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NORTHEASTERN REPORTER

VOLUME 142

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COMPRISING

ALL THE DECISIONS OF THE SUPREME COURTS OF
OHIO, ILLINOIS, INDIANA, MASSACHUSETTS
APPELLATE COURT OF INDIANA
AND COURT OF APPEALS
OF NEW YORK

WITH KEY-NUMBER ANNOTATIONS

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Each syllabus paragraph in this volume is marked with the topic and Key-Number section ⇐ under which the point will eventually appear in the American Digest System.

The lawyer is thus led from that syllabus o the exact place in the Digests where we, as digest makers, have placed the other cases on the same point–*This is the Key-Number Annotation.*

(142 N.E.)

JUDGES

OF THE COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME

ILLINOIS—Supreme Court.

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JUDGES.

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WILLIS C. McMAHAN.

[1] Beginning November Term, 1923.
[2] Resigned November 1, 1923.
[3] Qualified November 1, 1923.
[4] Died November 29, 1923.

MASSACHUSETTS—Supreme Judicial Court.

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NEW YORK—Court of Appeals.

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OHIO—Supreme Court.

CARRINGTON T. MARSHALL, CHIEF JUSTICE.

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JAMES E. ROBINSON.
THOMAS A. JONES.
EDWARD S. MATTHIAS.
ROBERT H. DAY.
FLORENCE E. ALLEN.

[5] Appointed December 19, 1923, took office Jan. 7, 1924.
[6] Term expired December 31, 1923.
[7] Elected November 6, 1923, to succeed John W. Hogan.

CASES REPORTED

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VOLUME 142

JACKSON et al. v. STATE ex rel. BOARD OF COM'RS OF HUNTINGTON COUNTY.
(No. 24038.)

(Supreme Court of Indiana. Jan. 11, 1924.)

1. Pleading ⇐⇒402—Reply of some defendants to answer to cross-complaint held not on behalf of all.

Where the record discloses that two of six defendants filed an answer of denial by "the defendants and each of them," recitals in a pleading filed by the two defendants as a reply to the answer to their cross-complaint, after the issue on their answer to the complaint had been closed by a reply thereto, could not give effect to such pleading as an answer to the complaint on behalf of all six defendants.

2. Appeal and error ⇐⇒917(2)—Presumption that paragraph of answer not on file to which demurrer sustained.

Where clerk's entry stated that the second paragraph of answer was not on file and the transcript disclosed that demurrer to said paragraph was sustained and that defendants immediately filed "third paragraph of answer," on which issue was joined, the Supreme Court must presume in favor of clerk that third paragraph was a mere amendment of second, and that the second paragraph thereby ceased to be a necessary part of the record on appeal, nothing being shown to the contrary.

3. Trial ⇐⇒395(2)—Finding that contract was "awarded" to bidder held sufficiently definite.

Finding that contract was "awarded to" a bidder constitutes a sufficiently definite finding, meaning that it was entered into with all required legal formalities.

[Ed. Note.—For other definitions, see Words and Phrases, Awarded.]

4. Appeal and error ⇐⇒901—Unless record shows error, presumption is trial court is correct.

Except in so far as the record is made affirmatively to show error was committed, appellate court must presume that all rulings of trial court were correct.

5. Highways ⇐⇒113(5)—Measure of damages for breach of contract based on actual cost of completing work.

The measure of damages in an action on a bond for breach of a road construction contract is based upon the actual cost, not the reasonable cost, of completing the work, in the absence of any showing that the advertisement and letting of the new contract was not fairly and honestly done, and it is not necessary to show that the work actually had been completed and the contract price at which it was relet actually paid.

6. Appeal and error ⇐⇒1030—Right result being reached, judgment not reversed for technical irregularities.

Where the face of the record shows that the parties were given full opportunity to present their case and that a right result was reached, the judgment will not be reversed because of technical irregularities of procedure.

Appeal from Superior Court, Allen County; Carl Yaple, Special Judge.

Action on a bond of a firm of contractors by the State, on the relation of the Board of Commissioners of Huntington County, against Amos L. Jackson and others. The court made conclusions of law favoring the relator, to which each defendant excepted. Affirmed.

W. H. Eichhorn and John H. Edris, both of Bluffton, for appellants.

Lucas & Spencer, of Huntington, for appellee.

EWBANK, C. J. This was an action on the bond of a firm of contractors to recover damages because of their failure to complete a free gravel road in Huntington county that was ordered constructed under the "three mile act" as then in force. Section 7719, Burns' 1908; Acts 1907, c. 46, p. 68, § 1. The greater part of the length to be improved was north of the Salamonie river, and was comparatively level, while the short distance south of the river was laid out to pass through a hill in a deep cut that would require five times as much excavation as the longer distance at the north end. All of the highway, after being properly graded, was to be metaled with gravel to a depth as stated. That part north of the river was completed according to contract, and the contractors had received more than half of the agreed price, when they quit work, in July, 1913, stating that they could not fin-

ish until a proposed bridge across the Salamonie river should be completed. The bridge was put in during the spring and summer of the next year, and after the contractors had been notified repeatedly to complete the work under their contract, and after the bridge had stood for 20 months, and after the contractors had notified the board of commissioners that they would not complete the road, suit was brought on their bond.

[1, 2] Of the six defendants the record does not disclose that any but the two contractors, who were the principals in the bond, filed answers to the complaint. What purports in its recitals to be an answer of denial by "the defendants and each of them" is set out on page 42 of the transcript, but the order book entry which precedes it and under which it purports to be incorporated in the transcript states only that "the defendants Jackson and Gordon now file a reply of general denial to the answer in two paragraphs to cross-complaint of said defendants Jackson and Gordon herein in these words." This entry follows other entries showing that an answer and cross-complaint had been filed by Jackson and Gordon, and that a reply to the answer and an answer to the cross-complaint had been filed by the plaintiff. Recitals in a pleading filed by two defendants as a reply to the answer to their cross-complaint, after the issue on their answer to the complaint had been closed by a reply thereto, could not give effect to such pleading as an answer to the complaint on behalf of all six of the defendants. Appellants seem to rely on a docket entry, copied on page 26 of the transcript, stating that "the defendants Amos L. Jackson and James O. Gordon now file second paragraph of answer herein in these words. Not on file in this office. Kent Sweet, Clerk"—and on the fact that the pleading set out 16 pages later, under the record entry stating that Jackson and Gordon filed a reply, as stated above, purports also to contain a "second paragraph of answer to the complaint" by said Jackson and Gordon. But the transcript discloses that a demurrer to the second paragraph of answer thus shown to have been filed was sustained, and that the defendants Jackson and Gordon immediately filed a "third paragraph of answer," on which issue was joined. We must presume in favor of the action of the clerk in omitting such second paragraph from the transcript at the place where it is shown to have been filed that the "third paragraph" so filed was a mere amendment of the second paragraph, and that the second paragraph thereby ceased to be a necessary part of the record on appeal, nothing being shown to the contrary. Ætna Ins. Co. v. Indiana Nat. L. Ins. Co. (Ind. Sup.) 133 N. E. 4, 22 A. L. R. 402; section 691, Burns' 1914; section 650, R. S. 1881. The only pleadings presented for our consideration are the three paragraphs of the complaint, the third paragraph of affirmative answer by the contractors, who are the principals in the bond sued on, the reply thereto of denial and estoppel, and the cross-complaint, answer, and reply.

On proper request by the defendants (appellants) the trial court made a special finding of facts, on which it stated conclusions of law to the effect (1) that the law was with the relator, and (2) that the relator was entitled to recover damages in the sum of $7,401, as being the difference between the price at which the work of completing the road had been relet and $5,099, the balance remaining unpaid of the original contract price; and each defendant excepted separately to each of the conclusions of law. Appellants have waived all assignments of error except the assignment that the trial court erred in each of its conclusions of law, to which alone the points and authorities and arguments in their brief are addressed.

[3, 4] There being no answer except an affirmative plea setting up certain alleged facts which the court expressly found did not exist, the recital in the special finding of facts alleged in the complaint which were not formally put in issue by a denial should be liberally construed. In addition to the facts we have recited above in stating the nature of the action, the special finding set out the contract and bond sued on, and found that no work had been done by the contractors for 3½ years before this action was commenced; that almost 3 years after they quit work, being more than 2 years after the time fixed by the contract for the completion of the work and 20 months after the bridge across the Salamonie river was completed and 6 months after the contractors had notified the board of commissioners in writing that they would refuse to complete the work in accordance with their contract, and after the bondsmen (other defendants) had also refused to complete the work upon being notified to do so, said board entered an order reciting these facts, declaring a determination that the work should be completed according to the original plans and specifications, ordering notice of the reletting of the contract to be given, and directing that suit be commenced on the contractor's bond; that after due advertising and the receipt of bids, of which the lowest was for $12,500, such lowest bid was accepted, and a contract for the completion of the work in accordance with the original plans and specifications was "awarded to such highest bidder" for the sum of $12,500. Appellants insist that this fell short of a finding that a contract with such bidder for the completion of the work for that price was entered into, by which the bidder became obligated to complete it for $12,500. In this we think appellants are mistaken. If the finding that a contract "was awarded" be at all indefinite, in view of the

fact that there was no denial of the allegations of the complaint, we must presume in favor of the action of the trial court that the language was used in the broadest sense of which it is capable, if necessary to uphold such action. Except so far as the record is made affirmatively to show that error was committed, we must presume that all rulings of the trial court were correct. And under the issues as above set out we think that the statement in the finding that the new "contract was awarded" must be understood to mean that it was entered into with all required legal formalities, since the acts to be done in reletting an abandoned contract are specifically prescribed by statute, and the court proceeded on the assumption that all such acts were properly done in stating its conclusions of law and entering judgment.

[5] But appellants insist that the measure of damages was the reasonable cost of completing the work, and not necessarily the actual cost of doing so. However, if the board of commissioners, after the contractors had abandoned the work and refused to complete it, relet the work to the lowest bidder after due advertisement, and entered into a contract with him at a price fixed by such bid, and took a bond from him to secure the performance of his contract, in conformity with the provisions of the statute in such cases, an inference that the price at which it was so let was the reasonable cost would necessarily follow, in the absence of any showing that the advertisement and letting of the new contract was not fairly and honestly done. Being limited by statute to the single method of advertising and reletting the contract, the result of such reletting is necessarily conclusive as to the reasonable cost of getting the work completed by that method, unless impeached for fraud or illegality. Donaldson v. State ex rel., 46 Ind. App. 273, 283, 90 N. E. 132, 91 N. E. 748.

Neither was it necessary to show that the work actually had been completed, and the price at which it was relet actually paid, in order to make out a cause of action for the recovery of the damages claimed. Donaldson v. State ex rel., 46 Ind. App. 282, 90 N. E. 132, 91 N. E. 748.

[6] The facts found show clearly that appellants bound themselves to complete the work for $11,999; that they received all of that price but $5,099; that the lowest bid for completing it was $12,500; and that a contract to complete it was let at that price, in full compliance with the statute. These facts, with the conclusion which follows, clearly established relator's right to recover the sum of $7,401 for which the judgment was rendered in its favor. Where it is obvious on the face of the record that the parties were given a full opportunity to present the case and that a right result was reached, the judgment will not be reversed because of technical irregularities of procedure.

The judgment is affirmed.

HUTCHINS et al. v. INCORPORATED TOWN OF FREMONT et al.
(No. 24096.)

(Supreme Court of Indiana. Jan. 8, 1924.)

1. Municipal corporations ⟸323(1)—Courts cannot interfere with determination as to wisdom of improvements.

The necessity or wisdom of local improvements within an incorporated town having been left by the Legislature to the judgment of the board of trustees having jurisdiction thereof, the court cannot by injunction interfere with the board's determination thereof.

2. Constitutional law ⟸290(1)—Act providing for assessment for improvements held not unconstitutional as taking property without due process.

Act 1921 (Burns' Ann. St. Supp. 1921, § 8711), under which an assessment was levied upon lands and lots within the corporate limits of a town to pay for a part of street improvements therein, is not violative of Const. U. S. Amend. 14, as depriving property owners of their property without due process of law, because authorizing an assessment to be levied against all the real estate of the town without regard to the benefits to be received, except so far as the Legislature has determined that benefit will be conferred and without providing for any hearing as to whether the said lands will be benefited to the extent of the assessment.

3. Constitutional law ⟸68(4)—Legislature has power to decide what property shall be taxed for public improvements.

The power to decide what property shall be taxed for a public improvement is legislative, and the courts have no right to review the decision of that question.

4. Constitutional law ⟸68(4)—Apportionment of assessment is for Legislature when levied by uniform standard.

Where an assessment for the construction of improvements is levied upon property, that is of the class that is generally recognized as benefited, and is levied by a uniform standard, the apportionment thereof is for the Legislature, and the courts cannot interfere unless the legislative discretion is clearly abused.

5. Municipal corporations ⟸407(1)—Legislature has power under certain conditions to charge cost of local improvement without hearing as to benefits.

The Legislature has power to create special taxing districts, and to charge the cost of local improvement, in whole or in part, upon the property in the said district either according to valuation or superficial area or frontage, without any hearing as to the benefits.

6. Eminent domain ⟸2(11)—Act providing for assessment for improvements not unconstitutional as taking property without compensation.

Act 1921 (Burns' Ann. St. Supp. 1921, § 8711), providing for the assessment upon all the real estate of a town to pay for part of cost of improvements, is not violative of Const. art. 1, § 21, as taking property without compensation, for, in enacting the statute, the Legislature was not exercising the power of eminent domain, but the power to tax; that power being unlimited, except as restrained by the Constitution.

7. Municipal corporations ⟸407(1)—Competent for Legislature to provide for method of assessment for cost of improvement.

It is competent for the Legislature, for the purpose of paying for at least a part of highway or street improvements, to adopt a method of fixing a uniform assessment upon certain property in a designated district, or to provide for the assessment of all the cost according to the actual benefits received.

8. Municipal corporations ⟸407(2)—Act providing for assessment for improvements held not violative of constitutional provision for uniform and equal rate of assessment.

Act 1921 (Burns' Ann. St. Supp. 1921, § 8711), providing for the assessment of all the real estate in a town to pay the cost of construction of improvements, is not violative of Const. art. 10, § 1, providing for a uniform and equal rate of assessment and taxation, if the assessment is uniform according to some recognized standard, such as the value area or frontage of the real estate.

9. Municipal corporations ⟸865(2)—Levy for improvements held not to increase town indebtedness beyond constitutional limit.

Contention that a proposed levy for improvements would cause a town to become indebted beyond its constitutional limits based on the debt of the joint school district, in which the town was joined for school purposes, cannot be sustained; the indebtedness of the joint school district not being the indebtedness of the town, and the proposed levy not creating either an indebtedness against the town or the joint school district.

Appeal from Circuit Court, Steuben County; Dan M. Link, Judge.

Action by William Hutchins and others against the Incorporated Town of Fremont and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Maurice McClew and Alphonso C. Wood, both of Angola, for appellants.

Best & Yotter and Bratton & Gleason, all of Angola, for appellees.

GAUSE, J. This was an action brought by the appellants to enjoin the appellees, the town, the trustees of the town, and the contractor, from paving certain streets in the town of Fremont, and also asking that the trustees of said town be enjoined from levying a tax or assessment upon the real estate of appellants, situated in said town, to pay for any part of such improvement.

The complaint was in two paragraphs. A demurrer of each of the appellees was sustained to each paragraph of the complaint.

The appellants having refused to plead further, judgment was rendered against the appellants, and this appeal is prosecuted from such judgment.

The appellants have assigned as error the action of the court in sustaining the demurrers to each paragraph of the complaint.

The board of trustees of the appellee town undertook to improve the two main streets of said town by paving the same, under sections 8710 and 8711, Burns' Supp. 1921, being an amendatory act passed in 1921 (Acts 1921, p. 324). Each paragraph of complaint alleges the passing of proper resolutions for such improvement, together with the giving of notice thereof; the filing of estimates by the engineer; the determination of said board that the abutting property along said streets would be benefited a designated amount, being less than the total cost thereof, and that in the notice to bidders said board gave notice that the cost of such improvement, in excess of the amount of benefits to the abutting property, would be paid out of the general fund of said town in cash, if said town was able to do so, and that if said town was not able to pay the balance of said cost in cash out of the general fund, the remaining part would be paid from a fund raised by an assessment against all the lands and lots situated in said town.

The complaint does not allege that appellants own land abutting upon said streets, but does aver that they own lands within said town; that said town does not have sufficient money in its general fund to pay for the balance of the cost of such improvement above the amount assessed against the abutting property, and that appellants' real estate in said town and not abutting upon said streets will be assessed for a part of the cost of construction. It is then alleged that their said lands will not be benefited by such improvement to the extent of the proposed assessments. It is alleged that so much of said act of 1921 (section 8711, Burns' Supp. 1921) as provides for an assessment to be levied upon all the lands and lots in said town, to pay for a part of said construction, is invalid in that it violates the Fourteenth Amendment to the Constitution of the United States, and section 21 of article 1 and section 1 of article 10 of the Constitution of Indiana. There are also many allegations in the complaint which are in the nature of arguments as to why the improvements proposed should not be constructed, such as that it will necessitate a high tax rate and

that the town will not have sufficient money left to keep its other streets in repair.

[1] The parts of the complaint seeking to question the necessity for or wisdom of the improvements will be passed with the remark that these are matters which the Legislature has left to the judgment of the board of trustees, and courts cannot, by injunction, interfere with the board's determination thereof. Cason v. City of Lebanon (1899) 153 Ind. 567, 55 N. E. 768. The appellants do not point out nor discuss in their brief wherein the proceedings of the board of trustees fail to comply with the provisions of the statute governing the same; but, in fact, the complaint discloses that such statute was complied with, and, if it is a valid law, then the appellants have not stated a cause of action.

[2] Appellants first contend that the act in question violates the Fourteenth Amendment to the federal Constitution, because it authorizes an assessment to be levied against all the real estate of the town, without regard to the benefits to be received, and without providing for any hearing as to whether the said lands are benefited to the extent of the assessment. Appellants contend that by this statute they will be deprived of their property without due process of law.

The principle contended for by appellants has been decided adversely to them many times, by both the Supreme Court of the United States and by this court. French v. Barber Asphalt Pav. Co. (1901) 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; Webster v. Fargo (1901) 181 U. S. 394, 21 Sup. Ct. 623, 45 L. Ed. 912; Detroit v. Parker (1901) 181 U. S. 399, 21 Sup. Ct. 624, 45 L. Ed. 917; Voris v. Pittsburg Plate Glass Co. (1904) 163 Ind. 599, 70 N. E. 249, and cases cited; State ex rel. v. Board, etc. (1908), 170 Ind. 595, 85 N. E. 513. The substance of the holding in all of the above cases is that a statute which provides for the assessment of the cost of a public improvement upon property within a certain district which, in the opinion of the Legislature will be benefited thereby, is not violative of said Fourteenth Amendment, because it provides for the distribution of the cost according to the value of the property in the district, its area, or the front-foot rule, without any hearing as to benefits.

In Elliott on Roads and Streets (3d Ed.) § 686, it is said:

"The numerical weight of authority * * * is overwhelmingly in favor of the right of the Legislature to determine what property shall be assessed and how the apportionment shall be made. According to the rule generally laid down, no question can be litigated involving the decision of the Legislature, or the local authorities upon whom the power to decide has been conferred, concerning the apportionment of the expense."

[3] The power to decide what property shall be taxed for a public improvement is a legislative power and the courts have no right to review the decision of that question.

In the case of Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763, Mr. Justice Gray, speaking for that court, said:

"The Legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion."

As to the objection that the law may be unjust or work a hardship upon some, the same case further says:

"The power to tax may be exercised oppressively upon persons; but the responsibility of the Legislature is not to the courts, but to the people by whom its members are elected."

Much space is devoted by appellants, in their brief, to the proposition that the taxpayers, upon whom the burden of paying for a part of the proposed improvement will fall, will not be benefited to the extent of the tax that will be levied. This is an objection that is frequently urged against taxes levied for any purpose. Sometimes the objections appear well taken, but the courts have no right to review such questions, and if relief is to be obtained, it must be through the Legislature, where the Constitution places the responsibility. See Byram v. Board, etc. (1896) 145 Ind. 240, 44 N. E. 357, 33 L. R. A. 476; State ex rel. v. Board, etc. (1908) 170 Ind. 595, 611, 85 N. E. 513; City of Springfield v. Green (1887) 120 Ill. 269, 11 N. E. 261; Payne v. South Springfield (1896) 161 Ill. 285, 44 N. E. 105; Shelby v. Detroit (1881) 45 Mich. 431, 8 N. W. 52; Norfolk City v. Ellis (1875) 26 Grat. (Va.) 224; Davis v. City of Lynchburg (1888) 84 Va. 861, 6 S. E. 230.

[4] We should not be understood as holding that the Legislature, under the guise of the taxing power, can so abuse its discretion as to levy an assessment, or a special tax for an improvement, against property that clearly could not be benefited, or where it is apparent that the question of benefits is entirely disregarded; but where the assessment is levied upon property that is of the class that is generally recognized as benefited, and is levied by a uniform and equal rate or standard, then the apportionment thereof is for the Legislature, and the courts cannot interfere unless the legislative discretion is clearly abused. Gilson v. Board, etc. (1891) 128 Ind. 65, 75, 27 N. E. 235, 11 L. R. A. 835; White v. People ex rel. (1880) 94 Ill. 604; Payne v. South Springfield, supra; Raleigh v. Peace (1892) 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; Allen v. Drew (1872) 44 Vt. 174.

The statute in question is criticized be-

cause the appellants are not given an opportunity to be heard as to the amount of the levy to be assessed against their real estate that does not abut upon the streets to be improved.

In the case of French v. Barber Asphalt Pav. Co., supra, it was said by the Supreme Court of the United States:

"The precise wrong of which complaint is made appears to be that the land owners now assessed never had an opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the Legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The Legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confided to its jurisdiction. It may err, but courts cannot review its discretion."

The same objection was urged to the statute known as the Barrett Law, which was the predecessor of the law under consideration. In the case of Voris v. Pittsburg Plate Glass Co., supra, it was claimed that said law was invalid as to assessments on back-lying real estate, because no notice or hearing was provided as to the owners of such back-lying land. In the above case it was held that the law was not invalid on that account, although no hearing for such owners was provided, and it was held that what had been said in the case of Adams v. City of Shelbyville (1900) 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797, 77 Am. St. Rep. 484, as to the necessity of a hearing, was obiter dicta.

[5] On account of some statements in the opinion, in the case of Norwood v. Baker (1898) 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, some courts were led to hold that a statute such as we are now considering would not be valid unless it provided for a determination of actual benefits and a hearing thereon. Later that opinion was explained by the Supreme Court of the United as not going to this extent, in the cases of Webster v. Fargo, supra, and French v. Barber Asphalt Pav. Co., supra, and it is now generally held that the Legislature of a state has power to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage, without any hearing as to the benefits.

[6] As to the contention that the proposed law is violative of section 21, art. 1, of the state Constitution, in that the provision for levying an assessment upon all the real estate in the town, to pay for a part of the cost of the improvement, without any determination as to the benefits, except as the Legislature itself has determined that all such real estate is benefited and has authorized the local authorities to determine the amount thereof, is the taking of property without compensation, it should be borne in mind that the Legislature in enacting a law such as is under consideration is not exercising the power of eminent domain, and is not taking the property of the landowners, in the sense that is referred to in said constitutional provision, but is exercising its power to tax. The courts cannot declare a law, which provides for the levying of a tax, to be in violation of this clause of the Constitution, because it might be shown that some one or more of the taxpayers within the taxing district would not be benefited to the amount of the tax. Diven v. Burlington Sav. Bank (1907) 40 Ind. App. 678, 82 N. E. 1020; Cooley, Taxation (3d Ed.) 1181–1183; Ray v. City of Jeffersonville (1883) 90 Ind. 567, 574; Voris v. Pittsburg Plate Glass Co., supra; City of Springfield v. Green, supra; Payne v. South Springfield, supra.

On the proposition that the levying of an assessment for purposes of street and other public improvements is an exercise of a branch of the taxing power, and not the power of eminent domain, and for that reason is not the taking of property without compensation, and that the decision of the Legislature thereon is binding upon the courts, see the following cases, in addition to those cited above: Board, etc., v. Harrell (1897) 147 Ind. 500, 46 N. E. 124; State ex rel. v. Board, etc. (1908) 170 Ind. 595, 609, 85 N. E. 513; Allman v. District of Columbia (1894) 3 App. D. C. 8; Hackworth v. City of Ottumwa (1901) 114 Iowa, 467, 87 N. W. 424; Meier v. St. Louis (1904) 180 Mo. 391, 79 S. W. 955; Chicago, etc., R. Co. v. City of Janesville (1908) 137 Wis. 7, 118 N. W. 182, 28 L. R. A. (N. S.) 1124 and note; Taylor v. Palmer (1866) 31 Cal. 240; Denver v. Knowles (1892) 17 Colo. 204, 30 Pac. 1041, 17 L. R. A. 135; Chicago & A. R. Co. v. Joliet (1894) 153 Ill. 649, 39 N. E. 1077.

In the case of Board v. Harrell, supra, this court said:

"The power of the Legislature in matters of taxation is unlimited except as restricted by the Constitution. The Legislature, in the exercise of this power in making local improvements, may create a special taxing district without regard to the boundaries of counties, townships or municipalities. * * * For the purpose of making such improvement, the Legislature may levy a tax upon all or a part of the property in such district by a uniform rule according to its value, or may charge the cost thereof to the property in such district according to what is known as the 'front-foot' rule, thus determining in advance what property is benefited, or it may delegate to a subordinate agency the power to ascertain and report the benefit, if any, to the different tracts of real

estate within such district. In other words, the *Legislature may declare that all or a portion of the property within such district is benefited, either according to its value* or in proportion to its actual benefit to be determined by the Legislature itself or by persons selected for that purpose." (Our italics.)

[7] In this state (and the same is true in many others), it has been the practice frequently employed, since early in the state's history, to adopt the method of fixing a uniform assessment upon certain property in a designated district, for the purpose of paying for at least a part of highway and street improvements, while as to ditches, where the benefit is largely confined to the land drained, the plan generally followed by the Legislature is to provide for the assessment of all the cost according to actual benefits received. It is competent for the Legislature to adopt either or both methods, where the improvement is of the character that will justify it. In the statute under consideration, both methods have been adopted. The actual benefits to the adjacent property is first determined by the board; then the balance of the cost, in addition to what the town pays out of its general fund, is assessed against all the real estate within a designated taxing district, namely, the corporate limits of the town, which the Legislature has determined will be benefited by the improvement.

[8] It is urged that the statute under consideration violates section 1 of article 10 of the state Constitution, which provides for a uniform and equal rate of assessment and taxation. This question also has repeatedly been decided adversely to appellants' contention by this court. It is held that this provision of our Constitution does not require assessments to pay for local improvements to be levied equally upon all property of every kind in the taxing district, but only requires that there be uniformity in making the levy upon all property of the class the Legislature has designated as benefited. That is, if the Legislature has determined that only the real estate in a given district is benefited, then if the assessment is uniform according to some recognized standard, such as its value, area, or frontage, the constitutional requirement is satisfied. On this, see Anderson v. Kerns Drainage Co. (1860) 14 Ind. 199, 77 Am. Dec. 63; Goodrich v. Winchester, etc., Turnpike Co. (1866) 26 Ind. 119; Palmer v. Stumph (1868) 29 Ind. 329; Law v. Madison, etc., Turnpike Co. (1868) 30 Ind. 77; Gilson v. Board, supra.

In the case of Goodrich v. Winchester, etc., Turnpike Co., supra, the court held valid, and not violative of any constitutional provision, a law which levied a tax upon all real estate within three-fourths of a mile of a proposed road, to pay for its construction.

Appellants cite frequently in their brief, and seem to rely upon, the case of McKee v. Town of Pendleton (1900) 154 Ind. 652, 57 N. E. 532. In that case a complaint was held good which did not show that the defendants were attempting to comply with any law in force, relating to street improvements, and because of general averments in the complaint that the town authorities were attempting to levy an assessment in excess of the benefits that a proposed improvement would confer, it was held that a cause of action was stated. Such is not the case here, where the complaint discloses that all the steps required by the statute have been complied with.

[9] The complaint in the case at bar avers that the town of Fremont and the school township of Fremont are consolidated for school purposes. It is then alleged that such joint school district is indebted to the amount of $80,000, which it is alleged is 4 per cent. of the total assessed valuation of all the property of said joint school district. It is then alleged that the proposed levy for the improvement herein involved will cause said town to become indebted beyond its constitutional limit. It should be seen from a statement of this proposition that it is without any basis. The indebtedness of the joint school district is not the indebtedness of the town. Furthermore, the indebtedness created by entering into the contract for the construction of the improvement proposed is not an indebtedness of either the town or the joint school district. Board v. Harrell, supra.

No error was committed in sustaining the several demurrers to each paragraph of the complaint.

The judgment is affirmed.

BUCK v. SQUIRES. (No. 24012.)

(Supreme Court of Indiana. Jan. 10, 1924.)

1. Habeas corpus ⇐113(12)—Final judgment not set aside because of technical insufficiency of return.

Where the parties to an action for the custody of an infant child did not suffer judgment on the pleadings and exceptions thereto, but joined issues and offered evidence, and final judgment was rendered after a full hearing as to the facts, the court having control of the child with duty to award its custody as its welfare might require, such judgment will not be set aside, because of a mere technical insufficiency of the return.

2. Habeas corpus ⇐76—Return held to show that defendant's possession of infant child was lawful.

Where a petition in habeas corpus by a guardian alleged that defendant unlawfully took possession of a child without right, a return showing that it was born in defendant's home, and had lived there with its mother until the

mother's death, and that, under an agreement with the mother, defendant had continued to care for it, sufficiently showed that defendant's possession was lawful, in absence of demand by some one having a superior right.

Appeal from Circuit Court, Greene County; Thos. Van Buskirk, Judge.

Habeas corpus by George W. Buck, guardian, etc., against Lillie Squires. Judgment for defendant, and plaintiff appeals. Affirmed.

Chas. D. Hunt, of Sullivan, for appellant.
Arthur T. Mayfield, of Terre Haute, for appellee.

EWBANK, C. J. This was an action of habeas corpus for the custody of an infant a few days past one year of age. The defendant (appellee) was its maternal grandmother, and the plaintiff (appellant) had been appointed as its guardian, but was not shown to be otherwise related. The complaint alleged that the child's father was a person of unsound mind, under guardianship in Sullivan county, Ind.; that its mother was dead, that on her death, four months before, the defendant "unlawfully and illegally took possession of said child without right"; that defendant had no natural right to the custody of the child, as her custody of it had not been authorized or permitted by the petitioner of any court; and that plaintiff had been appointed by the circuit court of Sullivan county as guardian of "said Robert Ray Beck, minor heir of Mabel Beck, late of said county, deceased," and had qualified as such. There was no averment that the defendant had been asked by the guardian or by anybody else to surrender the possession of the child, and had refused, or of any facts tending to show that her possession, if lawful in the beginning, had subsequently become unlawful.

The writ which the court issued merely commanded the defendant to produce the body of said infant before the court at a time stated, there to abide the order of the court. By way of a return to the writ the defendant first "denied each and every allegation in the petition contained," and secondly stated facts as follows: That the infant was detained by her, and was under her care, control, and protection in Greene county, Ind.; (a) that said restraint was lawful and right, and was for the best interests of the child; that its mother was her daughter; that its parents were married nine months before its birth, and made their home with her continuously until the child's father deserted its mother five months after the marriage, without cause, and thereafter its mother continued to live with defendant until her death, a year later; that the child was born in defendant's home in Greene county, Ind., while its mother was so living there, and thereafter continuously until the time of the trial lived with defendant in her said home, and defendant had had the care, custody and support of said child all its life; that defendant supported and cared for the child's mother during all of her married life; that its father was not present when the child was born, nor at the death and burial of its mother, but had abandoned it, and had never seen it, except when it was taken to him on three occasions; that before the death of its mother she and defendant agreed together that defendant was to have the custody of said child, and to maintain, board, clothe, and educate it, and pursuant to such agreement she was furnishing it with a suitable home, and was boarding and clothing it in accordance with said agreement; (b) that the child had become attached to defendant, and loved her like a mother, and its affection for her had become so firmly fixed because of the close association between them that to separate them would serve to mar and endanger the future happiness and welfare of the child; (c) that plaintiff was appointed as guardian of the child in Sullivan county, Ind., without notice to defendant, and she never knew of it until the day this suit was brought; that the child was not a resident of Sullivan county in which the appointment was made, and had no property in said county; and that before such appointment was made defendant had instituted a proceeding in the Greene circuit court to adopt said child as her heir, which proceeding was still pending in that court; (d) that said child was delicate, and defendant's care of it since its birth gave her a knowledge of its physical weakness, and prepared her to minister to its wants better than any one else; that it was "cutting teeth" at that time; and, because of its condition and the hot weather at that time of the year (July), no change of its custody should be made; (e) that the only restraint put upon the child by defendant was to care for it and look after it as a member of her household; that she was a suitable and proper person to have the care and custody of the child, and had a good home, and was amply able to support, clothe, care for, and educate said child, and surround it with the necessary comforts of life, and, if permitted to retain custody of it, would do so.

Plaintiff (appellant) filed exceptions to this return, the purport of all of which was that it did not state facts sufficient to constitute a cause of defense to the cause of action stated in the petition, or to entitle defendant to withhold the custody of the child from the guardian. The exceptions were overruled, and plaintiff filed a reply of general denial. The cause was thereupon submitted for trial by the court, and, after hearing evidence, the court entered a finding and judgment, in general terms, that the plaintiff should take nothing by his action, and that defendant

was entitled to and should be awarded the custody of the child, and her costs. No bills of exceptions were filed, and neither the finding nor any action taken or omitted by the court at the trial is challenged by this appeal.

The only question discussed in appellant's brief or in any manner presented for decision is whether or not overruling the exceptions to the return which defendant made to the writ of habeas corpus was reversible error. An exception to the return of the defendant in habeas corpus is not exactly the same as a demurrer to an answer in a proceeding under the Civil Code. Cunningham v. Thomas (1865) 25 Ind. 171; McGlennan v. Margowski (1883) 90 Ind. 150, 153.

[1] Where the parties to an action for the custody of an infant child did not suffer judgment on the pleadings and exceptions thereto, but joined issues and offered evidence, and final judgment was rendered after a full hearing as to the facts, such judgment will not be set aside because of a mere technical insufficiency of the return as pleaded and excepted to. The court having control of the infant, with the duty to award its custody as its welfare and best interests might be found to require, and possessing large discretionary powers to be exercised for its benefit, the duty and power of the court were not measured nor limited by the allegations of the return. Bullock v. Robertson (1902) 160 Ind. 521, 523, 524, 65 N. E. 5; Glansman v. Ledbetter (1921) 190 Ind. 505, 509, 130 N. E. 230.

[2] However, the petition being based wholly on the alleged fact that defendant unlawfully took possession of the child without right, a return showing that it was born in her home and had lived there with its mother until the mother's death, and that, under an agreement with the mother, defendant had thereafter continued to keep and care for it, sufficiently rebutted that charge, and showed that defendant's possession was lawful in its inception, and unless and until it should be made unlawful, as by a demand for possession of the child by some one having a superior right, or in some other manner. Neither do we think that a teething baby must necessarily be taken from one that it has come to regard as its mother, and sent to a new home in midsummer at the behest of the guardian, if the court shall think it detrimental to the child's health and welfare. And so far as we are advised, if a guardian were appointed for a child in a county in which neither it nor its mother had ever resided, and in which it had no property, after a petition for its adoption had been presented to the court having jurisdiction in the county where it was born, and where it actually resided, we are not prepared to say that the latter court, on being asked by habeas corpus to take the child from the one seeking to adopt it, who had not before known of the guardianship, and to give it into the custody of the guardian so appointed in the other county, would abuse its discretion if it should refuse to do so; at least, until the court which appointed the guardian could be informed of the facts, and asked to set aside such appointment for lack of jurisdiction to make it (section 3056, Burns' 1914; section 2512, R. S. 1881), and until the court in which an adoption proceeding had been commenced before the guardian was appointed could render final judgment in that proceeding; the guardian having been held not a necessary party to an adoption proceeding, even if lawfully appointed. Leonard v. Honisfager (1909) 43 Ind. App. 607, 88 N. E. 91; Shirley v. Grove (1912) 51 Ind. App. 17, 98 N. E. 874.

But since the judgment must be affirmed for the reasons first stated, we shall not prolong this opinion.

The judgment is affirmed.

BAIRD, Sheriff, v. NAGEL. (No. 24493.)

(Supreme Court of Indiana. Jan. 8, 1924.)

1. Habeas corpus ⇐113(4) — State cannot compel sheriff, sole defendant, to appeal from judgment discharging prisoner in habeas corpus.

Under Burns' Ann. St. 1914, § 671, giving either party the right to appeal from a final judgment in habeas corpus proceedings, the state, not made a party to or appearing in, habeas corpus proceeding against the sheriff, either in the lower or the Appellate Court, and not filing any assignment of errors, cannot compel the sheriff to appeal from a judgment discharging the prisoner.

2. Appeal and error ⇐150(1)—Third party cannot appeal adverse decision.

A third party cannot take an appeal in the name of a party to the decision merely because it may affect his interests adversely.

Appeal from Circuit Court, Clark County; James W. Fortune, Judge.

Habeas corpus by Harry Nagel against William A. Baird, Sheriff of Clark County, Ind. From a judgment releasing plaintiff from custody, defendant appeals. Dismissed.

U. S. Lesh, Atty. Gen., and James L. Bottorff, of Jeffersonville, for appellant.

WILLOUGHBY, J. It appears from the record in this case:

That the defendant, William A. Baird, was on April 30, 1923, the duly elected, qualified, and acting sheriff of Clark county, Ind., and had been such ever since the 1st day of January, 1923. That the petitioner, Harry Nagel, was on April 30, 1923, and since the 24th day of February, 1923, had been, confined in

the county jail in Clark county, Ind., by virtue of a commitment issued on the 24th day of February, 1923, by Henry A. Burtt, special judge of the city court of the city of Jeffersonville, Indiana, under the following commitment:

"State of Indiana, County of Clark.

"To the Jailor of Said County:

"Whereas, Harry Nagel has been tried before me as special judge and adjudged guilty of the offense of possessing intoxicating liquor with intent to sell the same, and by me fined in the sum of $400 and costs of $30, total fine and costs $430, and judgment rendered thereon for said sum, to which was added a jail sentence of 60 days: You are therefore commanded to confine him in the county jail for the space of 60 days unless sooner discharged by law, and if, at the expiration of said 60 days, said Nagle has failed to pay or replevy said fine and costs amounting to $430, then you will continue his confinement in said county jail for a period of 370 days.

"Dated this 24th day of February, 1923.

"Henry A. Burtt, Special Judge."

That on the 30th day of April, 1923, Harry Nagel, filed his verified petition in the cause, entitled Harry Nagel v. Wm. A. Baird, Sheriff of Clark County, Ind., by which petition it is shown that he is unlawfully restrained of his liberty, and is wrongfully imprisoned, and that upon such petition the court ordered that a writ of habeas corpus should be issued, and the same was issued, and the defendant in said cause, Wm. A. Baird, sheriff of Clark county, Ind., was ordered to have the body of Harry Nagel before the judge of the Clark circuit court on the 30th day of April, 1923, and such proceedings were had in said cause that it came to trial on the 1st day of May, 1923, and on said 1st day of May, 1923, the court entered judgment releasing the said Harry Nagel from custody.

It appears from the record that a motion for a new trial was filed on the 2d day of May, 1923, but the motion was not ruled upon until September 11, 1923, when it was overruled. The transcript was filed in this court November 16, 1923. On November 30, 1923, the appellant filed a motion to dismiss with proof of service of notice. Said motion was verified, and, omitting the caption, jurat, and signature, is as follows:

"The appellant in the above-entitled cause respectfully moves the court to dismiss said cause for the reasons following: (1) That said appellant did not authorize or consent to said appeal, or any other appeal from the judgment of the Clark circuit court in said cause, but expressly refused to appeal said cause, and had no knowledge that said cause had been appealed until after the transcript had been filed, the cause docketed, and newspaper comment on said appeal published. (2) That said appellant was represented in the Clark circuit court by Burdette C. Lutz, county attorney. That James L. Bottorff, who purports to represent appellant in said appeal, is the prosecuting attorney for the fourth judicial circuit, and as such prosecuting attorney voluntarily appeared in defense of said cause in the Clark circuit court, but without any employment by, or authority to bind this appellant, that one Joseph H. Warder, who is mayor of the city of Jeffersonville, and ex officio judge of the city court of Jeffersonville, also appeared with James L. Bottorff, in defense of said cause in the Clark circuit court, but without any employment by, or authority to bind, appellant. That said James L. Bottorff, prosecuting attorney, as aforesaid requested appellant to appeal from the decision of said Clark circuit court, but that this appellant, acting under the advice of said Burdette C. Lutz, then refused, and has ever since refused to appeal said cause. That the bills of exceptions and transcript in said cause were prepared and filed without appellant's knowledge or consent. That appellant neither signed a notice to the appellee and to the clerk of the Clark circuit court of his intention to take a vacation appeal, nor did he authorize said James L. Bottorff or any other person to sign such notice as his attorney or agent."

On December 7, 1923, James L. Bottorff filed an affidavit in opposition to the motion to dismiss. In such affidavit he alleges that he is the duly elected, commissioned, and qualified prosecuting attorney of the fourth judicial circuit of the state of Indiana; that a writ of habeas corpus was issued against appellant, as sheriff, same made returnable forthwith; that this affiant was notified of the filing of such petition for writ of habeas corpus, and that he appeared in said cause solely by reason of his official position and for the purpose of protecting the rights and interests of the state of Indiana; and in another place in said affidavit, affiant says:

That "said affiant talked with appellant at various times regarding the appeal of said cause, but that on each of said times said appellant stated that he did not desire to appeal said cause, but this affiant informed said appellant that he intended to appeal said cause on behalf of the state of Indiana, as he believed, that said appellant was only interested as the appellant therein, figuratively speaking, but that he believed that the state of Indiana was the real party in interest therein, and that it had the right to appeal said cause regardless of whether appellant was willing to do so or not. * * * That said affiant secured a general bill of exceptions and tendered the same to the court for settlement and signing, and filed the same in the office of the clerk of said court, and has personally paid the charges occasioned by the preparation of both the general bill and the transcript of the record in said cause. * * * That when said transcript was prepared this affiant forwarded the same to Hon. Ulysses S. Lesh, the Attorney General of the state of Indiana, for filing, and also prepared the brief for the purpose of printing the same without any expense to said appellant whatsoever." "That said affiant, upon learning of said appellant's contemplated motion to dismiss the appeal of said cause, tendered to said appellant his check signed by himself and made payable to said appellant, the amount of the

costs chargeable against said appellant, if any, to be filed in, for the purpose of keeping said appellant whole and protecting him against any financial loss which he might suffer in the event said cause may be affirmed on such appeal, which offer said appellant refused to accept." "Said affiant says that in prosecuting said appeal he does so wholly on behalf of the state of Indiana. * * *"

The assignment of errors in the cause is entitled Wm. A. Baird, Sheriff of Clark County, v. Harry Nagel, appellee, and is signed U. S. Lesh, Attorney General, and James L. Bottorff, attorney for appellant. A brief has been filed by the Attorney General and by James L. Bottorff, prosecuting attorney. They claim that the state of Indiana was interested in the habeas corpus proceeding, so that it had a right to appeal from the decision of the Clark circuit court releasing the appellant from custody. This question is not raised by the record, and is not decided. The state of Indiana is not made a party either in the Clark circuit court or on appeal, and no attempt has been made to make it a party.

[1] Section 671, Burns' 1914, provides:

"Appeals may be taken * * * by either party, from all final judgments," except in certain cases.

This section gives the right to appeal from final judgments in habeas corpus proceedings. The judgment in this case is a final judgment, and the right of either party to appeal under section 671 of the Civil Code, has been recognized in many cases in this court. The right of the state to appeal from a final order discharging a prisoner in habeas corpus proceedings has been held to exist in many other states, but it has not been directly passed on in this state. For cases on that subject, see Ex parte Murray, 112 S. C. 342, 99 S. E. 798, 5 A. L. R. 1152; Ex parte Jackson, 45 Ark. 158; State ex rel. v. Williams, 97 Ark. 243, 133 S. W. 1017; Ex parte Ah Oi, 13 Hawaii, 534; People v. Kaiser, 206 N. Y. 46, 99 N. E. 195; State ex rel. Bond v. Langum, 135 Minn. 320, 160 N. W. 858; State v. Buckham, 29 Minn. 462, 13 N. W. 902; State ex rel. v. Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700; State ex rel. v. Smith, 65 Wis. 93, 26 N. W. 258; State ex rel. v. French, 82 Wash. 330, 144 Pac. 28; Burr v. Foster, 132 Ala. 41, 31 South. 495; State v. Lacey, 158 Ala. 18, 48 South. 343; State ex rel. v. Livingston, 170 Ala. 147, 54 South. 109; State v. Gordon, 105 Miss. 454, 62 South. 431. In all these cases it appears that the state had been made a party to the proceedings, both in the trial court and in the court to which it was appealed. In the instant case there was no attempt either in the court below to make the state a party to the proceedings or to appear in behalf of the state, and no such attempt has been made in this court, and no assignment of error has been filed on behalf of the state.

[2] The contention of the prosecuting attorney of Clark county and of the Attorney General seems to be that the state may prosecute an appeal in the name of the appellant over his objection. We know of no authority, and have been cited to none, authorizing the state to proceed in such manner. A third party cannot take an appeal in the name of a party to the decision merely because it may affect his interests adversely. Colman v. West Va. Oil Co., 25 W. Va. 148; McIntyre v. Sholty, 139 Ill. 178, 29 N. E. 43; Board v. Wild, 37 Ind. App. 32, 76 N. E. 256.

In State ex rel. v. Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700, the court, in discussing the rights of the state and of the sheriff, under a proceeding like the one in the instant case, said:

"Upon the district attorney was imposed the duty of guarding the interest of the state, but he had no duty to perform by virtue of his office for the sheriff as an individual. The latter was a party, and an interested party, because he was charged with being guilty of the particular wrong which it was the purpose of the writ to redress; hence the law must be construed as according to him the same right as to any other party to be heard by counsel."

In that case it was held that the sheriff had a right to appear and be heard by counsel of his own choosing.

In the instant case the appellant was the sole defendant in the trial court, and is the sole appellant in this appeal. He cannot be required to prosecute this appeal for the benefit of another.

Motion to dismiss the appeal sustained. Appeal dismissed.

TUCKER v. TUCKER. (No. 24009.)

(Supreme Court of Indiana. Jan. 10, 1924.)

1. Receivers ⇐35(1) — Conclusions in complaint held not to have weight as evidence.

Allegations in complaint of affiant's conclusions that, unless receiver were appointed without notice, a business would be destroyed, and that notice would jeopardize safety of the business, could not have weight as evidence on application for the appointment of a receiver.

2. Receivers ⇐35(1) — Facts averred, held sufficient only for restraining threatened sale.

In suit for appointment of receiver without notice, averment that defendant, as plaintiff's partner, had exclusive possession of a hotel, and was taking all the income, and was about to dispose of the property, showed reason only for issuing restraining order forbidding sale pending notice of appointment of receiver, and not for appointment without notice.

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3. Receivers ⇐35(1)—Defendant's insolvency not shown by complaint.

In suit for appointment of receiver without notice, complaint alleging that defendant was an equal partner in hotel business, *held* not to show her to be insolvent.

4. Receivers ⇐35(1)—Affidavit must state facts, and not opinions, "sufficient cause shown by affidavit."

Under Burns' Ann. St. 1914, § 1288 providing that a receiver can only be appointed without notice on "sufficient cause shown by affidavit," facts showing sufficient cause to exist must be stated in the affidavit, not mere opinions or conclusions.

5. Receivers ⇐35(1)—Jointly owned property not taken without notice where restraining order sufficient.

Property of which a party has possession as owner or joint owner should not be taken from her by appointment of receiver without notice where temporary restraining order forbidding its sale or removal would be ample protection until notice could be given and application determined on merits.

6. Receivers ⇐35(1)—When cause sufficient for appointment without notice.

Cause for appointing a receiver without notice, to be sufficient, must be evidenced by facts from which an emergency arises rendering interference before there is time to give notice necessary in order to prevent waste, destruction, or loss, and showing that protection cannot be afforded in any other way.

7. Receivers ⇐35(1)—Rule as to appointing receiver in vacation without notice stated.

Courts have no jurisdiction to appoint a receiver in vacation without notice, in an action for dissolution of an alleged partnership, until summons for defendant has been issued and delivered to proper officer for service.

