement is necessary, and will be conducive to the public health, convenience and welfare, and we do hereby order the auditor to enter upon said journal an order directing Frederick Stever, a county surveyor, to go upon the line and file his report, and all other proceedings are hereby adjourned until we are notified by the auditor of the day set by him for the hearing of the surveyor's report."

Afterwards, on the 6th day of August, the surveyor's report was heard, and such further orders were made from time to time thereafter, as was necessary for the construction of the improvement determined upon on the 16th day of May, prior thereto.

Afterwards, on the 28th day of December, 1895, the defendants, Aldrich & Cameron, filed their petition in error in the court below, seeking a reversal of the findings and orders of the county commissioners, on the ground, among others, that the Board of County Commissioners had no jurisdiction, for the reason that no bond, as required by law, had ever been filed, making the plaintiff and Board of Commissioners parties defendant in such proceeding.

To this petition in error on the part of Messrs. Aldrich & Camern, in the court below, the defendant in error, Isabel Endley, filed her motion to dismiss the petition in error, on the grounds:

1st. —Because the court below had no jurisdiction.

2nd.—That more than six months had elapsed from the making of the final order complained of.

3rd.—That no order prejudicial to plaintiff in error had been made.

This motion to dismiss was overruled; and the court below, on a hearing, reversed the findings and orders of the county commissioners, on the ground that they had no jurisdiction, and rendered judgment for costs against the defendant in error.

Now, the plaintiff in error in this court, Isabel Endley, asks to have the judgment of the court below reversed, claiming, first, that the court erred in overruling her motion to dismiss the petition in error in the court below; and second, erred in sustaining the petition in error and rendering judgment of reversal, etc.

The first question necessary to be considered is: Did the court err in overruling the motion of Isabel Endley, to dis-

miss the petition in error below, on the grounds stated in her motion; if it did, the consideration of this one question will determine the whole controversy, and it will be unnecessary to consider any further questions presented by the record, but the case will necessarily have to be reversed, on account of error in overruling this motion to dismiss the petition in error below.

The question is whether the court below had jurisdiction—did more than six months elapse before the plaintiffs in error below, filed their petition to reverse the final orders complained of? If so, the court below acquired no jurisdiction of the subject matter of the action, and it was error on its part in refusing the motion to dismiss. This can only be determined by the record, and the statute.

Sec. 4452, Rev. Stat., as amended April 19, 1894, (91, O. L. 160), provides that the commissioners shall meet at the place of the beginning of the ditch as described in the petition on the day so fixed, and hear any and all proof offered by any of the parties affected by the improvement, and other persons competent to testify, and determine the necessity thereof, and in case the commissioners find in favor of the improvement, they shall fix the day for hearing of applications, etc.

It will be seen by this section of the statute, as amended, that the commissioners shall have proof offered by any of the parties, or other persons competent to testify, and then determine the necessity of what?—the improvement. This was done, as is shown by the proceedings of the commissioners, on the 16th day of May. This finding was such a final order, as, under sec. 4463, Rev. Stat., could have been appealed to the probate court by any person aggrieved thereby. It will be observed, that an appeal can only be taken from a final order, such as is specially mentioned in

this proceeding. If this is a final order recognized by the statute on appeal, can it be said that the same is not also a final order, from which error must be prosecuted within six months, in order to affect the proceeding or obtain jurisdiction? We are of the opinion that it is. This is a special proceeding provided for by the statute, and even though an appeal would not lie, we have no doubt that it is such a final order and determination affecting the rights of parties from which error would lie. This being the case, it follows, that the petition in error was not filed in the court below within the time prescribed by the statute, and that by reason thereof, the court below had no jurisdiction of the case, and it was error to refuse to dismiss the petition in error below.

For these reasons the judgment of the court below will be reversed, with costs, and proceeding to render the judgment which the court below should have rendered, the motion to dismiss the petition in error below, will be sustained, and the petition in error dismissed. Cause remanded for execution to court of common pleas.

L. B. Peaslee, for Plaintiff.

Harris & Cameron, for Defendants.

(Fifth Circuit—Delaware Co., O., Circuit Court—Dec. Term, 1897.)

Before Pomerene, Adams and Douglass, JJ.

STATE EX REL THOMAS VINING v. COMISSIONERS OF DELAWARE COUNTY.

1. A party may appeal from a final judgment rendered by the court of common pleas in a mandamus proceeding.
2. County commissioners and county treasurers are not exempt from giving bonds for appeal by sec. 5228.

ADAMS, J.

In the case of the State of Ohio ex rel. Thomas Vining v.

The Commissioners of Delaware county, and in some twenty-five other cases submitted with it, there are motions to dismiss the appeal. These are all proceedings in mandamus.

In cases Nos. 236,237,238,239,240, and in 263 and 264, these motions are filed on two grounds, 1st. That the action is not an appealable one; and 2nd. That no bond was given for an appeal. In the remaining cases, being numbers 245 to 262 inclusive, the motion contains the first ground only, that is, that the case or action is not appealable. And as that first ground is common to all these cases, it will be disposed of first.

We may say here, that it seems to this court, that it is more important that this question, which is a question of practice only, and not one of principle, should be finally settled; more important, that it should be finally settled than that it should be settled in either way, because, if it is once settled either way, parties can preserve their rights; if not appealable, they can preserve their rights by proceedings in error.

The argument made here, that such proceedings in mandamus are not appealable, involves the construction of the section of the statute, relating to mandamus, and sec. 5226, of the Revised Statutes.

Sec. 5226 provides, that

"in addition to the cases and matters specially provided for, an appeal may be taken to the circuit court by a party or other person directly affected, from a judgment or final order in a civil action."

The claim is made here, and correctly, that in the chapter relating to mandamus, there is no provision for an appeal; and the further argument is made, that the proceeding in mandamus is not a civil action, within the meaning of sec. 5226, and that, therefore, the case is not appealable.

We are cited to the case of 32 Ohio St., Chinn v. Trus-

tees, page 236, where the Supreme Court hold, that the civil action of the code is a substitute for all such judicial proceedings as were previously known, either as actions at law or suits in equity, and does not embrace proceedings in mandamus. There is, in this state, no statutory limitation as to the time within which a writ of mandamus may be obtained. And the holding there is, that the statute of limitations does not apply to a proceeding in mandamus, because the proceeding in mandamus is not a civil action.

That case, and the decision announced,—perhaps last week, by Judge Summers, speaking for the Circuit Court of the second circuit, in Law Bulletin, December 13, 1897, where that court holds directly, that mandamus is not a civil ation and is not appealable, are the authorities relied upon in support of this motion.

On the other hand, we have in 42 Ohio St., page 215, a holding by the Supreme Court to this effect, and I read the first paragraph of the syllabus,

"In mandamus in the court of common pleas to compel the council of an incorporated village to order an election on the question of a surrender of its municipal powers, under the provisions of the Rev. Stats., secs. 1633 to 1647, the issue was whether the requisite number of qualified petitioners had petitioned the council therefor. Held: That this was an issue not of right triable by a jury, and either party might appeal from the judgment of the common pleas thereon."

It is stated in argument, and I think it is apparent from an examination of the opinion in that case, that the only question discussed in the opinion, is, whether or not the issue was of right triable by jury. But the syllabus of the case is the rule of law that is concurred in by all the judges sitting in the case. And they do make the direct holding that an appeal lies in a mandamus proceeding, from the common pleas court to the then district court, as it would now be to the circuit court.

The motion for leave to file a petition in error to the district court in that case was overruled.

Now, if mandamus cases are not appealable, the district court and the circuit court have no jurisdiction of the subject matter of the mandamus proceedings on appeal. So that, if the rule is as contended for here, in support of this motion, the judgment of the district court in that case, was a nullity for want of jurisdiction, and the same might be said of the judgment of the supreme court denying the motion for leave to file petition in error.

Again, we are shown the record of a case disposed of by this circuit court, in Licking county, at the March term, 1892, which was an action commenced in the common pleas court, to compel the commissioners of Licking county, by a peremptory writ of mandamus to rebuild and keep in repair a bridge. After a trial in the common pleas court, the writ was made peremptory. The commissioners appealed to the circuit court, and a motion was there made to dismiss the appeal, on the ground that the action was not appealable. The circuit court overruled that motion, and on a final hearing,—I believe it was on a demurrer to the petition—the court decided in favor of the commissioners, and refused the writ of mandamus. Error was prosecuted to the supreme court, and one of the assignments of error in the petition in error, was the overruling of the motion to dismiss the appeal. That case is found in the list of cases not reported in full, in 54 Ohio St., 652, and the judgment was affirmed on the authority of State ex rel. v. Commissioners, 49 Ohio St., 301. Now, it is likewise apparent in this case —in the Licking county case—that if appeal does not lie in mandamus proceedings, that the judgment of the circuit court was a nullity for want of jurisdiction over the subject matter of the suit. And carrying that out logically, although the circuit court and supreme court have held that the county commissioners should not be compelled by man-

damus, to rebuild or repair the bridge; there is still the judgment of the court of common pleas in full force, unreversed and unmodified, compelling them to do that very act.

The case in the 49 Ohio St., 301, is a case that went up from Hamilton county. The statement of facts in that case, shows that it was a mandamus proceeding; that the case was appealed from the common pleas court to the circuit court. See also, 51 Ohio St., 83-86, and 54 Ohio St., 383-386. This case, 54 Ohio St., 383, was a mandamus case. The common pleas of Franklin county found for the respondents. On appeal, the circuit court found for the relator. On error, the supreme court reversed the circuit court, and remanded the case to circuit court for a new trial, or such other disposition as the facts and law of the case may warrant. It is true, that we have no discussion either in the Licking county case, or in this 49 Ohio St. case, as to the reasons given by the supreme court for their judgment. In this case decided by the second circuit, with Judges Williams, Stewart and Shauck, on the bench, 1 C. C. page 127, Judge Shauck after very ably and at length arguing to the effect that the mandamus proceeding is not appealable, feels compelled to follow the decision to which I have referred, 42 Ohio St., 215; and although that circuit court followed the decision of the supreme court in 42 Ohio St., as it were under protest, yet their judgment, which would be a nullity of the case was not appealable, was affirmed by the supreme court, as shown by 23 Law Bulletin, 235.

And then again, we have in 48 Ohio St., case of State ex rel. v. Crites, Auditor, on page 175, the so-called dictum, that "in view of the express provisions of the statute, it is difficult to see wherein a proceeding in mandamus differs in any material respect from a civil action, or even in any respects, except in name."

While we entertain the very highest opinion of the learn-

ing and ability of the judges who have recently decided in the second circuit, that proceedings in mandamus are not appealable, and while, doubtless, if it were an open question on the reasonable construction of these statutes, we would feel inclined to follow that decision, yet, this court as now constituted, has held, in line with this case in 42 Ohio St., page 215. This court, in 1892, in the Licking county case, made the express holding that proceedings in mandamus are appealable. The supreme court, in the six cases that I have referred to, have made in effect the direct holding that an appeal does lie in mandamus. Whether they have given the best reasons for that holding or not, is another question, but they have made the holding in these six cases, that an appeal will lie in mandamus. And we have no doubt that a great many other cases could be found, like this Licking county case, that have been decided by the supreme court without report, where appeals in mandamus have been upheld.

That being the state of the decisions in Ohio, on the subject of whether an appeal will lie in mandamus or not, we are content to follow our former holdings, to follow the holdings of the supreme court, until the supreme court sees fit to overrule its former holdings and reverse this court.

There is another question made; that is, admitting that some proceedings in mandamus are appealable, others are not. And the point is made in these two cases, 263 and 264, where it was sought by mandamus to compel the county treasurer to pay certain warrants. An argument is made, that the writ is simply to obtain the payment of money, and that, therefore, it is an action for money only, and that it would follow from that, that there would be a trial by jury, and, therefore, the action is not appealable. But even in that case, we think and hold, that there is a wide distinction between a peremptory writ ordering an officer to pay money, and a judgment for money only. The

effect is, and might be the same, and the party seeks to obtain the payment of money; but the particular relief that is sought in the mandamus case, is different from the money judgment. The enforcement of the order, would be through different means and different processes.

There is the further question made in some of these cases where the bond has not been given, and that involves the construction of sec. 5228. Sec. 5228, provides that, "a party in any trust capacity, who has given bond in this state with sureties according to law, shall not be required to give bond and security to perfect an appeal."

Prior to the revision of 1880, and so far as we have been able to trace the statute from 50 O. L., p. 93, down to the revision of 1880, (See Swan & Critchfield, p. 1167, sec. 6), executors, administrators and guardians, were the only trustees who were exempt from the necessity of giving bond.

On this question I speak for a majority of the court only. A majority of the court is of the opinion, and so holds, that sec. 5228, as it now reads, "A party in any trust capacity," must be construed in the light of the provision as it stood before the revision. Before the revision it stood, executors, administrators and guardians. That the enlargement by the phrase, "parties in any trust capacity," would only include trustees of the same class as executors, administrators and guardians, and is not broad enough to include public officers, such as county commissioners and county treasurers.

It therefore follows, that the appeals will be dismissed in cases Nos. 236, 237, 238, 239, 240 and 263 and 264, because no appeal bond has been given. In cases from 245 to 262 inclusive, where the bond has been given, the motions to dismiss the appeal are overruled.

James R. Lytle, McElroy & Carpenter, for the motions.

Geo. Coyner, Pros. Att'y., *Jones & Jones*, contra.

(Eighth Circuit—Cuyahoga Co., O., Circuit Court—Nov. Term, 1897.)

Before Hale, Marvin and Caldwell, JJ.

THE AMERICAN SURETY COMPANY OF NEW YORK v. JACOB A. RAEDER, ASSIGNEE, et al.

Contract with Board of Education for erection of school house—Provision in bond for payment of laborers and material men, valid—

Where, in a contract with a board of education for the building of a school house, the contractor was required to, and did give a bond for the faithful performance of the contract, providing also that he should pay all just and legal claims for labor performed upon, and for material furnished for the work, and also agreeing that the undertaking should be for the use of any laborer or material man having a just claim as aforesaid, as well as for the board of education, such obligation so far as laborers and material men are concerned is not beyond the powers of the board of education, but is valid, and may be enforced against the sureties on such bond by any laborer or material man who has a legal claim against such contractor for labor performed or material furnished in the erection of the building.

Error to the Court of Common Pleas, Cuyahoga county.

HALE, J.

On the 25th day of May, 1895, Peter J. Black entered into a contract with the Board of Education of the city of Cleveland, for the construction of a school-house, and to secure the faithful performance of that contract on his part, executed and delivered to the Board of Education his bond with The American Surety Company of New York, as surety.

The contract is very lengthy and need not be recited.

The bond, among other provisions, contains the following:

"The condition of this obligation is such, that, whereas the said Peter J. Black, did, on the 27th day of May, A. D. 1895, enter into the foregoing agreement with said Board of Education, which said agreement is made a part of this bond, the same as though fully set forth herein, now, if the said Peter J. Black, designated as said party of the second part, in the said foregoing agreement, shall well and truly

perform all and singular, the stipulations of said agreement by him to be performed, and shall pay all just and legal claims for labor performed upon, and for materials furnished for the work specified in said agreement, the same shall remain in full force and virtue in law; otherwise, then, this obligation shall be void. We hereby agreeing and consenting that this undertaking shall be for the use of any laborer or material-man having a just claim as aforesaid, as well as for said Board of Education."

It will be seen, that the contract and bond were executed at the same time, each referring to the other.

Black made default and abandoned the building before it was completed.

Bohm & Stuhr had performed labor and furnished materials under contract with Black, for the building, and at the time Black abandoned his contract, he was indebted to them in the sum of $2,900.00, and more. Thereupon, Raeder—assignee of Stuhr & Bohm—commenced an action in the court of common pleas upon the bond, to enforce the collection of this claim.

On trial in the court of common pleas, judgment was rendered in favor of the defendant in error, and against the plaintiff in error. Error is prosecuted in this court to reverse that judgment.

It is insisted by the Surety Company, that the defendant in error has no right of action on this bond, and that under the issues made by the pleadings, the judgment should have been for the plaintiff in error. It is suggested, first, that the contract as well as the bond, was, and is illegal and void, under the provisions of sec. 3899, of the statute under which the Board of Education was organized. That section reads: "No contract, agreement, or obligation, shall be binding upon the board unless an appropriation therefor, shall be first made by the council." There is no evidence that such an appropriation had been made; that is, nothing is disclosed by this record that such an appropriation had

been made. We are of the opinion, however, that neither Black nor his surety can avoid his or its obligation, by reason of this statute. The contract was partly completed, and some payments at least, made to Black upon it. The Board was in no way in default at the time that Black abandoned his contract, and, so far as disclosed by this record, was ready, willing and anxious, to perform its part of the contract. Under these circumstances, we think this claim can not be sustained.

Again, it is claimed that the Board was without authority to require or receive this bond, and, therefore, it is not binding on the surety; that the whole matter was ultra vires, so far as these laborers and material-men are concerned.

The subject matter of the contract, was clearly within the jurisdiction of the Board, and the contract one that the Board had ample authority to make, independent of any express provision of the statute. We are clearly of the opinion, that that Board, in a contract of this kind, could secure its performance in any proper manner, one of which would be to require a bond, as in this case.

The Board not only had the powers expressly granted it, but such as were by those expressly granted, implied and necessary for the carrying out of those that were expressly granted.

It is said, again, that there was a mistake of law on the part of the parties executing this bond; and it was sought to introduce evidence tending to establish that fact.

It is not denied that relief is sometimes granted to parties who have entered into a contract under a mistake of law applicable to the transaction, but we do not think this is one of those cases.

Testimony was offered on the trial of the case, by the party who drew the contract, of the intention of the Board of Education in taking this bond, that is, that it was not intended to cover claims of laborers and material-men. That

evidence was excluded. We think the intention of the parties should be gathered from the surrounding circumstances and the language embodied in the contract and bond, and that such testimony was not competent.

The main contention, however, is over the proper interpretation to be given to the bond, and whether it can, in any event, be enforced in behalf of the laborers and materialmen. That is the substantial question involved here.

Counsel for plaintiff in error, contend that the bond was given solely for the protection of the Board of Education, and inasmuch as the Board was under no legal obligation to pay any claims against Peter Black for labor and materials, and was in no way indebted to the defendant in error, no cause of action arises on the bond in his favor.

It is made quite clear, from an examination of the language of the bond, that the parties intended to give a right of action on the bond, for unpaid claims of this class, against Black. There is, so far as we are able to find, no direct authority in this state, upon the question involved. There are, however, a number of adjudications in other states, bearing directly on this proposition. 133 Mo., 561, involved the interpretation of a contract in which the city of St. Louis was a party upon one side, and had contracted for improvements upon the streets of the city, and a bond of the contractor taken, the conditions of which were similar to the one we are here considering,—in legal effect, the same. The bond provided, that the contractor should pay to the proper parties all amounts due for material and labor. There was no statute authorizing such a bond, but the supreme court of Missouri sustained the action, and said it was right and proper to enforce the bond according to its terms. There is, in that case, a very careful discussion of the question involved.

Several cases involving the exact questions have been determined by the supreme court of Nebraska. 41 Neb., 655,

contract for a street improvement. An action was brought by a material-man and laborer, upon the contract which provided that the contractor should pay all claims of laborers and material-men, and was sustained.

See also, 34 Neb., 220; 38 Neb., 794; 64 Iowa, 561; 63 Iowa, 162; 56 Mich., 345—The opinion in this case was delivered by Judge Cooley, and fully sustains the propositions contended for. On the other hand, a case directly in point, is reported in 69 N. Y. State Reports, 846. This case was determined by the supreme court of the state of New York, in the Buffalo district, and, we understand, is now pending in the court of appeals of that state. The exact question here involved was made, and the court held that the action could not be maintained.

The decided weight of authority is in support of the right to maintain the action.

It has long been the policy of the state to protect laborers and material-men who have performed labor or furnished material to the individual. This has been done by way of mechanics' liens. These lien laws are founded upon just and equitable principles; and while it is true that as to the public buildings and public improvements, the general rule is, that no liens can be obtained, still the same equity exists in favor of material-men and laborers.

The case to which I have referred, reported in 6 Mich., states the law as follows:

"It is not ultra vires for a municipal board in contracting for a public building, to stipulate that payments were not to be made to contractors so long as any claim for work or materials stood against them."

Judge Cooley, in disposing of the case, said:

"A corporation, when constructing a public building or other public work, is chargeable with a moral duty as an individual would be to see that it is so constructed that people may not be injured in coming near to, or making use of

it in a proper manner. In some cases, they may not be legally responsible for failure to perform this duty; but where the moral obligation exists, it cannot be said that any provision for its performance, not improper in itself, is ultra vires. A county may go to great pains and great expense to make the court-house unquestionably safe, that individual citizens may not suffer injuries consequent upon its construction; but if it may do this, it would be very strange if it were found lacking in authority to stipulate in the contract for the building, that the constructor, when calling for payment, shall show that he is performing his obligations to those who supply the labor and materials, and that the county is not obtaining the building at the expense of a few of its people. We cannot think such is the case."

So, guided by the decided weight of the authorities, and what we believe to be the more equitable rule, we hold that this bond can be enforced by the laborers and material-men, precisely according to its terms.

If the principal and surety in the bond desire not to be held to the language of the contract and bond, it is very easy to provide against it in the execution of the contract and bond.

The judgment in the case will be affirmed.

Garfield & Garfield, for Plaintiff in Error.

Dickey, Brewer & McGowan, for Defendant in Error.

(Sixth Circuit—Wood Co., O., Circuit Court, October Term, 1897.)

Before King, Haynes and Parker, JJ.

BERT STEELE v. WILLIAM EDWARDS.

Libel—Publication—Mailing postal card—

Merely mailing a postal card at a postoffice does not amount to a publication to the postal authorities or any person other than the one to whom it is addressed, of any matter written on the side thereof for the message.

Language that imputes no crime—Larceny—

The words "I want you to call and settle for the fodder you

were kind enough to take Saturday without permission. Call and settle at once," do not impute the crime of larceny to the person to whom they are addressed, and are not in themselves libelous.

Language not libelous in itself—What must be shown—

When language is not in itself libelous, but by a person acquainted with extraneous facts may have been understood in a libelous sense, the allegation and proof must show that the person to whom the language was published, was acquainted with such extraneous facts.

Error to the Court of Common Pleas of Wood county.

PARKER, J.

In this case the plaintiff in error, Steele, was plaintiff below, and filed his petition in the court of common pleas, charging the defendant, Edwards, with having uttered and published of, and concerning him, Steele, a certain libelous writing. The words of the alleged libel which were written upon a postal card and mailed at the post office at Bowling Green, are as follows:

"Bowling Green, O., Mch. 30th, 1896.

"Mr. Bert Steele:

"I want you to call and settle for the fodder you were kind enough to take Saturday without permission. Call and settle at once.

"Yours,

"William Edwards."

It is alleged in the petition, that the meaning of these words, as used by Edwards, was, that Steele had been guilty of grand larceny in taking the fodder referred to, and that therefore, the words were libelous and actionable. It is also averred in the petition, that before the time of writing and mailing the postal card, the defendant had asserted that a certain load of his fodder had been stolen. The defendant, for answer to this petition, denies each and every allegation contained in the petition, denying therefore, necessarily, all the averments contained in the innuendo, which

impute to the language used the meaning alleged; that is, a charge that Steele had committed the offense of grand larceny; and then the answer proceeds to explain the circumstances of the writing and mailing of the card, as follows:

"That a person other than the plaintiff, who, as defendant was reliably informed, was named Bert Steele, was indebted to him for a load of fodder which said person had taken and hauled away from the defendant's premises during the absence therefrom of defendant. That the defendant, who can neither read or write, instructed his daughter to write to said person, requesting him to call and pay for said fodder, whereupon she did write the postal card mentioned in the petition, and the same was mailed accordingly. That said postal card was not intended for the plaintiff, nor to be delivered to him, and defendant so informed plaintiff when he learned that said card had come into his possession. That if said card was delivered to the plaintiff by Post Office Department, it was through mistake, growing out of the identity of the name of the plaintiff with that of the person for whom it was intended, and to whom it was addressed."

The reply denies that any person named Bert Steele, was ever indebted to the plaintiff for any load of fodder, and denies that the defendant ever had any information, reliable or otherwise, as to any man named Bert Steele, having taken any fodder from the farm of defendant. Denies that defendant did not intend to have said card mentioned in the petition delivered to plaintiff. Denies that there was any mistake on the part of defendant arising from the identity of plaintiff's name with any other person's name, to whom defendant intended to address said card. The reply admits that the daughter of the defendant wrote the card under the direction of the defendant, but denies that the same was a request, or intended as a request, for any person to call and pay for the fodder, and denies every other allegation in the answer not admitted in the reply, to be true.

After the plaintiff had rested his case, the court, on motion of the defendant, withdrew the case from the consider-

ation of the jury, and directed the jury to return a verdict for the defendant, which the jury did, and because of this action of the court below, error is prosecuted in this court. Now, whether the words appearing upon this postal card were libelous, is a question for the court,—a question of law. That is to say, whether the words alone, without having any special or unusual meaning attached to them by the aid of averment of additional explanatory facts,—whether appearing by themselves without such aids, they were libelous or not, is a question for the court, and this court is of the opinion, that the natural import of the words does not convey a libelous meaning; that there is nothing about the language used, when given its ordinary significance, that imputes to the defendant the crime of grand larceny or any other crime, or any act upon his part, that would tend to disgrace him, or render him ridiculous,—anything in short, that would make it libelous.

A writing however, which may not be libelous on its face, may be shown to have been used and understood in a libelous sense. It may be so understood by reason of the situation of the parties; by reason of extraneous facts not appearing upon the face of the writing itself—words that, according to their ordinary signification, may be entirely innocent, or might, under certain circumstances, be understood by persons hearing or reading them, in a sense carrying a charge or implication of crime, or something that would make them libelous. Counsel for the plaintiff in this case, evidently did not regard these words as libelous upon their face, and therefore undertake to set forth in the petition, certain extraneous facts with relation to which the words were uttered or used, and then, by certain innuendoes, undertake to say that they were intended to be understood, and were understood in the sense of imputing to the plaintiff the crime of grand larceny. In such case, the question

whether such meaning was intended by the person publishing the writing, or whether such meaning was understood by the person to whom it was published, becomes a question for the jury. We cannot say that the words, under the circumstances set forth, would not convey the meaning ascribed to them. The question whether they bore that meaning then, would be a question that should be submitted to the jury. But it is necessary to allege and to prove that there were such circumstances as are alleged—that there was such a situation surrounding the transaction as would make it, at least, possible, if not probable, that the meaning ascribed to the words was the meaning intended, and the meaning understood.

From the evidence submitted to the jury, it appears that the defendant had had some arrangement with a man by name of Anson Steele, under which Anson Steele had obtained from the defendant, Edwards, certain fodder, and was to obtain more fodder which he was to pay for. That the understanding between the parties was, that he was to pay for it before he removed it from the premises of Edwards, and it appears that Mr. Edwards did not know the Christian name of the Steele with whom he had been dealing with respect to this fodder. That on a certain day, he noticed a person going out of his field with a load of fodder; that he supposed this person to be the Steele that he had agreed to let have a load of fodder, and that the words that he used on that occasion, and the words which he wrote upon the postal card, were with respect to that transaction. It appears that he inquired where Mr. Steele lived, and went to the house where he was directed, and there found a load of fodder; that he supposed,—taking his testimony for it, —that that was the residence of the Steele to whom he sold the fodder. He was informed that it was the residence of Bert Steele, and he was still in ignorance of the fact that the person to whom he had agreed to sell the fodder was

not Bert Steele. He did not find Mr. Steele at this house, but returned home and directed his daughter to write a postal card, calling upon Mr. Bert Steele, (whom he then supposed was the Steele to whom he had sold the fodder), to call and settle for what he had taken without permission, the understanding having been, that Steele was not to take the fodder until he had first paid for it. Now, it was upon that statement of the matter to the jury by witnesses, that the court withdrew the case from the consideration of the jury, that there was no testimony tending to show that the language had been used by Mr. Edwards in the libelous sense ascribed to it in the petition. It appears, however, that there was some testimony upon the part of Anson Steele, tending to show that Mr. Edwards had, upon the same day that he had called at the residence of Bert Steele, also called at the residence of Anson Steele, and that not finding the fodder there, he subsequently, upon meeting Anson Steele on the street, in conversation with him, said to him, "I did not find the fodder at your house, but I found it at the house of Bert Steele, and therefore, I have no claim upon you for the fodder." There was some evidence tending to show that this occurred before Mr. Edwards had written this postal card, so that, if the matter were to go to the jury upon the question of what was intended and meant by Mr. Edwards, perhaps it could not be said there was no testimony tending to show that the words were intended by Mr. Edwards to be understood in the libelous sense charged.

But a question which is more important in the case is:—In what sense was the language understood, or in what sense might it have been understood by those to whom it was published? The intent of a person using language, is only inquired into as we understand it, upon the question of malice. The person using libelous language may intend to have it understood in an innocent sense, and yet may be held liable in a civil action for damages. Now, in what

sense other than the sense which Mr. Edwards says he used this language, could it have been understood by those to whom it was published? It becomes, important to inquire then, how, and to whom it was published, if at all. The postal card was written by the daughter of the defendant, at his residence. There is no testimony in the record tending to show that after it was so written, it came to the eyes of any other person, or that it was read in the presence or hearing of any other person than the defendant's daughter. There are many authorities to the effect that it is not sufficient that one may have an opportunity to read a libelous writing to constitute a publication, but it must have been seen and read by, or to someone other than the writer, to make it a publication. It is no part of the business or duty of the post office officials to read a postal card; their doing so, would be an impropriety, if not an unlawful act, and it can hardly be presumed that they do, ordinarily, read the vast number of postal cards that go through the post offices. It would not do to assume, as a matter of law, that because a postal card has been placed in the post office, it has been read, since there has been an opportunity for the post office officials to read it Therefore, we do not regard the fact of the posting of the postal card at the post office as a publication of the matter written upon it. Technically, perhaps, it was a publication to the daughter. She was not the author of it, but was the amanuensis of the defendant, who can neither read nor write, and it may be said, that it was published to her because she wrote and necessarily read it. It does not appear that any other person ever read it or heard it read; therefore, it becomes important to know in what sense the daughter could have understood this language. Now, it does not appear so far as we have been able to find from the record, that the daughter had been apprised or made acquainted, with any circumstances that would cause her to understand this language as meaning

that Steele had been guilty of grand larceny. She had simply been directed by her father to write a postal card to Bert Seele, to call and settle for the fodder which he had taken without permission. It is a very scant publication to say the least of it, but if it is technically a publication—it was published to one who personally had no knowledge of the surrounding circumstances that would cause her to think that the language used (which sseems to be more her own language than her father's), imputed the crime of grand larceny to the person addressed. On this subject, I will read from sec. 135, of Townshend on Slander and Libel:

"In allowing extraneous circumstances to affect the construction of language, courts inquire whether or not, the hearer or reader of the language knew such circumstances. If the hearer or reader was acquainted with those extraneous circumstances, the construction will be with reference to them, not because it is important how the reader or hearer understood the language, but because those circumstances form a proper element in determining the meaning to be attributed to the language in question. If the hearer or reader was not acquainted with those extraneous circumstances, then they will not be taken into consideration in determining the meaning of the language. The hearer or reader not being acquainted with those circumstances which affect the meaning of the language, its effect upon such hearer or reader is as if no such circumstances existed, and the language is to be construed without reference to such circumstances. The circumstance that the act charged is physically or legally impossible, does not always prevent the language being actionable. The alleged test in such case is the knowledge possessed by those to whom the language is published."

And there are various illustrations given in the text. In the case of Brown v. Myers, in 40 Ohio St., p. 99, it is held, that language which otherwise would be actionable, might not be actionable if published under circumstances, or to parties acquainted with the circumstances, which would give to the language a meaning that would not be actionable.

That is the converse of the proposition which I have just stated, but is founded on like principles.

In this connection we will consider the question of the sufficiency of the petition, though it was not demurred to. I have called attention to the fact that the petition sets forth that before the committing of the grievance complained of, that is to say, before the publishing of this card, the defendant had asserted that a certain load of fodder, to him, the defendant belonging, had been feloniously stolen, taken and carried away. There was no testimony tending to show that he had ever made such a charge or declaration; but even if that had been shown, there is no allegation that any person to whom the language was published, knew of such charge or declaration, or was acquainted with any circumstance which would cause such person to understand the language as imputing to Mr. Steele the crime of larceny. It is not only necessary to prove that, but it is necessary to allege it, or, to state it more logically, it is necessary to allege it and to support the allegation by proof. In the case of Maynard v. Firemen's Fund Insurance Co., 34 Cal., 48, (also 91 Am. Dec., at p. 672), the court say:

"The averment in that complaint is, that the defendant intended to have it understood and believed by the language of the resolution, that the plaintiff was dismissed by the defendant because of dishonesty and want of ability to discharge and perform the duties of his occupation, and that he was wholly unfit and unworthy of employment; and further, that to consummate the wrong intended, the defendant caused the resolution to be published among the plaintiff's acquaintances, and communicated the same to the insurance companies named in the complaint. This may be sufficient to show what the defendant meant by the language used and published, but this alone is not enough.

"How the resolution was understood by those who read it, other than those who composed and published it, the complaint does not state. The plaintiff's acquaintances and the

officers of the insurance companies, amongst whom the resolution was circulated, if they read it, may not have understood it as importing anything to the discredit of plaintiff. It is admissible in actions of slander and libel, to aver and prove that the words alleged to be defamatory, and which have a covert or ambiguous meaning, were intended and used with the object of defaming, and were understood in a particular defamatory sense by those who heard them as the case may be. In Woolnoth v. Meadows, 5 East, 463, which was an action of slander, the words were of doubtful import, and the declaration, after the usual introductory matter and setting forth of the words, contained an express averment, that they were uttered and published by the defendant, with intent and meaning to convey, that the same were by the person in whose presence they were uttered and published, understood and believed to convey a charge of the particular crime mentioned in the declaration. Lord Ellenborough, Chief Justice, in his opinion, speaking of the averment, said: 'Upon a count so framed, the plaintiff must have gone into other proof than the mere speaking of the words, and he must have not only shown that the defendant's meaning was to impute a crime of that nature to the plaintiff, but that the words were so understood by the hearers.'"

The judge presiding in this case, says:

"The complaint does not aver that those who were furnished with the resolution, or copy of it, read it, or that, if they did, they understood it to impute to the plaintiff want of honesty or business capacity. The rule is, that the allegations and proofs must correspond, and the consequence of the rule is another, which is, that the evidence of a matter of fact essential to the support of the action, cannot be heard unless the complaint or other proper pleading contains an averment of such essential matter or fact. Upon the subject of showing by pleading what was intended by the alleged libelous words, and in what sense they were understood by those to whom they were published, we may, in addition to the case cited, refer to Goodrich v. Wolcott, 3 Cow., 239; Andrews v. Woodmansie, 15 Wend., 234; Gibson v. Williams, 4 Wend., 320; Dexter v. Taber, 12 Johns., 239; and Peake v. Oldham, 1 Cow., 275. All these authorities bear more

or less upon the questions considered, and may be read with profit by those who are interested in mastering this branch of the law."

We hold that the petition, counting upon language which is not libelous in itself, is faulty and insufficient, because it does not allege that the persons to whom the matter was published, were acquainted with facts which caused it to convey to them a libelous meaning, and that there is no evidence tending to show that it was so understood, or might have been, by the persons to whom it was published. Therefore, we think the court of common pleas did not err in taking the case from the jury, and the judgment will be affirmed.

James & Beverstock, for Plaintiff

James O. Troup, for Defendant.

(Eighth Circuit—Cuyahoga Co., O., Circuit Court—Nov. Term, 1897.)

Before Hale, Marvin and Caldwell, JJ.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA v. MARY KILBANE.

Insurance—False answers in application known to be false by agent—Collusion between agent and assured immaterial—

Under the statute, sec. 3625, R. S., false answers given by the assured in his application, constitute no defense to a recovery on the policy if the falsehood of such answers was known to the agent of the company, and the fact that the agent and the assured acted in collusion in inserting such false answer in the application, will not relieve the company from liability on the policy.

Error to the Court of Common Pleas of Cuyahoga county.

MARVIN, J.

The case of the Prudential Insurance Company against Mary Kilbane is a proceeding in error brought for the purpose of reversing the judgment of the court of common

pleas of this county. The original action was brougth by Mary Kilbane to recover upon two policies of insurance issued upon the life of John Kilbane who was her husband, and in which policies Mary Kilbane is named as the beneficiary.

The first of these policies was applied for on the 3rd day of August, 1893, and issued on the 21st day of the same month. The amount covered by that policy was one thousand dollars ($1000.00).

The other policy was applied for on the 9th day of August, 1893, and issued on the 4th of October following, and the amount named in that policy was one thousand and five hundred dollars ($1500.00).

On the 29th of October, the same month in which the last policy was issued, John Kilbane died. The company declined to pay the amount provided in these two policies, and the petition was filed and a separate cause of action set out upon each of the policies.

The answer sets out substantially the same defense to each cause of action, that is, that John Kilbane in the application made for each of these policies, made false answers to questions put to him; that he made such false answers knowing them to be false, and that the company was without knowledge of the falsity of the answers; that these answers were upon matters that were material, and that if true answers had been made by the assured, the policies would not have been issued.

Among the questions required to be answered in the applications was the following, numbered 10,—and that is true as to each of these policies: "Are you now engaged in, or have you any intention of engaging in the manufacture or sale of malt or spirituous liquors?" To this he answered "No." And in the series of questions provided to be answered by the applicant for insurance, to the medical examiner, the question in reference to this same subject-mat-

ter reads as the tenth question in the applications made to the agent except that it adds to the words already given, the word "handling," so that the question reads: "Are you now engaged in, or have you any intention of engaging in the manufactur or sale or handling of malt or spirituous liquors?" And in the medical examination, his answer to that question is "No."

The occupation of the applicant is required to be given also; there is a blank left for that; and in the application, in each case, the occupation of the applicant is given as "foreman on the docks."

Now the claim is, on the part of the plaintiff in error, the insurance company, that this man Kilbane was at the time when he obtained his insurance, and at the time when he applied for each of these policies, employed as bar-keeper in a drinking-saloon, and that he continued in that employment more or less from that time until he died.

The evidence tends to show that, though he was employed a part of the time upon the docks in handling ore, he, during a part of the time, but not perhaps as a steady employment, dealt out beer and whiskey at the bar of his father-in-law. It is said that the evidence tends to show more than this—that Kilbane was the proprietor of the bar—and, perhaps, this is true. It does show that a government revenue license was obtained in the name of the assured, for that business; and it shows that more or less he was employed in that saloon, though it can not be claimed that he made that a steady employment.

He worked a part of the time on the dock. But it is said on the part of the defendant here, the plaintiff below, that whatever the fact is as to the employment of the assured, it was known to the agent of the company what his employment was, and it was known that he did more or less work in the saloon; that he was in the saloon behind the bar at the time when one of these applications for insurance was made,

and that he furnished a drink, either of beer or whiskey, to the agent of the company at that time. And so it is said that such being the case, it is indifferent as to whether his answer was true or false to the question put, and in support of that view we are cited to section 3625 of the Revised Statutes, which reads:

"No answer to any interrogatory made by an applicant in his or her application for a policy, shall bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is wilfully false and was fraudulently made, that it is material and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, moreover, that the agent or the company had no knowledge of the falsity or fraud of such answer."

The plaintiff in error complains that the court erred in its instructions to the jury as to the effect of the knowledge on the part of the agent of the company, of the employment of the assured, and erred in its instructions as to the effect of a false answer being made by the assured upon these question.

As to whether John Kilbane falsely stated to the agent of the company what his employment was, we are referred to certain pages of the record where Mary Kilbane, the beneficiary, testified. On pages, both 18 and 27, of the record, she says that her husband told the agent he worked on the dock. She says that the agent was present when her husband dealt out liquor as I have already stated. And another witness, Peter McNeeley, testified to the same thing. And Mary Kilbane says, on page 18, that the agent of the company said to her husband at the time the application for one of these policies was signed: "I have put you down as foreman on the docks." She cannot swear that the particular paper writing shown her on the witness-stand is the one then signed,—she can neither write nor read writing—but

she says that some paper was there that the agent brought to the saloon and laid down before her husband, and then the agent said to her husband: "I have put you down as foreman on the docks." And Kilbane said: "I don't care what you put me down, so I can get my insurance all straight."

Now it is urged that if, as a matter of fact, the agent knew of the employment of Kilbane as a dealer in intoxicating drinks, there must have been a connivance between the agent and Kilbane, and known to the beneficiary, to defraud the insurance company, and that, therefore, the insurance company ought not to be bound.

On the 63rd page, as I remember, of the bill of exceptions, the occupations in which if people are engaged, the company would not accept their applications or issue policies, are to be found, and among the risks not accepted are those of "bar-keeper, bar-tender, beer-bottling, and saloon-keeper."

The general agent of the company testified at the trial that the universal custom of the company was to adhere to these rules and not accept the people engaged in the occupations thus enumerated in the list, and would not issue policies to people engaged in any of these occupations. And they say if it is true that the agent knew that the applicant was engaged in any one of these occupations, and saw fit to put him down as engaged in some other occupation, it was a conspiracy on the part of Kilbane and the agent, known to the beneficiary, and done with the intent to wrong the company; that this relieves the company from liability.

Counsel for the company requested the court to charge the jury:

"If John Kilbane knew at the time the applications were filled out, that the company's agent inserted a false answer to question No. 10 in the applications, and permitted the

same to be forwarded by the agent to the company so that the policies were issued thereupon, the policies are void, and plaintiff cannot recover."

The second request reads:

"If the said John Kilbane falsely represented to the medical examiner of the company that he was not engaged in the sale or handling of malt or spirituous liquors, there can be no recovery."

The third request reads:

"John Kilbane having warranted the statements contained in his applications to be true, if any of said statements are false, there can be no recovery by the plaintiff herein."

The fourth request reads:

"If the jury find from the evidence, that John Kilbane agreed with the company's agent to make false statements as to his occupation, in his applications to the company, and did make such false statements, and the policies were issued on both of said applications containing false statements, there could be no recovery herein."

The fifth request reads:

"The statute of Ohio, sec. 3625, is not intended to make an insurance company liable upon policies issued on applications containing answers known to the applicant to be false, and inserted in the applications by collusion between the applicant and the company's agent."

As to the first three of these requests it is clear that to have given either one of them would have been to have said to the jury that sec. 3625 of the statutes does not mean what it says; for it is clearly provided in that section, that no false answer given by the assured in his application shall be a defense to a suit upon the policy if the same was known to be false by either the company or its agent.

As to the fourth and fifth requests, each involves the question of whether, if the agent and the assured by collusion furnished false answers to the company to material questions, thereby inducing the company to issue its policy,

there can be a recovery. It is clear from the reading of the section of the statutes already given that its terms at least include cases covered by the two requests; but it is urged that it cannot have been the intention of the legislature to bind insurance companies by the acts of their agents thus acting fraudulently with the company. The legislature was not content to say that the company should be held upon its policies where false answers were given with its kowledge, but went so far as to say that if the agent had knowledge of the falsity of the answers, such false answers should not prevent a recovery.

Ordinarily, what is known to the agent of a corporation, is known to the corporation, and if the legislature had not intended to make this statute more binding upon the company than results from the fact that what is known to the agent is known to the corporation, there was no reason for expressly designating the agent as one whose knowledge of the falsity of the answers should prevent the company from making the defense.

Suppose that each member of the board of directors of the company knew that the statements in the applications were not true, and agreed with the applicant that he might make these untrue statements and the policy should be issued, could it be claimed that the company could take the money of the man who applied, and then, when the loss occurred, refuse to pay because they had connived with him to have false answers made? If that can not be done, if the officers of this corporation, by acting in collusion with the assured and accepting his false answers, knowing them to be false, caused the policy to be issued, and accepted the money, it can not make the defense sought to be made here. It would seem that under this statute such conduct on the part of the agent, would be equally unavailing as a defense.

My attention has been called to an opinion delivered by Judge Woodbury, in the circuit court of Jefferson county,

—the case is not reported, but I have a typewritten copy of the opinion before me; this was a suit upon a policy of life insurance. I am strongly impressed with the soundness of the reasoning in this opinion, and I quote from it as follows:

"The request which raises this question, is marked number 4 a.

"If the jury find that M. S. Longdon, the agent of the defendant, and Jesse R. Adams, conspired together to commit a fraud upon the defendant, and in pursuance with this conspiracy caused false and untrue statements to be made in the application, material to the risk, and if you find that the application, so made, was forwarded to the defendant, and on the strength of that application so made, the policy on which the suit was brought was issued and delivered to the said Jesse R. Adams, then, in that case, the same was and is void for fraud, and your verdict should be for defendant."

"This request the court refused to give. Now, in the charge, there is an exception that involves the same question. On page 51 of the record:

"The plaintiff in reply to the answer of defendant, denies that Jesse R. Adams, in the particulars wherein the defendant says that he made false and fraudulent representations, did make the representations claimed, and avers that as to those particulars he stated to the agent of the company, at the time of preparing the application, the truth, and that the answers in said application which are untrue, were inserted therein by the soliciting agent of the company, upon his own motion, and after he had been truly informed in regard thereto. That the answers complained of by the defendant as false and fraudulent, may vitiate the policy and defeat a recovery by plaintiff, you must find in the light of the testimony which has been given before you, that the answer or answers complained of were made by Jesse R. Adams; that the same were wilfully false on his part, and were by him fraudulently made; that the same were material and induced the company to issue the policy, and that but for such answers, the policy would not have been issued, and moreover, that the agent of the company had no knowledge of the falsity or fraud of such answers.

"So far as this charge, itself, is concerned, it is in the language of the statute, and it is evidently copied from it. So we are brought squarely to the question: What was meant by the legislature in the passage, or enactment, of this statute?

"It is insisted on the part of the plaintiff in error, that it was not the intention of the legislature, under this statute, to provide that the company should be liable under it, if the agent as well as the applicant, should both combine to defraud the company in the application and in the procurement of the policy; that the intent of the legislature was not this, but that in such case it was not the intention of the legislature to provide for a recovery."

Judge Woodbury then called attention to the evil which had grown up throughout the state by provisions being inserted in policies, both of life and fire insurance companies, to the effect that the agent to whom the application was made, should be held as the agent of the assured, and then says:

"And there had been more or less litigation in the state growing out of the very question involved in this case where false answers had been made, or where the agent himself had practiced a fraud upon the company; and a notable case is a case cited in the 30th of the Ohio St., and the cases following, in the 33d and 39th of Ohio St., where the company were seeking to avoid liability—although, confessedly the fraud had been perpetrated by the agent—yet they were seeking to avoid liability, by charging home the fraud of their agent—treating him as not their party for whom they were responsible—but treating him as a third person whose fraud should relieve the company from liability, as well as the fraud of the applicant."

Judge Woodbury further says:

"Now, in this condition of things, the legislature stepped forward, and evidently deemed it just that there should be some legislation that should settle this matter in the state of Ohio; and so they have provided, in the first instance, that no answer shall be held to preclude the right to recovery, unless it shall be clearly shown that they are fraudu-

lent—second, that they are material—third, that the policy would not have been issued if the true answers had been given; and then—to meet the further perplexity in regard to the agent, they further provide, 'Moreover, that the agent or company had no knowledge of the falsity or fraud of such answers.'"

"Now, the effect of this is, perhaps, to place it where the knowledge of the agent has been shown—exactly the same as if the company itself, by its authorized officers, had possessed the knowledge which the agent, himself, is alleged to have possessed."

Again quoting from Judge Woodbury:

"Now, with the agent standing exactly in the same relation to the company, and with a statutory provision providing that, before the false answer shall defeat a recovery, that it must be clearly shown that the agent of the company did not know, or, moreover, that the agent of the company had no knowledge of the falsity or fraud of such answers. We think the legislature intended to meet just such a case as this."

Without stopping to read the charge—the things complained of grew out of this same view, that is to say, the court not only refused to charge the requests, but charged that sec. 3625 applied to this case, and that knowledge on the part of the agent of the falsity of the answers would make the defense of such falsity unavailing in this case.

We find no error in the refusal of the court to charge as requested, and no error in the charge as given.

But there is another complaint made, which is, that the court was requested by the insurance company to submit two special findings to the jury, which the court declined to do. The right to have these questions submitted is claimed under a statute found in vol. 91 O. L., sec. 5201, page 298:

"But the court shall, at the request of either party, direct them to give a special verdict in writing upon all

or any of the issues, and in all cases when requested by either party, the court shall instruct the jurors if they render a general verdict, to find specially upon particular questions of fact to be stated in writing, and shall direct a written finding thereon, and the verdict and finding must be filed with the clerk and entered on the journal."

Because of that statute, and relying upon that statute as the authority for doing it, the defendant duly requested that these two questions be submitted to the jury for special findings:

"First:—Did the agent of the defendant company, know at the time that John Kilbane signed the application for the first policy of insurance sued upon here, that the said John Kilbane was engaged in the sale and handling of spirituous liquors?"

"Second:—Did the agent of the company know that the said John Kilbane was engaged in the sale or handling of spirituous liquors?"

Of course, if one of these requests should have been submitted to the jury, both should have been. The court did not submit them. Now, if these questions were calculated to mislead the jury—if they did not fairly submit to the jury the question which was in issue in the case, then it was error not to decline to submit them to the jury. The questions assume that Kilbane was engaged in the handling and selling of liquor.

If the questions had been in effect: "Did the agent of the company, know in what business John Kilbane was engaged at the time he made his application for insurance," it would have been entirely proper, and should have been submitted to the jury. Or, if this question had been asked to be submitted, "Was John Kilbane, at the time of the making of his application for either of the policies, engaged in selling or handling spirituous or malt liquors," it should have been submitted to the jury.

But there is a dispute in this record, as to whether Kil-

bane could be fairly said to be engaged in such sale or handling of liquors. The jury, if the questions proposed had been submitted to them, might have believed, as a matter of fact, that John Kilbane was not engaged in the handling or sale of liquor, and so must have answered to each of these questions, "No." If such answer had been made, and a verdict had been rendered for the plaintiff below, it would have been urged that the general verdict was inconsistent with the special findings, and the jury might well have reason to say, "if we answer these questions "no," it will be said that we must find a verdict for the defendant." Yet, it is clear, that if they believed that Kilbane was not thus engaged in the liquor business, the answer to each of these questions must have been "no."

It was not error on the part of the court to refuse to submit these questions to the jury.

There is one other matter complained of, and that is, the court in its charge said to the jury, that it was wholly indifferent whether Kilbane was a foreman on the dock or not, or whether he said that he was such foreman. The meaning of the court clearly was, that if he was employed on the dock, it was of no importance whether he was, or was not, a foreman.

There is nothing in the record to show that the plaintiff in error could have been prejudiced by this language in the charge, and the judgment of the court of common pleas is affirmed.

(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1897.)

Before King, Haynes and Parker, JJ.

BERNHARD J. KROWENSTROT v. THE STATE OF OHIO.

Criminal law—Venue—Discrepancy in affidavit and information—

1. Where an affidavit lays an offense as committed in Lucas county, is filed in the police court of a city in said county,

and afterwards, by an information duly filed in such court, the offense is laid in said city and county, the defect as to venue, if any existed in the affidavit, is cured by the information.

Prosecution under act to regulate practice of medicine—Negative averment in information—

2. In a prosecution under the "act to regulate the practice of medicine" passed February 27, 1896, it is not necessary to negative the provisions and exceptions as set forth in sec. 4403 f. in the information.

Same—Action of Board of Examiners in refusing certificate, not reviewable—

3. In such a prosecution, it is not competent for the defendant to show that the Board of Medical Examiners acted improperly or mistakenly in refusing him a certificate.

Criminal law—Evidence of other transactions than those described in information, not admissible—

4. Ordinarily, in criminal cases, the state is confined in its proof to the transactions described in the indictment or information, and will not be allowed to show others not set forth.

Error to the Court of Common Pleas of Lucas county.

KING, J.

Plaintiff in error was charged before the police court of Toledo with the violation of some provisions of an act entitled "An Act to regulate the practice of Medicine in the State of Ohio," which was passed and become a law on February 27th, 1896. Some errors that are claimed to have occurred in that trial I will notice briefly.

It is asserted that the court erred in entertaining jurisdiction of the cause, the information varying the offense and the statement of it from the statement contained in the affidavit, and that the court had no jurisdiction whatever under the affidavit as it was filed. The affidavit charged that the offense described was committed in the county of Lucas; the information charged that it was committed in the city of Toledo, within the county of Lucas and state of Ohio. It is said that the police court had no jurisdiction of the offense as charged in the affidavit, because the police

court of the city of Toledo does not have jurisdiction of an offense committed co-extensive with the county; that its jurisdiction is limited by a statute which prescribes that it shall have jurisdiction in the city of Toledo and within the territory within four miles of the same. Whether a conviction might have been had upon the affidavit we do not decide; but immediately after the filing of the affidavit, and pursuant to an ordinance of the city of Toledo, the prosecuting attorney of the police court filed an information in which he charged that the offense was committed in the city of Toledo, and that did not exclude the police court from its jurisdiction. It then had the power to try the case.

The next objection to the information is, that it charges that the defendant did for a fee of $25, "prescribe, direct, and recommend for the use of one Kresantia Weissenberger, a certain drug, medicine, or agency, to-wit: one bottle of dark liquid and one bottle of white liquid, the name and composition whereof is unknown, for the treatment and cure of a certain bodily infirmity * * unknown, the said defendant at the time not having received or obtained from the State Board of Medical Registration and Examination a certificate," etc.; and it is said that the statute under which he was prosecuted provides that the act does not apply to certain cases, and that all of those cases should have been stated in the information negatively. The provision of the statute is quite long, but it provides that the statute shall not be construed to prohibit services in cases of emergency, or of domestic administration of family remedies, and shall not apply to any commissioned officers of the U. S. army or navy or marine hospital service. We do not think it was necessary to negative in the information these provisions of the law. They do not come within the rule requiring a negative averment in the information. That matter was fully discussed by the able judge of the

court of common pleas in reviewing this case on error, and with his opinion upon that question we are entirely satisfied.

The information, as I have already read, charges that the defendant did prescribe and recommend to the person named a certain drug, medicine, or other agency, to-wit: one bottle of dark liquid and one bottle of white liquid. On the trial of the case, the state, to make its case, called Mr. Weissenberger, the husband of the patient, as well as the patient Mrs. Weissenberger herself, and also a young lady by the name of Sophia Wasserman, and proceeded to show, and did show, against the objection of the defendant, that on or about the 14th of January, 1897, Mr. Weissenberger and his wife, pursuant to an appointment with the defendant, called at his office, where they met this lady, Miss Wasserman, and that the defendant then proceeded with a knife and other instrument necessary, to perform an operation upon the arm of Miss Wasserman, by which he inserted a tube with an air pump, and pumped blood from the arm of Miss Wasserman into the arm of Mrs. Weissenberger. And the operation is described at some length by all three of the witnesses I have named, all the testimony being objected to. It is further shown in evidence that Mr Weissenberger, the husband of the patient, contracted with the defendant for the performance of this operation, for which he agreed to pay him the sum of $25; and the $25.00, as shown by the evidence, was for nothing else except for the payment for this transfusion of blood. The evidence further shows that after the operation was performed, the defendant gave to Mrs. Weissenberger two bottles of medicine substantially like that described in the information, and subsequently gave her other medicines, for which he charged, and which Mr. Weissenberger testifies that he paid him at other times and in different sums, amounting to $22.

It is claimed that it was error to admit the testimony relating to this occurrence of the transfusion of blood. We

think it was. As described in the testimony of the witnesses, it is clearly a different transaction from that set forth specifically in the information. It had, so far as the evidence discloses, nothing whatever to do with the administration of medicines, or with the administration of the medicines contained in the two special bottles, but was an entirely distinct operation, contracted for and paid for by the husband of the patient independently of the administration of the medicine which he did administer, charged separately, and received his pay separately for it.

The information undertakes to set forth specifically the medicine administered. They proceed at great length to show an entirely different transaction, having no real or apparent connection with the administration of the medicine.

It is not enough to say that both of these transactions were intended to cure the same disease. The state having seen fit to set forth the precise remedy employed, or the means employed, in this matter, they should be confined in their proof to that. And we think it was clearly a departure in attempting to show such a transaction as this transfusion of blood was

In the course of the trial the defendant offered, both upon the cross-examination of the state's witnesses and by his own, considerable testimony to show that he was a practicing physician of good repute, and allowed by the laws of the state of Ohio to practice here, and had been for many years—more than ten; that he had made application to the state board of registration to be registered; that he had sent to that board or deposited with it the fee prescribed by the statute, and had received a receipt for the amount of the fee, but that for some reason unknown to him, but which he alleged and sought to prove were none of the reasons prescribed in the statute, they had refused him a certificate of registration. We think that the court did not err in the exclusion of all that testimony; that the statute

itself must be followed; and if defendant is charged with having practiced without a proper certificate, he can not show why the state board refused him one. He cannot show that the board of medical registration, has erred in the performance of its duty, or that, if justice had been done him by them, he would have received from them a certificate. We do not think he could go into that in his defense.

It is urged again that this statute can not be made to apply to him; that it is retroactive, and to that extent—to the extent that it interferes with his right to practice medicine —it is unconstitutional. We decline to pass upon that question, but will remand the case to the police court for a new trial. We decline to pass upon it for the reason that, as we are informed, a case involving that question has already been argued in the supreme court, which will undoubtedly be decided in a few days; and if the court passes upon it there, the question will be decided; if they do not pass upon it, and if this case should ever come before us again, it will be time enough then to consider and decide that question.

A new trial will be awarded, and the case remanded to the police court.

G. A. Bassett, and *James & Beverstock*, for plaintiff in error.

C. E. Sumner, for defendant in error.

(Eighth Circuit—Cuyahoga Co., O., Cir. Court—Nov. Term, 1897.)

Before Hale, Marvin and Caldwell, JJ.

IN THE MATTER OF THE ANNEXATION OF CERTAIN TERRITORY TO THE TOWNSHIP OF NEWBURGH.

Annexation of part of one township to another, where a hamlet is situated in part in each of such townships—The word "council" as used in section 1380, Revised Statutes of Ohio, includes the board of trustees of a hamlet. Such trustees

are authorized to adopt a resolution directing the filing of a petition with the county commissioners for the annexation of so much of one township as is included in the hamlet, to an adjoining township in which the greater part of such hamlet is situated, and upon the filing of such petition the commissioners have jurisdiction to act thereon.

Error to the Court of Common Pleas of Cuyahoga county.

MARVIN, J.

One of the mnicipal corporations of Cuyahoga county is the hamlet of Newburgh, which is situated chiefly in the township of Newburgh but partly in the township of Independance.

On the 7th day of December, 1896, the Trustees of this hamlet passed a resolution directing the filing of a petition with the commissioners of the county praying that so much of said township of Independance as is within the boundaries of the hamlet, be annexed to the township of Newburgh.

In pursuance of this resolution such petition was filed on the 31st day of March, 1897. Notice of such filing was given by the commissioners, and a protest against such annexation was thereafter filed with them.

The matter came up for hearing on the 9th day of June, 1897, when said petition was dismissed, the commissioners holding that they were without jurisdiction to act upon the petition.

A petition in error was thereafter filed in the court of common pleas seeking to reverse this action of the commissioners, and, on hearing, that court made its order reversing the judgment of the commissioners, and remanding the case to them for further action.

The case comes to this court upon a petition in error seeking to reverse the judgment of the court of common pleas.

It is conceded by counsel for plaintiff that if the trustees of the hamlet are authorized by law to direct the filing of a petition with the commissioners for the purpose for which this petition was filed, then everything required by law was done.

Unless authority for such action is found in sec. 1380 of the Revised Statutes, no such authority exists. Said statute reads:

"If the limits of a municipal corporation * * * include territory lying in more than one township, and the council of such corporation shall * * * by vote of a majority of the members thereof, petition the commissioners of the proper county for a change of township lines so as to make them identical, in whole or in part, with the limits of the corporation, such board of county commissioners may, on presentation of such petition with the proceedings of the council duly authenticated, at any regular or adjourned session, change the boundaries of the township or townships accordingly."

It will be observed that the only body named in this section as authorized to act for the corporation is the "council", so that unless that word in this section is held to include the trustees of a hamlet, the authority for such action is not found in this section.

The question, therefore, is, whether the word "council", as here used, does include the trustees of a hamlet.

That a hamlet is a municipal corporation, is fixed in the classification of municipal corporations, section 1546 of the Revised Statutes. Section 1648 provides that the trustees of a hamlet shall have the control of the hamlet—that they constitute the legislative body. A hamlet has no council. That the legislature have overlooked the distinction between the municipal corporations having a council and those not having a council, in more than one instance, is manifest by referring to the statutes.

Section 3438, which is a section in reference to the right to construct street railroads, reads:

"The right so to construct or extend such railway within or beyond the limits of a municipal corporation can be granted only by the council thereof, by ordinance."

Section 1651 provides that the board of trustees of the

hamlet shall have exclusive jurisdiction over the streets and alleys of such municipality.

Section 2501 provides that nothing shall be done toward the construction of a street railroad in the streets of a municipal corporation until consent of the council of such corporation is obtained.

Keeping in mind the fact that the trustees have exclusive jurisdiction of the streets and alleys of the hamlet, it seems clear that they constitute a body which must act for the municipality, under the provisions both of section 3438 and of section 2501; and this court in a recent case, viz., The Hamlet of Newburgh v. The Akron, Bedford and Cleveland Railroad Company, held, that the consent for the construction of such railroad along the streets in the hamlet of Newburgh must be obtained from the board of trustees of such hamlet; that board having, as already noted, exclusive control of the streets and alleys.

On the 21st day of May, 1894, the legislature passed an act, found in 91 Ohio Laws, page 397, providing for the use of electricity as a motive power in the propulsion of cars on railroads, and in this act it is provided that:

"Before any poles and wires shall be constructed through or along the streets, alleys or public grounds of any municipal corporation, plans of such construction shall be submitted and approved by the municipal council of such corporation."

It is clear that if the holding of this court in the case hereinbefore noted was correct, the word "council," as used in this section, must include the trustees of the hamlet.

Section 1619, read in connection with section 1617 of the Revised Statutes, makes it manifest that the word "council," as used in section 1619, must include the trustees of a hamlet. The chapter is devoted to the advancement or reduction in grade, of municipal corporations. Section 1617 reads in part:

"To ascertain what cities of the second class are entitled

to become cities of the first class, what villages are entitled to become cities, and their proper class; and what hamlets are entitled to become villages," etc.

Now, the way in which they may be changed, as provided in section 1619, is:

"When the statement has been published, the council of any corporation which, according to such statement, shall have the required population to be advanced to a corporation of a higher class or grade, shall have the power at any time by ordinance passed for such purpose, to submit to the voters of the corporation the question whether such corporation shall be advanced."

Now remembering that in section 1617, one of the municipal corporations, for the advancement of which provision is made, is a hamlet, and that in section 1619 the body which shall pass the resolution is the council of such municipal corporation, it is clear that sec. 1619, when it uses the word council, means the legislative body, and includes the trustees.

Again, in sec. 2835 of the Revised Statutes, as found in Smith & Benedict, the statute before the last amendment, this language is used:

"Whenever it is desired by the voters of a township or municipal corporation" to do certain things which are enumerated there, "the trustees of the township or the council of the municipal corporation may issue and sell their bonds."

Provision is here made for townships and for municipal corporations to issue and sell bonds for certain purposes, and the provision is that the trustees of the township and the council of the municipal corporation shall do certain things in order to accomplish it. Section 2836 throws, as we think, some light upon this: "For the payment of bonds issued under the preceding section, the township trustees or municipal council shall levy a tax." Now, taking sec. 2836 in connection with sec. 2835 as

amended in the 90th vol. of the Ohio Laws, at page 229, and the proposition that the legislature has not kept clearly in mind the fact that a hamlet is a municipal corporation, and that the legislative body is not a council, is very manifest.

The amended section 2835 reads: "The trustees of any township or hamlet, or the council of any municipal corporation may issue bonds." Now, the legislature clearly overlooked the fact in this amendment that a hamlet was a municipal corporation at all. It is manifest that they undertook in sec. 2835 to provide that these bonds might be issued by the townships, hamlets and other municipal corporations, yet, the only way of providing for the payment of such bonds is found in sec. 2836, which speaks of the township trustees and the council of municipal corporations.

That disposes, as we think, of the question that the legislature may have meant to include hamlets among the municipal corporations which could seek the annexation to the township in which it was chiefly situated, of such parts of other townships as contain some part of the hamlet. In short, the fact that the word "council" is used, does not necessarily indicate that it must be only such municipal corporation as has a council. The only way to give effect to all of the language of sec. 1380 is, to hold that the word "council" includes trustees of a hamlet, as it does in the other statutes to which attention has been called. And to so hold, as we think, results in carrying out the clear intention of the legislature. That intent was doubtless to do away with the inconvenience of having those residing in different parts of the same municipal corporation, residing at the same time, in different townships, often necessitating the providing of separate ballots and boxes to be used at the same polls for the voters of the several townships, the exercise of jurisdiction by justices of peace, and of authority by other officers of the several townships in different parts of the same municipality, and other inconveniences.

Judge Ranney says in his opinion in the case of The State v. Blake, 2nd Ohio St. 152:

"It is a settled rule of construction that the intention of the law-maker is to be deduced from a view of the whole, and every part of the enactment, taken and compared together. He must be presumed to have intended to be consistent with himself throughout, and at the same time to have intended effect to be given to each and every part of the law. And from this it results that general language, found in one part, is to be modified and restricted in its application, when it would otherwise conflict with specific provisions found in another, and this from the reasonable and almost irresistible conclusion, that when the mind is directed to any particular subject, the language used is more likely to express the intention than the general words which might otherwise cover it, but from which it does not appear that the particular case was intended to be provided for * * * ."

We, therefore, hold that the court of common pleas was right, and the judgment is affirmed.

Carpenter & Young for Plaintiff in Error.

M. W. Cope, for Defendant in Error.

(Sixth Circuit—Wood Co., O., Circuit Court, October 1897.)

Before King, Haynes and Parker, JJ.

THE NORTHWESTERN OHIO NATURAL GAS COMPANY, v. CLARK A. BROWNING et al.

Gas and oil lease—Construction—Forfeiture—Record of extensions— The owner of a tract of land by a written lease granted to the lessee all the oil and gas in or under the soil, upon condition that the lessee should drill wells within a time limited, or to pay the lessor a certain sum per year at the beginning of each and every year during the continuance of the term named in the lease, or re-convey the premises, under which agreement the lessee elected to pay the sum named in the lease at the time stated, and did not drill the wells nor re-convey the premises; the parties thereto, by subsequen

written agreement endorsed on the lease, extended the term indefinitely, and provided for the payment of a larger sum per year than originally agreed upon. These terms were fulfilled by the lessee by payment of the amount of annual rental, and at the expiration of the last year for which payment was made and accepted, he tendered to the lessee the proper sum for another year which was refused, and the lessee thereupon treated the lease as forfeited and immediately re-let the premises to another. Held:

First: That the second lease was void; that if lessor had the right to refuse the tender of payment for a succeeding year, still the lessee had the right, after the expiration of the year for which he had paid for delay in drilling, to a reasonable time thereafter, in which to drill and operate the premises.

Second: That the original endorsements upon the lease of extension of time and of a change in the amount to be paid for delay in drilling, were not of themselves leases, or assignments of leases, or assignments of an interest in a lease required by the statute to be recorded, and no record thereof was necessary in order to be of binding force upon the parties to the agreement.

Error to the Court of Common Pleas of Wood county.

KING, P. J.

This action was to enjoin the defendants from entering upon certain lands to develop them for oil or gas, to which the plaintiff claims it has the right by a prior lease. The facts are, that on January 16, 1888, Philiph Barnhisel, the owner of the land in question, entered into a contract with William Fleming, to whose rights the plaintiff has succeeded, to operate the premises described in the contract under the provisions of that contract, which provisions are substantially as follows: That in consideration of the payment of sixty dollars, by Fleming to the owner, and of the covenants and agreements contained in the contract, the owner of the land did grant to Fleming, all the oil and gas in and under the premises described, together with the right to enter upon the premises for the purpose of operating for oil, gas or water; to erect such structures and machinery as

were necessary for the production and transportation of the product, provided that the owner should have the right to use the premises, excepting in so far as they might be needed by the second party. The contract further provided, that the grant first described, was made upon the following terms: That Fleming agreed to drill a well within thirteen months from the date of the contract, or thereafter pay to the owner, sixty dollars yearly, in advance, until the well was drilled, or the property granted re-conveyed to the first party. Then there is a provision, that if oil is found, that the owner should have one-eighth part of it; a provision that if gas is found, the owner should have one hundred and fifty dollars per year in advance, for each and every well from which gas is used off the premises; that the first party was to have free gas for use in stoves in residences; that the lessee should bury all pipe lines, and that no wells should be drilled nearer the house than three hundred feet. The seventh condition is as follows:

"Second party may, at any time, remove all his property and re-convey the premises hereby granted, and thereupon this instrument shall be null and void. This grant is made in lieu of the lease made to the Hancock Oil & Gas Co., dated February 10th, 1886, which lease is hereby cancelled. Unless a well shall be drilled on said land, within two years from this date, this contract shall become null and void, unless time further extended by first parties."

This instrument was properly executed, filed for record, and recorded, as required by the statute, sec. 4112a. Before the expiration of the two years named in the lease, the parties to it, or rather, the plaintiff in place of Fleming, and the owner of the property, entered into a contract that in consideration of one hundred and twenty-five dollars, paid by the Gas Company, and the further consideration that the Company should furnish gas free to January 1st, 1890, and continue that through during the continuance of the exten-

sion, the lessor consented to the extension of all the terms and conditions of the lease for one year, from January 16, 1890, or to January 16, 1891. This was signed by the owner of the land, December 11, 1889. On November 8, 1890, a further agreement in writing, was made on the original contract:

"In consideration of the sum of one hundred and fifty dollars, to me paid by the N. W. O. Nat. Gas. Co., and their further agreement to continue to furnish me gas free of charge, for household use, as they are now doing, I consent to the extension of all the terms and conditions of the within lease, for one year, or until January 16, 1892, and agree that it shall be optional with the said company, whether they drill or continue to pay me the same sum in advance, from year to year hereafter, and continue my gas free."

Neither of these instruments were recorded. The money stipulated to be paid, was paid by the plaintiff when it became due, or in advance, until the last payment that was due on or about January 16, 1895. The Gas Company also furnished the gas to the residence of the owner free of charge, and continued to furnish that, until after the commencement of this action. The Company did not drill any well under this lease. On January 16, 1896, or within a few days thereafter, the Company tendered, or offered the owners, the one hundred and fifty dollars, stipulated in the last written endorsement on the contract, and the owner refused to receive it, and on the 4th of February, 1896, made another lease, or contract, for the right to operate these premises for oil and gas with the defendants, and shortly after the execution of that lease, the defendants entered upon the premises and drew in material, and soon after began the erection of what is called a rig, and were about to drill when this action was commenced on the 8th day of April, 1896, to enjoin them from drilling or operating, and from coming on the premises for that purpose.

One question of fact arises, as to whether or not a tender was made. We think the evidence is sufficient to show that the tender of one hundred and fifty dollars was made. It is more doubtful as to the date upon which it was made, but we are disposed to hold that the evidence of the witness who testified to offering one hundred and fifty dollars, on the 16th of January, 1896, to the owner, is entitled to belief. It is denied generally by the owner, that any such offer was made. The witness testified it was made to him on the road, in the presence of his wife. He gives a number of facts which would seem to show, at least, that he could not be mistaken as to the date, and the wife of the owner is called as a witness, and she does not testify about the transaction at all. The owner simply says, nothing of the kind ever occurred, but that some days later, and as he puts it, on the 25th of January, another gentleman called at his residence, and did offer him one hundred and fifty dollars, which he refused. There is no dispute between the parties that this other gentleman did call and offer the one hundred and fifty dollars. He testified he made this offer on the 17th of January, or the next day after it was claimed that the first offer was made in the road. Those witnesses may be mistaken about the date, but we are inclined to believe the testimony of the witness who made the offer on the 16th. It may not be very material whether the offer was made on the 16th, 17th, or 25th.

It is claimed on the part of the defendants, that this lease ended on the 16th of January, 1896, at the election of the owner; that he might thereafter treat it as if it were at an end; that there had been no development of the property, and he might then lease it to others, and that in doing so on the 4th of February, he did what he had a perfect right to do.

The terms of this lease are somewhat different in some respects from others that have come before this court. It

was executed to develop the property for gas, in 1888, before there was any oil development in that neighborhood, and provides for an absolute grant of all the oil and gas underlying the property, and if it ended at the place where the conditions begin, it would be a sale of all the oil and gas in these premises, with the right to enter at all times to take it out, and upon the consideration of the payment of sixty dollars. Now, the first of these conditions upon which that grant is made, and upon which it rests, is that the second party shall drill a well within thirteen months from the date of the contract, or pay sixty dollars a year in advance, until a well is drilled or the property re-conveyed. If the contract stopped there, it would amount, not only to a grant of the oil and gas, but to a perpetual license to enter and develop the property, and the obligation would rest upon the grantee in this contract, to either drill a well in thirteen months, or pay sixty dollars a year in advance, or reconvey the premises; but a subsequent provision, which is the printed part of the seventh condition, provides, that the "Second party may, at any time, remove all his property and re-convey the premises hereby granted, and thereupon this instrument shall be null and void." With the seventh and first conditions of this grant standing there, and nothing following, the conclusion would be, that a perpetual license or right was granted to the company to enter upon these premises and take this oil and gas, or to pay sixty dollars a year in advance, or, if they desired to abandon, or to get rid of the contract, they must re-convey the premises, and if they failed to re-convey and failed to pay or drill, it is clear, that under this contract the owner would have a right of action against them at the beginning of each and every year, until the contract had been rescinded or property abandoned, for the recovery of the sixty dollars. This is clearly settled in the case of the Woodland Oil Company v. Crawford, in 55 Ohio St., page 165, which was a

lease somewhat different in its terms as to the grant from this, but which contained in it a provision, called a forfeiture clause, reading as follows:—"And a failure on the part of the second party to complete such well, or wells, as above specified, or instead thereof, to pay the rental as above provided, shall render this lease and agreement null and void, together with all rights and claims, and not to be binding on either party, and not to be revived without the consent of both parties hereto, in writing;" and it was there held, that upon a failure to drill a well as stipulated in the contract, with a condition of forfeiture which was in favor of the grantor only, that the obligation to pay attached, and that an action could be maintained for the rental. Another addition to the alternative condition in this lease, of drilling a well or paying, is, that the premises are to be re-coneyed; so that if the company desired to annul this contract, and release themselves without drilling, they must re-convey the premises. That is the only way they can abandon these premises. Until they do that, there is a continuous obligation resting upon them to pay sixty dollars a year in advance, and at the beginning of each year that would become due.

Now, the conditions which I have read, were incorporated in the lease on record, but in addition, there was written on the lease, further, that unless a well be drilled on the land within two years from the date of the contract, it should become null and void, unless time be further extended by first parties. So the lease, then, by its terms, weighing and considering them all together, was to become null and void at the expiration of two years from its date, subject however, to the condition that the first party might extend the time. Now, it is clear from the evidence, that before the two years expired, the first party did agree to extend the time for one year. They stipulated, and it was agreed to by the company for a different consideration, but

that is of no moment. That was paid and accepted, and so the conditions of the contract were extended for one year. What conditions? The right to enter upon these premises and drill, and all the conditions of the contract were extended for one year; not only the right to enter upon the premises, but the right to refrain from drilling for the consideration of one hundred and twenty-five dollars. Before the expiration of that year, a new contract or agreement was made, which amounted to an extension so far as the first parties were concerned, of all the rights of the parties,—all the conditions and terms of the original contract for one year longer, upon a still different consideration. That stipulation is in a little different language than the first, and contains perhaps, some additional provisions. I have said, that the first memorandum stipulates that the Company should furnish gas, which they did, a condition not in the original contract. Then, before the expiration of that year, it was agreed that for one hundred and fifty dollars, and the furnishing of gas free of charge, as they were then doing, the first party consented to the extension of all of the terms and conditions of the lease for one year, or until January 16, 1892, and agreed that it was to be optional with the company whether they drilled or continued to pay the rental named in advance from year to year. Now, they had that right in the original lease to continue to pay, at least for two years, and they had that right under the lease to pay longer if the first party consented to an extension of the time. The payment of the sixty dollars named in the original lease, would continue this lease as long as the first party agreed to continue it without including the obligation in the contract to drill the property at all. That is perhaps more clearly set forth in the last memorandum made; that upon payment of one hundred and fifty dollars, in addition, it shall be optional with them whether they shall drill or pay, and it may continue indefinitely. Now, the Gas

Company fulfilled that obligation. They paid, and they paid in January, 1895, not exercising their right to drill through that year, and that gave them the right, we think clearly, to refrain from operating these premises during that year. It was the acceptance of one hundred and fifty dollars by the owner of the property, in lieu of the fulfillment of the obligation to drill a well, or to operate this property as it ought to be operated. It relieved the lessee of the obligation to drill, and was accepted by the lessor in the place of his right to insist on operations, and that was the condition of affairs up to the 16th of January, 1896. The parties had rested upon that agreement and understanding, up to the 16th of January, 1896, and on that date the Gas Company, acting under, and pursuant to the provisions of this lease, made a tender to the owner of the one hundred and fifty dollars, stipulated in the contract. Now, whether he was bound to receive it or not, is, we think, unnecessary to decide, and we are not inclined to go further than is necessary to go in this case; but at least, we ought to say, that if he intended to treat this contract as at an end, he should have in some manner notified the Company that he should treat it at an end so far as the payment of the money was concerned. The owner testifies, that he said he would not receive this money, and wanted his property developed. If he said that, and it should be treated as a notice to the Company that he refused further to continue this agreement, that would give, as we have held heretofore, the Company the right to a reasonable time under their lease to enter upon these premises and properly develop them. Probably the obligation would have required them to sink off-setting wells, but that is neither here nor there, as nothing of that kind was needed or required, on the 16th of January, 1896.

If we are so far correct, then the Gas Company had at least a reasonable time, after January 16, 1896, to enter upon and into the possession of the premises, and drill for

oil and gas, and we do not think that reasonable time had elapsed before he granted all these rights away to the defendants in this case, and their rights attached. It is said that plaintiff delayed; but it would be unreasonable to hold that they were bound to drill pending this action. The litigation was pending, and we do not think it was bound to drill while the defendants were asserting a right to the possession of the property. It could wait until its rights were determined before it expended more money.

A question is raised here, whether those stipulations on the back of the lease ought to have been recorded; but we think the language of the recording statute does not fairly bring those terms within it. As has been before stated, this lease as originally made, until you reach the clause providing that it shall become null and void at the end of two years, is a perpetual grant to enter there, and even the force and effect of that limitation was done away with by the provision, that it shall not become null and void if time shall be further extended. That was in the lease as recorded. Now, the statute provides, that "all leases and licenses, and assignments thereof, or of any interest therein, heretofore executed, given or made, for, upon, or concerning the lands or tenements in this state, whereby any right is given or granted to operate, or to sink or drill wells thereon for natural gas and petroleum, or either, or pertaining thereto, shall be recorded in the lease-records in the office of the recorder, etc."

"Leases, licenses and assignments thereof." Assignment, certainly refers to assignment of leases and licenses, and of any interest therein heretofore executed. We think the proper construction of that clause is: "Assignment of any interest therein shall be recorded." Now, the only effect so far as the question before the court is concerned of those writings on the back of the contract, is to extend the time of the contract for the benefit of the Gas Company.

That is the only effect of it, and there is nothing in the statute that would warrant us in holding they should be recorded. They are neither leases, licenses or assignments thereof, or of any interest therein. It is simply a stipulation that the time within which the first party had the right to insist upon the development is extended, and the contract as recorded, stipulates that time may be extended by the consent of the first party, and that consent, we take it, need not have been in writing unless it were an agreement that for some reason or other would be inimical to the Statute of Frauds. So far as the agreement itself is concerned, it would have been fulfilled if it were shown by the facts and circumstances that the owner consented to an extension of time. The provisions of the lease were notice that the lease was still subsisting, and that both parties had rights under it;—the landlord having the right to insist on the payment of the sixty dollars rental, and the grantee the right so long as it had not been relinquished, abandoned, or forfeited, to enter upon the premises and drill at any time.

We think that the merits of the action are with the plaintiff, and the injunction should be made perpetual.

Jas. O. Troup, for Plaintiff.

Baldwin & Harrington, for Defendants.

(Second Circuit—Fayette Co., O., Circuit Court—May Term, 1897.)

Before Shearer, C. J., Summers and Wilson, JJ.

IN RE PALMER.

Disbarment of attorney—Not mere punishment—

(1.) Disbarment of an attorney is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them.

Same—Reinstatement—Moral character—

(2.) A court ought not to reinstate an attorney who has been disbarred unless satisfied that he is of good moral character.

On motion to vacate order of disbarment of Charles A.

Palmer and to reinstate him in his office of an attorney at law.

SUMMERS, J.

At the May term, 1892, of this court the said Charles A. Palmer was found guilty of misconduct in office and unprofessional conduct involving moral turpitude, and upon this finding a judgment was entered removing him from his office of attorney and counselor at law.

At the November term 1894 a motion to reinstate him was overruled. 9 O. C. C. 55, 72.

The grounds of the present motion are the following:

"That the said Charles A. Palmer has already been severely punished for any misconduct of which he may have been guilty, and his life and conduct since his disbarment have been such as to give assurance that by his restoration to the bar, no harm to the public or reproach to the bar would arise: and his restoration will not be incompatible with a proper respect of the court for itself and a proper regard for the dignity of the profession."

In ex parte Burr, 9 Wheat., 529, Marshall C. J. said:

"The profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend upon its exercise. The right to exercise it ought not to be lightly or capriciously taken from him."

"Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the bar should therefore, never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired."

Weeks on Attorneys at Law, 158, citing Bradley v. Fisher, 13 Wall, 356, Ex parte Bradley 7 Wall 364.

Considerations such as these, and a high regard for those eminent members of the bar in this and other counties who either favor the reinstatement of Mr. Palmer or so lightly regard their duty in the premises that they find it easier to permit themselves to be placed in that light before the court than to remain silent, have induced us to hold this matter under consideration for many weeks, not merely to leave no room for a suspicion of hasty judgment, but in order that we might, if possible, after mature deliberation, reconcile an order suspending the judgment in the case, during good behavior, with our sense of the duty devolved upon us by law.

The case now made is not materially different from that on the former motion, nor are the reasons assigned materially different. It must be therefore that the only excuse for the present application is the fact that there has been a change in the *personnel* of the court. A careful reading of the opinion on the decision of the former motion discloses nothing in the statement of the law governing the case to which we dissent.

Since the former hearing, Mrs. Palmer has obtained a divorce from her husband, so that he now has no family dependent upon him for support, and most of the testimony in that case was before us upon his appeal from the order as to alimony. The former hearing was upon affidavits; the present the court required to be upon the depositions or oral testimony of witnesses, and appointed counsel to represent the interests of the state.

The testimony is to the effect that Mr. Palmer since his disbarment has been industrious; that he has been upright in his dealings, and that he has so conducted himself that in the opinion of the witness he could be safely reinstated in his profession; and his own testimony as to his efforts to make a living and his want of success by reason of the discredit which a knowledge of his disbarment brings upon him.

As to the first ground of the motion, it is sufficient to say that removal from the office of attorney at law is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them. Disbarment because of the commission of crime does not exempt from indictment, nor is punishment for the offense or pardon a bar to removal from office.

As to the second branch of the motion. A good moral character, as well as a competent knowledge of the law and sufficient general learning, is a necessary qualification for admission to the bar, and where an attorney has been removed from his office for his unprofessional conduct showing the loss of such a character, he should not be reinstated if the court, with all the facts before it, would not in the first instance admit to practice a man with such character.

That these are correct statements of the law will appear, and the duty of the court as well, from the following extracts from cases selected from a much larger number examined.

In Ex parte Wall, 107 U. S., 265, 288, Mr. Justice Bradley says:

"Removal from office for an indictable offense is no bar to an indictment. The proceeding is in its nature civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them."

In Penobscot Bar v. Kimball, 64 Me. 140, the court held:

"The statute makes a good moral character a prerequisite of admission to the bar, and when an attorney at law has forfeited his claim to such character by such misconduct, professional or non-professional, in or out of court, as renders him unworthy to associate with gentlemen and unfit and unsafe to be entrusted with the powers, duties and responsibilities of the legal profession, the court may deprive

him of the power and opportunity to do further injury under the color of his profession by removing him from the bar.

"By admitting the respondent to the bar the court held him out to the public as worthy of confidence and patronage in the line of his profession. In view of the power of removal vested in the court, to allow the respondent to continue to exercise his profession after he has been thus proved to be unworthy of his office, would be indirectly to involve the court in the responsibility of his acts. And further, after the disclosures in this case, the court cannot forbear to pronounce the judgment of removal from office against the respondent without abdicating the high trust which the law confides to it in this behalf, and rendering that a nullity.

"The respondent has been pardoned for the forgery of which he was convicted and for which he was confined in the state prison; but the instrument forged was a deposition used in a cause before this court; and though the pardon purged him of the offense of which he was convicted, it did not affect the crime of the violation of his professional oath and duty, nor relieve him from the penalty of removal from the bar for this misconduct."

And in the opinion, Dickerson J. says: (154)

"The evidence discloses not merely a single instance of moral delinquency, disreputable practice and professional misconduct, but a series of them, showing the respondent to be unfit and unsafe to be intrusted with the powers, duties and responsibilities of the legal profession. No court would for a moment consider the claims of an applicant for admission to the bar who should be shown to possess such a moral character. If the violation of his oath of office, fraud upon the court, bad faith toward clients, dishonesty in his dealings as an individual, and disregard of the courtesies and proprieties due to the other members of the profession should operate a forfeiture of the office of an attorney, the respondent has no longer any claim or right to enjoy that office.

"Unpleasant as is the duty, grave as is the responsibility devolved upon us, and serious as must be the consequences to the respondent, we cannot forbear to pronounce the extreme judgment of removal without failing to discharge the

high trust which the law reposes in us, and which is indispensable to the maintenance of the dignity of the bench, the integrity of the bar, and the purity of the administration of justice. Indeed, to refuse to do so in this case, would be virtually to abdicate this trust, and render the law creating it a nullity. The guaranty which the law in this behalf provides for the security of the public must be maintained inviolate."

And Whipple, C. J., remarks as follows, Mills' case, 1 Mann., 393:

"Should this court, after being officially advised that one of its officers has forfeited the good name he possessed when permitted to assume the duties of his office, still hold him out to the world as worthy of confidence, they would in my opinion fail in the performance of a duty cast upon them by the law. It is a duty they owe to themselves, to the bar and to the public, to see that a power which may be wielded for good or for evil, is not entrusted to incompetent or dishonest hands. The extreme judgment of expulsion is not intended as a punishment inflicted upon the individual, but as a measure necessary to the protection of the public, who have a right to demand of us that no person shall be permitted to aid in the administration of justice whose character is tainted with corruption."

Again, Dickerson J., says (Ibid 146):

"If 'a good moral character' is indispensable to entitle one to admission to the bar, it is obvious that the necessity for its continuance becomes enhanced by the conflicts, excitements and temptations to which the practitioner is daily liable."

And Bigelow, C. J., in Randall, petitioner for mandamus, 11 Allen 473, 480, says:

"Nor can a judgment of removal be properly and technically considered as a punishment for a crime or offense. In Ex parte Brounshall, Cowp., 829, Lord Mansfield said: 'To strike an attorney from the roll' is not in the nature of a punishment; it is done 'because he is an unfit per-

son to practice as an attorney;' the court exercise their discretion whether a man, whom they formerly admitted to the bar, is a proper person to be continued in the roll.' The more reasonable inference is that the power of removal was given, (by the legislature), not as a mode of inflicting a punishment for an offense, but in order to enable the courts to prevent the scandal and reproach which should be occasioned to the administration of the law, by the continuance in office of those who had violated their oaths or abused their trust, and to take away from such persons the power and opportunity of injuring others by further acts of misconduct and malpractice."

Cassody, J. In re O—, 73 Wis. 602, 613, says:

"The chief object of this proceeding is not to punish the respondent, but to protect the public from imposition. An attorney bears with him the certificate of the court that he is of good moral character and a fit person to be trusted with the delicate and responsible duties of a member of the legal profession. This certificate the public has a right to rely upon, and to presume its holder to be a person of integrity and honor. Hence, when it has been made to appear that he has been guilty of acts which show him to be so deficient in honesty as to be unworthy of confidence, it is the duty of the court to withdraw its certificate. We owe this duty alike to the public and to the bar.

"By admitting an attorney to the bar, the court presents him to the public as worthy of its confidence in all his professional duties and relations, and if afterwards it comes to the knowledge of the court that he has become unworthy, it is its duty to withdraw that endorsement, and thereby cease to hold him out to the public as worthy of professional employment." * * * "The power of removal for just cause is as necessary as that of admission for a due administration of law." In re Samuel Davis, 93 Pa. St. 116.

"In proceedings to disbar an attorney on the ground that he had been convicted of a felony, the court may, even if he has been pardoned, take into consideration his conduct in commiting the crime, and estimate his character and fitness to practice law therefrom, to have property and interests of clients in his hands, and to hold himself out as an accredited officer of the courts." In the Matter of —— an Attorney, 86 N. Y. 563.

"In as much as good moral chaarcter is one of the qualifications essential to the admission of an attorney, he may be disbarred whenever he ceases to possess such qualification." Percy's Case, 36 N. Y. 651.

In Rice v. Commonwealth, 18 B, Monroe, Simpson, J., says:

"All courts have the power to control and regulate to a certain extent, the conduct of their officers, and to inflict on them for their official misconduct such punishment as the law prescribes. If a court have knowledge of the existance of such official misconduct on the part of any of its officers, it not only has the power, but it is its duty, to institute an appropriate proceeding against the offender, and to bring him, if guilty, to condign punishment. And it is much to be regretted that this duty, which the law devolves upon the courts of the country, is so little regarded, and that the obligations which it imposes are so frequently overlooked or neglected.

"It would be unjust to the profession, the purity and integrity of which it is the duty of all courts to preserve, and a disregard of the public welfare, to permit an attorney who has forfeited his right to public confidence to continue the practice of his profession" State v. McClaugherty, 33 W. Va., 250.

"The conclusion is painful, but imperative. Too much is staked upon the honesty and good conduct of lawyers for courts to wink at flagrant misconduct. They are trusted by the community with the care of their lives, liberty and property, with no other security than personal honor and integrity. It behooves the courts and the profession to see that their brotherhood keeps clean records." In re Henderson, 88 Tenn., 531.

In Kilbourn v. Hand, 9 Ohio, 42, Lane, C. J. says:

"The relation of attorney and client is a necessary one in every country whose civilization is in any degree advanced. The discharge of professional duties demands great and unreserved confidence from the client, and the connection of the attorney with courts, and his access to papers, require unsuspected integrity. Hence general honesty and fidelity to clients, is not only necessary to his success, but even to the

performance of his duties. Other good qualities may be wanting in his character, and some vices may be present, but these are the essential virtues of his calling, no more to be dispensed with than courage in a soldier, or modesty in a woman. The statute regulating admission to the bar, requires the court to be satisfied that the applicant possesses these qualities. The public have a right to presume that the court are fully satisfied upon these points, and to regard a license to practice as a certificate of good character from them. And whenever the court shall become persuaded that an attorney has lost these qualifications, essential to his usefulness, and necessary to the safety of his employers, they are wanting in their duties if they do not take away his means, and destroy his opportunities for mischievous action."

This qualification is not merely statutory, but is inherent in the very nature of the profession, and always and everywhere has been regarded as essential. Sir Walter Scott, who was well qualified to speak, says: in "The Antiquary:"

"But I was going to say that in a *profession where unbounded trust is necessarily reposed*, there is nothing surprising that fools should neglect it in their idleness, and tricksters abuse it in their knavery. But it is the more to the honor of those, and I will vouch for many, who unite integrity with skill and attention, and walk honorably upright where there are so many pitfalls and stumbling-blocks for those of a different character. To such men their fellow citizens may safely intrust the care of protecting their patrimonial rights, and their country the more sacred charge of her laws and privileges."

What, then, is this good moral chaarcter which is so essential to membership in the profession? It is the man himself, aside from his attainments and reputation. "Character lives in a man, reputation outside of him." Mr. Palmer, by his conduct since his disbarment, may have acquired among new acquaintances the reputation of a good moral character, but this cannot be accepted as conclusive evidence of his having such a character when the court is in possession of facts which reveal a different character.

In the matter of —— an attorney, 86 N. Y. 563, 575, Folger, C. J. says:

"We do not lose sight of the very numerously and respectably signed certificate that was presented to the General Term. It doubtless was considered by the General Term as it has been by us. It shows in that community a general public sympathy with the appellant. * * * * The certificate presented to the General Term does not assert a fair, moral and professional reputation of the appellant since the prosecution of him for forgery. It expresses, however, an opinion that he is a proper and competent person to practice law, and that the signers have general confidence in his integrity. That is tantamount to having a good reputation. It is a weighty testimonial in his favor. It had its effect upon the mind of the General Term without doubt, but not enough to counteract that of the facts that were shown. The General Term was bound to form an opinion of its own. It could not ignore facts because of the counter opinion of ever so many men of respectability and standing. They spoke to what the community thought of him, notwithstanding those facts, if indeed the community fully knew of them, and how it felt toward him; that is, it spoke to his reputation. The facts spoke of his impulses to action; that is, to his character, what was at work within him, and might at any time impel him to action."

There is no numerously and respectably signed certificate in this case, nor do we know whether there is in the community a general public sympathy with the applicant, nor is it important, for neither could relieve the court of its responsibility; but what the eminent judge there says, applies with especial aptness to the testimony of those who merely give expression to their opinion.

If Mr. Palmer was an applicant to this court for admission to the bar, we could not, with the facts of his past life which are before us, without shirking the duty imposed upon us, admit him, for want of one of the necessary qualifications. Even the good reputation to which his new acquaintances testify cannot have taken very deep root, for he him-

self, in his testimony, attributes his failure to succeed in a business in which unbounded trust is not necessarily reposed, to the fact that information of his disbarment followed him. The fact that Mr. Palmer has not defrauded any one since his disbarment can hardly be taken as any assurance that he would not again yield to the opportunities and temptations that might arise in the practice of the profession. On cross-examination, when pressed to answer whether he had ever offered to make such small restitution as was in his power, his readiness to charge counsel with an offer to betray the trust reposed in him by the court if he, the witness, would make restitution to counsel's clients, does not comport with a change of character. Nor does his omission to offer what restitution is in his power. The King in Hamlet says:

> "My fault is past. But, O what form of prayer
> Can serve my turn? Forgive me my foul murder!
> That cannot be; since I am still possess'd
> Of those effects for which I did the murder,
> My crown, mine own ambition, and my queen.
> *May one be pardoned, and retain the offense?*

It may be that the applicant has learned by sad experience that honesty is the best policy, and that he would not disappoint the good opinion of those who would entrust him with the privileges of the profession; but the law does not authorize us to accept any less assurance than a good moral character.

The motion is overruled.

Joseph Hidy, for applicant.

J. N. Van Deman, for state.

(Sixth Circuit—Wood County., Circuit Court—Oct. Term, 1896.)

Before Haynes, Scribner and King, JJ.

THE ROYAL INSURANCE COMPANY v. WILLIAM SOCKMAN.

Fire insurance—Condition against alienation—Sale of one part owner to other—

A policy of insurance against fire, issued to W. W. S. "and brothers" upon a house and barn and contents owned by said W. W. S. and his brothers P. S. and B. S. in equal shares and as tenants in common, contained provisions restraining and restricting alienation of the property, and to the effect that any change in title or interest occurring without notice to and consent of the insurance company should render the policy null and void, Held:

Same—

(1.) That a conveyance by P. S. and B. S. of their respective interest in the property to W. W. S. without notice to or consent of the company did not invalidate the policy.

Same—Right to sue for entire insurance—

(2.) That for a loss occurring after such conveyance, W. W. S. had a right to recover in a suit brought by himself alone, the whole amount of such loss, both that on account of the interest originally owned by him, and that on account of the interest of his brothers so conveyed to him.

(Decided on authority of West et al., v. The Citizens Insurance Co., 27 Ohio St., 1.)

Error to the Court of Common Pleas of Wood county.

SCRIBNER, J.

This is a petition in error to reverse the judgment of the Court of Common Pleas of Wood county, Ohio, in an action on a fire insurance policy.

The insurance policy in question, which is made part of the bill of exceptions taken in the case, appears to bear date of December 19, 1891. It recites in the outset, that in consideration of the representations, conditions, and warranties hereinafter mentioned or referred to, and the receipt of twelve dollars, the Insurance Company agree to indemnify William W. Sockman and brothers—(issued it will be ob-

served to partners under a partnership name), against all such immediate loss or damage as shall happen by fire, to the following specified and located property, (but subject to the conditions and stipulations contained in this policy), to an amount not exceeding twelve hundred dollars. The policy describes the property insured: a dwelling house, known as No. 1; a barn known as No. 2, and certain of the contents of each of the buildings. Upon each building, and upon certain contents of each building, a certain specified sum is named. The petition alleges among other things, that the defendant is a foreign corporation duly organized to transact the business of insurance, and is represented by agents only, in Wood county, Ohio. That the defendant, in consideration of a certain premium by and between the plaintiff and the defendant agreed upon, and by the plaintiff, then paid, to-wit: the sum of twelve dollars, and by a certain policy of insurance, duly executed, insured the said plaintiff against loss or damage by fire, to the amount of twelve hundred dollars. Then follows a description of the property. Then there is an allegation, that on October 19, 1894, the barn and contents and a portion of the contents of the house were totally destroyed by fire. A question is raised in the case upon which this allegation has some bearing, viz: "Plaintiff says he has fully complied with and performed the agreements and conditions contained in said policy to be complied with and performed by him," and this: "That immediately after said fire he gave notice in writing, to the said defendant of said loss resulting therefrom." Then follows an allegation quite material to the question in this case:

"That shortly thereafter, to-wit: on October 31, 1894, an adjusting agent of the defendant was sent by the defendant to the place where said fire occurred, to examine into the circumstances of said fire, and the loss and destruction of said insured property thereby, and the loss and damage resulting to plaintiff therefrom, who,

after making said examination and obtaining information and evidence in regard thereto, entered into a written agreement with said plainiff, wherein it was agreed between said parties, that the loss and damage suffered by said plaintiff, amounted to the sum of six hundred and twenty-five dollars and fifty cents, ($625.50), and that the consideration for said agreement was the avoidance of further expense and trouble in determining the amount of said loss and damage. The defendant thereby waived the filing of proofs as provided for by the condition of said policy, and in consequence of such action of said adjusting agent, said plaintiff was not required to, and did not furnish further proofs of loss."

The defendant, the Insurance Company, answered in the case, setting forth several matters of defense, each of which it was insisted, avoided all liabilities upon the part of the insurance company for the loss set out in the petition.

There is attached to the petition, a copy of the insurance policy. A reply was filed, and the case was tried to a jury, which, under the instructions of the court, returned a verdict for the plaintiff, Sockman. I don't mean to say that the court directed the jury to return a verdict, but under the instructions of the court, the jury found that the defendant was liable upon the policy of insurance, and that the matters set forth in the defendant's answer, either were not true, or were insufficient to constitute a defense.

The first defense in the answer was demurred to by the plaintiff, and the court sustained the demurrer to that defense; and some of the important and controlling questions determining and settling the rights of the parties arose upon that answer, and upon the ruling of the court in regard to it, and I will call attention to some material portions of that defense for the purpose of making more clear the question that is made in the case. The company in its defense sets forth one paragraph contained in the policy,

one condition, and that is No. 2 of the paragraphs or conditions forming a part of the policy, viz:

"This company will not be liable for loss or damage if the assured shall have, or shall hereafter make any other insurance on the property herein specified or any part thereof, or, if the above mentioned premises shall be occupied or used so as to increase or damage the risk."

And here follows some matters not material in this case:

"Or, if any change take place in the occupation, location, title, (other than by the death of the assured), interest or possession of the property herein specified * * * * without the assured's written notice to the company, and without the written permission of the company endorsed on this policy. In either case, without such written notice to and without such written permission of this company, this policy shall be void, and all insurance thereunder shall immediately cease and determine."

The defense to which I have referred, which is the first defense in the answer and to which a demurrer was sustained by the court, sets out that this defendant "denies that it ever executed its policy of insurance to the said plaintiff, and denies that it insured said plaintiff against loss or damage by fire to the amount of twelve hundred dollars, for the period of five years from the 19th day of December, 1891, to the 19th day of December, 1896, upon the property described and set forth in the petition."

That allegation is based upon the theory of the pleader, from what is contained in the policy, that the company agrees to indemnify William W. Sockman and brothers; and they never agreed to indemnify the plaintiff, William W. Sockman only, who is the sole plaintiff in this action. That is a sort of a negative pregnant. They say they never issued a policy to William W. Sockman.

"This defendant further denies, that the said plaintiff was the owner of the property described in the petition at the time of the issuing of the policy of insurance, and de-

nies that it ever agreed to indemnify and make good unto said plaintiff or his legal representatives, all loss and damage that might be sustained by said property at the time of its destruction, and further denies that said plaintiff has fully complied with and performed all the terms and conditions contained in said policy, to be complied with and performed by him."

It afterward appears, that the plaintiff was the owner of an undivided interest, and not the owner of the property itself, and they say they never undertook to insure the plaintiff only. They deny that the plaintiff performed the terms and conditions of the policy. I take it that has reference to what is more definitely stated further on, that the plaintiff, as claimed by the company, never made proofs of loss, or never complied with the requirements of the policy. Now, then, we come to the meat of the controversy:—

"This defendant further says, that at the time said policy of insurance was issued, the said William Sockman, Potter Sockman and Bryant Sockman, were the owners of the property described in the policy of insurance, and this defendant undertook and did insure the same, according to their respective interests therein, at the time of the issuing of said policy of insurance, and did not agree to pay to either of them the whole amount of the loss or damage that might be sustained upon said property, but to pay the same according to their respective interests therein at the time of the making and issuing of said policy."

Then there is set out another term of the policy:

"This defendant further answering, says, that by the terms and condition of said policy, it was provided and agreed, that if any changes took place in the occupation, location, title, interest or possession of the property therein specified, that in every such case said policy should be void, and all insurance thereunder should immediately cease and determine, unless the insured gave due notice to the company and obtained written permission of the company endorsed on the policy of insurance, and that

without such written permission of the company, said policy should be void and of no effect. This defendant further says, that after said policy of insurance was issued, the said Potter Sockman and Bryant Sockman, two of the insured therein, alienated, sold, transferred and conveyed their interest in, and title to said property, to William Sockman, and surrendered the possession of said property to him, and did not give notice to the defendant company of such sale and transfer, and did not obtain the written consent and permission of the defendant company endorsed on said policy or otherwise. This defendant says, that after the sale and transfer of said property by the said Potter Sockman and Bryant Sockman, as aforesaid, they ceased to have any interest in the property insured, and were no longer insured by the terms and conditions of said policy of insurance. This defendant further says, that said policy of insurance was not with the permission and consent of this defendant, or otherwise, transferred to the said plaintiff, and denies that the same was by any agreement with this defendant made payable to him. This defendant therefore says, that by reason of said sale and transfer of the interest of the said Potter Sockman and Bryant Sockman, two of the insured in the property aforesaid, said policy of insurance thereon, immediately became, and was void, and is of no force and effect, and said plaintiff has no right to have or maintain any action thereon against this defendant."

It was to this defense, as I have stated, that a demurrer of the plaintiff was sustained by the court of common pleas, and one ground of error assigned in the present petition in error is, that the court of common pleas erred in sustaining this demurrer, and holding that the facts stated in the first defense, constituted no defense to the action; and really, this, in our judgment, is the principal question for determination in this case.

The bill of exceptions, which contains all the testimony in the case, disclosed the fact that the allegations of fact contained in this defense are strictly true. That is to say, that these three brothers owned, as tenants in common, the property which was insured; each owning an undivided

one-third. They also owned other lands situated in Knox county, and, by agreement between these three brothers, this plaintiff, William Sockman, took the Wood county property, and conveyed to the two brothers, Bryant and Potter Sockman, the Knox county property. William Sockman conveyed to them his interest in the Knox county property, so that they became the owners of that property, and Potter and Bryant Sockman conveyed to him their interest in the Wood county property, so that he became the owner of the entirety of the Wood county property, and now the question is, whether or not this transaction between these brothers which is undisputed, comes within the operation and effect of the clause appearing in article second of the policy of insurance, which provides, that if any change shall take place in the occupation, location, title, (other than by death of an insured), interest or possession of the property herein specified, without the written consent of the company, that then this policy shall be void. Now, we have carefully considered this question, and are of the opinion that it is governed by the decision of the Supreme Court, reported in the 27th Ohio St. Reps., at page 1, being the case of West et al. v. The Citizens' Insurance Company. In that case, the property insured and in question, was personal property, a stock of goods—but we think that the rule which was applied in that case, applies to this case. That it does not matter that the property insured in this case was real estate, (there was some personal property covered by the policy), or whether it was personal property. The syllabus of that case which I will read, is very clear, and is as follows.

"Policies of insurance, like other contracts, are to receive a reasonable construction, so as not to defeat the intention of the parties. A policy of insurance issued to a mercantile partnership on a stock of goods owned by the firm, and with which they are carrying on business, which contains pro-

visions limiting or restricting alienation of the property, is not avoided by a sale by one partner to his co-partners, who continue the partnership business, of his interest in the stock of goods."

It will be observed, that the court here lays stress upon the fact that the sale is not to a third person, but is a sale by one partner to a co-partner. That is the nature of the transaction. No third person is introduced into the business by the transaction. No more is there here. These brothers who owned this property jointly, in equal undivided interest, simply exchanged one with the other their respective interest, and not upon any new consideration. The court in the case I refer to, further say:

"When the policy contains a provision that the assignment of the same or any interest therein, without the assent of the company endorsed thereon, avoids it, such a sale, and the assignment by the retiring partner to his co-partners, who continue the business, of his interest in the policy, does not avoid it. In case of loss after such sale and transfer, the remaining partners, being the real parties in interest, should sue on the policy, and in such action they are not limited, in the amount of recovery, to their interest in the partnership goods before such sale and transfer, but can recover for the whole loss."

Here the plaintiff has brought a suit in his own name, as the sole party in interest, to recover for the loss of the property. He has not sought to recover for a portion of the interest, but for the entire loss. In concluding its opinion the court say:

"Finally, the question arises—shall these plaintiffs recover the whole that H. F. West & Company might have recovered, or only their individual shares? Does the sale by Henry F. West avoid the policy as to his undivided interest? In Hobbs & Hurley v. Memphis Ins. Co., 1 Sneed, 444, a case much like this as to its facts, it was held, as to the share or interest of the retiring partner, the plaintiffs could not recover, but only for their own interest in the

firm; while in Hoffman v. Aetna Ins. Co., 32 N. Y., 415, 416, where the same question arose, it was decided otherwise. The court say there: 'There is no reason why the full measure of indemnity should be withheld from the plaintiffs, who were the owners at the date of the insurance, and sole owners at the time of the loss.' We concur in the reasoning of the court in that case, and its conclusions of law on this point. These plaintiffs were parties to the contract; they continued to conduct the business contemplated by the policy; there was no substantial change material to the risk, and none within the meaning of the clause under consideration. The policy was intended to protect the interest of each and all; and its language, fairly construed, is in harmony with that intent. We are aware that the conclusions we have reached are at variance with the greater number of reported cases, but we believe that these conclusions rest on the firmer and more satisfactory ground of sound principles, and that they are more conducive to substantial justice—the aim and end of all law."

Now, upon this view, it is clear that the court of common pleas ruled correctly in sustaining the demurrer to the first defense in this case, and that the facts admitted in the record and undisputed, furnish no defense in an action of the plaintiff in his own name, to recover for the loss under the policy.

There is another question presented in the record which we will briefly notice. That is this: The policy in its 18th clause, requires notice to be given in writing of the loss to the company and proofs to be made. In this case, it appears by the record, that an agent of the company, representing the company, came to this plaintiff and proposed an adjustment of the loss; that the two parties sat down together and went carefully over the matters involved in the ascertainment of the loss, and they reached a conclusion that the amount of the loss was six hundred and twenty-five dollars and fifty cents; that that conclusion and agreement was put in writing and signed, and it was further said, that the adjuster said to the plaintiff, that he need not give himself

any further trouble about making proofs of loss. In other words, that proofs of loss were expressly waived. During the trial of the case, evidence was given pro and con, as to whether such an arrangement had been entered into, and certain instructions were asked by the defendant bearing upon this proposition of fact, which were in the form of requests, and were refused, and the court instructed the jury correctly, that if the parties did come together and did agree upon the amount of the loss, that thereby any proof of loss was waived, and the parties should be held to the stipulations agreed upon. These constituted the principal questions arising upon the record in this case. There are some other matters; some rulings and exceptions to the instructions, but we see no error in these that would interfere with the verdict of the jury, and we find that the judgment shall stand, but without penalty.

Paxton, Warrington & Boutet, James & Beverstock, Attorneys for Plaintiff in Error.

Parker & Fries, Attorneys for Defendant in Error.

(Second Circuit—Franklin Co., O., Circuit Court—Oct. Term, 1897.)

Before Shearer C. J., and Summers and Wilson, JJ.

BANK OF CIRCLEVILLE v. BOWSHER.

Appeal—Notice—Judge's docket not part of record—

(1.) The judge's docket is no part of the records of the court, and notice of appeal entered upon such docket is not sufficient.

Same—Nunc pro tunc entry—

(2.) A party desiring to appeal his cause to the circuit court must, within three days after the judgment or order is entered, enter on the records notice of such intention, and an omission to do so cannot be cured by a *nunc pro tunc* order.

Error to Court of Common Pleas of Franklin county.

Motion to dismiss appeal.

SUMMERS, J.

The ground of the motion is that notice of intention to appeal was not entered on the records within three days after the entering of the judgment.

Judgment was entered on April 27.

The judgment entry which was filed on that day, contained no notice of defendants' intention to appeal; but, after three days had intervened, notice of defendants' intention to appeal was added to this entry. This addition was made without the consent of plaintiff's counsel, and, on May 12, at the same term, on their motion, this notice was ordered stricken from the entry and record, and was so done, without exception by the defendants.

Meanwhile, on May 8, the following entry was made upon the records:

"April Term, May 8, 1897. And now comes the defendants herein, Ferdinand Bowsher and Ella Bowsher, and give notice of their intentions to appeal this action to the circuit court, and the court fixes the appeal bond at two hundred and fifty dollars. And it appearing to the court that said notice was given within three days from the entry of judgment, the court orders that this entry be made as of the date of the entry of judgment. To which the plaintiff takes exception."

The defendants gave an undertaking in the amount fixed by the court and within the time prescribed, and filed a transcript and the original papers and pleadings with the clerk of this court.

Counsel for defendants say that at the time the judgment was rendered, the trial judge made a memorandum upon his docket of notice of defendants' intention to appeal, and of the amount of the appeal bond. But the question here is to be determined by the record, and, the notice of appeal having been stricken out of the entry of April 27, and from

the records, without objection by defendants, the record stands as if no notice had been entered except that in the *nunc pro tunc* order of May 8, and the question is whether an omission to enter upon the records, within three days after the judgment or order is entered, notice of intention to appeal, can be cured by a *nunc pro tunc* order?

The right of appeal rests solely upon statutory provisions, and unless those provisions have been complied with, this court does not by the appeal acquire jurisdiction of the subject matter.

Section 5227, Rev. Stats. provides that

"A party desiring to appeal his cause to the circuit court shall, within three days after the judgment or order is entered, enter on the records notice of such intention, and within thirty days after the entering of such judgment or order upon the journal of the court, give an undertaking with sufficient surety, to be approved by the clerk of the court or a judge thereof, as hereinafter provided."

The statute does not provide that notice shall be given to the court or to the opposite party, but requires notice of the intention to appeal to be entered on the records within three days after the judgment or order is entered. The object is to give notice, not merely to the opposite party, but to every one whose interest it may be to know. The duty and power of the court in respect to the matter of the appeal is limited to fixing the amount of the bond and deciding to which party it shall be made payable.

If the statute merely required notice of appeal to be given, and notice was given, then the court might, by a *nunc pro tunc* order, supply record evidence of that fact; but it is the office of a *nunc pro tunc* order to supply record evidence of what was previously done, and not at a subsequent time to do, as of a previous time, something which never was done. The Cleveland Leader Printing Co. v. Green, 52 Ohio St., 487.

In Moore v. Brown, 10 Ohio, 197, it is held that

"A notice of appeal, marked by the court on its docket, but not carried into the journals, is not a compliance with the statute requiring such notice to be entered on the record; nor can the omission be cured by a *nunc pro tunc* order at a subsequent term."

This decision is disapproved by Bartley, J., in Hubble v. Renick, 1 Ohio St., 171, 172, but the question was not involved in the decision of that case, and Moore v. Brown has not been overruled, and is decisive of the question here presented. The statute under consideration in Moore v. Brown is found in Swan, 1841, page 682, sec. 124, and required the party desiring to appeal to enter on the records notice of his intention at the term at which the judgment or decree was rendered. The law now requires the notice to be entered within three days after the entering of the judgment or order, and so far as this question is concerned, that is the only difference.

"When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court, such as entering an order *nunc pro tunc.*"

Credit Co. v. Ark. Cent. Ry., 128, U. S. 258.

Motion sustained, appeal dismissed.

C. J. Delaplane and *F. C. Hubbard*, for the motion.

Gale & Clarke, contra.

Note. See Layer, guardian v. Shaber Admr., 38 W. L. B., 299, 57 Ohio St., decided by the supreme court since this opinion was received for publication. Ed. W. L. B.

(First Circuit—Butler Co., O., Circuit Court—May Term, 1897.)

Before Cox, Smith and Swing, JJ.

THE TYTUS GARDNER PAPER COMPANY v. THE MIDDLETOWN HYDRAULIC CO.

— & —

THE MIDDLETOWN HYDRAULIC CO. v. THE TYTUS GARDNER PAPER COMPANY.

Alley way adjoining land sold, expressly excepted from sale, may be closed by owner—

1. The strip of 16½ feet hereinafter mentioned, not having been conveyed to the grantors of the Paper Co., by the Hydraulic Co., but expressly excepted from said conveyance, and there being no language in said deed referring to it as an alley or roadway, and such a right thereto not having been acquired by contract or prescription, the Paper Co. has no right to enjoin defendant from closing the same.

Right to use of bridge by prescription—

2. The bridge in question having been erected over the canal of the defenant by the plaintiff's grantors, with the concurrence and assistance of the owner thereof, and used for more than twenty-one years, the right to have the same remain, has been acquired by the Paper Co.

License granted for valuable consideration—Assignable—

3. The platform in question was placed over a part of said Hydraulic canal, under a license from the Hydraulic Co., granted for a valuable consideration to the grantors of the Paper Co., and has been so continued with the consent of the Hydraulic Co. from 1883 or 1884, and in no way interfered with such canal. Held, that a parol license executed is irrevocable when granted for a valuable consideration, and having been granted for the benefit of the property of the licensee in this case, the general rule that a license is not assignable does not apply in this case, and the Hydraulic Co. without good cause, should not now be allowed to remove the same without the consent of the Paper Co.

Appeal from the Court of Common Pleas of Butler county.

SMITH, J.

We state very briefly the conclusions at which we have arrived in these cases. And first, as to the strip of 16½ feet of ground between the Tytus Mill and the Jacoby Mill.

It is manifest that the legal title to this strip, is, and for many years has been, in the Hydraulic Co. That when the land on which the Tytus Mill is now situate, was conveyed by the Hydraulic Co. to the grantors of the Tytus-Gardner Paper Co., this strip was owned by the Hydraulic Co., and was not conveyed by said deed, but was expressly excepted therefrom, and there was no language in the deed which called for it as an alley or roadway, or in any way indicated that the strip was to be so used, or that any interest whatever therein, was conveyed by the Hydraulic Co. to the grantees in the deed. The grantees therefore, took no interest in it under such deed. No evidence was received or heard by the court, of any contract or arrangement between the Hydraulic Co. and the Tytus-Gardner Paper Co., or its predecessors in title, which gave them any right thereto, or any easement therein, or right of way over the same. Nor was there any evidence which shows that an easement therein, or a right of way over the same, has been gained by prescription. It is true, that for some years before the sale of the land to plaintiffs' grantors, and while the property was owned by the Hydraulic Co., there was some vacant ground belonging to the Company, and of which this strip was a part, over which persons desiring it were allowed to cross to reach the alley east of it; but this was not a well defined way, and not particularly over this strip, and such uses did not continue for twenty-one years, so as to ripen into a right. Judges Swing and Smith, therefore, with great reluctance, are compelled to hold, that the plaintiffs have not maintained their claim as to this strip, and are not entitled to the relief sought as to this. I say with reluctance, because we are satisfied that this strip was, in fact, reserved by the Company, intending that it might be used by the Jacoby Co., whose mills on the north side of the strip, came to the north line thereof, and by the grantees of the Company on the south side

thereof—both being customers of the Hydraulic Co., and purchasing water rights therefrom. We think that it would be very inequitable and unjustifiable, if the Hydraulic Co., for no good reason, and without any prospect or advantage to itself, should insist on closing up this way. But we see no legal method to prevent them from so doing if they see proper to do it. Judge Cox is of the opinion that the plaintiffs are entitled to this strip as an easement, or to a right of way on it, and favors granting the relief prayed for.

2nd:—As to the bridge: We agree that under all the circumstances of the case, the bridge having been put there with the full concurrence, and perhaps with the assistance of the Hydraulic Co., and having been used as a bridge for more than twenty-one years, the right to have the same remain, has been acquired by the plaintiffs, and that the Hydraulic Co. has no right to remove it.

3rd:—As to the platform. This question presents greater difficulty. It is clear that the right to place it there, in the shape in which it now stands, was granted for a valuable money consideration to the grantors of the Tytus-Gardner Paper Co., and that a consideration was paid to the Hydraulic Co. therefor, and that it was constructed at a large expense, and was continued there without any objection on the part of the Hydraulic Co., from 1883 or 1884, until shortly before the bringing of this suit in March, 1895. The platform was so erected under the direction of the Hydraulic Co., extending about sixteen feet from the west bank of the Hydraulic canal, extending for that distance over the canal, and about — feet in length—it is supported by seven posts, each, say, one foot in diameter. We find that in no material or essential way, does it interfere with the use of the canal. This canal, at that point, is located along one of the streets of the city of Middletown, and the right to place it there, on certain conditions and under certain restrictions, was

given to the Hydraulic Co. by the city of Middletown. Subject to this grant, the city is the owner of the street as it is of the other streets. No objection is made by the city to the platform as it exists.

Under this state of fact, has the Hydraulic Co., against the will of The Tytus-Gardner Paper Co., the right to remove this platform?

It would seem that the right to place it there was founded upon a license to do so, given by the Hydraulic Co. to the grantors of the Tytus-Gardner Paper Co., and not to the Paper Co. itself. As stated in vol. 13, Am. & Eng. Ency. of Law, 539, "License, as a term of real estate law, is an authority to do a particular act or series of acts, upon another's land without possessing any estate therein. It is distinguished from an easement in the fact, that the latter always implies an interest in the land upon which it is imposed." And on page 545, it is said. "A license is strictly confined to the original parties. It is purely a personal privilege, and unless coupled with an interest, is not assignable, and can operate neither for, nor against a third person."

The doctrine stated as to the non-assignability of a license, is the most troublesome question the Paper Co. has to meet as to this point. For while it is also the general principle that a parol license may be revoked by the licensor at will, yet, this is not universally the case. For instance, in our own state, it has been held (Wilson v. Chalfant, 15 Ohio, 248):

"1st. If one enter upon the land of another by virtue of a parol license, given for a consideration paid, and erects fixtures, trespass will lie against the owner of the land for destroying them.

"2nd. A parol license executed is irrevocable; and

"3rd. A license to erect fixtures upon the land of another, executed, gives the right of possession to control, repair and protect the fixtures against the owner ofthe fee."

In the decision rendered by the court, it is said:

"On this subject the decisions of judicial tribunals of our sister states differ. (Citing cases.) But in Ohio, we think it can, at this day, be hardly considered as an open question. Part performance of parol contracts, especially where the non-execution would operate as a fraud on the rights of the vendor, have repeatedly been enforced in equity, and a parol license executed has been held to be irrevocable in numerous instances upon the circuit, at law."

And in 20 Ohio St., 89, Judge Welch, in deciding the case of Hornback v. R. R. Co., says: "The contract is at least a parol license, and that license has been fully executed, with the knowledge and consent of the plaintiff, who has received the full price stipulated therefor." We see nothing in the decisions of that court subsequently changing the law as stated in 15 Ohio Reports.

As has been said, there is more reason to believe that the Paper Co. is not in a position to avail itself of a license granted to its predecessor in the ownership of the property, for the benefit of whom the license was granted. And yet, as the license was evidently intended for the benefit of the property then owned by the license, and now by the Paper Co., and was not intended for the personal use of the licensees, there is a strong element of justice in the claim that the Hydraulic Co. having received a pecuniary compensation for the license, ought not now, without just cause, be allowed to destroy the improvement so constructed with its full consent, and with the same necessity for its use still existing. If circumstances should hereafter arise, which would show that its continued existence was to the substantial injury of the Hydraulic Co., we do not say that the Company, on proper terms, might not be allowed to remove it. But as the case stands, we do not deem it equitable to require it to be done, on the showing made; but think it should be allowed to remain and the Hydraulic Co. be enjoined from removing it.

Another question arises in one or the other of these cases, as to the right of the Paper Co. to use the water from the hydraulic, after it is measured and delivered to it, for any other purpose than the turning of the wheels of the mill. That is, whether it may be used in the boilers which have been put into the mill of the Paper Co., to be converted into steam to turn other machinery. We are of the opinion that it has such right, except as stipulated in the lease, that is that it can not be used for flouring mill purposes. That the water being measured to them, and paid for, it may now be used for the purpose indicated. There was to be and could be no further use of the water after it left the mills of the Paper Co., but it then flowed directly into the Miami river, and was of no possible use to the Hydraulic Co.

The other questions made, as we understand, are not now in controversy. It being conceded that some use of the water was made by the Paper Co., which it was not entitled to use in that way, which use has ceased, and the question as to the disposition of the costs made in the second case, is all that remains. In view of all the circumstances of the case, we have arrived at the conclusion, that in each of the two cases, the plaintiffs should pay the one half of all the costs, and the Hydraulic Co. the other one half.

Morey, Andrews & Morey, and *J. J. Muir*, for the Hydraulic Co.

Thos. Milliken & Ben Harwitz, for The Tytus-Gardner Paper Co.

(Second Circuit—Darke Co., Circuit Court, Nov. Term, 1897.)

Before Shearer, C. J., Summers and Wilson, JJ.

RAILWAY CO. v. SIMON.