Appeal from Circuit Court, Knox County; Thomas B. Coulter, Judge.

Suit by Wilbur C. Tucker against Lola F. Tucker. From an interlocutory order appointing receiver without notice, defendant appeals. Reversed, with directions to set order aside.

Shake & Kimmell, of Vincennes, for appellant.

EWBANK, C. J. This is an appeal from an interlocutory order, in vacation, appointing a receiver without notice. Appellee and appellant are husband and wife. Appellee filed a verified complaint alleging that he and appellant were partners, engaged in the operation of a hotel at Vincennes, Ind., under an agreement to share the profits and losses of such business equally; that said partnership owned personal property used in said business and the good will thereof of the total value of $12,000, which could not be separated without loss to all parties, and a bank account which had been subject to the check of either partner; that 10 days before the complaint was filed appellant had transferred the funds from said bank account to an individual account in her own name, and had taken sole possession of all the hotel property and books, and ever since had excluded appellee therefrom, and was converting all the income and profits of such business to her separate use; that she was about to dispose of said property, and there was "danger of the profits, property, and good will being lost, removed or materially injured; that unless a receiver is appointed forthwith, and without notice, for said business, the same will be destroyed, and the plaintiff will suffer irreparable damage and loss; and that notice will jeopardize the safety and the custody of said business." It concluded with a prayer for the dissolution of the partnership, and that a receiver be appointed "forthwith, without notice."

The præcipe of appellant called for "a transcript of the entire record," and the clerk has certified that the transcript contains "copies of all papers and entries in said cause * * * as required by the above and foregoing præcipe." It appears therefrom that no summons was issued, and that the defendant (appellant) did not appear, and that the only entry made in the records of the court after the filing of the complaint was made by the court on the same day that it was filed, as follows:

"Comes now the plaintiff and asks that a receiver be appointed without notice in the above entitled cause, and the court, having inspected the verified application of the plaintiff for the appointment of a receiver and the complaint, finds that a receiver should be appointed forthwith and without notice. It is therefore ordered by the court that Edgar J. Julian be and he is hereby appointed as receiver," etc.

Three days later the receiver filed his bond, and the next day appellant filed exceptions to the order appointing the receiver without notice, and her own bond in the same amount in which the receiver had been required to give bond, and gave notice of an appeal, and two days later (being the seventh day after the receiver was appointed) perfected the appeal by filing the transcript and her assignment of errors in this court.

[1-4] The averment in the verified complaint, which we have put in quotation marks, of affiant's conclusions that, unless a receiver were appointed without notice, the business would be destroyed, and that notice would jeopardize the safety of the business, whatever effect they might have as matter of pleading in the formation of issues to which evidence of the implied facts might be addressed, could have no weight as evidence of any facts at all. And the mere facts, as al-

leged, that defendant had exclusive possession of the hotel, and was taking all the income, and was about to "dispose of said property," showed no reason for issuing anything more than a restraining order to forbid the proposed sale, pending notice of the application for a receiver, if, indeed, sufficient cause was shown for granting any immediate relief at all, before service of notice. The averment that the defendant was an equal partner in a hotel business worth $12,000 did not show her to be insolvent or unable to account for the current income for a day or two, and the averment that this property consisted of the furniture and good will of a local hotel showed that it was not subject to be surreptitiously carried beyond the jurisdiction of the court in the few hours necessary for giving notice to one running a hotel in the same city in which the court house was located. A receiver can only be appointed without notice "upon sufficient cause shown by affidavit." Section 1288, Burns' 1914; Section 1230, R. S. 1881. Which means that facts showing sufficient cause to exist must be stated in the affidavit or affidavits, not mere opinions or conclusions. General Motors Oils Co. v. Matheny (1916) 185 Ind. 114, 118, 113 N. E. 4; Kent, etc., Grocery Co. v. George Hitz & Co. (1918) 187 Ind. 606, 609, 120 N. E. 659; Continental Clay, etc., Co. v. Bryson (1907) 168 Ind. 485, 490, 81 N. E. 210; Ledger Pub. Co. v. Scott (Ind. Sup.) 141 N. E. 609.

[5] Property of which a party has possession as owner or joint owner should not be taken from her by the appointment of a receiver without notice, where a temporary restraining order forbidding its sale or removal would be ample for the protection of all interests until notice could be given and the application for a receiver heard and determined on its merits. Kent, etc., Grocery Co. v. George Hitz & Co., supra; Ryder v. Shea, 183 Ind. 15, 20, 108 N. E. 104; Henderson v. Reynolds (1907) 168 Ind. 522, 527, 81 N. E. 494, 11 L. R. A. (N. S.) 960, 11 Ann. Cas. 977.

[6] The cause for appointing a receiver without notice, to be sufficient, must be evidenced by the existence of facts from which an emergency arises rendering interference before there is time to give notice necessary in order to prevent waste, destruction, or loss, and showing that protection cannot be afforded the plaintiff in any other way. Henderson v. Reynolds, supra.

[7] Moreover, the court could have no jurisdiction to appoint a receiver in vacation without notice. In an action for the dissolution of an alleged partnership, until a summons for the defendant had been issued and delivered to the proper officer for service, which the record shows was not done in this case. Pressley v. Harrison (1885) 102 Ind. 14, 19, 1 N. E. 188; Alexandria Gas Co. v. Irish (1899) 152 Ind. 535, 536, 53 N. E. 762; Winona, etc., Traction Co. v. Collins (1904) 162 Ind. 693, 69 N. E. 998.

The judgment is reversed, with directions to set aside the order appointing a receiver.

HEDGES v. STATE. (No. 24393.)

(Supreme Court of Indiana. Jan. 11, 1924.)

1. Intoxicating liquors ⇐238(3)—Jamaica ginger not intoxicating as matter of law.

In a prosecution under Acts 1921, c. 250, § 1 (Burns' Ann. St. Supp. 1921, § 8356d) amending Acts 1917, c. 4, § 4, denouncing the unlawful manufacture and sale of intoxicating liquor, it cannot be said as a matter of law from the mere fact that an article kept and sold was Jamaica ginger that it was an intoxicating drink or was reasonably likely or intended to be used as a beverage.

2. Intoxicating liquors ⇐146(1)—State must allege and prove preparation kept for sale contains one-half of 1 per cent. alcohol and was sold as beverage.

In a prosecution under Acts 1921, c. 250, § 1 (Burns' Ann. St. Supp. 1921, § 8356d) amending Acts 1917, c. 4, § 4, for the unlawful sale of intoxicating liquor, the state must allege and prove as an essential element to sustain conviction that the preparation sold or kept for sale was a beverage containing one-half of 1 per cent. of alcohol by volume or that such sale was made under circumstances from which the seller might have reasonably known that it was to be used for beverage purposes.

3. Intoxicating liquors ⇐239(10)—Instruction that possession prima facie evidence that possessor engaged in unlawful sale as beverage held erroneous.

In a prosecution for the unlawful sale of intoxicating liquor under Acts 1921, c. 250, § 1 (Burns' Ann. St. Supp. 1921, § 8356d) amending Acts 1917, c. 4, § 4, an instruction that the possession of intoxicating liquor was prima facie evidence that the possessor was engaged in the sale of such liquor as a beverage was erroneous, since section 28 provides that possession shall be prima facie evidence "except as in this act provided," which, when read in connection with section 35, makes possession prima facie evidence only when the party charged possessed more than the exempted quantity.

4. Intoxicating liquors ⇐239(2)—Instruction assuming to define prima facie evidence held erroneous as not supported by evidence.

In a prosecution for the unlawful sale of intoxicating liquor under Acts 1921, c. 250, § 1 (Burns' Ann. St. Supp. 1921, § 8356d), amending Acts 1917, c. 4, § 4, an instruction assuming to define the expression "prima facie" evidence and then saying in effect that if the defendant was found in possession of intoxicating liquors the jury should find that he was engaged in the sale of intoxicating liquors as a beverage, unless such conclusion was contradicted or over-

come by other evidence, was erroneous, where there was no evidence as to the quantity in his possession.

Appeal from Circuit Court, Vanderburgh County; Philip C. Gould, Judge.

Robert Hedges was convicted of an offense, and he appeals. Reversed, with instructions.

E. J. Crenshaw, of Evansville, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward F. White, Deputy Atty. Gen., for the State.

MYERS, J. Appellant was charged by affidavit, tried, and convicted in the court below of violating section 1, p. 736, Acts 1921 (section 8356d, Burns' Supp. 1921, amending section 4, p. 15, Acts 1917). His motion for a new trial was overruled, and judgment rendered on the verdict of guilty. The action of the court in overruling his motion for a new trial is the only error assigned.

Appellant sought a new trial, alleging insufficient evidence to support the verdict and that the verdict was contrary to law; also that the court erred in giving instructions Nos. 5 and 6 upon its own motion.

The affidavit, in so far as the same is material here, charges that appellant "did then and there unlawfully possess and keep certain intoxicating liquors with the intent to sell, barter, exchange, give away and otherwise dispose of the same to be used as a beverage." This affidavit is predicated upon what may be designated as the second classification of offenses defined by the statute alleged to have been violated. For the purpose of this case, the statute reads:

"It shall be unlawful for any person * * * to possess or keep any intoxicating liquors with intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same, except as in this act provided."

The Attorney General first directs our attention to the inattentive and bungling manner in which the transcript in this case is prepared. While there is apparent justification for the criticism, yet we feel that legal rights ought not to be prejudiced and contentions refused consideration when, from an examination of a 79-page transcript, the court may readily know that it contains all of the essential prerequisites to present the questions submitted for decision.

Passing to the merits of this controversy, it is to be observed that the material facts are undisputed. Briefly stated, appellant, on November 28, 1922, occupied a room about 16 feet wide and 24 feet long, at the corner of Eighth and Division streets in Evansville, as a soft drink stand and grocery store. One side of this room was fully shelved and otherwise equipped for and used exclusively for the sale of groceries, patent medicines, and household remedies. The other side was used in the sale of soft drinks. Connected with this room was a porch used as a storeroom where eggs and an additional stock of groceries were kept. A hollow post 8 inches square was a part of the porch. On the above date, three police officers of the city of Evansville, with a search warrant, went to appellant's place of business and made a search of the premises, where they found six cartons of Jamaica ginger in the porch column, and bottles of lemon extract and cough syrup in the grocery side of the storeroom. We find no evidence whatever to sustain a conviction on account of sales of lemond extracts labeled 53 per cent. alcohol, or cough syrup labeled 10 per cent. alcohol. The conviction in this case rests entirely on the possession and sale of Jamaica ginger shown by the labels on the bottles 93 per cent. alcohol, and manufactured by the Walker Products Company of Evansville. The analysis of this product showed 86.4 per cent. alcohol by volume. A witness for the state who, as a chemist, analyzed this particular Jamaica ginger, testified that it was not fit for beverage uses, and unless it was changed in some form it could not be drank at all; that it was a preparation for medicinal and flavoring purposes, as, for instance, in making candies, ice cream, gelatins, custards, and for household cooking and medicinal purposes generally; that if drank in a sufficient quantity it would produce intoxication. The police officers testified that they knew where appellant kept this Jamaica ginger before they went to search his premises; that he told them at the time of the search that he kept it on the porch to keep it cool, otherwise it might explode, and when a customer called for it he would go and get it; that he had sold four or five cartons in four days. One of the officers also stated that, since prohibition had gone into effect, Jamaica ginger had been used as a beverage, but whether such was the case in and about Evansville he did not say. No witness testified to having become intoxicated from drinking Jamaica ginger, or as having seen persons intoxicated, and from the distinctive characteristics of such intoxication was able to say that it was produced by drinking Jamaica ginger, as distinguished from drunkenness caused by drinking other alcoholic liquors; nor was there any evidence tending to show the size of the bottles or the quantity of this liquid contained in a bottle, or whether one, two, or more bottles constituted a carton. There was no evidence from which the jury or court could form any opinion as to the quantity of Jamaica ginger possessed by appellant, or any basis from which the quantity sold might be reasonably inferred.

In the 1917 act, supra, the Legislature defined the words "intoxicating liquor" as follows:

"Sec. 2. The words 'intoxicating liquor' as used in this act shall be construed to mean all malt, vinous, or spirituous liquor, containing so much as one-half of one per cent. of alcohol by volume, or any other intoxicating drink, mixture or preparation of like nature; and all mixtures or preparations containing such intoxicating liquor, whether patented or not, reasonably likely or intended to be used as a beverage, and all other beverages containing so much as one-half (½) of one per cent. of alcohol by volume."

[1] We cannot say, as a matter of law, from the mere fact that the article kept and sold was Jamaica ginger, that it was an "intoxicating drink," or was "reasonably likely or intended to be used as a beverage," within the above definition of "intoxicating liquor." Commonwealth v. Sookey, 236 Mass. 448, 128 N. E. 788, 11 L. R. A. 1230; Hamilton v. State (Ind.) 133 N. E. 491, 19 A. L. R. 509.

Obviously, the above definition first classifies all intoxicating drinks containing one-half of 1 per cent. of alcohol by volume as "intoxicating liquor"; and, secondly, all mixtures or preparations containing one-half of 1 per cent. of alcohol by volume, not classified as "intoxicating drinks," are within the definition of intoxicating liquor only when they are "reasonably likely or intended to be used as a beverage." Moreover, the 1921 statute, supra, recognizes the second classification of the definition by providing that—

"And it shall also be unlawful for any person to knowingly sell at retail for beverage purposes any preparation containing alcohol, although such preparation is not included in the definition of intoxicating liquors in this act, or to sell the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use such preparation for beverage purposes."

[2] All of the evidence herein tends to show, and it must be admitted, that the particular liquor here in question and denominated "Jamaica ginger," in the form prepared and in this instance sold, was not "reasonably likely or intended to be used as a beverage," for from any view of the evidence it was not fit for beverage uses and could not be drank at all without changing the formula of the mixture or preparation by the use of additional elements. In our opinion, that part of the statute last above quoted was intended by the Legislature to cover a situation indicated by the evidence in this case, but in a case like that, the state must allege and prove, as an essential element to sustain a conviction, that the preparation sold or kept for sale was a beverage containing one-half of 1 per cent. of alcohol by volume, or that such sale was made under circumstances from which the seller might have reasonably known that it was to be used for beverage purposes. Thus, as said in Commonwealth v. Lanides, 239 Mass. 103, 108, 131 N. E. 302, 303:

"It is a question of fact whether the preparation is a beverage, and, if used extensively for such purposes and is intoxicating, a jury is warranted in finding that it is an intoxicating beverage, although it is called a medicine and is taken by many only for medicinal purposes."

The charge at bar is keeping for sale intoxicating liquor in violation of another provision of the statute grouping several acts in a single offense, but all relating to intoxicating drinks defined as "intoxicating liquor." The evidence, as we have seen, relates to a mixture or preparation not listed as "intoxicating drink," and hence tended to prove an offense with which appellant was not charged. We are not unmindful of the rule that great certainty in mere description of criminal offenses is not always required, but in every instance the accused is entitled to be informed of the accusation lodged against him by "a statement of the facts constituting the offense in plain and concise language without unnecessary repetition." Section 2040, Burns' 1914. It is apparent that appellant would not know from reading the affidavit that he was charged with keeping Jamaica ginger for sale as a beverage, nor were there any other circumstances alleged to advise him that it was reasonably probable that the purchasers of the Jamaica ginger were using or intended to use it for beverage purposes.

After resolving all doubts in favor of the judgment of the trial court, it is evident that appellant was convicted of an offense upon evidence tending to support a crime with which he was not charged. Hence, upon the entire record before us, we conclude that the verdict was not sustained by the evidence, and therefore contrary to law.

[3, 4] By instruction No. 5 the court, in effect, told the jury that the possession of intoxicating liquor was prima facie evidence that the possessor was engaged in the sale of such liquor as a beverage. Instruction No. 6 assumed to define the expression "prima facie evidence" "as used in this case," and then said, in effect, that if the defendant was found in possession of intoxicating liquor, as alleged in the affidavit, then the jury should find that he was engaged in the sale of intoxicating liquor as a beverage, unless such conclusion was contradicted or overcome by other evidence. These instructions were erroneous. In the first place, section 28 of the act of 1917 makes the possession of intoxicating liquor prima facie evidence that such possessor is engaged in the sale thereof "except as in this act provided." So that, when this section is read in connection with section 35 of the same act, it appears that the prima facie feature becomes pertinent only in case the party so charged was found in possession of more than the quantity in this latter section exempted. In this case there was no evidence

tending to show the quantity of Jamaica ginger found in appellant's possession, or the quantity sold by him. The instructions were not within the evidence, and misdirected the jury as to the law applicable to the case under the evidence.

The trial court erred in overruling appellant's motion for a new trial.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

EWBANK, C. J., concurs in reversal on grounds that erroneous instructions were given.

WALKER v. STATE. (No. 24287.)

(Supreme Court of Indiana. Jan. 9, 1924.)

1. Intoxicating liquors ⟸139—Count charging mere possession should be quashed.

A count charging mere possession of intoxicating liquor should be quashed.

2. Criminal law ⟸691—Defendant cannot complain of questions as to information obtained by unlawful search of codefendant's premises.

One accused of manufacturing, possessing, etc., intoxicating liquor cannot complain of questions eliciting information obtained by unlawful search of a codefendant's premises.

3. Witnesses ⟸277(5)—Cross-examination of defendant as to removal of still from husband's home and his conviction of violating law held improper.

In a prosecution for manufacturing, possessing, etc., intoxicating liquor, cross-examination of defendant as to removal of a still from her husband's home on a former occasion, and whether he had been convicted of violating the liquor law, *held* improper as referring to irrelevant matters.

4. Criminal law ⟸1144(17)—Judgment assumed to rest on good counts of indictment.

The Supreme Court may assume that the judgment appealed from rests on good counts of the indictment.

5. Criminal law ⟸1169(6)—Improper cross-examination of defendant as to husband's guilt of prior offense held not prejudicial error.

Improper cross-examination of one charged with manufacturing and possessing intoxicating liquors as to prior removal of a still from her husband's home, and his conviction of violating the liquor law, *held* not prejudicial error, in view of the entire evidence and a judgment imposing an aggregate fine and term of imprisonment not exceeding that fixed by the jury on each of four counts.

Appeal from Circuit Court, Vanderburgh County; Philip Gould, Judge.

Nora Walker was convicted of possessing, manufacturing, possessing with intent to sell, and possessing a still for the manufacture of, intoxicating liquors, and she appeals. Affirmed.

Wm. D. Hardy, of Evansville, for appellant.

U. S. Lesh, Atty. Gen., Mrs. Edward F. White, Deputy Atty. Gen., and George D. Heilman, of Evansville, for the State.

MYERS, J. Appellant and another were charged by affidavit and convicted in court below of unlawfully possessing intoxicating liquor, of unlawfully manufacturing intoxicating liquor, of unlawfully possessing intoxicating liquor with intent to sell the same, and of unlawfully possessing a still and device for the manufacture of intoxicating liquor, intended for use in violation of the laws of this state. Appellant prosecutes this appeal for the reversal of a judgment assessing a fine of $200 and imprisonment against her.

The errors assigned call in question the action of the court in overruling appellant's motion to quash the first count of the affidavit, and in overruling her motion for a new trial.

[1] The first count charged the mere possession of intoxicating liquor, and it was error to overrule the motion to quash that count. Ward v. State, 188 Ind. 606, 125 N. E. 397; Reed v. State, 189 Ind. 98, 126 N. E. 6; Crabbs v. State (Ind. Sup.) 139 N. E. 180; Powell v. State (Ind. Sup.) 139 N. E. 670; Reinchild v. State (Ind. Sup.) 139 N. E. 673; Asher v. State (Ind. Sup.) 139 N. E. 674; Dressler v. State, No. 24250, 141 N. E. 801 (this term).

The causes relied on in support of the motion for a new trial are: Error of the court in permitting witnesses, over her objection, to testify concerning what they procured or seized, what they saw and were told while upon the premises of her codefendant; also error in requiring appellant to answer questions on cross-examination pertaining to the alleged removal of a still from her husband's home in March or April before, and whether he had been theretofore convicted of violating the liquor law.

It appears from the evidence that the sheriff of Vanderburgh county, armed with a search warrant issued upon a John Doe affidavit, and three deputies, went to the home of this appellant's codefendant, and acting upon the authority of such warrant, they proceeded to search the premises supposed to be described in the warrant. However, before proceeding with this work, the sheriff read the warrant to the wife of the husband who had possession of the premises, and then, on seeing the husband near the barn, told him that he had a search warrant "for the house," and asked him if he had a still. He replied that he had, and to

the question "Whose still is it?" he said, "It is Walker's," and to the further question, "What are you doing with it over here?" he said, "I am to get fifty-fifty split; I watch the still, and when Mrs. Walker goes away, I run the still." The Walker home was across the road and to the southwest, and they were sent for. On their arrival, Mrs. Walker, this appellant, claimed the still as her own, and at the trial testified that the still belonged to her; that she bought it and arranged with Mr. Wesselman, in whose home it was found, to run on a fifty-fifty basis; that she expected to sell the liquor to the man from whom she bought the still, but had not seen him since she purchased it; that she had made 8 gallons of liquor; that her husband was a coal miner, out of work, and in hard luck; and that she had bought the still and made the arrangement spoken of without the knowledge or consent of her husband. It appears from the testimony of the officers making the search that, besides the still, 200 gallons of mash, jugs, and intoxicating liquor were found on the premises.

[2] The affidavit upon which the search warrant was issued was introduced in evidence, but the warrant could not be found. Objections were interposed to all questions calling for answers relating to any matter in which information was obtained by virtue of the search warrant, on the ground that it was obtained upon an insufficient affidavit. If it be conceded that the affidavit was insufficient, and that the search warrant was illegal, still appellant was in no position to claim the immunity the law affords against illegal search and seizure. The evidence proposed to be introduced was not obtained by any of the witnesses by the invasion of her home by virtue of the pretended process in question. It was Wesselman's home that was searched. It was he who was wronged, if any one, by the asserted illegal and unlawful acts of the officers and a question purely personal to him. Chanosky v. State (1915) 52 Okl. 476, 153 Pac. 131; United States v. Wihinier (D. C. 1922) 284 Fed. 528.

Had Wesselman moved to suppress, or objected to the introduction of the evidence procured by the search warrant issued upon the showing made by the affidavit, and he was here asking a review of the trial court's ruling admitting that evidence, we would have a very different question, and Veeder v. United States (1918) 252 Fed. 414, 418, 164 C. C. A. 338; Ripper v. United States, 178 Fed. 24, 101 C. C. A. 152; Giles v. United States (C. C. A. 1922) 284 Fed. 208; State v. Marxhausen, 204 Mich. 559, 171 N. W. 557, 3 A. L. R. 1505; Callender v. State (Ind. Sup.) 138 N. E. 817; Flum v. State (Ind. Sup.) 141 N. E. 353; Crabbs v. State, supra; and State v. Derry, 171 Ind. 18, 24, 85 N. E. 765, 131 Am. St. Rep. 237, are cases which might be considered well in point.

[3-5] With reference to the cross-examination of which complaint is made, it is clear from anything here shown that it had reference to matters entirely irrelevant and therefore improper from any point of view. But is the error one justifying us in reversing the judgment? Appellant was found guilty on each of the four counts and fined $200 on each count, except the first, where the fine was $100, but imprisonment for 60 days was added in the verdict on each count. The judgment imposed a fine of $200 and imprisonment for 60 days.

In view of the entire evidence and the judgment as finally rendered in this case, we are well convinced that a retrial would not result more favorably to appellant. Assuming, as we may, that the judgment rests upon the good counts and not upon the bad (Wallace v. State, 189 Ind. 562, 128 N. E. 604), and it affirmatively appearing from the record to our entire satisfaction that the erroneous evidence admitted upon cross-examination of appellant exerted no special influence over the verdict of the jury, or was otherwise prejudicial to the rights of appellant, but that in reality a fair and impartial trial was had and a just conclusion reached, a reversal of the judgment under these circumstances ought not to follow. Section 2221, Burns' 1914; Acts 1905, p. 657, § 334; Sanderson v. State, 169 Ind. 301, 315, 82 N. E. 525; Stalcup v. State, 146 Ind. 270, 275, 45 N. E. 334; Griffiths v. State, 163 Ind. 555, 560, 72 N. E. 563.

Judgment affirmed.

HOPKINS et al. v. DREYER. (No. 11749.)

(Appellate Court of Indiana, Division No. 1. Jan. 9, 1924.)

1. Appeal and error ⊜537—Bill of exceptions on evidence not filed during term held not within record.

Where, after overruling motion for new trial, defendants did not ask or obtain time beyond term in which to file their bill of exceptions on the evidence, such bill, not being filed before close of term, is not in the record.

2. Appeal and error ⊜928(3)—Presumed, in absence of evidence, instructions were warranted.

Where challenges to instructions are addressed to some facts within issues as made by pleadings, in absence of evidence it cannot be said the court committed error, as it must be presumed that evidence warranted the instructions.

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3. Appeal and error ⇐928(4)—Presumed, in absence of evidence, that requested instructions were correctly refused.

In absence of evidence from the record, it must be presumed on appeal that the refusal of requested instructions was because their statements of propositions were not applicable.

4. Appeal and error ⇐867(3)—New trial ⇐18—Overruling motion to strike from complaint not reviewable on appeal from denial of new trial.

Overruling a motion to strike out certain parts of a complaint is not a cause for new trial under the statute and presents no question on appeal from order denying new trial.

Appeal from Circuit Court, Elkhart County; James Drake, Judge.

Action by Helen J. Dreyer against Howard H. Hopkins and others. Judgment for plaintiff, and defendants appeal. Affirmed.

P. C. Fergus and John G. Yeagley, both of South Bend, for appellants.

L. L. Burris, of Goshen, Howard R. Inebrit, of Nappanee, and Frank P. Abbott, of Goshen, for appellee.

ENLOE, J. This was an action by appellee to recover damages for fraud and deceit alleged to have been practiced upon her, by appellants, in the purchase by her of certain property from the appellants. To a complaint in one paragraph the appellants answered by a general denial, and the issue thus formed was submitted to a jury for trial and resulted in a verdict for the appellee, upon which judgment was rendered. Appellants' motion for a new trial having been overruled, they now prosecute this appeal and assign as error the overruling of their said motion.

[1] At the time said motion was overruled, the appellants did not ask for and obtain time beyond the term within which to file their bill of exceptions on the evidence, and their said bill of exceptions, not having been filed before the close of the term at which said motion was overruled, is not, therefore, in the record. Tozer v. Hobb's Estate (Ind. App.) 137 N. E. 715. The questions, therefore, which appellants attempt to present, and which depend upon the evidence, cannot be considered.

[2] The appellants complain of certain instructions given by the court of its own motion. Each of the instructions so challenged is addressed to some fact or facts within the issues as made by the pleadings, and, in the absence of the evidence, we cannot say that the court committed error in the giving of any of said instructions. We must presume in favor of the trial court and that the evidence was such as to warrant the giving of each instruction complained of by appellants. Sherman v. Indianapolis Trac. & Term. Co., 48 Ind. App. 623, 96 N. E. 473.

[3] The appellants also complain of the action of the trial court in refusing to give certain requested instructions. Here again we must presume in favor of the action of the trial court, and that such requested instructions, even though they were each and severally correct statements of propositions of law, were not applicable to the evidence, and were therefore correctly refused. Jenkins v. Wilson, 140 Ind. 544, 40 N. E. 39; Holland v. State, 131 Ind. 568, 31 N. E. 359.

[4] The appellants assigned as one of the causes for a new trial the action of the court in overruling their motion to strike out certain designated parts of the complaint, and they have tried to present this matter as being error. Such matter is not a cause for a new trial under our statute, and therefore no question as to this matter is presented. Ward. v. Bateman, 34 Ind. 110; Milliken v. Ham, 36 Ind. 166.

No error has been presented, and the judgment is therefore affirmed.

HOOSIER CASUALTY CO. v. ROYSTER. (No. 11714.)

(Appellate Court of Indiana, Division No. 2. Jan. 9, 1924.)

Insurance ⇐455—Death held not through "external, violent, or accidental means."

Death, caused by a puncture of the lower bowel with a tube used for the introduction of medicine for the treatment of hemorrhoids, *held* not an accidental death by external, violent, and accidental means, within the provisions of an insurance policy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, External, Violent, and Accidental Means.]

Appeal from Circuit Court, Clinton County; Earl Stroup, Judge.

Action by Lydia Royster against the Hoosier Casualty Company. Judgment for plaintiff, and defendant appeals. Reversed.

H. C. Sheridan, of Frankfort, and W. H. Latta, of Indianapolis, for appellant.

Thomas M. Ryan, of Frankfort, for appellee.

NICHOLS, J. Appellee was named as beneficiary in an accident policy issued by appellant to one Sigel A. Royster, who was her husband. This action on the policy is upon the theory that a liability had accrued to her on account of the death of said insured. The liability of appellant is predicated upon the theory of accidental death occurring through external, violent, and accidental means. Appellee has filed her motion to dismiss the appeal, and contends in support thereof that appellant's brief is insufficient to present any question. We hold, however,

that the brief shows a good-faith effort, and that it is sufficient to present the question here involved. The motion to dismiss is overruled.

The only error presented is the action of the court in overruling appellant's motion for a new trial, which presents only that the finding and judgment of the court is not sustained by sufficient evidence and is contrary to law. The question in this case is whether the death of said insured was so occasioned. The evidence fully sustains the following averment of facts as found in the complaint:

"That the insured, the said Sigel A. Royster, was afflicted with hemorrhoids, and in treating such hemorrhoids, he used a tube for the introduction of medicine into the lower bowel, and on the 17th day of November 1921, in so introducing said medicine into said bowel, he accidentally and without intention on his part, punctured said lower bowel with said tube or instrument so used for the purpose aforesaid, and from which said injury he sickened and lingered until the 21st day of November, 1921, at which time he died from the results of said injury so suffered as aforesaid. That there were visible marks of said injury, in this: That the hole so punctured in the said lower bowel was about one-fourth inch in diameter. That there were external marks of said injury, in this: That within a short time after said injury the lower part of the abdomen became swollen and hardened, and that the death of said Sigel A. Royster resulted as a proximate result of said injury and from no other cause whatsoever."

By the evidence it appears that an operation before death disclosed that the injury in the lower bowel was located about 10 inches above the anus.

As we view the case, the same principle is involved as was involved in the case of Husbands , v. Indiana Travelers' Association (Ind.) 133 N. E. 130, decided by the Supreme Court, and on the authority of that case the judgment herein is reversed.

MOORE v. SERVICE MOTOR TRUCK CO.
(No. 11775.)

(Appellate Court of Indiana, Division No. 1. Jan. 10, 1924.)

1. Master and servant ⇐417(7)—Finding of Industrial Accident Board on evidence in compensation case final.

If a finding of the Industrial Accident Board is supported by any evidence, it must be sustained on appeal, under Workmen's Compensation Act, § 76, subd. (d).

2. Master and servant ⇐373—Occupational disease held not compensable as "accident."

Where one in charge of emery wheels in grinding department of truck factory knew that in time the dust would settle in his stomach and lungs and he would become sick, and he did in fact from such cause suffer with a sickness, consisting of a sloughing off of portions of the linings of his bowls, leaving raw areas, the disease was not the result of "accident," within the meaning of the Workmen's Compensation Act; an "accident" being an unlooked for mishap or untoward event not expected or designed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.]

Appeal from Industrial Board.

Proceeding by Benjamin F. Moore under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Service Motor Truck Company, the employer. Compensation was denied, and applicant appeals. Affirmed.

Herman N. Hipskind, of Wabash, for appellant.

Fesler, Elam & Young and Irving M. Fauvre, all of Indianapolis, for appellee.

BATMAN, J. [1] This appeal involves the denial of an application by appellant for an award of compensation against appellee, based on a finding, which recites in substance, among other things, that appellant's disability for work was due to a disease, which did not result from an accidental injury. If this finding is sustained by any evidence, the denial of the award must be sustained, under subdivision (d) of section 76 of the Workmen's Compensation Act (Acts 1919 p. 176), otherwise it must be reversed. Appellant contends that the Industrial Board erred in making the finding stated, as the undisputed evidence shows that his disability is not the result of a disease, but of an injury by accident. On the question thus presented we find there is substantial evidence tending strongly to establish the following facts: Appellant was in appellee's employ for three or four years. During this time he had charge of the emery wheels in the grinding department of its truck factory. His duties required him to grind, disc, and buff raw castings, and to polish metal parts on an emery wheel and buffing machine. This work caused the air to become laden with emery and metallic dust, which was breathed by appellant in the course of his work. Some of such dust became mixed with the saliva in his mouth, and passed into his stomach and bowels through the process of swallowing. No large or unusual quantities of such dust ever entered the body of appellant at any one time, but a considerable quantity accumulated in his bronchial tubes and lungs, and especially in his stomach and bowels, through the continued processes of breathing and swallowing during the said three or four years of his employment by appellee as a grinder and polisher of metals. As a result, the parts of his body mentioned above be-

came gradually affected to such a degree that on March 7, 1923, he became sick and unable to work, and so remained until the date of the hearing. In the course of his medical treatment oil was administered, which caused him to pass from his bowels a substance in the form of irregular shaped balls resembling putty, which were composed of emery and metal dust. The loosening and passing of these balls injured the linings of the bowels, so that portions thereof sloughed off and left raw areas. The evidence also tends strongly to show that working in this dust-laden air for any considerable period of time was injurious to appellee's employees; that it had made a number of them sick, and that by reason of the fact they had never remained long at such work. Appellant knew these facts, and testified that if these men had stayed as long as he did it would be natural to suppose that they would be in his condition. He knew that it was having an injurious effect upon him, and because of that fact he complained to appellee time and time again, and wanted to be transferred to other work. He knew for some time before he was compelled to quit work that his condition was gradually becoming worse, and so much so that, as he testified, he had to pinch himself to get any energy to work.

[2] It is clear that appellant is suffering from an illness, caused chiefly by an injury to his bowels, but can it be said that such injury was by accident, within the meaning of the Workmen's Compensation Act, rather than a result of an occupational condition—that is, a condition of some part of the body, which is the natural result of following a particular occupation for a considerable period of time, and frequently terminates in what is generally called an occupational disease? Without entering into a rediscussion of what constitutes an accident it suffices to cite the case of Wasmuth-Endicott Co. v. Karst (1922 Ind. App) 133 N. E. 609, in which the following definition is quoted with approval:

"An accident is an unlooked for mishap or untoward event not expected or designed."

Applying this definition to the facts which the evidence in this case tend to establish, it is clear that appellant's condition is not the result of an accident, as it was not an unlooked for mishap or untoward event not expected. He knew that the air in which he worked was impregnated with emery and metallic dust; that it was passing into his lungs and bowels; that it made others sick after they had worked in it for a time; that it was having an injurious effect on him from day to day, and on that account sought to have his work changed; that he was gradually growing worse—in fact so much so that he had to exert force in order to arouse enough energy to perform his duties. Such facts are sufficient to warrant an inference that he must have known that if he continued to work in such dust-laden air that he would finally reach a stage of disability. There was no showing that such dust at any time was thrown off or entered appellant's body in any unexpected manner, or in any unusual quantity, so as to create a fortuitous circumstance. The very nature of the work being done necessarily, and not accidentally, caused the surrounding air to become dust-laden and to enter appellant's body in the course of natural processes. In the case of Meade, etc., Corp. v. Starnes, 147 Tenn. 362, 247 S. W. 989, where the court was considering whether a disease, caused by breathing air impregnated with dust arising from a chemical used in the business in which an employee was engaged, was compensable as an injury by accident, the court said:

"We cannot conceive that the breathing of dust caused to arise necessarily from the very work being performed has in it any element of accident. The material being moved was in the form of dust. It was contained in sacks. The very nature of the material and its container, and the movement thereof, necessarily, and not accidentally, caused the dust to float in the air, and to be breathed by the workmen. There was no accident in the form of the material, its container, or method of movement. The escape of dust in its movement did not result from any fortuitous circumstance; it was necessarily incident thereto. It seems to us that the same reasons which exclude occupational diseases must apply here, and exclude an injury which is produced by the necessities of the occasion, in the absence of any accident entering into the cause of or as producing the particular occasion."

See, also, Young v. Melrose, etc., Co., 152 Minn. 512, 189 N. W. 426.

Appellant cites the case of Wasmuth-Endicott Co. v. Karst, supra, as controlling in the instant case, but we cannot concur in his contention in that regard. It will be observed in the case cited that the taking of typhoid germs into the system of the employee was unintentional, and in fact was unknown at the time, and the injury resulting therefrom was unexpected, while in the instant case the taking of the dust into appellant's body was both foreseen and realized by him from day to day, and he was aware of its evil effects upon his health, and had reason to anticipate that more serious consequences would follow. These facts clearly distinguish the two cases, and hence we cannot accept the case cited as decisive in appellant's favor.

The award is therefore affirmed.

KIRACOFE v. KIRACOFE. (No. 11742.)

(Appellate Court of Indiana, Division No. 2. Jan. 9, 1924.)

1. Husband and wife ⇐14(6)—Conveyance to husband and wife jointly creates estate of entireties.

A deed to husband and wife "jointly" creates an estate of entireties and not in joint tenancy.

2. Divorce ⇐322—Estate of entireties converted by divorce into estate in common.

An estate of entireties is converted by divorce into estate in common.

Appeal from Circuit Court, Wabash County; Frank O. Switzer, Judge.

Action for divorce by Florence S. Kiracofe against Alvin R. Kiracofe. Judgment for plaintiff, and defendant appeals. Affirmed.

Aiken, Douglass & Aiken, of Fort Wayne, for appellant.

Otto H. Krieg, of Huntington, for appellee.

NICHOLS, J. Action by appellee against appellant for divorce on the ground of cruel and inhuman treatment, for alimony, and for the custody of three children, the issue of the marriage.

Appellant answered in denial, and filed a cross-complaint alleging cruel and inhuman treatment, and further alleging that certain real estate, their home, was a present to him from his parents, that his mother gave him the money with which to erect the dwelling house thereon, and that in 1916 he conveyed said real estate through a trustee to himself and wife, "jointly, and not as tenants by entirety." In addition to his prayer for divorce and for the custody of the children, he prayed that the real estate be decreed to be his individual property, and that a commissioner be appointed to reconvey the title to him.

There was a trial by the court, and a judgment in favor of appellee for divorce, and for the custody of the children, with $12 per week for their support, for alimony in the sum of $500, and that the real estate, which was theretofore held by them as tenants by entirety, thereafter be held by them as tenants in common.

The error relied on in this court is the action of the court in overruling appellant's motion for a new trial, which presents that the decision of the court is not sustained by sufficient evidence and that it is contrary to law. We hold that the evidence is sufficient to sustain the court's finding that appellant was guilty of cruel and inhuman treatment. Nothing can be gained by setting it out in this opinion.

[1] Appellant contends that the decision of the court as to the real estate is contrary to law for the reason that it held that the title was before the divorce in appellant and appellee, husband and wife, as tenants by entirety, and hence by the judgment they became owners as tenants in common. It is appellant's contention that the title by the conveyance from the trustee was vested in appellant and appellee as joint tenants. The language of the deed is "to Alvin R. Kiracofe and Florence S. Kiracofe, husband and wife, jointly." This precise question was presented in the case of Simons v. Bollinger, 154 Ind. 83, 56 N. E. 23, 48 L. R. A. 234, and it was there held that a deed of conveyance to a husband and wife containing the word "jointly" in the granting clause does not create an estate in joint tenancy, but one of entireties.

[2] The estate at the time of the divorce being one of entireties, it was thereby converted into an estate in common. Lash v. Lash, 58 Ind. 526; Sharpe v. Baker, 51 Ind. App. 557, 96 N. E. 627, 99 N. E. 44.

Judgment affirmed.

BRUNO et al. v. PHILLIPS & CO. (No. 11638.)

(Appellate Court of Indiana, Division No. 2. Jan. 9, 1924.)

1. Sales ⇐201(4)—Generally title passes by delivery to carrier.

Where goods are bought at one place to be consigned and transported to the purchaser at another, generally, in the absence of contrary agreement, the delivery by the seller to the common carrier of such goods duly consigned to the purchaser is delivery to the purchaser, and title passes to the purchaser at that time.

2. Sales ⇐201(4)—Title to goods deliverable at purchaser's place of business held not to pass upon delivery to carrier.

If goods are sold to be delivered by the seller at the residence or place of business of the purchaser, delivery to the carrier is not a delivery to the purchaser, for in such case the carrier is the agent of the seller, and not of the purchaser.

3. Sales ⇐202(1)—Title to potatoes held not to pass until payment of price and delivery.

Where potatoes sold were contracted to be delivered at the buyer's city, where it was intended that the contract should be consummated by delivery and payment of the purchase price, *held*, that the title did not pass until there was delivery and payment.

4. Sales ⇐201(1)—Title to goods deliverable at buyer's residence does not pass until such delivery.

Where the seller contracts to deliver the goods at the buyer's residence or any other particular place, it is the seller's duty to go forward unconditionally with the transporta-

tion of the goods to that place, and, until he has done that, presumably the property is not intended to pass.

5. Sales ⇐202(6)—Taking bill of lading in seller's name prevents property from passing to buyer.

That a bill of lading for the property sold is taken in the seller's name, when not rebutted by contrary evidence, is decisive to show the seller's intention to preserve the jus disponendi to prevent the property from passing to the buyer.

6. Sales ⇐197 — Under executory contract title remains in seller until contract has been executed.

Under an executory contract of sale, the title to the goods remains in the seller until the contract has been executed, and whether in any case there has been actual sale or only an executory contract depends upon the parties' intention, determinable from the terms of the contract.

7. Sales ⇐202(6)—Sending draft with bill of lading attached admits an intention to reserve title until payment of purchase money.

The acts of a seller of potatoes in taking bill of lading to its order as consignee, and forwarding it with draft attached to a bank, with direction to deliver on payment of draft, *held* an admission on its part of an intention to reserve title until the purchase price was paid.

8. Sales ⇐218½—No question for jury when presumption arising from seller's sending bill of lading with draft attached.

When there is no evidence to rebut the legal effect and presumption arising from the seller's having the bill of lading made to itself as consignee and sending the bill with draft attached to bank to collect, there is no question of intention to submit to a jury, as the legal presumption controls.

9. Appeal and error ⇐1064(1)—Error in instructions not necessarily harmless where judgment might have been based upon a theory as to which the instructions were erroneous.

Where complaint in seller's action was in two paragraphs, the first for goods sold and delivered and the second for damages for refusal of the goods, it could not be maintained that error in instructing as respects passage of title to the goods, which error affected only the first theory in the complaint, was not ground for reversal of judgment for plaintiff, in that the merits of the case had been fairly tried and determined, where the Appellate Court could not determine that the verdict was not based on the first paragraph of the complaint.

Appeal from Circuit Court, Shelby County; Alonzo Blair, Judge.

Action by Phillips & Co. against Charles Bruno and another, partners trading as Bruno Bros. From judgment for plaintiff, defendants appeal. Reversed, with directions.

Little & Little, of Indianapolis, and Albert F. Wray and Michael Sullivan, both of Shelbyville, for appellants.

Williams & Pell, of Shelbyville, and Newberger, Simon & Davis and Jacob Morgan, all of Indianapolis, for appellee.

McMAHAN, J. Appellee is a dealer in produce, and as such maintained a place of business at Presque Isle, Me. It sold a car of potatoes through a broker to appellants, who were in the commission business in Indianapolis. This sale was evidenced by a written sales memorandum, one copy of which was delivered to appellants, another to appellees, and one copy retained by the broker. This memorandum stated that the sale was made subject to "usual" terms, and that appellants were to pay a certain price for the potatoes "delivered." Appellee loaded the potatoes in a car and delivered them to a common carrier at Presque Isle for shipment to Indianapolis, and procured a bill of lading wherein it was named both as consignor and consignee. This bill of lading with draft attached was mailed to a bank at Indianapolis, with directions to notify appellants and to deliver the bill of lading on payment of draft. The carrier also was to notify appellants of the arrival of the car. On arrival of the potatoes appellants, claiming they were decayed, refused to accept or pay for them, and later, on order of appellee, the broker, as agent for appellee, sold them at a price much less than the price which appellants had agreed to pay. The potatoes were in good condition when delivered to the carrier. There is a conflict in the evidence as to their condition when they reached Indianapolis.

Complaint by appellee in two paragraphs. The first paragraph was for merchandise sold and delivered. The second paragraph, after alleging the execution of the sales contract and the shipment of the potatoes as above stated, alleged the refusal of appellants to accept and pay for them, and asked damages because of such refusal. There was a trial by jury, which resulted in a verdict and judgment for appellee. Appellants appeal, and contend that the court erred in giving instructions Nos. 8, 9, and 11.

Instruction 8 was to the effect that, where goods are bought at one place to be consigned and transported to the purchaser at another place, in the absence of an agreement to the contrary the general rule is that a delivery by the seller to a common carrier of such goods, duly consigned to the purchaser, is a delivery to the purchaser, and title passes to the purchaser at the time of delivery.

The ninth instruction was to the effect that, if the potatoes in question were delivered to a common carrier pursuant to the agreement of the parties, free on board the car, addressed to defendant, with notice of

the shipment to defendants, such delivery to the carrier was a delivery to defendants. By the eleventh instruction the court told the jury that, where goods are to be delivered on board cars at a point of shipment, to be transported by railroad to a buyer at another place, and the goods are to be paid for in cash, the taking of an "order bill of lading" with draft attached is evidence of intention to pass title to buyer at point of loading, subject to a lien of the seller for the price.

According to the undisputed evidence, appellee was to deliver the potatoes to appellants on track in the railroad at Indianapolis. The written memorandum of sale stated that they were to be delivered to appellants at a named price according to usual terms. The evidence introduced by appellants and by appellee is that "delivered" as used in the sale contract meant delivered on board car in the railroad yard at Indianapolis, that the freight was to be paid by appellee, and that usual terms meant that bill of lading was to be mailed to bank with draft attached for purchase price, and was to be delivered to appellants when they paid draft.

[1, 2] The rule as stated in the eighth instruction is correct as an abstract statement of the law where goods are delivered to a carrier and consigned to the purchaser, but if goods are sold to be delivered by the seller at the residence or place of business of the purchaser, a delivery to the carrier is not a delivery to the purchaser, for in such case the carrier is the agent of the seller and not of the purchaser. Robbins v. Brazil, etc., Co., 63 Ind. App. 455, 114 N. E. 707.

In Sohn v. Jervis, 101 Ind. 578, 1 N. E. 73, the court in discussing this question, said:

"Here, however, the appellant did not consign the goods to the seller, but consigned them to himself, and there was, consequently, no delivery. The vendee got nothing, could get nothing, for the carrier was not authorized to place the goods in the hands of any other person than the consignee. It is impossible to perceive how there can be a delivery, where both the title and the right of possession remain in the seller."

Since the uncontradicted evidence is that the potatoes were to be delivered to appellants free on board car at Indianapolis, and that they were consigned to appellee and not to appellants, instructions 8 and 9 were not applicable to the evidence, and should not have been given.

[3] Appellants were not to accept or pay for the potatoes when delivered to the carrier in Maine. Neither were they to pay the freight or be responsible for the safety of the potatoes while in transit. The potatoes were not ready for delivery until they reached the place of delivery. These facts, in the absence of anything showing a contrary intention, are conclusive evidence that the title had not passed to appellants. Young v. Edwards, 64 W. Va. 67, 60 S. E. 992. No sale upon credit was intended. There was, therefore, no reason why appellee should part with title or possession before the purchase money was paid or tendered. The seller agreed to deliver at Indianapolis. To enable it to do so possession was indispensable. The contract to deliver at Indianapolis, where it was obviously intended the contract should be consummated by delivery and payment of the purchase price, necessarily leads to the conclusion that the title to the property was not to pass until there was a delivery and payment. United States v. Woodruff, 89 U. S. (22 Wall.) 180, 22 L. Ed. 863.

W. T. Phillips, president of appellee corporation, while testifying, said the word "delivered" as used in the sales memorandum meant "delivered on tracks in the city of Indianapolis." While appellants in their counterclaims alleged that under the terms of the sales memorandum the potatoes were to be delivered at their place of business, appellant Charles Bruno, while testifying as a witness, admitted that it was not the understanding or intention of the parties that the potatoes were to be delivered at their place of business, but that the delivery was to be in the railroad yards at Indianapolis.

We here have a case where the contract for the purchase of a car of potatoes for shipment from a point in Maine to be delivered to the purchaser at Indianapolis, where the seller delivered the potatoes to the carrier, took a bill of lading to its order, indorsed the bill of lading, and sent it with draft attached, with directions to deliver to the buyer upon payment of the amount named in draft, less the freight which the seller agreed to pay, but which it had not paid because it might be out both the money paid for freight and the potatoes in case they were lost or destroyed; where both buyer and seller understood the potatoes were to be delivered at place of destination, and not at point of shipment.

[4] As said in Williston on Sales, § 280:

"Where the seller contracts to deliver the goods at the buyer's residence or any other particular place it is the seller's duty to go forward unconditionally with the transportation of the goods to that place. Until he has done that, presumably the property is not intended to pass."

To the same propositions, see McElwee v. Metropolitan Lbr. Co., 69 Fed. 302, 16 C. C. A. 232.

[5] The fact that a bill of lading is taken in the name of the seller, when not rebutted by evidence to the contrary, is decisive to show his intentions to preserve the jus disponendi to prevent the property from passing to the vendee. Sawyer Medicine Co. v. Johnson, 178 Mass. 374, 59 N. E. 1022; Furman v. Union Pac. Ry., 106 N. Y. 579, 13 N. E. 587. And, as was held in Sohn v. Jervis, supra, where there is a complete written

contract with fixed and known incidents, the rights of the parties cannot be controlled by evidence of a custom contravening the law, or directly violating the terms of the written agreement.

[6] The contract of sale in the instant case was an executory contract of sale. Under such contract the goods remain the property of the seller until the contract has been executed; and whether, in a particular case, there has been an actual sale, or only an executory contract of sale, depends upon the intention of the parties, which is to be determined from the terms of the contract. Warner v. Warner, 30 Ind. App. 578, 66 N. E. 760; Branigan v. Hendrickson, 17 Ind. App. 198, 46 N. E. 560; Lester v. East, 49 Ind. 588.

In Nelmeyer Lbr. Co. v. Burlington, etc., R. Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534, it is said:

"A vendor's title to property sold by him is divested on its delivery to his vendee, and immediately upon such delivery the title to the property vests in the vendee; but where delivery of property sold is to take place is, of course, to be determined by the contract between the vendor and vendee; and if the contract between the parties expressly provides that delivery shall be made at a certain place, then the vendor's title to the property is not divested until delivery is made at such place."

We know of no case, where the seller agreed to deliver the property at a distant place, holding that the seller has fulfilled his contract when he delivered the property to a carrier, taking a bill of lading to himself as consignee. Where the buyer is to pay for such property on delivery at point of destination, the fact that the shipper takes a bill of lading to his order and forwards the same with a draft for the purchase money to a bank at place of destination is not of itself evidence of an intention of the buyer and seller that title should pass before the property reached the point of destination. The undisputed evidence in this case shows that title and possession of the property in question remained in appellee. The taking of the bill of lading to order of appellee and forwarding the same with the draft were entirely consistent with the legal conception of this contract—that the title remained in the shipper. The potatoes never having been delivered to appellants, appellee having both title and possession, the law giving the seller a lien for the purchase price is not applicable.

[7] The act of appellee in taking the bill of lading to its order as consignee and forwarding the same with the draft with direction to deliver on payment of draft is an admission on its part of an intention to reserve title until the payment of the purchase price. Emery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299.

"Where, however, the seller expressly or impliedly undertakes to deliver the goods at the place where the buyer desires to have them, then obviously the delivery to the carrier is but one step in the performance of the seller's undertaking. The carrier, in this case, is the seller's agent, and the seller's duty is not performed until the goods have been transported to, and delivered at, their stipulated destination. Until that time the goods are at the seller's risk." 2 Meachem on Sales, § 1184.

The delivery is complete as soon as, but not sooner than, the goods are unreservedly and unconditionally placed at the buyer's disposal, without the reservation of any other claim upon the goods than that of stoppage in transitu. Mechem, § 1187, 1195. The same author, in discussing the effect of taking a bill of lading to seller's order, stipulating that the property is to be delivered to himself or to his order, in section 774 says:

"There is the clearest possible evidence upon the face of the transaction that, notwithstanding such an appropriation of the goods as might have been sufficient to transfer the title to the buyer, the seller has determined to prevent this result by keeping the goods within his own control."

The author then cites Dows v. National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214, to sustain the statement that, while such evidence is not absolutely conclusive, "it is held to be almost conclusive." And in section 779 it is said:

"Equally significant of the intention is the case in which the bill of lading, taken to the order of the seller, is indorsed by him and attached to a draft upon the purchaser for the price; and the draft is then delivered to a bank for collection, or is discounted by the bank in reliance upon the security afforded by the bill of lading. In such a case, presumptively, no title passes to the purchaser until by payment of the draft he has duly obtained the possession of the bill of lading, although the goods have been sent to the buyer's own ship."

In Dows v. National Exch. Bank, supra, the court held that an inference that the seller intended to pass title was forbidden, and that no such intent could be implied in the face of the express arrangements and positive orders.

[8] The legal effect of the transaction in the instant case is to reserve the title in the seller until the purchase price has been paid. The sending of the bill of lading with the draft was evidence in support of the rule instead of being evidence to overthrow or rebut the rule by showing an intention of the seller to part with title. When there is no evidence to rebut the legal effect and presumption arising from the bill, there is no question of intention to submit to a jury. The legal presumption must and does control. Kentucky, etc., Co. v. Globe Refining Co., 104 Ky. 559, 47 S. W. 602, 42 L. R. A. 353, 84 Am. St. Rep. 468; Willman Mercantile Co. v. Fussy, 15 Mont. 511, 39 Pac. 738, 48 Am. St. Rep. 698.

The court also erred in giving the eleventh instruction. Smith Co. v. Marano, 267 Pa. 107, 110 Atl. 94, 10 A. L. R. 697, cited by appellee to sustain instruction 11, is of no controlling influence. The goods in that case were sold "C. I. & F." and the contract of sale was controlled by a statute which by express words relieved the shipper from the risk that was upon him from the time the property was delivered to the carrier.

[9] Appellee contends that the merits of the cause have been fairly tried and determined, and that the judgment should be affirmed notwithstanding any error in the instructions. This contention cannot prevail, as we are not able to say that the merits of the cause were fairly tried and determined, since the verdict may be based on the first paragraph of complaint.

Judgment reversed, with directions to sustain appellants' motion for a new trial, and for further proceedings consistent with this opinion.

SCOTT et al. v. CITY OF COLUMBUS. (No. 18025.)

(Supreme Court of Ohio. Dec. 26, 1923. Application for Rehearing Denied Jan. 31, 1924.)

(Syllabus by the Court.)

1. Constitutional law ⇐281—Eminent domain ⇐207—Separate tracts must be separately assessed, but owners' rights may be waived.

Under section 19, article I, of the Ohio Constitution, and within the due process clause of the Fourteenth Amendment to the United States Constitution, and under section 8687, General Code, the separate owners of separate tracts of land, which are being sought in appropriation proceedings by a municipal corporation, are entitled to have their separate tracts of land assessed separately, and not in a lump sum. This right may be waived.

2. Eminent domain ⇐219—Right to question assessment of separate tracts in lump sum, held waived.

In an appropriation proceeding brought by a municipality under chapter I, division II, title XII, General Code, application was made to appropriate two separate adjacent tracts of land owned by separate owners as if they comprised one tract owned by joint owners, and trial proceeded on that theory. The owners appeared at the trial and themselves offered evidence as to the value of the two tracts as a whole, and tendered no evidence as to the value of the separate tracts, making no objection that the two tracts should be valued separately until after an assessment of the value of the two tracts was made in a lump sum by the jury. Such action amounts to a waiver of the right to question the proceedings.

Error to Court of Appeals, Franklin County.

Action by the City of Columbus against Daisy M. Scott and another to appropriate property for park purposes. Assessment of damages was made, and motion for new trial was overruled. On error, the Court of Appeals affirmed the judgment of the court of common pleas, and defendants bring error. Affirmed.—[By Editorial Staff.]

Upon January 30, 1922, an action was instituted by the city of Columbus, Ohio, under the provisions of chapter I, division II, title XII, part first, of the General Code, in order to appropriate for park purposes certain property known as lots 17, 18, 29, and 30 of John Hyer's amended subdivision in the city of Columbus, Ohio. Lots 17, 29, and 30 of this subdivision belong to Daisy M. Scott; lot 18 is owned by Annie Neil Scott. Daisy M. Scott acquired title to her lots upon November 15, 1879, and Annie Neil Scott acquired title to lot 18 on April 17, 1914. The application filed by the city attorney in the court of common pleas of Franklin county for appropriation of the land, omitting the caption and formal parts, reads as follows:

"Now comes the city of Columbus and represents that it is a city duly organized under the laws of the state of Ohio; that by virtue of the laws of Ohio it has power and authority to appropriate property and pursuant to which its council, by resolution duly adopted on the 28th day of November, 1921, did declare its intention to appropriate in fee simple the property hereinafter described, to public use for park purposes, of which resolution due notice was given according to law; that thereafter, by ordinance duly passed on the 27th day of December, 1921, two-thirds of all members elected to council concurring therein, did appropriate said property and did direct said appropriation of said property to proceed, and directed the city attorney to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for such property; that the several parties made defendants herein, to wit, Daisy M. Scott and Anna N. Scott, own or claim to own or have some title or interest in said property directed to be appropriated as aforesaid, which said real estate is more particularly described as follows: 'Situated in the county of Franklin, state of Ohio, and in the city of Columbus, and being lots Nos. 17, 18, 29, and 30 of John Hyer's amended subdivision of lot No. 6 of Stevenson's Heirs' subdivision of fourth quarter, township No. 1, eighteenth range, United States military lands, as the same are numbered and delineated upon the recorded plat thereof, of record in Plat Book 1, page 388, recorder's office, Franklin county, Ohio.'

"Wherefore plaintiff prays that the court cause a jury to be impaneled to make inquiry into and assess the compensation to be paid by the plaintiff for the property appropriated as above described and set forth, as provided in section 3681 et seq., of the General Code of Ohio, and upon payment to the owner or own-

ers, or a deposit of the amount so assessed, as the court shall order, that the possession of said property may be awarded to the city of Columbus, and said city put in possession of said property according to law.

"Charles A. Leach, City Attorney,
"Charles A. Leach, and
"Chas. S. Best, Attorneys for Plaintiff."

No objection whatsoever was made by plaintiffs in error to this application, either as to form or substance. Upon hearing of the matter by the court of common pleas a jury was impaneled and evidence given of the value of the lots. Part of this evidence was presented by the plaintiffs in error, Daisy M. Scott and Annie Neil Scott, and the evidence presented, both upon the part of the city and upon the part of the Scott sisters, was of the value of the tract as a whole.

Testimony was given showing the front-foot value of the lots. Different values were placed upon the property fronting on Summit street from the values placed on that fronting on Fourth street. Different values were placed on the front and rear portions of the land. Upon one of these lots the family residence was situated, and, while the value of the homestead was appraised, no testimony was given as to the value of the lot upon which the homestead was situated. No other evidence than that as to the foot-front value was given of the separate value of each particular lot.

The assessment of the jury, omitting the names of the jurors, is as follows:

"We, the jury in this case, duly impaneled and sworn do assess as the compensation to be paid by the city to the owners of the several lots and parcels of land, described in the application herein, as follows: The value of land, including buildings and other structures situated wholly on the land taken, forty thousand dollars and no cents ($40,000.00).

"And we do so render our verdict on the concurrence of ten members of our said jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his name hereto this 23d day of March, 1922."

Immediately after the assessment was rendered by the jury, the Scott sisters discovered, as is alleged, for the first time, that the application had been made to appropriate the land as one parcel. Motion for a new trial was filed upon the ground that Annie Neil Scott is seized in fee of lot No. 18 of the said premises, and that she has no right, title, nor interest in lots Nos. 17, 29, and 30 in the said subdivision, and that Daisy M. Scott is seized in fee simple of lots 17, 29, and 30 of the said subdivision; that she (Daisy M. Scott) has no title of record in lot No. 18, but that she has merely an equitable interest in the said lot.

Motion for new trial was overruled by the court of common pleas and judgment was entered upon the amount awarded by the jury. Upon petition in error, the Court of Appeals affirmed the judgment of the court of common pleas.

Vorys, Sater, Seymour & Pease and Timothy S. Hogan, all of Columbus, for plaintiffs in error.

Chas. A. Leach, City Atty., and John L. Davies, both of Columbus, for defendant in error.

ALLEN, J. Plaintiffs in error claim:

"(1) Neither lot owner has had compensation for her lot assessed by a jury.

"(2) Neither lot owner has been afforded due process of law, because there is no proceeding by which either owner may now have the value of her property, or her share of the $40,000, fixed by a jury. Any proceeding to divide the fund would necessarily be in equity.

"(3) The proceeding under chapter I, division II, of title XII of the General Code is a proceeding in rem. The duty is upon the municipality to procure an assessment of each lot or parcel of land taken. The privilege afforded the owners to offer evidence of value does not cast upon them any duty to anticipate a possible failure of the jury to assess compensation for each lot or parcel of land."

These propositions are based upon the following constitutional and statutory provisions:

Article I, section 19, Constitution of Ohio (Bill of Rights):

"Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war, or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefit to any property of the owner."

Article I, section 1, Constitution of Ohio (Bill of Rights):

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

Fourteenth Amendment, section 1, Constitution of United States:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. * * *"

Section 3687, General Code:

"The assessment shall be in writing, signed by the jury, and shall be so made that the

amount payable to the owners of each lot or parcel of land may be ascertained."

[1] Taking up in their order the points relied upon by plaintiffs in error, we are, in the first place, of the opinion that neither lot owner in this proceeding has had compensation for her lot assessed by a jury. The fact that an assessment in a lump sum was made of all four lots does not constitute the proceeding a separate assessment of lot No. 18, belonging to Annie Neil Scott, nor a separate assessment of lots 17, 29, and 30, belonging to Daisy M. Scott. From the finding of the jury it is impossible to tell what is the value in money of any one of the separate lots. Second, we agree that in this proceeding neither lot owner was afforded that due process of law to which she is entitled under the state and federal Constitutions. Neither of these separate owners has had the value of her property fixed by a jury, and had compensation made or secured to her separately. She was entitled to have that done. Third, we agree that the proceeding under chapter I, division II, title XII, part first, General Code, is a proceeding in rem. This has been definitely settled by the case of Martin v. City of Columbus, 101 Ohio St. 1, 127 N. E. 411, and is not questioned in this court.

The duty rests upon a municipality to procure an assessment of each lot or parcel of land taken. The privilege afforded the owners to offer evidence of value does not cast upon them any duty of offering such evidence, and, quoting the words of Judge Wanamaker upon page 6 of 101 Ohio St., on page 412 of 127 N. E., in the Martin Case:

"The property owner need not even appear. The Constitution and the laws protect him as to 'full compensation or just compensation for the value of the property taken.'"

None of these considerations, however, disposes of the propositions peculiar to this case. An application was filed in this proceeding, which treated the lots in question as one tract, and at least raised a question as to whether the ownership was not joint in the Scott sisters. The plaintiffs in error received notice of this application, and objection could have been made thereto on the ground that the application was not definite, that the parties were not properly joined, and that certain of the tracts therein described were under separate ownership. No such objection was made.

When the hearing was had, the plaintiffs in error introduced evidence bearing upon the value of the tract as a whole, including all four lots. None of the evidence, with the exception of that relating to the foot-front values, bore upon the value of the separate lots. The municipality offered evidence bearing upon the value of the tract as a whole, but no evidence was offered by the city of the value of the separate tracts. Objection could have been made by the plaintiffs in error, who were present, taking active part in the trial, that the land was separately owned. No such objection was made.

It is true that from the foot-front values the value of the separate lots, if unimproved, might have been deduced. However, one of the lots had a dwelling upon it. This dwelling was valued in the testimony, but nowhere did plaintiffs in error state, and nowhere in the evidence does it appear, upon what lot the dwelling was situated.

To make still more emphatic their acquiescence in the valuation of these four lots as a whole, Annie Neil Scott, without objection from Daisy M. Scott, took the stand and testified as follows:

"Q. You live on the property in question? A. Yes, sir.

"Q. You are one of the owners of the property, are you? A. Yes, sir.

"Q. How long has that property been in your name? A. It has been in my name about 7 years.

"Q. Who is the other owner of the property with you? A. My sister, Daisy M. Scott. * * *

"Q. How long has that title to this property been in the name of yourself and your sister and your family—about how long? A. Fifty-four years. My father bought it 54 years ago this spring, this month. * * *

"Q. Have you at any time during this period of ownership made any effort to divide or subdivide it? A. No, sir."

When the case went to the jury, therefore, the jury had before it only evidence of the value of the tract as a whole, and nothing upon which to base an assessment of the separate lots. That this was so was due, not only to the failure of the plaintiffs in error to object to the proceedings, but also to the testimony which they had themselves actually introduced.

Furthermore, the plaintiffs in error made certain requests to charge, in which the two tracts of land were treated as one, under joint ownership of the Scott sisters. These charges were given by the court as requested.

Therefore the question here confronting us is not that of the owner, who without entering into the trial has had compensation for his lot lumped with compensation for lots owned by others, nor is it even the case in which the owner offering evidence in the trial has given separate evidence of the value of his own lot. Here is a case in which—presumably to secure the highest possible value, judging from the briefs—the plaintiffs in error themselves, on hearing, gave repeated testimony as to the value of this tract as a whole, no testimony whatever as to the separate value of the separate lots, except in evidence as to foot-front values, and even acquiesced in their own evidence in the appearance of joint ownership.

[2] Did they by their conduct during the hearing, into which they voluntarily entered and in which never at any time until upon motion for new trial was a question raised as to the legality of an assessment made in a lump sum, waive their right to raise this question?

Upon these facts the cases cited by plaintiffs in error, Brennan v. City of St. Paul, 44 Minn. 464, 47 N. W. 55, and Rusch v. Milwaukee, L. S. & W. Ry. Co., 54 Wis. 136, 11 N. W. 253, have no bearing here.

It is the general rule that a person may by his own omission to act waive constitutional and statutory rights. The rule as stated in 12 Corpus Juris, 773, follows:

"A person may waive his constitutional rights by taking part without objection in judicial proceedings otherwise unconstitutional as against him."

If trial by jury can be waived, which involves the basic right of a person to have his case adjudicated under the time-hallowed rules of the common law, why cannot a right to have one's property assessed separately be waived? In fact there is considerable authority in favor of this view, and cases offering facts parallel to those of the instant case upholding the waiver, are to be found in the general law. One of them is Kankakee & I. R. R. Co. v. Chester, 62 Ill. 235. This was a proceeding by the railroad company to condemn land for a right of way through a farm consisting of several tracts. On the trial both parties treated the farm as a single tract, and the jury fixed the compensation and the owner's damages as upon one tract. In the Appellate Court, upon appeal, for the first time, the company objected that the finding should have applied separately to each specific tract. The court held that the objection could not be urged for the first time in the Appellate Court, and also that the question could not have been raised on a motion for a new trial, saying in the syllabus:

"It is a rule of general application in courts of law that if a party acquiesces in the mode of conducting a cause by his adversary, by failing to object and except in apt time, then whether the objection pertained to the introduction of evidence, the measure of damages, or instructions to the jury, he will be precluded from raising it in the Appellate Court."

In its opinion (62 Ill. at page 236) the court says:

"We shall not enter into any construction of the statute with reference to the question, because if it gives the right as claimed by appellant, still it is one that may be waived; and appellant having, all through the trial, both as respects the examination of witnesses and asking instructions to the jury, treated appellee's farm as a single tract, and remained silent as to the right now insisted upon, we must regard it as having waived the right."

In the Matter of the Application of Cooper, Mayor, 93 N. Y. 507, a condemnation proceeding, the landowner participated in securing an appraisement of his property. After the appraisement he questioned the proceedings, claiming that there had been a failure to comply with certain statutory conditions, and that the statute itself was unconstitutional. The court in its opinion, on pages 511 and 512, says:

"It is obvious that these objections existed, if at all, at the outset of the proceedings, and when Collins as a property owner was before the court they might have been presented in opposition to the application and motion which resulted in the order of December 13. If they had any merit and he intended to rely upon them, it was his clear right and duty to bring them forward at the first opportunity. * * * It is not necessary to consider the validity of the objections, for we agree with the learned counsel for the respondent that the conduct of the appellant at the former stage of the proceedings, and to which we have adverted, estops him from now entering upon the inquiry.

"It is very well settled that a party may waive a statutory and even a constitutional provision made for his benefit, and that having once done so he cannot afterward ask for its protection. * * * The appellant is in this position. *He participated as an actor in procuring the order which he now seeks to set aside, and took his chance for a satisfactory valuation of his property for the purpose contemplated by the act. To that end there was not only acquiescence on his part, but intelligent and efficient dealing with the matter and consent to the order. By this consent he must be deemed to have made his election and should be held to it.*"

The syllabus in the case reads:

"A statutory or constitutional provision for the benefit of a party may be waived by him, and, having once waived it, he is estopped from thereafter claiming the benefit.

"Proceedings were instituted under the act of 1880 (chapter 191, Laws of 1880) to acquire title to lands for a public market in the city of New York. C., the owner of lands sought to be acquired, joined in the proceedings, by petition asking for the appointment of a person named as one of the commissioners of estimate and assessment, who was appointed. The commissioners duly executed their office, appraising among other lands that of C., who thereupon moved to set aside the order appointing the commissioners, because of the alleged unconstitutionality of said act, and of noncompliance by the moving party with certain statutory conditions. *Held*, that C. was estopped from raising these questions."

To the same point are the holdings in the following cases: Thornton v. Town Council of North Providence, 6 R. I. 433; C. & M. Elec. Rd. Co. v. Diver, 213 Ill. 26, 72 N. E. 758; Metropolitan W. S. El. Ry. Co. v. Eschner, 232 Ill. 210, 83 N. E. 809; Bd. of Commrs. of Lyon Co. v. Coman, 43 Kan. 676, 23 Pac. 1038; Huntress v. Effingham, 17 N. H. 584; Kansas City Interurban Ry. Co. v. Davis, 197

Mo. 669, 95 S. W. 881, 114 Am. St. Rep. 790; Choate v. So. Ry. Co., 143 Ala. 316, 39 South. 218; and Ehret v. Schuylkill River East Side R. R. Co., 151 Pa. 158, 24 Atl. 1068.

It would be inequitable to hold that a party could not only stand silent without objection throughout a trial, but could even offer affirmative evidence based upon a certain theory of the case, and, after verdict, secure a new trial, resulting in great delay and enhanced cost, on the ground that the theory of facts which he had set forth in his own evidence was erroneous. The inequity would be still more pronounced in case of a rise in real estate values, a practical situation which is always possible in real estate transactions.

The court holds that the plaintiffs in error, by their failure to object and by their active participation in these proceedings have waived their statutory and constitutional rights to insist upon a separate assessment as to each separate tract. We therefore find no error in the record and affirm the judgment.

Judgment affirmed.

MARSHALL, C. J., and WANAMAKER, JONES, MATTHIAS, and DAY, JJ., concur.

(109 Ohio St.)

SAUER v. DOWNING. (No. 17840.)

(Supreme Court of Ohio. Dec. 18, 1923.)

(Syllabus by the Court.)

Judgment ⟸593—Judgment not res judicata as to issues not tried.

Where an alleged verbal contract is divisible, one part pertaining to the acquisition of title to personal property and the other to the operation of a business and the division of profits, and litigation has been had and judgment entered determining that the part of the contract which pertained to the acquisition of title to the personal property has not been proven, and the issue in such trial has been confined to that part of the contract, such judgment is not res adjudicata as to that part of the contract which pertains to the operation of a business and the division of profits, as to which no issue was made at the former trial.

Day, J., dissenting as to judgment alone.

Error to Court of Appeals, Meigs County.

Action by Emil Sauer against John B. Downing. Judgment for plaintiff was reversed by the Court of Appeals, and plaintiff brings error. Reversed and judgment of court of common pleas affirmed.—[By Editorial Staff.]

Peoples & Peoples, of Pomeroy, and Hogan, Hogan, & Hogan, of Columbus, for plaintiff in error.

Fred W. Crow and O. H. Stewart, both of Pomeroy, and D. H. Armstrong, of Columbus, for defendant in error.

ROBINSON, J. The plaintiff in error here was plaintiff below, and defendant in error here was defendant below, and will be referred to herein as plaintiff and defendant.

The amended petition of plaintiff, upon which this cause was tried, avers that in 1916 plaintiff was the owner of a certain lease of a coal mine; that in the fall of that year "plaintiff and defendant entered into an oral agreement whereby the defendant agreed to market all the coal mined by plaintiff from his said coal mine and advanced said plaintiff $1.50 per ton for the purpose of enabling said plaintiff to promptly meet his semimonthly pay roll and other incidental mining expenses, in consideration that the plaintiff would mine and deliver the coal from said coal mine of plaintiff into the railway cars at the Dabney tipple in Pomeroy, Ohio;" that such agreement further provided that "all of the proceeds derived from the marketing and sale of said coal, after meeting the expenses of mining, as hereinbefore set forth, should be divided share and share alike, each receiving a one-half portion, after having first paid the royalty on said lease in the sum of twelve and one-half cents (12½¢) per ton."

The amended petition further avers that plaintiff operated the mine under the agreement until the spring of 1917; that during that period he mined and furnished on board cars, and defendant marketed, coal to the amount of 2,886.35 tons, for which the defendant received $9,337.82; that the total amount paid by the defendant on account of the agreement was $4,329.52; and that the one-half of the excess of the amount received over the expenditures amounted to the sum of $2,423.75, for which he asks judgment.

The defendant by answer made a general denial and also pleaded a former adjudication.

The record discloses that at the time of the claimed agreement the plaintiff was the owner of a lease upon the coal in question; that the defendant was the owner of certain mine cars and other personal property used by plaintiff in the operation of the mine; that in the spring of 1917, upon the plaintiff refusing to continue to deliver coal to the defendant, the defendant brought suit in the Common Pleas Court of Meigs County against the plaintiff to recover the possession of the personal property, claiming ownership thereof, in which suit the defendant, plaintiff here, filed a general denial, and at the trial, under the general denial, offered evidence to the effect that he had entered into an agreement with the plaintiff in that cause, defendant here, whereby he became the owner of the

personal property in controversy, and that plaintiff there was to be paid therefor out of the proceeds of the sale of coal in excess of $1.50 per ton, and that in other respects the agreement was as set forth in the petition herein.

There was some evidence offered and admitted in that trial touching the amount of coal delivered and the price received, and other evidence proffered touching the same matter, which was excluded.

In the submission of the replevin case to the jury the court charged the jury as follows:

"The court says to you that, if the plaintiff has proven by a preponderance of the evidence that he was the owner of the property, and that the alleged contract with Mr. Sauer was not entered into at all, then your verdict should be for the plaintiff. On the other hand, the court instructs you, if you believe from the evidence that such a contract was entered into, and that Mr. Sauer by the terms thereof purchased the property, then the court says to you, the title to the property changed, and your verdict should be for the defendant."

It thus is apparent both from the exclusion of evidence touching the matter of profits and the charge of the court that the cause in the replevin case was submitted to the jury upon the theory that, if the agreement pertaining to the sale of the property by Downing to Sauer was entered into, the title to the property passed from Downing to Sauer at the time of the agreement, irrespective of any profits which may or may not have been earned, and the title to the property was in no sense dependent upon the determination of the question whether Sauer had paid therefor, or whether Sauer was indebted to Downing or Downing indebted to Sauer, and, while it may logically be argued that the jury in that case, having found that no agreement was entered into between Downing and Sauer whereby the title to the personal property passed from Downing to Sauer, would, had the question been submitted to them, have made the same finding as to the agreement with reference to the division of the profits over and above $1.50 per ton, being a part of the same verbal agreement, yet, since the existence or nonexistence of that part of the contract, according to the view of the trial court, in no way entered into the determination of the issue there involved, and the issue was specifically confined to the question whether there was an agreement to the sale of the personal property, it cannot be said that the particular controversy in the case at bar "was therein necessarily tried and determined."

Measured by the rule laid down in the case of Lessee of Lore v. Truman, 10 Ohio St. 45, wherein this court declared that:

"Where a judgment or decree is relied on by way of evidence, as conclusive per se, between the parties in a subsequent suit, it must appear by the record of the former suit, that the particular controversy sought to be precluded was therein necessarily tried and determined,"

the verdict of the jury and the judgment in the replevin case at most affected the credibility of the plaintiff, and did not amount to a bar in the present action.

We therefore do not find ourselves in accord with the judgment of the Court of Appeals reversing the judgment of the court of common pleas upon the sole ground that the cause of action of the plaintiff was tried and determined in the replevin case. A jury might well find that Sauer had failed to furnish a preponderance of proof as to the purchase of the personal property, and had furnished a preponderance of proof as to the agreement with reference to the sale of the coal; and indeed separate juries have so found. The question determined by the jury in the instant case was not submitted to the jury in the replevin case, and the question determined by the jury in the replevin case was not submitted to the jury in the instant case.

The judgment of the Court of Appeals will be reversed, and that of the court of common pleas affirmed.

Judgment reversed.

MARSHALL, C. J., and WANAMAKER, MATTHIAS, and ALLEN, JJ., concur.

DAY, J., concurs in the syllabus, but not in the judgment.

COSTAKIS v. VILLAGE OF YORKVILLE. (No. 17855.)

(Supreme Court of Ohio. Dec. 26, 1923.)

(Syllabus by the Court.)

1. Municipal corporations ⇐106(2)—Statutory rule as to reading of ordinance mandatory.

The provisions of section 4224, General Code, requiring that a municipal council shall not pass an ordinance of a general nature unless it has been fully and distinctly read on three different days, and that such rule can only be dispensed with by a three-fourths vote of all members elected thereto taken by yeas and nays entered on the journal, are mandatory.

2. Municipal corporations ⇐106(3)—Suspension of statutory rule as to reading of ordinance held sufficient.

In order to dispense with that rule of the statute and permit the three readings on the same day it is a substantial and sufficient compliance with that statute if the minutes entered on the journal show that by a three-fourths vote of all members elected to such council the requirement of reading on three different days was dispensed with, and that three readings on the same day be permitted, though it does not

appear that any reference whatever was made to the statute.

Error to Court of Appeals, Jefferson County.

Steve Costakis was convicted of an offense. On error the conviction was affirmed, and defendant brings error. Affirmed.—[By Editorial Staff.]

Gordon D. Kinder, of Martins Ferry, for plaintiff in error.

Arthur L. Hooper, of Steubensville, for defendant in error.

MARSHALL, C. J. This is an error proceeding from the courts of Jefferson county, Ohio, originating in the court of the mayor of the village of Yorkville. It was a prosecution under one of the penal ordinances of that village, relating to disturbances to the order and quiet of the village, and resulted in conviction and imposition of a fine. No legal questions were presented for the consideration of this court concerning the conduct of the trial, and the sole question presented and argued is whether or not the ordinance of the village under which the prosecution was conducted was a valid ordinance.

It is claimed that the ordinance was invalid because of alleged irregularity in the proceedings of council in the adoption of the ordinance. The meeting of the council was a regular meeting, and, so far as the record discloses, all members of council were present. In any event the record does not deny that the five members of council present and voting constituted three-fourths of all the members elected thereto. The ordinance in question was introduced and read for the first time at that meeting, which was held May 19, 1917. After the reading of the ordinance the first time, the following action was taken, as disclosed by the minutes of the meeting:

"On motion of Nunley, seconded by Brooks and carried, that the rules and regulations of council be suspended and Ordinance No. 15 be passed to its second and third reading and posted.

"Roll Call. Ayes: Bayer, Brooks, Evans, Kirkbride, and Nunley—5. Nays: None.

"Ordinance No. 15 was then read by the clerk the second time.

"Roll Call. Ayes: Bayer, Brooks, Evans, Kirkbride, and Nunley—5. Nays: None.

"Ordinance No. 15 was then read by the clerk for the third time.

"Roll call. Ayes: Bayer, Brooks, Evans, Kirkbride, and Nunley—5. Nays: None.

"Ordinance No. 15 was then declared passed, and ordered posted according to law."

It is urged that this action was a violation of the provisions of Section 4224, General Code, which read, in part, as follows:

"No by-law, ordinance or resolution of a general or permanent nature, * * * shall be passed, unless it has been fully and distinctly read on three different days, and with respect to any such by-law, ordinance or resolution, there shall be no authority to dispense with this rule, except by a three-fourths vote of all members elected thereto, taken by yeas and nays, on each by-law, resolution or ordinance, and entered on the journal."

[1] The motion for suspension received a three-fourths vote, and the only question for determination is whether or not the suspension referred to the rule of the statute as defined in section 4224. It is contended by counsel for the accused that the motion by its terms referred only to the rules of council. What these rules were, or whether there were any rules of council, does not appear in the record. If council had a rule on the subject, it does not appear whether such rule was the identical rule shown by the above-quoted portion of section 4224. It is very clear by this record that the ordinance was read three times on the same day, and passed after the third reading, and that no other action pertaining thereto was taken after that day, except the usual publication. The provisions of section 4224 are clearly mandatory, and unless complied with the ordinance is invalid.

[2] Whether the rule of the statute was waived must be determined by the language of the minutes, and in construing this language the rule is that every reasonable presumption should be indulged in favor of validity. In the absence of any showing that council had rules and regulations on this subject, and in the absence of any showing that such rules and regulations were different from the rule of the statute requiring a suspension of the requirement of reading on three separate days, it will be presumed that, if any rule existed, the rule was the same as the statute, because council could not legally have any rule which would be in conflict with the statute. A careful analysis of the motion shows that it relates to a proposed suspension of some rule forbidding the second and third readings on the same day as the first, and it is clearly the purport of the motion to permit the second and third readings on the same day. It is true that the motion does not in terms refer to the statute, and yet the effect of the motion is to disregard the rule provided in the statute, that of reading on three different days, and in lieu thereof to have three readings on the same day. And the motion was in fact carried by the required three-fourths vote, and the vote was in fact entered upon the journal. It appears, therefore, that the provisions of the statute were fully observed, and that the rule of the statute was in fact suspended in the manner therein provided. The form of the minutes is inartificial, and we do not commend it as a form to be followed in such matters, yet we are unable to say that the word "rules" did not refer to the rule as

declared in section 4224. And we are clearly of the opinion that the rule of that section was in fact complied with.

It will be noted that Section 4224 does not specifically require that there be a suspension of the statute, but the language is that council must "dispense with that rule" by a three-fourths vote.

The important, substantial thing is that there be a determination of three-fourths of the entire number elected that the three readings be made on the same day, and that such determination be entered on the journal before the second and third readings. All this substantially appears. It is not a sufficient answer to this to say that it might have been more clearly and definitely expressed.

The judgments of the lower courts must therefore be affirmed.

Judgment affirmed.

WANAMAKER, ROBINSON, JONES, MATTHIAS, DAY, and ALLEN, JJ., concur.

GARDNER'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 10, 1924.)

Master and servant ⇐375(1)—Injury to motorman crossing street for a drink held not compensable as "arising out of employment."

Where a street railway motorman, when arriving at a switch, alighted from the car and started across the road to get a drink and relieve nature, and was struck by an automobile, the injury did not arise out of the employment, within the Workmen's Compensation Act, though it was customary for crews to cross the road for that purpose; such custom not being known to the master.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

Appeal from Superior Court, Suffolk County; McLaughlin, Judge.

Proceeding by Orange Gardner under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Berkshire Street Railway Company, the employer, and the Employers' Liability Assurance Corporation, Limited, the insurer. There was an award of compensation, and a decree of the superior court directing its payment, and the insurer appeals. Reversed, and decree entered for insurer.

Gay Gleason, of Boston, for appellant.

D. G. Campion, of Springfield, for appellee.

CROSBY, J. The employee was a motorman of the Berkshire Street Railway Company. His run at the time of the accident was between Pittsfield and Great Barrington. He left the latter place in the evening and with his car arrived at the switch at South Lee at 10 o'clock that night; the railway tracks at this point were on the grass off the macadam road. He alighted from the car and started across the road "to get a drink and relieve nature," and when six or eight feet from the side of the car was struck and injured by a passing automobile. There was evidence that it was customary for the crews of the different trolley cars, when stopping at this switch, "to get a drink of water and relieve nature," but there was no evidence that the employer had knowledge that its employees, when stopping at the switch, usually crossed the road for these purposes, and there was nothing to show that they were invited to do so by the employer. The only issue is whether the injury arose out of the employment.

"Numerous of our cases illustrate the principle that the sphere of employment exists and affords its shield to the employee while within the premises of the employer on the way to or on the return from actual performance of the specific duties of the employment." White v. E. T. Slattery Co., 236 Mass. 28, 34, 127 N. E. 597, 599; Sundine's Case, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318; Von Ette's Case, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641; Stacy's Case, 225 Mass. 174, 114 N. E. 206; Osterbrink's Case, 229 Mass. 407, 118 N. E. 657; Hallett's Case, 232 Mass. 49, 121 N. E. 503; Moore v. Manchester Liners, Ltd., [1910] A. C. 498.

In Bell's Case, 283 Mass. 46, 130 N. E. 67, it was held that accidents happening to an employee on his way home from work, but not on premises of his employer, as a rule do not arise in the course of his employment. In that case the employee, having left the premises of his employer on his way home from work, crossed the tracks of a railroad and was struck by a train and fatally injured. It was held that the injury did not arise in the course of or out of the employment within the meaning of the Workmen's Compensation Act (St. 1911, c. 751, as amended by St. 1912, c. 571).

A like result upon similar facts was reached in Fumiciello's Case, 219 Mass. 488, 107 N. E. 349. In the case at bar the injury to the employee while crossing the road for the purpose stated "cannot fairly be traced to the employment as a contributing approximate cause." McNicol's Case, 215

Mass. 497, 499, 102 N. E. 697, L. R. A. 1916A, 306. There was no causal relation between the employment and the injury and no legitimate inference can be drawn that the risk of crossing the street, which resulted in the injury, was incidental to or connected with the conditions of the employment. The case does not differ in principle from one where the employee, during his trip, crossed a highway to obtain food or drink at a restaurant and met with an injury in the restaurant, or was struck by an automobile while returning therefrom to his car. He was not on his employer's premises when injured and at the time was exposed to no risk which was incidental to his employment. The case is not distinguishable in principle from Fumiciello's Case, supra; Ross v. John Hancock Mutual Life Ins. Co., 222 Mass. 560, 111 N. E. 390; Donahue's Case, 226 Mass. 595, 116 N. E. 226, L. R. A. 1918A, 215; Braley's Case, 237 Mass. 105, 129 N. E. 420; Rourke's Case, 237 Mass. 360, 129 N. E. 603, 13 A. L. R. 546; Upton v. Great Central Railway, [1923] 2 K. B. 879.

It does not follow, however, that a motorman is necessarily precluded from the benefits of the act because injured while on a public street, if at that time he is actually engaged in the work for which he was employed. It cannot be doubted that if a motorman, standing upon the street adjusting a trolley pole or engaged in other work incident to the operation of his car, were injured he would be entitled to compensation. At the time of the accident in the case at bar the employee was not using the street as a motorman in the performance of his duties, but as one of the public. Donahue's Case, supra. Cook's Case, 243 Mass. 572, 137 N. E. 733, rests upon its peculiar facts and is distinguishable. In crossing the street the motorman was exposed to the same danger of being struck by an automobile or otherwise injured as pedestrians generally are subjected to.

Keaney's Case, 232 Mass. 532, 122 N. E. 739, is not a decision in favor of the employee's contention. In that case a teamster, while driving upon a highway, stopped his horses and got off his wagon for the purpose of picking up some papers carried in his hat, which had blown off, and was struck and fatally injured by a passing automobile. It was held that his employment while on the street exposed him to the particular injury he received.

If the employee in the present case in crossing the street had slipped and stumbled and thereby received an injury it is plain that the risk was no greater than of an unemployed person under the same conditions.

It follows that the employee, when injured, was acting wholly outside of his contract of employment. The danger from which he suffered was not due to exposure to a special risk, but was one to which an ordinary member of the public was equally exposed. The decree must be reversed and a decree entered for the insurer.

So ordered.

YUTZE v. COPELAN, Chief of Police of City of Cincinnati. (No. 17942.)

(Supreme Court of Ohio. Dec. 26, 1923.)

(Syllabus by the Court.)

Habeas corpus ⇐4—Writ will not lie to test constitutionality of statute in favor of one convicted, where criminal court had "jurisdiction" to determine it.

A writ of habeas corpus will not lie, to test the constitutionality of a statute or ordinance, in favor of one who has been convicted, where the criminal court wherein conviction was obtained had jurisdiction or power to determine the question of constitutionality. In such case the writ cannot be made a substitute for proceedings in error.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction (Of Courts).]

Error to Court of Appeals, Hamilton County.

Petition for habeas corpus by Charles Yutze against William Copelan, Chief of Police of the City of Cincinnati. Dismissal of application was affirmed on error by the Court of Appeals, and petitioner brings error. Affirmed.—[By Editorial Staff.]

Yutze was arrested, tried, found guilty, and fined by the municipal court of Cincinnati for the violation of the following ordinance:

"Sec. 973. That no person shall remove or carry in or through any of the streets, squares, courts, lanes, avenues, places or alleys of the city of Cincinnati, any house dirt or house offal, animal or vegetable, or any refuse substance, from any of the dwelling houses, or other places of the city, or the carcass of any dead animal, unless such person so removing or carrying the same shall have procured a permit so to do from the director of public service, prescribing the terms and conditions as may be deemed essential to the health and interests of the city: Provided, however, the provisions hereof shall not apply to any contractor with the city in relation to garbage," etc.

Thereafter, being detained by the chief of police, he invoked the jurisdiction of the common pleas court by applying for a writ of *habeas corpus*, contending that the ordinance of the city was unconstitutional and

void. His application was dismissed by that court, which held that, although *habeas corpus* was a proper remedy, the ordinance was constitutional and valid. Error being taken to the Court of Appeals, that court affirmed the judgment of the lower court, holding also that the ordinance was valid, but stating in the opinion "that a writ of *habeas corpus* will not lie to test the constitutionality of an ordinance, after conviction and before review." Error is now prosecuted to this court, wherein it is sought to reverse the judgments of the lower courts.

Pogue, Hoffheimer & Pogue and Walter M. Locke, all of Cincinnati, for plaintiff in error.

Saul Zielonka, City Sol., and Chauncey D. Pichel, Pros. Atty., of the Municipal Court, both of Cincinnati, for defendant in error.

JONES, J. One question presented by this record is whether a writ of *habeas corpus* will lie to test the constitutionality of an ordinance in favor of one who has been convicted of its violation. Upon this question there is a contrariety of opinion in the various state jurisdictions. The text in 29 Corpus Juris, p. 35, and 12 Ruling Case Law, p. 1199, states that the weight of authority supports the rule that a court on *habeas corpus* proceedings may inquire into the constitutionality of a statute under which the petitioner has been convicted, and that if the statute proves to be unconstitutional the petitioner shall be discharged. Among other authorities which support this principle are the following: Ex parte Rollins, 80 Va. 314; Ex parte Smith, 135 Mo. 223, 36 S. W. 628, 33 L. R. A. 606, 58 Am. St. Rep. 576; Ex parte Harrison, 212 Mo. 88, 110 S. W. 700, 16 L. R. A. (N. S.) 950, 126 Am. St. Rep. 557, 15 Ann. Cas. 1; Servonitz v. State, 133 Wis. 231, 113 N. W. 277, 126 Am. St. Rep. 955; In re Unger, 22 Okl. 755, 98 Pac. 999, 132 Am. St. Rep. 670; In re Zany, 20 Cal. App. 360, 129 Pac. 295; In re Smith, 35 Nev. 82, 126 Pac. 655, 129 Pac. 308; and Harper v. Galloway, 58 Fla. 255, 51 South. 226, 26 L. R. A. (N. S.) 794, 19 Ann. Cas. 235.

On the other hand, almost an equal number of other state courts hold that the judgment of conviction in a criminal court, having jurisdiction of the offense, is not void because of the invalidity of the ordinance or statute under which the conviction may have been had, and that a writ of *habeas corpus* is not available to raise the question of unconstitutionality. Among the authorities so holding are the following: Koepke, Sheriff, v. Hill, 157 Ind. 172, 60 N. E. 1039, 87 Am. St. Rep. 161; In re Maguire, 114 Mich. 80, 72 N. W. 15; Ex parte Fisher, 6 Neb. 309; People ex rel. Birkholz v. Jonas, Constable, 173 Ill. 316, 50 N. E. 1051; and People ex rel. Harris v. Graves, 276 Ill. 350, 114 N. E. 556. Other cases might be cited, but they would only tend to show the wide difference of opinion upon the aspects of the case here presented.

The basis of the reasoning underlying the opinions of those courts which hold that *habeas corpus* is a proper remedy to test the unconstitutionality of a statute rests upon the conclusion that if the statute or ordinance be unconstitutional the court is entirely without jurisdiction; that it is in effect the same as if an offense were charged under a statute which did not exist; that in either case the court would be powerless to act in any stage of the proceedings—in the issuance of process, in the trial of the cause, or in pronouncing judgment upon such void statute or ordinance. Most of the courts which so hold place reliance upon the dicta used by the various federal judges of the United States Supreme Court, to which attention will be called later. Under the modern trend of authority, the courts holding otherwise, including, as we think, the Supreme Court of the United States, now rest their decision upon the well-known rule that *habeas corpus* is not the proper remedy to review errors, either of fact or law, that may occur in the trial of a criminal case; that, jurisdiction having been conferred, a criminal court is empowered to determine in the first instance the question whether a statute or ordinance, as the case may be, is violative of our organic laws, and that if any error intervenes in the decision of the trial court the defendant has a right of review in the appellate courts, where the question of unconstitutionality may again be passed upon and determined. It would seem that this is the sensible view. Otherwise an offender might keep the card of unconstitutionality up his sleeve and later play it by invoking the writ of *habeas corpus*. And this he might do not only after trial and conviction in the nisi prius court, but after full review in the appellate courts. If it be conceded that a conviction in the trial court would be absolutely void were the statute or ordinance upon which the violation was predicated unconstitutional, it then follows that a judgment of affirmance rendered by the Court of Appeals or the Supreme Court would likewise be void. Were that so, any one detained under such unlawful conviction and sentence could at any time apply to the court of common pleas, Court of Appeals, or Supreme Court, and collaterally attack any proceeding under which conviction was had. Indeed, the writ might be invoked even though the question of constitutionality were fully heard and determined by the trial and appellate courts.

Stripped to its bare bones the real question is: What is meant by the word "jurisdiction?" The proponents of the argument

favoring invocation of the writ argue that the court is not clothed with jurisdiction if the statute is unconstitutional. But it seems to us that they overlook the usual and ordinary meaning of the term. "Jurisdiction" is defined as the power to hear and determine. The court of first instance has power to hear and determine the law question as to whether the statute or the ordinance is constitutional or otherwise. If it is a civil case in which the unconstitutional feature of the statute is presented, there can be no doubt that the court had jurisdiction to determine its constitutionality, and a judgment in such case would not be subject to collateral attack. Indeed some of our courts announce the rule that conviction upon an unconstitutional statute cannot be inquired into in *habeas corpus*, because such proceeding is equivalent to a collateral attack upon a criminal judgment in a case wherein that question could have been or had been determined. Recognizing, however, the divergent judicial pronouncements in this country upon this subject, we may be permitted to revert to what we consider the more recent opinions of the Supreme Court of the United States upon this controverted point, especially in view of the fact that many courts, holding that *habeas corpus* is a proper remedy in such cases rely, in the main, upon what was said by Justices Bradley and Miller in Ex parte Siebold, 100 U. S. 371, 377, 25 L. Ed. 717, and Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274. In the latter (110 U. S. at page 654, 4 Sup. Ct. 153, 28 L. Ed. 274), Justice Miller used the following significant language:

"If the law which defines the offense and prescribes its punishment is void, the court was without jurisdiction and the prisoners must be discharged."

Substantially the same language is used by a dictum in Ex parte Shaw, 7 Ohio St. 81, 70 Am. Dec. 55, but the constitutionality of law was not there involved. However, in more recent cases, the United States Supreme Court has held, that, while federal courts have discretion in *habeas corpus* in cases of conviction where it is claimed that the statute under which the conviction was had is violative of the organic law, it is only where exceptional circumstances intervene that such courts may order the release of convicted offenders, and that in the absence of such exceptions such complainants will not be allowed to test the constitutionality of the statute in *habeas corpus*, but will be relegated to the tribunals of the state court wherein such questions may be threshed out. Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868. In the Royall Case it was urged by the petitioner that he was restrained of his liberty in violation of the United States Constitution. The circuit court had dismissed the petition in *habeas corpus*, and in affirming its judgment Mr. Justice Harlan, in the course of his opinion, said, at page 250 of 117 U. S., at page 740 of 6 Sup. Ct. (29 L. Ed. 868):

"The question as to the constitutionality of the law under which he is indicted must necessarily arise at his trial under the indictment, and it is one upon which, as we have seen, it is competent for the state court to pass. * * * Nor do their circumstances, as detailed in the petitions, suggest any reason why the state court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted."