Common carrier—Agreed valuation—When binding—

A contract of carriage, fairly made and signed by a shipper, agreeing upon the valuation of the property carried, with

the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, will, even in case of loss through negligence, be upheld, and the shipper limited to the agreed valuation.

The plaintiff below, Simon, sued the C., C., C. & St. L. Railway Co. as a common carrier, to recover $3,000 damages. He alleges that in September, 1896, at Evansville, Indiana, he delivered a valuable race horse to The Evansville & Terre Haute Ry Co., for shipment by said company and connecting lines from said city to Columbus, Ohio, and that said company, then and thereby agreed, and became bound through itself and its connecting lines, to transport and safely deliver the horse to plaintiff at Columbus; that said company safely transported the horse to Terre Haute, and delivered him to the defendant; that the defendant was a common carrier, and as such received the horse and agreed and undertook as a connecting carrier, to carry the horse and deliver him to plaintiff at Columbus, Ohio; that through the negligence of the defendant, a collision occurred at Indianapolis between two of its trains, and the car containing the horse, was thrown from the track and the horse permanently injured.

The defendant answered setting up two defenses. First, (admitting the receipt of the horse and many of the allegations of the petition), that at the time of the delivery of the horse to the first company at Evansville, the plaintiff there entered into a written contract with that company, which it alleges was made in its own behalf and in behalf of the defendant, and sets out a copy of the contract. So much of the contract as is pertinent, is as follows:

Read this contract.

Evansville & Terre Haute Railroad and Associated Lines.

LIVE STOCK CONTRACT.

Liability limited to the declared valuation by shippers, but not exceeding the following:

Each horse or pony (gelding, mare or stallion,) mule or jack————$100.

And in no event shall the carrier's liability exceed twelve hundred dollars per car.

Agents are not permitted to receive or ship animals of a higher value than as stated above, unless by special agreement noted hereon, and a proper contract or release is signed by the owner or shipper thereof. And it is agreed between the owner and shipper of these animals and the said railway company, that in case of accident, resulting in injury to said animals, the value thereof shall in no case exceed the valuations named above.

Shipments of Live Stock in Car Loads,

or less than car loads, will only be taken at the rates named herein, after this contract or agreement shall have been signed by the Company's Station Agent and the owner or shipper, by which it is agreed and understood, that such owner or shipper shall load, feed water, and take care of such stock at his own expense and risk; and will assume all risk of injury, or damage that the animals may do themselves, or each other, by kicking or gouging, suffocating, fright, burning of hay or straw, or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold, or by changes in weather, or for delay caused by stress of weather, by obstruction of track by riots, strikes, or stoppage of labor.

J. B. Cavanaugh, Gen'l. Freight Agent.

Nos. of Way Bills	Nos. of cars	No. of Animals in each car shipper's count.	Freight Office, Evansville & Terre Haute R. R. and Associated Lines. Evansville Station, Sept. 17, 1896, 10:30 A. M. Received of A. Simon to be delivered to A. Simon, Columbus, Ohio, Station, at the following rates: 4000 (a) 48 cts for horses 1 Horse O. R. Rel.

in consideration of which, and for other valuable considerations, it is hereby mutually agreed that said company shall not be liable for loss of live stock by jumping from the cars, delay of trains not caused by negligence as aforesaid, or any damage said property may sustain, except such as may result from a

collision of the train with other trains, or when the cars are thrown from the track in course of transportation, and in this case the company upon whose road the accident, loss or damage shall occur, shall be liable therefor, and no suit shall be brought or claim made against any other company forming a part of the route for such loss or damage (it being expressly understood and agreed that the responsibility of this railroad company shall cease upon delivery of said property to its connecting line, unless otherwise agreed to in writing, and signed by the respective parties hereto), and that the rules and regulations printed above are an essential part of this contract.

Evansville & Terre Haute R. R. Co.,
By E. E. Wieland, G. Agent.
A. Simon, Owner.

Defendant further alleges, that at the time the contract was made, the plaintiff represented in the written agreement to the first company, that the horse was of the value of one hundred dollars, and no more; that he paid the freight, the rate being based upon such valuation, though he knew at the time, that the agent was not permitted to receive or ship animals of a higher value than one hundred dollars at the same rate as an animal worth not to exceed one hundred dollars, and with such knowledge, represented to said company, and agreed to and with said company, for the benefit of said company and its connecting line, the defendant, in said written agreement, that the value of said horse was one hundred dollars and no more, and that said company for itself and the defendant, relying upon the statement and agreement of the plaintiff, that the horse was of the value of one hundred dollars, and that the risk incurred in case of accident, would be only one hundred dollars, for itself, and defendant accepted the horse for shipment upon said valuation and at a rate based upon said valuation. Whereupon defendant says, that plaintiff is estopped to claim that the horse is of greater value than one hundred dollars, for which sum, with costs of suit, it offers to confess judgment.

Second. For a second defense the defendant sets up the contract; that it was made by the first company in behalf of both, and says that the contract was made and executed in the state of Indiana; that the freight was paid in Indiana, and that the accident happened in Indiana, and that according to the laws of that state, the plaintiff is bound and

concluded by the value which he placed upon said horse in the contract, and upon the basis of which the freight was paid by him, and offers to confess judgment.

To these defenses the plaintiff interposed a general demurrer, which was sustained, and the defendant not desiring to plead further, the court assessed the damages at one thousand dollars, and rendered judgment.

The error complained of, is the sustaining of the demurrer to the answer.

SUMMERS, J.

The first question to be determined is, whether the interpretation of the contract is governed by the laws of Ohio, or of Indiana; for, if by the latter, the demurrer admits that by the law of Indiana, the plaintiff is bound by the valuation by him placed upon the horse and upon which the freight was based.

The rule established by the Supreme Court of the United States is, that

"The law of the place where a contract is made governs its nature, obligation and interpretation, unless it appears that the parties, when entering into the contract, intended to be bound by the law of some other country."

Liverpool & Great Western Steam Co. v. Phoenix Insurance Company, 129 U. S., 397.

In England the rule is the same. See In re Missouri Steamship Co., 42 Ch. Div., 321; Hutchinson on Carriers, (2nd Ed.), sec. 144a.

"Matters bearing upon the execution, interpretation, and validity of a contract, are determined by the law of the place where it is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy depend upon the law of the place where the suit is brought."

Scudder v. Union National Bank, 91. U. S., 406. In the opinion, Mr. Justice Hunt gives illustrations of matters connected with performance, and it is evident that the question here does not relate to such matters.

In this state, however, the matter seems to be controlled by the place of performance, and a different rule is established, by which, of course, we are bound.

In Railway Co. v. Sheppard, 56 Ohio St., 45, it is decided, that.

"A contract made in one state or country to be performed in another, is governed by the latter, which determines its validity, obligation and effect," and that "where a railroad company receives live stock in another state, under a contract there made to transport it to a designated place in this state, and while the stock is being carried in this state, it is injured by the company's negligence, the rights of the parties, in an action for damages for the loss, are governed by the laws of this state, and not by those of the state where the contract was made."

See also, Jacobson v. Adams Express Co., 1 O. C. C., 381.

But counsel for plaintiff in error, claim that the case is not in point, because it is limited to cases in which the accident happens in the state, and that the case decides that the rights of the parties are to be determined by the laws of the state of Indiana, in which the accident happened. This claim may be warranted by what appears in the opinion, if not by the quotations we have made from the syllabus. On page 46, the judge delivering the opinion, says:

"We understand the rule to be, that where a contract is made in one state to be performed in part in another, and an action is brought for a breach of that part of the contract, the rights of the parties must be determined according to the law of the latter state. Story on Contracts, sec. 655; Barton v Wheeler, 49 N. H., 9."

The decision in the case above referred to, in the United States Supreme Court, is to the contrary. Mr. Justice Gray, delivering the opinion, says: (129 U. S., 397, 461), (having determined that the contract was an American and not an English contract):

"This being so, the fact that the place where the vessel went ashore, in consequence of the negligence of the master and officers in the prosecution of the voyage, was upon the coast of Great Britain, is quite immaterial."

And on page 458, he says:

"The suggestion in Barton v. Wheeler, 49 N. H., 9, 29, that the question, whether the liability of a railroad corporation for goods transported through parts of two states, was that of a common carrier or of a forwarder only, should be governed by the law of the state in which the loss happened, was not necessary to the decision, and appears to be based on a strained inference from the observations of Mr. Justice Story, in Pope v. Nickerson, above cited. In a later case, the Supreme Court of New Hampshire reserved any expression of opinion upon a like question. Gray v. Jackson, 51 N. H., 9,39."

But, as we have already shown, our supreme court has decided that the laws of the place of performance govern. So that the demurrer to the second defense was properly sustained.

The next question is, whether a contract, signed by a shipper, agreeing upon the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, will be upheld and the shipper be limited to the agreed valuation, in case of loss through negligence.

It is claimed that this question has been answered in the negative in U. S. Express Co. v. Backman, 28 Ohio St., 144. An examination of that case will show that it was admitted that the goods were of greater value than that agreed upon, and that the carrier knew that fact at the time the contract was made. Jacobson & Co. v. Adams Express Co., 1 O.C. C., 381, is also cited. In that case, the court was of the opinion that there was no special contract. The second syllabus is as follows:

"In the foregoing case, a receipt of the company stating that in no event shall the holder demand beyond the sum of

$50.00, at which the article forwarded is valued, "not signed by the shipper and no statement made by him as to value," is not a valid stipulation against a loss by fraud or negligence."

In Hunt v. Penn. Railroad Co., 112 U. S., 331, it is held: "Where a contract of carriage, signed by the shipper is fairly made with a railroad company, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

The opinion is by Mr. Justice Blatchford, and a careful study of it will show that most of the suggestions made in the argument of the case at bar, are disposed of there. It was contended for the plaintiff, Hart, that the bill of lading did not purport to limit the liability of the carrier to the amount stated in it, in the event of loss through the negligence of the defendant. He shows that the contract is not susceptible of that construction, and then says, it must be presumed from the terms of the bill of lading, that the rate of freight is graduated by the valuation.

"It is further contended by the plaintiff, that the defendant was forbidden, by public policy, to fix a limit for its liability for a loss by negligence, at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract, is not a valuation previously made by the shipper. But we see no sound reason for this distinction."

It is the law of that court as well as of this state, that a common carrier may, by special contract, limit his common law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants, and, after reviewing the cases in that court in which it is so held, and stating that the court adhered to the views in them announced, he says, on page 340:

"The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract. The limitation as to value, has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying, that the value is greater. The articles have no greater value for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonble, that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

In Railway Co. v. Sheppard, 56 Ohio St., 44, an examination of the record discloses that there was no agreed valuation of the horses, but the contract provided, "that in consideration of being released from liability, as hereinafter specified, the said company agrees to transport one car load of horses" at the reduced rates.

The contract in this case is not, as to the question under consideration, distinguishable from the one passed upon in Hart v. Pennsylvania R. R. Co., supra.

That cases dealing with such contracts are to be distinguished from those dealing with contracts providing for a limited liability, is pointed out by Mr. Hutchinson, in his work on Carriers, sec. 250.

The service required in the transportation of a race horse, may not be as great as in the case of an ordinary horse, but the risk is greater, and the business cannot be successfully or fairly conducted, unless the charge is based upon the risk as well as the service. This fact was recognized at an early day, and the common carrier was permitted to protect himself from imposition by a special acceptance, and, as Mr. Justice Blatchford points out, contracts such as these may be upheld by the same principle.

If a box or package is so disguised by the shipper as to cause it to resemble such a box or package as usually contains articles of little value, in order to avoid paying a reasonable compensation for its carriage, and the carrier is misled and accepts it as such, the shipper, in case of loss, cannot recover because of his fraud. Hutchinson on Carriers, secs. 214-216; Despatch Line v. Glenny, 41 Ohio St., 166.

If he misrepresents the value of the article, and the carrier is misled, the shipper is at least estopped to claim a greater value.

In the Lottawanna, 21 Wall., 558, 572, Mr. Justice Bradley, speaking of the general maritime law and of the importance of uniformity to the commercial world, says:

"The convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence, the adoption by all commercial nations, (our own included), of the general maritime law as the basis and ground work of all their maritime regulations."

Considerations of advantage from uniformity upon a matter of so much importance, as well as of respect for the de-

cisions of the highest court, lead us to hold, in the absence of a decision directly in point by our own Supreme Court, that the plaintiff below is estopped to claim that the horse was worth more than one hundred dollars.

The court erred in sustaining the demurrer to the first defense.

Judgment reversed. Demurrer to first defense overruled; demurrer to second defense sustained, and cause remanded.

John F. Dye, and *L. F. Limbert*, for Plaintiff in Error.

T. C. Miller, and *Allread & Teegarden*, for Defendant in Error.

(Sixth Circuit—Wood Co., O., Circuit Court—October Term, 1897.)

Before King, Haynes and Parker, JJ.

CHRISTINA I. ROUSH v. JAMES H. WENSEL et al.

Will—Partly written, partly printed—

(1.) The fact that a will is partly printed and party written, does not make it invalid.

Contest of will—Order of testimony—Competency—

(2.) A plaintiff contesting a will on the ground that the testator was without testamentary capacity, having called as witness in chief one of the devisees, who is a defendant and whose interests are adverse, will not be permitted to inquire of such witness' at that stage of the case, whether he has not admitted or declared that the testator was incapable of transacting business. It is not competent to prove the incapacity of the testator in that way.

Same—

(3) A non-expert witness will not be permitted to testify to his opinion of the mental condition of a testator until he shall have testified to facts within his knowledge tending to throw light upon such mental condition and forming a basis for such opinion.

Same—Cross examination--Adverse witness called in chief--

(4.) A party calling a witness who does not appear to have any interest in the controversy, will not be permitted to cross-examine him upon the mere assumption that he is an adverse witness.

Same—

(5.) A party will not be permitted to ask his own witness if he has not made certain statements out of court, unless such witness has testified to facts inconsistent therewith, and the party has been surprised by such testimony.

Same—

(6.) A party may not call a witness supposed to be adverse, in anticipation of his being called by the other side, and elicit from him answers otherwise incompetent, with a view of laying ground for his impeachment.

Error to the Court of Common Pleas of Wood county.

PARKER, J.

On June 25th, 1896, Christina Roush filed her petition in the court of common pleas of this county attacking the validity of a will made by John Wensel, making defendants to her petition James H. Wensel and all other persons who appear to be interested, as required by sec. 5859 of the Revised Statutes. The date of the will referred to is January 25th, 1896. Its validity is attacked on the following grounds:

1st. That said John Wensel, at the time of said paper writing, was not of sound mind and memory, but by reason of extreme old age, long continued ill health and protracted sickness, he was mentally incapacitated from making any valid will or a proper distribution of his property.

2nd. That the said John Wensel, at the date of said paper writing, was under restraint, and was coerced into signing the same by the undue influence of the defendant James H. Wensel, and by false and fraudulent representations of the said James H. Wensel and certain other persons, who urged him continuously to make the so-called will in the manner and form in which it now appears.

3rd. That the said paper writing, purporting to be the last will and testament of the said John Wensel, was by him in his lifetime revoked.

4th. That the said supposed will is not in writing, as required by sec. 5916 of the Revised Statutes of Ohio.

The will in question, with the proof and probate, is with

the papers, and it appears that part of it is written and part of it is printed; the parts which are printed being the introductory clauses and the testimentary clause. I may as well give the parts that are printed. It starts out in print "The last will and testament of," and then is written in "John Wensel;" then printed" of" and then written "Montgomery township, Wood county, Ohio;" and then printed "In the name of Benevolent Father of All: I, the said," then written "John Wensel;" then printed "being of sound and disposing mind and memory, considering the uncertainty of continuance in life, and desiring to make such disposition of my worldy estate as I deem best, do make, publish and declare, this to be my last will and testament; hereby revoking and annulling any and all former wills whatsoever by me made. First: I desire all my just debts and funeral expenses to be paid as soon as possible after my decease" then written "by my son James H. Wensel." Then printed "Second: I give and bequeath," and then follows in writing about two pages of devises and bequests of his property; and then, at the close of the will, is printed "I nominate and appoint" written "my son James H. Wensel;" printed "to be executor of this will;" written "I desire that no appraisement be made;" and printed "In witness whereof I have hereunto set my hand and seal this," written "25th, printed, "day of," written, "January," printed "in the year eighteen hundred and ninety" written "six", and the name of the testator is signed. The clause following is partly written and partly printed

It is said that because these parts which I have mentioned are printed, the will is invalid, and we are referred to section 5916 of the Revised Statutes in support of that claim. This section was amended on the 17th of April, 1896, sometime after the execution of this will, but before the death of the testator, he having died on the 5th day of June, 1896. At the time this will was written the statute read as follows:—

"Every last will and testament (except nuncupative wills hereinafter provided for) shall be in writing and signed at the end thereof by the party making the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge the same."

The amendment consists of the addition of the following words: "and may be handwritten or typewritten", so that it now reads, "Every last will and testament (except nuncupative wills hereinafter provided for) shall be in writing, and may be handwritten or typewritten, and such will shall be signed at the end thereof, etc." It seems to us that there was much less difficulty about the matter before the statute was amended. That it was easy enough to arrive at a conclusion before this amendment of the statute, that a will printed or partly printed would be a written will; but the legislature seems to have deemed it necessary to make it more specific as to typewritten wills, and in doing so they have put into the statute something which throws a doubt upon the validity of a printed will, or one partly printed.

Nevertheless we conclude that the subject is covered by another provision of the statute. Section 4947, is the first section of part third, remedial part of the Revised Statutes. The chapter on "Wills" reads as follows: "In the interpretation of part third, unless the context shows that another sense was intended, the word 'person' includes a private corporation, writing' includes 'printing,' etc."

So that we hold the "writing" as used in section 5916 of the Revised Statutes, includes "printing", and that a printed will signed by the testator is valid.

After the plaintiff had rested her case, the defendant moved the court to direct the jury to return a verdict for the defendants in said cause, which motion the court sus-

tained and directed the jury accordingly, to which plaintiff excepted, and a verdict was returned by the jury accordingly. Thereupon the plaintiff undertook to prepare a bill of exceptions incorporating all of the evidence, so that the question of whether the court erred in sustaining this motion might be submitted to this court. Now we find that the first thing that was offered by the defendants in evidence, as required by the statute, was this will and the record of probate. That part of the bill of exceptions reads as follows:

"The defendants offered in evidence the record of probate of the will of John Wensel, deceased, which is hereto attached, marked, Exhibit A" and made a part of the record in this cause";

But it is not attached. It is not made a part of the bill of exceptions. The rules require that any exhibit that might be made a part of the bill of exceptions shall be attached to the bill. There are some things of course that cannot be attached, that it is physically impossible to attach to a bill of exceptions, and therefore the attaching of such exhibits may be excused or dispensed with. Notwithstanding that this exhibit has not been attached, we have looked into and have considered the questions raised, though we are not required to do so, and are not certain that we have any authority to do so, but our conclusions about the matter are such that no harm can come from it.

Now, on the trial of the case, the defendant, James H. Wensel, was called by the plaintiff in chief to maintain the issues on her part, and was asked certain questions about declarations made by himself as to the mental condition of the testator and to the effect that the testator was not capable of transacting business and should have a guardian. We cannot see how at that stage of the trial, that kind of questions, especially by counsel for the plaintiff, of a witness, whom he had put upon the witness stand to support his

claim, could be competent. We can hardly see how it can be competent at any stage of the case. It certainly would not be competent for the purpose of showing imbecility or want of testamentary capacity on the part of the testator to call a witness and ask him if he had not stated to someone that the testator was not competent to transact business with a view of eliciting from him a declaration or admission that he had so stated. Nor would it be competent to call as a witness a party to the suit, assuming that he was adverse, and undertake to lay the ground for his impeachment before he had been made a witness by anyone else for any purpose. He might not be produced as a witness upon the part of the defendants in the case at all; then, of what use or consequence would it be to call him and ask him certain questions, and then undertake by other witnesses to impeach him?

It would be like setting up a man of straw and knocking him down again, and would be making no progress in the case at all. We find nc error in the ruling of the court upon these questions. On pages 16 of the record, Mr. Van Voorhis, a witness on behalf of the plaintiff, was asked the following questions:

"Q. I desire to ask you now, Mr. VanVorrhis, from what you saw of his condition and from the situation, and from the facts that you have stated, was he capable of carrying on ordinary business?"

The defendant objected and the court asked:— "What time?" And counsel answered, "In January, 1896." It appears that the will was made on or about the 5th day of January, 1896. The court sustained the objection, and counsel for plaintiff stated,

"We except, and expect to show that this party would say that he was not capable of performing the ordinary business affairs of life."

Now, the witness, Van Voorhis, was not an expert, and it

is not pretended that he was either a physician or expert on mental diseases, but he is asked to testify from his knowledge of certain facts. He is asked to express an opinion after having made certain observations. Looking into that which preceeds the question to which I have referred and which is supposed to form a basis for this inquiry, we find that the witness has testified that the testator was sick at the time he was referring to, and had been sick for some time, and he makes it very clear by his testimony that the testator was physically weak. He also states that the last time he was there he thought the testator was "a little flighty". Just when this last time was, is not very clear, but that is the most he says—the strongest statement that he makes tending to show that anything whatever had even temporarily affected the mind of the testator.

He was asked this question further on:

Q. "Now state to the jury what, if any, changes you noticed and what they were?" A. "Well I don't know as I can answer that question."

Q. "Physically, what difference did you notice?" A. "I said he was feeble."

Q. "Did you notice any difference in his mental condition? That is to say, in his condition while he was sick from what he had observed while he was well. A. No, I don't think I did; he did not say much. I generally asked him how he felt and made a few remarks and that is all that was said."

Now, upon what kind of preliminary examination the plaintiff claims the right to ask the witness and have him testify as to the mental condition or capacity of the testator? A non-expert witness may testify to his opinion of the mental condition of a person in connection with certain facts previously related and upon which he basis such opinion. He must state his observations and upon what he founds his opinion, but it must appear that those facts—those circumstances—are such as have a tendency, at least in some de-

gree, to indicate mental weakness. There is nothing whatever in the testimony of this witness of that character, and nothing that we think would authorize him to express any opinion as to the mental condition of the testator. These observations apply to another witness whose name I do not now recall. There is a question of another character further along in the record which was excluded, but that is covered by what I have stated about the testimony that they attempted to elicit from the witness, James H. Wensel. At pages 50 and 51 of the bill of exceptions it appears that while Fred Heminger was testifying on behalf of the plaintiff, the following questions were asked:

"Q. Now I will ask you if you had any conversation with Henry Wensel in relation to the guardianship of the old man?"

"Defendant objected, and exception.

"Q. I will ask you, Mr. Heminger, if on or about June 20th, 1896, in Bowling Green, Ohio, in conversation with Mrs. Roush and J. A. Bush you did not state to them that you stopped Henry Wensell from coming here to have a guardian appointed for the old man about the time Kabig got the stock two years ago?

"Defendant objected and exception.

"Q. I will ask you as to whether on or about some time in the year, 1895 or '96, you did not state to Dan Heminger—

"Defendants objected; sustained and exception, and the court said to plaintiff's counsel:

"The record may show that the court will not allow counsel to cross-examine his own witness."

We can see nothing in the record that would authorize this kind of questioning. Counsel does not seem to have been taken by surprise by any statement upon the part of the witness. He simply puts him upon the stand, and attempts to elicit by his cross-examination, statements that counsel seem to have knowledge of. There is no offer to prove anything in answer to any of these questions, and that is sufficient reason for disregarding the exception, and

we think the ruling of the court was correct upon the ground that the court places it—that there was nothing in the circumstances that would authorize the plaintiff to cross-examine his own witness.

As I have stated, the court directed a verdict. We have looked carefully through this record, and we cannot find any evidence tending to support the allegations of the petition to the effect that John Wensel was not of sound mind and memory at the time he made this will, or that he was under restraint or coerced, or that there was any fraud practiced upon him, or that he had in his lifetime revoked his will, and therefore we hold that the court did not err in directing the verdict and the judgment will be affirmed.

James & Beverstock, for Plaintiff in Error.

Baldwin & Harrington, for Defendant in Error.

(First Circuit—Hamilton Co., O., Circuit Court—Nov. Term, 1897.)

Before Cox, Smith and Swing, JJ.

HAWKINS v. BARROW.

Devise by husband to widow—Death of widow before election—

1. Where a husband, by his last will and testament, devises all of his property, real and personal, to his wife who survives him, and such will is duly and promptly presented to the proper court for probate, and continued for hearing, and before it was admitted to probate, (as was afterwards done), the widow departed this life, intestate, such real estate so devised to her, descends to her heirs at law, subject to the payment of the debts of the testator and the intestate, and not to the heirs at law of the testator—and this is the case though no election in fact to take under the will was made by such widow by her acts and conduct.

Same—

2. In such case the provision made for the widow, being in addition to dower, she would retain her dower right free from the claims of creditors, and there can be no controversy but that the provision made for her by the will, is better than that made for her by the law.

Same—When land devised passes to widow's heirs—

3. The provisions of sec. 5964, Rev. Stats., that if the widow or widower shall fail to make the election provided for in sec. 5963, after the probate of the will, and after being cited to do so, she or he shall retain dower and such share of the personal estate of the deceased consort, as he or she would have been entitled to by law, in case the deceased consort had died intestate leaving children, do not apply to a case where the will is not probated at the time of the death of the widow or widower.

SMITH, J.

The facts in this case, briefly stated, are these: William Barrow, late of this county, died Oct. 31, 1894, seized in fee simple of the real estate in question. He left surviving him a widow and eight children, the issue of his marriage with her, and one child the issue of a former marriage. He left a last will and testament which was duly admitted to probate, and record in this county, December 12, 1894, and by which he devised all of his estate, real and personal, to his wife, absolutely. Before the will was admitted to probate, viz: November 19, 1894, his widow was killed by a train of cars, and of course, she never made any election in the probate court to take the provision made for her by the will of her husband, as it was not probated until after her death.

It appeared that on the death of the husband, there was some dissatisfaction on the part of the children as to the terms of the will. It is shown that an oral agreement was entered into between the widow and her eight children, by which it was arranged that she was to convey to her said children, all of the real estate in question devised to her by the will of her husband, retaining and reserving therein a life estate to herself. And such a deed was prepared by the attorney of the parties, but was never executed by her, either on account of her sudden death, or for some other reason. At the time of the death of the husband, he and his wife were living in Sharon, and not on the land in

question. After his death she removed to the farm, and was living there at the time of her death, and no objection to this was made by anyone. The evidence tends to show, that owing to the controversy which had arisen in the family, the widow was hesitating whether she would take the provision made for her by the will of her husband, and a few days before her death, said to some one that she would take under the law.

On the death of the widow, the plaintiff, the child of Barrow by his first marriage, filed this petition, averring that she and each of the other eight children, were seized of the one equal ninth part of the real estate, and asking that partition of the same be made accordingly. All of the eight children of Wm. Barrow, with one exception, deny that the plaintiff has any interest in the land, and claim that the eight children of Mrs. Barrow own the same in fee. And this is the question submitted to this court. It is conceded that the will of William Barrow, gave to his widow his whole estate absolutely. Unless, therefore, the failure of the widow to have the will probated during the time she survived her husband, and to elect to take the provision made for her by the will, deprived her of the benefit of the devise so made to her, it is evident, that on her death intestate, the whole of the estate, remaining after the payment of the debts of her husband, and her debts, would go to *her* children, and the plaintiff would have no interest whatever in this real estate. What then, is the effect of her death without having made the election in court, to take the provisions made for her by the will?

Sec. 5963, Rev. Stats. in effect provides, that if any provision be made for a widow or widower in the will of the deceased consort, the probate court shall forthwith, after the probate of such will, issue a citation to such widow or widower, to appear and elect whether to take such provision, or to be endowed of the lands of the deceased consort, and

take the distributive share of the personal estate—"but the widow or widower, shall not be entitled to both dower and the provisions of the will in her favor, unless it plainly appears by the will that the widow or widower, should have such provision in addition to the dower and such distributive share." And sec. 5964 provides, that if the widow or widower shall fail to make such election, he or she shall retain the dower and such share of the personal estate of the deceased consort, as he or she would have been entitled to by law, in case the deceased consort had died intestate leaving children.

If any part of this estate had been given to any other person than the widow, or any limitation as to her interest therein made by the will, as for instance, if she was only to have it for life, or during her widowhood, it would seem from these provisions of the statute, as a general rule, that to entitle her to the provisions made for her by the will of her husband, an election made by her to take such provision is essential, at least where the will has been admitted to probate in her life time, and she is duly cited under sec. 5963, Rev. Stats. And that without such election, she is remitted to her statutory rights as widow of her husband. And it is clear, too, in such case, that the election must be made by her personally, and can not be exercised for her after her death by her heirs or legal representatives, though it may be entirely certain that the provision made for her by the will, was much greater in amount than what she would receive under the statute if she declined to take under the will. It is true that there may, in the absence of an election by her in court in the mode pointed out in the statute, be an election in fact, by acts done by her, which clearly show that she had decided to take the provisions made for her by the will, and had in some way carried this intention and purpose into effect; and particularly is this so where the other parties interested in the estate have knowledge of this,

and make no objection and act accordingly. Lessee of Thompson v. Hoop, 6 Ohio St., 481; Baxter v. Bowyer, 19 Ohio St., 491; Stockton v. Wooley, 20 Ohio St., 184. In such case, to some extent at least, the doctrine of estoppel applies.

The evidence in this case as to an election in fact by this widow, is not of a very satisfactory character, either for or against it. Looking at the terms of the will itself, it would seem that if she looked alone to her pecuniary interest, she could not hesitate. The will gave to her the whole estate, real and personal, after the payment of the debts of the testator, absolutely. She had the full and undisputed right to dispose of it during her lifetime, or by will at her death. The devise to her including her dower, it was equivalent to a provision in addition to dower, and even if the land had been liable to sale for the debts of her husband, in the event of an election by her to take under the will, she would have held the dower right free from the claims of creditors of the estate. Baxter v. Bowyer, supra. So that there was no room for choice as to what would be best for her to do in a pecuniary view. And yet the evidence tends to show, and perhaps does show, that shortly before her death, she expressed her intention of taking under the law, for what reason does not appear. On the other hand, the evidence shows, that after her husband's death she removed to the land given to her by the will, and made a parol contract with her own children to convey the land to them in fee simple, reserving to herself a life estate therein. It is true that this deed was not executed though drawn up by the attorney of all the parties and submitted to them, and of course, the parol contract could not be enforced against her or her representatives, but is goes far to show her election in fact.

But the question most discussed in this case, is, whether where a husband, as in this case, gives the whole of his estate after the payment of his debts, absolutely to his widow,

and she dies, shortly thereafter, before the probate of the will, and without negligence on her part, (for the will had been promptly offered for probate, and continued for hearing), or even after the probate of the will and being cited, fails to elect within the year given to her, she loses all the benefit of the provision made for her thereby, and is remitted to her statutory rights as his widow. The question is certainly one of great importance, and it must be conceded, that on the language of the statute, it is a doubtful one. If a husband or wife, relict of a deceased consort, under whose will he or she would be entitled to the whole of the estate, and which provision is of far more value than would be the right under the statute, is to lose the benefit of the testamentary provision made for her thereby, without any fault or negligence on his or her part, simply because the will not being probated before her death, she can not elect to take such provision; or after probate and citation she is prevented by some reason from doing so, great injustice may be done to her. It would seem, therefore, that the courts should not so hold unless it is manifest that such is the clear law.

It is clear, as before stated, that the courts of this state have made an exception to the general rule of the statute, that the election, to be valid, must be made in the probate court in the mode pointed out in the sections of the law which we have quoted. This is shown by the decisions already referred to. And the claim is made by the counsel for the defendant, that where everything has been given by the will to a widow or widower by the will of the deceased relict, that no election in court is necessary in such a case, and on failure to do so, that he or she takes the whole estate so devised, subject of course to the rights of creditors of the estate.

We know of no decision of the courts of any state under a statute similar to ours which holds that such is the case.

The case of Baxter v. Bowyer, 19 Ohio St., 490, before cited, comes nearer to it than any we have seen. It was there held in the 4th and 5th subdivisions of the syllabus:

"Where the provision in a will for the widow includes the dower, it is equivalent to a provision in addition to dower, and she holds the dower right free from the claims of creditors of the estate," and "in such case, if the widow actually accepts the provision, and then dies without making her statutory election in court, and without being cited to appear in court for that purpose, she will be held to have taken under the will."

In that case, the testator had devised all his estate to his wife for her life, and for her support during her life, with power of sale for the benefit of the estate, and on her death, what remained was to go to other parties named in the will. And in the statement of the case it is said:

"The testator's wife survived him and took possession of the property, which consisted of some ten thousand dollars worth of real estate, and personal property to the amount of twenty-five hundred dollars. She possessed and used the entire property during her life, and died in less than one year after the death of her husband, without making any election in court to take under the will, and without being cited to appear in court for that purpose."

Judge Welch in delivering the opinion of the majority of the court, says:

"We are unanimous, however, in the opinion, that under the circumstances of this case, the widow must be held to take under the will, and that, therefore, the representatives are entitled to no part of the personal estate. The circumstances I allude to are these: 1st. The provision made for her by the will includes her dower, and is therefore tantamount to a provision in addition to dower, and entitles her to hold the dower interest freed from the claims of testator's creditors. 2nd. She, in fact, accepted and enjoyed the provision, though she never made the statutory election in court. 3rd. She was never cited to appear in

court, and died within the time allowed for that purpose. What would be our holding as to the effect of the widow's non-election in a case where either, or any of those cir-cirumstances should be wanting, we do not at present undertake to say."

We understand from this, that the effect of a non-election in court, in a case like the present, where there was not an election in fact, is not decided.

In a case like that before this court, where the fact of an election by conduct and acts, is, to say the least, not clearly shown, but where the provision made by the will was clearly in addition to her dower, and manifestly better than what the law would give her, we would greatly hesitate to hold that, even if the will had been probated in her life-time, and she duly cited, but by some casualty had been prevented from an election in court, she would be deprived of the provision made for her by the will, and be remitted to her rights as a widow, under the statute. But the case before us is much stronger in favor of the defendants than the one supposed. Here the will had not been probated at the time of her death. She had no opportunity to make her election. The will made a provision for her much greater than her share as a widow under the law would have been. The statute makes no provision that in such a case she shall simply take her statutory rights. The sections quoted, only provide for this in case the will is probated, and she is cited, and fails for one year to make her election in court. As there is no provision that in case she dies before the probate of the will, that the effect should be the same, we think that it does not have such effect, but that the provision made for her by the will stands.

We hold therefore, that on the death of Mrs. Barron intestate, she held the title to this land in fee, and that it descended to her eight children, and that the plaintiff has no interest therein.

John Coffee, for Plaintiff.

Chas. J. Hunt, Von Seggern, Phares & DeWald, contra.

Steel v. Pogue et al.

(Third Circuit—Hancock Co., O., Circuit Court—May Term, 1897.)

Before Day, Price and Norris, JJ.

CHARLES M. STEEL v. JOHN F. POGUE, et al.

Title by delinquent tax sale—Strict compliance with statutory requirements necessary—

To accomplish a valid sale of lands or lots, at delinquent tax sale, so as to vest the legal title in the purchaser, it is essential that all the requirements of the statutes with reference to the proceding of levying and collecting taxes, be strictly followed by all officials having any duty to perform in relation thereto.

Same—

A failure to comply with any one of such statutory requirements, is an irregularity that will invalidate the sale.

Invalid tax sale—What purchaser is entitled to—

After two years from the day of such tax sale, the provisions of sec. 2880, R. S. apply an govern; and in such situation, the purchaser at an invalid tax sale is only entitled to recover against the owner of such land or lot, the aggregate sum of the original purchase and taxes subsequently paid, with interest thereon from the date of payment but no penalty and no costs incurred in the sale.

Appeal from the Court of Common Pleas of Hancock county.

DAY, J.

Plaintiff's action is to procure an order of the court quieting his title to certain real estate, described in the petition, as against the adverse claims of the defendant Pogue. As a defense, and for a cross-action entitling him to affirmative relief, defendant, Pogue, asserts title and right of possession of the said real estate in himself by virtue of an auditor's deed therefor, of date January 17, 1895, based on, as he asserts, a valid proceeding and sale to him, at a delinquent tax sale duly made on the 17th of January, 1893. Defendant shows that at the last named date he paid the taxes, interest and penalty then due thereon and unpaid, in the sum of $600.00, and has since paid current taxes in

the aggregate sum of $177.00. That after the expiration of two years from the day of sale, the owner not having redeemed the said land, the auditor of the county duly executed and delivered to him, a proper deed, conveying the said real estate, which deed was duly accepted, filed for record, and recorded. Defendant asserts the validity of the said sale and deed, and claims to have the legal title and right of possession to the said real estate by virtue thereof, and prays in the alternative: First, a judgment establishing the validity of his title and right of possession; and if that cannot be properly done, then, second, that the said lands be ordered sold on his tax lien, and out of the proceeds, he be paid the several sums paid by him as taxes, etc., with penalty and interest thereon according to law, and also any sums paid by him as costs and expenses of the sale and transfer on the duplicate, in all a total sum of $1125.00. In a reply the plaintiff specifically admits the non-payment of taxes—the sale at delinquent tax sale to Pogue, and the subsequent payment of taxes by him in the sums stated; the failure of the owner to redeem; the execution and delivery of the deed by the auditor, and its record; but denies the regularity of the proceedings leading up to the sale, and the validity of the sale and the efficiency of the auditor's deed to cast title in Pogue. It is conceded there is an amount due, as stated, on account of the sale and the subsequent payment of taxes and lawful interest thereon; but it is denied that Pogue is entitled to payment of any penalty at all, or re-payment of any expense for certificates, transfers or other expenses incurred in the matter.

While there is an issue of fact arising on the claimed validity of the tax sale and the efficiency of the tax deed to cast title on the purchaser, yet it is conceded as a fact that an official having a duty in connection with the levy and collection of taxes, the county treasurer perhaps omitted to do a necessary thing, neglected to make and enter on the

record a certain certificate required by the law to be made and entered; and so there are no disputed facts in the case. The parties are in agreement as to what the facts are, and the issues arising and over which they are at variance, are questions of law pure and simple. And the questions are: 1. Is an auditor's deed for lands sold at a delinquent tax sale, where the antecedent proceeding is defective—where all the requirements of the statute have not been complied with—valid and effective to cast the legal title thereof on the purchaser at such sale? If not, and, in lieu of such paramount title, the purchaser has acquired the right and lien of the state on the land, for the payment of taxes, then, 2. Has such purchaser a legal right to exact and collect a penalty of twenty-five per centum, or any penalty, on the original purchase money and taxes subsequently paid, and any expense incident to the purchase?

1. That irregularity and neglect to take all the preliminary steps required by the statute in the proceeding leading up to and culminating in a delinquent tax sale, will render the sale invalid and ineffectual to transfer the legal title to the purchaser, is not an open question in this state. The proposition is *stare decisis*. All the decisions of all the courts on that question, are of the purport and substance, that any irregularity or defect in the antecedent proceeding —any neglect or omission, even if quite technical, if it amounts to a substantial departure from the strict provisions of the statute, is held to render the proceeding and sale defective and invalid as a sale. It is also well settled that a purchaser at an invalid tax sale, acquires no title to the real estate sold as against the holder of the legal title, but by express provision of the statute does acquire all the rights of the state to enforce payment of taxes, and a lien on the property sold to secure the repayment of the purchase money and taxes subsequently paid, with such interest, penalty and expense as the statute provides. The conceded

fact, of omission to make and enter on record a required certificate, settles the one issue in this case in favor of the plaintiff. The proceeding was irregular and defective, and the sale manifestly invalid, so that the auditor's deed made in pursuance thereof, was inefficient, and conveyed no title to the purchaser.

2. Has the purchaser at an invalid tax sale, having thereby acquired the rights of the state to collect taxes, in that particular case, a legal right to exact and collect a penalty on the original purchase money and taxes subsequently paid, and also the expenses or costs incident to the purchase? The answer to this question must necessarily be in the alternative. In some circumstances and conditions, yes; in others, no; the proper answer depending altogether upon the provisions of the statute touching the matter, considered and applied in connection with the peculiar facts in each particular case; and an affirmative answer in every case depending upon the presence of the material fact that the holder of the legal title is seeking to redeem his lands from such tax sale. Sec. 2890 Rev. Stat. provides that lands sold at delinquent tax sale may be redeemed by the owner, and fixes the time within which redemption must be made, at two years from the day of sale. After the expiration of such two years, there is no provision of law enabling owners to redeem, as matter of right. After such time, it seems, the purchaser is entitled to a deed for the lands purchased, and the owner has only the chance of regaining his property if a valid sale has not been accomplished. Section 2891 Rev. Stat. provides for a penalty and costs as follows:

"Any person desiring to redeem any land or town lots sold at delinquent sale, may do so within one year from and after the sale thereof, by depositing with the county treasurer, upon the certificate of the auditor, an amount of money equal to that for which such land or lot was sold and the taxes subsequently paid by the purchaser, together with

interest and fifteen per centum penalty on the whole amount paid, including costs, and one dollar to pay the expense of advertising as provided."

After the expiration of one year, and before the expiration of two years, the same section 2891, provides, the owner may make a deposit with the treasurer, upon the certificate of the auditor, of an amount of money equal to the amounts paid by the purchaser, with interest and twenty-five per centum penalty on the whole amount paid, including costs, and one dollar for cost of advertising as provided.

It will be observed, the penalty and costs paid on the purchase for certificates and transfers, contended for by Pogue, are provided for by section 2891, just quoted from, but only in case the owner seeks to redeem his lands or lots within the two years provided for such redemption by sec. 2890; and not under any other circumstances. In this case, the owner did not seek or attempt to redeem, but allowed the law to take its course, he assuming the risk of loosing his entire estate if the tax sale happened to be not invalid; so it would seem the provisions of sec. 2891, do not apply, or in any way refer to the facts we have here, and cannot be made available by defendant. In case the sale is invalid by reason of irregularity in the proceeding leading up to it, the rights of the owner and purchaser are defined and regulated by another and different section of the statute. Section 2880, Rev. Stat. provides:

"Upon the sale of any land or town lot for delinquent taxes, the lien which the state has thereon for taxes then due shall be transferred to the purchaser at such sale; and if such sale should prove to be invalid on account of any irregularity in the proceeding of any officer having any duty to perform in relation thereto, the purchaser at such sale shall be entitled to receive from the proprietor of such land or lot the amount of taxes, interest and penalty legally due thereon at the time of such sale, with

interest thereon from the time of payment thereof, and the amount of taxes paid thereon by the purchaser subsequent to such sale; and such land or lot shall be bound for the payment thereof."

This section fixes and defines the rights of a purchaser at a delinquent sale and the liabilities of the owner of the land sold, in case the sale is invalid by reason of irregularity; while sec. 2891, providing for payment of penalty and costs in addition to the taxes actually paid, with interest, fixes and defines the rights and liabilities of the purchaser and owner when the owner, within the time fixed by sec. 2890, seeks to redeem his land from a delinquent sale. Clearly, we think, the provisions of sec. 2880 are applicable and govern in the case before us, and it appearing the sale is invalid by reason of irregularity, it follows the defendant is only entitled to receive such sums in re-payment, as is provided by it. The provisions of the section are very plain and explicit, and no doubt can possibly arise as to what the rights of the defendant are; he can only recover back the money paid by him, with interest from the date of its payment. This view has been enforced by the supreme court a number of times; first, in the case of Johnson v. Stewart, 29 Ohio St., 498. In that case the supreme court says:

"A purchaser at an invalid tax sale can only recover from the owner, or enforce a lien against the land for the taxes paid, with interest, and without penalty."

This holding was approved and followed in Younglove v. Hackman, 43 Ohio St., 69. This ruling has not been reversed or modified, but has been approved and followed in still later decisions by the supreme court.

On the authority of sec. 2880 Rev. Stat., and the decisions of the supreme court noted, we hold the defendant is entitled to receive from the plaintiff, the amount of the original purchase, and taxes subsequently paid, with interest from the date of payment, but no fees for certificates or

transfers, and no penalty. The amount may be ascertained, and when discharged by plaintiff, there may be a decree entered quieting plaintiff's title as against all claims of the defendant. If not paid within a short time, an order of sale may issue.

Jason Blackford & Byal, for Plaintiff.

J. A. &. E. V. Bope, for Defendant.

(Second Circuit—Montgomery Co., O., Circuit Court—Dec. 1897.)

Before Shearer C. J. and Summers and Wilson, JJ.

MADISON MUNDY'S EXECUTORS v. BERNICE M. MUNDY et al.

Will—Revocation by subsequent marriage.

1. The common law rule that marriage alone does not revoke a will of the husband made before marriage is not abrogated in this state by reason of the statute of descent making husband and wife heirs to each other.

On appeal from the Court of Common Pleas of Montgomery county.

The facts necessary to the determination of this case are the following:

The will of Madison Munday, deceased, was admitted to probate May 29, 1879, devising one-half of his real estate, in trust, to his son. James M. Munday. On the 2nd day of May. 1890, James M. Munday executed his will, by the terms of which he devised the whole of his estate to his sister, Sarah Decker, who has since deceased, and her heirs are made parties defendant in this action. On the 11th day of May, 1893, he married the defendant, Berenice M. Munday, who is now his widow. He died September 19, 1893, without issue, and without making any provision for his wife. His will was admitted to probate September 25, 1893, and the real estate, bequeathed to him by his father, was held in trust by the executors of the father's estate, the

rentals alone, being made payable to him until the happening of some certain event. Both the widow of James M. Munday, and the heirs of Sarah Decker, deceased, claim the right to receive the rents from said real estate. The executors of Madison Munday, deceased, bring this action under sec. 6202, Rev. Stats., asking to be instructed concerning the administration of their trust in that behalf. The only question involved is, whether, under the circumstances, the marriage of James M. Munday, after the execution of his will, revoked the same.

A decree was rendered in the common pleas court, in favor of the heirs of Sarah Decker, deceased. The widow, Berenice M. Munday, appeals.

A. W. Kumler, for appellant, cites Tyler v. Tyler, 19 Ill., 151; Board of Foreign Missions v. Nelson, 72 Do., 565; Duryea v. Duryea, 85 Do., 50; Brown v. Scherrer, 5 Col. App., 255; 77 N. C., 435; Sneed v. Ewing, 5 J. J. Marsh, 460; Garret v. Dabney, 27 Miss., 335; Tiedman on Real Prop., sec. 888; Swan v. Hammond, 138 Mass., 45; Stokes v. O'Fallen, 2 Mo., 29; Doyle v. Doyle, 50 Ohio St., 330; 37 W. L. B. 265, 306, 327, 344, 364.

Kennedy & Munger, for appellees, cite, 1 Jarman on Wills, (5th Ed.) 270; 20 Encyc. of Law, 316; Hoitt v. Hoitt, 63 N. H., 476; Bowers v. Bowers, 53 Ind., 430; Re Estate of Hulett (Minn. Supreme Court); 34 L. R. A., 384; Goodsell's Appeal, 55 Conn., 171; Morgan v. Davenport, 60 Texas, 230; Fuller v. Coates, 18 Ohio St., 350.

WILSON, J.

At common law the rule is, marriage and the subsequent birth of a child, amount to a revocation of a will of the husband made before marriage; but that a subsequent marriage, *or* the birth of a child, is not a revocation—they must conjoin. This rule was taken from the Civil Law, based upon "a presumed alteration of the intention of the testator arising from the occasion of new moral duties." But in the

case of Doe d. Lancashire v. Lancashire, 5 Term Rep., 49, Lord Kenyon says:

"Perhaps the foundation of the principle is not so much an intention to alter the will arising from these circumstances happening afterwards, as a tacit condition annexed to the will itself, at the time of making it, that the party does not intend it should take effect if there should be a total change in the relations of the family."

In the case of Rush v. Wilkin, 4 Johnson's Ch., 506, Chancellor Kent says:

"The claim of the wife to the benefit of this presumption in the case of a devise of land, is admitted not to be very strong, because, if she was let in, the land would still descend to the heir, and the law has secured to her, in every event, a provision for life, out of the real estate. Her claim to a provision from the personal estate, rests on higher ground, for in respect to that portion of her husband's property, she is left entirely at the control of his will and pleasure; but her pretension is here also weakened from the consideration of the provision by dower, which the common law has already secured to her."

These conditions have been modified by statute, in this state, to the extent that the wife is now the heir of the husband, both as to real estate and personal property, when there are no children, or their descendants, surviving; preserving to her only, the right of dower, if there be children. Provision is also made for her out of the personal estate of the husband, consisting of a year's support, and one-half of the first four hundred dollars, with one-third of the remainder, after the debts are paid; also her homestead and other exemptions.

The question is, whether, under the law as thus modified, and by reason of such modification, the common law rule, that subsequent marriage alone, does not revoke a will of the husband, is abrogated.

In Tyler v. Tyler, 19 Ill., 151, it is held:

"In Illinois, where the statute makes the husband and wife heirs to each other when there is no child or descendant of a child, in the absence of facts arising subsequent to marriage, showing an intention to die testate, a revocation of a will made by a husband prior to his marriage, by which he disposes of his whole estate, without making any provision in contemplation of the relations arising out of his marriage, will be presumed."

No reason is given for the rule, in this case, other than the change in the statute of descent, making the wife the heir of the husband. The law of the case, however, was twice subsequently attacked, in the supreme court of that state, and the court as often refused to reconsider it, for the reason that it had become a rule of property, and further, it having since been incorporated into the statute law of the state, a reversal would only have a retroactive effect. The American Board of Foreign Missions v. Nelson, 72 Ill., 564; Duryea v. Duryea, 85 Ill., 50.

In the case of Swan v. Hammond, 18 Mass., 45, is found an obiter dictum to the effect that:

"Marriage alone, in the case of a man or woman, would seem to be a sufficient change in condition and circumstances to cause an implied revocation of a will previously made. A will made before marriage, and taking effect after marriage, must take effect in a very different manner from that in the mind of the testator when the will was made. The rights of the husband or wife, must greatly modify its provisions, and it can hardly be supposed, that an unmarried person would make the same will he or she would make after marriage."

This would seem to be a wholly inadequate ground upon which to raise the implication, that a will, devising real estate in this state, should be revoked by marriage alone. The only effect of marriage upon the devise, would be to burden it with the right of dower, and the law places

this incumbrance upon the devise, whether the will be made before, or after marriage. There is, therefore, no cogent reason why the will should be changed after marriage, unless it be intended to change the devise. The statute law of this state, does not undertake to change the devise directly, by a limitation put upon the power of testamentary disposition after marriage, and it would seem to follow, that it should not be done indirectly, by an implied revocation of his will, because of marriage.

In the case of Brown v. Scherrer, 5 Col. App., 255, it is held: "Marriage, although without issue, operates in this state to revoke a will." This case, however, is distinguishable from the case at bar, by reason of the statutory limitation upon the right of either the husband or the wife, to make a testamentary disposition of an aliquot part of his or her, real estate, as against the right of inheritance in the other. And, inasmuch as the will, made before, is destructive of this right, it is held to be revoked by the marriage, in order that the right may be protected. The court supports this conclusion by the argument, that in England, a will made before marriage, is revoked as to realty only when a male heir is born, who can inherit under the law of primogeniture, and in that event, the father not having the power to defeat the statutory right of inheritance, the will is revoked ex necessitate.

So, in the case of Garrett v. Dabney, 27 Miss., 335, under the married woman's act in that state, which secured to the husband an estate in fee, if the wife died without issue, her will made before, was held to be revoked by marriage, because it deprived her of the power to change her will, which was obnoxious to her husband's right in the real estate, vested at the time of marriage. Under the statutes of Ohio, the power of the husband to dispose of his real estate, is the same after marriage as before, leaving to the wife only the statutory right of dower, which attaches

in any event. The same reason for revocation, therefore, because of marriage, does not exist in this state.

In 37 W. L. B., pp. 265 et seq., is a series of articles on the subject of common law and statutory revocation of wills, by marriage, by birth of child, by both, written by E. J. Marshall, of the Toledo Bar, in which the writer collates the authorities on the subject, and reaches the conclusion, that the reason for the common law rule, that marriage and birth of a child are both necessary to a revocation, no longer exists in Ohio. The other authorities, cited by appellant's counsel, do not present any new or additional phase of the question.

In Connecticut, where by statute the wife inherits as heir to her husband, it was held in Goodsell's appeal from Probate, 55 Conn., 171, that "A will is revoked by marriage and the birth of a child, but not by marriage alone." Citing, 1 Redfield on Wills. (4th Ed.,) 298; Brush v. Wilkins, 4 Johns. Ch., 506; Warner v. Beach, 4 Gray, 162; Jarman on Wills, (5th Am. Ed.,) 272. To the same effect are Hoitt v. Hoitt, 63 N. H., 475; Bowers v. Bowers, 55 Ind., 430, which are well considered cases.

In the case of Re Estate of Hulett, (Minnesota Supreme Court), 34 L. R. A., 384, it is held: "The fact that under our statutes a wife may inherit from her husband, has not changed the common law rule that the will of a man is not revoked by the subsequent marriage alone, without the birth of issue." This case would seem to be directly opposed to Brown v. Scherrer, supra. The same statutory provisions as to inheritance by the wife from the husband, and a similar limitation of the testamentary power of the husband, as against the wife's right of inheritance, are found in each case; so that the cases can not be reconciled or distinguished, on principle. In Re Estate of Hulett, all the statutory provisions, changing the relations of husband and wife, as touching their effect on the common law rule of revocation, are made to yield to the argument, that,

"The main reason why, at common law, marriage and the birth of issue were deemed such a change in the conditions or circumstances of the husband, as would work an implied revocation of his prior will, was, that otherwise, his issue would be wholly unprovided for,—a thing which was not to be supposed to have been in the contemplation of the testator; whereas, under our statute, and we assume without special examination under the statutes of those states in which the decisions cited were rendered, even if the will stand, very liberal provision has been made for the widow independently of any act of the husband;" and "The mere fact that she may now under the statute in certain contingencies inherit from her husband is not sufficient to warrant us in holding that the common law rule has been so changed, that marriage alone, is such a change of condition or circumstances, as will work an implied revocation of the prior will of the husband."

This question, however must be determined largely by the provisions of the statute law in Ohio. It is the province of the legislature, and not of the courts, to change the rule of the common law. The question, therefore, is whether or not such legislative intent can be gathered from the statutes effecting the numerous changes in the relations of husband and wife. In England and many of the states, it is expressly provided by statute, that marriage alone, shall revoke a will. There is no such express provision in the statute law of Ohio. That being so, sec. 5953, Rev. Stat., which provides in what manner a will may be revoked, would seem to be exclusive. The revocations implied by law, included in the saving clause of that section, must be held to be such, and such only, as were recognized at common law, at the time the statute was enacted. Hence, we have not only the absence from the statutes of the express provision found in other states, that marriage alone shall revoke a will, but a provision, which by its terms, must be held to exclude a revocation upon that ground. It is significant also, that sec. 5959, Rev. Stat., which provides,

when revocation by the birth of a child shall take effect, does not deem subsequent marriage of sufficient importance to be mentioned as a constituent part of the cause of revocation; and that sec. 5961 provides, that revocation shall not take place by reason of the birth of a child, if the testator have a child, or children, at the time the will is executed. The policy of the law seems to be to limit, rather than to enlarge, the rule of revocation. Sec. 5958, Rev. Stat., provides: "A will executed by an unmarried woman, shall not be deemed revoked by her subsequent marriage;" and this, notwithstanding the statute of descent, makes the husband the heir of the wife under the same circumstances, as under which the wife is made the heir of the husband. To say that by implication, a subsequent marriage will revoke the husband's will, for the reason that she is his heir, in the face of the provision that it will not revoke the wife's will, he being her heir, is to establish an inequality between them, which is repugnant to the whole trend of the statutes, making them equal before the law. On the other hand, to allow the common law rule, that subsequent marriage alone, will not revoke the husband's will, to stand, is to establish equality between them; and this, we may conclude, was the object of the section, providing that a woman's will shall not be revoked by marriage.

We therefore conclude, that the change in the law of descent, making husband and wife heir to each other, under certain contingencies, does not abrogate the common law rule. The record does not disclose whether or not all of the parties in interest are *sui juris*. The court therefore has not considered what effect the probate of the will and the failure to contest the same within the two years' limitation would have upon the right to raise the question passed upon.

We find the right to the rents in question to be in the heirs of Sarah Decker, deceased, and a decree may be entered accordingly

State ex rel. Monnett, Attorney General v. McMillan.

(Second Circuit—Clark Co., O., Circuit Court—Dec. Term, 1897.)

Before Shearer C. J., and Summers and Wilson, JJ.

THE STATE OF OHIO EX REL. FRANK S. MONNETT, ATTORNEY GENERAL v. JAMES C. McMILLAN.

1. A councilman, during his term of office, is ineligible to the office of member of a board of education.
2. Section 1717 R. S. construed.

QUO WARRANTO.

The petition reads as follows:

"Frank S. Monnett, Attorney General of the state of Ohio, comes here into court, and gives the court to understand and be informed that the defendant, James C. McMillan, is a resident and elector of the incorporated village of South Charleston, in Clark county, Ohio, and has been such resident and elector thereof for more than six years last past: that the said incorporated village of South Charleston is duly organized under the laws of the state of Ohio, and as such village is duly authorized by law to elect members of the village council, who are duly authorized and empowered by law to pass such ordinances and do all other things within their statutory power for the regulation, management and control and government of such village.

"That said village of South Charleston is located within the limits of the special school district of South Charleston, and is part of the same, and said special school district includes all the territory of the incorporated village of South Charleston aforesaid.

"That in pursuance of law and in accordance with the statute, the said incorporated village of South Charleston, on the first Monday of April, 1895, duly elected said defendant, James C. McMillan, as a member of the council of said incorporated village of South Charleston, for the period of two years next ensuing, and thereupon the said James C. McMillan duly qualified and entered upon his duties as such member of council and continued to hold such office for said term of two years: that on the first Monday of

April, 1896, while the said James C. McMillan was then acting as a duly qualified member of the incorporated village council of South Charleston as aforesaid, he was by the qualified electors of said special school district of South Charleston, elected to the office of member of the school board of such special school district of the incorporated village of South Charleston, for the term of three years next ensuing, and thereupon the said James C. McMillan assumed to qualify and act in the capacity of such member of the school board. That afterwards, to-wit, on the first Monday of April, 1897, and at the expiration of his term as councilman for said incorporated village of South Charleston, he, said James C. McMillan, was by the qualified electors of said incorporated village of South Charleston aforesaid, elected to the said office of member of the village council for the full term of two years next ensuing, and he thereupon duly qualified and entered upon the duties of said office and is now acting in such capacity.

"The relator herein says that James C. McMillan is now the duly elected, qualified and acting member of council of the incorporated village of South Charleston, but that said defendant James C. McMillan has usurped and unlawfully holds and exercises said office of member of school board of said special school district of South Charleston, and as such officer assumes to do and perform all and singular the duties pertaining to such office as member of school board as aforesaid under the claim that he is eligible to hold said office of member of the school board while acting in the capacity of councilman of the incorporated village of South Charleston, duly elected and qualified as aforesaid.

"Relator further says that said James C. McMillan was at the time of his alleged election to the office of member of school board, ineligible to hold such office, and is still ineligible to act in such capacity.

"Whereupon relator prays that the defendant, James C. McMillan, be required to answer by what warrant he claims to have used, to exercise and enjoy said office of member of school board of special school district of South Charleston and that he be adjudged not entitled thereto, and that judgment of ouster therefrom may be pronounced against him and for all proper relief in the premises.

The defendant demurs to said petition upon the ground, that the facts therein stated do not constitute a cause of action against him.

SHEARER, C. J.

The question presented by the demurrer is to be determined by the construction of sec. 1717 of the Rev. Stat., which provides, among other things, that "no member of council shall be eligible to any other office, or to a position on any board provided for in this title, or created by law, or ordinance of the council, except as provided in the seventh division of this title."

The seventh division concerns boards of improvements, boards of administration and the like, and in no way affects the question before us.

It is argued that this section, properly understood, forbids the election or appointment of a councilman to membership of a board of education, or to any other board created by law; that boards of education are created by law and, that therefore a councilman is not eligible thereto.

For the defendant it is insisted that his election to the school board did not violate sec. 1717; that the meaning of the section is that no member of council shall be eligible to any other office, or to any board created by law or ordinance of council—that is created by law of the council, or by ordinance of council. That this must be so because the offices are not incompatible; that they are not within the prohibition of section 18 of the Revised Statutes, nor do the duties of boards of education in any way conflict with or affect the duties of municipal councils.

It is also claimed that sec. 1717 applies only to such boards the members of which are selected or appointed by council.

At common law, the acceptance by an officer of another office incompatible with the first, *ipso facto* vacated the first.

But the appointment of a councilman to another office

which he is ineligible to fill is absolutely void. State ex rel. v. Kearns, 47 O. S., 560. If, therefore, under the provisions of section 1717 a councilman is ineligible to the office of member of a board of education, the defendant's election to that office is void and he should be ousted, and it becomes unnecessary to determine whether or not the offices are incompatible.

The provision of section 1717 now under review was introduced into the statute by an act to amend the municipal code passed April 18, 1870 (67 O. L. 69) and reads and is punctuated as follows:

"No member of council shall be eligible to any other office, or to any position on any board provided for in this chapter, or created by any law or ordinance of council save as provided in chapter 46 of this act."

In the present section there is a comma between the words "law" and "or", which is not found in the old section; and it is argued from this circumstance that the legislature intended to confine the prohibition to boards created by a law or an ordinance passed by council; that the comma is an interpolation and should not be regarded in the construction of the new section.

Councils do not pass "laws" but express their legislative will by ordinances and resolutions; and a reasonable construction of the language of the original section is that the ineligibility therein declared extends to any board created by a law of the state or by an ordinance of a municipal corporation.

Doubtless the commissioners of revision, in compliance with the duty imposed upon them by the act providing for the consolidation and revision of the statutes, introduced the comma into the new section to relieve it of any ambiguity which might have been supposed to exist in the original enactment (72 O. L. 87), and the general assembly for the same reason permitted the comma to remain when the re-

vision was adopted by that body. With the propriety of the law we have nothing to do. It is an act which the general assembly were empowered to enact—and thus the law is written.

The authorities cited by counsel do not seem to be in point and are not helpful in the solution of the question herein considered.

We are of opinion, that the defendant was ineligible to election as member of the board of education, by reason of his membership of the council of the incorporated village of South Charleston at the time of such election.

Judgment of ouster.

F. S. Monnett, Attorney General, and *Horace W. Stafford*, Prosecuting Attorney, for Relator.

Marcus Shoup, for Defendant.

(Eighth Circuit, Cuyahoga Co., Circuit Court,—Oct. Term, 1897.)

Before Hale, Marvin and Caldwell, JJ.

J. W. CALDWELL v. THE BOARD OF COUNTY COMMISSIONERS OF CUYAHOGA COUNTY et al.

The act for suppression of Mob Violence unconstitutional.

1. The statute, 92 O. L., 136, for the suppression of mob violence provides that the party complaining shall recover a definite sum regardless of the actual damages he has suffered.
2. In so far as the damages awarded by the statute exceed the actual damages suffered by the complaining party, the county is taxed for private interests.
3. The state has no power to tax the public for purely private interests.
4. The power of the legislature, under the provisions of the constitution, to levy taxes is not without limitations, and such powers are not only grants, but limitations.

CALDWELL, J.

The case of J. W. Caldwell v. The Board of County

Commissioners of Cuyahoga county et al. comes on error into this court, the demurrer having been sustained to the petition, and final judgment entered.

The question arises under the act found in 92 O. L., page 136, an act for the suppression of mob violence.

The plaintiff claims that he was working at the Brown Hoisting Works during the strike that occurred a little over a year ago, and while so engaged in working, while going from the works, a mob did him personal violence, and he brings his action under this statute, to recover damages for such violence. The first section of this act defines "a mob," and defines what "lynching" is, as follows:

"That any collection of individuals, assembled for any unlawful purposes intending to do damage or injury to any one, or pretending to exercise correctional power over persons by violence, and without authority of law, shall for the purposes of this act be regarded as a 'mob', and any act of violence exercised by them upon the body of any person, shall constitute a 'lynching' ".

"Serious injury" is defined in section 2.

"The term 'serious injury', for the purposes of this act, shall include any such injury as shall permanently or temporarily disable a person receiving it from earning a livelihood by manual labor."

Section 3.—"Any person who shall be taken from the hands of the officers of justice in any township by a mob, and shall be assaulted by the same with bricks, clubs, missils, or in any other manner, shall be entitled to recover from the county in which such assault shall be made, the sum of one thousand dollars as damages, by action as hereinafter provided."

Section 4—(and the question here arises largely on this section):

"Any person assaulted by a mob and suffering lynching at their hands, shall be entitled to recover of the county in which such assault is made, the sum of five hundred dollars; or if the injury received is serious, the sum of one thousand dollars; or if it result in permanent disability to earn a livelihood, the sum of five thousand dollars."

Section 5 provides how this money is to be disposed of. In certain cases it creates a trust for the family, and specifies how it shall be distributed.

Section 6—"Actions for the recoveries provided for in this act may be begun in any court having original jurisdiction of an action for damages for malicious assault, within two years of the time of such lynching." That is the limitation.

Section 7 provides:

"That when the judgment is given by the court, it is to include an order upon the county commissioners or county officers to include that in the next tax levy."

Section 8 provides:

"Any person entitled to a share in any recovery under this act who shall consent to a release or compromise of such claim in consideration of the payment of any sum less than the full amount of said recovery, shall be liable to indictment for a misdemeanor, and punished, at the discretion of the court, as in other misdemeanors."

Section 10 provides:

"The county in which any lynching shall occur, shall have a right of action to recover the amount of any judgment rendered against it in favor of the legal representatives of any person killed or seriously injured by a mob, including costs, against any of the parties composing such mob. Any person present at such lynching shall be deemed a member of the mob, and shall be liable in such action."

Section 11 provides for one county recovering from another.

Section 12 says:

"That a recovery under this act shall not bar a prosecution for homicide or assault for engaging therein."

The first question is whether section 4 makes a minimum amount that the party can recover.

"Any person assaulted by a mob and suffering lynching at their hands shall be entitled to recover of the county in

which such assault is made, the sum of five hundred dollars; or if the injury received is serious, the sum of one thousand dollars; or if it result in permanent disability to earn a livelihood by manual labor, the sum of five thousand dollars."

We think the court below construed that section correctly. And the court below construed that section to mean that if a person is assaulted, he can have five hundred dollars, and this does not depend upon what injuries he received; that if any person is assaulted by a mob and suffers lynching at their hands, it means simply an act of violence exercised by them upon the body of that person, that is a lynching; then he "shall be entitled to recover of the county in which the assault is made, the sum of five hundred dollars." That is a prescribed minimum by this statute, we think. "Or if the injury received is serious, the sum of one thousand dollars;" that is another part of the section, and the party so injured will recover that anyhow, regardless of what his injuries are.

It is contended that the difference between the actual injury and what the injured party is permitted here to recover by this statute, is a mere gift to the party on behalf of the county, and that it is, therefore, levying or taxing the public simply for private interests—not for public good, but simply for private interests.

There is, perhaps, a moral obligation, at least, upon a county, and it is held constitutional for the legislature to determine whether or not a county shall or shall not respond to a person who loses his property by mob, or who suffers in his person by a mob.

The legislation has been upheld where it has been introduced in any state, as to the losing of property by a mob, making the county respond in damages for the amount of property lost. We know of no legislation where the county has been made to respond for any injury to

persons such as this act specifies; but the question is not before us as to whether the county may be made to respond in the actual amount of damages, for we have no such law. But it is contended, that all that the party receives above what he has actually suffered is a gift to the party, and is taxing the people for a private individual to whom the county owe no duty or moral obligation whatever. The county, however, may owe a moral obligation, and if that moral obligation exists, it may be sufficient to sustain a statute; but the moral obligation of the county can extend no further than to the actual amount of damages suffered. Beyond that there is no moral obligation. Hence, it is contended that beyond that, there can be no legal obligation—there can be no legal obligation created by statute, and the difference between the actual damage and the minimum amount prescribed by statute is a mere gift to the party injured. And that is met on the other side, by saying that in Ohio no legislative act is unconstitutional unless it is prohibited by the constitution, and there is no prohibition on the taxing power of the legislature.

We refer to the case of the Board of Education against The State, 51 Ohio St. page 531. That was a case where the legislature undertook to provide for the board of education to pay a debt, which debt the board of education disputed; and the legislature constituted itself a court far enough to decide whether the board of education ought to pay, and then provided that the board of education should levy a tax to pay it. The court held that the legislature had no authority, in the first place, to order the payment of the debt to a private person; and in the second place, to determine the amount it should pay.

This determines both. It determines that any person who is assaulted, shall recover so much money. The legislature determines the amount of damages—the actual amount of damages.

We think the case in 51 Ohio St. is decisive in this action; that the legislature cannot proceed to legislate in this manner.

Suppose one individual had been mobbed, and the legislature had proceeded to find that fact, and then required the county to levy a tax to pay the individual five hundred dollars; that would bring the facts within the case I have cited in the 51 Ohio St. But the question is, whether or not there is a limitation upon the taxing power of the legislature, in the constitution.

The supreme court in this case cite a case found in the 28 Ohio St., 521, as follows:

"That the provisions of article 12 of that instrument," (that is, of the constitution) "though they relate to finances and taxation, are limitations upon rather than grants of powers of taxation."

And there is more added. And that is what Judge Bradbury in his opinion says that the court decided in this case of The Western Union Telegraph Company versus Meyer, as I have already stated, found in 28 Ohio St., 521.

And Judge Bradbury says this is clearly established by the great weight of authority as well as of reason, that the power is not unlimited; that in doubtful cases the courts should not interfere with the exercise of this legislative discretion, and that in all cases the legislative determination is entitled to great respect; but still, that the power "is not unlimited is, we think, clearly established by the great weight of authority as well as of reason."—State ex rel. versus Commissioners, 35 Ohio St., 468. Then he cites 27 Iowa, 28; 19 Wis., 64; and 25 Am. & Eng. Ency. of Law, 89 and 90. Then he adds to that:

"The power of taxation is given to the general assembly as an indispensable means of providing for the public welfare. Government could not be carried on without such power, and the power should be commensurate with the objects to be attained; but no good reason can be assigned for vesting it with power to take portions, large or small, of the

property of one or a number of persons, and granting it as a benevolence to another. Where a legislature attempts this, directly or indirectly, it passes beyond the bounds of its authority, and the parties injured may appeal to the courts for protection. The same constitution which grants the power of taxation to the general assembly, recognizes the sanctity of private property, and declares that the courts shall be open for the redress of injuries."

And again the judge says:

"This limitation of the legislative power of taxation is generally recognized by the authorities. The rule supported by a long array of adjudicated cases is laid down in 25 Am. & Eng. Ency. of Law, 74, as follows: 'it is within the province of the courts, however, to determine in particular cases, whether the extreme boundary of legislative power has been reached and passed.'"

"In Weismer versus Village of Douglas, 64 N. Y., 99, Folger, J., says: 'But to tax A and the others to raise money to pay over to B, is only a way of taking their property for that purpose. If A may of right resist this, as surely he may, how is he to make resistance effective and peaceable save through the courts which are set to be his guardian? How may the courts guard and aid him, unless they have the power upon his complaint to examine into the legislative act and to determine whether the extreme boundary of legislative power has been reached and passed?' We think, however, that whenever a contention arises between an individual and some public body respecting the existence of a claim against the latter, the controversy falls within the province of the judiciary."

Then there is a limitation upon the powers of the legislature to tax the county, and we think the legislature has exceeded its power in this case.

Many of the details that I should state in this case I will not, because of the very complete and able opinion of Judge Dissette in his disposition of the case below, reported in 4 Nisi Prius Reports, 249.

We affirm the judgment of court below.

Willis Vickery, and *Albert Holmes*, for Plaintiff in Error.

P. R. Kaiser, for Defendant in Error.

(Eighth Circuit—Cuyahoga Co., O., Circuit Court—Nov. Term, 1897.)

Before Hale, Marvin and Caldwell, JJ.

JOSEPH DAVIS, EXECUTOR, v. MARY HUTCHINGS.

Proceeding for the proper construction of will under sec. 6202 R. S. applicable to the determination of rights of legatees.

(1.) Although the rights of legatees under a will may be determined in proceedings under secs. 6198-9 and 6200 R. S., yet the means provided by sec. 6200 R. S. are not exclusive for the determination of the rights of legatees, and an executor may bring an action also under sec. 6202 R. S. asking the direction of the court as to the proper construction of the will, involving the determination of the rights of legatees.

"Balance" equivalent to "residue."

(2.) The word "balance", as used in the will in his case, is equivalent to "residue".

Void bequests—Objection may be made by any party interested.

(3.) Bequests in a will which turn out to be void for any reason, will go to the residue of the estate where there is a clause in the will bequeathing the residue of the estate to parties named therein.

Void bequests inure to benefit of residuary legatee, not to heir-at-law.

(4.) Where bequests to charitable institutions are void because made within a year of testator's death and an heir-at-law is living, under sec. 5915, R. S., the heir-at-law is not the only party who may object to such bequests, but any party interested in the estate may do so. And such bequests will not inure to the benefit of the heir-in-law, but go to the residue of the estate, and inure to the benefit of the residuary legatee.

Appeal from the Court of Common Pleas of Cuyahoga county.

MARVIN, J.

The case of Joseph Davis, executor of the will of William Hutchings, deceased, against Mary Hutchings and others, is a case commenced by a petition filed in the court of common pleas by Joseph Davis as such executor, asking for the instruction of that court as to his duties under the will of which he is executor.

The petition was filed under the provisions of sec. 6202 of the Revised Statutes, which reads:

"An executor, administrator, guardian, or other trustee, may maintain a civil action in the court of common pleas against creditors, legatees, distributees, or other parties asking the direction or judgment of the court in any matter respecting the trust, estate, or property to be administered, and the rights of the parties in interest, in the same manner and as fully as was formerly entertained in courts of chancery."

And then follows a provision that if the trustee is requested to bring such action—to file such petition, by certain parties, he shall do so.

A demurrer was filed to this petition.

The petition sets forth that the plaintiff is the executor, duly qualified, of the will of William Hutchings, deceased, and then he quotes from the will various provisions. He says that different parties make a claim to the same parts of the estate, and he asks the direction of the court.

Very little was said in the hearing, as to this demurrer.

The cases of The First Presbyterian Society against the First Presbyterian Society, 25 Ohio St., at page 128; Merrick against Merrick, 27 Ohio St., page 126, and Bowen against Bowen, 38 Ohio St., page 426, are all to the effect that a state of facts such as the petition in this case discloses, warrants the filing of such a petition. Attention is called to the case of Bowen against Bowen, supra, for the reason that in that case, although it is held that the rights of legatees under a will may be reached by virtue of the provisions of secs. 6198, 6199 and 6200 of the Revised Statutes, yet the court, on page 429, says:

"The executors have the right, under the statute, to protect themselves by obtaining the direction and judgment of the court upon the meaning or effect of the will."

Section 6198 provides that proceedings may be had in the probate court by parties who claim to be entitled to a distributive portion of an estate, whether they be legatees, heirs, or other distributees, by which their rights may be

determined; but that can only be done after a general order of distribution has been made, the executor having filed his account showing the amount in his hands after the payment of debts, costs and expenses, and any legacies which he has paid; and, if thirty days thereafter he has failed to pay any one who claims to have the right to a distributive portion, such person may commence proceedings either in the probate court or in the court of common pleas, and if commenced in the probate court, the court shall, on motion of either party, send the case to the court of common pleas, and the parties may all be brought in and their rights determined in that action.

It seems to us clear, that the means provided in sec. 6198 and the sections immediately following, are not the exclusive means by which the rights of legatees in a case like the present may be determined, but that the course pursued by the executor in filing his petition in this case is clearly authorized, and that it is the preferable course to pursue. The demurrer is overruled.

We come then to what construction is to be given to this will.

William Hutchings executed his will on the 24th day of November, 1893, and died on the 12th day of September, 1894—less than one year after the execution of the will.

He had but one heir-at-law, an adopted daughter by the name of Isolena Davis.

By his will he provided for the payment of his debts, and the costs and expenses of settling his estate. He then bequeathed property as follows:

To his daughter, Isolena Davis, $500.00;

Then to quite a number of other people, some relatives of his and some relatives of his wife, sums amounting in the aggregate to $2,800.00.

He then follows with bequests as follows: "$1,000.00 for the county poor-house for Cuyahoga county;

$1,000.00 to the Congregational church at Chagrin Falls, Ohio; and $500.00 to The Bible Christian Conference in England—in the aggregate, $2500.00. Then (after directing that his real estate be sold) he says:

"And further the proceeds arising therefrom, with all from any and all sources, due to me from mortgage, bank, or bills unpaid at the time of my death, be used in paying all before specified as my indebtedness to my legatees and charities, and the balance divided between the children living at my death of the hereinafter named brothers and sisters of my late wife and myself,"—naming them.

The contention here is on the part of Isolena Davis; she being, as I have already said, the only heir-at-law, being an adopted daughter of the testator.

It is contended on her part that, as the bequests made to these charities, by virtue of the statute, sec. 5915, are void he died intestate as to that $2,500.00; and therefore, his daughter, as heir-at-law, is entitled to have that amount paid to her; while on behalf of the people named as those who are to have the "balance," it is claimed that such $2,500.00 goes to them as a part of the residue of the estate not already disposed of in the will.

Something was said on the hearing, as to this language: "The *balance* be divided between the children living at my death of the hereinafter named brothers and sisters of my late wife and myself;" that that was not equivalent to saying "the residue be divided" among these people, or is bequeathed to these people.

It seems to us that the word "balance," as used here, is equivalent to saying that the "residue" be divided between these people; that what he meant to do was to give what was left after the payment of the bequests preceding this, to these people; and if that is so, we can see no distinction to be made between using the word "balance," and the word "residue".

The authorities are almost uniform that bequests in

a will, which turn out for any reason to be void, will go with the residue where there is a clause in the will bequeathing the residue of the estate to people named in that clause of the will.

In some of the jurisdictions there is a distinction made between devises of real estate and bequests of personal property. And it is held in some jurisdictions—not as uniformly now as earlier—that a devise of real estate to a residuary devisee will not include a devise made in a will which lapses or becomes void; but the cases which so hold do not hold that the same is true as to personal property.

There is a case in 6 Conn., page 293—the case of Greene v. Dennis, in which it is held that a devise of the residue of real estate after certain devises had been made, and where, among the devises made, there were some which had lapsed—that the devise of the residuum would not carry that part of the real estate included in the void devise, but in that case, the court say in the opinion, on page 304, that if it were a bequest of personal property, the rule would be different, and that the residuum would include the void bequest.

In the case in 9 Allen, page 283, Thayer v. Wellington, the court go into an elaborate discussion of the effect of a bequest of a residuum of the estate—where any bequests named in the will are void or have lapsed from any cause, and they say that the rule is universal in its application, or that the courts are uniform in holding, that the bequest of the residuum takes not only all that is not bequeathed otherwise in the will, but all that is not well bequeathed—so bequeathed as that the legatee can take it.

In the argument, we were cited by counsel representing the heir-at-law, to a case in 20 Wendell, 457, Van Kleeck v. The Minister and Officers of the Reformed Protestant Dutch Church of the city of New York, as holding a contrary doctrine. An examination of that case shows it was a

devise of real estate, and not a bequest of personal property, and the court say, that if it were a bequest of personal property, the rule would be otherwise, and that the legatee of the residuum would take the bequest which had lapsed or become void.

Another case upon which counsel for the heir-at-law seem greatly to rely, is the case of Kerr v. Dougherty, in 79 New York, page 327.

In his brief, the counsel for the heir-at-law makes copious extracts from the opinion in this case (Kerr v. Dougherty). The judgment was rendered by a divided court—two judges dissenting—and in that case the judge delivering the opinion for the majority announced the general rule, that a residuary bequest will include such parts of the property as were not so bequeathed as that the legatee could take under the bequest; but the court—satisfactorily to itself—made a distinction between that case and the ordinary bequest of the residuum. That case has been considered in the state of New York a good many times since—in the 96 N. Y., page 499, in the matter of Benson, guardian; in 113 N. Y. 115, Ricker v. Corvince; in the 88 N. Y., 568 in the case of Floyd v. Carow; in the 18 N. Y., 243; 46 Hun, 509; 126 N. Y., 215, Booth v. The Baptist Church—each one of these cases comments on the case of Kerr, executor, v. Dougherty, supra; and in each it is stated that the doctrine in New York, as well as in other jurisdictions, is that a bequest of the residuum of personal property carries to the residuary legatee not only all that is not otherwise bequeathed, but also such as is undertaken to be disposed of under void bequests, and that no other doctrine was intended to be announced in the Kerr v. Dougherty case, although the language used in the opinion might be understood otherwise.

It was urged, in the argument, that the manifest purpose of sec. 5915 of the statutes was to protect the heir-at-law,

and that since but for the fact of the adopted daughter, Isolena Davis, being alive, the bequests to the several charities would be good, she and she alone should profit by the fact that such bequests were made void by the statute; that is, that whoever takes that included within the void bequests, does so because the daughter is alive, and that it would be unreasonable to say that these residuary legatees shall take this when the only reason that any one can take it from those named in the void bequests, is because she is living; that certainly she should be the one benefited by the bequests becoming void.

A similar argument was used in the case of Patton v. Patton, 39 Ohio St., 590, and the court, in considering it in the opinion, on page 596, use this language:

"This contention is based on the assumption that lineal heirs alone might object to such bequest, as the proviso was for their protection alone. But this assumption is not authorized by the statute. We can see no reason why any one interested in the descent and distribution of the estate might not assert the invalidity of the bequest. True, the invalidity of the bequest depends on the existence of lineal descendants, natural or adopted, at the death of the testator; but no use of the void bequest is preserved to lineal descendants."

We find nothing in this case to indicate that the testator intended that his daughter should receive more than the $500.00 bequeathed to her. She was not overlooked at the time the will was made, and it would seem that the testator had no desire or intention that she should receive more than the amount named in the bequest to her.

We, therefore, conclude that the money named in the bequests to charities is to be treated as a part of the residuum of the estate to be distributed to those named as taking "the balance," and the decree will be entered accordingly.

E. P. Wilmot, and *A. W. Jones*, for Plaintiff.

C. Collister, and *Judge Jones*, for Defendant.

(First Circuit- Hamilton Co., O., Circuit Court—Jan. Term, 1897.)

Before Day, Price and Norris, JJ.

(The judges of the Third Circuit sitting in the First Circuit.)

H. M. DUNLAP v. DOUTHET et al.

Judgment of court of other state—Proof of—

DAY, J.

The law of Pennsylvania, constituting and conferring jurisdiction on the court of common pleas of Allegheney county, Pennsylvania, having, without objection, or exception, been proven, a duly attested and certified transcript of the record of a judgment of that court, is competent evidence to establish the fact of such judgment.

Judgment affirmed.

(Eighth Circuit—Cuyahoga Co., O. Cir. Court—Dec. Term, 1897.)

Before Caldwell, Marvin and King, JJ.

(King, J. of the Eighth Circuit taking the place of Judge Hale.)

THE EAST CLEVELAND RAILWAY CO. v. SYLVESTER T. EVERETT.

Private corporation—Sale of bonds—Power of selling committee to employ broker—

1. A committee, duly empowered by a corporation to negotiate for purchasers and to sell an issue of bonds, have power to employ a broker to sell such bonds.

Same--Compensation of broker employed—

2. A broker so employed and rendering services under such employment may recover of the corporation the reasonable value of such services.

Sale at less than par not without express authority of Board of Directors—

3. The Board of Directors not having authorized its said committee to sell the bonds at less than par, the committee could not authorize a broker to secure purchasers for ninety-five per cent of par.

Evidence—Hypothetical question must apply to facts of case—

4. In proving the value of the services of such a broker by the testimony of experts, it is improper to include in a hypothetical question the statement that such broker was authorized to sell the bonds at ninety-five cents on a dollar.

KING, J. (In place of Hale, J.)

The plaintiff in error was plaintiff below, and brought its action to recover the value of fifteen (15) bonds, it alleged that the defendant had converted to his own use, of the value of $15,000. Defendant in his answer denied the conversion, alleged that the bonds, with others, were placed in his hands as a broker to negotiate a sale thereof, and, as a second defense, alleged that he rendered services pursuant to an employment by the railroad company in the sale of an issue of $1,000,000 of bonds, which entitled him to a commission as compensation in the sum of $25,000.

The trial resulted in a verdict and judgment for the defendant in the sum of $4,750.

The first objection, and one argued at length, is that the only authority shown for the services defendant alleges he rendered, is pursuant to a written agreement set forth in the answer, purporting to have been made with the plaintiff, but in fact, plaintiff says it was made with the president and assistant secretary of the corporation, and without the knowledge or consent of the board of directors, and, it is argued, was beyond the power and authority of these officers to make.

It appears from the record, that the defendant has for many years been interested and engaged in owning, negotiating, buying and selling securities of the character described in this case; that the president of this railroad company was his brother, the secretary thereof, a relative, and he himself was a stockholder; that on January 12th, at a stockholders' meeting, a resolution was adopted authorizing the board of directors to mortgage the railway property for $1,000,000, and to execute bonds for that sum bearing interest at five per cent. and due in eighteen years, and to dispose of the same and use the proceeds in payment of an existing mortgage and certain floating indebtedness; and defendant claims, that, thereafter, the president and secre-

tary directed him, verbally, to investigate the bond market. That he had repeatedly been engaged in negotiating loans for the plaintiff, and these officers called on him again. That he visited eastern cities where such bonds are usually sold, and made efforts to sell and place them.

Before any bonds were actually sold, the board of directors, on the 12th day of March, passed a resolution authorizing the president and secretary of the corporation to cause the bonds to be printed, to properly execute a mortgage upon the property securing the same, and to dispose of the bonds and pay the indebtedness before referred to

On the 2nd of March, ten days before the passage of this resolution, the contract which the defendant alleges is the written evidence of his employment was entered into actually between the president and the assistant secretary of the corporation on one hand, and Sylvester T. Everett on the other hand, but apparently was entered into by the railroad company through said officers.

The evidence seems to satisfactorily show that beyond the knowledge of the president, secretary, assistant secretary, and one other director, the other directors as individuals and the board of directors as a body had no notice or knowledge of any kind that this employment or contract had been entered into. And these directors, outside of the four mentioned, testified that they had no knowledge that Mr. Everett was engaged in the performance of services for this railroad company.

We do not think, however, in order to sustain the defendant's claim, that it was necessary to show a contract with the corporation, although on that point the court charged the jury that it was necessary to either show a contract with the board of directors, or a ratification by them of one already made.

Without extensively quoting, reference may be made to 3 Thompson's Law of Corporations, sec. 3945, and the case there cited, 11 Metcalf, Mass., 167.

Same author, sec. 3955, says:

"The execution of the necessary written instruments to effectuate the powers thus possessed by such committee, being a mere ministerial act, the committee has, no doubt, the power to appoint an attorney in fact or sub-agent to execute such instruments."

And the same author, vol. 4, sec. 4659, refers to numerous acts which have been held valid on the part of the president of the corporation without express authority. Among others, "to employ a broker to sell certain stock which the bank has taken to secure a loan."

Section 5866, refers to the powers of the president, or secretary or managing officer, to employ an attorney to prosecute or defend litigation, and referring to authorities in 9th Paige, 496; 5 Denio, 355; 61 Missouri, 89-94; 2 Metcalf, Ky., 240. Also sec. 4970, referring to a case in 13 Col., 534. And as to the general doctrine upon this subject, I refer to the same author, sec. 4881:

The stockholders in this case had conferred upon the board of directors the power, not only to make out the evidences of debt and execute them, but to negotiate and sell them. The board conferred upon its president and secretary practically the same power. Hence we think the president and secretary might authorize one engaged in the business of negotiating for purchasers of such securities, to negotiate for the sale of these, and that, if the defendant, pursuant to this authority, verbally in the first instance, but afterwards reduced to writing, performed services, and on March 12th. the power of the president was confirmed by the resolution of the board, then he might recover what those services were reasonably worth.

It is urged in the second place, that the charge of the court is erroneous in this respect, that the court said to the jury, "the testimony of experts in the form of an opinion as to the value of such services, based upon an assumed

state of facts—a supposed state of facts—is entitled to little weight if the facts assumed, or any material part thereof, as the basis of their opinion, are not true." There is a little more in the charge to the same effect. And we think that this portion of the charge is not supported by the authorities, especially a case in the 7th Circuit Court Reports, 328 and 332; also 28 Ohio St., 547. We should be obliged to hold this was erroneous, but curiously enough, before the court proceeded to give its general charge, the plaintiff requested certain matters to be given in the charge to the jury, and, among others, the following:

"14. Testimony of experts in the form of opinions based upon an assumed state of facts, is entitled to but little weight if the facts assumed, or any material part thereof, as the basis of their opinions, is not true."

According to our analysis of this request and the charge upon that subject, they are substantially identical in form and effect, and the plaintiff having requested the court to give that to the jury, can hardly take advantage of it by exception or objection now after the court has given it.

3rd. Passing from the charge upon the subject of expert evidence, there are numerous objections to the form of questions and the character of the testimony given in response thereto, throughout the record. On page 250, is the first of these, and it contains, as a fact, one statement that is carried into very many of the questions in this record, and may be disposed of in passing upon this single question. The witness is inquired of, in substance, what would be a fair commission for selling $1,000,000 of five per cent. bonds running eighteen years and conditioned upon the paying off of a prior $500,000 mortgage and cancelling certain floating indebtedness? The attorney, in a second question, says, you would have to take it for granted that the company placed a minimum limit of 95 and that the bonds, in point of fact, were placed at from 98 to par.

Again, the attorney says before the answer comes in, placing them at from 98 to par, the minimum price for the sale of the bonds by the company being 95. To all of this there are proper objections, and the witness answers, that the commission, under these circumstances, would be 3½ to 5 per cent.

The difficulty with this question arises from the assumption that the company had authorized the sale of these bonds at 95. From first to last of this record, there is produced no action of the company fixing the minimum price at which these bonds were to be sold, no action of the company fixing any price at which they should be sold, no action by the company, by its board of directors or stockholders, authorizing any committee of its own number to fix a price at which these bonds should be sold, no resolution authorizing the president and secretary to fix such price, and we are constrained to hold that upon the proposition of the power to fix a price less than par, that the president or secretary or other officer or person having only a general authority to negotiate for the sale of bonds, has no power to sell the same at less than par without the concurrence of the board of directors in his act, and hence, that the minimum price fixed for these bonds at ninety-five cents on the dollar is an assumption not supported by the proof. The only ground for that arises in the written contract set forth in defendant's answer. in which the defendant is authorized to negotiate these bonds at a price not less than ninety-five cents on the dollar; but, as I have suggested, the president had not any authority to fix the price, and, consequently, had no authority to authorize the defendant to fix that price as a minimum, and hence, it was an improper fact to put into a hypothetical question.

A reading of these questions and the answers thereto, indicate that the witnesses generally gave considerable importance to the fact that the company was willing to sell

these bonds at ninety-five cents on the dollar, and that this broker had negotiated their sale at ninety-eight cents or par, and it had, in our judgment, considerable effect in determining the amount of commission testified to by these various witnesses.

On page 287 of the record a hypothetical question is asked, substantially in this form: "What would be a fair compensation for the sale of these bonds, running eighteen years, bearing five per cent. interest, the sale being made at 98, and from the proceeds pay off a mortgage of $500,000, Mr. Sylvester T. Everett managing all the details of the transaction and paying his own expenses?" We think that is an unfair assumption. The question should state the precise facts, whether these are but few in number or many, which it is claimed the evidence tends to prove were the acts performed in the sale of these bonds and the earning of this commission, and to inject into the question "managing all the detail of the transaction," is meaningless, or if it has a meaning, may well be misleading, and the question should not have been allowed.

On pages 377 and 378 of the record are questions asked of the witness Lamprecht, in one of which is stated this hypothesis

"Before going east he executes one note signed by himself for $100,000 endorsed by the East Cleveland Railway Company, endorsed another note executed by the East Cleveland Railroad Company to raise money to pay off the $200,000 with accruing interest on the note secured by mortgage for $500,000 in the east."

We think these facts should have been omitted from that question, and that the question was incompetent in the form in which it was made.

Defendant's cause of action is not for commissions earned in endorsing paper, and, so far as anything in this record is concerned, there is nothing to show but that this was al-

ways an accomodation on the part of the defendant, and there was no understanding or agreement with the president or any other officer of the corporation that the defendant was to be paid for such endorsements, and that should have been omitted from the question.

All of these questions, then, to which special reference has been made, were erroneous, and we think their answers had considerable effect upon the verdict in this case.

4th. Considerable has been said about the charge of the court upon the subject of ratification.

We do not think anything in the charge of the court is erroneous upon that subject unless it may be said that the court gave too great prominence to that question and the charge is thereby misleading. There is, in our judgment, no evidence in this case, upon the subject of ratification. Defendant was entitled to recover, if at all, upon his contract of employment. He has certainly shown no ratification of the contract that would authorize him to recover. We do not discuss, or think it necessary to discuss, whether he should have pleaded that or not. But the court might well have omitted considerable in the charge, upon the subject of ratification.

5th. We believe and are constrained to hold that this verdict is erroneous as to the amount of it. We think the weight of the evidence indicates that the defendant was not entitled to recover as his compensation for the services rendered, in any event, a sum exceeding the amount of the proceeds of the bonds he admitted he had received.

Shortly after the time when defendant alleged he performed the services, the president called upon him for his bill, and he made a written statement to the railroad company in which he charged the company for various services performed by him, for various sums of money paid to and for its use, and charged himself with the receipt of the $15,000 worth of bonds as well as others balancing the account

and so far as his act goes, satisfying his claim against the company by the receipt and credit of $15,000. That was an important act, and the jury ought to have been instructed that it was entitled to great weight, and we think it is fair to say that from all the evidence, plaintiff ought not to recover a new and greater amount than that which he accepted, received, and notified the company was a full payment from it. It has more weight than a mere account; it has the effect of a receipt in full to the company; and, while a receipt may be explained, there seems to be nothing here explaining it, or no explanation other than that the amount credited was not as much as the services were worth in the opinion of the witness given at this trial.

We conclude, therefore, that because the amount of the recovery of the defendant is in excess of the amount he is entitled to receive, and because of the introduction of this evidence based upon improper hypothetical questions as referred to, that the judgment in this case must be reversed.

CALDWELL, J.

The court below, on the question of the authority of the committee appointed to negotiate these bonds—on the authority of the president to appoint Sylvester T. Everett to aid and assist the committee, charged the law in such manner that the plaintiff in error is not complaining of it, and there is no cross-petition in error, so that the law, as charged by the court below, is not involved in this case in the trial here and, not being involved, I do not want it understood that I am committed to that proposition of law.

MARVIN, J.

I concur in the opinion as read.

J. M. Jones and *W. W. Boynton*, for Plaintiff in Error.

Dickey, Brewer & McGowan; *Everett, Weed, Meals & Sluss*, for Defendant in Error.

(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1897.)
Before King, Haynes and Parker, JJ.

THE TOLEDO & MAUMEE VALLEY RAILWAY CO. v. THE TOLEDO TRACTION CO. et al.

Street railroad—Arrangement by one to allow other road use of its tracks—Arrangement of such other road with third road to use tracks, when will not invalidate arrangement with the first road—

A traffic arrangement between two electric street railroads, by which road A., the city road, agrees to furnish power and permit road B., the suburban road, to run its cars and traffic over the tracks of road A., is not violated by road B. permitting a portion of its cars to run over the tracks of another connecting road as well as over its own and the tracks of road A., where the latter arrangement does not increase unreasonably the number of cars to be carried by road A.

Error to the Court of Common Pleas of Lucas county.

KING, J.

This is an action begun in the court of common pleas November 25, 1896, to enjoin the defendant, The Toledo Traction Company, who is, at the time of this trial, the successor of the other defendants by virtue of consolidations and otherwise, from interfering to obstruct and stop certain of its cars about to be run over the tracks of the defendant in the city of Toledo.

The petition alleges, that on June 1st, 1894, the plaintiff entered into a contract with the defendant, whereby it acquired a right to run its cars over the tracks of the defendant in the city of Toledo therein described, and sets forth in its petition the contract in full. The answer denies so much of the petition as alleges that the defendant is wrongfully stopping the cars, and alleges that the plaintiff had no right to run the cars in question over its track in pursuance of the contract described in the petition, or otherwise.

It appears from the pleadings and from the evidence, that in 1894, the plaintiff, an incorporation, was about to build and construct a railroad which should run along, near or adjacent to the Maumee river, on either side of it, and

should run from the line of the corporation of the city of Toledo, on the west side of the river, to and through the village of Maumee, crossing the Maumee river near the village of Maumee, and running on the easterly side of the Maumee river to the corporation line of the city of Toledo, connecting at both of these points with certain lines of the defendant, and so when completed there would be, pursuant to this contract, a complete belt line constructed and running through the city of Toledo, and on either bank of the river, and through the villages of Maumee on the western side of the river, and Perrysburg on the eastern side of the river. The road was constructed as proposed in this contract, and the parties to this case and to that contract entered into carrying out the provisions of it, and continued to carry them out for a period of time, perhaps a year and a half or two years, when, after the construction of the plaintiff's road, and while the parties were in the execution of this contract according to its provisions and terms, about April, 1896, a corporation, called The Toledo, Bowling Green & Fremont Railway Company was chartered, and constructed, or was then about to construct, a railway from the village of Perrysburg to Bowling Green, some ten miles further south from Toledo than Perrysburg is situated, and proposed to connect it with the road of the plaintiff; and thereupon it entered into a contract with plaintiff in most of its terms substantially like that entered into between the plaintiff and the defendant in respect to running cars over its tracks. The road was constructed as proposed to Bowling Green, and the Toledo, Bowling Green & Fremont Railway Company entered upon the business of running cars over its tracks, and also entered into carrying out the provisions of its contract with the plaintiff, whereby certain cars which ran over the road of the Bowling Green & Fremont Railway Company, also ran continuously from the point where that road connected with the plaintiff's road, over the tracks

of the plaintiff's road, to the city of Toledo, and then ran over the tracks of the defendant's road, making the circuit that had been contemplated by the contract between the plaintiff and the defendant. That running arrangement was carried on for some months, when the defendant interfered to stop certain of these cars, and did stop them, and this action is begun to enjoin those acts—to enjoin the defendant from obstructing the running of these cars over its road. The arrangement between the Bowling Green road and plaintiff in this case, for running cars, is set forth at some length in its contract, which was offered in evidence, and the arrangements there stipulated for, have, in some respects, been changed between those parties by their subsequent conduct, or by subsequent oral agreements between them, so that, at the time when this action was commenced and when the defendant interposed these obstructions to running the cars, the facts were substantially these: The plaintiff company furnished three of its own cars which had, up to that time been ordinarily used upon its own tracks and in its own business, to be run over the line of the Bowling Green road, from Perrysburg to Bowling Green and return, as well as over the line of its own road; and as actually operated, they were run from the village of Perrysburg to and through Toledo and back, and thence to Bowling Green and return to the village of Maumee, and from the village of Maumee down its tracks to and through Toledo, making the same complete circuit stipulated for in the contract between these parties. The plaintiff road, up to the time it made this actual running arrangement with the Bowling Green road, had been running five cars upon its own road. When it made this arrangement, it took three of those cars and extended the distance that they were to travel in the manner that I have described. It added no more cars to its own line, and five cars were continued to be run over its line, two of them exclusively upon its line and

the line of the defendant, and three of them upon the lines of the defendant and the line of the plaintiff, and the line of the Bowling Green road. I might say that the real purpose of that arrangement, so far as it can be obtained from the proof, was to obviate the necessity of a transfer of passengers at the village of Perrysburg from the Bowling Green line to the plaintiff's line.

The written contract between the plaintiff and the Bowling Green road provides, among other things, in paragraph 2, following the preamble:

"Second party (Bowling Green road) shall furnish at its own expense and cost the power to propel and the men and labor to operate its cars over that portion of said road to be constructed by it, and it shall further pay to first party a sum sufficient to reimburse it for all moneys paid out or expended by first party in furnishing the necessary men and labor to run and operate the cars of second party over the entire distance along and around said railway of first party."

Again, in paragraph 4, is this provision:

"Second party shall deliver to first party and first party shall receive from second party, all cars of second party at the point where the said railway intersects the westerly line of West Boundary street in the village of Perrysburg. Said first party shall take charge of, operate, propel and run all of said cars from said point last above named in a northerly direction along its railway so to be constructed along or near the westerly line of Findlay street to Sixth street."

And then follows a description of the line of plaintiff's road.

So that contract, it appears, provides that in the interchange of cars and the running arrangements that were made between them, that when the cars came upon the track of the plaintiff's road, it was to operate, propel, and run them, and for the expenses of this operation and run-

ning, the Bowling Green road was in some manner thereafter provided for to pay the plaintiff road.

There are used in that contract a good many expressions in reference to the Bowling Green road's property, like "its cars;" but, as I have said, the conduct of the parties and their actual arrangements afterwards have so far changed this contract, that at the time when this litigation arose the Bowling Green road was running no cars of its own, but it was simply running the cars of the Maumee road over its railway under this contract with them, and when these cars came upon the track of the plaintiff's road, the plaintiff was to have charge of them, have complete control over them, and was to operate them. These cars, then, upon the road of the plaintiff, were under its sole management and control.

This contract, which is made the basis of this action, should not and cannot be construed beyond its true intent and meaning; but that meaning, obtained from the document itself, and the whole of it, aided by any extraneous light that the other testimony in the case may throw upon it, should be given to it by the court, and full effect should be given to such meaning when it can be once ascertained. That contract is very long, and provides a great many stipulations covering a variety of things that were anticipated to arise between these two companies, and it sets forth in the first paragraph of the preamble that the plaintiff proposed to build a road over a certain route, and that route is particularly described; but here I notice that from the beginning to the end of this contract, there is no provision or stipulation from which it even could be inferred that either party, at the time of the execution of this contract, contemplated that by its terms it should restrict the plaintiff from extending its road over any other route that it might thereafter desire to. It proposed to construct over this route, and that route is described, but it certainly is not by its lan-

guage restrictive upon the plaintiff, either as to the exact line the plaintiff's road should follow between the points named, nor that the southern terminus of this road should be at either of the villages named. It is said now, in the third paragraph at the commencement of the contract:

"The parties hereto desire to make a mutual arrangement and agreement, whereby said roads may be connected so that the traffic over the road of second party may pass over the roads of first parties, so as to make a continuous circuit or belt line connecting the city of Toledo and the villages of Maumee and Perrysburg, and so that the traffic may be transported between the points named without change of cars or delays of any kind."

Then the object of the parties when they got together, was to make a contract by which all the traffic carried over the road of the Maumee company might be carried without change of cars when it should reach the line of defendant's road. That was between the city of Toledo and the villages of Maumee and Perrysburg; but what effect has the placing in there of the villages of Maumee and Perrysburg, further than that they were points then contemplated where the road was to stop at the southern end? Had the parties at the time contemplated building a road, not to Maumee and Perrysburg, but to Napoleon or Bowling Green, there is nothing in the contract to show that the same provisions would not have been inserted with reference to traffic arrangements. It is true that there is nothing in any of the provisions that I have or shall hereafter refer to, that the defendant is bound to carry the independent distinct traffic of any other railroad. This paragraph is referred to as having some bearing:

"Second party shall deliver to said first parties, and the first party shall receive from second party, all cars running over the road of second party at the southerly line of the

city of Toledo, at the respective points on the east and west sides of the Maumee river above indicated."

Then there follows the provisions as to fares, which are immaterial here. There is this further provision:

"Second party shall forever indemnify and hold and save harmless said first parties, and each of them, from all liabilities, damages, costs, or expense, caused by the negligence or the wrongful acts of the employes of second party, in operating its cars over and along the tracks of the first parties, it being understood and agreed that the conductors, motormen and other servants and employes of second party, are not to be held or construed in any event or in any respect to be the agents, servants, or employes in any manner or form of said first parties, or either of them."

I refer to that for the purpose of distinguishing it from any provision there is in the other contract. There is no like provision in the contract with the Bowling Green road; on the contrary, the provision in that contract is, that the plaintiff's road is to operate the cars that it receives from the Bowling Green road, and that the Bowling Green road is to pay it the expense of such operation. If that were carried out in accordance with the plain language and expressed intent and purpose of it, the plaintiff company would be responsible for the acts of negligence of the conductors and motormen upon the cars that it received from the Bowling Green road while they were running over its road. Whether it might fall back eventually upon the Bowling Green road is another matter, but this responsibility it assumes by its contract. By the contract said plaintiff is made responsible for the running of its cars when they get into the city of Toledo. It there contracts with the defendant company that it will indemnify it against any liability or any loss that it may sustain by reason of any acts of its employes, etc.

We think that the only question now submitted to us is whether the defendant should be enjoined from obstructing

the three cars which the proof shows were being run, not only over the plaintiff's road, but over the Bowling Green road as well. We do not see fit, nor do we think it is important, to discuss or to decide upon any case or state of facts which are not before us. We seek only to ascertain if there has been such a substantial violation of the contract between these parties by the plaintiff, as authorized the defendant to stop these three cars under the circumstances described. The defendants here claim, not that it should not carry the passengers or traffic brought into the city over the defendant's road from Bowling Green or from the Bowling Green road, but that it should not be required to allow the cars to run over the plaintiff's road and under the plaintiff's direction and authority, that have also been allowed to run over the Bowling Green road, to come into the city and run over defendant's road, and use its power; that is to say, these three cars that have not only been used upon the plaintiff's road to accomodate its traffic—carrying passengers that come upon the cars along its line—but also used to go beyond the limits of plaintiff's road, and to carry traffic and passengers that came from points further away may be stopped. If these passengers and this traffic came from these further points by any means possible, and at Perrysburg or Maumee came upon the cars of the plaintiff company, it is conceded that defendants are bound to carry them. Now then, in this case these cars are the property of plaintiff. There is no evidence in the case showing under what terms and conditions they are allowed to run over the Bowling Green road; and while they run over the plaintiff's road they are operated by and are under its exclusive control, and while they run upon its tracks they carry passengers to and from Toledo and from and to points along its line; and if these cars remain on plaintiff's line until they reach Toledo, it is said by the defendant they have a right to come into the city over defendant's tracks; but if at some

point along the line of plaintiff's road they are allowed by the plaintiff to run off on a side track to some other place, and pick up other traffic and passengers there and bring them onto plaintiff's road, they are not allowed to enter the city under the provisions of this contract. We do not think the contract should receive such a narrow construction as that would be, irrespective of any question of public policy or the rights of the public to travel upon these roads.

We deal only with the case that we have before us, and do not undertake to discuss anything that might arise hereafter. It might be conceded that if an unreasonable amount of traffic is furnished to the defendant's road, or an unreasonable number of cars without traffic are furnished, that the defendant would have a right to relief in some form or other; but as long as its objection is not that it is receiving traffic, but that the traffic does not originate upon the line of plaintiff's road, but comes from some other track and by some other means reaches the plaintiff's road, we do not believe that their objection to running these cars is well founded. We do not believe it is a substantial objection, in other words, resting upon good and solid grounds, that would authorize us to say, as we would have to say if we dismissed this bill, that the defendants have a right to put obstructions in their track, and stop the running of these cars, carrying this kind of traffic. It is stated they have to furnish power. It is true they have contracted to do that; but the ultimate object and purpose of this contract was, to get business. It is idle to seek to evade it. It was supposed when the parties entered into it, that it would be mutually beneficial to both of them. That was the idea in making it, that to secure the proceeds from the carrying of passengers would be mutually beneficial to both roads; and to say now that because those passengers come from a few miles south of Perrysburg they should not be allowed to come into the city under thiis contract, would

put a very strained construction on it, the only ground for resting it upon, being the fact that they rode continuously from their starting point to the city of Toledo on the cars of the plaintiff. To say that this will open up the roads of the defendant to the traffic of the country around here with every railroad whose traffic may be run into the city of Toledo upon it, is begging the question. We haven't reached that point. This conclusion does not give the right to another company or individual to run its traffic or its passengers or its cars over the tracks of the defendant company. But we think all the facts in this case concur in making these cars and this traffic, the cars and traffic of the plaintiff road, that come fairly and squarely within the provisions of this contract, which the defendants are bound to receive under this contract in the manner in which it has been tendered to them. Therefore the injunction prayed for will be made perpetual.

Smith & Baker, for defendants.

King & Tracy, for plaintiff.

(First Circuit—Hamilton Co., O., Circuit Court—Jan. Term, 1897.)

Before Day, Price and Norris, JJ.

(The judges of the Third Circuit sitting in the First Circuit.)

JNO. KRAUSE v. AMANDA E. STICHTENOTH et al.

Overruling Demurrer with leave to answer, is not final order to which error will lie.

DAY, J.

The ruling of the court of common pleas, sustaining the demurrer to the petition in this case, and granting leave to amend the pleading in ten days, is not a final order to which error will lie.

The petition in error is dismissed.

(Eighth Circuit—Cuyahoga Co., O., Cir. Court—Dec. Term, 1897.)

Before Caldwell, Marvin and King, JJ.

[Judge King of the Sixth Circuit taking the place of Hale, J.]

THE STATE OF OHIO ex rel. THE CITY OF CLEVELAND v. THE CLEVELAND ELECTRIC RAILWAY CO.

Mandamus--When will not lie—

(1). Mandamus will not lie where there is no office, trust or station which the law specially enjoins upon the defendant. Nor will it lie where the relator has a plain and adequate remedy in the ordinary course of the law.

Acceptance by street R. R. of conditions of ordinance, or franchise by county commissioners constitutes contract—

(2). Under sections 2501 and 2502, when a street railroad company accepts the conditions of an ordinance which fixes the terms and conditions of the construction and operation of its road upon a street of the city, the same constitutes a contract between the city and the street railroad company. By sec. 3439, the same is true as to county commissioners where that board grants the easement to the railroad company.

State as a party in mandamus--Extent to which state will proceed—Public and private rights—

(3). Where the relator is a private corporation or an individual, and the public is in no way interested, the state, though a party, will not go beyond the point where the rights of the relator cease. But in matters where the public is concerned the state may and often will go beyond the point where the rights of the relator cease.

Same—Complete remedy at law—

(4). Where the rights of the relator are fixed by contract and the relator has a complete remedy at law to enforce such contract rights, and the state cannot proceed with the action without having the contract in question first construed and then enforce it as construed, the state will leave the relator to its remedy at law.

Error to the Court of Common Pleas of Cuyahoga county.

CALDWELL, J.

The petition sets forth that the defendant, The Cleveland Electric Railway Company, has a line of road in the city of Cleveland, commencing at Water street and passing over Superior street, and various other streets until it reaches Cedar avenue, and then over that avenue until it reaches the easterly limits of the city. This is known as its Cedar

avenue line. Being anxious to extend this line without the city limits some eight years ago, it presented its petition to the county commissioners for a grant to lay its road on Cozad street from the end of Cedar avenue line to the Mayfield road, and from there over certain roads to its car barns on Euclid avenue, and on other streets named, back to the point on the Mayfield road where Cozad street comes into that road.

This easement was granted by the county commissioners with all the conditions usual as to location of tracks on the roads, paving, manner of running cars, and others.

This grant specifies no time that it shall continue. It provides that all the cars passing over Cedar avenue shall pass over the roads and streets named in the grant. This grant was accepted by the company, and the extension built and operated.

Some four years ago, by an extension of the city limits, all of the streets and roads covered by the grant before referred to, became a part of the city. The name of Cozad street was changed to that of Murray Hill avenue. Prior to the bringing of this action, the defendant ceased to run cars over Murray Hill avenue, and extended its Cedar avenue line up Cedar Glen, and so on to Murray Hill. The city council by numerous resolutions and ordinances, sought to compel the defendant to continue running its Cedar avenue cars over Murray Hill avenue. The defendant refused to comply with any, or all of said resolutions and ordinances, and this action in mandamus was then brought by the city in this court, to compel the defendant to run its Cedar avenue cars over Murray Hill avenue.

This is a statutory action, and can be brought only when the statute authorizes the same.

The defendant claims the statute does not warrant the bringing of mandamus by the city for the relief it seeks, for two reasons: 1st. Because there is no office, trust or

station, which the law specially enjoins upon the defendant. 2nd.—Because the city has a plain and adequate remedy in the ordinary course of the law.

Sec. 6741 provides when a writ of mandamus may issue:

"Mandamus is 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."

Sec. 6744 provides when it must not issue:

"The writ must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law; and it may issue on the information of the party beneficially interested."

If the defendant is avoiding or violating a public duty, or easement granted by the city, then a special remedy has been given the city, in sec. 1777, Rev. Stat., which provides certain duties of the city solicitor:

"He shall apply, in the name of the corporation, to a court of competent jurisdiction, for an order or injunction to restrain the misapplication of funds of the corporation, or the abuse of it corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinances governing the same, or which was procured by fraud or corruption. And he shall likewise, whenever an obligation, or contract, made on behalf of the corporation granting a right or easement, or creating a public duty, is being evaded or violated, apply for the forfeiture or specific performance of the same, as the nature of the case may require."

The plaintiff contends, that the obligation of the defendant to operate its road on Murray Hill avenue, is not only a contract duty, but is a corporate duty resting upon it perforce of its charter, and this duty is a trust.

There is force in this claim. Whether this is a case where the state can, and will reach out beyond the contract of the city with the defendant, and enforce this duty upon

the defendant as a charter duty resulting from a trust, is a question somewhat new in this state, and not free from difficulties.

Sec. 2501, Rev. Stat., imposes upon the city council the duty of fixing the terms and conditions of construction and operation of street railroads in the language following.

"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 the council, by ordinance, shall have granted permission and prescribed the terms and conditions upon, and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor; and cities of the first and second grade of the first class, and of the second grade of the second class, may renew such grant at its expiration, upon such conditions as may be considered conducive to the public interest."

Sec. 2502, Rev. Stat., provides, among other conditions: "That no grant nor renewal of any grant for the construction or operation of any street railroad, shall be valid for a greater period than twenty-five years from the date of such grant or renewal, * * * and * * * the municipal corporation shall not, during the term of such grant or renewal, relieve the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant."

These statutes apply to street railroad grants given by the county commissioners, as will be seen by sec. 3439, of the statutes.

When the terms and conditions of a grant are fixed in an ordinance or resolution, passed by the authority having the power to grant, and they are accepted by the railroad company, they constitute a contract binding upon both parties.

The Cincinnati Str. R. R. Co. v. Smith, 29 Ohio St., 291; The Cincinnati & Springfield Ry. Co. v. The Village of Carthage, 36 Ohio St., 631; City of Columbus v. Str. Railroad Company, 45 Ohio St., 98.

In the Cincinnati Str. R. R. Co. v. Smith, it was contended, that the streets being in the public, the grant is a contract made in behalf of the public, in the making of which the city does not act in its own behalf as a corporation, but as the agent of the public, in the exercise of a governing power of the state, delegated to it in the particular instance to be exercised in the mode authorized. The court cites the statute as to recording plats, showing streets, alleys, etc., and that the effect declared by the statute, is to place the streets, etc., in the corporate name, in trust to, and for the uses and purposes so set forth, and expressed or intended. The court then say:

"This vests the fee of the streets in the corporation, subject to the right of the state to direct the mode of administering the trust."

Then, after citing the statute placing all highways, etc., in the control of the city council, and the statute granting to the city council power to grant a company authority to construct its road in a certain street, etc., the court says:

"These sections, taken together, show that the state, in its sovereign character, has reserved no property interest in the streets in question. The revenues and profits that are to accrue from the use of the streets in the mode contemplated, will be the private property of the city, in which the state has no interest whatever."

The state has created the defendant a corporation with powers to build and operate a street railroad in the city of Cleveland. On what particular street, or streets, it may be built, on what terms and conditions it may build and operate its road, and for what time it may occupy the grant of the street, are all to be determined by the city council under such restrictions as the state has imposed upon the granting power. The grant of the county commissioners, and the acceptance of the same by the railroad, constitute the contract governing the parties, and mandamus is not the proper remedy to enforce a contract.

The city contends, that the effect of the grant given by the county commissioners without naming any length of time it is to continue, is, by implication, to extend it for twenty-five years, or at least, until the expiration of the grant of Cedar avenue. The railroad claims, it only continues at the volition of either party, both parties thus admitting that the time grows out of the contract, and is a part of it. The ultimate right they agree, is a contract right. This being true, the authorities all agree that mandamus is not the proper remedy.

As we have pointed out, sec. 1777, Rev. Stat., affords the city a plain and adequate remedy. It follows, that for the two foregoing reasons, this court has no jurisdiction to determine the rights of the parties by this action in mandamus.

The relator, the city of Cleveland, it is claimed, may have a complete remedy for enforcing its contract, and hence it may not be able to avail itself of the action of mandamus. Yet, the state is a party, and a party in interest, and as to the state, the remedy provided for the city is cumulative. That the state has created the corporation to perform a public duty upon the streets of the city, and the powers and duties of the corporation enjoin upon it a trust, and out of this trust arise duties to the public which the state can, and will command it to observe, even though the city may have another remedy.

The authorities agree, that in actions in mandamus, where the relator is a private corporation, or an individual, and the public is in no way interested, the state will go only so far as the rights of the relator go, in maintaining the action. But in matters where the public is concerned, the state may, and often will, go beyond the point where the right of the relator ceases. The relator may be barred from bringing mandamus, by reason of a contract, while the state may not thus be barred. The relator may have another plain,

and adequate remedy, while the state may not. A rule that the state, in such cases, often adheres to, is, that it will go no further than the relator can go if such advance step must be governed by the contract of the relator. We have seen that the state has given up all interest in the streets of cities, except to declare their uses and to regulate such uses. All else is committed to city councils. Not only has this extensive control over the streets been conferred on cities, but the remedies to enforce this authority are equally broad. This seems to point with great certainty to the intention that the city should act without the aid of the state, and that the state should not exercise its power of mandate, except, as a rule, in cases beyond the remedy given the city, or in cases of emergency, or in cases instituted by the Attorney-General. The supreme court of our state has, so far as we know, adhered to this.

The State ex rel. the Board of County Commissioners of Ross County, v. The Zanesville & Maysville Turnpike Road Company, 16 Ohio St., 308. In this case mandamus was brought by the county commissioners to compel the Turnpike Company to repair a bridge. The Turnpike Company was a public corporation, exercising its franchise in a public highway. The state was urged to go beyond the remedy of the relator. because there was a trust. The court say:

"Granting for the purposes of this case as here presented, the full competency of the parties and the binding obligation of the contract, alleged according to its terms, we look in vain for a duty, specially enjoined by law, 'resulting from an office, trust, or station.' Here is no office, no trust, no station, within any definition of that term known to the law. It is simply an obligation arising out of contract." * * * "We do decide, that purely contract obligations, involving no trust, cannot be enforced by mandamus."

The writ was demanded on the ground that it was the corporate duty of the Turnpike Company to keep the bridge

in repair. To this the court said: "We will assume that it is the corporate duty of the company to keep the bridge in repair; but does it follow, that the relators are entitled to the peremptory writ?" The court mention the question as to whether this corporate duty is a trust within the meaning of the statute; but in substance, say, that to call upon the court to decide that question, some one must be relator who represents the public; and the court will not decide it where the relator relies upon a contract and represents nothing but his own interest under that contract. The city appears in its corporate capacity, and as such it has no interest but its contract. It follows, that the court should go only so far as the relator can go.

Should the state undertake to go beyond this, it would at once find itself involved in the contract between the parties. The state cannot authorize the city and the railroad company to enter into a contract, among other things, determining the length of the grant, and then by mandamus compel the company to operate its road longer than it has agreed to. This would be authorizing parties to determine their rights by contract, and then the state compelling them to act beyond the contract. This would be impairing a contract which the state can not do, at least, in this way. It follows that the state can only construe the contract as to the grant. Is it for twenty-five years, or for the unexpired years of the Cedar avenue grant, or at the option of either party? After it is construed, then enforce it for such time. All this the city has ample power to have done without the aid of the state.

We conclude the statute of mandamus gives us no jurisdiction of this action.

The peremptory writ is refused, and the petition is dismissed.

Miner G Norton, and *G. L. Phillips*, for the Plaintiff.

Squire, Sanders & Dempsey, for the Defendant.

Newberry v. The State of Ohio.

(Sixth Circuit—Lucas Co., O., Circuit Court, Oct. Term, 1897.)

Before King, Haynes and Parker, JJ.

CHARLES F. NEWBERRY v. THE STATE OF OHIO.

Prosecution for conveying into prison things with intention to aid in escape—Sec. 6902 R. S.

On the trial of one charged under sec. 6902, Rev. Stat., with having conveyed into a county jail a revolver and other articles useful to effect the escape of a prisoner lawfully detained therein, and with intent to thereby facilitate the escape of such prisoner, the court charged the jury that if the defendant gave the revolver to the prisoner with the intent that he should use it to effect an escape while he was out of the jail for a temporary purpose in the custody of the sheriff, and to be returned to the jail when such temporary purpose was accomplished, then, while so temporarily out of the jail, he was a prisoner confined in the jail within the meaning of the statute, and such intent would be an intent to facilitate the escape of a prisoner detained in the jail within the meaning of the statute. Held: Not error.

Action of trial court in overruling motion in arrest of judgment based on many alleged defects in the indictment, sustained.

Error to the Court of Common Pleas of Lucas county.

PARKER, J.

An indictment was returned by the grand jury of Lucas county, Ohio, against the plaintiff in error, charging him with having conveyed into the jail of said county articles useful to effect the escape of a prisoner detained therein, in violation of sec. 6902, Revised Statutes, a part of which, applicable to the case in hand, reads as follows:

"Whoever conveys, or attempts to convey, into * * * a jail, * * * anything useful to effect the escape of any prisoner lawfully detained therein, and with intent thereby to facilitate the escape of such prisoner, whether an escape be effected, or attempted, or not, shall, if such prisoner be detained for felony, be imprisoned in a penitentiary not more than three years nor less than two years", etc.

The indictment after setting forth that one Harry Davis

had been charged with the crime of murder in Wood county, Ohio, upon which he had been arrested and ordered into the custody of the sheriff of Wood county to await the action of the grand jury, and for which he had afterwards been indicted by the grand jury; to which indictment he had entered a plea of "not guilty," whereupon he was remanded to the custody of said sheriff to await his trial, and had been by said sheriff conveyed to Lucas county and confided to the custody of the sheriff of said county for safe keeping, proceeds to charge that:

"Charles E. Newberry and John Muchler, Jr. afterwards, and while the said Harry Davis was and remained in the custody of the said Charles E. Tual, sheriff of Lucas county, and while so confined in said jail of Lucas county, and before the said Harry Davis had been discharged or released by any order of any court, to-wit: On the 10th day of November, 1896, at the county of Lucas aforesaid, unlawfully, feloniously and purposely did convey into the jail of Lucas county ten steel saws, one revolving pistol, one instrument commonly called a billy, one key, one-half pint of acid, and four quarts of whiskey, being tools, instruments and things proper to facilitate the escape, and useful to effect the escape of prisoners lawfully detained therein, and the same being such instruments and things aforesaid, then and there unlawfully and purposely did deliver the same without the consent or privity of the said Charles E. Tual, sheriff of said county of Lucas, to the said Harry Davis who was a prisoner in said jail as aforesaid, and was lawfully detained and confined in said jail for the crime of murder in the first degree as aforesaid, upon the order of the court aforesaid, said crime of murder being a charge of felony under the laws of the state of Ohio, and the said saws, pistol, billy, key, whiskey and acid being such instruments and things as aforesaid, were then and there so conveyed into said jail and delivered to said Harry Davis by the said Charles Newberry and John Muchler, Jr. as aforesaid, with intent then and there to aid and assist the said Harry Davis to escape and attempt to escape".