Later, in the case of Johnson v. Hoy, 227 U. S. 245, 247, 33 Sup. Ct. 240, 241 (57 L. Ed. 497), Mr. Justice Lamar used the following pertinent language:

"The writ of habeas corpus is not intended to serve the office of a writ of error even after verdict, and, for still stronger reasons, it is not available to a defendant before trial, except in rare and exceptional cases as pointed out in Ex parte Royall, 117 U. S. 241. This is an effort to nullify that rule and to depart from the regular course of criminal proceedings by securing from this court, in advance, a decision on an issue of law which the defendant can raise in the district court, with the right, if convicted, to a writ of error on any ruling adverse to his contention. That the orderly course of a trial must be pursued and the usual remedies exhausted, *even where the petitioner attacks on habeas corpus the constitutionality of the statute under which he was indicted*, was decided in Glasgow v. Moyer, 225 U. S. 420."

Glasgow v. Moyer, 225 U. S. 420, 32 Sup. Ct. 753, 56 L. Ed. 1147, is a case wherein a writ of *habeas corpus* was sought. Mr. Justice McKenna, reciting the fact that a section of the Criminal Code under which the appellant was indicted was attacked as "unconstitutional because (a) it is not within the constitutional grant of legislative power to Congress," and referring to the principle denying the right to use the writ in order to correct error, says, on page 429 of 225 U. S., on page 756 of 32 Sup. Ct. (56 L. Ed. 1147):

"The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional. * * * Those questions, like others, the court is invested with jurisdiction to try if raised, and its decision can be reviewed, like its decisions upon other questions, by writ of error. The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of *habeas corpus* cannot be employed to retry the issues, whether of law, constitutional or other, or of fact."

In the case of Henry v. Henkel, 235 U. S. 219, 35 Sup. Ct. 54, 59 L. Ed. 203, Mr. Jus-

tice Lamar, after adverting to the fact that applications for *habeas corpus* had been before that court for various reasons, including the unconstitutionality of a statute, state or federal, on which the charge was based, said at page 229 of 235 U. S., at page 57 of 35 Sup. Ct. (59 L. Ed. 203):

"But in all these instances, and notwithstanding the variety of forms in which the question has been presented, the court, with the exceptions named, has uniformly held that the hearing on *habeas corpus* is not in the nature of a writ of error nor is it intended as a substitute for the functions of the trial court. Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court. If the objections are sustained or if the defendant is acquitted, he will be discharged. If they are overruled and he is convicted, he has his right of review. Kaizo v. Henry, 211 U. S. 146, 148. The rule is the same whether he is committed for trial in a court within the district or held under a warrant of removal to another state. He cannot, in either case, anticipate the regular course of proceeding by alleging a want of jurisdiction and demanding a ruling thereon in *habeas corpus* proceedings. Glasgow v. Moyer, 225 U. S. 420."

This rule was applied in In re Gregory, 219 U. S. 210, 31 Sup. Ct. 143, 55 L. Ed. 184. There Gregory had been arraigned in the police court, had pleaded not guilty, waived jury trial, and submitted his case to the court. A judgment of guilty was entered and the defendant sentenced to pay a fine. He thereupon filed his application for a writ of *habeas corpus* in the Supreme Court. Mr. Justice Hughes delivered the opinion, in the course of which he said:

"The only question before us is whether the police court had jurisdiction. A *habeas corpus* proceeding cannot be made to perform the function of a writ of error."

The only ground upon which the jurisdiction of the police court was assailed was that "the statute under which the information was brought is unconstitutional." The learned justice held that the police court had jurisdiction to determine not only the legal questions arising upon the record, but the constitutionality of the statute. If the statute was valid, there certainly could be no question that a writ of *habeas corpus* should be denied. So, if the police court had jurisdiction to declare the ordinance valid it likewise had jurisdiction to determine and declare its invalidity. In the course of his opinion, Mr. Justice Hughes cited the case of Ex parte Watkins, 3 Pet. (28 N. S.) 193, 7 L. Ed. 650, wherein Chief Justice Marshall said, at page 203 of 3 Pet. (7 L. Ed. 650):

"The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable, or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other, and must remain in full force, unless reversed regularly by a superior court, capable of reversing it."

The Justice also cited the case of Ex parte Parks, 93 U. S. 18, 20, 23 L. Ed. 787, wherein the court said:

"Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States) is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question."

And the learned Justice closed his opinion with the statement that finding that jurisdiction had been conferred upon the police court by statute the application for a writ of *habeas corpus* should be denied.

It will therefore be seen from an examination of the federal authorities that they hold that a trial court has jurisdiction to hear and determine the legal question whether a statute under which the prosecution is based is constitutional or otherwise, and that on such grounds *habeas corpus* is not the proper remedy, except under peculiar and exceptional circumstances, to obtain the release of one who has been convicted. Such release must be obtained in the ordinary course of law, either by the determination of the trial court or by an appeal to the courts of error.

In the instant case the defendant had the right of review. This court has held that *habeas corpus* may be employed where a state criminal court has attempted to try an offender for an offense other than that for which he was extradited; likewise that such remedy might be employed where a state court arrogated to itself the jurisdiction of a federal court. Ex parte Bridges, 2 Woods, 428, Fed. Cas. No. 1,862, cited in Ex parte Royall, supra. Likewise, if a magistrate in this state were to try an offender for felony, when he was vested only with jurisdiction in misdemeanor, a writ of *habeas corpus* would no doubt lie. Defendant might also apply, under our Constitution, for a writ of prohibition in such case.

We are constrained to the conclusion reached by the provisions of the Ohio Code upon this subject. Section 12165, General Code, provides:

"If it appears that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or mag-

istrate, 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; or, if the jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment, or order."

The municipal court, in the present instance, had jurisdiction to render the judgment of conviction. Had it held the ordinance unconstitutional, that court would have had jurisdiction to render a judgment acquitting the defendant. The section of the Code quoted specifically states that, if such magistrate had jurisdiction, the writ of *habeas corpus* shall not be allowed. This court has had two cases wherein it entertained jurisdiction in *habeas corpus* after arrest, but before conviction. Both of these cases arose while the above-quoted section was in force. They are Arnold v. Yanders, 56 Ohio St. 417, 47 N. E. 50, 60 Am. St. Rep. 753, and In re Preston, 63 Ohio St. 428, 59 N. E. 101, 52 L. R. A. 523, 81 Am. St. Rep. 642. In the latter case, the writer of this opinion was one of the counsel for the petitioner in *habeas corpus*. In both of these cases the writ was sought before conviction, but the question of remedy was not presented or disposed of in either case.

We are therefore of the opinion that the municipal court of Cincinnati had jurisdiction in the present instance, and that after conviction the offender cannot employ the writ of *habeas corpus* upon the alleged ground that the ordinance under which he was convicted was unconstitutional and void.

Having decided that plaintiff in error has pursued the wrong remedy, the court deems it unnecessary to pass upon the constitutionality of the ordinance. For the reasons stated in this opinion the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

MARSHALL, C. J., and WANAMAKER, ROBINSON, MATTHIAS, DAY, and ALLEN, JJ., concur.

BRAMSON v. BOGRAND. (No. 18077.)

(Supreme Court of Ohio. Nov. 20, 1923.)

Error to Court of Appeals, Cuyahoga County.

Klein & Harris and T. S. Dunlap, all of Cleveland, for plaintiff in error.

Woods, Lang & Eastman, of Cleveland, for defendant in error.

PER CURIAM. It is ordered and adjudged that the said petition in error be, and the same hereby is, dismissed for the reasons no debatable constitutional question is involved in said cause.

Petition in error dismissed.

MARSHALL, C. J., and WANAMAKER, ROBINSON, JONES, MATTHIAS, DAY, and ALLEN, JJ., concur.

David B. CARPENTER v. Ruth SMITH et al. (No. 18125.)

(Supreme Court of Ohio. Nov. 27, 1923.)

Error to Court of Appeals, Cuyahoga County.

David B. Carpenter, of Cleveland, in pro. per.

William H. Chapman, of Cleveland, for defendant in error Smith.

C. C. Crabbe, Atty. Gen., and David E. Green, of Cleveland, for defendant in error Industrial Commission of Ohio.

George H. Phelps, of Findlay, amicus curiæ.

PER CURIAM. It is ordered and adjudged that the petition in error be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

Petition in error dismissed.

MARSHALL, C. J., and WANAMAKER, ROBINSON, JONES, MATTHIAS, DAY, and ALLEN, JJ., concur.

CITY OF WARREN v. WOOD et al. (No. 18065.)

(Supreme Court of Ohio. Nov. 13, 1923.)

Error to Court of Appeals, Trumbull County.

Marion D. Lea, City Sol., and Archer L. Phelps, both of Warren, C. C. Crabbe, Atty. Gen., and Arthur H. Wicks, of Columbus, for plaintiff in error.

Gillmer & Gillmer, of Warren, for defendants in error.

PER CURIAM. It is ordered by the court that the petition in error herein be, and the same hereby is, dismissed; no constitutional question being involved.

Petition in error dismissed.

ROBINSON, JONES, MATTHIAS, DAY, and ALLEN, JJ., concur.

ABT v. STATE. (No. 18043.)

(Supreme Court of Ohio. Nov. 13, 1923.)

Error to Court of Appeals, Hamilton County.

Charles F. Dolle, of Cincinnati, for plaintiff in error.

Murphy & Joseph, of Cincinnati, and J. A White and Chas. M. Earhart, both of Columbus for defendant in error.

PER CURIAM. It is ordered by the court that this cause be, and the same is hereby, dismissed on motion of defendant in error on the grounds that no debatable constitutional question is involved.

Cause dismissed.

MARSHALL, C. J., and WANAMAKER, ROBINSON, MATTHIAS, DAY, and ALLEN, JJ., concur.

JONES, J., took no part in the consideration or decision of the case.

HUBERT et al. v. KESSLER. (No. 17761.)

(Supreme Court of Ohio. May 29, 1923.)

Error to Court of Appeals, Lucas County.

Alonzo G. Duer, of Toledo, for plaintiffs in error.

Karl A. Flickinger, of Toledo, for defendant in error.

PER CURIAM. The court finds in this case from the record that several issues of fact were presented in the pleadings for the determination of the jury. The plaintiffs claimed recovery upon an alleged agreement for real estate commission based on a written contract, which the plaintiffs claimed had been modified orally by the parties. The establishment of this modification was necessary to sustain plaintiffs' claim for recovery. The defendant denied that the written contract had been modified as claimed by the plaintiffs.

Certain errors appear upon the record with regard to the admission of testimony and to the charge of the court thereon, but upon the issue of the modification of the contract the record is entirely free from error.

As the verdict returned by the jury is a general verdict and it is not disclosed by answer to interrogatories or otherwise upon which issue the verdict was based, it is not affirmatively shown that the errors existing in the record influenced the verdict. The judgment must therefore be affirmed.

Judgment affirmed.

WANAMAKER, ROBINSON, JONES, MATTHIAS, DAY, and ALLEN, JJ., concur.

STATE ex rel. TAYLOR v. HOLTZ, Mayor, et al. (No. 18096.)

(Supreme Court of Ohio. Oct. 23, 1923.)

In Mandamus.

Mills, Knight & Miller, of Cleveland, for relator.

F. W. Green, J. W. Woods, and Ben B. Wickham, all of Cleveland, for defendants Holtz and Seeley.

Edward C. Stanton, Pros. Atty., George C. Hansen and Harry E. Parsons, all of Cleveland, for defendant Stannard.

PER CURIAM. This cause coming on for hearing upon the demurrer to the petition, on consideration whereof the court sustains the demurrer upon the authority of the case of Cullen, etc., v. State ex rel. City of Toledo, 105 Ohio St. 545, 138 N. E. 58.

Demurrer sustained.

MARSHALL, C. J., and WANAMAKER, ROBINSON, MATTHIAS, DAY, and ALLEN, JJ., concur.

UNDERWOOD v. MOOK. (No. 17927.)

(Supreme Court of Ohio. Nov. 13, 1923.)

Error to Court of Appeals, Logan County.

West & West, of Bellefontaine, for plaintiff in error.

A. R. Osmer, of Franklin, and W. Huston, of Bellefontaine, for defendant in error.

PER CURIAM. It is ordered and adjudged that the petition in error filed herein be, and it hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

Petition in error dismissed.

MARSHALL, C. J., and WANAMAKER, ROBINSON, MATTHIAS, DAY, and ALLEN, JJ., concur.

JONES, J., took no part in the consideration or decision of the case.

BOSTON SAFE DEPOSIT & TRUST CO. v. GOLDTHWAIT.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 9, 1924.)

1. Wills ⇐548—Grandchild held not to take on death of child without issue.

Under a will leaving property in trust, income to be paid to children, share of child dying without issue to go to surviving children, *held*, that grandchild, whose parent predeceased the testator, was not entitled to any part of the share of a child of the testator dying without issue after testator's death.

2. Wills ⇐456—Words not given unusual meaning.

In the construction of a will, words are not to be given an unusual meaning, unless it appears that such a meaning was intended by the testator.

3. Wills ⇐497(2)—"Children" construed not to include grandchildren.

Though it has been frequently decided that the word "child" and the word "children" should be construed to include grandchildren, when this construction is necessary to carry out the testator's intention, the principle of these cases is not applicable where the share of a daughter dying without issue is by the express terms of the will payable to the testator's "remaining children during their lifetime."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Child—Children.]

Appeal from Probate Court, Suffolk County; W. M. Prest, Judge.

Proceeding between the Boston Safe Deposit & Trust Company and Crawford Goldthwait, involving the construction of the will of John Goldthwait, deceased. From a decree of the probate court an appeal is taken. Affirmed.

C. M. Rogerson, of Boston, for appellant.

H. L. Boutwell, of Boston (F. A. Cross, of Boston, on the brief), for Goldthwait.

W. P. Everts, of Boston, for Helen G. Davis.

A. G. Grant, of Boston, guardian ad litem.

CARROLL, J. John Goldthwait, by the sixth article of his will, admitted to probate on February 2, 1899, directed his trustee to pay over the net income of the fund to his three children in equal shares during their lifetime:

"Upon the decease of any of my children living at the time of my decease, leaving no issue living at the time of his or her decease, I direct said trustee to pay over such deceased child's share of said income, in equal parts, to my remaining children during their lifetime. Upon the decease of any of my children leaving issue living at the time of his or her decease, I direct said trustee to pay over to such issue the parent's share of said income during the lifetime of my remaining children."

And upon the decease of the last of his children living when he died, he directed that the trust should cease and the principal of the trust fund together with its accumulations, be distributed "among the issue of my children living at the time of the decease of my last child."

When the testator died, his son, Charles B. Goldthwait had deceased leaving one child, Crawford Goldthwait, the respondent. Two daughters of John Goldthwait, Mrs. Pierce and Mrs. Davis, survived him. Mrs. Pierce died January 8, 1923, leaving no issue surviving her. The respondent contends that Mrs. Pierce having died without issue, the net income of the trust fund should be paid in equal shares to him and to Mrs. Davis. The contention of the guardian ad litem is that half of the share of income formerly paid to Mrs. Pierce should go to Mrs. Davis, and half should accumulate and be distributed with the principal on the death of Mrs. Davis. The probate court decreed that two thirds of the entire income were to be paid to Mrs. Davis and one third to the respondent during the life of Mrs. Davis.

[1, 2] The will provided that on the death of any of the testator's children leaving issue, the parent's share of the income was to be paid to his or her issue; it also provided that in event of decease of any of his surviving children without issue, the deceased child's share of the income was to be paid to the remaining children. Mrs. Pierce having died without issue, and Mrs. Davis being the only surviving child of the testator, this share of the income formerly paid to Mrs. Pierce should be paid to Mrs. Davis. In our opinion the testator used the word "children" in its natural sense, to designate his immediate offspring, and in disposing of a share of income payable to one of his children during her lifetime, and on her death without issue to the remaining children, he did not mean to include grandchildren. In the construction of a will words are not to be given an unusual meaning unless it appears that such a meaning was intended by the testator. The testator gave the share of income belonging to each child on his or her death to the issue of the deceased child; but if there were no issue the share was to go to his surviving children. He distinguished between the word "issue" and the word "children" and had in mind the difference in the meaning of the two words. Lawrence v. Phillips, 186 Mass. 320, 71 N. E. 541; Wheaton v. Batcheller, 211 Mass. 223, 97 N. E. 924; Mullaney v. Monahan, 232 Mass. 279, 122 N. E. 387. On this point, we discover no ambiguity in the will. It clearly shows the testator's intention, that on the death of Mrs. Pierce, her share of the income should go to the testator's surviving child, Mrs. Davis.

[3] It has frequently been decided that the word "child" and the word "children" should be construed to include grandchildren when this construction is necessary to carry out the testator's intention. See Minot v. Taylor, 129 Mass. 160; Bowker v. Bowker, 148 Mass. 198, 19 N. E. 213; Balch v. Pickering, 154 Mass. 363, 28 N. E. 293, 14 L. R. A. 125; Boston Safe Deposit & Trust Co. v. Nevin, 212 Mass. 232, 98 N. E. 1051. But the principle of these cases is not applicable to the case at bar, where the share of the daughter dying without issue is, by the express terms of the will, payable to the testator's "remaining children during their lifetime."

A part of the share should not be accumulated and distributed with the principal on the death of Mrs. Davis, as contended by the guardian ad litem. The will directs that the share of the deceased child in the income shall be paid on her death to the surviving child. Costs as between solicitor and client are to be in the discretion of the probate court.

Decree of the probate court affirmed.

MORSE v. O'HARA.

(Supreme Judicial Court of Massachusetts. Essex. Jan. 3, 1924.)

1. Appeal and error ⇐4—Method of review of denial of motion to dismiss appeal.

Where proceeding for relief as poor debtor came on to be heard in superior court and appellant filed a motion to dismiss his own appeal, no appeal lies from denial of such motion under G. L. c. 231, § 96, the proper way to secure review being by exception.

2. Appeal and error ⇐271—Points affecting jurisdiction raised at any time without exception.

Refusal of requested ruling in superior court to dismiss appeal in proceeding for relief as poor debtor, on the ground that district court had imposed no sentence, affected the jurisdiction, and was a matter that could be raised at any time and considered though no exception was saved.

3. Action ⇐18—Proceedings under charges of fraud civil and not criminal.

Proceedings under charges of fraud against one seeking relief as poor debtor, under G. L. c. 224, §§ 6, 40, 41, 43, are civil and not criminal.

4. Judgment ⇐1—Final decision with respect to cause within jurisdiction.

A judgment is the final decision or sentence of the law rendered by a court with respect to a cause within its jurisdiction and coming legally before it as the result of proper proceedings rightly instituted.

5. Execution ⇐451—Sentence essential to support poor debtor proceeding.

Judgment on charges of fraud in poor debtor proceedings, under G. L. c. 224, §§ 6, 40, 41, 43, imports both a finding of guilty and the imposition of sentence, and in absence of sentence no appeal lies from district court to the superior court.

Exceptions from Superior Court, Essex County; Marcus Morton, Judge.

Proceeding by Warren A. Morse for administration of oath for the relief of poor debtors, in which charges of fraud were made by James O'Hara, judgment creditor. The court made a finding of guilty on the charges of fraud, and refused the oath, and petitioner appealed to the Superior Court, which denied his motion to dismiss his own appeal, and he brings exceptions. Exceptions dismissed.

J. P. S. Mahoney, of Lawrence, for Petitioner.

R. L. Sisk and W. E. Sisk, both of Lynn, for respondent.

RUGG, C. J. This case arises out of the arrest of the petitioner on an execution issued in favor of O'Hara against him in an action of tort for personal injuries. The debtor, after having been once refused the oath for the relief of poor debtors, and after having waited the statutory period thereafter, petitioned another court to administer to him that oath. In that proceeding charges of fraud were preferred against him by the judgment creditor. The court found after examination that the debtor had no property to apply on the execution, but made a finding of guilty on the charges of fraud and for that reason refused the oath. The record states that the "debtor appeals from the judgment of guilty upon the charges of fraud." He gave recognizance as required and was thereupon discharged from custody.

[1] When the case came on to be heard in the superior court the debtor filed a motion to dismiss his own appeal. It was denied and the debtor appealed. No appeal lies. G. L. c. 231, § 96; Samuel v. Page Storms Drop Forge Co., 243 Mass. 133, 137 N. E. 169. The proper way to secure review of such ruling is by exception.

[2] A requested ruling, that the court had no jurisdiction on the ground that the district court had imposed no sentence upon the finding of fraud, and that therefore the matter was not properly before the court, was refused. This point affected the jurisdiction of the superior court over the cause. That may be raised at any time. Eaton v. Eaton, 233 Mass. 351, 364, 124 N. E. 37, 5 A. L. R. 1426; Corcoran v. Higgins, 194 Mass. 291, 80 N. E. 231; Devine's Case, 236 Mass. 588, 590, 129 N. E. 414. It has been argued in this court. Therefore it must be considered and decided notwithstanding the fact that no exception was saved.

The statutory provisions respecting the making and trial of charges of fraud in poor debtor proceedings are found in G. L. c. 224, §§ 6, 40, 41, 43. By section 40 it is provided that such—

"charges shall be considered in the nature of an action at law, to which the defendant or debtor may plead guilty or not guilty, and which the court may thereupon hear and determine."

By section 43 it is enacted that if upon trial the debtor—

"is found guilty of any such charge, he shall not benefit by proceedings under this chapter, and may be sentenced to imprisonment for not more than one year."

The right of appeal is declared in section 41 in these words:

"A party aggrieved by a judgment rendered under the preceding section may appeal therefrom to the superior court. * * *"

[3-5] There is nothing to indicate that "judgment" in section 41 is used in any other than its ordinary meaning. The inference from the context is that it was intended to have its usual signification. Judg-

ment is the word used to express the action from which appeals may be taken in civil matters from district courts to the superior court. See G. L. c. 231, § 97. Proceedings under charges of fraud are civil, not criminal, in their nature, Parker v. Page, 4 Gray, 533; Anderson v. Edwards, 123 Mass. 273. Judgment is the final decision or sentence of the law rendered by a court of justice with respect to a cause within its jurisdiction and coming legally before it as the result of proper proceedings rightly instituted. Peirce v. Boston, 3 Metc. 520, 521; Commonwealth v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699; Weld v. Clarke, 215 Mass. 324, 102 N. E. 422; Gould's Case, 215 Mass. 480, 482, 102 N. E. 693, Ann. Cas. 1914D, 372; Commonwealth v. Dascalakis, 246 Mass. 12, 140 N. E. 470, and cases there collected. The word "judgment" is commonly used in this sense in connection with appeals. Cotter v. Nathan & Hurst Co., 211 Mass. 31, 97 N. E. 144, and cases there collected; Hogan v. Ward, 117 Mass. 67; Riley v. Farnsworth, 116 Mass. 223; Weil v. Boston Elevated Railway, 216 Mass. 545, 546, 104 N. E. 343, and cases there collected; Reynolds v. Missouri, Kansas & Texas Railway, 224 Mass. 253, 112 N. E. 859; McMillan v. Gloucester, 244 Mass. 150, 138 N. E. 718. A few instances of peculiar facts may be found where the rule has been slightly relaxed. Commonwealth v. McCormack, 126 Mass. 258; Maley v. Moshier, 160 Mass. 415, 36 N. E. 64; Oliver Ditson Co. v. Testa, 216 Mass. 123, 103 N. E. 381, and cases there collected. But they are exceptional and, without impugning their authority, are not to be extended to a case like the present. Judgment upon charges of fraud under the pertinent sections of the poor debtor law imports both the finding of guilty and the imposition of sentence. So far as we know, it has been the universal practice, in appeals by debtors found guilty upon charges of fraud under the poor debtor law, for sentence to be imposed in the court of first instance before appeal has been taken. Morse v. Dayton, 125 Mass. 47; Smith v. Dickinson, 140 Mass. 171, 3 N. E. 40; Lockhead v. Jones, 137 Mass. 25; Noyes v. Manning, 159 Mass. 446, 34 N. E. 682; Clatur v. Donegan, 126 Mass. 28; Fletcher v. Bartlett, 10 Gray, 491; Mowry's Case, 112 Mass. 394; Lamagdelaine v. Tremblay, 162 Mass. 339, 39 N. E. 38. This conclusion is supported by the decisions where the decision in the court of first instance has been in favor of the debtor on charges of fraud. The right of the debtor under such circumstances is to have the oath administered to him and to be discharged, even though he may be found guilty on the charges on appeal by the creditor. Ingersoll v. Strong, 9 Metc. 447; Collamore v. Fernald, 3 Gray, 318; Stockwell v. Silloway, 100 Mass. 287.

The case at bar is governed in principle by Bowler v. Palmer, 2 Gray, 553. That was an appeal from a justice of the peace, where verdict had been rendered in favor of the plaintiff, but no judgment entered, to the court of common pleas. The statute permitted an appeal from a judgment. The appeal was taken by the defendant who, after entering the case in the appellate court and answering to the merits, moved to dismiss his own appeal. It was held:

"This action was never withdrawn from the jurisdiction of the justice of the peace before whom it was brought and prosecuted. He had rendered no judgment in it, and it was still pending before him, when an appeal to the court of common pleas was claimed and taken by the defendant. But that appeal was wholly ineffectual, because no party can appeal from any of the proceedings of a justice of the peace, in a civil action, except his final judgment."

Commonwealth v. McCormack, 126 Mass. 258, like Jordan v. Dennis, 7 Metc. 590, Wheeler & Wilson Mfg. Co. v. Burlingham, 137 Mass. 581, Granger v. Parker, 142 Mass. 186, 7 N. E. 785, and Shour v. Henin, 240 Mass. 240, 243, 133 N. E. 561, has no relevancy under the circumstances here disclosed.

The decision by the judge of the district court on the charges of fraud was one step in the procedure. Sentence was necessary before the case would reach the stage of judgment, from which alone the debtor could appeal. The case at bar is still pending in the district court awaiting judgment. Costs of all proceedings on appeal and on exceptions should be awarded against the debtor. The result is that the exceptions must be dismissed. In the superior court the appeal must be dismissed.

So ordered.

BUTLER v. MARTIN.

(Supreme Judicial Court of Massachusetts. Suffolk. Dec. 29, 1923.)

1. **Fraud ⇐13(2)—Representations as to value of stock considered with other facts as to knowledge.**

In action for damages for false representations in sale of stock, defendant's representation that stock was worth $130 a share should be considered in connection with his knowledge, full management, and control of the corporation's affairs, his statement that "he had dollar for dollar in assets," and auditor's finding that he knew "or ought to have known" that the machinery valued in the certificate of condition at over $24,000 was in real value worth only $7,500.

2. **Fraud ⇐64(3)—Whether stock of value represented question of fact.**

In action for damages for false representations in sale of stock, the question whether the value of the stock was as represented was one of fact.

3. **Evidence ⇐142(3)—Evidence as to selling price of stock held not too remote in action for false representation.**

In an action for damages for false representations in sale of corporate stock, which was not dealt in on the market, it was not, as matter of law, error to admit evidence as to a sale by plaintiff and price received about two years and ten months after the sale, as against contention that it was too remote, under G. L. c. 106, § 56.

4. **Appeal and error ⇐1071(1)—Refusal to rule that finding of auditor not justified harmless.**

Court's failure to grant plaintiff's request that auditor's finding as to value of good will was not justified, and must be excluded, *held* harmless in action for damages for false representation in sale of corporate stock, where the judge ruled that the finding, in so far as based on an estimation of the value of the good will, was erroneous, and correctly ruled that finding aside from good will must stand.

5. **Fraud ⇐66—Reliance on false representations must be affirmatively found.**

In action for damages for false representations in sale of corporate stock, it must be affirmatively found as a fact that plaintiff bought in reliance upon defendant's false representation as alleged, and such finding cannot be supplied by implication.

6. **Fraud ⇐20—Reliance on representations essential.**

In order for purchaser of corporate stock to recover damages for false representations, the false representations must have influenced the purchaser, and induced him to buy.

Exceptions from Superior Court, Suffolk County; J. D. McLaughlin, Judge.

Action in tort by Joseph A. Butler against George J. Martin to recover damages for false representations alleged to have been made by the defendant in the sale to the plaintiff of shares of corporate stock. The court found for defendant, and plaintiff brings exceptions. Exceptions overruled.

See, also, 141 N. E. 668.

H. V. Cunningham and W. S. Bangs, both of Boston, for plaintiff.

Hurlburt, Jones & Hall, F. P. Garland, and A. B. Tyler, all of Boston, for defendant.

BRALEY, J. The case having been referred to three auditors whose findings of fact were to be final, a trial was had upon the coming in of their report before a judge sitting without a jury, who found for the defendant, and the case is here on the plaintiff's exceptions to his refusal to rule as requested and to the rulings given.

It appears from the report that the plaintiff seeking an advantageous opportunity for investment had interviews with the defendant, who during all the negotiations was president, general manager and majority stockholder in active control of the business of the Martin Manufacturing Company, a domestic corporation. At the first interview the defendant told the plaintiff, "that the * * * company had during the last year done business to the value of from * * * $350,000 to $400,000." But no definite representation concerning the value of the assets was made. A second interview followed at which the defendant solicited the plaintiff to take "ten thousand preferred stock and ten thousand common stock and that he would be made vice-president." The character of the stock was explained by the defendant, "that the preferred was cumulative and came ahead of the common stock, and had always paid eight per cent." The plaintiff informed the defendant that since the first interview he had examined the certificate of condition filed by the company as required by statute, and "was familiar with its contents," and the certificate which was introduced in evidence showed that the machinery was valued at "$24,677.29." The plaintiff testified that the defendant then said:

"The figures shown in the statement filed were way below the real value of the property, that in making up those figures 'everything was shrunk to nothing;' that the property was really worth a great deal more than those figures showed, and the several items * * * in the certificate of condition were discussed in detail."

The defendant's version was that "he told the plaintiff that he, Martin, had dollar for dollar in assets. * * * no good will charged in there at all, or 100 cents on the dollar; that the assets were enough to make the common stock worth $130 a share," and the statement of condition was the same as

shown on the books of the company, and "these figures were what he was talking about" when he told the plaintiff "he had dollar for dollar in assets." The defendant after some computations said to the plaintiff, that "the common stock was valued at $130 per share, and that there would be issued to him one hundred and seventy-seven shares." The defendant further said, that the common stock "was worth $130 as shown by the assets."

[1-3] The plaintiff bought the stock and received certificates for seventy-seven shares of common, and one hundred shares of second preferred for which he paid the company "$20,000." The defendant's representation that the stock was worth $130 a share should be considered in connection with his knowledge, full management, and control of the corporation's affairs, and the statement, that "he had dollar for dollar in assets," and the auditors' finding, that he knew "or ought to have known" that the machinery valued in the certificate of condition at $24,677.29 was in real value worth only $7,500. Pearson v. Howe, 1 Allen, 207, 208; Litchfield v. Hutchinson, 117 Mass. 195, 198; Kerr v. Shurtleff, 218 Mass. 167, 171, 172, 105 N. E. 871. The auditors' general finding however is that the stock was of the value represented. The question, of course, was one of fact. Stewart v. Joyce, 201 Mass. 301, 87 N. E. 613. But in coming to this conclusion they admitted as evidence of value at the date of purchase, the sale by the plaintiff of the stock on March 23, 1916, for $20,800. The plaintiff having duly excepted contends that the evidence was inadmissible. G. L. c. 106, § 56. It does not appear that the stock was ever dealt in on the market, but was inactive, and we cannot hold as matter of law that the sale which took place about two years and ten months after the plaintiff bought, was so remote as to be of no probative value. Jenkins v. Weston, 200 Mass. 488, 86 N. E. 955; Aldrich v. Aldrich, 215 Mass. 164, 102 N. E. 487, Ann. Cas. 1914C, 906; Johnson v. Lowell, 240 Mass. 546, 549, 134 N. E. 627. The plaintiff's first request was refused rightly.

[4] The auditors further state that if this evidence was rightly admitted they further find that on the date of purchase the company "had a good will" not included in the certificate which was of sufficient value to make up the difference between the real value of the assets "described in the certificate * * * and what it would have been had the certificate * * * been true, and on this theory of the case we find the plaintiff has suffered no damages." The exceptions recite that the term "good will" was not used or mentioned before the auditors, and was first used in the report. It is contended that the plaintiff's second request, that this finding "was not justified by the evidence and must be excluded," should have been given. But the plaintiff had not been harmed by the court's refusal to give it, because the judge states in his rulings that the finding in so far as it was based on an estimation of the value of the good will was erroneous, and he correctly ruled that the finding, quite aside from the good will, "as the matter is presented in the report * * * must stand, that the shares were worth $130." Stiles v. White, 11 Metc. 356, 45 Am. Dec. 214; Thomson v. Pentecost, 210 Mass. 223, 96 N. E. 335.

[5, 6] It is moreover alleged in the declaration that the plaintiff "in the purchase of said stock * * * acted in good faith in reliance upon the defendant * * *." The absence of a finding to that effect, which is a question of fact, cannot be supplied by implication. It must be affirmatively found. If the alleged false and material representations had no influence, and the plaintiff willing to take the chance would have bought if they had not been made, then they were not a motive for the purchase, and he was not induced to buy by means of them. Matthews v. Bliss, 22 Pick. 48, 53; Safford v. Grout, 120 Mass. 20; Windram v. French, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750; Burns v. Dockray, 156 Mass. 135, 138, 30 N. E. 551; Lee v. Tarplin, 183 Mass. 52, 54, 66 N. E. 431; Stewart v. Joyce, 201 Mass. 301, 309, 87 N. E. 613. The judge for the reasons stated rightly ruled that the plaintiff could not recover, and it is unnecessary to review the fourth and fifth requests which he refused to give in terms, or to determine the accuracy of subsequent rulings which were rendered immaterial by his first ruling, that on the auditors' finding as to the value of the stock shown by the sale, the plaintiff had failed to prove he had been defrauded.

Exceptions overruled.

HAMMOND v. HAMMOND.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 3, 1924.)

Trial ⇐36—Admission of cumulative evidence of insanity of witness discretionary.

Where the only issue was whether plaintiff gave an insurance policy to defendant, it was discretionary with the trial court whether it would admit letters tending to show insanity of the plaintiff and insane delusions to affect his credibility as a witness; insanity at the time the letters were written being undisputed.

Exceptions from Superior Court, Suffolk County; C. T. Callahan, Judge.

Suit in equity by William P. Hammond against Sally Lawson Hammond to obtain possession of a policy of endowment life insurance. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

P. A. Hendrick, of Boston, for plaintiff.

G. M. Poland, of Boston, for defendant.

DE COURCY, J. The plaintiff is an insane person under guardianship. This suit in equity was brought to obtain possession of an endowment insurance policy on his life, now in the possession of his wife, the defendant. The endowment period ended before the suit was brought. The only issue tried to the jury was:

"Did the plaintiff transfer and deliver to the defendant the policy of insurance described in the bill with the intent to make her the legal owner thereof?"

They answered in the negative.

On the trial of this issue the defendant testified in substance that her husband delivered the policy to her in 1913, telling her that it was hers whether he died before it expired or not. On the margin of the policy, however, appeared the following:

"Boston, Mass., December 29, 1913.

"Sarah A. Hammond, the beneficiary mentioned in this policy, being deceased, it is hereby agreed that the amount insured herein shall be payable to Sallie Lawson Hammond, wife of William P. Hammond, the insured, if she shall survive him in case of his decease during the endowment period. Otherwise payable to the said William P. Hammond at the end of the endowment period."

The plaintiff also testified that he never gave the policy to his wife, and that it was in his desk with his other papers when he went to the hospital in March, 1918.

The defendant, for the purpose of affecting her husband's credibility as a witness, offered two letters written by him to a third person in September, 1918, in which he stated that the defendant had been criminally assaulted and was in the family way, and she further offered to show that the statements in the letters were untrue, and were "pure delusions." The only exception in the case is to the exclusion of these letters and offer of proof. The letters show no hostile state of mind toward the defendant. There is nothing in them referring in any way to the insurance policy, which is the subject matter of the suit, and nothing bearing on loss of memory, beyond what might be inferred from the general fact of insanity. At most they tend to show that the plaintiff was laboring under an insane delusion in September, 1918. But his insanity since March, 1918, was not questioned. He was admittedly insane at the time of the trial, and under guardianship. The admission of cumulative evidence on that undisputed point was wholly within the discretion of the trial judge. Dorr v. Tremont National Bank, 128 Mass. 349. The real issue in the case was whether the plaintiff made a gift of the insurance policy to the defendant in 1913. If his insanity in 1918 could have any bearing on the credibility of his testimony that he made no such gift, the same inferences from that insanity were open to the defendant whether the letters were in evidence or not.

Exceptions overruled.

WILL v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 4, 1924.)

1. Evidence ⇐591—Party bound by own testimony.

A party is bound by his own testimony.

2. Street railroads ⇐98(1)—One is not justified in relying on motorman without taking precautions.

One alighting from an automobile onto a car track might depend to a reasonable extent on the expectation that a motorman would not be negligent; but he was not justified in abandoning all precautions for self-protection.

3. Street railroads ⇐98(1)—Person stepping out of automobile contributorily negligent.

Guest in automobile, stopping beyond trolley stop for purpose of taking the trolley, was guilty of contributory negligence, and could not recover for injuries received when automobile was struck in rear by street car while he was alighting on the left side, without looking to see if any car was coming.

Report from Superior Court, Suffolk County; Louis S. Cox, Judge.

Action of tort by George Will against the Boston Elevated Railway Company for personal injuries. On report after a verdict for plaintiff. Judgment for defendant.

W. C. Jaycox and O. A. Marden, both of Boston, for plaintiff.

R. L. Mapplebeck, of Boston, for defendant.

RUGG, C. J. The evidence in its aspect most favorable to the plaintiff would have warranted a finding that he was being carried as a guest in the rear seat of an automobile of a friend to take a trolley car of the defendant; that the driver of the automobile, passing the trolley car as passengers were alighting from it, went to a point as far to the right-hand side of the street as he could get, just beyond the white post indicating the next regular trolley car stop where he stopped the automobile; that the plaintiff opened the door on the left side of the automobile and as he was getting out without looking to see if any car was coming, the car coming from behind struck the automobile on the left-hand side on the back light, the door was bent and the plaintiff was struck and injured, and that the street was straight for a distance of some 400 feet from where the trolley car was stopped discharging passengers to the place of the accident.

[1-3] There was no evidence to support a finding of due care on the part of the plaintiff. His own testimony was that he alighted from the automobile into the pathway of the trolley car, without looking to see if any car was coming; that he did not hear or see the car or know anything about it until it struck him. His view was unobstructed. He is bound by his own testimony. Sullivan v. Boston Elevated Railway, 224 Mass. 405, 112 N. E. 1025. It is manifest that the slightest attention to his own safety would have prevented his injury. While he might depend to a reasonable extent on the expectation that the motorman would not be negligent, he was not justified in abandoning all precautions for self-protection. The circumstance that the automobile had stopped just beyond a white pole does not exculpate the plaintiff. It is common knowledge that trolley cars do not stop at white poles unless there are persons waiting to become passengers or passengers to alight. There is nothing to indicate that in the case at bar there was any occasion for this trolley car to stop at this pole. Merely that an automobile comes to a stop near a white pole without signal of any kind so far as appears was no notice to those in charge of the car to bring it to a standstill. The striking of the back light of the automobile by the trolley car has no bearing on the due care of the plaintiff. It does not appear that the plaintiff had any knowledge of the precise position of the automobile with reference to the trolley car or relied upon it in any degree. The plaintiff was in a place of entire safety within the automobile. He voluntarily and without exigency moved into a danger zone by getting in front of an oncoming trolley car, which must have been in plain sight and very near when he opened the door of the automobile and got out.

The case falls within the authority of numerous decisions. O'Neill v. Middlesex & Boston St. Ry., 244 Mass. 510, 138 N. E. 841; Gibb v. Hardwick, 241 Mass. 546, 135 N. E. 868; Sullivan v. Chadwick, 236 Mass. 130, 137, 127 N. E. 632; Driscoll v. Boston Elev. Ry., 233 Mass. 232, 123 N. E. 667; Pigeon v. Massachusetts Northeastern St. Ry., 230 Mass. 392, 119 N. E. 762; Dwyer v. Boston Elevated Ry., 220 Mass. 193, 107 N. E. 924; Hayes v. Boston Elevated Ry., 224 Mass. 303, 112 N. E. 484; Smallwood v. Boston Elevated Ry., 217 Mass. 375, 104 N. E. 748; Kennedy v. Worcester Consolidated St. Ry., 210 Mass. 132, 96 N. E. 78; Kouyoumjian v. Boston Elev. Ry., 212 Mass. 111, 98 N. E. 585; Newburg v. Fitchburg & Leominster St. Ry., 219 Mass. 21, 106 N. E. 549; Cohen v. Boston Elev. Ry., 202 Mass. 66, 88 N. E. 453, and cases there collected; Callaghan v. Boston Elev. Ry., 200 Mass. 450, 86 N. E. 767; Kelly v. Boston Elevated Ry., 197 Mass. 420, 83 N. E. 865, 15 L. R. A. (N. S.) 282. It is distinguishable from cases upon which the plaintiff relies, like Shapiro v. Union St. Ry (Mass.) 141 N. E. 505, Reynolds v. Murphy, 241 Mass. 225, 135 N. E. 116, Dube v. Keogh Storage Co., 236 Mass. 488, 128 N. E. 782, Gerhart v. Holyoke St. Ry., 236 Mass. 392, 128 N. E. 421, and Scannell v. Boston Elev. Ry., 176 Mass. 170, 57 N. E. 341.

Judgment for the defendant.

WHALEN v. MUTRIE.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 4, 1924.)

1. Municipal corporations ⇐706(3)—Negligence in operating truck must be proved.

In an action for death of pedestrian run down by a motor truck, the burden of proof to show the defendant's negligence is upon the plaintiff, and such negligence cannot be inferred merely from the happening of the accident.

2. Municipal corporations ⇐706(5)—Testimony that truck was going fast too indefinite to show negligence.

In an action for death of pedestrian on street, testimony that when witness saw truck it was going "fast" was too indefinite, without anything to indicate the rate of speed, to warrant a finding of negligence.

3. Municipal corporations ⇐706(5)—Evidence insufficient to show negligence of truck driver.

In action for death of pedestrian on street, evidence *held* insufficient to warrant a finding of negligence on the part of defendant's truck driver.

Exceptions from Superior Court, Suffolk County; Henry T. Lummus, Judge.

Action of tort by Mary J. Whalen against Patrick B. Mutrie, arising out of fatal injuries sustained by Joseph F. Whalen on a public highway in the city of Boston through a collision with an automobile truck owned by the defendant. After verdict for plaintiff, motion to have the court enter a verdict for defendant was allowed, and plaintiff brings exceptions. Exceptions overruled.

S. E. Duffin, of Boston, for plaintiff.
C. L. Allen, of Boston, for defendant.

CARROLL, J. On May 9, 1921, the plaintiff's intestate received fatal injuries, from a collision with the defendant's automobile truck, on Dorchester avenue, a public highway in the city of Boston. The truck, at the time of the accident, was operated by an employee of the defendant, engaged in his employer's business. The jury viewed the scene of the accident.

There was evidence that the deceased was 60 years of age, and of good health, hearing and eyesight. The only testimony concerning the accident came from one witness, who testified that, as he was crossing Dorchester avenue, he saw the plaintiff's intestate killed, about half past 7 o'clock in the morning; that he did not see him until he was under the truck; that "the right front wheel" had gone over him and "a hind wheel pressed on him" and the truck was stopped; that he didn't see where Whalen came from or where he was going, but he saw him fall. In response to a question from the court, "Did you see Whalen before the instant that he was hit?" he said. "No, sir; " and in answer to the question, "Where was Whalen the first sight of him you had?" the witness stated, "The first time I see him he was falling and the truck on top of him." He further testified that the morning was clear; that he saw people crossing the street, but no other automobiles were moving; that as the defendant's truck came towards the witness and after it passed him, its direction was not changed and no horn was blown; "that as the witness was crossing the street * * * he kept his eyes on the truck;" I started off from the sidewalk and walked ordinary way, but as soon as I see this truck come fast I just skipped like that and turned my head and look to see."

No evidence was offered by the defendant, who moved for a directed verdict. The jury found for the plaintiff, and the trial judge reserved leave, with the assent of the jury, under G. L. c. 231, § 120, to enter a verdict for the defendant. He then moved that a verdict be entered under the reserved leave, which motion was allowed and the plaintiff excepted.

[1-3] There was no evidence of the defendant's negligence. The intestate was not seen by any one until the instant he was struck; where he came from, what he was doing, whether walking or running, in what direction he was moving, is entirely a matter of conjecture; there is nothing to show how the accident happened. The burden of proof to show the defendant's negligence was upon the plaintiff, such negligence cannot be inferred, in a case like this, merely from the happening of the accident. Reardon v. Boston Elevated Railway, 245 Mass. —, 141 N. E. 857; Jabbour v. Central Construction Co., 238 Mass. 453, 131 N. E. 194; Nager v. Reid, 240 Mass. 211, 133 N. E. 98; Baglio v. Director General of Railroads, 243 Mass. 203, 137 N. E. 257; Rizzitelli v. Vestine, 245 Mass. —, 141 N. E. 110. The fact that when the witness saw the truck it was going "fast" is too indefinite, without anything to indicate the rate of speed, to warrant a finding of negligence. Sellbedea v. Worchester Consolidated Street Railway, 223 Mass. 76, 111 N. E. 767; O'Donnell v. Bay State Street Railway, 226 Mass. 418, 115 N. E. 672. There was no evidence to prove that the driver of the truck saw the plaintiff's intestate, or in the exercise of proper care could have seen him until the moment of the collision; it could not have been found that the failure to blow the horn contributed to the accident. See Lovett v. Scott, 232 Mass. 541, 122 N. E. 646.

Exceptions overruled.

SWEATLAND v. SPRINGFIELD PUBLIC MARKET, Inc.

(Supreme Judicial Court of Massachusetts. Hampden. Jan. 5, 1924.)

Municipal corporations ⇐809(1)—Evidence insufficient to show fruit stand owner responsible for banana being on sidewalk.

That bananas sometimes fell to the sidewalk from defendant's fruit stand did not warrant an inferential finding that banana on which plaintiff slipped and fell on the sidewalk, not in front of defendant's premises, but about 15 feet away, came from a rubbish pile near the fruit stand, or that, if it did, defendant was negligent in its removal therefrom.

Exceptions from Superior Court, Hampden County; Richard W. Irwin, Judge.

Action of tort by Louis R. Sweatland against the Springfield Public Market, Inc., to recover damages for injuries suffered when plaintiff claimed he slipped on a banana in front of another store, located north of defendant's property. The court refused to grant defendant's motion for a directed verdict, and it brings exceptions, after a verdict for plaintiff. Exceptions sustained, and judgment entered for defendant.

Graves & Moran, of Springfield, for plaintiff.

Ely & Ely, of Springfield, for defendant.

PIERCE, J. This is an action of tort to recover damages for injuries received by the plaintiff as a result of a fall upon a banana, which was on a sidewalk on Main street, in the city of Springfield, "about 15 feet north of the Public Market Building and north of the Public Market premises." The evidence in its aspect most favorable to the plaintiff's contention that his injury was due to the negligence of the defendant in allowing rubbish fruit and vegetables to accumulate near and about the fruit stand of the defendant, in substance, is that the Springfield Public Market, Inc., on the day and time of the accident to the plaintiff, maintained a public market on Main street, and there exposed bananas for sale on a stand or table located on the north side of the recessed entrance to the market; that the defendant kept a broom near the stand and with it each day from time to time swept up any accumulated rubbish; that immediately after the accident there was a pile of dirt, peanut shucks, and bananas that had been brushed into a "corner jog," where the entrance to the market projects 8 or 10 inches beyond the window. It appeared in evidence that the plaintiff left the market, went out the front door, turned to the right and started up Main street; that when he had gone about 15 feet north of the Public Market building and north of the Public Market premises, he slipped on an overripe banana, fell, and received injuries. The court at the conclusion of the evidence denied a written motion of the defendant for a directed verdict in its favor.

The motion should have been allowed. The fact that the defendant sold bananas, and that bananas sometimes fell to the sidewalk from its fruit stand, do not warrant an inferential finding of fact that the banana on which the plaintiff slipped and fell on the sidewalk, not in front of the defendant's premises but about 15 feet away, came from the rubbish pile near the fruit stand of the defendant; nor that, if it did, the defendant was negligent in respect to its removal therefrom. Whether the banana came to the place of the accident through the negligence of the defendant, or through the careless conduct of some unknown person, is a matter of pure speculation and conjecture. Goddard v. Boston & Maine Railroad, 179 Mass. 52, 60 N. E. 486; Hotenbrink v. Boston Elevated Railway, 211 Mass. 77, 97 N. E. 624, 39 L. R. A. (N. S.) 419; Norton v. Hudner, 213 Mass. 257, 100 N. E. 546, 44 L. R. A. (N. S.) 79; Lyons v. Boston Elevated Railway, 204 Mass. 227, 90 N. E. 419; Zugbie v. J. R. Whipple Co., 230 Mass. 19, 119 N. E. 191; Downing v. Jordan Marsh Co., 234 Mass. 159, 125 N. E. 207.

Exceptions are sustained and judgment may be entered for the defendant. G. L. c. 231, § 122.

So ordered.

HUTCHINSON v. BLANCHARD.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 5, 1924.)

1. Wills ⟸681 (2)—Devise held to give fee to trustee in trust; "all the real estate."

A devise of real estate in trust to B. and his heirs, executors, and administrators *held* to give to B. and to his successor in office a fee in the real estate in trust, under P. S. c. 141, §§ 5, 6 (G. L. c. 203, §§ 5, 6).

2. Trusts ⟸194—Decrees of probate court not attacked collaterally.

Decrees of probate court authorizing testamentary trustee to sell land under St. 1907, c. 262, entered when it was a court of superior and general jurisdiction with reference to all cases and matters in which it had jurisdiction under R. L. c. 162, § 2 (G. L. c. 215, § 2), cannot be attacked collaterally.

3. Trusts ⟸194—Decree permitting sale of land not collaterally attacked.

No person who might have been heard upon trustee's petition for decree and license to sell land under St. 1907, c. 262, and no person who had an opportunity to appeal from the decree, or from a subsequent decree, authorizing release by trustee to correct a mistake in the conveyance, but did not, can question the jurisdiction of the probate court to make the decrees.

Appeal from Land Court, Middlesex County; C. T. Davis, Judge.

Petition by Walter K. Hutchinson to the Land Court for the registration of land, opposed by Roger Blanchard. Decree for petitioner, and objecting party appeals. Affirmed.

J. G. Brackett, of Boston, for petitioner.

R. Blanchard, pro se.

PIERCE, J. This is a petition to the land court for the registration of three parcels of land, situate in Arlington and Lexington in the county of Middlesex, which lands were by deeds of grant and release conveyed to the petitioner, Walter K. Hutchinson, by Edwin B. Hale, trustee under the will of Charles H. Blanchard and acting under alleged licenses of the probate court for the county of Middlesex.

Hale in succession to one George B. Bigelow, then deceased, was appointed trustee under the will of Charles H. Blanchard in 1901, and duly qualified. The will gave to said Bigelow and his heirs, executors and administrators, all his real and personal property in trust, to pay to L. Josephine Wilson one-

sixth of the net income from said trust estate during her natural life; and during the natural life of said Josephine to pay five-sixths of such net income to his children by her. The will provided further that "upon the decease of said L. Josephine Wilson" I direct all of the trust estate with any accumulation be made over and conveyed to our said children. The will gave "said trustee full power to change investments at pleasure." The testator appointed said Bigelow the executor of his will and empowered—

"the executor and the trustee under this will, whenever it may seem to him discreet and for the interest of the trust to sell, mortgage and convey any and all of the real or personal estate that I may leave, or may be held by said trustee, upon such terms and conditions as he may deem proper. * * * The proceeds of any such sale or mortgage to be used in satisfying any indebtedness of mine outstanding or any mortgage on any of my estate and the balance to be held upon the same trusts as the property hereby devised in trust."

For the purpose of satisfying an outstanding mortgage given by the testator on certain real estate in Boston, held by the trustee, the trustee on May 22, 1919, petitioned the probate court for license to sell all the real estate described in the petition for registration to said Hutchinson for $6,000. The license was granted. Hutchinson paid the agreed price, which was fair and reasonable for the entire estate, and received of the trustee a deed which followed the description of the land in the petition and license but did not include, through mistake, the entire estate which the parties intended should be conveyed. Subsequent to the conveyance, Hutchinson entered into possession of the entire estate and expended large sums in improvements and paid the taxes thereon. In consequence of a notification that Hutchinson was about to institute proceedings to compel a conveyance of the remainder of the tract, the trustee, reciting the facts, petitioned the probate court on February 8, 1921, for leave to release any vested, contingent or possible right or interest which the trustee had in the entire estate. The petition was allowed. An appeal was taken to this court by a brother of the present respondent. The decree was affirmed and is reported as Hale v. Blanchard, 242 Mass. 262, 136 N. E. 102.

At the hearing for registration it appeared that L. Josephine Wilson, the beneficiary for life, died June 8, 1919 two days before the decree granting the first petition to sell. It is the contention of the present respondent that under the will the trustee had no possible right or interest in any of the Blanchard property upon the death of the life tenant, other than to "make over and convey" to the children of said Blanchard the estate which he held in trust under said will. The present respondent further contends that the probate court had no jurisdiction to grant the trustee a license to sell, and that the deeds to the petitioner are invalid.

[1, 2] The devise of "all the real estate" to Bigelow and his heirs, executors and administrators, gave to him and to his successor in office a fee in the real estate described in the will, in trust. P. S. c. 141, §§ 5, 6, now G. L. c. 203, §§ 5, 6. The probate court when the decrees were entered was a court of superior and general jurisdiction with reference to all cases and matters in which it had jurisdiction. R. L. c. 162, § 2; G. L. c. 215, § 2. And its decrees cannot be attacked collaterally. Taylor v. Badger, 226 Mass. 258, 262, 115 N. E. 405; Renwick v. Macomber, 233 Mass. 530, 532, 534, 124 N. E. 670. By St. 1907, c. 262, the probate court, "upon petition of a trustee or other person interested" after notice, was given authority to order a sale, conveyance, transfer or exchange of real estate held in trust if it appeared to be necessary or expedient "although the instrument creating the trust contains a power authorizing the petitioner to make such sale and conveyance." When the petition for license to sell all the real estate of the testator was filed in the probate court on May 22, 1919, that court had jurisdiction under the statute of 1907 of the subject-matter, and, upon notice duly served, of all parties having an interest in the sale of the estate. It must be assumed on the record that all parties interested and having a right to be heard were actually or constructively before the court when it entered its decree and license to sell the real estate described in the petition. No appeals from said decrees were taken to this court and the decrees stand in this regard in force and unrevoked.

[3] The conveyance under the decree and under the will failed through mutual mistake to effectuate the probate court decree to a degree which, this court declared in Hale v. Blanchard, supra, warranted the action and second decree of the probate court. No person who might have been heard upon the petition, and no persons who had an opportunity to appeal from the decrees but did not, can again question the jurisdiction of the court to make the decrees that were in fact made. It results that the ruling of the land court "that the deeds to the petitioner from the trustee were valid, and that title is now in the petitioner" was right.

Order for decree for petitioner affirmed.

POTTER v. McLANE.

(Supreme Judicial Court of Massachusetts. Bristol. Jan. 7, 1924.)

1. Wills ⇐439—Ascertaining intention cardinal rule of construction.

The cardinal rule in the interpretation of wills, to which all other rules must bend, is that the intention of the testator shall prevail, provided that it is consistent with the rules of law.

2. Wills ⇐441—Intention to be collected from words of will.

Intention of testator is to be collected from the words of the will itself, as read in the light of the attendant circumstances.

3. Wills ⇐440—Intention appearing, aid of rules of construction unnecessary.

When the whole will makes manifest the testator's intention, there is no occasion to invoke the aid of rules of construction.

4. Wills ⇐548—Child surviving widow, and not grandchildren, took share of child dying without issue.

Under will leaving property to widow for life, at her death to be equally divided between surviving children, the share of any child not surviving the widow to go to his issue, "but in case any of my said children shall die leaving no lawful issue then it is my will that such of my said children as shall survive him, her, or them shall take such share or shares absolutely to be divided equally between them share and share alike," *held* that, where only one child survived the widow, he took the whole of the share of a child dying without issue, to the exclusion of issue of other children.

Appeal from Superior Court, Bristol County; Stanley E. Qua, Judge.

Action by Arthur E. Potter against Frederick J. McLane, wherein defendant filed petition in nature of interpleader, summoning in as claimants to a fund Frances S. Brown and others. From the judgment, plaintiff and claimants appeal. Action against defendant discontinued: judgment to be entered in favor of one of the claimants.

Wood & Brayton, of Fall River, for plaintiff appellant.

Borden, Kenyon & Hawes, of Fall River, for claimants appellants.

Appellee, pro se.

DE COURCY, J. Joseph D. Brown, late of Fall River, died August 31, 1890, leaving a will dated August 20, 1875. He had six children who were living on both of those dates. The will gave a life interest in all his property to his wife, Mary Thomas Brown, and then provided as follows:

"Second. And upon the death of my said wife, I hereby give devise and bequeath absolutely all my said real and personal estate to my children, namely, my daughters, Susan E. Lee wife of John Lee of New Bedford in the commonwealth of Massachusetts, Isadore C. Potter, wife of Caleb C. Potter, of said Fall River, my sons, Charles F. Brown of Jacksonville, in the state of Illinois, Eliphalet S. Brown, Benjamin B. Brown and Thomas Jefferson Lee Brown all of said Fall River to be divided equally between them, share and share alike.

"Third. And in case any of my said children shall die leaving lawful issue, then it is my will that such issues shall take their parent's share to be divided equally between such issue share and share alike. But in case any of my said children shall die leaving no lawful issue then it is my will that such of my said children as shall survive him, her or them, shall take such share or shares absolutely to be divided equally between them share and share alike."

The widow died April 29, 1919. She outlived all of said children excepting Thomas J. L. Brown. Four of the deceased children, Susan, Isadore, Charles, and Eliphalet, left issue. The other deceased child, Benjamin, left no issue; and he devised the residue of his property to his sister Isadore. She died in May, 1918, intestate, leaving the plaintiff Arthur E. Potter as her sole heir.

At the time of his decease the testator Joseph D. Brown owned a piece of real estate in Fall River. After the death of his widow the defendant Frederick J. McLane sold it for the owners, and paid to the grantors five sixths of the net proceeds. The remaining sixth, $1,069.21, representing the alleged share of the son Benjamin, he paid into court; and filed a petition in the nature of interpleader, summoning in certain claimants to the fund. The controlling question is, What interest did the son Benjamin B. Brown acquire in said real estate under his father's will?

[1-3] As was said by Hammond, J., in McCurdy v. McCallum, 186 Mass. 464, 469, 72 N. E. 75:

"The cardinal rule in the interpretation of wills, to which all other rules must bend, is that the intention of the testator shall prevail, provided that it is consistent with the rules of law."

[4] That intention is to be collected from the words of the will itself, as read in the light of the attendant circumstances. When the whole will makes manifest the testator's intention, there is no occasion to invoke the aid of rules of construction. The will of Joseph D. Brown clearly indicates how he meant to dispose of his property. His first purpose was to give the use and income to his widow for life; and this he did by the apt language of paragraph "first." His next concern was for his six children; and by the "second" paragraph the remainder after the widow's life estate was to go to them. If all of them had survived the widow, plainly they would have been entitled each to one sixth of the estate. But the will did not

end here. While the record does not disclose the testator's age or that of his wife, it does appear that 15 years elapsed after the date of the will before he died, and almost 44 years before his widow died. When the will was executed, in 1875, he naturally would assume that some of his children were likely to predecease the widow; as in fact five of them did. Accordingly he made provision for that contingency by the "third" paragraph. First he provided for those of his children who should die leaving issue; devising such share to the issue, by way of representation. He then added the clause above recited, dealing with any of his children who should die "leaving no lawful issue"; giving such share to the testator's surviving children. There is no dispute by the parties that both the "second" and "third" paragraphs are operative upon the death of the widow. This last clause is directly applicable to the one-sixth share which would have belonged to the son Benjamin B. Brown if he had survived the widow. His death terminated whatever interest the will gave him; however that interest be technically described. See White v. Underwood, 215 Mass. 299, 102 N. E. 426. The only child of the testator who survived the widow was the claimant Thomas J. L. Brown. Accordingly, as we construe the last part of paragraph "third," he alone is entitled to the proceeds of the one-sixth interest in real estate which is in controversy.

It follows that the trial judge was right in finding for the claimant Thomas J. L. Brown in the sum of $1,069.21. The parties do not desire to raise any question as to the form of action or pleadings. The case is remanded for further proceedings to the superior court, where the fund now is. The action against the defendant McLane is to be discontinued and his costs charged upon the fund. Judgment is to be entered in favor of the claimant Thomas J. L. Brown, in accordance with this opinion. G. L. c. 231, § 40.

So ordered.

SWEENEY v. F. W. WOOLWORTH CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1924.)

1. False imprisonment ⇐5—Physical contact unnecessary.

Any restraint, although without physical contact of the person, is sufficient to constitute "false imprisonment."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Imprisonment.]

2. False imprisonment ⇐31—Evidence held insufficient.

In action for false imprisonment, evidence *held* insufficient to justify a finding that plaintiff was restrained of his liberty.

3. False imprisonment ⇐5—Charge of larceny not false imprisonment.

To charge one with larceny was not of itself false imprisonment, and there was no false imprisonment where one in charge of a store charged a customer with larceny and insisted that he should turn his pockets out, and told him that if he did not do so he would have an officer there and arrest him.

Exceptions from Superior Court, Suffolk County; Geo. A. Sanderson, Judge.

Action of tort by John D. Sweeney, p. p. a., against the F. W. Woolworth Company, for assault and false imprisonment. Defendant, being aggrieved by refusal of court to rule and to order a verdict in its favor, brings exceptions. Exceptions sustained.

Francis Juggins and Ralph E. Evans, both of Boston, for plaintiff.

Arthur S. Phillips and J. Edw. La Joie, both of Fall River, for defendant.

CROSBY, J. This is an action of tort. The declaration is in two counts: the first for assault, the second for false imprisonment. As the trial judge ruled that there could be no recovery on the first count, the second only is before us. At the close of the evidence, the defendant moved for a directed verdict upon the grounds that there was not sufficient evidence to warrant a finding that the acts complained of were committed by an agent or servant of the defendant, and that such acts did not in law constitute false imprisonment. The motion was denied and the defendant excepted.

There was evidence that one Hardie was the manager of the defendant's store at the time the acts complained of were committed: that his duties were to sell the merchandise consigned to him for sale, to direct and control the clerks in his employ, and to turn over to the defendant all proceeds of sales for an accounting; his compensation being a part of the profits. The sales were conducted in the defendant's store and it is a legitimate inference that the business was carried on its name. It is plain that Hardie was the defendant's agent and that the latter was liable for his acts within the scope of his authority to the same extent as if he were paid a salary.

The plaintiff, a minor, testified in substance that on the date of the alleged false imprisonment he went into the defendant's store, accompanied by another boy, to buy a pencil; that he had been there before; that he looked around for a pencil; that he went to the back counter and not seeing any went to the counters near the middle of the store, and, upon inquiry not obtaining what he wanted, started to leave the store; that when he was about six feet from the outer door Hardie came down in front of him and said, "Give up;" that he replied,

"Give up what?" that he was frightened; that Hardie said, "What you took off the counter," and the witness answered, "I didn't take anything;" that Hardie said, "Yes, you did, * * * go down in the cellar," pointing to the entrance, and the witness replied, "No, I won't; I didn't take anything; here is the dime I got from my mother to buy the pencil, and that is all I got;" that Hardie then ordered the plaintiff to turn out his pockets; that he replied, "No, I won't," and Hardie said, "Yes, you will;" that the plaintiff said, "You can turn them out yourself, if you want to," and Hardie answered, "No, I won't; I will have an officer down here in a minute, if you don't, and arrest you;" that then the plaintiff became frightened, and turned his pockets out, and showed Hardie a couple of handkerchiefs and a dime, and then Hardie said, "Get out of the store, and never let me see you in it again;" and that the plaintiff then left the store. The plaintiff further testified that Hardie did not stand between him and the door, but by the counter at the side of the door; that he (the plaintiff) stood facing the counter with his back toward the street. He also testified that Hardie "would'nt let me move either side. He stood right there. I didn't move at all. He wouldn't let me go near the door."

The defendant took and filed the deposition of Hardie, a portion of which was offered by the plaintiff and received in evidence, in which Hardie testified that his attention had been called to the two boys "by a lady customer, who told him they were taking goods from the counters"; that he watched them for several minutes; that they moved to another counter as he approached; that they began to watch him, and he saw one of the boys put some goods on a counter and move along; that when he asked them what they had in their pockets, both emptied their pockets willingly, and that he did not threaten or detain them. The jury were not bound to believe this evidence, but were entitled to credit the plaintiff's story as the true recital of what occurred.

[1-3] The question is whether there was sufficient evidence to warrant a verdict for the plaintiff upon all the testimony most favorable to him. It is well settled that any restraint, although without physical contact of the person, is sufficient to constitute false imprisonment. Jacques v. Childs Dining Hall Co., 244 Mass. 438, 138 N. E. 843, 26 A. L. R. 1329, and cases cited. We are of opinion that the evidence was insufficient to justify a finding that the plaintiff was restrained of his liberty by anything that was said or done by Hardie. To charge the plaintiff with larceny was not of itself evidence of false imprisonment. There was nothing in what Hardie said that amounted to a restraint of the plaintiff. He insisted that the latter should turn his pockets out, and told him that if he did not do so he would have an officer there and arrest him. Thereupon the latter turned out his pockets as requested and left the store. Nor was there anything in what Hardie did to restrain the plaintiff of his liberty. While the plaintiff testified that Hardie would not let him move either side, that he stood right there, that he would not let him go near the door, yet it appears that during the conversation he was standing near the door between it and Hardie, and could have left the store, so far as appears, without any interference whatever. The plaintiff's statement that Hardie would not let him go near the door is a conclusion of fact which is expressly negatived by his other testimony. In other words, there was no evidence that during the brief conversation the plaintiff was prevented by acts of physical force, threats or otherwise from leaving the store at any time. There were no words or conduct which could have induced a reasonable apprehension by the plaintiff, notwithstanding his tender years, that he could not leave the defendant's premises without interference if and when he desired to do so. Moreover, there was nothing in the conduct of the defendant's agent in the detention of the plaintiff in this case which exceeded the exercise of his legal rights. The case is distinguishable in its facts from that of Jacques v. Childs Dining Hall Co., supra.

We are of opinion that the motion for a directed verdict should have been granted.

Exception sustained.

BRIGHAM v. BICKNELL.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 8, 1924.)

Partnership ⇐333—Capital not furnished part of assets, and correctly stated in account as asset of partnership.

Where one partner was to contribute machinery and stock in trade and the other $1,000 in cash, and they were equal partners, the amount which the partner agreeing to pay cash failed to pay the firm was a part of its assets, and on dissolution did not belong to the estate of the other partner, and was correctly stated in an account as an asset of the partnership.

Appeal from Superior Court, Suffolk County; F. T. Hammond, Judge.

Action in equity by Maude A. Brigham, executrix of the estate of Henry A. Davis, deceased, against A. Ingham Bicknell, as executor of the will of Arli A. Wetherbee, deceased. Decree for defendant, and plaintiff appeals. Affirmed.

J. K. Berry, of Boston, for appellant.

A. D. Radley, of Boston, for appellee.

CARROLL, J. When this case was before us, Davis v. Bicknell, 244 Mass. 352, 139 N. E. 490, it was decided that the plaintiff was entitled to an accounting on the basis of equality and that the defendant should be charged with the sum of $1,000, with interest thereon from August 1, 1894, to the date of the dissolution of the partnership. The rescript directed that the interlocutory decree was to be modified by sustaining the plaintiff's fifth exception to the master's report, and the final decree was reversed, the case to stand for further proceedings in the trial court not inconsistent with the opinion.

On the plaintiff's motion for further proceedings after rescript, the judge of the superior court restated the partnership account, including in the partnership assets the $1,000 which Wetherbee was to pay with interest from August 1, 1894, to February 11, 1919, amounting to a total of $2,471.67, crediting to Wetherbee's estate one-half of the net assets and finding that the net amount due from Wetherbee's estate to Davis' estate was $882.48. A final decree was entered thereon, from which the plaintiff appealed.

The findings and the decree were not inconsistent with the former decision of this court. The sum of $1,000, with interest, was due to the partnership; it was one of its assets; this sum was not a debt of Wetherbee's estate to the Davis estate, as claimed by the plaintiff. Wetherbee and Davis were equal partners, they were to share equally in the profits and losses of the partnership business; at its termination they were to share equally in the distribution of its assets, and the amount due from the Wetherbee estate was correctly stated in the account as an asset of the partnership.

There is nothing in McMahon v. Brown, 219 Mass. 23, 106 N. E. 576, which supports the plaintiff's contention. In Livingston v. Blanchard, 130 Mass. 341, Livingston was to contribute the entire cash capital invested in the business; and the profits, after the payment of expenses including interest on the capital, were to be divided equally. It was decided that, on the dissolution of the firm, Livingston (or the plaintiff as the executrix of his will) was entitled to repayment of the capital contributed by him, before the defendant was entitled to receive anything as profits, and that—

"The amount of profits was ascertainable only by deducting from the assets left, after paying the expenses of the business, the amount of the capital invested."

In the case at bar Davis was not to pay the entire capital; he was to contribute certain machinery and stock in trade, and Wetherbee was to contribute $1,000 in cash. They were, as found by the master, equal partners; and in accordance with the other findings as to sharing losses and profits and the distribution of the assets, the amount which Wetherbee failed to pay the firm was a part of its assets, and it did not belong to the plaintiff's estate. The plaintiff's share in the firm's property was stated properly in the account. The decree of the superior court is affirmed, with costs of this appeal taxed against the plaintiff.

So ordered.

HAYWARD v. BLAKE et al.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 8, 1924.)

1. Trusts ⟸273—Executrix of beneficiary entitled to interest on mortgage to date of death.

Where the beneficiary of a trust for her life died between the days on which interest on a mortgage note was payable, her executrix was entitled to receive interest from the date when the last interest was payable to the date of life tenant's death, in view of G. L. c. 197, § 27, as to apportionment.

2. Trusts ⟸272(3)—Dividend payable after death to stockholders on date prior to death payable to beneficiary's executrix.

Where beneficiary was entitled during her life to income from corporate stock held in trust, and a dividend was declared May 16, payable July 15, to all stockholders of record June 20, and life tenant died July 6, her executor was entitled to the dividend.

3. Trusts ⟸272(3)—Dividend payable to beneficiary's estate, when declared during lifetime, though payable later.

Where dividend on corporate stock was declared on June 13, and was payable July 15, without a vote making it payable to stockholders of any certain date, and one entitled to the income from such stock for life died July 6, her executor was entitled to receive the dividend.

4. Trusts ⟸271½—Failure to fix compensation not error, when question not raised.

On a trustee's petition for instructions, where the pleadings raised no question as to the trustee's compensation, the decree was not erroneous, because not fixing his compensation.

Appeal from Probate Court, Middlesex County; L. E. Chamberlain, Judge.

Petition in equity by George B. Hayward, special administrator of the estate of Jennie L. Nichols, deceased, against Henry N. Blake, trustee for the deceased under the will of Charles E. Clark, and others, in which the executrix of deceased intervened. From the decree, defendants appeal. Modified and affirmed.

H. N. Blake, for appellants Clark and Blake.

George B. Hayward, of Boston, for appellee.

CARROLL, J. This is a petition in equity by the special administrator of the estate of Jennie L. Nichols, the executrix of her will subsequently intervening as plaintiff, against Henry N. Blake, trustee for Jennie L. Nichols under the will of Charles E. Clark, and against other respondents, praying for a determination of the interest of the petitioner in certain mortgage interest and stock dividends, received by Blake as trustee.

Blake held as trustee a note, secured by mortgage on real estate in Massachusetts, and shares of stock of the American Telephone & Telegraph Company and "Western Union Telegraph & Telephone Company." Jennie L. Nichols died July 6, 1922. In the probate court it was decreed that the trustee pay to the plaintiff the sum of $26.13, that being the proportionate share of the interest on the mortgage note from January 15, 1922, to July 6, 1922; a dividend of $245, declared June 13, 1922, and payable July 15, 1922, on the shares of stock of the "Western Union Telegraph & Telephone Company," and a dividend of $119.25 of the American Telephone & Telegraph Company, declared May 16, 1922, payable July 15, 1922, to stockholders of record June 20, 1922. From this decree the defendants appealed.

A trustee was originally appointed under an agreement of compromise, approved by the probate court, by which the trustee was to pay to Mrs. Nichols "the net income thereof" of the trust fund in question. The predecessor of Blake as trustee was appointed under a decree providing that during her life he was to "hold all personal property to the income of which said Jennie L. Nichols may be entitled." Blake, on the resignation of his predecessor, petitioned to be appointed trustee, alleging that the beneficiary was entitled during her lifetime to a certain portion of the estate, and that the decree appointing him, after referring to the circumstance that she was entitled to the income during her life, directed "that said petitioner be appointed trustee as aforesaid."

[1] The duty of the trustee was to pay to Jennie L. Nichols during her life the income of the trust fund. The interest on the mortgage note was apportioned properly from the date of the last payment of interest to the date of her death. "A person entitled to * * * interest or income, or his representative, shall have the same apportioned if his right or estate therein terminates between the days upon which it is payable, unless otherwise provided in the will or instrument by which it was created." G. L. c. 197, § 27. The beneficiary's life estate terminated between the days upon which the interest was payable, and her executrix was entitled to receive the interest from January 15, 1922, to July 6, the date of her death. Old Colony Trust Co. v. Sargent, 235 Mass. 298, 126 N. E. 526. See Dexter v. Phillips, 121 Mass. 178, 188, 189, 23 Am. Rep. 261; Adams v. Adams, 139 Mass. 449, 1 N. E. 746; Stone v. Bradlee, 183 Mass. 165, 172, 66 N. E. 708.

[2] The dividend on the shares of the American Telephone & Telegraph Company was declared on May 16, 1922, payable (after the death of Mrs. Nichols) on July 15, 1922, to all stockholders of record June 20, 1922; this dividend was payable to her executor; it was declared before her death and was payable to stockholders of record on a date prior to her death. Nutter v. Andrews (Mass.) 140 N. E. 744.

[3] The dividend on the Western Union Telephone & Telegraph Company was declared on June 13, 1922, and was payable July 15 without a vote making it payable to stockholders of any certain date. This dividend was payable to the beneficiary. Dividends declared during the life of a beneficiary for life and payable after his death, there being no vote that they are payable to stockholders of any certain date, are payable to the beneficiary for life. Nutter v. Andrews, supra.

The defendant was bound to administer the trust in accordance with the decree of the probate court affirming the compromise agreement and appointing him to the office of trustee, and we find nothing in the agreement of compromise contrary to the decrees based thereon.

The original decree directed that the fund was to be held during Mrs. Nichols' life and that the net income thereof was to be paid to her. The subsequent decrees are to the same effect; that she was to have the entire income during her life. The interest was properly apportioned and the dividends declared during her life belonged to her estate. Keating v. Smith, 5 Cush. 232, Loomis v. Gorham, 186 Mass. 444, 71 N. E. 981, and Stearns v. Stearns, 192 Mass. 144, 77 N. E. 1154, relied on by the defendants, are not in conflict with what is here decided.

[4] The defendants also contend that the decree of the probate court should be reversed, because the compensation of the trustee was not settled. In this petition for instructions no question of the trustee's compensation arose; and it was not raised by the petition or the pleadings.

The executrix of the will of Mrs. Nichols having intervened as plaintiff since the date of the appeal, the decree is to be modified by striking out so much of the decree as relates to the payment of interest and dividends to her special administrator, the interest and dividends being payable to the executrix; as so modified it is affirmed.

Ordered accordingly.

CHITTENDEN v. ROYAL INDEMNITY CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 5, 1924.)

1. Bills and notes ⟸499—Payment not inferred from record entry in former suit of agreement filed therein.

Payment of a note cannot be inferred as matter of law or fact from a mere record entry in former suit on recognizance bond of indorser of the note of an agreement filed therein and reading: "Neither party. No further suit to be brought for same cause of action."

2. Attachment ⟸337—Effect of failure of creditor to make use of collateral method to collect debt or judgment.

A surety on a bond to dissolve an attachment has no legal or equitable right which can be impaired by the failure of the creditor to make use of any collateral methods to collect the debt or judgment against such debtor.

3. Attachment ⟸337—Arrest on execution does not discharge surety.

An arrest on execution, even though the debtor was committed to prison, does not discharge the sureties on a bond given to dissolve attachment.

4. Attachment ⟸337—Failure to prosecute breach of recognizance does not discharge sureties.

A failure to prosecute successfully a breach of a recognizance given by arrested debtor does not discharge sureties on a bond given to dissolve attachment.

Exceptions from Superior Court, Suffolk County; C. T. Callahan, Judge.

Action of contract on a bond by Samuel N. Chittenden against the Royal Indemnity Company. Directed verdict for plaintiff, and defendant, being aggrieved by instructions, refusal to rule, and exclusion of evidence, brings exceptions. Exceptions overruled.

C. A. Warren, F. W. Doring, and F. Killam, all of Boston, for plaintiff.

L. G. Roberts, of Boston, for defendant.

PIERCE, J. This is an action on a bond, taken from a debtor with sureties in the usual form, to dissolve an attachment of the goods and estate of the debtor on mesne process. At the trial the plaintiff proved the recovery of judgment January 2, 1923, in the action in which the bond was given, for an amount and costs in excess of the penal sum of the bond, against the debtor in said action brought February 23, 1921; testified that "said judgment had not been satisfied either in whole or in part"; and rested.

The defendant in support of its answer offered proof that the plaintiff on December 3, 1917, recovered judgment against one Wellman, an indorser on one of the several notes upon which judgment was recovered against the debtor in the original action in which the bond sued on was given; that Wellman, on an alias execution, was cited into the poor debtor court in the police court of Newton; that he was defaulted at the hearing and was arrested on the execution in Boston in Suffolk county; that he entered into a recognizance bond in the statutory form and appeared for examination within 30 days before the policy court of the city of Newton, but did not offer himself for examination in Suffolk county within 30 days after his arrest. The defendant offered further proof that suit was begun by the plaintiff on the recognizance bond given by Wellman, and that thereafter an agreement was filed in the action on the recognizance bond as follows:

"Neither party. No further suit to be brought for same cause of action."

At the close of the evidence the defendant requested the court to rule:

"That on all the evidence, plaintiff is not entitled to recover."

The court refused to give the requested ruling and the defendant excepted.

[1] The refusal was manifestly right. The defendant did not prove or offer to prove that the final judgment against the debtor in the action in which the bond was given was satisfied in whole or in part by the payment of money or of any other valuable thing. Its defense rests upon the proposition that the plaintiff by the voluntary entry of "Neither party. No further suit to be brought"—has in legal effect destroyed the validity of one of the notes which, with others, were transmuted into the judgment against the debtor by the plaintiff; and that a recovery of the full amount of the judgment against the surety defendant would permit the plaintiff to recover twice upon the same note. The short answer is that payment of the note cannot be inferred as matter of law or fact from the mere record entry of "Neither party. No further suit to be brought for same cause of action."

[2-4] It is plain a surety on a bond to dissolve an attachment has no legal or equitable right which can be impaired by the failure of the creditor of the debtor in the action or suit to make use or abandon the use of any collateral methods to collect his debt or judgment against such debtor. The creditor may enforce the claim by any and every legal method until its satisfaction. It is settled that an arrest upon execution even though the debtor was committed to prison, does not discharge the sureties on an attachment bond; and it is also settled that a failure to prosecute successfully a breach of a recognizance does not discharge such sureties. Moore v. Loring, 106 Mass. 455; Craw-

ford-Plummer Co. v. McCarthy, 227 Mass. 350, 353, 116 N. E. 575.

The exceptions must be overruled.

So ordered.

Appeal of CONNELL.

(Supreme Judicial Court of Massachusetts. Bristol. Jan. 2, 1924.)

1. Wills ⇐318(1)—Order of probate judge respecting framing of issues ordinarily not disturbed.

By reason of the element of discretion involved in the action of a judge of probate, his order respecting the framing of issues, made on statements of counsel as to the expected proof, ordinarily will not be reversed, where it is supported by such statements.

2. Wills ⇐316(1)—Expected proof as to incompetency and undue influence held to justify framing of issues for jury trial.

In a contested proceeding to prove a will, statements of counsel as to expected proof of unsoundness of mind and undue influence *held* to disclose a genuine and doubtful question of fact to be decided, and decree ordering issues to be submitted to a jury was proper.

Appeal from Probate Court, Bristol County; M. R. Hitch, Judge.

In the matter of the estate of Charles W. Connell, deceased. Petition by Arthur I. Connell to prove a will and have letters testamentary issued to him. From a decree ordering issues as to undue influence and unsoundness of mind to be submitted to a jury, petitioner appeals. Affirmed.

A. E. Seagrave, of Fall River (C. L. Baker, of Fall River, on the brief), for appellant.

J. M. Swift, of Boston, for appellee.

DE COURCY, J. This is an appeal from the order of the probate court directing issues for a jury trial. The testator, Dr. Charles W. Connell, died on February 7, 1923, leaving as his only heir at law and next of kin his daughter, Clarissa E. Sokoll, the contestant. By his will, dated January 29, 1920, he gave all his property to his brother Arthur I. Connell as trustee; the income to go to said brother and his sisters Sarah J. and Harriet E. Connell, and the survivor of them; and on the death of the survivor, the principal to go to his nephew William A. Connell. The will states:

"I have not given or devised any of my property to my daughter, Clarissa, because of her unfilial conduct and because in my opinion she is possessed of all the property that she can wisely use."

It further provides that if she should be in need during the continuance of the trust, the trustee might provide her "with such necessities as he shall deem sufficient."

The issues framed relate to the testator's soundness of mind, and to the exercise of undue influence by his said two sisters.

[1] In the probate court the motion for jury issues was heard on statements by counsel of what he expected to prove. The question is before us on appeal substantially as it was before the probate court, except that, by reason of the element of discretion involved in the action of the judge of probate, his order respecting the framing of issues ordinarily will not be reversed where it is supported by the statements of expected proof. Fuller v. Sylvia, 240 Mass. 49, 133 N. E. 384; Cook v. Mosher, 243 Mass. 149, 137 N. E. 299; In re McNeil's Estate, 246 Mass. —, 140 N. E. 922.

It would serve no useful purpose to recite the statement in detail. On the issue of soundness of mind the indicated evidence was that even before his wife died (April 13, 1915)—

"a decidedly noticeable change came over the attitude and actions and apparent mental processes of Dr. Connell; he became a morose man, sullen with his family, subject to violent fits of anger; at times uncontrollable outbursts of passion, ugly to his wife, so that she stated she was afraid of him, and afraid to cross his wishes, * * * and stated she was afraid to ask her sister to the house because of the way in which the husband would treat her about it."

With reference to the alleged reasons for disinheriting her, the contestant offered proof tending to show that they were unfounded in fact, and due to delusions or monomania with reference to money matters, and to her marriage. As to money matters, the offer deals with the testator's handling of his daughter's share of her mother's property, as if it were his own, his inadequate allowance to her, and his failure to make any accounting until she employed an attorney to compel him to do so. With reference to the marriage, it deals, among other things, with his insistence that she was too young to marry, although more than 24 years of age, and well educated, and the fact that the young man she married was known by the testator to be one of ability and good habits. To characterize her conduct as "unfilial" because she married the man she loved, after her mother had approved of him, and the testator himself at one time had assented to the proposed marriage, is claimed by the contestant to be so irrational and unjustifiable as to indicate an insane delusion on his part, operating to cause him to disinherit his only child.

The alleged facts bearing on the issue of undue influence, in addition to some already referred to, are numerous instances indicating that in matters relating to the management of his home, to the clothing and conduct of his daughter, and to her marriage, he was controlled by the continuous and increasing influence of his two sisters. This

culminated in her leaving home. And when she was about to be married, the testator and his sisters, with whom he then was living, refused to attend the wedding, and wrote similar letters to her, referring to her "unloving demeanor" and "cruel treatment."

[2] While the inferences sought to be drawn from the proposed evidence may be overcome by evidence showing that the provisions of the will were justified, and were dictated by a free and sound mind, we cannot say there is not disclosed "a genuine and doubtful question of fact to be decided," and one "supported by evidence of a substantial nature." Fuller v. Sylvia, 240 Mass. 49, 53, 133 N. E. 384; Raposa v. Oliveira (Mass.) 141 N. E. 870, and cases cited.

Decree affirmed.

SMITH v. BREWSTER.

(Supreme Judicial Court of Massachusetts. Norfolk. Jan. 7, 1924.)

1. Wills ⟸384—Statement of facts assumed to contain summary of oral testimony.

On appeal in a will contest, *held*, that it would be assumed on the record, notwithstanding agreement of counsel to the contrary, filed after the death of the judge of probate, that the "statement of facts" found by him "on motion for jury issues" was a summary of the evidence of witnesses who testified at the hearing.

2. Wills ⟸164(1)—Undue influence ordinarily depends on circumstantial evidence.

Proof of undue influence ordinarily must depend largely on circumstantial evidence.

3. Wills ⟸316(3)—Issue of testamentary capacity held to be framed for jury trial.

In will contest, *held*, that court, under the evidence, erred in refusing to frame issue of testamentary capacity for jury trial.

Appeal from Probate Court, Norfolk County; J. H. Flint, Judge.

Contest of will between George N. Smith and Etta E. H. Brewster. From denial of a motion to frame issues for trial by jury, contestant appeals. Affirmed in part, and reversed in part.

MacKusick, Hoe & Wenrich, of Boston, for appellant.

J. J. Corbishley, of Waltham, for Blanche Bennett.

BRALEY, J. [1] This is an appeal from the denial of a motion by the contestant and appellant to frame issues for trial by jury whether the testator was of sound mind when he made his will, and whether he executed the instrument with the understanding and purpose that it should be his last will and testament, and whether the will was procured to be made by the fraud or undue influence of Blanche Bennett, Daniel Maude, Josephine Newton, or either of them. We assume on the record, notwithstanding the agreement of counsel to the contrary, filed after the death of the judge of probate, that the "statement of facts" found by him "on motion for jury issues" is a summary of the evidence of witnesses who testified at the hearing. It was said in Cook v. Mosher, 243 Mass. 149, 152, 153, 137 N. E. 299, 300:

"It is the duty of this court to examine the evidence, to reach its own conclusion as to the facts, and to decide the case according to its own judgment, giving due weight to the finding of the judge. But a finding made by him after a hearing in which witnesses have testified orally before him will not be reversed unless plainly wrong."

[2] While proof of undue influence ordinarily must depend largely on circumstantial evidence, a careful examination of the testimony fails to show, that the denial by the judge of probate of that issue, as well as the issue whether the testator executed the instrument with an understanding and purpose that it should be his last will and testament, cannot be held to have been plainly erroneous, even if the testator subsequent to the execution of the will said it "was not as he wanted it." Hoffman v. Hoffman, 192 Mass. 416, 78 N. E. 492; Emery v. Emery, 218 Mass. 227, 105 N. E. 879; Baker v. Comins, 110 Mass. 477, 488.

[3] But on the issue of testamentary capacity the record tends to show that the testator was a sick, decrepit old man suffering from Bright's disease and hardening of the arteries, and that he was somewhat feeble-minded. The testimony of his attending physician was to the effect that he considered the testator a "moron," only "10 per cent. normal," and "it seemed doubtful if he was able to manage his business affairs." The evidence of another witness was "that along toward the last he was failing rapidly." It is plain there was substantial evidence for the consideration of a jury whether his mental soundness was sufficient to enable him to make a will. Whitney v. Twombly, 136 Mass. 145, 146, 147. The order denying the motion on the second issue is reversed, but as to the first and third issues it is affirmed, and the case is to stand for further proceedings in the court of probate not inconsistent with this opinion.

Ordered accordingly.

DUNBAR-LAPORTE MOTOR CO. v. DESROCHER.

(Supreme Judicial Court of Massachusetts. Hampden. Jan. 7, 1924.)

1. Replevin ⟸69(4)—General denial held to put in issue plaintiff's right of possession.

In an action by conditional seller of automobile to recover it from defendant's garage, where it was being held for repairs under G. L. c. 255, § 35, defendant's general denial put in issue the plaintiff's right of possession.

2. Replevin ⟸70—Burden on plaintiff to show right to immediate possession.

In replevin by the conditional seller of an automobile to recover it from garageman claiming a lien on it for repairs by virtue of G. L. c. 255, § 35, the burden rested on plaintiff to prove that, at the time possession of the automobile was taken by virtue of the writ, it was entitled to immediate possession.

3. Livery stable and garage keepers ⟸8(1)—Conditional seller held not entitled to possession as against lienor.

Where plaintiff's president saw automobile on street several weeks after conditional sale, and it appeared to have been improperly cared for, and plaintiff permitted it to remain in the purchaser's possession after learning of its condition, and thereafter it was delivered to defendant for repairs, plaintiff was not entitled to possession as against the defendant, claiming a lien by virtue of G. L. c. 255, § 35, on the ground that the car was not properly cared for by the purchaser under the contract, permitting seller to take possession if it was of opinion that the automobile was not receiving proper care.

Exceptions from Superior Court, Hampden County; R. W. Irwin, Judge.

Action in replevin by the Dunbar-Laporte Motor Company against Valmore Desrocher to recover possession of an automobile held by it under a conditional sale contract, or lease. A verdict was directed for defendant, and plaintiff brings exceptions. Exceptions overruled.

F. J. McKay, of Holyoke, for plaintiff.

Morrisey & Gray, of Springfield, for defendant.

CROSBY, J. This is an action of replevin. The plaintiff, a company dealing in automobiles, sold to one Vielliloux an automobile in accordance with a written contract, which recited that the purchaser had paid $250 at the time of sale, and given 10 promissory notes to become due by their terms on different dates; the title to the automobile was to remain in the plaintiff until all the notes and any renewals thereof were paid. The contract contained other provisions, which need not be referred to at this time; it was dated August 28, 1920. The defendant testified that Vielliloux left the car at the defendant's garage and requested him to make certain repairs upon it; and, having made the repairs, he claims a lien by virtue of G. L. c. 255, § 35. Vielliloux, as the conditional owner of the car, had the right to deliver it to the defendant for the purpose of having repairs made on it, Guaranty Security Corp. v. Brophy, 243 Mass. 597, 137 N. E. 751; and the latter is entitled to a lien under the statute if he made the repairs without actual notice of the conditional sale or lease "provided, that the property was delivered to the bailee prior to the breach of any condition of the sale or lease." The defendant testified that he did not learn that the plaintiff had any claim on the car until all the repairs were completed. If this evidence was not believed, there was no evidence to warrant a finding that he had notice of the conditional sale or lease.

[1] The agreement provided for the payment of 10 notes on different dates; 9 for $35 each, and the tenth for $185. The note due September 28, 1920, was paid on September 25, 1920; the second, due October 28, 1920, was paid on October 26, 1920. The third note fell due November 28, 1920. The defendant, who was called as a witness by the plaintiff, testified that the car was delivered to him by Vielliloux on October 9, 1920. There was evidence that the car left the garage the last part of November or the first part of December, 1920. The replevin writ is dated December 7, 1920. It appears from the evidence that when the automobile was delivered to the defendant on October 9, 1920, there had been no breach of any condition of the sale or lease respecting the payment of any note. The defendant's answer, which was a general denial, put in issue the plaintiff's right of possession. D'Arcy v. Steuer, 179 Mass. 40, 60 N. E. 405.

[2] The burden rested upon the plaintiff to prove that, at the time possession of the automobile was taken by virtue of the writ, it was entitled to immediate possession. Wylie v. Marinofsky, 201 Mass. 583, 88 N. E. 448. In other words, the plaintiff to be entitled to possession of the automobile was required to prove that the defendant had actual notice of the conditional sale or lease when the car was delivered to him, or that such delivery was made after the breach of a condition of the sale or lease. In both these respects the plaintiff failed to sustain the burden of proof.

The agreement also provided that, if at any time after the date thereof, the plaintiff should be of opinion that the property was not receiving proper care, the purchaser would deliver it to the plaintiff or to its order upon surrender of the agreement "and it shall have the right to take possession of * * * said property. * * *"

[3] While the plaintiff's president testified that he saw the car on the street two or

sixth of the net income from said trust estate during her natural life; and during the natural life of said Josephine to pay five-sixths of such net income to his children by her. The will provided further that "upon the decease of said L. Josephine Wilson" I direct all of the trust estate with any accumulation be made over and conveyed to our said children. The will gave "said trustee full power to change investments at pleasure." The testator appointed said Bigelow the executor of his will and empowered—

"the executor and the trustee under this will, whenever it may seem to him discreet and for the interest of the trust to sell, mortgage and convey any and all of the real or personal estate that I may leave, or may be held by said trustee, upon such terms and conditions as he may deem proper. * * * The proceeds of any such sale or mortgage to be used in satisfying any indebtedness of mine outstanding or any mortgage on any of my estate and the balance to be held upon the same trusts as the property hereby devised in trust."

For the purpose of satisfying an outstanding mortgage given by the testator on certain real estate in Boston, held by the trustee, the trustee on May 22, 1919, petitioned the probate court for license to sell all the real estate described in the petition for registration to said Hutchinson for $6,000. The license was granted. Hutchinson paid the agreed price, which was fair and reasonable for the entire estate, and received of the trustee a deed which followed the description of the land in the petition and license but did not include, through mistake, the entire estate which the parties intended should be conveyed. Subsequent to the conveyance, Hutchinson entered into possession of the entire estate and expended large sums in improvements and paid the taxes thereon. In consequence of a notification that Hutchinson was about to institute proceedings to compel a conveyance of the remainder of the tract, the trustee, reciting the facts, petitioned the probate court on February 8, 1921, for leave to release any vested, contingent or possible right or interest which the trustee had in the entire estate. The petition was allowed. An appeal was taken to this court by a brother of the present respondent. The decree was affirmed and is reported as Hale v. Blanchard, 242 Mass. 262, 136 N. E. 102.

At the hearing for registration it appeared that L. Josephine Wilson, the beneficiary for life, died June 8, 1919 two days before the decree granting the first petition to sell. It is the contention of the present respondent that under the will the trustee had no possible right or interest in any of the Blanchard property upon the death of the life tenant, other than to "make over and convey" to the children of said Blanchard the estate which he held in trust under said will. The present respondent further contends that the probate court had no jurisdiction to grant the trustee a license to sell, and that the deeds to the petitioner are invalid.

[1, 2] The devise of "all the real estate" to Bigelow and his heirs, executors and administrators, gave to him and to his successor in office a fee in the real estate described in the will, in trust. P. S. c. 141, §§ 5, 6, now G. L. c. 203, §§ 5, 6. The probate court, when the decrees were entered was a court of superior and general jurisdiction with reference to all cases and matters in which it had jurisdiction. R. L. c. 162, § 2; G. L. c. 215, § 2. And its decrees cannot be attacked collaterally. Taylor v. Badger, 226 Mass. 258, 262, 115 N. E. 405; Renwick v. Macomber, 233 Mass. 530, 532, 534, 124 N. E. 670. By St. 1907, c. 262, the probate court, "upon petition of a trustee or other person interested" after notice, was given authority to order a sale, conveyance, transfer or exchange of real estate held in trust if it appeared to be necessary or expedient "although the instrument creating the trust contains a power authorizing the petitioner to make such sale and conveyance." When the petition for license to sell all the real estate of the testator was filed in the probate court on May 22, 1919, that court had jurisdiction under the statute of 1907 of the subject-matter, and, upon notice duly served, of all parties having an interest in the sale of the estate. It must be assumed on the record that all parties interested and having a right to be heard were actually or constructively before the court when it entered its decree and license to sell the real estate described in the petition. No appeals from said decrees were taken to this court and the decrees stand in this regard in force and unrevoked.

[3] The conveyance under the decree and under the will failed through mutual mistake to effectuate the probate court decree to a degree which, this court declared in Hale v. Blanchard, supra, warranted the action and second decree of the probate court. No person who might have been heard upon the petition, and no persons who had an opportunity to appeal from the decrees but did not, can again question the jurisdiction of the court to make the decrees that were in fact made. It results that the ruling of the land court "that the deeds to the petitioner from the trustee were valid, and that title is now in the petitioner" was right.

Order for decree for petitioner affirmed.

POTTER v. McLANE.

(Supreme Judicial Court of Massachusetts. Bristol. Jan. 7, 1924.)

1. Wills ⇐439—Ascertaining intention cardinal rule of construction.

The cardinal rule in the interpretation of wills, to which all other rules must bend, is that the intention of the testator shall prevail, provided that it is consistent with the rules of law.