The conclusion of the indictment being in the usual form.

Preceding the part of the indictment which I have just read, is a history of all the steps taken in the arrest and prosecution of Davis before the return of the indictment against him by the grand jury of Wood county, and it sets forth that the warrant for his arrest was issued by the mayor of the village of Bowling Green in Wood county, to the marshal of said village and the sheriff of said county; that "Richard Biggs and Alf. Farmer were duly appointed special marshals, and took oath of office as such special marshals, to assist Joseph F. Reed, the marshal." That said special marshal Richard Biggs, arrested the said Davis, made his return of said warrant to said mayor, "whereupon the said Harry Davis, while then and there in the custody of said Richard Biggs was then and there, before said Almer R. Campbell, the said mayor as aforesaid, charged in due form of law upon a complaint in writing upon the oath of one Alf. Farmer with having unlawfully, purposely, feloniously, and with deliberate and premeditated malice, killed one Jesse Baker, whereupon the said Harry Davis was duly arraigned before the said mayor upon said charge, and upon hearing said complaint read, pleaded not guilty to the same, and then and there did waive an examination and requested to be bound over to the court of common pleas of Wood county, Ohio." That he was held accordingly without bail. "Whereupon the said mayor issued a commitment for said Harry Davis addressed to the keeper of the jail of said county of Wood, commanding him to receive the said Harry Davis into his custody in the jail of said county there to remain until he be discharged or dealt with by due course of law, and delivered the said commitment to Joseph F. Reed, the marshal of said village of Bowling Green, and afterwards, upon the same day, the said Joseph F. Reed, marshal as aforesaid, delivered the body of the said Harry Davis then and there into the custody of said Richard Biggs" the sheriff and keeper of the jail of Wood

county, who detained and confined him in said jail . That afterward "there being no sufficient jail in said county of Wood in which to safely detain and confine said Harry Davis while awaiting his said trial the said Harry Davis was, together with a copy of the commitment under which he was so detained and confined, delivered by said Richard Biggs, the sheriff of Wood county, to Charles B. Tual, the duly elected, qualified and acting sheriff of Lucas county, Ohio, the said Lucas county being a county in the state of Ohio, which adjoins the said county of Wood". That said sheriff of Lucas county received said Davis, and detaind and confined him in the Lucas county jail. That afterward, the grand jury of Wood county returned an indictment against said Davis charging him with murder in the first degree in the killing of said Jesse Baker, and that said Harry Davis was arraigned upon the said indictment and entered a plea of not guilty, thereto; "and it was by the said court ordered that the said Harry Davis be tried at nine o'clock in the forenoon of the 23rd day of November, A. D. 1896, and that the said Harry Davis be and remain in the custody of the sheriff of Wood county to await his trial upon the said 23rd day of November, 1896, and thereupon the said sheriff of Wood county delivered the said body of the said Harry Davis back to the sheriff of Lucas county, and the said Harry Davis was by the sheriff of Lucas county again confined and detained in the said jail of Lucas county." Then follows the part of the indictment which I have read, charging Newberry and Muchler with having conveyed certain articles named into the jail of Lucas county with the intent charged.

I have been particular in quoting from the indictment so that what I may say upon certain points urged against its sufficiency may be better understood.

No exceptions were taken to this indictment until upon the trial an objection was made to the introduction of cer

tain evidence upon the part of the state, and after the trial, (which resulted in the conviction of the plaintiff in error), when, by a motion for a new trial, and a motion for arrest of judgment, the sufficiency of the indictment was challenged.

After the plaintiff in error had plead to the indictment, and the trial of the cause had begun, it was too late to raise objections to any faults in the indictment that amounted to mere defects in its form or in the manner in which the offense was charged. Sections 7249 and 7253, Revised Statutes, Bartlett v. State, 28 Ohio St., 669. So we need only consider such alleged defects as may be taken advantage of by demurrer before plea, or by motion in arrest of judgment after trial and conviction. The motion in arrest of judgment in this case sets forth with particularity the defects which plaintiff in error claims, appeared upon the face of this indictment, to-wit:

1st. That it fails to show that at the time the mayor issued his warrant against Davis there had been filed with him an affidavit charging said Davis with an offense.

2nd. That it fails to show the proper and legal appointment of Richard Biggs and Alf Farmer as special marshals to assist Reed, the marshal of said village of Bowling Green.

3rd. That it shows that said warrant was issued to said marshal and to the sheriff of Wood county, and was served by the special marshal, Richard Biggs, thereby showing that said special marshal had no authority to arrest said Davis.

4th. It shows that Davis was arrested by said special marshal and was in his custody when he was arraigned before said mayor, and that thereafter said mayor issued a mittimus directed to the marshal of said village, and fails to show how the marshal obtained custody of said Davis.

5th. It fails to show that said mayor certified to the clerk of the court of common pleas of Wood county, a transcript of his records in the matter alleged to have taken place be-

fore him in the case of the State of Ohio v. said Davis, and fails to show how said court of common pleas acquired jurisdiction over said matter.

6th. It fails to show that said mayor had jurisdiction of said cause, because it fails to show that the crime had been committed within the county of Wood, or within the limits of said village.

7th. It fails to show that said Davis, after having been put into the custody of the sheriff of Lucas county, was delivered to the sheriff of Wood county by virtue of a writ of habeas corpus issued by the court of common pleas of Wood county, as provided in sec. 7386, Rev. Stat.

8th. It fails to show that after said Davis was arraigned and entered his plea of not guilty to the indictment returned against him by the grand jury of Wood county, the sheriff of Wood county found the jail of said county to be insufficient to hold the body of said Davis, and also fails to show that said sheriff found the jail of Lucas county most secure, as required by section 7382 of the Revised Statutes.

9th. It fails to show that after the arraignment and plea of said Davis he was delivered by the sheriff of Wood county to the sheriff of Lucas county with the copy of commitment by virtue of which said sheriff of Wood county held him, as required by section 7383 of the Revised Statutes.

10th. That it fails to show on its face that whiskey is a thing useful or proper to effect the escape of said Davis.

11th. It fails to show that it was intended by said defendant Newberry to aid and assist the said Harry Davis to escape or attempt to escape from said jail of the county of Lucas.

12th. It fails to show that at the time said things were alleged to have been conveyed into said jail, the said Newberry knew that said Davis was lawfully confined in said jail.

13th. It fails to show that at the time the sheriff of Wood

county first delivered the body of said Davis to the sheriff of Lucas county, he tendered to said sheriff of Lucas county the fees provided by section 7384 of the Revised Statutes, or that such fees were tendered the second time said Davis was removed to the jail of Lucas county.

It is urged by counsel for plaintiff in error, that because of these alleged apparent irregularities in the steps taken to effect the arrest and detention of the prisoner Davis, and of the alleged failure of the indictment to show certain steps necessary to the legality of his arrest and detention, the alleged assistance given him by the plaintiff in error to effect his escape was not, or could not have been illegal or criminal. In short, that it not being charged or shown that Davis was legally detained in the jail of Lucas county, the plaintiff in error might have lawfully conveyed into said jail articles useful to effect his escape while he was there detained. It is contended that the true criterion for determining whether the detention of Davis was so far unlawful as to justify acts which would be a violation of sec. 6902 if the detention were legal, is to be found by inquiry and finding whether the discharge of Davis from such custody could have been effected by a writ of habeas corpus—that is, if his discharge could have been thus effected, then any act or effort to effect his escape or liberation would have been lawful. Without endorsing this proposition, we are willing to resort to this criterion, since, by so doing, we cannot fall into any error that will be prejudicial to the plaintiff in error.

Our views and conclusions upon the several alleged defects in the indictment touching the proceedings leading up to the detention of Davis in the Lucas county jail, make it unnecessary for us to discuss them severally or in detail.

It has been shown that by process or means, regular or irregular, Davis was brought before the mayor of Bowling Green, and was arraigned upon a written charge of murder

in the first degree, and that thereupon he was committed to the custody of the marshal of the village who delivered him into the custody of the sheriff and jailer of Wood county to be detained until discharged according to law, and that, upon this order of commitment, a mittimus was accordingly issued to said marshal. That this action was taken upon Davis having entered his plea to the charge, and having waived examination and requested that he be bound over to court.

It has also been shown that the indictment charges that when Davis was delivered by the sheriff of Wood county into the custody of the sheriff of Lucas county, the said Charles E. Tual received from the sheriff of Wood county a copy of said commitment.

We hold that thereafter his discharge could not have been effected by habeas corpus on account of any illegality or irregularity in or about his arrest or any of the proceedings prior to said commitment.

In Dows' case, reported in 18 Pa. St., 37, the law is laid down in the syllabus as follows:

"In the case of the escape of the fugitive from justice from this state to Michigan, after having been charged in this state by indictment with forgery, his arrest in the latter state without legal authority possessed by those who made it, will not entitle the prisoner to discharge before prosecution, his release not being demanded by the executive of Michigan."

Dows was a fugitive from justice from the county of Allegheney, Pennsylvania, being at the time he fled, charged by indictment with forgery and with obtaining money under false pretenses, and it having been ascertained that he was in the state of Michigan, a requisition was made by the governor of the state of Pennsylvania upon the governor of Michigan, upon which the governor of Michigan issued a warrant for the arrest of Dows; but he was not arrested in pursuance of that. He

was arrested at Detroit by the officers of the steamer "Ocean" when on board said boat, and was carried away into the state of Pennsylvania, and there delivered to the sheriff of Erie county, and conveyed to Pittsburgh and lodged in jail. The arrest was without a warrant, and by persons not authorized to make the arrest. That the arrest was illegal was assumed by the court deciding the case, and it was said that if the prisoner had been demanded by the governor of the state of Michigan, the Pennsylvania authorities would probably have been required to surrender him up to the state of Michigan. But it was held that the rights of sovereignty of that state did not reside in the prisoner, and he could not assert them; and that, on his own account, he could not assert the want of authority for, or the illegality of his arrest as a reason why he should not be detained and prosecuted. In the opinion of the court many cases are cited in support of this doctrine, and it is said that it has been formally established and is founded on a principle of universal law.

Sections 5729 and 5741, Revised Statutes, (being parts of the chapter on habeas corpus), seem to us, standing alone, to furnish sufficient authority in support of this conclusion.

"Sec. 5729. If it appear that the person to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ shall not be allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment or order."

"Sec. 5741. When the judge has examined into the cause of caption and detention of the person so brought before him, and is satisfied that he is unlawfully imprisoned or detained, he shall forthwith discharge him from confinement. On such examination the judge may disregard matters of form or technicalities in any mittimus or order of commitment by a court or officer authorized to commit by law."

See also the cases of Hatch v. Sheriff, 2 C. C., 163; Madden v. Smeltz, 2 C. C., 168; State ex rel. v. Hamilton, 3 C. C. 10; In re. George, 5 C. C. 207-210; and Ex parte Mosler, 8 C. C. 324-325; which are holdings under these sections more or less in point, but which we will not now take the time to discuss.

The indictment sets forth that an order of commitment was issued, etc. It must be presumed that this was in due form, which required, (as provided by sec. 7188 Rev. Stat.), that the prisoner should be received into the custody of the officer "in the jail of the county aforesaid, there to remain until discharged by due course of law."

If the proceedings in transferring the custody of Davis to the sheriff and jail of Lucas county were otherwise lawful, we hold that his detention of the prisoner could have been justified under this warrant or demand; but, assuming without deciding that the charge in the indictment that Davis was confined and held "upon the order of the court aforesaid" (to-wit: upon the order for his detention made by the court of common pleas after he had entered his plea to the indictment), would preclude the state from relying, in this case, upon any other order or warrant of commitment which had come into the hands of the sheriff of either county, we proceed to consider how the matter stands upon that order of the court.

We think it too plain to require extended argument or much citation of authorities, that after Davis had entered his plea to the indictment without taking any exceptions to the steps in his prosecution preceding the indictment, it was too late for him to make such objections even if such steps had before then been open to objection; and that, upon his entering such plea, it was within the power of the court to order him committed to await further steps in the case. Indeed, the court was not authorized in the case of murder in the first degree, to make any other order, and we hold that

this order of the court was sufficient in itself to justify the detention of the prisoner by the proper custodian at a proper place, even though upon it, or in pursuance of it, no written authority had been placed in the hands of such officer. That if Davis had sought his liberation by habeas corpus proceedings, it would have been good and sufficient answer to his petition for the officer to set forth the pendency of the prosecution and the order of the court for his detention. Even if this is not correct, it does not follow that the detention of Davis would have been unlawful, for the warrant or order of commitment might have issued after the writ of habeas corpus had been allowed, and in such case it would afford a justification for the holding of the prisoner when the matter should come on to be heard in the habeas corpus proceeding, and we have no doubt an attempt to hold the sheriff or jailer liable for false imprisonment in the interim would be defeated by an exhibition of this order of the court. Surely the plaintiff in error cannot claim greater rights, privileges or immunities in the premises for Davis and as a shield for himself than Davis could have availed himself of on his own account. In support of our conclusions upon this point we cite. The People ex rel. James Trainor, appellant v. Samuel Baker, keeper etc., respondent, 89 N. Y., 460. A case (the title of which has escaped me) in 114 U. S., 417; and 9th American & Eng. Ency. of Law, 190.

The contention that because there was irregularity in the arrest and preliminary examination of Davis and a failure upon the part of the magistrate to certify a transcript from the records of his proceedings to the court of common pleas, the grand jury was without authority in the premises so that the indictment was unauthorized and invalid, and the imprisonment of Davis upon it was consequently unlawful, we deem utterly without foundation. It is entirely clear that the indictment needs no such support; that the grand jury was authorized to inquire into the matter wi thout regard to

whether there was or was not a preliminary examination, and that no possible irregularity, informality or illegality in the steps before, or proceedings upon the part of the magistrate could in any way affect the validity of the indictment, or the detention of the prisoner in consequence of such indictment.

It is also urged that because the prisoner was not returned to Wood county to plead to the indictment by virtue of a writ of habeas corpus, as provided by section 7386 of the Revised Statutes, his conveyance to Wood county on that occasion was unlawful, and that it follows that his subsequent detention by the sheriff of Lucas county, in the Lucas county jail, was also unlawful. We do not concur in the view that the transportation of the prisoner from the jail of Lucas county to the presence of the court in Wood county to plead to the indictment was unlawful because no writ of habeas corpus was issued for that purpose. The sheriff of Wood county was authorized to produce the prisoner, and he held him in his custody on that occasion by virtue of the order of the magistrate and the mittimus before adverted to precisely as if he were bringing him from the Wood county jail to the court room for the same purpose; and while the sheriff of Lucas county might have insisted upon a writ of habeas corpus before surrendering the prisoner to the custody of the sheriff of Wood county, yet, his not having insisted upon it, did not in any way affect the legality of the detention and transportation of the prisoner from the Lucas county jail to the Wood county court house and his return to the Lucas county jail, but, if it were true that on this occasion the prisoner Davis was unlawfully surrendered, transported and returned, it does not follow that his subsequent detention by the sheriff of Lucas county would be illegal. Such act, even if unlawful, would not be so incur-

able and of such permanent and extensive influence as to vitiate all prior and all subsequent steps in the course of prosecution. It has been said by way of illustration that if the sheriff of Lucas county had taken the prisoner across the line into the state of Michigan, he could not have there lawfully restrained him of his liberty because of the lack of authority of the sheriff in that state. Conceding that this is true, if the sheriff had by any means secured the return of the prisoner to Lucas county he might there take and hold him, and the fact that the prisoner had been unlawfully detained for a season in Michigan would not affect the legality of such subsequent taking and holding.

Sec. 7382, Rev. Stat., reads in part as follows:

"The sheriff or person acting as such in any county having no jail or no sufficient jail shall convey any person charged with the commission of an offense or sentenced to imprisonment in the county jail, or in custody upon civil process, to the jail of such adjoining county as he deems most convenient and secure."

It is contended that, because the indictment in this case does not set forth that the sheriff of Wood county deemed the jail of Lucas county most secure, therefore it does not appear that Davis was lawfully imprisoned in Lucas county, and that it follows that the plaintiff in error could not have been guilty of a violation of law in conveying into said jail and putting into the possession of said Davis, materials and things useful to effect his escape. If it should appear that the sheriff of Wood county did not deem the jail of Lucas county most secure for the purpose mentioned, would it follow that the imprisonment of Davis therein, would be so far illegal that a person might lawfully do what is charged against the plaintiff in error? We think not.

Coming back to the test suggested, if Davis had applied to a court for a writ of habeas corpus to secure his release from such jail, and had alleged as a ground that the sheriff

of Wood county did not deem that jail most secure for the purpose stated, what would have resulted from this?

If a court should so far consider it as to admit proof of the fact and as to regard it as something affecting the rights of the petitioner in the premises, certainly it would not go so far as to discharge him absolutely from custody, and would go no farther than to order his transportation to a proper and lawful place of confinement. We doubt if it is a matter touching or affecting the rights of the prisoner at all, and we are clear that it is not a necessary averment in this case, and that, if it were contained in the indictment, it would not be traversable; it would not be necessary to prove it, it would be, in short, merely surplusage; and, I may as well say here, that from our conclusion that the prisoner was lawfully held under the order made upon his entering his plea to his indictment, it follows that all of the averments in the indictment in this case of the steps leading up to the indictment of Davis were unnecessary; but since they are here, we do not say that they need not be proved as stated.

On the point that the indictment fails to charge that the plaintiff in error knew that Harry Davis was lawfully confined in the Lucas county jail, we deem it sufficient to cite the case of The State v. Hilton, 26 Mo., 199, in which the court say: "That the custody of a person in the hands of a public officer would imply notice that the prisoner was lawfully held, and the rescue would be at the peril of the party making it." This states a general principle applicable to the case at bar.

It is also urged that the indictment is defective: 1st. Because it shows on its face that whiskey is not a thing useful, or proper, to effect the escape of a prisoner; and 2nd. It does not appear affirmatively, by proper averments, that whiskey could, or might have been useful to effect such purpose in this case. Counsel undertake to make a distinction between such articles as appear naturally to be use-

ful for such purpose, and such as do not appear to be so, but may be shown to have been so in a particular case. Or, otherwise stated, between such as are per se useful for the purpose stated, and such as may be shown by proper averments to have been useful for such purpose; and it is said that such articles as explosives, fire-arms and saws, come within the first category, while articles like water, whiskey, etc., no apparent use of which could be made for the purpose stated, come within the second category. No authority is cited in support of this attempted distinction, and we are of the opinion that there is no basis in reason or authority for it, and that a general averment on the subject, like that in this indictment, following the language of the statute, is sufficient; but of course, the proof must show and satisfy the jury that the articles named were, or may have been useful for the purpose of effecting the escape of the prisoner. The testimony in this case tended to show that the whiskey was used to stupefy prisoners and others about the jail, so that they might not be aware of the work being done by Davis to effect his escape, sawing at the windows, etc., and that Newberry knew of this use. We think the question was properly submitted to the jury as a question of fact under proper instructions, though we will not say that the evidence as to the whiskey alone, was sufficient to support the verdict.

The point is also made against the indictment and against the evidence, and the charge of the court, that it must be averred and proved that the intent of the plaintiff in error, was to facilitate the escape of the prisoner, Davis, from the Lucas county jail. This is not charged in the indictment, and the proof tends to show that the articles conveyed by the plaintiff in error to the jail, were to be used by the prisoner, Davis, while he was temporarily outside the walls of the prison. The charge of the court upon the subject to which exceptions are taken, reads as follows:

"But if the defendant gave the revolver to Davis with the intent that he should use it to effect an escape while he was out of the jail for a temporary purpose, in the custody of the sheriff of Lucas county, and to be returned to the jail when such temporary purpose was accomplished, then, while so out of the jail, he was a prisoner confined in the Lucas county jail, within the meaning of the statute, and such intent would be an intent to facilitate the escape of a prisoner detained in the jail, within the meaning of the statute."

We concur in this construction of the law.

We have attempted to notice the principal objections urged against this indictment—those that seemed to us to be most worthy of consideration. We cannot touch upon every point urged against this conviction, as the record, which is very voluminous, is bristling with exceptions, and proves that counsel for the plaintiff in error, have been alert and careful to preserve his rights and save every possible question; and we feel like commending the care and industry, the indefatigable efforts of counsel for the plaintiff in error in his behalf, not only in this court, but, as made apparent by this record, in the court below.

We find no errors prejudicial to the plaintiff in error occurring upon the trial of the case, either in the admission or rejection of evidence or otherwise; and we find no error in the charge of the court, or in the action of the court in refusing to charge certain propositions requested. It would serve no good purpose to review the evidence in this case, but it is sufficient to say that we have read it carefully, and are of the opinion that it supports the verdict. In a word, we find no error in this record, and therefore the judgment of the court below is affirmed.

The opinion of Judge Pugsley, in passing upon the motion for a new trial and the motion in arrest of judgment, has been handed to us. We did not consider it, or even look at it at all, until we had reached our conclusion in this

case, when, upon its perusal, we are pleased to say, that we found the reasoning and conclusions of the learned judge to agree with our own. In so far as we have not covered the subject, we will say that we concur in his reasoning and conclusions.

I wish to say in conclusion, that the defendant appears to have been very ably defended, and to have had a fair trial. The crime, under the circumstances was one that was especially reprehensible in view of the fact that the prisoner Davis, was in the custody of the plaintiff in error, who was bound to see that he was safely kept and held; therefore, there is more moral turpitude attached to the act than there would have been if it had been committed by a person not intrusted with the custody of the prisoner—a person having no duty devolving upon him in the premises; and we think that the judgment and sentence is moderate under the circumstances.

W. H. Harris and *Marshall & Fraser*, for Plaintiff in Error.

C. E. Sumner and *W. G. Ulery*, for Defendant in Error.

(Third Circuit—Marion Co., Circuit Court, September Term 1897.)

Before Day, Price and Marvin, JJ.

(Judge Marvin, of the Eighth Circuit, taking the place of Judge Norris.)

ISAAC E. OSBUN v. SAMUEL H. BARTRAM.

Action against several defendants on joint liability—Judgment by default against one joint defendant before determination of case erroneous—

In an action to recover on a claimed joint liability, arising on a joint contract of lease, against a number of defendants, who are jointly sued, and against whom a joint judgment is asked, it is error for the court to render a several judgment on default against one of the defendants, without first trying and determining the rights and liabilities of all the defendants, touching such claim.

Error to the Court of Common Pleas of Marion County.

The facts, as they appear from the record in this case, are as follows: S. H. Bartram, defendant in error, was plaintiff in the lower court, and brought suit on a joint claim in his favor, arising on a joint contract of lease, against Osbun and four other persons; and in his petition stated a joint cause of action against all of them, with a prayer for a joint judgment. Summons was issued and served on all the defendants; all of them answered, in some form or other, except Osbun, who did not answer or demur but made default, and was in default for answer at the time of the rendition of the judgment against him. Afterwards, on the 18th of January, 1897, and before any trial on the merits was had, or any inquiry or investigation was made in the matter, as to the rights or liabilities of any of the defendants, the court on motion of the plaintiff for that purpose, rendered a several judgment on default, for the full amount of the claim, against Osbun individually. The court overruled a motion to vacate and set aside the judgment, but it was allowed to stand, and was entered on the record and now stands as a valid and subsisting judgment against Osbun, who prosecutes error and seeks a reversal of the judgment on the grounds that it was erroneously given and entered.

DAY, J.

The single question presented by this record is: was it error for the court to render a several judgment against one party to a claimed joint liability, in advance of a trial, or inquiry and finding, as to the rights and liabilities of the other parties defendant?

It was the rule of the common law that where a joint contract or joint liability was the subject of an action, the recovery, if one was had, must be against *all* or *neither* of the defendants; and that rule is still in force, except in so far as it has been modified by statutory provisions. It has not been entirely abrogated, but has been modified, and to

an extent only, by the provisions of sections 5311, 5312 and 5313, Revised Statutes. The provision of section 5312 is as follows: "In an action against several defendants, the court may render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.'

The provisions of this section do modify the rule of the common law and authorize a several judgment, on a joint liability; but only when it is proper to render a several judgment. The court must notice the situation and conditions obtaining, in any given matter, in order to determine the proper action to be taken therein; and the question as to whether it is proper to render a several judgment against one of a number of defendannts, where a joint claim is asserted against all, can only be ascertained by an examination of the facts. Clearly the modified rule requires a trial, or, at least some kind of an inquiry, and ascertainment, by the court, of the relative rights and liabilities of all the defendants, as a condition precedent to the rendering of a several judgment against either of them.

The decision of the supreme court in the case of Aucker v. Adams & Ford, reported in the 23 Ohio St., 543 is exactly in point and is decisive of this case. The third syllibus is as follows: 3. "Where a joint suit against all the obligors in a bond is the only remedy of the plaintiffs thereon, it is error, under the provisions of section 371 of of the code, for the court to render a several judgment against one or more of the defendants, leaving the action to proceed against the others." Judge McIlvaine for the court, on page 550-51 discusses the question presented by this record. He says: "There can be no doubt that the cases wherein it is improper to render a several judgment against one or more of the defendants, leaving the action to proceed against the others, are limited, as a general rule at least, to actions founded on joint contracts." * * * *

"This construction of the section harmonizes more fully with the general system of practice introduced by the code, and especially with the provisions of sections 38 and 77 of the code. So that, the rule would seem to be, that the court, in its discretion, may render a judgment against one or more of the defendants, leaving the action to proceed against the others whenever it appears that the plaintiff might have demanded a several judgment on the contract if he had elected to sue the defendants separately. On the other hand in all cases, where the subject matter of the action is such that the plaintiff could not have prosecuted several actions, his only remedy being to demand a joint judgment in a joint action, he cannot have a several judgment against any of the defendants until the liability of each and all the defendants has been determined upon final trial of all the issues in the case. Upon such final trial, if all the defendants are found to be liable, then judgments should be rendered against all; and if some only are found to be liable and others not, the judgment should be against those found to be liable, and in favor of those who are found to be not liable."

We are of opinion there was error in the action of the court below, in rendering a several judgment against the plaintiff in error, on default and before a trial was first had, to ascertain and determine the relative rights and liabilities of all the defendants; and for that reason alone the judgment is reversed and remanded for further proceeding in accordance with law.

Charles F. Garberson, for Plaintiff in Error.

S. H. & J. H. Bartram, for Defendant in Error.

Culver v. Ragan et al.

(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1896.)

Before Haynes, Scribner and King, JJ.

SARAH M. CULVER v. JOHN H RAGAN, et al.

Building of blacksmith shop near a dwelling house in village--Injunction—

Plaintiff sought to restrain defendant from moving a building upon a lot in the village of Bowling Green and use of the same for a blacksmith shop:

Held: Under the facts of the case an injunction should not have been allowed.

Error to the Court of Common Pleas of Wood county.

HAYNES, C. J.

In this case a petition in error is filed to reverse the judgment of the court of common pleas in a case wherein Sarah M. Culver was plaintiff, and John H. Ragan and Jacob Snyder were defendants.

The case was heard upon the petition and a demurrer thereto, the petition being for an injunction, and setting out that the plaintiff, Sarah M. Culver, is the owner of the west thirty two feet of lot number one hundred and twenty nine (129) in the village of Bowling Green; that she and her husband for many years have, and still occupy a brick dwelling house thereon, and that its value is six thousand dollars; that the defendant, Ragan, has secured a lease of the lot immediately west of her lot, and is about to move an old unsightly frame building, one story in height, from another portion of the village, and will use it to carry on the business of horseshoeing, general blacksmithing and repairing of all kinds of vehicles; that he will place in the building, forges, anvils and other tools necessary to carry on such business; that he will use in his blacksmith business, large quantities of bituminous coal, thereby causing to be generated large quantities of smoke and soot which will escape through a low chimney in said shop, and be carried by the wind against, upon and into her house; that the soot and

dirt will settle on her roof, and she will be unable to use her cistern water for domestic purposes; that she has seven windows on the west side of her house which she must keep open, and the said smoke will enter her house and befoul it and the contents; that the stench of burning hoofs and hoof parings incident to horseshoeing will pass from the shop to her dwelling and cause her and her family great discomfort and annoyance; that the noxious smells and gases from the odor of the horses brought to and kept standing in said shop will float upon the atmosphere and into her rooms; that there will be a constant stamping and neighing of horses, and constant noise from the anvils which will be very disagreeable; that because of the very inflammable character of the furnaces to be used therein, the sparks from the chimneys to said furnaces will greatly endanger her dwelling and prevent her from obtaining re-insurance upon her dwelling, and that the value of her property will be greatly reduced if the defendant is permitted to place and use said building as aforesaid.

An injunction was granted. A demurrer was filed to the petition which was overruled, and the defendants not desiring to plead further, appealed the case to the court.

We think the court ought not to have allowed the injunction in the case, at the time it did. In the first place, carrying on the business of a blacksmith is a usual and very respectable business. It must be carried on somewhere. It certainly, unless there is some extraordinary reason for not carrying it on, should be allowed to be carried on in the village of Bowling Green.

This building was to be placed on a lot near the business portion of the village, and the right to do that we think is perfect in the defendant. He has a right to put his building there unless there is some ordinance or some authority of the village to restrain him from putting it there. The defendant has a right to carry on his business of blacksmith-

ing if he does it in an ordinary and peaceable manner, and the court should have waited until the work was commenced and the manner of carrying on that work was ascertained before it prevented the use of the building at all.

It may be that in carrying off smoke the chimney might be so constructed as to carry it over and beyond the dwelling in question. It is true that coal smoke is not a very nice thing either in a city or village, but if you use coal you must have smoke. As used in a city, it comes down sometimes in large clouds, and is to some extent quite annoying, but nevertheless, people who live in cities must endure inconveniences and annoyances of that kind for the common benefit of all. They cannot have all the benefits of solitude and all the benefits of a city at the same time.

We think, also, that people would have a right to bring their horses to the shop to be shod, and in standing there they will be no more offensive than farmers bringing their horses to town and hitching them to hitching rails on the street, and allowing them to stand there.

The work in the shop can be carried on, we think, without any great amount of inconvenience or annoyance to the plaintiff. It is possible there might be at times some noise from the anvils as there is noise from wagons or omnibuses or street cars, and a thousand and one things in a city. People who live in cities may live where street cars change and cross and where there is a continuous noise. In fact, upon the main streets of a city like Toledo there may be so much noise that a person can hardly do business, yet this has to be endured in a city. We think that blacksmithing is a business that has to be done, but if the defendant was carrying it on in an unusual manner, he could be restrained.

It was my duty to sit in a case in Cleveland wherein the Transfer Company of Cleveland had established in the upper part of the city on a lot adjoining, I think, the house of Judge Hutchins, a barn where they kept horses and carri-

ages in order to reach the railroad depots quickly, and there was great complaint made in that case in regard to horses standing there, from the odors that arose from the urine, etc., and after a full discussion of the case the court made some orders that should limit the manner in which the horses were to be kept, but we did not attempt to abate that business. They had the same question in regard to the car stables located on Ashland Avenue in Toledo, but they never obtained an order from the court to have them removed. They were controlled to some extent in the manner of carrying them on, but they were not abated.

We are very clearly of the opinion in regard to the case under consideration, that the action of the court was premature, and that the judgment of the court should be reversed, and the case sent back for hearing and trial. As we have indicated, we think no order should be granted by the court until there is an actual possession taken of the premises, and some action on the part of the defendant which indicates the manner in which he is to exercise his trade. There is no reason why the defendant should be compelled to go outside of the village limits to do business, or why a person who wishes to have his horse shod should have to follow the shop outside of the village limits.

The judgment of the court of common pleas is reversed and the cause remanded for trial.

Means & Haskell, for Plaintiff.

A. R. Campbell, for Defendants.

France et al. v. Peerless Refining Co. et al.

(Third Circuit—Hancock Co., Circuit Court—December Term, 1897.)

Before Day, Price and Norris, JJ.

WATSON A. FRANCE et al v. THE PEERLESS REFINING CO. et al.

Where a receiver is appointed in a proper case by a court of competent jurisdiction of one county, it is error for such court, on mere motion, to discharge such receiver and order him to turn over the property to an assignee subsequently appointed by a court of another county, before hearing the case on its merits—

Error to the Court of Common Pleas of Hancock county.

On a petition filed for that purpose, a receiver was duly appointed for the Peerless Refining Company, a corporation having its principal place of business at Findlay, Ohio, by a judge of the court of common pleas of Hancock county, at Chambers, on August 13, 1897. Such receiver at once qualified and entered upon the discharge of his duties, was put in possession and control of the property and assets of the company, and was proceeding to administer his trust; when, on the 5th day of November, 1897, on motion of the defendant company to discharge such receiver, the court of common pleas, in advance of a trial of said cause on its merits, sustained the motion and ordered the discharge of such receiver, and that he turn over, all the property and assets of such company in his possession, as such receiver, to an assignee appointed by the probate court of Cuyahoga county, subsequent to the appointment and possession of such receiver.

BY THE COURT:

Regarding the petition as an application for the appointment of a receiver, the facts stated therein, showing insolvency of the corporation, frauds and mismanagement of its board of directors and managers, to the detriment, present and prospective, of the corporation, its stockholders and creditors, justified the appointment of the receiver for the purposes specified in the order of appointment; and the receiver having qualified and entered upon the trust by being put in possession of the property and assets, and proceeded in execution of the order of appointment, the matter was

within the grasp of the law for all proper purposes appearing upon a trial of the case on its merits; and, under the averments of the petition, and the facts appearing, it was error, for the court, on a preliminary motion, in advance of such trial and disposition of the case on its merits, to discharge the receiver and relinquish the possession of the property and assets received by him, to an assignee subsequently appointed in another jurisdiction.

The order of discharge is reversed, with costs.

Thomas Meehan and *Elijah T. Dunn*, for Plaintiff in Error.

Ross & Kinder, and *Judge Blandin*, for Defendants.

(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1897.)

Before King, Haynes and Parker, JJ.

HENRY M. STRONG, et al. v. THEODORE SCHMIDT.

Tenant holding over becomes tenant from year to year—

During the year, tenant left the premises claiming the right to do so without liability to pay the rent thereafter.

Held: That in order to admit proof by parol evidence of a surrender, there must have been a surrender in fact of the premises, accompanied by delivery of possession to the landlord, accepted by him as such surrender.

Error to the Court of Common Pleas of Lucas county.

HAYNES, J.

This case is here upon a petition in error. It has been here once before, and is reported in 14 C. C. R., 302, Bulletin, March 15, 1897. The case went back to the court of common pleas for a new trial, and was tried again, and now comes back the second time, the lower court having followed the opinion of the circuit court in regard to certain points, and charging anew on some other points.

The testimony as set forth in the record, shows that Schmidt was in possession of the premises under a lease from the plaintiffs for a year. Near the close of that year,

certain matters transpired between the parties. Schmidt claimed that while he had agreed by the lease to pay $600 per annum, in fact he was to pay only $550. As the lease was approaching its completion, a new lease was written for another year, which was sent to him, and he declined to sign it. On or about the 31st of August, 1893, he wrote to Pomeroy & Son a letter, in which he said, "In looking over my lease I find it reads for one year. Under your present conditions I do not wish to renew the same for one year, but will rent by the month." The next morning Pomeroy & Son answered him as follows:

"The owners of the Law Building decline your proposition. If it will be any convenience to you, we will renew your lease until April or May, '94, but otherwise they wish the contract fulfilled as it stands. They do not see any great excuse for your arrears of rent, and request a settlement without delay."

That is all that occurred between the plaintiff and the defendant prior to the expiration of the written lease, and Schmidt continued to hold possession of the premises, and paid rent at the rate of $50 a month. He continued in possession of the premises down to about the 15th of March, the next spring—1895, and on the 1st of March he wrote a letter as follows:

"George E. Pomeroy & Son,

"Gentlemen—I hereby notify you that I will vacate room No. 310 Superior street, by March 31st, 1895."

No attention was paid to that letter, and on the 30th of March he wrote to them, enclosing the key in the letter, and putting it through the door of the office room, where it was found in the morning. His letter was as follows:

"Mess. Geo. E. Pomeroy & Son:

"Dear Sirs:—Herewith I hand you the keys to your room 310 Superior street, which I have this day vacated. Mr. Brumback tells me that he has arranged with you to leave

the wire screen partitions belonging to The Mutual Aid Building & Loan Company, in the room until such time as you may notify the company to take them out. Any arrangement you have made with Mr. Brumback does not concern me in any manner.

The key was passed over to the janitor, and in a short time afterwards, the testimony shows, there was placed in the window a notice for rent, but no rental was made of the premises. At the close of the month of April, a demand was made upon Schmidt by the plaintiffs for a month's rent, which was not paid. At the expiration of the month of May, on the 1st of June, a demand was again made for that rent, and in addition for $50, May rent, etc., and that was not paid, and thereupon suit was brought for two months rent, and subsequently another suit was brought, and the two consolidated, for rent down to the 1st of September, which was the close of the year. This testimony was offered, most of it subject to the exception of defendant's attorneys, and at the conclusion of the trial the court submitted to the jury the question which is stated as follows:

"The defendant claims that he held possession of this property as a tenant of the plaintiffs until the 1st of September, 1895; but his contention is, that he did not hold over under the terms of the written lease from year to year, after the expiration of that lease on the 1st day of September, 1893. And the burden is upon the defendant in this case to show, by a preponderance of the evidence, that there was a change in the tenancy after the expiration of the written lease on September 1st, 1893, or at that time. When a tenant, with the consent of his landlord, express or implied, holds over his term, the law implies a continuation of the original tenancy upon the same terms and conditions, in the absence of any other contract or agreement between the parties.

The fact of holding over after the expiration of the written lease, and entering upon another year, raises the presumption that such holding over is in accordance with the terms of the written lease, or former tenancy; and where the term of the former tenancy is one year, as it was in this case, if there is no other contract or agreement or understanding between the parties, the tenant is held for another year, at the same rent that he was theretofore paying. This presumption, which the law raises in the case, is one that may be rebutted by proving the real contract or understanding, if there was one."

The matter seems to have been submitted by the court upon the theory that the defendant having said that he would not hold under that contract or agree to the terms of the former lease, that that terminated the lease entirely, and he became perhaps a tenant from month to month or some shorter term, and that he had a right to leave at any time he saw fit to do so; and the question is, whether that was error on the part of the court.

It is well established in Ohio, we think; it is well established by the terms of the law generally in other states; it is the common law of England, as we understand it, where a party is in possession of premises for a year under a written lease, and holds over, if the landlord recognizes that holding over by receiving rent of him, that that creates a new tenancy for another year, or from year to year, and that tenancy is to be terminated only by a written notice by either party at or near the expiration of the lease. At common law six months notice was required. We had that question before us at the last term. A majority of the court held that it was sufficient to give only reasonable notice. It is held by the supreme court of this state in the case of Armstrong v. Kattenhorn, 11 Ohio, 272, that where a party being in possession of premises under a lease, in order to make a new contract that shall be binding between the par-

ties, that contract, under the statute of frauds, must be in writing, or if it is a verbal contract, that there must be such a change of possession referable to that new contract as will take the case out of the statute of frauds. The last reference to that case that I know of in the reports of this state is in 45 Ohio St., 543—the case of Myers v. Crosswell. There is a discussion there of the law in regard to the statute of frauds and the part performance necessary to take the case out of the statute. At page 548, quoting from Pomeroy on Specific Performance of Contracts, the court say:

"A plaintiff cannot, in the face of the statute prove a verbal contract by parol evidence and then show that it has been partly performed. This course of proceeding would be a virtual repeal of the statute. He must first prove acts done by himself on his behalf which point unmistakably to a contract between himself and the defendant, which cannot, in the ordinary course of human conduct be accounted for in any other manner than as having been done in pursuance of a contract, and which could not have been done without an existing contract; and although these acts of part performance cannot of themselves indicate all the terms of the agreement sought to be enforced, they must be consistent with it and in conformity with its provisions when these shall have been shown by the subsequent parol evidence. It follows from this invariable rule, that acts which do not unmistakably point to a contract existing between the parties, or which can be reasonably accounted for in some other manner than as having been done in pursuance of a contract do not constitute a part performance sufficient in any case to take it out of the operation of the statute, even though a verbal agreement has actually been made between the parties.

"In this state it has been held that 'if possession be relied upon it must be clearly referable to the contract, and be delivered and held in performance of it. Possession must give the contract life, and if they can possibly be separated the parol agreement perishes under the operation of the statute. Hence, if the possession can be referred to any

other source than the parol contract which it is claimed to support, even to the wrongful act of the party in possession or to a different contract the statute applies.' ".

The testimony clearly shows that the defendant was in possession under a written lease. He refused to sign a new lease for the reason that he was not satisfied with its terms. He wrote letter to the other parties, saying that he would hold from month to month, and stated that orally, perhaps to the agent. The parties themselves, instead of consenting to that, answered that they would not consent. So that we have the terms, so far as any writing is concerned. We have a proposition to hold on differnet terms, with a refusal on the part of the landlord, and under that state of facts the defendant continued in possession.. There was no change in possession, nor did the landlord in any manner or form reorganize that there was a holding over under different terms than those of the lease. We see no reason whatever why the statute of frauds does not apply here and we think that all the evidence in regard to the statements made by the defendant as to how he would hold or in what manner was entirely irrelevant and illegal.

The rule of law is—it is said that the presumption of law is, that he holds under the former contract from year to year. The language is varied by different courts in delivering the opinions: by some it is said to be a "presumption," by some it is said to be an "implied contract," and by some it is said to be a "constructive contract;" but no matter what it is called the law clearly is, that where the party has continued in possession after the termination of a year's lease and the landlord has accepted rent from him, that the lessee holds for another year, and that the same is as binding and obligatory upon both parties, as it would be if re-executed. The landlord cannot evade it only at the expiration of the year, nor can the tenant leave possession of the premises. He is likewise bound to pay rent for the

year. If he chooses to leave the premises, his obligation still remains to pay. It is a binding contract. That contract can only be set aside in some manner that has reference to the law of the land. There are two and perhaps three ways in which it can be set aside: a new contract may be made, and there may be a surrender of the premises; but the new contract, in order to be binding, must be either a contract in writing under the statute of frauds, or it must be, if a parol contract, in pursuance of a change of possession, as the supreme court has said, which makes a new and binding contract.

It is said that there was a surrender of the premises. I should say here at the outset that no surrender was pleaded whatever. Two defenses only were set up in the pleadings —one that there was a contract from month to month, and another that there was a new contract made as a settlement of some suit that was pending, and that at the expiration of the time the defendant went out and the landlord took possession of the premises, and gave notice of a desire to rent them. The court says:

"The question as to whether there was a surrender of the premises by the defendant to the plaintiffs, and an acceptance of that surrender by the plaintiffs, has been discussed in argument, with reference to the evidence in the case. If a tenant voluntarily abandons premises during the term without the authority of the landlord, or sufficient cause, he is not relieved from the payment of rent. The landlord may take possession and re-rent, and credit the first lessee with the proceeds which he may receive by re-renting the property; but if the landlord consents to the abandonment, or if the abandonment is for sufficient cause, the tenant will be discharged from its payment. It is claimed in this case, on the part of the plaintiffs, that when Mr. Schmitt abandoned the room, moved out of it, and sent the key to the agent of the plaintiffs, he simply abandoned the room; that he did it without the consent of the plaintiffs, and that they were not bound, or their rights were not affected by his ac

tion in the matter. The plaintiffs' rights are not affected by such abandonment unless he consented to the abandonment. A surrender of the tenant, a turning over of his estate to the landlord, cannot be done by the tenant without the acquiescence of the landlord. A surrender must be by agreement. The minds of the parties must meet, or they must so conduct themselves as that they are held to a meeting. It is essential to a surrender that there be an acceptance of, a surrender of, the interest. A leasehold interest in property cannot be one sided. And you must determine from the evidence in this case what the facts are with reference to this branch of the case, if you come to a consideration of this branch of the case."

As I have said, there was no surrender pleaded—no issue made upon that. The matter was submitted to the court, and went to the jury under this part of the charge that I have read. We said in deciding this case before, that a writing was not necessary for the surrender of the premises. This arises from a peculiar formation of the statute of frauds. In England the statute was in substance that there should be no grant of any premises by way of lease, nor surrender, except it was in writing, and the surrender had to be accompanied with the same formalities in regard to making it a written contract that the grant was. The language of the statute in this state is, that there shall be no grant of a lease, and the word "surrender" is left out entirely. So that there may be a surrender by parol, but that surrender must be a surrender in fact, and not an agreement to surrender. An agreement to surrender must be in writing in order to be valid. Under the section (4199) of the statute of frauds which requires that a contract in regard to land must be in writing, an agreement to make a future surrender must be in writing; but an oral agreement to surrender, accompanied by an actual possession, as a termination of the contract of lease, accepted by the grantor, would take the contract out of the statute and be valid as a surrender.

On evidence of this branch of the case I shall have nothing to say, except that the tenant abandoned these premises, and went off and left them, saying to the landlord "I won't have anything further to do with them." He takes the key and puts it in a letter, and leaves it in the office of the agent—in fact, left it in the door of the office. Mr. Pomeroy, as agent of the landlord, took it and handed it over to the janitor, and subsequently put in the window a notice to rent; but nowhere did he accept the surrender of the premises. The landlord held the tenant for the rent, demanded the rent, and then demanded it again, and when refusal was had, he commenced an action. It is said he did not commence until 60 days after the termination of the year: he had six years in which to commence an action, if he had a cause of action, under the statute of limitations. What was the duty of the landlord? Was it not to take care of the premises?

The tenant had gone and left them. It was perfectly proper for the landlord to offer the premises for rent, and if he rented them—got anything for them—to credit the tenant. The fact that the key was left does not amount to anything, or tend to prove anything.

We think the court erred in submitting these two propositions to the jury. We think it would have been proper for the court at the termination of the evidence to have directed a verdict for the plaintiffs. We think the evidence should have been ruled out. We think there is no defense upon the testimony offered to the claim of the plaintiffs for this rent.

The judgment of the Court of Common Pleas is reversed.

C. W. Everett, for Plaintiffs in Error.

Hurd, Brumback & Thatcher, for Defendant in Error.

(Third Circuit—Putnam Co., Circuit Court—November Term, 1897.)

Before Day, Price and Norris, JJ.

JOSEPH R. MEGRUE, et al. v. THE BOARD OF COMMISSIONERS OF PUTNAM COUNTY, O.

Suburban Railway—Contract with County Commissioners as to use of roads.

Under the provisions of sections 3283 and 3284 Revised Statutes, a county board of commissioners, has power and is authorized to contract with a railroad company with respect to the manner, terms and conditions upon which such company may occupy, cross or divert a public highway in the construction of its railroad; and such contract, when fairly made, is valid and will be enforced the same as other valid contracts.

Error to the Court of Common Pleas of Putnam county.

The Board of County Commissioners of Putnam county, filed a petition against Joseph R. Megrue, James B. Townsend and Nelson E. Mathews, alleging in substance: That on the 25th day of November, 1895, the defendants named, executed and delivered to the plaintiff their certain writing obligatory, whereby they became bound to the said board for the use of Putnam county, in the sum of one thousand dollars. The condition of the writing obligatory was to the effect that The Lima Northern Railway Co. had located and graded, and was about to construct, its railroad on and across the Columbus Grove and Ottawa public road, in section three, Pleasant township; and the construction of said railroad on the said public road will destroy its usefulness as a public way, and compel its abandonment at that point, and its rebuilding in a different location; that the said defendants, acting for and representing the railway company, proposed and agreed with the said board of commissioners, in consideration of the surrender of a portion of said public road for the uses and purposes of said railway company, to purchase the necessary ground and construct a public road on and along the east side of the said railroad right of way, so as to make the said public road connected and continu-

ous; and to place good gravel on it, and to finish and complete it, suitable for public travel, within thirty days from the time rails are laid on the said railroad to the north line of said section three; and upon default of the said railway company in complying with the terms of said agreement, the said defendants were to become liable for the reasonable cost and expense of rebuilding or finishing and completing the said public road; the board surrendered to the railway company the designated portion of the public way, and the company entered upon and took possession of it, and constructed its railroad on and across it, and laid rails thereon to the north line of said section three, before January 1, 1896. The railway company purchased a strip of ground sixty feet wide and fifteen hundred and eighty feet long, in the location agreed upon, and partially rebuilt the public way as per its agreement, but has failed and refused to fully complete the same within thirty days, or at all, although requested. After waiting a reasonable time, much longer than thirty days, the board of commissioners completed the grading and ditching, and put gravel thereon, and in September and October, 1896, fully completed the said public way according to the terms of the agreement at the reasonable cost and expense of $464.00. By reason of the facts stated, the claim is asserted that the conditions of the writing obligatory have been broken, and the liability of the signers, the defendants, has become absolute; and judgment is prayed against them for the amount of the cost and expense incurred in completing the public way. A second cause of action, with similar facts, is stated, and judgment demanded. A general demurrer, that the petition does not state sufficient facts to constitute a cause of action against the defendants, was overruled, and defendants not desiring to answer or further plead, judgment was entered against them for the full amount claimed. Defendants prosecute error, and base their right to a reversal of the judgment on the insufficiency of the petition.

DAY, J.

The only question raised on this record is as to the sufficiency of the petition: Are sufficient facts stated to entitle the board of county commissioners to recover against the defendants below? The whole contention of plaintiff in error rests on the assumption that the board of commissioners was without power to make the contract which forms the basis of the action. It is urged, that the board of commissioners is without authority and cannot take action, legally, to vacate or dispose of any part of a public highway, in the absence of the initial steps provided by the statute; that no such steps were taken in this case, and hence, that the agreement to surrender a part of the public road to the railway company for its uses was unlawful, the board without right or power to act in the matter, and its contract absolutely void. This claim, we think, would have to be allowed, if the transaction in question was, alone, a proposition to locate and establish a road, or, to vacate some part of a public road; but such was not the proposition. The proposition was not in any sense, to vacate a public road and to locate and establish a new one. The public road is not, and was not to be vacated and a new one opened, under the contract between the railway company and the board of commissioners. The words used in designating what the board was to do was, "surrender a portion of the public road for the use of the railway company in constructing its road and road crossing." "Surrender" does not mean, in any sense, to vacate, or locate. In this, and in every connection, the word surrender only means to yield to," "to cease to resist the efforts of another;" and the word including the entire contract in this instance, must be interpreted in the light of the legal right of the railway company to occupy and cross a public highway; and the fact that the company was making an effort to occupy, as a crossing, this identical part of the public road.

Interpreted in this light then, the transaction and agreement in its entirety, was simply and only a proposition to divert—to turn aside slightly, from its former location at one point, a continuous highway for the mutual welfare and benefit of the public and the railway company. And for this, it is believed, there is found special warrant in the statutes. In sec. 3283, Rev. Stat., it is provided:

"If it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, etc., or any part thereof, the officers having charge thereof, and the company, may agree upon the manner, terms and conditions upon which the same may be used or occupied."

Further, provision of the section is: "If no agreement can be had, the railway company has a right of eminent domain, and may appropriate the same, as provided by law." The following sec. 3284, provides: "A railway company may, when it is necessary in the building of its road, to cross a road or a stream, divert the same from its location;" the only requirement being, that it "must, without unnecessary delay, place the road or stream in such condition as not to impair its former usefulness."

We think the provisions of secs. 3283 and 3284, Rev. Stat., contain ample authority for the board of commissioners of a county, to not only surrender—that is, yield to the efforts of a railway company to occupy some portion of a public highway; but also to make a contract stipulating and fixing the manner and terms of occupancy, and requiring the company to put the public road, as diverted, "in such condition as not to impair its former usefulness." And so we reach the conclusion in this case, that the board of commissioners of Putnam county, in making the contract it did make, and in exacting the security for the faithful performance of the contract it did, was clothed with ample power, and was in no sense acting without lawful authority. The contract it secured was fairly made, and was valid, and there

was no error in its enforcement by the common pleas court.

The judgment is affirmed.

W. H. Leete, W. B. Richie, Watts & Moore, for Plaintiff in Error.

Jas. P. Leasure, Prosecuting Attorney, for the Commissioners.

(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1897.)

Before King, Haynes and Parker, JJ.

ALBERT W. PANCOST v. THE STATE OF OHIO, EX REL. MARY E. PANCOST, now MARY E. LANDER.

Contempt of court for failure to pay alimony—Inability to comply.

Plaintiff in error was imprisoned for contempt in refusing to obey an order granted in a divorce case to pay certain sums to the divorced wife for the support of minor children.

Held: Under the evidence, it was not within the power of the plaintiff in error to perform the order of the court within the meaning of sec. 5646, Rev. Stats.

Error to the Court of Common Pleas of Lucas county.

HAYNES, J.

A petition in error is filed in this case for the purpose of reversing the action of the court of common pleas in a certain proceeding in contempt.

The petition of the relator sets forth that:

"At the April term of this court, 1893, the plaintiff, then Mary E. Pancost, by the consideration of said court, in an action therein pending wherein Mary E. Pancost was plaintiff, and Albert W. Pancost was defendant, obtained a decree against defendant, a part of which is in words and figures following, to-wit:

"'And it is further ordered, adjudged and decreed, that the defendant Albert W. Pancost shall pay to the said plaintiff, Mary E. Pancost, for the care, custody and maintenance of each of said minor children Olive Pancost and Leslie Pancost, the sum of $675, payable at the rate of $13.75 per month, for each of said children, payments to be

made on the 1st and 15th of each and every month hereafter until the full sum of $675 has been paid, for the care and maintenance of each of said children. The first payment to be made as of July 1, 1893; and upon default of payment of the amount herein ordered, for five successive days, execution shall issue against the defendant for any amount remaining unpaid.' "

It then admits the payments of sums up to a certain amount, and says that since that time the defendant has wholly failed to pay the remaining amount that is due. Demurrers were filed to that petition, which were overruled, and an answer was filed, in which the defendant stated that he admitted that at the April term of this court, 1893, Mary E. Pancost obtained a decree of divorce, and admits the decree as set out.

And answering further, defendant says that he is a married man, and the head and support of a family consisting of a wife and one child; that he is not the owner and holder of a homestead; and that his daily earnings are all necessary for the support of his family. Wherefore defendant asks that said charges in contempt be dismissed, and for other and proper relief.

An order having been made to which I will refer shortly, the defendant filed a motion for a new trial, in which he set forth, among other things, that the decision of the court was contrary to law and contrary to the evidence; that the court erred in the admitting of evidence and in rejecting evidence. The testimony was heard of Mr. Hamilton, who was the cashier of the Milburn Wagon Co., and of Mary E. Lauder, the divorced wife, and of himself, and certain letters were introduced in evidence. Upon the hearing of the evidence and the argument of counsel, the court made an order which recites the original decree, and found as was stated therein, that certain payments had been made on account of the support of the children, but found that certain amounts were unpaid, and that there was due at

that time "the sum of $495.65, and of interest the sum of $18.41, and of installments not yet due, there remains to be paid of that for the month of August, 1897, the sum of $10.65."

"And the court further finds that said Albert W. Pancost is guilty of contempt of this court, as in said charges set forth, and said contempt consists in the omission to do acts which it is yet in his power to perform.

"Wherefore, it is considered by the court that the said Albert W. Pancost be committed to the county jail of Lucas county, and therein confined until he shall have fully complied with the order of the court in the case of said Mary A. Pancost v. Albert W. Pancost, rendered at the April term of this court, A. D. 1893, so far as the same relates to the payment by said Albert W. Pancost to the said Mary A. Pancost, of money for the support and maintenance of Olive Pancost and Leslie Pancost, children of said Albert W. and Mary A. Pancost, and until he pay the costs of this proceeding, including a fee of $25 each, to James M. Brown and John Berry, attorneys, heretofore appointed to prefer charges herein against said defendant, which he is hereby ordered to pay; and it is further ordered, that an order of commitment issue to the sheriff of Lucas county in accordance herewith."

The proceeding is had under sec. 5640, Revised Statutes:

'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."

And it is under that first clause that the proceedings are had. Sec. 5644, provides:

"Upon the day fixed for the trial the court shall proceed to investigate the charge, and shall hear any answer or testimony which the accused may make or offer."

"Sec. 5646. When the contempt consists in the omission to do an act which is yet in the power of the accused to perform, he may be imprisoned until he performs it."

Argument has been made before the court as to whether

the court had jurisdiction to issue this order under sec. 5640, for the reason that it was claimed that the order so made was a final judgment, and not properly an order of court. That part of the order in the original proceedings on which it was based, provided that he should pay $675, "and upon default of payment of the amount herein ordered for five successive days, execution shall issue against defendant for any amount remaining unpaid." It is claimed on behalf of the relator that this was an order pure and simple, and is distinguishable from the judgment which is rendered for alimony in favor of the wife.

Sec. 5696, provides:

"The granting of the divorce, and the dissolution of the marriage, shall in no wise affect the legitimacy of the children of the parties thereto; and the court shall make such order for the disposition, care, and maintenance of the children, if there are any, as is just and reasonable."

Sec. 5699 defines the rights of the parties when a divorce is granted by reason of the agression of the husband, and it is provided, among other things, that property may be allowed to the wife for alimony, or it may allow alimony 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 deems just and equitable."

Now, whether this be such a final order that a court cannot take jurisdiction of it to issue an order for contempt, or whether it be such an order as comes within the first section of 5640, we shall not decide to-day. We leave that open for future consideration and future decision, if the necessity shall ever arise for deciding it.

Inquiry was made of counsel whether the exemptions allowed to heads of families and widows, in sec. 5430, were applicable to a case of this kind. That provides that:

"Every person who has a family, and every widow, may hold the following property exempt from execution, attach-

ment, or sale, for any debt, damages, fine, or amercement, to-wit:

"6. The personal earnings of the debtor, and the personal earnings of his or her minor child or children, for three months, when it is made to appear, by the affidavit of the debtor, or otherwise, that such earnings are necessary to the support of such debtor, or of his or her family; and such period of three months shall date from the time of issuing any attachment or other process, the rendition of any judgment, or the making of any order, under which the attempt may be made to subject such earnings to the payment of a debt."

The supreme court, in a case reported in 50 Ohio St., 576, had under consideration the question whether a judgment for alimony was a judgment that became a lien upon lands, and discusses this question of debt. I read from page 481:

"It is contended in argument that alimony is not a debt, and if not, that it is difficult to see how it is a lien unless expressly made so by the court. But, in Lockwood v. Crum, 34 Ohio St., 1, it is well said by Boynton, J., in delivering the opinion of the court: 'The claim for alimony rests on the common law obligation of the husband to support the wife in a manner suitable to his condition and station in life during the existence of the marriage relation. And this obligation is as binding after the commission, by the husband, of a marital offense entitling the wife to a divorce, as before. In respect to such obligations she may well be held to be a creditor of the husband.' In Chase v. Chase, 105 Mass., 385, it was held that a judgment for alimony in the case of a divorce a vinculo, or from bed and board, creates a debt of record in favor of the wife, and that she is entitled, as a creditor, to impeach a conveyance made by him with intent to defraud her. It is said by the supreme court of the United States, in Barber v. Barber, 21 How., 582, 595, that when the court having jurisdiction of her suit, allows the wife from her husband's means, by way of alimony, a suitable maintenance and support, 'it becomes a judicial debt of record against the husband; and it is as much a debt of record, until the decree has been recalled,

as any other judgment for money is.' And if the duty of the husband to provide proper maintenance and support for his wife, before and after a decree of divorce, is not technically a debt, it is, nevertheless, a paramount obligation springing out of a sacred relation, which, when it has passed into judgment, should, as such, carry with it the well known binding force that attaches to judgments at law.''

In the case of Pretzinger v. Pretzinger, 45 Ohio St., 452, I read from the syllabus:

''The obligation of the father to provide reasonably for the support of his minor child, until the latter is in a condition to provide for his own support, is not impaired by a decree which divorces the wife a vinculo on account of the husband's misconduct, gives to her the custody, care and nurture of the child, and allows her a sum of money as alimony, but with no provision for the child's support.

''The mother may recover a reasonable compensation from the father, for necessaries furnished by her to the child after such decree, and may maintain an original action for such compensation against the father, in a court other than that in which the divorce was granted.''

That case differs from the case at bar in this: that here there was this allowance to the wife for the support and maintenance of these minor children; so that obligation, so far as this case is concerned, is carried into that order, or judgment, if it be a judgment (for it seems to have the form of a judgment, in that it allows execution to be issued upon the non-payment on the sums).

But whether or not the exemption should be held to apply in a case of this kind, or in this particular case, we shall not definitely decide, for the reason that we do not think it is necessary. At the same time it will be seen by the decision of the supreme court that it might be very proper to take it into consideration when we come to consider the question of the property that the plaintiff has with

which to meet this obligation which is imposed upon him by this order. We think, however, that this order was not made within the meaning of the statute which I have read: "When the contempt consists in the omission to do an act which is yet in the power of the accused to perform, he may be imprisoned until he performs it."

Now, it will be observed that the order directed him to pay the sum of $495 and $18.41 of interest, and he was further directed to pay $50 as attorneys' fees, and was directed to pay the costs of the contempt proceedings. In our judgment the testimony clearly shows that he was not in a condition or had the power at that time to perform the order The testimony shows that he had during the previous year been earning at the rate of $100 a month, and that since the 1st of January last, and up to the 12th of July, when the order was made, he had been earning about $60 a month, or a little over. Some of the testimony shows that for the ordinary necessities of the house, such as living, light, fuel, etc., it was costing him $40 a month. He had other incidental expenses, which practically left him at the end of each month without any money arising from his earnings during the month. And it further appears, that he had no other property which was available to pay this amount. It is true that he had some interest in property in South Carolina, in real estate, but it was then out of his possession, under some arrangement whereby the use and income of it should go to pay certain liens upon it, and also to make certain improvements upon it, for which a power of attorney had been executed to his brother, who was carrying out the arrangement. So at the time this order was made the defendant had no money whatever applicable to the payment of this amount. Defendant was a married man, as he sets up in his answer, and says he had one child, which I suppose is a child by his subsequent marriage. At any rate he was a married man, was keeping house, and

he was lawfully married—that is, he had a right to marry. And he was bound to support that wife and maintain her according to his circumstances. He was also bound to maintain his children, either through the order that had been made by the court, or independent of that order, under his general liability to support his children. If an order had been made for some limited amount, so that he could fairly lay aside some little sum from his earnings, aside from the questions of exemptions, it would present a very different question. To impose upon him the duty of paying this amount—the sum of $550—and the costs of this court, we think was an excessive order, from the testimony of the case.

In regard to the attorneys' fees we are unable to find any authority for the court directing their payment. But whether the court was authorized to do that or not, we are clearly of the opinion that he had no authority to order this man to be imprisoned at that time for the payment of those attorneys fees, nor for the payment of the costs made in the contempt proceedings. In support of that we cite a case from 80 Mo., 447. I read from the syllabus:

Petitioner was found guilty by the circuit court of Jackson county, of contempt in wilfully violating its restraining order, by removing and refusing to return certain fixtures in controversy in a pending civil suit, and was adjudged to pay the adversary party therein $150, as costs and expenes incurred by the latter in the contempt proceedings; also to pay a fine of $500, and that he restore the property mentioned in the order and be committed to jail until he paid said sums of money and returned the property. Held, that so much of the judgment of the court as related to the payment of the fine and the $150, was illegal and void.

The case is a lengthy one, and discusses many questions under their statutes; but where they hold that he might be

imprisoned for not returning the property, they say:

Here the court had jurisdiction, and the imprisonment of the petitioner until he should comply with the order of the court, was warranted by law. After he shall have restored the goods the prisoner will be entitled to his discharge, the other requirements of the judgment being nullities. Feely's case, 12 Cush., 598; People v. Markham, 7 Cal., 208.

For these reasons the judgment of the court will be reversed, and the defendant be discharged, and the case be remanded to the court of common pleas.

Horace A. Merrill, for Plaintiff in Error.

J. M. & W. F. Brown, and *John Berry*, for Defendant in Error.

(First Circuit—Butler Co., O., Circuit Court—Oct. Term, 1897.)

Before Cox, Smith and Swing, JJ.

THE C., H. & D. RAILROAD CO. v. N. L. HEDGES.

Injury of employe by defective machinery—Allegation of want of knowledge of defect by employe necessary—

1. On the facts stated in the petition of the plaintiff, there should have been an additional allegation therein, that the defects averred by him to have existed in the machinery, and which caused him injury, were not known to him in time to have avoided such injury.

Same—Want of knowledge by employe essential to recovery—

2. The charge given by the court to the jury, to the effect that if such machinery was out of condition, and the defendant company had knowledge thereof, or by reasonable diligence could have ascertained it, that it was liable in the action, was erroneous. This leaves out of view the question whether the plaintiff himself had knowledge of the defects alleged to have existed, and thus might have avoided the injury; and such error was not elsewhere cured by the charge of the court. The court also erred in refusing to give the 6th special charge asked by the defendant.

Same—Act of 1890 applies to injuries sustained before act passed in suits afterwards brought—

3. The injury to this plaintiff occurred before the passage of

the law of April 12, 1890 (87 O. L., 150), but the action was commenced while the law was in force. The charge of the court, in effect, that the provision of the law that where an employe of a railroad company is injured while in the discharge of his duty by reason of defective machinery, and the defect is made to appear at the trial, the same shall be prima facie evidence of negligence on the part of the corporation in this case, was not erroneous.

Error to the Court of Common Pleas of Butler county.

SMITH, J.

We are of the opinion that there was no substantial error in the rulings of the trial court as to the admission or rejection of evidence prejudicial to the plaintiff in error. Some evidence was ruled out which we think was competent, but afterwards the same evidence, substantially, was given tc the jury by the same witnesses, and thus the error was cured, and was not prejudicial to the plaintiff in error.

It is claimed by counsel for the plaintiff in error, that in many particulars the court erred in the charge given to the jury, and in refusing to give certain special charges asked to be given.

Properly to answer the questions raised, the issues made by the pleadings, and what the evidence tended to prove must be considered. The petition filed May 19, 1890, in substance, was that the defendant is a corporation, and is a common carrier, engaged in carrying passengers and freight over its road from Cincinnati to Dayton, and that on November 23, 1889, and for a long time before, he, the plaintiff Hedges, was in the employ of said defendant as foreman of a switch crew, engaged in switching and transferring cars from point to point in the Hamilton yard of the company, and on said day the plaintiff, in the discharge of his duties as such employe, was engaged in letting off the brakes which had been set on a box freight car, then in use by the defendant; and while so engaged, without any fault on his part, the plaintiff was thrown and caused to fall, and thus was

severely injured; and he then proceeds to describe what the defect was, and the particular nature of the accident to himself, averring that while he was in the discharge of his duties, and in a proper, prudent and careful way was about to let off the brake, it unexpectedly let go of its own accord, striking the plaintiff, and inflicting the injury upon him. That the brake machinery and apparatus were defective, out of repair and in a dangerous condition, and that the ratchet wheel on the brake rod was old and worn, so that the notches thereon were so worn away that the iron pawl failed to catch and securely hold the same, and that said iron pawl or brace was worn, or loose, and that the bolt which held the same on said board had no nut thereon, and had become loose, so that said iron pawl failed to hold said ratchet wheel. It was further averred that said defective, improper and dangerous brake apparatus and machinery were so used and maintained by the defendant carelessly and negligently, and with full knowledge of said defective, improper and dangerous condition aforesaid.

The answer of the defendant admits the allegations as to its being a corporation, common carrier, etc, and that plaintiff, while in its employ as stated, was injured as alleged, but denies all the other allegations of the petition.

It is to be noted that in this petition, the plaintiff nowhere avers that he was ignorant of the fact at the time or before he was so injured, that the machinery was defective, as he now alleges that it was. We incline to the opinion that this should have been averred and proved. The case of Railroad Co. v. Barber, 5 Ohio St., 541, tends strongly to support this view. It was there held that:

"The conductor of a train of railway cars, being the representative of the company in the command and management of the train, and not being under the immediate control or direction of a superior officer, is held to ordinary and reasonable care and diligence, not only in the management of

the train, but also in the due inspection of the cars, machinery and apparatus of the train, as to their sufficiency and safety: And if he received an injury while neglecting that care and diligence required of him in the management of his train, or by reason of any defect or insufficiency of the cars, machinery or apparatus, with a knowledge of which he was running the train, or which could have been known to him by the exercise of the care and diligence required of him in the performance of his duty; or in other words, if his neglect in either of these particulars contributed as a proximate cause of the injury, he can have no right of action against the company for damages

"In such action the plaintiff, in order to lay a sufficient foundation for a recovery and judgment for an injury received by him while acting as such conductor, must aver or show in his petition, in addition to the allegation that he had not a knowledge of the insufficiency or defects which were the alleged cause of the injury, that he had exercised due care and diligence in the use and examination or inspection of the cars, machinery, etc. belonging to the train, while the same were in his charge and under his direction."

(Sections 3 and 5 Sub-divisions of the syllabus.)

In the case at bar, as was alleged and conceded, the plaintiff was the foreman of the switching train, and not, as we understand, under the immediate control of a superior or supervisory agent; and it is difficult to see why the statement in the syllabus referred to, as to the duties of the conductor of a freight train, does not apply to him. But if not, it would seem that he was bound to use due care in the use of the machinery, and to aver and show that the defects complained of were unknown to him. By his proof he does attempt to do this to a certain extent; but on his own evidence, there is some question whether he did not discover the defect complained of in time to have avoided the injury to himself.

We refer to this as being of importance in the consideration of the question whether there was error in the charge

given by the court to the jury. In the general charge given, the trial judge, after stating the issues as made by the pleadings, (not very accurately however, for he entirely omits the averment of the petition that the plaintiff while engaged in letting off the brakes which had been set on the car, "without any fault on his part was thrown and caused to fall"), proceeds to say, as to the duties imposed on the plaintiff:

"These duties, as has been stated to you, were to make up trains, to separate trains brought in, and to make up trains, and switch the different cars to make up trains to different destinations. The evidence shows you also that there were other parties, called inspectors, whose duty it was to inspect cars and see they were in proper condition. If you find that it was no part of the duty of Mr. Hedges on that day to inspect the cars to see whether they were in proper condition or not, then he is not chargeable with any notice on that subject, unless it was a matter that he had knowledge of—then of course, he is bound to take notice of the condition of the cars when he is performing his duties as switchman.

"I say to you that if this dog was out of condition, or if this rachet wheel was out of condition, or both, and the defendant company had knowledge of the fact, then Mr. Hedges is entitled to recover. The converse of that proposition is true, namely: if the defendant company had no knowledge of it, or if by reasonable diligence it could not have ascertained that fact, then the defendant company is not liable."

Again, in another place, the court says:

"As to the knowledge of the company, it is for the jury to consider whether the defendant company had actual knowledge of the condition. If it had, then it is liable for this damage on its failure to repair; or, if by reasonable diligence it could have ascertained the condition of this nut, assuming that it was out of order, then it is equally liable."

It seems to us that in the giving of these charges the

court erred to the prejudice of the defendant company in this: that the jury were substantially charged twice, without any qualification whatever, that if the machinery in question was out of order, and the company had knowledge of it, or by reasonable diligence, could have obtained such knowledge, the plaintiff was entitled to recover, totally ignoring the question whether the plaintiff himself had knowledge of this defect in the machinery at the time, or by the exercise of proper care on his part could have discovered it, and thus have avoided the injury, as to which, in our opinion, there was evidence tending to prove that such was the case even on the evidence offered by the plaintiff himself. This is emphasized and made more clear by the refusal of the court to give to the jury the sixth special charge asked by defendant's counsel, as follows:

"Defendant requested the court to state generally to the jury that if Nathanial Hedges, the plaintiff, failed to use ordinary care in unwinding the brake upon the wheels of the car, and that by reason of his want of ordinary care he contributed in any degree to his injury, he can not recover."

After this the court further charged the jury as follows:

"The court thinks that it has or at least it intended to give this as a portion of its charge viz.: That it was the duty of Mr. Hedges to act in a careful prudent manner, in a reasonable manner, to use reasonable diligence in switching these cars.

"The court charges the jury now, (and thinks it did before) that if the evidence shows to you that it was the duty of other persons to examine the cars, inspect them, to see that they were all right, and it was the duty of Mr. Hedges simply to switch them, that he was not bound to make any examination except what he discovered in the course of his switching duties, and if he discovered any defect during his discharge of those duties of switchman, having charge of a crew switching cars, of course it was his duty to take notice of it, and it was his duty to report it to the car inspector."

This supplementary charge wholly failed to cure any error in the charge given, or in refusing to give charge No. 6 asked for, and which ought to have been given. It only says if he did discover it in the discharge of his duty, it was his duty to take notice of it and report it to the inspector.

But suppose he discovered it was dangerous, and that as a prudent man he should not attempt to unwind the brake, and yet he did so, and thus produced the injury. Should the court not have said that in such case he was not entitled to recover? But there is not a syllable in the charge which deals with this phase of the case. Proper exceptions were taken to all of these charges and failure to give the special charge No. 6.

Exception was also taken to the charge of the court as given, and the refusal of the court to give special charge No. 7, asked for as to the burden of proof being upon the plaintiff, and the applicability of the law of April 2, 1890, (87 Ohio Laws, 150), or any part of it to this case. As has been stated, the injury to the plaintiff occurred before the passage of the law, but the action was commenced afterwards. The court, in effect, charged that the provision of the law that where an employe of a railroad company is injured while in the discharge of his duty, by reason of defective machinery, and the defect is made to appear at the trial, the same shall be prima facie evidence of negligence on the part of the corporation. This we think was correct. Though the injury happened before the passing of the act, the action was commenced afterwards, and was governed as to matters of evidence by the law then in force; and the court also correctly stated the law as to the burden being on the plaintiff to show negligence on the part of the defendant company. The other special charges asked for by the defendant were, we think, either given in substance, or contained some statement of law which justified the court in refusing to give them.

Exception was also taken to various parts of the charge of the court, as announcing to the jury what had not been proved by the evidence in the case. We think that the charge in some particulars is open to criticism in this respect. It is the duty of the jury to say what has or has not been shown on a particular subject, and the court, where there is any room for difference of opinion as to these matters, should avoid any expression of opinion in the charge to the jury on such subjects; but in this case, it is unnecessary further to refer to them.

While there is conflict in the evidence, or some question as to whether the plaintiff exercised due care, we do not think the verdict was so manifestly against the weight of the evidence as to require a reversal of the judgment. But on the other grounds stated, the judgment will be reversed, and the case remanded for a new trial.

Millikin, Shotts & Millikin, for Plaintiff in Error.

Morey, Andrews & Morey, for Defendant in Error.

(Eighth Circuit—Cuyahoga Co., O., Circuit Court—Dec. Term, 1897.)

Before Hale, Marvin and Caldwell, JJ.

W. L. WEST, ADMR, v. J. J. DEAN.

Estate owning chattel mortgage—Administrator can not buy property for the estate—

Where among the assets of an estate there is a chattel mortgage, the administrator can not buy the property mortgaged and bind the estate by a promise made in his capacity as administrator of the estate to pay the purchase money. It is not the part, but a violation of his duty as administrator, to buy any property for the estate even though he may think it will turn out to the advantage of the estate, and even if it so turn out.

Same—Suit against administrator as such on his promise to pay purchase money—Judgment binds the administrator personally, not the estate—

In such case a judgment, recovered against the administrator, in a suit instituted against him as administrator on such promise, made as administrator, to pay the purchase money, will not bind the estate, but will be effective against the administrator personally.

Error to Court of Common Pleas of Cuyahoga county.

MARVIN, J.

The case of W. L. West, Admr., v. J. J. Dean, comes here upon a petition in error.

A suit was brought in the court of common pleas by Dean, the title of the case, as given in his petition, being "J. J. Dean v. W. L. West, administrator of the estate of John Glenn, deceased." The petition avers that West is the administrator of the estate of Glenn; that Dean was the owner of certain personal property; that Glenn, whose estate is being administered by West, had a chattel mortgage upon that property; that West purchased the interest of Dean in the mortgaged property, agreeing to pay therefor "as administrator of the estate of John Glenn, deceased," the sum of fifty-two dollars. It avers that such payment has not been made, and prays for a judgment against said defendant, for that amount, with interesst.

Judgment was rendered in the court of common pleas, in these words: "It is, therefore, considered that said plaintiff recover of said defendant his said damages and also his cost of suit. Judgment is rendered against said defendant for his costs herein."

That judgment was taken upon default, and the error complained of is, that the petition stated no facts which warranted the judgment; that everything being true, as stated in the petition, there was no ground for the judgment.

Two questions are here involved: one, as to whether there could be a judgment upon that petition against West as administrator of the estate of Glenn.

West promised to pay, the petition alleges, "as administrator," the sum of $52.00, for the interest of Dean in the mortgaged property. And, on the part of the defendant here—the plaintiff below—it was urged, that having made that promise "as administrator," and having failed to pay, judgment could be rendered against him as administrator; that it is fair to suppose the administrator regarded the buying in of the mortgaged property as the most advantageous manner of collecting the debt secured by the mortgage, and that, if it were such, then he might bind the estate to pay the $52.00.

It seems to us, that there is a mistake in supposing that the administrator may bind the estate to pay money for the purchase of any such property.

I think there is a very general misunderstanding as to the duties of an administrator.

It is the business of the administrator of an estate to convert the personal property into money, and to pay the debts, and to distribute what is left, and it is no part of his duty, —not only no part of his duty, but a violation of his duty, to undertake to buy property for the estate, even though he may think it will turn out to be to the advantage of the estate—and even though it does so turn out.

Suppose, after this property had been purchased by the administrator, it had been destroyed by fire or otherwise, immediately, is it possible that it can be said to have been the property of the estate when thus destroyed? I do not mean to say "the property of the estate;" I recognize that an estate never owns anything—it is the thing owned; but is it possible that we could say it is a part of the estate, if it had been thus destroyed? The estate of a decedent is that which he owned at the time of his death, and no property, thereafter purchased by his personal representative or by any other person, ever becomes a part of such estate.

Our own Supreme Court have said, in the 28 Ohio St.,

in the case of Peter Lucht, Admr., etc. v. John Behrens, beginning on page 231, that an executor, not authorized by the will of the testator to do that, cannot carry on a business for, or of an estate, and incur debts which shall bind the estate; and gives reasons why that may not be done: liabilities may be incurred; an executor or administrator may make a mistake in thinking that he is doing what is advantageous to the estate; and at the conclusion of the opinion, this language is used:

"To allow personal representatives of estates to go beyond this, and, without authority of law, or under the will, to embark the assets of an estate in trade or business, however well-intentioned they may be, and thereby subject the estate to all the hazards of the venture, would encourage that which it has been the special policy of the law to prevent—the employment of trust property in any other mode than is clearly authorized. For aught we know (for the court refused to hear evidence on the subject from the defendant), this well-meant endeavor to preserve the business of the testator, for his sons, while paying the debts and supporting the family out of it, may have been disastrous; and if this judgment stands and is collected, it may defeat the express provisions of the will."

It will be observed that the court does not say the business turned out disastrously, but that it *may* be disastrous, and the very fact that it may so turn out, establishes that the administrator or executor must not so invest the money, even though he thinks it will turn out for the best interest of the estate.

In 5th Circuit Court Reports, page 12, McBride & McBride v. Louis Brucker, Admr., the court hold, that the administrator can not contract a debt for attorney's fees which can be recovered out of the estate. He may pay attorney's fees that are necessary in the administration of the estate and he will be allowed, in his account filed in the probate court, for proper and suitable fees paid to the attor-

ney; but he can not bind the estate by a promise that out of it shall be paid attorney's fees, even though it is proper that an attorney shall be employed. The same is held in several other states, if not in all of them.

Woerner, in his American Law of Administration, sec. 356, says:

"It is a well recognized principle, that if liabilities are contracted by the personal representative, although for the benefit and in the interest and behalf of the estate, it is not liable to creditors. Disbursements, reasonable in amount and for services necessary in the proper discharge of the duties imposed upon them, will constitute a charge in favor of the executors and administrators against the estate, although their allowance should leave no surplus to pay creditors of the deceased."

The case of Dailey v. Dailey, in the 66 Ala. R., 266, is a case where suit was brought by Lucinda Dailey against Geo. J. Dailey, as administrator of the estate of Geo. Dailey, deceased. Among the things for which she claimed a recovery, was one for twenty-five barrels of corn, which she, at the request of the administrator, after his appointment, had fed to the swine belonging to the deceased at the time of his death. The court in relation to that item, use this language, on pages 268-9 of the opinion:

"One item was for corn fed to the stock of the estate at the request of the administrator, made after his appointment. Such agreement is but the personal contract of the administrator, and is no charge on the estate when demanded by the creditor."

It is further said in that opinion, that if it was necessary to have this corn to feed to the swine, the administrator might have paid for it, and been allowed its value in the settlement; but he could not bind the estate to pay for the purchase of that corn. And all upon the theory I have stated, that it is not the business of the administrator to invest the funds of an estate and make purchases and have charges against the estate therefor.

The case in the 47 N. Y., 366, Austin et al. v. Munro, et al., is a case in which the doctrine is, as we think, well stated:

"The rule must be regarded as well settled that the contracts of executors, although made in the interests and for the benefit of the estate they represent, if made 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 promissors, 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 might not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator."

From these authorities and from the general doctrine of the duties of an administrator, we are clear that the court could not render any judgment—ought not to have rendered any judgment upon this petition against the administrator *as such*. The other question involved is whether a judgment could be rendered upon the petition against the defendant *personally*.

The title of the case is, as I have already said, "J. J. Dean v. W. S. West, Administrator of the Estate of John Glenn, deceased."

The allegations, however, are that *as administrator* he made the promise. But whether it be said that the words in the title of the case, after the name of the defendant, are simply descriptive of the defendant, or that he was sued in his representative capacity, we still think it is settled in Ohio, that the judgment against him is against him *personally*, and not against him *as administrator*, and the judgment

itself, standing as it does, could not be enforced against the estate.

Attention is called to the case of Thomas, Admx., v. Moore, etc., 52 Ohio St., commencing on page 200. A suit was brought before a justice of the peace by Moore, as surviving partner of a firm of lawyers; the other partner, McKnight, having died. The bill of particulars set out that services were performed by this firm for the defendant, at her request, in various suits brought on behalf of the estate then being administered by her, and the prayer was for judgment for the amount of these fees. This suit for fees was brought against "Elizabeth J. Thomas as administratrix of the estate of David Thomas, deceased." The judgment was against the defendant in the case, and an appeal was taken by her. The question was, whether she was required to give a bond in order to perfect her appeal. It was urged that because of the statutory provisions as to appeals by trustees, no such bond was necessary. Judge Williams, in his opinion, uses this language:

"Sec. 6408, Rev. Stats., contains the general provision that 'when the person appealing from any judgment or order in any court or before any tribunal is a party in a fiduciary capacity in which he has given bond within the state for the faithful discharge of his duties, and appeals in the interest of the trust, he shall not be required to give bond, but shall be allowed the appeal, by giving written notice to the court of his intention to appeal within the time limited for giving bond.'

"The provision just quoted is applicable to appeals from justices of the peace, and dispenses with the necessity of an undertaking for an appeal from their judgments in cases within its scope, namely, where the appellant is a party to the judgment in a fiduciary capacity, and the appeal is in the interest of the trust; so that, the inquiry here is, whether the defendant's appeal presents a case of that kind. We think it does not. The judgment is not against

the defendant in her fiduciary character. Though described in the proceedings as the administratrix of her intestate's estate, the judgment rendered is not a judgment *de bonis intestatoris*, her designation in the proceedings as administratrix, being descriptive of her person merely, and execution issued upon the judgment can run only against her property."

From these considerations, we conclude that this judgment, as it stands, is a judgment against West personally, and not against him in his representative capacity; that such judgment was warranted by the petition, and the same is affirmed.

Lawrence & Estep, for Plaintiff in Error
George A. Groot, for Defendant in Error.

(First Circuit, Hamilton Co., O., Circuit Court—Nov. Term, 1897.)
Before Cox, Smith and Swing, JJ.

THE WOOSTER TURNPIKE CO v. THE C. P. & V. R. R. CO.

Railroad crossing turnpike—Low bridge--Remedy—

Where an injunction is asked to restrain a railroad from building a bridge over a turnpike which would leave only a space between the surface of the pike and the bridge not sufficient for the purposes of the public using such pike, and it appears that much work has been done in building such bridge before the Turnpike Co. objected; that the cost of raising the bridge and the approaches thereto, would involve a heavy expense, and that the difficulty could be remedied at a much less expense and trouble by lowering the surface of the pike at the point in question, the court will order that the latter be done at the expense of the Railroad Co.

Same—Power of Turnpike Co. to acquire land in fee-simple—

Where it appears that after making the application for such injunction, the Turnpike Co., to further prevent the building of the bridge, had acquired the fee-simple of the land occupied by the turnpike and the bridge at that point, in which before it held only an easement of right of way, such fee not being necessary to the Turnpike Co. for any other purpose than to prevent or delay the building of the bridge, Held: that the Turnpike Co. has no legal right under our present laws to acquire and hold the fee-simple estate in such land for such a purpose.

Application for injunction.

SMITH, J.

On consideration of this case we hold,

1st. That the Turnpike Company is not the owner, in fee simple, of the land over which this bridge is erected; that it has simply the right to use the same for the purposes of a turnpike road.

2nd. That the bridge now erected there, or in process of erection, being only thirteen and one-half feet above the surface of the turnpike road, it is probable that it may interfere to some extent with the proper use of the said turnpike, by vehicles of extraordinary height as have of late years come into occasional use in this region—such as "Tallyho", furniture vans, etc. We would not, however, be disposed to hold that a bridge of a railroad company, over a roadway like this, must be so high above the surface of the ground underneath it, as not to interfere in any degree with the passage of vehicles along the road, no matter how high they might be constructed or loaded. The use of the road must be a reasonable one. And the claim made in the affidavits filed by the Turnpike Company, that it is possible or probable that this roadway may in the future have a street railway thereon, and that (if so) the cars can not pass under this bridge unless it is raised several feet above its present height, without lowering its trolleys, does not strike us as entitled to consideration. Evidently the trolley may be lowered at that point without difficulty. But inasmuch as there seems to be some reason to apprehend that this bridge, as being now constructed, may interfere with the reasonable use of the turnpike in a few cases, as for instance, by wagons loaded with hay, chairs, etc., as the road has been used by them, we think that some provision should be made to guard against this—though it is true that there are other bridges over this same road, on either side of this one, which are much lower than the one in question. But

as the cost of raising this bridge and the approaches on either side of it for a long distance would be very considerable and the height of the bridge and roadway was not objected to until recently, we think it would be inequitable to require it to be done, if the trouble can otherwise be avoided at much less cost, and we think it can by lowering the surface of the turnpike. We suggest therefore, that unless the parties can agree as to the cost of doing this, and putting the turnpike road into substantially as good a condition as it now is, that an expert engineer be sent out to view the premises and report to the court whether it can be done, and the cost of it, and how it should be done, so that there will be a space of fifteen feet between the bridge and the surface of the turnpike road. If it then appears to us that it is practicable to do this at a reasonable cost, we would feel disposed to require this sum to be paid to the turnpike company, by the railroad company, to be applied by it to doing the work, or require the railroad company to perform the work to the satisfaction of the court, as a condition to our allowing the bridge to remain at its present location. If the turnpike company refuses to take the money and do the work, or to have it done by the company, its application for an injunction will be overruled; in the meantime the provisional injunction heretofore allowed, will be dissolved.

After we had reached the foregoing conclusion, and after the writing of the above memorandum, our attention was called by counsel to the fact that some days after the hearing of the application in this court, the turnpike company had obtained from the person owning the fee thereof, a quit-claim deed for that part of the ground covered by the roadway of the plaintiff company which lies between the west line of the turnpike at that point, and the center line thereof. It seems that when the railroad company recently purchased the ground upon which to construct its new track and cross the turnpike road by the bridge in question, it

only purchased from the owner up to the west line of the turnpike, and that the land on the east was purchased by it to the center of such road. This fact becoming known to the turnpike company at the hearing in this court, it obtained a deed from the owner of the land as stated, and now seeks to strengthen and support its original claim thereby. Should this fact induce us to change or modify in any way the conclusion at which we had arrived before being advised of this fact?

We do not feel disposed to do so. We question very much whether the turnpike company, under the laws as they now stand, has any legal right to acquire the fee simple of this ground for any such purpose. There is no doubt but that it is now entitled to, and is using and occupying the space in question, for turnpike purposes, and they have an easement in it for such purpose. There is no claim or evidence that the fee is necessary for such use, or that it is needed for any other purpose than to hinder or defeat a great public improvement in process of construction and nearly completed, and this should not be allowed unless its right is clear. We therefore adhere to our original ruling, and think that the suggestions therein made should be acted upon by the parties.

E. McColston, for Plaintiff.

Hollister & Hollister, for Defendant.

(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1897.)

Before King, Haynes and Parker, JJ.

JENNIE C. FLETCHER v. OLIVER P. FLETCHER, et al.

Divorce and alimony—Defendant's interest in any property may be averred in petition—

The plaintiff in a divorce proceeding may describe in the petition all the property in which the defendant has any interest, no matter what that interest is, and make others who

claim any interest in such property parties to the suit, and the court has power to determine in such action, what the interest of defendant or of other parties to the suit is, and take it into account in the allowance of alimony.

Same—Property described in petition bound from date of filing of petition and service of summons—

Where the petition alleges that defendant has fraudulently, without consideration, conveyed property to a third person to defeat her claim for alimony, and that said third party is about to sell the same and has instituted proceedings in the probate court for the sale of the property to pay creditors of the defendant, and prays for an injunction to restrain such party from proceeding further, an injunction may properly be granted for that purpose. But where the property is fully described in the petition, no injunction is necessary to bind the property from the date of filing the petition and service of summons as to any claim plaintiff may be determined to have by the court.

KING, J.

Three different petitions were filed in the court by the plaintiff below, who is here the plaintiff in error, to each of which demurrers were severally sustained, and the action of the court on those demurrers is assigned for error; also the dissolving an injunction granted in the action; and the action of the court in removing or discharging a receiver appointed. As to the latter ground, it is sufficient to say that there is no bill of exceptions setting out the evidence, and it appears that the motions were heard upon evidence, and therefore the action of the court cannot be reviewed at this time and in this proceeding.

Plaintiff filed her petition on the 24th of September, 1896, alleging several grounds for divorce as existing, and in her petition she describes certain tracts of real estate, alleging that certain real estate—describing it by metes and bounds, and its situs, one tract in Michigan and another tract in Toledo—had been conveyed to defendant Henricks for the purpose of putting it beyond her reach, so that it might not be made subject to the payment of any judgment

for alimony; and she wound up with the prayer that that conveyance be set aside, and she be allowed reasonable alimony. She also asked for an injunction, alleging that her husband was threatening to convey certain property, and also that Henricks would convey the piece to which he had the legal title, if not prevented by an injunction. A temporary injunction was allowed by a judge of the court of common pleas. That stood until when, upon motion, it was dissolved. On the 13th of January, 1897, some five months after the filing of this petition, the principal defendant, her husband, filed an amended answer, in which he set out the defenses upon which he relied. He denied generally the grounds for divorce that were set out in the petition, and then set up what he had been doing with his property. With reference to the property that had been conveyed to Henricks, this defendant, her husband, says he admits that the property had been conveyed to Henricks,

"But avers that the same was at the instance and solicitations of her attorney, and that he conveyed said property at her request, and for her behoof and benefit, and to satisfy her of his affection for her, and of his willingness to do all things in his power for her welfare, and for the purpose of showing her that he bore her no ill will. And this defendant further says, that shortly subsequent to said transfer, he agreed with her attorney as to alimony for her, and that his attorney and her attorney then agreed upon practically the sum of $1500, in cash and real estate, the same being all and more than this defendant was worth."

And he avers that in all things he has endeavored to do what was right; and he further says, "he denies all allegations in said petition as to his placing or trying to place any property of any description beyond plaintiff's reach, or trying in any way to deprive her of any property rights whatever."

The defendant Henricks did not answer, but he filed a

demurrer, which was heard and determined on March 15th, some little time after this answer of the principal defendant. The demurrer was sustained, and in the judgment of the court sustaining that demurrer, I think appears also the judgments upon the motions that had been filed as to the receiver, and the judgment dissolving the injunction. There had also been a motion filed to have Mr. Henricks show cause why he should not be punished as for contempt, and that was disposed of against the application of the plaintiff.

On the 17th—two days later—the plaintiff filed an amended petition. She sets forth substantially the same things that were in the original petition, and with reference to this property conveyed to Henricks, she in substance adopts some of the allegations of her husband's answer—that it had been conveyed to Henricks to be held by him in trust to satisfy any judgment for alimony that she might recover, and that it had been transferred to him for her benefit; and she further says, that prior to the transfer the property had been acquired by the joint efforts of her husband and herself, and she had an interest therein. To that a general demurrer was filed, and it was heard on the first day of April, 1897, and sustained. On the 2d day of April, 1897, a second amended petition was filed, which sets out more particularly the allegations with reference to this property conveyed to Henricks, and also sets forth that some time after the original petition was filed, perhaps in November, the defendant Fletcher had conveyed all his property to an assignee for the benefit of his creditors, and that the assignee was Henricks, and that Henricks, in his capacity as assignee, had filed a petition in the probate court in which he was seeking to sell this very property described in her petition, conveyed to him to satisfy such judgment for alimony, or such decree for alimony as the court of common pleas might thereafter render, and it was not at the date of the assignment the legal estate of Flet-

cher, her husband; and she asks for an injunction as to these acts of Henricks in the probate court. A general demurrer was filed to that, and on May 18th, 1897, it was sustained.

All these acts of the court, are alleged as error.

It is contended here by counsel, for the demurrers, that the plaintiff, in these amended petitions especially, has set up specifically a trust, and that she could not unite an action to enforce a trust made for her benefit as cestui que trust, with any cause of action that might fall within the jurisdiction of the court under a petition for divorce and alimony; that this is a misjoinder of causes of action, so far as it seeks to enforce anything against Henricks; that while she might allege that her husband has property which he is seeking to hold away from a judgment for alimony, she cannot come in and say a trust has been declared for her, and ask the court to adjudicate about that trust; and that the demurrers were sustained properly for that reason.

We cannot agree with the argument, nor with the decision of the court below upon any of those demurrers. We do not say as to the first petition that there was any error in that; but clearly the plaintiff, in filing a petition for divorce, had a right to describe all the property in which the defendant had any interest, no matter what that interest was. She might allege that he had, in anticipation of her filing a petition for alimony, conveyed that property away, without consideration, for the purpose of defeating her application for alimony. She might have made that allegation, described the property, and brought the grantee of the property into court, and held him, subject to the final decree that might be made—not for the purpose of setting aside that deed, although we have no doubt the court might do that; but for the purpose of holding that property in order to determine what her rights were—whether the court would grant her alimony in kind, in lands, or in money

and make a money decree a lien upon the land. The court has ample power to determine every interest the defendant had in any propery, or that of other parties to that suit who claim an interest in it. If this land was held by Henricks for the use of the plaintiff, it was actually the property of the defendant Fletcher, the amount and value of which the court should always consider in rendering its decree for alimony. Whether the court should, if it found that this conveyance was made as the defendant Fletcher alleges it was made, decree that Henricks should convey that property to the plaintiff as and for her alimony, or whether the court should decide that, in view of the property that Fletcher had, and the character of it, he should pay her so much money, and that should be a lien upon his other property or upon this, is not a matter of any consequence now The court of common pleas, when it tries and determines this question, will make such decree as it deems right and legal. This pleading shows that Henricks was a proper party, if the allegations of the petition are true, and they are to be taken as true by the demurrer.

Whether the filing of this petition holds this property now as lis pendens, is not now to be decided. The question is, whether this petition contains a cause of action as against Henricks. We cannot see why it does not. The statute in reference to divorce and alimony, secs. 5699 and 5705, provides that any and every interest, legal or equitable, of the defendant, in any property whatsoever, may be described in the petition and taken into account by the court in its allowance of alimony.

It is claimed here by counsel for the demurrers, that this petition seeks to administer this assignment. We do not think it can bear that construction. The petition alleges that Fletcher had assigned all his property to Henricks to administer for the benefit of his creditors. It also alleges that before this assignment he had conveyed this estate to

Henricks to hold in trust for certain purposes and uses. If these allegations were true, then the deed of assignment did not convey to Mr. Henricks, assignee, any of this real estate. The petition alleges that Henricks, assignee, is seeking in the probate court of this county to sell this property that he holds as trustee for plaintiff, and pay it over to the creditors of Mr. Fletcher. Clearly the court of common pleas should stop that proceeding until it shall determine whether this woman is entitled to alimony.

It is said again, that this assignment was made after this injunction was dissolved. It is not so alleged in the petition, but we think that that makes no difference. If Henricks was a proper party, if the allegations made against him as to his interest in this real estate are sufficient, and if the real estate is properly described, then no injunction was necessary. In 30 Ohio St., 579, is a case cited to us which we think expresses our view of this case, and clearly expresses it—the case of Tolerton v. Willard. That arose from an action brought for divorce and alimony, in which the plaintiff described certain real estate as being owned by the defendant. She further set forth that "she had received from her father's and her brother's estate moneys belonging to her as an inheritance to the amount of $2700; that her husband had, after the marriage, purchased a half section of land for $1600, and it was understood that said half section, in consideration of the moneys thus received by the plaintiff, was to be conveyed and secured to the plaintiff and her heirs, as her separate estate and property; but that defendant wrongfully caused the conveyance to be made in his own name, and has since sold a large portion, and mortgaged the same;" and she further averred that he intended to sell and mortgage the balance. As a matter of fact, after the filing of the petition, he did mortgage the balance. If that allegation in her petition is to be construed strictly, it was an allegation of a trust resting in her husband, which

could have been enforced in a separate action. The prayer asked for an injunction, but no injunction was allowed in that case. When the court came to hear the case, divorce was granted, and when it came to consider the question of alimony, it allowed her $5000, and the real estate described in the petition was held to pay the $5000, and it was ordered to be a lien upon the real estate until the same was paid, with interest, and in default of payment within the time limited, the real estate should be sold by the sheriff. Afterwards, proceedings were brought to marshal the liens and sell the property, and the property was sold at sheriff's sale under those proceedings, and the plaintiff bid in the property at a price named. She paid off the judgments prior to her lien, and kept the balance of the purchase money to apply on her alimony.

The court held that the petition which described this property and asked for an injunction, charged it with equities—not with her right to alimony, but with equities in her favor, and was sufficient to prevent an alienation of this property pendente lite; and it was a sufficient ground for any equitable relief which the facts, after the hearing by the court, would warrant, and also sufficient to bring this property within the doctrine of lis pendens as to whoever might acquire any equity in it; that the decree of alimony, which settled the equities, being for $5000 in money, did not allow her an estate in this land, but made that a charge upon it, and bound the property from the date of the filing of the petition and service of summons. I cannot go over the decision in full, but it clearly sustains the proposition, that the petition, which made the defendant a party and which set up this trust, although no injunction was granted, was sufficient to charge all who might have knowledge of the pendency of the suit, and that when the court came to make its decree, it might grant such relief as the facts warranted; it might recognize that the property was

held in trust for her and purchased with her money, or it might take it into consideration in allowing alimony, and allow a larger sum of money on account of that, or allow it in real estate.

To the same effect, or at least upon the same line, is 50 Ohio St., 589, where it is held that no injunction is necessary to hold property in an application for divorce and alimony, where the property is described and the owner of the property and the person having an interest in it is made a party; that he cannot thereafter transfer it, although there is no injunction against his transfer.

We think both of these amended petitions were correct and proper, but we deem it sufficient to say that the court erred in sustaining the demurrer to the last amended petition; that the action of the court should be reversed and set aside, and the case remanded to the court of common pleas for further proceedings.

Hurd, Brumback & Thatcher, for plaintiff in error.

Frank I. Isbell and *Seney, Johnson & Friedman*, for defendant Hendricks.

C. W. Everett, for defendant Fletcher.

(First Circuit—Hamilton Co., O., Circuit Court Nov. Term, 1897.)

Before Cox, Smith and Swing, JJ.

THE STATE OF OHIO EX REL. KATHERINE C. MULLIKAN v. EUGENE L. LEWIS, AUDITOR OF HAMILTON CO., OHIO.

Taxation—Addition of value of new building already embraced in valuation by Board of Equalization—Clerical error—Owner entitled to refunder of taxes paid in such case—

Where, by a mistake of the county auditor, a sum for a new building returned by the assessor was added to the valuation of land, while the value of such building had already been embodied in the valuation as fixed by the county board of equal-

ization, this is a clerical error, to the correction of which the owner of the property is entitled, and he is also entitled to a refunder of the amount of the taxes paid by him on such erroneous addition to the valuation of his property.

Same—Appraisement made on different day than provided by law. Although the law requires that the appraisement of real estate in decennial years shall be made as of the second Monday of April, yet it will not be presumed that the appraisements were made as of that date when it is shown as a matter of fact that the valuation was made at a different time.

SMITH, J.

In this case the parties have submitted to us what is called an "agreed statement of facts," but the attorneys for the defendant, while consenting that it is correct, insist that on a trial of the case evidence as to many of the statements made therein would not be competent or relevant; so it is agreed further, that if in the opinion of this court evidence as to these facts would not be admissible, such facts themselves are not to be considered by us, but be stricken out.

We are of the opinion that such facts so objected to might properly be proved in the case, and being admitted to exist, that we should consider them, and in this agreed statement we find that the relator is entitled to the relief prayed for.

The facts briefly stated are these:

In 1889, the relator was the owner of a vacant lot in Clifton, which was on the county duplicate for taxation that year, at a valuation of eight hundred ($800) dollars. In the fall of that year, the relator commenced the construction of a building thereon, which was completed by June 1st, 1890. At the November election of 1889, Miller was elected decennial assessor for the district in which this lot was situate, and entered upon the discharge of the duties of said office, in March, 1890. At the April election of 1890, Biedinger was elected annual assessor for Clifton, in which this lot was situate, and in pursuance of law made a return

of the building on this lot as an unfinished structure, placing a valuation thereon of fifteen hundred ($1,500) dollars, and this sum, with the original valuation of the lot, eight hundred ($800) dollars, was placed on the duplicate for 1890, making the total valuation thereon twenty-three hundred ($2,300) dollars, and taxes were paid thereon for that year.

At a meeting of the decennial appraisers, held at the office of the auditor in 1890, such appraisers and their assistants, including said Miller and his assistants, being present, the auditor gave them verbal instructions to value the land and finished buildings only. The appraisement of relator's lot and this building was made by the decennial assessor in July, 1890, as a finished structure, the building having been fully completed before the 1st day of June, 1890. The law required him to make his return on the first Monday of July, 1890, but he did not do so until after December 6th, 1890. He returned the building at $2800.00
and the land at $2400.00

Total valuation. $5200.00

The decennial county board of equalization convened August 11th, 1890, and continued their sessions until November 30th, 1891.

At the April election in 1891, Biedinger was again elected annual assessor for Clifton, and he made a return as to this structure on relator's lot, as follows:

"Total value of structure, . $3500.00.
"Partial value reported last year to be deducted $1500.00. Amount to be added to 1891 duplicate for new structures, $2000. Finished."

It was further agreed that the minutes of the decennial board of equalization for April 25th, 1891, show that said board was viewing property in Clifton at that time; and that the annual board of equalization of the county for

1891, did not meet as required by law in May, 1891, but did convene August 10th, 1891, and continued in session until September 9th, 1891. The minutes of said last board are silent as to the returns of the annual assessors for 1891, but show that it acted upon certain returns of chattel property of the assessors. Nothing is said therein as to new structures. The assessors of the several townships returned to the auditor the sworn statements of all persons listing personal property, and new structures, and also a book containing the names of persons listing personal property and new structures, and the new structures returned by the assessors.

The minutes of the decennial board of October 6th, 1891, show that on that day the board was equalizing the value of property in Clifton, and completed the same October 29th, 1891. The minutes of the county board of equalization show that on November 20, 1891, the board certified the value of all property in Clifton for purposes of taxation, the value of relator's said property being $5200.00, to which was added 5 per cent. by order of the state board of equalization, thus making the decennial valuation $5460.00.

This was sent to the county auditor to enable him to make up the duplicate for 1891, and in making up the duplicate for 1891, the auditor added to said valuation of $5460.00, the valuation of $2000, which the annual assessor for 1891 had returned, and upon this $2000 so added, the relator has paid the taxes for 1891-2-3-4-5 and 1896, in all, $225.36.

In March, 1897, a claim was presented by the relator to the auditor, asserting that the $2000 had been added by some clerical error, and asking that the duplicate be corrected, and that the auditor refer the claim to the commissioners, that the taxes so improperly paid thereon for 1891-2-3-4-5, might be refunded. Thereupon the auditor, on March 30th, 1897, advised the commissioners that he had

corrected the duplicate and had remitted the taxes for the year 1896, and he did issue a warrant for the one-half of the taxes for 1896, on the $2000.00, which was paid to relator, and gave her a remit for the other one-half of said taxes on the $2000 which became due in June, 1897, and which was credited on said taxes; but afterwards the auditor, on the advice of the solicitor, rejected the claim, and restored the $2000.00 to the valuation, and this action is brought to require the auditor to correct the duplicate as to said $2000.00, and to require him to submit said claim to the county commissioners.

As hereinbefore stated, we are of the opinion that the claim of the relator is an equitable and just one. It is evident on the facts stated, that during all of these years the relator has been paying taxes on $2,000, more than she should have done. That the valuation made by the decennial assessor in July, 1890, after this building was completed, viz: $2800, for the building, and $2400 for the lot, in all $5200, together with the 5 per cent. ordered to be added by the state board of equalization, viz: $260.00, in all $5460, was all that should have gone on the duplicate of 1891, and that the addition of the auditor of the $2000 for the same structure was wrong.

We think these facts sufficiently appeared from the records of the auditor and of these boards, and that it was a clerical error which he could and ought to correct. The claim of counsel for the defendant, that it must be conclusively presumed that all appraisements of real estate in the decennial year were made as of the second Monday of April, is not well founded, and particularly so, when it is shown as a matter of fact that the valuation was made at a different time. A decree may be taken as prayed for.

Frederick Hertenstein, Attorney for Relator.

Rendigs, Foraker & Dinsmore, County Solicitors, Attorneys for Defendant.

Radcliff v. Radcliff.

(Third Circuit—Hancock Co., O., Circuit Court—May Term, 1897.)

Before Day, Price and Norris, JJ.

FRANK W. RADCLIFF v. CORA E. RADCLIFF.

Divorce—Dismissal of petition on ground of insufficiency—Appeal —Sec. 5706 Rev. Stat.

Where a petition for divorce fails to state a cause of action for that relief, the court, on objection by the defendant, may properly refuse to admit or hear any evidence offered by the plaintiff; and if no leave to amend the defective petition be asked, the court may dismiss it at the costs of the plaintiff, and such order and judgment is not a dismisal of the petition "without final hearing," from which an appeal will lie to the circuit court under sec. 5706 of Revised Statutes, and such appeal should be dismissed.

PRICE, J.

The plaintiff sued for divorce in the lower court, and alleged in his petition that he and the defendant were married at Cleveland, Ohio, on the 30th day of June, 1890, and that no children have been born of such marriage, and makes the necessary averments as to his residence in Hancock county to entitle him to bring his suit in that county. It is also alleged that he has provided a comfortable home for his wife and furnished all the necessaries of life, and in all respects has been an indulgent and faithful husband.

As the sum of his grievances and ground for divorce, he says the wife has been guilty of gross neglect of duty toward him, in this, to-wit: That ever since the 17th day of April, 1894, she has wholly failed, refused and neglected to perform any of her marital duties, and on that day, left his home and has ever since refused to co-habit with him. He further says there was no just cause or provocation for leaving him, and that she did so without his consent and against his will.

The petition was filed on the 25th day of June, 1896—a little over two years from the date, the wife left the home of the husband.

The wife filed an answer to the charge made, and alleges the cause of the separation to be the wrongful conduct of the plaintiff.

By cross-petition she asks alimony, and on her motion, new parties were made defendants, to whom she alleges, the husband had transferred valuable stocks and property in fraud of her rights.

The reply traversed the averments of the cross-petition. At the January term of the court of common pleas, 1897, the cause came on for trial, and the certified entry shows the following disposition of the case:

"This day came Frank W. Radcliff, plaintiff, with his attorneys, and also came the said Cora E. Radcliff, defendant, with her attorneys, and thereupon this cause came on for hearing, and the said plaintiff having caused his witnesses to be sworn, offered himself as a witness in his own behalf, who was about to testify, and the defendant, by her counsel, objected to the introduction of any testimony under said petition, for the reason that said petition does not contain facts sufficient to constitute a ground for divorce for said plaintiff, which said motion was argued by counsel, and the court being fully advised in the premises, it is ordered that said motion be, and the same is hereby sustained, and said petition of said plainitff, and also the said cross-petition of said defendant, is hereby dismissed, without prejudice, at the costs of the said plaintiff."

The plaintiff excepted to the decision and order of the court, and also gave notice of appeal to this court, and has perfected his appeal.

We have heard the motion of defendant to dismiss the appeal, and the question is made, whether an appeal will lie, to this court, from the order and decision of the lower court?

The only authority for such appeal in an action for divorce, is found in section 5706 of Revised Statutes, which reads:

"No appeal shall be allowed from any judgment or order of the court of common pleas under this chapter (divorce and alimony), except from an order dismissing the petition without final hearing, or from a final order or judgment, granting or refusing alimony * * * ; when judgment is rendered for both divorce and alimony, the appeal shall apply only to so much of the judgment as relates to the alimony. * *"

The controversy here arises over the construction to be given to the order of the court, and the first clause of the section quoted: "No appeal shall be allowed from any judgment or order of the court under this chapter, except from an order dismissing the petition without final hearing."

It is claimed for the plaintiff that the court did dismiss the petition without final hearing, and hence the right of appeal existed.

The witnesses for plaintiff were sworn, and the plaintiff offered himself as a witness in his own behalf, and objection was made by the defendant to the introduction of any testimony, on the ground that the petition stated no case for divorce. The objection was sustained, and the petition dismissed; and the order was, in substance, a holding that the petition did not contain facts sufficient to constitute a ground for divocre. There was no request for leave to amend the petition, and it would have been an idle ceremony to hear evidence offered by each party, if there was no case stated in the petition.

The plaintiff alleged in that pleading, that the wife was guilty of gross neglect of duty in leaving his home at a certain time and refusing to return and perform her marital duties. Under this form of averment he would establish gross neglect of duty by proving wilful absence. The facts pleaded show wilful absence, but for less than three years, and the husband cannot transform the situation into a case under another statutory name, to-wit: gross neglect of duty.

The objection to any evidence raised the same question

that would have been raised by a general demurrer, and the hearing of witnesses would not strengthen the petition or enlarge its scope.

It is not the usual rule of practice, perhaps, but it is a rule nevertheless, that a party may properly object to the introduction of any evidence to support a fatally defective pleading.

To set out facts making only a part of a cause of action will not justify the admission of testimony to establish an entire, or good cause of action, and failing to demur does not lose to the defendant the right to object to its introduction.

What, then, is the character of the decision and order of the lower court? Was the petition dismissed "without a final hearing?"

We think not. There was no effort to amend, and the plaintiff thereby chose to go down with his faulty pleading. He had stated his case on which he relied for a decree, and the facts stated were adjudicated and held to be insufficient to warrant a decree. This was a final hearing of the petition, and a hearing of plaintiff's case on the merits, and hence it was not dismissed "without a final hearing."

What bearing on this question have the words—"dismissed without prejudice,"—which are found in the entry?

None, in our judgment. Those words constitute a reservation in favor of the plaintiff to again sue upon the cause of action, and the judgment of dismissal in question, would be no bar to the maintainance of such new action.

The order and judgment of dismissal are none the less final, because of the the words "without prejudice" in the entry.

Black, in his work on Judgments, in sec. 721, says: "Where a bill in equity is dismissed 'without prejudice,' the effect of the reservation is to prevent the decree from constituting a bar to another suit brought upon the same subject matter.

"The purport of a decree so framed is, that such dismissal shall not operate as a bar to a new suit which the party may institute. It does not debar the defendant of any defense which he might be entitled to make in the new suit, and confers no privilege on the complainant."

"In fact, the effect of the reservation is merely to prevent the decree from constituting a bar to another suit brought upon the same title, but it by no means compromits the court as a judicial determination in favor of that title. Nor does it alter the case, that the court erred, by dismissing the bill 'without prejudice,' when it ought to have been dismissed finally on its merits."

If the court below was wrong in the order and judgment, error is the proper remedy, and not appeal. Motion to dismiss appeal sustained.

H. F. Burket, for motion.

A. Blackford, Judge Noble, contra.

(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1897.)

Before King, Haynes and Parker, JJ.

THE WHEELING & LAKE ERIE RAILWAY COMPANY v. JACOB KOONTZ, et al.

Stoppage in transitu—When right to applies—

1. The general rule is, that the vendor of goods on credit, may exercise the right of stoppage in transitu on the insolvency of the vendee at any time before there is an actual or constructive delivery of the goods to the vendee.

Same—Exception—Sale to bona fide purchaser—

2. An exception to this rule is, when, during the transit the vendee transfers the bill of lading to a bona fide purchaser for value. By such transfer the right of stoppage is terminated.

Same—Sale for pre-existing debt—

3. When, before the delivery of the goods to the vendee or his agent, he sells them to the carrier in payment of a pre-existing debt, the carrier is not a bona fide purchaser for value, and the right of stoppage in transitu still remains in the vendor.

Error to the Court of Common Pleas of Lucas county.

HAYNES, J.

A petition in error is filed here for the purpose of reversing the judgment of the court of common pleas in an action that was brought by the plaintiffs below, a partnership under the name of Koontz & Phillips, against The Wheeling & Lake Erie Railway Co., to recover the value of certain lumber that had been purchased by the railway company of the Gasche Lumber Company of this city. Koontz & Phillips claimed a right to the property by virtue of being vendors, and by virtue of the right of stoppage in transitu that was vested in them upon learning, as they did learn, that the Gasche Lumber Company had become insolvent.

The case was tried tc the court of common pleas upon an agreed statement of facts, and has been very fully and ably argued here by counsel upon both sides of the case. Judgment was rendered in the court of common pleas in favor of Koontz & Phillips against the railway company, and it was sought to reverse that judgment. The questions that were presented here were very interesting ones, and perhaps I may say, questions of serious doubt as to which side is correct in their claims in regard to the law of the case. We have given the case a very full examination, having heard it some eight or ten days ago, and having retained it for a more full discussion than we could give it at the time we rendered our former opinions; and with some doubts and uncertainties in our minds, we have arrived at the conclusion that the judgment of the court of common pleas should be affirmed.

The case was assigned to me to deliver an opinion, but since I have had the papers I have read the opinion of the court below in the case, which was evidently prepared with great care. 5 Nisi Prius Reports, 15. It gives a very full and clear statement of the facts in the case, and also a very full discussion and clear statement of what we believe to be the law of the case; it would therefore seem to be a

work of supererogation for me to attempt to repeat those statements; for I should be able, perhaps, to add nothing to what has been said by the judge of the court of common pleas. I should simply cite, if I cited any additional authorities, the case of Loeb v. Peter & Bro., 63 Ala., 243, reading from page 249 a statement of the law of the case as given by that court in a case which in all its leading particulars was substantially like the case at bar; also the case of Lesasseur & Wise v. The Southwestern, found in 2 Woods' U. S. C. C. R., 35—a decision rendered by Justice Bradley, of the Supreme Court of the United States.

The judgment of the court of common pleas will be affirmed, but with certificate of reasonable cause for filing petition in error.

Swayne, Hayes & Tyler, for Plaintiff in Error.

Marshall & Fraser, for Defendant in Error.

(First Circuit—Hamilton Co., O., Circuit Court—Nov. Term, 1897.)

Before Cox, Smith and Swing.

A. O. WHITE v. E. F. HERNDON.

Action on note—Defense part of consideration illegal—Judgment on part admitted to be legal—On dismissal of case by plaintiff as to balance, suit for such balance not maintainable in other state—

Where an action is brought in another state (Kentucky) on a promissory note for $1,000, and an answer is filed by the defendant assuring that a certain part, viz: $700 of the consideration of said note, was for liquor sold by the payee to the maker thereof, contrary to the law of said state, and therefore, that the note was invalid, and the court rendered judgment against the defendant for $300 as undisputed, and continued the cause for hearing as to the balance of said note, and thereupon the plaintiff dismissed his said action as to the balance of said note, and after the payment of said judgment the said plaintiff brought an action in this state on said note to recover the balance due thereon, and there was no evidence that by the laws of Kentucky such practice was allowable, the first judgment when pleaded and proved in the second action was a bar to any recovery therein.

White v. Herndon.

Error to the Court of Common Pleas of Hamilton county.

SMITH, J.

An action was brought by White against Herndon in one of the courts of Kentucky on a promissory note for $1000. One of the defenses interposed was that about $700 of the consideration thereof was for liquor sold by the payee of the note to the maker thereof, contrary to the laws of said state, and therefore, that the note was invalid. This was denied by the reply of the plaintiff. Thereupon the court, acting, as is said by counsel, under the provisions of a statute of that state, (but of which there is no evidence in the record), being of the opinion that about the sum of $300 of the demand of the plaintiff on the note sued on was not disputed by the answer, rendered a judgment for that sum in favor of the plaintiff against the defendant on the cause of action set up in the petition, and continued the case for further hearing as to the balance of the claim. Afterwards the plaintiff came and voluntarily dismissed his action against the defendant. The judgment of $300 against the defendant was paid by him.

Thereupon the same plaintiff brought his action against the same defendant in the court of common pleas of this county on the same note, crediting the amount paid thereon after the rendition of the other judgment. The defendant, as one of his defenses, pleaded the former adjudication in bar of the second action. The plaintiff replied that there was no such record. On the trial, the record of the Kentucky court was introduced in evidence showing the facts hereinbefore stated, and it was admitted that the parties in the two suits were the same, and the cause of action the same, with the exception that credit for the amount so paid was given in this second case; and there was no evidence in contradiction or impeachment of the record, and the only question submitted to the court was, whether the judgment in the first case was a bar to the prosecution of the second.

As has been stated, there was no evidence given as to the law of the state of Kentucky, or of any statute of that state, as to the procedure in cases of this kind; but it was conceded in this court by counsel that there is a statute substantially like sec. 5320 of our Revised Statutes. The court of common pleas, in substance, charged the jury that the judgment in the first case was a bar to the prosecution of the second action, and on the rendition of a verdict for the defendant, a motion for a new trial was overruled, and judgment entered upon the verdict. A bill of exceptions was allowed, containing the evidence, charge, etc., and a petition in error filed, seeking the reversal of the judgment.

If the first action and judgment had been in a court of this state, and the same proceedings had therein, and the second action also brought here, and the judgment in the former action pleaded in bar thereof, and the same evidence offered, could it have been maintained? We think not. The first action was upon an entire and indivisible contract. The defense was one which went to the entire cause of action. There was no admission that there was any thing due upon the note sued on. If the allegation of the answer in the first action was true, that a part of the consideration of the note was founded on an illegal and unlawful transaction between the parties, the note was wholly void, and no recovery could be had upon it. 20 Ohio St., 431. Illegality in respect to a part of the consideration of an entire contract avoids it in toto. And the rule is also well settled that in an action brought upon an entire contract, a judgment rendered in favor of a plaintiff for a part of his claim is a bar to any other action brought by him on the same contract And so is a judgment against him in the first action

Did sec. 5320, Revised Statutes, establish any different rule as to this? We think not. It provides that "When all or a part of one or more of the causes of action are not put in

issue by answer, judgment may be taken as upon a default for so much of the plaintiff's demand, as is not put in issue by the answer, upon any or all of the causes of action, without prejudice to the rights of the plaintiff as to that portion of his demand disputed'' Clearly, this section does not refer to the case of a suit on an entire demand, where on any ground the defense goes to the whole of the cause of action sued on, as in this case It must be applicable only to cases in which there are several causes of action, where one or more may be admitted by failure to plead, and one or more are disputed, or where, for instance, a claim is made upon an account consisting of several items, some of which are admitted or not disputed, and others are denied. In either of these or similar cases, the statute does apply, and there may be a judgment for the admitted or not disputed items or causes of action without prejudice to the rights of the plaintiff as to those portions of his demand which are disputed. But in a case where the cause of action is on an entire demand, and the whole claim is disputed, the section does not apply, and if, from error, or other reason, a judgment is entered for a less amount than plaintiff claims, this, while the judgment remains in force, is a full settlement of the whole claim of the plaintiff on such cause of action. Such would be the law of Ohio, and we suppose everywhere, unless otherwise provided by statute; and there is no evidence of any such statute in Kentucky. And in our opinion, the entry of such judgment would, when properly pleaded and proved, be a complete bar to a prosecution of the same action in the same court where it had been continued for trial, as to such part of the claim as was erroneously considered not to be put in issue.

The judgment of the court of common pleas will be affirmed.

Mr. Bambach, for Plaintiff in Error.

Mr. McCoy, for Defendant in Error.

(Third Circuit—Hancock Co., Circuit Court—December Term, 1897.)

Before Day, Price and Norris, JJ.

A. J. THOMAS v. J. W. KIRKBRIDE.

Oil & Gas Lease—Forfeiture—Not enforcible for indefiniteness—

A lease of lands for purposes of operating and producing oil and gas found therein, contained the following provision of forfeiture: "Second party agrees to complete four wells the second year, two the first six months of the second year and two of them the last six months of the second year. If the four wells are not completed within the time specified, twenty-two acres of this grant shall be forfeited for each well not so completed" *Held*:

(1.) The completion of four wells on the leased lands, within and during the second year, is such a substantial and sufficient compliance with the provisions of the lease, with respect to forfeiture, as will obviate and defeat a forfeiture.

(2). The stipulation that twenty-two acres shall be forfeited, for each well not so completed, is entirely too vague and indefinite in the matter of description, and furnishes no reliable data —no certain starting point, from which the twenty-two acres can be measured and accurately located, and for that reason is void for uncertainty.

Appeal from the Court of Common Pleas of Hancock county.

DAY, J.

In this case, both, plaintiff and defendant claim the exclusive right to operate for and produce oil and gas on a 155 acre tract of land, situate in Biglick township, Hancock county, and known as the Roller farm. Both claim in virtue of separate and distinct leases, or oil contracts, made and delivered by the owners of the land, on separate and distinct dates. Each lease is made upon a good and sufficient consideration thereunto moving, and is duly acknowledged and recorded. The instrument which forms the basis of plaintiff's claim is of date July 1897; and that of defendant, of December 1895. These instruments, if valid, supply a substantial basis upon which to rest the claim of both plaintiff and defendant. There was a ques-

tion made as to defendant's ownership of the lease of 1895, but the evidence clearly and conclusively establishes his right to its benefits. Plaintiff does not controvert, but substantially concedes the validity of the lease of 1895, at the beginning and for months after its execution; but asserts the claim that by virtue of certain provisions of forfeiture contained in it, the entire lease has become forfeit; and if not, that then it has become forfeit, at least, in part, and that in consequence of such forfeiture, his lease of 1897 has become valid and subsisting as to all, or a part, of the farm in question; the extent of the validity of the lease of 1897, depending entirely upon the extent to which the first lease has become forfeited and void. Forfeiture, either in whole or in part, is denied by the plaintiff, and so the precise question we have for decision is, has the lease of 1895 become forfeit in whole or in part; and, if forfeit, to what extent.

The provisions of the lease of 1895, necessary to be noticed in determining the question presented, are as follows:

"If no well is completed within three months from this date, (Dec. 18, 1895), then this grant shall become null and void, unless second party shall pay to first party $39.00 in advance for each three months thereafter such completion is delayed.

"Second party agrees to protect the lands contained in this grant against all paying oil wells drilled on adjoining property. If the first well is a paying well, a second well shall be completed by July 1, 1896, and a third well by September 18, 1896. If these three wells are not completed within the time specified, twenty two acres of this grant shall be forfeited for each well not so completed. Second party agrees to complete four wells the second year, two the first six months of the second year, and two of them the last six months of the second year. If the four wells are not completed within the time specified, twenty two acres of this grant shall be forfeited for each well not so completed." * * * "If no well is completed within

nine months from the date of this grant, this grant cannot be continued by the rental heretofore named, and is null and void."

There is no dispute as to the facts in the case. It is a fact that the first well stipulated for in the lease, was drilled to completion about June 1896. It was not a paying well; neither oil or gas was found therein in any quantity. No other wells were drilled until in August, 1897, and since then, to the time of the hearing in this court, three wells have been drilled, all of them yielding oil in paying quantities.

Considering these conceded facts in connection with the stipulations of the lease for a first well within nine months from its date; and for two wells, in July and September, 1896, if the first well was a paying one, and the conclusion seems imperative that, by completing the first well before the expiration of nine months from the date of the lease, in June 1896, the grant was saved from becoming null and void, in toto, and the integrity of the lease was made absolute for the full term specified therein, subject, of course, to the other conditions of forfeiture contained in it. The first well drilled, not being a paying one, as the stipulation provides, there was no requirement to drill a second and third well in July and September, and the provision for forfeiting twenty two acres for each of the three wells not drilled the first year, was obviated, and no forfeiture can properly be declared on that account.

The provision for four wells the second year, two in the first six months and two in the last six months of the year, and a forfeiture of twenty two acres for each well not completed within the time specified, is not so clear and easily disposed of as the provision for the first year. A more difficult proposition is presented provoking some discussion and some difference of opinion as to the proper disposition of it.

The first part of the agreement is that four wells shall be

drilled the second year. That would be easy enough if it were all, but it is not; for following that agreement is a stipulation that two of the wells are to be drilled in the first six months and two the last six months of the second year; and then follows the provision of forfeiture: "If the four wells are not drilled by the time specified," twenty two acres for each shall be forfeit. Which time specified? The second year? or the first and second six months of the second year? Plaintiff insists that the time contemplated by the parties, and specified, is the first and second six months of the second year; and that by failing to drill two wells the first six months there became forfeit forty-four acres of this tract of land. That claim is, perhaps, not tenable. It seems more likely the time intended by the contracting parties, upon which a forfeiture should operate in case of failure to perform, was that specified as the second year, and that the division of that time into two parts was directory only, and for the convenience of the parties to the contract. The wording of that provision of the lease seems to enforce this view. The provision is for four wells the second year, and the stipulation of forfeiture is: "if four wells are not completed within the time specified" forfeiture shall result, etc. There is no provision of forfeiture if two wells are not completed in the first six months of the second year and two in the last six months. Forfeiture is very rarely decreed or enforced, unless specifically provided for by the contract. To call for such action, forfeiture must be clearly nominated in the contract. It is not believed that by the phrase, "time specified," the parties intended both times, second year, and first six and last six months of the second year; for the two might be inconsistent and conflict and confusion might arise. It is possible to complete four wells the second year, and none of them in the first six months of the year. In such case the driller would have complied with his contract to make four wells in the second year, and

yet suffer forfeiture of a large portion of his leasehold estate, if plaintiff's contention be correct and is allowed. A majority of the court is of the opinion, that if four wells were completed within the second year, without reference to the first or last six months of that year, it would be a substantial compliance with the provisions of the lease; so much so, that a forfeiture, which is not favored of the law, would not be declared or enforced by any well disposed court, possessing and exercising equity powers and jurisdiction; and the court would be willing on that ground, if there was no other, to rest a decision of the case, adverse to the plaintiff. But a very respectable minority, Judge Price, is found dissenting from that view, and so we do not base our decision in the case on that ground alone; but as well upon another ground, which seems entirely sound, and upon which the entire court can and does stand; and that is the proposition that the provision for forfeiture is so vague and indefinite that it is void for uncertainty.

There is no particular or definite description by which either of the twenty-two acre tracts can be located. There is an utter absence of any and all data, by which a starting point, from which to measure, may be found. It was suggested by counsel that the Stahl-VanVleck case, 53 Ohio St., 136, at page 147 supplied a rule by which the several twenty two acre tracts to be forfeited might be ascertained and measured. That case, we think, however, does not supply a rule, or even suggest one, or in any way relieve the forfeiture provision of the lease, from the imputation of uncertainty. In that case the court was defining a process or rule by which could be ascertained which one of three described forty acre tracts of land was intended to be operated for gas and oil, under a lease of one acre of one of the forty acre pieces, the one acre to be selected by the owner, and the selection made. Judge Burket, in stating the rule, used the following language:

"If the number of acres contracted to be operated in case gas or oil shall be found, is the same as a subdivision of a section, say 10, 20, 40, 80, or 160 acres, it will be held that the subdivision of the section upon which the well is located, is the land intended to be operated under the lease. Otherwise the land to be operated is to be taken in a square form, with the well as its center, unless the well is so near a line of the land as to make this impossible, in which case the land to be operated will be in a square form including the well, and extending to such line."

The rule as stated by Judge Burket is well enough, and would doubtless work as well in ascertaining a tract of land to be forfeited, as land to be operated, if the starting point was definitely stated, as was the fact in the VanVleck case. An acre was selected there where a well was to be drilled; that furnished a definite starting point from which the rule was evolved; but in the case before us, no point was selected or pointed out in any way, where a well was to be completed, either the first or second year; and it is absolutely impossible to find a definite point named in the lease or supplied by parol to enable the court to find a definite point from which to measure any number of acres for forfeiture. In such case the court must decline to declare or enforce a forfeiture on the two-fold grounds, that no forfeiture is due, and the provision for forfeiture is entirely vague and uncertain.

The finding will be against the plaintiff, and his petition is dismissed. Defendant's title is quieted as against the plaintiff, and the plaintiff is required to pay the cost.

Geo. H. Phelps, and *Henry W. Seney*, for plaintff.

John Poe, for defendant.

(Sixth Circuit—Sandusky Co, O., Circuit Court—Jan. Term, 1898.)

Before King, Haynes and Parker, JJ.

WEBB C. HAYES, RUTHERFORD B. HAYES, FANNIE HAYES AND BIRCHARD HAYES v. ADDIE M. SMITH.

Harboring vicious animal—Liability for injury—

1. All who take part in harboring a vicious animal may be sued jointly in an action for damages resulting from the vicious conduct of such animal.

Evidence—Cross-examination—Hypothetical question—

2. A witness testifying in chief that from his knowledge and observation he believes or is of the opinion that a certain dog is "peaceable" and "good natured", and not "vicious", upon cross-examination may be asked whether, if such dog should do certain acts described in the question, witness would consider him a "peaceable" and "good natured" or a "vicious" dog, for the purpose of determining what witness means by the terms "peaceable" and "good natured", and "vicious." Whether such supposed acts are such as have been done by the dog in question is immaterial.

Argument of counsel—Absurd deductions from the evidence—

3. The urging by counsel in argument of illogical or even absurd deductions from the evidence, does not amount to misconduct justifying the setting aside of a verdict where it does not clearly appear that the jury was thereby misled or prejudiced.

Executors harboring vicious dog as property of estate—Liability—

4. Where an answer of defendants who are executors, but who are not sued as such, admits that they kept and harbored a dog, but avers that they did so as executors only, such attempted qualification of the admission will be disregarded, and the admission will be given effect.

Same—Notice to one joint owner—

5. Notice to one of several joint keepers or harborers of a dog of his vicious propensities, is notice to all.
6. Such notice need not be actual, but may be inferred from circumstances.

Scienter—

7. The question of scienter is for the jury.

Keeper of vicious dog—Duty of care—

8. The keeper or harborer of an animal of a kind that frequently develops and displays vicious propensitites, is chargeable with knowledge of such vicious habits of such animal as must have become known to him if he had exercised such reasonable care and watchfulness as a prudent man ought to exercise under the circumstances. A dog is an animal of that kind.

Special verdict following language of pleading—

9. A special verdict that follows the averments of a pleading in which the facts found are well pleaded, is not therefore faulty.

Silence as to one issue in special verdict—

10. The absence of an affirmative finding in a special verdict as to any issue, amounts to a finding thereon against the party upon whom rested the burden of proof as to such issue.

[Verdict for $7,500, reduced to $5,000 by remittitur, because excessive, and affirmed for latter amount.]

PARKER, J. (Orally.)

In this case error is prosecuted to a judgment of the court of common pleas of Sandusky county. The case was reserved there for decision here. The case was tried to a jury upon the amended petition of Addie M. Smith, plaintiff below; the several separate anwers thereto of the plaintiffs in error—defendants below, and replies to these answers. The papers and pleadings are quite voluminous. The amended petition sets forth:

"That heretofore, to-wit: on the first day of January A. D. 1893, and from thence and until, and at the time of the injury to the said plaintiff as hereinafter mentioned, the said defendants wrongfully, injuriously and negligently, did keep and harbor a certain dog, and that they and each of said defendants during all that time had notice of and well knew, that said dog was fierce, vicious and dangerous; and as they and each of them well knew that said dog was in the habit of attacking, biting, chasing and frightening teams, horses and horses attached to wagons, carriages and other vehicles, and also in the habit of attacking and biting mankind, of all of which said defendants and each of them had at all times full knowledge; and that said dog did afterwards, and while so kept and harbored by said defendants as aforesaid, to-wit: on the eighteenth day of August, 1893, and while plaintiff was riding in a buggy along and on the public highway, run out upon the public upon which plaintiff was then travelling as aforesaid, and fiercely and ferociously did spring at and viciously attack the horse drawing the buggy in which plaintiff was then riding; and by reason of said attack so made by said

dog upon said horse the said horse became and was frightened and unmanagable, and overturned the buggy in which plaintiff was riding, and threw plaintiff with great force and violence upon the ground, thereby inflicting upon plaintiff's head and other parts of her body dangerous wounds and injuries, whereby she sustained a great loss of blood from her head and other parts of her body, a severe shock of the nervous system, and partial loss of memory. And by means of the injuries so as aforesaid inflicted upon plaintiff she has sustained permanent mental and physical injuries, total loss of hearing in one of her ears, and has at all times since she received said injuries endured constant pain and bodily suffering."

The petition sets forth in detail further results of the injury and certain specific damages in the way of doctor's bills, etc., and contains an allegation that the full amount of damage sustained is twenty-five thousand dollars, and a prayer for judgment for that amount.

The answers filed by all of the defendants, excepting the defendant Rutherford P. Hayes, seem to be nearly, if not quite, identical in form. I will read the answer of Fanny Hayes:

1st. Defense. For a first defense to the amended petition of the plaintiff filed herein, the defendant Fanny Hayes says, that her father, Rutherford B. Hayes, died, leaving a last will and testament, which is in the words and figures following, to-wit:

"'In the name of the Benevolent Father of All: I, Rutherford B. Hayes, of Spiegel Grove, Fremont, Ohio, do make and publish this my last will.

"1. I wish all my just debts to be fully paid.

"2. I give and bequeath the home place known as Spiegel Grove, and all the personal property connected therewith, to Birchard A., Webb C., Rutherford P., Fanny and Scott Hayes to be by them held in common without sale or division of the same until all parties or the survivors of them agree to the sale or division, but in case of sale or division the same to belong equally to my said children or their heirs.

"3. The residue of my estate, real and personal, I give and bequeath equally to my five children.

"4. The interest of my daughter Fanny in said estate is to be held by my son Birchard A. in trust for her benefit and support, and all payments by him are to be directed to her on her personal receipt or for her benefit.

"5. I appoint my sons Birchard A., Webb C. and Rutherford P. Hayes executors of this my last will and testament.

"6. The said executors are to have jull power to sell and convey said property, both real and personal, and to execute deeds and contracts relating thereto and to carry out existing contracts.

"It is my desire that my said executors be not required to file any inventory or to give any bond. I hereby revoke all wills and codicils heretofore by me made.

"In testimony whereof, I have hereunto set my hand and seal this 12th day of April, 1890. Rutherford B. Hayes.'

"That said last will and testament was, on the 26th day of January, A. D. 1893, duly admitted to probate by the Probate Court of Sandusky county, Ohio, and recorded in the records of wills of said county, in volume E. at pages 163 and 164.

"That among the assets of the estate of said Rutherford B. Hayes, deceased, was the dog in the amended petition described, which the said executors, on and prior to August 18th, A. D. 1893, and thereafter until June 1, 1894, kept and harbored as and for the purpose of a watch dog for the protection, preservation and benefit of the estate of said deedents."

The second defense, contains this paragraph:

"2nd Defense: For a second defense to said amended petition this answering defendant denies that the defendants in the amended petition mentioned, or either of them, did keep or harbor the dog therein described, and denies that they or either of them knew that said dog was either fierce, vicious or dangerous."

And then follow other denials as to the alleged habits of the dog and as to the defendants knowledge of such habits, and a denial of the circumstances alleged in the pe-

tition of the attack upon the plaintiff and the result of the injury.

The third defense is a somewhat vague allegation of contributory negligence. It is to the effect that the horse drawing the buggy in which the plaintiff was riding, as alleged in the amended petition, was so carlessly and improperly managed, that without any fault of this defendant and by want of due care in the management of said horse, the injury to plaintiff, if any, was sustained. "That said horse was skittish, easily frightened and not a road-worthy horse, all of which said plaintiff well knew." But there is no direct allegation that the plaintiff was driving the horse or that the plaintiff was guilty of any contributory negligence in the premises.

For a Fourth Defense, it is said that the amended petition contained separate causes of action against the several defendants that are improperly joined.

The answer of Rutherford P. Hayes contains these second, third and fourth defenses, substantially as stated in the other answers, but it does not contain the first defense. I will inquire if I am right in assuming that that was the answer upon which he went to trial?

Mr. Bartlett: Yes: that was an answer filed after the demurrer to the first defense, and that was probably the reason why the first was left off.

The Court: Motion to reform the amended petition so as to have it state the facts showing wherein the liability of the five defendants was joint, and to strike it from the files because not conforming to the order of the court with respect to the original petition requiring an amendment setting forth such facts, etc., filed, argued and overruled. There were special demurrers filed, also on the same ground, that is to say—upon the ground that separate causes of action against the several defendants were improperly joined; and the same question was presented by this fourth defense in the answer.

The trial resulted in a verdict of $7,500 in favor of the plaintiff and against all of the defendants. There was also a special verdict returned upon the request of defendants, under section 5201 Rev. Stat.

Motion for a new trial; overuled; judgment rendered, and a petition in error was filed in this court.

There are some twelve assignments of error; but the questions presented and argued here—omitting those which did not seem to counsel to be of enough importance to require argument, either oral or in their briefs, and which are not considered by the court of enough importance to require mention—the principal assignments of error are:

1. Error in overruling special demurrer, on the ground that "Separate causes of action against several defendants are improperly joined."

2. Error in admission and rejection of testimony.

3. Misconduct of attorneys for plaintiff, in argument to jury.

4. Verdict not sustained by sufficient proof.

5. Special verdict not conformable to law, and insufficient.

6. That the damages are excessive.

7. Error in overruling motion for a new trial. The latter, however, does not present any qestion besides those above mentioned; except as to whether the verdict is sustained by the weight of the evidence.

As to the first question, we are of the opinion that there is a cause of action stated against each and all of the defendants below, upon which they may be jointly sued. The general rule upon the subject is, that all who have united in the commission of a tort to person or property, whether the injury result from force, negligence, want of skill, or fraud or deceit, may be joined as defendants in a single action, or they may be sued separately, at the plaintiff's option; or he may sue two or more of them, and not all.

The only exception to this rule is in instances where from the nature of the case the tort cannot be committed by two or more jointly, as, for instance, in cases of oral slander. This general rule applies to the defendants below—the gist of their alleged wrong-doing being the keeping and harboring of a vicious dog.

Our conclusions that the rule is applicable to this case, and that sufficient facts are stated in the amended petition to show joint liability, are supported, we think, by the case of Jack, et al v. Hudnall, 25 Ohio St., 255. The report of that case is very short, and I will read it:

"This was an action by Hudnall against the plaintiffs in error, for trespass committed by their cattle upon Hudnall's premises. The defendants (plaintiffs in error) denied the alleged trespasses. The cause was submitted to the court, a jury being waived, and the court found the facts specially, as follows:

"1. That the plaintiff sustained damages to the amount of twenty dollars, by reason of the trespass of some twelve heads of cattle, as in the petition set forth.

"2. That said three defendants lived on a farm which they owned and cultivated in common, whereon said cattle were kept.

"3. That the said cattle that committed the trespass were owned by the defendants.

"4. That there was no joint ownership in said cattle, but that each defendant owned a part of said cattle in his or her individual right, each owning certain ones of said cattle separate from either of the others of said defendants."

There is an absence in the allegations of the petition here that these defendants were joint owners of this dog—the allegation being, in effect, that they jointly kept and harbored it; so that it makes the case as stated in the petition, and the case here as stated by the court substantially alike.

"Upon this finding the court rendered a judgment for the plaintiff, and the same was subsequently affirmed on proceedings in error in the district court, and it is now sought to reverse this judgment of affirmance, and also the judgment of the common pleas."

"Welch, J. As we understand the finding of the court, these cattle were in the joint possession and custody of the defendants. The finding at least fairly admits of that construction, and under the well-known rule, it should therefore be adopted, rather than a different construction, which would render the judgment erroneous. The cattle were "kept" upon the farm, and the three defendants own and "cultivated" the farm "in common." Prima facie, the defendants kept and cared for the cattle in common. This being the case, we have no hesitation in saying that the court below was right in holding that the defendants below were properly joined in the action.

All of the Judges concurred.

The first proposition in the syllabus is:

"Tenants in possession may be sued jointly in an action for trespass committed by animals kept by them in common upon the premises, although the several animals are owned by them separately and individually."

Making, in some aspects of it, a somewhat stronger case than this at bar.

The second alleged error that is brought prominently to our attention is, with respect to the admission of certain evidence and the exclusion of certain evidence.

It is urged that non-expert witnesses on behalf of defendants below were permitted, on crosss-examination, to testify to opinions as to the character of the dog. Our attention is called particularly to the testimony of William E. Lang, and to the testimony of A. J. Jackson, and their cross-examinations. In the course of her testimony in chief, the witness Lucy Keeler details her observations of the dog on various occasions. She seems to have been a friend of the Hayes family, and to have been frequently at their residence at Spiegel Grove, and to have been well acquainted with this dog, and after testifying as to the conduct of the dog so far as it came under her observation, she is asked this question, in chief:

"Q. From your knowledge of him what do you say as to his being a quiet peacable, good-natured dog?"

On behalf of defendants they had not been content to allow the witness to merely detail to the jury the conduct of the dog, and allow the jury to draw its own conclusions as to the character of the dog, but the question was put to the witness direct as to the character of the dog—founded, of course, upon her knowledge and observation. Her answer is:

"A. I am quite sure he was a quiet, peacable, good-natured dog, from my knowledge."

Not that the particular conduct which she observed was peacable, quiet and good-natured, but from her observation of said dog she concluded, and it was her opinion, that he was a dog of that character.

Now, upon her being cross-examined with respect to this opinion, this occurs (on page 566):

"Q. And the conclusion you came to that the dog was a peacable dog was from and only from those acts that you have described, while in the grove and about the home? A. Well, I might have formed other opinions from other circumstances, although I might not have remembered them.

"Q. You didn't give any other circumstances? A. No.

"Q. Suppose that a man was driving along a public highway in a sleigh with his wife and babe in the wife's arms, and the dog would leap at the horse, at the head of the horse, spring at him with an attempt to grab the horse by the head or nose, miss the horse, pass on by, then come back at the lady that was sitting in the sleigh and jump at her, and suppose she was pulled over away from the dog and the dog would run around and jump at the man and the dog was driven away with the whip, your opinions would be somewhat changed about the good nature of this dog, would it not?

(Objected to by defendant's counsel; overruled by the court and exception taken.)

"A. If those are facts, my opinion would certainly be changed.

"Q. Now, suppose that dog had run out upon the public highway from thirty to forty different times, and leaped at horses hitched to wagons and carriages, leaped at their noses, and barked and frightened them and ran after them and barked, now would that change your opinion of the good nature of this dog?

"(Objected to; overruled and exception taken.)

"A. I think that would change my opinion if it were proven to me.

"Q. Now, if this dog would attack a man and force him down upon the ground or sidewalk, and hold him there until he was kicked off, would that change your opinion as to the character of the dog?

(Objected to; overruled, exception taken.)

"A. If it were proven to me, it would.

"Q. You mean to say if these facts existed I suppose your opinion would be different? A. No, if I were convinced.

"Q. If you were convinced these facts existed, that is what you mean? A. Yes."

And then she proceeds to give her opinion that the dog was cowardly, and details some circumstances indicating his cowardly nature.

The testimony of Lang and Jackson, the former appearing at page 621, and the latter appearing at page 692 to 695, need not be given here; it is sufficient to say that the question asked in chief in each instance was substantially the same as the question asked of this witness, Lucy Keeler, as to the opinion of the witness of the character of the dog, and the cross-examination in each instance was substantially the same as the cross-examination of Miss Keeler.

There were certain remarks made by the court upon the examination of one of these witnesses, that perhaps I should call attention to. In the course of the cross-examination of Mr. Lang, which appears at page 623, we find the following:

Q. Now, what do you say about a dog that would run and jump over the fence and attack horses and spring at their

heads and noses and cause them to run away and run after them barking, what would you say about that kind of a dog, would that be a vicious dog, in your opinion?"

(Objected to by defendant's counsel; objection overruled, defendant excepted.)

"By the Court: The court has held that you were entitled to ask the witnesses as to the character of this dog, as to whether peacable, quiet character or not. This witness however answered this was not a vicious dog; that this was his answer directly, and it seems to me that the cross-examination should be as broad as the testimony of the witness in chief. I think that is proper cross-examination of such an answer as he was permitted to give in direct examination. The question may stand."

Then comes the answer:

"A Well, I think likely I would."

That is to say, he would form the opinion that it was a vicious dog if it indulged in such conduct as is described in the question.

Then the court makes this remark, in the presence of the jury:

"In connection with this testimony on cross-examination, it is not for the purpose of giving the jury his opinion of this dog on trial, but simply cross-examination on his standards of opinion. It is all the time a question for the jury, to determine whether or not this dog was vicious or not."

And again, on the following page, after further questions of the same character:

"By the court: I will say that this is permitted by the court simply on the ground that they have the right to ask the witness on cross-examination, his standard of opinion."

And in the course of the cross-examination of Jackson, at page 694, when a like question was presented to the court, the court makes this remark:

"By the Court, I think this cross-examination should relate to the knowledge of the witness; the holding of the court is, you may cross-examine him on his opinion and what his opinion would be if he had knowledge of such

things; I think you should adhere to that rule as laid down. The witness gives his opinion as to the dog, the court holds that you may ask if he knew this, that or the other thing; I do not think that question is in proper form."

Referring to the question just asked.

Again, on the following page:

"By the court: That is admitted simply for the purpose of cross-examining this witness as to his opinion, not for the purpose of giving opinion of the dog in question and should not be so considered by the jury."

In our opinion, this was competent cross-examination as a test of the basis of the opinion of the witness that the dog was quiet and peacable and not vicious; to determine what he meant by the terms "quiet", "vicious" etc.; but not to ascertain or show to the jury his opinion of the real character of the dog based upon the facts assumed; and the court, we think, guarded the matter by proper cautionary remarks to the jury. That the assumed fact may not have been established by evidence, and though there may have been no evidence tending to establish the same, we think affords no ground for the objection to the testimony of this witness. The plaintiff had the right to test the witness by assuming and presenting for his consideration facts and circumstances entirely different from anything indicated by the testimony in the case, if he chose to do so. The real question to be ascertained by this course of examination was what the witnesses meant by the terms quiet, docile, goodnatured, or the contrary—vicious? Would they be of the opinion that a dog was vicious if it did this, or that, or the other? As a matter of fact, there was testimony in the case tending to establish the assumed facts.

The third matter presented for our consideration, is as to the alleged misconduct of plaintiff's attorneys in argument.

On page 952 of the bill of exceptions, this appears, as the utterance of counsel on behalf of defendant in error—plaintiff below—in the opening argument to the jury:

"Never before in my short experience of nearly eighteen years, did I see that stubborn, unrelenting effort on the part of moral man to suppress truth and nothing but the truth as was upon the part of the defendants in this case.

"Col. Bartlett. (To the court.) If your Honor please, I take exceptions to this statement of counsel.

"No response by the court."

It appears by the bill of exceptions that the court did not make any response when these objections were made and exception taken.

Also at pages 953 and 954:

"Col. Bartlett (one of defendant's attoneys) sat here for the very purpose, hired by the sheckels of these defendants, for the very purpose that he did, to keep out the God's honest truth.

"Col. Bartlett: (To the court.) I take exceptions, if your Honor please, to that last statement of counsel.

"No response by the court."

"Mr. Garver: They knew that if the truth was told in this case, that though the heavens would fall they could not escape a verdict at your hands."

That particular utterance does not appear to have been called to the attention of the court.

And again, on page 955:

"That dog was allowed to live only up to the time that they knew this case would have to be tried by a jury of twelve men. A few months before this case was called that dog was put to death; only a few weeks before this case was called for trial that dog was put to death by the hand or by the direction of one of these defendants who is interested to the tune of $25,000.

"Col. Bartlett: (To the court). I wish to lodge an exception to the last remarks concerning the dog being put to death.

"No response from the court."

On page 956, in speaking of the plaintiff's witness, Rinebolt, he says

"He does not come here of his own volition, but he comes here under the strong arm of the law, and he is brought here an unwilling witness."

On page 957, speaking of the same witness, he says:

"His power of speech "Get out! Get out!" and the bark of the dog that could be heard a quarter of a mile brought to his rescue at that time and place one of the inmates of that house, one of the men that was around that sanctum * * *

"Col. Bartlett: I object to that, if your Honor please. That testimony is not in the case; it has been ruled out.

"No response from the court."

"Mr. Garver: There it is again, when you call the jury's attention to the God's own fact, 'I object! I want it to be so recorded.' Oh, that hurts. They are bleeding under that lash as they never bled before. My God! How can we go to this jury now and say that these parties did not have notice? Don't you see? Fanny Hayes spent her summer upon that porch 80 feet long in front of the house and a side porch of almost the same dimensions and upon the croquet grounds and upon the lawn tennis grounds between the house and Buckland Avenue. Notice! Great Heavens, gentlemen!"

On page 958, he says:

"One of the most important things and one of the most important things in this case is: Did these defendants have notice? Fanny Hayes, out upon the grounds within 260 feet of the public highway, with this dog barking with that voice of his, as he has been described to you, what do you say? Called back—"Come back!"

"The cries of that old man brought to his assistance one of the inmates of that house, the man that was upon the ground, and when that dog heard that old familiar sound of the old man Elliget he knew enough to obey and to return."

"Col. Bartlett: I object to the counsel assuming that there is any evidence that Fanny Hayes was upon the

grounds at the time of the alleged attack by this dog upon Mr. Rinebolt, and except to the remarks assuming that there is such evidence.

"No response by the court."

"Mr. Garver: Again we have got it. From the time the testimony in this case was offered until the time when the feeble arguments are to close we are to be stopped. Stopped for why? I will tell you why. He thinks he will lure us from the point and the thread of our theme. I say that that was the purpose and the intention of counsel. When witnesses were testifying he was talking, and he objected and objected and objected, hoping that you would miss a part of this, and you would not be able to hear it all, and so it was from the mouth of that distinguished lawyer when anything hurt or cut deep, 'I object.'"

The charge in this argument of efforts of defendants' and their counsel to supress the truth, was evidently founded upon and was stated as an inference from what had occurred upon the trial, circumstances which were open to the observation of the jurors, and from which they might have drawn entirely different and contrary conclusions. It does not seem to have been stated as a fact upon which counsel were proceeding to give the jury information. It was a very general statement, and while it may be open to the criticism that it was a remarkably extravagant charge, that very quality would be likely to go a great way towards rendering its effect nugatory and harmless. While we cannot commend this method of address, and do not consider it a good substitute for argument, yet allowance must be made for the zeal of counsel and the heat of debate, and we would not feel justified in setting aside a verdict upon the assumption that the jury had not made proper allowance on these accounts.

The general charge that the defendants and their counsel were keeping from the jury certain facts that the plaintiff was trying to bring before the jury, is abundantly justified by the record; but, instead of being a subject for unfavor-

able criticism, it was really cause for commendation of defendants' counsel, since these facts, though facts and truths, were not pertinent, and were properly excluded. In so far as the efforts of counsel for defendants in this direction had been successful, they had the approval of the court in its rulings, and the jury doubtless had enough intelligence to give that fact due weight. We think it unlikely that this statement which implied undue effort to keep back facts that might be prejudicial to the defendants, would have been prejudicial to the defendants even before their counsel had addressed the jury upon this subject; and after his dispassionate, fair and judicial statement of his attitude, we feel sure that any doubt of the propriety of his conduct must have been dissipated. It will be observed that it is not charged that any fact that should have been known by the jury, had been concealed from them—that is to say, that the efforts of counsel to exclude anything from the jury that they should have known, had been successful, or that this proof had been prevented; but the substance of the statement is that the facts in evidence were not such as to warrant and ensure a verdict, and that the effort made to exclude certain evidence amounted to a confession of its damaging character, a very common line of argument, although not usually pursued with so much vehemence and with such strong asseverations as were employed in this instance.

As to the statement at page 955, to the effect that the dog had been put to death by direction of one of the defendants; and at pages 956 and 957, to the effect that Fanny Hayes was upon the grounds and in hearing at the particular time when this dog had been chasing a team and was called back by some one on the grounds, this appears to have been stated as counsel's inference—as deduced from

the evidence, and not as a fact outside of the evidence—a deduction which he wishes to have the jury adopt. Whether this would be fair inference from the facts proved, we need not consider, since we cannot in any event hold that it is prejudicial error to draw even absurd deductions from the facts and press them upon the consideration of the jury. The prejudice in such case is more likely to result to the side employing such arguments. That there was such an incident as the chasing of the teams and the calling back of the dog, appears to have been shown, and while the witness was not permittd to testify to certain declarations of the person who called the dog back, the fact of the chasing of the team and calling back of the dog does not appear to have been ruled from the jury.

We cannot say that any prejudicial error resulted from the silence of the court when the suggestion was made by the objection and exception of counsel, that the limits of fair and legitimate argument were being transgressed. We so hold upon the assumption, but without deciding that the action of the court was duly invoked, that the silence of the court amounted to an adverse ruling, and that exceptions were duly saved. The general trend of the authorities upon this subject is indicated in the following sections, from Thompson on Trials, Chapter XXX, Vol. 1, where the whole subject, in all its various aspects, seems to have been very fully discussed and a great many authorities cited. In sec. 965, this appears:

"Observations on Limits Allowed to arguments. On this subject it was said by Fowler, J., in what has come to be regarded as a leading case: 'The counsel represents and is a substitute for his client; whatever, therefore, the client may do in the management of his cause, may be done by his counsel. The largest and most liberal freedom of speech is allowed, and the law protects him in it. The right of discussing the merits of the cause, both as to the law and the facts, is unabridged. The range of discussion is wide. He

may be heard in argument upon every question of law. In his address to the jury, it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of the parties; to impugn, excuse, justify or condemn motives, so far as they are developed in evidence, assail the credibility of witnesses when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance upon the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as learning can make it; and he may, if he will, give play to his wit, or wings to his imagination."

In sec. 983, we have this:

"Nor is it ground for a new trial in a criminal case, that the prosecuting counsel has made an illogical argument, or has mis-stated the law in his address to the jury; the adverse party can secure a correction."

And there is much more upon the same subject, especially in sec. 989.

Fourth. The verdict is challenged upon the ground that there is insufficient evidence to sustain it.

Upon this head it was urged on behalf of the plaintiffs in error, Fanny Hayes and Scott R. Hayes, that there was an entire failure of proof to show that they participated in the keeping, or the harboring of this dog, at or about the time that plaintiff was injured, as alleged, to-wit, August 18, 1893.

Certain facts touching the ownership and custody of the dog are stated in all the answers, except that of Rutherford P. Hayes; that is, that it was owned by Rutherford B. Hayes, the father of the defendants, in his lifetime; that it constituted a part of his personal estate at his decease; that after his decease—which occurred in January, 1893—and on until the 18th day of August, 1893, and thereafter until June 1st, 1894, it was "kept and harbored as, and for the purpose of a watch-dog, for the protection, preservation and benefit of the said estate." The answer further

sets forth, that the persons who then kept and harbored this dog, were the defendants, Birchard A. Hayes, Webb C. Hayes and Rutherford P. Hayes, who were the executors of the last will and testament of Rutherford B. Hayes, and that they so kept and harbored it as executors. Then comes a denial that any of the defendants kept and harbored the dog. The separate answers of the defendants Birchard A. Hayes and Webb C. Hayes, were formally introduced in evidence by the plaintiff below. This was objected to, and exception taken; but we find no error in this, though we do not see the necessity or utility of this action. The declarations against interest, and the admissions of parties in their pleadings, are matters before the jury that they have a right and are bound to consider without the formality of their introduction in evidence. I should modify that statement somewhat in view of the fact that, upon demurrer, this part of the answer was stricken out; that may possibly have made it necessary to introduce so much of the answer as had been held bad on demurrer, in evidence. Now, the allegation that Birchard A. Hayes, Webb C. Hayes and Rutherford P. Hayes, harbored this dog "as executors," that is, in a representative capacity, cannot be regarded as of legal significance or effect. The admission that they kept and harbored the dog, stands with all it implies and all the legal responsibility it involves, and the statement that they did this as executors, is nugatory, and may be disregarded. The denial that these persons did keep and harbor, amounts to saying that they did not so keep and harbor the dog personally; that is, that they did not do it personally because they were acting in the capacity of executors. When taken and reconciled with the other statement as to their keeping and harboring the dog as executors, it does not amount to a complete denial of the keeping and harboring by these persons who are the executors. Though they may have been acting

as executors, yet they are personally responsible, and cannot require the plaintiff to seek relief against the estate. It is doubtful if they could have recourse against the estate for indemnity; but this we need not consider.

The case then on this point, stands admitted by two of the three executors, defendants, viz: Birchard and Webb.

The case as to Fanny and Scott, stands differently, in this: that while they admit that the dog was a part of the assets of the estate of their father—that it was kept and harbored as a watch-dog for the protection, preservation and benefit of the estate, at the time when the mischief was done, they say that it was not so kept or harbored by them, or either of them, but that it was so kept and harbored by Birchard A., Webb C. and Rutherford P. Hayes. So as to them, we must look to the proof to see whether they participated in the keeping and harboring of the dog at the time in question. While we are of opinion that a finding upon the pleadings that the dog was kept and harbored by at least two of the executors that I have mentioned, would have been justified, yet our conclusions upon that point do not rest entirely on this deduction from the pleadings.

About the place where the dog was kept and harbored there is no question. It was kept and harbored at Spiegel Grove, the homestead of Rutherford B. Hayes in his lifetime, and a home for some at least of the defendants, and a place of common resort for all after his death and after the 18th of August, 1893.

Now, this homestead "and all the personal property connected therewith," is devised and bequeathed, in clause 2, of the will, to all these defendants in common, to be "held in common without sale or division of the same until all parties, or the survivors of them, agree to the sale or division, etc." We are of the opinion that the dog, which had been kept on these premises since a pup, was a part of the

"personal property connected therewith," the same as the cats or imprisoned birds, or the coach horses, or cows, devoted to domestic uses and on the place at the time of the decedent's death. This "personal property" is not confined to household goods or furniture, or to the inanimate property.

Though by clause 4 of the will, the interest of Fanny in the estate was to be held for her in trust by Birchard A., and by clause 6 the executors were given full power to convey the property, "both real and personal," yet we are of the opinion that these powers as to the property set forth in clause 2, if they applied thereto at all, were curtailed and qualified by the provision that all the heirs were to hold their property in common, and that it was not to be sold or divided without the consent of all. That therefore every one might, on his own motion and account, exercise his individual right, in common with the others, to hold the property; and that this, as to the dog, involved the right and power to keep and harbor it upon those premises. Did Fanny and Scott exercise this right, or was it surrendered to the others, personally, or as executors? We cannot go over the evidence on this point in detail. Proceeding from this conclusion as to the meaning and effect of the will, we believe that there can be no reasonable conclusion upon the fact, other than that Fanny and Scott participated in keeping and harboring the dog. Miss Fanny was residing at Spiegel Grove, and was the conductor of the household affairs, a large part of the time intervening between the time of the decease of her father and the time of the accident, and in that capacity she ordered and bought food for the dog, and had him fed. As to Scott, the dog was purchased for him, and seemed to be regarded by him and by the others as in a special sense, his dog. He brought it home when a pup and looked after its feeding and care. Though he was living in Cleveland during the period from the

death of his father until after the 18th of August, 1893, yet he was often back at his old home, apparently not as a mere guest, but as one having rights and privileges there, and on certain of these occasions he gave directions about the feeding and care of the dog. As before stated, his right to keep and harbor that dog there was as full and complete as that of any of his brothers or his sister, and as full and complete as his right to have any of the personal property covered by clause 2 of the will kept there. This right was not dependent upon his making that his home. It also appears that the household expenses—including the cost of food for the dog—were paid from a common fund in which all the defendants had an equal share and interest. It does not appear that any one of the defendants ever objected to the dog being kept and harbored there, until some time after this accident, when he was taken to Cleveland and disposed of—perhaps killed—by Webb's order. It is true that neither one of these defendants—Scott nor Fanny, could have, by their own motion and without consulting the others, disposed of this dog; it was not possible to control their undivided interests in the dog otherwise than as the whole dog was controlled, and it might be said that each was somewhat at the mercy of the others in case there should be a difference. As I have said, however, none of them seems to have objected to the dog being kept and harbored on the place as it was. What the effect would have been if Miss Fanny, for instance, had treated the dog after the manner that Rip Van Winkle's wife Gretchen treated his dog Schneider, we cannot say, though perhaps it need not be doubted but such positive action could be taken in the premises by either, as to relieve him or her from all responsibility on account of the conduct of the dog.

I have mentioned in a general way part of the facts only that lead us to the conclusion which seems to us to be inev-

itable—that Fanny and Scott participated with the others in keeping and harboring this dog.

As to Rutherford P. Hayes, I have pointed out that his answer differs somewhat from the others, and that it does not contain this averment with respect to the ownership of the dog, its disposition by the will, and its subsequent custody, keeping and harboring by the executors. But, independently of that, we find with respect to him, after full discussion of the testimony, that he was living at home during the spring and summer preceding this accident, and was the overseer of the premises, at least upon the outside of the house, and took an active part in the purchase of and paying for the provisions, including food purchased for the dog; knew of his being there, and certainly had a right to and did exercise some authority with respect to the animals kept in and about the premises.

Under the head of "Failure of Proof" it is also urged that the scienter has not been established as to any of the defendants; and if as to any, not as to all. Counsel differ widely as to the law upon this point, and many respectable authorities are found to sustain the opposite claims of the parties. Upon the one hand it is claimed that the owners of domestic animals are chargeable with notice of their vicious propensities without having any actual notice. Upon the other hand it is contended that actual notice must be brought home. And there appears to be a middle ground upon this subject. As indicating one view, I read a clause from Clark v. Hite; Tappan, page 1; not because it is authority of the highest character, but simply because the proposition is very tersely and clearly stated. The judges sitting in the cases were Tappan, President, and Gomber, Speers and Kirkpatrick, Associates:

"Case:—The declaration was in the usual form, and claimed damages for the loss of a hog killed by the defendant's dogs. Plea, not guilty.

"It appeared from the evidence, that the plaintiff's hog was killed by two dogs belonging to defendant, in the woods near the field. The dogs had before been seen chasing plaintiff's hogs, and the plaintiff had given the defendant some notice of it. It was doubtful, however, from the evidence, whether the defendant actually knew that his dogs were accustomed to chase and worry hogs.

"The President observed to the jury: That there seemed but little room to doubt, from the evidence, that the defendant's dogs had killed the plaintiff's hog; that the principal point in dispute was, whether the defendant knew that his dogs were accustomed to do such mischief; it was necessary that such knowledge should be averred and proven, to support this form of action—but how proven? The presumption of law is, that every man is acquainted with the habits and disposition of his domestic animals, so that, to make out the fact of knowledge, nothing more is necessary than to prove that the dogs were the property of the defendant and domesticated by him. Verdict for the plaintiff."

We do not find is necessary, however, in this case, to rely upon the proposition stated by the court in that case. The trial judge charged the jury as follows:

"If you should be satisfied by a preponderance of the evidence, as I have said, that the dog prior to the 18th day of August, 1893, had a disposition and propensity to attack horses and teams, and had shown such disposition and propensity by his character and acts, then you will inquire whether or not the defendants, or any one of them, had notice or knowledge of such habits, disposition or propensity on the part of said dog, for the defendants cannot be held liable in this action, nor any one of them, unless you are satisfied by a preponderance of the evidence that such defendant or defendants, had notice or knowledge of the propensity or habit in the dog, complained of in this action.

"It is not necessary that any formal notice should be given, but the notice or knowledge must be of such a kind or character as would put a person of ordinary care and prudence upon his guard; that is, notice or knowledge of such facts as would lead a person of ordinary care or pru-

dence, to believe that the dog was liable to commit such acts in the way of attacking teams and horses as are complained of here, and thereby injure persons and property. If you should fail to find by a preponderance of the evidence, that the defendants, nor any one of them, had such notice or knowledge, as I have defined to you, then your verdict must be in favor of all of the defendants, for there can be no verdict against the defendants, or any one of them, in this action, unless you are satisfied by a preponderance of the evidence that such defendants had such notice or knowledge of the character or propensity of the dog, as is complained of by the plaintiff in this action. And in determining this question, you will consider all of the evidence relating to, or bearing upon that subject," etc.

No exceptions were taken to the charge, and there are no exceptions on account of the court having failed to charge any other propositions desired.

In so far as this charge limits the effect of notice to one of the joint owners, or one of those who may be jointly keeping and harboring the dog—limits the effect to those that had received such notice, we think it is too favorable to the plaintiffs in error; we are of opinion that notice to one of the joint owners, of the vicious propensities of an animal which is being kept and harbored jointly by them, is notice to all, and, coming to consider the verdict upon the evidence, we do so with this rule in mind and giving it effect.

There is also much respectable authority to the effect that notice to the servant having the care of the animal, is sufficient. Now, there is some evidence tending to show that direct and positive information of the vicious character of this dog was given to one of the defendants, viz: Rutherford P. Hayes, by a person who had been attacked by the dog—Mr. Mills. He first testified to the dog having made an attack on him and his having cudgelled the dog and caused it to beat a retreat; and afterwards, upon being called, he testified—pages 601-2—as follows: He was

asked whether he had any conversation with Rudd—that is Rutherford P., upon the subject of his conflict, or contact with the dog, and he answered as follows:

"Now, in regard to the name of this dog, I wouldn't testify as to that; I don't know the name, I was down town a short time, within that same week, I wouldn't say what day I was down town, and met the one they called Rudd, met him near the Savings Bank, and he stepped up to me and says, 'Do you know anything about who hurt my dog?' I said, 'Did some one hurt your dog?' And he said, 'If I knew the man, or could see the man, I would be tempted to boot him.' I said 'Perhaps I am the man. I said 'You had better take care of that dog, or you might get into trouble ' He said 'Some people get too smart sometimes,' 'and went into the bank; that is all that was said."

"Q. What was said on the subject if the dog would attack you again? A. .I said 'He will get worse if he attacks me again."

He was cross-examined upon that subject, and adhered to the statement. Mr. Rudd Hayes denies, as a witness, that such a conversation occurred. The question was for the jury.

There is also some testimony tending to show that Rutherford P. had been advised that a horse had been frightened. This testimony, however, does not tend to show that this occurred through any fault of the dog; the dog may have been behaving himself and may have been entirely innocent of wrong when the horse was frightened. Independently of this, there is much evidence of the vicious conduct of the dog in the roads bounding those premises and at no great distance from the house, covering the period from the death of Rutherford B. Hayes until the date of the plaintiff's injury, besides events occurring before the death of R. B. Hayes. These may be considered both as bearing upon the question of the character of the dog and the question of notice, actual or implied, to the defendants of that character. For convenience I will read from the notes of

the trial judge on overruling the motion for a new trial, for an epitomized statement of the conduct of the dog:

"Witnesses testified to the dog running out in the road, jumping over the fence, jumping at horses' heads in the road in the vicinity of this residence, all the acts of the dog put in evidence were in the vicinity of Spiegel Grove. The evidence showed that the dog weighed probably 125 or 150 pounds, that he was 32 inches in height, or thereabouts. That he was an English mastiff, of rather strong and powerful build. that he had a very loud bark—which one witness testified could be heard a quarter of a mile—other witnesses testified that he roared, and some that he growled, and these witnesses testified, as I say, about the dog running out as they passed by, jumping over the fence, jumping at their horses' heads. One witness testified to the dog jumping at his horse, then coming around and snapping at his wife who was in the sleigh with him, and then going on the other side and snapping at him. One witness testified to driving a mare, and of the dog coming out and trying to get hold of the mare's leg. One witness testified to the dog coming out when the horse got his leg over the tongue. Another testified to the dog coming in the road and the horse rearing and the dog getting under his feet and barking and snapping, and the horse jumping, and the witness testified that he turned in his buggy and fired several times, hollering at the dog. Before that, many testified to hollering at this dog and at their horses when the dog came out. One testified to seeing the dog come out when two women were in a buggy, hearing the screams of the women, seeing the dog chasing the buggy for some distance. Others testified to seeing the dog chase horses and buggies in which men were driving over the hill, as far as they could see them. One witness, by the name of Muchmore, testified that he was going by on the road at one time, and the dog came out and got on to him and pushed him on the ground and tried to bite him, and held him there until some woman came out of the Hayes residence and got the dog off. A man by the name of Mills, testified to the dog attacking him on one occasion in June, 1893, and says soon after that he came along and saw the dog again, and struck him with a club, and the next day he saw one of the defendants, Rutherford P. Hayes."

Witness then proceeds to narrate the conversation between himself and said defendant.

"A witness by the name of Kridler, testified that he was in the grounds with a man and a child, driving, and that Gen. Hayes was sitting on the porch, and the dog ran after his horse and wagon and chased him out of the grounds, and followed him down the street for some distance and frightened his horse, and Mr. R. P. Hayes testified that Kridler told him that after that, that dog, or some dog there, had frightened his horse, without stating any facts with regard to it.

"Now, there were a large number of these witnesses, more than I will stop now to refer to."

And I may say that the trial judge does not undertake to, and does not give all of the instances testified to by the witnesses as to the attacks made by this dog upon persons and upon horses: they are quite numerous, and I will not venture to say how many, but they were quite frequent, and they were upon the roadway at the front or the side of the house, or at the two fronts of the house, within a few hundred feet—certainly within a distance where a dog that "barked and roared," as the witnesses testified this dog did on such occasions, could have been readily heard in and about the house.

Applying certain rules deduced from the authorities, which we deem reasonable and correct rules of law applicable to this case on this point, viz:

First—That the question of scienter is for the jury.

Second—That notice to one joint owner, keeper or harborer, is notice to all.

Third—That this notice need not be actual, but may be inferred from circumstances; and,

Fourth—That the keeper and harborer of an animal of a kind that frequently develops and displays vicious propensities, is chargeable with notice of such vicious habits of such animal as must have come to his knowledge if he had

exercised such reasonable care and watchfulness as a prudent man ought to exercise over an animal of that kind; and holding that a dog is an animal of that kind, we conclude that the evidence justified the finding of the jury that the defendants below had, or were chargeable with notice of the vicious habits of this dog. And we reach this conclusion without invoking the rule that one who harbors a dog as a "watch-dog" is chargeable with knowledge that its character is so ferocious as to make it unsafe to allow it to remain unconfined—a principle firmly established by the authorities and that might well be applied here, in view of the admission of all the defendants that this dog was kept and harbored as a watch-dog. The proof, however, seemed to indicate that this dog was not ferocious in the sense that he would bite, tear, or rend those attacked, but he was, nevertheless, a roaring and howling nuisance, and his viciousness in this respect made him dangerous to passers by on the public highway.

It is contended that the proof does not justify the conclusion that the dog attacked the horse on the occasion of plaintiff's injury. It is true that plaintiff does not say it did so. Perhaps she did not see or hear the dog—her testimony is open to that construction, and others near by did not see or hear it on that occasion; but that may be true, and yet the dog may have attacked the horse just as the husband of the plaintiff testifies. He was personally present in the buggy, with his wife, driving the horse, and he testifies circumstantially to the attack having been made upon the horse by the dog. No one contradicts him directly, and his testimony contains no intrinsic evidence of falsity, so we cannot say that the jury was bound to disbelieve him.

In this connection I will dispose of the seventh ground by stating briefly that we do not find that the verdict is against the weight of the evidence.

Fifth—The fifth ground of error is: That the special verdict is insufficient in form or substance.

Without stopping to read it, I will state that the special verdict follows very closely the amended petition, taking it up paragraph by paragraph, and the jury reciting that they find the facts as stated.

There can be no valid objection, as it seems to us, to following the language of the pleadings—since the facts are to be pleaded, and the facts are also to be found. The facts appear to have been well pleaded, and so formed a good basis for a special finding of facts.

But it is alleged that it is faulty in that it does not contain any finding upon the issue as to the alleged contributory negligence.

There is no evidence in the record in support of the allegation of contributory negligence; so there was no affirmative fact to be found on this head.

The absence of an affirmative finding as to any issue, amounts to a finding against the party upon whom rested the burden of proof as to such issue, and hence the implied finding on that issue of contributory negligence is against the plaintiffs in error.

All the facts necessary to be found affirmatively to justify the general verdict, and as to which the burden of proof rested upon the plaintiff below, were found in her favor.

In support of the proposition of law just stated—that silence as to a given issue amounts to a finding against the party upon whom rested the burden of proof as to such issue, I call attention to 66 Indiana, 386, Graham v. The State ex rel. Board of Comr's. of Jefferson Co. One of the propositions of the syllabus of this case is as follows:

"Under the statute of this state, only the facts which are proved upon the trial of a cause are to be found in the special verdict, or stated in the special finding; and if the facts proved and found leave some issues in the case undetermined, those issues must be regarded as not proved by the party having the burden of proof; and in such case the

special finding is not objectionable because it does not pass upon all of the issues, and affords no sufficient cause for a venire de novo."

This proposition is discussed on pages 394 to 396, of this volume. I will not take the time to read this—since I have consumed a great deal of time already. There are other Indiana cases in the same line: 102 Ind., 90, 101, 291; 76 Ind., 264; 106 Ind., 464. Now, that was held under an Indiana statute, of which our statute—as we are advised—is an exact copy, the Indiana statute having been first adopted.

Sixth—The sixth and only remaining ground urged is, that the verdict is excessive, so much so as to indicate passion or prejudice, and to warrant the conclusion that as to the whole amount it is not supported by the evidence.

It appears from the testimony that the plaintiff was thrown out of a buggy, upon her head and shoulders perhaps, at all events there was a severe contusion on the head and jaw; she was wearing artificial teeth, one part of which is attached to the bill of exceptions, which were broken in her mouth, and which cut the roof of her mouth badly, causing it to bleed profusely. She was stunned by the fall, and persons who went to her immediately afterwards found her bleeding, not only at the mouth, but at the nose and ears. The testimony tends to show that thereafter, for some days, and especially during the night season, she suffered intense pain; that lumps gathered upon the back of her head and neck soon after this injury. For some time after, instead of a discharge of blood from the ear, there was a discharge of pus.

Afterwards the pain became so intense in the region of her ear and back of her head, that surgeons were called. She was put under the influence of anaesthetics, and a surgical operation was performed, by first cutting and then chisseling into the bone at the back of the ear—into the mastoid process

—chisseling from three-fourths of an inch to an inch into this part of the skull, which they found diseased and filled with a cheesy substance, which afterwards seemed to liquify and run off as blood and pus. This opening did not heal for a long time, and she suffered a great deal of pain and inconvenience. The plaintiff, before this accident, seems to have been a very hearty woman physically, and a very bright and active woman mentally, one who took pleasure in society and in reading and thinking about topics of interest. Since this accident her nature seems to have been entirely changed. She is extremely frail and delicate and nervous, and her memory is impaired, almost gone; she can not remember what she reads, or hold to a topic consecutively in discussion. As another result of her accident, she often has fainting spells; becomes dizzy and falls, and seems to become partially unconscious of her surroundings. There is no doubt but she was very seriously injured, and not much doubt but her injury is permanent, and that her hold upon life is precarious.

The amount of recovery was seven thousand five hundred dollars. It is true, as suggested, that she was not a wage-earner, but she was the house-keeper of her husband. There is nothing in the case to justify any vindictive or punitive damages. The court charged the jury fairly upon that proposition—the damages must be compensatory only. The plaintiff, if entitled to recover at all (and we have decided that she was entitled to recover), is entitled to a substantial amount. It is urged that, since her condition is so deplorable, the court should not disturb a verdict of any amount, because no amount could fully compensate her for what she has lost. That is true. It is true, no doubt, that she would not accept if the amount were offered to her when she was in her senses, 7,500.00, or many times that, to be

reduced from her former health to her present condition. But, if we were to apply the rule that because such a condition and such injuries cannot be fully compensated, that no verdict would be too high because it cannot compensate, we could not interfere with the most enormous verdict in a case of this kind. We do not think this is the true rule to be applied. A verdict of $7,500, against a man in the ordinary walks of life, would be ruinous; it would sweep away the accumulations of a life-time of the ordinary professional man or merchant or farmer, or of any one belonging to the middle classes of society. We have concluded that this verdict should not stand for the full amount. We do not find that the verdict being so high is the result of passion or prejudice, or that on account of the operation of passion or prejudice the judgment need be reversed, but we are inclined to think that all in excess of five thousand dollars of the verdict is hardly supported by the evidence, and we have concluded that if a remittitur is entered as to all in excess of $5,000, we will affirm the judgment for that amount. If such remittitur is not entered, the judgment will be reversed on the ground that the verdict for the full amount, i. e. for the amount in excess of $5,000, is not sustained by the evidence.

Bartlett & Wilson, and *Birchard A. Hayes*, for Plaintiffs in Error.

D. B. Love, *Finefrock & Garver*, and *Basil Meek*, for Defendant in Error.

State ex rel. Meader v. Sullivan et al.

(First Circuit—Hamilton Co., O., Circuit Court—Oct. Term, 1897.)

Before Cox, Smith and Swing, JJ.

THE STATE OF OHIO EX REL. JOSEPH F. MEADER v. JOHN J. SULLIVAN, et al.

Removal of member of Board of Supervisors of Cincinnati from office by mayor—What will not constitute proper charges—

Sec. 2690m, R. S., confers upon the mayor of Cincinnati the power and jurisdiction to remove any member of the Board of Supervisors of that city for neglect of duty or misconduct in office, after giving to the person charged an opportunity to defend himself. But such charges must present facts that in law constitute neglect of duty, and therefore charges will not be sufficient as ground for removal that charge defendant with being guilty of an affirmative act—in this instance, of consenting and allowing a tax return of the Street Railway Company to go on the tax duplicate for the current year, knowing the same to be much too low in amount—when such act is not by the statute required of the board or its members, and, if performed, would have been useless and without legal effect.

QUO WARRANTO.

On demurrer to answer of John J. Sullivan.

SMITH, J.

The first question which we consider in this case is, whether the charges which were presented to Mayor Tafel, on September 3, 1897, against the defendant, Sullivan, who was then one of the members of the board of supervisors of the city of Cincinnati, purporting to charge said Sullivan with neglect of duty as a member of said board, and of which charge notice was given to said defendant by serving him with a copy thereof and notifying him that said charges would be for trial and hearing, on September 7, 1897, at the office of the mayor, embodied facts which, in judgment of law, constituted, if true, neglect of duty on the part of the defendant as a member of the said board. If they did state facts, which, if true, constituted neglect of duty, we

think the decision of the supreme court in State v. Hawkins, 44 Ohio St., 98, is authority for holding that under sec. 2690*m*, Revised Statutes, which confers upon the mayor, the right and jurisdiction to remove any member of said board for neglect of duty or misconduct in office, he might proceed to hear and determine the truth of the charges, giving to the person charged an opportunity to defend himself therefrom, and if in the judgment of the mayor he is found guilty, that he might properly be removed.

But it is objected and insisted by the counsel for the defendant, that there never was any valid or legal charges presented against him; that said charges so presented against him did not state facts that in judgment of law constituted neglect of duty, and therefore, that the mayor had no authority to proceed to hear or determine the truth of the allegations made, or render any judgment thereon: and when the case came before the mayor for hearing, the defendant, as alleged in the answer we are considering, filed an application and motion in writing, alleging the insufficiency of such charges, both as to substance and form, and objecting to a trial and hearing thereon, and asking that they be dismissed, (setting out a copy of the motion filed by him). The answer further avers, that this motion was overruled by the mayor who then ordered the trial to proceed, and that thereupon defendant filed his answer denying the truth of the facts alleged in each of the charges, and that thereupon the mayor, against the objection of the defendant, entered upon the trial and hearing of said charges, and that not a word of evidence tending to sustain the truth of the facts alleged in said charges, or either of them, was adduced or heard by the mayor; and that no statement or information of any personal or official knowledge of the mayor of any kind, tending to substantiate or prove the facts alleged in said charges or either of them, was made or communicated to the defendant. The answer further avers,

that on September 22, 1897, the mayor made his certain order and caused it to be served on the defendant, in which it is stated, "I find from the evidence and also from the facts within my personal knowledge, that the said John J. Sullivan has been guilty of neglect of duty in his official capacity as a member of the said board of supervisors," and proceeded to remove him from his said office. All of which defendant avers was contrary to the facts and the law of the state.

For the proper determination of the principal questions under consideration, viz: whether the charges were sufficient, if true, to put the defendant on his defense, or to justify any action on the part of the mayor, such as was had, it is essential to have before us a copy of such charges as they are set out in the answer of the defendant.—They are as follows:

"Hon. Gustave Tafel,

"Mayor of the City of Cincinnati.

"Sir:—The undersigned citizens and tax-payers of Cincinnati, hereby charge John J. Sullivan with neglect of duty as a member of the board of supervisors of Cincinnati, in this, to-wit:

"*B.* Said John J. Sullivan knew that the capital stock of the Cincinnati Street Railway Company was about $15,625,000.00, and that its market value was about $19,000,000.00, and knew, or should have known, that the tangible property of said company, real and personal, owned by said company in the city of Cincinnati, and subject to taxation at the time the valuation of property for the current year was to be fixed, was many millions of dollars, to-wit: about $10,000,000.00; nevertheless, about August, 1897, he did wilfully, wrongfully, and to the great prejuduce and loss of other tax-payers of the city of Cincinnati, consent to, and approve as a member of said board of supervisors, a valuation of said personal property of said Cincinnati Street Railway Co., for purposes of taxation for the current year, at the sum of $835,230.00, and realty at about $350,000; that said valuation was a gross wrong upon other tax-payers of the city of Cincinnati, and that said John J. Sullivan knew the same to be grossly inadequate, as alleged, when

he consented to and approved the same, and that by the exercise of ordinary care, as a member of said board, he would have known what the undersigned aver is a fact, that the true value of said taxable property for purposes of taxation on the county duplicate, was many millions of dollars, to-wit, not less than about $10,000,000.00, and that although other property of citizens subject to taxation was uniformly valued by said John J. Sullivan for taxation, at about 65 per cent. of its selling value, the property of said Cincinnati Street Railway Company, was wilfully and with intent to prefer, and be partial to and favor it, fixed at a valuation of about 7 per cent. of its selling value.

"*C.* Said John J. Sullivan knew that the capital stock of the Cincinnati Gas Light & Coke Co., was about $8,500,000.00, and that its market value was over $17,000,000.00, and knew, or should have known, that the tangible property, real and personal, owned by said company in the city of Cincinnati, and subject to taxation, was at the time of valuation of property for the current year, many millions of dollars, to-wit, about $10,000,000.00; nevertheless he did, about August, 1897, wrongfully, wilfully, and to the great prejudice of, and in gross wrong of other tax-payers of the city of Cincinnati, consent to, and approve as a member of said board of supervisors, a valuation of said property for purposes of taxation for the current year, at the sum of $2,145,408.00, which was $354,392.00 less than the valuation of the same property for the preceding year; that said valuation was a gross wrong upon other tax-payers of the city of Cincinnati, and that said John J. Sullivan knew the same to be grossly inadequate when he consented to, and approved the same, and that by the exercise of ordinary care, said members of said board would have known what the undersigned aver is a fact, that the true taxable valuation of said property on the county duplicate was many millions of dollars, to-wit, not less than about $10,000,000.00.

"Wherefore, the undersigned request your Honor to give notice of these charges, to fix a day for hearing the same, and to take such further action as may be authorized by law.

"Respectfully," etc.

The foregoing purported to be signed by the tax-payers' association of Hamilton county, by Jos. Hippart, Pres., and Fred Fieke, Sec'y., I. B. Marsman and about sixty-four other persons.

It will be seen from a reading of these charges and specifications, that they are of a very grave character. If it be true that Mr. Sullivan knew that the capital stock of the Street Railway Company, was about $15,625,000·00, and that its market value was about $19,000,000.00, and knew, or should have known, that the tangible property of said company, real and personal, owned by said company in the city of Cincinnati and subject to taxation at the time the valuation of property for the current year was to be fixed, was many millions of dollars, to-wit, about $10,000,000.00, and that he, when called upon as a member of the board of supervisors of the city, to act upon the correctness of the returns of corporations and individuals for the current year, and equalize the same and, so far as lay in his power, correct any untrue or false returns, knew, as is averred in said answer, he did, that the return of said Railway Company of its personal property and real estate for taxation, viz., the personalty at $835,230.00, and the realty at about $350,000, was altogether too small, and thus a gross wrong upon the other tax-payers of the city, and when by the exercise of ordinary care as a member of the board, he would have known (what the charge asserted as a fact) that the true value of said taxable property for purposes of taxation on the county duplicate, was not less than $10,000,000.00, and that although other property of citizens was uniformly valued by him for taxation at about 65 per cent. of its selling value, the property of said Railway Company was by said Sullivan, wilfully, and with intent to prefer and be partial to and favor it, fixed at a valuation of about 7 per cent. of its selling value, and he did any act in the pretended discharge of his duty to carry said purpose into

effect, or omitted, with the intent charged, to do anything legally in his power to do, to prevent such injustice and wrong, there could hardly seem room for any difference of opinion as to such conduct, but everyone would say that this was gross misconduct in office, or gross neglect of duty, and that removal from office would not be a harsh penalty therefor.

But the question remains, whether any such neglect of duty, (for that is the charge), is alleged against the defendant. While knowledge of the facts as to the under-valuation of this property by the company is properly alleged on the part of Sullivan, and his wrongful purpose and intention is charged, what is the act done, or the duty omitted, which is charged against him, as constituting the neglect of duty? It is, as we understand, that with such knowledge and intent, "he did about August, 1893, wrongfully, wilfully, and to the great prejudice and loss of other taxpayers of the city of Cincinnati, *consent to and approve*, as a member of said board of supervisors, a valuation of said personal property of said Cincinnati Street Railway Company, for purposes of taxation for the current year, at the sum of $835.230.00, and realty at about $350.000," which he knew to be grossly inadequate, and when by the exercise of ordinary care as a member of the board, he would have known the real value thereof to be $10,000,000.00, which was averred to be the real value.

Now, if a consent or approval of such a return by the board of supervisors, and of the valuation made therein, was a duty imposed upon it, or was necessary or essential to the placing of the same upon the duplicate for taxation, and the members of the board, or one of them, with the knowledge averred to have existed on the part of this defendant, and with the purpose and intent specified, it would seem clear to me, that this charge as presented would be a good and valid charge under the authority before cited. A

brief examination of the statutes as to the making returns of the kind mentioned in these charges, and of the duties of the county auditor, (in this city), the board of supervisors performing the duties of an annual board of equalization, is therefore necessary.

Under the provisions of sec. 2744, Revised Statutes, the president, secretary and principal accounting officer of a corporation like the Street Railway Company, or the Gas Company, shall list for taxation, verified by the oath of the person so listing, all the personal property, (which shall be held to include all such real estate as is necessary to the daily operations of the company), moneys and credits of such company or corporation within the state, at the actual value in manner following: Then it is pointed out that such return is to be made to the auditor, of the several counties in which the property is situate, and the amount in each township, city, village, etc., to be apportioned to each. This return is to be made in May of each year. Under secs. 2781, and post, the county auditor in certain cases is authorized to correct returns made for the current year, or for five years previous to the examination. By sec. 2806, it is made the duty of the county auditor to lay before the proper board of equalization, the returns made to the assessor by individuals, each year, and of the returns made to him by corporations under sec. 2744. Under sec. 2690*m*, the board of supervisors in this county, takes the place of the annual board of equalization in other counties, and such returns made to the auditor are laid before said board of supervisors, which performs the duties imposed by sec. 2807, on the boards of equalization.

This section provides among other things, that

"Said board shall hear complaints and equalize the assessments of all personal property, moneys and credits, new entries and new structures returned for the current year by the township assessors and county auditors: and they shall have

power to add to, or deduct from the valuation of 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 to add other items upon such evidence as shall be satisfactory to the said board, whether said return be made upon oath of such person, or upon the valuation of the assessor or county auditor; but when any addition shall be ordered to be made to any list returned under oath, a statement of the facts upon which such addition was made shall be entered upon the journal of the boards. Provided that no such addition shall be made to such list returned under oath without the board having first given reasonable notice to the person or persons (if their residence be within the county), whose personal property is sought to be added to, or the valuation increased, to appear before such board at a time and place to be fixed by said board, and show cause why such addition should not be made, or why such valuation should not be increased."

Under this section it seems to us, that whenever the board has good reason to believe that any return made by a person or corporation, so placed before it for review or equalization, is incorrect, and that the valuation of the personal property therein reported, is greatly below its real value, or that items of personal property, as defined by sec. 2744, which should have been included therein, have been altogether omitted from such return, that it is the bounden duty of such board to enter upon the examination of these questions and exercise the powers which the law confers upon it, even if no complaint be made by a person or persons not members of the board. This would seem to be one of the purposes for which the board was established, and the failure to discharge this duty, or in good faith to discharge the other duties incumbent upon them with respect to such returns, especially if it appeared that such failure to act was with personal knowledge of the falsity of such returns, and with the intent to suffer and permit the person or corporation making such return, to escape its fair and proper share

of the burdens of taxation, would be misconduct in office and neglect of duty.

And we are further of the opinion, that it is the duty of each member of the board who has reason to believe, or does believe, that such returns are clearly wrong, to use his honest efforts with the board of which he is a member, to correct the wrong, and if with the purpose and intent averred in this case, he does not do so, he neglects the duty imposed upon him. If he does in good faith do what he can to correct what he believes to be wrong, and the evidence shows that he was mistaken, or he is overruled or voted down by his associates, he is free from blame.

It seems to us clear that, in terms at least, no charge is made against this defendant other than this—that he consented to and allowed this return or valuation of the Company for the purposes of taxation for the current year. So far as we can see, there is no provision in the statute which makes the consent or approval of the board, or any one of its members, at all necessary or essential for the placing the amount returned upon the duplicate for taxation. Unless it is duly and legally altered or changed by the board when the returns are laid before it by the auditor, it goes upon the duplicate at the valuation returned by the corporation as a matter of course. The charge against the defendant, is that he was guilty of an affirmative act, and that an act, which the statute did not require the board, or him as a member of it, to perform, and which, if performed, would have been perfectly useless and without any legal effect. How can it be that the doing of such an act is a neglect of duty?

If the charges had been that with knowledge of the incorrectness of those returns in the particulars stated, the defendant, with the intent charged, had wilfully and intentionally failed to use any of the powers conferred upon him by the statute, as for instance, that he had failed to call the at-

tention of the board thereto, and to use his efforts to have the correctness thereof investigated by it, or, if necessary, to make complaint himself in regard thereto, or if on such investigation, (if entered upon), he knowingly and wilfully failed to discharge any duty imposed upon him by the law, a very different case would be presented, and in such case, in our judgment, it could not be correctly held, that if they were shown to be true, it would not amount to misconduct in office, or neglect of duty.

But as now presented, we are of the opinion that the charge made was fatally defective as not stating facts which show, (if they are true), that the defendant was guilty of neglect of duty—and therefore, that his removal from office by the mayor on such charges, was unauthorized.

As to the other point presented by counsel for the defendant, that the removal was not a valid act by the mayor, for the reason that at the hearing and trial of the defendant, there was no evidence tending to sustain the truth of the facts alleged in said charges, or either of them, and that no statement or information of any personal or official knowledge of the mayor of any kind, tending to substantiate or prove the facts alleged in said answer, was made or communicated to the defendant, and yet, that the mayor found him guilty, we have this to say. That in our judgment the holding of the Supreme Court in the case before mentioned, State ex rel. v. Hawkins, 44 Ohio St., 98, would require us tc hold, that if the charges upon which the defendant was tried by the mayor, were valid, as alleging facts which, if true, would constitute neglect of duty, that we could not in any way interfere with the judgment or finding of the mayor, for that is final, and the court has no jurisdiction or right to review it.

As will be noticed in this discussion, we have only considered the first of the charges made against the defendant —that relating to the returns of the Street Railway Com-

pany. The second charge, as to the action of the defendant with regard to the returns of the Gas Company, is in all respects substantially the same, and the same principles of law apply to that charge also.

The result therefore is that, in our view, the demurrer to the answer of the defendant should be overruled.

S. N. Maxwell and *John F. Follett*, for Plaintiff.

E. W. Kittredge and *Wm. M. Ampt*, for Defendants

(Third Circuit—Crawford Co. Circuit Court—September Term, 1896.)

Before Day, Price and Rohn, JJ.

THE O. S. KELLY COMPANY v. BERNARD LOBENTHAL, et al.

Chattel mortgage—Refiling—

(1). Under section 4155, Revised Statutes, it is not required of a person authorized to make the affidavit for the re-filing of a chattel mortgage, to name or enumerate the mortgagors, or state under oath more than the amount of the claim secured, that it is just and unpaid, together with a statement exhibiting the interest of the mortgagee in the property at the time the same is made and claimed by virtue of the mortgage.

Subrogation—Equity—

(2). A purchaser of chattel property from a mortgagee having possession, will, in equity, be subrogated to all the rights and equities of such mortgagee in and to the mortgage covering the same, to the extent of his interest therein, as against a subsequent mortgagee seeking, in proceedings in foreclosure, to recover the same.

Interest—

(3). The interest of such purchaser in the property, by subrogation, is the amount paid not exceeding its entire value; and where it is shown or conceded that such purchaser paid full value for such property, he will be subrogated to its entire interest, and his title thereto protected in equity as against a suit in foreclosure by a susbequent mortgagee claiming the same.

Error to the Court of Common Pleas of Crawford county.

ROHN, J.

On January 26, 1892, the plaintiff in error in this case filed its petition in the court below against Bernard Lobenthal, John Lobenthal, The Citizens National Bank of Galion, Dill and Reister, H. C. Carhart and John J. Shumaker, for the purpose of obtaining a judgment against Bernard and John Lobenthal upon two certain promissory notes, and foreclosing a certain chattel mortgage upon personal property described in its petition. The defendants, The Citizens National Bank of Galion, Dill & Reister, H. C. Carhart and John J. Shumaker were made parties defendant in the action on the ground that they claimed some interest in the property described in plaintiff's petition, which it was asserted, was subordinate to its claim.

To this petition, The Citizens National Bank of Galion filed its separate answer and cross-petition, asking judgment against Bernard and John Lobethal upon a balance due it upon a certain promissory note for $600, and also, the foreclosure of a certain chattel mortgage given to secure the same. John J. Shumaker answered separately, also, to the petition of the plaintiff, first by answer, and secondly by an amended answer, alleging, in substance, that in May, 1891, he, with the consent and authority of the defendant, The Citizens National Bank of Galion, and with the knowledge and approval of the defendants, Bernard and John Lobenthal, purchased a certain Mansfield Traction Engine, for the sum of $425, its full value, which sum was paid to the bank, and credited upon the Lobenthal note; and which engine was at that time included in the chattel mortgage of said bank securing its note of $600; and that by reason of such purchase and payment he, Shumaker, was subrogated to all the rights and equities of the bank in and to said traction engine, by virtue of the chattel mortgage in favor of the bank to the amount paid therefor. This same engine is claimed by the plaintiff in this case by reason of its mort-

gage, though given subsequently to the mortgage held by the bank.

Upon substantially this state of facts issue was made up and a trial had in the court below, which found the equities in relation to the engine in controversy in favor of the defendant John J. Shumaker, and rendered judgment accordingly. The plaintiff now prosecutes error in this court, alledging error:

First, in over-ruling its motion for a new trial.

Second, Error in over-ruling the plaintiff's motion to make amended answer of defendant John J. Shumaker more definite and certain.

Third, that the facts set forth in the answer and amended answer of the defendant John J. Shumaker, are not sufficient in law to maintain the action or support the judgment against the plaintiff in error.

Fourth, that the judgment was given for said John J. Shumaker and the Citizens National Bank of Galion, when it ought to have been given for the plaintiff.

The first error assigned, is the overruling the motion of the plaintiff for a new trial. This assignment of error, includes all the other assignments, and, consequently, all will be considered together or under one head.

The undisputed facts in this case, as disclosed from the record and proceedings, are:

First, that the defendants Bernard Lobenthal and John Lobenthal, on or about the 19th day of April, 1890, executed and delivered their certain chattel mortgage to one A. F. Lowe to secure the payment of a note to said Lowe for the sum of $600, and that among the property thus mortgaged was an engine known as "A Mansfield Traction Engine."

Second, that the mortgage thus received by Lowe was deposited with the Township Clerk of Jefferson Township, Crawford County, Ohio, on the 21st day of April, 1890, it

being averred, and not denied, that the mortgagees lived in that township, and the mortgage was properly filed as required by section 4151, Rev. Stat.

Third, that on or about the time of the execution and delivery of said mortgage and note, Lowe, who was then the cashier of the Citizens National Bank of Galion, transferred the same to such bank.

Fourth, that the mortgage was re-filed, as follows:

March 26, 1891, by A. F. Lowe, Cashier of Bank; March 15, 1892, by A. F. Lowe, Cashier of Bank; March 9, 1893, by A. F. Lowe, Cashier of Bank; March 8, 1894 by A. F. Lowe, Cashier of Bank.

Fifth, That on the 10th day of July, 1890, the plaintiff in this action, the O. S. Kelly Company, obtained from the defendants Bernard and John Lobenthal, a certain chattel mortgage, securing two promissory notes mentioned and described in this petition, and conveying, among other property, the same "Mansfield Traction Engine" described in the first mortgage to Lowe—there being no question but that this mortgage was properly filed and re-filed, until the commencement of this action.

Sixth, That this engine, covered by both mortgages, was purchased by John J. Shumaker for $425 cash, from Bernard and John Lobenthal, with the full consent of The Citizens National Bank of Galion which then held Lobenthal's note for $600 secured by this mortgage made to Lowe, and which also had possession of the engine in question; and, further, that the amount of the purchase money of the engine was, by common consent and agreement of the Lobenthals, Shumaker and the bank, credited as part payment on the $600 note held by the bank, and the bank relinquished all claim to the engine in question after receiving its full value in money.

The whole and sole contention comes up between the plaintiff, The O. S. Kelly Co., and the defendant John J. Shumaker.

From the facts as they now appear, the plaintiff claims that by virtue of its mortgage it has the first and best lien on the engine in question, and asks to have the same sold, and the proceeds applied toward the payment of its judgment secured by the consideration of the court below, against the Lobenthals on the notes secured by its mortgage.

The defendant John J. Shumaker asks to be subrogated to all the rights and equities of the Citizens National Bank, in and to the mortgage held by it, covering this same engine and securing the same note upon which it credited the $425 paid by him for the engine.

1. It is evident, before the defendant Shumaker can claim subrogation to the rights and equities of the bank by and through the mortgage executed by the Lobenthals to Lowe, that it must first appear to the satisfaction of the court, that the chattel mortgage so held by the bank was in all respects perfect, and created a good and sufficient lien on the engine in question, prior to the mortgage of the plaintiff company. This raises the question, as made by the pleadings and evidence, whether the Lobenthal-Lowe mortgage, which it is conceded was executed prior to the mortgage of plaintiff, was properly re-filed and kept alive under the statutes of this state by the bank until the commencement of this action. It is unnecessary to do more than refer to the question relating to the filing of the mortgage in the proper township of Jefferson, for the reason, as stated before, it is averred and not denied, that the Lobenthals resided in the township where the mortgage was filed. Then the only question regarding the sufficiency of the Lobenthal-Lowe mortgage relates as to whether the same was properly re-filed within thirty days preceding the expiration of each successive year, as provided by the statutes of this state, until the commencement of this action. For

this purpose it will only be necessary to consider the first re-filing made March 26, 1891, as, before the expiration of the next year, this action was commenced, to wit: January 26, 1892. It is claimed by the able argument of plaintiff's counsel, that there is nothing to indicate any connection between the amount claimed by Lowe when the mortgage was executed and the amount claimed upon the re-filing referred to—that is: that the amount claimed in the first instance was from Bernard and John Lobenthal, and upon re-filing from Bernard alone and that it does not correspond with the conditions of the mortgage. For a proper determination of this question it is only necessary to refer to sections 4154 and 4155 of the Revised Statutes of the state, which provides:

"Section 4154. The mortgagee, his agent, or attorney, shall, before the instrument is filed, state thereon, under oath, the amount of the claim, and that it is just and unpaid, if given to secure the payment of a sum of money only; and if given to indemnify the mortgagee against a liability as surety for the mortgagor, such sworn statement shall set forth such liability, and that the instrument was taken in good faith to indemnify against loss that may result therefrom."

"Section 4155. Every mortgage so filed shall be void, as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless, within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement verified as provided in the last section, together with a statement exhibiting the interest of the mortgagee in the property at the time aforesaid, claimed by virtue of such mortgage, is again filed in the office where the original was filed."

These statutes we think have been substantially complied with by A. F. Lowe, Cashier, or in other words, agent for the bank. It nowhere appears necessary for the person, authorized to make the affidavit under the statute for the

re-filing of a chattel mortgage, to name or enumerate the mortgagors, or to, as in this case, state under oath more than the amount of the claim, that it is just and unpaid, together with a statement exhibiting the interest of the mortgagee in the property at the time the same is made and claimed by virtue of the mortgage. Was the interest of the then mortgagee exhibited by the affidavit made? We think it was, as it advised all parties interested of the interest of the bank in the property covered by the mortgage. This being true, we think the chattel mortgage was properly refiled, and was, at the time of the commencement of this action, superior to the mortgage of plaintiff.

2. The next and only question which remains for the court to consider, can the defendant Shumaker, as purchaser from the Lobenthals and bank of the engine, be subrogated to the rights and equities of the bank in and to the mortgage covering the same as against the mortgage of plaintiff? It is claimed, and not without reason, on the part of the plaintiff's counsel, that subrogation in this case cannot be made in favor of Shumaker, because "one of the prerequisites to the exercise of the right of subrogation is the complete discharge of the debt: a partial payment will not suffice." In other words, that before Shumaker could claim subrogation, he would have been compelled to discharge the entire debt due the bank; and that the bank's rights would have to "be entirely divested," before Shumaker could be substituted or subrogated in its place as to its rights under the mortgage. Subrogation is the substitution of another person in the place of a creditor, to whose rights he succeeds in relation to the value of the property, not exceeding the original debt. This sounds purely in equity, and is founded upon equitable principles. It is an equitable assignment by subrogation, and "is enforced" says Pomeroy's Equity, vol. 3, sec. 1211, "whenever the person making the payment stands in such relations to the premises or to

the other parties that his interests, recognized either by law or by equity, can only be fully protected and maintained by regarding the transaction as an assignment to him, and the lien of the mortgage as being kept alive, either wholly or in part, for his security and benefit." And Pomeroy further says in the succeeding section, "The doctrine is also justly extended, by analogy, to one who, having no previous interest, and being under no obligation, pays off the mortgage or advances money for its payment, at the instance of a debtor party, and for his benefit; such a person is in no true sense a mere stranger and volunteer."

Applying these principles to the question under consideration, can it be said that Shumaker was a mere "stranger and volunteer," when at the instance of Lobenthal and the bank, he paid his money, full value as shown by the evidence, for the engine? But it is said Shumaker did not pay the entire debt due the bank. That is true, but he paid the entire debt to the bank in so far as the bank had any claim against the engine; it released the engine to Shumaker so far as its claim was concerned; it looked to other property covered by the mortgage for the balance of the debt due to it from the Lobenthals; and a majority of the court are of the opinion that there can be no trouble in extending the equitable doctrine of subrogation or assignment of this mortgage, under all the circumstances, to Shumaker for his protection for the full amount paid by him to apply on the mortgage debt to the bank. There can be no conflict between the bank and Shumaker, as the bank claims no interest in the property purchased from it, and there can be no trouble in extending to Shumaker all the rights and equities which the bank had in and to the mortgage covering the engine in question.

There can be no doubt of the equities in this case being with Shumaker—he gains nothing by the result of this suit,

except a protection, by the court, of an article of personal property for which he paid full value. The plaintiff, on the other hand, loses none of its security which it had in the first instance, and still has, subject to the prior existing mortgage held by the bank, and now extended to Shumaker for his protection.

A majority of the court are of the opinion that there was no error in the proceedings and judgment of the court below, and finding that the equities were with the defendant John J. Shumaker, the judgment of the court below will, therefore, be affirmed, with costs. Execution awarded and cause remanded for execution.

PRICE, Judge, dissents.

Edward Vollrath, for Plaintiff in Error.

Finley, Beer & Bennett, for Defendant in Error.

(First Circuit—Hamilton Co., O., Circuit Court—Nov. Term, 1897.)

Before Cox, Smith and Swing, JJ.

FRANK SCHMIDT v. THE VILLAGE OF ELMWOOD PLACE.

City ordering sidewalk—Notice to property owner—

A city has no power to lay a side-walk and assess the abutting property for the cost of it, until the owner has been notified to lay it, and has had the opportunity to do so.

Resolution for improvement of street—Notice to property owner jurisdictional—

The notice to the property owner of the resolution declaring the necessity of improving the street, is necessary to confer jurisdiction upon the municipality to make the improvement, and a failure to give such notice is not a mere technical irregularity or defect within the meaning of curative section 2289, R. S., but invalidates the assessment.

Appeal from the Court of Common Pleas of Hamilton county.

SMITH, J.

In 1892, the Village of Elmwood Place made an assess-

ment by ordinance for sidewalk improvement on two lots owned by the plaintiff, the assessment on each lot being for $12.66.

In June, 1893, the defendant made another assessment for the improvement of Linden street on which the lots fronted, in the sum of $87.78 on each of said lots. It is admitted that no notice was ever given to the plaintiff who was a non-resident of said village, but a resident of the county, of the passage of any resolution by the defendant of the necessity of either of said improvements, and that plaintiff had no notice of the fact of said improvements until after they were made. In all other respects it is conceded that the regular and legal steps were taken. It is sought to enjoin the collection of the whole of these assessments on the ground that no notice was ever given to the plaintiff of the passage of either resolution declaring the necessity of such improvement, and if this is not sufficient, that such assessment was for more than 25 per cent. of the value of the lots after the improvement was made, and praying that it be limited to 25 per cent. of the value of the property after the improvement was completed.

1st. As to the sidewalk assessments: The proceedings of the municipal authorities as to the making and repair of sidewalks, and the assessment therefor, are prescribed by sec. 2329, Revised Statutes. This section provides for the passage of a resolution declaring that certain sidewalks shall be constructed, and for a written notice to be given to the owner or his agent (if a resident of the municipal corporation) of each parcel abutting on the sidewalk of the passage of such resolution. If the owner is a non-resident, and neither he or his agent can be found, notice is to be given by publication in some newspaper of general circulation in the corporation. Sec. 2330 gives such owner thirty days after service of notice to construct such sidewalks. If he does not do so, the authorities are to do it at the ex-

pense of the owner of the property abutting thereon, and the same, with a penalty of 20 per cent., shall be a lien on the abutting property and be collected as other assessments. In the 11 C.C. Rep., 69 it was held that "the city has no power to lay a sidewalk and assess the abutting property for the cost of it, until the owner himself has been notified to lay it and has had the opportunity to lay it." We think this is good law, and as notice was not given in this case, the assessment for the sidewalk will be enjoined.

2nd. As to the effect of the failure to serve plaintiff with a copy of the resolution declaring the necessity of improving the street. Did this render the whole assessment void, or under the provisions of our curative statutes as to assessments, can the court properly, in an action brought by the corporation to collect the assessment, or in one brought by the owner to enjoin it, in a case where no notice of the proceedings to improve has been given as required by sec. 2304, allow such part of the assessment as is a proper charge upon the property to be collected in the one case, or to stand in the other?

Sec. 2289, Revised Statutes. was the original curative section, and provides, in substance, that in any action, brought by the municipality to recover the amount of the assessment or enforce the lien thereof, "if it shall appear that by reason of *any technical irregularity* or *defect*, whether in the proceedings of the board of improvements, or of the council, or any other officer of the corporation, or in the plans or estimates, the assessment has not been properly made against any defendant, or upon any lot or parcel of land sought to be charged, the court may nevertheless, on satisfactory proof that expense has been incurred which is a proper charge against said defendant, or lot or parcel of land in question, render judgment for the amount properly chargeable against such defendant or on such lot or land, but in such cases the court shall make such order for the payment of costs as

may be deemed equitable and proper."—As stated, this seems to be applicable only to actions brought by the municipality, but we have no doubt but the same rule should be applied to cases where an owner of land seeks to enjoin an assessment on account of some "technical irregularity or defect."

But we are of the opinion that the failure to give the notice required by law, is not a mere technical irregularity or defect—but on the contrary, is necessary to confer jurisdiction upon the municipality, and unless it is given, that the assessment can not be legally made upon the property of a person entitled to such notice. We do not say that there must be a literal compliance with the terms of the statute to give such jurisdiction. For instance, as held by this court in the Green case, 7 C. C. Rep., 233, that notice may be served, but not in strict compliance with the statute, and then it would constitute a technical irregularity or defect which would bring the case within the provisions of sec. 2289. But where *no* notice is given or attempted to be given, and the municipality proceeds to assess the land of the owner, the case is different. As held in 47 Ohio St., 217, the purpose of this notice is not merely to notify the owner, so that he may claim damages if he desires to do so. He is entitled to it for other purposes, and if his rights in this respect are disregarded, he is entitled to have the assessment held invalid. We think this view is warranted by the decisions of the supreme court in 18 Ohio St., 85; 27 Ohio St., 527; 34 Ohio St., 468, and 43 Ohio St., 75.

We think it is strengthened, too, by the provisions of sections 2289*a*, 2289*b*, and sections 2289*c*, and 2289*d*, as enacted Jan. 11, 1893, vol. 90 O. L., page 5. By this legislation, it was in effect provided, that where the municipal authorities heretofore or hereafter should have failed to pass ordinances for assessments in the manner provided by the statute, (and a failure to do so, rendered the as-

sessment invalid as held by the supreme court), and in other respects specifically mentioned have failed to observe the provisions of the statute, that if it still appeared that some part of the assessment was a just claim upon the land, that it might be collected nevertheless, or that the whole assessment should not be enjoined or held invalid. But there is no pretence that any of these sections applies to a case where no notice was given as required by law.

In the case at bar, Schmidt, the plaintiff, in his petition avers that without prejudice to his rights and by way of compromise he had tendered to said defendant the sum of $45 for each of said lots in payment of the full amount of the assessments made thereon, and is ready and willing to pay the same still. If the defendant is willing now to accept said amount in full of its claim, the decree may be taken in its favor for that amount, and the rest here enjoined. If not, the whole will be enjoined, saving the right to the defendant (if any it has), under sec. 2290, to order a re-assessment. In either event the costs will be adjudged against the defendant.

Burch & Johnson, for Plaintiff.

Scott Bonham, for the Village.

(Sixth Circuit—Lucas Co., O., Circuit Court—Jan'y. Term, 1898.)

Before King, Haynes and Parker, JJ.

THE SUN OIL COMPANY v. THE OHIO FARMERS' INSURANCE COMPANY.

Insurance—Fire caused by third party—Right of Insurance Co. to sue for damages—

(1.) If insured property is destroyed by fire through the fault or negligence of another than the insured, the insurer, upon payment of the loss, will be subrogated to the rights of the insured to the extent of the indemnity paid.

Interrogatories for jury—Refusal by court to submit—

(2.) It is not error for a court to refuse to submit interrogatories to a jury at the request of a party, when such request is

absolute and unconditional, and not with the qualification and condition that they are to be answered in the event that a general verdict is returned.

Same—Improper interrogatories—

(3.) A court is not bound to and should not propound interrogatories upon questions having no legitimate bearing upon the issues, or the answer to which can have no influence on the general verdict.

Same—Interrogatories requested to be submitted as a whole—

(4.) Where a party requests the court to propound all or none of a series of interrogatories, some of which are proper and some of which are improper, it is not error for the court to refuse to submit the whole or any part of such series.

PARKER, J.

This case comes into this court by petition in error from the common pleas, where the Ohio Insurance Company was plaintiff, and the Sun Oil Company was defendant. The petition filed by the plaintiff below sets forth that it is a duly incorporated insurance company, authorized to do business in the state of Ohio; that the defendant, The Sun Oil Company, is also an incorporated company, engaged in the business of mining for and producing petroleum oils; that on the 16th day of September, 1893, the plaintiff insured George Bowe and William M. Bowe against loss or damage by fire, to their barn, hay, grain, fodder and seed and certain other property, in an amount not exceeding $1017.25. That while said contract of insurance was in force, certain of this property was destroyed by fire; that the amount of the loss so occurring was $1017.25, which the plaintiff was required to and did pay to the Bowes. The petition then proceeds to charge that this fire occurred through the fault and negligence of The Sun Oil Company; that while it was engaged in the prosecution of its business of mining and drilling for petroleum oil, it used a certain boiler to operate a certain engine and machinery, in proximity to this barn and other property so insured. That upon the day the fire occurred there was a high wind prevailing and blowing from

the direction of this boiler toward this barn and other property; that the Sun Oil Company failed to use proper screens or other precautions to prevent sparks from being emitted from the smoke-stack of this boiler; that they burned wood under the boiler, which caused large sparks, and a great many of them, and that on that account, and on account of the prevailing wind or gale, their action was negligent, and that in consequence of this negligent action, certain litter in and about the barn was fired, and the fire was communicated therefrom to a straw-stack next to the barn, and this property was so destroyed.

The answer denies the allegations upon which the conclusion of negligence is founded.

The claim of the insurance company was for $1017.25, which it had been required by the Bowes to pay in consequence of this fire. They claim that by operation of law they became subrogated to the rights of the Bowes as against The Sun Oil Company. The case went to a jury, and the jury returned a verdict in favor of the plaintiff below for the full amount claimed, and upon this verdict a judgment was entered.

The principal contention here, on behalf of the plaintiff in error is: that the case stated in the petition was not made out by the proofs; that if any case was made out by the proofs, it was one widely varying from that stated in the petition—that there was either a failure of proof, or a material variance. This contention was based chiefly upon the claim that it was fairly established by the evidence that there was no negligence on the part of defendant below in the use of the sort of fuel that was used under this boiler, and that there was no negligence in not using a screen or spark-arrester over the smoke-stack. It does not appear to have been claimed on behalf of the plaintiff below that these acts, either of them, amounted to negligence *per se*; but that, under the circumstances, considering the proximity of the

barn and these inflammable materials, and the gale that was blowing from the direction of the engine towards the barn, and the further fact, which appears in the evidence, that the servants of the defendant below who were operating this boiler had been cautioned against the danger—that all of these facts and circumstances combined amounted to negligence on the part of defendant below.

After a careful consideration of this question, we do not find that there was any failure of proof, or variance, which required the court below to act upon the motion of the defendant below to arrest the case from the jury.

It is also contended that the verdict is against the weight of the evidence. We do not deem it necessary to go through this bill of exceptions and review the evidence, but we have read it and considered it, and it seems to us that the jury was justified in finding as they did—that the defendants below were guilty of negligence; that the verdict is amply sustained, as I have intimated. The engine was situated but a short distance—some 300 or 350 feet—from this barn, straw-stack, litter, etc., and the wind was blowing in that direction, and sparks were blowing out of the smoke-stack; and, in addition to these considerations, a fire had been communicated from this boiler to a fence-post, or part of a fence, between the boiler and the barn, and upon this fire being extinguished, the attention of these servants of the defendant, The Sun Oil Company, was called to the fact that fire had been so communicated from their boiler, and they were cautioned against operating the boiler as they were operating it under the existing conditions; they were told that it would probably result in the burning down and destruction of the premises of the Bowes. They seem to have recognized the fact that the operation was dangerous, and promised to correct their mode of operation so that the danger would be averted; but it appears that they did not do so, and the fire resulted.

This contention seems to have been based on the theory of counsel for plaintiff in error—that the insurance company was bound to make out the same kind of a case of negligence against the Sun Oil Company as it would be required to make out in order to successfully resist an action upon the part of the Bowes upon the insurance policy. To resist this action upon the policy successfully, or to give a right of action to the insurance company against the Bowes, if the act had been their act—the setting of fire to this property—it would have been necessary to show that the negligence was so gross as to amount to wilfullness or fraud. It is contended that the rights of the insurance company against the tort feasor are no greater than the rights of the insurance company against the insured; but we are not cited to any authority in support of this contention, and we know of none. We regard it as a novel proposition, and one in support of which we can think of no good reason.

The rule as to the insurance company, that is to say affecting the right of the insurance company against the insured, grows out of and is modified by the contract of insurance. The Sun Oil Company, the defendant below, is not privy to this contract: it has no rights under it. Its rights against the insurance company are not enlarged by it, nor are the rights of the insurance company against it in any way reduced, qualified, or limited by it. The consideration does not proceed from the Sun Oil Company to the insurance company, and no promise runs from the insurance company to the Sun Oil Company. The rule is too well settled to admit of any doubt, or to require any discussion or the citation of any authorities, that if the insured property be destroyed through the fault or negligence of another than the insured, the insurance company, upon payment of the loss, will be subrogated to the rights of the insured owner to recover from the wrong-doer to the extent that the insurance company has been obligated to pay, and

has paid. The rights of the insurance company under such circumstances are precisely those of the owner against the wrong-doer.

The rules of law applicable to the case appear to have been very fully, clearly and correctly given by the court in its charge to the jury. There are certain exceptions noted to the charge, but we do not deem it necessary, in view of the course the discussion has taken, to say more than this in reference to the charge. We find no error in it.

It was also contended on behalf of the plaintiff in error that the court below erred in failing or refusing to submit to the jury certain written interrogatories which it is said were submitted by counsel for the defendant below to the court for that purpose and with that request. These interrogatories are spoken of by counsel for plaintiff in error as if they were the same thing as the special verdict provided for by the code. There seems to be a material difference and distinction between the two, and one that should be considered in order that what has been held with reference to each and the application of what we shall say here shall be understood. The law with reference to special verdicts and special interrogatories seems to have been incorporated into a statute, for the first time, in the state of New York, although a similar practice obtained in this country before that, both in courts of law and courts of equity—especially in the latter. The other states appear to have followed in their enactments the New York code pretty closely, and our statute upon the subject appears to be almost, if it is not exactly, identical with the statute of Indiana. There appears to have been a great many decisions in the state of Indiana under this statute. In our state, there are not so many. When questions arise upon these special verdicts, we are usually referred to the decisions of the courts of Indiana, which are very full and numerous. I call attention, without reading, to sec. 5200, Revised Statutes, which defines

special and general verdicts, and read section 5201, which is a counterpart of section 546 of the Indiana code:

"In all actions the jury, unless otherwise directed by the court, may, in its discretion, render either a general or special verdict; but the court shall, at the request of either party, direct them to give a special verdict in writing upon all or any of the issues, and in all cases when requested by either party, the court shall instruct the jurors, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing, and shall direct a written finding thereon, and the verdict and finding must be filed with the clerk and entered on the journal."

Sec. 5202,—(which is the same as sec. 547 of the Indiana code), provides: "When the special finding of facts," (not the special verdict), "is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly."

Answers to interrogatories (the propounding of which seems to be the form in practice, of stating in writing the particular questions of fact upon which the finding of the jury is desired), control the general verdict, but do not dispense with it. The special verdict differs from this finding as to particular facts or issues, in that it is a finding by the jury upon *all* facts or issues upon which evidence is submitted, *without interrogatories*, and it *dispenses with the general verdict*. In other words, a general verdict has no place in a case where a special verdict is returned, whether such special verdict is returned by direction of the court, on its own motion, or by request of the parties, or by the jury without any direction from the court.

This distinction is pointed out in a number of Indiana cases. I call attention to the case of The Louisville, New Albany & Chicago Railway Co. v. Balch, 105 Ind. Reports, 93. Referring to sections 546 and 547 of the Indiana code, the court says:

"These sections of the statute clearly provide for two kinds of verdicts, a special and general verdict. They do

not together form one verdict, but are separate and distinct.

"A general verdict is a finding generally for the plaintiff or defendant upon the facts and the law as given by the court in instructions. A special verdict is a finding of the facts only. In this, the jury have nothing to do with the law. The court does not instruct them as to the law, but in the rendition of the judgment, applies the law to the facts found by the jury." Citing Indianapolis, etc., Ry. Co. v. Bush, 101 Ind. 582.

"There is a marked distinction between a special verdict, and interrogatories propounded to the jury. These are allowed only in case a general verdict is found, and are allowed for the purpose of discovering whether or not the jury have rested their verdict upon sufficient, material and consistent facts. They may be propounded in reference to one or more of the material facts in the case. Such interrogatories cannot accompany a special verdict, because the special verdict is itself the finding of the facts. It is perfectly consistent to allow interrogatories to accompany a general verdict, for the reasons stated, but it would not be consistent to allow both a general and special verdict in the same case, for the reason that one finds both the law and the facts of the case, while the other finds the facts only, leaving the law for the court in the rendition of the judgment. Each is a mode different from the other, in reaching the final conclusion in the case, and settling the ultimate rights of the parties.

"The jury, unless otherwise directed, may find either a general or special verdict; but if, upon the request of either party, they are required to find a special verdict, they should not return a general verdict also. These views are fully sustained by the well considered case of Todd v. Fenton, 66 Ind. 25."

There is more discussion of the question in the authority from which I have read.

It has been held with reference to special verdicts—and the statute is clear upon the subject—that it is sufficient for counsel to demand that a special verdict shall be rendered.

But it is held that the court is not bound to comply with

a request to submit interrogatories, unless coupled with the qualification that the same are to be answered only in case a general verdict is returned. If no verdict is returned, or if a special verdict is returned, the jury may not be required to answer the interrogatories. There are a great many decisions to this effect. I call attention briefly to one or two.

The Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co. v. Bowen, Adm'r., in the 70 Ind. p. 478:

"A jury can only be required to answer special interrogatories conditionally upon their finding a general verdict, and then only when so instructed by the court, upon the request of one or both the parties. The submission of interrogatories to the jury is a judicial act, and the record ought in some way to show affirmatively that the interrogatories were submitted to the jury in the manner and under the circumstances contemplated by the statute, before any question can be made upon such interrogatories in the supreme court."

In 91 Ind., 252 (Taylor v. Burk, Ex'r.), reading from the syllabus:

"There is no error in the court's refusal to propound an interrogatory to the jury, at the request of a party, when such request is absolute and unconditional, and not in the event they render a general verdict."

With those authorities in mind, let us look at the bill of exceptions and see what occurred upon the trial of the case at bar. The first mention that seems to have been made of the interrogatoires is by the court. The court says:

"With regard to the questions of the special verdict, I would say that I have given them such attention as I have been able to in the short time allowed me. While I think under the law they are handed up to the court in time, yet they should have been handed up a little before they were handed up. I am also of the opinion that a portion of them

are improper questions to submit, and they being asked for as a whole and attached together, I must refuse to submit them as a whole. There are certain questions there that, if they had been handed up detached, I would submit to the jury, or if they are hereafter detached and broken up, I will instruct the jury upon them and have them answered. Exceptions by Mr. James."

It is then noted that the "special verdict, marked S. V. as hereinafter shown and attached as part hereof," was made a part of the bill of exceptions. It seems that after the jury were sent out, the court again called attention to these interrogatories, as shown in the record; to-wit:

"Immediately after the jury had retired the court said to counsel for defense that the special questions and answers might be cut apart, and that he would submit certain ones as being pertinent and proper. That it was not too late to call the jury back and give them further instructions as to the special verdict; and thereupon counsel for the defense explained to the court that the questions were prepared very early in the case and before he knew fully what would be the special claim of the plaintiff, and while he thought that the first two questions were perhaps not important in view of the claims made upon the trial and argument, yet he deemed the entire list of questions pertinent and proper, and that he desired to have them all answered, and desired to have them all submitted as proper; that he preferred to have them all given, or none, and proposed to stand or fall on the list as a whole, and saved his exception."

It does not appear, except by implication, that the court was requested to submit these interrogatories at all—that is to say, it does not appear except by the language of the court after the jury had gone out.

It appears that certain interrogatories had, in some way or other, gone into the hands of the court, and the court made certain remarks in reference to them, and announced his decision to not send them all to the jury, and Mr. James excepted, from which it is implied that Mr. James, who was

counsel for defendant below, desired to have the interrogatories submitted. That is the only way it appears. That is scarcely sufficient to make the failure of the court to send these interrogatories in, reversible error. Every presumption is in favor of the absence of error. Prejudical error must appear affirmatively. We think we should follow the Indiana decisions above referred to. The court was not requested to submit these interrogatories to be answered in case a general verdict was returned. We may say that it appears by fair inference or implication, that there was a request to send these interrogatories to the jury, but it cannot be said—there is nothing to justify us in saying—that the request was that these interrogatories should be answered in the event that the jury should return a general verdict; and we hold, that it is not improper upon the part of the court to refuse to send in even proper interrogatories, unless the request is coupled with this condition. But the court is not bound to submit improper interrogatories. It appears by what occurred after the jury retired, that a series of interrogatories had been submitted, with a request that all should be submitted to the jury, or none. We are clear that if there were any of these interrogatories—any one or more of the series—which should not have been submitted to the jury, or that the court was not bound to submit to the jury, that that would justify the court in declining to submit any—under the circumstances.

It is argued that the court, notwithstanding this request of counsel, should have passed upon the interrogatories and decided which were proper and which were improper, and should have given to the jury those which it deemed proper; but we do not agree with this view. We do not think the court was bound to sift the wheat from the chaff, and especially in view of the request of counsel that all should be given, or none. The rule as to requests to charge the jury, to the effect that if some of a series of connected prop-

ositions are bad, it is not error to refuse the whole (19 Ohio Reports, 337); and that, if a charge is asked as an entirety, and part of it is unsound, it is not error to refuse the whole, involves a principle that applies in its logic to interrogatories, since the action of the court in each case has to do with guiding the jury to proper conclusions, and therefore, a similar rule should be applied. Confusing or misleading the jury by the submission of improper questions in one case, may be as fatal to the ends of justice, as confusing or misleading it by improper instructions in the other.

In support of what I have said, to the effect that the court is not bound to submit interrogatories which are improper, I cite Thompson on Trials, sec. 2681, which reads as follows:

"Many loose questions are often submitted to a jury which can have no effect upon the general verdict, which ever way it may be returned. The object of these special findings is, not only to secure a more useful and minute examination of the component parts necessary to a general verdict, but either to confirm or antagonize that verdict, which ever way it may be returned. An interrogatory, therefore, the answer to which will in no way control the general verdict, should not be submitted. They should be limited to material and controverted questions of fact. Each question submitted should be limited to a single, direct and material controverted issue or fact, and in such a way that the answer will necessarily be positive, direct and intelligible. Facts not put in issue by the pleadings, need not be found. It is no objection to a question that it is leading; it is rather to be desired. The form should be such that it can be answered positively. The particular form in which it shall go to the jury, is always under the control of the court, and it is not bound to submit one in the exact from requested."

In support of these different propositions a great many authorities are cited, chiefly from the Indiana Reports, to-wit:

27 Ind., 400: "Where the questions propounded require

the jury to find the evidence, rather than facts, or where they relate to matters having no material bearing upon the rights of the parties, the court may refuse to submit them to the jury."

108 Ind., 481: "It is not proper to submit to the jury interrogatories which merely call for an expression of opinion upon a question of law involved in the case, nor interrogatories the answers to which can have no influence on the general verdict."

85 Ind., 33: "It is not error to refuse to submit to the jury an interrogatory as to a question of fact not involved in the issues, or as to a question of law."

Certain of the interrogatories which were not submitted, because of the refusal of the court to submit, and of which complaint is made, read as follows:

"1. Do you find that there was any negligence on the part of the defendant in locating the well, with the boiler and engine to generate power therefor, at the point on the Bonawit farm where it was located?"

That is entirely immaterial: it is not claimed or contended that there was any negligence on the part of defendant in locating the well, boiler or engine.

"2. Was it negligent for the defendant to burn wood in its boiler in the drilling of such well?"

It is questionable whether that should have been submitted, because it was the burning of the wood with the high wind prevailing, and other circumstances, which were alleged to have been negligence.

And so as to the spark-arrester, in the third question.

"6. From the circumstances surrounding the premises and as shown by the evidence to exist at that place at that time, might not the fire have originated from some other source?"

Now, clearly, the court was not required to submit to the jury a question which would oblige the jury to speculate upon how this fire might have originated in some other way

than that which the testimony shows. The question for the jury was whether or not the fire was communicated from this boiler? Having decided that, either affirmatively or negatively, that was all they were required to decide upon that subject.

The next question is: "If not, why not?'

Because of these questions, which the court was not bound to submit to the jury, and should not have submitted to the jury, as well as because the interrogatories were not submitted with the request that they be answered in the event that a general verdict should be returned, we hold that the court did not err in refusing to submit these interrogatories to the jury, even though some of the questions were proper, and, if submitted alone, with a proper request, should have gone to the jury.

The judgment is affirmed.

James & Beverstock, for Plaintiff in Error.

Potter & Emery, for Defendant in Error.

(First Circuit—Hamilton Co., O., Circuit Court—Nov. Term, 1897.)

Before Cox, Smith and Swing, JJ.

THE CITY OF CINCINNATI v. MAGGIE EGAN.

Evidence—

Where the question whether the city or the property owner on a street, in the course of improvement of the same, had built a retaining wall to protect such owner's property and building thereon from injury by a fill in the street, and was responsible for the negligent manner in which the same was built whereby such owner's building was damaged, and the city claims that such wall was built by the contractor having the contract for the improvement of the street, under a private arrangement between the contractor and the property owner to which the city was not a party, it is competent for the city to prove that it did not authorize the building of the wall, and did not pay for its cost.

Error to the Court of Common Pleas of Hamilton county.

SMITH, J.

The judgment sought to be reversed in this case was rendered in an action brought by Maggie Egan against the city to recover damages. Her petition contained three separate causes of action. In the first she sought to recover $2000 damages for an alleged injury by the city to her lot and the improvements thereon, abutting on a street, which she claims was, without warrant of law, filled to a great height in front of her property. In the second she sought to recover $700 damages, averring that to maintain and support the fill made on said street in front of her premises, the city built a high retaining wall along the same, shutting in her dwelling house, cutting off her access thereto, and depriving her of the necessary light and air from her premises, and built it so carelessly and negligently, that it afterwards cracked and allowed water and sewage to pass through the same and on to the foundation of her house, undermining the same, and greatly injuring it. In the third cause of action it is averred that in the construction of said wall, the city appropriated therefor a strip of her ground four feet wide and thirty-eight feet long, and that the same is used by it as a necessary part of the street, and she has thereby been deprived of her property rights therein to her damage $800. The answer of the defendant, in substance, is a general denial of the averments of the petition, and sets up facts which it is claimed show that the improvement was legal and valid, and that for several reasons the plaintiff was not entitled to recover any damages. As a further answer to the second and third causes of action, it says that the retaining wall in question was placed there by the defendant or her agents. This is denied by plaintiff's reply.

At the trial of the case in the court of common pleas the evidence tended to prove that the city had contracted with a Mr. Neidemeyer to construct this improvement of the street

in front of and on either side of plaintiff's premises. That it was a general contract to do work, such as filling and excavation, at certain prices per yard I believe, and so much for masonry per perch. There was no stipulation in the contract as to this wall. The city offered evidence tending to prove that it was in fact built under a contract between Patrick Egan, the father of the plaintiff, and Mr. Neidemeyer, the contractor, who had made the other improvement for the city. The evidence as to this was, that Egan asked Neidemeyer if he had made up his mind how much he was going to charge for doing it. That he answered, yes—$3 per perch, provided he would allow him to use old perch (stone?) in the wall which then stood there—And to this Egan replied, "All right, go ahead and build it."

In addition to this the city sought to prove by W. H. Bosh or L. F. Bosh, who were assistant city engineers, and one of them the officer in charge of this improvement, that no authority or direction had been given by the engineer in charge, to the contractor, to construct this retaining wall, and that in computing the estimate of the amount due from him to the city for work done on the street improvement, no estimate for the work done on this wall by him was made, and that the contractor, or his assignees, never received any pay from the city for such wall. The court refused to allow this evidence to be given, and the city duly excepted.

In this action we are of the opinion that the court erred to the prejudice of the defendant. The claim of the city was that it had never authorized this wall to be built by Neidemeyer, and had nothing to do with it, but that it was done by some one else; and there was evidence tending to show that it was done under an arrangement between Egan and the contractor. But why was it not competent for the city further to prove that it did not authorize Neidemeyer to do so, and that the cost of the wall was not included in the estimate of the amount payable to him under his con-

tract with the city, and that he never was paid anything for this wall by the city? We see no good reason for its exclusion. The question whether it had been built by the city was one of the issues in the case, and any evidence fairly tending to prove that the city had not built the wall, was competent and relevant, and we think the evidence rejected was of that character.

The verdict of the jury was a general one in favor of the plaintiff for the sum of $—— This or a part of it may have been on account of the claim made in the second and third causes of action—and as the amount found due on each cause of action can not be ascertained, it follows that the judgment must be reversed.

We see no other error in the case.

(First Circuit—Hamilton Co., O., Circuit Court—Jan. Term, 1898.)

Before Cox, Smith and Swing, JJ.

HENRY RANSICK v. THE STATE OF OHIO.

Bill of exceptions before J. P.—Need not be copied into docket—

Sec. 6565, R. S., applies to the taking of exceptions before a justice of the peace, in all cases, civil as well as criminal, and therefore, by the express provision of this section, the bill of exceptions is not required to be copied into the record or docket of the justice.

Same—Must be filed with clerk within ten days—

A bill of exceptions taken before a justice of the peace must be filed with the clerk of the common pleas within ten days to avail plaintiff in error.

Oleomargarine—Pure butter not containing 80 per cent. of butter fats—

There is nothing in sec. 4200-19, R. S., either when construed literally or when construed together with the other sections of the act and considered with reference to the evil to be remedied—that leads to the belief that the legislature intended to enact that an article, admitted to be pure butter,

should be called and designated as oleomargarine, provided said pure butter should not contain at least 80 per cent. of butter fats.

Error to the Court of Common Pleas of Hamilton county.

SWING, J.

The plaintiff in error was arrested and convicted before a justice of the peace, for exposing oleomargarine for sale without having a placard in a conspicuous place as provided by statute. The case was taken to the court of common pleas, where the judgment of the justice of the peace was affirmed, and the case is in this court on error to this judgment.

In the court of common pleas, the court was of the opinion that the judgment of the justice should be affirmed, on the ground that the bill of exceptions not being copied into the record, there was no proper bill of exceptions, and the court therefore did not pass upon the other questions in the case which were, first, whether on the admitted facts the plaintiff in error was guilty of an offense; and second, whether it is necessary that the bill of exceptions should be transmitted with the papers to the clerk of the common pleas within ten days from the decision, in order to secure to the party his rights under the statute. These questions however, all arise in this court.

First—Is it necessary that the bill of exceptions be copied at length upon the docket of the justice and a transcript of the docket record be filed with the petition in error? Prior to the amendment to sec. 6565, Revised Statutes, 90 O.L., 358, this was undoubtedly required, and whether it does now, or not, depends upon whether this section applies to criminal cases before a justice as well as to civil cases. In our opinion, this section does apply to criminal cases, and is the only provision of the statute which does make any provision for the mode of taking exceptions before a justice—and if it

does, by the express provision of this section, the bill of exceptions is not required to be copied into the record or docket. The language of the section is broad and comprehensive. It says: "In all cases before a justice of the peace, whether tried by jury or by the justice. * * ." and if sec. 6565 does not apply to criminal cases, there is no provision in the statutes which makes provision for the taking of exceptions in such case before a justice. No such oversight as this can reasonably be entertained to have been made, and if it does apply as to the manner of taking of such exceptions, it must also be held to apply in all its provisions. And if it does, the bill need not be copied into the record.

The civil code does not contain any such statement as sec. 6565 contains, that "in all cases," and therefore, sec. 7304, Rev. Stat. which relates to criminal cases, provides that the rules governing civil cases shall apply to criminal cases; but the justice's section having provided for "all cases before a justice," it was not necessary that there should be any similar provision for criminal cases before a justice, provided "all cases" meant "all cases," both civil and criminal, and not simply "all" civil cases. We are clearly of the opinion that the section is intended to apply to all cases tried before a justice.

We took this position in the case of Bosodi v. The State, in 13 C. C., 275, but the question was not then distinctly put in issue, and probably was not therefore a direct authority, and on that account we here state more fully our reasons for so holding.

Second.—As to whether is was necessary that the bill of exceptions should be filed with the clerk within ten days in order to avail plaintiff in error. This question was determined in the above cited case, and we adhere to the views therein stated.

Third.—Was the plaintiff guilty of an offense? The evi-

dence clearly showed that what the plaintiff in error did was to expose to sale an article of pure butter, made from the milk and cream of cows, without any foreign substance of any kind in it; but said pure butter contained, according to the chemical analysis, something less than 80 per cent. of butter fats.

It is claimed on behalf of the state, that this article, admitted to be nothing but pure butter, is not pure butter, but oleomargarine, by reason of sec. 4200-19- -sec. 4, Revised Statutes, which section reads as follows:

"The word oleomargarine, as used in this act, shall be construed to mean any substance not pure butter of not less than 80 per cent. of butter fats, which substance is made as substitute for, in imitation of, or to be used as butter."

We see nothing in the literal construction of this section, or when construed together with the other sections of the act and considered with reference to the evil to be remedied, that leads us to believe that the legislature intended to enact that an article, admitted to be pure butter, should be called and designated as oleomargarine, provided said pure butter should not contain at least 80 per cent. of butter fats.

We think the judgments of the court of common pleas and the justice of the peace, should be reversed and said cause is remanded to the court of common pleas for further proceedings according to law.

Tafel & Schott, Attorneys for Plaintiff in Error.

O. J. Renner, Attorney for Defendant in Error.

Smith & Nixon v. Simper and White.

(First Circuit—Hamilton Co., O., Circuit Court—Nov. Term, 1897.)

Before Cox, Smith and Swing, JJ.

SMITH & NIXON v. G. & E. SIMPER and LAURA WHITE.

Chattel mortgage, not filed, has priority over subsequent mortgage with notice—

A chattel mortgage, although not filed as the statute directs, has priority over a chattel mortgage subsequently executed to a third party and properly filed, where such subsequent mortgagee has notice at the time of the existence of the first mortgage.

Evidence—Rebuttal—

Where in replevin the defendant attempts to prove his right to the possession of the article by producing a chattel mortgage under which he acquired such possession, it is competent for the plaintiff to introduce evidence to defeat defendant's claim under such chattel mortgage, and defendant would then be entitled to introduce evidence in rebuttal.

Replevin suit under chattel mortgage—Holder of other mortgage not bound to become party—

A party holding a chattel mortgage is not bound to intervene and set up his claim in a replevin suit instituted by a third party holding a chattel mortgage on the same property, if not made a party to such suit, but may afterwards commence an action for the recovery of the property under his own chattel mortgage.

Error to the Court of Common Pleas of Hamilton county.

SMITH, J.

The plaintiffs in error commenced an action in replevin against the defendants in error to recover the possession of a piano which they (the plaintiffs) claimed to own, and which they averred was unlawfully detained from them by the defendants. The defendants, G. & E. Simper, by their answer, simply denied the averments of the petition.

At the trial the plaintiffs, in support of their claim, offered in evidence a mortgage given to them by Laura White on the piano when she was the owner of it, to secure the payment of the purchase price thereof, and proved the amount due to them therefor, and that the condition was broken,

and a demand for its possession and a refusal to deliver it, and that thereupon they replevied it. It further appeared on cross-examination of their witness, that the mortgage had never been filed as the statute provides. Plaintiffs then rested.

By way of defense, the Simpers offered in evidence a mortgage on the piano and on other property executed to them by Laura White, after the execution of the mortgage by her to Smith & Nixon—and that the same had been duly filed. That on default of payment, they had taken the property from her in replevin proceedings against her.

By way of rebuttal the plaintiffs called Mrs. White as a witness and sought to show by her, that at the time she executed the mortgage to the Simpers she had no knowledge that it was a mortgage or in any way a lien on her property. That she was then not indebted to them in any sum, but that on the contrary they were indebted to her; and were so when the property was replevied. That she did not know that the piano was covered by the mortgage, and that she had notified the Simpers that Smith & Nixon then had a mortgage thereon. This evidence was all excluded by the court on the ground that it was not proper evidence in rebuttal, and plaintiffs excepted.

In this we think the court erred. As against any subsequent mortgages executed by Mrs. White with notice to the mortgagee of the prior mortgage on the piano to Smith & Nixon the mortgage to Smith & Nixon was a good and valid one, though not filed. Such subsequent mortgage with notice of the prior mortgage, is not a *bona fide* mortgage, and the first mortgage, though not filed, has priority over it. 7 Ohio St., 198; 17 Ohio St., 488; and 11 C. C., 193, recently affirmed by the supreme court. So, too, if there was nothing due on the Simper mortgage when they replevied the property under it, it gave them no right to hold the property as against a prior mortgagee though the mortgage of the latter was never filed.

The claim of the Simpers was first asserted in this case when they offered their mortgage in evidence. Smith & Nixon had then a right to show that it was not a valid mortgage, or good as against them—or had been paid, or was a forgery, or any other matter which would show that the Simpers had no claim to the property under it. The contention of counsel for the defendants in error is that if such evidence were allowed, then that the Simpers would have the right to rebut this rebutting evidence, and this is not allowable. Of course they would have such right, for our statute, sec. 5790, Revised Statutes, expressly gives it to them. It provides, in substance, that the party who would be defeated if no evidence were offered must first produce his evidence, and the adverse party must then produce his evidence, and that the *parties* shall then be confined to *rebutting* evidence. Clearly in this case the evidence sought to have been introduced, if admitted, could have been rebutted by the Simpers.

It is further urged that such evidence should not have been allowed in this case, but that Smith & Nixon should have set up their claim in the replevin suit of the Simpers against Mrs. White. But so far as appears in this case, they were not parties to that proceeding, and were not bound to become parties thereto, but could properly assert their claim to the piano in this action. It is further objected that all of the evidence offered in this case is not set out in the bill of exceptions. If the reversal of the judgment was sought on the ground that the verdict of the jury was against the weight of the evidence the objection would be good. But such is not the case. The only error assigned is that the court erred in excluding evidence, and to raise this question it is not necessary to have before us all the evidence in the case. For the reason stated, the judgment which was against the plaintiffs, will be reversed, and a new trial awarded.

(Eighth Circuit—Cuyahoga Co., O., Cir. Court—Oct. Term, 1897.)

Before Hale, Marvin and Caldwell, JJ.

THE GERMAN-AMERICAN SAVINGS BANK CO. v. LOUIS J. GROSSMAN.

Set-off—By bank, of claim not yet due, against deposit of insolvent party—

A bank having a deposit, subject to check, from an insolvent depositor who is also indebted to the bank, may apply and set-off that deposit against the indebtedness of such insolvent debtor of the bank, although the same is not yet due.

S. Isaac & Son, being insolvent, on the 8th day of February, 1896, made a assignment to Louis J. Grossman, defendant in error, by deed filed in the probate court of Cuyahoga county, Ohio.

Prior to said February 8th, 1896, S. Isaac & Son were customers of and depositors in The German-American Savings Bank of Cleveland, Ohio, plaintiff in error, and as such depositors had on deposit, as a general deposit with said bank, on said February 8th, 1896, and at the time of their assignment, the sum of $148.54.

At the time of said assignment S. Isaac & Son were insolvent and indebted to said bank in the sum of $1500.00, evidenced by two unmatured promissory notes of $500.00 and $1000.00 respectively, given by said S. Isaac & Son to said bank.

That said deposit of $148.54 was a balance of said S. Isaac & Son's deposit and account with said bank, and that said deposit account included not only the general money deposits of said firm, but also included the loans to said firm by said promissory notes not due by their terms at the time of said assignment, and that said loans were made because and for the reason that said S. Isaac & Son were customers of and depositors in said bank, and had a general deposit account with said bank.

Said bank retained and applied said balance of deposit toward the payment of said notes, and refused to pay over

said deposit to the assignee upon his demand for the same.

W. H. Beavis, attorney for and on behalf of the bank cited the following cases:

Schunk, Assignee, v. Merchants National Bank, Cin. Sup. Ct., 16 Weekly Law Bulletin, 363; Wagner v. Stieglitz, 22 Ohio St., 297, 302; Armstrong, Receiver, v. Warner, 49 Ohio St., 376; Bank v. Hemingray, 34 Ohio St., 381; Thomas v. Exchange Bank, 35 (Iowa) Lawyers' Annotated Rep., 379, Cin., N. O. & T. P. Ry. v. Cit. Nat. Bank, 24 Bulletin, 198, at page 207.

L. J. Grossman, in his own behalf, offered the following authorities:

Treasurer v. Bank, 47 Ohio St., 503, 522; Covert v. Rhodes, 48 Ohio St., 66, 71; Bank v. Brewing Company, 50 Ohio St., 151; Ross v. Johnson, 1 Handy, 388; Sec. 5077 Rev. Stat. of Ohio; 27 Ohio St., 355.

HALE, J.