2. Wills ⇐441—Intention to be collected from words of will.

Intention of testator is to be collected from the words of the will itself, as read in the light of the attendant circumstances.

3. Wills ⇐440—Intention appearing, aid of rules of construction unnecessary.

When the whole will makes manifest the testator's intention, there is no occasion to invoke the aid of rules of construction.

4. Wills ⇐548—Child surviving widow, and not grandchildren, took share of child dying without issue.

Under will leaving property to widow for life, at her death to be equally divided between surviving children, the share of any child not surviving the widow to go to his issue, "but in case any of my said children shall die leaving no lawful issue then it is my will that such of my said children as shall survive him, her, or them shall take such share or shares absolutely to be divided equally between them share and share alike," *held* that, where only one child survived the widow, he took the whole of the share of a child dying without issue, to the exclusion of issue of other children.

Appeal from Superior Court, Bristol County; Stanley E. Qua, Judge.

Action by Arthur E. Potter against Frederick J. McLane, wherein defendant filed petition in nature of interpleader, summoning in as claimants to a fund Frances S. Brown and others. From the judgment, plaintiff and claimants appeal. Action against defendant discontinued; judgment to be entered in favor of one of the claimants.

Wood & Brayton, of Fall River, for plaintiff appellant.

Borden, Kenyon & Hawes, of Fall River, for claimants appellants.

Appellee, pro se.

DE COURCY, J. Joseph D. Brown, late of Fall River, died August 31, 1890, leaving a will dated August 20, 1875. He had six children who were living on both of those dates. The will gave a life interest in all his property to his wife, Mary Thomas Brown, and then provided as follows:

"Second. And upon the death of my said wife, I hereby give devise and bequeath absolutely all my said real and personal estate to my children, namely, my daughters, Susan E. Lee wife of John Lee of New Bedford in the commonwealth of Massachusetts, Isadore C. Potter, wife of Caleb C. Potter, of said Fall River, my sons, Charles F. Brown of Jacksonville, in the state of Illinois, Eliphalet S. Brown, Benjamin B. Brown and Thomas Jefferson Lee Brown all of said Fall River to be divided equally between them, share and share alike.

"Third. And in case any of my said children shall die leaving lawful issue, then it is my will that such issues shall take their parent's share to be divided equally between such issue share and share alike. But in case any of my said children shall die leaving no lawful issue then it is my will that such of my said children as shall survive him, her or them, shall take such share or shares absolutely to be divided equally between them share and share alike."

The widow died April 29, 1919. She outlived all of said children excepting Thomas J. L. Brown. Four of the deceased children, Susan, Isadore, Charles, and Eliphalet, left issue. The other deceased child, Benjamin, left no issue; and he devised the residue of his property to his sister Isadore. She died in May, 1918, intestate, leaving the plaintiff Arthur E. Potter as her sole heir.

At the time of his decease the testator Joseph D. Brown owned a piece of real estate in Fall River. After the death of his widow the defendant Frederick J. McLane sold it for the owners, and paid to the grantors five sixths of the net proceeds. The remaining sixth, $1,069.21, representing the alleged share of the son Benjamin, he paid into court; and filed a petition in the nature of interpleader, summoning in certain claimants to the fund. The controlling question is, What interest did the son Benjamin B. Brown acquire in said real estate under his father's will?

[1-3] As was said by Hammond, J., in McCurdy v. McCallum, 186 Mass. 464, 469, 72 N. E. 75:

"The cardinal rule in the interpretation of wills, to which all other rules must bend, is that the intention of the testator shall prevail, provided that it is consistent with the rules of law."

[4] That intention is to be collected from the words of the will itself, as read in the light of the attendant circumstances. When the whole will makes manifest the testator's intention, there is no occasion to invoke the aid of rules of construction. The will of Joseph D. Brown clearly indicates how he meant to dispose of his property. His first purpose was to give the use and income to his widow for life; and this he did by the apt language of paragraph "first." His next concern was for his six children; and by the "second" paragraph the remainder after the widow's life estate was to go to them. If all of them had survived the widow, plainly they would have been entitled each to one sixth of the estate. But the will did not

three weeks after the sale and that it appeared to have been improperly cared for, yet the purchaser did not agree to keep it in repair, and the plaintiff permitted it to remain in the purchaser's possession after learning of its condition, and thereafter it was delivered to the defendant for repairs. In these circumstances the plaintiff is not entitled to possession as against the defendant on the ground that the car was not properly cared for. As the plaintiff did not prove that the defendant had actual notice of the conditional sale, or that there was default in the payment of any of the notes when the car was delivered to the defendant, it is plain that the plaintiff failed to sustain the burden of proof. Sawyer v. Spofford, 4 Cush. (Mass.) 598; Fisher v. Alsten, 186 Mass. 549, 72 N. E. 78; Field v. Fletcher, 191 Mass. 494, 78 N. E. 107; Wylie v. Marinofsky, supra.

The trial judge rightly directed the jury to return a verdict for the defendant.

Exceptions overruled.

P. BERRY & SONS, Inc., v. CENTRAL TRUST CO. et al.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 7, 1924.)

1. Frauds, statute of ⇐33(1)—Promise to pay for corporate stock held not special promise to answer for debt of another.

An agreement between holder of second preferred stock and one who had been a common stockholder, whereby former was to permit its stock to be voted and transfer all its rights to syndicate, in consideration of a promise by the common stockholder to pay $750, *held* founded on a valid consideration, and not a special promise to answer for the debt of another within G. L. c. 259, § 1, cl. 2, though the common stock had been taken over by the syndicate of which the common stockholder was a member, and the object of the transaction was to release the corporation of claims of preferred stockholder.

2. Frauds, statute of ⇐33(1)—No promise to answer for debt of another, where promisor received something.

G. L. c. 259, § 1, cl. 2, relating to a special promise to answer for the debt of another, does not apply where the promisor received something from the promisee for his own benefit.

3. Appeal and error ⇐1078(1)—Exceptions not argued waived.

Exceptions not argued are treated as waived.

Exceptions from Superior Court, Middlesex County; Joseph Walsh, Judge.

Action of contract by P. Berry & Sons, Inc. against the Central Trust Company and others, executors under the will of Byron T. Thayer, deceased. Verdict for plaintiff, and defendants bring exceptions. Exceptions overruled.

E. A. Whitman, of Boston, for plaintiff.

J. H. Hurley, of Boston, for defendants.

CROSBY, J. The plaintiff was a creditor and the largest holder of second preferred stock in the Mills Tea & Butter Corporation. The defendants' testator was also a large creditor and a stockholder in the corporation.

In December, 1920, the corporation, being in financial difficulties and the owner of all its common stock, turned over that stock and the management of its business for the term of six months to a committee, in accordance with the terms of a written agreement, under which the committee had full power to terminate the agreement, or to wind up the affairs of the company for the benefit of its creditors.

At the end of the six months, as the business was still unsuccessful, a syndicate, of which the defendants' testator was a member, was formed to provide the committee with funds to pay the creditors 10 cents on a dollar. The syndicate furnished the money and took over the common stock therefor, and as the plaintiff and four other creditors refused to accept the 10 per cent., the committee, purporting to act under the agreement above referred to, "proceeded to sign in behalf of all the creditors, including the plaintiff, a discharge of their claims." The syndicate then tendered to the plaintiff 10 per cent. of its claim, which was refused. The plaintiff then proposed to the attorney for the syndicate that some of the Boston creditors buy its stock. The attorney stated he would see what could be done, and the plaintiff's president said he would mail the stock to the attorney, and this was done the following day.

Thereafter a meeting of the stockholders was held for the purpose of confirming an agreement previously entered into by the syndicate to sell all its assets to a new corporation, known as the Country Club Stores. It was found that the two-thirds vote of all classes of stock necessary in order to pass the vote could not be obtained, unless the plaintiff's stock was acquired. After the meeting the defendants' testator had an interview with one Ahern, the secretary and general manager of the plaintiff company, and urged him to accept the 10 per cent. and let the stock of his company be voted and the sale consummated. Ahern testified that at this meeting the defendants' testator agreed to pay the plaintiff $750 and said:

"We agreed to turn the stock over; we agreed not to attach the stores and to deliver this stock to anybody that this syndicate wanted it delivered to; in other words, we would get out bag and baggage."

James P. Berry, the plaintiff's president, testified that he had a telephone conversation with the defendants' testator, Thayer, in which the above conversation with Ahern was referred to; that Thayer said to him in substance that if he (Berry) would not bring an action against the company and would not prevent the sale going through, and would authorize the attorney of the syndicate (who held the stock) to vote it, that he would personally pay the $750. This proposition Berry testified he accepted. It also appeared that the tender was deposited in the bank by the plaintiff; that a proxy was sent by the plaintiff to the attorney, who voted the stock at an adjourned meeting; and that the sale was authorized and consummated.

[1] Upon the foregoing evidence it could have been found that the contract between the plaintiff and Thayer was that the plaintiff, in consideration of the promise by Thayer to pay $750, sold and transferred all its rights in the Mills Company to Thayer. If such was found to be the understanding between the parties, it was founded upon a valid consideration (Abbott v. Doane, 163 Mass. 433, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465; Swartzman v. Babcock, 218 Mass. 334, 105 N. E. 1022), and was not a special promise to answer for the debt of another within the statute of frauds (G. L. c. 259, § 1, cl. 2).

[2] In the case at bar when the syndicate advanced the money to pay the 10 per cent., its members, including Thayer, did not release their claims against the corporation, but they were expressly reserved by the terms of the agreement, so that the members took control of the company practically free from all indebtedness but their own. Thayer took the note of the company for his contribution to the sum raised to pay the 10 per cent. He was therefore personally pecuniarily interested in obtaining a settlement of the plaintiff's claim against the company. Upon the evidence it could have been found that the contract was independent of the statute. The section of the statute of frauds relied on by the defendant does not apply where the promisor receives something from the promisee for his own benefit. Alger v. Scoville, 1 Gray, 391; Griffin v. Cunningham, 183 Mass. 505, 509, 67 N. E. 660; Paul v. Wilbur, 189 Mass. 48, 52, 75 N. E. 63; Manning v. Anthony, 208 Mass. 399, 94 N. E. 466, 32 L. R. A. (N. S.) 1179.

The case of Carleton v. Floyd, Rounds & Co., 192 Mass. 204, 78 N. E. 126, which held that an oral promise by a stockholder in a corporation, who was about to acquire the business of the corporation, to pay the debt of a creditor of the company if he would refrain from attaching its property and putting in a keeper, was a special promise to answer for the debt of another within the statute, has no application to the case at bar upon the facts as they could have been found by the jury.

[3] The third request for a ruling that if the plaintiff accepted 10 per cent. of its claim that it would be a fraud upon the creditors for it to be paid any additional amount has not been argued and may be treated as waived; we may say, however, that it was rightly denied.

The defendants' motion for a directed verdict and their requests for rulings were rightly denied. The exception to the admission of Exhibit 1 is not argued and is treated as waived.

Exceptions overruled.

STEVENS v. BERKSHIRE ST. RY. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1924.)

1. Bonds ⟸79—Mortgage bond a "negotiable instrument."

A first mortgage coupon bond, payable to bearer, or, if registered, to the holder, was a "negotiable instrument," under G. L. c. 231, § 29.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negotiable Instrument.]

2. Corporations ⟸473—Action itself sufficient demand for payment of bond.

Neither presentment of first mortgage bond payable to bearer, or, if registered, to holder, to the trustee named in the instrument, at whose office it was made payable, nor demand for payment, was necessary before bringing suit against the corporation executing the bond, which was the primary and only promisor; the action itself being a sufficient demand, under G. L. c. 107, §§ 23, 93.

3. Corporations ⟸473—Genuineness of trustee's certification of mortgage bond not in issue under general denial.

In an action on a mortgage bond, a negotiable instrument, where defendant made no specific denial of genuineness of signature of trustee certifying that bond was one of those specified in mortgage, with a demand that it should be proved at the trial, the defense was not open under general denial, under G. L. c. 231, § 29.

4. Railroads ⟸188—Illegality of mortgage bond must be pleaded.

A railroad mortgage bond, a negotiable instrument, is presumed to be legal until the contrary is shown, and affirmative defense of illegality for want of approval of mortgage by board of railroad commissioners, under R. L. c. 109, § 24, is unavailable, unless pleaded in the answer.

Exceptions from Superior Court, Suffolk County; A. R. Weed, Judge.

Action by Sidney Stevens against the Berkshire Street Railway Company on a mort-

gage bond. Finding in favor of plaintiff, and defendant brings exceptions. Exceptions overruled.

H. P. Mason, of Boston, for plaintiff.
A. W. Blackman, of Boston, for defendant.

BRALEY, J. [1] The judge was warranted on the record in finding that the plaintiff was the holder and owner of a first mortgage 5 per cent. gold coupon bond for $1,000, payable to bearer, or if registered to the holder, issued by the defendant, and signed respectively by its president and treasurer, a copy of which is annexed to the declaration. G. L. c. 231, § 29. It was a negotiable instrument. Dexter v. Phillips, 121 Mass. 178, 183, 23 Am. Rep. 261; Pratt v. Higginson, 230 Mass. 256, 258, 259, 119 N. E. 661, 1 A. L. R. 714.

[2] Neither a presentment of the bond to the trust company named in the instrument which held as trustee a first mortgage on all the property, privileges and franchises of the defendant to secure bondholders, and at whose office and place of business it was made payable, nor demand for payment was necessary before bringing suit. The defendant is the primary and only promisor, and the action itself is a sufficient demand. G. L. c. 107, §§ 23, 93. Goodfellow v. Farnham, 239 Mass. 590, 591, 132 N. E. 363.

[3] The bond has attached a "trustee's certificate," purporting to be signed by the trust company, stating that:

"It is hereby certified that the within bond is one of the bonds specified in the within indenture of mortgage as secured thereby."

The bond having provided that it "is valid only when the Girard Trust Company has indorsed hereon a certificate that it is one of the bonds in the said indenture specified as thereby secured," the defendant's first contention is that the plaintiff cannot recover because he introduced no evidence of the genuineness of the signature of the trustee. But the answer is a general denial, and the defendant having made no specific denial of the genuineness of the signature of the trust company, with a demand that it should be proved at the trial, this defense is not open. G. L. c. 231, § 29. Lowell v. Bickford, 201 Mass. 543, 88 N. E. 1; Whiddon v. Sprague, 203 Mass. 526, 89 N. E. 917; Dean v. Vice, 234 Mass. 13, 124 N. E. 673; Levison v. Lavalle, 243 Mass. 47, 136 N. E. 645.

[4] The defendant's final contention is that a street railway company organized under the laws of this commonwealth could not at the date of the bond, June 2, 1902, mortgage its franchise or property and issue bonds thus secured without the approval of the board of railroad commissioners as provided in R. L. c. 109, § 24, and the plaintiff having failed to introduce any evidence that the defendant had obtained the approval of the board, the judge should have ruled as requested, that the action could not be ascertained. The bond which the plaintiff bought was issued, and sold by the defendant, and the proceeds were received under the terms of the mortgage. A contract is presumed to be legal until the contrary is shown, and the affirmative defense of its illegality is unavailable unless pleaded in the answer, which has not been done in the present case. Granger v. Ilsley, 2 Gray, 521; Suit v. Woodhall, 116 Mass. 547, 549; Whittingslow v. Thomas, 237 Mass. 103, 105, 129 N. E. 386. We find no error of law in the rulings at the trial and the exceptions must be overruled.

So ordered.

HEBRON'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 8, 1924.)

Master and servant ⟸385(11¼)—Time when payments of one-half incapacity compensation by commonwealth begins.

Where employee previously had lost the sight of his left eye, and on November 21, 1919, his right eye was injured, as the result of which the sight was affected and gradually grew less, and on December 3, 1921, its vision was reduced to one-tenth of normal, the commonwealth should pay one-half of total incapacity compensation, under G. L. c. 152, § 37, from December 3, 1921, and not from December 1, 1919, when insurer's liability commenced under section 29.

Proceeding by John Hebron under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Old Colony Breweries, the employer, and the Maryland Casualty Company, the insurer. There was an award of compensation, and a decree of the superior court directing payment, and the insurer appeals. Decree affirmed.

J. R. Benton, Atty. Gen., and Roger Clapp, Asst. Atty. Gen., for the Commonwealth.
E. I. Taylor, of Boston, for insurer.

CARROLL, J. In this proceeding under the workmen's compensation statute (G. L. c. 152) the question to be decided is the time when payments of one-half the incapacity compensation are payable by the commonwealth under section 37 of the statute. So far as material to this issue, G. L. c. 152, § 37 provides:

"Whenever an employee who has previously suffered a personal injury resulting in * * * the reduction to one tenth of normal vision of one eye with glasses, incurs further disability by the * * * reduction to one tenth of normal vision in an eye, by reason of a per-

sonal injury for which compensation is required by this chapter, he * * * shall be paid the compensation provided for by sections 31, 32, 34 or 35, in the following manner: One half of such compensation shall be paid by the state treasurer from the fund established by section 65, and the other half by the insurer."

Sections 31, 32, 34, 35, of the statute relate to compensation to be paid in case of death and to general incapacity compensation. Under section 65 certain payments are to be made to the treasurer of the commonwealth by the insurance company, and from this fund the state treasurer is to make the payments upon the written order of the department for the purposes set forth in section 37.

The employee, previous to the injury in question, had lost the sight of his left eye. On November 21, 1919, his right eye was injured in the course of his employment, as a result of which the sight of this eye was affected and gradually grew less, and on December 3, 1921, its vision was reduced to one tenth of normal.

The Industrial Accident Board found that the commonwealth should pay one-half the total incapacity compensation from December 3, 1921. The insurer contends that the commonwealth should pay this compensation from December 1, 1919, and that the decree of the superior court ordering payment to the Maryland Casualty Company from December 3, 1921, should be modified and payments directed to be paid from December 1, 1919. The case is before us on the appeal of the insurer.

The obligation of the state treasurer under G. L. c. 152, § 37, to pay one-half the compensation, arose at the date when the employee lost the sight of his eye. The liability of the insurer began on the eleventh day after the employee's injury. G. L. c. 152, § 29. The statute providing for this special fund from which the state treasurer was to make the payment, and the payment by him, does not direct that these payments should be made from the eleventh day after the injury. The obligation commences when the "further disability by the loss or permanent incapacity" by the "reduction to one-tenth of normal vision in an eye" begins, and as the loss of the right eye did not begin within the meaning of the statute, until December 3, 1921, the payments were to be made from that date.

The fund deposited with the state treasurer was not to be used in all cases of total incapacity. It was limited to the specific cases enumerated, where an employee had previously suffered a personal injury resulting in the loss of a hand or foot, or the loss of sight of one eye, and suffered further disability by the loss of the remaining hand, or foot, or loss of sight, in which event "he, or his dependents, if death results from the injury" shall be paid the compensation, and the payments to be made from the state fund were limited to the time when the specific disability occurred. The decree directing payment from December 3, 1921, when the disability took place, and the sight was lost, was right.

Decree affirmed.

KRONBERG et al. v. BULLE.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 10, 1924.)

1. Appeal and error ⟸870(3)—Master's report not before court on appeal from final decree.

No appeal having been taken from interlocutory decree overruling defendant's exceptions to master's report, they are not before the reviewing court, unless and so far as they are necessarily involved in the final decree.

2. Appeal and error ⟸694(1)—Master's findings stand where evidence not reported.

Where the evidence is not reported, the master's findings must stand.

3. Appeal and error ⟸870(3)—Appellant may assert that final decree is not warranted by master's findings.

Although defendant did not appeal from decree overruling exceptions to report of master, he was entitled to argue on appeal from the final decree that on the facts found by the master the decree was unwarranted.

4. Adjoining landowners ⟸4(2)—Right of lateral support.

For an excavation causing an injury to the soil in its natural state of an adjoining owner, an action will lie, but in the absence of proof of a right by grant or prescription in the plaintiff, or of actual negligence on the part of the defendant, no action will lie for an injury to structures by excavating adjoining land not previously built upon.

5. Adjoining landowners ⟸4(3)—Findings held to establish liability for damage to adjoining structures.

Where, apart from finding that defendant adjoining landowner dug a trench in his own land, the master also found that in some places he cut beneath plaintiffs' wall itself, that is, dug upon the land of the plaintiffs, the findings were sufficient to establish liability for damage to the structures on the land of the plaintiffs.

6. Adjoining landowners ⟸4(3)—Undermining land by conducting water along trench invasion of rights.

The digging of a trench along boundary line and conducting of water into it from the roof of a house, so that it undermined and washed away soil under structures on plaintiff's land, constituted an invasion of plaintiff's rights, and entitled him to recover for damage to the structures on his land.

7. Adjoining landowners ⟸4(7)—Master may determine boundary in action for injuries.

It was not beyond the authority of master to determine boundary line between the lands

of parties in an action for relief against acts of adjoining landowner, causing land of plaintiffs to be undermined and cave in, and structures on it to be damaged, as against objection that plaintiffs should have petitioned to the land court.

Appeal from Superior Court, Suffolk County; Wait, Judge.

Bill by Julius Kronberg and another against David J. Bulle, owner of adjoining premises, to obtain relief against acts committed by defendant, causing land of plaintiffs to be undermined and cave in. Decree for plaintiffs, and defendant appeals. Affirmed.

E. A. Howe, of Boston, for appellant.
C. H. Donahue, of Boston, for appellees.

CROSBY, J. The plaintiffs and the defendant are owners of adjoining premises occupied respectively as a residence. This bill is brought for relief against acts alleged to have been committed by the defendant which caused the land of the plaintiffs to be undermined and cave in, and certain structures upon it to be thereby damaged.

The case was referred to a master, who found that the plaintiffs built upon their land, along a portion of the dividing line between their land and that of the defendant, a wall and a concrete walk; that afterwards the defendant dug a trench in his lot along the face of the wall for its entire length, and immediately adjacent to it, and that in some places he cut beneath the wall itself; that he then connected corrugated iron pipes with a conductor from the roof of his house in such a way that water from the roof drained into the trench and ran down by and under the wall, and undermined it to such an extent that in places it fell down, the concrete walk was caused to be badly cracked, and a post supporting the rear piazza of the plaintiffs' house has settled. He also recites:

"I find that the digging of the trench by the defendant was not for a temporary purpose, nor for the erection of a structure on the defendant's land, but solely for the purpose of receiving the water which ran from the defendant's roof and conducting the same along the line of the wall to a point in the rear of the defendant's lot and I further find that this trench was dug with a reckless disregard of the consequences of such digging, and that as a result thereof the defendant had removed the lateral subjacent support of the plaintiffs' land and of the structures thereon and undermined the same, and has caused the land of the plaintiffs and the structures thereon, consisting of a concrete walk and a wall, to cave in and to be thrown down."

The master further found that by reason of the trench and the water therein collected the plaintiffs' land continued to be encroached upon, undermined and washed away, and that the results of the acts of the defendant have extended over onto the land of the plaintiffs, even should the defendant's contention as to the location of the boundary line be correct, and that the plaintiffs were entitled to recover for damage to the wall, concrete walk and piazza.

[1, 2] No appeal having been taken from the interlocutory decree overruling the defendant's exceptions to the master's report, they are not before us, unless and so far as they are necessarily involved in the final decree. Clapp v. Gardner, 237 Mass. 187, 191, 130 N. E. 47. As the evidence is not reported, the master's findings must stand.

[3] Although the defendant did not appeal from the decree overruling the exceptions to the report, he was entitled to argue upon this appeal from the final decree that on the facts found by the master the decree was unwarranted. Fay v. Corbett, 233 Mass. 403, 410, 124 N. E. 73.

[4] The rule is well settled that for an excavation causing an injury to the soil in its natural state of an adjoining owner an action will lie, but that in the absence of proof of a right by grant or prescription in the plaintiff, or of actual negligence on the part of the defendant, no action will lie for an injury to structures by excavating adjoining land not previously built upon. Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57; Foley v. Wyeth, 2 Allen, 131, 79 Am. Dec. 771; Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312.

Although the question whether the defendant would be liable for injury to structures was expressly left open in Gilmore v. Driscoll, supra, 122 Mass. at page 207, 23 Am. Rep. 312, it was held in White v. Dresser, 135 Mass. 150, 46 Am. Rep. 454, that the defendant would be so liable, and in Hopkins v. American Pneumatic Service Co., 194 Mass. 582, 80 N. E. 624, a like conclusion was reached. See also Hartshorn v. Tobin, 244 Mass. 334, 138 N. E. 805.

[5] Apart from the finding that the defendant dug the trench in his own land the master also found that in some places he cut beneath the wall itself; that is to say, that he dug upon the land of the plaintiffs. The findings are sufficient to establish liability for damage to the structures on the land of the plaintiffs.

[6] The further finding that, by reason of the digging of the trench and of the collecting and conducting of water into it from the roof of the defendant's house and otherwise, the plaintiffs' land continued to be encroached upon, undermined and washed away, constitutes an invasion of the plaintiffs' rights and entitles them to recover for damage to artificial structures on the land. Fitzpatrick v. Welch, 174 Mass. 486, 55 N. E. 178, 48 L. R. A. 278. See also Mahoney v. Barrows, 240 Mass. 378, 134 N. E. 246.

The contention of the defendant that the final decree does not conform to the allegations and prayers of the bill is without merit.

[7] The further contention that it was beyond the authority of the master to determine the boundary line between the lands of the parties and that the plaintiffs should have petitioned to the land court for that purpose cannot be sustained. The relief sought is for a tort in the nature of trespass. The determination of the questions in issue involved the ascertainment of the dividing line between the lands of the parties; that question was in dispute and the evidence upon it as appears from the master's report was conflicting. If the plaintiff were obliged to go to the land court and there have the boundary line established, it would follow that no proceeding in law or equity where a trespass to real estate was involved, and the boundary line was in dispute, could be brought until the plaintiff had first petitioned to the land court, and had there caused his boundary line to be established and his title registered. That such a contention is unsound is too clear for discussion.

It is plain that upon the facts found by the master the plaintiffs are entitled to the relief prayed for in the bill.

Decree affirmed.

BAGNELL v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 8, 1924.)

1. Carriers ⇐320(11)—Negligence as to one injured in slipping on icy step while alighting held for jury.

In an action for injuries received when alighting from car by slipping on ice which had formed on step, defendant's negligence *held* properly submitted to the jury.

2. Carriers ⇐347(9)—Care of plaintiff held for jury.

In an action for injuries received when alighting from car by slipping on ice formed on step, due care of plaintiff *held* for the jury.

3. Carriers ⇐348(13)—Instruction as to presumption of exercise of due care by passenger held erroneous.

The presumption established by G. L. c. 231, § 85, that a person injured or killed was in the exercise of due care, etc., disappears when evidence is introduced showing the facts bearing on the question of care, and court erred, in passenger's action for injuries, in charging that, unless defendant satisfied them that plaintiff was not exercising due care, "then the presumption remains with her."

Exceptions from Superior Court, Middlesex County; Jos. Walsh, Judge.

Action of tort by Elizabeth M. Bagnell against the Boston Elevated Railroad Company for personal injuries. Verdict for plaintiff, and defendant, being aggrieved by rulings, brings exceptions. Exceptions sustained.

F. J. Daggett and C. D. Driscoll, both of Boston, for plaintiff.

F. J. Carney, of Boston, and John A. Canavan, of East Boston, for defendant.

CARROLL, J. The plaintiff was injured when alighting from one of the defendant's cars, by slipping on ice which had formed on the step. She testified that on the afternoon of January 28, 1920, she boarded the car at the car barn in Medford; that the lower step of the car was a folding step, the second was stationary, and the third "was onto the platform of the car"; that she noticed there was ice "frozen to the step, and irregular, lumpy" on the stationary step; that during the day it had been snowing, sleeting and raining; that she remained in the car about 15 minutes; that on arriving at her destination she started to step down and slipped on the stationary step. There was additional evidence tending to show that there was ice on this step. It was described by one witness as "thin in some places and thicker in other places; it was frozen to the step"; and by another witness as "hardened ice, * * * about half an inch thick in some places, and not quite so thick in others."

[1] The question of the defendant's negligence was properly submitted to the jury. There was evidence that the ice had formed on the step when the plaintiff became a passenger; that it was hard, and was in this condition when the car left the car barn. The jury were warranted in finding that the step was unsafe, and that the defendant could have known of its condition and remedied it. Gilman v. Boston & Maine R. R., 168 Mass. 454, 47 N. E. 193; Foster v. Old Colony St. Ry., 182 Mass. 378, 65 N. E. 795; Parker v. Middlesex & Boston St. Ry., 237 Mass. 291, 129 N. E. 353.

In Labrie v. Donham, 243 Mass. 584, 138 N. E. 3, there was nothing to show that, if any ice were on the step, how long it had been there. Goddard v. Boston & Maine Railroad, 179 Mass. 52, 60 N. E. 486, Lyons v. Boston Elevated Railway, 204 Mass. 227, 90 N. E. 419, and Hotenbrink v. Boston Elevated Railway, 211 Mass. 77, 97 N. E. 624, 39 L. R. A. (N. S.) 419, relied on by the defendant, are not applicable. In the case at bar the ice was upon the step before the car started on its journey. The defendant in the exercise of reasonable care should have discovered it and taken proper precautions to make the car safe.

[2, 3] The due care of the plaintiff was for the jury to decide. Parker v. Middlesex & Boston Street Railway, supra. The judge

instructed the jury on this question that the burden of proof was upon the defendant on all the evidence to show that the plaintiff was not in the exercise of due care, and in speaking of St. 1914, c. 553, G. L. c. 231, § 85, he stated:

"She starts with the presumption that she was in the exercise of due care. * * * The plaintiff comes into court before the jury with the presumption that she was in the exercise of due care at the time that the wrong or injury was received. But the burden being upon the defendant it is for you to say, when evidence appears upon that question, from all the evidence, whether the plaintiff was in the exercise of due care, and unless the defendant has satisfied you that she was not, then the presumption remains with her, and you are to presume that she was in the exercise of due care."

At the close of the charge the defendant took an exception to this part of the charge, calling the judge's attention to the expression "then the presumption remains with her," and referring to this presumption said:

It "is only applicable when there is no evidence as to what the plaintiff was doing at the time; that once evidence appears as to what the plaintiff was doing, the presumption disappears, and that there only remains upon the defendant the burden of proving that the plaintiff was not in the exercise of due care."

The statute above referred to provides that in all actions to recover damages to the person or property, or for causing the death of a person, "the person injured or killed shall be presumed to have been in the exercise of due care, and contributory negligence on his part shall be an affirmative defence to be set up in the answer and proved by the defendant." It was correct to say that the plaintiff "starts with the presumption that she was in the exercise of due care." This presumption of due care in favor of the plaintiff is provided for by the statute; but there was error in instructing the jury that "the presumption remains with her," when evidence appeared bearing on the question of her due care. We think the jury were misled by this instruction, and understood by it, that although there was evidence before them explaining the conduct of the plaintiff and showing in what manner she was acting when alighting from the car, they could still make use of the presumption in deciding the question, and that this presumption remained with her throughout the trial. The due care presumption in actions for injury to persons or property is a rule established by statute. As was pointed out in Duggan v. Bay State Street Railway, 230 Mass. 370, 378, 119 N. E. 757, 760 (L. R. A. 1918E, 680) it is not evidence; it is a rule concerning evidence. "The presumption of the present statute is merely like numerous other presumptions. It stands only until the facts are shown." The defendant introduced no evidence, but there was evidence from the plaintiff and one of her witnesses showing the facts bearing on the question of her care. When this was produced there was no longer a presumption in her favor. The presumption was not evidence in any sense and did not remain "with her" when evidence showing the facts appeared on that question. The presumption being in the plaintiff's favor, the burden of proof was on the defendant; but the presumption did nothing more than establish the inference of her due care in the absence of evidence showing the facts. The issue involved was to be decided on the evidence alone, without reference to the presumption. See in this connection Commonwealth v. Sinclair, 195 Mass. 100, 110, 80 N. E. 799, 11 Ann. Cas. 217; Duggan v. Bay State Street Railway, supra; Commonwealth v. Anderson, 245 Mass. 177, 139 N. E. 436; Agnew v. United States, 165 U. S. 36, 51, 17 Sup. Ct. 235, 41 L. Ed. 624.

We discover no other error in the conduct of the trial.

Exceptions sustained.

C. A. DODGE CO. v. WESTERN AVENUE TABERNACLE BAPTIST CHURCH.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 7, 1924.)

1. Religious societies ⇐27(4)—Pastor held without authority to contract for repairs.

Where by-laws of church provided trustees should have general management and care of property of the church, the pastor, although he was chairman of the board of trustees, had no right to make a contract on behalf of the corporation for repair of the church after a fire without the assent of at least a majority of the members of the board.

2. Religious societies ⇐31(6)—No ratification of unauthorized contract as matter of law.

In action against church to recover for labor and materials furnished in repair of building after fire, *held* that it could not be said as matter of law that defendant ratified unauthorized contract of pastor with plaintiff.

3. Appeal and error ⇐1008(1)—Finding of judge must stand, unless court bound to find for other party.

Where an action is tried by a judge without a jury, his finding for the defendant must stand, unless it can be said as matter of law that the court was bound to find for the plaintiff.

Report from Superior Court, Middlesex County; R. F. Raymond, Judge.

Action of contract by the C. A. Dodge Company against the Western Avenue Tabernacle Baptist Church to recover for labor and ma-

terial furnished in the repair of a building. On report. Judgment for defendant.

H. C. Dunbar, of Boston, for plaintiff.
M. W. Bullock, of Boston, for defendant.

CROSBY, J. This is an action of contract brought against the defendant, a religious corporation organized under the laws of this commonwealth, to recover for labor and materials furnished by the plaintiff in the repair of a building after it had been damaged by fire, which was owned by the defendant and used for religious worship. The case was tried before a judge of the superior court without a jury, who found for the defendant and reported the case to this court.

The record shows that Thomas S. Harten was the pastor of the church, and chairman of the board of trustees, before and during the time the labor and materials in question were furnished; that shortly after the fire he called a meeting of the members of the church to consider what should be done respecting the repair of the building so that it could be used as a place of worship; that the meeting was attended by a greater number than was required by the by-laws for the transaction of business; that "at this meeting the church voted to renovate the * * * property and to put it in condition for use by the church as a place of worship"; that shortly after this meeting Harten stated to the plaintiff's representative that he was acting as agent for the church, engaged the plaintiff to prepare plans and specifications, and employed it to repair the building; that Harten told the plaintiff that the church would pay for the repairs out of money to be received from various fire insurance companies; that this money, however, was applied on mortgages on the property, and no part of it was paid to the plaintiff; that the plaintiff's representative talked only with Harten with reference to the repairs and took no steps to ascertain his authority to bind the church; that Harten stated he had full authority from the church and the plaintiff relied on that statement; that Harten asked the plaintiff to send all bills to him, and the account on the plaintiff's books was charged and sent to him.

Acting under this employment the plaintiff furnished the labor and materials set forth in its declaration, and it is agreed that the items charged were furnished, that the prices were reasonable, and that the plaintiff has in all respects performed its contract.

Section 5 of the by-laws of the defendant provides as follows:

"The trustees shall have the general management and care of the property of the church other than money. They shall have authority to buy, sell and lease the real estate when authorized by the members of the church at a regular or special meeting."

From the time of the incorporation of the defendant until the foreclosure of the mortgage on the property, after the repairs were completed by the plaintiff, the trustees never met or performed any official act; there was no evidence that any member of the board ever requested that such a meeting be held, and during all this time Harten as chairman performed the duties of the board.

[1] It is plain that under the by-law above quoted the trustees were vested with authority to care for and manage the property of the corporation and to make needed repairs upon it, and that the pastor of the church, although he was chairman of the board of trustees, had no right to make a contract on behalf of the corporation with the plaintiff without the assent of at least a majority of the members of the board. Packard v. Universalist Society in Quincy, 10 Metc. 427; Child v. Christian Society, 144 Mass. 473, 11 N. E. 664; Slattery v. North End Savings Bank, 175 Mass. 380, 56 N. E. 606; Bishop v. Burke, 207 Mass. 133, 93 N. E. 254; People's National Bank v. New England Home, 209 Mass. 48, 95 N. E. 77.

"When the alleged principal is a corporation, a ratification may be shown by proving that the officers who had the power to authorize the act knew of it, and adopted it as a valid act of the corporation, although no formal vote is passed by them." Murray v. Nelson Lumber Co., 143 Mass. 250, 251, 9 N. E. 634, 637.

[2] The plaintiff contends that even if the defendant was not originally bound by the contract it has recognized and ratified it, or has become estopped to deny its validity. The following and other findings are recited in the report: That the trustees and the members of the church knew of the contract; that at a meeting of the members duly called it was voted to put the building in condition for use by the church, and during the progress of the work the pastor on two or three occasions announced from the pulpit that he had employed the plaintiff company to renovate the property, these announcements being made on Sunday mornings and in the hearing of the entire congregation of from 75 to 100 people; that 50 or more members of the church solicited contributions from persons who were not members, to help pay the expense of the repairs, and that contractors employed by Harten to install electric wiring in the building were paid the balance due them after the completion of their work by check of the defendant signed by its treasurer.

It is a necessary inference from the finding for the defendant not only that the contract had been entered into by Harten without authority from the defendant, but that it had not been ratified.

[3] Where an action is tried by a judge without a jury his finding for the defendant must stand unless we can say as matter of law that the court was bound to find for the plaintiff. Andrews v. Board of Registrars of

Easton, 246 Mass. —, 143 N. E. —, and cases cited.

In accordance with the report judgment is to be entered for the defendant.

Ordered accordingly.

BLOOM v. NUTILE SHAPIRO CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1924.)

1. Banks and banking ⇐102—Assent of principal implied to employment of subagent.

Where the nature of a contract in the business in which a bank engages necessitates for its execution the employment of subagents, the assent of the principal is implied.

2. Evidence ⇐589—Court not bound to believe testimony.

Judge was not bound to believe any testimony offered by the defendant.

Appeal from Municipal Court of Boston, Appellate Division.

Action by Harry Bloom against the Nutile Shapiro Company. The trial court found for plaintiff, and reported the case. The appellate division ordered that report be dismissed, and defendant appeals. Order dismissing report affirmed.

V. C. Lawrence and D. W. Donahue, both of Boston, for appellant.

S. A. Dearborn, of Boston, for appellee.

CROSBY, J. This action, brought in the municipal court of the city of Boston, is for the recovery of $700. The declaration is in two counts, the first upon a special contract by which it is alleged that the plaintiff deposited with the defendant $700; that in consideration thereof the defendant agreed to deposit 5,000 rubles in a designated bank in Russia and obtain for the plaintiff a bank book, so called; that the defendant delivered to the plaintiff a receipt for the deposit; that the defendant has refused to deliver to the plaintiff a bank book, or deposit to the plaintiff's credit 5,000 rubles, and has failed to carry out the contract. The second count is for money had and received by the defendant to the plaintiff's use.

The receipt, dated December 21, 1917, is absolute in form, and provides for the transmission of the funds, and that the bank book be sent to America. On the receipt the following also appears, having been placed thereon by means of a rubber stamp:

"If money orders cannot be effected, refund will be made at rate of exchange on day returned."

It is the contention of the plaintiff that the foregoing was placed upon the receipt about a year after it was issued to him on an occasion when he called at the defendant's office and demanded his money. At the argument it was admitted by the defendant that the words stamped on the receipt were not there when delivered. The trial judge found for the plaintiff and reported the case, and the appellate division ordered that the report be dismissed.

[1] It is the contention of the defendant that the nature of the contract was such that it was required to employ a suitable agent to transmit the funds and secure the bank book, which it did, and that it is not responsible to the plaintiff for the negligence or misfeasance of the agent so employed. It is settled in this commonwealth that, where the nature of the contract in which a bank engages necessitates for its execution the employment of sub-agents, the assent of the principal is implied. In Fabens v. Mercantile Bank, 23 Pick. 330, it was said at page 332 (34 Am. Dec. 59):

"It is well settled, that if the acceptor of a bill or promisor of a note, has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank, that it was to be transmitted to the place of the residence of the promisor, and the same rule shall then apply, as if on the face of the note, it was payable at that place. * * * We are therefore of opinion that the defendants had performed their duty, when they transmitted the note to a solvent bank in good standing, and were not responsible for the misfeasance or negligence of that bank."

The principle so enunciated has been affirmed in subsequent decisions of this court. Dorchester & Milton Bank v. New England Bank, 1 Cush. 177, 186; Warren Bank v. Suffolk Bank, 10 Cush. 582; Lowell Wire Fence Co. v. Sargent, 8 Allen, 189, 191; Murray v. Postal Telegraph Cable Co., 210 Mass. 188, 194, 96 N. E. 316, Ann. Cas. 1912C, 1183. It does not appear, however, that the rule stated in the cases above referred to is applicable to the case at bar.

The report of the trial judge states that "the material evidence in the case was substantially as follows." There is then a recital of evidence offered by the plaintiff and by the defendant, but the only findings of fact made by the court are after such recitals, and are contained in a single paragraph as follows:

"I find that the plaintiff paid the defendant seven hundred dollars ($700) and in consideration thereof the defendant agreed to procure a Russian government bank book showing a deposit of five thousand (5,000) rubles and to deliver said book to the plaintiff in this country, and I further find that the defendant has failed to perform its contract."

[2] The judge was not bound to believe any testimony offered by the defendant.

Lindenbaum v. New York, New Haven & Hartford Railroad, 197 Mass. 314, 84 N. E. 129. He may have been satisfied that the defendant never purchased the rubles from the State Bank, or requested it to forward them to Russia in accordance with the terms of the receipt, and that the defendant retained possession of the $700 and made no attempt to carry out its agreement. The mere recital by the judge of evidence submitted to him falls far short of a finding that he believed it established the facts which it was offered to prove. The fair inference from his finding is that he did not believe that the contention of the defendant had been sustained. It follows that he was not required to make the rulings requested, and that the entry must be:

Order dismissing report affirmed.

NUTTER v. ANDREWS et al.*

(Supreme Judicial Court of Massachusetts. Plymouth. Sept. 14, 1923.)

1. **Trusts ⇐273—Life beneficiary's estate not entitled to dividends declared after her death.**

Where there was nothing to indicate that corporate dividends declared after death of beneficiary for life of property held in trust were payable solely out of earnings made prior to her death, they were not payable to her estate.

2. **Trusts ⇐273—Payments made directly by lessee to lessor's stockholders not apportionable between life beneficiary and remaindermen.**

Where lease by corporation for rental equal to 5 per cent. on its capital stock required payments to be made direct to its stockholders by lessee, such payments were dividends, and where beneficiary of trust for life died before date when, according to established custom, stockholders were to be ascertained, the payment could not be apportioned under G. L. c. 197, § 27, relative to apportionment of rents.

3. **Corporations ⇐155(4)—Dividend payable to owner of shares at time declared.**

As a general rule, the person to whom dividend on corporate stock is payable is he who owned the stock at time dividend was declared, and not owner at time of payment.

4. **Corporations ⇐155(5)—Stockholder may sue for declared dividend.**

Stockholder may sue for amount of declared dividend, if not paid on demand after time fixed for payment.

5. **Corporations ⇐155(4)—Vote of directors fixing date as of which right to dividends determined binding.**

Vote of corporate directors in declaring dividend that it shall be payable to those who are stockholders of record on specified future date relates to detail of internal management of the corporation, and is binding on stockholders.

6. **Trusts ⇐273—Beneficiary dying after declaration of dividend bound by vote fixing date as of which right determined, so that dividends were payable to residuary legatee.**

Where corporate directors, in declaring dividend during life of beneficiary of trust, provided for payment to stockholders of record as of later date before which the beneficiary died, her estate was bound thereby, and dividends were payable to the residuary legatee and not to the estate.

Report from Probate Court, Plymouth County; M. R. Hitch, Judge.

Suit by Maria L. Nutter, trustee, against Mary J. Andrews and others. Reported from the probate court to the Supreme Judicial Court. Decree as stated in the opinion.

J. J. O'Reilly, of Brockton, for respondent Mary J. Andrews, adm'x.

Edward A. MacMaster, of Bridgewater, for respondent First Parish in East Bridgewater.

RUGG, C. J. A testator gave shares of stock in sundry corporations to his trustee upon divers trusts, one of which was to pay to his daughter after reaching the age of 21 years and during the period here in question "the net income" of the trust estate. The daughter reached the age of twenty-one years on September 17, 1918, and died on February 17, 1922, without leaving issue. A question arises between the administratrix of the estate of the deceased daughter and the residuary legatee of the testator as to the right disposition to be made of dividends on stock in the corporations which have been received by the trustees. The dividends fall into three classes for the purposes of this decision.

1. Dividends declared before the death of the beneficiary for life, payable to stockholders of record on dates prior to her death but payable on dates after her death. It is conceded by all parties that these dividends ought to be paid to the administratrix of the deceased daughter.

[1] 2. Dividends declared after the death of the daughter to stockholders of record on dates after her death and payable on still later dates. It presumably does not appear when these dividends were actually earned. There is nothing to indicate that they were payable solely out of earnings made prior to the death of the beneficiary for life. No right became vested as a property right dis-

*REPORTER'S NOTE.—This case as originally filed was published in 140 N. E. 744. Since this filing and publication, changes in the language of the opinion have been made by the judge, which, while not affecting the merits of the decision, make it necessary, in the interest of our subscribers, to reprint the case here.

tinct from the general assets of the corporation during the life of the beneficiary for life, and therefore nothing is payable to her estate.

[2] In this class fall payments to stockholders of the American Telegraph & Cable Company leased for fifty years to the Western Union Telegraph Company at a rental equal to five per cent. on the capital stock of the lessor company. These payments are made directly by the lessee company on the first days of March, June, September and December to stockholders of the lessor company of record at the close of business on the preceding day. The dividends are paid under the terms of a long term lease directly to the stockholders of the lessor company by the lessee company without particular vote of declaration by either company. The general custom as to payment took the place of a vote of declaration of dividend. The test here is whether one is a stockholder when according to the established custom the stockholders entitled to payment were to be ascertained. The rights of the beneficiary in this particular are to be determined on the same footing as if she were a direct stockholder.

This payment is properly a dividend. The stockholders did not lease their shares. The company in which they were stockholders leased its property. The lessee company pays its rental by making payments immediately to the stockholders of the lessor company of dividends on their stock. That appears to be merely matter of convenience. It does not affect the substantial fact that the transaction constitutes payment of rent by the lessee corporation and receipt of dividends by stockholders of the lessor corporation. Such dividends are not apportionable under G. L. c. 197, § 27; Granger v. Bassett, 98 Mass. 462, 469.

3. Dividends declared by vote of directors before the death of the beneficiary for life, payable by the terms of such vote to stockholders of record on dates after her death and coming due and payable on still later dates.

[3, 4] The general statement of the rule for determining the person to whom a dividend on shares of a corporate stock is payable is that it belongs to the owner of the shares at the time the dividend is declared and not to the owner at the time of its payment. The reason is that when the dividend is declared its amount then is separated from the general assets of the corporation for distribution among the stockholders and becomes their individual property. The right to payment of the proportional part of the dividend attributable to the shares of stock then owned attaches immediately. The right of the stockholder becomes fixed by the declaration. The debt then is established. The payment is postponed for the convenience of the corporation. The stockholder may sue for the amount due if not paid on demand after the time fixed for payment. Ford v. Easthampton Rubber Thread Co., 158 Mass. 84, 32 N. E. 1036, 20 L. R. A. 65, 35 Am. St. Rep. 462; Matter of Kernochan, 104 N. Y. 618, 11 N. E. 149; Hill v. Newichawanick, 8 Hun (N. Y.) 459, affirmed in 71 N. Y. 593; Wheeler v. Northwestern Sleigh Co. (C. C.) 39 Fed. 347; Lock v. Venables, 27 Beav. 598; Lobaco Co. v. Chaffin, 193 Ky. 225, 235 S. W. 993.

It has been held that dividends declared during the life of the owner or of the beneficiary for life, but payable at a date falling after his death without a vote making them payable to the stockholders as of any certain date, were payable to the estate of the owner or of the beneficiary for life. This is but an application of the general principle already stated. De Gendre v. Kent, L. R. 4 Eq. 283; Wright v. Tucket, 1 J. & H. 266. These decisions to the effect that the date of passing the vote furnishes the test by which to determine the person entitled to the dividend have been made concerning cases where there has been no specification in the vote declaring the dividend as to the time and manner for determining the stockholders entitled to receive the dividend.