The case of The German American Savings Bank Company v. Louis J. Grossman comes here on error to the court of common pleas.

Grossman is the assignee of Isaac & Sons, a firm that was, prior to the 8th of February, 1896, doing business in this city; they were doing at least a portion of their banking business with the plaintiff in error, The German American Savings Bank Company.

On the 8th day of February, 1896, that firm made an assignment for the benefit of their creditors, at which time they had on deposit with The German American Savings Bank Company, subject to check, $148.54. The firm was indebted to the bank in the sum of $1,500 on two promissory notes, one for $500 and the other for $1,000, not due at the time of the assignment. The assignee made demand upon the bank for the deposit which the firm had at the time. The bank refused to pay, claiming the right in equity to set

off and apply the deposit to the indebtedness which Isaac & Sons owed the bank.

The case was tried in the court of common pleas without the intervention of a jury, substantially upon an agreed statement of facts, resulting in a judgment for the defendant in error, and the question is whether a bank having a deposit subject to check may apply and set off that deposit against the indebtedness of an insolvent debtor of the bank

We think the case of Armstrong, Receiver, v. Warner et al., 49 Ohio St., 376, has a very decided bearing upon that question. In that case, Armstrong was receiver of the Fidelity National Bank. At the time that bank went into his hands, as receiver, Warner was indebted to the bank upon a claim not then due. Warner brought an action against the receiver to compel the application of his indebtedness to the bank, upon the indebtedness which he owed the bank; he undertook to make a set-off. The lower court sustained Warner in his contention—sustained the right of set-off under the circumstances named. The supreme court affirmed that holding, and Judge Williams, speaking for the court upon that subject, says:

"The remedy of set-off has been much enlarged in equity, and is there administered in cases where, under the strict rules of law, it would not be available. Thus, at law a joint demand cannot be set off against a several one, nor a several demand against a joint one, but equity adopts a different rule where, on account of the insolvency of one of the parties, the other is in danger of losing his claim; and generally, equity will enforce the right of set-off by decreeing the compensation of mutual demands so far as they equal each other, where they have grown out of the same or connected transactions, or the one has formed in whole or in part, the consideration of the other and the party against whom the se-off is asserted is insolvent."

The case of The Nashville Trust Company v. Bank, 91 Tenn., 336, is directly in point, sustaining the contention of the bank.

The case of Thomas et al. v. The Bank, Lawyers' Reports Annotated, 379, is also directly in point, sustaining the contention of the bank. It is from the Iowa Supreme Court.

There are many other cases giving support also to this contention, which I will not stop to cite.

It is very generally held, however, that the insolvency of a debtor affords sufficient grounds for the application of the doctrine of equitable set-off. And we hold, under all the facts of this case, on the agreed statement of facts upon which the case was determined, that the equitable grounds for the allowance of the set-off claimed by defendant below are present in the case under consideration, and that the set-off should have been allowed under the proof produced.

It follows, then, that the judgment of the court of common pleas should be reversed, and the case remanded for a new trial.

W. H. Beavis, for Plaintiff in Error.

L. J. Grossman, for Defendant in Error.

(First Circuit—Hamilton Co., O., Circuit Court—Oct. Term, 1897.)

Before Cox, Smith and Swing, JJ.

ALBERT BETHEL v. CINCINNATI STREET RAILWAY COMPANY.

Street Railroad—Footman stepping in front of approaching car between street crossing—Failure to look—

Where there are two street railway tracks in a street, a party who is walking behind a wagon being driven on one track which prevented him from seeing a car approaching on the other track, and who stepped on such other track without looking whether a car was approaching on the same, it being between street crossings—is guilty of such contributory negligence as will prevent him from recovering damages for injuries sustained by being run down by such approaching car.

Same—High speed of cars between street crossings is not negligence—

While street cars at street crossings must so regulate their speed and

give such warning of their approach that footmen using ordinary care may cross in safety, yet the rule between crossings is different, and footmen must be aware that cars between crossings run at a high rate of speed and are not under control, and can not be stopped instantly, and the motorman need not apprehend that a footman between crossings will put himself on the track without first observing whether a car is approaching.

Operation of street cars—Judicial notice.

Courts will take judicial notice of how street cars are operated.

Error to the Court of Common Pleas of Hamilton county.

SWING, J.

This case is here on error to the judgment of the court of common pleas. It was an action in that court by Bethel against the Street Railway Company, for damages for injuries caused by Bethel being run over by one of the defendant's cars. The case came to trial before a jury, and at the conclusion of the plaintiff's evidence, the court, on motion of the defendant, directed the jury to return a verdict for the defendant. This it is claimed was error, as was also the act of the court in refusing, during the hearing of the plaintiff's evidence, to permit the plaintiff to amend his petition and set up that the defendant was negligent in failing to provide an approved safety guard devise, by reason of which the plaintiff was injured.

The principal question in the case is whether, upon a consideration of the evidence, it tended to prove that the plaintiff was injured by reason of the negligence of the defendant.

The facts in the case are substantially as follows: Bethel was struck and knocked down and run over by a car of the defendant, two of his toes being crushed so as to require amputation. The casualty occurred between Freeman Avenue and Carr Street, one night in the city of Cincinnati. At this point there are two tracks of the railway on which cars run in opposite directions. Bethel was on the north side of the street, and attempted to cross the street when he was struck by the car, which was going east. A market wagon

was going west on the west track of the railway, and as this wagon passed, Bethel walked immediately in the rear of it on the east railway track, and right in front of the car. There was no evidence which tended to show that the moterman saw Bethel approaching the crossing before he stepped on the track, nor was there any evidence which tended to show that after Bethel got on the track and the motorman saw his perilous condition, that he could by any means have avoided the accident. There was no evidence which tended to show that the car was run at a negligent rate of speed, or that if the speed was too high, that that was the approximate cause of the accident.

It seems to us that the admitted facts in this case bring the question under the rule of law announced in the fourth and fifth propositions of the syllabus in the Crawford case, in 24 Ohio St., p. 631, which is as follows:

"4. In an action for damages for alleged negligence, the question of negligence on the part of the defendant, or of contributory negligence on the part of the plaintiff, is a mixed question of law and fact, to be decided by the jury under proper instructions from the court."

"5. But if all the material facts touching the alleged negligence be disputed, or be found by the jury and admit of no rational inference but that of negligence, in such case, the question of negligence becomes a matter of law merely, and the court should so charge the jury."

And there can be no rational inference in this case but that the accident was caused by the negligence of the plaintiff. He stepped upon the track right in front of the car, and before doing so, he did not take any precautions to ascertain whether a car was approaching or not. The railway company could not possibly be on the guard against any such conduct as this. It had a right to assume that between crossings no one would attempt to cross the track without first taking means to ascertain whether a car was approaching or not. There is no evidence

tending to show that the motorman had any reason to think that any one would attempt to cross the track as soon as the car passed the market wagon. While Bethel must have known, and was bound to know that a car might be coming from the direction which was not within his vision by reason of the market wagon between him and the direction of the approaching car, yet after the passing of the market wagon he did nothing to inform himself as to whether a car might not be approaching on the track which he intended to cross, but he stepped immediately on the track right in front of the car, so that it was impossible for the motorman to have stopped the car and have avoided the accident after Bethel came on the track.

It seems clear to us, beyond question, that the cause of the accident was not by reason of any negligence of the street railway company, for one can not see what it could have done to have avoided it. And it seems equally clear to us that the accident was caused by the defendant's failing to take precautions to inform himself whether a car was approaching on the track upon which he stepped, as a man of ordinary prudence, we think would have done.

It is said in the Schwartz case, 8 C. C. 484 that courts would take judicial notice of how street cars are operated, for courts will not be ignorant upon matters of universal knowledge. It is stated in a Cincinnati Almanac that the street cars of Cincinnati carried during the year 1897, 60,000,000, passengers about 150 times the entire population, and it would seem but reasonable to say, that probably nothing is of more universal knowledge in this city than the manner in which street cars are operated.

The substitution of the electric for the horse and cable cars was largely caused, no doubt, by the demand of the public for more rapid street car transportation. Street cars are in this day a public necessity, and can only be efficient when affording rapid transportation. The same distances are

probably covered now in less than one half the time consumed by the old horse cars. In order to do this, the old custom of the horse cars, to stop at any point to take on or let off passengers, has been done away with, and regular stopping places have been established at street crossings and a few public places. Between crossings the cars are, and must be run at a rapid rate compared with the speed of the old horse car, but at the crossings the cars must be under control. Judge Spear, speaking for the court in the case of the Cincinnati St. Ry. Co. v. Snell, 54 Ohio St., 205, says: "* * gives the foot passenger such a right at street crossings as to make it the duty of drivers of vehicles, whether wagons, wheels, or cars, to so regulate their speed, and give such warning of approach at whatever cost of pains and trouble on their part, as that the foot man using ordinary care himself and barring inevitable accident, may cross in safety." The rule between crossings must be different. The footman knows that at these points the cars run at a high rate of speed; they are not under control, and can not be stopped instantly, and furthermore the motorman has no reason to apprehend that a footman between crossings will carelessly and without first observing put himself on the track of the railway, for men of ordinary prudence do not do this. It is no hardship upon the footman to require him to take this precaution to guard against approaching cars between crossings; if this was not required of him, rapid transit could not be had, and the great body of the public would be greatly injured. These remarks however are made solely with reference to the facts in this case.

As to the other question, whether the court erred in refusing to grant the plaintiff leave to amend his petition. We are of the opinion that there was no abuse of the discretion vested in the judges. It does not appear that the cars were not provided with proper guards, and it does not appear that any known guards or proper guards would have

avoided the accident, and it does not appear but what all the facts wanted to be set up were not well and accurately known to the plaintiff long before the case came to trial.

For these reasons the judgment of the court of common pleas is affirmed.

Joseph Cox, Jr. and *W. E. Bundy*, for Plaintiff.

J. W. Warrington, for Defendant.

(Second Circuit—Clark Co., O., Circuit Court — February, 1898.)

Before Adams, Shearer and Wilson, JJ.

(Judge Adams of the 5th Circuit taking the place of Judge Summers.)

THE STATE OF OHIO EX REL. HORACE W. STAFFORD, PROSECUTING ATTORNEY OF CLARK COUNTY. v. JOHN M. GOOD.

Election—Garfield law—Members of the regular committee of the party acting as agents of candidate—

While a candidate may pay an assessment to the committee of his party, and have nothing further to do with the management and conduct of his campaign, and then the committee or the members thereof would not be his agents in the management of his campaign, yet the question of agency is a question of fact, and a candidate for an office can make the regular chosen committees of his party his agents in the management of his campaign for that office.

Same—Money expended by agents of candidate for his benefit—

It makes no difference, so far as the law is concerned, whether the candidate paid any money directly and out of his own pocket, or whether it was paid for him and for his benefit by his friends and agents. If the amount thus paid out exceeds the amount allowed by law as the limit of his expenses, his election is void.

ADAMS, J.

The case of the State of Ohio ex rel. Horace W. Stafford, Prosecuting Attorney of Clark county, against John M. Good as mayor of the city of Springfield, is a proceeding brought under the provisions of the corrupt practices act, commonly known as the Garfield law, against John M. Good,

charging him with having violated the provisions of the Garfield law in numerous instances, and asking that by reason of his alleged violations of that law his election to the office of mayor of the city of Springfield be declared void and the office declared vacant.

These allegations of the violations of the Garfield law are set out in the plaintiff's petition and an amendment thereto. The defendant, in answering, admitted many of the allegations of the petition and amendment thereto, but denies generally all of the allegations relating to any violations of the Garfield law. It is on the issues made by these pleadings, and the evidence, that this case has been submitted to this court.

The recent decision of the supreme court in a case that went to that court from Adams county, makes it unnecessary for this court to consider many questions that might have been asked in this case as to the constitutionality of the Garfield law, for that decision of the supreme court stands in its entirety. It is simply the duty of this court to determine those facts upon the evidence, and having determined those facts, to determine whether, as a matter of law, a judgment of ouster should be rendered against the defendant. Good was elected mayor of the city of Springfield at the election in the spring of 1897. His statement of expenses filed under the law shows an expenditure of $5 in securing the nomination, and an expenditure of $45 in securing his election. It is claimed that he exceeded this latter amount very greatly in securing his election to the office. It appears in proof here that shortly after his nomination for the office of mayor, that the central committee was to solicit for him; whether it was the central committee of Clark county, or the central committee of Springfield, there seems to be a large discrepancy among the witnesses. One witness testified that it was the central committee of the county, which chose a sub-committee; and another an ex-

ecutive committee for the management of the campaign in the city of Springfield.

It is claimed on the one side that Good was responsible for the expenditures made by this committee, and it is claimed on the other hand that this executive committee was the regular appointed committee and chosen representative of the party; that they were not the agents of the candidate within the meaning of the act.

It seems to the court, that while a candidate may pay in an assessment to the committee of his party and have nothing further to do with the management and conduct of the campaign, that the committee would not be, or the members of the committee would not be his agents in the management of that campaign. But the question of agency is a question of fact, and the candidate for the office can make the regular chosen committee of his party his agents in the management of his campaign for that office.

The nature of the testimony submitted to the court makes it unnecessary that I should take up and attempt to review the conflicting statements made by various witnesses here. This court has considered the testimony in the light of all the circumstances; the interests of the witnesses on either side; the importance of the issue to the defendant, Good; the importance of the issue to the public if there have been violations of the law of the state, and that the penalty and punishment of that law should be imposed. We have weighed the evidence and considered the law of all those facts and circumstances. This proof establishes beyond controversy that Elliot and Burnett were the agents of Good in the management of this campaign; this proof establishes beyond controversy that Good expended money himself and through his agents, Elliott and Burnett, for the furtherance of his election; that he paid to Edward Garrett, through Elliott, for the furtherance of his election the sum of $25; that he himself paid to John A. Wright, for the

same purpose, the sum of $7.50; that he paid to T. A. Gross for the same purpose the sum of $10.00, and that he paid Captain Rudd, the captain of the colored military company, the sum of $50.00 for the purpose of the furtherance of his election, and that he received $100.00 to be used for the furtherance of his election from a man by the name of John Snyder, and that sum did not go into the hands of the treasurer of the committe, but that it was paid out to Armstrong, and by him expended as all this money was expended, in buying liquors and paying voters for the election.

We further find that when Good was present, and conducting his campaign for the election, and making the rounds to the various saloons in this city, that Burnett was buying for his benefit the beer at Gaier's saloon, which amounted to $35.00; that he paid for beer at the dance of the German Red Cross Society, $45.00; that Elliott paid for the same purpose at Grimmer's saloon the sum of $6.00, and on the same occasion Burnett paid $5.00. These sums that were expended by Burnett and Elliott for beer, were on occasions when Good was present, when the expenditure was made in the furtherance of his election to the office of mayor of the city of Springfield.

The court holds that it makes no difference, so far as the law is concerned, whether Good paid out money directly and out of his own pocket, or whether it was paid for him and for his benefit by his friends and agents, Elliott and Burnett.

These amounts make a total of $283.50, none of which is accounted for in Good's certificate of his campaign expenses. This amount exceeds $139.00, considered to be the limit of his lawful expenses in this campaign, by $144.50.

So we find that this certificate of expenses was wilfully false in the particulars that it does not state these amounts that I have enumerated, and we also find that all these expenditures were for illegal purposes.

Three other matters were insisted upon in the hearing as to ante-election promises claimed to have been made by Good. One claimed to have been made to Bolan, one to the members of the Trades Assembly, and one to the witness Hartman.

We think that the proof fails as to the alleged promise to the witness Hartman, but we think the greater weight of the evidence is in favor of the contention that Good did promise to Bolan a place as an active member on the board of public affairs, and that he did make to the members of the Trades Assembly the promise to appoint a man to a position on some board, out of a list of men to be selected by them.

We find that those promises were in fact made, and that those promises, as a matter of law, were all illegal; that they were such as under the Garfield law would render Good ineligible to be elected to the office, and under section 11 of the statute, it makes his election void and the office of mayor of the city of Springfield vacant, and it is the judgment of the court, that for these various violations of the provisions of the so-called Garfield law, that the election of Good to the office of mayor of the city of Springfield is declared void, and the office is adjudged to be vacant.

A judgment of ouster will be rendered.

Horace W. Stafford, and *Keifer & Keifer*, for State.

Bowman & Bowman, and *Hagan & Hagan*, for Defendant.

(Eighth Circuit—Cuyahoga Co., O , Circuit Court—Jan. Term, 1898.)

Before Hale, Marvin and Caldwell, JJ.

WILLIAM H. HUDSON et al. v. FERDINAND VOIGT.

Practice—Where, reply necessary but not filed, case being tried as if reply filed without objection—

Where, in an action for damages for assault and battery, the answer sets up the defense of justification, a reply to such defense should be filed. But where no reply is filed, but the case is tried and dealt with by court and jury as if a reply had been filed without any objection being raised by the defendant, a verdict and judgment will not be set aside, on error, on account of the omission of filing a reply.

Action for damages for assault and battery—Attorney fee—

An action for damages for assault and battery belongs to that class where the jury might in their discretion include a reasonable attorney fee for counsel of plaintiff as part of the damages, but evidence as to the value of such attorney fee would not be competent.

Error to the Court of Common Pleas of Cuyahoga county.

HALE, J.

The case of Wm. H. Hudson and others against Ferdinand Voigt comes here on error to the court of common pleas. Several exceptions are made upon the record.

The action was brought by Voigt, defendant in error, against the plaintiffs in error, to recover damages for an injury he (Voigt) had received from an assault and battery, inflicted upon him by the plaintiffs in error, as he alleged.

The first defense was a general denial in substance.

The second defense was a plea of justification; that the plaintiffs in error were first assaulted by Voigt, and used only such force as was necessary to repel that assault.

There was no reply to this defense. The case went to trial, and evidence was adduced on both sides as to the transaction—all the evidence that could possibly have been introduced had there been a reply.

The charge of the court dealt with that question precisely

as if there had been a reply, and, so far as we are able to ascertain from the record, no such question was made in the court below that a reply was essential, or no objection was made to the submission of that question to the jury because of the fact that there was no reply.

Now, conceding that a reply would have been better and, perhaps, essential—I think the practice is to reply to a defense of that kind—we see no prejudice to the plaintiffs in error by reason of the omission of a reply.

The whole case was tried and dealt with by court and jury precisely as it would have been, had such a reply been filed.

In the charge of the court, the court told the jury they might allow, as part of the compensatory damages, a reasonable attorney fee, although no evidence had been offered upon the subject of the value of those attorney fees. While such evidence has been held by the supreme court to be incompetent, but clearly, under the rulings of the supreme court, this case belongs to that class of cases in which the jury might, in its discretion, include in their award of damages a reasonable attorney fee to counsel representing the plaintiff in the case; and while the charge was very meager upon that point, although very profuse generally and prolix, we are satisfied that the jury was not authorized, under that charge, to go any further in the assessment of the damages than the law would authorize. There was no request to make more definite and certain, and we are inclined to hold there was no prejudice to the plaintiff in error by reason of that charge.

Complaint is made that in the charge also the court state that not only the persons who did the beating, but those who aided by word of mouth and encouraged the commission of the act, would be responsible. Exception is taken to the manner in which that is stated. We suppose it means no more than if the court had said to the jury, "Who-

ever aids in an assault, is equally guilty with the party who does the pounding." I say that, so far as the questions of law are made, we see no good reason for disturbing the verdict on that ground.

Coming to the facts of the case, it seems that the defendant in error had loaned to one of the plaintiffs in error, Richards, the sum of One Hundred and Fifty Dollars $150.00). To secure its payment, he (Voigt) had taken a note of the daughter of Richards, Martha Richards, for the sum of One Hundred and Fifty Dollars ($150.00), and a chattel mortgage upon certain property, said mortgage being executed by the daughter. The note became due.

These facts are conceded, as far as I have stated them.

The note became due, and Voigt took possession of the property covered by the chattel mortgage, and removed that property to his own home. In the evening of the day on which the property was removed by Voigt, J. G. Richards and his son, and Hudson (who was a constable), and his son went to the house of Voigt—the business place of Voigt—for the purpose of reclaiming the property. Prior to that visit, a suit in replevin had been commenced, and Hudson, the constable, had a writ of replevin in his possession. He was under instructions, as it appears from this bill of exceptions, to obtain the property if he could do so, without serving the papers; that is, he was to get the property if he could, and not use his writ.

In the transaction at the house, either in serving the writ, or in obtaining the property, or in an endeavor to obtain the property, Voigt was very severely handled, quite badly bruised and used up and landed in the county jail by Hudson.

Now, if the evidence of the defendants, the plaintiff in error, was the true history of that transaction, this judgment is decidedly wrong, because it could be inferred from the testimony that Hudson was attempting to serve

his writ of replevin, was met by a revolver, and in taking care of himself as against the assault of Voigt, whatever injury was done to Voigt was done by reason of that fact. But the testimony on the part of Voigt shows that there was no attempt there to serve the writ of replevin, but Richards and this man Hudson were acting without serving the writ, and that they were acting simply and solely in the capacity of private individuals up to the time of this assault; and if the true history of the transaction is given by Voight and his wife, and those who testified in his behalf, then there was no justification for this beating of Voigt by Hudson and those who were with him.

Now, this was a question of fact submitted to the jury. There was evidence in the case, from which the jury might have decided the case either way, either for or against Voigt —for or against the plaintiffs in error. It was left to the jury as to which they would believe. They found in favor of Voigt, and that was sanctioned by the trial court.

Now, under the rule that pertains in this state, we would not feel justified in this conflict of testimony, in disturbing this verdict on account of its being against the weight of the evidence.

The rule is very well settled in this state, that it must be very clearly against the weight of the evidence to authorize this court to disturb the verdict.

Finding no error upon this record, the judgment of the Court of Common Pleas is affirmed.

Hessenmuller & Bemis, for Plaintiff in Error.

C. E. Schwan, for Defendant in Error.

C., H. & D. R. R. Co. v. Wagner.

(First Circuit—Hamilton Co., O., Circuit Court—Oct. Term, 1897.)

Before Cox, Smith and Swing, JJ.

THE C., H. & D. R. R. Co. v. ROSA WAGNER.

Where there is a double track in front of a station, and snow having fallen, what would be sufficient for the R. R. Company to secure safe and convenient passage from the platform across the first track, to enable passengers to reach the second track.

Error to the Court of Common Pleas of Hamilton county.

SMITH, J.

The plaintiff in error seeks the reversal of a judgment, rendered against it in favor of the defendant in error, on the grounds that the trial court erred in admitting and rejecting evidence, and in the charge given to the jury, and in refusing to charge as requested, and in overruling the motion for a new trial, based on these grounds, and the additional ground that the verdict was against the evidence.

The petition of the plaintiff in substance averred, that on the day in question she purchased a ticket for passage on defendant's road from Cumminsville to Elmwood, and waited at the station for the train on which she was to take passage. That between the track on which her train was to come, (the north bound), was another track, (the south bound), and that this track, and the way over it to the north bound track, was by the negligence of the defendant company, left covered with snow, so that the tracks could not be seen, and the same were not planked or guarded or protected in any way, or so arranged as to prevent injury to anyone crossing said track in order to get to the defendant's train as aforesaid. She further averred that when her train stopped, she, upon the direction of the defendant company, started across to the same, and by reason of such negligence on the part of the defendant, without any knowledge

on the part of any such obstructions, and without fault on her part, she stumbled, slipped and fell, and was severely injured. The answer of the company admitted that it was a corporation as alleged, but denied all the other averments of the petition.

We are of the opinion that the verdict of the jury, which must have found that there was negligence on the part of the defendant company, was manifestly against the weight of the evidence on this point. This accident occurred shortly after noon. The plaintiff had been at the station house of the company for about two hours waiting for her train. She knew that her train was to come on the track farthest from the station, and that the south bound track was between the station and the north bound track, and that she would have to cross one track to reach her train. And one train passed south to her knowledge while she was waiting in the station. There had been quite a heavy fall of snow the day and night before, and it was still lying on the ground. How deep it was can not be accurately stated, as the witnesses differ as to this, some putting it at two to three inches—others four to five, and one witness guessed that it was eighteen inches deep, but evidently she was mistaken. It was probably from four to six inches deep. But we think it is clearly shown by the evidence that the long stone or cement platform in front of the station and which came nearly to the south bound track, had been cleared off by the railroad men early in the morning, and that in addition to this, several tracks had been cleared away from the platform over the first track to the second, affording a safe crossing from the platform to the north bound track, and the snow cleared away from the passage-way between the two tracks, so that passengers could easily and safely reach the north bound train. The other parts of the south bound track were covered with the snow which had fallen, except the rails which were plainly visible. This must have

been so from the fact that trains had been passing there during the morning after the snow ceased to fall, and the evidence of witnesses is express as to this, though the plaintiff and another witness who followed her, testified that they could not see the rails. It seems clear, if plaintiff's own evidence is to be credited, that she did not cross on the crossings made for passengers, but waded through the snow. This she ought not to have done, but even then, if she had looked for the rail which she ought to have done, for she knew it was there, she ought to have seen it. At all events, it seems clear that she slipped on one of the rails, and thus received her injury. But if it be true, as we think it was, that the defendant company had cleared the platform and made one or more safe and convenient crossings over this south bound track, we think that negligence on the part of this company was not shown. Unless there were special circumstances shown, we can see no necessity for clearing the whole of the tracks in front of the station of the snow which had fallen thereon, and in this case there was no evidence tending to show that ordinary prudence required it to be done.

We see nothing in the charge of the court which was excepted to, that seems to us erroneous and prejudicial to the defendant.

We are of the opinion that the charge No. 7, asked to be given was correct. It was in this form: "I charge you that the defendant in this action was only bound to exercise ordinary care in view of any dangers to be apprehended, and that the failure of the defendant to remove snow from its tracks is not negligence per se." This was refused and exception taken. The general charge on this subject, was this: "If you find from the testimony that the defendant did use the care in clearing the approaches to this train, that a prudent person would have exercised under the circumstances, then your verdict must be for the defendant."

This was correct, but it left out of the view the last paragraph of the special charge refused which was correct.

For these reasons the judgment will be reversed and a new trial awarded.

Ramsey, Maxwell & Ramsey, for Plaintiff in Error.

Chas. W. Baker, for Defendant in Error.

(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1897.)

Before King, Haynes and Parker, JJ.

THE CINCINNATI, HAMILTON & DAYTON R. R. CO. v. HENRY CRISS.

Negligence—Railroad permitting oil to accumulate on track—

(1.) A railroad company permitting crude oil to accumulate in large quantities and remain for an unreasonable time upon its side tracks, where brakemen are accustomed to go in coupling and uncoupling cars, and whereby such work is made dangerous, is guilty of negligence, and answerable therefor in damages to a brakeman who, while in the performance of his duty, slips upon such oil and is injured.

Same—Connecting railroads working under traffic arrangement—Injury to employe of one R. R. Co. through negligence of other R. R. Co.—Liability—

(2.) Such tracks being used to transfer cars from another railroad to defendant's railroad in pursuance of a traffic arrangement between the companies owning such roads, the owner of such transfer tracks is liable for such negligence resulting in an injury to a brakeman not in its employ, but in the employ of such other company, if at the time he receives such injury he, in the discharge of his duty, is assisting in such transfer of cars.

Admission of improper testimony, but afterwards jury instructed to disregard it—When not ground for reversal of judgment—

(3.) When upon a trial, testimony is improperly admitted over the objection of a party, and the jury is subsequently instructed to disregard such testimony, the judgment will not be reversed on account of the error committed in admitting such testimony, when it is not evident that the jury failed to follow the instruction given to disregard it, or it does not otherwise appear that prejudice resulted therefrom to the party complaining.

Error to the Court of Common Pleas of Lucas county

PARKER, J.

This action is brought to reverse the judgment of the court of common pleas in an action wherein Henry Criss was plaintiff, and the Cincinnati, Hamilton & Dayton Railway Company was defendant, brought by the plaintiff below for damages for personal injuries sustained by him in consequence of alleged negligence upon the part of the railway company. The case went to trial, and resulted in a verdict of $7500 in favor of the plaintiff below. Various exceptions were taken during the course of the trial, which appear in the bill of exceptions, which is a part of the record here. A motion for a new trial was taken, on the grounds, (1.) That there was error in the admission of evidence on behalf of the plaintiff below, which was objected to and exception taken by the defendant in error. (2.) That the verdict was not sustained by sufficient evidence. (3.) That the verdict was against the weight of the evidence. (4.) That the verdict was contrary to law and the evidence. (5.) That the damages awarded were excessive. (6.) For errors of law occurring upon the trial. This motion was overruled, and judgment entered on the verdict.

A sufficient statement of the cause of action stated in the petition is found in the brief filed here on behalf of the plaintiff in error, and I will read from that:

"May 8th, 1895, Henry Criss filed his petition against the defendant in which he alleges, in substance, as follows: That the defendant is, and for a long time has been, maintaining, in connection with its railway, certain yards containing numerous side tracks for the use of cars operated on said line of railway; that one of said tracks, known as No. 8, was used by the defendant for the purpose of receiving and standing cars thereon which had been received from the Lake Shore & Michigan Southern Railway Company; that it was usual and customary for said Lake Shore Company to deliver to said defendant on said track; that on the 10th day of April, 1895, the plaintiff was in the employ of

the said The Lake Shore & Michigan Southern Railway Company as a brakeman; that about 3 o'clock in the morning of said day, while it was dark, it became the duty of the plaintiff, in connection with other employes, to switch three cars from the tracks of the Lake Shore Company and to place the same on said track No. 8 for the defendant; that when these cars came to the vicinity of said track, it was found that the same was almost filled with cars, and the plaintiff was ordered by his conductor to go along said track and make room for said additional cars; that plaintiff did find room on said track for these cars, but that it was necessary to couple together the cars already standing thereon; that while plaintiff was attempting to couple said cars he stepped upon a quantity of oil negligently permitted to accumulate and remain upon said track, lost his balance, and in attempting to save himself from falling, his left hand got between the drawbars, and was so injured that it became necessary to amputate the same at the wrist. He therefore asks damages."

To the petition an answer was filed, which is in form a general denial of all the allegations except that respecting the railway company being a corporation duly incorporated, etc. The answer contains this averment also:

"The damage complained of in plaintiff's said petition was caused and occasioned by the carelessness and negligence of said plaintiff, and that the negligence and carelessness of said plaintiff then and there directly contributed to the damage complained of in said petition."

Upon the trial, however, most of the facts controverted by this answer were admitted or conceded, or were established beyond controversy by the proofs. The real questions of fact which were controverted, were as to the manner in which the accident happened, and as to whether there was an accumulation of oil upon the track as alleged in the petition, it being contended by the defendant below, that instead of the plaintiff slipping upon the oil as he went between the cars to couple them, he undertook to couple the cars and did not give himself sufficient time to make the

coupling; that he had sufficient time if he had taken it, but he waited until the cars came too closely together, then attempted to change a link from one car to another and make the coupling, and in consequence of his time being too short for that operation, his hand was caught and crushed, so that it was required to be amputated. It was claimed that something of this kind was admitted by plaintiff to a witness when he was being conveyed from a place near where the accident occurred to the city hospital. The plaintiff, however, on the witness stand denied that he had ever made any such statement or admission.

I will consider, first, the exceptions noted as to the admission of evidence upon the trial of the case. Upon page one of the bill of exceptions appear the following questions and answers: The plaintiff is testifying in his own behalf:

"Q. What wages were you receiving at the time you lost your hand? A. Well, I think it was $2.50 a night for ten hours.

"Q. Tell what the opportunity was, if any, for promotion to a steady job from the work you were doing at that time."

"Objected to by counsel for defendant, and objection sustained."

Further down the page:

"Q Now I will ask you what was the custom of the Lake Shore Company, if you know, with reference to giving a man who was working in the position you were, a better position or steady work. (Objected to by counsel for defendant, objection overruled, to which defendant, by counsel, duly excepted.) A. If you understand the work they will give you a better position.

"Q. What is the custom with reference to the length of time a man is required to continue working in the position such as you were before being advanced to steady work? (Objected to by counsel for defendant; overruled; defendant excepted.) A. Well, if you understand the work they would give—put you up.

"Q. How long would you have to be employed as an extra, ordinarily, under the custom, to get steady work? A. He could learn in about a year—he would know all about it.

"Q. Was there any custom about giving an extra man the preference in hiring men to do steady work over men who had not worked as extras? (Objected to; overruled; defendant excepted.) A. They would give it to the oldest man.

"Q. Make that plain, now, just what the custom was, and who they would give steady work to, and how that was done. (Objected to; overruled; defendant excepted.) A. You would go in your turn; there was several extra men.

"Q. The oldest extra man would come in for the steady job first under the custom? (Objected to; overruled; defendant excepted.) A. Yes, sir.

"Q. What do you say about a man having to work as extra or not under the custom on that road at that time before he would receive such a steady job? (Objected to; overruled; defendant excepted.) A. It all depends on how many quit. If anybody quits, the next man takes his place."

It appears from the testimony of this witness that according to the custom he is undertaking to tell about, the chances of an improved situation on the road did not amount to much more than a bare possibility. Under certain circumstances it would seem that certain men, with certain experience, after performing satisfactory work for the company, might be promoted, and might improve their condition—might receive easier or more profitable employment. We are not prepared to say that testimony of that character may not, under some circumstances, be prejudicial and erroneous. We are unable to see, however, where the answers of the witness in this case with respect to the alleged custom of this railroad company could have in any way prejudiced the plaintiff in error. For that reason we hold that there was no error in the record with respect to them. No authority is cited upon either side on this proposition,

and we have not been able, in the time we have had to examine the case, to find any bearing directly upon it; therefore we do not undertake to lay down any rule on the subject, but simply say, under the circumstances of this case, we cannot say that the answers were prejudicial.

Coming down to pages 79 and 80. Edward Criden was testifying as a witness on behalf of the plaintiff below. He testified that soon after the accident--the next morning, perhaps—he went along the track about where this accident is said to have occurred, and that he discovered oil upon the track at a certain point. He is asked this question:

"Q. Tell the jury if you noticed or looked to see whether there was any oil upon the track along about where the cross-mark appears? A. This exact spot?"

He refers to a cross-mark upon a certain photograph that was exhibited to him, there being other testimony tending to show that the accident occurred at the point where the cross-mark was made on the photograph.

"Q. Yes; about that place, as near as you can get it from this photograph. A. There is oil in different spots all along that track."

A motion was made to rule this answer from the jury, which was overruled, and counsel for the defendant excepted. Counsel proceeds with the witness:

"Q. Just describe the oil as you saw it along on the tracks—along on this track No. 8, about where that cross-mark appears—I mean as you observed it there the next day. A. I dont know as I can say for sure that it was at that exact point or not.

"Q. Well, along at this place, and in the neighborhood of that cross-mark, right along there. (Objected to, unless he can testify as to the condition of this track at the place where the accident happened.)

"Q. If you observed track No. 8, along in the neighborhood and at the place marked with a cross-mark, along about that locality, so as to be able to describe the condition of the tracks on the day that you were working there after

Criss got hurt, please state what you saw there. (Objected to by defendant's counsel, unless the question is limited to the place where it is claimed this accident happened, which is indicated on that photograph by a cross. Overruled; defendant excepted.) A. It was spotted with oil on different parts of the track. (Motion made to strike out answer by defendant's counsel; overruled; defendant excepted.)

"Q. Confine your answer to the immediate neighborhood or at the place where the cross-mark appears, about that place—what you saw there, if anything, in the way of oil."

The same objection was made, and the court says:

"His attention is now called to a particular photograph, Exhibit 'B'—if he noticed the condition and can say what the condition of the track was there at the point indicated in the photograph, or in the vicinity of it. He may testify to that. He is now testifying with reference to this picture before him, and the mark that is indicated there. (Defendant by counsel duly excepted.)

Mr. Brumback: "Everything else may be stricken out except what he testifies to with reference to this place and the immediate vicinity."

Mr. Tyler: "I made my objections, and the court has passed on them, and I have saved my exceptions."

Mr. Brumback: "I don't care if any testimony is ruled out, excepting the part inquired about, and the immediate vicinity of this cross-mark; in other words, where the accident occurred. We don't know where the accident occurred, therefore we can not restrict it to any definite place, only in the immediate vicinity of that cross-mark. I concede, perhaps, it is not proper testimony as to anywhere else—at least I don't want to take the chance of any error, and the court may rule out answers of the witness so far as any other place is concerned."

It will be observed, also, that in addition to this declaration upon the part of counsel for plaintiff that he claimed nothing from such testimony, that the questions of counsel to the witness were with reference to oil at or in the immediate vicinity of the place where the accident was said

to have occurred; so that in so far as the answers told of oil at any other place, they were not responsive to the questions of counsel.

Mr. Tyler then remarks: "Then my objection to all these answers should be sustained."

The Court: "The testimony of this witness, then, that there was oil on that track in any place except in the immediate vicinity of the cross-mark indicated on this picture, will be excluded from the consideration of the jury, and you will not consider it, gentlemen, as evidence in this case as to the condition of that track."

So that it seems that at this point counsel for the defendant below requested that the court rule this testimony from the jury, and the court, acting upon that as well as upon the suggestion of counsel for the plaintiff, did so. It is urged, however, by counsel for plaintiff in error that this testimony was prejudicial, and that the admission of it was error, and that the ruling of the court taking it from the jury on his motion and in accordance with the suggestion of counsel on the other side, did not cure the error; and he insists that the verdict should be set aside, notwithstanding that action of the court. In 16 Ohio St., 221, appears the case of Thomas Mimms v. The State of Ohio—a criminal case. This is said in the syllabus:

"Where the court improperly overruled the objection of the defendant to testimony offered on the trial by the state, the judgment against him will not be reversed for such erroneous ruling, when the court, on motion of the defendant, excluded all the testimony so given from the consideration of the jury, and instructed them that it must be wholly disregarded."

This was a murder case — criminal case of the highest character, in which the strictest rule ought to be observed by the court, and if there was any error that might be prejudicial—that might not be cured by taking the matter from the consideration of the jury—certainly careful con-

sideration would be given to that suggestion, in a case where a man upon trial was in peril of his life. I will not stop to read from the opinion of the court upon the subject, but call attention to another case in which this question was before the supreme court of Ohio, found in 19 Ohio St., page 596—the case of Klein v. Thompson. This was an action for damages on account of assault and battery. Nothing is said about the point in issue in the syllabus, but at page 571 this appears:

"Declarations of the defendant, made subsequently to the assault and battery, and tending to show express malice in the defendant in inflicting the injury complained of, were also allowed, against the exception of the defendant, to go in evidence. But the court subsequently, during the progress of the trial, on discovering that the petition contained no averment of malice, ruled out the evidence, and instructed the jury to disregard it."

Whether that was done upon the motion of either party does not appear.

"It is contended that the introduction of this evidence was error to the prejudice of the defendant, which was not cured by subsequent exclusion. In this state we do not regard the admission of improper evidence to the jury, which is afterward ruled out, as of itself constituting ground for reversal; though the question of its influence in producing a wrong verdict ought to be considered on a motion for a new trial."

Citing the case of Mimms v. The State in 16 Ohio St., 221.

I recollect that there was an interesting case involving this question decided in the third circuit some years ago, I think in Auglaize county, but I have not been able to lay my hand upon the report. There the same claim was made by the plaintiff in error, that the prejudice was so great resulting from the admission of testimony that the judgment ought to be reversed, notwithstanding the fact that the court

attempted to disabuse the minds of the jury of the effect of it; and if I recollect the case correctly, the circuit court laid down the rule that it must clearly appear that the testimony must have had that effect upon the minds of the jury; that it will be presumed that the jury observed the instructions of the court to disregard the evidence which was ruled away from them; and that only in case where the testimony was of such a character that it would appear to a reviewing court that it would be impossible for a court by any sort of an instruction, or for the jury by any kind of a resolution or effort, to eradicate the prejudicial impression from their minds, would a reviewing court be justified in reversing a judgment on account of such testimony. We do not think this testimony is at all of that character. There is some question as to whether it was of a character that required a ruling of the court to take it from the jury.

Upon page 94 is a question that I believe is not insisted upon in argument. The witness is asked this: "Tell the jury whether you observed oil leaking at that place where you understood Mr. Criss got hurt, before he got hurt." That was objected to, and the objection overruled, and exception taken. The witness had testified to the means by which he had ascertained and identified the place of the accident, so that the jury might have been allowed to consider his testimony, as to oil at the place he observed, and at the same time decide whether or not it was the place at which Criss was injured.

Those, I believe, are all of the exceptions to the admission of testimony. There were no exceptions taken to the charge of the court, or to any action of the court with respect to the giving or refusing of charges requested.

That leaves, then, for further consideration the question whether the verdict is sustained by the evidence. Upon that I say briefly, that we think that the facts alleged in the

petition amount to negligence upon the part of the railroad company, which would make it liable to this plaintiff below for any injury which he might have received in the line of duty, and while in the exercise of due care upon his part, he being an employe of another company; and we think that the facts alleged are fairly established by the evidence. It is also urged that the verdict is against the weight of the evidence. Without entering into a discussion of this evidence, or reciting what it is, I will say in brief that we have carefully considered this question, having gone through the bill of exceptions and read carefully the testimony of the witnesses and scrutinized it closely, and we cannot agree with this view of the matter. There are six witnesses on behalf of the plaintiff below, including himself, who testify positively to having seen this oil on the railroad track at or about the place where Criss was injured. Some of them appear to be entirely disinterested witnesses. Some of them say they saw oil in such quantities that they might have readily shoveled it up. They were unable to tell just what the depth of the oil was, and they might readily have been mistaken, and have overstated its depth; but making a fair allowance for that, we think it fairly appears from the testimony that there was such a quantity of oil there, and that it remained for such a length of time, that the railroad company was guilty of negligence in not removing it. On the other hand, there are four witnesses on behalf of the defendant below who undertook to testify as to the oil. They simply say that they saw no oil. Some of them could not and would not undertake to tell whether or not there was oil there, but they were in and about there under such circumstances that if there had been oil there, they may have failed to have discovered it. They were not looking for nor thinking about oil; they were there for the purpose of examining cars, to see if there were any defects in them that might have re-

sulted in this accident. Their attention was not drawn to the question whether there was or was not oil on the track. We think the verdict is not opposed to the weight of the evidence.

It is also urged that the verdict is excessive in amount. We do not think so: we think it is warranted by the evidence.

Swayne, Hayes & Tyler, for Plaintiff in Error.

Hurd, Brumback & Thatcher, for Defendant in Error.

(First Circuit—Hamilton Co., O., Circuit Court—Nov. Term, 1897.)

Before Cox, Smith and Swing, JJ.

CARRIE B. LAW v. GEORGE W. LAW.

Alimony—Power of court to afterwards change amount of alimony decreed, where amount had been fixed by agreement among the parties—

The court of common pleas which had granted to the plaintiff a divorce from her husband, for gross neglect of duty, and which had in the same decree made to her an allowance of alimony from his estate, has the right for good cause shown, at a subsequent term of the court, to modify such decree for alimony and to reduce the amount to be paid to her each year, and on appeal, the circuit court has the same right.

[*Contra*—Where the amount of alimony was arrived at by an agreement between the parties themselves, with the provision that such alimony should be in lieu and full satisfaction of all claims and rights of the wife in the property and estate of the husband, and the wife thereupon, by written instrument, duly relinquished all her rights and interest in the property of her husband, the decree not providing for any change in the condition of the parties the happening of which in the course of nature might and could have been foreseen by the parties, the court has no power to change the contract of the parties, and can not change the amount of the alimony so decreed—Minority opinion by Smith, J.]

Appeal from the Court of Common Pleas of Hamilton county.

SMITH, J.

A majority of the court is of the opinion that the court of common pleas, which on August. 1, 1889 had granted to the plaintiff, Mrs. Law, a divorce from her husband, for gross neglect of duty, and which had in the same decree made to her an allowance of alimony from his estate, had the right, for good cause shown, at a subsequent term of the court, to modify such decree for alimony and to reduce the amount to be paid to her each year, and that on appeal, this court has the same right. The facts set out in the petition filed by the defendant in the same case averred that after such original decree, which had directed the payment to Mrs. Law by her husband of $3000 each year as alimony, and gave to her the custody of their child, Edith B. Law, and provided that out of said sum the plaintiff was to support, maintain and educate said Edith, that the said child, about the first day of May, 1893, voluntarily left her mother and went to live with her father, who, until June 26, 1894, (when the court acted on the motion or petition of Mr. Law to reduce the alimony), had supported, maintained and educated her until she was of full age, and that after she arrived at age she was married. These allegations were supported by the testimony, and the majority of the court finds that the allowance of alimony to Mrs. Law should be reduced to the sum of $2200.00 per annum from July 1, 1893, payable in monthly installments of $182.33⅓ each.

Judge Smith is of the opinion that no change should now be made in the provisions made as to alimony to Mrs. Law in the original decree of Aug. 1, 1889. That the terms of the decree, in so far as the alimony was concerned, were arrived at by an agreement made between the parties themselves, and were merely ratified by the court by its decree; one of the terms of which, so agreed to and incorporated into the decree, was that "the provisions herein made for and on behalf of the said Carrie B. Law as to alimony, shall be

in lieu of and in full satisfaction of all claims, rights, interests or demands that said plaintiff has or may have acquired in the property and estate of said defendant by reason of her marriage to him, and the said plaintiff shall relinquish any and all such interests by instrument in writing duly executed upon the demand of said defendant'', which was done.

In pursuance of the terms of such compromise agreement and the decree based thereon, a bond was duly executed by the defendant with surety to the satisfaction of the plaintiff, to secure the fulfilment by Mr. Law of the agreement and decree recited therein. And there having been no provision in such contract, or in the decree itself, that in case of a change in the condition of the parties, or by the circumstances of the case, there might be a change in the amount decreed to her as alimony, and the parties having knowledge that there must in the course of nature be such change, for instance, that if the child lived a few years she must attain her majority,or that she might die or marry during the life of the mother, or that she might leave her mother, the presumption is that as no provision is made as to what shall be done in such event, no change in the amount of alimony was contemplated. And as the decree provides absolutely for the payment to Mrs. Law of $3000 per year as alimony during the life of Mrs. Law, unless she herself should marry, when all payments to her as alimony for herself should cease, I think that in view of all the facts and circumstances it would violate the contract made between the parties to change this allowance, and that it would be inequitable to do so, she having released all her interest in the estate of Mr. Law, other than that secured to her by the decree. I think this view is supported by the decision of the case of Olney v. Watts, 43 Ohio St., 507.

Pratt v. Walworth.

(Eighth Circuit—Cuyahoga Co., O., Circuit Court—Jan. Term, 1898.)

Before Hale, Marvin and Caldwell, JJ.

H. H. PRATT v. W. F. WALWORTH.

Contract of Indemnity—When may be sued on—

Where a party indemnifies by contract another against all liability on certain obligations to pay, such indemnified party has a cause of action against the party giving him the contract of indemnity when judgment is obtained against him on such obligation.

Error to the Court of Common Pleas of Cuyahoga county.

CALDWELL, J.

The case of H. H. Pratt v. W. F. Walworth is here on error from the court of common pleas, and the error alleged is that when the trial of the case opened below, H. H. Pratt offered himself as a witness, and objections were made to any testimony under the pleadings. The objection was sustained. Motion for a new trial was made and overruled. A bill of exceptions is here presented, setting forth what was done at the trial.

The action of Pratt came about in this way:

H. H. Pratt and P. W. Payne were partners selling typewriters, and they desired to dissolve partnership, and it was done in this way. P. W. Payne wrote this letter, which was acted upon by his partner, H. H. Pratt:

"For the purpose of closing our partnership and to enable one of us to act elsewhere, I hereby make to Mr. H. H. Pratt the following proposition:

"I will give or take for your entire interest in the business, as it now stands, Five Hundred Dollars ($500.00), to include the good-will and ownership of all assets of the business of whatever kind, and the assumption of all the liabilities of the same by the remaining partner, and the giving by him to the retiring partner full and sufficient indemnity against past, present and future liability arising out of the partnership business."

Pratt acted upon this proposition by agreeing to sell up-

on the terms therein stated, and then Walworth gave this indemnity:

"I hereby guarantee to H. H. Pratt against any liability on paper, made by the late firm of Payne & Pratt, with my endorsement; also against liability on acceptance in favor of Smith-Premier Company, dated May 1st and due July 3rd, 1892, and generally against any liability legally incurred as a member of said firm. W. F. WALWORTH."

The Smith-Premier Typewriter Company, one of the creditors named herein, sued, and obtained a judgment and issued execution, and that was returned "No goods found." Then H. H. Pratt, to whom this indemnity writing or contract was given, brought suit against W. F. Walworth to recover the amount of the judgment that had been rendered against him by the Smith-Premier Typewriter Company, and then the Smith-Premier Typewriter Company came into court below, and by proper pleadings undertook to place itself in position that whatever Walworth paid to Pratt, it might receive on that judgment—whenever the amount of the judgment was paid, it might receive it.

The ground on which the court below refused to hear testimony under the pleadings was that this was an indemnity to save harmless Mr. Pratt, and that there was no liability. There was no cause of action against Walworth until Pratt had paid this judgment that had been rendered against him; whenever he had made any payment, then he might recover, and not until then.

This class of contracts has frequently been before this court and the courts of different states; and the courts of our state have passed upon matters of this kind to some extent; and the general holding is, with very rare exceptions, that if the contract of indemnity is to save the party indemnified, harmless or from all damages, that then there is no cause of action on the part of the person indemnified against the one who indemnifies until such time as judgment has been ren-

dered and has been paid by him. If it is to pay a certain obligation that the party, the one indemnified, is to pay, the authorities are quite unanimous, if not entirely so, that the time of payment is whenever the obligation exists; some authorities holding that whenever the debt is due and unpaid, the action may be brought; others holding that it must be determined to be due, and the amount, by some judicial action. But nowhere in this state, do we find any case that covers the language in this indemnity contract. The arrangement between the parties was, that the one who bought the assets of the firm, was to furnish the indemnity contract—full and sufficient indemnity against past, present and future liabilities; not against any damage, but to save him harmless from past, present and future liability, nor that the person who gave the indemnity contract should pay all the debts, but was to save him from liability, and the indemnity contract follows that language: "I hereby guarantee H. H. Pratt against any liability," and that word "liability" is the one used.

Therefore, as to just how this contract should be construed we get no light from the adjudications in this state; and going to other states, we find some little disagreement among the authorities. The general current of authority, and quite general on behalf of a large number of the states, is, that a contract of this kind is to be construed that the the liability, or that the person who signs the indemnity contract, can be sued at any time after judgment has been secured against the party who is indemnified.

There are two or three cases cited to us—one in Indiana, one from Michigan, that construe such a contract in such a way that there can be no cause of action until the judgment is paid; but they are exceptions to quite a well settled line of adjudications, that the cause of action arises whenever liability is established by judgment obtained against the party indemnified and we believe that is the ruling that

should obtain in this case; that Mr. Pratt had his cause of action when the judgment was rendered against him, and that he did not bring it until that time had arrived, and that his cause of action at that time existed against Walworth, and the ruling of the court, therefore, was erroneous.

The creditor seeks to come in here, and has argued his case upon the supposition that no cause of action at that time existed on the part of Pratt against Walworth, and yet, notwithstanding a creditor could subject the liability of Walworth, even at that time, for the payment of the debt to it.

We think there is no warrant for that.

But if Pratt had a cause of action—if the time had come when Pratt could subject the indemnity contract to his benefit, and his cause of action was complete, then it is entirely proper that the creditors should intervene and receive the benefit therein from the court.

The case is reversed, and remanded for new trial.

C. A. Neff, for Plaintiff in Error.

Carpenter & Young, Gilbert & Hill, for Defendant in Error.

Seventh Circuit—Jefferson Co., O. Circuit Court—Nov. Term, 1897.

Before Lauble, Frazier and Burrows, JJ.

WILLIAM MEDILL AS ADMINISTRATOR v. HENRY FITZGERALD et al.

SAME v. SAME.

WILLIAM MEDILL, AS ADMINISTRATOR, v. ROBERT LYON, et al.

SAME v. SAME.

Advancement to child to take effect after death—Evidence required—

Where a decedent, at his death, holds promissory notes and a mortgage executed to him by his daughter and her husband, in order to establish a claim that the money for which such

instruments were given was a gift to the daughter by way of advancement or otherwise, the evidence must be clear and convincing.

Same—

Evidence that such money was advanced by the father to build a home for the daughter, with the intent that interest thereon should be paid to him during his life and that the principal should be the daughter's at his death, is not sufficient to establish an advancement, or a gift *inter vivos* or *causa mortis*.

LAUBIE, J.

The cases of William Medill, as administrator of Christian Schneider, deceased, v. Henry Fitzgerald and wife, and the same plaintiff v. Robert Lyon and wife, are of the same character—wherein the defendants appeal and prosecute error from the same judgment.

The defendants move to dismiss the appeals, and the question presented is whether a party may appeal and prosecute error at the same time, from the same judgment; and if so, secondly, whether there was any right of appeal in the cases.

So far as the first question is concerned, it has been recently decided by the supreme court, that a party may appeal and prosecute error at the same time; and if it be determined that there was no right of appeal, then the error proceeding would stand.

Upon the question whether the cases were in fact appealable under the statute, we also hold against the motion. Either party had the right to appeal.

The actions upon the part of Medill were brought, as stated in his petitions, upon three several causes of action; the first two upon independent promissory notes executed by the defendants to the decedent, and the third for the purpose of foreclosing a mortgage given to secure the larger of the two notes in each case.

There was no denial in the answers of the execution and delivery of these notes and mortgages, but the defendant

set up, in each case, in the nature of a cross-petition, an equitable cause of action to have the notes and mortgage delivered up and cancelled, on the ground that the money which they represented, was a gift by way of advancement to Mrs. Fitzgerald and Mrs. Lyon, the daughters of the decedent.

In such a case, where by cross-petition the party seeks equitable affirmative relief which, if granted, would extinguish the legal cause of action, either party has the right of appeal. 54 Ohio St., 348.

Appeals were properly taken in these cases, and the petitions in error may be dismissed.

The question now recurs upon the disposition of these appeal cases. An agreement is presented to us by counsel, that in case this court find the appeals properly taken and good in law, that we should consider the cases as tried before us upon the testimony contained in the bill of exceptions, the same as if the witnesses had testified before us orally.

As I have said, the only issue in either case was upon an equitable cause of action, set up and denominated an answer to the petition it is true, but which is, in fact, a cross-petition, that the money represented by the notes and mortgage sued upon, had been given to the daughter by the father Christian Schneider, the decedent, as an advancement, either in full or in part satisfaction of her share of his estate upon his decease.

The burden of proof, therefore, rested upon the defendants; and a mere preponderance of evidence is not sufficient to establish the affirmative of that issue. The evidence must be clear and convincing that such was the agreement.

In the case against the Fitzgeralds, the two notes, one for $300 and one for $800, were payable in one year after their date, and were dated in September, 1891; and the claim is that in the spring prior thereto, the father gave

them the money represented by these notes, to build a house for themselves upon the lot in question. It is also alleged in the cross-petition, that the decedent gave this lot to them at that time, but there is no evidence of it. The Fitzgeralds, or one of them, which one does not appear, owned the lot; nor does it appear from whom the title was derived, nor is it material to the disposition of the case.

The same is true as to the Lyons case, but in that instance the house was built and the money advanced in 1894, and the notes executed December 24th, 1894, more than three years after the Fitzgeralds', but when the house was finished is not distinctly shown in the eivdence. In one case, the contractor who built the Fitzgerald house, testified that Fitzgerald paid him the money, and not Schneider; and in the other case, the contractor who built the Lyons house says that Schneider paid most of the money, and Lyon paid him some; but when the money was paid or given, or the houses finished, is not definitely shown. The daughter of Fitzgerald testified that in the spring of 1891, as she came home from school, when she was fourteen years of age, her father, mother and grandfather were upon the porch of the house they lived in, and she heard her grandfather say he would give her mother and father money to build a house, and her Aunt Menie too—that was Mrs. Lyon—and her grandfather said: "You had better take it now as any other time;" and she says, "They said, all right, and they took the money and built the house." But if any money passed at that time, or that she saw the money, does not appear. It is a general statement or conclusion of hers, that they took the money and built the house.

So there is no evidence really as to when the money was given, except that it must have been paid by Mr. Schneider, or handed over to the parties while the houses were building. At all events, in each instance, after the house was finished, these notes were executed for the amount that Mr.

Schneider had advanced, and a mortgage taken by him to secure the larger note. In each instance there were two notes given of the same date, payable one year therefrom—one for $300 and one for $500 by the Lyons; but for some unexplained reason the decedent did not include both notes in the mortgage.

Now, an advancement is a gift to take effect immediately, as the share or part of the share of a child in the estate of the father, which the child would otherwise receive at his death, intestate. It is a gift absolute, to take effect immediately. And therefore, it was incumbent upon these defendants to show that the money represented by these papers was a gift absolute, and to take effect at once.

Here the old gentleman took notes from each for the amount advanced, signed not only by the daughters, but by their husbands, each payable a year after its date, with a mortgage on each house from each couple to secure the larger part of the indebtedness represented on the face of the papers.

On the face of things, therefore, it was not a gift, but a loan.

In what manner and to what extent did these defendants rebut this, and show that the papers did not represent the true contract; that instead of it being a loan, a debt from them payable to the old gentleman in one year, it was an absolute gift to take effect *in presenti*?

The evidence offered by the defendants themselves, taking it all just as it stands in the bills of exceptions, instead of showing it was an absolute gift, to take effect *in presenti*, shows that it was a gift to take effect at death, if at all.

The brother of the decedent testified that the old gentleman told him that he had given this money to his daughters to build houses, and had taken notes and mortgages for it; (the only witness in the case that ever heard the decedent speak of the notes and mortgages).

Mrs. Schneider, a sister-in-law of Christian Schneider, the deceased, testifies that he said: "He gave the girls money to build the houses, and they have to pay him interest as long as he lived. He had to live on the interest and when he is dead, it is the girls."

William Y. Durban said the decedent told him several times along in 1894 and 1895, after both houses had been built, that "he had helped his daughters to build their houses in order for them to have homes. that they were to pay him interest while he lived, and at his death it was to be theirs. He didn't say he held any notes or mortgages against them, but he said, if they didn't pay him the interest, he could sell the property; he wanted the interest to live on while he lived, but if they didn't pay the interest, he could sell the property." And upon cross-examination he says: "Q. He said, when he died he intended to give it to them. Is that it? A. Yes sir."

In his re-direct examination, he says: "Q Did he say he intended to give it, or that it was theirs when he died? A. He said it would be theirs when he died." Re-cross examination. "Q. He didn't say it was theirs then? A. No sir, because it wouldn't be theirs as long as he was collecting interest on it."

Mrs. James Craig says: "Q. He said that he had given Yetta and Menie money to buy this property. Q. Did he say how much? A. I couldn't say exactly, but it seems to me he said he gave Yetta $1100, and then he thought he ought to give Menie something, and he gave her $800, and they built their houses. Q. Did he say he had notes and mortgages against them? A. No sir. He said they had to pay him the interest on this money during his life time to keep him, and at the end of his life he expected them to keep their property. That is the conversation he had with me. It is no interest to me. Q. He didn't say whether he had one or two notes? A. He didn't say he held any notes or

mortgages. Q. But he said they had to pay interest during his life? At his death he expected to give them the houses? A. He didn't expect to give it; he had given it. He expected them to keep it. He wanted interest on the money during his life time. Q. At the end of his life it was theirs? A. At the end of his life he was going to let them have it. Q. He had given it to them—he gave it to them. Explain that to me. A. I am telling you as he told me. He said he gave Yetta, I think, $1100; I wouldn't be sure, and they were going to build a small house, or had a small house, and he proposed her to have a better and larger house. He gave her $1100, I think that was it. Then he wanted Henry Fitzgerald to pay him the interest on that during his life, and he was going to make him do it, and at the end of his life, the property would be theirs. Q. That is what he told you? A. Yes sir."

Mr. Ellis says: "After Henry Fitzgerald's house was built, him and me got into conversation in the shop. We got to talking about building and about the children. He said he allowed to give the girls his property at his death. He said he would hold a claim on it, and if they would pay him a small interest up to his death, the property would be the girls. He said he intended to give Charley—he told me the amount, but I don't know what the amount was. Afterwards he said Charley sent again to him for money. He said John and him went in the pottery. He didn't say he paid any for John, but that John and him had taken stock in the pottery. Q. Did you have any talk afterwards about Mr. Lyon? A. Not that I know of. Q. He never talked about Mr. Lyon's house? A. No sir, nothing more than he said he intended to give the girls their share of the property. Q. That was before Mr. Lyon built his house? A. Yes sir. Q. After Mr. Lyon built, you had a talk again? A. Yes sir. He said he would claim a little interest. He wouldn't charge much interest until his death, and

then the property would belong to the girls. I told him at the same time—'why don't you make them a deed— I give my children a deed apiece for a house and lot, I says, why don't you keep a little claim on it'; I says, I thought I might as well have the good of it as other people. I couldn't get any rent for it, and everybody that live in it cheated me out of the rent, and I wanted to be clear of paying taxes for it.' Q. What did he say to that? A. He laughed and said it was time enough when he died for the girls to get the property. He said he intended for them to have homes, and help them build their homes, and proposed for them to have them.''

So the defendants themselves proved the declarations of the old gentleman that it was a gift not to take effect immediately, but at his death—that he intended to give them the money at his death, which was consistent with the fact that he had taken notes and mortgages for the amounts.

That he failed to carry out his intention can not now be helped. It is possible, ignorant man as he was—and these parties all seem to be ignorant—he may have believed that because he did not record the mortgage it would not be good, and would be worthless at his death.

It appears from the evidence of Mr. Fitzgerald and Mr. Lyon that after the death of the decedent they approached Medill, the administrator, about these notes and mortgages, and asked him if they could be collected; that Medill told them, yes, that he was going to try to collect them; they must make some payment; that he put the mortgages on record as soon as he discovered them, and he was going to foreclose them if they did not make some arrangements about it.

What was their answer about it at the time, from their own testimony? Why, they said we never expected to pay, or to have to pay these notes; the old gentleman gave the money to our wives, and he said he would not record the

mortgage, and the mortgage is no good. They made no claim whatever that this money was given to the wives as their share, in whole or in part, of the amount they would receive at the death of the father out of his estate. Ignorant people as they are, they would know about such gifts, although they might not know the technical name thereof, and yet, they then made no claim that these were gifts of that character.

This is consistent with the statement of Mr. Conway, another witness on the part of the defendants, who testified: "Mr. Schneider and I were particular friends. I used to go over there often. I lived right across the street from him. He was telling me who owed him, and he told me Mr. Lyon owed him $800 and Mr. Fitzgerald $700. He told me they hadn't been paying interest. That is what he told me."

The witness was mistaken as to the amounts, but the defendants themselves were showing that the decedent referred to the monies secured by the mortgages.

It is far, therefore, from being made clear that this was a gift by way of advancement; and it is equally clear that it was not a gift *inter vivos*. The same testimony that shows it was not an adavncement, shows it was not a gift *inter vivos*. To be such it must be clear that there was a gift and delivery of the money to take effect at once. Nor would it be a gift *causa mortis*, because obligations were taken for the money, and were held by the decedent until his death.

We are compelled to come to this conclusion. We have examined this case thoroughly, and would be pleased if we could save to these poor people their homes, because we are convinced the decedent intended to give them this money, but ignorantly failed to legally carry out that intent, but unfortunately we are unable to do it.

Judgment must be taken for the plaintiff in each case.

W. L. Medill, for Plaintiff, (in both cases).

Erskine & Erskine, and *Rogers & McCauslen*, for Defendants.

(Eighth Circuit—Cuyahoga Co., O., Circuit Court—Sept. Term, 1895.)

Before Caldwell, Hale and Marvin, JJ

THE LAKE SHORE & MICHIGAN SOUTHERN R.R. v. AUGUST E. SCHADE, ADMINISTRATOR OF GEORGE KIRKHOPE.

Railroad—High rate of speed at R. R. crossing outside of municipalities—Not negligence—

(1.) It is not negligence per se for a railroad company to run its train at a high rate of speed, in the absence of any statute governing the same, across road crossings outside of municipalities.

Same—Duty to exercise ordinary care—Question for jury—

(2.) The railroad company, in running its trains across such crossings, must exercise ordinary care; and the question whether it exercised such ordinary care is properly submitted to the jury, and the jury, in determining that question, has a right to take into consideration the condition of the crossing, its dangers, the want of a flagman or gate, the obstruction to the view of the traveller, the absence of the ringing of the bell or sounding of the whistle, and all of the facts and circumstances surrounding the crossing at the time.

Same—Surrounding conditions—

(3.) If the circumstances and facts surrounding the crossing at the time required the railroad company, in the exercise of ordinary care, to slacken the speed of its train, then it must do so; and its neglect to so do and the running of the train at a high rate of speed would be negligence.

Negligence of party going on track in front of approaching train—Duty of R. R.—

(4.) If the decedent in this case was negligent in going upon the track in the manner and at the time he did, yet if the engineer in charge of the train ought, by the exercise of ordinary care, to have seen the plaintiff in his perilous position and could, by the exercise of ordinary care, have stopped or checked the speed of the train so as to avoid the collision, and failed to do so, it was negligence for which the company is liable, notwithstanding the negligence of the decedent in going upon the track.

Same—

(5.) If plaintiff was negligent in going upon the track as he did, yet if after such negligence the persons in charge of the train, by the exercise of ordinary care, could have seen the plaintiff in his dangerous position and stopped or checked the speed of the train and avoided the injury, and they failed to do so, they were guilty of negligence; and such negligence is the proximate cause of the injury, and the railroad company is liable.

Testimony as to failure to ring bell and blow whistle—When positive testimony—

(6.) The testimony of the witnesses who testify that they were walking on the track, knew the train was coming, were giving their attention to the train, and that they heard no whistle or bell, is not negative, but positive testimony.

Error to the Court of Common Pleas of Cuyahoga county.

This case was commenced by the defendant in error as plaintiff in the common pleas court of Cuyahoga county, to recover damages against the defendant Railroad Co. plaintiff in error here, for negligently killing George Kirkhope at a highway grade crossing of the Railroad Co.

The accident happened about 7 o'clock, in the month of December. The decedent was driving with his son in a one-horse wagon. The road on which he was driving ran nearly parallel with the railroad for some fifty rods, the two gradually coming nearer together until they reached a point where the railroad track and highway were only about thirty feet apart, when the road turned and went at an angle across the railroad track. The railroad track is a double track road. The decedent was driving north. The fast mail train going east upon the north track struck the decedent's wagon, killing him, his boy and his horse.

The negligence averred in the petition was:

That the track was peculiarly dangerous, because the defendant had permitted shrubbery to grow along its right of way, which prevented a person driving upon the highway from seeing an approaching train.

That the train ran at a negligent rate of speed under the circumstances.

That no bell was rung or whistle sounded for the crossing.

That the engineer and fireman in charge of the train neglected to keep a proper lookout ahead, and neglected to slacken the train and avoid the injury.

CALDWELL, J.

George Kirkhope was killed at a point somewhere near

Noble on the Lake Shore & Michigan Southern R. R., while crossing the railroad track, he being upon the highway. He was riding in a wagon, and his son was with him. The train ran into the wagon, and Kirkhope and his son were killed. Schade was appointed administrator, and he brings this action.

It is not necessary to state at this time definitely what negligence he complains of, farther than that he complains that the bell was not rung and the whistle not blown, there were no gates, and no flagman at the crossing; that the train was run at a very high and reckless rate of speed, and especially so when taken into connection with the surroundings, and it being difficult for any one to see a train approaching as that train was approaching this crossing.

The case went to trial, and there was a judgment in favor of the administrator, and the railroad is here averring error. The averments are that the jury were not justified in finding the verdict which they found, there being special findings as to some matters; and in the next place that the approximate cause of the injury was negligence of the deceased, and not of the railroad company; that the court erred in submitting to the jury the question of whether the railroad company was guilty of negligence in not seeing the deceased upon the track. It is averred that there was error in the charge as to the rate of speed at which the railroad company had a right to run this train. It is averred that there were errors in refusing to give certain requests.

In the order of the argument, the first error complained of in the charge is that the attorneys made a request and it was this:

"That the defendant company in determining the rate of speed at which this train should run—such rate being reasonable and proper in view of the objects to be accomplished by the company outside of municipalities in this state—is not bound to consider the increased risk to persons

at road crossings, or lessen the speed of its trains at such crossing on that account; and that if there was nothing in the rate of speed of the train while approaching the road crossing in controversy, inconsistent with the general and legitimate conduct of the business of the defendant, that then in that case such rate of speed can not of itself be an act of negligence for which the defendant is responsible in this action."

It is claimed that that charge was not given, nor anything that is its equivalent. The request is based upon the fact that the legislature not having controlled the rate of speed, not having determined by any statute at what rate of speed railroads should run at crossings in country districts where there is a highway crossing the railroad tracks, and not having required any gates or any flagman at such places, that the rate of speed has been left to the railroad company, and that such rate of speed can be used at these crossings which the railroad company deems proper and right in the prosecution of its business. And it is urged that it materially interfered with these pulbic servants and with the public generally, if trains had to be slackened much at highway crossings; and that the full intent of the legislature is that the railroads should govern this matter by its own rules; and that having determined the rate of speed of their trains, and not having determined that they shall slacken at the crossings or highways, it necessarily follows that crossing the highway at a high rate of speed is not per se negligence. It is claimed that the court did not give that request.

The court in its charge said this:

"It is said the defendant company was guilty of negligence in the rate of speed it was running its train upon that occasion, and in its failure to keep a flagman at the crossing to warn persons approaching the crossing of the approach of the train. The law

does not require the defendant company to place a flagman or any other warning than what the evidence shows was at this crossing on this occasion, either at the place of the crossing or the approach of the train. It does not and did not on this occasion limit its rate of speed at this location or locations similar to it. Whether or not failure to give warning at a crossing other than ringing a bell or blowing a whistle, and whether or not the rate of speed at which the train was run, either one or both, would constitute acts of negligence, depends upon the facts and circumstances surrounding this crossing, the nature and character of it, and the damages incident to the use of the crossing by the defendant company arising from the rate of speed at which it ran its train. I mean by that that it is not necessarily negligence on the part of the railroad company to run its train at a high rate of speed across this crossing, nor necessarily negligence on its part that it did not have a flagman or a man stationed there to warn persons of the approach of the train; but that the high rate of speed and the absence of the flagman are facts to be taken together with every other fact which tends to bear upon the dangerous character of this crossing and the dangers to which the public in the use of the crossing would be subject by the defendant's use of it. They are questions to be considered by you in determinng whether or not in these respects the defendant company was guilty of negligence. By being guilty of negligence I mean whether or not in running the train at that crossing in the absence of any other warning than they did give, whatever you may find that to be, and considering the nature and character of the crossing and the difficulties that might or might not be in the way of parties seeing the approach of the train; and all other facts concerning it, whether or not the defendant company used ordinary care, such care as an ordinarily prudent person would use under like circumstances in that employment, that business, that place and those surroundings in the running of their train and in the management of their business. This care they are required to use; and it is in these respects the plaintiff says they failed to use that degree of care. Did the rate of speed at which they ran their train amount to a failure to use ordinary care, considering the

nature and character of the crossing and of the surroundings, all the facts bearing upon the character and dangers which might be connected with it. Then whatever the rate of speed mentioned, whatever the surroundings upon the crossing mentioned, whatever the dangers mentioned incident to it, if it was in the exercise of ordinary care in that line of business, considering the locality and circumstances and the business carried on, the dangers incident to the use of it, taking into consideration the exercise of ordinary care on the part of the public in the use of the highway, it would not be negligence."

I have read the entire charge upon that subject by the court. In the brief certain portions of it were taken out and not fully set out.

Although the court here has charged that it is not negligence *per se*, or not necessarily negligence running at a high rate of speed at crossings of highways, yet the court says to the jury that this railroad is by such rules not exempt from the exercise of ordinary care at such places. In fact, no railroad nor no person under any ordinary circumstances is ever exempt from exerising ordinary care

There may be instances where ordinary care amounts to but very little; but at the same time this railroad was certainly at this corssing, as at all crossings of highways, bound to exercise towards the public traveling the highway ordinary care. From the fact that it is not negligence *per se* to run at a high rate of speed, we think that does not exempt the railroad company from the exercise of ordinary care while running at that high rate of speed.

Now, ordinary care in all cases must depend upon the surroundings, must depend upon the dangers of the place to some extent. Ordinary care varies according to the hazards of the undertaking and the hazards of the circumstances in the exercise of ordinary care. The court in submitting to the jury the circumstances of this case makes it necessary to state here that the circumstances referred to

are these: that the railroad company on its own right of way had allowed brush to grow up between the railroad track and the highway where the highway parallels or nearly parallels the railroad track before approaching this crossing. When near the crossing, the higway turns and goes across the railroad track. Now the railroad company having permitted this brush to grow up on its own land so as to obscure the view of the train approaching upon the track for some distance, is one circumstance which the court refers to especially in the surroundings of this crossing. It will hardly do to say that the railroad company is in the exercise of ordinary care when it runs its trains on all crossings at a very high rate of speed. There may be circumstances brought about by the railroad company itself, as it was in this case, where it could hardly be said to be the exercise of ordinary case to be running at a very high rate of speed.

Then we think, although a party when he got near the track could have seen this train, yet there is much evidence in the bill of exceptions tending to show that until he got close to the track, it would be quite impossible for him to see the approach of this particular train, that it would be obscured from view. The court said to the jury substantially this: That while it is not negligence *per se* to be running on a crossing at a high rate of speed, yet if you find the circumstances are such that this railroad, in the exercise of ordinary care, should have slacked up at this particular crossing and not have run at so high a rate of speed, then I say to you that the railroad company is not excused. And the court submitted the question to the jury whether under all the circumstances, the railroad company was in the exercise of ordinary care at that crossing. It may seem a little dangerous to submit to a jury this question under these particular circumstances, and the court in his charge brings in with it also what the railroad had done to guard this crossing; what it did to protect this party by way of ringing

bells and blowing whistles, and it might have been just as well to have charged the jury separately upon these matters, instead of bringing all the acts of negligence alleged in the petition under one general charge. The charge might have been as to the separate acts of negligence averred. But still, considering the whole matter, we think the court did not err under the circumstances of this case. In fact, the supreme court has said that it would be negligence for a railroad to run its train on a crossing where the approach of the train is obscured from view by anything it may have placed on its own tracks, as for instance other cars; that they would be called upon to exercise a higer degree of care, and that they could not run at so high a rate of speed under those circumstances as they would if those circumstances did not exist. We think the court has confined the law within that principle, and we do not reverse this case on that allegation of error.

The court charges again:

"One of the charges of negligence in this case is that while George Kirkhope, the deceased, was upon the track in a place of danger from the approaching engine, the engineer or persons in charge of this train could have seen him, and at least have checked the speed of the engine so as to permit him to pass on in safety. We say to you, if by the exercise of ordinary care on the part of the engineer he could have seen the decedent George Kirkhope, upon the track, and the dangerous position he was in, and by the exercise of ordinary care could have stopped his engine in time, or checked its speed so as to have permitted him to escape from this dangerous place, and saved his life, it was his duty to exercise that care."

Then the court gave the law in an exact manner in this way:

"Failure to do it would be negligence, which would permit recovery in this case, although George Kirkhope may have been guilty of negligence in going upon the track and being in that position. That is upon the rule that

where a person sees another in a position of danger, no matter how such person came there, if by the exercise of ordinary care he could save such person from injury, it is his duty to do so, and the failure to exercise such care is negligence."

This is objected to, because the court has stated the abstract rule of law, given at the last of what I have read, as being good law; but the objection is in the application of it to this particular case. It seems from the evidence that Kirkhope had driven upon this track as he approached it, and as he was about half way across the track on which the train was running, the wagon was struck about the center—his horse apparently had gotten over. George Kirkhope and his son and the horse were all killed. The wagon was broken in two in the center, one part being left on one side of the train and the other on the other side.

The evidence is that the engineer did not see him on the track till he was within about twenty feet of him. Then there is evidence on the part of the engineer that with the head light he could distinguish objects 300 feet ahead of the train, and yet he did not see this object upon the track till he was within twenty feet of it. This train was running at a very rapid speed, and the evidence had a tendency to show that if he had been looking when 200 or 300 feet away, he would have seen Kirkhope upon the track or in the place of danger; and there is evidence tending to show that if he had been looking at that time, he would have seen him. That is, he could see by his head light to distinguish objects 300 feet ahead of his train. And there is evidence tending to show that if he had slowed up when at that point where there is evidence tending to show he might have seen the deceased, that it would have given the deceased time to have got clear of the track. Under that testimony the court charged that if Kirkhope was negligent in getting upon the track, and

got upon the track when he could have seen this train approaching, and should have seen it, notwithstanding that position of error, if the engineer could have saved him after he saw him there, then the company would be negligent. He went further and said that if in the exercise of ordinary care the engineer could have seen him in time—not that he did, but if he could have seen him in time to have saved his life he was negligent if he did not do so. This part is objected to. It is claimed the law does not warrant that charge; that the responsibility of a railroad company under such circumstances is that it shall do all that is possible in the exercise of ordinary care after a party is seen in a position of danger, not after he might have been seen. If it is the law that a party is guilty of negligence after he might have seen, then it might be urged that parties might often be held responsible when no danger was expected and none was apparent, and that they must be upon such continual looking for danger that it would interfere with the proper prosecution of the business of the defendant. I have seen this objection, stated in a text book, to this rule being extended to what might have been seen.

Now the case in 49 Ohio St., Railroad Company v. Kassen, which has been frequently cited to this court of late, is a case where a party fell off a train, or got off a train, and was injured. It was purely his own negligence. The parties on the train he fell from knew of his helpless condition, and went on and paid no attention to him. They did not report it to the company, and did nothing to get him out of his place of danger. Another train came along, not knowing of his condition, and injured him, and the court there seems to justify, at least in the opinion of the majority of us, the rule of law in this state, that a defendant in cases of this character is liable when he sees the plaintiff in a place of danger, or when the plaintiff is in a place of

danger, not only from the time he sees him, but from the time he should have seen him in the exercise of ordinary care. In the Kassen case the lapse of time in which the railroad company could act to save him, was long. There may be cases where the parties act so nearly at the same moment that the court can say, as a matter of law, that there was no time nor opportunity for the defendant to do anything to save the plaintiff from the danger in which he negligently placed himself. Many cases will be found between these extremes, as to time and opportunity. If the evidence tends to show that there is time and opportunity, after defendant becomes aware, or by the exercise of ordinary care would know of the peril of plaintiff, to save him from injury, then the court should leave to the jury the question of whether or not the defendant acted with due care in trying to save plaintiff from injury. If the time is long, as in the Kassen case, and the defendant does nothing, knowing the danger of plaintiff, then, all will agree, the defendant is liable. That liability does not depend upon the time, alone. Time and opportunity, if long and prominent, only more clearly mark and emphasize the proximate cause of injury. As time and opportunity lessen, the proximate cause may become more uncertain. Yet it is the province of the jury to say whether they exist, or not. It might be said in behalf of this rule that the railroad company is never excused from the exercise of ordinary care. Here is a place of danger. It is the duty of any one approaching a railroad crossing upon a highway to look and listen and use his senses and care commensurate or proportioned to the danger he is about to undertake—that of crossing a railroad track. Now, to say that a railroad company may run when approaching a place that is dangerous to the public, or to say that when it sees a person and then does all it can to save his life, is that the exercise of ordinary care? Every one, I

think, and the majority of this court think it is not the exercise of ordinary care; that a railroad company is called upon when approaching a place of this kind to keep a lookout consistent with the duties of the employes, and watch to see that no injury is done. There was evidence tending to show that this engineer had not complied with that principle of law. Yet I feel for one that it was his duty to have done that, and that no circumstances are shown in the testimony of this case that would excuse the engineer from that duty. The only excuse offered is that the door was open to give fuel to the fire, that the light shone in his eye and he could not well see ahead under those circumstances; that this door was open at this particular time, and he says the door is open a good deal of the time, more than half the time, receiving fuel and taking care of the fire; and it would seem that if the railroad has no better arrangement for protecting the public and for allowing the engineer to exercise ordinary care under such circumstances, that that would be an act of negligence of itself, although it is not complained of in this case.

It may be said that the decedent was guilty of negligence, and the jury certainly would be warranted in finding that he was guilty of negligence before he drove onto this track. The evidence tends to show that he might have seen this train, and if he had performed his duty, that he would have seen it. He could hardly help seeing the head-light, and there is no question but that he is guilty of contributory negligence in going on the track under those circumstances and under this evidence. I feel we can not say that although he was guilty of that negligence, although he did not look, because if he had looked he would have seen the train, and according to the case in 28 Ohio St., to say he looked, if he were living, would be simply to say that a man looks at the sun and yet don't see the sun, for the train must have been in plain view at that time. But although

he has been guilty of all this negligence, getting on the track in the most careless manner, yet if the trainmen, in the exercise of ordinary care, had time and opportunity to see, and if the evidence shows that there was opportunity, as it does in this case—or has a tendency to show in this case—that he had opportunity to check that train and save the life of the person in danger, we think it was his duty to do that, and where that duty was neglected it was negligence not to see, and it becomes the approximate cause of the injury; and that being the approximate cause of the injury it throws the liability or responsibility upon the railroad company.

Now it is said in this case that there were errors on the part of the court to refuse to charge certain requests. We have examined these requests, and without reading them now, we find no error in refusing these requests.

In the next place, it is said that the verdict is against the evidence so much so that this case should be reversed on that ground. This proposition of law has been argued to support this principle: persons testify they did not hear the whistle or the bell; the trainmen testify of the blowing of the whistle and the ringing of the bell. Here is a conflict of testimony; yet it is urged that there is no conflict between positive testimony as one person says he did hear the bell ring, and another person testifies he did not hear it; and there being no conflict between such testimony, it is urged that the evidence is nearly all, if not quite all, that the bell did ring and the whistle did blow. But this testimony, when we come to examine it, is not exactly of this character. There were persons walking on this track toward Noble, or toward Nottingham, I am not sure which; but they were walking upon the track and heard the whistle of this train, and knew it was about time for it to come. They heard it whistle at Nottingham in the yard or at the station. There were several road corssings between where

they were and Nottingham, and they were listening for the approach of that train and paying particular attention, and they say that the bell did not ring at any of these road crossings, nor did the whistle blow; and they testify the same as to this crossing here. That is not negative testimony. Where a person testifies that he was looking or listening and paying particular attention to a certain thing as to whether the bell rings or not, and then testifies as to that that it did ring or that it did not ring, one is as positive as the other. This testimony assumes that character of positive testimony, and it did raise a conflict before the jury, and the evidence is of that character that we feel we can not disturb this verdict under the evidence. We find no error in this record. The case is affirmed, and the judgment is affirmed

HALE, J., dissenting:

I have been unable to concur with the majority of this court in the sustaining as applicable to this case. It has been so fully discussed by our presiding judge that it is the duty of a railroad company, in case a traveler was negligent, to have saved him if by ordinary care it could have been done. The charge as given I have no sort of disposition or desire in any shape to criticize. Every dictate of humanity, every reason that could be suggested, would sustain the decision rendered in the case here cited in 49 Ohio St., Railroad against Kassen. It was clearly right. The only doubt that remains in my mind is whether the principles there announced should be applied to a case of this kind; whether the rule applies in case of a collision at a railroad crossing between the traveler and the train running upon the track, where nothing whatever appears in the case in fact which shows that the employes on the train had a better opportunity of seeing the man upon the crossing than the man upon the crossing had of seeing the train. I concede that the railroad company

was negligent in not looking out for the traveler, and not using the ordinary means to save him. I concede that. But on the supposition that the company was negligent in not discovering the traveler, supposing you say a company by ordinary means could have discovered the traveler, you must also say that the traveler by the use of ordinary care could have saved himself from passing in front of that train. And where the two exist, negligence of the company in running its train upon the traveler without seeing him, and the traveler going on the track without seeing the approaching train, I think that these two causes are the approximate cuase of the injury; and they can't complain of the railroad company because the negligence of the two combined was the approximate cause of the injury. I don't think it was intended by the supreme court to apply this rule and principle to an ordinary case of a collision at a railroad crossing. In every case that has preceded this, where the facts are similar to the one we now have, the courts have never used the expression "although the traveler was guilty of negligence in being on the track, the company after it became aware of its presence, could by ordinary care have saved him". Then there is an intervening cause, and it is clearly the duty of the company to have done it. If the traveler is upon the track without negligence on his part, then he can recover. If the traveler is upon the track negligently, and the company's employes discover him in season and by ordinary care, then he may recover. But where it is the negligence of the traveler going on the track and not being discovered, then I think that is the approximate cause of the injury, and no recovery can be had by him. While fully approving of the doctrine laid down in 49 Ohio St., I do not believe it should have any application to a case of this kind. In that case, you remember, the traveler walked off a train. He is left there, lying upon the track, unconscious and disabled. Another train comes and kills him,

The court, in charging the jury, said there was no negligence on the part of the train that killed him; and it says the only question left in this case therefore, for you to determine, is whether the company had notice through the employes of the train from which he fell that the man had fallen upon the track. This makes the whole thing turn upon whether they had notice or not, or ought to have been charged with notice. Clearly, that was right. But I can not see how it can have application to a case of this kind. That is all I desire to say. I think this question is one of very great importance. Almost superlative importance. If it is to be applied in every case of collision at crossings, it is a rule of law that is somewhat new.

M. R. Dickey, for Plaintiff in Error.

E. J. Pinney, and *C. A. Sheldon*, for Defendant in Error.

(The judgment of the court in this case was affirmed by the supreme court without report, November 16, 1897.)

(Eighth Circuit—Cuyahoga Co., O., Circuit Court—Oct. Term, 1897.)

Before Hale, Marvin and Caldwell, JJ.

MELVILLE F. MASSEY v. MARY F. STIMMEL.

Alimony—Not to be awarded against non-resident defendant, although he has property within the state—

In a divorce proceeding, alimony can not be awarded where the domicile of the defendant is in another state and service of process is only obtained by publication, except where he appear and submit himself to the jurisdiction of the court; and this is so although the defendant has property within the state.

Appeal from the Court of Common Pleas of Cuyahoga county.*

[*Decision of Dellenbaugh, J., in court of common pleas, reported in 5 Nisi Prius Reports, 29.]

MARVIN, J.

The plaintiff, Massey, sets out in his petition, that on the 9th day of June, 1883, the defendant, who for some years previous and up to that time had been his wife, procured a divorce from him in the court of common pleas of this county; that the decree entered by the court in that action included an order that there should be paid to the wife the sum of five hundred dollars as alimony; that at the time such decree was made he was a non-resident of this state and was a resident of the state of New York; that no service was had upon him, and that the judgment was a fraud upon him, and he says that the defendant in this action will, unless prevented by an order of this court, cause certain property of his, situated in Erie county of this state, to be sold to satisfy that award of five hundred dollars alimony, and prays that she may be enjoined from so doing.

A demurrer was filed to this petition, the ground of which is that the petition is based upon the fact that the decree was obtained by fraud, and that there was no allegation that the suit was brought within the time provided by law after the discovery of the fraud.

We do not understand that this petition is based upon "fraud", in the sense in which it is used in the argument by counsel who filed the demurrer, or in the sense in which it is used in the statute.

The ground upon which it is said that the decree, or the order for the payment of five hundred dollars alimony can not be sustained, is that the court was without jurisdiction to decree alimony, and that, in that sense, only, was any "fraud" perpetrated. We think that this is clearly a correct statement of the effect of the petition. It is not that kind of a fraud which authorizes the setting aside of the judgment under this statute, which is set out in the petition, and the demurrer is, therefore, overruled.

This brings us to the question: Did the court have

jurisdiction to enter the order that alimony be paid?

The determination of this question determines the case.

The evidence establishes, as we think, that the plaintiff in this action, at the time of the filing of the petition for divorce, and during all the time of the pendency of that suit, was a resident of the state of New York. He says so; nobody denies it; his brother says it; and we think there is no question that he was a resident of New York; and, indeed, the defendant here—the plaintiff in that action—obtained service, if any was obtained, by publishing notice in a newspaper describing him as "residing in the state of New York," and caused a copy of the summons to be mailed to him in New York.

And that raises the question as to whether the court here had any jurisdiction over a resident of the state of New York to award alimony against him where no personal service was obtained upon him in the state of Ohio. There was a publication in a newspaper of general circulation in this county for six consecutive weeks apprising this plaintiff, the defendant in that action, that his wife had sued him for divorce and alimony. And it is certain that very shortly after the decree was entered this plaintiff knew, not only that his wife had obtained a decree for divorce, but that the court had awarded her alimony in the sum of five hundred dollars. This the plaintiff admits, and exhibits a newspaper clipping sent to him by his brother shortly after the divorce was obtained, announcing the decree for divorce and alimony.

There is a conflict in the testimony as to whether the plaintiff saw the defendant after such divorce was obtained and before the bringing of the present suit; and as to this it is hardly possible to avoid the conclusion that somebody committed deliberate perjury on the trial of this case. The plaintiff says that he did not see his wife from the time he went to New York some months before the suit for divorce

was brought, until after the bringing of the present suit. Defendant says that he called at her house on more than one occasion, and talked with her with reference to the education of their son, and that he took the son with him from her house to visit the theatre; but as we view the case, it is indifferent which of these statements is correct.

The authorities are uniform that the courts may obtain jurisdiction to decree divorce where, under certain circumstances, the service upon defendant is not personal, but only constructive. The plaintiff being a resident of the state in which the divorce is sought, is entitled to have his or her marital status fixed by the decree of the court in which the law authorized the suit for divorce to be brought.

It follows, of course, that where the court decrees a divorce to a citizen of its own state, thereby fixing the marital status of such citizen, it necessarily fixes the marital status of the consort of such citizen whether a citizen of its own state or not; and this, not because of its jurisdiction over the non-resident, but because, in the exercise of its jurisdiction over the citizen of its own state, the result necessarily is that the status of the non-resident is fixed by the same decree. If the resident husband or wife residing in this state ceases to be the husband or wife of the non-resident, such non-resident thereby ceases to be the husband or wife of the citizen of this state.

But an order upon the defendant in a divorce case to pay alimony is a judgment *in personam*, and the court is without jurisdiction to render such judgment where only constructive service is had upon the defendant.

It does not necessarily follow that, because the court has jurisdiction to decree a divorce where no personal service is had upon the defendant, that it has jurisdiction to award alimony.

I quote from section 933 of the vol. 2 of Black on Divorce:

"A decree in divorce is *in rem* and, therefcre, justified by jurisdiction over the *res* alone, only in so far as it affects the marital status. If it goes further than this, and assumes to adjudicate matters collateral or incidental to the dissolution of the marriage, the proceeding becomes one *in personam*, and no personal liability can be imposed upon the defendant unless there is jurisdiction of his person acquired by proper service of process. All the cases which recognize the jurisdiction of the state to determine the marital status of its own citizens, although one of the parties lives in another state, limit the exercise of it to the dissolution of the marriage. The decree in such cases affects only the status of the marriage relation. To go one step further, and say the guilty party who is a non-resident, and, therefore, beyond the process of this court, shall not marry again, is quite another thing."

Without reading further in that connection, I read from the same section again:

"On the same principle, when the defendant in divorce, is a non-resident and is not personally served with the process within the state, or has not voluntarily submitted himself to the jurisdiction of the court, a decree awarding alimony has no extra-territorial validity, for, to that extent, it is purely a personal judgment."

It may, however, be said that for the defendant here to seek to subject the property of the plaintiff situated in this state to the payment of the decree for alimony, is not to claim that the award of alimony is to have "extra-territorial validity", because no effort is made to subject property to the payment of this decree which is beyond the jurisdiction of the court

The case of Bunnell v. Bunnell, found in the 25 Federal Reporter, beginning on page 214, is a case decided in the U. S. circuit court for the eastern district of Michigan in 1885 by Judge Brown, now a Justice of the Supreme Court of the

United States, and it seems to meet this question. The syllabus reads:

"A state statute permitted its courts, in suits for divorce, to award alimony, and to sequestrate the property of the defendant within the jurisdiction, and appropriate the same to the payment of alimony. Held, that this statute did not apply where the defendant was called into court by publication, and that a decree for alimony against a defendant not personally served with process, was void for want of jurisdiction."

I quote again from the opinion on page 216:

"That the decree in the divorce suit, in so far as it purported to be a personal decree against the defendant for alimony and costs, is void, can admit of no doubt. In the absence of personal service upon the defendant within the jurisdiction of the court, no court has power to render a judgment *in personam* which can be the subject of an action or the basis of an execution. To render a valid judgment, a court must obtain jurisdiction either of the person or property of the defendant within its jurisdiction. If jurisdiction of the person be obtained by personal service of process, the judgment will be valid the world over. If jurisdicton be obtained by seizure of property, the judgment will be valid only as it respects that property, and within the jurisdiction of the court rendering it."

Again I read from the same opinion, on page 217:

"The distinction between cases where jurisdiction is acquired by a seizure of the *res* at the same time the suit is begun, and those wherein a personal judgment against a party not served with process it attempted to be enforced against property within reach of the court, is clearly stated in Pennoyer v. Neff, 95 U. S., 714. In that case, one Mitchell brought suit against the defendant, Neff, and, failing to obtain service against him within the state, called him into court by publication under a statute of Oregon, which provided that in case service of a summons could not be made and defendant could not be found within the state, the court might order service to be made by publication of the summons. Judgment having been obtained and levied

upon the property of the defendant within the state, the property was sold upon execution by the sheriff, and bid in by the plaintiff, Pennoyer. The court held that the judgment, being personal in its character, was without validity, and did not authorize the sale of the property in controversy. The plaintiff assumed the position that where the defendant has property within the state, it is immaterial whether it is in the first instance brought under control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of the demands against the owner, or the demand be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution. But the court held that the jurisdiction of the court to inquire into and determine the obligations of the defendant was only incidental to its jurisdiction over the property. Its jurisdiction in that respect could not be made to depend upon facts to be ascertained after it had tried the cause and rendered the judgment. 'If the judgment be previously void, it will not be valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it.' 'The judgment, if void, when rendered, will always remain void.'"

Section 9, of the 2nd Vol. of Bishop on Marriage, Divorce and Separation, reads:

"Alimony.—It exists only by judicial decree. Therefore, by all opinions, it cannot be validly awarded in a mere ex parte divorce suit *in rem*, where the non-appearing defendant's domicile is in another state. If he dwells in the same state, a statute may, according to the Indiana case, authorize a decree for alimony against him on constructive notice. If in another state it can not; except when he appears and submits to the jurisdiction, then it can."

From these authorities which we believe to be in harmony with the authorities generally on the same subject, we hold that the court of common pleas in which the divorce suit was tried, was without jurisdiction to award alimony, and that the plaintiff in this action is entitled to an orde

enjoining the defendant from proceeding to subject his property to the payment of such alimony.

Judgment will be entered accordingly.

C. E. Pennewell, *Phinney & Merrill*, Attorneys for Plaintiff in Error.

Frank A. Beecher, Attorney for Defendant in Error.

(Third Circuit—Auglaize Co. Circuit Court—November Term, 1897.)

Before Day, Price and Norris, JJ.

M. J. MOONEY, Administrator of the Estate of Agnes Watters, Deceased, v. THE VILLAGE OF ST. MARY'S, OHIO.

Defect in bridge in municipal corporation—Liability for injury—Where the proper authorities of a municipal corporation, after knowledge of the existence of a dangerous hole in a street bridge over a stream or canal within the corporate limits, permit the same to remain open without guards or signals to warn pedestrians of the danger, they neglect a duty imposed by sec. 2640, Revised Statutes, and the corporation is liable in damages to any one, who, being without fault, is injured by falling into such unguarded place; and this is so, notwithstanding the provisions of secs. 860, 4936 and 4938, Revised Statutes., which make it the duty of the county commissioners to construct and keep such bridges in repair.

Error to the Court of Common Pleas of Auglaize county.

PRICE, J.

The plaintiff in error was plaintiff in the court below in an action to recover damages from the defendant, The Village of St. Mary's, for negligence which caused the death of Agnes Walters, the plaintiff's intestate.

The facts shown in the record disclose, that on or about the 30 day of June, 1895, a large woolen mill or factory in said village, and which stood near the east end of a public bridge on one of the principal streets, and which spans the Miami and Erie Canal, was destroyed by fire, and that the fire was in some manner so communicated to the north

side of the bridge constructed and set apart for pedestrians, that a hole was burned in the same not far from its east end. The hole was about ten feet long east and west, and almost the full width of this sidewalk. The village authorities placed temporary barriers about the open space made by the fire, but it is claimed by the plaintiff they were insufficient in character and fastenings to properly guard the place and warn persons traveling the street of the presence of danger, and that in the night of the 25th of July of that year, the decedent, while lawfully passing over the canal and in the use of the sidewalk on the bridge, without fault on her part and not knowing the existence of the hole, walked into it and fell to the hard bed of the canal, and thereby sustained fatal injuries.

The plaintiff alleges, that it was the duty of the village to keep the bridge, including the part used by pedestrians, in repair and safe condition for use, and in neglecting to do so, and in neglecting to place and maintain proper guards about the place of danger while the same existed there, it became liable for the injuries sustained.

Inasmuch as the defendant contends, in part, that the petition states no cause of action, we here re-state its averments wherein the negligence of the village is charged:

"The sidewalk referred to and the bridge connected therewith, on the 25th day of July, 1895, and for a long time prior thereto, were placed there for the use of pedestrians and the general public, lawfully walking on or across said bridge, which sidewalk was under the supervision and care of the defendant, whose duty it was to keep the same in safe repair. That upon and for a period of about thirty days prior to the 25th day of July, 1895, the sidewalk upon the north side of said bridge and near the east end thereof, was out of repair, there being a dangerous hole in and through said sidewalk of some ten feet in length and of the full width of the same; and that the sidewalk where said dangerous hole existed, extended over the Miami & Erie Canal about fifteen feet above the bed of the canal, and

that defendant had notice of said dangerous hole soon after it was made, and attempted to place safe-guards and obstructions around and about said hole to prevent accidents and injuries to persons passing along and upon said sidewalk, but that due and owing to the negligence and want of care of defendant, said dangerous hole in said sidewalk upon the night of said 25th day of July, 1895, was without safe-guards or obstructions, and was by defendant, upon said night allowed to remain open, exposed and without danger-lights or guards."

It is next averred, that the decedent, while attempting to cross the bridge at night, accidently stepped into the place of danger and fell to the earth below, and was thereby killed.

First. The village, by answer, denied that it had the care and supervision of the bridge and sidewalk, and denied all allegations of negligence made against it.

Second. As a further defense, it is alleged in the answer, that the bridge and sidewalk mentioned, were a part of the street, and which street is also a state and county road, and had been so for many years prior to the death of plaintiff's intestate; and that the village had not been at any time entitled to receive any part of the bridge fund of the county, and that it had received no part of said fund, and that the duty to repair and maintain the bridge devolved upon the county commissioners.

Third. The defendant also charges that the fall and death of decedent were caused by her own negligence.

The reply admits that the village had never received any part of the county bridge fund, and that the bridge and street were part of a state and county road as claimed in the answer, and denied that the deceased was negligent.

At the close of the plaintiff's testimony, the court directed a verdict for the defendant, and rendered judgment accordingly.

The case is here on error to reverse the judgment, and it has been ably argued by counsel for the parties.

It is admitted in the pleadings, and it is a fact conceded in the evidence, that the bridge in question spans the Miami & Erie Canal, and is part of the street running east and west in the village, and that the street is at that point laid on a long established state and county road; that it was constructed by the county commissioners, and that the village was not entitled to and received no part of the bridge fund levied on property within the same.

It is claimed by the defendant that under the law and according to such facts, it was and is not responsible for the condition of the bridge or the consequences set out in the petition; and we are informed by counsel, that the court below entertained this view, and therefore directed the verdict for defendant.

It is an old statute which makes it the duty of county commissioners to construct and keep in repair all necessary bridges. It dates prior to the revision of Swan & Critchfield, and is now found in sec. 860 of the Revised Statutes, which reads:

"The commissioners shall construct and keep in repair all necessary bridges over streams and public canals on all state and county roads * * * *except only such bridges as are wholly in such cities and villages as by law have the right to demand and do receive part of the bridge fund levied upon property within the same.*"

And we refer to sec. 4936, Revised Statutes, which is:

"The commissioners of any county through which any canal or feeder of a canal of this state passes, except such as are built by incorporated companies, shall, at the cost of such county, keep in good repair all bridges, where any state or county road crosses such canals."

Also see sec. 4938 to same effect. It seems very clear from these sections, that the duty to maintain and keep in repair the bridge mentioned in this case rested upon the county commissioners, and we know that prior to the amendment of sec. 845, Revised Statutes, made in 1894, there was

no remedy against county commissioners for neglect to keep such bridges in repair and safe condition. It seems there was no remedy for their negligence. See Board of Commissioners v. Mighels, 7 Ohio St. Rep., 110.

But the amendment now provides a remedy for such neglect of official duty. Vol. 91 O. L., 142.

But it is claimed for plaintiff in error that, notwithstanding the above legislation, there is such care and supervision of the streets, alleys, bridges, etc., enjoined upon cities and villages by another section of the statute, that a right of action exists against the village of St. Mary's in this case, and the sec. 2640 provides:

"The council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and *bridges* within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance."

This also, is an old statute. We trace it back as far as an amendment made March 18th, 1859. See 56, O. L., 57, where the section assumed almost its present form as sec. 2640—but it related to cities.

In 1869 the municipal code was adopted, and the old section was carried into it as sec. 439. (See 66 O. L., 222.)

By this revision and codification, the rule was extended to cities and villages alike.

By reason of sec. 2640, it is claimed, and, we think, with much reason, that while it was the duty of the county commissioners to construct and keep such bridges in repair, there is a certain degree of care, supervision and control vested in the village council. We have seen that the two classes of legislation—for the commissioners and the council—are of many years standing. If there is any difference, the rule of conduct prescribed in sec. 2640 out-ranks the other in age. Hence it is that the sections should be construed together. Such is the view taken by our supreme

court in State ex rel. v. Commissioners, 49 Ohio St., 304, where it is said:

"The duty here imposed is a part of the general duty to construct and keep in repair all necessary bridges over streams and public canals on all state and county roads imposed on county commissioners by sec. 860, Revised Statutes, and became necessary as a limitation of sec. 2640, Revised Statutes, giving to cities and villages the supervision and control of all public highways and bridges within their corporate limits, and requiring them 'to keep the same in repair and free from nuisance.' These sections all relate to the same subject, and must be construed together. As an effect of these provisions, it became the duty of county commissioners to construct and keep in repair all bridges on the public highways of the county, except such bridges as are within cities and villages that have the right to demand and receive a portion of the bridge fund."

Applying the law to the case at bar, we are of opinion that it was not the duty of the village to repair the bridge where it had been burned, as that work was imposed upon the county commissioners.

It does not follow, however, that this fact relieves the village of the care, control and supervision of the bridge.

There is no conflict of duties between the commissioners and municipal authorities. The former have the control of the bridge fund, and hence their duty to construct and repair. The latter have no control of the bridge fund, and therefore are not required to either construct or repair. But they do "have the care, supervision and control of all public highways, streets, * * * sidewalks, grounds and bridges within the corporation, and shall cause the same to be kept open * * and free from nuisance." And either or both may now be liable for neglect of duties imposed by law.

What were its duties in the case before us?

Several days prior to the fatal injury, fire had burned

away a portion of the sidewalk, part of the bridge ten feet in length and the full width of the walk. This made it a place of great danger of which the village had prompt and full knowledge. It undertook to discharge its duty by placing obstructions and barriers about the hole to keep people away from it. It is alleged, and there is evidence in the record tending to prove, that these barriers were not fastened to any permanent object, but were loose and easily removed or thrown down; and the evidence tends also to prove that the village authorities had relaxed their care on the day and night of the injury, so that the barriers were not in place, and that there were no danger signals there to warn pedestrians of the place of danger. We think it is the duty of the village authorities to either temporarily cover the hole, or protect from it by barriers and signals, and to maintain the same in safe condition until the commissioners—the proper party—could be notified and make the necessary repairs. Such is the kind of care, supervision and control of the streets and bridges contemplated in sec. 2640. Otherwise it would be of no practical use or benefit. It is a reasonable rule of conduct. This bridge was upon the main thoroughfare of the town, and on each side of it were stores and other places of business. It was in almost constant use, and the village owed it to its citizens, of whom the deceased was one, to safe-guard the scene of danger until repairs could be made. To do so, would be the exercise of the ordinary police power and regulation which is coextensive with the corporate limits; and to neglect so plain a duty would be such negligence as would make the village liable where there is no other element in the case to defeat recovery

It has been repeatedly held in Ohio, that where one having a contract with the village or city for the construction of a sewer or other public improvement, with the knowledge of the municipal authorities, negligently leaves open an ex-

cavation, or places a dangerous obstruction in the street, without guards or signals, where person or property is injured thereby, the city or village may be held primarily liable, although it was the duty and even the agreement of the contractor to properly guard the place to prevent injury. A full consideration of the proposition with cases cited may be found in case of City of Zanesville v. Fawnman, 53 Ohio St., 605.

We would hold, therefore, that, if there is no other question in the case which defeats recovery, the trial court erred in directing the verdict for defendant.

But we have another branch of the case in which it is charged in the answer and fairly supported in the testimony, that decedent was guilty of contributory negligence, without which no injury would have occurred. And the presumption of this negligence arises on the plaintiff's evidence, and is not explained or rebutted.

The size of the opening burned in the sidewalk we have already noticed. The burning of the mills had caused this about thirty days before, and the effects had become somewhat notorious in the village. Quite an accumulation of warped iron and other debris from the mill was near the east entrance to the bridge—the sidewalk part of it. It could not be reached from the west because of a caving in of the earth. The scales east of the entrance a few feet, and which formed part of the street sidewalk, had been burned out—making a break in the walk on that side near the bridge. The steps from the street sidewalk on that side, and which were used to get upon the bridge level, had also been burned—that the perpendicular height there was near twenty inches, so that it required something of an effort to reach the place of danger for all of these reasons.

There was an electric light, if not on center of the bridge, not far from it, and elevated about fifteen feet above bridge. Mrs. Terrell, one of the ladies who was behind deceased, said

it was as light there (where the hole was) as electricity could make it. The light shone brightly on the bridge. Mr. Seasholes, from his window about 200 feet east of the bridge, by this light, saw deceased on the walk. He saw her stand and look for a moment, and then disappear.

Another witness said, she looked, and then walked on. All others avoided that part of the bridge. It was with some extra steps and inconvenience that she reached the fatal place. She was not in the exercise of ordinary care and prudence. The facts, about which there is no dispute, clearly established her negligence.

For this reason alone, we affirm the judgment.

C. A. Layton, *D. F. Mooney*, and *Armstrong & Johnson*, for Plaintiff in Error.

Solicitor *J. T. Schoonover*, and *J. H. Goeke*, for Defendant in Error.

(Sixth Circuit—Huron Co., O., Circuit Court—Jan'y. Term, 1898.)

Before King, Haynes & Parker, JJ.

HATTIE C. BOEHM v. C. W. YANQUELL et al.

Contract—Misunderstanding between parties—

When an alleged agreement was entered into by an honest misunderstanding and through a mutual mistake of the parties, there is no legal contract, and the remedy is to set it aside, and not to enforce it.

KING, J.

An action was brought in the common pleas court by C. W. Yanquell to recover against Fred. M. and Hattie C. Boehm the sum of $900.00, with interest from June 28, 1893, claimed to be due the plaintiff as the balance of the purchase price of certain real estate. The real estate in question was a mill and the land on which it is situated,

and about 1878 this mill property was owned by one Jacob Boehm, since deceased. In 1878 he sold an undivided one-half of the mill property to Yanquell for a consideration of $4050, of which consideration the purchaser paid $900.00 shortly after the purchase, and the balance, $3150, he did not pay; this was evidenced by five promissory notes of $630.00 each, and these notes were secured by mortgage upon the undivided half.

In March, 1893, Jacob Boehm died, and Yanquell, who then owed these notes, proposed to sell to the heirs of Jacob his undivided half of the mill, and it is claimed in the case that the proposition he made in that respect was accepted by the Boehms, and later, in June, 1893, the transfer was made. The consideration for the transfer is in dispute.

Yanquell claims that he proposed to convey his interest in the real estate for the amount which he had paid, $4050, and this sum was to be paid by a surender of the notes at their face value, $3150, disregarding the interest accrued, and a payment to him of $900.00 in cash. He made his proposition to Fred. Boehm. He claims that it was agreed that Fred. should convey his proposition to his sister Hattie, who lived six or seven miles away; that some time after he made the proposition Fred. returned and signified that his sister would accept it; that nothing more was said about it until the 26th day of June, when the parties met in the office of Judge Stickney at Norwalk to prepare the papers, and a deed was there drawn up which recites in the consideration clause, that "in consideration of the payment of $4050, paid by Hattie C. Boehm to Fred. M. Boehm, the receipt whereof is acknowledged, the grantor does convey, etc."; that the deed so made was executed by him and his wife and accepted and received by the defendants; that they turned over to him the notes in question, but did not pay him the $900.00, and he brings this action to recover that sum.

There are several objections to the charge of the court

and to the refusal to give certain requests, and the claim is urged that the verdict and judgment is not supported by sufficient evidence.

The plaintiff sought below to hold Hattie Boehm upon the claim that Fred. Boehm acted in the transaction as her agent, and the case was submitted to the jury upon that theory, and the jury instructed that they must find from the evidence that she had authorized her brother Fred. to act for her in the transaction. The plaintiff did not claim to have had any conference or conversation with Hattie or in her presence until the parties met to draw up the deed. On that occasion the plaintiff claims that Mr. Stickney prepared a deed; that he read or started to read the deed, and said that he had left the consideration blank, and inquired what sum should be put in; that plaintiff responded and said that he should put in the full amount, and thereupon he wrote in $4050 as the consideration, and the deed was then signed. The plaintiff does not say that Hattie said anything about it except by her silence to consent that the consideration clause should be filled out as suggested by the plaintiff. It is also claimed in argument that Hattie received the deed, had it put upon record, and that afterwards, perhaps after this action was commenced, she and her brother sold the property and received the proceeds of the sale, and that from this a ratification may be presumed.

We think the record is entirely barren of evidence tending to show that Hattie Boehm either authorized her brother to act for her as her agent, or that she at any time or in any manner assented to the proposition which the plaintiff claims he made for the purchase of this property, and we think that the acceptance of the deed and the benefits therefrom by Hattie Boehm do not amount to a ratification of the contract which the plaintiff claims was made and which the defendants deny, and that because of this, the verdict and judgment is unsupported by evidence against Hattie Boehm.

We also think in that condition of the record that the court should have given the seventh request made by the defendants, which was refused, to-wit: "There is no evidence in this case tending to prove that Fred. M. Boehm had any authority as the agent of Hattie Boehm, to make such an agreement with the plaintiff as is sued upon in this action." This is enough to say about the case as far as Hattie Boehm is concerned. So far as Fred. is concerned, some further observation should be made.

I have referred to the claim the plaintiff makes as to the transaction in Judge Stickney's office. On the part of Fred. he testifies in his own behalf that the proposition made by the plaintiff was that he would convey his interest in the property if the parties interested would surrender to him the five notes which they held as a part of the estate of Jacob Boehm, deceased. Fred. says that he carried that proposition at the plaintiff's request to his sister and to their mother, who was likewise interested in the estate, and who are the only ones interested, and they agreed to the surrender of the notes and that the plaintiff's interest in the mill should be conveyed to Hattie and Fred.; that he notified the plaintiff of their acceptance, and they met on the day above named at Judge Stickney's office. Fred., Hattie, and their mother all testify that Judge Stickney in referring to the consideration clause, said he had not filled it out, but that any sum would answer, a dollar or a thousand dollars or the amount in the old deed which he had before him and from which he had procured the description he inserted in the new deed; that no one made any reply, and Judge Stickney again inquired if they had any preference, saying that it made no difference what was inserted in that clause, and that the plaintiff then spoke up and said that he might as well put in the amount in the old deed, and that this accounts for writing in the sum of $4050.

The testimony of Judge Stickney, taken at a former trial,

was offered on this trial. He testifies that he was consulted by both Fred. Boehm and Yanquell some days before the 26th of June, about drawing up these papers, and that Yanquell had furnished him with his deed from Jacob Boehm, and he had written a new deed some days before the 26th; that he understood from both parties that the Boehm family was to cancel the notes and mortgage and deliver them up to Yanquell as the consideration for the property; that he wrote all of the deed except the consideration clause; that he began to read it when the parties were there upon the 26th, and when he reached the blank he said "here is a space to be filled in with the amount," but nobody said anything. "I said how much shall I put in? Nobody said anything, and I then remarked, you can put in one dollar, as the only point is to re-convey the title—you can put in one dollar or twenty dollars or a thousand dollars, or if you choose, you can put in the old price stated in the deed which would be $4050; but none said anything about it for a moment. Finally Mr. Yanquell speaks up to me and says, well, it will look better, I guess, and you had better put in the last sum—$4050. I then inserted the amount and that is the way that amount became inserted." He further testifies that after the papers were executed and delivered, the parties all left the office, but soon after Mr. Yanquell returned, closed the door behind him and said to him, "Stickney, I want to ask you a question; I am satisfied with all this business, but I want to ask you a question." I says, "What is it, Mr. Yanquell"? He says, "Can't I collect this $900 off from the estate of Boehm, now?" Says I, "Under the circumstances you can't collect it, for you have simply gone, under the transaction, and paid the debt that you owed to Mr. Boehm by cancelling the claim you had; but if you have made a contract with Fred., or with anybody that is responsible—have got a responsible contract—you can enforce that contract; I don't know whether you have

or not", but under the other circumstances, I said to him, "you can't collect the $900." Mr. Stickney testifies to some other conversation with Yanquell then, and the parties separated. On the way home Fred. Boehm went to the train with Yanquell, and Yanquell made some inquiry as to when Fred. would pay the $900.00. There is a dispute about what took place there. It is conceded, however, that Fred. said nothing indicating that he either understood what Yanquell wanted or whether he was going to pay it. The same afternoon at the mill Yanquell made his claim more specific, and Fred. then told him that he didn't owe him any $900.00, and was not going to pay anything. There is other evidence in the record but it is hardly material enough to justify reciting.

We have come to the conclusion that the clear weight of this evidence is with the defendant Fred. Boehm as to the contract for the sale of this land. But, if the testimony of Yanquell were believed and the testimony of Fred Boehm as to the proposition originally accepted, then there was a mistake; the minds of the parties did not meet in a valid contract, and having this idea in view, defendant asked the court to charge the jury as follows:

"9. If the contract which one party honestly and reasonably supposes he is making is essentially different from that which the other party at the same time honestly and reasonably supposes it to be, then there is a mutual mistake and no contract legally results, and the proper remedy is not to attempt to enforce the contract, but to have it set aside, and if you find such mistake of the parties to have happened in this case, your verdict must be for the defendants."

The court refused to give this, and to his refusal the defendanst excepted. We think in view of the evidence and the claim made by the defendants, that they were entitled to have this request given.

In view of what we have said with reference to the case

of Hattie Boehm, it is unnecessary to refer to the charge of the court, considerable of which is excepted to, but is disposed of by our holding that the court should have instructed the jury directly to return a verdict in her favor. We think that the verdict is not supported by sufficient evidence as to Fred. Boehm as well as Hattie, and for the refusal of the court to give the seventh and ninth requests not given, and for error in overruling the motion for a new trial on the ground that the verdict was not supported by sufficient evidence, we reverse the judgment and remand the cause for a new trial.

A question was urged upon the form of the verdict. We are satisfied the court below correctly disposed of that question, that the verdict as rendered by the jury contained sufficient to enable the court to ascertain its meaning and effect, and that a judgment was properly rendered against both defendants so far as the verdict itself is concerned.

G. T. & C. H. Stewart, and *A. E. Rowley*, for Plaintiff in Error.

Vickery Bros., for Defendant in Error.

(Sixth Circuit—Lucas Co., O., Circuit Court—Oct. Term, 1897.)

Before King, Haynes and Parker, JJ.

THE STATE OF OHIO ex rel. ALEXANDER BACKUS, ASSIGNEE in trust for the benefit of all the creditors of THE ABNER L. BACKUS & SON'S CO. v. IRWIN I. MILLARD, as Probate Judge of Lucas Co., Ohio,

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Order raising assignment and discharging assignee at assignee's request—Valid until set aside in proper proceeding, or reversed on error—Mandamus, when not proper remedy—

Where the Probate Court makes an order discharging an assignee for the benefit of creditors, at his own request and vacating the assignment, such order is binding on such assignee and on all parties having notice of such application, until set aside by proper proceeding or reversed on error. And when the assignee, after such discharge, comes into the Probate Court and asks that such order

of discharge be set aside and he be permitted to continue to act as assignee, and for leave to file an additional account and for an allowance for his expenses, which application and motion is refused by the Probate Court on the ground of want of further jurisdiction in the matter, such assignee can not petition the Circuit Court for a writ of mandamus to compel the Probate Court to entertain his said application, so long as the order of the Probate Court discharging the assignee remains in force and unreversed.

MANDAMUS.

HAYNES, J. (Orally.)

On the 20th day of August, 1897, there was filed in this court a petition for mandamus in this case. An application was made to one of the judges of this court for an alternative writ of mandamus, which was granted in due form, and thereupon the defendant, having entered his appearance by virtue of the statute, files a demurrer to this petition, thereby raising the question whether a writ of mandamus ought to be allowed in the case. He demurs upon the ground that the court has no jurisdiction of the subject of the action, and that the petition does not state facts sufficient to constitute a cause of action.

We have listened to the arguments of counsel, and have given this matter our attention, and are unanimously of the opinion that the demurrer should be sustained; and that for reasons which I will endeavor briefly to state.

The petition says that on the 10th day of June, 1893, relator was appointed assignee in trust for the benefit of all the creditors of said The Abner L. Backus & Son's Company, an insolvent corporation, and was duly qualified and entered upon the duties of his trust; that defendant Millard then was and still is probate judge of Lucas county, Ohio. He further says that on the 19th of August, 1893, the relator filed a paper writing in the probate court, of which the following is a copy:

"Now comes Alexander Backus, the duly appointed and qualified assignee of the Abner L. Backus & Son's Co., and

shows to the court that the following were at the time the assignee accepted the trust, the only creditors of said assignor, viz:"

Then it sets out quite a list of creditors, and among others it mentions Abner L. Backus, $35,093.64, and proceeds:

"That since said assignment has been made, all of the creditors except those hereinafter named have been paid in full, and no liability in their favor is now existing, as is shown by the vouchers and exhibits hereto attached, and join the assignee in the request to this court that the trust may be vacated, the assignee discharged, and he and his sureties released from further liability on account of their prior existing claims. That the following named persons and firms, creditors of said assignor, to-wit: Houck & Jones, Centerville, Indiana; Vernon & Moss, Anderson, Indiana; Weckizer & Boggs, Argos, Indiana; Fowler, Harpster & Smith, Harpster, Ohio; have been notified by the assignee that he is ready and able to pay to them in full the respective amounts with interest, but they have hitherto failed to present any claim against the assignor or receive or receipt for the payment thereof to the assignee. He further shows he has paid all costs and expenses of administering the trust. Wherefore the undersigned asks that he be discharged from the further duties of his trust; that he be allowed to deposit for the benefit of said last named creditors of The Abner L. Backus & Son's Co. the amount now due to them, or that he be allowed to retain in his hands the said amounts due respectively to each of said creditors and give undertaking in such amounts as this court may designate until such time as they, said creditors, are willing and ready to accept payment thereof; and thereupon he may be released and discharged as such assignee; his bond heretofore filed in this court be cancelled, or make such other and further orders as the court may deem right and proper in the premises."

To that he makes oath. On the same day, to-wit: August 9th, the probate court made an order of which the following is a copy:

In the Probate Court of Lucas county, Ohio.

Ex parte the assignment for the benefit of creditors of The Abner L. Backus & Son's Company.

"This day came Alexander L. Backus, the duly appoint-

ed and qualified assignee of said The Abner L. Backus & Son's Co. and filed a statement of the credits and liabilities of said company at the date of said assignment, and submitted proof that said creditors, except those of them hereinafter named, had been paid in full; that no liability of said corporation in their favor now exists, and that they join said assignee in asking his discharge from said trust, and also that the following named creditors of said corporation, to-wit: Houck & Jones, Vernon & Moss, Weckizer & Boggs, and Fowler, Harpster & Smith, have presented no claim for their respective demands, but that said assignee has in his hands sufficient funds to pay the same; that said assignee has submitted proof that it would be manifestly just and to the interest of the assignor that he be released from the further administration of said trust; and the court being now fully advised in the premises, it is hereby ordered, all of the creditors, except those as above named, in open court consenting thereto, that said trust be vacated and the assignee released and discharged from further liabilities by reason of his trust; upon condition, however, that said Alexander Bakcus file forthwith a new undertaking in the sum of $2500, payable to the state of Ohio, for the use of the unpaid creditors of said Abner L. Backus & Son's Company, conditioned that he will, on demand, pay all unliquidated claims of said corporation. And said Alexander Backus having filed said bond, which is hereby approved, he is hereby discharged from said trust as assignee of Abner L. Backus & Son's Company; ordered that he pay the costs, taxed at $———."

It is claimed that this order is void, for the reason that all of the creditors of the Abner L. Backus & Son's Company did not join in the petition or consent to the cancellation of the assignment. We do not come to that conclusion; nor do we think that the case cited of Garver v. Tisinger, found in 46 Ohio St. 56, requires us to come to that.

The petition recites that at the time the order was made, to-wit: August 19th, 1893—

"No notice of any kind, either personal, by publication or otherwise, was given the assignor The Abner L. Backus

& Son's Company of the filing or pendency of said paper writing by said relator, as such assignee, or of the time of hearing of any matter pertaining to said assignment of any nature whatever; that at the time of the making of said order by said probate court (the order of date August 9th, 1893), the said assignor, The Abner L. Backus & Son's Company, was not present in said court, nor was any one authorized to act for it present in said court; and the said assignor, The Abner L. Bakcus & Son's Company, did not consent to said order of August 19th, 1893, and the said assignor, The Abner L. Backus & Son's Company, had no knowledge of said order of August 19th, 1893, until long after said order was made and entered. That at the time of the making of said order by said probate court (the order of date August 19th, 1893), the following named co-partnership firms were creditors of said assignor The Abner L. Backus & Son's Company, in the sums set opposite their respective names, as follows: (Naming the four firms already referred to). That neither of the above named creditors were present in said court, nor was anyone authorized to act for them or either of them present in said court at the time of making said order of date August 19th, 1893; and the said above named creditors, or either of them, did not consent to said order of August 19th, 1893, and the said above named creditors had no knowledge of said order of August 19th, 1893, until long after such order was made and entered."

We are proceeding now upon the relation of the assignee. The assignee is asking that this order of August 19th, 1893, be treated as a nullity, and that it be declared by the probate court and recognized by this court that the assignment had not been terminated or cancelled, and to declare that he to all intents and purposes is as much the assignee to-day of the corporation as he was at the time the assignment was made and he accepted the trust. It will be noticed that there is in this case a very full finding that all the creditors except these four have been paid; that all of the reditors except these four have asked that the assignment be cancelled and ended; and that all the creditors except these

four were present, and in open court consenting thereto, and an order was made that the trust be cancelled, and that the assignee should give bond for the use of these unpaid creditors, and that he did file such bond, and it was ordered that he be discharged.

So far as the bond is concerned, we think the true construction of this order is this: on the application simply to discharge the assignee from his trust, it is shown that all the creditors except four have been paid, and the object and purpose of giving that bond was to secure these four creditors if the bond of the assignee should be cancelled The language of the order is as follows:

"That said trust be vacated, and the assignee released and discharged from further liabilities by reason of his trust; upon condition, however, that said Alexander Backus file forthwith a new undertaking, etc"

We take it that the assignee was discharged The intention of the court was to discharge him. The only thing that the court was undertaking to do was, if it made a cancellation of the bond, to secure the creditors who had claims or accounts against the estate; and thereupon the order provides that as a condition of that cancellation a new bond be given to take the place of the other. The clear effect of that is to discharge the assignee, without reference to the fact whether he gave a bond or not.

We think, therefore, that that order must be held to be a valid and binding order, except as to these four parties that I have mentioned, and they are not here making any complaint. Indeed, so far as appears by the record, the assignee has in his hands the money necessary to pay these four persons, and they have not made any claim for it, or called upon him for it in any manner or form, although they have been notified by him that he has the money for them, and is ready to pay it over to them.

That order stood unchallenged up to the filing of this

petition, except by certain proceedings which are recited in this petition as follows:

"That on the 19th day of May, 1894, one Abner L. Backus, who was at the date of said assignment and still is a large creditor of the said assignor, filed in said probate court a paper writing of which the following is a copy:

"And now comes Abner L. Backus, a stockholder in and a creditor of said company, and moves the court to vacate the conditional order of the court to discharge the assignee from the further administration of said trust, for the following reasons, viz:

"1. That the order of the court that said assignee give a new bond has not been complied with.

"2 That it is not true that the new undertaking to be given by the assignee was in fact given and approved by the court.

"3. That the assignee has, through a misunderstanding, misinformation, and mistake, reported to the court that all of the creditors of the insolvent corporation, except four, had been fully paid, and had given their consent to the discharge of said assignee, which was not true in fact, for that the undersigned and three others had not been paid in full, and had not given their consent.

"4. That there are now actions pending in the court of common pleas in and for Lucas county, Ohio, against the said Abner L. Backus & Son's Company, in which said corporation may be adjudged to pay large amounts, and the stockholders ultimately made liable therefor.

"5. That the undersigned is one of the largest creditors of said insolvent corporation whose claim is wholly unpaid.

"Abner L. Backus,
by L. H. Pike, his atty.

"I hereby enter my appearance and consent to the immediate hearing and disposition of the within motion, by the court.

"May 19th, 1894. Alexander Backus,
"Assignee of A. L. Backus & Son's Co.,
"by L. H. Pike, his atty."

That on the same day, to-wit. May 19th, 1894, the probate court of said county made an order which was duly entered upon the journals of said court of said date, of which the following is a copy:

"In the Probate Court of Lucas county, Ohio.

"Ex parte The assignment of J. E. May 19th, 1894.
The Abner L. Backus &
Son's Company.

"This day this cause came on further to be heard on the motion of Abner L. Backus to vacate the conditional order heretofore made by this court to discharge the assignee from his trust, and the assignee in open court consenting thereto, and the court after hearing the evidence being fully advised in the premises, does find:

"That the order heretofore made that said assignee Alexander Backus give a further bond in the sum of $2500 before being discharged had not been complied with; that the journal entry reciting that the bond was given or approved was a mistake of the clerk of the court; that the assignee had through a misunderstanding and misinformation reported to the court that all of the creditors of said corporation, except four named in the report, and for whom he had a sufficient amount of money in his hands to pay them in full, had consented to the discharge, when in fact there were other creditors of said firm unpaid who had not given their consent to the vacation of the trust and the discharge of the assignee, and that the order was improperly obtained; and that said assignee still has in his possession money belonging to said insolvent estate, and that there are assets which he has not yet distributed; that Abner L. Backus, the party moving to vacate the order, is a creditor of and stockholder in the company, and has an interest in the proper administration of said trust; and that said order for discharge being conditional on the proper performance by said assignee of the condition affirmed by the court, which order was not complied with by said assignee, and has not since been so complied with.

"It is therefore ordered and adjudged by the court that the conditional order heretofore made to discharge the assignee be vacated, set aside and held for naught, and that said Alexander Backus, assignee as aforesaid, proceed to discharge the duties as assignee, and administer the trust according to law."

It will be observed that this order was granted upon the application of Abner L. Backus, with the consent of the

assignee, Alexander Backus, and without any notice of any kind, so far as the record shows, to the assignor. The petition now proceeds:

"That at the time and prior to the making of said order by said probate court, to-wit: the order of date May 19th, 1894, no notice of any kind, either personal, by publication or otherwise, was given the assignor, the Abner L. Backus & Son's Company, of the filing or pendency of said paper writing by said Abner L. Backus, or of the time of the hearing of said paper writing filed by said Abner L. Backus; neither did the said assignor, The Abner L. Backus & Son's Company, have any knowledge of the hearing of said paper writing filed as aforesaid. That after the order of date May 19th, 1894, was so made and entered as aforesaid, said relator, as such assignee, further performed duties that were necessary in the execution of said trust in good faith; and in the further performance of said duties incurred and paid expenses that are properly chargeable to said trust. That on the 3d day of October, 1895, your relator, as such assignee, filed in the probate court of said county a paper writing of which the following is a copy:

"To the Probate Court of Lucas county, Ohio:

"Ex parte the assignment of
The Abner L. Backus & Son's Company. Second Report.

"The undersigned assignee respectfully represents that it will appear from the previous report of the assignee and other files in this cause that there was at the date of the last report in the hands of the assignee an amount sufficient to satisfy the respective claims of four of the creditors of said insolvent corporation not yet proven and presented, and a large amount of assets in possession of one Samuel L. Backus, belonging to said corporation and this assignee respectively. The late Abner L. Backus, now deceased, was a creditor of said insolvent corporation on whose motion this order discharging the assignee was vacated. But by the last will and testament of said Abner L. Backus, deceased, it is provided that his interest in the assets of The Abner L. Backus & Son's Company shall go, and is bequeathed, to said Samuel R. Backus on condition that said Samuel R

Backus execute to the executors of said last will a bond in a sufficient amount to hold the estate of the deceased harmless from any liability by reason of the interest of Abner L. Backus in said insolvent corporation.

"Immediately after receiving notice from this court that this assignee should make a further or final report as such assignee, he gave notice to said Samuel R. Backus, that he should either execute the required bond to the executors, or hand over the assets in his possession to the assignee. But said Samuel R. Backus refuses to comply with this demand in any manner or form, but threatens to bring an action against the undersigned for failure to pay over to him the assets now remaining in the hands of this assignee; or it may become necessary that the assignee bring the proper action against Samuel R. Backus for the recovery of the property belonging to the estate in his hands. Wherefore the undersigned asks for an order further extending the time to make a final report of his trust.

"Alexander Backus,

"Assignee of Abner L. Backus & Son's Company."

That upon the hearing of said paper writing said probate court of said county made and entered upon the journals a finding and order of which the following is a copy:

"On December 10, 1895, came on for hearing said application of Alexander Backus, the former assignee herein, asking for further time in which to file his final account. Thereupon the court carefully examined the application, and also carefully examined the proceedings of this court heretofore had herein, together with its several orders as appears from the journal of this court; and the court being fully advised in the premises finds and orders as follows:

"1. That said Alexander Backus, upon qualifying as assignee herein, gave notice of his appointment as such assignee, as required by law, by publishing notice of said appointment for three consecutive weeks, on the same day of the week, in the Toledo Bee, a newspaper published and of general circulation in Lucas county, Ohio; due proof of said publication of notice having heretofore been filed in this court, the same is approved and confirmed.

"2. That said Alexander Backus, as assignee, was on

the 19th day of August, 1893, discharged as assignee herein, and said The Abner L. Backus & Son's Company was thereby released and discharged from under its said assignment, upon condition that the said assignee give a bond in the amount of $2500 for the benefit of certain creditors, the money to pay whom the assignee retained in his possession, and which bond the court approved.

"3. That the order upon the journal of this court granting the application of Abner L. Backus, under date of May 19, 1894, was made without any notice whatever having been given to the said The Abner L. Backus & Son's Company, and the order that the assignee proceed to administer his trust as assignee is therefore void.

"4. The court therefore finds that said Alexander Backus, by reason of the discharge aforesaid, ceased to be the assignee of said The Abner L. Backus & Son's Company, on the 19th day of August, 1893, and that he has at no time since said date, and is not now the assignee of said The Abner L. Backus & Son's Company.

"5. It is therefore ordered by the court that said application of said Alexander Backus for leave for further time in which to file his final account, be and the same hereby is ovreruled and disallowed.

"Thereupon said Alexander Backus gave notice of his intention to appeal this cause to the common pleas court, and also duly excepted to the ruling of each of the above findings and orders herein."

"That on the 8th day of July, 1896, your relator, as such assignee, filed in the probate court of said county a paper writing of which the following is a copy:

"The undersigned assignee respectfully represents that his former report, dated August 19, 1893, made within seventy days after he had qualified as such assignee, was neither complete or entirely accurate, and it would further appear from the records of this court in this case that there was never filed a complete list of the liabilities or assets of the assignment, nor was an inventory and appraisement ordered and made, because, as will hereafter appear, the large majority of the claims against said estate were liquidated within 70 days, but owing to the fact that the books and papers of The Abner L. Backus & Son's Company, pertaining to its assignment, being as far as the assignee is now aware in

the possession of Samuel R. Backus, at the date of the assignment, the vice-president of said corporation, and that Edwin Parsons, then the secretary and a director of said assignor, acting during the first ninety days after I qualified as my clerk, I am now unable to make an absolutely complete report of my transactions and proceedings, said books and papers still being in the possession of the above named persons, notwithstanding I have made of the Abner L. Backus & Son's Company, repeated demands for such books and papers.

"The following is a more complete statement of the liabilities of said assignor:

The Second National Bank of Toledo, Ohio,	$150,000.00
The Union Railroad Elevator & Trans. Co.	50,177.84
Rice, Quimby & Co.,	67,525.00
Abner L. Backus,	35,093.64
Hauck & Jones,	400.14
Vernon & Moss,	125.12
Weckizer & Boggs,	5220.24
Fowler, Harpster & Smith,	201.59

"The last four of the above named claims have never been presented to this assignee, and no payment has been made by him thereon. The claim of Abner L. Backus, now deceased, and represented by his executors, Edwin Jackson and Alexander Backus, is still entirely unpaid. All other claims above stated and a number of others which cannot be named, for the reason already stated, are all paid and liquidated in full."

He then sets out some matters in relation to accounts that were given to secure some claims to the Second National Bank, etc., that perhaps are not relevant here, and then sets up some costs and expenses as having been made, and says he is still further indebted to his attorney, and so on. And thereupon on August 17, he filed the following motion or paper:

"Now comes Alexander Backus, assignee, and moves the court to set for hearing his second partial account of said assignment, and order publication of notice according to law of the filing and hearing of said account, filed July 8, 1896.

2. And said assignee further moves the court to approve said account, and to make an allowance for his services and disbursements as assignee."

He says:

"That on the 27th day of August, 1896, the said probate court of said county, acting upon paper writings of your relator, as such assignee, made and entered upon the journal of said court an order of which the following is a copy:

"Now, on this 27th day of August, 1896, came on to be heard the motion of Alexander Backus, filed on August 17, 1896, which is hereto attached, marked Exhibit A, to set the time for hearing of the second partial account of said Alexander Backus, as assignee of The Abner L. Backus & Son's Company, and publish notice of the filing and hearing of said account, marked Exhibit B, hereto attached and made a part of this entry, and also the motion of said assignee to approve the account and make him an allowance for his disbursements and services as such assignee. The Abner L. Backus & Son's Company did not appear. The court being now fully advised in the premises, denied said motion and refused to fix the time for the hearing of said partial account, and refused to order a publication of a notice for the hearing of said account, and also denied the motion to approve his accounts for disbursements and to make an allowance for commissions or other compensation or for his services as assignee, for the reason that this court has no jurisdiction of the parties, or of the subject matter; to all of which rulings of the court said Alexander Backus, assignee as aforesaid, then and there excepted. And thereupon said Alexander Backus, as assignee, gave also notice of his intention to appeal this cause to the court of common pleas in and for Lucas county, and the court being of the opinion that said assignee was discharged and the trust had terminated, and that it had no jurisdiction as aforesaid, at the request of said Alexander Backus, ordered that said Alexander Backus, assignee, give a bond of $200, to perfect such appeal, in case he is entitled to an appeal, to which rulings and orders said Alexander Backus also, then and there excepted."

The petition further sets forth, that Abner L. Backus

has departed this life, and that Edwin Jackson and Alexander Backus were appointed and qualified as executors of his last will, and that on said 27th day of August, the following paper was filed in said court:

"And now comes Alexander Backus and Edwin Jackson, the duly appointed, qualified, and now acting executors of the last will and testament of Abner L. Backus, late of Lucas county, aforesaid, deceased, and respectfully represent that the said estate of Abner L. Backus is a creditor of said assignor in the sum of $35,093.64, which said claim has heretofore been duly allowed by the assignee of the said The Abner L. Backus & Son's Co., as a valid claim against the estate of said company; that said claim remains and is now unpaid and unsatisfied; that said assignee has never filed any account of his administration of said trust; that he now has money of said company in his hands aggregating upwards of $1038.99, which are subject to distribution among the creditors of said estate; that there are also further valuable assets belonging to said estate which said assignee has failed to collect and convert into money.

"Wherefore, said executors pray that said assignee may be ordered to file his account herein, to collect all outstanding assets belonging to said estate, that a dividend may be duly declared by this court and payment thereof ordered made to said executors upon their said claim herein, and for all other and proper relief.

"Alexander Backus and Edwin Jackson,

"By George H. Beckwith their attorney.

"That on said 27th day of August, 1896, the said probate court of said county, acting upon the paper writing filed by said executors, made and entered upon the journals of said court an order of which the following is a copy:

"And thereupon on said 27th day of August, 1968, there came also to be heard the motion filed by Edwin Jackson and Alexander Backus, deceased, said motion hereto attached and made a part hereof, marked Exhibit C, to order Alexander Backus, assignee of Abner L. Backus Son's Company, to file his account, collect all outstanding assets belonging to the estate of assignor, that this court might declare a dividend and order payment to be made to said executors of said estate of Abner L. Backus, deceased, a cred-

itor of the assignor whose claim was allowed and wholly unpaid, and the court being fully advised in the premises denied the motion of said executors and refused to make the order prayed for, or to make any order in the premises, on the ground that said assignee was discharged, and that this court had no jurisdiction as aforesaid; to all of which rulings and orders of the court said executors then and there in due time excepted, and also gave notice of their intention to appeal from said order of this court to the court of common pleas of Lucas county, and said executors not having given bonds as executors, they are required to give a bond in the sum of $200, to perfect their appeal in case they are entitled to an appeal."

It is said that this order and all of the orders hereinbefore recited appear upon the journals of the probate court, and that no other orders or journal entries were made in said matters. And the relator prays:

"That an alternative writ of mandamus be allowed and issued against said defendant, Irwin I. Millard, as probate judge of Lucas county, Ohio, requiring him as such judge and said probate court, to proceed with the filing, publication, and hearing of the accounts of your relator as assignee in trust for the benefit of all the creditors of The Abner L. Backus & Son's Company; and that said defendant, Irwin I. Millard, as probate judge of Lucas county, Ohio, and said probate court, be required to proceed with the settlement of said trust under the provisions of the statutes in such cases made and provided, the order of said probate court of date August 19, 1893, to the contrary notwithstanding; and that upon the final hearing hereof, a peremptory writ of mandamus to be awarded to the same end and object; and that relator further have his costs and all other relief."

I have already stated the views of the court in regard to that first order of August 19, 1893. That order stands as an order of court, and can only be attacked by parties who desire to attack it, and who were made parties, or who are reported to be parties, in the manner pointed out by law. We take it that the finding of the court that these creditors

were present in court asking for this relief, shows that the parties were present, and is binding upon them until that is set aside by the court in which the order was made. It certainly is binding upon the assignee, who is the relator herein, and upon whose motion an application to allow those orders was made. Abner L. Backus did appear in person in court and filed a motion, or an application, whatever it was, to set aside a former order. That he might well do under the provisions of the statutes of this state providing in what manner and form the judgments of a court may be set aside at terms after the orders and judgments have been made. There are statutes which make such provisions, which are applicable to proceedings in the probate court. But the assignee having been discharged, being out of court, and the assignor by virtue of that order being entitled to proceed to transact business, these proceedings did not dissolve the corporation; it was entitled to be heard upon this application of Abner L. Backus, and the record is entirely silent as to whether or not they were made parties. It nowhere shows in the orders of the court that they were parties, or were present in any way consenting. The allegations of the petition are, that in fact they never were present, and never were served with notice. The order that was made upon them, being made with the consent of the assignee and of Abner L. Backus, was held by the probate court in proceedings afterwards to be void. It certainly was void as against The Abner L. Backus & Son's Co. They never were made parties to it in any manner or form. And the orders which I have read that were made by the probate court in regard to the application of the assignee to have a hearing upon the accounts which he had filed, and to have an allowance to him of certain expenses, and the approval of his action as assignee and his discharge, stand today in that court unreversed and in full force.

The object of this mandamus, as I have said, is to compel the probate court to disregard these orders, and to proceed to hear that account. And it is claimed that mandamus is the proper remedy in that behalf. It is well established that a writ of mandamus will not issue where the party who seeks relief has an adequate remedy at law. We are of the opinion that these orders that were made are so far final orders in the proceedings in this case, that they are subject to be either affirmed or reversed upon the filing of a petition in error by the party who deems himself aggrieved thereby; that is to say, that the assignee, or the executors of Abner L. Backus could, as to the orders made to them respectively, have filed a petition in error to reverse those orders; that until they are reversed they stand binding and conclusive upon the parties; and that the party in making this application is in fact asking us to do that by a petition in mandamus which ought to be done by the proper court upon petition in error; that is to say, they ask us to try these matters, and to declare them nullities, and to proceed regardless of them to order, direct, and compel the probate court to act in this matter.

These are all the reasons that I desire to give why we sustain the demurrer, and why we shall order a dismissal of the petition. There are other reasons apparent upon the face of the record that might be mentioned, but of course, it is not necessary to state them at the present time.

L. H. Pike, and *H. W. Seney* for Relator.

King & Tracy, for Defendant.

State ex rel. Meader et al. v. Sullivan et al.

(First Circuit Hamilton Co., O., Circuit Court, Oct. Term, 1897.)

Before Cox, Smith and Swing, JJ.

THE STATE OF OHIO EX REL. MEADER, et al. v. JOHN J. SULLIVAN, JOHN ZUMSTEIN, LEWIS WERNER AND GEORGE MORTIMER ROE.*

Quo warranto—Prosecuting Attorney need not verify petition, nor give security for costs—

1. Where the Prosecuting Attorney has filed, by leave of the court, a proceeding in quo warranto, on the relation of other persons, challenging the right of several persons, claimed to unlawfully hold and who were usurping the rights, privileges and functions of certain public offices, such petition need not be verified, and security for costs need not be given.

Same—Demurrer to petition—What grounds insufficient—

2. The petition in this case is not subject to a demurrer on the grounds, 1st, that the plaintiff has not capacity to sue; or 2nd, that there is a misjoinder of parties plaintiff; or 3rd, because there is a defect of parties plaintiff; or 4th, because there is a defect of parties defendant; or 5th, because several causes of action, and separate causes of action against several defendants are improperly joined; or 6th, because the petition does not state facts sufficient to establish a cause of action.

Same—Joint proceeding against several defendants—

3. If it had appeared on the face of the petition, what seems to be conceded as true, that separate charges were brought against each of these defendants, and a separate trial had and a separate judgment of removal in each case, the demurrer would be sustained on the 5th ground set up, viz: that several causes of action, and separate causes of action against several defendants are improperly joined. In such case there could not properly be a joint proceeding against all.

QUO WARRANTO.

SMITH, J.

On the 30th of November, 1897, John C. Schwartz, the prosecuting attorney of this county, having obtained the leave of this court to do so, filed his petition in this case, stating that he, said Schwartz, prosecuting attorney for Hamilton county, on the relation of J. F. Meader, and

(*For the decision of this case on the merits, see 15 C. C. 333.)

Harry Haacke, E. G. Schreifer and Samuel A. Miller, brings this action on behalf of the state of Ohio, and informs the court (in substance), that on September 22, 1897, Gustavus Tafel, then duly acting as the mayor of the city of Cincinnati, by virtue of the power vested in him by sec. 2690m, Revised Statutes, did remove, upon charges preferred before him, and a full hearing of the same, the said four defendants from their offices as members of the board of supervisors of said city, and did thereupon appoint to fill the vacancy in the unexpired term of said defendants, caused by their said removal, Henry Haacke to fill the unexpired term of said Sullivan; E. G. Schreifer to fill the unexpired term of Louis Werner, and S. A. Miller to fill the unexpired term of said Roe. That they qualified as such members of said board of supervisors, and having the legal title to said offices and the legal right to the possession of the property belonging thereto, demanded possession of t' e place of meeting, books and other property used in the transaction of the business of said board, but the defendants refused, and still do refuse to surrender possession of said property, and unlawfully, without title or right thereto, retain possession of the same, and unlawfully hold the same and pretend to exercise the right to act as members of the said board of supervisors and transact the business belonging to said board. That the defendants did, and each of them have, since the 22nd day of September, 1897, and do now, usurp the office of members of the said board of supervisors, and unlawfully hold the same, and have and do usurp the rights, privileges and functions of such office, to the great prejudice and damage of the state of Ohio and the city of Cincinnati.

Wherefore the said prosecuting attorney prays the advice and judgment of the court in the premises, and due process of law against the said defendants; that they be required to answer to the state of Ohio by what warrant they claim to have, use and enjoy the liberties, privileges

and franchises as aforesaid of members of the said board of supervisors of the city of Cincinnati, and that they be ousted therefrom, and for all proper relief.

This petition was signed by Mr. Schwartz, as the prosecuting attorney of the county of Hamilton, but not verified.

One of the defendants, Mr. Roe, filed a motion to strike the petition from the files and to dismiss the action for the following reasons: 1st. That the petition was not verified as required by secs. 5102 and 213, Revised Statutes; and 2nd., Because neither of the relators, or any one on their behalf, has given security for costs as required by sec. 6764, Revised Statutes.

Louis Werner and John Zumstein file separate demurrers to the petition, stating these grounds:

1st. Because the plaintiff has not legal capacity to sue. 2nd. Because there is a misjoinder of parties plaintiff. 3rd. Because there is a defect of parties plaintiff. 4th. Because there is a defect of parties defendant. 5th. Because several causes of action, and separate causes of action against several defendants are improperly joined; and 6th. Because the petition does not state facts sufficient to constitute a cause of action.

We have heard the arguments of counsel on the questions raised by the motion and demurrer, and state our conclusions as to these questions.

And first, as to those raised by the motion.

The action is one brought by the state of Ohio, by the prosecuting attorney of the county, duly authorized by law to bring the same. Sec. 213, Revised Statutes, provides, that "no undertaking or security is required on behalf of the state, or of any officer thereof in the prosecution or defense of any action, writ or proceeding. Nor is it necessary to verify the pleadings on the part of the state, or any officer thereof in any such action, writ on proceedings." Sec. 6762, under the provisions of the statute as to Quo Warranto pro-

ceedings, says, that the prosecuting attorney is authorized to bring such action when he has good reason to believe that it can be established by proof. By sec. 6763, he may bring such action upon his own relation, or on leave of the court, (which was given here), on the relation of another. And in an action like this, he may require security for costs to be given as in other cases, but is not bound to do so. Where the action is brought by a private person claiming to be entitled to a public office unlawfully held by another, he may by himself, or an attorney at law bring such an action upon giving security for costs. Sec. 6764. This is not such an action. The motion is therefore overruled.

Second. As to the demurrer, we hold 1st. That the plaintiff in this case, (the state of Ohio), has the legal capacity to sue. 2nd. That there is but one plaintiff (the state), and therefore that there is no misjoinder of parties plaintiff. 3rd. That there is no defect of parties plaintiff. 4th. That there is no defect of parties defendant. 5th. That several causes of action are not improperly joined. There is but one cause of action.

6th. As to the 6th ground, included in the fifth, viz., that separate causes of action against several defendants are improperly joined, there is much more difficulty. We have no hesitation in saying that as at present advised, if the facts in this case as stated, and as we understand conceded to be true, appeared on the face of the petition, we would hold that there would appear to be separate causes of action against each one of these defendants, and therefore, that they were improperly joined in one action, and that the demurrer would have to be sustained, as the statute, sec. 5062, makes this a good ground of demurrer to a petition. It is evident from these statements of counsel, and which facts do not appear on the face of the petition, that separate charges were brought against each of these defendants—that a separate trial was had in each case, and as a necessary

consequence, different evidence in each, and a separate judgment of removal in each case. It can not be, we suppose, that there was any necessary connection between the case of one of these defendants and that of either of the others. There was no common bond of union between them, and each of them must stand on his own footing, and that it is not allowable to permit one defendant to be joined in and burdened with the costs and expenses of a litigation as to the right of one or more other persons to an office, when in law the result of such litigation can not affect him—however much personal interest he may feel therein.

Of course, we recognize the law to be that if all the persons whose right to hold office is in controversy, stand in the same position, as for instance, where they claim to hold by virtue of a statute the validity or constitutionality of which is denied or contradicted, the reasons urged would not apply, and we think the authorities are that in such case, all may be made defendants to one quo warranto proceeding. But in a case where it appeared that separate proceedings were had against each to remove him, and on grounds pertinent to each, and there were several judgments, in our opinion, there could not be a joint proceeding against all.

But on the allegations of this petition, we do not see that this question is properly prosecuted for decision. As we understand it, the pleadings in quo warranto cases are peculiar—such was the case before the comparatively recent amendment of our code of civil procedure brought them within its provisions, and this court held several years ago, in a case reported in 13 C. C. Rep., 379, that the effect of this, was not substantially to change the character of the pleadings. Our recollection of the law is, that according to the old system, it was not necessary where the state challenged the right of a person to hold a public office, that there should be any great particularity in the statements of the petition in quo warranto. That all that was essential

was that the plaintiff should allege that the defendant was unlawfully usurping a certain office, and call upon him to answer by what warrant he claims the right to do so. If this be so still, and we incline to the opinion that it is, this petition is sufficient to require the defendants to file their answer and show their right, and upon this an issue can be raised by reply or demurrer. On these grounds therefore, we hold that the demurrers are not well taken, and they will be overruled; but if we are right in the suggestions before made, as to the real facts being that there are separate causes of action against the several defendants, and that this would appear from the answer filed, it would seem advisable that separate proceedings be had against the several defendants, in the first instance.

S. N. Maxwell, and *Mr. Follett*, for Relator.

E. W. Kittredge, and *W. M. Ampt*, for Defendants.

(Sixth Circuit—Lucas Co., O., Circuit Court—Jan. Term, 1898.)

Before King, Haynes and Parker, JJ.

NICHOLAS BURCH v. THE TOLEDO PLOW COMPANY.

Sale of business—Right of purchaser to trade-mark subsequently adopted by vendor—

1. B. sold to C. certain specific property together with certain existing patents, and agreed that C. should have the right to use any future patents in its shop that B. might obtain; afterwards B. procured a patent upon a new invention of his own, and entered into the manufacture of the newly patented article on his account, and adopted and placed on his product a trade mark which he used for several years when C. adopted and used the same trade mark on its product. Held: That in an action by B. to enjoin C. from using such trade mark, it is not a defense to show that B., at the time of such sale or subsequently, had also agreed that he would not engage in the manufacture of the same or similar articles.

Same—

2. That while C. might have acquired the right to use B's. new patent in its shop, it had not acquired the right to B's. future trade marks.

Same—Proper remedy for breach of contract not to manufacture—

3. That if B. had violated his agreement not to manufacture, C's. remedy was by an action brought either to enjoin such work, or for damages.

4. Whether such contract not to thereafter manufacture, unlimited as to duration or place, would be enforcible. either at law or in equity, is not decided.

Error to the Court of Common Pleas of Lucas county.

KING, J.

In this case a petition was filed in the court of common pleas of this county, to enjoin the defendant from the use of a trade-mark, consisting of the words "The New Burch" together with the figures "21" and "22" used upon plows, the former number indicating a right-hand plow, and the latter a left-hand plow.

It is alleged in the petition that the plaintiff was engaged in the manufacture of plows, at Crestline, Ohio. That in 1887, he adopted this name and these numbers, and marked them upon the plows of his production, and sold them through the country wherever he could find buyers. In 1897, the defendant, The Toledo Plow Company, began to use this name which plaintiff had so adopted, upon its products.

Some of these allegations are denied in the answer; and the answer alleges, substantially, this state of facts: that in September, 1883, the plaintiff alone, was engaged in the manufacture of plows at West Toledo; that in that month three gentlemen here entered into a partnership with him buying one half-interest in the business—in the factory, the land upon which it was situated, the machinery, tools, patterns and patents, and everything owned by the plaintiff and used by him; that they paid to him for that, the sum of

$10,000; that also, a little later—in January, 1884—these parties organized a corporation, known as The Toledo Plow Company, and took stock therein, the plaintiff being a stockholder and an officer thereof. This new corporation purchased from the firm of which plaintiff was a member, all of its machinery, patterns, tools, patents, stock and real estate, the resolution to that effect being attached to the answer. That afterwards the plaintiff sold his shares of stock to private individuals, and that they were persons interested in the corporation and owners of stock therein. "That at the time the plaintiff sold his interest in said business as aforesaid, he entered into a verbal agreement with the persons purchasing his shares of the capital stock of said company, who then constituted all of the holders of the capital stock of said company, whereby the plaintiff undertook and agreed that he would not thereafter enter into the business of manufacturing plows. The defendant says that shortly thereafter, the plaintiff began and has since continued the manufacture of plows at Crestline, Ohio. The defendant says that the said plaintiff at the time of his manufacturing plows at West Toledo, named the plows so manufactured the "Burch Plow," and thereafter the said partnership, and subsequently the said defendant corporation, continued the use of said name more or less in the manufacture of plows, with designated numbers therefor. That about the year 1887, the plaintiff procured another patent, as an improvement upon the Burch plow, previously manufactured by the plaintiff and the defendant, and thereupon called the same "The New Burch," the right-hand plow being numbered 21, and the left-hand plow being numbered 22. The defendant says that the said The New Burch, numbered 22, differed only from the previous Burch plow manufactured by the defendant and numbered from 1½ to 20, in the use of the device covered by the said new patent, and that in no other substantial respect was the

said New Burch different from, or a change in the plow previously manufactured. The defendant says, that under the terms of the original agreement, as shown by said Exhibit "A," the said defendant had a shop-right to manufacture the said New Burch, and use the patented device acquired and used by the plaintiff as aforesaid." And defendant admits that prior to the time of the filing of the petition of plaintiff, it had manufactured and sold plows and marked the same "The New Burch," numbered "21," as alleged.

"Exhibit A," referred to above, is as follows:

"Toledo, O., Sept. 22d, 1883.

"F. D. Suydam, John C. Clarke & Horace M. Wright.

"Gentlemen:—I will sell you one-half of my plow factory, including the land on which it is situated, machinery, tools, patterns and patents and everything pertaining and relating to the manufacture of plows, for the sum of ten thousand dollars. Then form a partnership with you in which I will represent one-half, and you the balance. Then I will sell the firm my manufactured plows at 50 per cent. discount off my list and stock, raw and in process, at market value. I also agree to include in the sale of my patent a shop-right of any other patent I may be able to secure.

"Sept. 22, 1883. N. BURCH."

"N. BURCH:

"We accept the above offer.

"F. D. SUYDAM, By John C. Clarke.

"JOHN C. CLARKE.

"H. M. WRIGHT."

Exhibit "B." is a resolution by the board of directors; but it would add nothing to the claim made by the defendant. The claim made here by the defendant is, that when the plaintiff sold his business to the firm—which was afterwards acquired by the corporation—he not only sold all his property on hand, or an interest therein, but he agreed at the time that the company or firm should have a shop-right to use any new inventions which he might make in the plows, in their manufactory.

Second: That when he came to sell his stock to private individuals, he agreed with them—severally or jointly, it is not alleged which—that he would not thereafter enter into the business of manufacturing of plows. That is an allegation in the answer; and, clearly, it would have the interpretation that he was not ever to enter into the business of manufacturing plows anywhere. Now it is said that notwithstanding that would be a contract perhaps unreasonably in restraint of trade, and which a court of equity would not enforce, or a court of law either if an action were brought by the corporation to enforce it—yet, when Burch shall come into a court of equity and ask to have the corporation enjoined, he does not come with clean hands, but is in such situation that the court will leave him where it finds him; in other words, that it will not enjoin the defendant from the use of this trade-mark, because while he has entered into a contract which perhaps is void—because not in writing—or into a contract which perhaps could not be enforced because unreasonable, still a court of equity will not give him any relief. I have not time to go over the argument in all its details, but that is the substance of it.

From this answer it appears that Mr. Burch sold a half-interest in his running business in Toledo in 1883, and thereafter, as a member of that firm, he conveyed the whole of the business to a corporation in 1884. That the agreement by Burch with his partners was to the effect that the firm should have a right to use in the shop any patent which he might thereafter secure for improvements upon plows.

The allegation in the answer, that he made an agreement with these stockholders, that he would not enter into the business of manufacturing plows, is of an exceedingly shady character. It is doubtful if there is any privity of contract between the stockholders severally and the corporation, or whether the corporation could take advantage of that contract; but we do not rest the decision upon that ground.

Conceding that they might, and conceding that if this contract had been in writing, it would have been one that the Plow Company could have enforced against Burch, yet the agreement was, that Burch should not manufacture plows; the agreement was, that the corporation should have the use in its shops of any patents that Burch might thereafter obtain. Burch has violated one of these agreements by going into the business of the manufacturing of plows. But he claims that in entering into the business of manufacture of plows he did not manufacture the plow that defendant was manufacturing; on the contrary, he secured a patent upon an improvement of that plow, and he manufactured the improved plow, and that was not the plow that the defendant itself was manufacturing. He made no agreement with defendant that he should not thereafter invent, or that he should not have the property in his invention. He did not convey to the defendant a right to his future inventions, exclusively—but conveyed only the right to the defendant to use his inventions in their shop. They would thereby acquire no right to prevent him from using them if the contract was valid; nor could he prevent them, if they had the right to use them, from adopting any name or device they saw fit.

In 1887, having secured this new intention, he commenced the manufacture of plows—possibly in violation of the agreement that he would not do so, but he manufactured the improved plow, upon which he had obtained a new patent and upon which he placed his new trade-mark. This action is to enjoin the defendant from the use of that trade-mark, and we can discover no equitable reason why Burch has not a full right to apply to a court of equity to enjoin them from the use of this trade-mark. It is not an answer to say that he had agreed not to manufacture plows; he did not agree not to improve his plows by new inventions, and he had not agreed that the property in those inventions

should pass to and be vested in the Plow Company. They did not acquire by this contract concerning this invention, a right to use Mr. Burch's trade-mark. We think the answer sets up a clear case of infringement of this trade-mark, and therefore the injunction will be made perpetual.

Almon Hall, for Plaintiff.

E. W. Tolerton, for Defendant.

(Eighth Circuit—Cuyahoga Co., O. Circuit Court, Dec. Term, 1897.)

Before Hale, Marvin and Caldwell, JJ.

THE CASE SCHOOL OF APPLIED SCIENCE v. SAMUEL K. GRAY AND ECKSTEIN CASE, EXECUTORS.

Legacy—When interest on to commence—

When no time is fixed in the will for the payment of a general legacy, and there are sufficient assets in the hands of the executor for the payment of all debts and legacies, though there is not enough money on hand to make all such payments at the expiration of one year from the date of the executor's bond, such legacy bears interest from such expiration of the year.

Error to the Court of Common Pleas of Cuyahoga county.

MARVIN, J.

The Case School of Applied Sience v. Samuel K. Gray and Eckstein Case, executors of the last will and testament of Laura K. Axtell, deceased, comes here upon a petition in error seeking to reverse the judgment of the court of common pleas of this county. A suit was brought in that court by the plaintiff in error, a corporation, to recover a legacy bequeathed to it by the testator, Laura K. Axtell.

This will was admitted to probate, and on the 15th day of August, 1890, the defendants gave bond as execcutors, and letters testamentary were issued to them.

Two bequests were made in the will to the plaintiff in error: one for $50,000, and another for $1,000.

The executors filed an amended answer, from which it appears that though the assets of the estate were sufficient to pay all legacies, there was not sufficient money in the executors' hands to pay in full until November 4, 1895, when a bequest to the defendants' testator under the will of Levi Kerr was paid to these executors, by the executors of said will of Kerr; letters testamentary were issued on the will of Kerr prior to the death of Axtell, so that this legacy from Kerr to Axtell was a part of the estate of Axtell at the time of her death. It was not in the hands of the executors of Axtell until the 4th of November, 1895, but it was at her death a part of her estate, and if a proper inventory was made of her estate when the executors made their return to the probate court, that legacy was inventoried.

On the 29th day of November, 1890, the executors of Axtell paid on this legacy, the sum of $22,537.50, by surrendering a note held against the plaintiff, which, at that date, amounted to that sum.

On the 6th day of February, 1896, the executors paid upon the legacy, the additional sum of $20,000.00. So that in the aggregate there has been paid, $42,537.50, on the two legacies, they aggregating $51,000.00. There remains, then, due upon the principal of these two legacies, $8,462.50.

Some time prior to the 18th of August, 1896, the executors of Axtell filed their account in the probate court, and on the date last named, an order of distribution was made by such court—the order which is provided by statute, that the fund remaining in the hands of the executors be paid to the parties entitled by law to receive the same.

The case was submitted to the court of common pleas on the pleadings, showing substantially the facts above stated, and that court entered a judgment for the plaintiff for $8,785.40.

The answer admitted that there was due to the plaintiff the balance of the principal of those two legacies, together with interest from the day on which the order of distribution was made in the probate court, the 18th of August, 1896, and a computation shows that the court of common pleas allowed interest from that date, and gave judgment for the amount as thus computed.

The plaintiff in error complains that the time from which the interest was computed, was wrong; that it should have been allowed from an earlier date.

As already said, letters testamentary were issued to these defendants on the 5th of August, 1890, so that more than six years elapsed between the time of the issuing of the letters testamentary and the time of the making of the order of distribution; the claim on the part of the defendants being, that the interest should commence from the last named date. Now, it seems to us to be settled that an error was committed in fixing the date from which interest was to be computed.

The case of Webster v. The Bible Society, is a case that went to the supreme court from this county; it is found in the 50 Ohio St., being the first case in the volume. The question in that case was, whether the statute of limitations ran against the payment of the legacy, the time having been something like forty years from the probate of the will and the issuing of letters testamentary, to the time when the suit was brought for the payment of the legacy by the Bible Society.

The account was filed by the executors of the will of Mr. Weddell in the probate court but a short time before this suit was brought, and an order of distribution was made, and if the claim made by the defendant here is the law, it would seem as though that claim ought not to have been declared barred by the statute of limitations, because the claim made here is, that the right of the legatee to receive

payment of his money is when the probate court makes its order of distribution. Yet the language of the judge, speaking for the court, on page 17, is: "In any view that may be taken of our statutes, the cause of action accrued not later than four years from the date of the administration bond."

The court made its order of distribution, as said before, in that case, not long before that suit was brought; but the court held that the action was barred by the statute of limitations because the legatee had the right to the payment of its money either at the end of one year, or four years from the date of the bond of the executors, although no order of distribution was made.

This court, in the case of Webster v. Bible Society, held that the time when that legacy became due was at the end of one year from the date of the executor's bond, and although the case was reversed, the supreme court did not pass upon that question. There is no intimation, as we read this case, that the supreme court would have reversed the case upon that proposition. We have the authority of this court then, for saying that the date from which interest should have been computed, is one year after the giving of the bond by the executors.

A case was cited on the hearing which we have examined, from the 23rd Bulletin, page 438. In that case there were certain monies placed by will in the hands of a trustee, and the income was to be paid to a person named in the will—the widow of the testator; she had an ante-nuptial contract, but the will provided that the contract should be carried out. The claim was that the legatee, the widow, was entitled to her legacy from the time of the death of the testator. And Judge Phillips, before whom the case was heard, cited numerous authorities, that the interest would not begin to run until a reasonable time after the death of the testator,

although if there was property of the estate, though not money, with which to pay the bequests sometime, interest should begin at the end of one year; the language used is "one year from the death of the testator," although our supreme court has said "one or four years from the date of the bond," without reference to the death of the testator.

We understand that the general rule in America is that the legacy is payable if there is money to pay it one year from the date of the bond, if there is property sufficient to pay the legacy though sufficient money has not yet been realized, then the legacy will bear interest from one year after the date of the bond. Rice's American Probate Law & Practice, page 373, under the heading "Rules Applicable to Interest," uses this language:

"If a general legacy be given with no time of payment fixed, it begins to draw interest one year from the date of the letters, when it becomes due."

Dayton on Surrogates 3d edition, pp. 464-5 says:

"When no time of payment is fixed, the executor is by law allowed one year from the testator's death to ascertain and settle his affairs, at the end of which time the court, for the sake of general convenience, presumes the personal estate to have been reduced into possession. Upon that ground, interest is payable from that time, unless some earlier period is fixed by the will."

The same language is used in Williams on Executors, vol. 2, bottom page 1424, and a large number of authorities are there cited in support of the proposition.

Giauque on Settlement of Decedent's Estates, 3d edition, page 155, says: "As a general rule, a legacy bears interest beginning one year from testator's death."

We are cited to section 3181, Revised Statutes of Ohio, on the matter of interest. That section reads:

"In cases other than those provided for in the two preceding sections" (and these are provisions as to the payment of interest on judgments and bonds where interest is named),

"when money becomes due and payable upon any bond, bill, note, or other instrument of writing hereafter made upon any book account or instrument hereafter entered into, and upon all judgments, decrees and orders of any judicial tribunal, for the payment of money arising out of a contract made or other transaction which hereafter occurs, the creditor shall be entitled to interest at the rate of six per cent. per annum, and no more."

It is urged that money cannot be due and payable until one is entitled to bring suit for it, and that one would not be entitled to bring suit for his legacy at the end of one year when the estate is still in the process of settlement. The object of this section of the statute is to prescribe the rate of interest where there is no contract as to the rate, and it may well be doubted whether, beyond fixing the *rate* of interest, it has any application to a legacy. There is a provision of the statute, however, (sec. 6128), that one may have a legacy paid before any distribution is ordered, by giving a bond. And in commenting upon this section the supreme court, on page 17 of 50 Ohio St., in the case of Webster et al. v. Bible Society, uses this language:

"It may be fairly inferred from the statute, that a legatee may sue for the payment of his legacy before the expiration of the four years; but when he does, he may be compelled to give the bond and security therein provided for."

Without determining whether a suit could have been maintained for this legacy at the end of one year, the estate being in the situation it was, to-wit, the executors being without sufficient money to pay, but always having more than enough property, we hold that the plaintiff is entitled to recover interest from the expiration of one year from the date of the bond of the executors, and the court below having held otherwise, the case is reversed for that error.

Williamson, Cushing & Clark, for Plaintiff in Error.

F. J. Jerome, for Defendant in Error.

Kinsella v. DeCamp.

(First Circuit—Hamilton Co., O., Circuit Court—Nov. Term, 1897.)

Before Cox, Smith and Swing, JJ.

ANNA L. KINSELLA v. E. L. DECAMP.

Correction of erroneous journal entries—Power of court—

1. A court of record has the right at any time to make its journal speak the truth—that is, to show what the action or judgment of the court really was; and when by mistake, fraud or otherwise, there appears on the journal what purports to be the action of the court, as that a particular judgment was rendered or order made, when in fact no such judgment had been rendererd or order made, the court has full power, at the same or a subsequent term, on its own motion, or that of a party in interest, to strike the same from the journal or make it conform to that really made.

Correction of judgment during same term—

2. Where a judgment has been rendered or an order made at one term of the court, which has been correctly entered upon the journal, and no motion for a new trial has been filed, but the court, on reflection or otherwise, becomes satisfied that it should not have been made or entered, it may at the same term of the court be vacated by it, under the general power of courts of general jurisdiction to control its judgments during the term at which they were rendered. But this only applies to courts of general jurisdiction which have regular terms.

Same—Powers of probate court to modify or vacate its judgments—

3. But this rule does not apply to courts of probate under our constitution and laws. They are "open at all times," and no terms thereof are provided by law, except by sec. 5855, Rev. Stat., which gives to such courts power in certain cases to vacate or modify their own judgments after the term at which they were made, for which purpose it shall be considered as holding in each year, three terms of four months each. But this has no application to proceedings for the settlement of the estates of deceased persons.

Same—

4. On the facts hereinafter stated which show the sustaining of exceptions by the probate court to an account filed by the executor of the will of a deceased person, and finding a balance in the hands of the executor which he is ordered to distribute, and which order was correctly entered upon the journal of said court, such court had no power thereafter to enter another order vacating the same, though such

last entry recites that the first was made "under a misapprehension of fact and by inadvertance;" and such action was a nullity. And where, before such last action, a suit had been brought upon the bond of said executor, based on the refusal to distribute the estate in accordance with the first judgment, the fact that such first judgment was so attempted to be set aside, or that the plaintiff appealed from the last judgment, is not a bar of the plaintiff's right to recover.

Error to the Court of Common Pleas of Hamilton county.

SMITH, J.

In this proceeding in error the plaintiff seeks the reversal of a judgment rendered in favor of the defendants, in an action brought by the former against the latter.

On the trial in the court of common pleas, a finding of facts and of law was made, and the question submitted is, whether the facts found warranted the judgment as rendered.

In brief, the facts found were as follows: E. L. DeCamp was the executor of the will of Wm. C. Kinsella, deceased, and on January 15, 1894, on the settlement of the final account of said executor, the plaintiff having filed exceptions thereto, the probate court of this county heard such exceptions, and an entry was made by such court, finding that on the settlement of said account, there was a balance in the hands of said executor, due the estate of Kinsella, less the costs of court, of $932.21, which he was ordered to distribute according to law and the will of the testator.

That on the 16th of February, 1894, the plaintiff, the sole legatee under the will of Kinsella, and entitled to any balance in the hands of the executor, demanded payment of said sum of $938.21 of DeCamp, which was refused, and on March 3, 1894, this action was brought on the bond given by DeCamp as executor, against him and his sureties to recover said amount so found due.

That on April 30, 1894, an entry was made by the probate court as follows:

"On motion of Elizabeth L. DeCamp, executrix herein, made in open court in the presence of counsel for Anna L. Kinsella, and it appearing to the court that the order of the 15th day of January, A. D. 1894, was made under a misapprehension of fact and by inadvertence, it is hereby ordered that said entry be, and the same is vacated and held for naught. And the exceptions of Anna L. Kinsella to the final account of said executor, are hereby continued for the further consideration of the court, to all of which said Anna L. Kinsella, by her counsel excepts."

And afterwards, on February 7, 1895, an entry was made by said court in said proceedings, overruling the exceptions to the account. To this Anna L. Kinsella excepted and gave notice of appeal, and afterwards gave the bond and perfected her appeal to the common pleas, which is still pending therein. As a conclusion of law the court of common pleas held that plaintiff could not maintain this action and dismissed the same at her costs. Was this action of the court right?

The only defense interposed to the action (except the denial of a demand on the executor for payment) was, "that on the 30th day of April, 1894, the order of the probate court of Hamilton county, set forth in the petition, was vacated and set aside by said court." It is said however, by counsel, that the ground upon which the court of common pleas decided the case against the plaintiff was, that if it should be conceded that the probate court had no power to vacate the judgment as was done, or attempted, by the entry of April 30, 1894, yet the plaintiff in error waived her right to object thereto by appealing from the decision afterwards made by the probate court, on the questions raised by the same exceptions to the account of the executor. So that, on the pleadings in the case and the finding of facts made by the court of common pleas, two questions are presented and have been argued, viz: 1st. Whether the probate court had any right or authority at the time it at-

tempted to do so, (April 30, 1894), to vacate the order or judgment entered Jany. 15, 1894, finding the balance then in the hands of the executor, and ordering its distribution; and if not, whether such action was void or simply erroneous. And 2d, if the court had not such right, and the action was void, whether the subsequent conduct of the plaintiff so waived it, as to put it out of her power in this action to claim that it was void.

In the first place, we may say that we recognize to the fullest extent the right of any court at any time to make its journal or record speak the truth—that is, to show what the real action of the court was. For instance, if by mistake or fraud there appears on its journal what purports to be the action of the court, as that a particular judgment was rendered, or order made, when in fact no such judgment or order had been rendered or made, the court has full power to erase such pretended order or judgment from the journal, or by proper entry thereon, to vacate the same and hold it for naught, on its own motion, or that of a party in interest, —and in our judgment, though such action is not had at the term at which the entry of the vacated order appears to have been made. Or, if by reason of a clerical error, or by mistake or wrongful conduct of any one, the real judgment of the court as rendered or announced is not correctly placed upon its journal, the court, certainly during the same term, and probably at a subsequent term, if a court of general jurisdiction having stated terms, is authorized to correct the same and make it speak the truth—without resort to the proceedings warranted by sec. 5354 and post, of the Revised Statutes. Whether, if a certain specified judgment has been announced by a court, and that judgment has been correctly entered upon the journal of the court, and no motion for a new trial had been interposed as provided for by law, but the court subsequently, on reflection it may be, becomes convinced that the decision so rendered and

entered was wrong, may at the same term of the court at which such judgment was entered vacate the same, is a question as to which we have doubt, but are of the opinion that the law does confer such discretion and power. But if it does, we think it applies to courts of general jurisdiction and which have regular terms only.

But so far as we can see, courts of probate under our constitution and laws are not of this character. It is in the language of the constitution, "open at all times", and so far as we are advised, no terms of said court are provided for by law, except by sec. 5355, which gives to such court power in certain cases to vacate or modify its own judgments after the term at which they were made, and in estimating time that such court shall for that purpose be considered as holding in each year three terms of four months each, the first commencing on the first of January of each year; and by sec. 6468, which provides that in the exercise of criminal jurisdiction it shall be considered as holding monthly terms, commencing on the first Monday of each month.

But as we understand it, it has been expressly held by the supreme court in 26 Ohio St., 357, that the provision made by sec. 5365 as to terms of said court have no application whatever to proceedings for the settlement of the estates of deceased persons, and the remedies pointed out for the correction of the accounts of executors and administrators by other statutes than 5354 and post, must be pursued. This case is important as holding that in such cases as the settlement of such accounts there are no terms of the probate court.

We are led to the conclusion then, that where in the settlement of an account of that kind, and where, as in this case, there were exceptions to the account of the executor, and a decision is made by the court, and that decision is properly entered upon the journal or record of the probate court, it is final unless reviewed or changed in some manner pro-

vided for by the law regulating the settlement of estates of deceased persons—and that the probate court in such case has not the right to vacate such order or judgment otherwise, and that an order made long after the entry of the original judgment, as was done in this case, was a nullity, and the original order stands in full force. If, however, no such judgment as that of Jany. 15, 1894, was ever rendered by the probate court, and the same was without the authority of the court placed on the journals thereof, "under a misapprehension of fact, and by inadvertence," as before stated, the court had the right, on discovering the fact, to strike it out and hold it for naught.

The question for decision in this case, is what does the record show as to this.

In the first place, the petition avers that on the 15th of January, 1894, it was found, adjudged and considered by the court, that there remained in the hands of said DeCamp, upon the settlement of his said account," the said balance found to be in his hands ($938.21), which he was ordered to pay over and distribute according to law. The answer of the defendant expressly admitted that the order was made by the court as alleged in the petition—so that there was no controversy or issue made in the pleadings as to this.

The court at the trial also found that on the 15th of January, 1894, an entry was made by the probate court as set out in the finding of facts. So that it seems clear that the judgment so entered at that time was the judgment of the court and was entered by the court as made by the court. If this be so, it would seem that the case would be brought within the doctrine hereinbefore stated, and that the probate court had no right to vacate it as was attempted to be done by the entry of April 30, 1894, notwithstanding the statement therein that it (the order of Jany. 15, 1894) "was made under a misapprehension of fact and by inadvertence". Those words might well mean that the court on re-

flection had become convinced that the decision before made and placed upon its journal was contrary to the evidence submitted, and therefore was made by inadvertence. If the court had a right to do this when it did, and as it did, it would have the right to do it ten years after that time, which would be contrary to settled and acknowledged principles of law, and could not be properly done by any court of general or special jurisdiction without express authority to do it conferred by the statute.

If the action of the court on April 30, 1894, vacating the judgment of January 15, 1894, was invalid and void, as we feel compelled to hold it was, on the record before us, the original judgment remained in full force and effect, and the fact that the probate court afterwards proceeded to re-hear the matter and render a different judgment, and that the plaintiff in error took an appeal therefrom, did not in any way affect the first judgment, or operate to waive the right of such plaintiff to show in this action that the original judgment stood in full force.

The judgment of the court of common pleas will therefore be reversed. But instead of rendering a judgment on the finding of fact in favor of the plaintiff, for the amount sued for, as we perhaps might do, we have thought it best, in view of the doubt that may possibly exist as to the ground upon which the probate court acted in making the entry of April 30, 1894, to remand the case for a new trial, if desired by the defendant in error, or for such other proceedings as may be warranted by law. In the event of such new trial, it can doubtless be shown, what was the ground upon which the probate court acted, and whether, in view of the law as we hold it to be, such action was valid or void.

F. F. Oldham, for Plaintiff in Error.

Robert Ramsey, for Defendant in Error.

Mosby v. Street Railway Co.

(Eighth Circuit—Cuyahoga Co. O. Circuit Court—Jan. Term, 1898.)

Before Hale, Marvin and Caldwell, JJ.

GRANSON MOSBY v. THE CLEVELAND STREET RAILWAY COMPANY.

Claim for personal injuries—Settlement only to be set aside for fraud—

Settlement of a claim for and a cause pending to recover damages for personal injuries will not be set aside unless there is clear evidence of fraud and undue influence.

Same—What will not be considered fraud—

That the injured person had not fully recovered, could neither read nor write, and his attorneys were not present and had no knowledge of the settlement, will not be sufficient to warrant the setting aside of such settlement.

(Decided February 26, 1898.)

Appeal from the Court of Common Pleas of Cuyahoga county.

CALDWELL, J.

This is the case of Granson Mosby against The Cleveland City Railway Company, a corporation.

The plaintiff in this case, Granson Mosby, was engaged in trucking about the city; he had a horse and a wagon and did trucking around the city, hauling ashes and anything he could find to do; he was upon the track one day, and a motor of the defendant railway company came in contact with his wagon and broke it up considerably, and injured his horse so that it died, and he was thrown to the pavement and pretty seriously hurt; he was taken to the hospital and treated by the physicians of the Cleveland Street Railway Company. After he had been there over a month and was somewhat improving, the agent of the street railway company went to see him, and between them they began to talk about a settlement of the claim—Mosby had then brought his suit. This talk resulted in a proposition on his part, and not exactly a proposition on the part of the

agent but a suggestion of what he would try to get the railway company to do, which was a settlement of $500.00. A day or two after that, the agent appeared at the hospital again, and the arrangemeunt was completed, the writings properly drawn and receipted, and the paper signed which authorized the railway company to have the case dismissed in the common pleas court, which has been done.

This action was then brought. Mosby, it seems, was afterwards dissatisfied in regard to the settlement he had made, and this action was brought to set aside the dismissal of that case and to set aside the settlement. The money was not tendered back, nor paid back. Perhaps that would not make much difference. Now, there is no evidence that the railway company in any way acted fraudulently in making this contract with Mosby, nor is there evidence that it took any undue advantage of him. There is something said about his condition. But the evidence does not show that his condition was such but that he could make a contract at that time. And there is considerable said about his attorneys not knowing about it. There is some evidence going to show that Mosby did not want his attorneys to know it, and the court is very well aware, just as all attorneys are, that a client sometimes does not care to have them know that he is acting in his own behalf, and his attorneys say this was the case here; it is evident in this case that their client was not going to share with his attorneys; there is something in that; very likely there was; anyway it is said that Mosby was a colored man who could neither read nor write, and was very ignorant of the methods or proceedings of this kind, and it was undue advantage to settle with him in the absence of his attorneys and without their knowledge.

That is really the only claim that is made here; but it would seem to us a bad precedent to establish, that an ignorant man, merely because he has not an attorney when he makes a contract, and because he can neither read nor

write, and no advantage taken of him in any way or manner, may avoid his contract—it seems to us it would be a bad precedent to hold that in a case of that kind the contract should be set aside. It would lead to quite an upheaval of contract relations. It is too radical a ground to take. We can not do it.

We do not know anything about the circumstances—whether Mosby could ever have recovered a cent or not; but it would seem that if he had a clear case against the railway company, he had settled for a pretty small amount according to the way those things usually go. But Mosby knew the circumstances. The agent talked over with him how this accident occurred, who was to blame, and whether he could recover or not. And it would seem to us from the talk that took place there between him and the agent that the agent did not mislead him at all, did not undertake to palm off upon him any theory that it was entirely certain that he might recover or might not; that there would be a conflict in the evidence.

We can not say that there was any such advantage taken of him in his settlement that would lead to his being allowed to withdraw from his contract.

We allow a judgment in favor of the defendant, and the petition of the plaintiff is dismissed.

Hessenmueller & Bemis, for Plaintiff.

Squire, Sanders & Dempsey, for Defendant.

(Second Circuit—Franklin Co. O. Circuit Court—Jan. Term, 1898.)

Before Shearer, C. J., and Summers and Wilson, JJ.

OHIO ex rel. DeWITT C. JONES v. GEO. BELLOWS et al.

Section 1221, Revised Statutes, construed—

1. The word "found" in this section is jurisdictional, and means being present in the county.

"Violence" means the unlawful use of physical force or other agency to cause death. It does not include mere accident or casualty.

Coroner—When to hold inquest—

2. The coroner is authorized and required to hold an inquest upon a dead body lying in his county, when he knows, or has reason to suppose, the death was caused by unlawful means.

Appeal from the Court of Common Pleas of Franklin county.

SHEARER, C. J.

This is an action prosecuted by the state of Ohio, upon the relation of DeWitt C. Jones, a tax payer, against the board of county commissioners, the auditor, the treasurer and the coroner of Franklin county to enjoin the allowance and payment out of the treasury of said county of certain fees and charges of said coroner for his official services in and about an inquest held upon the dead body of one Richard Claprood, who came to his death on the 5th of September, 1897, in a street fight with one George Robinson, in the presence of a large number of spectators.

Substantially, the grounds upon which the injunction is demanded are that the inquest was unwarranted and illegal because the body of Claprood was not "found" under circumstances creating doubt or uncertainty as to whether he came to his death by violence, nor as to how or by what means or by whose hand he came to his death; that said killing was not a case which, within section 1221, Revised Statutes, authorized an inquest; that such inquest was un-

necessary and ineffectual for any purpose contemplated by law, and a wanton assumption of power by the coroner in order to obtain money from the county treasury in fraud of the rights of the relator and of the public.

The defendants, by their answer, assert the legality of the action of the coroner, and aver that at the time of the killing of Claprood he, the coroner, was absent from the city of Columbus on official business; that upon his return he was informed of the killing and went to the place where the homicide occurred, and learned that the body had been removed to the morgue; that he repaired to the morgue and found the dead body which bore evidence of having come to its death by violence. Meantime the witnesses of the killing had dispersed and gone; that he thereupon caused subpoenas for witnesses to be issued, and held an inquest, and filed his report as required by law.

Defendants further allege that the condition of the body, and the facts surrounding the death, were such that the ends of justice required that an inquest be held for the purpose of determining the cause of the death of the deceased, as well as the manner in which the violence was inflicted and the person or persons by whom the death was caused; and that defendants in all things in the premises acted in good faith; that the fees charged are reasonable and in accordance with the statute.

It is further alleged that said coroner had no knowledge or information as to the cause of said death except as he derived it from said inquest.

The averments of the answer above recited are controverted by the reply.

The court below granted a perpetual injunction. The defendants appeal, and the cause is submitted to us upon the pleadings and certain affidavits and other documents constituting part of the report of the inquest.

The facts as disclosed by the evidence are that on Sunday

the 5th of September, 1897, one George Robinson and Richard Claprood engaged in a fight in Court Alley in the city of Columbus, and Claprood was fatally stabbed by Robinson, dying instantly. Quite a large number of people were present during the broil and saw Claprood fall dead. Shortly after the killing the police appeared, arrested Robinson, and took him to the city prison and the dead body to the morgue.

Later in the day the coroner, who had been absent from the city, returned and was told that a man had been killed in Court Alley. He went to the place and found the body had been removed and Robinson arrested. He then went to the morgue, viewed the body which showed evidence of death by violence, caused a post-mortem examination to be made, and held an inquest. A large number of witnesses were examined, and it was found that the cause of the death was a stab in the heart inflicted by Robinson.

It is contended on behalf of the relator that the facts stated did not authorize the coroner to hold an inquest; that the holding of the inquest was an abuse of power, and that the payment of fees therefor would be a fraud upon the relator and the public.

To resolve this question requires a construction of section 1221, Revised Statutes, which provides that "when information is given to any coroner, that the body of a person whose death is supposed to have been caused by violence, has been found within his county, he shall appear forthwith at the place where such body is, shall issue subpoenas for such witnesses as he deems necessary, and administer to them the usual oath, and proceed to inquire how the deceased came to his death; if by violence from any other person or persons, by whom, whether as principals or accessories before or after the fact, together with all the circumstances relating thereto" etc. This section further provides that the testimony shall be reduced to writing, sub-

scribed by the witnesses, and with the finding, etc. returned to the clerk of the court of common pleas. That the coroner, if he deems necessary, shall hold the witnesses to bail for their appearance at the court of common pleas, or, in default of bail, commit them to jail.

By section 1222 he is required to arrest the party found to have caused the death, if present, or if not present, to inform a justice of the peace and the prosecuting attorney of the facts found, in order that the slayer may be dealt with immediately according to law.

The coronial office is of ancient origin, and its duties, while they have undergone some changes, are substantially the same as they were under the English common law. These duties are in many respects judicial, and their exercise, except in case of gross abuse, should not be interfered with.

Of course, it is not in every case of death from unknown causes that the coroner would be authorized to hold an inquest; but if he knows, or has reasonable ground to believe, the death was the result of violence, or unlawful means, the coroner not only may, but is required to, hold an inquest. Violence, in the sense used in the statute, means force unlawfully exercised, as distinguished from mere accident or casualty. See Anderson's Law Dic. 1091. Also Lancaster Co. v. Holyoke, 21 L. R. A., 394 and notes.

The report of Muzzy v. The Commissioners of Hamilton Co., 2 West. Law Jour., 426, cited by counsel for the relator, is not official. It is a mere "editorial note." And we are not inclined, for reasons stated further on, to accept the editorial opinion of what the court in fact decided. It may be that the coroner "has no power to hold an inquest except in cases where the cause of the death is unknown"; but such holding, it seems to us, ignores a

very important duty imposed upon the coroner aside from determining the cause of the death, namely, the securing and preservation of the evidence of the crime while the facts are recent and the circumstances unchanged; also the securing of the attendance of witnesses before the grand jury. These duties are specially enjoined by law upon the coroner, and, if omitted, in many cases the state would be unable successfully to prosecute the guilty party.

It was said by Mercur, J. in Lancaster Co. v. Mishler, 100 Pa. St.,627, "that the duty of a coroner to hold an inquest rests on sound reason—on that reason which is the life of the law. It is not a power to be exercised capriciously and arbitrarily and against all reason. The object of the inquest is to seek information and obtain and secure evidence in case of death by violence or other undue means. If there be reasonable ground to suppose it to be so caused, it becomes the duty of the coroner to act. If there be no reasonable ground to suspect that the death was not a natural one, it is a perversion of the whole spirit of the law to compel the county to pay him for such services."

In that case the deceased died at an advanced age, at home, surrounded by his family and having been attended during his illness by a regular practicing physician; his death was natural, and there was nothing suspicious, sudden or extraordinary about it.

We are, therefore, of opinion that where a person has come to his death by violence, as hereinbefore defined, whether in the presence of third persons or not, it is the duty of the coroner to hold an inquest, not only to ascertain the cause of the death, but whether a crime has been committed, who the perpetrator is, and to secure and preserve the evidence to the end that justice may not be defeated.

The word "supposed" in the statute does not necessarily imply doubt, uncertainty or ignorance of the cause

of the death. It is broad enough to include both suspicion and knowledge. If the coroner either knows or suspects the death to have been by violence, he may act.

We are not impressed with the contention that the word "found," as used in sec. 1221, is to be understood in the restricted sense of "discovered", or "found by accident or search," but rather in the broader sense of being present within the coroner's jurisdiction.

A dead body may be discovered within the county by accident, its existence not previously having been suspected; it may be discovered by search—its existence being known, but its whereabouts unknown; it may have been struck dead, as in this case, in the presence of a multitude, and the assailant may be known. In all such cases, the body is "found". In Illinois "found" is treated as synonymous with "lying". Rev St. Ills., 1883.

A person may die in his own home, surrounded by his friends, and under circumstances which indicate a natural death. He is buried in the public cemetery on the family lot, and his grave is marked with his name and the date of his death. Subsequently circumstances may give rise to the suspicion of poisoning, or other foul play, as the cause of his death. Can the coroner exhume the body and hold an inquest thereon? The answer is "No", if the contention of the relator is sound; for the body is not "found". Its existence and whereabouts are known; it died in the presence of friends, and was buried by them, and the cause of the death was supposed to be "known". But will it be claimed that under the circumstances just stated the coroner could not lawfully hold an inquest? It will not do to say that he is without power to act unless the dead body is "found" in the sense insisted upon by the relator. That is not the test; neither would the ends of justice be subserved by such interpretation of the statute. If knowledge comes to the coroner that there is a dead body within his jurisdiction

which there is reason to believe came to its death by violence, as distinguished from mere accident or casualty, he is authorized to hold an inquest thereon, not only for the purpose of determining the cause of death, but to discover the guilty party, if any, and to ascertain and preserve the evidence, and to take the steps pointed out by the law to secure the attendance of the witnesses in court.

The coroner must act in good faith—not capriciously or arbitrarily. He may not act where there is no ground to suspect violence was the cause of the death.

We find no cause to doubt the good faith of the coroner in this case, and think his action not only was justified by the circumstances, but was required by the law.

Injunction dissolved, and petition dismissed.

Mr. Dillon, and *George Jones*, for Relator.

Dyer & Williams, for Defendants.

(First Circuit—Hamilton Co., O., Circuit Court—Nov. Term, 1897.)

Before Cox, Smith and Swing, JJ.

THE CHICAGO LABEL AND BOX CO. v. WASHBURN.

Sunday—When not excluded in computation of time—Motion for new trial.

Under sec. 5307, R. S., a motion for new trial must be filed within three days after verdict rendered, and where one of such three days is a Sunday, it is counted unless it is the last of the three days, when it is excluded under sec. 4951, R. S.

Error to the Court of Common Pleas of Hamilton county.

SMITH, J.

The error assigned in this case is, that the court of common pleas set aside a verdict which had been rendered in that court in favor of the plaintiff in error against the defendant in error, and granted a new trial.

The verdict in the case was rendered on Friday, June 18,

1897,—and the motion for new trial was filed on Tuesday, June 22, 1897. Sec. 5307, requires such a motion to be filed within three days after the verdict was rendered This was not filed until the fourth day thereafter. The second day after the day on which the verdict was rendered was Sunday, and it was claimed that that day should be excluded in the computation, and therefore that the motion was filed in time, and that the court had authority to grant the motion for a new trial.

Sec. 4951. Revised Statutes is as follows: "Unless otherwise specially provided, the time within which an act is required by law to be done shall be computed by excluding the first day and including the last, and if the last be Sunday, it shall be excluded." This applies to all computations of time under the provisions of our code of civil procedure, and must apply in this case, as no special provision is made as to motions for new trials. And whatever may have been the rule in cases of this kind at common law, the express provision of the statute must govern.

The court then having no right to entertain or grant the motion, its action in doing so was erroneous and will be reversed, and the cause remanded to that court to be proceeded in according to law, which will be to enter judgment upon the verdict rendered, unless for good cause shown.

Johnson & Levy, for Plaintiff in Error.

J. A. & M. Caldwell, and *A. W. Bruck*, contra.

(Eighth Circuit—Cuyahoga Co., O., Circuit Court—Jan. Term, 1898.)

Before Hale, Marvin and Caldwell, JJ.

FRANK WINDERS v. ROBERT A. HUDSON.

Appeal from J. P.—Failure of applicant to file transcript, etc., within statutory time—Effect—

Where on appeal of a case from a J. P., the appellant has failed to file the transcript and other papers with the clerk of common pleas within thirty days from the rendition of the judgment appealed from, the appellee may have the case docketed in the common

pleas and ask for a judgment in his favor similar to that entered by the J. P., and it is then too late for the appellant to file a cross-petition to have the judgment of the J. P. vacated upon the ground of want of jurisdiction.

Bill of Particulars—What sufficient to give J. P. jurisdiction—It is sufficient to give the J. P. jurisdiction if the Bill of Particulars filed with the J. P. gives the adverse party a fair intimation of plaintiff's claim.

CALDWELL, J.

In the case of Frank Winders v. Robert A. Hudson it seems that Winders is the secretary of a state board existing at Columbus, before whom the physicians, under the law passed at the last session of the legislature, are required to register. The secretary of the board sent out a publication—a circular, asking physicians to send their diplomas to the board, and if sent by mail, they would be returned by mail; if sent by express, they would be returned by express; and Robert A. Hudson sent his diploma, and it was not returned to him. How much search was made for it, does not appear—it is not important in this case—but in due course of time, he brought suit against Frank Winders, secretary of the board, to recover damages for the loss of his diploma, and that suit was brought before a justice of the peace in this city. It went by default, and a judgment was had in the case, for two hundred and seventy-five dollars ($275) as the value of that diploma.

Winders undertook to appeal the case, or to take the case up to the common pleas court, but failed to file the transcript in time—took it in too late—and by some authority, authority from some judge, he was permitted to file it. Then a motion was made to strike it off, and it was stricken off. Then Hudson took the transcript and filed it in the common pleas court, and thereafter filed a motion to have judgment entered upon it in the common pleas court under a provision in the statute. This was opposed by Frank Winders, and the court overruled Winders' objection to the

judgment being entered in the common pleas court, and Winders brings his petition in error into this court, not to affect anything that the justice of the peace did in the case, but to claim that the rendering of the judgment in the common pleas court was error, and the case turns largely upon section 6588:

"If the appellant shall fail to deliver the transcript and other papers, if any, to the clerk, and have his appeal docketed as aforesaid, on or before the thirtieth day from the rendition of the judgment appealed from, the appellee may, thereafter, at the term of said court next after the expiration of said thirty days, file a transcript of the proceedings and judgment of such justice, and the said cause shall, on motion of the appellee, be docketed; and the court is authorized and required, on his application, either to enter a judgment in his favor similar to that entered by the justice of the peace, and for all costs that have accrued in said court, and award execution thereon; or such court may, with the consent of said appellee, dismiss the appeal at the cost of the appellant, and remand the cause to the justice of the peace, to be thereafter proceeded in as if no appeal had been taken."

The court is authorized and required, on the application of the party getting the judgment before the justice of the peace, to enter judgment in his favor similar to that entered by the justice of the peace. Winders interposed to have the court refuse to enter that judgment, and we are not certain but that interposition might be made if made in the right way. If a cross-petition should be filed at the time the motion is made, or thereafter before the judgment is entered, asking to have that judgment vacated, or to have the court at least refuse to enter judgment upon it on the ground that the justice acted entirely without jurisdiction, we are not certain but that it might be done, and the party, on such a cross-petition, might proceed and have the entire judgment vacated and set aside, and get affirmative relief to that extent. A recent holding in the supreme court would

seem to show that that would be a direct attack upon that judgment, but that the party could interpose and present his defense that he should have presented before the justice of the peace we think can not be done. In other words, if he has been in default before the justice of the peace, and error has occurred in the justice's court he has failed to except to and take the case to the higher court upon proceedings in error or by appeal, he can not resort to these proceedings to correct such errors.

It is claimed in this case that the bill of particulars that was filed before the justice of the peace, was so indefinite that it failed to give the justice of the peace jurisdiction of the action. It must amount to that, because, if it was not so indefinite as to fail to give him jurisdiction, we can hardly see how it would be sufficient ground to interpose matter before a higher court in the manner in which this was attempted; but while the statute prescribes what the bill of particulars shall set forth, the terms are so general that the bill of particulars seems sufficient if it only gives the party a fair intimation, a fair understanding, of what will be claimed. That it is sufficient that a justice of the peace could have jurisdiction without any bill of particulars or without any complaint, and without the parties coming and submitting their issues to the justice, we think would be doubtful, very doubtful. It is a court of limited jurisdiction, and when the statute prescribes how a court shall act and what shall be sufficient to give the court jurisdiction of a cause of action, that must prevail. But we think there was enough in this bill of particular to give the court jurisdiction of the action. That being so, we think that nothing short of a plea in the common pleas court at the time the common pleas court is asked to enter a similar judgment, or a like judgment—nothing but a plea setting forth want of jurisdiction on the part of the justice of the peace, by way of cross-petition, under which there may be asked affirmative

relief, perhaps, against the judgment—nothing short of that, we think, can avail.

It is claimed that this judgment is an outrage and a monstrous thing; and it is very likely that that may be so; we are not here to determine that matter, but it very probably is—we might state it that strong. The idea that a diploma which might be duplicated, perhaps, for a small sum, for a very small amount of money—that a party should have to pay two hundred and seventy-five dollars ($275) for its loss, would look very strange; but that is a matter that any party can easily have accomplished with that kind of judgment against him, if he will stay away from court. That is exactly what Mr. Winders did. He staid away, and consequently this judgment was gotten against him. We are sorry that Mr. Winders has been so derelict in attention to this matter, and the judgment is one that if we found any way possible, we would be glad to relieve him from, but we do not see any way to do so.

Clark & Thompson, for Plaintiff in Error.

Hadden & Parks, for Defendant in Error.

(First Circuit—Hamilton Co., O., Circuit Court—Jan. Term, 1898.)

Before Cox, Smith and Swing, JJ.

I. G. SIMPER v. ANDREW BENTLEY.

Replevin—Wrongful possession must appear—

The gist of replevin is unlawful possession of the property. Where therefore, defendant has disposed of the property and is no longer in its possession, the proper remedy is not replevin, but an action for unlawful conversion.

Error to the Court of Common Pleas of Hamilton county.

SMITH, J.

We are of the opinion that the second defense interposed by the defendant to the petition of replevin filed against

him by the plaintiff, charging him with the illegal detention of a cow on which plaintiff averred he had a chattel mortgage, and to the immediate possession of which he was entitled, set up a good defense to the action, and that the court of common pleas did not err in overruling the demurrer filed thereto. The answer substantially averred that at the time the action was commenced and when summons issued, the cow in question was not actually or constructively in defendant's possession, which fact plaintiff knew at the time he commenced his action. That if he ever had possession of the property, he had parted with the same in good faith and without any knowledge of plaintiff's claim thereto, long before the action was commenced, all of which plaintiff knew when he commenced his action.

The gist of the action of replevin, is the unlawful detention by the defendant of property to the possession of which the plaintiff is entitled. On the averments of this answer paintiff was not detaining the property from the defendant at all, for he had in good faith disposed of the same long before the suit was commenced, as the plaintiff well knew. His remedy therefore, if he had any against the plaintiff, was for an unlawful conversion of his property, and not by replevin to recover the possession of it. And in our opinion, the provision of our statute, sec. 5827, that in replevin cases, where the property is not taken by the officer, or is returned to the defendant on plaintiff's failing to give bond, the action shall proceed as one for damages, does not apply to a case of this kind; but to one where the replevin is properly brought, and the property can not be found, or is returned to the defendant as above stated.

The overruling of the demurrer being the only error assigned, the judgment will be affirmed.

G. R Werner, for Plaintiff in Error.

Gorman & Thompson, for Defendant in Error.

McClain v. McKisson et al., and two other cases.

(Eighth Circuit, Cuyahoga Co., O., Circuit Court, Jan. Term, 1898.)

Before Hale, Marvin and Caldwell, JJ.

JOHN D. McCLAIN v. ROBERT E. McKISSON, Mayor of the City of Cleveland; DARWIN E. WRIGHT, Director of Public Works of the City of Cleveland; HORACE L. ROSSITER, Director of Accounts of the City of Cleveland; CHARLES W. CHASE, Treasurer of the City of Cleveland.

THE STATE OF OHIO, on the Relation of JOHN D. McCLAIN v. HOWARD H. BURGESS, City Clerk of the City of Cleveland.

THE STATE OF OHIO, on the Relation of JOHN D. McCLAIN v. THE COUNCIL of the City of Cleveland, and the members thereof.

Action by taxpayer to enjoin illegal contract by city on third party's agreement to pay costs—

A tax-payer may bring an action to restrain the city from entering into an illegal contract under sec 1777, R. S., after having requested the city solicitor to do so as required by sec. 1778, R. S., and his refusal; although one of the competing bidders for the contract who may be the beneficiary of such action, has agreed to indemnify such tax-payer against all the costs and expenses he may incur thereby, it appearing that such tax payer intended to bring the action, but was unable to pay the costs and expenses himself.

Record of proceedings of council—Duty of clerk—Correction by council—Mandamus—

It is the duty of the clerk of the city council to make an accurate record of the proceedings of council, and the council has the power to determine whether the journal truly sets forth its proceedings; but when the record of the previous meeting of the council is read at a succeeding meeting under the rules adopted by council, and council has corrected and disposed of the journal, the clerk has no further right and there is no further duty enjoined upon him by law to correct the same, and mandamus will therefore not lie to compel him to do so.

Same—Power of council over its journal—

A municipal council is a legislative body clothed by law with the power to correct and dispose of the journal of its proceedings, and in the absence of any charge of fraud or corruption in the action of the council in correcting its journal, its action is final and conclusive, and courts have no right to interfere therein.

Power of council. after rejecting all bids, to reconsider its action—
The council has the power, after having once voted to reject all bids offered for a public contract, to reconsider its action and accept one of the bids, where no rights have vested under the first action of the council, or where its first action has not so fully disposed of the matter that council could not take any further action in the matter.

Same—Power of council to accept next lowest bid without re-advertising—
Council, after having rejected all bids for a public contract, may, at a subsequent meeting, without re-advertising for bids, reconsider its first action, and award the contract to one of the original bidders.

Power of council of Cleveland, under Federal Plan Law, to advertise for bids under sec. 2419, R. S.
"The Federal Plan Law" leaves the right to the council of the city of Cleveland, to proceed under sec. 2419, to advertise for and dispose of bids for furnishing a pumping station for the water-works of that city, and under that section has the option to award te contract to the next lowest bidder, if in their opinion the lowest bidder can not be depended upon to do the work with ability, promptness and fidelity, and courts can not interfere with that option in the absence of any charge that the council acted fraudulently or corruptly.

CALDWELL, J.

The city of Cleveland desired a pumping engine of certain capacity, power and dimensions, to be placed in the Division Street Pumping Station, for use in pumping water, as a part of its water-works system. The city council requested the director of pub ic works to advertise for bids for the same. The director called for bids. In response to his call a number of bids were received. One of these bids, by the Holly Manufacturing Company, was numerically the lowest bid. The Edward P. Allis Company was the next lowest bid that could be considered. The bids were opened. Thereafter, on January 20th, 1896, the council rejected all the bids; which action is known as "File Number 9520."

Up to this point in the proceedings, it is agreed that the action of the city officers and council was regular and according to law; and it is claimed on behalf of the plaintiff, that

all action on this subject taken after January 20th, 1896, is irregular and without any warrant in law.

On the 27th day of January, 1896, a motion was made to reconsider the action of January 20th, 1896, rejecting all the bids. This was at the next regular meeting after the meeting of January 20th, 1896. The plaintiff claims this motion was lost, because a majority of all the members elected to the council did not vote in favor of it. This is denied by the defendants. There are twenty-two members elected to the city council, and at all these times they were all living and qualified to sit and act in the meetings. The Chair announced the motion as carried. Then a motion was made and carried, accepting the E. P. Allis Company bid. At next council meeting, the clerk of the council had made up the minutes of the meeting of the 27th of January as showing that the motion to reconsider had been carried by a vote of twelve in its favor. Upon a reading of the minutes, the correctness of the same in this respect was challenged; but the council, by a vote of sixteen for and five against, voted to approve the journal as read. Thereupon this action was brought on January 31st, 1896, to enjoin the city officers from carrying out the purpose of the council to award the contract to the E. P. Allis Company.

On February 5th, 1896, the plaintiff, in the name of the state, brought an action in mandamus to compel Howard H. Burgess, city clerk, to correct the council record of the meeting of January 27th, 1896, so as to make it appear and read that said motion to reconsider had only eleven votes in its favor, instead of twelve votes as the record reads, and to have the record or journal show that the motion was lost.

After these two actions were appealed to this court, an action in mandamus was commenced in this court by plaintiff on behalf of the state, against the city council and the members of the council, asking substantially the same relief as is asked against the clerk in the action against him.

These three cases have been tried together in this court, with the understanding that if the court shall award the writ in either or both of the cases in mandamus, then the court may take its judgment therein as res judicata in determining the rights of the parties to the injunction case.

These cases present the following questions for the considerations of the court:

1. The right of John D. McClain to bring these actions.
2. Shall the court order the city clerk to correct the council journal.
3. Shall the court change, or order the council to change its journal.
4. The right of the city council to reconsider the motion of January 20th, 1896, by which motion it rejected all the bids.
5. Had the council authority to award the contract, after it had voted to reject all bids.
6. Can the contract be awarded to one who is not the lowest bidder?

These questions will be considered in the order in which they are stated.

First. The right of John D. McClain to bring these actions.

The plaintiff, under sec. 1778, Revised Statutes, served notice upon the director of law of the city, requesting him to bring these actions, who did not bring them, and thereupon the plaintiff instituted these proceedings. He has been placed upon the witness stand to testify as to how he came to bring these actions, and his motives in doing so. From his testimony it appears that he was approached in this matter by the Holly Manufacturing Company, and that the Holly Manufacturing Company has promised to indemnify him against the costs and expenses in prosecuting these actions. He testifies that he wanted to bring these actions himself, but was not able to undertake

the payment of the costs and expenses should he fail in them. He is not a resident of the city of Cleveland, but owns property in the city upon which he pays taxes. Some portions of his testimony tend to show that he was manifesting much interest in this contract and the proceedings to let the same, prior to January 27th, 1896; but it does not appear that he is in any way connected with the Holly Manufacturing Company, further than above stated; and he does testify that his purpose in bringing these actions is to restrain the city of Cleveland from entering into what he regards an unlawful expenditure of money, in that the city of Cleveland is proposing to accept a bid which is not the lowest bid by about ten thousand dollars.

We think, under these facts, that the plaintiff had the right to bring these actions; and that, while his success in them may prove beneficial to the Holly Manufacturing Company, yet we think he is sincere in his claim that his principal object is to restrain the city from entering into an unlawful contract. We therefore hold, that he had a right to bring these actions.

Second. Shall the court order the city clerk to correct the council journal.

Sec. 1755 says:

"The clerk shall attend all the meetings of the council, and make a fair and accurate record of all its proceedings, and of all rules, by-laws, resolutions and ordinances passed by the council, and the same shall be subject to the inspection of all persons interested; and in case of his absence from any meeting, the council shall appoint one of its own number to perform his duties for the time."

Sec. 1679 provides:

"The council, and when of two branches, each branch, shall be the judge of the election returns, and qualifications of the election returns, and qualifications of its own members; shall determine the rules of its procedure, and keep a

journal of its proceedings, and may compel the attendance of absent members in such manner and under such penalties as may by ordinance be prescribed."

It must be conceded that the record required to be kept by the clerk as provided in sec. 1755, is the same as the journal required to be kept by the council in sec. 1679. Construing these two sections together, it is apparent that the council has the right to determine when the journal truly sets forth its proceedings; and this section gives to the council the right to adopt rules governing its procedures. Under this authority, the council has adopted certain rules of procedure, in which it has provided that at each regular meeting of the council, the president of the council shall cause the journal of the preceding session to be read and disposed of, unless otherwise ordered by the council. These provisions of the law were intended to require the clerk to make an accurate record of all the doings of the council while in session, which record should be presented to the council at its next meeting for examination and for such corrections as the council should determine were necessary, to make the journal fully conform to the action of the council. After the journal has thus been corrected and disposed of by the council, the clerk has no further right to change the same. There is no longer any duty enjoined upon him by the law to correct the journal of the council. Mandamus can be brought against him only to compel him to comply with some plain duty placed upon him by the law. If then, after the journal has been corrected and disposed of by the council, he no longer has any right to change the same, and no longer is under any such legal obligation, then the court will not order him to do what he is not authorized to do by law.

From this it follows that the proceedings against the city clerk are not well founded, and the petition will be dismissed.

Third. Shall the court change, or order the council to change its journal.

As the basis of this action, it is claimed that when the vote was taken on the 27th day of January, 1896, to reconsider the motion of January 20th, 1896, rejecting all bids, the motion was not carried by a legal vote. There were present in the council at that meeting, twenty-two members. Upon the roll-call on that motion, eleven members voted in favor of reconsidering and awarding the contract to E. P. Allis and Company, and ten voted against the reconsideration. The question to be determined from the vote is in part, if not wholly, whether councilman Jackson voted at all on that motion. The evidence shows that when the roll was called, it was customary for the clerk to look at a councilman when he called his name, and the councilman's assent was often given by a nod of the head, or his dissent by a shake of the head. The evidence, we think, shows conclusively that when the roll was called, councilman Jackson looked at the clerk and nodded his head. The clerk tallied him as voting in favor of the reconsideration. The clerk announced the vote as twelve in favor of reconsideration, and ten against it. At this point in the proceedings there was much confusion in the council chamber, and one member of the council arose and claimed that two members had not voted. Then it was claimed that councilman Jackson had not voted Mr. Jackson tried to stop the person who was making this claim, and told him to let it pass; and when he did this, he knew that he was tallied as voting in favor of the motion. The matter was pressed, until Mr. Jackson said that he had not voted, and desired to be excused from voting, as he had been sick and absent, and was not very familiar with the matter under consideration. Thereupon the council voted eighteen in favor of excusing him, and two against. There was some talk after this ac-

tion was had in the council, among the members, as to whether eleven votes in favor of the reconsideration would carry the motion; and it is claimed that some official of the city, who was present in the council chamber, gave it as his opinion that the motion would be carried if only eleven members voted in favor of it. The evidence shows that the journal clerk, who writes up the record for the city clerk, commenced to write the record as soon as possible after the meeting; that this clerk poceeded to write the minutes of the meeting of January 27th, 1896, and had written some portion of them, when the city clerk found that the minutes were being written up as showing that only eleven members voted in favor of the reconsideration. Thereupon he had certain portions of the minutes erased and written up as showing that twelve members voted in favor of the motion; and the journal as thus written, was presented to the city council at its next regular meeting; and when read, a motion was made to strike out the number twelve, and insert number eleven as voting in favor of the motion. Mr. Jackson then said to the council that he had undoubtedly given the clerk to understand, by the nod of his head when the roll was called, that he voted in favor of the motion. The vote was taken by the council, and after a full consideration of the matter, the council voted sixteen in favor of approving the journal as it was written, and five members voted against it.

The law requires that a majority of all the members elected to the council are necessary to carry the motion of January 20th, 1896, and the rules of the council provide:

"That any action of the council as to the passage of an ordinance for the payment of claims may be reconsidered by motion if the motion to reconsider be made not later than the next regular meeting after such action was taken; and also that every member present shall vote on the call of the 'yeas' and 'nays' unless excused by the unanimous consent of the council."

The city council is a legislative body, and the question which is here presented, is one which relates to its proceedings as such a body; and it affirmatively appears that the question which is now submitted to this court upon mandamus, was made in the council itself; and upon consideration after hearing evidence on the question of approving the journal, this legislative body determined that its record, as made, was according to the facts. There is no suggestion of fraud, or collusion, or bad faith, and the court is asked to determine whether the council reached the right conclusion or not, in approving its journal. We think that the jurisdiction of the council in this matter is final and conclusive, in the absence of any charge of fraud or bad faith in the matter, and that this court will not inquire into the accuracy of that record any more than it will inquire into the motives which prompted the members of the city council in voting as they did. We think it is not clear by any means that the council did not determine this question correctly, upon the evidence as it is presented before us. There is no doubt, as Mr. Jackson and the clerk both testify, that he voted in favor of the motion. Whether he intended to so vote or not, it does appear that he did not vote, and it appeared to the council when they approved their journal, that he intended the clerk to understand that he voted in favor of the motion, and the members had not all voted to excuse him from voting as the rule requires.

The petition against the council asking the court to change, or order the council to change its journal, is dismissed.

Fourth. The right of the city council to reconsider the motion of January 20th, 1896, by which motion it rejected all the bids.

If the council has not this right, then the motion to reconsider, it is claimed, has no effect; and the action of the council still stands, that all the bids are rejected. Beach on Public Corporations, sec. 366, says:

"The general rule is settled beyond dispute, that action taken by the town meeting may be reconsidered and rescinded at the same meeting, or at any adjourned, or at any other subsequent meeting; and a vote not to reconsider a previous vote taken at the same meeting, does not abridge the power of after-meetings over that vote. Where there is a vote in the negative, the voters may nevertheless, at the same or any other meeting, rescind the vote, and pass measures in the affirmative, or they may take inconsistent action without formally rescinding the vote. If the votes are repugnant, the former is rescinded by implication."

And in sec. 297:

"It is the undoubted right of corporate bodies, unless clearly restrained by legislative enactment, to reconsider a vote as often as they see fit, or to rescind the same, provided vested rights are not disturbed, up to a time when by a conclusive vote, accepted as such by itself, a determination has been reached. They may adopt rules as to the time when reconsideration may be moved, and it is not necessary to the validity of the resolution to reconsider, that it should be moved by one who voted originally with the majority; and a board of aldermen, which has indefinitely postponed action on a resolution of the common council, can afterwards rescind that action, and pass the resolution."

There are a large number of authorities cited in the note that fully sustain the text of the author.

To the same effect is sec. 290 in Dillon on Municipal Corporations:

"At any time before the rights of third persons have attached, a council or other corporate body may, if consistent with its charter and rules of action, rescind previous votes and orders."

The rule of the council governing the matter of reconsideration has already been given. The rule, however, has some limitations:

"If a vote of the town has given a cause of action against it, no subsequent proceedings can impair or dispute this vested right; and it is generally true that rights of third

parties resting on a vote, cannot be divested by reconsideration."

Another exception to the general rule is:

"If a vote has accomplished its purpose, and wrought out the intented result, its force is spent, and an attempt to reconsider it is futile."

These authorities seem to establish the right of the city council to rescind the motion of January 20th, 1896, unless it shall appear that under the motion of January 20th, 1896, there had become vested rights, or that that motion so fully disposed of the entire subject matter, that the council could take no further action upon the same.

Had the city council awarded this contract to the Holly Manufacturing Company, instead of rejecting all bids, then we can see how the Holly Manufacturing Company would have had, under that vote, a vested right; but it is equally clear that, under the vote to reject all bids, the Holly Manufacturing Company obtained no vested right. The motion to reject all bids, did not dispose of the matter before the council so fully that it could not reconsider. There is no such limitation in the law, and authorities, so far as we have seen any upon the subject, are that the council, after rejecting all bids, may reconsider that vote, and award the contract; or, if the contract is awarded to a bidder, and he refuses or fails to enter into the same, the council may thereafter award the contract to another bidder. In Ross v. Stockhouse, 114 Ind. 200, it is held that

"A board which has rejected all bids received in pursuance of due notice of the letting of a contract for a street improvement, may at a subsequent meeting, without a readvertising for bids, reconsider the vote of rejection and award the contract to one of the original bidders."

In Kinsell v. The City of Auburn, 7 N. Y. Supplement 317, the court decided:

"The common council may reject any or all of the pro-

posals, if they shall deem it for the interest of the city; and if either of said proposals is deemed favorable to the city, the common council may direct the mayor and city clerk to contract with the party whose proposal is accepted."

In this case, after bids for constructing a sewer were opened, and the council passed a resolution awarding the contract to the lowest bidder, he failed to enter into the contract, and the council at the next meeting reconsidered the motion awarding the contract, and awarded the contract to the next lowest bidder. The court held that the proceeding was legal.

It is apparent then, from the very nature of the proceeding, and from the authorities, that the council had authority to aawrd the contract after it had voted to reject all bids.

Sixth. Can the contract be awarded to one who is not the lowest bidder?

This question involves an examination of the statutes, to determine under which provision this contract was let. Sec. 76 of the Federal Plan Law, points out how the city is to proceed in case of an improvement or repair or purchase of supplies, where the cost exceeds five hundred dollars; and paragraph 5 of that section provides:

"If the work bid for embraces both labor and material, they shall be separately stated, with the price thereof."

Paragraph 6 reads:

"None but the lowest and best responsible bid shall be accepted when such bids are for labor and material separately, but the council may, at its discretion, reject all the bids, or accept any bid which may be the lowest aggregate cost, when recommended by the board of control."

This provision of paragraph 6 seems to refer entirely to cases where labor and material may be bid for separately; that separate bids may be tendered and accepted when they are the lowest and best responsible bids; but if the fractional bids are not lower than any one bid which includes all

the fractional parts, or is the aggregate of all of them, then the aggregate bid may be accepted.

Sec. 794, applies to cities and towns and villages among other corporations and boards, but this section makes it imperative that the officer, board or authority calling for the bid, shall require separate and distinct proposals to be made for furnishing the materials for doing the work, or both, in their or his discretion, for each separate and distinct trade or kind of mechanical labor or employment, or business necessary to be used in making such public improvement. In this respect, the statute is similar to the one in the Federal Plan Law. It would seem from the notice inviting the bids, that the city was not proceeding, as to the character of bids, under either of these provisions of law. The notice fully provides for a pumping engine, and that all steam pipes, fixtures, water pipes, mains, valves and labor are to be furnished with the pump. The bid called for is a unit, and gives no opportunity to anyone to bid separately on material or labor or anything else called for in the notice. The Federal Plan Law places the waterworks of the city under the management of the director of public works of the city, who takes the place of the trustees or board under the provisions as provided for in the general law of the state pertaining to waterworks; and any authority in the law vested in the trustees or board, is now vested in such director.

Sec. 2415 provides:

"The trustees or board shall be authorized to make contracts for the building and machinery of waterworks, buildings, reservoirs and the enlargement and repair thereof, and the manufacture and laying down of pipe, and the furnishing and supplying with connections of necessary fire hydrants for fire department purposes, and keeping the same in repair, and for all other necessary purposes to the full and efficient management and construction of waterworks."

Sec. 2419 provides:

"The trustees or board, before entering into any contract for work to be done, the estimated cost of which exceeds five hundred dollars, shall cause at least two weeks notice to be given in one or more daily newspapers of general circulation in the corporation, that proposals will be received by the trustees for the performing of the work specified in such notice; and the trustees shall contract with the lowest bidder, if in their opinion he can be depended on to do the work with ability, promptness and fidelity; and if such be not the case, the trustees may award the contract to he next lowest bidder, or decline to contract, and advertise again."

The notice seems in all its parts and purposes to have been made under this section of the law. It is not made to harmonize with the purpose and intent of the provisions of the Federal Plan Law, nor of the general provisions of the law as found in section 794; nor do the bids in any manner purport to be made under those sections; and it is evident that those sections were not intended to apply to a matter of this kind. And sec. 2419 is one under which the city authorities had a right to call for bids. They have called for bids under this section. The bids have been made to conform to these provisions, and it is under this section that the authority of the city to award the contract is to be determined. This section gives to the city an option to award the contract to the lowest bidder, if in their opinion he can be depended upon to do the work with ability, promptness and fidelity; and if such be not the case, then they may award it to the next lowest bidder, or decline to contract. This section places this option entirely upon the opinion of the city authority, and the court certainly cannot interfere with that opinion.

In this case, proof has been introduced as to the character of the bidders, and it is claimed that the Holly Company is fully capable of doing this work with ability, promptness and fidelity. There is no claim here that the city is in any manner acting fraudulently or by way of collusion to

evade the intent of this statute; and for aught that appears in the case, it is acting honestly, and with an opinion that has to it some foundation. The city under this statute had the right to reject the Holly bid, and accept the bid of the Allis Company. The duty and discretion of deciding this question is imposed upon the city authorities, and not upon us. 10 C. C. R., page 74.

The plaintiff's petition for an injunction is dismissed.

Judge MARVIN delivered a dissenting opinion as follows:

I agree with the result reached in the two mandamus cases; but I have not been able to agree with my associates in the injunction case. The Federal Plan Law, it seems to me, undertook to, and, I think, did provide a plan of government for the city of Cleveland, and a means of letting contracts by the city of Cleveland. If it be true that the director of public works of the city of Cleveland has all the authority that the trustees of waterworks have under the general statute, then it would seem to follow that the contract in a case like this must be let by the director of public works. Section 2415 of the statute provides that the trustees of waterworks may make contracts. Now, so far as I have understood this case, it has not been claimed that the director of public works could have let this contract. The city authorities do not seem to have acted on that idea; and it was awarded by the council.

It must be conceded that as to the course to be pursued in a case like this the legislation is not plain. Section 76 of the Federal Plan Law provides:

"When the corporation makes an improvement or repair, or purchases any supplies, the cost of which will exceed $500, it shall proceed as follows:

"Then follows the various sub-divisions of the section, No. 6 being as follows:

"None but the lowest and best responsible bid shall be

accepted when such bids are for labor and material separately, but the council may, at its discretion, reject all the bids or accept any bid which may be the lowest aggregate cost, when recommended by the board of control."

Now, it is conceded that it is not plain as to what is to be done, except where the bids are to be separate—for different things to be furnished or done. This subdivision, as has been said in the opinion already delivered, is substantially like section 794 of the statute. That section is construed, in the main, with section 799, in 39 Ohio. St. Reports, where Judge Doyle delivered the opinion. In that case Judge Doyle took occasion at least twice in the opinion to say that the court does not undertake to say, under the language, that the contract is to be let to the lowest and best bidder, whether there is a greater discretion than where it is to be let to the lowest bidder. But pursuing the matter for a moment further as to whether the contract is to be awarded by the council or director of public works As I have said, the council seems to have proceeded upon the idea that it was to be awarded by the council; and I believe that that was the intention of the federal plan and of this subdivision 6 of the statute, although the language is not plain, and there is no other provision, so far as I know, and I have looked with some care, for the letting of contracts. Now, that being so, if this contract is to be let under that statute, it must be either let to the lowest and best responsible bidder, or to the lowest responsible bidder. My own opinion is that in no event can the contract be let to any but the lowest bidder; and if he is not the best bidder, the council may reject the bids and again advertise. I think the whole spirit of the statute requiring competitive bidding is in accordance with that view.

The only general statute which provides for letting to the lowest and best bidder is section 794, and, as I have said, the supreme court, in the case to which I have called at-

tention, where the decision was made by Judge Doyle, expressly avoided determining whether there may be a letting of the contract to other than the lowest bidder.

Under section 2419, which has been constructed by the Circuit Court of Hamilton county, to which attention has been called in the opinion already delivered, the discretion is plainly left with the public authorities; because that provides that the contract shall be let to the lowest bidder if in their opinion he can be depended on to do the work with ability, promptness and fidelity; and if such is not the case, the contract may be let to the next lowest bidder. There is clearly a discretion left. There is a discretion left under my construction of this statute, subdivision 6 of section 76. If in the judgment of the authorities the lowest bidder is not the best bidder, they may reject all bids. Now, to illustrate the difficulty that I think comes from taking any other view—the object of the statute being to secure the benefit of competitive bidding—take this case: The answer, among other things, says that the pump, with the appurtenances, that the E. P. Allis Co. propose to furnish, weights 100 tons more than the one that the Holly Co. proposes to furnish. But it does not follow that because the E. P. Allis Co. will furnish the apparatus desired for $64,000, weighing so much more than the one that the Holly Co. propose to furnish, that the Holly Co., if it had the opportunity to bid for an apparatus of this additional weight, would not still be the lowest bidder. There has been no opportunity, so far as appears in this case, for anybody to bid on a pump that should weigh the additional 100 tons; and it would seem to me that the course to be pursued would be to reject all these bids and advertise again. If it is desirable that the pump and its appurtenances shall weigh 100 tons more than it is said the Holly Co. apparatus weighs, let the advertisement indicate the weight the apparatus shall have—that it shall not be less than a given amount. It seems to me that it is

in direct violation of the spirit of the statute to say that a contract may be let to a bidder not the lowest, who is a responsible bidder and who complied with the conditions of the notice; and in my judgment, in a case like this, where the separate parts are not to be bid for separately, it must be let to the lowest bidder or not let at all. Then there is subdivision 8 under this section:

"If two or more bids are equal for the whole or any part of the work, but are lower than any others, either may be accepted, but in no case shall the work be divided between them."

It, therefore, seems to have been the intention of the legislation to let these contracts to the lowest bidder who can conform to all the requirements, and who is responsible and will give the proper bond.

Now, without stopping to give any others, these are some of the reasons for dissenting from the opinion of the majority of the court in the case brought by McClain for an injunction.

(Third Circuit—Hardin Co., O., Circuit Court—Feb. Term, 1898.)

Before Day, Price and Norris, JJ.

JOHN T. HARRIS v. MAGDALENA WESTERVELT.

Proceeding to recover concealed assets and for removal of administrator can be joined—

It is not improper to join in one proceeding, an application for the recovery of concealed assets of an estate, and for the removal of the administrator of such estate: and the mere fact of such joinder, will in nowise affect or change the character of either proceeding with respect to appeal.

Appeal—Proceeding to recover concealed assets—

Appeal lies from a final order in a proceeding to recover concealed assets, by express provision of sec. 6407, Rev. Stat. There is no similar provision with reference to removal proceedings, and in such matter appeal does not lie.

Error to the Court of Common Pleas of Hardin county.

On June 11, 1896, the plaintiff filed in the Probate Court of Hardin county, his application, in form an affidavit, setting forth, in substance, that he was a creditor and interested in the proper administration of the estate of William Westervelt, deceased; that the defendant Magdalena Westervelt was widow of the deceased William Westervelt, and administratrix of his estate; that the said administratrix unlawfully and fraudulently conceals and withholds from the inventory and refuses to have inventoried as assets of the said estate, certain pesonal property described, and of the value of some $1,600.00; that there are unsettled claims and demands existing between the administratrix and the estate, which are the subject of controversy between the said administratrix and affiant and other creditors and interested persons; and praying for the removal of the administratrix, the appointment of a new one, and that a proceeding as provided by law be had to this end, that said concealed property be added to the inventory as assets of the said estate. On the 22nd of June, 1896, upon notice, the probate court heard and disposed of the application. An entry was made upon the journal finding in favor of the administratrix on all the propositions involved, and against the applicant Harris; that no controversies exist beween the administratrix and creditors of the estate with respect to unsettled claims and demands; that the personal property, set out and described in the application and said to be concealed assets of the said estate, is not assets of the estate, but is the property of the said Magdalena Westervelt; that no cause is shown for the removal of the administratrix, and the application is disallowed and dismissed with a judgment against Harris for the costs of the proceeding. Harris gave notice of his intention to appeal the matter to the court of common pleas, and, within the time provided by the statute, gave an undertaking for appeal in an amount fixed by the court, and perfected an appeal if the matter is

appealable under the provisions of the statute. The common pleas court, on motion, dismissed the appeal on the ground: "No appeal lies from the order of the probate court in said proceeding." Harris saved an exception to this ruling of the court, and prosecutes error here to obtain reversal of the order dismissing the appeal.

DAY, J.

The single question presented by this record is: Does appeal lie, under the provisions of law, from the probate court in such matter or proceeding? And the question can only be correctly answered by a proper determination of the character of the proceeding. The statutory provisions for appeal from the probate to the common pleas court, are simple and so clear and definite as to leave but little, if any, room for difference of opinion as to what matters are and are not appealable. And as in this case, the controversy is not as to the law of the case—as to what the provisions of law are, but rather as to the character of the proceeding itself. Is it of such character that, under the plain provisions of the statute, appeal lies?

What then was this proceeding? If it was merely to obtain the removal of an executor or administrator and the appointment of a new one, no appeal lies. In such case the statute makes no provision for appeal; and the suppreme court has held that none lies. If, however, it was a proceeding against a person suspected of having concealed, embezzled or conveyed away property or assets of the estate of a deceased person, by the express provision of section 6407, Revised Statutes, it is appealable. If such was the character of the proceeding in question, an appeal was properly perfected, and the lower court was in error in summarily dismissing plaintiff out of court.

Counsel for defendant, with zeal and persistence, asserts it was a proceeding to procure the removal of the administratrix, and of course not appealable, there being no provis-

ion for appeal in such case. Counsel for plaintiff, with equal zeal and persistence, contend it was a proceeding against a person suspected of having concealed property and assets of the estate of William Westervelt deceased, and appealable of course, by the express provision of the statute. It may, with propriety, be said that both are to an extent right, from the standpoint assumed by them. A careful reading of the complaint filed by Harris discloses, that it was a proceeding to procure the removal of an administrator and the appointment of another one. It was also "a proceeding against a person suspected of concealing assets of the estate;" and, that a proceeding of such dual character was entirely legitimate and proper, there can be but little, if any, doubt. The alleged improper administratrix and concealer of assets, consisted of one and the same person; and it is the policy of the law to minimize litigation in the number of actions and proceedings that may properly be instituted and maintained; and to that end, by express provision of law, the joinder of various differing causes of action, in a single proceeding is provided. It would seem, therefore, that it could not be improper, if under the provisions of sec. 6017, Revised Statutes, a creditor desired the removal of an administrator, and also, under sec. 6053, desired to proceed against the same person for concealing assets of the estate, to unite the two in one complaint and pray relief concerning both in the one proceeding. That is precisely what was done in this case, and we think properly.

The first complaint contained in the motion is that the administratrix is concealing property and assets of the estate, and the property is described with particularity. The second complaint is that there are differences existing between the administratrix and the creditors of which the affiant is one, as to claims of the administratrix, that are liable to lead to litigation, as ground for the removal of the administratrix. The prayer is, for removal of the administratrix

and the appointment of another one; and, such proceeding as will add the concealed property to the inventory, as assets of the estate.

The questions raised and presented by the affidavit filed, were submitted to and decided by the probate court, and final judgment entered thereon. All the propositions involved were adjudged, and the judgment, if allowed to stand, will constitute a bar to any subsequent proceeding against the administratrix for the same alleged concealment of assets of the estate; so that a final judgment was entered against the plaintiff in a proceeding against a person suspected of concealing assets, from which plaintiff has the right of appeal in virtue of the provisions of the statute, unless something has intervened by which the right of appeal has been taken away. Nothing has intervened—nothing unusual has got into the case, unless it is unusual to hear and determine two separate independent propositions in one proceeding; and it is not claimed or believed, that the mere fact that the "proceeding against a person suspected of concealing assets," was disposed of in connection, and in the same proceeding, with an "application for the removal of an administrator", would change its character in any respect, or in any way affect the matter, so as to make it non-appealable. If this is correct, the right of appeal remained unaffected, and the plaintiff in error having taken the necessary steps in time, perfected an appeal in the matter, and the lower court was in error in dismissing it.

The judgment is reversed, with costs. The motion to dismiss the appeal is overruled and the cause remanded for further proceeding according to law.

Frank C. Daugherty, for Plaintiff in Error.

Smick & Hoge, for Defendant in Error.

(First Circuit—Hamilton Co., O., Circuit Court—Jan. Term, 1898.)

Before Cox, Smith and Swing, JJ.

THE VILLAGE OF NORWOOD v. GEORGE C. OGDEN AND LAURA L. WHALING.

Appropriation for street purposes—Assessment of compensation and costs on owner's remaining land by foot front—

Under the decisions of the Supreme Court it is not unconstitutional for a city to condemn a strip of land for street purposes, pay for it, and then assess the amount of the damages awarded for the land and the expenses of condemnation proceeding on the abutting lots and lands by the front foot, although by such proceeding the owner of the strip taken will be compelled to pay back by way of assessment the money awarded to him together with the costs of the condemnation proceeding.

Error to the Court of Common Pleas of Hamilton county.

SMITH, J.

In the original action Ogden and others sought to restrain the village from the collection of an assessment levied on their property to pay condemnation money for property appropriated by the village to open a street in said village. A general demurrer to the petition was filed by the village. This demurrer was overruled by the court, and the defendant not desiring to plead further, the injunction was made perpetual, and judgment rendered against the village for the costs, and to all of which it excepted, and filed this petition in error, seeking the reversal of said judgment.

In substance the petition alleged that on Feby. 15, 1892, the village, by its council, passed an ordinance for the condemnation and appropriation for public use, for opening and extending Sherman avenue, of a strip of ground, and providing that the condemnation money, costs, etc. be assessed per front foot upon the property bounding and abutting on that part of Sherman avenue so condemned and appropriated therein. That proceedings were accordingly had against plaintiffs and others to assess said compensation, and Geo..

C. Ogden was allowed $625, and Laura L. Whaling $625, which was paid to them.

That on Nov. 7, 1892, the council passed an ordinance to assess a special tax on real estate bounding and abutting on Sherman avenue from the east side of Allison street to the east line of Ogden's land, as provided in said ordinance—viz., so much on each front foot of the several lots of land bounding and abutting on Sherman avenue from east side of Allison street to east line of Ogden's; to pay the cost and expense of condemning property for extending said Sherman avenue between the points aforesaid, together with the interest on bonds, etc.

It is further averred that the village seeks through the enforcement of said ordinance to assess the damages caused to plaintiff and others by the appropriation of the property of plaintiffs and others, the costs and expenses etc. back on the remaining property of plaintiffs and others, bounding and abutting on that part of Sherman avenue so condemned and appropriated according to the front foot. There are other allegations as to the collection from plaintiffs of the amount assessed against plaintiffs' property for 1893, and the certification to the county auditor of the installments for the years 1894 and 1895 on their property; and it is averred that if plaintiffs are compelled to pay the assessments made against them, it will require not only the total amount of the compensation money awarded to them, but other sums in addition, and that this is arbitrary, unjust, and in violation of law and the constitution of the state, and will be a confiscation of their property which is without due process of law, and in violation of the constitution of the United States.

It is our understanding that the constitutionality and validity of such legislation and proceedings has been settled adversely to the claim of the plaintiffs below, by the supreme court of this state. Sec. 18 Ohio St., 303; 29 Ohio

St., 69 and 49 Ohio St., 334. While these decisions stand, or unless a different rule is established by the Supreme Court of the United States, we are bound by them.

It was stated by counsel for defendant in error, that all of the land abutting on the property so condemned and appropriated, liable to assessment, was not in fact assessed. This does not appear from the allegations of this petition, and in our opinion the petition did not state a good cause of action, and the demurrer was improperly overruled, and the judgment for plaintiffs improperly rendered. The judgment will therefore be remanded to the court of common pleas for such further proceedings as are warranted by law.

(Sixth Circuit—Lucas Co., O., Circuit Court—Jan. Term, 1898.)

Before King, Haynes and Norris, JJ.

(Judge Norris taking the place of Judge Parker.)

CATHERINE S. FISHER v. WASHINGTON W. TRYON, GEORGE B. SCHULTZ, and THE TOLEDO TRANSFER COMPANY.

Pleading—Averments in, bind party—Different parties defendants—

(1). A party is concluded by the averments of his pleadings, and will be bound by the averments as between himself and one of the defendants, although evidence may have been properly admitted as between himself and another party in the case *to the contrary.*

Independent contractor—Liability of property owner—

(2). Application is made in discussing the charge of the court and facts of the case, of the rules laid down in 47 Ohio St., p. 207 and 49 Ohio St., p. 69, in regard to the liability of property owners for acts of contractors.

Hack driver—Duty of care—Excavation in street—

(3). The petition charged that the driver of the Transfer Company's hack, did not use *ordinary and reasonable* care in driving and looking out along the street. The court charged "that it was the duty of the driver while driving to keep a prudent and careful lookout ahead of him, and to use all reasonable care to avoid obstructions and excavations in the street; that is, such

care as an ordinarily prudent person in his situation and under the circumstances surrounding him, is accustomed to exercise." Held: A correct statement of the law governing this case.

Action for damages for tort against different defendants—Verdict against all, only for joint tort of all—

(4). In an action in tort against several defendants, the jury were charged that if they found against all of the defendants, they could only assess damages which resulted from the acts of *all the defendants.*

Error to the Court of Common Pleas of Lucas county.

HAYNES, J.

A petition in error is filed by the plaintiff for the purpose of reversing a judgment of the court of common pleas rendered in a case wherein Catherine S. Fisher was plaintiff, and these defendants in error were defendants. The petition in the common pleas was originally filed by plaintiff against George B. Schultz and Washington W. Tryon, alone, and it set out, among other things, that said city was a municipal corporation and that certain streets in said city crossed each other; "that on the 22nd day of September, 1894, the defendants entered upon said St. Clair street, a little northwesterly of where it intersects with Monroe street, and removing the paving stones upon one side of said street, did excavate a large and deep hole in said street, for the purpose of making some kind of water or gas-pipe connection or otherwise, the exact nature of which to plaintiff is unknown." It then states the duty of defendants in regard to the excavation; that "they negligently, wrongfully and carelessly, after making the said excavation in the roadway of said street, and while at work thereat, failed to place either barriers or lights in, around and by the same, and left the same open and exposed in the night season of said day when it was dark, in such wise that persons passing upon and along said street, upon foot and in vehicles, were liable to fall therein, and be thereby greatly injured, as defendants well knew, or by the exer-

cise of reasonable care might have known." It then sets out that upon said day and in the evening thereof, the plaintiff was being carried, with her husband and her sister, in a carriage from the Boody House, in the city of Toledo, to the Michigan Central Railway Company's depot in Toledo, along said street, and that while being so carried along said street, "one side of said carriage suddenly dropped down into said hole so made by defendants, throwing plaintiff forward and severely bumping and injuring her body, cutting and bruising her forehead above one eye, so that the same was caused to bleed profusely. Thereupon plaintiff, with the other occupants of said carriage, got out therefrom and were helped by plaintiff's husband to the sidewalk. It was very dark at said time, and neither plaintiff nor her companions were able to see or distinguish the surroundings. After said carriage had been lifted up and moved forward, plaintiff's husband came to plaintiff and undertook to assist her to again re-enter the said carriage, and while plaintiff was proceeding from where she was standing on the sidewalk to where said carriage was located, plaintiff suddenly stepped off into space, and was thereupon precipitated and thrown into the said deed hole then and there existing in the above part of said street as aforesaid. Said hole was about eight feet deep, and plaintiff fell to the bottom thereof, falling against and striking her body against the sides and bottom of the same, to her great injury and damage as hereinafter stated. It then proceeds to state the injuries that she received.

Subsequently, by leave of court, plaintiff filed an amendment to her petition making the Toledo Transfer Company a party to the action, and in regard to that she says: "That the Toledo Transfer Company is a corporation duly organized under the laws of the state of Ohio, and carrying on a general hack and vehicle transfer business in the city of Toledo, Ohio. Since filing her petition in this cause, the

plaintiff has been informed and believes that the said The Toledo Transfer Company is a proper party defendant herein, by reason of its negligence in connection with the injuries inflicted upon and sustained by plaintiff as set forth in her petition. Upon the night of the 22nd day of September, 1894, when plaintiff was being transferred in a carriage upon and along St. Clair street, in the city of Toledo, from the Boody House Hotel, to the Union Railway Station, in said city, as set forth in the petition, she employed for that purpose the defendant, The Toledo Transfer Company, who was then and there a common carrier of passengers, to carry and transfer her from said Boody House to said Railway Station. And in pursuance of said contract of carriage, plaintiff was riding in a carriage or hack of said The Toledo Transfer Company at the time she received her injuries, as set forth in the petition. As such carrier of the plaintiff, it was the duty of said The Toledo Transfer Company to carry plaintiff safely and without harm, and deliver her at the said railway station. In that behalf it was its further duty to have its agent driving the carriage in which the plaintiff was riding, keep a constant, prudent and careful lookout, ahead of said carriage, to see and to avoid any obstructions or excavations that might be in and along the way over which said carriage was to pass. And yet the agent of the said defendant who was driving said carriage, did not so keep a constant, prudent and careful lookout upon the street along which he was driving; but on the contrary, negligently, wrongfully and carelessly, without the *exercise of ordinary or reasonable care*, drove the said carriage into the hole or excavation made in said St. Clair street, as described in the petition. Plaintiff is now informed and believes that the said agent of The Toledo Transfer Company did not exercise ordinary and reasonable care to observe and avoid the said excavation in said street, or take warning thereof so as to avoid the same; but did drive his

said carriage so that the wheels thereof ran into the large hole excavated in St. Clair street as aforesaid, thereby proximately conducing to all the injuries and sickness and damages sustained by the plaintiff, as in her petition described."

Tryon, in his answer—after making general denials—says that he is the lessee of a store-room situate on the southeasterly corner of Monroe and St. Clair streets. "That in connection with his said business, and for the purpose of furnishing power to propel certain appliances used in and about said store, he has, and at the happening of the events hereinafter set forth, had in operation in his store, a water motor, which was furnished and supplied with water from the water main in St. Clair street, said water main being owned by the city of Toledo. That on or about the 22nd day of September aforesaid, there was a leak in his service pipe; that to prevent damage to property it was necessary to have it repaired immediately, and he employed the defendant, George B. Schultz, to repair it. That said George B. Schultz is, and was at that time a plumber, engaged in such work, and who was regularly licensed and authorized by the said city of Toledo to perform such work, and to make the necessary excavations in the streets for the purpose of doing the same. That thereupon said George B. Schultz proceeded to repair said pipe, and in so doing, it became and was necessary for him to make an excavation in order to reach said pipe where the same was broken and leaking, and also at the point or place where said service pipe was connected with said waterpipe in St. Clair street. The said last-mentioned excavation was at the only point where the water could be turned or shut off from said service pipe while said repairs were being made, and that it was necessary for said water to be so shut off before said repairs could be made. This defendant further says that he in no wise directed, controlled, supervised or managed,

and that he in no wise attempted to direct, control or manage or supervise the mode or manner of making said repairs, or in making the excavation necessary in and about the carrying on of said work. This defendant further says that he made a contract with said defendant, George B. Schultz, to make said repairs, but that in making such repairs said Schultz was not under, or subject to any direction or authority from this answering defendant as to how or in what manner said work should be done."

The defendant George B. Schultz filed an answer himself, and it is mainly a denial of any negligence. The main part of it is that he denies that the excavation was not properly lighted and cared for, and he avers that if the plaintiff drove into the hole, she drove into it of her own negligence.

The defendant Transfer Company answering, admits that these parties were being transferred; admits that these holes were dug there, and says: "It admits that said defendants, Schultz and Tryon, did wrongfully, negligently and carelessly, after making the said excavation in the roadway of said street, and while at work thereat, fail to place either barriers or lights in, around and by the same, and left the same open and exposed in the night season of said day when it was dark, in such wise that persons passing along and upon said street upon foot and in vehicles were liable to fall therein and be thereby greatly injured, as said defendants Shultz and Tryon well knew, or by the exercise of reasonable care, might have known. That admission is in the language of plaintiff's petition.

A joint reply was filed by the plaintiff in the case. The petition having been filed in March, 1895, Schultz's answer was filed in March, 1895, and the answer of Tryon filed in March, 1895, and the amendment to this petition, mal ing other parties, in April, 1895; service was had upon the Transfer Company at that time, and it filed its answer March 17th, 1897. This joint reply was filed on the 22nd day of Marc h.

It appears in the journal entry that, upon motion of the defendant Transfer Company, the reply itself was stricken from the files. It appears in the bill of exceptions, that it was stricken from the files, for the reason, as stated, that the reply did not conform to the order of court. That being stricken off on the 22nd, the plaintiff was allowed to immediately file separate replies thereto, and on the 24th of March, two days thereafter, he did file separate replies to the answers of the several defendants.

Trial was commenced on the 20th of March, 1897, and continued until a verdict was rendered, occupying, I think, a couple of days.

Some objections were made to the introduction of testimony by the parties, but nothing that affects materially the plaintiff. The testimony was given and the case then submitted to the jury, after the charge of the court, and most of the errors that are complained of arise from the charge given by the court to the jury. There is a general allegation in the motion for a new trial that the verdict is against the evidence, and it is said in the petition in error, that one of the greatest errors is that the court erred in overruling the motion for a new trial.

The testimony as it was offered by the various parties, shows substantially this state of facts: That this lady, with her husband, resided at Ypsilanti, in the state of Michigan, and had been on a visit at Tiffin, Ohio. They came into Toledo on the afternoon of the day stated in the petition, arriving about four o'clock, over the Pennsylvania road and were carried by one of the hacks of the Transfer Company, from the Pennsylvania Depot to the Boody House, and at that time an order was given by the husband of the plaintiff, that the hack return for them at 8 o'clock, or a little after, to take them from the Boody House to the Michigan Central Depot—the Union Depot. The hack did return, and it was while passing along the street on their way to

said depot that the accident occurred. The testimony on the part of the plaintiff, in regard to the condition of affairs, so far as she and her husband observed them, at this point, was that there were no lights at the place were the accident occurred, and that it was very dark, and that, as they were riding along, the carriage—as the husband thinks—turned a little to the left, and suddenly one side of the fore part of the carriage dropped down a little distance and thereupon his wife was thrown forward—he being seated with his back toward the horses, and the lady on the hind seat—and hit a portion of her body, and also her forehead, against her husband, cutting her head, as the husband testifies, so that the blood ran down one side of her face, and there being perhaps some bleeding at the nose. He testifies that he then opened the carriage door, upon the right hand side, and all the parties got out and went towards the sidewalk on the westerly side of the street; that in a very few moments the driver said to these parties "Come on;" and they started to walk over—the wife and her sister walking together, and the husband standing very near the carriage. Several parties had in the meantime gathered around the place where the accident had happened, and as the plaintiff and her sister passed through the crowd, Mrs. Fisher suddenly went down into this hole in the street, and received additional injuries.

The testimony on the part of the Transfer Company tends to show that when the wheel went into the hole, the driver was pitched off upon the earth lying alongside of the hole; that he got up, and one or two persons came and lifted up his carriage; that when they did so the husband was standing by, and said: "Can we reach the depot?" That the driver took out his watch and said "Yes"; that he had fourteen minutes; that Mr. Fisher thereupon called to his wife to come over, and she came across and he opened the door and they got in, and, according to his testimony he didn't see

anything of the falling into the hole, or of the lady being lifted from the hole. They then got into the carriage and started towards the depot, and then the husband ordered the driver to drive back to the Boody House, which he did, where the parties remained until the next night, and then returned home.