[5] The power to declare dividends is vested in the corporation. It usually is exercised by the directors. The time when the vote declaring a dividend shall be adopted and the time when the dividend shall be payable within reasonable limits are wholly under the control of the corporation or its authorized officers. It is common knowledge that frequently in the resolution declaring a dividend is also a clause to the effect that the dividend shall be payable to those who are stockholders of record on a specified date. Dividends often are declared by savings banks payable to the depositors of record on a fixed date. This form of vote in declaring dividends doubtless has been adopted because of its convenience and because it avoids confusion and misunderstandings. Such vote relates to a detail touching the internal management of the corporation. It belongs to a class of affairs which the corporation has a right ordinarily to settle and thereby bind its stockholders so long as the action taken is in good faith and without fraud or collusion. It is in substance a declaration that the vote for the payment of the dividend shall be operative and take effect as to stockholders on that date and not earlier. There is no inflexible rule of law which prevents such vote of those responsible for the management of the corporation from having its natural effect. Persons by becoming stockholders in a corporation impliedly agree to be bound by the reasonable rules and practices adopted for the management of corporate affairs. Business policies

adopted by business men for the management of business transactions ought not to be frustrated unless contrary either to some rule of law or to fundamental ethical rules of right and wrong. Votes as to the time and method for ascertainment of the stockholders entitled to dividends, such as here are in question, do not offend against either of these tests. It is but the logical result of general principles of corporation law to hold that a vote of that nature passed in good faith and reasonable in its operation is binding upon the stockholders. It was so held in a well-reasoned judgment in Richter v. Light, 97 Conn. 364, 116 Atl. 600.

[6] All the dividends of this class had been voted during the life of the beneficiary for life but payable to stockholders of record as of a date after her death and payable at a still later date. We think that the rights of her estate should be determined by the effect of the vote to the same extent as if she had been herself a stockholder of record, and that the dividends should be paid to the residuary legatee and not to the estate of the life tenant.

The case of Johnson v. Bridgewater Iron Mfg. Co., 14 Gray, 274, is not pertinent to the facts here disclosed. It there was held that a dividend declared and payable after the death of the beneficiary for life, but specified by vote of the directors to be for a period of time ending before her death, was payable to her estate. That case is not like any of the dividends described in the case at bar, because here there is no specification that any of the dividends wholly were earned during, or were declared to be for, that period.

Costs as between solicitor and client for the representatives of the life tenant and of the remainderman are to be taxed in the discretion of the Probate Court.

Decree accordingly.

KRUPP v. CRAIG.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 5, 1924.)

1. Assumpsit, action of ⟸19—Form used before Practice Act proper.

Declaration in assumpsit may be in the form used before the Practice Act was adopted in 1852.

2. Witnesses ⟸414(2)—Policy of insurance held improperly admitted to corroborate testimony.

In an action for board and room, court erred in permitting defendant, in corroboration of his testimony as to where he was living at a certain time, to introduce a policy of insurance; it having no material evidentiary value, and being a self-serving declaration.

3. Time ⟸9(2)—Excluding first or last day.

Where plaintiff permitted defendant to move his family into his house, to pay therefor when he got work, and defendant went to work on January 11, 1916, plaintiff's action, commenced January 11, 1922, was brought within 6 years from the accrual of the cause of action.

4. Contracts ⟸323(1)—Direction of verdict erroneous.

In assumpsit to recover for board and room, *held*, that the court erred in directing verdict for defendant.

5. Husband and wife ⟸235(2)—Whether contract for board was with wife and not husband held for jury.

In action by widow to recover for board and room furnished defendant during the lifetime of her husband, the fact that husband owned house, and that food, light, water, and interest was paid out of the allowance plaintiff had every week from him, and that he furnished money to pay for all these things, and was willing that defendant and his family should live under the roof with him, was evidence of the agency of the plaintiff for the husband, for the consideration of the jury, but was not conclusive, or as a matter of law inconsistent with the claim of an express contract between the plaintiff and defendant, under St. 1874, c. 184, § 1 (G. L. c. 209, §§ 2, 4).

Exceptions from Superior Court, Suffolk County; Frederick J. Macleod, Judge.

Action of contract by Esther M. Krupp against James W. Craig for board and lodging. Verdict for defendant, and plaintiff brings exceptions. Exceptions sustained.

D. P. Ranney, of Boston, for plaintiff.

Cox & Bacon and W. P. Kelley, all of Boston, for defendant.

PIERCE, J. [1] In this case the declaration sets out a cause of action in assumpsit, in a form which was used in this Commonwealth before the practice act was adopted in 1852, and is one which may now be used if the pleader elects to do so. See American Precedents of Declarations (1821) p. 126. See Raymond v. Eldridge, 111 Mass. 390. The answer of the defendant is a general denial, a plea of payment, and the statute of limitation.

At the close of the evidence the judge in response to a motion by the defendant that on all the evidence a verdict be directed for him ruled as follows:

"I am going to grant the motion to direct a verdict for the defendant on both counts—the first count now is waived, I understand. With reference to this motion the court suggests to counsel for the plaintiff that he will be permitted to amend his declaration by including a count for work and labor performed by the plaintiff for the defendant, and unless such an amendment is made at this time the court will direct a verdict for the defendant."

The plaintiff declined to amend "her declaration according to the suggestion of the court" and duly excepted to the allowance of the defendant's motion for a verdict.

The facts which the jury would be warranted in finding in support of the declaration in substance are as follows: The plaintiff is a sister of the defendant. In the year 1915 she resided with her husband and two children in a partly finished five-room house, owned by her husband, on Kendrick Road, Greenwood, Mass. On a Sunday in October, 1915, the defendant came to the house, said that he was out of employment, and asked the plaintiff in the presence of her husband if he could bring his family to stay with her until he received work, and that when he got work he would pay her for whatever he would owe her. The plaintiff consulted her husband, and, later the same day, said she would take the defendant and his family. The defendant and his family, consisting of his wife and three children, came to the house of the plaintiff on the 21st or 22d of October, 1915, and stayed there continuously until May 30, 1916. They occupied two out of three bedrooms and shared the rest of the house in common with the plaintiff and her family. The defendant went to work January 11, 1916. He paid the plaintiff $5 each week for the last three weeks of May, 1916. He also paid her in June, 1916, $37, which could have been found to have been paid on account of his indebtedness to her. The plaintiff paid the food bills with money furnished by her husband, who died in 1919.

It was the contention of the defendant that he never made any contract to pay money to the plaintiff for board; that he did not have any conversation with the plaintiff and her husband; that he paid the husband as he had agreed one-half of what he earned; that he went to his sister's house in October, 1914, and left on Decoration Day, 1915; that the money he gave his sister he gave in a money order for about $40, in June, 1917, to relieve her urgent need of money, and not to pay any debt of his to her.

[2] He further testified that he knew he left the house of the plaintiff in 1915 because he took out a policy August 29, 1915, in the Metropolitan Life Insurance Company and the address of that policy is 20 Park street, Wakefield. He then offered in evidence a policy of insurance in the Metropolitan Life Insurance Company, signed by James W. Craig, for the purpose of corroborating his testimony as to where he was living at that time. Subject to the exception of the plaintiff the policy was admitted in evidence. This exception must be sustained. The policy with its indorsement had no material evidentiary value in the proof of the disputed question of the place of the defendant's residence in 1915, and was otherwise objectionable as a self-serving declaration. Sargent v. Lord, 232 Mass. 585, and cases cited.

[3-5] The writ in this action was dated January 11, 1922, which was within six years after the defendant went to work January 11, 1916, and consequently within six years after the plaintiff's cause of action accrued. Seward v. Hayden, 150 Mass. 158, 22 N. E. 629, 5 L. R. A. 844, 15 Am. St. Rep. 183. The direction of a verdict for the defendant because in substance the allegations of the declaration are not supported by the proof was error. A married woman when the contract was made with the defendant and performed by the plaintiff had full authority in law to make contracts, oral and written, in the same manner as if she were sole, and all work and labor performed by her for other than her husband and children was, unless there is an express agreement on her part to the contrary, presumed to be on her separate account. St. 1874, c. 184, § 1; now G. L. c. 209, §§ 2, 4. The fact that the husband owned the house and that the food, light, water and interest were paid out of the allowance the plaintiff had every week from him, and that he furnished money to pay for all these things and was willing that the defendant and his family should live under the roof with "him and me," were evidence of the agency of the plaintiff for the consideration of the jury, but were not conclusive or as matter of law inconsistent with the claim of an express contract between the plaintiff and defendant, Harmon v. Old Colony Railroad, 165 Mass. 100, 42 N. E. 505, 30 L. R. A. 658, 52 Am. St. Rep. 499.

It results that the entry must be:

Exceptions sustained.

JONES v. REVERE PRESERVING CO. et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1924.)

1. Bills and notes ⇐4—Trade acceptance a "bill of exchange."

An unconditional order in writing by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay at a fixed or determinable future time a sum certain in money to order, though sometimes called a "trade acceptance," is to be considered a "bill of exchange," as defined by G. L. c. 107, § 149.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill of Exchange.]

2. Bills and notes ⇐476(2), 489(5)—Failure of consideration must be specially pleaded.

A failure of consideration, either in whole or in part, is a matter of defense, and must be specially pleaded, and cannot be shown under an answer containing only a general denial, under G. L. c. 107, § 51.

3. Sales ⇐355(2)—Fraud must be specially pleaded.

In an action on a bill of exchange representing the purchase price of dates, defendant was not entitled under a general denial to introduce evidence to show that the dates were of inferior quality, on the ground that fraud was practiced on the defendant, "which went to the very making of the contract."

4. Bills and notes ⇐530—Holder of bill of exchange entitled to interest to date of verdict.

In an action on a bill of exchange, plaintiff is entitled to interest to the date of verdict.

Exceptions from Superior Court, Suffolk County; R. W. Irwin, Judge.

Action of contract by Claude H. Jones against the Revere Preserving Company, with trustee, on a bill of exchange. Verdict was directed for plaintiff, and defendant brings exceptions. Exceptions overruled.

A. H. Reed, of Boston, for plaintiff.
George H. Russ, of Boston, for defendant.

CROSBY, J. This is an action of contract to recover the amount due upon a bill of exchange drawn by the plaintiff, accepted by the defendant, and payable at the Hub Trust Company in Boston. The instrument in question represented the amount of the consideration paid for certain goods sold and delivered by the plaintiff to the defendant. The defendant's answer is a general denial. At the trial the plaintiff offered in evidence the bill of exchange, and rested. The defendant was permitted to introduce evidence tending to show that a carload of dates, which was the subject of the sale, was not as represented by the plaintiff; that the dates were of inferior quality and worth much less a pound than the contract price; and further, that the defendant did not return the dates, but used some of them in making an inferior and cheap class of goods. The plaintiff offered no evidence in rebuttal. At the close of the evidence the defendant requested the court to give the following rulings:

"(1) That under the pleadings the defendant is entitled to show failure of consideration.

"(2) If the goods delivered were not of the quality ordered, the defendant had the right to keep them and pay a fair market value therefor."

The court refused so to rule and directed the jury to return a verdict for the plaintiff for the full amount of the bill of exchange, with interest to the date of the trial; the defendant excepted.

[1] While the instrument declared on is sometimes called a "trade acceptance," it has all the elements requisite to a bill of exchange as defined in the Negotiable Instruments Act (G. L. c. 107, § 149), and is to be so considered. It is:

"An unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay * * * at a fixed or determinable future time a sum certain in money to order. * * *"

The defendant, not having returned the goods and having used a part of them, sought to prove a partial failure of consideration. G. L. c. 107, § 51, provides that:

"Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise."

[2] As failure of consideration, either in whole or in part, is a matter of defense, it is settled both under the statute and at common law that it must be specially pleaded and cannot be shown under an answer containing only a general denial. Hodgkins v. Moulton, 100 Mass. 309, 310; Indiana Flooring Co. v. Rudnick, 236 Mass. 90, 127 N. E. 428. In the case last cited it was said that:

"Such a defense is analogous to that of recoupment, which must be specially pleaded. Davis v. Bean, 114 Mass. 358; Wentworth v. Dows, 117 Mass. 14; Sayles v. Quinn, 196 Mass. 492."

See, also, Gillis v. Cobe, 177 Mass. 584, 605, 59 N. E. 455; Puffer Manufacturing Co. v. Krum, 210 Mass. 211, 213, 96 N. E. 139.

[3] The defendant contends that as it introduced evidence to show that the dates sold were found to be of inferior quality and at least two or three years older than called for by the agreement, a fraud was practiced by the plaintiff on the defendant "which went to the very making of the contract and therefore need not be specially pleaded." This contention cannot be sustained; even if there were evidence sufficient to justify a finding of fraud in the sale of the goods, which we do not decide, the defendant cannot avail itself of such fraud in defense unless specially pleaded. It was said in Wentworth v. Dows, supra, 117 Mass. at page 15:

"In an action upon a promissory note, the defendant is permitted to allege and prove in defense that which was formerly only the subject of a cross-action. Thus breach of warranty or fraud in the sale of personal property may be given in evidence, when specially set up in the defendant's answer by way of recoupment."

[4] The defense relied on not having been specially pleaded, the defendant's remedy, if it has any, is by a separate action. As the evidence admitted was not competent in defense, the court properly instructed the jury to return a verdict for the plaintiff for the

amount of the bill of exchange with interest to the date of the verdict. Granara v. Jacobs, 212 Mass. 271, 275, 98 N. E. 1029.

Exceptions overruled.

O'BRIEN v. BOSTON ELEVATED RY. CO.

HIGGINS v. SAME.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 4, 1924.)

Street railroads ⇐117(11, 24)—Negligence and contributory negligence held for jury.

In action for personal injuries received when trolley car ran into standing automobile of one plaintiff, from which the other plaintiff was descending, whether defendant's motorman was negligent, and whether plaintiffs were free from negligence, *held* for the jury.

Exceptions from Superior Court, Middlesex County; F. J. Macleod, Judge.

Actions of tort by John H. O'Brien and Margaret Higgins, respectively, against the Boston Elevated Railway Company, to recover damages for personal injuries alleged to have been caused by the negligence of a motorman in charge of a trolley car of the defendant. Verdict for plaintiffs, and defendant brings exceptions. Exceptions overruled.

John J. Cummings and Thomas Brennan, both of Boston, for plaintiffs.

F. J. Carney, of Boston, and J. A. Canavan, of East Boston, for defendant.

RUGG, C. J. These are actions of tort to recover compensation for personal injuries alleged to have been caused by the negligence of a motorman in charge of a trolley car of the defendant. Uncontroverted facts were that an automobile with left hand drive, driven by the plaintiff O'Brien with whom the plaintiff Higgins was riding as a guest, passed the stationary trolley car in Davis Square, Somerville, proceeded down Elm street, and at some point came partly upon the track in front of the following trolley car; that the automobile was brought to a stop on the track near the corner of Elm and Russell streets and near a white pole, where at least one person was waiting to become a passenger on the trolley car; that, as the plaintiff Higgins was alighting, the trolley car struck the rear of the automobile and she was thrown to the ground and the automobile was pushed along the street. All this occurred at about 11 o'clock on a Sunday evening in February. The place was well lighted and there was no other traffic in the vicinity. There was evidence tending to show in its aspect most favorable to the plaintiffs that O'Brien, about one hundred feet before stopping his automobile, put out his left hand as a signal, and that at that time looking back he saw the trolley car at Chester street, which was about 450 feet behind him, and that he did not look back again and could not tell where the trolley car was when he stopped his automobile. O'Brien drove by one white post after passing the trolley car in Davis Square and drove on to the second white post, intending to stop there in order that Miss Higgins might leave the automobile and take the trolley car. After the automobile stopped, the door stuck and Miss Higgins was delayed thereby in alighting. It was impossible to drive the automobile to the right of the car tracks, because that part of the street was covered with slanting snow and ice to a considerable depth, and the only practicable place to drive was in whole or in part on the space covered by the tracks. The plaintiff Higgins testified that she did not look back for the trolley car; that she knew that O'Brien was a skillful driver and trusted him, and that she observed people waiting at the white pole to board the car and relied upon the motorman stopping the trolley car for them.

The governing principles of law are thoroughly settled and need not be repeated. It has not been argued that there was not evidence of the negligence of the motorman. The facts and evidence already summarized show that it could not rightly have been ruled as matter of law that either plaintiff was not in the exercise of due care. That was a question of fact to be decided by the jury under appropriate instructions. The cases fall within the authority of the decision as to rear end collisions illustrated by Jeddrey v. Boston & Northern Street Railway, 198 Mass. 232, 84 N. E. 316, and cases there collected; Callahan v. Boston Elevated Railway, 205 Mass. 422, 91 N. E. 388, 18 Ann. Cas. 510, and cases there cited; Carroll v. Boston Elevated Railway, 205 Mass. 429, 91 N. E. 525; Chaput v. Haverhill, Georgetown & Danvers Street Railway, 194 Mass. 218, 80 N. E. 597; Williamson v. Old Colony Street Railway, 191 Mass. 144, 77 N. E. 655, 5 L. R. A. (N. S.) 1081; Bombard v. Worcester Consolidated Street Railway, 234 Mass. 1, 124 N. E. 434; Morrissey v. Boston Elevated Railway, 210 Mass. 424, 97 N. E. 83; Herman v. Middlesex & Boston Street Railway, 235 Mass. 179, 126 N. E. 283; Reardon v. Boston Elevated Railway, 242 Mass. 383, 136 N. E. 153. The plaintiff Higgins was entitled to go to the jury on the principle of Shultz v. Old Colony Street Railway, 193 Mass. 315, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402.

The evidence distinguishes the cases at bar from decisions like Lawrence v. Fitchburg & Leominster Street Railway, 201 Mass. 489, 87 N. E. 898, O'Neill v. Boston & Mid-

dlesex & B. Street Railway, 244 Mass. 510, 138 N. E. 841, and Will v. Boston Elevated Railway, 142 N. E. 44.

Exceptions overruled.

PRUDENTIAL TRUST CO. v. HAYES.

(Supreme Judicial Court of Massachusetts. Worcester. Jan. 3, 1924.)

1. Evidence ⇐71—When presumption of receipt of letter arises, stated.

The presumption of the receipt of a letter arises when it is deposited in the mail, but the deposit need not be at the post office; the same legal effect following if the letter is placed in a post office box on the street, or in the mail chute in an office building.

2. Evidence ⇐181—Admission of copies of letters without evidence of custom as to mailing held not reversible.

Where defendant admitted receipt of two letters, and there was proof that all letters were delivered to the clerk who in the ordinary course of plaintiff's banking business mailed them, it was not reversible error to admit copies of all the letters after due notice to produce had been served, though the mailing clerk did not testify that it was his invariable practice to deposit all letters in the mail.

3. Appeal and error ⇐926(5)—Assumed evidence was properly limited by judge.

It must be assumed on review that evidence was properly limited by the judge.

Exceptions from Superior Court, Worcester County.

Action of contract by the Prudential Trust Company against John F. Hayes to recover on a renewal note from the indorser. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

C. B. Rugg and A. W. Blackmer, both of Worcester, for plaintiff.

J. F. McGrath and J. Joseph MacCarthy, both of Worcester, for defendant.

DE COURCY, J. The note in suit was for $2,500, dated August 26, 1918, payable to the Lenox Motor Car Company, and discounted for said company by the plaintiff. At that time the name of the defendant appeared on the note as an endorser. There was evidence from which the jury could find that the words "Waiving demand notice and protest" were then above his endorsement; although in his written statement he denied it. The note was not protested for nonpayment. A verdict was returned for the plaintiff.

The only exceptions taken by the defendant were to the admission in evidence of four letters with reference to the unpaid note, purporting to be written by the plaintiff's former treasurer, William P. Bailey, to the defendant. In substance Bailey testified (as to each letter) that he dictated it; that he signed it in accordance with his invariable practice; and that while he did not know if it was actually mailed he gave it to a clerk to mail—she being the "mailing clerk," as we interpret his testimony. So far as disclosed by the evidence for the plaintiff these were the only letters sent. At the trial the defendant was duly notified to produce all correspondence in relation to the note. In his written statement he admitted the receipt of two letters from the plaintiff; but said they were merely requests to call at the bank. Hayes was a director of the trust company, and also of the Lenox Motor Car Company.

[1] Apparently it was not questioned at the trial that the letters were properly addressed, as indicated on the alleged copies. Indeed that might well be inferred from other facts, such as that the trust company was writing to one of its directors, and that he admittedly received some letters sent by it. The doubtful issue is whether a sufficient mailing was shown to constitute prima facie evidence that the letters were received by the addressee in the ordinary course of the mails. Briggs v. Hervey, 130 Mass. 186; Eveland v. Lawson, 240 Mass. 99, 132 N. E. 719. A presumption of the receipt of a letter arises when it is deposited in the mails. The deposit need not be at the post office. The same legal effect would follow if the letter were placed in a post-office box on the street, Johnson v. Brown, 154 Mass. 105, 27 N. E. 994; or in the mail chute in an office building. Tobin v. Taintor, 229 Mass. 174, 118 N. E. 247. In the present case the fact of mailing was sought to be proved by inference from certain other facts; especially that the mailing clerk was told to mail it. If there had been the further testimony by that clerk that it was her duty and custom to mail all such letters, even though she had no recollection of this particular one, undoubtedly an inference could be drawn by the jury that the letter had been mailed. In Dana v. Kemble, 19 Pick. 112, the letter was left at the bar of the Tremont House. The bar keeper testified that it was the invariable usage of the house to deposit all letters so left in an urn kept for that purpose; whence they were distributed to the rooms of the guests to whom they were directed, almost every fifteen minutes during the day. He further testified that he had never known any failure of such a letter to reach the addressee. The court said there was sufficient evidence of the delivery of the original letter to admit a copy. In McKay v. Myers, 168 Mass. 312, 47 N. E. 98, a press-copy of a letter, which the plaintiff testified he wrote to the defendant, was admitted (the defendant having failed to

produce the original upon notice) because he testified to a general course of business which tended to show that he deposited the letters in the Post Office; although he could not say, as a matter of memory, that he deposited this particular letter. See cases collected 19 Ann. Cas. 651, note; 49 L. R. A. (N. S.) 458, note.

[2, 3] In order to warrant the presumption of mailing it is not enough, according to many authorities, to show that the letter was left in a customary place for mailing; the testimony of the employee actually doing the mailing, that it was his invariable practice to collect and deposit all such letters in the mail, is also deemed necessary. Hetherington v. Kemp, 4 Campb. 193; Gardam & Son v. Batterson, 198 N. Y. 175, 91 N. E. 371, 139 Am. St. Rep. 806, 19 Ann. Cas. 649; Peirson-Lathrop Grain Co. v. Barker (Mo. App.) 223 S. W. 941. See Pierson-Lathrop Grain Co. v. Potter Lumber, Grain & Hardware Co., 210 Mo. App. 387, 397, 239 S. W. 559; Federal Asbestos Co. v. Zimmerman, 171 Wis. 594, 177 N. W. 881, 25 A. L. R. 5. The case at bar is a close one. But in large banks and business houses, it must often be practically impossible to honestly obtain more definite evidence as to mailing than the delivery of letters to the mailing clerk, whose duty it is to deposit them in the Post Office in the usual course of his employment. A mere statement by such clerk that he invariably posted all letters entrusted to him would probably be an inference on his part, rather than a matter of memory and in any event would be cumulative. See Wigmore on Evidence (2d Ed.) 330, 331; Norway Plains Co. v. Boston & Maine R. R., 1 Gray, 263, 267, 268, 61 Am. Dec. 423. On the facts shown in this record, including the admitted receipt by the defendant of two letters, and the proof that all letters were delivered to the clerk who in the ordinary course of the bank's business mailed them, in the opinion of a majority of the court it was not reversible error to admit the copies in evidence, after due notice had been served on the defendant to produce all correspondence in relation to the subject matter. We are not now dealing with the contents or probative value of the letters, but merely with their admissibility. They were not admitted to prove that demand and notice had been waived; and it must be assumed that their use was properly limited by the judge. Swampscott Machine Co. v. Rice, 159 Mass. 404, 34 N. E. 520; Myers v. Moore-Kile Co. (C. C. A.) 279 Fed. 233, 25 A. L. R. 1; Lawrence Bank of Pittsburgh v. Raney & Berger Iron Co., 77 Md. 321, 26 Atl. 119; Smith v. Heitman Co., 44 Tex. Civ. App. 358, 98 S. W. 1074; Trotter v. Maclean, 13 Ch. D. 574, 580.

Exceptions overruled.

HADDAD v. GRIFFIN.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 7, 1924.)

1. **Carriers ⇐4—One letting automobiles for hire not necessarily a common carrier.**

One who was in the business of letting automobiles for hire was not necessarily a common carrier.

2. **Carriers ⇐397½—Private carrier liable for loss of articles only in case of negligence.**

If one in the business of letting automobiles for hire was a private carrier, he would be liable for the loss of articles left in one of the automobiles only in case such loss was due to his negligence or that of his agent or servant.

3. **Carriers ⇐39, 236(1)—While common carrier is bound to carry persons and property, private carrier is not unless under special agreement.**

While a common carrier generally is bound to carry persons and property for all who desire such service on tender of reasonable compensation, yet a private carrier is not bound to carry unless he makes a special agreement to do so.

4. **Carriers ⇐397½—One letting automobiles held not liable for loss of articles.**

One in the business of letting automobiles for hire was not liable for loss of articles placed in the car by a passenger, where the driver had no knowledge that they were there, and there was no evidence of lack of reasonable care.

Appeal from Appellate Division of District Courts, Northern District.

Action of contract or tort by Rose Haddad against Thomas Griffin to recover the value of a leather bag and box and their contents. From an order of the Appellate Division of the Northern District, dismissing the report, plaintiff appeals. Affirmed.

Daniel B. Beard, of Boston, for appellant.

Toye, Halligan & Murray, of Boston, for appellee.

CROSBY, J. This is an action to recover the value of a leather bag and box and their contents. The action was tried before the judge of the Third District Court of Eastern Middlesex who found for the defendant, and reported the case to the Appellate Division of the Northern District under St. 1922, c. 532, § 8. The case is before us on appeal from an order dismissing the report.

The following facts were found by the trial judge: The husband of the plaintiff contracted with the defendant, who is in the business of letting automobiles for hire, for four automobiles to carry the plaintiff and her friends from Natick to Boston on the night of January 22, 1922. The plaintiff's agent who hired the automobiles knew that the defendant would be obliged to obtain

other cars. The defendant furnished one and obtained three others from another garage keeper. All the automobiles on the night in question were under the direction of the defendant, and the service rendered was paid for by the plaintiff to the defendant. It appears that the automobiles were driven to a house in Natick; that the plaintiff with her child entered one of them; that her bag and box she caused to be placed in another automobile occupied by several persons, among whom was her sister, a minor, but a proper person to be custodian of the articles; that the driver of this automobile did not know that the bag and box were so placed; that after the automobiles arrived at a house in Boston the occupants immediately alighted and went into the house; that the plaintiff's sister either did not see the articles or did not pay any attention to them in alighting; that after the occupants of the automobile went into the house the bag was missed, and a few minutes later, and before any of the automobiles had left, several persons came out and looked for the missing articles, but they could not be found and there was no evidence to explain their disappearance; that the driver of the machine was either sitting at the wheel or standing on the sidewalk near by talking with other chauffeurs when the search was made.

The plaintiff requested the court to rule that—

"The plaintiff having proved the delivery in good condition of the bag, declared on in her declaration, to the defendant, the burden is upon the defendant to prove its safe transportation and delivery to the plaintiff at her destination."

This request was refused and a finding was made for the defendant. We are of opinion that the request was rightly denied, and that no error of law appears in the action of the court in finding for the defendant.

[1-3] The argument of the plaintiff that the defendant was liable for the loss of the articles on the ground that he was a common carrier cannot be sustained. The only finding respecting the occupation of the defendant is that he was "in the business of letting automobiles for hire"; but whether he was a common carrier, or only a private carrier, does not expressly appear nor can it be inferred from any facts found. Although he was in the business of letting automobiles for hire, it does not necessarily follow that he was a common carrier, either of passengers or goods. If he was a private carrier he would be liable for the loss of the articles only in case such loss was due to his negligence, or that of his agent or servant. While a common carrier generally is bound to carry persons and property for all who desire such service upon tender of reasonable compensation, yet a private carrier is not bound to carry for any reason unless he makes a special agreement to do so.

[4] It is plain that, as the driver of the machine in which the bag and box were placed had no knowledge that they were there, and as there is no evidence of lack of reasonable care on the part of the defendant or his agents, a finding of negligence would not have been warranted. Dwight v. Brewster, 1 Pick. 50, 53, 11 Am. Dec. 133; Houle v. Lewonis, 245 Mass. 254, 140 N. E. 427, and cases cited.

Order dismissing report affirmed.

L. L. COHEN & CO., Inc., v. DAVIS, Agent.

(Supreme Judicial Court of Massachusetts. Bristol. Jan. 4, 1924.)

1. Railroads ⟸5½, New, vol. 6A Key-No. Series—Company not suable for damages caused during federal control.

An action to recover damages to goods shipped during federal control of the railroads should have been brought against the government, and not against the railroad company.

2. Railroads ⟸6½, New, vol. 6A Key-No. Series—Government agent properly substituted for railroad as party.

Where one wrongly brought action against railroad, instead of government in control thereof, the representative of the government could be made a party by substitution, and this substitution could take place more than two years after the end of government control, where the action was commenced before the expiration of federal control, under Transportation Act 1920, § 206, subds. (a) and (d), being U. S. Comp. St. Ann. Supp. 1923, § 10071¼cc.

3. Parties ⟸63—Substitution of party not commencement of new action.

Substitution of party defendant is not the commencement of a new action.

4. Carriers ⟸52(2), 53—"Bill of lading" receipt of quantity and description of goods shipped, and contract to transport and deliver.

A "bill of lading" is a receipt of the quantity and description of the goods shipped and a contract to transport and deliver them as specified therein.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill of Lading.]

5. Carriers ⟸51—Description in bill of lading did not warrant mixture of contents of car.

A description in bill of lading, "one carload of scrap iron," did not import that the contents of the car could be mixed or mingled without damage, so as to relieve the carrier for improper reloading in transit; it appearing

that the shipper had put iron of a different nature in different parts of the car.

6. Carriers ⟸69(5) — Whether railroad on notice that scrap iron not to be mingled question for jury.

Where loose scrap iron was confined between bundles of sheet iron scrap and bales of skeleton scrap as loaded on car by shipper, the carrier might well be charged with notice that the division was made with a definite design, and that the carrier should not reload the iron so as to mix it, and court erred in not submitting the question to the jury.

7. Carriers ⟸69(3)—Burden on carrier to prove damaged condition of goods due to causes not rendering it responsible.

If goods were received for shipment in good order, the burden was on carrier, in suit for damages, to prove that their damaged condition on arrival was due to causes for which carrier was not legally responsible.

Exceptions and report from Superior Court, Bristol County; Hugo A. Dubuque, Judge.

Action by L. L. Cohen & Co., Inc., against the New York, New Haven & Hartford Railroad Company, to recover damages to a carload of scrap iron shipped. James C. Davis, Agent, was substituted as defendant. On exceptions by defendant to refusal to dismiss, and on report after directed verdict for defendant. Judgment for plaintiff.

L. Swig, of Taunton, for plaintiff.
A. W. Blackman, of Boston, for defendant.

DE COURCY, J. On December 13, 1918, the plaintiff shipped from Taunton, Mass., "one carload scrap iron," consigned to Midvale Steel & Ordnance Company, Coatesville, Pa. A reasonable time for delivery at said destination was not later than two months. The shipment was loaded into a "sideboard flat" car; that is, a flat car open at the top, with wooden sides and ends about four feet in height. The plaintiff placed at one end of the car sheet iron scrap, which was tied up in bundles; at the other end skeleton scrap, so called, which was tied up in bales; and in the middle of the car small particles, known as tack or nail scrap. While the car was in transit, and on the lines of the Pennsylvania System, it became reasonably necessary to transfer the contents. The iron was loaded into a battleship hopper car, which, it could be found, was not adapted to the carriage of scrap iron; and in the transfer the fine scrap was loaded on top and mixed in with the other material, so as to render the lading unmarketable and worthless. The consignee refused to accept delivery, and the plaintiff declined to take it on its return to Taunton, about February 19, 1919.

The plaintiff, by writ dated January 9, 1920, brought an action of contract against the New York, New Haven & Hartford Railroad Company, "controlled and operated by the United States Railroad Administration." The plaintiff's motion to substitute James C. Davis, Agent, as party defendant, was allowed in September, 1922. On October 7, 1922, an order of notice issued and was served upon one Astley, the division superintendent, service on whom would have been good in an action against said railroad company. The defendant Davis appeared specially on November 6, 1922, and filed a motion to dismiss. This motion was denied, subject to the defendant's exception. At the subsequent trial on the merits, the judge directed a verdict for the defendant, and reported the case to this court.

[1, 2] As the cause of action in this case arose during federal control of the railroad, it is now settled that the action should have been brought against the government and not against the railroad company. Missouri Pacific Railroad v. Ault, 256 U. S. 554, 41 Sup. Ct. 593, 65 L. Ed. 1087; Nominsky v. New York, New Haven & Hartford Railroad, 239 Mass. 254, 132 N. E. 30. The contention of the defendant that the representative of the government cannot be made a party by substitution in any case where the action originally was wrongly brought against the railroad company is contrary to recent decisions of this court. Ætna Mills v. Director General of Railroads, 242 Mass. 255, 136 N. E. 380; Genga v. Director General of Railroads, 243 Mass. 101, 110, 111, 137 N. E. 637; Director General of Railroads v. Eastern Steamship Lines, Inc., 245 Mass. 385, 139 N. E. 823.

[3] The defendant further contends that in no event can substitution be had later than two years after the end of government control. It is true that section 206 (a) of Transportation Act 1920 (41 Stat. at Large, 456 [U. S. Comp. St. Ann. Supp. 1923, § 10071¼cc]), provides that, after the termination of federal control, actions arising out of the operation of the railroad while under such control should be brought "within the periods of limitation now prescribed by state or federal statutes but not later than two years from the date of the passage of this act." But that subsection purports to deal only with the time within which actions may be commenced, where the cause thereof arose during federal control and no action was brought during that period. In the case at bar, the action was begun January 9, 1920, almost two months before the termination of federal control. The subsection of the Transportation Act here applicable is 206(d), which provides that such actions "pending at the termination of federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, sub-

stituting the agent designated by the President under subdivision (a)." This subsection contains no time limitation. De Witt v. New York Central Railroad, 119 Misc. Rep. 456, 196 N. Y. Supp. 870; Henry v. New York Central Railroad, 204 App. Div. 491, 494, 198 N. Y. Supp. 542; Hanlon v. Davis, 276 Pa. 113, 118, 119 Atl. 822. Even if section 206(a) were applicable, the Massachusetts law as to amendments does not regard such substitution as the commencement of a new action, and it would have been within the discretion of the trial court to allow the substitution despite the fact that more than two years had elapsed since the termination of federal control. Ætna Mills v. Director General of Railroads, supra; Genga v. Director General of Railroads, supra; G. L. c. 231, § 138. In view of the Act of March 3, 1923 (42 Stat. 1443), amending Transportation Act 1920, § 206, we deem it unnecessary to consider the Act of Congress of February 8, 1899 (U. S. Comp. St. § 1594), limiting the time for substitution of a successor in office. See Sack v. Davis, 245 Mass. 114, 139 N. E. 819; Director General of Railroads v. Eastern Steamship Lines, Inc., supra. We are of opinion that the motion to dismiss was denied rightly.

[4-7] As to the merits. On the facts shown the defendant was responsible for the damage to the shipment unless he was relieved from the common-law liability by the terms of the bill of lading, or the damage was due to the act or default of the plaintiff itself. The bill of lading is a receipt of the quantity and description of the goods shipped, and a contract to transport and deliver them as specified in the instrument. Hastings v. Pepper, 11 Pick. 41. The mere description "one carload scrap iron" did not necessarily import that the contents of the car could be mixed or mingled without damage. The owner, as one of the contracting parties, had a right to judge for itself what arrangement in the car was best adapted for the carriage of its goods. And while the defendant presumably might have refused to accept the iron for shipment if not satisfied with the packing and position adopted by the shipper, he did not do so, but accepted the carload with full knowledge on the part of his employees of the nature and arrangement of its contents. Hastings v. Pepper, supra. The manner in which the loose scrap was confined between bundles of sheet iron scrap and bales of skeleton scrap might well charge the carrier with notice that the division was not random but made with a definite design; and that he should handle the shipment accordingly. Noble v. American Express Co., 234 Mass. 536, 125 N. E. 598; Colbath v. Bangor & Aroostook Railroad, 105 Me. 379, 74 Atl. 918, 134 Am. St. Rep. 569. In fact the plaintiff loaded the car, and presumably it was intended that the consignee, and not the defendant, should unload it. So far as appears the shipment as arranged would have gone through without damage, but for an intermediate reloading of this bulky freight, weighing more than 100,000 pounds; a reloading which apparently was not contemplated by the parties. There was evidence for the jury that the damage complained of was due to the failure of the defendant to provide a suitable car, or the negligence of the employees in unloading and reloading, or both. Pratt v. Ogdensburg & Lake Champlain Railroad, 102 Mass. 557, 567. And if the goods were received for shipment in good order, the burden was on the defendant to prove that their damaged condition on arrival was due to causes for which he was not legally responsible. Hastings v. Pepper, supra.

The case should have been submitted to the jury. In accordance with the report judgment is to be entered for the plaintiff in the sum of $400.

So ordered.

PUTNAM v. HANDY.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1924.)

1. Appeal and error ⇐870(3)—Exceptions to master's report not considered, when decree confirming not appealed from.

Defendant not having appealed from interlocutory decree confirming master's report, his exceptions are not before the reviewing court on appeal from final decree.

2. Corporations ⇐310(1) — Director and president charged with duty of caring for property and managing affairs honestly.

A director and president of a corporation, while not responsible for errors of judgment, was a fiduciary charged with the duty of caring for the property of the corporation and of managing its affairs honestly and in good faith, and if he violated this duty, and impairment of assets or loss of property or profit to himself resulted, he can be compelled to make full restitution.

3. Attorney and client ⇐104—Client bound by knowledge of counsel.

One causing property to be attached is bound by the knowledge of his counsel within the scope of his employment as to what subsequently took place.

4. Corporations ⇐317(3) — Director and president attaching assets held to have deliberately sacrificed them.

Director and president of corporation, who attached its assets for a debt due him, and had them sold as perishable, for less than their value, the corporation not appearing, *held* to have deliberately sacrificed the interests of the corporation, which he was bound to protect and conserve, in view of G. L. c. 223, §§ 88, 89, 91, 92.

5. Attachment ⊜328—Conclusiveness of return of officer.

In the absence of fraud, an officer's return on an attachment as between the parties and their privies is conclusive as to all matters which are properly the subject of a return by him.

6. Corporations ⊜317(3)—Return on attachment held not to protect officer from liability.

Where attachment proceedings against a corporation by its president and director were originated and conducted in such manner as to cause a substantial loss to the corporation, the officer's return, showing an appraisal of the attached property, *held* not to protect the president and director from liability for his misconduct.

Appeal from Superior Court, Suffolk County; George A. Sanderson, Judge.

Suit by Alfred W. Putnam, trustee in bankruptcy of the United States Leatheroid & Rubber Company, against Herbert L. Handy for an accounting for the value of property of the bankrupt corporation attached and sold by him. Decree for plaintiff, and defendant appeals. Affirmed.

W. R. Buckminster and J. E. Crowley, both of Boston, for appellant.

A. W. Putnam, of Boston, for appellee.

BRALEY, J. [1-3] The defendant not having appealed from the interlocutory decree confirming the master's report, his exceptions are not before us, and the question for decision is whether on the pleadings and the report with such reasonable inferences of fact therefrom as the trial court could draw, the final decrees should be reversed. Forino Co., Inc., v. Karnheim, 240 Mass. 574, 580, 134 N. E. 605. The plaintiff is the duly appointed trustee in bankruptcy of the United States Leatheroid & Rubber Company, a domestic corporation, which was adjudged a bankrupt May 4, 1921. The defendant who was a director and president of the company while not responsible for errors of judgment, was a fiduciary charged with the duty of caring for the property of the corporation, and of managing its affairs honestly, and in good faith. If this duty has been so violated as to result in impairment of assets, or loss of its property, or of profit to himself, he can be compelled to make full restitution. United Zinc Companies v. Harwood, 216 Mass. 474, 476, 103 N. E. 1037, Ann. Cas. 1915B, 948, and cases cited; Lazenby v. Henderson, 241 Mass. 177, 135 N. E. 302. The company, which the master finds "at all times * * * was insolvent" owed the defendant over $80,000, and on February 11, 1921, with knowledge of the company's financial condition, and of the indebtedness due to other creditors, he caused all its tangible personal property except that which was covered by mortgage to be attached, and a keeper placed in charge. It may be said at the outset that in what subsequently took place under the attachment, he is bound by the knowledge of his counsel within the scope of his employment. Raynes v. Sharp, 238 Mass. 20, 130 N. E. 199. The defendant's counsel on March 17, 1921, requested the attaching officer to sell the property as perishable under G. L. c. 223, § 88. The officer's return shows that under the proceedings required by sections 89, 91, 92, the plaintiff chose one of the appraisers who had been the keeper, the officer chose an appraiser "to represent the defendant, the defendant not appearing," and also selected the third appraiser. The defendant company, an interested party, was entitled under section 89 to notice of the proposed sale. Pollard v. Baker, 101 Mass. 259, 261. But the master reports that he cannot determine whether the directors had such notice, and he finds that of the appraisers, the appraiser selected by the plaintiff was alone qualified to determine the value of the property. It is also found that the company did not defend the action, and that counsel were not retained to protect its interests. The master further finds that in fact the property was not perishable, and the expense of a keeper was merely nominal. In this connection, and as bearing on the conduct of the defendant, the following finding is made:

"That the usual method of conducting a sheriff's sale of goods in attachment is to post a notice but that sometimes, though not often, a sale is advertised * * * in the newspapers, but * * * the only notice was by posting in the town hall * * * forty-eight hours before the sale."

[4-6] It appears from further findings, that the property which was worth $10,043.21, was valued by the appraisers at $4,195, and was sold for $4,200 to an office associate and stenographer of defendant's counsel. A corporation known as the Middlesex Rubber Company had been organized in the meantime by defendant's counsel, to which the purchaser at the sale transferred the "merchandise formerly owned" by the leatheroid company. Immediately following this transfer defendant's counsel, who was the mortgagee in possession under foreclosure of a mortgage on the real estate and machinery of the leatheroid company, executed and delivered to the Middlesex Company a lease thereof, the rental being fixed at an amount equal to the interest on the bonds of the leatheroid company, to secure which the mortgage had been given. The bankrupt corporation stripped of all available assets thereupon ceased to transact business, and the Middlesex Company took possession of all its real and tangible property. The defendant was a holder of certain of the bonds secured by the mortgage, and the transactions above described enabled

him even if he was not a director, officer, or stockholder in the Middlesex Company, to obtain in common with other bondholders, the payment of interest as it fell due on the bonds. What has been said sufficiently shows, that the interests of the corporation which he was bound reasonably to protect, and conserve, he deliberately sacrificed, or as stated in the report, he didn't care "what happened to the assets of the company." United Zinc Companies v. Harwood, supra; Allen-Foster-Willett Co., Petr., 227 Mass. 551, 116 N. E. 875; Cosmopolitan Trust Co. v. Mitchell, 242 Mass. 95, 120, 136 N. E. 408. It is contended by the defendant that the officer's return showing his action on the attachment, which included the appraisal, is conclusive, and cannot be collaterally attacked. It is true, that in the absence of fraud, an officer's return, as between the parties and their privies, is conclusive as to all matters which are properly the subject of a return by him. United Drug Co. v. Cordley & Hayes, 239 Mass. 334, 132 N. E. 56; Croker v. Baker, 18 Pick. 407, 412. But in the present case the entire proceedings were originated, and conducted by the defendant in such a manner as to cause a very substantial loss to the company whose interests as we have said he was bound reasonably to protect. The officer's return under such circumstances affords no justification for his own misconduct. It is next contended that the corporation being without a remedy, the plaintiff cannot prevail. It is settled however that on the record the corporation would have been entitled to relief. Von Arnim v. American Tube Works, 188 Mass. 515, 74 N. E. 680; United Zinc Companies v. Harwood, supra; Cosmopolitan Trust Co. v. Mitchell, supra. The trial court not only rightly declined to give the defendant's first, second, third, eighth, and ninth requests, but was justified in ordering the defendant to pay the plaintiff $5,843.21, the difference between the amount received at the sale by the officer and the value found by the master, with interest from March 30, 1921, the date of the sale. The decree must be affirmed with costs of the appeal.

Ordered accordingly.

WASHBURN v. UNION FREIGHT R. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1924.)

1. Railroads ⇐324(3)—Husband, operating automobile registered in wife's name, trespasser, not entitled to recover for negligence.

Where plaintiff's automobile was registered in the name of his wife as the owner, and accident occurred October 16, 1913, resulting in injuries to the automobile, prior to St. 1915, c. 87, plaintiff in operating the automobile was a trespasser on the highway, and was not entitled to recover for simple negligence of a railway company.

2. Railroads ⇐339(2)—Railway held not guilty of wanton conduct as to automobile driver.

Failure of railway, whose tracks were in a street, to have flagman present to warn travelers of proposed movement of cars, *held* insufficient to warrant a finding of wilful and wanton conduct, warranting recovery for injuries to an automobile not legally registered.

Report from Superior Court, Suffolk County; J. H. Sisk, Judge.

Action of tort by Gardner Washburn against the Union Freight Railroad Company to recover for damage to an automobile caused by defendant's alleged wanton or reckless conduct. On report. Judgment for defendant.

E. C. Jenney, of Boston, for plaintiff.
A. W. Blackman, of Boston, for defendant.

BRALEY, J. The evidence, viewed in its most favorable aspect to the plaintiff, would have warranted the jury in finding that, while the plaintiff's automobile, in charge of an experienced chauffeur, was passing in broad daylight through Atlantic avenue, a public way in the city of Boston, above which were the tracks of the Boston Elevated Railway Company, came to a stop because of the continuous congestion of traffic on the avenue. The defendant's railroad, used for the transportation of freight, was located on and operated within the limits of the avenue, where it allowed freight cars to be stalled with openings between them, and shortly before the collision between the plaintiff's automobile and one of the defendant's cars there was a noise caused by the cars, pushed by a dummy engine, coming together, and the chauffeur, being warned by a bystander, jumped from the car in time to avoid being injured. But the shunting or pushing of the cars suddenly set in motion one or more of the cars near the automobile, forcing it against one of the supporting columns of the tracks of the railway company, causing injuries to the automobile for which damages are sought. It was the practice or custom of the defendant, when cars were thus moved, to have a flagman a few feet in front of them to warn travelers using the street of their approach, but at the time of the accident the flagman was absent.

[1, 2] It is contended by the plaintiff that a verdict for the defendant should not have been directed. The automobile, however, was registered in the name of the plaintiff's wife as the owner, and the accident having occurred October 16, 1913, St. 1915, c. 87, does not apply. The plaintiff therefore was

operating the automobile as a trespasser on the highway. Doherty v. Ayer, 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 816, 125 Am. St. Rep. 355; Dudley v. Northampton Street Railway, 202 Mass. 443, 89 N. E. 25, 23 L. R. A. (N. S.) 561; Feeley v. Melrose, 205 Mass. 329, 333, 334, 91 N. E. 306, 27 L. R. A. (N. S.) 1156, 137 Am. St. Rep. 445; Chase v. New York Central & Hudson River Railroad, 208 Mass. 137, 94 N. E. 377. The plaintiff urges that there was evidence for the jury of recklessness and wanton conduct on the part of the defendant, which if found entitles him to recover.

"But the conduct required to be proved is something different from negligence even when the degree may be found under our law to be gross. The alleged wrongdoer acts wantonly and willfully only when he inflicts the injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist. The result is a willful, not a negligent wrong." Wentzell v. Boston Elevated Railway, 230 Mass. 275, 277, 119 N. E. 652; Freeman v. United Fruit Co., 223 Mass. 300, 111 N. E. 789.

The failure of the defendant to have the flagman present, or to warn travelers of the proposed movement of the cars, is insufficient to warrant a finding of willful and wanton conduct as just defined. The entry must be:

Judgment on the verdict for defendant.

GLOVIN v. EAGLE CLOTHING CO., Inc., et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1924.)

1. Corporations ⇐433(2)—Whether note ratified question of fact.

Whether corporation ratified note executed by its president, instead of its treasurer, *held* a question of fact, to be determined on all the evidence and the inferences to be drawn therefrom.

2. Witnesses ⇐319—Admission of impeaching evidence discretionary.

Admission of evidence introduced as affecting credibility of witness rests within the sound discretion of the presiding judge.