The testimony on the part of Schultz and Tryon is, that a light was placed on this hole about five o'clock in the evening, and remained there until about eight o'clock, and was burning when Mr. Schultz went to his supper, the work being then completed with the exception of filling up the excavation. That when he returned, just after the accident occurred, the light, was not burning and the lantern was lying there somewhere. It appears from the testimony of the boy who was a helper there, that he was in the hole where the repair had been made, and that hole, according to the testimony, was situated within the curb line, between the curbstone and the sidewalk, on the easterly side of the street; and Harry Schultz, a son of defendant Schultz, had come over to where he was for the purpose of getting a light, a few moments before the accident, and lighted his candle there by the other party's candle, and went back to the hole in the street. Just where Harry Schultz was at the time of the accident, does not perhaps appear, except inferentially. He was present in court at the trial, but was not called by either party. It is said that he lighted his candle for the purpose of getting down into the hole to turn on the water; and the young man in the other hole testifies that the water was turned on, and he remained there to see that it worked right. It is claimed in argument that Harry Schultz had taken this lantern—his own light having gone out—for the purpose of lighting himself into this hole and to turn the water into the service pipe; but that does not appear very clearly—at least no parties appear to have been there at the time of the accident except the driver, and probably this son of Schultz.

The jury evidently found that at the time of the accident, the light was not burning upon the embankment; that there was no light or guard there at that time, and they returned a verdict of $1200 against Schultz, a verdict for the defendant Tryon and for the defendant Transfer Company. It is for the purpose of reversing this judgment in favor of Tryon and the Transfer Company that the petition in error is filed.

I will say here, that on reading the testimony, it appears to us that if the jury took that view of the facts in the case, that the verdict is in accordance with the probabilities. We think it very probable that while a lantern had been put on the dirt pile about five o'clock, for some reason, it was not there at the time of this accident.

I have stated these matters very fully, for the reason that they throw light upon the charge of the court, and I will examine that charge to see whether the law was or was not correctly laid down by the court. Part of the charge was as follows:

"Next as to the defendant, The Toledo Transfer Co. This branch of the case also presents some peculiar features. I will first read and give to you as the law of the case to be applied by you, the special instructions Nos. 1 and 2, which have been requested in behalf of the Transfer Company."

"1. The jury is instructed that as between the plaintiff and the defendant The Toledo Transfer Company, all of the allegations of the petition admitted by the answer of said defendant are to be taken as between the plaintiff and said defendant as true, notwithstanding any evidence that may have been received as to any of the facts so alleged and admitted."

"2. The jury is instructed that as to the defendant The Toledo Transfer Co., an excavation was made in said street by persons other than the Toledo Transfer Company, and that the same was left open and exposed in the night season of the day of said accident, when it was dark, in such wise that persons passing along and upon said street, upon foot

and in vehicles, were liable to fall therein. That the person or persons so making said excavation in the roadway in said street, and while at work thereat, failed to place either barriers or lights in, around and by the same. That it was very dark at said time, about the hour of 8-35 P. M. of said day, and neither plaintiff nor her companions were able to see or distinguish the surroundings. That each and all of the above statements of fact are to be taken and considered as facts, of course solely upon the issue between the plaintiff and the Transfer Company, notwithstanding any evidence which may have been received in this case tending to contradict the same."

One of the peculiarities of the case is, that by the introduction of the defendant Transfer Company into the case, this has brought, in my judgment, several causes of action into one single cause of action: The liability of the defendants Schultz and Tryon upon the fact as to whether or not they had caused this excavation to be dug in the street and left it without any proper barriers or lights or warning. The liability on the part of the Transfer Company that there being a hole in the street—no matter how the hole came there—whether by the action of man, or natural causes —there being a dangerous hole in the street, the driver carelessly and negligently drove into the hole, and as a result of it, the plaintiff was injured. Now in order to establish the negligence of Tryon and of Schultz, it was necessary to make the averment that there was no light—no protection—to this hole, and that it was dark, so that it could not be seen; and, as I said before, the testimony of the plaintiff was very strong upon that point. In order to establish the liability of the Transfer Company, it was necessary to show that it was light at the time of this accident, that it was light—so that the driver could see—so that he ought to have seen—might have seen—this excavation. Now the plaintiff files a petition against Schultz and Tryon and alleges, in strong language, that there was no light at this point; no barrier, and that it was very dark. Afterwards

he filed an amendment to his petition and made The Toledo Transfer Company a party, leaving the allegation just as it was in regard to the lights and the condition of affairs at the excavation or hole, and said that the defendant negligently drove into it, that is, the driver of the Transfer Company. In the answer of Tryon, he denied that there were no lights there, and practically stated that there was, and Schultz also; but in the answer of the Transfer Company they admit the allegations of the petition, almost substantially in the language of the petition itself, and planted themselves upon it, and stood upon it, and it was with regard to these allegations that this charge of the court was made and exceptions taken.

We suppose there is nothing better established than that the solemn allegations of a party in his pleadings in a case are to be taken as conclusive against him. He was bound to state the facts of his case; and he did state them as he supposed them to be true and correct, and by those he was bound. It was argued that he was entitled to the allegations made in the answer of Tryon; but we think that that position is not well taken. The suit is against all of these parties; that all of them have in some form united in joint wrong, were parties to it—the allegation is that these parties were tortfeasors. A judgment may be rendered in favor of either or against either of these parties, and they are each of them entitled to their own separate defenses according to the facts which are alleged against them, and the defense of this Transfer Company was—that it was dark at that point, and the driver not able to see. The misfortune is that it was joining inconsistent actions in the same cause of action and tried in the same case. We are clear that the charge of the court was right, and that no error intervened in giving the charge.

Now, in regard to the defendant Tryon, an exception is taken to the charge given by the court in respect to him.

The plea that he had made was, practically, that he had let the work to Schultz, who was an independent contractor; that he himself had retained no power or control over the actions of Schultz, and gave no directions in any manner or form whatever, and that Schultz was a person who was licensed by the city of Toledo to make connections with the water-works of the city, and testimony is offered to show that persons were prohibited from in any manner interfering with the water-works, under penalties, unless by the consent of the proper authoritiess, or unless they had a license from them. I will read the charge in regard to Tryon. It is a little long, but it is necessary to give it in order to understand it fully:

"Next as to the defendant Tryon. If you do not find from the weight of the evidence that the defendant Schultz, or any of his employes, was negligent in the respect alleged, then there is no liability upon the part of the defendant Tryon, and in that case your verdict must be in his favor also. The plaintiff seeks to recover or to hold the defendant Tryon liable for the negligence of Schultz; therefore, if the proof fails to show that Schultz or any of his employes were negligent, or if it fails to prove that the injury resulted from such negligence, then no recovery can be had against Tryon; but if you find from the weight of the evidence that Schultz is liable for the injury, then you will determine whether or not Tryon is liable. In order to entitle the plaintiff to recover against the defendant Tryon, it must be shown by the weight of the evidence that is admissible in this case against the defendant Tryon: (1) That Schultz was negligent in not having the excavation properly lighted or protected at the time of the happening of the accident; (2) that under the law which I will explain to you hereafter, Tryon is liable for the negligence of Schultz; and (3) that such negligence was the proximate cause of the injury. It is one of the many peculiar features of this case that certain evidence has been introduced against the defendant Schultz which is not admissible and cannot be considered by you as against the defendant Tryon. Without stopping to explain why this is so, I will read and give you

an instruction referring to that evidence which has been requested on behalf of the defendant Tryon. It is request No. 8:

"In determining whether said excavation was properly lighted or protected at the time of the accident, you will not, as against the defendant Tryon, consider any evidence relating to any trial which may have been had against the defendant Schultz in the police court of this city with reference to this accident, nor will you consider as against the defendant Tryon any testimony that was given before you as to what any witness or witnesses testified to in said trial of the defendant Schultz in the police court.

"With the exception of the testimony that is referred to in that instruction, you will consider as against the defendant Tryon all the evidence in the case bearing upon the subject, and determine whether or not Schultz was negligent in not having the excavation properly lighted or protected at the time of the accident.

"Let me repeat: in determining whether Tryon is liable, you will consider all of the evidence as to Schultz except the testimony in the police court in that connection. I need not repeat what I have already said as to the defendant Schultz upon that subject. If you do not find as against the defendant Tryon that the defendant Schultz was negligent, then your verdict must be in favor of Tryon. But if you find that as against the defendant Tryon that Schultz was negligent, and that such negligence was the proximate cause of the injury, then you will consider the remaining question as to Tryon, and that is, whether Tryon is liable for the negligence of Schultz. It appears from the pleadings and evidence that Tryon was the lessee and occupant of the store upon the northeast corner of Monroe and St. Clair streets; that the service pipe which was connected with the water-main in St. Clair street, and which supplied his premises with water, leaked; that he employed the defendant Schultz to repair the leak, and that for this purpose it was necessary for Schultz to make an excavation in the street. And it further appears that Tryon did not reserve to himself any direction or control over the mode or manner in which Schultz was to do the work. Upon these undisputed facts Schultz was to do this work which he was

employed by Tryon to perform, as an independent contractor—what is known in law as an independent contractor. He was not the agent of Mr. Tryon, or servant of Tryon, in doing the work. And the question arises: Under what circumstances, if any, Tryon is liable for the negligence of Schultz, or his employes, in the performance of the work as I have said, the defendant Schultz being an independent contractor. Ordinarily, and as a general rule, one who causes work to be done is not liable for injuries that result from carelessness in its performance by the employe of an independent contractor to whom he has let the work without reserving to himself any control over the execution of it, but that principle has no application when the injury is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case, that is, where the injury is one that might have been anticipated as likely to result from the performance of the work if reasonable care was omitted in the performance of it—the person causing the work to be done will be liable, though the negligence is that of an employe of a independent contractor. The defendant Schultz being an independent contractor, the defendant Tryon is not liable for his negligence or the negligence of his employes, unless, to the knowledge of Tryon, the performance of the work which he employed Schultz to do, necessarily tended to expose persons to injury if the work was not properly guarded. If, therefore, the injury in this case resulted from the negligence of Schultz or his employes, and if Tryon had reason to anticipate the injury as a direct and probable consequence of the work Schultz was employed to perform provided the work was not properly guarded, then Tryon is liable for the negligence of Schultz. But if the injury did not result from the negligence of Schulz, or if Tryon had no reason to anticipate that such an injury would result from the performance of the work if reasonable care was omitted in the performance of the work, then Tryon is not liable. I shall leave it to you, as a question of fact in the case, whether or not the performance of this work necessarily tended to expose persons to danger if it was not properly guarded, and

whether or not Tryon might reasonably have anticipated the injury as liable to result from the performance of the work if it was not properly guarded. You will consider the nature of the work, what it was, where it was to be performed, whether the excavation in the street was necessary for the performance of the work which Tryon employed Schultz to do, viz: the repair of the pipe; what the defendant Tryon knew about the subject, and all the evidence."

The main objection to this part of the charge is that portion where it says Schultz was an independent contractor, and in regard to what Tryon should anticipate as to the danger of the work to be done. The supreme court of this state has made decisions touching the questions under discussion. In the 8 Ohio St., in the original case of Clark v. Fry, which stood as the law of the supreme court for twenty years, they held that where work was placed in the hands of an original contractor to perform the work, that the owner of the building was not liable. The supreme court say in the case in 49 Ohio St., 69, that they do not intend to and do not disturb the decision of the supreme court in that case, or the law as there laid down as applicable to the facts of that case; and that was a case from very near where this accident occurred, on Summit street in this city, where a building had been let to a contractor who had been placed in possession of the property, who was to furnish the materials and erect the building, and as a part of the plan of the building, and necessary in the erection of it, an area was dug extending a few feet into the sidewalk, and while it was being excavated and the earth piled around it, the plaintiff, Fry, came along and fell in, and the court held that the owner of the building, Clark, was not liable. The whole doctrine was discused at that time in regard to nuisances and these various questions.

In this case in 49 Ohio St., Hawver v. Whalen, p. 69, which occurred in Ceveland, the owner of the property had caused an excavation to be made for a building, and had

entered into a contract with parties to erect the walls of the building and to do the mason work and the area, and while they were performing that work upon the area, and perhaps had got the wall substantially completed, a board which had been placed over it for people to pass upon, had become removed, and the plaintiff stepped down into the hole, and was injured. The supreme court held in that case that inasmuch as the excavating was being done by the owner himself, he was not exonerated from the fact that he afterwards employed another person to furnish the material and do the mason work of building the area.

There is a case in 47 Ohio St. 207, where a railroad company was making an excavation clear across the street, and in that case the supreme court held that the company was liable. And they say in this case of Hawver v. Whalen that they do not dispute the proposition as laid down by the supreme court in Clark v. Fry. The distinction is, that in one case the whole work was in the possession of the contractor, and in the other the hole itself had been excavated by the owner of the building, and he afterwards let the work of erecting the walls around the hole to an independent contractor.

Now it seems to us that is the distinction made in this case, and, upon the facts of this case, the charge of the court was right in this case. The work which was to be done here—as the work in the Fry case—the main portion of it, was to be done within the curbstone, and not in the street itself—not in the roadway. At the point where the water is let on, there came a leak, and the water was running out at that point, and was escaping down the street and into the building, and was liable to create a good deal of damage. The city had passed an ordinance which did not permit any person to touch the water pipes except by the consent of the proper authorities, and under that ordinance plumbers were authorized to whom was given authority to enter upon the streets and tap the water pipes. This party

had given bond to the city of Toledo, in the sum of a thousand dollars, to save it harmless from all damages, and thereupon he was permitted in the exercise of his authority to enter upon the streets and tap the water pipes. The business he was to do for Mr. Tryon was to get to this point and fix the water-pipe. In doing that, it became necessary for him to shut the water off from the pipe that connected with the building, and, in order to do that, it became necessary to dig this hole in the street, but the main work was done at the other point. The court charged that if the party might anticipate damage and injury accruing to the public, Tryon might be liable—under those circumstances. Upon that charge the jury found in favor of Tryon. Now the law laid down by the court in that particular case is almost in the language of the syllabi in the above cases in 47 and 49 Ohio St.—it is what a party may anticipate, or ought reasonably to anticipate, may occur if proper care is not used; that is to determine the liability of the party. So, in that respect, we find no error in the charge of the court.

Now there is another thing in regard to the charge against the Transfer Company. The court says—among other things: "And whether or not the driver was negligent, depends upon what was his duty under the circumstances, and whether he failed in the performance of his duty. It was the duty of the driver of the carriage while driving along upon the street, to keep a prudent and careful lookout ahead of him, and to use all reasonable care to avoid obstructions and excavations in the street; that is, such care as an ordinarily prudent person in his situation and under the circumstances surrounding him, is accustomed to exercise. He had the right to assume while driving along upon the street that the street was free from obstructions and excavations, but that right did not relieve him from the duty of using proper care to avoid excavations in the

street. If he did not know of this excavation, and by the exercise of reasonable care could not have known of it, then he was not in fault. The inquiry then will be, there being, as to the Transfer Company, no signal light to warn the traveler of the excavation, and the other facts existing which are admitted by the pleadings, did the driver see the hole, or might he have seen it by the exercise of reasonable care, in time to have avoided driving the carriage into the hole? What did he actually see; or what, by the exercise of reasonable care, might he have seen? In order to entitle the plaintiff to recover from the defendant the Transfer Company, it must be shown by the weight of the evidence that the driver of the carriage was negligent, and that his negligence was the proximate cause of the injury. And in determining whether the driver was negligent, you will consider the facts alleged in the petition which are admitted in the answer of the Transfer Company, and only such parts of the evidence in the case as relates to matters or facts not so alleged and admitted."

Now it is claimed on the part of plaintiff in error, that the charge is not strong enough in favor of the plaintiff—that it is not stringent enough in regard to the duties of the Transfer Company. It is argued that the Transfer Company is a common carrier of passengers, and that the obligation or degree of care that they should exercise was the highest degree of care. In regard to the character of that company, it is averred in the petition that it is a hack and transfer company, and at another point it says that it is and was a common carrier of passengers. The answer admits that it is in the business of driving hacks for the purpose of transferring people about the city, but denies that it is a common carrier—that is, it denies generally all other allegations.

Quite an extensive brief has been filed, and we have examined a great many authorities in regard to the matter.

Even in regard to common carriers, there is a great variety of opinions in decisions of different courts; some courts laying the degree of negligence substantially in accordance with that laid down in this case, and others perhaps stronger. The rule is laid stronger in regard to carriers that carry persons by the means of powerful agencies, like railroad cars, than as to those which carry by horses and carriages. Some difference is made between carriers and private individuals who carry; but, after examining these various authorities and the facts of this case, under the allegations of plaintiff's pleadings alleging that the driver did not use ordinary and reasonable care, and so pleading negligence the driver of this hack—we think that the charge of this court was correct, and was strong enough, and that there was no error in regard to that.

There is another point in the charge in regard to this liability. It will be observed that this carriage went into this hole, and this lady was precipitated against her husband, and was injured. They then got out of the carriage and went to the sidewalk, and in coming back—whether in obedience to the call of the driver or in obedience to the call of the husband, is in dispute—but, at any rate, the woman started to come back to the carriage; the petition avers that her husband was with her, but it appears from her own testimony that he was not—that he stood by the driver, and she stood by the sidewalk—and she started to go back to the carriage, in company with her sister, and as they pushed through the crowd to do so, she stepped down into the hole.

The charge of the court was, that if they found against all of the defendants, the jury could only find in this particular case the damage which resulted from acts of all the defendants, to-wit, the combined act of all the defendants in leaving the hole unguarded and the carriage negligently going into the hole, which might exclude any damages

which might have arisen by her afterwards from having walked into the hole herself.

Without discussing the question further, we think the law was rightly given on that. The court took the pleadings as he found them, and they asked for a joint judgment against all the defendants, and the plaintiff in recovering such a judgment must have recovered it upon the facts set forth for damages to which all the defendants contributed.

We think it sufficient to say we have discussed all the points which have been made by the brief, and have read and re-read this evidence, and we are of opinion that no error appears in the charge of the court, and that the verdict of the jury is sustained by the evidence. The judgment will therefore be affirmed, but without penalty against Schultz.

Hurd, Brumback & Thatcher, for Plaintiff.

Doyle, Scott & Lewis, for The Toledo Transfer Co.

B. F. Reno, for George B. Schultz.

King & Tracy, for Washington W. Tryon.

(Fourth Circuit--Ross Co., O., Circuit Court—Dec. Term, 1897.)

Before Cherrington, Russell and Sibley, JJ.

FIRST NATIONAL BANK OF PLYMOUTH v. BOARD OF EDUCATION OF HARRISON TOWNSHIP, ROSS COUNTY, OHIO.

Public schools—What not "philosophical apparatus," under sec. 3995, R. S.

What are known in this case as "Yaggy Geographical Cabinets," may be furnished by Boards of Education for school houses, under section 3987, R. S. They do not fall within the limitation of 3995, as philosophical or other apparatus for the demonstration of any branch of education.

Error to the Court of Common Pleas of Ross county.

SIBLEY, J.

This case comes up by a petition in error, seeking to re-

verse the judgment of the common pleas. The facts are not in dispute. As set out in the record, they really present but a single question, which is, whether what is known as "Yaggy Geographical Cabinets" are covered by the provisions of section 3987, or by those of 3995, Revised Statutes. If within the former, the plaintiff in error is admittedly entitled to recover, and the judgment below must be reversed; otherwise, it should be affirmed.

By the agreed statement of facts, embodied in the bill of exceptions, these cabinets are described as follows:

"Each consists of a cylinder or box of wood or cloth-covered straw-board with hooks to fasten it to the wall; that inside of such box are a number of charts or maps, upon spring rollers, so arranged that when said charts or maps are rolled up, and not in use, they are protected from the dust and light, by said cylinder or box; that said charts or maps are colored drawings, of different natural and political divisions of the earth's surface."

A cabinet, attached to and made part of the bill, shows this description to be substantially accurate; that the charts are ordinary geographical maps, larger than those in books or atlases; that the box, springs, etc., are devices designed, first, to protect the maps, and, second, to render their use more convenient to pupils and teachers.

We are clear that there is no conflict between sections 3987, and 3995. Each has its distinct field of operation, in entire harmony with the other. (Dunn v. Freed, 10 Cir. Ct. 294.) Difficulty arises only when it is sought to apply them to a particular group of facts—in discriminating the different classes of apparatus to which these sections respectively relate.

The case just cited decides that Kenedy's Mathematical blocks are a "special apparatus for the demonstration of a special branch of education," and so within section 3995; and the supreme court has held that Andrews' Tellurian

Globes fall into the same category, the record admitting that they are apparatus intended for the demonstration of certain branches of education taught in township schools. (Board of Ed. v. Andrews, 51 Ohio St., 199.) These are the only adjudications upon the sections in question, and were they in no sense authority for us, would have our entire approval. Neither, however, seems to reach this case, and we therefore are left to decide it in the light of such an analysis of the statute and facts, as may appear to be sound.

That this "cabinet", or round box, with rollers, springs, and to which the maps are attached, is an apparatus, is unquestionable. So, too, are the charts themselves. Each is a means to some end, which, according to the lexicographers, is sufficient to stamp them with that general character. But so are stoves to heat a school room and seats for the pupils who come there. Yet these latter, all will agree we apprehend, come under section 3987. To bring an appliance of this nature within section 3995, something beyond the mere fact that it is an apparatus is required. It must in addition be a "philosophical or other apparatus for the demonstration" of some branch of education taught in a district school. This is clear by the express terms of the statute. How, then, stands the case with respect to this cabinet? That neither as to the box, with its machinery, or the maps belonging thereto, it is a philosophical apparatus, is too apparent for argument. Even before the older division of phenomena, included in "natural philosophy", was merged into what now is covered by the term "physics", it could not be thus regarded, for the reason that this apparatus, so far as it relates to any branch of knowledge, refers to geography, which then was a separate field of learning. Moreover, as respects the cylinder, rollers, and springs, that they contain nothing, in whole, or as parts, for the de-

monstration of any branch of education, is equally clear. Manifestly not designed for such purposes, they cannot so be used. The only question left then is in reference to the charts or maps. Can they properly be regarded as a device for the "demonstration" of geographical knowledge, to which, from their nature, they have some relation. We think not. What are these colored papers, indeed, but imperfect pictures used to aid the imagination in forming some idea of the natural and political divisions of the earth? When thus made, or if drawn more rudely upon a blackboard, by teacher or pupil, can it be said that they either prove or carry in them the slightest evidence for the truth of any fact so pictured? Whether or not such facts exist obviously must be shown, if at all, by other means. Hence, while illustratively aiding the mind in forming a conception of things otherwise established as true, and thus serving a useful purpose in education, like any other imaginary picture in relation thereto, they do not demonstrate the truths of geography. For demonstration, in the sense used in section 3995, must, as we conceive, be held to mean some degree of proof. One example of its import is the dissection of an animal body, with appropriate explanation. There, the actual facts are exhibited to the eye, and so seen to be such.

Opened thus, to direct observation, they are said to be demonstrated. But is it not evident that an anatomical chart, which merely pictures the same facts, though very accurately, would not be evidence of them—could not therefore be a demonstration of that branch of knowledge? In this respect, charts and maps of the kinds referred to, differ from blocks which can be used to prove a mathematical truth, and from Tellurian Globes, so constructed as when operated, to represent the relative motions of the earth and moon with respect to each other and the sun, and explain the various natural phenomena caused by such motions. The

latter apparatus, by affording an explanation of what would result from the movements of heavenly bodies, furnishes in itself a known scientific method of proving the truth of teaching upon that point—is therefore a mode of its demonstration. Argument hardly seems necessary to show that looking at or memorizing a geographical map, can have no such force or effect as respects geographical truths. In other words, it neither does, nor can be made to prove, and consequently can not in any admissible sense be said to demonstrate a fact which it pictures.

With this view of the matter, then, we feel constrained to say that these cabinets are not "apparatus" of the kind contemplated by section 3995, but fall within the furnishings which for common use in school houses, by pupils and teachers, may properly be provided by boards of education. It follows, of course, that the judgment below must be reversed.

Albert Douglas, for Plaintiff in Error.

L. B. Yaple and *John C. Entrekin*, for Defendant in Error.

(Sixth Circuit—Lucas Co., O., Circuit Court—Jan. Term, 1898.)

Before King, Haynes and Parker, JJ.

NATHAN REUBEN v. JOHN SWIGART.

Independent contractor obstructing street—When owner not relieved from liability for negligence of contractor.

(1). An owner of a city lot who obtains permission from the city to partially obstruct a street adjacent to such lot by placing thereon material to be used in the construction of a building on such lot—such permission being granted upon the condition that such owner shall maintain lights and guards, to warn travelers on the street of the presence of such obstruction, and who permits his contractor to place such material on the street, cannot escape liability to a

traveler injured by such obstruction in consequence of the absence of such lights, or guards, on the ground that the alleged acts of negligence were those of an independent contractor over whom the owner had no control.

(2). The owner of real estate who causes work to be done in relation to it, the probable consequences of the performance of which will be to endanger others in the legitimate use of a public highway, cannot shift from himself responsibility for these probable consequences by letting the work to an independent contractor over whom he reserves no control.

Error to the Court of Common Pleas of Lucas county.

PARKER, J.

This is an action begun by the plaintiff in error before a justice of the peace to recover from the defendant in error on account of injuries which the plaintiff says that he sustained in consequence of the defendant allowing an obstruction to be and remain upon a street in the city of Toledo in front of the premises of the defendant. The cause was appealed to the court of common pleas, where a petition was filed by the plaintiff, an answer by the defendant, and to that the plaintiff replied. A general demurrer to the reply was interposed, which demurrer was sustained, and the plaintiff not desiring to plead further, judgment was entered dismissing the petition, and for costs. On account of that judgment, error is prosecuted here by the plaintiff in error, who was plaintiff below.

The petition is quite brief, and indeed all the pleadings are, and I can best state the case by reading from them:

"For a cause of action against the defendant John Swigart, the plaintiff herein says, that sometime prior to the 15th day of January, A. D. 1896, the defendant John Swigart negligently and carelessly caused to be placed or permitted a pile or mound of sawdust to be put or remain at or near the middle of the street or public thoroughfare of the city of Toledo, known as Canton avenue, at a point about the middle of the block between Jackson avenue and

Smith street; that at about 6 o'clock P. M. on the evening of the 15th of January, 1896, the plaintiff was driving a horse and buggy along and through said street at the point aforesaid in a careful and lawful manner. It being dark, and no lights or guards being on or about said mound or pile of sawdust, the said Nathan Reuben, without any fault or negligence on his part, failed to discover the said pile of sawdust, and owing wholly to the negligence and carelessness of the defendant John Swigart aforesaid, the right fore wheel of the buggy in which plaintiff was driving struck said obstruction, and the vehicle was overturned, in consequence whereof plaintiff was thrown violently on the ground. That by reason of the premises the plaintiff was cut and bruised and otherwise injured, to his damage of $300."

For which he asks judgment.

To that an answer is filed, the first defense of which is a general denial and an allegation that if any injury resulted to the plaintiff it was through his own fault and negligence. The question here arises upon the fact set forth in the second defense.

"For his second defense to plaintiff's petition the defendant says that at the time of the alleged injury to the plaintiff, he, defendant John Swigart, together with his brother Eugene Swigart, were the owners in fee simple as tenants in common of lot No. 246 of Woodruff's addition to the city of Toledo, Lucas county, Ohio, which said lot had a frontage upon the Canton avenue mentioned in the petition of about 59 feet, and was situated about the middle of the block between Shepherd street and Smith street in said city. Defendant further says that prior to the time of said alleged injury to plaintiff, the defendant and his said brother had arranged for the erection on said lot 246 of a three story brick mercantile building, which said building was at said time in process of erection, but not completed. Defendant further says that at he time of plaintiff's alleged injury the defendant was not, nor was his said brother, in possession or control of said premises or building, or of the approaches thereto, or street in front thereof, and had not been in possession or control thereof for a long time prior

thereto; that upon said date, and for a long time prior thereto, the said premises had been in the possession and control of one Hiram F. Hall: that the defendant and his said brother long prior to the alleged injury of plaintiff had duly enterd into a contract with the said Hiram F. Hall, whereby the said Hall had agreed to erect and complete the said building for the said defendant and his said brother on said lot 246 aforesaid, and to that end to make, perform, and furnish all the labor necessary to its erection, and to procure and provide all necessary and proper material for the construction thereof. Defendant further says in and about the construction of said building, under and by the terms of said contract, said defendant was not, nor was his said brother, to have, nor could they, or either of them have, any personal direction, control or authority over the said Hall, or over any of his laborers, employes or agents, as to how, or in what mode or manner he, or they, should perform or complete the said contract or erect or complete said building; nor was said Hall, nor were any of his agents, laborers, or employes on said day or for a long time prior thereto, in effect under or subject to any direction, control or authority of this defendant or of his said brother as to the mode or manner in which the said work or erection should be performed; nor did defendant or his said brother then or at any time attempt to exercise any such control, direction, or authority."

This defense further sets forth that Hall, the contractor, took complete possession of the lot, and had such possession up to the time of the alleged injury, and that at the time the premises were put in the possession of Hall they were in all respects in a safe condition; that the pile of sawdust mentioned in the petition was not then upon the street, and that the defendant, at the time of the alleged injury, and at the time the sawdust was placed upon the street, was living in Cincinnati, so that he had no knowledge of the fact.

"Defendant further says that the sawdust mentioned in the petition was procured by said Hall for the purpose of filling in one of the floors of said building for the prevention of noise, and solely for use in and about the construc-

tion of said building, under the terms of the contract between said Hall and the defendant and his brother mentioned above, and when said sawdust was delivered at the said building, such delivery being as aforesaid about two hours prior to plaintiff's alleged accident, the same was placed almost entirely upon the sidewalk, etc."

That said sawdust, if it was improperly placed there in the street, was placed there by Hall or by his laborers, employes, or agents.

It will be observed that in the answer it is conceded that the contractor was to procure and provide all necessary and proper materials for the construction of the building, and that the sawdust, the pile of which is alleged to have caused this injury, was a part of the material which was furnished under the contract to go into the construction of the building.

To that the plaintiff filed the following reply:

"The plaintiff for reply to the second defense in the defendant's answer herein says, that prior to the commencement of the construction of the building referred to in the plaintiff's petition and the answer of the defendant filed in the above entitled action, the defendant herein, on application, was given the privilege or right, under section 622 of the Revised Ordinances of the city of Toledo, to place building material to be used in the construction of said building in the thoroughfare or street known as Canton avenue, in said city of Toledo. That by virtue of such permission given the defendant by the street commissioner, a mound or pile of sawdust referred to in the petition and answer, was placed in the street in front of the defendant's said premises, but negligently and carelessly left in an ungarded and unsafe condition, and without lights to warn the public of its location, on the night the plaintiff herein was injured. That under sec. 626 of the Revised Ordinances of the city of Toledo the defendant herein was required to place guards around such an obstruction as the one herein referred to, and further provides that in case any accident should happen or injury result by reason of the failure to place said

guards or lights around an obstruction of the kind referred to, the person giving said permission to obstruct the street would be liable for the damages resulting from such omission or want of care."

As I have said, the general demurrer to that reply was sustained. The answer states the defense that the premises, including the part of the street in question, were not at the time of the alleged act of negligence and of the accident and injury complained of, under the control of the defendant, but were in the possession and under the contol of an independent contractor, who had undertaken to erect a building for defendant on the lot fronting the part of the street in question, and that the defendant had no right or authority to control or supervise the work of the contractor in the promises, and that he did not do so.

Defendant in error contends that the allegations of the reply, to the effect that permission had been granted to him to place materials in the street at this point, and that these materials were placed there under and in pursuance of said permission, and that the condition of such permission provided by the ordinance, imposing upon him the correlative duty to place guards or lights about the obstruction that might be placed in the street under this permission, does not state facts taking the case out of the general rule that "where a person contracts with another, exercising an independent calling, to do work for him, according to the contractor's own methods and not subject to the employer's control or order, except as to the results to be obtained, the former is not liable for the wrongful act of such contractor or his servants."

The plaintiff, on the contrary, contends that these facts bring the case within one or more of the established exceptions to the rule above stated. One exception to this rule is where the work which the contractor is employed to perform is necessarily dangerous to the public, or attended by

a nuisance; and another is where a legal obligation to do a certain thing is imposed upon a person, and such person contracts with another to perform the work in connection with which this duty is imposed, and the contractor fails to perform the duty, to the injury of a third person. In neither of these cases, can the person employing another to do the work himself escape liability. It is not pretended that the case at bar comes within any other exception to the rule, but it is alleged that the facts bring it within one or both of these exceptions. We will find it convenient to consider the case further with the rule and these exceptions in mind.

The first case to which I call attention is that of Gray and wife v. Patten and Hubble, 117 Eng. C. L. Rep., 969. The syllabus reads as follows:

"1. Where a statutory obligation is imposed on a person, he is liable for any injury that arises to others in consequence of its having been negligently performed, and this whether it was performed by himself or by a contractor employed by him.

"2. A. was empowered under the Metropolis Local Management Act, 18 and 19 Vic. c. 120, ss. 77, 110, 111, to make a drain from his premises to a sewer, by cutting a trench across a highway, and filling it up after the drain should be completed. For this purpose he employed a contractor, by whose negligence it was filled up improperly, in consequence of which damage ensued to B.: Held by this court, reversing the decision of the Queen's Bench, that A. was responsible in an action by B."

The opinion of the court was delivered by Erle, C. J., and covers a little more than a page of the report. I will read it:

"In this case the plaintiff declared for damage to his wife from falling into a drain made in the highway by the defendant. The defendant justified making the drain under a power given by the Metropolis Local Management Act, 18 and 19 Vic. c. 120, to make a drain from his premises to a sewer:

"Upon the trial it appeared that the defendant had lawfully made the drain under that act, that is to say, a trench which was across the highway, the cause of the damage, and had employed a contractor both to make it and to fill it up properly, and by the negligence of the contractor the drain was filled up improperly, and so the damage was caused. At the trial the verdict was entered against the contractor and for the employer, on the ground that the employer was not responsible for the negligence of the contractor, and so it was decided in the court below, and this is an appeal from that judgment.

"The appellant contends that a duty was imposed on the defendant Pullen, as the owner of the premises who caused the drain to be made across the highway, to fill up that drain in a proper manner. Sec. 77, authorizing the making up of the drain, implies that the duty to fill it up was also imposed, and sec. 110 commands that the person who makes it shall fill it up properly, and the appellant contends that the person making the drain is responsible if the duty imposed on him by the statute is not performed and damage is caused thereby, and that the complaint is of an omission to perform a duty imposed by statute, not of a wrongful act by a contractor beyond the scope of his employment. He relied on Hole v. The Sittingborne Railway Co., 6 H. & N., 488, where the duty imposed on the defendants by statute was to make a bridge that would open, and they employed a contractor who made a bridge that did not open as the statute required; and the defendants were held liable on the ground of their omission to perform the duty imposed by statute There the Chief Baron says, in effect, that the party who undertakes that a work shall be done is not released from liability for breach of his undertaking because he employed a contractor to do it, and the contractor's neglect caused the reach; the obligation imposed by that is analogous to that created by an undertaking, the omission to perform which is not excused by reason that the party employed a third person as contractor to do it for him who failed; and he distinguished the case where a contractor in his contract does a wrongful act not according to his contract and causes damage thereby; in those cases the employer is not responsible. This distinction is also taken by William, J., in Pickard v. Smith, 10 C. B. N. S., 470,

(E. C. L. R. vol. 100), deciding that the employer allowing a coal merchant to make an opening in a way for coal is responsible for the negligence of the coal merchant's men in omitting to close the opening; for the employer was bound to see that the opening should be properly closed, and his omission to perform his duty is not excused by the omission of the agent whom he had employed to act for him.

"For these reasons it appears to us that the defendant Pullen is not excused from liability for omission to fill up the drain properly, on the ground that he had employed a contractor to do that duty for him, and the contractor was negligent and left the duty unpreformed. We think that the duty was implied in the grant of the power open the drain in a highway in sec. 77, and was expressed in sec. 110 and that this statutable duty is created absolutely, and is not a duty created by sec. 111 imposing a penalty to be enforced solely by enforcing the penalty. The penalty imposed by sec. 111 appears to us to be a cumulative remedy.

The question is, whether the verdict should be entered against the defendant Pullen, and we answer that question in the affirmative."

This case is similar to the case at bar, in that a duty was imposed as a condition to the exercise of the privilege granted. But there the duty was imposed by the supreme law-making power of the state, while here its imposition is attempted by a municipal government of limited legislative and police powers. If, however, the obligation sought to be imposed on the defendant by the city in the case at bar is within the power delegated to the city, how does the case differ in principle from that cited?

It being made the duty of the city to keep the streets clear of obstructions that would make them dangerous to travelers, and the city being bound by law to respond in damages to one injured by reason of its failure in the performance of this duty; and the city being further empowered to grant such privileges as were granted to the defendant in this case; we think it clear that the city may

impose upon the person to whom the privilege is granted, duties and obligations calculated to not only save the city from loss, but travelers from injury; and that such duties, so imposed, have the same effect as if imposed by the supreme law-making power directly, instead of indirectly through the city as an agency of government.

The statutes upon this subject, forming the basis of these remarks and conclusions, are sec. 6921 Revised Statutes, which makes it an indictable offense to obstruct a highway; sec. 2640 Revised Statutes, which gives the council the control of the streets in the following language:

"The council shall have the care, supervision, and control of all public highways, streets, avenues, alleys, sidewalks, public grounds, and bridges, within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance."

Sec. 1692, the opening paragraph and sub-divisons 3 and 18 read as follows:

"In addition to the powers specifically granted in this title, and subject to the exceptions and limitations in other parts of it, cities and villages shall have the general powers enumerated in this section, and the council may provide by ordinance for the exercise and enforcement of the same.

"3. To prevent injury or annoyance from anything dangerous, offensive, or unwholesome, and to cause any nuisance to be abated.

"18. To lay off, establish, open, widen, narrow, straighten, extend, keep in order and repair, and to light streets and alleys, public grounds, etc."

Also the general provisions authorizing municipalities by proper ordinances, resolutions, etc., to carry these provisions into effect.

Even if this duty shall be deemed to arise out of contract rather than legislative sanction, the result would seem to be the same. I call attention to the case of Water Co. v. Ware, 16 Wal. 566, the syllabus of which reads as follows:

"Where an incorporated company undertook to lay water pipes in a city, agreeing that it would 'protect all persons against damages by reason of excavations made by them in laying pipes, and to be responsible for all damages which may occur by reason of the neglect of their employes on the premises;' held, on the company's having let the work out to a sub-contractor through the negligence of whose servants injury accrued to a person passing over the street, that the company could be properly sued for damages.

"The city of St. Paul, desiring to have water pipes laid along the streets of the city, passed an ordinance authorizing the St. Paul Water Co., an incorporated company, to to lay them. But as it was necessary that large excavations of earth should be made along the streets, and considerable blasting of rock below, the ordinance in one of its sections provided as follows:

" 'The said water company expressly agrees to protect all persons against damages by reason of excavations made by them in the said city, in laying pipes, and to keep the said excavations properly guarded by day and night, and to become responsible for all damages which may occur by reason of the neglect of their employes in the premises, and that the streets and highways in said city shall not be unnecessarily obstructed or incumbered in laying said pipes.'"

"The water company accepted the ordinance. It did not, however, do any work itself or by its own servants, but made a contract in writing with one Gilfillan to do the work for them. Under this contract, Gilfillan himself superintending the work every day, certain excavations, drillings, and blastings were made in different streets of the city.

"While these operations were going on in one of the streets, a certain Ware, driving his horse and wagon in it, was much injured, owing to his horse taking fright at a steam drill in the street, put there to drill the rocks that it was necessary to remove, and suddenly and without notice set in motion. He accordingly sued the company for damages."

I will read one or two paragraphs from the opinion of the court which was delivered by Mr. Justice Clifford:

"The evidence exhibited in the record shows that the de-

fendants agreed with the municipal authorities to protect all persons against damages by reason of the excavations made by them preparatory to laying the pipes, and to keep the work properly guarded by day and night, and to be responsible for all damages which 'may occur by reason of neglect of their employes in the promises;' and that the streets should not be necessarily obstructed or incumbered in doing the work. Such an agreement would not acquit the municipality of an obligation, otherwise attaching, to keep the streets safe and convenient for travelers, but it may well be held that a party injured through a defect or want of repair in such a street, occasioned by the neglect or carelessness of such a contractor in doing the work, or of those for whose acts he is responsible, may, at his election, sue the contractor for redress or pursue his remedy against the municipality, as it is clear that the contractor, in case of a recovery against the latter, would be answerable to the municipality as stipulated in his agreement."

Again, reading from page 576:

"Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; not where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agreed and was authorized to do, the person who employs the contractor and authorizes him to do those acts in equally liable to the injured party."

It will be observed that in the case at bar it is alleged that this permission was obtained by the owner of the premises to place material upon the street at this place in the course of the erection of a building for him; that in pursuance of this permission the contractor placed materials upon the street, which caused the injury to the plaintiff. So that the placing of these materials there was in the line of the performance of his duty under the contract—a thing contemplated by him in the performance of his contract, a thing authorized by the person who had obtained

the permission, and had undertaken and was bound to keep the lights and other guards around such materials or obstructions as would prevent injury to travelers upon the highway. I will read one further sentence from this opinion:

"It would be monstrous, said Lord Campbell, if a party causing another to do a thing were exempted from liability for the act merely because there was a contract between him and the person immediately causing the act to be done, which may be accepted as correct if applied in a case where the work contracted to be done will necessairly, in its progress, render the street unsafe and inconvenient for public travel. More than one party may be liable in such a case, nor can one who employs another to make such an excavation relieve himself from liability for such damages as those involved in the case before the court by any stipulation with his employe, as both the person who procured the nuisance to be made and the immediate author of it are liable."

Our attention is called to a decision by the distirct court sitting in Hamilton county that I will not take the time to read from, which seems to support a contrary doctrine. That might have a controlling effect with this court if we had no utterance of our own supreme court upon the subject.

I intended to remark upon the reading of the authority of the United States Supreme Court just read from, that while civil liabiliy cannot be imposed by ordinance alone, it may be by contract resulting from the acceptance of privileges conferred by ordinance—the acceptance of privileges with conditions attached to the acceptance, and performance of the work under these privileges.

I call attention to the case of Railroad Co. v. Morey, 47 Ohio St., 207, which, we think, is sufficient in point to control the decision in this case. I read from the third proposition in the syllabus:

"One who causes work to be done is not liable, ordin-

arily, for injuries that result from carelessness in its performance by the employes of an independent contractor to whom he has let the work, without reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral and flowing from the negligent act of the employe alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case the person causing the work to be done will be liable though the negligence is that of an employe of an independent contractor."

The statement of the case is as follows:

"The defendant in error, George A. Morey, brought, in the Court of Common Pleas of Fayette county, an action against The Southern Ohio Railroad Co., plaintiff in error, to recover damages claimed to have been sustained by him on account of himself and horse falling into a ditch that the plaintiff in error had caused to be dug and left unguarded, across Water street, in the town of Washington, in said county, on the night of November 9, 1885.

"The record discloses that the plaintiff in error, at the time of the accident, owned and operated a railroad which ran through said town of Washington, and occupied part of said Water street with its tracks, and owned and occupied a depot situate on lots owned by it, that were adjacent to said street. That the ditch causing the injury had been dug during the day, the night of which the accident occurred, for the purpose of laying tiling for a drain from the depot above mentioned; that the ditch was dug entirely across that part of said street which was or could be used for travel; that it was from four to six or seven feet deep, about two and one half feet wide at the top, and about two feet wide at its bottom, and the earth from it thrown out two or three feet high on both sides; that the night was very dark, and the ditch left wholly unguarded. That the defendant in error, having no knowledge that the ditch had been dug, and without fault on his part, fell into it, together with his horse, and thereby received the injuries of which he complained, and that the ditch was, in fact, dug by a man employed by the firm of R. P. Willis & Son, who did the plumbing work for the depot.

"The main contention between the parties at the trial was whether this plumbing was done under such an independent contract as would exonerate the railroad company from liability for the negligence of the contractor and his immediate servants."

It will be observed that the work in this case was an excavation in the street. We do not see that there is any difference in the principles applicable to a nuisance of one sort that would make a street dangerous for travelers, and a nuisance of another sort making the street equally dangerous; for instance, an excavation in the street, and a pile of dirt or other obstructions in the street.

As to the amount of material in this street, in the case at bar, the location of it, etc., of course, we are bound upon this hearing to take as true the allegation of the plaintiff's pleadings that there was a large amount of saw-dust near to the middle of the street that interfered with public travel. Again quoting, the court says on page 213:

"The only serious question in the case is presented by charges given or refused by the court."

The court among other things charged the jury as follows:

"If the necessary or probable effect of the performance of the work would be to injure third persons, or create a nuisance, then the defendant is not relieved from liability because the work was done by a contractor over whom it had no control in the mode and manner of doing it."

To this the plaintiff in error excepted.

"The question is here presented whether the owner of real estate, who causes work to be done in relation to it, the probable consequences of the performance of which will be to endanger others or to create a nuisance, can shift from himself all responsibility for these probable consequences by letting the work to an independent contractor over whom he reserves no control? Will a sound public policy permit this to be done? If so, then we may expect the prudent

proprietor, when he has work to be done which involves these probable consequences, to provide for its performance by a carefully guarded contract by which he retains no control over it whatever."

The court proceeds to distinguish the case of Clark v. Fry, 8 Ohio St., 358, and discusses, at some length, the principles involved, arriving at the conclusion that in a case like that before the court the plea that the work was done by an independent contractor would not avail. In support of this a case in 149 Mass., 335, is also cited, which we think tends to support the doctrine.

There are various subsequent utterances by our supreme court upon the subject which are not precisely in point, but which show that the court has approved the doctrine announced in the case from which I have just read.

The court, in announcing the opinion in Railroad Co. v. Morey, has taken care to say that the doctrine of Clark v. Fry would not be extended by the court, and was not the rule to be applied in a case like the one then under consideration. In Clark v. Fry the record did not disclose that the excavation in question extended so far into the street as to impede public travel, or so as to become a nuisance, and that element seemed to be absent from the case.

Our conclusions, then, upon this matter are, that the demurrer to the reply should have been overruled; that the court erred in sustaining this demurrer; and therefore the judgment of the court will be reversed, the cause will be remanded with instructions to the court to overrule the demurrer to this reply.

A. H. Coldham, for Plaintiff in Error.

Porks & Van Campen, for Defendant in Error.

(Tnird Circuit—Allen Co.,O., Circuit Court—April Term, 1898.)

Before Day, Price and Norris, JJ.

THE SOLOR REFINING COMPANY v. SUSAN ELLIOTT, ADM'X. of the estate of JOHN W. ELLIOTT, deceased.

Action for wrongfully causing death—Authority of administrator—

(1). Letters of administration issued by a probate court of competent jurisdiction authorized the administrator to maintain an action for death caused by wrongful act etc., though such letters disclose the fact that deceased left no estate either real or personal, and fail to indicate that the appointment was made for the purpose of bringing the suit.

Same—Limitation—

(2). The limitation of an action under sec. 6135 of the Revised Statutes, for causing death from wrongful act, runs from the death of the person who dies from the wrongful act; and the right to maintain the action, is not affected by the lapse of time between the injury and the death, unless recovery by the deceased person, had not death ensued, is barred by the statute of limitations at the time of death.

Same—Settlement of cause of action in life-time of deceased—

(3). A contract of settlement, unimpeached for cause, made by the deceased in his life-time with the person whose unlawful act is the cause of death, for the injury which resulted in the death, the terms of which contract were complied with, in the life-time of the deceased, by the party whose unlawful act caused the death; when so pleaded, and established, is a bar to an action by his administrator under sec. 6134 of the Revised Statutes.

No double liability for wrongfully causing death—Sec. 6134, R.S.—

(4). Sec. 6134, which warrants an action for causing death by wrongful act, does not create a second liability, and is not double liability for the same wrong, but implies that the liability for the wrong has not been satisfied; that the penalty for the wrongful act and result, has not been paid; and the wrong doer being deemed to be still liable for the wrong, the statute determines in whose favor the liability still exists, and points out the remedy by which satisfaction of it may be enforced.

Action maintainable by administrator, only if deceased could have maintained action for damages—

(5). An action for death by wrongful act, can only be main-

tained by the personal representative of deceased, when such condition exists, at the time of death, that the deceased, had not death ensued, could have maintained an action for the injury.

Deceased having debarred himself of right to sue, administrator can not sue—

(6). If deceased in his life-time debarred himself from recovery, and had no cause of action at the time of his death, no action would arise in favor of his next of kin at his death, and his administrator would be precluded from maintaining an action under sec. 6134.

Proof of contract of settlement on general denial—

(7). When a contract of settlement, pleaded in the answer, is met by a general denial, once its execution is established, the contract is beyond further attack, under the issue as tendered by the general denial.

Error to the Court of Common Pleas of Allen county. NORRIS, J.

The defendant in error, who was the plaintiff below, brought her action against the Solor Refining Company for negligently causing the death of John W. Elliott. In her petition she avers her appointment as the administratrix of his estate, names his next of kin who survived him, and says that John W. Elliott died on the 2nd of February, 1894, and that his death was wrongfully caused by the defendant, in this way. On the 28th of March 1891, Elliott was an employe of the Solor Refining Company, as a laborer. His duty was, to help in the repair of shells; into which vapor passed through a compound kept in motion by brushes. The shell head was a heavy piece of metal.

Elliott was there by order of his foreman assisting in placing the shell head in position. A rope attached to the machine by which the head was being raised into position was not securely attached, and was suffered to so remain through the negligence of the foreman, under whose orders Elliott was acting; by reason of this the rope gave way and caused the shell head to fall upon Elliott, inflicting upon him in-

juries from which, on the 2nd of February, 1894 he died. Elliott had no means of knowing, and did not know of the condition of this rope; but the foreman had the means of knowing, and did know of its condition. Plaintiff avers that Elliott was in the place assigned to him by the foreman, and was without any fault upon his part which contributed to his injury; and that Elliott thus came to his death through the sole cause of defendant's negligence.

The defendant in its answer admits that Elliot was employed; that he was injured, and that he died; and denies all else in the petition.

It pleads as a further defense that on August 28th, 1891, it made full settlement with Elliott, for all loss and damage by him sustained by reason of said injury; that it paid him the sum of money stipulated by the contract, and that Elliott received this sum in full settlement for all claims against defendant by reason of said injury. As a third defense the defendant pleads the statute of limitations.

The plaintiff for reply denies the second and third defenses in the answer.

The issues thus made up were submitted to a jury, which returned a verdict for the plaintiff. Defendant filed its motion for a new trial, which was overruled, and these proceedings in error are instituted for reversal.

The errors assigned in the motion for a new trial and in the petition in error, are:

Because the verdict is against the weight of the evidence, and is contrary to the law of the case.

Error in overruling the motion for a new trial.

Error in the charge as given, and in refusing to charge as requested by plaintiff in error.

Error in the admission of evidence over the objection of plaintiff in error, and in rejecting evidence offered by the plaintiff in error to maintain the issues on its part.

It is claimed that the admission of the letters of administration was error. That the letters, upon their face, show that there was no property upon which to administer; that the purpose of administration is to settle the estate of the deceased person, and that in this instance there is no estate; and that, when an administrator is appointed for the sole purpose of bringing an action, that purpose must appear in the record of the proceeding resulting in the appointment. The record of the Probate court in the matter of this appointment is not before us; so that we are unable to say whether or not it was affirmatively found, and of record, that the purpose of this appointment was to maintain this action. But be that as it may; the action---as the one at bar—is to be brought and maintained by the personal representative of the deceased person. The probate court has jurisdiction to appoint, and having appointed, and being a court of competent jurisdiction so to do, it is conclusive, in the face of nothing to the contrary, that all the jurisdictional facts were made apparent to the court before it took action in the premises. And the fact, that the purpose for which the appointment is made is not recited in the letters, is not material. The appointment was made, the court had jurisdiction to appoint an administrator, and the judgment of the court in that proceeding is in full force. We think, therefore, that the letters of administration were properly admitted in evidence to prove the authority of plaintiff to maintain her action.

It is claimed that plaintiff's action cannot be maintained because of the expiration of four years since the injury which resulted in Elliott's death, and before the commencement of this case. The injury occurred on the 28th of March, 1891. Elliott died on the 2nd of February, 1894. The petition in this case was filed April 28th, 1895, and on the same day summons issued.

Elliott's cause of action was not barred at the date of his

death by the four years' limitation in which his action could have been brought; so, aside from any other intervening cause, on that day, had not death ensued, he could have maintained his action in so far as it was affected by the statute of limitation. The right of action which the plaintiff prosecutes, did not exist in Elliott's lifetime; it arose immediately upon his death; and though the fact as to whether this action ever would arise, so far as the statute of limitation is concerned, depended upon his right to maintain an action at the time of his death—had death not ensued—yet the statute which creates the action and the remedy---a new remedy for the same wrong, not a survival of his cause of action, but a new action which succeeded his cause of action, and which was created by reason of his cause of action and his death---the statute which created this action limits its commencement within two years after his death. This limitation does not commence to run in his lifetime; it does not date from the injury, but it commences to run at his death when the action accrued. So that if Elliott, had not death ensued, could at the date of his death have maintained his action, this action having been commenced within two years next after his death, is not barred by the statute of limitations. We therefore are of the opinion that the third defense in the answer fails.

The second defense in defendant's answer pleads full and complete settlement made with John W. Elliott, for all loss, expense and damage by him sustained by reason of the injury of March 28th, 1891, which is alleged to have resulted in his death. And that defendant performed the contract by payment of the sum that Elliott agreed to receive. Defendant sets up in its answer a copy of this contract of settlement, which was in writing and signed by the parties, and pleads it as a complete and full bar to plaintiff's recovery.

There can be no doubt that the paper writing upon which

this defense is based, is in form a contract with all the requisites of a contract.

To this defense is made in the reply, a general denial.

The statute of this state creating actions as the one at bar, in favor of the surviving wife or husband and children, or next of kin, of a person whose death is caused by the negligence of another, and affording a remedy, is a copy of the Lord Campbell act, as applicable to the conditions in this country. And the statutes in the various states, in which the cause of action of the injured party does not survive, to the same effect and of the same import, are in substance, and in some instances exactly, like our own statute.

The courts in construing these statutes hold—and I take the language from the case of Price v. The R. R. Co., found in the 12 S. E. R.: "That the test of the right of an administrator to maintain an action for a death by wrongful act, is whether deceased could have maintained an action for the injury had he survived." This appears to be the test. Those statutes are not construed to be a revivor or survival of the cause of action of the deceased person nor to be a double liability for the same wrong; but rather to succeed the cause of action abated by the death of the injured person, and take its place; not in favor of his estate, but in favor of his next of kin. The wrong not having been righted in the lifetime of the injured person, the wrong-doer does not escape the penalty of his wrongful act by the death of the person upon whom the wrong is inflicted; but the penalty not having been paid, and the wrong-doer still being liable for the wrong, the statute determines in whose favor the liability shall exist, and points out the remedy by which satisfaction of it may be enforced. And this implies that the liability has not been satisfied and discharged; that the death was caused by the wrongful act of another, and that the act was such as would, if death had not ensued, have entitled the party injured to maintain an action and recover

damages in respect thereof. The right of action must exist in favor of the injured person, at the time of his death. If he, in his lifetime, has debarred himself from recovery, by any act which would bind him if alive, he has no cause of action to which the statutory cause could succeed. He has discharged the liability, and created a condition which prevents the action from arising in favor of his next of kin, and which precludes his administratrix from recovering upon a liability which the deceased, in his lifetime, by his own act, discharged.

After a full examination of the authorities, a majority of the court can come to no other conclusion than that this is the only construction that this statute will bear.

The defendant pleads a settlement which, in the absence fraud and without impeachment for cause, is a full and complete settlement between Elliott and the defendant for the injury which it is alleged caused his death, and released defendant from all liabilities to him, flowing from the injury. If the contract of settlement stands, Elliott, at the date of his death, had no cause of action against the defendant; and that being the case, no cause of action could arise in favor of his next of kin which could be maintained by this plaintiff.

The plaintiff meets this contract of settlement, as pleaded in the answer, by a general denial. Under an issue thus tendered, and the execution of the contract being proved, it was beyond further attack in the action. An instrument of that character, upon a mere general denial, and without any specific attack beyond a denial of its execution, cannot be impeached, once its execution is disclosed, under pleading presenting no further issue regarding it. So that the evidence offered, which tended to impugn the contract, was not admissible under the pleadings; and we think the court was in error when it was allowed to go to the jury.

And in so far as the charge of the court treats this con-

tract, after its execution has been established, as susceptible of further attack under these pleadings, and invites the attention of the jury to it in that regard, we think there is error.

And in view of the contract and its effect as we consider it, the propositions of law bearing upon it, requested by defendant below to be given to the jury as a part of the charge, should have been given, and there refusal was error.

With this view of the contract of settlement, and its effect, a majority of this court conclude that the verdict is not sustained by the weight of the evidence. These errors appearing upon the face of the record, to the prejudice of the plaintiff in error, the judgment is set aside, and a new trial is granted at the costs of defendant in error. Execution is awarded, and the case is remanded to the common pleas for execution and new trial.

Day, J., dissents as to the contract of settlement barring recovery.

Wheeler & Brice, for Plaintiff in Error.

W. B. Ritchie, and *Motter & McKenzie*, for Defendants in Error.

(First Circuit—Hamilton Co., O., Circuit Court—Jan. Term, 1898.)

Before Cox, Smith and Swing, JJ.

THE CLEVELAND, CINCINNATI, CHICAGO & St. LOUIS RAILWAY COMPANY v. THE VILLAGE OF ST. BERNARD.

Authority of municipality to require lighting of railroad tracks—Sec. 2495, R. S., constitutional—

(1). Sec. 2495 and following of Revised Statutes granting the power to municipal bodies to require railroads running trains in the corporation to light their track, does not violate the constitution of the United States, nor that of this state. It is in the exercise of the police power in the interest of the welfare and safety of the public.

Headlight on locomotives—Duty of Railroad—

(2). If it be necessary for the protection of the lives of passengers and the safety of property entrusted to its care to use a headlight upon a locomotive, it is the right and duty of the railroad company to so use it.

Lighting railroad tracks—Reasonableness of requirement in ordinance—

(3). While the municipal corporation is authorized to prescribe the kind of light to be used on the railroad track within its limits, it must not be such light as would cast an unreasonable burden upon the railroad company. While the municipality has a right to fix the place and kind of lights to be erected by the railroad company, in doing so it must exercise it with reference to the safety and protection of the public in crossing said railroad and so as not to interfere with the just rights and duties of the railway company while passing through the village, nor so as to cast an unreasonable burden upon the railway company.

Same—Light required on track interfering with safety in operation of railroad—

(4). Where an action is brought to compel a railroad company to pay the expenses of lighting a track with light of a particular candle power, it is a good defense to the action that the power is so great as to obscure the headlight upon a locomotive and render nugatory the power of the employes of the railroad to manage the trains so as to protect the lives of the passengers entrusted to their care, and that persons who cross the railroad will be greatly endangered in being prevented from seeing headlights of approaching trains, and a demurrer to an answer setting up this defense should be overruled.

Same—Reasonableness of ordinance—

(5). The reasonableness of such an ordinance, when questioned, is a proper subject to be tried by the courts.

Error to the Court of Common Pleas of Hamilton county.

Cox, J.

This case comes into court on a petition in error filed by the Railway Company to reverse a judgment of the court of common pleas, in sustaining a demurrer of the village of St. Bernard, to the answer of the Railway Company to the petition of said village, and rendering a judgment against said company and in favor of said village.

In the court below, action was brought by the village to recover from the Railway Company the sum of one hundred and fifty dollars, with interest from the first day of July 1895, for money expended by the village, for placing electric lights along said railroad in the village of St. Bernard, and lighting the same.

Plaintiff in its petition alleges that it is a municipal incorporation organized under the laws of Ohio and situated in Hamilton county, Ohio, and that defendant is a corporation under the laws of the state of Ohio, and maintains and operates a steam railway in the village of St. Bernard, on the right-of-way owned by said defendant.

Plaintiff further says, that on the 2nd day of August, 1894, the counsel of the plaintiff duly passed an ordinance to provide for lighting the railway of the defendant company within the limits of St. Bernard, in which ordinance the defendant company was required within twenty days from the delivery of a copy of said ordinance to the person having the management of the defendant's railway, to erect and maintain poles, wires and electric arc lamps, of 2,000 candle power, and of the same kind and quality as were then being erected for use on the public streets of said village, and specifying the points on said railroad on which said lights should be erected; that on the 8th of August, 1894, notice of the requirement to light said railway was given, by serving on M. E. Ingalls, the president of said Railway Company, a true and correct copy of said writing and said ordinance; that the defendant company neglected and failed for more than twenty days after the receipt of said notice, to erect said poles and lights, or to do said lighting in conformity with the provisions of said ordinance; that on the 6th day of September, 1894, the plaintiff corporation passed a resolution directing the board of water works and electric light trustees of said village, to erect said poles at the points aforesaid, and do the lighting as required in said or-

dinance at the expense of the defendant company; that pursuant to said ordinance and resolution, said village, through its board of water works and electric lighting trustees, did erect and construct three electric lights, of 2,000 candle power each, at the points designated on the line of defendant's railway within the village, and thus continued to light said railway as required by said ordinance, from January 1, 1895, to July 1, 1895, at the cost of said village of $50.00 for each lamp; and that the defendant railway company has refused to pay said sum or any part thereof, and thereupon, on the 19th of September, 1895, the village council passed an ordinance assessing said sum of one hundred and fifty dollars, the expenses of lighting said railway, on the real estate and leasehold interests of defendant's company in Hamilton county, Ohio, to pay the expense of lighting the defendant's railway within said village; that upon the failure to pay same within ten days, the same should be collected in the manner provided by law; that the defendant's company have failed to pay said sum although more than ten days have elapsed since the passage of the same, and the plaintiff prays judgment against the defendant for said amount and interest, and that the real estate and leasehold interests of the defendant company in Hamilton county may be appraised, advertised and sold, and the proceeds thereof applied to the payment of said judgment.

To this, the defendant answered, saying that the only authority of the plaintiff to pass the said pretended ordinance set forth in the petition, is under sections 2494, 2495, 2496, 2497 and 2498, of the Revised Statutes of Ohio; that the act under which said ordinance is passed, violates the constitution of the United States, to-wit:

"That it assumes to authorize cities and villages through which the defendant roads run, to lay upon the defendant a heavy burden without due process of law, in so much as it provides that the defendant may, without hearing or no-

tice, be required to put up a certain designated kind of light, and that such light may be required to be kept and maintained at all hours, irrespective of the use made of the streets or crossings where such lights are required to be placed:"

"That said act fails to provide for notice and hearing, and that there are questions of fact under the constitution of the United States of which defendant is entitled to notice, a day in court and a hearing, upon the following questions, to-wit:

"1st.—Whether the placing of electric lights at a crossing is necessary to provide for the security and safety of citizens and other persons from the running of trains through said city or village.

"2nd.—Whether the placing of electric lights at crossings will not render the head-lights useless, destroy their utility and render it impossible to operate its railway with safety to passengers and employes.

"3rd.—Whether the kind of light to be used at such crossings is such as can be used with reasonable safety, and such as will conduce to the safety of passengers and employes.

"4th.—Whether it is necessary to maintain lights at all hours of the night, or only a certain time before and after the arrival of trains.

"5th.—Whether the lighting of a railway in a street at a point specified, is reasonable for the safety of the public.

"6th.—Whether the kind of light required by the ordinance of cities and towns passed under the authority of said act, is reasonable and suitable and necessary for the safety of persons using the streets and crossings."

And for further answer defendant says:

"It is an inter-state railroad engaged in transporting articles of commerce and passengers into, through, and from more than twenty states of the United States, and was so engaged at the time said ordinance was adopted, and has been so engaged for more than ten years, and all its trains and locomotives which pass through the said village are used in drawing cars and trains, in which passengers and articles of commerce are transported from and through

the different states; that in order to enable the defendant to discharge its duties as a common carrier, it is indispensably necessary that all its locomotives should be provided with head-lights, and that they are so provided, and that it is indispensably necessary that the head-lights of its locomotives should cast a light on the track in front of the train, and that such light should not be diminished, obscured or rendered ineffective, and that the safety of all passengers transported by the defendant, of all employes engaged in operating its locomotives and trains, and of all property entrusted to it for transportation, imperatively requires that the light from the head lights of its locomotives should not be obscured, obstructed or diminished; that the placing or erecting of electric lights at the crossings in such ordinance specified and required, will disable the defendant from safely and properly performing its aforesaid duty as a common carrer of inter-state freight and passengers; that the effect of such electric lights shall be to endanger the safety of all passengers carried by the defendant, and of all employes engaged in operating its locomotives and trains, and of all property entrusted to it for transportation.

"That the effect of such electric lights as are required by said ordinance, is to obscure, obstruct and in effect destroy the light of its locomotives, and if erected as required prevent the engineers and fireman in charge of defendant's locomotives from seeing persons or objects on the track, and will render the head-lights upon the locomotives almost entirely useless and ineffective, and the defendant will thereby be incapacitated from safely and properly discharging its duties as a carrier as aforesaid; that the ordinance will be a great burden to the defendant in erecting and maintaining at great expense electric lights in various villages through which the road runs; that the defendant will suffer great loss and injury in the operation of its road, to-wit: a loss of more than ten thousand dollars.

"That the erection and maintenance of said electric lights as required by said ordinance, will make the crossings unsafe and dangerous to all persons who pass over them; that they will tend to prevent persons about to cross over said crossings, from seeing or observing head-lights of approaching trains; that light from the head-lights of such

trains will be obscured and rendered more or less useless and ineffective; that the public safety or welfare will not be promoted by the erection of said electric lights; on the contrary, the danger to all persons using or passing said crossings will be greatly increased, and that as a consequence thereof, the liability of the defendant for injuries to persons at crossings will be greatly increased, and it will be put to great expense and costs in defending actions for personal injuries."

To this answer of defendant the plaintiff filed a general demurrer, which was sustained by the court, and judgment rendered for the plaintiff, to which judgment defendant excepted.

As to the first answer claiming that the act of the legislature under which this ordinance was passed is unconstitutional, we think the claim of the defendant should not be sustained. Section 2494, which authorized the village to require the company to light its track, was before the Supreme Court of this state in the case of Railroad Company v. Sullivan, 32 Ohio St., 152, and was held to constitute a reasonable exercise of police power and therefore constitutional, and this opinion was approved and re-affirmed by the Supreme Court in the case of The Cincinnati, Hamilton & Dayton R. R. Company v. The Village of Bowling Green, Ohio, as reported in Vol. 39, of the Weekly Law Bulletin, p. 84, and in 57 Ohio St., 342-3, the court saying: "The power given by the legislature to a corporation to require the lighting of a railroad track, is a branch of the police power of the state." And the court sustained the constitutionality of all sections referred to.

What laws and ordinance may be passed in the exercise of the police power of the state has been the subject of many decisions, a number of which have been cited by counsel for the defendant. In the case of The People v. Jackson, 9th Michigan, 235, the court says:

"The powers which can only be justified on the speci-

fic ground that they are police regulations, and which otherwise would be clearly prohibited by the constitution, can be such only as are so clearly necessary to the safety, comfort, or well-being of society, or so imperatively required by the public necessity as to lead to the rational and satisfactory conclusion that the framers of the constitution would not otherwise have adopted."

In the Slaughter House Case, 16 Wallace, 36 and 37, the Court says:

"But under the pretense of prescribing a police regulation the state cannot be permitted to encroach upon any of the just rights of the citizen, which the constitution intended to secure against abridgement."

And the Court of Appeals of New York, 98 N. Y., p. 98, says:

"The police power is not without its limitations and that in its exercise, the legislature must respect the great fundamental rights guaranteed by the constitution. If this were otherwise, the power of the legislature would be practically without limitation.

"In the assumed exercise of the police power in the interest of the health, the welfare or safety of the public, every right of the citizen might be invaded and every constitutional barrier swept away. This doctrine is approved in 109 N. Y., 389."

Judge Cooley, in his work on Constitutional Limitations, 6th Ed., 710, says: the limit to the exercise of the police power in these cases must be this:

"The regulations must have reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter, and they must not under pretense of regulation take from the corporation any of the essential rights and privileges which the charter confers; in short, they must be police regulations in fact, and not amendments of the charter and curtailments of the corporate franchise. The maxim *sic utere tuo ut alienum non laedas*, is that which lies at the foundation of the

power, and to whatever enactment affecting the management and business of private corporations it cannot be fairly applied, the power itself will not be extended."

The object of this law is evidently in the interest of the welfare and safety of the public, and in the exercise of the power given by the legislature to a municipal corporation, this object should be kept steadily in view, and the principle of the police power of the state must not be violated. In the Bowling Green case, 39 Law Bulletin, 87, and in 57 Ohio St., 347, the Supreme Court say:

"Section 2495, among other provisions, requires the ordinance to specify the manner in which said railway should be lighted. This language seems broad enough to authorize the municipality to prescribe the kind of light to be employed for that purpose, whether electricity, gas, or any other material or means that may be reasonably adopted to the purpose. The power to select the kind of light to be used can be exercised, of course, only when more than one kind is available."

And the courts say further, on the same page:

"Yet, as the power to compel a railroad company to light its track at all implies authority to require it to be efficiently done, it would seem necessarily to follow that within reasonable limits the power to prescribe the kind of light rests with the municipal authorities. They of course, in this respect, could not cast an unreasonable burden on the railroad company. Doubtless this ordinance would cast upon a railroad company an unreasonable burden if it prescribed an electric light when the municipality contained no electric plant or other convenient means of generating electricity; otherwise the municipality, large or small, through which the railroad might pass, could compel those who operate the road to erect a plant to generate the light."

And on page 345, 57 Ohio St., Bowling Green case, the court say:

"Both reason and authority deny to a corporation clothed with such rights and powers and bearing such relation to the public, the power to arbitrarily fix the price at which

it will furnish light to those who desire to use it. If the parties could not agree upon price, they could appeal to the courts of the state and compel the municipality to furnish the lights at a reasonable price."

It will be seen by these decisions of the Supreme Court, that the exercise of the power conferred by this statute must be reasonable and must not cast an unreasonable burden on the railroad company, otherwise the ordinance would be void; and while the municipality has the right to prescribe, in the first place, the kind of light and points where it may be placed within the limits of the village, yet it may not do so arbitrarily or unreasonably, and when it is contended by the railroad company that such acts are unreasonable and arbitrary, it is the duty of the courts to determine whether the regulation is a reasonable exercise of a power which is generally prohibited by the constitution. According to the maxim *sic utere*, etc., it being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others. Any law which goes beyond that principle, which undertakes to abolish rights the exercise of which involves an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security cannot be included in the police power of the government.

It is a governmental usurpation and violates the principles of abstract justice, as they have been developed under our public institutions, Tedeman on Police Powers, page 4. That it is the duty of the courts to pass upon the reasonableness of the acts of a municipal corporation requiring railroads to be lighted, seems to be assumed in the Bowling Green case by the Supreme Court without any question.

Now, the answer of the Railway Company to the peti-

tion of the plaintiff sets up that it is an inter-state railroad, engaged in transporting articles of commerce and passengers into, and through more than twenty states, and its trains and locomotives that pass through this village are so used. That in order to discharge its duties, it is indispensably necessary that all its locomotives should be, and are provided with head-lights for the purpose of casting a light on the track in front of the train, and that such light should not be diminished, obscured, or rendered ineffective, and that the safety of all passengers transported by the railway and of all employes engaged in operating its locomotives and trains, and all property entrusted to it for transportation, requires that the light should not be obstructed, obscured or diminished, and that the placing or erecting of such electric lights at the crossings in the ordinance specified and required will disable the defendant from safely and properly performing its duty, and the effect of such electric lights will be to endanger the safety of all passengers carried by the defendant and all employes engaged in operating its locomotives and trains, and on all property entrusted to it for transportation; that such electric lights will obscure, obstruct and in effect destroy the light of its locomotives, and will prevent the engineers and firemen in charge of defendant's locomotives, from safely and properly discharging its duties as a common carrier, and will be a great burden to defendants in erecting and maintaining at a great expense and the road will suffer great loss and injury in the operation of its trains; that it will make the crossings unsafe and dangerous to all persons that pass over them, and they will tend to prevent persons about to cross over said crossings from seeing or observing the head-lights of approaching trains, and the public safety or welfare will not be promoted by the erection of said electric lights; on the contrary, the danger of all persons using or passing said crossings will be greatly increased and the road will be put

to great expense in defending actions for personal injuries.

While the municipality has the right to fix the place and kind of lights to be erected by the railroad company, in doing so it must exercise it with reference to the safety and protection of the public in crossing said railway, and so as not to interfere with the just rights and duties of the railway company in managing its trains and locomotives in passing through the village, as in the management of its locomotives and trains great care is required of the railway to so manage them as to protect the lives of the passengers and the safety of the property entrusted to it for transportation. To do this, it is asserted by the defendants in the answer, it is necessary that head-lights be used upon the locomotives which will cast a light upon the track in front of the train and if this light is obscured or diminished, the safety of passengers and property will be greatly endangered, and persons who cross said railroad will be prevented from seeing or observing head-lights of approaching trains.

The Supreme Court of Ohio, 10th Ohio St., p. 116, say, the operators of a railroad train have an unqualified right to carry a head-light upon the train at night whenever necessary for the safety of the lives and property embarked upon the trains; and upon page 120, the court says, "if it be shown to be necessary, it is the right and duty of the company to see to it that such light be then carried."

While the Supreme Court has held in the Bowling Green case, vol. 57 Ohio St., p. 342-3, that the village has authority to prescribe the kind of light that shall be employed, and that, where the village has an electric plant, it is not unreasonable because it requires a railroad company to use in lighting its track the particular kind of lamp and illuminating material in use for lighting the streets of such city or village, yet the question as to the power of the light used did not seem to have been raised in the case. It does not appear in the facts of that case how many candle

power of electricity was afforded by each lamp on the streets or on the railroad, but the opinion seems to turn upon the kind of light, whether electricity, gas, or other light which might be used by the village. It could hardly have been intended to decide that such light would be reasonable if the illuminating power of the lamps in the streets were so great that if used in a lamp upon the railroad track it would obscure the head-light upon a locomotive and render nugatory all the power of the employes of the railroad to manage the trains so as to protect the lives of the passengers and the safety of the property entrusted to them.

Now, in this case, the village has prescribed the light to be used on the railroad to be of 2,000 candle power.

This answer directly attacks the reasonableness of the ordinance fixing the kind of lights and the places where they should be put, and raises an issue which should be met by a reply of the plaintiff. If sustained by the proof. it would be an answer to the claim of the plaintiff, if its tendency would be to show that the ordinance in question, instead of being for the safety and protection of the public, will have the contrary effect. We think the demurrer to the second part of defendants answer should have been overruled in the court of common pleas, and this judgment should therefore be reversed, and the case remanded.

John T. Dye, *S. O. Bayless*, *Harmon*, *Colston*, *Goldsmith & Hoadly*, Attorneys for Plaintiff in Error.

F. M. Gorman, Attorney or Defendant in Error.

(Sixth Circuit—Lucas Co., Circuit Court, January Term, 1898.)

Before King, Hayes and Parker, JJ.

HENRY STEWART, a minor, by his next friend, JULIA VAN SICKLE, v. THE TOLEDO BRIDGE COMPANY.

Employer and employe—Knowledge of defect in machinery—Necessary allegation in petition—

(1). Where an action is brought by a servant against his master, charging the master with negligence in providing defective appliances whereby the servant was injured, and the petition is defective because not containing an averment that the master had notice or knowledge, or ought to have had, of such defect in the appliances, but the petition is not demurred to, and the proofs are received without objection that they tend to establish such fact not alleged, the reviewing court will look beyond the pleading and determine whether the proofs establish such notice to or knowledge of the master.

Motion to direct verdict—When proper—

(2). Upon a motion to direct a verdict the court is not authorized to weigh the evidence; if there is evidence tending to sustain plaintiff's case on all points, no matter how slight, the case must be submitted to the jury, and, for the purpose of the motion, everything is admitted which the evidence in any degree tends to prove, and this involves and includes any and every conclusion which a jury might fairly and reasonably deduce from the evidence.

Inspection of appliance—When not sufficient to exonerate master—

(3). An inspection of appliances procured by the master to determine whether such appliances are safe and fit for a certain use, will not exonerate the master from responsibility to a servant who is directed to and does devote such appliances to a use not considered or contemplated by such inspection, and totally different from the use with respect to which such inspection was made.

Negligence not inferable from happening of accident—

(4). Negligence, or knowledge as an element of negligence, may not be inferred from the mere fact that there was a defect and an accident consequent upon it.

Safe appliances—Master bound to reasonable care—

(5). In providing suitable and safe appliances the master is bound to the exercise of reasonable care only. The servant assumes all risk of latent defects of which the master was ignorant, unless the master was negligent in not discovering the same.

Error to the Court of Common Pleas of Lucas county.

PARKER, J.:

The plaintiff in error, a minor, about 18 years of age, suing by his next friend, was plaintiff below, and the defendant in error, an incorporated company, was defendant below. Omitting certain introductory and formal allegations of the petition, it reads as follows:

"At the times hereinafter named, plaintiff was in the employ of defendant and under the supervision of its officers and managers.

"Plaintiff was engaged in the occupation of painting on the bridge known as the up-river bridge, and worked upon scaffolding and supports provided and furnished by defendant.

"That by reason of the neglect and carelessness of defendant, it permitted and allowed to be placed into the construction of said bridge, a certain rod of iron which was wholly defective and unsafe, and not fit for use. That while at work upon said scaffolding, which was suspended in part from this defective rod and without any fault or neglect on plaintiff's part, and without any knowledge on his part of such defect, said defective iron suddenly broke, thus causing plaintiff to fall a long distance, to-wit, thirty-seven and one-half feet, into the Maumee river, and upon logs floating therein, breaking his right leg above the knee and otherwise greatly injuring him and causing him great loss in time and money, and much pain, etc.," for which he asks judgment in an amount named.

The answer denies negligence, and alleges that the plaintiff's injuries were received through the fault of a fellow-servant and through plaintiff's contributory negligence.

These allegations of new matter are denied by a reply.

Upon the plaintiff resting his case, the jury was directed by the court to return a verdict for defendant, which was done. On this verdict judgment was rendered, and on account of this action of the court error is prosecuted here.

It will be observed that the petition contains no averment that the defendant had notice of the defect or knowledge

thereof, or ought to have had; nor do we find any averment that may be regarded as a substitute therefor. The general charge that "by reason of the neglect and carelessness of defendant it permitted and allowed" the defective rod to be used in the construction of the bridge, is not sufficient. This charge of negligence is in the nature of a conclusion. Whether the act was negligent, depends partially at least, upon whether the defendant had knowledge or notice of the defect or by the exercise of reasonable care ought to have discovered it. Certain rules upon this subject are laid down in Wood on the Law of Master and Servant, sec. 414, and are quoted with approval by Judge Minshall, in his opinion in Coal & Car Co. v. Norman, 39 Ohio St., 598, a part of which reads as follows:

"The servant, in order to recover for defects in the appliances of the business, is called on to establish three propositions: 1st. That the appliance was defective. 2nd. That the master had notice thereof, or knowledge, or ought to have had. 3d. That the servant did not know of the defect, and had not equal means of knowing with the master."

Then Judge Minshall proceeds to say:

"And it is elementary in the law of pleading, that whatever a party is required to prove in order to make out his claim, must be averred."

The part lacking in this petition, is that required by the second rule stated above "That the master had notice thereof, or knowledge, or ought to have had." No advantage was taken of this defect in the petition by demurrer or otherwise, and no objection was interposed to the introduction of any evidence upon the trial on the ground that it tended to prove this element of notice or knowledge as to which there was no averment; and therefore, we look farther into the record to see whether there was any evidence tending to prove this as well as the other facts necessary to be established by the plaintiff to make out his case.

In the consideration of this question, we apply certain rules deduced from the decisions of the Supreme Court of this state, as follows:

That upon a motion to direct a verdict the court is not authorized to weigh the evidence; if there is evidence tending to sustain plaintiff's case, on all points, no matter how slight, the case must be submitted to the jury; and, for the purpose of the motion, everything is admitted which the evidence in any degree tends to prove, and this involves and includes any and every conclusion which a jury might fairly or reasonably deduce from the evidence.

Now, the evidence in this case discloses that the plaintiff was employed by defendant as one of a gang of painters to paint a certain bridge being erected by defendant over the Maumee river, at Fassett street, Toledo, Ohio. The construction of the bridge had been completed about forty-five days before the plaintiff and the other painters with whom he was working had been put to work. In the meantime another gang of painters had covered the bridge with one coat of paint, working upon a swinging scaffold of the same kind, and fastened to the bridge in the same way as that used by the plaintiff and the gang with which he was at work, and the latter were applying the second coat of paint to the bridge. The frame-work of the bridge was of iron and steel, and there was used in its construction certain steel rods from seven-eighths of an inch to one and one-eighth inches in diameter, and perhaps twenty-five or thirty feet long, which extended across the bridge from side to side obliquely under "T" or "I" beams, upon which the plank floor rested, and these rods passed through and were fastened to certain floor-beams upon which the "I" beams rested, the principal use of such rods being to strengthen the bridge for the resistance of lateral strains produced by wind, the currents of the river, and perhaps other causes. These rods were near to the "I" beams of the bridge,

within a few inches thereof—so near that in painting the upper surfaces of the rods where they crossed such beams it was necessary for the painters to hold their brushes horizontally. The staging or swinging scaffold used by the painters consisted of planks extending across the bridge beneath it, and held in position by ropes fastened thereto and to these rods above, and the scaffold was fitted with ropes, pulleys and tackel which admitted of its being raised or lowered as occasion should arise in the progress of the work of painting. Two or more of these planks being so fixed in a certain locality, two or more were fastened and swung in the same way at such a distance from the others as would admit of other planks being laid from one to the other, and the latter could be moved along on the frame made by the former to suit the convenience of the painters at their work.

The scaffolding was prepared for the use of several persons, we do not know how many, but certainly two, if not more, at the same time. While plaintiff was upon this scaffold in discharge of his duty as an employe of the defendant, one of these rods to which the ropes holding one corner of the scaffold were fastened, suddenly gaveway---broke off--whereby that part of the scaffold on which plaintiff was standing, fell, and he was precipitated to the river below, falling upon a raft of logs, breaking his leg and otherwise injuring his person.

Plaintiff was the only person on this part of the scaffold at the time it fell. There seemed to be no unusual strain upon the rod at the time. Its breaking seems to be inexplicable upon any theory other than that of a defect in the rod, for it seems that a sound rod of that size would have sufficient strength to withstand the strain then upon this rod.

It appears that the materials for this scaffold were furnished by the defendant, and that a foreman who had charge of the construction and painting of the bridge directed plaintiff and his fellow workmen to fasten the scaffold to

these rods precisely as they did fasten the same, and it was the duty of this same foreman to see to the removal of defective parts of the bridge and the replacement thereof by parts not defective.

The plaintiff also introduced evidence to the effect that the defendant had in its employ during the construction and erection of this bridge, one V. A. Haas, whose duty it was to inspect the rods and other parts of this bridge, and who did inspect this rod, and that the plaintiff was not under the orders or control of said Haas.

Robert H. Finch, an employe of defendant, testifies to the inspection having been made by Haas, and also to inspections of the rod by a person in the employ of the company who furnished the unfinished rod to the defendant, and also to an inspection made by a person in the employ of the city; but as this witness does not appear to have had personal knowledge of any of these inspections, we base no conclusions upon his testimony with respect thereto. However, his testimony to the effect that Haas was employed to make the inspection, and that he was a competent inspector, must receive consideration.

More definite testimony as to the employment, qualifications and duties of Haas and of an actual inspection made by him, is given by James A. Huston, the president of the defendant company. In the course of the trial it was agreed that if James A. Huston was personally present he would testify to certain things, and those things were reduced to writing and introduced in evidence by the plaintiff as the testimony of Huston, as follows:

"I am president of The Toledo Bridge Company. The Toledo Bridge Company has always had an inspector. His name is V. A. Haas. It was his business and duty to inspect all workmanship and material going into the Fassett street bridge. He had been inspector for us ever since the company was organized, and was the inspector for the

Smith Bridge Company before that time. He was a competent, careful inspector: He inspected the rod which broke. It was his duty to inspect it. The way the scaffolding was upon which Stewart was painting when he fell was the usual way to paint bridges from. The rod which broke had been painted once since it had been in position in the bridge, and Stewart was giving it its second coat when it broke. Henry Stewart was not under the orders and control of said V. A. Haas, but was under the control and orders of Ben Hamlin, his foreman."

Now, the particular questions presented and debated here are whether there was any testimony tending to show that the defendant had actual notice or knowledge of this alleged defect in the rod, or was chargeable with notice thereof, and whether it discharged its whole duty by employing a competent person to inspect the material used in the construction of the bridge?

We will first discuss the question as to the effect of employing an inspector.

It is argued on behalf of defendant that it has done all that the law requires of it in the premises to avoid responsibility for defects, by employing a competent inspector and instructing him to inspect the material and see to it that only proper materials were used in the construction of the bridge; and that such inspector was a fellow servant of the plaintiff, so that if he neglected or failed in his duty, and by his fault this defective rod was placed or allowed to remain in this bridge, because of the well-settled rules as to injuries resulting from the fault of fellow servants, the plaintiff has no remedy against the defendant. In support of this claim we are cited to L. S. & M. S. Ry. Co. v. Lamphere, 9 C. C., 263, 266; C. & Z. R. Co. v. Webb, 12 Ohio St., 475; R. R. Co. v. Fitzpatrick, 42 Ohio St., 318.

It follows from these cases that where the inspector and the person injured are fellow servants, and the inspection is as to a use, by such injured person, of the article inspected,

he cannot recover from the common master even if the inspector shall fail to faithfully or properly perform his duty whereby the injury results. But it does not follow from these decisions that one who is employed to inspect rods going into the construction of a bridge to determine whether they are suitable for the use for which they are designed, is the fellow servant of the one who is called upon long after to work upon such bridge, and is directed in the performance of such work to use such rods in a way not contemplated or designed in the construction of such bridge, or taken into account by such inspector in the inspection thereof. An inspector whose duty it was to determine whether this rod was fit to withstand the strain put upon it by lateral motion of the bridge, caused by wind, or water, or other things, might not be called upon to say whether it would stand the strain of such a weight put upon it as that of the scaffolding and these men. It is apparent that the strains are entirely different in character, and they may be as widely different in degree. The inspector might very properly decide that the rod was fit and proper for the strengthening of the bridge as designed. and yet, if the question was put to him, he might say that it was wholly unsafe as a support of the weight of this scaffolding and these men. If, then, the decision of this latter question was not submitted to him, and was not made any part of his duty, how can it be said that his employment should affect in any way the right of the plaintiff or the responsibility of the defendant, when the rod is devoted to this different use?

It does not appear that the inspector was called upon to inspect or test the rod with respect to this use. Neither does it appear that the rod was unfit for its use as a part of the support of the bridge. So far as we are informed it might have been fit for the latter use and unfit for the former.

Another element that may affect this question of inspec-

tion is that of time. When the inspection of this rod was made does not distinctly appear, but it is fairly inferable from the evidence that it was made while the bridge was in the process of erection, probably before the rod was used in the bridge.

Now, can it be said that such an inspection, with no duty to renew it, would exonerate the master from all liability to those employed to work upon the bridge, even though they use it as contemplated by the inspection, if such use occurs months or years after its erection and after the inspection thus made? We do not think the authorities warrant such a conclusion. Indeed, there is much authority that sustains a rule which seems to us to be reasonable and just, but which cannot be easily reconciled with the rule laid down in the Ohio cases cited, and therefore we do not feel inclined to extend the latter rule or apply it to cases not falling clearly within it. This rule is to the effect that the duty of furnishing safe appliances and machinery cannot be delegated by the master so as to shift from him or relieve him of his responsibility to his servant in the premises—that the inspector or other person to whom such duty is delegated becomes the agent of the master, and his negligence or fault is the negligence or fault of the master. The rule is stated in various ways in the authorities; for instance, in 7 Am. & Eng. Ency. of Law, at p. 830:

"It is the duty of a master, not only in the first instance, to make reasonable efforts to supply his employes with safe and suitable machinery, tools, etc., but also thereafter to make like efforts to keep such machinery, etc., in safe and serviceable condition; and to that end he must make all needful inspections and examinations."

In a note it is said: "A person performing this duty is not a fellow servant." In support of that proposition there are a great many authorities cited.

"In Fuller v. Jewett, 80 N. Y., 46; s. c. 1 Am. & Eng.

R. R., Cas. 109, the point raised was, whether the machinists of a railroad company, who are employed to manufacture and repair its engines, are properly to be considered co-employes of engineers employed to run those engines. The decision was that they were not."

"One charged with keeping machinery in safe condition is not a fellow servant with him who operates it, in the sense which would relieve a corporation from liability when the latter is injured by the negligent performance of his duties by the former. Houston, etc., Ry. Co. v. Marcelles, 59 Tex., 334."

"If no one is appointed by a railway company to look after the condition of its cars and see that the machinery and appliances used to move and stop them are kept in repair and in good working order, it is liable for the injuries caused thereby. If one is appointed by it charged with that duty, and the injuries result from his negligence in its performance, the company is liable. He is, so far as that duty is concerned, the representative of the company. North'n. Pac. Ry. Co. v. Herbert, 116 U. S., 642."

Again, on page 834, Encycl. of Am. & Eng. Law, under the head of "Criterion of Fellow Servants:"

"The true rule for determining who are fellow servants is to be determined, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant. If it is an act that the law implies a contract duty upon the part of the employer to perform, then the offending employe is not a servant, but an agent; but as to all other acts they are fellow-servants."

In support of this proposition a great many authorities are cited and certain illustrations given in the notes. As pertinent to certain of these remarks upon what may be deemed fair qualifications of the rule adopted in Ohio, I call attention to the case of Arkerson v. George W. Dennison, in vol. 117, Mass., 407, the syllabus of which case reads as follows:

"In an action by a workman against his employer, for

personal injuries caused by the fall of a staging upon which the plaintiff was at work repairing a building, the evidence tended to show that the plaintiff went onto the staging by the defendant's direction; that the staging was insecure in consequence of being constructed of unsuitable materials, or by neglect to fasten it together sufficiently; that the staging was built before the plaintiff began work, by persons who were afterwards his fellow workmen; and that the defendant directed what lumber was to be used therefor. It was not contended that the staging was built under the direct personal supervision of the defendant, but there was evidence that he superintended the work generally. Held, that the jury would be warranted in finding a verdict for the plaintiff."

After discussing certain general principles applicable to cases of this character, Wells, J., in the course of his opinion, at page 412, says:

"The negligence of fellow workmen, for which the master is held to be exempt from responsibility, is negligence in respect to that which the workmen undertook or were set to do. When the preparation of the appliances is neither entrusted to nor assumed by them, the master may be held guilty of negligence, if defective appliances are furnished, even though the workmen themselves are employed in the preparation of them. In such case, negligence appearing, it is a question of fact for the jury whether that negligence was in respect of what was done or undertaken by the fellow workmen, or was the negligence of the master."

Coming now to the question whether there is any evidence tending to show that the defendant had notice of this defect in the rod—(for that there was a defect we assume as we feel bound to in the consideration of this case, since there was testimony tending to show it),or showing that it ought to have known of it, and therefore is chargeable the same as if it actually knew, how does the case stand?

It must be remembered that negligence, or knowledge as

an element of negligence, may not be inferred from the mere fact that there was a defect and an accident consequent upon it. The plaintiff is bound to make out his case affirmatively by evidence. There is no evidence tending to show that any responsible agent or officer of the company whose knowledge would be its knowledge, knew of this defect in the rod.

The master is not an insurer of the perfection of the machinery and appliances furnished to servants to be used in their work. He is not responsible for hidden defects of which he had no knowledge, unless by the exercise of reasonable care such defects would have become known to him. In providing suitable and safe machinery and appliances, he is bound to the exercise of reasonable care only. And the servant assumes all risk of latent defects of which the master was ignorant, unless the master was negligent in not discovering the same. The only direct evidence submitted as to the appearance of the alleged defect has reference to the appearance of the ends of the iron at the point of fracture after the break occurred. Giving to this the most favorable construction for the plaintiff it will bear, it tends to show no more than that there was an old crack or partial fracture in the upper surface and part of the rod at the point where it gave way, extending into the rod from one-fourth of an inch to one-half of the diameter of the rod. Witnesses say that this was indicated by the surfaces of that part of the fracture being darker than the remainder of the surfaces at the place of fracture. While the testimony upon this point is uncertain and conflicting, we give to it, as before remarked and as the rule requires, the construction most favorable to the plaintiff.

But this is not enough. Has it been made to appear affirmatively, or is there any evidence tending to prove that the defect, if it existed, was obvious, or might have been discovered by the master by reasonable care? For, while

the question whether the defect was discoverable by the exercise of such care is for the jury, the court is not bound to submit the question to the jury unless the evidence tends to show that it was so. We are of the opinion that the evidence not only falls short of showing or tending to show this affirmatively, but that, on the contrary, it tends to prove, and that very clearly, that the defect, if it existed, was of that latent and secret character that must have eluded the most careful and searching examination and scrutiny. I call attention to the evidence on this point, since there is but little of it.

Louis Highland, (pp. 27-8, Record), testifies:

"Q. Is is not a fact that if you were painting an iron rod, any break that was at all black might be discoverable so as to be seen at once? A. That would be according to whether there was any paint marks in there or not; the break might have been so closed that the paint would not run in.

"Q. If the break was large enough to be seen, the paint would run in, wouldn't it? A. Yes, if it could be seen."

Here is a witness for plaintiff who testified to the dark appearance of the break or fracture, indicating to him that there was an old crack or fracture. It appears further on, in the testimony of this witness, that if there was in fact any fracture there, it was so close that no paint ran into it when the first coat of paint was applied to this rod by the gang of painters; yet, he says the fracture could not have been seen if not large or open enough to admit the paint.

James Daley, at age 54, testifies as follows:

"Q. When you had your planks on those rods, where would your head be? A. Up near the floor.

"Q. Above the lateral? A. It would be above the lateral rod.

"Q. Any break or crack on top of the rod, could be seen? A. Yes.

It appears, as I have stated, that there was no paint in this

old crack or fracture, and that another gang of painters had gone ahead of this gang in their painting, and that the plaintiff and the persons belonging to his gang or crew had fastened their scaffolding to this rod, and there is an entire absence of evidence tending to show that any of these workmen had discovered in their work in painting about this rod any defect in it, though working with it and making their fastenings upon it at almost the precise point where the fracture occurred.

Robert Finch, testifying at pages 30 to 35, declares that there was nothing about the ends of this rod at the point where it broke to indicate that there had been an old fracture or breakage. He says that he made a careful examination of this rod after it was broken, and that, from appearances, the rod at that particular point, for some reason, had become crystalized and brittle. Then he is asked the question direct, whether the defect, if it existed, was one which could be discovered or was discoverable, and he declares that it could not have been discovered; that it was of that latent and secret character that it could not have been discovered while in place, though it might have been discovered by taking the rod out and making a test by bending it, or perhaps by some other process. It is also shown by the testimony of this witness—though it would be obvious without testimony—that the weight of the rod would bring close together the surface of any crack in the upper part of the rod.

Another significant fact is this, that another gang of painters had used this rod in the same way, without mishap, shortly before the plaintiff used it, and that use amounted in our opinion to a practical test of the strength of the rod for the very purpose for which plaintiff was directed to use it. which would warrant the defendant in directing the plaintiff to so use it, and this fact, together with the fact that the defect, whether consisting of crystalization or a partial fracture, was not obvious, we think sufficient to

establish affirmatively (though this is not required to sustain the judgment), that the defendant had not been guilty of such a want of due care as would justify the imputation of knowledge of the defect, or as would justify the imposition upon it of the burden of the consequence of such knowledge; and while inspection or the employment of an inspector may not of itself amount to a justification in a case of this kind, it is entitled to weight and consideration upon the question of the exercise of due care upon the part of the company.

This seems to us to be one of that class of unfortunate accidents the risk of which the plaintiff assumed when he accepted the employment, an accident resulting from a secret defect in the appliances, and occurring under circumstances which involved no wrong or fault on the part of the defendant, and therefore no legal responsiblity upon its part.

The judgment of the court below will be affirmed.

Dodge & Canary, and *M. B. Lemmon*, Attorneys for Plaintiff in Error.

Rathbun Fuller, Attorney for Defendant in Error.

(First Circuit—Hamilton Co., O., Circuit Court—Jan. Term, 1898)

Before Cox, Smith and Swing, JJ.

OMWAKE v. JACKSON.

Action in Foreclosure—No interest in subject matter acquirable during pendency—

An action in foreclosure is in the nature of an action *in rem*. Such being the case, sec. 5055, R. S., applies, and no interest can be acquired by third persons in the subject matter as against plaintiff's title.

Assignment for benefit of creditors does not transfer jurisdiction in action in foreclosure from common pleas to probate court—

The jurisdiction of the court of insolvency, while original and exclusive as to all matters pertaining to the settlement of the estate of the assignor, is nevertheless limited to the matters which

the assignor is capable of transferring to the court through his assignment; and where the court of common pleas has previously obtained jurisdiction of subject matter by the terms of the statute, the assignor has not the power to transfer the jurisdiction to the court of insolvency.

Error to the Court of Common Pleas of Hamilton county.

SWING, J.; Cox and Smith, JJ., concurring.

This case was heard and decided by this court some weeks ago, but not having been fully argued, and not being thoroughly satisfied as to the correctness of our conclusions, we requested counsel to re-argue the case. This was done, and the case was very fully and ably argued by counsel, both orally and by brief, with the result that we are now satisfied that our former conclusion was erroneous.

The facts necessary to be stated in order to point out the matter in controversy, are: On July 18, 1896, Omwake brought suit in foreclosure of a real estate mortgage against Lucy Jackson et al., and service of summons was made on the mortgagor on April 24, 1897. Lucy Jackson filed an answer. Afterwards, on October 23, 1897, Lucy Jackson executed a general deed of assignment. Afterwards, the assignee filed an answer setting up the fact of the assignment, and claiming that the court of common pleas was thereby ousted from jurisdiction so far as proceeding to a sale of the real estate, and that the sale and exclusive jurisdiction as to the sale of the property was lodged in the court of insolvency.

After a careful consideration of the question, we are now satisfied that the assignment did not take away from the court of common pleas the jurisdiction of that court to render and execute any judgment that it might deem proper to make as to the foreclosure and sale of the premises.

It seems to us that the determination of the question hinges on whether the action is one *in rem* or *personam*.

We are of the opinion that an action in foreclosure is in

the nature of an action *in rem.* Judge Hitchcock, in the case of Frische v. Lessees of Kramer, 16 Ohio, p. 141, says:

"By our practice, the proceedings in chancery, which we sometimes denominate proceedings to foreclose an equity of redemption, are in fact in the nature of proceedings *in rem.*"

Jude McIlvaine, in the case of Wood & Pond v. Stanberry et al., 21 Ohio St., p. 149, says, speaking of the proceeding to sell real property under a mortgage, that it is "a proceeding strictly *in rem.*"

In the case of Spence v. Insurance Co., 40 Ohio St., p. 521, McCauley, J., says: "The two actions are essentially different; one exhausts the mortgage security, the other affords a personal remedy; one may be maintained without service, and the other may not;" thus fully recognizing that the foreclosure of the mortgage is a proceeding *in rem.*

Other decisions of our own Supreme Court support this view, and to the same effect might be cited text books and a mass of decisions of other courts.

If a proceeding *in rem*, we are of the opinion that sec. 5055, of the Revised Statutes, applies. This section is as follows:

"When the summons has been served or publication made, the action is pending so as to charge third persons with notice of 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 section is simply declaratory of the rule of the common law. We see no reason why in its terms this section does not apply to deeds of assignment in the court of insolvency; and we think the ends of justice will be best subserved by the court of common pleas retaining the jurisdiction of the action. We do not question in the least the contention of the opposite counsel to the effect that the court of insolvency has the original and exclusive jurdisiction as to all matters pertaining to the settle-

ment of the estate of the assignor, as is held by our supreme court in the cases cited in argument; but that must be limited to the matters that the assignor is capable of transferring to that court through his assignment to his assignee; and the court of common pleas having got jurisdiction of the subject matter, by the terms of the statute the assignor did not have the power by reason thereof to give to the court of insolvency the jurisdiction.

A great number of authorities have been presented to us, but if we are correct in our view of this section of the statutes, an elaborate review of them could not make the matter any plainer, and is entirely unnecessary.

Our conclusion, therefore, is that the assignment did not transfer to the court of insolvency the jurisdiction that had already vested in the court of common pleas, and that the latter court still retained the action with power to proceed to final judgment and execution, and the case having been appealed to this court, that it is now here for such determination.

(Sixth Circuit—Lorain Co., O., Circuit Court—Jan. Term, 1898.)

Before King, Haynes and Parker, JJ.

CHARLES A. JONES v. JOHN L. JONES.

Acceptance of less sum than amount of judgment with a release of the whole—Circumstances under which release effectual—

A judgment creditor, living in another state, of an insolvent debtor in Ohio accepted a less sum than the balance still unpaid on the judgment, part of which had been paid before, and the balance of which had remained unpaid for years so that the judgment had become dormant. The money was payable to him under the condition that it be accepted in full satisfaction of the judgment, and a release in blank had been sent along for the judgment creditor to sign, which he did. Afterwards he commenced proceedings to revive the judgment for the purpose of collecting the balance of the judgment. Held, the release was effectual as a full satisfaction of the judgment.

Error to the Court of Common Pleas of Lorain county.

KING, J.

The case of Charles A. Jones against John Jones, is a proceeding in error to reverse the judgment of the court of common pleas. The parties in this case are brothers; and John L. Jones resides in, or near Richmond, Va., and the defendant below, Charles A. Jones, resides in this county.

In 1884, John L. Jones recovered a judgment in the court of common pleas of this county against Charles A. Jones, for a sum of not less than $300. That judgment he does not seem to have given any attention to until it became dormant, nor until the commencement of this action in the court below, March 18, 1897, to revive that judgment.

At the same time an affidavit was prepared and sworn to and filed for an attachment, and an attachment was issued, and process of garnishment was served upon the clerk of the court, and possibly upon another party who, at that time, was the judgment debtor of Charles A. Jones. Immediately after the issuing and service of this process of garnishment, there was a motion made to dismiss the attachment, and such proceedings were had on that motion that it was sustained some time later, and the action of the court of common pleas in dissolving that attachment was taken to the circuit court on error, and affirmed.

While this action was pending, after filing the motion for dissolution of the attachment, the attorney of Charles A. Jones addressed to John L. Jones, this letter: (The letter is upon the letter head of N. L. Johnson, Attorney-at-law, Room 2, Johnson Block):

"Elyria, O., March 26, 1897.

"Mr. John L. Jones,

"Highland Springs, East Richmond, Va.

"Dear Sir:

"Your brother, Charles A. Jones, of this place, has just

obtained a judgment against one John T. Brooks. Charley has been having a hard time for years, and lately especially, has had trouble in getting what is due him. But he is anxious to settle with all his own creditors just as far as he possibly can out of this judgment. You will remember that you obtained a judgment against him back in 1884, on a note originally for $150, and you will also remember that he has paid you $125 in all, on that old note.

"Now, your brother has placed in my hands fifty dollars for you, which I have sent to The First National Bank of Richmond, Va , payable to our order. I have sent with it a release for you to sign. By going to the bank at once and signing the release you will receive the fifty dollars He sends you all he can, and while he regrets that it is not more, trusts it will be satisfactory.

"Yours very truly,
"N. L. Johnson."

That letter was mailed to the bank with a draft for $50. It seems that the bank sent the notice to Mr. Jones, and he did not answer directly, and they returned the draft, together with the blank release, to Mr. Johnson, and after returning it Mr. Jones came in and inquired for it, and they then wrote to Mr. Johnson to send it back, and he sent back the draft and the blank release.

Then Jones came to the bank and took the release and executed it, and then received the draft from the bank, which he had cashed, and took the money and went his way.

Subsequently an answer was filed in this action, setting up this release as a defense to the action. There was a reply filed to that, admitting that the release had been executed, but alleging that it had been procured by fraud and mistake.

The issues thus made up were presented to the court without the intervention of a jury, and a judgment was rendered for the plaintiff, reviving the judgment, and finding against the defendant upon the issues of the release.

First, I want to observe as to the reply, that it does not allege a good cause of defense; there is no fact stated constituting a defense of that kind; nor is there any evidence offered in support of it, showing either fraud or mistake.

No fraud is claimed, and the only mistake claimed is, that Mr. Jones, the owner of the dormant judgment, thirteen years old, testifies that when he received the letter from N. L. Johnson, he supposed it was his lawyer.

Now, there is nothing in that letter which would lead any man to suppose that he was writing as the attorney of Mr. John L. Jones; on the contrary, the letter plainly indicates he is writing as the attorney of Charles Jones.

Again, it will be ordinarily assumed that a man ought to know his own attorney, and Mr. Jones ought to have known his; although it may be true, as he testifies, that he knew nothing about this attachment suit, and had not heard from him, or of him, since the rendition of this judgment thirteen years before.

However that may be, it cannot for an instant be supposed that Mr. N. L. Johnson could have known anything about the relations that existed between John and his attorney, and he may well have assumed that they were in touch, and that the principal knew what the agent was about in commencing this action. So, when he wrote him the condition of his client, that he could not pay his debts in full; that he had recovered a judgment—the very judgment they were seeking to attach in this action; when he wrote him he only had that as an asset, and was willing to divide it among his creditors, and out of it he was willing to pay him $50 if he would give him a release of this judgment and these proceedings, it would seem Mr. Jones must have known what he meant, what he was writing about; and we think there is not a glimmer of a mistake here, upon the facts as testified to by this Richmond gentleman or his lawyer.

And that brings me then to the second question, whether or not that was an effectual release. Upon that I do not care to say much, except to read some of the case in the 20th Ohio Reports, 106, Harper v. Graham. There are many cases bearing upon this question pro and con that valuable time might be spent perhaps in examination of, but none of them that more fully and completely discusses this question than this one.

In this case, as in the one at bar, the party had recovered a judgment against another who was insolvent.

There was no proof offered in this case as to the responsibility of the defendant. But I am inclined to assume, that his brother having held a judgment against him for thirteen years that he could not, or had not collected on execution, he must have been close to a condition of insolvency.

In the 20th Ohio, a judgment was recovered by one party against another who was insolvent. Afterwards the judgment creditor agreed to receive the sum of $550 upon the judgment and the payment of attorney fees of $100, which were paid, and full receipt given for the judgment: Held, that a satisfaction of such judgment would, from this state of facts, be ordered to be entered. In this case the judgment was recovered in 1844, for the amount of about eighteen hundred dollars, principal and interest and costs, by Isaac Graham against Robert Harper.

That judgment, it will be noticed, was recovered in Ohio, but the defendant at the time resided in Arkansas.

Graham procured a certified copy of this judgment, and forwarded it to his attorneys in Arkansas for collection.

There were thereafter propositions made for terms, and one was agreed upon by which $550 was to be paid to apply on the judgment, and $100 was paid to Graham's attorneys in Arkansas, and some costs made upon this certified judgment were also to be paid, aggregating an amount of $556, for which a receipt was given in full of the judgment,

which then amounted to considerable more than eighteen hundred dollars. Now, in discussing the effect of that, Judge Ranney, in delivering the opinion, has considerable to say, part of which I desire to notice.

On page 114, of this book, he says:

"It was very early settled as a rule of the common law, that the payment of less than the sum due upon a liquidated demand, although agreed to be received in full satisfaction, could not be insisted upon s such; because there was no valuable consideration to uphold the agreement to relinquish the balance. But if the party to whom the money was coming executed a release under seal for the same debt, he was effectually barred, although he should have received nothing upon it. The rule and the reason were purely technical, and often fostered bad faith. The history of judicial decisions upon the subject has shown a constant effort to escape its absurdity and injustice.

"Hence, we find the supreme court of the state of New York, in the case of Kellogg v. Richards, 14 Wend., 116, holding the following language in respect to it: 'The rule that the payment of a less sum of money, though agreed to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical, and not very well supported by reason. Courts therefore, have departed from it on slight distinctions.'

"The supreme court of Massachusetts, in the case of Brooks v. White, 2 Met., 285, speak of it in no less explicit terms. They say:

"This rule which may obviously be urged in violation of good faith, is not to be extended beyond its precise import; and whenever the technical reason for its application does not exist, the rule itself is not to be applied. Hence, judges have been disposed to take out of its application all those cases where there was any new consideration, or any collateral benefit received by the payee which might raise a technical legal consideration, although it was quite apparent that such consideration was far less than the amount of the sum due.

"A moment's attention to the cases taken out of the rule,

will show that there is nothing of principle left in the rule itself. One of the earliest cases is Reynolds v. Pinbowe, Cro. Eliz., 429, where, after judgment for five pounds, the plaintiff on receipt of four pounds, assumed to acknowledge satisfaction of the judgment before a given day; and this was held good upon the ground that it was a benefit to the plaintiff to receive the money without suit or charge, and to prevent a writ of error by which the defendant might have avoided the whole judgment. The authority of the case has been questioned, but I find it relied on in the very recent case of Sibner v. Tripp, 15 Mees & Welsh, 22, and conclude that it is regarded as good law in England now.

"In Pinnell's case, 5 Co., 117, it was held that the payment of a less sum before the debt fell due, would discharge it, and this reason is given: 'Peradventure parcel of the sum before the day it fell due, would be more beneficial to him than the whole at the day; and the value of the satisfaction is not material.' Another case taken out, is thus alluded to in Co. Lit., 212b: 'If the obligor pay a less sum, either before the day, or at another place than is limited by the condition, and the obligee receiveth it, this is a good satisfaction.'

"So in Kellogg v. Richards, before cited, it was held that the receipt of the note of a third person for less than the amount due, would be a good accord and satisfaction; and the same thing was held in the case of Brooks v. White, before cited.

"Again, it is well settled by a great number of authorities, that the receipt in satisfaction of any other article than money will be effectual, no matter how small the value as compared to the debt. Blynn v. Chester, 5 Day, 360.

"As stated by Alderson, B., in Sibner v. Tripp, 15 Mees. & Welsh, 37: 'If you substitute for a sum of money a piece of paper, or a stick of ceiling wax, it is different, and the bargain may be carried out in its full integrity. A man may give in satisfaction of a debt of one hundred pounds, a horse to the value of five pounds, but not five pounds.' In this case it was held that the acceptance of the negotiable security of the debtor himself, by the creditor, was in law a satisfaction of a debt of greater amount. This decision was made as late as 1846, and the learned judge

from whom I have quoted, ventures to intimate in respect to the whole subject that 'the courts might well have held the contrary, and have left the matter to the agreement of the parties.'

"We see, then, that the payment of a less sum than is due, the day before a debt falls due, will discharge it; payment at another place than is stipulated will do so; the delivery of a collateral article of any value will do so; the acceptance of a debtor's note with the security, the note of a third person, or even the negotiable note of the debtor himself will do so; and yet the payment of as much money in hand as is called for by such note, will have no such effect, although it is demonstrable that the utmost the creditor can get from such note can not exceed the amount that he gets in hand in the other case, without trouble, delay or expense. It may seem to some persons, not having a great veneration for those institutions of antiquity for which no reason can be given, that a rule so effectually undermined, and having neither rhyme nor reason to support it, ought to be at once overruled and the whole matter placed upon the footing of reason and common sense. Especially as the exigencies of modern commerce frequently compel the most deserving men, with the aid of friends, to compromise their debts for less than the amount due —an operation mutually beneficial to both debtor and creditor, as the creditor gets a part where otherwise he would lose the whole, and the debtor is left free to commence again with the hope of better success.

"These considerations will necessarily arise whenever it becomes necessary to decide the general question. In this case we aspire to nothing higher than to follow in the footsteps of the sages of the law, and hold this one of the cases 'taken out' of the rule. This money was payable at the clerk's office in Butler county, or to the plaintiff, residing in the same county. It was paid in Arkansas. It is true it might be said that this was not so beneficial to the plaintiff, as though it had been paid to him in Butler county. This may be, but still it does not prevent it from being at a different place, which is all the rule seems to require.

"Again, Harper was bound to pay the judgment, but he

was not bound tc pay Graham's lawyers. He did pay them $100 in the settlement that was made, and this separately from the amount paid upon the judgment. Graham so treated it himself, for he indorsed only $550 upon the judgment, instead of $656.50, the amount actually paid by Harper. Harper thus discharged a debt due from Graham to his attorneys, and this was a 'collateral benefit received by Graham, which raises a technical legal consideration' for the promise of Graham to discharge this judgment; although both sums paid, fall far short of the amount of the judgment."

I have read enough to indicate what the opinion of the court is about this question. While it may be regretted that the supreme court of Ohio did not follow out the very suggestion made here in that opinion, and have decided the case upon the solid ground that two parties had made a binding and lawful agreement between themselves, and are therefore to be held to it, rather than to undertake to get a reason for getting away from it; but if there was a reason in that case, there was one in this case equally good. There was a judgment in this court payable to the plaintiff below, and payable to the court or in the clerk's office. It was dormant; but an action had been brought upon it to revive it. So it is also true, an attachment had been issued, and equally true a motion to dissolve it was made, and a litigation upon hand. Parties may settle their litigations, settle their pending law suits, that is well settled.

So we may put our decision upon the ground of settling a pending litigation, or put it upon the almost precise ground on which the case in Ohio was put. It was the payment of a sum of money in Richmond, Va., the plaintiff's own home. Either reason is sufficient to sustain this release.

The judgment in this case ought to have been for the defendant below upon that release, and against the plaintiff. For that reason we reverse the judgment; it is not supported

by the facts, and contrary to law, and remand the case for a new trial.

N. L. Johnson, and *Ben W. Johnson*, Attorneys for Plaintiff in Error.

C. W. Johnston and *J. H. Leonard*, Attorneys for Defendant in error.

(Sixth Circuit—Lucas Co., O., Circuit Court—Jan. Term. 1898.)

Before King, Haynes and Parker, JJ.

WILLIAM A. TURNER v. THE CITY OF TOLEDO, et al.

Corporation municipal—Liability for negligence of its officers—

1. An action cannot be maintained against a municipal corporation or its officers in their official capacity, based upon acts of negligence of its board of health or health officer, for damages claimed to have resulted therefrom.

Health officer—Power to make contract for nursing sick person—

2. The board of health of a city, or its health officer with the approval or ratification of the board, may enter into a lawful contract for nursing and caring for the sick and for the use of premises occupied as a temporary hospital.

Error to the Court of Common Pleas of Lucas county.

KING, J.:

This action was heard in the court of common pleas on a demurrer to the petition, which was sustained by that court, and final judgment rendered thereon. The plaintiff below seeks to have that judgment reversed here, and claims that the court erred in sustaining the demurrer.

The action was brought by Turner against the city of Toledo and the mayor of said city; the police commissioners of said city, being the acting board of health in and for said city; Guy G. Major, the mayor of said city and ex-officio president of said board of police commissioners and board of health, and J. T. Woods, M. D., the executive

officer of said board of health, defendants. The petition contained two causes of action; the first of which, after alleging the different offices held by defendants and the duties which they fulfilled, and after alleging some provisions of the ordinances of the city—which I need not notice particularly—and stating the powers and duties of these various officers to some extent, and then specially averring that Dr. J. T. Woods was the health officer of the city, and thereby an executive officer of the board of health, and averring that the plaintiff was the owner of certain premises, and was engaged at the time of the grievances committed in the business of running a saloon at some point in the city, and that he conducted thereupon a large and profitable business, he alleges that upon April 4, one Arthur Goins, a resident of the city of Toledo, came into his saloon and claimed to the plaintiff that he was sick and unable to leave the premises. That the plaintiff thereupon immediately informed the health officer that the said Goins was at his said saloon and unable to leave it, and demanded, he says, that said health officer, acting in his official position and character, should remove said Goins immediately from plaintiff's saloon to the city hospital; claiming also to the city health officer, that if the man who was sick remained upon his premises, it would greatly injure and damage his business. That at this time the man was not in any dangerous condition—so plaintiff thought. That on the 9th of April—a day or two afterwards—said health officer appeared on the scene and inspected Mr. Goins, and pronounced him sick with small pox, and he then proceeded, as the petition alleges, to wrongfully, illegally and maliciously quarantine the plaintiff's house and saloon, and ordered into the saloon and premises seven persons, and ordered the premises closed and quarantined, and forcibly detained therein by the said quarantine the plaintiff's wife and the seven persons aforesaid, and that said quarantine was ordered by this officer or agent

of the board. That after this occurred, the health officer promised the plaintiff that the city of Toledo and the board of health would pay for the use, the loss and destruction of all property used, lost or destroyed by said quarantine, and all damages that might occur to the plaintiff in the way of rent or loss of business as the result of such quarantine.

The plaintiff then proceeds to set forth his loss, in a variety of items, amounting to $554.58, and at the close of his petition he asks judgment for that sum of money, as well as upon a second cause, which I will refer to later.

It is alleged here, that the court erred in sustaining the demurrer to that cause of action; and considerable argument is devoted to the idea that the city is liable for the acts of its health board and of its health officer in doing things of that kind. I shall be unable to go into a discussion of all the authorities cited. The line of demarkation between the liability of the city for the acts of its officers of that kind, is not very plain nor clear. All I can do is to refer to some cases bearing upon the subject, and say to what conclusion we have come as to this case.

The latest case upon that question in this state, is in 42 Ohio St., 628, and in the opinion delivered there, the court say:

"In an action against a municipal corporation to recover damages for an injury to the person, sustained by reason of the negligence of the agents of such corporation, it is important to ascertain with precision the duty which such agents failed to perform, or performed negligently. For, although such corporations derive all their powers from one source, namely, the legislature, and necessarily perform their functions solely by agencies, yet there is a marked distinction as to their liability for the acts of their agents, arising from the different characters in which the corporation is charged with the performance of duties. Thus, with respect to the power to suppress riots and assemblages of disorderly persons, it has been uniformly held, in the absence of statu-

tory provisions to the contrary, that the corporation is a mere agency of the state, and not liable for negligence in the performance of such duties. Upon this principle it has been held that there is no corporate liability for the acts of a mob, although the charter contains this provision as to the duties of the council, that 'it shall be their duty to regulate the police of the city, preserve the peace, prevent riots, disturbances and disorderly assemblages.'"

Western Reserve College v. Cleveland, 12 Ohio St., 375.

"Nor is such corporation liable to an individual for damages resulting from a failure to provide the necessary agencies for extinguishing fires, or for negligence of officers and others connected with the fire department, although the obligation to perform such duties is imposed by the statute."

Wheeler v. Cincinnati, 19 Ohio St., 19.

"Nor is a city liable for failure to enforce an ordinance with respect to the storage of oils, although its agents had notice of the failure to observe the ordinance, and notwithstanding the fact that by reason of such non-observance, the property of a citizen of the corporation was destroyed."

Roberts v. Cincinnati, Superior Court, Gen'l. Term, 5 Am. Law Rec., 73.

"But concerning the powers and privileges which are to be exercised for the improvement of the territory within the corporate limits, and as to which the pecuniary and proprietary interests of individuals are represented, as the construction of a bridge."

Dayton v. Pease, 4 Ohio St., 80..

"Or placing water mains in a street."

Ironton v. Kelley, 38 Ohio St., 50.

"The liability of the corporation for negligence is largely, if not entirely measured by the liability of individuals for similar acts. This principle was applied in Newark v. Frye, decided by this court, March 22, 1881. The council of the city of Newark, being authorized to 'guard against injuries by fire,' and to purchase fire engines, etc., 'and all other apparatus and instruments as shall be deemed necessary to the extinguishment of fires,' and having under

consideration the propriety of purchasing the Champion Fire Engine, a fire extinguisher, appropriated money for the purchase of combustible material for the purpose of making a test of such engine. An old building was removed to the center of one of the principal streets of the city, and the same was partly filled with boxes and shavings, on which was poured a large quantity of gasoline, some of the officers of the city assisting in the work, and several members of the council being present and making no objection. On applying a match there was an immediate explosion, which destroyed the structure, killed several persons, and injured others. The court properly held the city liable, following Dayton v. Pease;" and citing in this case many others.

Undoubtedly there is difficulty, sometimes, in determining the class in which a particular case must fall; and it is also true that there is considerable conflict in the authorities, as to the extent of such liability. We will make no attempt to settle this conflict, but have referred to the above cases for the purpose of illustrating the distinction already stated between cases falling within the police power of the corporation, and those in which it represents the property rights of the citizen. Reference to most of the cases on the subject, decided previous to 1877, will be found in Hill v. Boston, 122 Mass., 344. (And citing others.)

In that connection, I want to say that the case of Hill v. Boston, 122 Mass., is not only a leading case, but contains a very learned opinion of that court by the then Chief Justice Gray of that court, in which all the authorities at that time decided are reviewed by him, and it may be said, to a certain extent at least, that the distinction in the cases and in the grounds of liability, is reasonably clear. It is clear that the city is not liable for the acts, or omissions to act, of its fire department engaged in undertaking to perform their duty. It is not liable for the acts or omissions

to act of its police officers engaged in undertaking to perform their duty. It is not liable for the acts or omissions to act of its board of health, its sanitary police, or its health officers, undertaking to perform their duty. This, I think is well settled: those being simply the agencies for carrying out the acts of government for the benefit of the citizens of the corporation, but from which no particular individual derives any pecuniary benefit.

In the case which I have read from, the action was brought to recover damages for injury sustained from the discharge of a cannon in the public street by an assemblage of disorderly persons, as alleged in the petition, which further says: "That the authorities of the village had negligently and carelessly given permission to such persons to fire the cannon," and took no steps to prevent such firing. The court held that the municipal corporation was not liable, even upon the principle which had been affirmed by the Supreme Court in the case of Newark v. Frye.

The health board is devised and designed by the legislature for the protection, so far as possible, of the public health. They are not liable if they fail to protect the public health, and the city is not liable for its acts even if it steps outside of and beyond the legitimate exercise of its true powers conferred upon it by statute and by ordinance. I cite a case on that subject from 33 Minn. 289, where it is held "that the city was not liable for the acts or negligence of such board in the discharge of its duties, the same being public and governmental, and not corporate in their character."

Clearly, a board of health in the state of Ohio has such power as the statute has conferred upon it, and probably has such implied power as is necessary to carry the express powers into effect. The sections of the statute relating mainly to the duties of the boards of health are 2113, 2115, and 2116, and these provide for the establishment of a board

of health. I should say that by the provisions of sec. 2141, as amended in 1887, the board of police commissioners is created and constituted a board of health. Now, this board has authority to appoint a health officer, and it has power to appoint a clerk, and has power to appoint as many ward and district physicians "as it may deem necessary for the care of the sick, poor and persons under quarantine surveillance, and may provide for such quarantined persons necessary attendance, nurses, medicine and support until convalescent. The board shall have exclusive control of their appointees, and define their duties and fix their salaries; and all such appointees shall serve during the pleasure of the board." (Sec. 2115.)

Sec. 2116: "The board of health shall abate and remove all nuisances within its jurisdiction. It may compel the owners, agents, occupants or tenants of any lot, property, building or structure upon or in which any nuisance may be, to abate and to remove the same by orders therefor, and treat the neglect or refusal to obey orders for such purpose as a misdemeanor punishable as hereinafter provided. The board may, also, by its own officers and employes, abate and remove nuisances, and certify the costs and expenses of such suppression, removal or abatement, to the county auditor, to be assessed against the property, and thereby made a lien thereon, and collected as other taxes. The board of health may regulate the location, construction, repair, use, emptying and cleaning of all water-closets, privies, cess-pools, sinks, plumbing, drains, yards, pens, stables, or other places where offensive or dangerous substances or liquids are or may accumulate. The board may create a complete and accurate system of registration of births, marriages, deaths, and interments occurring in such corporation, for the purposes of legal and genealogical investigations, and to furnish facts for statistical, scientific and sanitary inquiries; and when complaint is made, or a reasonable belief exists that an infectious or contagious disease prevails in any house or other locality, the board may cause such house or other locality to be inspected by its proper

officers, and on discovering that such infectious or contagious disease exists, may, as it deems best, send the persons so diseased to the pest-house or hospital, or may restrain them and others exposed within said house or locality from intercourse with other persons, and prohibit ingress or egress to or from such premises."

Now that is a pretty broad power, actually and expressly conferred by the statute. If they find a house in which there is an infectious disease, they may quarantine it and keep the inmates within, and keep those from the outside from going in; and they may also provide that those in the immediate locality who have been exposed to this infectious disease shall take up their abode and remain there. I think there is no question of their power to do that. The thing that the board of health had undertaken to do was to quarantine that house, and it is clear to us that there is no provision of the statute under which the owner could recover, although it might be a very serious loss to him.

Upon this point there is an authority in 66 Me, 74, holding, in general terms, that a board of health may, if they think best for the safety of the inhabitants, remove persons who have dangerous diseases to a separate house, or confine them to their own—that they have authority to do that. The court say:

"It is unquestionable that the legislature can confer police powers upon public officers for the protection of the public health." It was argued in this case that the statute was unconstitutional. "The maxim *salus populi suprema lex* is the law of all courts and countries. The individual right sinks in the necessity to provide for the public good. The only question has been, as to the extent of the powers that should be conferred for such purposes. We do not think that personal injuries need be apprehended from the action of officers in cases of this kind. Experience probably shows that communities and individuals are not promptly enough aroused to the dangers that beset them in such emergencies. If an injury is inflicted upon a person

by the malice of the public servants, he has a remedy for it. And the petition for habeas corpus is always open to him."

So, in this case, if these people were unjustly confined they could have the benefit of this writ. The petition alleges that the man had the small pox and was quarantined there, as well as seven other persons. It does not particularly allege where these other people were, but I think it may be assumed that they were confined in that house for some reasonable cause. Now, all of that, we think, affords to plaintiff no right of action against the city. We think the court of common pleas was therefore correct in sustaining the demurrer to this cause of action.

The second cause of action, while very crudely drawn and omitting a great many allegations that it might have contained, does substantially, however, allege: "that the said board of health and said city, defendants, through their executive officer and agent aforesaid, entered into a verbal contract with this plaintiff for him and his wife Ruthana Turner, to perform the work and labor necessary for said inmates quarantined in his said premises, No. 1607 Canton Avenue, in said city, county and state, and that said board of health and city, defendants, would give them a reasonable compensation for their said work and labor, and the said board of health and city to furnish the necessary provisions for said persons quarantined, and pay for the same; that said Turner, the plaintiff, and his said wife might find necessary for cooking purposes, and also to furnish and pay for the medicine necessary for said persons quarantined." It proceeds to allege that the quarantine lasted for the period of one month; that the services referred to were rendered by the plaintiff and his wife, and were worth $150, for which he asks judgment. This second cause omits a good many allegations; it does not particularly allege who was confined in the house, who was sick, to whom these attentions were paid; it omits to state for what these services were actually

rendered. Relying, as it does, upon the first cause of action, it is incomplete; but we have seen fit to look at it as if it were a cause of action stating a contract between the health officers or board of health and this plaintiff, to furnish nursing and care for these sick people in this house. And that is exactly what the statute which I have just read authorized the board of health to do; and if they did that in this case---entered into a contract with these people to furnish nursing, care, board and lodging, etc., they had the power to do it, and the city is unquestionably liable.

The cases which were cited in argument by counsel for plaintiff in error as authorities for maintaining the first cause of action, do not support that, but do in fact support the right to maintain the second cause of action. The case of Rae v. Flint City, in 5 Mich. 526, is authority to the effect that where there was no board of health, the council having failed to exercise the duty conferred by the legislature in appointing one, but having employed a nurse in a small-pox hospital, it was held that the council had authority to employ such nurse, and authority to pay the same. 61 Iowa, 205, was cited as bearing upon the principle that the county is liable to the city for expenses for taking care of a small-pox patient within its bounds; but we are satisfied that the second cause of action sets up a contract between the city and the plaintiff, and is a good cause of action, and we reverse the judgment of the court of common pleas so far as it sustains the demurrer of the city of Toledo, and we affirm the judgment as to all the other defendants in the case on both causes of action, and as to the city of Toledo on the first cause of action, but reverse it as to the city of Toledo on the Second cause of action, and remand it to the court of common pleas for further proceedings.

J. Berry, and *E. P. Raymond*, for Plaintiff in Error.

W. A. Mills, for Defendants in Error.

(Third Circuit—Allen Co., O., Circuit Court, April Term, 1898.)

Before Day, Price and Norris, JJ.

THE BUCKEYE PIPE LINE COMPANY v. WILLIAM G. FEE.

Review of case upon the facts—What motion for new trial below must contain—

(1.) When a case is submitted to the court upon the facts; in order to bring the evidence embodied in the record up for review, objection must be made in the motion for new trial to the finding. The motion must assign as a reason for new trial, in substance, that the decision of the court as to what the facts determine, is not warranted by the weight of the evidence.

Attachment for non-residence—Owner's domicile does not determine situs of property—

(2). Wherever the owner may maintain a suit to recover property, the property may be attached as his property if the grounds of attachment exist. The situs of the property not being determined by the owner's domicile.

Option as to place of delivery—Lost by refusal to deliver at all—

(3). Where a storer or common carrier of property, has, by contract, an option as to the place of delivery to the owner and refuses to deliver at all, the option as to the place of delivery is waived by such refusal.

Storer and common carrier of oil operating in Ohio and Indiana—Attachment of oil—

(4). The Buckeye Pipe Line Co. is a storer and common carrier of oil. Oil placed in its custody loses its identity. All the oil so held by it is a common stock of oil, owned by various persons, whose interests are represented by the run tickets of the company. This common stock of oil is stored both in the states of Ohio and Indiana; and the interests of the owners represented by their respective run tickets, is deliverable, at the option of the company, at any of its oil delivery stations in Indiana or Ohio:

Held: That the situs of this common stock of oil, being as well in Ohio as in Indiana, the interest represented by a run ticket is subject of garnishment in this state. And this though the actual oil upon which the run ticket issued, was produced in Indiana, and never was in Ohio.

Error to the Court of Common Pleas of Allen county.

NORRIS, J.

At the November term, 1896, of the court of common pleas of this county, an action was pending wherein the de-

fendant in error, Wm. G. Fee, was plaintiff, and E. D. Miller, E. C. Talmage and C. E. Russell were defendants. Ancillary to this suit a writ of attachment issued against Miller, Talmage & Russell and the plaintiff in error, The Buckeye Pipe Line Company, was made garnishee, and was served with notice in garnishment, and was required to answer, and did answer as garnishee. Afterward, by the consideration of said court, defendant in error recovered a judgment against Miller, Talmage & Russell, and the court ordered the Pipe Line Company, as garnishee, to turn over to the sheriff of this county certain crude petroleum, found by the court to be the property of Miller, Talmage & Russell and in the possession and in the control of the garnishee, in such amount that the avails might satisfy the judgment and costs. This order the Pipe Line Co. refused to obey, and failed to turn over to the sheriff any of the oil so found to be in its custody and possession. And the controversy which this court is now called upon to review, is the action brought by Fee, the defendant in error, against the plaintiff in error, The Buckeye Pipe Line Company, to recover the amount of that judgment.

That it had in its possession and under its control at said time certain oil of Miller, Talmage & Russell; that the judgment was recovered and the order made, and that it refused to obey the order, The Pipe Line Company does not deny; but it claims immunity from liability from the following facts which the parties agree was the true condition that obtained when the action between Fee, and Miller, Talmage & Russell was commenced and when the proceedings in garnishment were sought to be enforced by the order of the court in that action; and upon these facts, as thus agreed, the case was submitted to the court of common pleas of this county.

The facts are as follows: The Buckeye Pipe Line Company is an Ohio corporation; its business is confined to

that of a common carrier and storer of oil; its principal office is at Lima, Ohio, where the books of its business are kept. On the 7th of November, 1896, it had in its possession and under its control 1086.04 barrels of oil to the credit of Miller, Talmage & Russell, a firm composed of the defendants against whom Fee's action was pending, and against whom he recovered the judgment, and the value of the oil was sufficient to satisfy the judgment. The oil was produced in Huntington county, Indiana, and received by the company in Indiana in its usual course of business, and held by the company as common carrier and storer of oil, and never was in Ohio; no Indiana oil is carried into or stored in Ohio by said company.

The oil territory of Indiana, including Huntington county, and the oil territory in north-western Ohio, including Allen county, Ohio, comprise the territory known as the Lima Division of said company; its stations for the delivery of oil are in this territory in both Indiana and Ohio, including said counties of Allen and Huntington, and all transfers of oil are made on its books at Lima. Its system of storage and pipe lines in Indiana are not connected with its Ohio system of storage and pipe lines; the oil received in Indiana cannot be delivered through its pipes in Ohio, but is delivered in Indiana. The oil produced in Indiana is of a different kind and quality from that produced in Ohio, and generally of a different market value; but since January, 1896, the value of Indiana oil and oil produced in Allen county, Ohio, has been and is the same. Oil received and stored in Indiana from different wells and delivered by different persons to the Pipe Line Company, is mingled, so that the identical oil cannot be returned, but oil of like kind and quality is delivered from the general stock of the company in Indiana.

The oil in custody was received on a "run ticket"; amongst the conditions of the contract upon which it was

thus received is: "That the oil is received into the general stock of the Buckeye Pipe Line Company, Lima Division, subject to certain transportation and storage charges; and that the point of delivery by the company shall be at the option of the company, within the Lima Division. That the company shall not be liable for loss resulting from unavoidable causes; and that all losses from such causes shall be charged pro rata upon all petroleum in its custody, Lima Division, at the time of loss, and the quantity represented by the Run Ticket shall be reduced by its proportion of loss."

It is agreed that the company had a right to deliver the oil in controversy at any of its delivery stations in Indiana. It is further conceded as a fact, that when oil is sold by a person who has oil stored, it is transferred upon the books of the company, Lima Division, at Lima; that there is constant market for Indiana and other oil in the company's custody, and that all oil sold is at once transferred to the credit of the purchaser upon presentation of the purchase order, at any of its offices, and report of that fact by the company's agent to the Lima office.

The owner of oil, or the purchaser, can secure the delivery of the actual oil belonging to him, upon demand and payment of charges, and such deliveries are being constantly made.

The sheriff did not seize the oil in controversy; the attachment was served in no other way than by leaving a copy of the attachment with the agent of the company at Lima, Ohio, and informing him of the contents thereof.

A copy of the sheriff's return is embodied in the agreed statement of facts which, aside from other considerations, as far as form and manner is concerned, would indicate a proper service.

In a case pending in the Circuit Court of Huntington county, Indiana, after January 1, 1897, that court, which is a court of competent jurisdiction, appointed a receiver for

Miller, Talmage & Russell, and directed the plaintiff in error to deliver the oil in controversy to said receiver.

The company has a lien on this oil for transportation and storage charges. Since the order and judgment recovered by Fee against Miller, Talmage & Russell, the plaintiff, through the sheriff of this county, had made demand upon the company for the oil in controversy, which has been refused and the oil never delivered. These are the agreed facts presented by the bill of exceptions, and upon the condition disclosed by them the plaintiff in error, defendant below, asserts that it was in no wise bound to obey the order of the common pleas; that it has the right of the controversy, and that Fee has no ground of recovery in this action.

In the common pleas, a jury being waived, the case was submitted to the court; the result was a finding for the plaintiff below against the defendant, The Pipe Line Company. Defendant's motion for a new trial was overruled, and judgment was entered upon the finding of the court; and to reverse that proceeding this case in error is prosecuted.

The ground assigned in the motion for a new trial is, that the judgment is not sustained by sufficient evidence, and is contrary to law.

The reason for reversal assigned in the petition in error is, that the court erred in rendering judgment for the plaintiff against the defendant, and erred in overruling the motion for a new trial.

A verdict, is the conclusion of a jury, upon issues of fact submitted to the jury in an action.

A finding, in the sense used in this case, is the conclusion of the court, upon issues of fact presented to the court in an action. In each case, whether a verdict or a finding, it is the decision of what the facts determine.

A judgment, is the final adjudication of the rights of the parties to a controversy. A judgment is what the law de-

clares shall be done; it is the award based upon the finding. It is the act of the court, warranted by the law, and conclusive between the parties to the suit, because it is founded upon the decision of what the facts determine.

In order to review a case—as the one at bar—upon the evidence, the objection must be made to the finding of the court, that it is not supported by the evidence; that the decision of the court, as to what the facts determine, is not warranted by the evidence.

This reason for a new trial, must be assigned in the motion for new trial, in order to bring the evidence in the record up for review in that regard. The objection in this case is, that the judgment is not sustained by sufficient evidence. To thus attack the judgment without objecting to the finding upon which it is based, does not appear to be such an assignment of error as will bring the evidence in the record up for review when such motion is overruled. See 17 Ohio St., 262; 384; 14 Ohio St., 272-276; 32 Ohio St., 562.

But passing this point, for it may be, and probably is, when taking into account the learning and care and skill of plaintiff's counsel, that the omission to make objection to the finding was a clerical error.

It is claimed that the property which was subject of garnishment, not being in the strict sense a credit; and the identical oil in controversy never having been seized by the officer, and never having been in this state, but always having been in the state of Indiana, renders it impossible that jurisdiction by the proceedings in attachment and garnishment can be acquired here; and hence, that recovery can not be had. That the proceedings being *in rem*, the jurisdiction is governed by the situs of the property.

In most instances this is true; the situs of personal property is, for most purposes, the domicile of the owner, because it is deemed to be attached to his person. But, say the courts,

the law for attaching property of non-residents, necessarily assumes that the property has a situs distinct from the owner's domicile. Wherever the owner may maintain a suit to recover the property, if the grounds exist, the property may be attached as his property. And this probably would determine the situs of the property in controversy in this case.

It is conceded that when the oil of Miller, Talmage & Russell, went into the possession and custody of the Buckeye Pipe Line Company, it lost its identity; it was no longer susceptible of separation or seizure; it became, and was, a part of the common stock of oil of the Buckeye Pipe Line Company, Lima Division.

The Indiana oil, and Ohio oil, is conceded to be of different quality; yet this is a fiction that cuts little figure, when faced by the facts that the oil in both fields was of the same market value; that is was optional with the company to deliver oil represented by its run tickets, either in Ohio or Indiana, no matter in which field produced; and, that the Indiana and Ohio oil, Lima Division, was taken and considered, and made, a common stock of oil, out of which this run ticket, or any run ticket, might be paid, by delivery of the quantity of oil at any of its stations of the Lima Division. So that this run ticket, represented so much oil of a common stock. Miller, Talmage & Russell owned by virtue of it, so many parts of this common stock, and if any of the common stock was destroyed, they lost their proportion of the common stock thus destroyed. This ownership was in the common stock, and their loss was in the common stock; and they, and other owners of the run tickets of this company, owned all the oil of this common stock. None of them owned any particular oil, either in Indiana or Ohio; they owned it together, all of it, both in

Indiana and Ohio, their interests being defined by their run tickets.

The liability and rights of this garnishee to this attaching creditor, is measured by its liability to Miller, Talmage & Russell. It claims, and has the option, upon demand, to deliver the oil represented by this run ticket, at any of its stations in the Lima Division, as it may determine. But with its common stock as well in Allen county, Ohio, as in Huntington county, Indiana, it makes flat refusal to deliver at all.

Suppose that upon demand, made by Miller, Talmage & Russell, in the absence of that proceeding in garnishment, it refused to deliver the oil represented by this run ticket to Miller, Talmage & Russell; could it be successfully denied that Miller, Talmage & Russell would have a right to recover, against the company, in Allen county, Ohio, their interest in their common stock? We think not. After having refused altogether, could the fact that the company had an option as to where it would deliver, justify a refusal to deliver at all? And still refusing, would the court consider its option as any longer a right that it might exercise under its contract? We think not.

Under the facts as agreed, we conclude, that the proceedings in attachment and garnishment, clothed Fee with the rights that could have been exercised by Miller, Talmage & Russell. And a refusal to deliver the oil at all from this common stock, upon demand of the sheriff, under the order of the court, was a waiver of the company's right to exercise its option as to the place of delivery; and the property being part of a common stock, the situs of which was as well in Allen county, Ohio, as in Huntington county, Indiana, we are of the opinion that the action was properly brought, and jurisdiction properly acquired here.

It is conceded that the attachment in this state issued, and the proceedings in garnishment were had, before the

appointment of the receiver for Miller, Talmage & Russell, by the Circuit Court of Huntington county, Indiana, and before that court took cognizance of the matter. That being the case, the jurisdiction of a court of this state, competent to deal with the controversy, having been first acquired over the property in dispute, such jurisdiction is exclusive. And the order of the Circuit Court of Huntington county, Indiana, upon plaintiff in error, to turn the oil in controversy over to the receiver of that court, is no protection to plaintiff in error.

Finding, therefore, no error on the face of the record to the prejudice of the plaintiff in error, the judgment of the common pleas is affirmed, with costs, and the case is remanded for execution.

James O. Troup, for Plaintiff in Error.

William H. Cunningham, for Defendant in Error.

(Third Circuit—Allen Co., O., Circuit Court—April Term, 1898.)

Before Day, Price and Norris, JJ.

J. A. RIGLEY v. WILLIAM WATTS.

Promissory note payable on demand—Maturity—

A promissory note, payable "on demand after date," is not an instrument to pay money on time; but is a promise to pay which becomes mature at its execution and due at its date.

Same—Commencing suit equivalent to demand—

When a promissory note, "payable on demand after date", is delivered, the payee may at once put it in action; the commencement of the suit is sufficient demand.

Same—Fixing place of payment—

Words in a promissory note, purporting to fix the place of presentation and demand, as between the payee and the maker, do not of themselves imply their performance necessary to charge the maker.

Error to the Court of Common Pleas of Allen county.

NORRIS, J.

This case comes into this court upon petition in error. On the 17th of January, 1898, the defendant in error, William Watts, executed to the plaintiff in error, his promissory note of that date, with a warrant of attorney in usual form attached. The promissory note reads, "On demand after date, we, or either of us promise to pay," etc. The subject for controversy is found in the words "On demand after date". The note fixed the place of its payment "at the store of William Watts," in this county.

Upon the delivery of this note, and on the day of its date, by virtue of the warrant of attorney to confess judgment, the plaintiff proceeded in the court of common pleas of this county, to reduce the note to judgment. At the same term of the court, upon motion of the defendant, the judgment so given on the note, was vacated and set aside; the execution which had issued upon the judgment, was ordered by the court to be returned, and all property held by levy thereunder, was ordered released.

The essential objection to the judgment is, that it was taken before the note had by its terms become due. The proceedings of the court vacating and setting aside this judgment, are sought to be reversed.

The errors assigned are: Error in sustaining defendant's motion to vacate and set aside the judgment. Error in ordering the sheriff to return his execution, and error in ordering the release and surrender of the property held in levy under said writ.

This case depends upon how the words "on demand after date" are to be construed, and what meaning they import when used in a promise to pay.

When a contract is worded "to pay on demand", the courts construe the instrument to be due upon delivery. It is due at its date; it commences to draw interest at its date,

and the statute of limitation commences to run against it at its date.

A promissory note, payable "on demand after date", has been held, not an instrument to pay money on time, but to be a written promise due at its date; and interest commences to run, and the statute of limitation commences to run at its date. And it is held that in reckoning the interest, or the running of the statute, the day of its date is to included.

That this is the law, there can be no doubt; and perhaps hidden somewhere in the mind of the jurist, is a reason for it, which in my researches I have not yet been able to find. I have promised myself that sometime, when dockets were lighter, to either discover, or try to forge out a tangible reason which would brush away, at least to my own satisfaction, the fiction upon which this construction seems to rest. Sufficient is it however to say, that a note payable "on demand after date", is due at its date; it is mature when it is executed; interest runs on it, and the statute of limitation begins to run against it, before the ink is dry. Such appears to be one of the rules of the law merchant affirmed by the construction of the courts.

The commencement of a suit is sufficient demand, and when a promissory note payable "on demand after date" is delivered, the payee may at once place it in action, which action shall be his demand.

Something is claimed, because the note reads, "promise to pay at my store", and that these words fix the place of presentation and demand. These words are not construed to be restrictive, as between the payee and the maker of a note, and as between the payee and the maker, do not of themselves imply their performance necessary to charge the maker; so as between the payee and the maker, these words are no more than so much blank space.

The authorities, which warrant this opinion, may be found in 17 Ohio, 9; 9 Ohio St., 517; 35 Ohio St., 343;

132 Mass., 338; 146 Mass., 118, (also to be found in N. E. R., 87); 22 Pacific Reporter, 876 (California case); 88 N. Y., 343; 3 Randolph Commercial Paper, 1040; 2 Daniels on Negotiable Instruments, 89, 110, which are furnished to the court in counsels briefs.

As the case addresses itself to us, vacating and setting aside the judgment, and releasing the levy was error. The proceedings of the court below in setting aside the judgment, will therefore be reversed at the costs of the defendant in error; and the motion to vacate and set aside the judgment is overruled; and the case is remanded to the court of common pleas for execution

Homer P. Sewell, and *Cable & Parmenter*, for Plaintiff in Error.

D. C. Henderson, for Defendant in Error.

(Sixth Circuit—Lucas Co., O., Circuit Court—Jan'. Term, 1898.)
Before King, Haynes and Parker, JJ.

NOAH. WHITNEY, ASSIGNEE, et al. v. JEROME GILL, ARTHUR H. HULL, and ISABEL M. BARBER.

Mechanic's lien law of 1894—Being unconstitutional, former law remains in force—

The act of April 13, 1894, (91 O. L., 135), to amend the mechanics' lien law, being unconstitutional and void, was not effective to repeal the law in force at the time of its passage.

Error to the Court of Common Pleas of Lucas county.

PARKER, J.

The action below was brought by the defendant in error, Jerome Gill, against the defendants in error Arthur Hull and Isabel M. Barber. Afterward Hull made a general assignment for the benefit of his creditors to Noah A. Whitney, who defended on behalf of the creditors of Hull, and who now on the same behalf prosecutes error in this court.

The claim sued on was for work performed by Gill under a contract with Hull, the principal contractor in repairing and reconstructing a certain building for Isabel M. Barber, the owner thereof, and of the lot on which the same was situated. The amount of the claim as asserted in the petition, was $243.80 and interest. The petition alleges that Isabel M. Barber had in her hands an amount of money sufficient to satisfy this claim, which money was due from her to the principal contractor, Hull, under her contract, and the performance by Gill of all things required to perfect a lien against the premises as provided by the act to amend the Mechanics' Lien Law passed April 13, 1894 (91 O. L.,135), or to perfect his right to have this fund applied to the payment of his claim, as provided by said law before the amendatory act of April 13, 1894 was passed.

An answer by Hull, which appears to have been adopted by his assignee and upon which the case was tried, presents an issue which is joined by reply, as to the amount due to Gill, admitting only $5.81 of the claim; but it does not controvert the facts as to the steps taken by Gill to perfect his lien on the premises or his right to the money in the hands of Isabel M. Barber and due to Hull under his contract. However, the question as to Gill's right, either to enforce the alleged lien upon the premises, or to recover these funds in the hands of Isabel M. Barber, necessarily arose upon the hearing of the case.

A jury was empaneled to determine the issues as to the amount due to Gill from Hull, and it returned a verdict in favor of the former and against the latter, for $211.81.

Afterward, as to all matters and issues not determined by the verdict of the jury, the case was, by agreement, submitted to the court upon an agreed statement of facts, and the court adjudged that these funds in the hands of Isabel M. Barber should be paid into court and applied to the payment: first, of the costs; second, to the discharge of

Gill's claim; and, third, any balance to Whitney as assignee for Hull.

It is on account of this judgment that Whitney, as assignee, prosecutes error here.

The agreed statement of facts upon which the court found for Gill and gave judgment in his favor, was incorporated into a bill of exceptions, which is a part of the record submitted to us, and is in the words and figures following: (omitting the introductory clause):

"It is stipulated by and between the plaintiff, Jerome Gill, and the defendant, Noah A. Whitney, assignee, that the facts being upon the issues between them are as follows, to-wit:

"1. Arthur H. Hull entered into a contract with the defendant Isabel M. Barber, for the reconstruction of her building known as Nos. 217 and 219 Summit street, in the city of Toledo, Ohio.

"2. That the said Hull duly performed said contract, and that there was, on March 3d, 1896, and is now due and owing upon said contract from the said Isabel M. Barber the full sum of $243.80, which is retained in her hands awaiting the orders of the court as to who is entitled to receive the same.

"3. That the plaintiff, Jerome Gill, was employed as a sub-contractor by the said Arthur H. Hull to perform certain work and labor in connection with the said re-construction of the said building, and for which he has obtained judgment in this action against the said Hull in the sum of $—— and costs herein, taxed at $——.

"4. That on the 3d day of March, 1896, after the entering into said contract between said Gill and said Hull and the performance of the said labor, the plaintiff filed with the recorder of Lucas county, Ohio, an affidavit containing an itemized statement of his account and the value of the same with all credits thereon, together with a statement of the contract under which the same was performed, and the time when the same was performed, when the amount thereof should have been paid, and a description of the premises upon which the buildings were situated, which affidavit was

recorded in the Record of Liens of said county. A full and true copy of said affidavit, certified as such, was on the 3d day of March, 1896, delivered personally to the said Isabel M. Barber, and all formal steps required by the mechanics' lien laws pertaining to sub-contractors prior to the amendments of April 13th, 1894, were duly performed by said Gill in connection with his said claim.

"5. The defendant Noah A. Whitney, assignee, was, on the 4th day of December, 1896, duly appointed and qualified by the probate court of Lucas county, Ohio, assignee for the benefit of the creditors of Arthur H. Hull, and among the assets assigned to him by the said Arthur H. Hull is the right to receive from the said Isabel M. Barber any interest said Hull may have in the proceeds of the contract between the said Hull and the said Isabel M. Barber."

Now, this action was begun before the case of Palmer & Crawford v. Tingle, and Young v. The Lion Hardware Company, 55 Ohio St., 423, had been decided by the supreme court. After the decision in those cases that the act of April 13, 1894 (91 O. L., 135), in so far as it gives a lien on the property of the owner to sub-contractors and laborers and certain others, is unconstitutional and void, Gill's claim of a lien upon the property could not be maintained; but it is insisted on his behalf that his right to look to the fund as provided by the mechanic's lien law before the amendatory statute was passed, is restored to him, or, more accurately, has never been taken away or suspended; that the attempt to amend and provide a substitute having failed, and it being apparent that the legislature would not have repealed the statute giving laborers and material men a right to pursue and secure funds of the head contractor in the hands of the owner, except in the carrying out and as a part of their purpose to provide a substitute therefor, the part of the act which provides for the repeal of the old law falls with the rest; that all parts are alike abortive and nugatory.

This is the real question here, in so far as the mechanics' lien law is involved. In support of this contention we are cited to a great many decisions of courts of last resort in other states and to some text--books, and these authorities amply support the proposition that where an act repealing another act and providing a substitute therefor is itself invalid, the repealing clause must also be held inoperative, unless it shall appear that the legislature would have passed the repealing clause even if it had not provided a substitute for the act repealed.

The following are some of the authorities cited upon this point:

Sutherland on Statutory Interpretation, secs. 175-176; State ex rel. v. Smith, 48 Ohio St., 211; Times v. State, 29 Ala., 165; State v. LaCross, 11 Wis., 51; Stevenson v. Ry. Co., 6 Wis., 605; Child v. Shemar, 18 Ia., 261; People v Tiiphain (N. Y.), 3 Parker, 241; Endlich on Interpretation of Statutes, sec. 192; State v. Blend, 121 Ind., 514; Devoy v. Mayor, 36 N. Y., 449, 457; State v. Halleck, 14 Nev., 202; State v. Commissioners, 38 N. J. L., 320-322.

Also the opinion of Judge Hollister, of Hamilton county, Ohio, Common Pleas Court, in the case of Gorman, assignee v. Bepler et al., reported in 4 Ohio Nisi Prius Reports, 241, where the precise question was under consideration by that learned judge, who resolved it in favor of the proposition that the repealing provisions failed with the other provisions of the act. In this opinion other authorities are cited as supporting this conclusion.

Another case which we have examined is that of The Sprey Lumber Company v. The Sault St. Marie Savings Bank, 77 Mich., 199. In that case the statute under consideration was almost identical in its main features with the statute which we are here considering, and it was held that, the principal provisions of the statute failing, because of their unconstitutionality, resulted in the repealing clause

also failing, so that the old statute remained in force.

On behalf of plaintiff in error it is conceded that the general proposition above stated is established by the authorities, but it is contended that it is inapplicable here, because it is said that besides providing different liabilities for the owner, and different remedies for the material man and laborer who served or furnished to a head contractor and not to the owner, this act of April 13th, 1894, substantially alters the old law in other respects, and that the features which are held to be unconstitutional and void by the supreme court are not the main features of the act. That the parts and provisions held unconstitutional are independent of and separable from these other important provisions which are not obnoxious to the constitution, and that, therefore, such other provisions may be and are in all respects valid and in full force.

If these premises are correct, then there would seem to be an unsuperable difficulty in the way of giving effect to the doctrine above set forth as to the repealing provision. Because of the provision of sec. 16, art. 2, of the constitution of Ohio that "No law shall be revived, or amended, unless the new act contain the entire act revived, or the section or sections amended; and the section or sections, so amended, shall be repealed", it is not possible to give a partial or qualified effect to this doctrine, whereby a part of a section or sections repealed may be regarded as in force, and a part of the same section or sections, as amended, may also be regarded as in force. In other words, parts of a given section as amended may not be eliminated because unconstitutional and the remainder allowed to stand, and at the same time provisions in the same section before its amendment and not in the amended section be given effect. Either the amended section, and that alone, or the unamended section and that alone must stand. And it is said that because this is so, and because there are important new provisions

in the amended section that need not necessarily fail because of certain abortive provisions therein, we are not authorized to hold the whole invalid, and therefore cannot give effect to a doctrine that would recognize the old law as in force. What cannot be done by express legislative action may not be accomplished by judicial construction.

But after a careful examination of the statutes on the subject of mechanics' liens, we do not discover any material or important changes made by the act of April 13, 1894, except in the provisions and features held to be invalid. By the addition of the words "contractor or sub-contractor" in sec. 3184, the omission of the word "owner" from secs. 3194 and 3195, the dropping out of secs. 3196, 3198, 3199, 3201, 3202, 3203 and 3204, and certain other slight changes of phraseology, and sections supplemental to sec. 3185, the law was made to provide that a lien might be taken by a laborer, material man, or sub-contractor upon the structure or premises, though the material or labor might have been furnished to a contractor and not to the owner, and the owner might have paid the person with whom he contracted in full, in good faith, and without any knowledge of the claims of such material men or laborers—whereas, before the amendment of April 13th, 1894, such material men could only proceed by a method similar in effect to the process of garnishment to reach the funds of the contractor in the hands of the owner; and by the amendment and repeal the privilege is taken away from them.

I repeat, we have been unable to discover any other substantial change in the law accomplished by the amendment, and after careful consideration of the matter, we adopt the view of the court below, holding that the law as it stood before was not affected by the act of April 13, 1894, and that the court did not err in holding that Gill had perfected his right to have this fund applied upon his claim.

When we come to consider the long-established policy of

the legislature with respect to the claims of laborers and material men, evidenced by the mechanics' lien law and other statutes, we cannot bring ourselves to think that the legislature would have contemplated depriving the material men and laborers employed by contractors of all right or opportunity to secure and obtain satisfaction of their claims; a result which must follow if neither the new nor the old law as to such persons is in force.

We also find ground for affirming this judgment in sec. 6355, of the Revised Statutes. This has not been discussed to us by counsel; but after a careful consideration of the terms of this section, we think it applies to the case in hand. This is a part of the statute on the subject of insolvent debtors:

"All taxes of every description assessed against the assignor upon any personal property held by him before his assignment, shall be paid by the assignee or trustee out of the proceeds of the property assigned in preference to any other claims against the assignor; and every person who shall have performed any labor as an operative in the service of the assignor, shall be entitled to receive out of the trust funds, before the payment of the other creditors, the full amount of the wages due to such person for such labor performed within twelve months preceding the assignment, not exceeding three hundred dollars."

By the agreed statement of facts it apears to us that this claim is for labor—labor, as we find it, performed by an operative in the service of this creditor. It was performed within twelve months of the time the claim was ascertained, and at the time the assignment was made. The asssignee was appointed December 4, 1896, and all of the work appears to have been performed after December 26, 1895, and the claim does not exceed $300—it was $243.80. The assignee does not bring forward or assert any other labor claims that would have a right to participate in the distribution of this fund, nor does any one else seek to intervene in such claim, and therefore, we conclude that the court was right and

correct under this secction of the statute in awarding sufficient of this fund to the defendant in error, Gill, to satisfy his claim, and the judgment of the court below will therefore be affirmed.

Hurd, Brumback & Thatcher, for Plaintiff in Error.

W. H. A. Read, for Defendants in Error.

(Sixth Circuit—Lucas Co., O., Circuit Court—Jan'y. Term, 1898.)

Before King, Haynes and Parker, JJ.

DANIEL W. TOMBOW v. RICHARD H. HASKINS.

Exemption—What will amount to selection under the statute—
The selection of property required to be made by a debtor who claims it exempt in lieu of a homestead under sec. 5441, is sufficiently indicated in case money owing him is held by garnishee process, by his making a motion to the court to discharge the same.

Error to the Court of Common Pleas of Lucas county.

KING, J.

This is an action to reverse the judgment of the common pleas affirming a judgment of a justice of the peace. Suit was brought by Tombow against Haskins before a justice of the peace, to recover upon an account of $19.75. There was also appended to the bill of particulars an affidavit of attachment, alleging that defendant was a non-resident of Lucas county, and attachment process was issued and a notice of garnishment was served upon The Lloyd Lumber Company, garnishees. The garnishees appeared in court and answered that they were owing to the defendant $40, and thereupon the defendant filed a motion to discharge the attachment and garnishee process, for the reasons: "First, that the property about to be attached and money garnisheed is exempt from execution under the laws of the state of Ohio; and, second, the insufficiency of the affidavit of attachment." The justice sustained the attachment, but the

common pleas reversed it. Now the plaintiff below seeks to have the judgment of the common pleas reversed, because it is claimed that the court erred in holding that the money in question was exempt from execution. It is said, in argument, that the motion to discharge was supported by affidavits which clearly showed that defendant was the head of a family—a married man, living with his wife, and supporting her—and, as a conclusion of law, that the property was exempt under the laws of the state, but no other facts showing whereby it was exempt. These affidavits, we should say, contained the further statement that he owned no homestead, either he or his wife, or real estate. The principal contention made here by the plaintiff in error is, that there was no selection made by defendant below, as required by the statute, sec. 5441, which provides:

"Husband and wife living together, a widower living with an unmarried daughter or minor son, every widow and every unmarried female having in good faith the care, maintenance and custody of any minor child or children of a deceased relative, residents of Ohio, and not the owner of a homestead, may in lieu thereof, hold exempt from levy and sale, real and personal property to be selected by such person, his agent or attorney, at any time before sale, not exceeding five hundred dollars in value, in addition to the amount of chattel property otherwise by law exempted."

From the reading of that it would seem that the substance of the statute applies to a levy that is so made upon chattel property, and therefore, that it was necessary for the defendant to appear and select property enough to make up five hundred dollars in value, and make a demand upon the officer. But in the case before us there was a garnishee's process served by the officer—and of course in the absence of defendant—and the person garnisheed, simply came into court by virtue of the provisions of law and answered as to the amount of money in his possession owing to defendant, and paid the money over to the justice of the peace. No

opportunity, therefore, could have been afforded to the defendant to appear before the officer and demand that this property be set off to him; the only person he could appear before was the justice of the peace, and we think he did that when he filed this motion to discharge the attachment, upon the ground that this money in question was exempt under this provision of the statute, he being the head of a family and not the owner of a homestead.

These statutes have been liberally construed by the courts, to effect the objects and purposes of them. It is certain that this application must be made to the justice of the peace, and it would hardly do to hold that it was not made in proper form in this case—coming in the form of a motion. It seems to be direct, and it specifies exactly why the attachment should be released from this money: because, as the motion states, it was exempt from execution under the statutes of the state of Ohio; and, if exempt at all, it is conceded that it must be exempt under this particular statute.

We think, therefore, that the court of common pleas did not err in the reversal of the judgment of the justice of the peace, and its judgment will be affirmed.

Another question was made in the case by the plaintiff in error, and that is, that this judgment of the court of common pleas is erroneous because it did not set the case down for trial in the court of common pleas in accordance with the provisions of the statute relating to such judgments of justices—and a decision from the first circuit is cited. As to that I will say this, that the proceedings before the common pleas do not show whether the defendant asked the court to have that provision made. So far as appears by the record, the defendant was present. The court made this order, on the 10th of July:

"That the order of the justice of the peace, refusing to discharge the attachment in said case, be reversed; that the plaintiff in error recover from the defendant in error

the costs of this proceeding; and that execution issue therefor. To all of which findings, rulings and orders the defendant in error then and there duly excepted."

Whether the court set the case down for hearing or not, at that time, does not appear in the entry.

On the 22d of December, 1897, some months after that, this order was made:

"This cause coming on this day for hearing upon the motion of the plaintiff in error for judgment upon the findings heretofore made by this court, was submitted to the court upon the record and nothing else, and the court finding that the plaintiff in error is entitled to judgment upon the findings of this court heretofore rendered herein, it orders the attachment issued by Joseph R. Cooper, a justice of the peace, to be, and the same is hereby discharged.

"To all of which said rulings, findings and orders of the court, the defendant in error, by his attorney, then and there duly excepted."

The defendant seems to have been there to except to this judgment of the court, but does not seem to have asked the court to do anything else. Now then, to have made an exception there which would have been available—for the defendant claims that he should have had an opportunity to be heard—he ought to have offered testimony to the court, or asked for time to hear testimony; but nothing of that kind was done. As it appears by the record, the defendant was present. The case was submitted upon the previous record containing these affidavits attached to it, and the court thereupon rendered judgment, and all that defendant did in relation to it was to except to the judgment. That certainly would not be sufficient. He must by himself have made some motion—asked the court to do something, to hear testimony, or do something else besides taking exceptions to the ruling. But he did not offer to produce any

testimony or claim that he had any other evidence than that contained in the record; so that the judgment will have to be affirmed.

Ralph S. Holbrook, for Plaintiff in Error.

Chittenden & Chittenden, for Defendant in Error.

(Sixth Circuit—Lucas Co., O., Circuit Court Jan'y. Term, 1898.)

Before King, Haynes and Parker, JJ.)

JAMES M. ASHLEY, JR. v. EDWIN C. WALKER.

Contract for sale of shares of R. R. stock—Breach by refusal to accept—Re-sale by broker—

(1). In a contract for the sale of shares of stock, on refusal of the vendee to accept the stock, the vendor may sell the same for the best obtainable price, and if the proceeds of such sale are less than the amount named in such contract, together with the expense of sale, he may recover of the vendee such difference.

Re-sale—What required—

(2). Such a sale shall be fairly made and within a reasonable time after the refusal of the vendee to accept the stock.

Reasonableness of time—When question for jury, and when for court—

(3). Whether the time when such sale was made was within a reasonable time after the breach of the contract by the vendee, is a question of fact to be submitted to the jury, unless the undisputed facts and inferences reasonably drawn therefrom clearly show the time to be either reasonable, or the contrary, when the question becomes one of law for the court.

Error to the Court of Common Pleas of Lucas county.

KING, J.

This action was brought in the court of common pleas by Edwin C. Walker, against James M. Ashley, Jr., setting forth that the defendant, Ashley, on or about the 8th day of February, 1893, entered into an agreement in writing, of which this is a copy:

"February 8th, 1893.

"Mr. William S. Calhoun,

"Dear sir:

"For value received you may deliver to me at any time within four (4) months from date two thousand shares (2000) Toledo, Ann Arbor & Nor. Mich. stock at thirty-nine dollars a share. An indenture on back.

(Signed) "J. M. Ashley, Jr."

On the back of said paper is written the following:

"2-8-93.

"This put becomes operative and in full force and effect in blocks of 500 as the numbers of the certificates under this put are given to me and is good only for the certificates so enumerated to the full number of 2000 shares.

(Signed) "J. M. Ashley, Jr."

The petition also averred that subsequent to the execution of this put, Calhoun had purchased one thousand shares of the stock of this railroad, within the period named in the contract, to-wit, four months, and that on the 26th day of April, 1893, he had duly tendered the stock to the defendant, who had declined to receive it, and refused to pay for it. That thereafter the stock had been sold by him on account of defendant, at the best prices which could be obtained therefor, which was very much less than the sum named in the contract, of $39 per share. That he had thereby sustained damages in the sum of $25,525.00, for which he asks judgment with interest thereon from April 26, 1893.

To this petition an answer was filed denying that on the day named, the defendant entered into a contract with William S. Calhoun like the one set up in the petition, but admitting that a certain agreement had been made, without setting forth what it was, but claiming that the plaintiff should, on the trial, produce proof of his agreement. Then there were certain denials, denying that he purchased the stock which it was claimed he had purchased, and denying

that he had transferred his title in it to the plaintiff Edwin C. Walker. Then there was a cross-petition.

This action came on for trial in the court of common pleas upon these issues; evidence was introduced, after which the court charged the jury to return a verdict for the plaintiff for the amount claimed in the petition. Motion for a new trial was made and overruled, and it is sought here to reverse the judgment rendered upon that verdict because it is contrary to the law and the evidence, and because it is alleged that the court committed error at the trial, in instructing the jury to return a verdict for the plaintiff.

The first reason assigned by counsel for plaintiff in error for the reversal of this judgment is: That the contract sued upon was not binding upon the plaintiff, but only binding—if on anybody—upon the defendant; in other words, that it a unilateral contract. The agreement was that the defendant, within four months, was to pay $39 a share for 2000 shares of stock that shold be furnished to him by Calhoun, but that Calhoun did not agree that he would furnish 2000 shares, or any other number of shares, within that time.

We do not look upon that contract with the view taken of it by counsel for plaintiff in error. In the first place, it will be borne in mind that the contract recites a consideration: "For a valuable consideration, I agree to take and pay for 2000 shares of this stock to be sold and delivered to me by Mr. Calhoun, if the same be delivered within four months and in blocks of not less than 500 shares at a time." So that the contract iitself imports a consideration for the option.

Again, we think it would be binding when accepted; and that an acceptance is shown when the person named in the contract complied with its terms, had purchased and continued to offer to Mr. Ashley the stock named in the contract, or a part thereof, in blocks of not less than 500 shares.

A text book cited is Clark on Contracts, pages 168-9:

"In such case, however, according to the better opinion, as we have seen in treating of offer and acceptance, the promisor is in the position of one who has made a continuing offer, which, though it may be withdrawn before anything is done by the promisee, will become binding in return, or by doing the acts contemplated. In giving the promise or otherwise supplying the consideration, he supplies the element of mutuality. If, therefore, a person promises to sell such goods as another may order, or to sell land if another shall choose to buy it, and before his order is withdrawn the other orders goods, or agrees to buy the land, the promisor is bound to sell at the price named."

And one or two authorities I will briefly refer to:

70 N. Y., 202, is a case almost like the one before the court.

"A contract whereby A., for a valuable consideration, agrees to purchase of B. gold coin at a specified price within a specified time, B. having the option to deliver or not, is not upon its face a wager contract within the meaning of the statutory provision declaring such contracts void."

They do not there discuss the question of mutuality, but they decide that the contract was binding upon the purchase and offer of the coin.

So in 71 N. Y., 420, in a case similar in point:

"An agreement for a valuable consideration by A. to purchase from or sell to B., at the option of the latter, a certain number of shares of stock within a limited time at a specified price is not, per se a gambling contract. An illegal intent will not be presumed; and in the absence of proof that the parties were merely speculating upon the fluctuations in the price of the stock without any intent that A. should deliver or accept, but simply should pay difference, the contract is valid and may be enforced."

In that case it seems that the objection was that it was a gambling contract. That objection is not urged to this contract. But the stock itself was to be sold, provided that Calhoun should, within the time named, purchase and deliver, or tender to the purchaser, the stock in question, in

the amounts named; so there is no element of gambling in the contract, and these authorities are to the effect that contracts precisely like it would be binding. No question was raised in those cases that the contract was not mutual. In the second place it is urged that the court, in instructing the jury to return a verdict for the amount claimed in plaintiff's petition, established a rule of damages that is incorrect.

In effect, the court held that the rule of damages in the case at bar was the amount of the difference between the price named in the contract and the amount which had been received for the stock upon a sale made by Calhoun, some days or weeks afterwards; and it is contended that the true rule of damages should be the difference between the amount named in the contract and the value of the stock at the time and place when it was tendered or offered.

It appears plainly from the evidence that on the day when this stock was tendered, it was worth substantially the price named in the contract—$39 per share. It appears from the evidence—at least Mr. Calhoun, testifying for the plaintiff says, that he retained the stock in his possession until about the 19th of May—between the 19th and the 25th of May (the tender being made on the 26th of April), and between the 19th and 25th he sold this stock in the stock market in New York, at the Exchange, at public sale; that is, it was public to the persons who were members of the stock exchange; and that he obtained the best price that could be got on that day, which was about $11 or $11.50 per share, very much less than the price which ruled on the 26th of April; so that, if the measure of damages be that claimed by the plaintiff in error, the damages to be awarded to the plaintiff below would be scarcely more than nominal; while, if the rule adopted by the court below was correct, the rule of damages would be that upon which the jury found. Taking Mr. Calhoun's testimony as a basis, there is no question but what the loss was correctly stated.

We think the court below adopted the correct rule upon that subject, and I will refer briefly to two or three authorities upon that question:

70 N. Y., 13, is a case holding that rule of damages.

In 140 N. Y., 70, is another case. I read from the syllabus:

"A vendor of personal property not delivered, has three remedies against the vendee in default: he may store the property for the buyer and sue for the purchase price; he may sell the property as agent for the vendee, and recover any deficiency resulting, or he may keep the property as his own and recover the difference between the contract and the market price at the time and place of delivery."

In Benjamin on Sales (6th Edition), p. 774, the rule is stated thus:

"The vendor's remedy, after a re-sale made in the absence of an express reservation of that right, is assumpsit on the original contract, which was not rescinded by the re-sale. And in this action he may recover as damages the actual loss on the re-sale composed of the difference in price and expenses, or he may refuse to give credit for the proceeds of the re-sale and claim the whole price, leaving the buyer to a counter-claim for damages of the re-sale."

On page 775, in an "American Note", it is stated:

"The right of re-sale on the default of the buyer to make payment, and to recover the difference between the proceeds and the original contract price, is universally established in this country."

Citing numerous authorities.)

"In such sales the vendor acts as agent for the vendee, as the title is not ordinarily re-transferred to him by the mere default of the vendee in making the stipulated payment."

Then, among the authorities which are cited, are: 70 N. Y., 13; 21 Wisconsin, 562, and others; citing numerous cases. These authorities say:

"It is not necessary that the sale should have been made at the earliest possible moment after the default is known, even though the article be falling in market."

"Notice to the buyer of the time and place of re-sale is usual, and is important as tending to prove the sale a fair one; but it is not absolutely necessary in all cases that such notice should have been given."

"If the re-sale be fairly made, especially if at public auction, the amount thus obtained is considered as a fair test of the market value, and the difference between the amount thus received and the original contract price is therefore the true standard of the vendor's damages."

And a case is cited in 18 Grattan, 785, which sustains the same general doctrine. These authorities would therefore bear out, we think, the rule held by the court below when it undertook to instruct the jury in this case that the measure of damages was the amount named in the plaintiff's petition; but these authorities go a trifle further than that. Cases which I have referred to and did not read hold, that if the vendor or promisor shall undertake to act as the agent of the vendee and re-sell the property, he must do so within a reasonable time, and it is held in one of these New York cases that a delay of two months was not unreasonable. In the case which I have referred to —18 Grattan—it was held that a delay of five months was not unreasonable.

The plaintiff in error, however, claims that that question should have been submitted to the jury that it was for their determination. We had occasion to discuss that question in the case of Gladwell v. Holcomb, et al., which I find in the 7th Ohio Circuit Court Reports, page 369. In that opinion the American & English Encyclopaedia of Law is referred to, where it is said, on page 641: vol. 19:

"On principle, it would appear that if a statute or any positive rule of law prescribes the doing of an act within a reasonable time, it is the province of the court in construing such law, to declare whether a given time is, within the intent or meaning of the law, a reasonable time. So in the interpretation of a written instrument specifying a reasonable time, the question what is such time, is one for the court to answer, after considering the terms of the instru-

ment and the intent of the parties. But an important qualification to both of the above principles is to be noted. If the question as to what is a reasonable time is not resolved expressly or impliedly by the rule of law, or by the writing which is under consideration, so that the judge in deciding the question would have no legal ground, but merely his individual ideas to go upon; and especially if, in addition, the question depends in the individual case upon peculiar, numerous or complicated circumstances—the reasonableness of the time becomes a question for the jury, whose province it is, rather than that of the judge, to say, in view of all the facts of the case, whether or not the time in question is reasonable in the sense of being in accordance with the course of business and the ordinary transactions of life. It has, however, been said that the time in question may be so short or so long that the court will declare it, as a matter of law, to be reasonable or unreasonable."

And under the latter proposition there is cited in the Encyclopaedia quite a number of cases which seem to sustain the doctrine there laid down. And in line with the proposition above as to submission to the jury, there are a great many cases cited in the Encyclopaedia, and among them a case in 14 Ohio St., 18, which is the only one I care here to refer to. This was a controversy between execution creditors, and the question was whether an officer who held an execution and had levied under the same, had unreasonably delayed to sell the property, so that the creditor in that execution had thereby lost his priority. The court say, in the second proposition of the syllabi, (p. 18):

"The question whether the delay, if any, was reasonable or unreasonable, depends on all the circumstances surrounding the parties and the property seized in execution, and is, peculiarly, a question for the jury, under the instructions of the court."

Now these authorities would seem, perhaps, to be opposed to the rule which was stated in the case cited by this court, but we think they are not: they only apply to different cases, as we undertake to say there that we think

it a proper rule that where the time is clearly either reasonable or unreasonable, it is the duty of the court so to determine, just as it would be the duty of the court in an action based upon negligence—said to be a mixed question of law and of fact and one peculiary for the jury—yet, where the acts were such that any reasonable man would say that they were the exercise of ordinary care, it is the duty of the court to say so; or where the acts were such that a reasonable minded man would say it was negligence, it would be the duty of the court to say so; but in any case of doubt, or where minds might differ, it has been held by the supreme court that it is a question for the jury. In the Gladwell case before the court at that time, there was no question made that, if the rule of law was that reasonable time should be given, that that reasonable time had in that case been given—which was a notice to leave the premises—the contention being that the law was that the common law rule should prevail. The court held that the justice of the peace had not erred in saying that the time named (four months) was a reasonable time. But, in this case, the facts and circumstances are very different. In this case it appears that on the day when this tender was made, this stock was substantially worth the price named in the contract. It fell on that day several dollars per share, and some days later it raised, and then again it fell and seemed to continue to fall until about the 19th or 29th of May it had fallen to about eleven cents per share, and then Mr. Calhoun put it upon the market and sold it, claiming here, as he does, that he sold it for Mr. Ashley, the defendant.

Now, we think whether that was done within a reasonable time or not, in view of all the circumstances of the case, in view of the condition of the market, in view of the character of the stock, in view of what was the condition of the railroad of which this was the stock, that the whole question should have been submitted to the jury to determine

whether that sale was made within a reasonable time. Again, it appears in this evidence, by the testimony of Calhoun and of another individual who was present with him, that they made a tender of this stock on the 26th day of April, and that Mr. Ashley refused to receive it; that on the following day they returned with the stock and presented it to Mr. Ashley, and he again refused to receive it. They do not, either of them, testify to any conditions attached by Mr. Ashley to his refusal on either day. Their testimony was taken by deposition, and they were not present at the trial. On the trial of the case Mr. Ashley testified that Calhoun tendered him the stock on the day named and he refused to receive it, claiming that it was the custom or rule of the stock exchange that he should have 24 hours within which to accept the stock—in other words—24 hours within which to get ready to pay it; that there was some conversation about it, and the men went away. They took the numbers of the stock, and thereupon he followed them, and they went directly to the stock exchange, to the floor thereof, and the same man who had offered him a thousand shares, put up the thousand shares for sale and sold it immediately for $38.50 per share. That on the next day he came back with another thousand shares of stock. On cross-examination Mr. Ashley says the stock brought to him on the second day was the same stock which was brought on the first day. It is not clear, that is from that testimony, that Mr. Ashley meant to say that he brought the same identical certificates on the second day that he brought him on the first day. We think that, as it appears here that Mr. Calhoun himself was the owner of only a thousand shares which he bought for the purpose of fulfilling his contract, that he must have kept his tender good, and must have sold the identical stock in May that he tendered on the 26th of April. He could not tender this stock and then turn that over to the broker and tell him to sell it, then borrow some more stock and go back and make a new tender.

It was suggested that it made no difference whether that was the same stock or not, but we think it does. If he were a general stock broker, and had a large amount of this stock, and he had offered Mr. Ashley a thousand shares and Mr. Ashley had not accepted it, and he had gone away and then sold perhaps the precise thousand shares, but had kept the tender good for a thousand shares, perhaps it might make no difference; but Mr. Calhoun was not a stock broker and he did not himself, individually, offer this stock for sale—it was offered by a stock broker, by an agent of the plaintiff in this case, named Taylor, who had access to the floor of the stock exchange, and Mr. Calhoun was not in that business. He had entered into these negotiations perhaps to make a little money and to help Mr. Ashley, so that if his thousand shares of stock was actually sold on the day he made that tender, he must stand by the price received for it. There is evidence to indicate that there was a dispute on this question, and that should have been submitted to the jury—therefore this judgment will be reversed, and the case remanded for a new trial.

C. S. Ashley, for Plaintiff in Error.

Scribner & Waite, for Defendant in Error.

(First Circuit—Hamilton Co., O., Circuit Court—Jan. Term, 1898.)

Before Cox, Smith and Swing, JJ.,

THE UPHAM MANUFACTURING CO. v. GIBSON & WARRINGTON.

Journal entry prevails over statement in bill of exceptions—

(1.) Where it is shown by a journal entry that a motion for a new trial was overruled on a certain day, but the bill of exceptions recites that it was overruled on a different day, the former must govern.

Same—

(2.) A motion for a new trial was overruled on July 22, but was en-

tered on the minutes as having been overruled on the preceding June 29, the last day of the term at which the trial occurred. A bill of exceptions was allowed and signed on September 9, forty-nine days after the overruling of the motion. *Held*—That the fifty days allowed for signing the bill began to run from the date of the entry, and not from the date of the overruling of the motion as shown on the bill.

Error to the Court of Common Pleas of Hamilton county.

SMITH, J.

As all of the questions in this case arise on the bill of exceptions, and it is claimed by the counsel for the defendants in error that such bill can not be regarded or considered by this court, this question must be first disposed of, for if found in favor of the defendants in error, the judgment must be affirmed.

As shown by the transcript of the journal entries, on the 15th day of May, 1895, the jury which tried the case in the court of common pleas, rendered a verdict in favor of Gibson & Warrington, the plaintiffs below, against the defendant company for $2,177.28. On May 17th, 1895, a motion for a new trial was filed by the said defendant, and on June 29, 1895, an entry was made on the journal of the court overruling that motion, and rendering judgment in accordance with the verdict. This was on the last day of the January term of that year.

On the same day (June 29th) is an entry in these words:

"Now comes the defendant, and presents to the court its certain bill of exceptions herein, which being found by the court to be true, and to have been submitted to opposite counsel in accordance with the statute in such case made and provided, is allowed, signed, and on motion made part of the record in this case."

If the bill of exceptions which is found among the original papers in this case, had purposed to have been signed by

the trial judge on the day when this entry was made, of course everything would have been in accordance with the provisions of the statute, and the question raised could not have arisen; but instead of this the bill expressly states that it was signed and allowed on the 9th day of September, 1895, which was seventy-two days after the overruling of the motion for a new trial, while the statute expressly provides that it must be submitted to the trial judge within forty-five days after the overruling of such motion, and be signed by him within fifty days after such overruling, unless by endorsement thereon such judge extends the time for ten days longer. It is clear, therefore, that if the motion for a new trial was overruled on June 29, 1895, and the bill of exceptions was not, in fact, signed and allowed until September 9 following, the trial judge had lost jurisdiction to allow and sign any bill of exceptions based or founded on the overruling of such motion, and his act in doing so was nullity, and the bill can not be regarded by us.

But it urged by the counsel for the plaintiff in error, that this should not be so, for these reasons: That the bill of exceptions itself shows by a recitation therein, that the motion for a new trial was not overruled until July 22, 1895, and that as the bill was allowed and signed on the 9th day September, 1895, which was only forty-nine days after the overruling of the motion for a new trial; that it was so allowed within the fifty days given by the statute, and if the motion in fact was overruled on July 22, the claim would be well founded. But as the transcript of the journal entries shows that it was overruled on June 29, and not on July 22, the question arises whether a reviewing court is to be governed by the record of the court as shown by the entry on the journal, or by the statement made as to this by the trial judge in the bill of exceptions signed by him afterwards. Before discussing this question it may be well to say, that there is an indorsement on the bill itself in the handwriting

of the judge, directing the bill to be filed on September 9, and the entry allowing the bill of exceptions, which was copied upon the journal, is indorsed by the trial judge directing it to be entered the same day, September 9; but for some reason, not explained, this entry also appears upon the journal of June 29, 1895, following the entry of the overruling of the motion for a new trial.

We are of the opinion that where the record of the court, that is the journal entry made, shows that a motion for a new trial was overruled on a day named, and the bill of exceptions recites that it was overruled on a different day, that the former must govern. The statute, section 4962, provides that the clerk shall keep the journal, and record the proceedings of the court, and it follows that if a motion for a new trial is overruled, it must be entered upon the journal with the date at which it is done; and while such entry stands, it is conclusive. It is true that under other provisions of the statute, bills of exceptions, when allowed, are to be filed with the pleadings of the case, and if desired, made a part of the record of the case; but it could not properly be held, we think, that any recital therein by the trial judge, could in any way override or control a regular entry on the journal of the court, which the law requires to be placed thereon; that if the journal is silent as to any action of the court which is required to be there, that a statement in the bill of exceptions that such action was had, will not take the place of the journal entry. Accordingly it has been held by this court in several cases, that were the journal of the court shows that no exception was taken to the overruling of the motion for a new trial, a statement in the bill of exceptions that it was, would not supply the defect. See, also, Heffner v. Moyst, 40 Ohio St., 112, and Challen v. Cincinnati, 40 Ohio St., 113.

The difficulty, then, which meets the plaintiff in error in this case, is this: the motion for a new trial having been

overruled June 29, 1895, and the journal showing that a bill of exceptions was allowed on that day, there is no such paper with the files, the only one being that signed on September 9, and under our holding in the Gazlay case, 8 C. C., 256, the journal entry of June 29, can not be held to apply to that bill, even if the clerk improperly marked it as filed as of June 29. And as the journal shows no allowance of a bill on September 9, there is nothing to show that the bill in question was filed on that day; and if there were, it would, as we have held, have been too late, as it would not have been singed within fifty days from the overruling of the motion.

In view, then, of the facts in the case, and the clear decisions of the supreme court that the provisions of the statute as to the allowance of bills of exception are mandatory, and if it appears from the record that they have not been strictly complied with, that the trial court has not authority to sign or allow a bill, we feel compelled to hold that this bill of exceptions can not be regarded, and that the judgment must be affirmed.

H. P. Lloyd, for Plaintiff in Error.

W. *Prather*, for Defendant in Error.

(Third Circuit—Allen Co., O., Circuit Court—April Term, 1898.)

Before Day, Price and Norris, JJ.

THE BOARD OF EDUCATION, etc. v. JAMES B. TOWNSEND.

Contract depending on continued existence of thing--Destruction as an excuse for non-performance—

It is a general rule that, when a party voluntarily undertakes to do a thing without qualification, performance is not excused because by inevitable accident, or other contingency not foreseen and not provided against, performance becomes impossible. In general, a contract must be performed or non-performance compensated. As forming an exception to such general doctrine it is the rule, that when performance depends on the continued

existence of a person or thing, and such continued existence is assumed by both parties as a basis of the agreement, the death of the person or destruction of the thing puts an end to the obligation.

Same—

An agreement: "Within sixty days to remove the present school-house located on the south-east corner of said sec. 18, to a new site provided, and rebuild and reconstruct the said building so that it will be in suitable and proper condition for school purposes," falls within the exception to the general rule, and the school-house having been destroyed by a violent wind storm before the expiration of sixty days, performance is impossible and is excused.

Error to the Court of Common Pleas of Allen county.

DAY, J.

The plaintiff here, and in the lower court, prosecutes error to procure the reversal of a judgment rendered against it, in an action to recover a damage claimed to have resulted from a failure of defendant to perform his contract to remove and rebuild plaintiff's school-house, situate in one of the sub-districts of Bath township, Allen county.

The facts of the case are agreed upon by the parties, and are: The said board of education, and defendant Townsend, made an agreement in writing, on November 7, 1895, in which the said board agreed to make a proper conveyance of a strip of land, ninety feet wide, owned, occupied and used by it for school purposes and particularly described, on which was a school-house, to the Lima Northern Railway Company, on and over which to construct and build its railroad. In consideration of such conveyance for the use of the railway company, Townsend agreed to procure another school-house site near by, for the said board, and to remove and re-build the said school-house on such new site, and put it in such condition that it would be fit for use for school purposes; also to remove certain out-buildings, and do and perform other things, all of which was to be done

and finished within sixty days from said November 7. The strip of land was at once conveyed to the railway company, and a railroad track was constructed upon and across it. Townsend procured the new site, had title thereto vested in the board of education, and done and performed all the other stipulations of his contract, to the satisfaction of the said board, except the removal and re-building of the school-house on the new site; and that condition of his contract he entirely omitted and failed to perform. On November 28, 1895, twenty-one days after the agreement to remove and re-build was made, the said school-house was, by a violent wind storm, blown down and completely destroyed, so that, as a school house, it could not be removed. Subsequently, and in the fall 1896, the board, after requesting Townsend to build a school-house and his failure to do so, built a school-house on the new site, at an expense $1,349—differing from the destroyed house in the particular of a cupalo, which cost $50.—The old school-house was so badly wrecked that it could not be removed and re-built; and a new one of the same size constructed of similar new material would cost $1,000. Prior to the wind storm, and until its occurrence, Townsend made diligent and reasonable endeavor to procure the removal of the house, but made no such effort after its destruction. The house was continuously occupied and used by the board, for purposes of the school, and was so occupied and used up to, and including the day before its destruction.

The plaintiff's contention is, that notwithstanding the total destruction of the house by the wind storm, defendant is not excused from the performance of the contract, but is liable to respond, and must respond in damages, because of non-performance. While the defendant asserts the claim, that the subject matter of the contract, the old school-house, was destroyed by act of God, without any fault of his, so that the contract with respect to the removal and rebuild-

ing of the house, became impossible of performance, and in law and good conscience, he is excused and released from the obligations of it, in that regard.

The question presented is an interesting one, and rather unusual, from the fact that it rarely arises. The precise question we have here has not frequently, if at all, engaged the attention of the courts of the state. If our court of last resort or any reviewing court of the state, has, at any time entertained and considered the proposition, or made any ruling with reference to it, the fact has not been brought to our notice, and it would seem that, so far as any reported adjudication by our courts is concerned, the proposition is a new and undecided one. The courts of last resort of other states and countries, however, have dealt with the matter, and reported cases there are in plenty, blazing the way and evolving a reasonable rule by which the rights of parties may be correctly measured.

It is a general rule that inevitable accident, or unavoidable casualty, making strict performance of an agreement impossible, does not absolve a man from his contracts. In general they must be performed or their non-performance compensated. There is an exception to this rule, as well established as the rule itself, that in contracts in which performance depends upon the continued existence of a certain 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. The implication arises, notwithstanding the unqualified character of the promissory words of the contract, because, from the nature of the contract, it is apparent that the parties contracted upon the basis of the continued existence of the particular person or thing. To this effect is the purport of nearly all the decided cases. Mr. Beach, in the first volume of his work on the Modern Law of Contracts, sec. 217, clearly

and concisely states the rules of law obtaining in such controversies, as follows:

"The general doctrine that, when a party voluntarily undertakes to do a thing without qualification, performance is not excused because by inevitable accident or other contingency not foreseen, it becomes impossible for him to do the act or thing which he agreed to do, is well settled. But it is equally well settled that when performance depends on the continued existence of a given person or thing, and such continued existence was assumed as a basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation."

It will be observed that the contractor is not excused from performance of his contract, as a matter of course, whenever performance becomes impossible through the act of God, or inevitable casualty, but only in contracts in which such inevitable accident is expressly provided against, or the continued existence of the subject matter of the contract is assumed, by both the contracting parties, as a basis of the agreement; and the class to which a given contract belongs is to be ascertained and determined, only, from an examination and consideration of the terms and stipulations of the particular contract.

Among the unforeseen happenings, effective to excuse the performance of a contract, are included extraordinary floods, storms of unusual violence, sudden tempest, sudden death and the like. They are said to be unavoidable, inevitable casualty, or act of God, and in proper circumstances, excuse non-performance of a contract. That is to say, the acts of the Almighty are not within the contract, and were not considered. The parties did not assume to direct or guard against the unknown and unknowable acts of God, but made their contract with reference to present existing conditions, mutually relying on a beneficient Providence, and hoping for a continuance of the favorable conditions; and if the favor is withdrawn, it is the act of Providence, may be a calamity, to be deplored of course, but for which

neither is to blame or to be held responsible. The performance of the contract, in such case, becomes impossible without the fault of either party, and is excused.

Does the case at bar fall within the general rule, or within the exception so plainly stated? This, as has been stated, must and does depend upon the nature of the contract in question. The precise wording of the contract with respect to the removal and re-building of the school-house, is as follows:

"Said James B. Townsend further agrees within said time (60 days), to remove the present school-house, located on the south-east corner of sec. 18, * * * to the above described premises (the new site) and re-build and re-construct the said building so that it will be in suitable and proper condition for school purposes, * * *."

From a careful reading of this provision of the contract, it is quite apparent that both parties assumed and relied on the continued existence of the school-house, and neither one contemplated, much less provided against its destruction, or stipulated for or against liability to make compensation as damage, in the event of its ceasing, from any cause, to exist. The contract is for the removal and re-building of a particular school building—the one situate on the south-east corner of sec. 18. No other building was then in contemplation or consideration. They could as well have provided for the removal and reconstruction of some other building —of a building—or the construction of a new one, if such was their agreement. But not so. Reasonably construing the contract, both assumed and presumed the school building, desired and necessary to be removed, would continue to stand and exist as a school-house, and they made their contract for its removal and re-building, so it would be in proper condition for school purposes; and, under the rule stated, this manifestly belongs to the group or class of contracts which form an exception to the general rule, in that, the continued existence of the school-house as a distinct

entity was assumed, by both parties, as a basis of the agreement, and its destruction having been wrought by inevitable accident or act of God, for which neither one is to blame, the performance of its stipulations is impossible, and is excused.

We perceive no error in the record, and the judgment is affirmed, with costs.

Cable & Parmenter, for Plaintiff.

W. B. Richie, and *W. H. Leete*, for Defendant.

(Sixth Circuit—Lucas Co., O., Circuit Court—Jan. Term, 1898.)

Before King, Haynes and Parker, JJ.,

LEROY WELEVER v. THE I. H. DETWILER COMPANY and GEORGE K. DETWILER.

Statute of Frauds—Contract for earth to be removed from lot—

A contract for the mere removal of earth for a certain money consideration is not within the statute of frauds. But where it appears from the evidence, that the main consideration was not the price to be paid for the removal, but to get the earth to be removed, to be re-sold or used in executing other contracts for filling lots, so that the substance of the contract was the earth itself, then such contract is within the statute of frauds.

Error to the Court of Common Pleas of Lucas county.

HAYNES, J.

A petition in error is filed in this court for the purpose of reversing the judgment in the court of common pleas in an action brought in that court wherein Welever was plaintiff and the Detwilers were defendants. Suit was brought by Welever against the Detwilers for the recovery of a certain price agreed to be paid for the removal, it was alleged, of certain earth from a lot. Issues were joined by way of denial in the case, and upon the trial of the case, at the conclusion of the evidence, the court directed the jury to re-

turn a verdict in favor of the defendants, and the ground of that direction was, that the contract proved upon the trial of the case was within the statute of frauds—the testimony showing that the whole agreement was oral.

In order to get at a proper understanding of the case and the proper application of the principles of law, it will be necessary to read the petition in the case:

"For cause of action against the defendants, plaintiff says that he entered into a contract with the defendants to remove a bank of earth then and there being on certain lots fronting on Euclid Avenue, East Toledo, Ohio, between Third and Fourth streets. By the terms of said contract, plaintiff was to receive from defendants the sum of $50 for the removal of the said earth."

Now it will be seen before we get through, that there is no statement that the earth, in any manner or form, should belong to the plaintiff.

"After entering into said contract with the defendants, plaintiff says that he bargained with two owners of property located near said bank, to-wit, one Frank Hake and one D. Harpster, to receive from them $25 for the removal of said bank of earth.

"Plaintiff further alleges that prior to entering into said contract with the defendant, he had contracted and agreed with one G. H. Hartupee to procure and haul the necessary earth to fill certain lots owned by him in East Toledo near the bank of earth aforesaid. And by reason of said contract with said Hartupee, this plaintiff did go to the defendants and enter into a contract with them as aforesaid for the removal of said bank of earth, in order to use the same in filling the lot of G. H. Hartupee as aforesaid.

"Plaintiff further says that, having thus made all his arrangements to remove the said bank of earth, and being able and prepared to do so, the defendants, in utter disregard of their contract with the plaintiff, refused to allow or permit the plaintiff to remove the said bank of earth, and have thence hitherto persisted in the breach of their contract by so refusing to allow the plaintiff to remove said earth. And so it was that the plaintiff was compelled to procure

earth at another place some distance farther from the said lot of G. H. Hartupee than was the said bank of earth of defendants, and was compelled to dig and haul the same at great cost and expense to plaintiff over what he would have been compelled to pay had defendants fulfilled their said contract.

"Plaintiff was also put to much time and expense in finding the said earth with which to fill said lot of said Hartupee in order to fulfill his contract with him.

"Plaintiff is further damaged by reason of the breach of said contract by defendants, in that he had contracted with one Harpster for a large amount of earth, to-wit: 513 wagon loads, which cost plaintiff to haul and deliver to the said Harpster six cents per load more than it would have cost had said defendants fulfilled their contract, and allowed and permitted plaintiff to remove their said bank of earth as aforesaid.

"An itemized account of the loss and damage sustained by plaintiff by reason of the said breach of contract by the defendants, is hereto attached, marked "Exhibit A" and made a part hereof, the full amount of the same being $410.83.

"Wherefore plaintiff prays judgment, etc."

It will be observed that nowhere does the pleader state that he had informed the defendants in any manner or form of the purposes for which he intended to use this earth, or that he was to use it to fulfill any contracts whatever. The work was never done, and, although the question is not raised, it seems to me that the petition does not state a cause of action against the defendants. The bill which he makes up for this work is as follows:

Contract price with Detwiler,		$50.00
Contract price with Frank Hake and D. Harpster,		25.00
Cost to fill lot of G. Hartupee, shovellers and teamsters,	$542.95	
Lost time of self and son,	42.00	
Labor of self and son,	144.00	
	$728.95	

CREDIT:			
Cash from Hartupee,	$398.90		
Cash from Worall, removing earth,	25.00	$423.90	
Loss on job		$305.05	$305.05
513 loads of earth to Harpster at six cents a load extra cost,			30.78
Total damage,			$410.83

In his testimony, which is given in the case, plaintiff states that he went to the Detwilers and told them that he wanted to get this earth, and that they had some talk in regard to the matter, and Detwiler agreed to meet him later upon the premises. They then met upon the premises, and he claims that Detwiler agreed to give him $50 to remove the earth. There was a dispute between them, however, as to whether a certain privy which stood upon the premises should be removed also by Mr. Welever, and upon that incident of the agreement they divided, and the contract was given to another. But he states in his testimony in regard to it as follows:

"Q. Did you tell him anything about your making an arrangement to put this earth elsewhere? A. Yes, when he says to me, 'You can commence on there in ten days, or as soon as I get back, in ten days, I will move the house, give the job to a house mover.' Well, now,' says I, 'I want to make a contract with another man: I want to be sure I will have the placing of this earth'. He says, 'Whatever you like, do whatever you like with that bank, but the earth is yours, now, cut it down until I tell you to stop, put it where you like, make any contract you want to, this bank is yours.' 'I know I am not mistaken: it is yours.' Then I went and made by contract for this bank of earth to put it into this hole."

Now, if this was a mere contract to remove the earth, perhaps no question would be raised as to whether it was

within the statute of frauds. But we are clearly of the opinion, from the statement made by plaintiff as a part of his testimony, that the consideration of fifty dollars for removing the earth was a small part of his contract, and the real thing that he expected to obtain was earth, as a part of this lot. It was out of the earth itself, which was to be his, that he expected to make his profit by re-selling it or using it in refilling other lots, for which he was to get a compensation. So that we are constrained to hold that the substance of the contract was the sale of the earth itself—the fifty dollars to be paid him for removing it was simply incidental, and not the main consideration of the contract.

Now, whether this is within the statute of frauds, we think is a question that is very largely decided for us in the case of Hirth v. Graham, 50 Ohio St., 57, recently decided by the supreme court of this state. In that case the question arose in regard to the sale of some standing timber—whether or not the sale was within the statute of frauds. The court say, in the second syllabus:

"A sale of standing timber, whether or not the parties contemplate its immediate severance and removal by the vendee, is a contract concerning an interest in lands, within the meaning of the statute of frauds, and is voidable by either party if not in writing."

That case was first tried before a justice of the peace, and came up from that court. A request was made to the justice to instruct the jury that "if they find from the evidence that the trees about which this action is brought were at the time of said alleged contract then growing upon the land of defendant, and that no note or contract or memorandum of the contract of sale was at the time made in writing, the plaintiff cannot maintain this action, and your verdict should be for the defendant"; which instruction the justice refused to give, but on the contrary gave them the following instruction on the subject:

"This is an action for damage, not on the contract, nor to enforce the same, and if you find that a contract was made verbal or otherwise, and the defendant refused or failed to comply with its terms, the plaintiff is entitled to any damage you may find him to have sustained by way of such non-compliance."

There is quite an extensive opinion by Bradbury, Judge, the announcement of the opinion of the court occupying several pages, and the question is very fully discussed as to whether the statute of frauds is applicable to a case of that kind, that class of cases. It is shown that in some states of this Union the courts hold that the statute of frauds is not applicable; but in a large majority of states the statute is applicable, and the opinion proceeds to say:

"The question is now for the first time before this court for determination; and we are at liberty to adopt that rule on the subject most conformable to sound reason. In all its other relations to the affairs of men, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution as chattel property; it descends with the land to the heir, and passes to the vendor with the soil. Coal, petroleum, building stone, and many other substances constituting integral parts of the land, have become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that sales of such substances with a view to their immediate removal, would not be within the statute. Sales of growing timber are as likely to become the subjects of fraud and perjury, as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands, should depend not upon then intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty."

See also unreported case of Lithgow v. Shook, 39 Law Bulletin, 39.

Now, holding this to be a sale of a portion of the real es-

tate, a sale of a portion of the land itself, we are clearly of the opinion that it falls within the statute of frauds, and that the contract being verbal, no recovery could be based upon it, and the court of common pleas was therefore right in directing the jury to return a verdict in favor of the defendants, and the judgment of the common pleas will therefore be affirmed.

Hurd, Brumback & Thatcher, for Plaintiff in Error.

King & Tracy, for Defendant in Error.

(Fifth Circuit—Stark Co., O., Circuit Court—Feb. Term, 1898.)

Before Adams, Douglass and Smyser, JJ.

B. DANNEMILLER & SONS v. HENRY LEONARD & SON.

Evidence—Conversation by telephone—Competency of one listening to conversation—

Where a conversation by telephone is carried on by the parties to an action about the subject matter of the action, and there is an issue as to what was said between them, a witness who heard one of them talking into the telephone, may testify to what he heard.

Error to the Court of Common Pleas of Stark county.

ADAMS, J. (Orally.)

The case of B. Dannemiller & Sons against Henry Leonard & Son is here on error. The plaintiff in error was the plaintiff below, and the case was commenced by the filing of a petition in the short form on an account for $733.99. The answer first contains a *denial of the indebtedness*, and on that, for obvious reasons, nothing could be claimed. The answer further alleges, in brief, a payment on the account on December 29th, 1896, by a note of D. Tyler for $550.40; claims that amount should be credited on the account, and admits a balance due of $183.59, and no more. and for the amount admitted to be due, the defendants afterwards offered to confess judgment.

The reply admits that the parties agreed to receive the note as a payment; and the note, in fact, about which the controversy arises, was a forty day note, made by D. Tyler, payable to the order of Henry Leonard. But the reply further states that they agreed to take that note as a payment, with the further agreement that Henry Leonard should endorse the note in the ordinary commercial way; but says that shortly after the receipt of the note the plaintiffs discovered that it was endorsed by Henry Leonard "without recourse", and that that endorsement was fraudulent, and in violation of the contract, and that they elected to rescind the contract and returned the note, and denies all other allegations of the answer.

It may as well be noted here that there are no other or further allegations of fraud, except that tney say that this endorsement was fraudulent—"without recourse." There are no facts alleged from which the inference of fraud could be drawn; but the reply does allege a breach of the contract.

The case was tried on these issues, and resulted in a verdict for the plaintiff for an amount somewhat less than the amount for which the defendants offered to confess judgment—one hundred and eighty some dollars.

The plaintiffs prosecute error here, and insist this judgment should be reversed,—first, for error in the exclusion of evidence, (2) error in the charge, and (3) that the verdict is not sustained by sufficient evidence.

The controversy here, and the fact to be determined by the jury, and to be reviewed by this court, as to the weight of the evidence, depends entirely upon the evidence of Julius Dannemiller and Henry Leonard. Henry Leonard testifies that the contract was that Dannemiller & Sons were to take this note of D. Tyler as a payment. He says that nothing was said about endorsing it "without re-

course", but that he told them that if they preferred Tyler to him, they could have the note.

Dannemiller testifies that it was stated explicitly to Henry Leonard that he must endorse the note, and that "he knew what that meant—that if Tyler did not pay the note, that he must."

That is denied by Leonard, and as we view this case, that was the only controversy between the parties as to what the real contract was; although there might have been another controversy as to whether Dannemiller knowingly accepted the note with the endorsement "without recourse" thereon, and thereby agreed to a new and a different contract from the one which he testified to.

So that, there being this conflict of testimony, and it depending almost entirely upon whether the jury would believe Julius Dannemiller or Henry Leonard, it is clearly not a case where a reviewing court can say that the verdict is clearly or manifestly against the weight of the evidence.

This charge is long, and there are numerous exceptions to it, but we have examined the charge carefully, and while in the trial of this case and in the charge there was perhaps too much said about the question of fraud (because we think that there was no real allegation of fraud in the pleading), yet, after a careful examination of this charge, we think that the charge stated the law correctly as the case was tried between the parties.

The other error, in the exclusion of the evidence, occurs on page 36, as to the testimony of Louis R. DeVille. Both Dannemiller and Leonard testify that one or two conversations that they had were over the telephone. That is, Dannemiller was in the office of Dannemiller & Sons using the telephone there, and Leonard was at the other end of the line. Both agree that there was a conversation, and disagree as to the terms of that conversation, as to what was said by the respective parties to the conversation.

Louis R. DeVille testifies that he was in the office of Dannemiller & Sons, and we think he identifies that telephone conversation with sufficient certainty, so that there can be no reasonable doubt that he was present, if his testimony is to be believed—that he was present in the office of Dannemiller & Sons at the time that Dannemiller was talking to Leonard over the telephone.

Now he is asked to testify as to what Dannemiller said into the telephone at his end of the line. Of course, he could not hear, and he does not attempt to state what occurred at the other end of the line, nor does he attempt to repeat what Dannemiller said had occurred at the other end of the line. But the attempt is made to show by him what Dannemiller said; and the offer to prove by him is that Dannemiller said into the telephone, in that conversation, that "this note is to be endorsed by you, you know what that means,—if Tyler does not pay it, you must." Now the question is whether that testimony is competent or not; and if competent, is it material.

The case in 153rd Illinois, page 262, and I need only read the second paragraph of the syllabus,—says:

"It is not error to permit a by-stander in a telephone office to testify to the part heard by him of a conversation by telephone, such conversation being shown aliunde to have been between the parties to a suit, and upon the subject-matter thereof."

Leonard testifies that this conversation was about the subject-matter of the suit. Dannemiller testifies that it was about the subject of the suit, and each gives his version of that conversation. DeVille testifies that he was there, and he heard Dannemiller's part of it, and the offer is made to prove by him what Dannemiller said. We think that on the authority of this Illinois case, and upon the reason of the matter, that the testimony is competent.

By way of illustration, if you leave out the connection by the telephone line, and have Dannemiller and Leonard in adjoining rooms so that they are not visible to each other, but the sound of their voices could be heard between them, and have DeVille in the room with Dannemiller where he can see and hear Dannemiller, but cannot see or hear Leonard, and you have Leonard and Dannemiller admitting that they were talking to each other at that time, and DeVille testifying to what Dannemiller said, we think that would simplify the matter by leaving out the telephone connection, clearly DeVille's testimony tends very strongly to corroborate the testimony of Dannemiller as to what that conversation was. Where there is a dispute between Dannemiller and Leonard as to what was said there, we think the evidence was competent. And it was material; in the state of this proof, where the case turned upon whether Dannemiller told the truth, or whether Leonard told the truth, or which one the jury would believe, we think that it was a very material matter. It might have changed the verdict in this case. And, for the error in the exclusion of that evidence, and for no other error, the judgment of the court of common pleas is reversed, and the cause is remanded for a new trial.

Third Circuit—Defiance Co., O., Circuit Court—March Term, 1896.
Before Day, Price and Norris, JJ.
HENRY SUHR v. S. W. HOOVER.

Court limiting argument to jury to subjects averred in pleading not error—

(1.) It is not error for the court to limit the field which might be covered by counsel in their address to the jury, to the matters averred in the pleadings—in this instance, an action on promissory notes, where not mere failure, but utter want of consideration was set up as a defense, to confine them to the claim of total want, and not mere failure, of the consideration.

Holder of notes acquired before maturity for value, knowing the consideration therefor, which is found without substance, not innocent holder—

(2.) The holder of notes acquired before maturity for value, who has full knowledge of the pretended considerations for which they were executed, which considerations are found of no substance, if not a fraud, is not an innocent holder, and can not enforce payment.

Error to the Court of Common Pleas of Defiance county.

NORRIS, J.:

The defendant in error was the plaintiff below, and commenced his action to recover on two promissory notes executed by the plaintiff in error, to one W. F. Place, or bearer; one for $250, due four months after date, and one for $225, due six months after date, each dated April 2, 1895, and bearing interest at 6 per cent. per annum. And he filed his petition in the trial court founded upon these evidences of indebtedness.

To this petition defendant filed his answer and amendment thereto, and denies each allegation of the petition, and as a further defense to plaintiff's action, he says that his signatures to said notes were obtained by misrepresentation made to him and by fraud practiced upon him by Place, the payee, and Hoover, the present holder and plaintiff in this case. That they represented to him that they owned certain secrets useful in the treatment of Hernia, and that if defendant Suhr and one Charles Hubbard would execute their notes for $675, they would sell them the exclusive right to use said treatment in Defiance and Henry counties, and would furnish them, free of charge for one year, a certain medicine used in the treatment of Hernia, of which medicine Place was the sole manufacturer and owner, and would furnish full printed instructions fully informing them as to how said system of treatment should be practiced; and after the expiration of one year, furnish them with said medicine at the price of $3 per fluid ounce. Hubbard was a

practicing physician, and upon these representations and promises, and upon the representations made by Hoover and Place that under this system of treatment and by the use of this medicine, there would be no cutting, no pain, no danger to life, no detention from usual occupation, that after cure there would be no necessity to use a truss, and that the cure would be radical and complete—upon these representations and promises made by Hoover and Place, and relying upon them, defendant Suhr and said Hubbard signed a contract which, in substance, embraced these provisions in its terms, and that in compliance with said contract, and relying upon said representations, defendant executed the notes set out in the petition.

Defendant says, that all these representations were false; that said system of treatment is very painful and attended with great danger to life; that said system of treatment did detain the patients from their occupation, and did not effect the cure of Hernia. In short, that the representationss were false; that said treatment was without value, all of which Hoover, who defendant alleges was a party to the conspiracy to defraud him and procure said notes, and said Place well knew, and of which he was ignorant, and upon the truth of which he relied, and that hence his notes upon which plaintiff seeks to recover, were without any consideration, all of which plaintiff knew when he took the notes, and that to suffer the plaintiff to collect the same would be a fraud upon his rights.

To these averments of defendant's answer and amendment, plaintiff replies and makes general denial, and avers that he bought these notes before maturity for value and without notice of the infirmities alleged in the answer.

The issues thus made up were submitted to a jury in the common pleas court of this county, which resulted in a verdict for the plaintiff. Defendant's motion for new trial was not allowed. Judgment was entered upon the verdict,

a bill of exceptions was taken to the proceedings of the court below, and error is here prosecuted to obtain reversal.

The reasons assigned for reversal, embodied in the motion for a new trial and in the petition in error, are:

"That the verdict is against the weight of the evidence and contrary to the law of the case.

"Error in admitting evidence over defendant's objection and in the exclusion of evidence offered by the defendant.

"Error in the charge to the jury.

"Error in overruling the motion for a new trial."

And the defendant also complains that the trial court abused its discretion in certain criticisms of the answer made in presence of the jury; and it erred in refusing to allow defendant's counsel to address the jury upon evidence other than such as bore upon the failure of consideration pleaded in the answer.

The court, upon objection being made to the introduction of testimony sustaining the matters and things pleaded in defendant's answer, by way of substantive defense, refused to allow the case to proceed upon the pleading as it then stood, and remarked, in substance, that the allegations of the answer as to misrepresentations and fraud as therein pleaded were not sufficient to bar a recovery or to sustain the admission of evidence. And this in the presence of the jury.

These remarks of the trial judge were criticisms of this pleading; they were made before the testimony had proceeded to any length, at least upon defendant's case. They did not go to the merits of the controversy, and were not in a spirit of hostility to the defendant or his cause, and so far as we can see, in no wise were to his prejudice in the determination of the case. The court promptly allowed amendment. We see in this objection no serious cause to differ with the court below.

As to the limit put by the trial court upon the field that

might be covered by defendant's counsel in their address to the jury, we see in this nothing prejudicial, because by it the subject of comment was only circumscribed by the horizon of the case. The proposition, not only of failure, but entire want of consideration for the notes in suit, as pleaded in the answer and amendment, was a theme upon which counsel, if they saw fit, could point a moral or adorn a tale to their heart's content. And nothing is revealed by the record that would indicate that counsel wrapped their faces in their mantels, or at all retired from the combat.

We have read this record very carefully, every word of it, and we have failed to find error in the admission or rejection of evidence.

And now coming to the objection that the verdict is not sustained by, but is contrary to the weight of the evidence, and is against the law of the case. This assignment of error brings up in review everything upon which Mr. Hoover's right of recovery is grounded. It directs the attention of this court to the consideration of the notes upon which recovery is sought, and challenges the construction of the contract, which recites the reasons, and values, and the considerations for which the notes were given. The contract is in evidence, and upon it depends this case. The contract is a pretty skillful piece of fine printing. The Wilcox Hernia Co. was a concern located at Binghampton, New York—so says the contract, I quote from it, "and W. F. Place was the owner"—Place, as such, was the owner of certain useful secrets in the treatment of Hernia or rupture, and he was the sole manufacturer of a certain remedy used in and about this treatment of that complaint. Suhr, this defendant, and Hubbard, were desirous of purchasing the exclusive right to use this treatment, and in consideration of $675, part of which is evidenced by the notes in suit, Place, as the owner of the Wilcox-Hernia Co., agrees to grant, bargain, sell and convey to defendant Hubbard, the exclu-

sive right to use this treatment in Defiance and Henry counties. That is the contract. As an incident and condition of this agreement, the Hernia Co. agrees to furnish the defendant and Hubbard with full printed instructions for practicing this system, and without charge agrees to furnish for the period of one year, whatever of this medicine might be required in the treatment of cases. And will, says the contract, after three years, furnish the medicine or fluid at $3.00 per fluid ounce, and will not furnish the fluid to anyone else in this territory, nor practice said system of cure in these counties. And as a further consideration, and for this, the second parties agree to practice the system and use the fluid only in those counties, and agree to use diligence and care in the treatment of cases, and further agree—not to pay any more money—but to execute their notes, upon the delivery of the contract, as the evidence of the purchase price which they agree to pay, for the exclusive privilege of practicing the system of treatment in these counties.

Now, what did this defendant and Hubbard buy with this $675? They bought no secret, for no secret was ever revealed to them. Not a year's supply of medicine, for that was not the system of treatment, but a mere incident of the system of treatment. For the gratis medicine they were to use diligence and care in the practice of the system, and make a market for fluid at $3.00 per ounce; and were to execute their notes as evidence of the full purchase price agreed in the contract, for the right given to exclude others from alleviating, by the same system, the sufferings of their kind, and not for the payment of the notes, but for the purpose of these latter stipulations, they give a bond of $1,000.

They got for their $675, what was represented to them, and what is solemnly declared in the contract to be a valuable and a secret and an exclusive method of cure, in the mysteries of which they were to be initiated, and in the

practice of which they were to be educated, and made wise by the full printed instructions of the Wilcox Hernia Co. And the contract pretends to give them the sole control over the territory, and the exclusive right to use the system therein.

Now, of what did the system for which they agreed to pay $675 consist? It consisted of subcutaneous treatment of Hernia, with an ordinary hypodermic syringe, and of nothing else. Was it a novel method of treating that affliction? No, it was nearly as old as the cesarean birth. Was it secret? Far from it; a physician who knows not of it is away outside of the most venerable upon surgery and specialties. Is it patented? No. What right, exclusive or otherwise, was acquired by this purchase to practice this system of treating rupture? No right. By What authority could the Wilcox Hernia Co., of Binghampton, N. Y., vouchsafe to defendant or to Hubbard the exclusive right to do these things in Defiance and Henry counties, Ohio? By no authority whatever. What then was bought with this $675? Nothing, not a thing in the world. And even if it were that which could be parted with, the record shows that defendant and his colleague received no printed instructions, and no formula.

At the time this contract was signed and these notes were given Hoover was in the Hernia combination himself. His office appeared to have been the headquarters of Place, as it was of Allen and Griffin, and others who were engaged in the practice of this system, or were lay members of a syndicate, the object of which was to push the method.

Hoover had bought territory of Place three months before the date of these notes. They, Hoover, Allen and Griffin and others, were all present when this deal was made. Hoover knew all about the consideration of these notes; he knew all about this Hernia-Wilcox combination. He says the system was not new, was not patented, was not a secret.

Of the fluid, the formula of which he swears he knew and refused to give from the witness stand, he don't say it is new or the best, but merely designates it as pretty good fluid. And with all this knowledge of this transaction from its very inception, standing as he did as godfather to it, how could he be an innocent holder of these notes? He surely could not, and we so find. The notes were without consideration, and he knew it when he acquired them. This being the case, we find that the verdict is not supported by the weight of the evidence, but is contrary to the evidence, and against the law of the case.

And in the face of the contract as we have considered it, we find that the charge of the court, which is otherwise full and complete, in so far as the jury were instructed that this contract imputed a consideration for the existence of these notes, was misleading.

The judgment is therefore reversed and a new trial is granted at costs of defendant in error, and the case is remanded to the common pleas for execution and for further proceedings.

John W. Slough and *B. B. Kingsbury*, for Plaintiff in Error.

C. A. Bowersox, for Defendant in Error.

(Sixth Circuit—Lucas Co., O., Circuit Court—Jan. Term, 1898.)

Before King, Haynes and Parker, JJ.

THE PHOENIX INSURANCE COMPANY, of Hartford, Conn., v. CHARLES ROMEIS.

Fire insurance—Appraisement of loss claimed to be void—Direct action on policy proper—

(1.) In an action against an insurance company for the amount which it should pay on account of a loss by fire which loss had been appraised by appraisers as provided by the policy, but which appraisement, [the] insured claimed, was improp-

erly made and void, the action was correctly brought upon the policy for the whole amount it was claimed the company was liable to pay

Same—Action to have appraisement set aside not necessary—

(2.) In such a case it is not necessary by a separate action, or a separate cause of action, in the petition, to first attack and seek to have the appraisement set aside by the court.

Appraisement—What will not amount to—

(3.) The property injured was a stock of goods, some of which were entirely, and others, partly destroyed. Held, the appraisers could not make a proper appraisement of the whole loss by a mere inspection of the stock remaining, nor without consulting books and papers, and hearing witnesses upon values of the articles destroyed.

Error to the Court of Common Pleas of Lucas county.

KING, J.

June 22, 1896, defendant in error was insured by the Phoenix Insurance Company for $2,000. June 28, 1896, a fire injured the stock of goods insured and destroyed a part. There was other insurance upon this stock of goods amounting to $5000. A suit was brought in the court of common pleas to recover of the Phoenix Insurance Company a two-seventh part of the loss alleged to be $1901.42, with interest from October 26, 1896.

To the petition there was an answer, and a reply to the answer. Afterwards a trial was had at the September term, 1897, which resulted in a verdict for the plaintiff for $2010.94, upon which verdict a judgment was rendered for that amount, after the overruling of a motion for a new trial, and the case is brought here, and we are asked to reverse that judgment.

We have given quite an extended consideration to the case, because it involves a great many questions, and some of them important ones. The variety and number of exceptions in the record will preclude our noticing them in detail. Those which we deem it necessary to notice, may be classified as follows:

"1. It is claimed that there was an appraisement entered into by the parties under this policy, the result of which binds both, and that an action could not be maintained upon the policy until the appraisal was first set aside, in a separate action, or by a separate cause of action included in the same petition, and heard and determined by the court before and apart from determining the other issues of fact in the case.

"2. That the court erred in permitting evidence to be offered under the petition as drawn attacking the appraisal, and in submitting this evidence to the jury along with the other issues in the case.

"3. That the verdict as returned by the jury upon that question, is not sustained by the evidence.

"4. It is claimed that the plaintiff should not have recovered because he had not complied with certain conditions of the policy precedent to the right to maintain an action—that is, that he did not make proper proof of loss as required by his policy; and next, that he did not submit to an examination under oath, nor produce his books and papers, as required by the terms of the policy.

"5. That improper evidence was admitted on the part of the plaintiff below.

"6. That the court erred in its charge to the jury.

"7. That the amount of the verdict returned by the jury is excessive."

1. Taking them in the order I have named, the first question arising is, whether the pleadings have properly presented the issue which the court heard and submitted to the jury. The petition alleged the loss, the issuing of the policy, the fire, the amount of the loss; failure of the company to pay; that plaintiff had duly performed all the conditions on his part, and asked for judgment.

The answer of defendant admits the issuing of the policy, the amount of their insurance—substantially as it was in the petition; admits that a fire occurred, and that the stock was damaged.

It denies the other allegations of the petition, and alleges as a third defense, that the policy contained

a condition whereby it was agreed that in the event of disagreement as to the amount of loss, the amount should be ascertained by two competent and disinterested appraisers. It quotes that item of the policy, and then alleges that a disagreement *did* arise between the parties, and that the plaintiff and defendant entered into an agreement in writing—and which agreement also included the other insurers—for submitting to appraisers the amount of this loss; that thereupon the plaintiff appointed a person and the defendant appointed another to act for it and the co-insurers; that the agreement was signed, and thereupon the persons named entered upon the discharge of the duty of appraisal, and did appraise the loss, which appraisement they signed and duly verified.

The answer alleged that they found the amount of damage to this stock of goods to be $2660.77. It does not say anything further about the amount, but if it were carried out it would be found that upon that the plaintiff would be entitled to recover about $760.22, with interest from the date named in his petition, which would perhaps make about $800 all together.

To this answer there is a reply conceding the allegations contained in the answer: that there was this provision in the policy; that the parties had entered into an agreement to appraise this property, and going on further to say that the appraiser selected by the Insurance Company was incompetent, interested, prejudiced and biased, and setting up several other things as objections to him, and alleging that they did not return a proper, fair, true or just appraisement, that the appraisement was invalid for these reasons, and ought to be set aside.

It is said, as I have before suggested, that this ought to have been the subject of a separate action, or brought as a separate cause of action, and first determined in this case. A great many authorities have been cited by counsel on

both sides, which we have examined, and have come to the conclusion upon that question that this action was properly brought. We do not decide or hold that it might not have been differently brought, and properly so. We would not undertake to hold that it would not have been proper pleading for the plaintiff to allege in his petition the making of the appraisement and the award of the appraisers, and then assert that it was invalid for the reason assigned, and ask to have it declared invalid and set aside. There are cases that have proceeded on that line, in states adopting a system of pleading like ours, 137 N. Y., 137, (Bradshaw v. Insurance Co.), but there is no decision on the precise point of pleading contained. There are some cases that are somewhat in point on the subject, and we are disposed to follow them. The first I refer to is a case found in 16 Washington Repts. 232, (Davis v. Insurance Co.). Action was brought, as in this case, and the answer was the same as in this case, followed by a reply attacking the ward of the appraisers. This, the court held was entirely proper. I have not time, and it would not probably be profitable, to read from that very interesting case, but many authorities are cited, deciding the question squarely. One in 67 Federal Reporter, 483, (Kahnweiler v. Ins. Co.) decided by the Circuit Court of Appeals, District of Kansas, is an interesting case; and the decision is sound, as we view it. There is a case in 68 Federal Reporter, 173, (Robertson v. Scottish Union, etc. Ins. Co.), along the same line, in which they distinguish certain cases in New York and North Carolina from a case decided in Virginia, but holding that in Virginia, under the practice there prevailing—the common law system of pleading—that a separate action would be required. To the same effect is a case in 85 Iowa, 6 (Adams, Admr. v. Ins. Co.), although the question is not squarely determined as to the matter of pleading; but in that case the action was as in the case at

bar, and the defense set up in the answer that the matter had been adjusted by appraisers, and that the plaintiff had no cause of action upon the policy and it was insisted that he could not recover upon the policy because there had been an appraisal, but the court held that he could. To the same effect is 140 Mass, 343, (Soars v. Ins. Co.), and I think it a very pointed case upon this question. There they hold that in an action where it was claimed by the plaintiff that the action of the appraisers was for any reason invalid so that the appraisement would be set aside by the court, that it might be so treated by the plaintiff, and that the action was properly brought upon the policy, and not upon the award of the appraisers, and, on page 345, the court say:

"The jury have found that the award which the defendant relies on is invalid It can therefore have no effect upon the rights of the parties.

"But if it had been a valid award, it could not, as contended by the defendant, prevent the plaintiff from maintaining his suit upon the policy. The award has reference merely to the damages. The agreement of submission merely refers to arbitrators, the appraisal and estimate of the damage by fire to the plaintiff's property, and expressly provides that the award shall have no reference to any other question or matter of difference, and shall be 'of binding effect only so far as regards the actual cash value of, or damage to, such property.' A valid award under this submission might be evidence of the damages in an action upon the policy; but it is too clear to admit of any discussion that the only action of the plaintiff must be upon the policy, and not upon the award."

Perhaps in that case the award would not have the same effect as it would have had in this case if it had been valid, but the authority, I think, is very pertinent to this question; so that we can hold, based upon good authority, that the action was properly brought. The defense came in properly in the answer, and the attack upon the award is placed in the reply.

2. Now, under this condition of the pleadings, the court might well have allowed the proof to follow the order of the issues made by the pleadings. But, upon the trial, the court required the plaintiff, in order to attack this award of the appraisers, to offer his evidence bearing upon that point in connection with his other evidence in making out his case. There was no error committed by the court in that order — certainly none to the prejudice of defendant; it simply required of the plaintiff to put in all the testimony that he had bearing upon all the issues in the case, in the first instance, and the defendant then would have the advantage of knowing what that evidence was, and could then answer. In this connection it is said that the court erred in submitting that evidence to the jury; that, although the pleadings might be proper and it be entirely correct to attack this award in an action brought to recover for the amount of the loss, yet the question of validity should have been determined by the court, and not submitted to the jury. We think the court might have determined that. But, again, its action in submitting the question to the jury, could not, by any process of reasoning, be prejudicial, since the evidence submitted to the jury was also submitted to the court, and the court, in passing upon the motion for a new trial, necessarily passed upon these issues, so that it was passed upon twice—the defendant had two tribunals to decide the question rather than one, and one of these is the one which it claims should have heard and determined it alone. The statute, sec. 5131, as well as the principles of practice in courts of equity allow the court to submit any question—any issue of fact—to a jury. We hold that there was no error in submitting this question as it was submitted to the jury.

3. This brings us to the question whether this verdict,

upon that point, is sustained by the evidence? We are constrained to hold that it is. We could not hold otherwise. There are several reasons for this. I will say here that—curiously enough—neither the insurance policy, nor agreement to arbitrate is found in this record, from beginning to end; and the only point which is made about that is, that the bill of exceptions, while it purports to set out all the evidence, does not set that out. However, that can hardly be essential, since the question is raised by the answer and reply. The answer alleges that the policy contained this agreement:

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each electing one, and the two so chosen shall first elect a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire."

The agreement was made, then, to submit this loss to competent and disinterested appraisers. That was the agreement in the policy. I take it that they did not make any other contract when they came to make the agreement of appraisement. Now, the evidence tends to show in this case that the appraiser appointed by the insurance company lived at Columbus, Ohio, and that he was sent for by the company to come to the town of Alexandria, Indiana—in another state—to appraise this loss. It tends to show that he had previously acted for this company in the same capacity. It tends to show that while present and acting as appraiser, he effectually dominated and controlled his co-appraiser, that he usually had the last word, and what he said was adopted.

Now, there is, in our judgment, enough of this sort of evidence to sustain the verdict of the jury, and holding that this appraisement for this reason was invalid. See 131 N. Y., 131. But we do not care to rest the decision upon that. Referring to the agreement as contained in the answer—after referring to the appraisers as "competent and disinterested persons", it says: that they "shall then estimate and appraise the loss, stating separately sound value and damage" What does that expression mean? Obviously it means that the appraisers are to state separately the sound value and the damage to each and every article injured by the fire—not the sound value and the damage to the stock of goods insured, but to the articles thereof. Otherwise, these gentlemen are not appraisers at all—they are judges; they constitute a jury; they are arbitrators to determine the amount of loss rather than the particular injury that may be traced to each and every article.

Again, if they are to determine all the loss, both that upon the injured articles and that which is represented by no injured articles—in other words, where there are articles that are entirely wiped out of existence, if they are to find the loss of stock, to that extent they become tryers of a question of fact, and must get evidence. It is argued by plaintiff in error that it would have rendered their finding absolutely void if they had called witnesses before them, or had investigated other facts than those which their eyes disclosed. Then it must follow that they were not there to do anything but to appraise the damage to the articles which were still in existence. They undertook, however, in this case to do more: they did set forth the damage to the articles in existence, and stated the amount of the whole that they found—stating a gross sum—and wrote in their report that this included the articles totally destroyed by fire—but what they were they did not say—finding that the total damage or loss to the stock—and not to the articles—

was twenty-six hundred and some odd dollars, and they signed the report and went away. Now, that report was invalid for the reason that the appraisers could not, by the process adopted, know the number, character, quality or value of the articles totally destroyed. The evidence in the record was overwhelming that there were articles that were entirely burned; and there were others like hats, of which there was only left the piece of wire that went around the rim. These appraisers could not tell the kind of goods they were, what they were worth, or the condition they were in before the fire, without calling for testimony—without inquiring of somebody who knew about it—or without getting hold of some books, papers or invoices and arriving at it by the best means possible. We do not find it necessary to hold that they had power to do that, but we do hold, that they did not undertake to do it in this case—they did nothing which would enable them to find the value of the property totally destroyed. Further, the evidence shows beyond doubt that the plaintiff below was present in the town at the time of the appraisement; that he had seen the appraisers, together with his local attorney, and had informed them that he had his books and papers showing his invoices for many of the goods which were in the store, and was ready to produce them at any time. He was informed by these appraisers that when they wanted him they would notify him. He waited at his boarding place during the day and until evening, and then found that they had signed their appraisal, left it at the hotel and fled the town. Now, for that reason, we think, this verdict was fairly supported by the evidence—because, as I have said, this was not an appraisal.

4. It is urged that other specific conditions of the policy, were not complied with by the insured. The proofs of loss are a part of the record in the case. We think the plaintiff furnished proper proofs of loss. He furnished them within sixty days—at least no complaint is made on that

point. They were sworn to within sixty days, and appear to be proper on their face, and there is no evidence of any kind that the company ever objected to them; on the contrary, it proceeded to demand, as it might under this policy, an appraisement of the property, and appointed its appraiser and entered into the appraisal of it after agreeing that the statement of the appraisers should govern, and is here insisting that it shall govern.

Second, it claims that the defendant did not submit himself and his books for examination. I have referred to what he was ready to do when the appraisers were there. I do not find in the record that the company made any other demand upon him at any other time to present himself or to bring his books and papers for examination; but he was there at the time named, and ready, and the appraisers would not hear him. Therefore that objection is untenable.

5. The next objection is, that improper evidence was admitted. There are two or three hundred objections and exceptions to the evidence in this record. We do not think any of them are worthy of discussion except what I will refer to more particularly—found on pages 127 and 128. The plaintiff on the witness stand testified that the next day after this appraisal was made he was at his attorney's office, and the appraiser who had been selected by him came in—Mr. Pilger by name—and he states who were present, and then says he had a conversation with Pilger in the presence of the witnesses named—"In the presence of the parties I spoke of there, in Judge Ryan's office, I asked him the question what he meant by his conduct, and about deceiving me as he did."

"Q. In what respect, referring to what? A. That he and Mr. Boyd had agreed to send for me, to inquire for my books and papers, and which they did not do.

"Q What answer did he make then? A. He said, in the presence of the other parties, that Mr. Boyd, when he

asked that I be sent for, said to him 'Now that is useless; it won't make any difference what his books say or what his papers indicate, or what person he would bring into this before us. I have made up my mind not to give him a cent more.''

These questions were all objected to, and motions made to strike out, which were overruled. Now that objection is preceded by an objection to testimony concerning anything that took place at the time of the appraisal. The secretary or clerk of the appraisers was called and testified to some things which were said during the appraisal, and that was objected to. We are inclined to hold that that was competent evidence; but, when we come to the detailing, on the following day, of what one of the appraisers said that the other appariser had said, we can not doubt but that it was incompetent. You could not impeach this appraisement by proof of what these appraisers had said about it after they had finished it. What they said about it while engaged in making the appraisal, we understand would be competent, because it goes with the act—it is a part of the act, and tends to explain it; and if anybody heard that and was himself called as a witness, he might testify to it; but after they had completed their work and been discharged, we doubt if what either said could be offered in this secondary manner, and certainly it is true that the plaintiff could not offer witnesses to prove what one of them said the other one had said—that is too remote. But while holding it incompetent, that does not dispose of it, for we do not think it was prejudicial. I have indicated in discussing the preceding question, that we consider the record here as showing that this appraisal was absolutely invalid. There is not a particle of evidence to dispute the claim of the plaintiff as to how it was made up, and the evidence shows plainly and distinctly upon its face that it was invalid, for the reason which I have before

discussed, and hence all of this evidence objected to was merely incidental and immaterial.

6. This brings me to the charge of the court. A great deal of this is disposed of by the same observation. The court could have said to the jury as a matter of law, that this appraisement was not properly made and they should disregard it. That would have disposed of a good share of this charge and the objections which are made to it. There is no conflict in this evidence; there is no question that this was not an appraisement of the loss or damage to this property. If the appraisers attempted to guess at it, they had no business to guess, because they were bound to ascertain the amount of loss from the sources of knowledge best attainable, if they are required to pass upon that question at all. This apparisement then was never made, and it might have been so treated by the court, and undoubtedly was so viewed by the jury. Justice would require that it be set aside. Arrived at in the manner in which it was, it does not deserve a moment's consideration.

Some criticism is indulged in by plaintiff in error because the court has made use of certain words which did not seem to be proper; in other words, the court used a number of different words to express perhaps the same thing. It is said that the court referred to these men, in describing what should be their qualifications, by saying that they should be capable, qualified, disinterested, fit, unbiased, etc.. those all referring to the same thing. They might be collected under the terms in the policy, as competent and disinterested. The word "competent", as used by the court, could not have referred at all to the mere qualifications of these men. No attack was made by the plaintiff or by anybody else upon the qualifications of these appraisers Either of them might have undertaken to and have told the value of goods like these, this no one for an instant doubts. The incompetency, or the interest shown, is manifest by

the result of their work—the fact that they did not give due weight to the facts which would make for the one party and against the other, and gave undue weight to facts which were in favor of one party against the other, that would render them, within the terms of the policy, either incompetent or interested, and it did not make any difference which, the final result of it is to render their work invalid. The question to be arrived at ultimately is whether the appraisement was properly made; and, as we have said, it was not properly made, for the very good reason that these men did not undertake to make an appraisement at all: they simply omitted to appraise, because they could not appraise goods which were not in existence without getting knowledge of those goods from some source, and that knowledge they did not have, and did not seek to acquire. So it is that in this appraisement they were either "incompetent" or "interested". If this was a disputed fact, in a new case, it would be required to be submitted to the jury—with some qualifications. I may say that we would not be inclined to hold that a party insisting upon an appraisal may repudiate it on the ground of the incompetence of the appraiser selected by him, if such incompetency was known at the time of the selection; but as I have said, the incompetence—referring to the qualifications or capacity—was not here made a question at all. Hence it would have been sufficient for the court to say to the jury that this appraisal need not be regarded by them, and, therefore, what the court finally said in discussing it, it was immaterial.

The other exceptions and arguments which have been made I have not had time to notice, but we do not regard any of them as erroneous in the sense that they should call upon us to reverse this judgment.

7. The parties in this case seem to have been antagonistic in more senses than one, if we may judge from the arguments which were made before us. The result of that was

that the jury seem to have found for the plaintiff, and did not pay much attention to what they found; and, under some circumstances, perhaps the court would be inclined to favor such a result, but we must view these facts as we find them.

We have gone over this record pretty carefully to see whether the verdict in amount is supported by the evidence, and we think we may say that it is not. We find that the inventory upon which the plaintiff based the amount of goods which he had in the store at the time of the fire—the inventory taken in 1895, is $6208.43. The amount of goods which he thereafter purchased to the time of the fire was $5056.12; included in these amounts are $237.00 goods returned; and $178.75 counted twice, leaving $10,848.80 worth of goods which he had either in the inventory of January, 1895,or had thereafter purchased. From the time of the inventory of January 1, 1895, until the day of the fire he had sold goods amounting to $6500.96—at the selling price.

In arriving at the cost of those goods, the plaintiff gets somewhat confused, but he swears pretty positively—and we think he meant it when he said it—that he sold these goods for an average profit of 40 per cent., he placing the figures so as to range from 33⅓ per cent. to 45 per cent., as the average profit. He is then inquired of what these last goods cost when they were bought, and he says $3900, and after that he is in hopeless confusion as to how he arrived at it. He is asked what he means by 40 per cent., and his answer shows that he was either muddled, or never knew. He says he arrived at it by getting the amount of goods sold,and multiplying that by 40 per cent. Then,of course, he is right when he says that $3900 was the cost—but it would make the rate of profit 66⅔ per cent. We do not think he meant that; we think he meant to say that he added 40 per cent. to the cost price as his profit, and that would make the cost price of the goods sold $4643.54,

which would leave $6205.26 worth of goods in the store at the time of the fire.

He says he allows 5 per cent. upon the value of those goods then in the store for depreciation; that some of them were some years old, and some were new. We see no reason why that allowance would not be small enough. That would leave the value of the goods $5895.00. From that, after the fire, he raked out of the embers and water goods which he says were of the value of $610, which amount he stands by, although he testifies that he failed to get that for them; but he proposed to take that upon himself, and credits that amount. That would leave, according to figures, $5285 as the amount of this loss, of which the defendant is to pay two-sevenths, which would be $1510, and with interest from the 26th of October, to the first day of the term of the court—September 13, 1897—would make the amount of the judgment which ought to have been rendered in this case, $1590.03.

I should say that the amount of the verdict as rendered is somewhat larger than the amount claimed in the petition, which arose probably from their computing interest to a later date; but we think this verdict can only be supported for about $1590; that it is excessive to the extent of $420.91

Now I will say that in arriving at that, and in making this computation, we have done so with some hesitation. It is possible that in testifying in this case that the amount of his profit was 40 per cent., that the plaintiff has been honestly mistaken as against his own interest; it may be that he did not mean that, and that the truth is that the cost of the goods was $3900. But if we affirm this judgment, we must hold that it was excessive to the amount of $420.91. We will, however, reverse it as being excessive, and award a new trial unless the defendant in error will remit that amount and accept the sum of $1590.03.

Smith & Baker, for Plaintiff in Error.

Brown & Geddes, for Defendant in Error.

(Fifth Circuit—Licking Co., O., Circuit Court—March Term, 1898.)

Before Adams, Douglass and Smyser, JJ.

TRAVICE VANCE et al v. MARGARET PARK.

Absolute devise claimed to be in trust—Proof required to establish trust—

Where a will devises property absolutely to a devisee, with the oral understanding that such devisee shall take the property in trust for other parties, such trust may be established by parol evidence, but the proof must be "clear, convincing and conclusive."

Appeal from the Court of Common Pleas of Licking county.

SMYSER, J.

The case of Travice Vance et al. v. Margaret Park was heard to the court upon testimony. The controversy arises solely over a fund of a thousand dollars. The plaintiffs filed a petition in which they say that they are the heirs at law of Asa Park, deceased, and said defendant is his widow. He died on the 5th of November, 1894. At the time of his death, and on the 13th day of June, 1894, he was the holder and owner of a life insurance policy in the Odd Fellows' Beneficial Association of Columbus, Ohio; which, at the first mentioned time, was worth the sum of a thousand dollars. That on the said 13th day of June, 1894, said Asa Park made and executed his last will and testament. That at the time of making said will, the defendant was present with said decedent, and then promised and agreed with him that if he would name her in his will as his sole beneficiary, she would collect from the said association the amount due, or to become due upon said policy, and, in the event of the recovery of the same, she would immediatey pay the same to said heirs in the manner following: one-fifth thereof to Mary Wells; one-fifth to Rachel

Brown; one-fifth to Ella Dumbauld, Laura Boss, Mary Doist, George Vance, Travis Vance, Eliza Vance and Elsie Vance, who are children of Eliza Vance, deceased; one-fifth to the children of Thos. C. Park, and one-fifth to the children of Lucy Smith. That thereupon the said Asa Park, on the said 13th day of June, 1894, in his said will named the said defendant as his sole beneficiary. That she has received this money, and refuses to pay it over. The prayer of the petition is that the money be declared to be a trust fund in her hands; that she be charged as a trustee, and directed to make payment as set out in the petition.

An answer is filed, setting out a copy of the will, making various admissions, and then a general denial. There are two defenses set up, which are substantially one, and that is, that she did not receive this money as administratrx; that she received it as widow, and that, as widow, she is entitled to the money according to the rules and regulations of the association, which became bound to pay in the event of death; and denies any trust in the matter.

The will is attached to the answer, and was offered in evidence: "I give and devise to my beloved wife, Margaret Park, all my property of every description, to be held by her absolutely in her own right."

The laws and regulations of the association were also offered, and I read from page 14:

"Sec. 20: And the president and secretary, on the death of a member of the association who is entitled to benefits, shall draw an order on the treasurer for the amount due, payable to the following persons and no others, as beneficiaries, and in the order named: (1) widow, (2) children, (3) mother, 4) sister, (5) father, (6) brother, or (7) grandchildren of such deceased member, unless that order of persons be changed by direction of said member."

It is contended here that there was a change in the order of persons to whom payment should be made of this fund,

by the testator. It is apparent that it is not by the terms of his will, and it is probably not necessary to decide the question here as to whether or not the fund provided for, and the order stipulated in sec. 20, to which I have called attention, can, or cannot, be changed by will. The 29 Ohio St., 557, would indicate that such change cannot be made, but the order has probably amended its rules by reason of that decision. Prior to the amendment and revision of their rules, which took place in 1884 or 1894, I don't remember which, (but it was after this certificate was issued), it read: "Unless that order of persons be changed by direction of said member in his life-time." These words are omitted.

We have heard the evidence. There are only two witnesses—Mr. Stasel, who drafted the will, on the one hand, and Mrs. Park, the defendant, on the other. As I say, it is quite apparent that if there is to be a trust arising in this case, it must be by virtue of parol testimony, fixing the status of this fund. It is not apparent from this will; in fact, the will precludes the notion of any trust arising. The fund is by the will given to her absolutely, if it is a part of his estate. If this fund is a part of Park's estate, by the terms of the will it goes to the widow absolutely. If not a part of his estate, it would go to her under section 20 that I have read.

Mr. Stasel was sent for by Park; he goes out to see Mr. Park; talks the matter over with him, and something is said about this fund. The old gentleman said to him that "I would like to have that go to my grandchildren." Mr. Stasel very prudently inquired something about the grandchildren. He ascertained from him the fact that many of them were minors; they were numerous; living in various parts of the country; some in Ohio, Illinois, and scattered, Mr. Stasel says he cannot remember just exactly where, but all over the country. Owing to the fact of their being so

situated, and many of them minors, he said to the testator that it was inexpedient to devise or bequeath this fund to these grandchildren, for the reason that the whole fund, in many instances, would be consumed by the appointment of a guardian. Thereupon, Mr. Stasel suggested to him: "Why not give it to your wife, and let her make distribution?" And he says that Mr. Park said to him: "I will be satisfied with that." And Mr. Stasel says that Mrs. Park was interrogated and asked if she would be satisfied, and she said she would; and that thereupon the will was so written. Now, Mrs. Park denies this. She says that she was in and out; that there was some talk about giving this to the grandchildren, but how it was finally concluded, she didn't know; and the court itself put the question to her: "Did you understand when that will was written that you were taking this fund for the grandchildren?" And she said, most emphatically, that she did not so understand it. That is the situation of the oral proof.

The rule is that, in order to engraft a trust by parol upon a written instrument, the proof should be clear, convincing and conclusive. It could be done in this instance just the same as if it were a deed; and we think the same rule is applied here as is laid down in the 46 Ohio St., 102, Mannix v. Bishop Purcell et al.: "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." So, we think it would be competent here to show by parol that this lady took this fund, not as widow; that the direction had been changed, and that she held it in trust for these grandchildren. But, there are some other rules that must be applied. By this authority: "such evidence should be clear, convincing and conclusive." I will not stop to call attention to the 16 Ohio St., and the other authorities

that the court called attention to as to when the trust will arise.

From this evidence, although we think Mr. Stasel is telling just exactly what he remembers about it, we think this lady is honest in her denial. From this proof we cannot find that any trust arises against her.

The proof must be "clear, convincing and conclusive." The will itself is very cogent evidence against the claim made here. A word from the draftsman, if such was the intention of the testator, could have put that question beyond controversy. But, the will gives her the property absolutely. The rules of the order stipulate that it shall go to the widow first. In my judgment, there is a total failure of proof. There is not even a variance. The claim of counsel in this petition and on the proof is that a trust was to arise in favor of the grandchildren. Mr. Stasel says that no names were given, but the grandchildren as a whole, or as a class were used. The petition says: "one-fifth thereof to go to Mary Wells". I don't know whether she is a daughter or not. I suppose she is. "One-fifth to Rachel Brown"; and then sets out the children of Eliza Vance, deceased. From all that appears in the evidence, we do not know whether these are children or grandchildren. If they are children, there is a total failure of proof in this case, because there was not a word passed between the testator and the draftsman that this fund was to go to any of his children. The only persons talked of were the grandchildren. There wasn't anything passed between Mr. Stasel and the testator that it should be divided according to the number of the children he had. It was to go to the grandchildren as a class; and the averment here is that it was to go one-fifth to Mary Wells, and so on. No such talk was had.

In view of all the facts, we are quite clear that there was no trust arising in this matter; that this woman, as widow, is entitled to this fund; and the decree will be so entered.

Blair Brick Co. v. Waltz et al.

(First Circuit—Hamilton Co., O., Circuit Court—Jan. Term, 1898.)

Before Cox, Smith and Swing, JJ.

THE J. W. BLAIR BRICK COMPANY v. GUSTAV WALTZ et al.

Entire mechanic's lien law of '94 invalid—Former law in force—

The decision by the Supreme Court that the Mechanics' Lien law of 1894 is unconstitutional so far as its provisions for sub-contrators' liens are concerned, renders that law invalid as a whole, inclusive of the repealing clause therein, and the Mechanics' Lien law thus attempted to be repealed remains in force. (Following the decision of the Circuit Court of the Sixth circuit in Whitney v. Gile, ante, p. 648.)

Appeal from the Court of Common Pleas of Hamilton county.

While the mechanic's lien law of Ohio, enacted in 1894, was in force, Waltz et al. took the contract for the erection of a building for George C. Schneider, and while the work was in progress the J. M. Blair Brick Company (who had obtained judgment for $471.15 against Waltz et al. for brick used in another building), filed a creditor's bill against Waltz et al., based on said judgment, and subsequently made the owner, Schneider, a party defendant. A number of sub-contractors also became parties defendant.

SWING, J.

A decree should be entered in this case finding no equity in favor of the plaintiff, but finding the defendants entitled pro rata to the fund brought into court by Schneider; McCammon & Co. to share with the others, provided they complied with the law. This decision is made on the authority of the case of Whitney v. Gile et al., 15 O. C. C., 648, in 39 Weekly Law Bull., of June 6, 1898.

Foraker, Outcalt, Granger & Prior, for Plaintiff.

Ed. M. Spangenberg, John J. Gasser, Chas. J. Hunt and *Wm. Hartley Pugh*, for defendants.

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