Exceptions from Superior Court, Suffolk County; Marcus Morton, Judge.

Action on promissory note by Abraham L. Glovin against the Eagle Clothing Company, Inc., and trustees. Verdict for plaintiff, and defendants bring exceptions. Exceptions overruled.

Lewis Goldberg, of Boston, for plaintiff.

O. Storer, of Boston, for defendants.

CROSBY, J. This is an action on a promissory note for $1,000, payable to the order of the plaintiff, and signed "Eagle Clothing Co., Inc., by David H. Davidoff, Pres." The defendant admits that it is a corporation and that Davidoff was its president in July, 1921, when the note was executed and delivered to the plaintiff. The by-laws of the corporation in part are as follows:

"Except as otherwise provided by these by-laws or by vote of the board of directors, the treasurer shall have the sole and exclusive right and power to make, sign and indorse and accept for and in the name and behalf of the corporation, promissory notes, drafts and checks, and then only in the regular course of its business."

The note in question was payable at the Commonwealth Trust Company in Boston, which company, by express vote of the directors of the defendant corporation, was authorized and instructed to honor checks drawn in the name of the defendant on the trust company bearing the signature of the president of the defendant.

There was evidence tending to show that the corporation was a close one, in which few persons were interested and most of whom were actually engaged in the management of its business. Davidoff, the president of the corporation, testified that he and Isaac Wolf, husband of Esther Wolf, the secretary and a stockholder, were the persons active in the affairs of the company, and that he (Davidoff) signed all the checks for the defendant and made the deposits in its account in the bank. He further testified that there was a conversation between those active in the conduct of the business, relative to borrowing money, as a result of which he went to New York, saw the plaintiff, borrowed $1,000 from him, and on July 15, 1921, returned to Boston; that on the same day he deposited to the defendant's account in the trust company the $1,000 so borrowed. There was also evidence that the note in question was carried on the books of the defendant as an obligation of the company under the heading "List of Loans Payable."

[1] While under the by-laws the authority to sign notes was vested exclusively in the defendant's treasurer, and no express authority was conferred on its president so to act, yet there was ample evidence to warrant a finding that the corporation, acting through its managing officers, ratified the acts of the president in securing the loan of $1,000 from the plaintiff and in executing in its name a note for that amount. A verdict could not properly have been ordered for the defendant; whether the act of Davidoff, as president, in signing the note was ratified by the corporation, was a question of fact to be determined upon all the evidence and the fair inferences to be drawn therefrom.

Nims v. Mount Hermon Boys' School, 160 Mass. 177, 182, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467; Beacon Trust Co. v. Souther, 183 Mass. 413, 417, 67 N. E. 345; North Anson Lumber Co. v. Smith, 209 Mass. 333, 338, 95 N. E. 838; Albiani v. Evening Traveler Co., 220 Mass. 21, 107 N. E. 406.

The decision in Murray v. Nelson Lumber Co., 143 Mass. 250, 9 N. E. 634, relied on by the defendant, is not at variance with the conclusion here reached. In that case the issue whether there was sufficient evidence of ratification was not considered; the only question decided being whether the instructions given by the trial judge were correct.

[2] In October, 1921, Davidoff sold his stock in the corporation to one Goldberg and thereafter ceased to be connected with the company. The defendant offered in evidence, to affect the credibility of Davidoff, copy of an agreement signed by Goldberg in which the latter was to pay four accounts therein referred to and due from the defendant; this evidence was excluded subject to the defendant's exception. Neither of the parties to this action was a party to the agreement; it related to a matter not involved in the present suit; and it is difficult to see that it had any bearing whatever upon the credibility of the witness. If this agreement, or the question put to Davidoff on cross-examination respecting Goldberg's promise to pay the four accounts referred to, might have affected the credibility of the witness, its admission was within the sound discretion of the presiding judge Jennings v. Rooney, 183 Mass. 577, 579, 67 N. E. 665; Fisher v. Ford, 232 Mass. 56, 121 N. E. 529.

Exceptions overruled.

VIAUX v. JOHN T. SCULLY FOUNDATION CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1924.)

1. Wharves ⇐9—Letter and answer held to constitute lease.

A letter, stating that addressee might occupy part of writer's wharf for the storage of sand and gravel or other building material for four months from date for a rental of $150 a month, payable in advance on the 1st day of each month, and answer thereto, accepting "the terms of the same for rental of your wharf," *held* to constitute a lease.

2. Wharves ⇐9—Tenant liable for damages to wharf, though not not predominating cause.

Under a lease of part of wharf for storage of sand and gravel, requiring damage from the occupation to be made good, it was not necessary that presence of the sand and gravel be the predominating cause of the damage; it being enough to establish liability to show that the acts of the defendant were a concurring cause.

3. Landlord and tenant ⇐37—Lease to be construed in accordance with usual meaning of language.

Letters constituting a lease and containing contract to pay damage caused by occupation are to be construed in accordance with the natural and usual meaning of the language used.

4. Wharves ⇐9—No warranty as to condition of wharf held to exist.

A lease of part of a wharf for the storage of sand and gravel or other building material, any damage to the premises arising from the occupation to be made good, *held* not to contain any warranty as to the condition of the wharf, or that it was fit for the purpose for which it was hired.

5. Landlord and tenant ⇐49(2)—Requested ruling held not applicable to facts in action for damages.

In an action on a written lease to recover damages arising out of the occupation by the defendant of the leased premises, under a clause requiring defendant to make good any damage from occupancy, court properly refused to rule that the jury could only find for the plaintiff in case of voluntary waste and that the defendant was not liable for permissive waste; such ruling being inapplicable.

6. Trial ⇐259(1)—Request to comment on testimony of witnesses must be in writing.

Exception to refusal of court to comment on testimony of witnesses after the charge will be overruled, where the request was not in writing, and was not presented before the arguments, as required by rule 44 of the superior court.

7. Trial ⇐349(2)—Framing special question for jury within discretion of court.

Whether special questions are to be submitted to a jury is wholly within the discretion of the court.

8. Trial ⇐145—Court rightly directed verdict for plaintiff as to one count, on undisputed evidence.

In action for rent and for damage to premises from occupancy, where it was undisputed that defendant entered into the agreement and had not paid any rent as required by its terms, and no legal defense was shown to the claim therefor, court rightly directed a verdict for the plaintiff on the count for rent.

9. Wharves ⇐9—Promise to pay rent for part of wharf not abated by injury to wharf.

If a wharf, by reason of fall of retaining wall, could no longer be used by lessee for the purpose of storage for which it was hired, lessee was not relieved from liability to pay rent, there being no implied covenant of warranty that the premises were fit for any particular use.

10. Trial ⇐252(1)—Instruction as to matter without evidence in support properly refused.

Court properly refused requests to rule as to a matter which there was no evidence to support.

Exceptions from Superior Court, Suffolk County; J. F. Quinn, Judge.

Action of contract by Frederic H. Viaux against the John T. Scully Foundation Company to recover under first count for rent and under third count damages arising out of occupation of premises. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

E. K. Arnold and A. B. Carey, both of Boston, for plaintiff.

J. H. Hurley and W. J. Drew, both of Boston, for defendant.

CROSBY, J. This is an action of contract, to recover under the first count of the declaration for rent of premises in the city of Cambridge, alleged to have been leased to the defendant, and under the third count for damages claimed to have arisen from the occupation of the premises so leased. The second count was waived. The trial judge directed a verdict for the plaintiff on the first count; the third was submitted to the jury, which returned a verdict for the plaintiff.

The rights and obligations of the parties arise from two letters. The first, dated May 1, 1917, is from the plaintiff to the defendant, and so far as pertinent to the issues involved is as follows:

"You may occupy for the storage of sand and gravel or other building material that part of my wharf on Commercial avenue, fronting on the Charles river and extending 100 feet back from the sea wall, for the period of four months from this date to September 1st next for a rental of $150 per month payable in advance on the 1st day of each month beginning May 1, 1917. Any damage to the premises arising from your occupation is to be made good by your company."

By letter dated May 5, 1917, the defendant answered:

"Replying to your letter of the 1st inst. would say that we accept the terms of the same for rental of your wharf."

The record shows that the defendant had occupied the wharf under a similar agreement for the four months next prior to May 1, 1917, and continued to occupy it until May 11, 1917, for the storage of sand and gravel; on that date a portion of the front wall of the wharf gave way and bulged outward, causing the damage for which the plaintiff seeks under the third count to recover by virtue of the agreement. The defendant's exceptions relate to the admission and exclusion of evidence, to the refusal of the court to give certain rulings, and to certain parts of the charge.

[1] The letter from the plaintiff to the defendant and the reply of the latter purport to be a contract under which the premises are to be occupied; the rights and relations of the parties are defined in the letters, which contain apt words to operate as a present demise, and are to be so construed; accordingly the exception to the ruling that the letter and acceptance constitute a lease cannot be sustained. McGrath v. Boston, 103 Mass. 369; Shaw v. Farnsworth, 108 Mass. 357; Duncklee v. Webber, 151 Mass. 408, 24 N. E. 1082.

It is the contention of the plaintiff that, owing to the depositing by the defendant of large quantities of sand and gravel on the wharf, the retaining wall was pushed outward, causing the injury complained of, and that the damage arose out of the occupation of the premises within the meaning of the terms of the agreement.

The defendant contends that owing to dredging in connection with the construction of the Charles River Basin, the action of the currents of the stream, the condition of the piles, the age of the wharf, the percolation of waters into and under it, and other causes independent of occupation by the defendant, the wall fell. The question whether the fall of the wall was due wholly or in part to acts of the defendant in depositing sand or gravel on the wharf, or was wholly the result of other causes over which the defendant had no control, was submitted to the jury under full and appropriate instructions. The court ruled that the presence of sand and gravel need not have been the sole cause of the damage, but that if the weight of the material caused it wholly or in part that the defendant would be liable.

[2] The defendant's request for a ruling that the defendant would not be so liable, unless the presence of the sand and gravel was the predominating cause of the damage, could not properly have been given. It was enough to establish liability to show that the acts of the defendant were a concurring cause to the fall of the wall, and the judge so instructed the jury. The contract governs and the rights of the parties are to be determined thereby. As was said in Travelers' Insurance Co. v. Melick, 65 Fed. 178, at page 184, 12 C. C. A. 544, at page 551 (27 L. R. A. 629):

"It must be borne in mind that the doctrine of proximate cause has a different relation to an action for negligence from that which it bears to a contract to indemnify for the result of a given cause. In the former it measures the liability, while in the latter the contract fixes the extent of the liability."

See Lothrop v. Thayer, 138 Mass. 466, 475, 52 Am. Rep. 286.

[3] The rights of the plaintiff and the obligations of the defendant arise under a contract, and do not involve negligence of the defendant, or good or bad faith on its part. The contract is to be construed in accordance with the natural and usual meaning of

the language used. If the weight of the material placed upon the wharf was a concurring cause to the fall of the wall, it is clear that there was a causal connection between the act of the defendant and the pushing out of the wall. McNicol's Case, 215 Mass. 497, 102 N. E. 697, 46 L. R. A. (N. S.) 547. It cannot properly be held that the defendant would be exempt from liability unless the sole or predominant cause of the fall of the wharf was due to the occupation of the defendant; so to hold would be contrary to the language of the contract.

[4] There was no warranty as to the condition of the wharf or that it was fit for the purpose for which it was hired, accordingly the defendant's tenth and fourteenth requests were rightly refused, and the exception to this part of the charge must be overruled. Dutton v. Gerrish, 9 Cush. 89, 55 Am. Dec. 45; Taylor v. Finnigan, 189 Mass. 568, 76 N. E. 203, 2 L. R. A. (N. S.) 973; Barnett v. Clark, 225 Mass. 185, 114 N. E. 317.

[5] The fifteenth request, that "the jury can only find for the plaintiff by showing that the defendant had committed voluntary waste; that the defendant is not liable for permissive waste"—was inapplicable to the facts; no question of waste is involved in the present action which is brought upon a written lease to recover damages arising out of the occupation by the defendant of the leased premises. The rights of the parties are to be determined by the proper construction of the language which they saw fit to adopt. Lothrop v. Thayer, supra. The decision in Means v. Cotton, 225 Mass. 313, 114 N. E. 361, is not relevant to the facts in the case at bar. This request was rightly denied.

[6] The exception to the refusal of the court to comment on the testimony of the witnesses White and Adams after the charge must be overruled. It is enough to say that the request was not in writing, and was not presented before the arguments, as required by rule 44 of the superior court; beside it was objectionable upon other grounds. Commonwealth v. Hassan, 235 Mass. 26, 126 N. E. 287.

The exception to the refusal of the court to instruct the jury as to the meaning of the words "usual provisions of tenancy are to prevail" is unsustainable. This request was not made in compliance with rule 44 of the superior court and apart from that objection these words of the lease have no bearing upon the issues involved.

[7] The exception to the refusal of the court to frame a special question for the jury is without merit. It is well settled that whether such questions are to be submitted to a jury is wholly within the discretion of the court. Boston Dairy Co. v. Mulliken, 175 Mass. 447, 56 N. E. 711; Hill v. Hayes, 199 Mass. 411, 85 N. E. 434, 18 L. R. A. (N. S.) 875.

[8] It being undisputed that the defendant entered into the agreement and has not paid any rent as required by its terms, and as no legal defense was shown to the claim therefor, the court rightly directed a verdict for the plaintiff on the first count. Campbell v. Whoriskey, 170 Mass. 63, 48 N. E. 1070; Gaston v. Gordon, 208 Mass. 265, 270, 94 N. E. 307; McIntire v. Conlan, 223 Mass. 389, 390, 111 N. E. 852; Zielmann v. Copelof, 232 Mass. 393, 396, 122 N. E. 552.

[9] If the wharf by reason of the fall of the retaining wall could no longer be used by the defendant for the purpose for which it was hired, the defendant was not relieved from liability to pay rent. There was no implied covenant of warranty that the premises were fit for any particular use. Barnett v. Clark, supra; and the defendant's promise to pay rent is not abated or suspended by the injury to the wharf in the absence of an agreement to that effect. Therefore the defendant's fourth request was rightly denied. Kramer v. Cook, 7 Gray, 550, 553; Roberts v. Lynn Ice Co., 187 Mass. 402, 73 N. E. 523.

[10] The fifth request could not properly have been given as there was no evidence which would have warranted a finding that there was an eviction. Taylor v. Finnigan, supra, 189 Mass. at page 573, 76 N. E. 203, 2 L. R. A. (N. S.) 973.

It is apparent from what has been said that there was no error in the refusal of the court to give any of the defendant's requests for rulings, or in the instructions to the jury.

We have carefully examined all the exceptions to the admission and exclusion of evidence; it would not seem necessary that they be considered in detail; it is apparent that none of them can be sustained.

The trial judge accurately ruled upon all questions which arose respecting the evidence presented, and fairly, fully and correctly instructed the jury upon all the material issues.

As no error of law appears, the entry must be:

Exceptions overruled.

BARTNETT v. HANDY et al.*

(Supreme Judicial Court of Massachusetts. Hampden. Jan. 5, 1923.)

1. **Appeal and error ⟸842(7)—Appeal from judgment on finding held to raise no question of law.**

An appeal in an action at law, from a judgment based on a finding of the judge, sitting without a jury, *held* to present no question of law.

2. **Fraud ⟸20—Reliance on misrepresentations essential.**

Where plaintiff, at the time he sold corporate stock to the president and general manager of the corporation, was conversant with its affairs and did not believe statements made by the president about the stock being void, or about the bad financial condition of the company, but knowing all the facts made the best deal he could, there could be no recovery based on misrepresentations.

3. **Corporations ⟸133—No recovery for refusal to transfer stock when injunction in force restraining transfer.**

There could be no recovery against a corporation or its president, treasurer, and general manager for refusal to transfer stock where, at the time, an injunction was in force restraining the transfer of any stock standing in the name of plaintiff's assignor.

Appeal from Superior Court, Hampden County; George A. Sanderson, Judge.

Action by Walter J. Bartnett against Herbert L. Handy and another, for damages for refusal to transfer stock, and for misrepresentations and other wrongful acts inducing the sale of the stock to the defendant named at less than its value. From a judgment for defendants, plaintiff appeals. Affirmed.

The case was heard with several others by an auditor, who found that there was an injunction restraining the transfer of the stock, and that plaintiff was conversant with the affairs of the company, and did not believe and was not misled and did not rely on the defendant Handy's misrepresentations, but was well conversant with the entire situation and, knowing all the facts, made the best deal he could. The evidence, if any, other than the auditor's report, was not in the record.

Ernest W. Carman, of Springfield, for appellant.

Ely & Ely, of Springfield, for appellees.

DE COURCY, J. [1] This appeal from a judgment for the defendant, based upon a finding of a judge sitting without a jury, presents no question of law. De Propper, Petitioner, 236 Mass. 500, and cases cited at page 501, 128 N. E. 785, 786. The parties, however, have argued the case as if the record presented exceptions to a ruling by the judge solely upon the findings in the auditor's report treated as agreed facts. Manning v. Woodlawn Cemetery Corp., 239 Mass. 5, 9, 131 N. E. 287. Even if the record be so treated, the judgment must be affirmed.

In October, 1915, the plaintiff received from W. H. Miner a certificate for 250 shares of the W. H. Miner Chocolate Company. The certificate stood in Miner's name and was duly indorsed by him. Bartnett attempted to have a new certificate issued in his own name, but the defendants refused to transfer the stock, stating that there was an overissue. The stock was sold by the plaintiff to the defendant Handy in August, 1918, for $22.50 per share. The following March this action of tort was brought to recover for the loss sustained by selling this stock below its market value; the plaintiff basing his claim upon the refusal of the defendants to transfer the stock, and also upon alleged misrepresentations made to him by Handy with reference to the overissue of stock and the financial condition of the corporation. The trial court found for the defendants. The only question raised by the plaintiff's appeal is whether the judgment entered thereon is warranted in any view of the evidence.

[2] The auditor found that at the conference between the parties on July 6, 1918, Handy, who then was president, treasurer and general manager of the W. H. Miner Chocolate Company, told the plaintiff that the stock was overissued, that the company was heavily indebted to him, and that the stock was of little value. At a conference held in August he refused to give the plaintiff a financial statement; and although he had complete knowledge of the affairs of the company, he did not give the plaintiff the information to which he was entitled as a shareholder. But the difficulty with the plaintiff's case is that he was not misled by the misrepresentations and concealments of Handy. The auditor expressly finds:

"Mr. Bartnett acted as the attorney of Mr. Miner and confidential advisor throughout Mr. Miner's relations with the Miner Chocolate Company. He had been conversant with the affairs of the company since it started. He did not believe the statements which Mr. Handy made about the stock being void or being overissued and he did not believe the statements which Mr. Handy made, whatever they may have been, that the company was in a bad financial way. He was not misled by the statements of Mr. Handy nor did he rely on them * * * I find that Mr. Bartnett was well conversant with the entire situation, and knowing all the facts, except as I have stated, made the best deal he could with Mr. Handy."

*REPORTER'S NOTE.—This case as originally filed was published in 137 N. E. 65L. Since this filing and publication, changes in the language of the opinion have been made by the judge, which make it necessary in the interest of our subscribers, to reprint the case here.

These findings dispose of any claim based upon misrepresentations. Lilienthal v. Suffolk Brewing Co., 154 Mass. 185, 28 N. E. 151, 12 L. R. A. 821, 26 Am. St. Rep. 234; Harvey v. Squire, 217 Mass. 411, 105 N. E. 355.

[3] It is a sufficient answer to the action for failure to reissue the 250 shares in the name of the plaintiff, that an injunction had been issued in December, 1917, in a suit in equity brought by Handy against Miner and others, restraining said chocolate company from transferring stock which stood in the name of William H. Miner; which injunction had not been dissolved even at the time of the hearing before the auditor. It was open to the plaintiff to apply for a modification of that restraining order, and, if successful, to then pursue such further remedies as might be appropriate. The judgment in favor of both defendants was warranted by the evidence, and must be affirmed.

So ordered.

DOWNEY v. LEVENSON.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 8, 1924.)

1. Evidence ⇐400(2)—Oral statements merged in written contract.

Previous talk between parties to contract of sale of real estate was merged in the written contract as finally executed.

2. Vendor and purchaser ⇐143—Assignee of contract to sell real estate entitled to maintain action to recover payment made.

That purchaser of land under contract examined the title before executing the agreement, and had possession of and examined a lease before the contract was entered into, does not preclude his assignee from maintaining action to recover payment made because of a defect in the title consisting of renewal privilege in lease.

3. Evidence ⇐433(1), 467—Parol evidence admissible to establish waiver or mistake.

Parol evidence is admissible to establish waiver or mistake.

4. Vendor and purchaser ⇐134(1), 334(5)—Assignee of purchaser could rescind because of renewal clause in lease.

Assignee of purchaser of real estate under contract had right to rely on a recital that a lease expired on a certain date, and a privilege in the lease of a year's extension was an additional incumbrance, which could have been found to affect the value of the estate, and warranted his recovery of deposit, though the assignor knew before the agreement was executed of the additional incumbrance.

5. Evidence ⇐413—Evidence of knowledge of assignor inadmissible against assignee, as varying terms of written instrument.

Evidence that purchaser of real estate under contract knew that a lease contained privilege of extension was not admissible against an assignee of the purchaser, when contract recited that the lease would expire on a certain date, as its effect would be to vary and control the terms of the written instrument.

6. Vendor and purchaser ⇐143—Knowledge of incumbrance does not affect right to conveyance in accordance with agreement.

If one enters into a written agreement for the purchase of real estate free from incumbrances, and knows before he makes the agreement that the estate is subject to a mortgage, lease, attachment, or other incumbrance, such knowledge does not affect his right to a conveyance in accordance with the agreement, as the seller may cause the incumbrance to be removed.

7. Trial ⇐382—Court cannot rule against recovery, where evidence conflicting.

Where the evidence was conflicting, the judge could not properly rule that plaintiff was not entitled to recovery.

8. Trial ⇐386(4)—Rulings assuming facts contrary to findings rightly denied.

Requests for rulings assuming facts contrary to findings of the judge were properly refused.

Appeal from Municipal Court of Boston, Appellate Division.

Action of contract in the municipal court of Boston by Stanley W. C. Downey against Henry H. Levenson, to recover money paid under written contract for the purchase and sale of real estate. There was a finding for plaintiff, the appellate division dismissed a report, and defendant appeals. Order dismissing report affirmed.

J. J. Kaplan, of Boston, for appellant.
S. Sigilman, of Boston, for appellee.

CROSBY, J. This is an action by the vendee, under a written contract for the purchase and sale of real estate, to recover $2,000 paid as a deposit, on the ground that the vendor was unable to give a good title in accordance with the terms of the agreement. The record shows that the action was tried twice in the municipal court of the city of Boston. At the first trial there was a finding for the defendant. Upon report the appellate division ordered a new trial, and the defendant appealed. At the second trial before another judge of the court, he filed a report and found for the plaintiff. Thereafter the appellate division dismissed the report and the defendant appealed. The questions before us are (1) whether the appellate division rightly ordered a new trial after a finding for the defendant at the first trial, and (2) whether there was any error at the second trial.

Under the agreement one Seligman was named as the purchaser; he afterwards assigned his interest therein to the plaintiff. The contract, dated June 29, 1920, provided among other things that the conveyance of

the real estate was to be made on or before September 1, 1920," subject among other incumbrances to a lease to H. B. Hood Company of a store on the premises "which lease expires January 1, 1921." The agreement further provided that—

"If the party of the first part shall be unable to give title or to make conveyance as above stipulated, any payments made under this agreement shall be refunded, and all other obligations of either party hereunto shall cease, but the acceptance of a deed and possession by the party of the second part shall be deemed to be a full performance and discharge hereof."

The deposit having been made as stipulated the plaintiff declined to accept a deed of the property, and brought this action to recover the deposit because the term of the lease above referred to contained a privilege for the extension thereof of one more year; it was not claimed that there was any defect in the title other than the renewal privilege in the lease above referred to.

[1, 2] At the first trial the judge made the following finding:

"I find as a fact that the lease herein referred to expired January 1, 1921, but contained the privilege of extension of one year at the same rate; and that this lease was exhibited by the defendant to the plaintiff's assignor prior to the execution of the agreement for the sale of the property upon an alleged breach on which the present suit is based."

The judge gave the plaintiff's first request, which was in effect that the words in the agreement import "plainly and unambiguously that the term of the lease to H. B. Hood Company did not extend beyond and after January 1, 1921." The plaintiff's other requests were denied. Any previous talk between the parties was merged in the written contract as finally executed, and the finding of fact above recited makes it plain that there was a breach of it on the part of the defendant. The circumstances that Seligman, the plaintiff's assignor, examined the title before executing the agreement, and that he had possession of and examined the lease before the contract was entered into do not preclude the plaintiff from maintaining this action.

The plaintiff's fourth request for a ruling that "under the terms of said agreement and the assignment thereof to the plaintiff, the plaintiff was not bound to accept a deed of the premises therein described if the term of said lease extended or might extend beyond and after January 1, 1921," should have been given.

[3, 4] It cannot be doubted that parol evidence is admissible to establish waiver or mistake, Leathe v. Bullard, 8 Gray, 545; but there was no evidence before the trial judge sufficient to warrant a finding that the plaintiff or his assignor waived the provision in question in the Hood lease, or that there was any mutual mistake with reference thereto. The recital in the agreement that the lease was to expire January 1, 1921, is explicit and free from ambiguity, and the judge so ruled; it cannot be construed as referring to the original term alone. The plaintiff had a right to rely on the recital that it was for one year only; and, as the lessee had the privilege of its extension for another year, it was an additional incumbrance on the property and could have been found to affect the value of the estate although the tenant might not exercise its option.

[5] The fact that the lease was shown to the plaintiff's assignor by the defendant prior to the execution of the agreement could not properly have been found to be a waiver of the plaintiff's rights under the agreement. Jarvis v. Buttrick, 1 Metc. 480. The plaintiff had a right to rely upon the terms of the agreement which could not be varied or controlled by parol evidence. The circumstance that the plaintiff's assignor knew before the agreement was executed of the additional incumbrance, due to the fact that the lessee had the privilege of an extension, by itself did not authorize the admission of evidence of such knowledge, as its effect would be to vary and control the terms of the written instrument. Spurr v. Andrew, 6 Allen, 420, 422; Flynn v. Bourneuf, 143 Mass. 277, 9 N. E. 650, 58 Am. Rep. 135.

[6] If one enters into a written agreement for the purchase of real estate from another, free from incumbrances, and knows before he makes the agreement that the estate is subject to a mortgage, lease, attachment or other incumbrance, such knowledge does not affect his right to a conveyance in accordance with the agreement as the seller may cause the incumbrance to be removed before the time expires for the carrying out of the contract.

The case of Marcus v. Clark, 185 Mass. 409, 70 N. E. 433, cited by the defendant, is distinguishable in its facts from those in the case at bar. In that case it appeared that the plaintiff not only knew of the incumbrances when the contract was made, but was satisfied to take a conveyance subject to them, and expected to do so, and did not raise any objection thereto until the time for performance had expired, and was unable to pay the purchase price at the time agreed upon; in these circumstances it was held that the plaintiff's right to rely on the existence of the incumbrances as a breach of the contract could be found to have been waived. The decision in Brewer v. Winchester, 2 Allen, 389, has no application to the facts in the present case.

There was no evidence which would have warranted a finding that there was a mutual mistake of the parties. The judge found, and the defendant contends, that the plaintiff's assignor knew of the provisions of the

lease, and there is nothing to show that the agreement was not drawn in the form meant by the parties or that it was intended that the incumbrance of the lease was not to be limited to its original term. It follows that the decision in Goode v. Riley, 153 Mass. 585, 28 N. E. 228, is inapplicable to the evidence in the case at bar. The incumbrance of the privilege for an extension of the lease was as matter of law sufficient to entitle the plaintiff to refuse performance. Upon the subsidiary findings and rulings of the judge at the first trial the plaintiff was entitled to recover.

The action of the appellate division in ordering a new trial was not error, and the defendant's motion that the court direct a finding in his favor could not properly have been allowed.

We now proceed to consider whether there was any error at the second trial. At that trial certain requests for rulings presented by the defendant were denied and a finding was made for the plaintiff. The judge also made the following finding of fact:

"I find that neither the plaintiff nor his assignor knew of the option to extend the lease another year till after the execution of the agreement for sale; that the plaintiff was ready, able and willing to perform his part of the contract on September 1, and that the defendant through his attorney, Michelman, before and on said first day of September and thereafter refused to give a deed as called for in the agreement, thereby relieving the plaintiff from any obligation to make a technical tender of money. I also find that there was no 'mistake' on the part of either party to the agreement."

[7, 8] The defendant's first request that on the evidence the plaintiff was not entitled to recover was rightly denied. The evidence was conflicting and the judge could not properly rule as requested. The second, and ninth requests were properly refused as they were erroneous in law. The third, fourth, fifth, sixth, seventh and eighth were rightly denied as the findings of the judge are contrary to the facts assumed in the requests.

As no error of law appears, the final order dismissing the report must be affirmed.

So ordered.

FORMAN et al. v. GADOUAS et al.

(Supreme Judicial Court of Massachusetts. Bristol. Jan. 3, 1924.)

1. Appeal and error ⇐996—Review of findings which are merely inferences from master's report.

Findings which are merely inferences drawn from master's report, unaccompanied by evidence, do not stand on the same footing, as findings made by a judge based on the hearing of oral testimony, which are not reversed unless plainly wrong, and the court, on appeal, considers and decides the case on the facts in the master's report without regard to inferences drawn by the judge.

2. Specific performance ⇐8, 16, 53—Matter addressed to sound discretion of court; not granted if result oppressive; unjust conduct of plaintiff bars relief.

Specific performance is not a matter of strict and absolute right, but is a matter in the sound discretion of the court and will not be granted if the result would be oppressive or unfair, even though there is no sufficient ground for rescission, or if the plaintiff has been guilty of conduct savored with injustice touching the transaction.

3. Specific performance ⇐16—Inference that enforcement would work unusual hardship held not warranted.

Facts found by master in action for specific performance *held* not to warrant an inference that it would work unusual hardship to order specific performance.

4. Specific performance ⇐64 — Fair agreements ordinarily enforced.

Commonly specific performance of ordinary fair agreements between competent parties to convey land is required by chancery courts in the absence of special circumstances rendering it inequitable.

5. Frauds, statute of ⇐118(1)—Two papers held memorandum of sale of land sufficient to satisfy statute.

Two papers, one a memorandum "Sold the property to M., 583 South Main St. & 18 cottage purchase price $24,000.00, $11,500 first mortgage and the balance to be paid $4,000 in cash, $8,500 to be paid on installment to bring the amount $24,000. Interest on balance at 6 per cent. clear of all incumbrances. The installments $50.00 per month," and a paper "Received $100 deposit on the sale within 30 days," constituted a memorandum sufficient to satisfy G. L. c. 259, §§ 1, 2.

6. Frauds, statute of ⇐118(2)—Two papers signed by party to be charged to be read together to ascertain sufficiency under statute.

Two papers signed by party sought to be charged are to be read and treated together in order to ascertain the true nature and legal sufficiency of the memorandum for sale of land under G. L. c. 259, §§ 1, 2.

7. Frauds, statute of ⇐115(4) — Sufficient that memorandum signed by party to be charged and set forth his obligations.

Under G. L., c. 259, §§ 1, 2, memorandum for sale of land need only be signed by the party to be charged, and set forth the stipulations to be performed by him, the other party having accepted the terms of the agreement.

8. Frauds, statute of ⇐103(2)—Acceptance of terms of written agreement signed by one party manifested by suit for specific performance.

Under G. L. c. 259, §§ 1, 2, acceptance of terms of agreement by party seeking to enforce agreement to sell land, signed only by

the other party, is sufficiently manifest from bringing of action for specific performance.

9. Frauds, statute of ⊂=108(4) — Plaintiff's agreements constituting consideration need not be stated in writing.

Omission from memorandum of sale of land of agreement that payment of balance of purchase price was to be secured by a mortgage given by the plaintiffs does not prevent plaintiffs from obtaining specific performance, as the consideration may be shown by parol.

10. Specific performance ⊂=32(3)—Mutuality of obligation as essential to enforcement of contract.

The general principle that equity refuses specific performance where there is no mutuality of obligation is not applicable to contracts unenforceable against plaintiff under the statute of frauds where defendant has bound himself by a sufficient memorandum; the bringing of the suit by the plaintiff being proof of his assent to the agreement and establishing mutuality.

11. Specific performance ⊂=20—Right to require trustee to convey property under agreement with beneficiary.

Where cestui que trust under a trust deed had absolute and unqualified right to require the trustee to convey the property to her nominee, free from all trusts, and to pay to her the proceeds, a bill was maintainable against both the trustee and the cestui que trust for specific performance of an agreement to sell by the cestui que trust alone.

Appeal from Superior Court, Bristol County; Hugo A. Dubuque, Judge.

Suit in equity by Moses Forman and another against Ida Gadouas and another, to compel specific performance of an agreement for the conveyance of land. From a decree dismissing the bill, plaintiffs appeal. Reversed, with directions to enter decree ordering conveyance.

N. Yamins, B. Cook, Jr., and C. P. Ryan, all of Fall River, for appellants.

D. R. Radovsky and H. W. Radovsky, both of Fall River, for appellees.

RUGG, C. J. This is a suit in equity to compel the specific performance of an agreement for the conveyance of land. The case was referred to a master, upon whose report it was heard and decided by a judge of the superior court. A decree was entered confirming the master's report and dismissing the bill. The plaintiff's appeal brings the case here.

The master found that the defendant Gadouas had said to a broker named Markell that her property was for sale for the sum of $24,000, without any commission or brokerage to be paid by her, or for $24,500, should she have to pay the broker's commission. Markell accordingly requested the plaintiffs to look at the property of the defendant, which they did and notified him that they desired to purchase it. Markell then again saw Mrs. Gadouas and said to her that the plaintiffs were desirous of purchasing the property for $24,000, of which the sum of $11,500, the amount of an existing first mortgage to a savings bank, was to be assumed by the plaintiffs, and they were to pay $4,000 in cash and give her a second mortgage for the balance of the purchase price, $8,500, to be paid by installments of $50 monthly, and with interest on the principal at six (6) per cent. per annum. Mrs. Gadouas verbally accepted the offer and requested Markell to notify the plaintiffs to call early on the following morning.

The two plaintiffs accordingly went to the house of the defendant Gadouas on November 18, 1919, and she then and there signed a paper of the following tenor:

"Sold the property to Morris & Henry J. Forman 583 So. Main St. & 18 cottage purchase price $24,000.00 $11,500 first mortgage and the balance to be paid $4,000.00 in cash $8,500 to be paid on installment to bring the amount $24,000. Interest on balance at 6 per cent. clear of all incumbrances. The installments $50.00 per month."

At the same time one hundred dollars in money was paid to her by the plaintiffs and she signed this:

"Received $100 deposit on the sale within 30 days."

The title to the real estate stood in the name of the other defendant, Arthur F. Janson, the brother of Mrs. Gadouas, as trustee for her on the trust (amongst others not material to the issues here raised) at her request to sell and convey the same free from the trust and to pay the proceeds to her. The defendant Janson did not sign the agreement, disapproved of the sale as soon as he learned of the agreement, and was unwilling to join in the conveyance. He returned the one hundred dollars to the plaintiffs in the latter part of December, 1919, which they sent back.

The plaintiffs on the 18th of November and for thirty days or more thereafter were able to obtain the necessary amount of cash and otherwise were ready, willing and able to fulfill the terms of the purchase set out in the memorandum and in the oral agreement by giving a mortgage to secure $8,500 part of the purchase price. The defendants have refused to make conveyance of the land to the plaintiffs.

The judge states in his "Findings and Decision" that—

"There is no special equity which requires the performance of the contract; on the other hand I find that it would be unreasonable and oppressive for the defendant to be compelled to part with her home and only means of income under a contract improvidently, un-

conscionably and hastily made, when she, a married woman living apart from her husband, acted without independent advice. She repudiated the transaction and offered to return the deposit as soon as she realized the effect of the same. I find that the plaintiffs only sought to buy this piece of valuable property, which admittedly has great prospective value, for an inadequate consideration, taking undue advantage of the defendant for speculative purposes only."

[1] These findings were merely inferences drawn from the master's report. No evidence accompanied the report. Such findings do not stand on the same footing as do findings made by a judge based on the hearing of oral testimony which are not reversed unless plainly wrong. Lindsey v. Bird, 193 Mass. 200, 79 N. E. 263; Martell v. Dorey, 235 Mass. 35, 40, 126 N. E. 354; Cook v. Mosher, 243 Mass. 149, 153, 137 N. E. 299. Where the facts are in a master's report, this court on appeal considers and decides the case on these facts (which commonly must be accepted as true) and their proper inferences without regard to the inferences drawn by the judge. Glover v. Waltham Laundry Co., 235 Mass. 330, 334, 127 N. E. 420, and cases there collected; Curran v. Magee, 244 Mass. 1, 5, 138 N. E. 1.

The facts found by the master do not warrant the inferences that it would be "unreasonable and oppressive" to require the defendant Gadouas to carry out the contract, that the property has great prospective value, that the consideration to be paid was inadequate, or that undue advantage was taken of the defendant Gadouas by the plaintiffs. Those matters were put in issue by the defendants' answer. The master failed to find that any one of these averments was a fact. It is found that the brother of the defendant Gadouas disapproved the sale on several grounds as soon as he was informed of it. The master does not find that those grounds were sound in truth. For aught that appears in the master's report, the price may represent the full value of the property; the defendant Gadouas, who was fifty-one years of age, may be a competent business woman quite able to care for her own interests; she may not have been overreached in any particular or to any degree, and the bargain may have been a fair one and the property may have no speculative or prospectively increasing value.

[2, 3] Specific performance is not a matter of strict and absolute right. A petition therefor is addressed to the sound discretion of the court. It will not be granted if the result would be oppressive or unfair even though there is no sufficient ground for rescission of the agreement or if the plaintiff has been guilty of conduct savored with injustice touching the transaction. Banaghan v. Malaney, 200 Mass. 46, 85 N. E. 839, 19 L. R. A. (N. S.) 871, 128 Am. St. Rep. 378; Richardson Shoe Machinery Co. v. Essex Machine Co., 207 Mass. 219, 225, 93 N. E. 650; People's Express, Inc., v. Quinn, 235 Mass. 156, 126 N. E. 423. The case at bar is plainly distinguishable from cases of that kind. No facts are set forth in the master's report which warrant the inference that it would work unusual hardship to order specific performance of the contract. Nickerson v. Bridges, 216 Mass. 416, 103 N. E. 939.

[4] The master's report is utterly lacking in any findings of fact or statements of evidence which warrant an inference that on general equitable principles specific performance ought not to be decreed. In this aspect the case at bar is the ordinary one of a fair agreement between competent parties to convey land. Commonly specific performance of such agreements is required by chancery courts in the absence of special circumstances rendering it inequitable. Staples v. Mullen, 196 Mass. 132, 81 N. E. 877; Noyes v. Bragg, 220 Mass. 106, 109, 107 N. E. 669; Morse v. Strober, 233 Mass. 223, 123 N. E. 780; Dennett v. Norwood Housing Association, Inc., 241 Mass. 516, 135 N. E. 866.

[5] The papers signed by the defendant Mrs. Gadouas and already quoted constituted a memorandum sufficient to satisfy the statute of frauds. It is provided by G. L. c. 259, § 1, that—

"No action shall be brought * * * Fourth, upon a contract for the sale of lands. * * * Unless the * * * contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith. * * *"

Manifestly the paper signed by the defendant Mrs. Gadouas was not a full contract or agreement. Therefore the principles of law relative to the construction and variations of such instruments have no relevancy to the case at bar. The paper signed by the defendant Mrs. Gadouas, who is the party to be charged, was a memorandum of the agreement and is to be governed by the principles applicable thereto under the statute of frauds. It further is provided by G. L. c. 259, § 2, that—

"The consideration of such * * * contract or agreement need not be set forth or expressed in the writing signed by the party to be charged therewith, but may be proved by any legal evidence."

[6] The two papers hitherto quoted and signed by the defendant Gadouas are to be read and treated together in order to ascertain the true nature and legal sufficiency of the memorandum. Nickerson v. Weld, 204 Mass. 346, 354–357, 90 N. E. 589; Harvey v. Bross, 216 Mass. 57, 104 N. E. 350; Schmoll Fils & Co., Inc., v. Wheeler, 242 Mass. 464, 469, 136 N. E. 164.

[7, 8] The two papers signed by the de-

fendant Mrs. Gadouas set forth with accuracy every obligation to be performed by her. Confessedly the description of the land to be conveyed was sufficient. The quality of the title was specified. The time of performance was stated. The price was set forth with details as to cash and first mortgage and as to the balance in respect to its amount, times of payment and interest. The only element omitted was that the payment of that balance was to be secured by a second mortgage to be given by the plaintiffs. That, however, was to be executed by the plaintiffs, who are seeking to compel the defendant Mrs. Gadouas to perform her part of the agreement and who are willing to perform every obligation resting on them. It is not essential that the memorandum be signed by both parties to the agreement but only by the party to be charged. It is enough if a sufficient memorandum is signed by the party to be charged setting forth all stipulations to be performed by him, and that the other party has assented to or accepted the terms of the agreement. That he has thus accepted and assented is sufficiently manifest from bringing his action. Dresel v. Jordan, 104 Mass. 407, 412.

[9] The omission from the memorandum signed by the defendant Mrs. Gadouas of the part of the agreement that payment of the balance of the purchase price was to be secured by a mortgage given by the plaintiffs does not prevent the plaintiffs from obtaining, nor shield the defendant Mrs. Gadouas from making, specific performance of the contract. The giving of that mortgage security was a part of the consideration to be paid by the plaintiffs and may be shown by parol in a suit against the defendant Mrs. Gadouas. The case upon this point is governed by numerous authorities from which in principle it is indistinguishable. Packard v. Richardson, 17 Mass. 122, 9 Am. Dec. 123; Hayes v. Jackson, 159 Mass. 451, 34 N. E. 683; White v. Dahlquist, 179 Mass. 427, 60 N. E. 791; Desmarais v. Taft, 210 Mass. 560, 97 N. E. 96. It is precisely within the authority of Park v. Johnson, 4 Allen, 259.

There is nothing inconsistent with this conclusion in Bogigian v. Booklovers' Library, 193 Mass. 444, 79 N. E. 769, or in Pearlstein v. Novitch, 239 Mass. 228, 131 N. E. 853. In the former of these two cases the attempt was to secure performance by the defendant of an active obligation not stated in the memorandum, and in the latter the attempt was to vary the terms of a formal contract signed by both parties. The authority of Grace v. Dennison, 114 Mass. 16, on this point was greatly shaken if not overruled by Hayes v. Jackson, 159 Mass. 451, 453. In Morton v. Deane, 13 Metc. 385, and Riley v. Farnsworth, 116 Mass. 223, essential terms of the sale apart from the consideration were omitted. In Elliot v. Barrett, 144 Mass. 256, 10 N. E. 820, there was no sufficient memorandum for at least two independent reasons. Other cases relied on by the defendant Mrs. Gadouas, Howe v. Walker, 4 Gray, 318, Ashcroft v. Butterworth, 136 Mass. 511, and White v. Bigelow, 154 Mass. 593, 28 N. E. 904, are too clearly different from the case at bar to merit discussion.

[10] The general principle undoubtedly is that equity refuses specific performance of contracts where there is no mutuality of obligation. Putnam v. Grace, 161 Mass. 237, 247, 137 N. E. 166; Boston & Worcester St. Ry. Co. v. Rose, 194 Mass. 142, 149, 80 N. E. 498. But that principle is not applicable to contracts unenforceable against the plaintiff under the statute of frauds in suits for specific performance against a defendant who has bound himself by signing a memorandum sufficient under that statute. The bringing of the suit by the plaintiff is proof of his assent to the agreement and establishes mutuality. There is thus a mutual contract, although the proof as to the defendant is expressed by signature to a writing, while that as to the plaintiff rests on oral evidence and on the admissions of his bill. This proposition is well settled. Old Colony Railroad v. Evans, 6 Gray, 25, 33, 66 Am. Dec. 394; Dresel v. Jordan, 104 Mass. 407; Slater v. Smith, 117 Mass. 96; Nickerson v. Bridges, 216 Mass. 416, 421, 103 N. E. 939; Record v. Littlefield, 218 Mass. 483, 485, 106 N. E. 142; Cashman v. Dean, 226 Mass. 198, 202, 115 N. E. 574; Fry on Specific Performance (5th Ed.) §§ 470, 471.

[11] The bill may be maintained against both the defendants. Mrs. Gadouas under the trust deed has an absolute and unqualified right to require the trustee to convey the property to her nominee free from all trusts and to pay to her the proceeds. It is equally the absolute and unqualified duty of Mr. Janson to make conveyance. The obligation of Mrs. Gadouas under her agreement is such that equity will require the conveyance to be made.

Equity under these conditions will compel each defendant to perform his plain legal duty. Kuhn v. Eppstein, 219 Ill. 154, 76 N. E. 145, 2 L. R. A. (N. S.) 884; McDonald v. Yungbluth (C. C.) 46 Fed. 836; Shreck v. Pierce, 3 Iowa, 350; Sayre v. Lemberger, 92 N. J. Eq. 373, 112 Atl. 490, reversed on another ground in 92 N. J. Eq. 656, 114 Atl. 454. See Fry on Specific Performance (5th Ed.) p. 431, § 878.

The final decree must be reversed. An interlocutory decree may be entered confirming the master's report. A final decree is to be entered ordering the conveyance to be made in accordance with the agreement. The details of the decree and the matter of costs are to be fixed in the superior court.

Ordered accordingly.

CHURCH v. BROWN.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1924.)

1. Appeal and error ⇐694(1)—Finding of master conclusive where evidence unreported.

Where the evidence before the master is not reported, his findings are conclusive.

2. Appeal and error ⇐522(1)—Evidence taken before judge in case afterwards referred to master not part of record.

Where, after a case was partially heard by a judge of the superior court, it was referred to a master, the evidence taken before the judge *held* not properly a part of the record on appeal.

3. Army and navy ⇐34—Soldiers' and Sailors' Civil Relief Act held not to render mortgage sale invalid.

Soldiers' and Sailors' Civil Relief Act, § 302(3), being U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3078¼ff, did not prevent or make invalid a mortgage foreclosure sale, when the person in military service knew of it and made no objection thereto.

4. Appeal and error ⇐870(2)—Appellant, on appeal from final decree, may argue facts found did not warrant decree.

On appeal from final decree in suit for an accounting, it is open to appellant to argue from the facts found by the master that appellee is not entitled to prevail, though there was an interlocutory decree confirming report of master and overruling appellant's exception, and evidence before the master is not reported.

5. Joint adventures ⇐4(1)—One guilty of fraud in procuring agreement not entitled to accounting.

One who induced another to enter into an agreement for the purchase of property for resale and division of profits by misrepresentation and fraud with reference to the purchase price and other matters, and paid nothing toward the purchase price, and did not pay any part of money advanced by the other to carry the transaction, and never intended to make any payments in accordance with his agreement, was not entitled to an accounting on sale of the property by the other; it appearing that he stood in a relation of trust and confidence to the other and that he was trusted implicitly.

6. Equity ⇐65(1)—He who asks equity must be free from unconscionable conduct.

A party who asks relief in equity must be free from unconscionable conduct on his part; that is, he must come into court with clean hands.

Appeal from Superior Court, Suffolk County; Sanderson, Judge.

Bill for an accounting by David B. Church against Eliza J. Brown. From interlocutory and final decrees in favor of defendant, plaintiff appeals. Affirmed.

H. E. Dennison, of Boston, for appellant.
H. A. Murphy, of Boston, for appellee.

CROSBY, J. [1, 2] This is a bill for an accounting. The case was partially heard by a judge of the superior court and, before the hearing was completed, referred by him to a master, who has filed a report. The evidence taken before the judge and found on pages 8 to 38, both inclusive, is not properly a part of the record and should not have been embodied therein. As the evidence before the master is not reported, his findings are conclusive. An interlocutory decree has been entered confirming the report and overruling the plaintiff's exceptions; and a final decree has been entered dismissing the bill. No exhibits are referred to in the report or made a part of the record.

The bill alleges that the parties entered into a joint enterprise in equal shares to purchase, and in pursuance thereof did purchase, certain real estate for $30,000 and certain adjustments, and paid for the same by giving a mortgage to the Randolph Savings Bank for $24,000 and the balance in cash; that by agreement between the parties the cash was raised by a second mortgage of $4,000 and that the defendant contributed toward the balance $2,358.25 and that the plaintiff contributed thereto $1,203.85; that out of the rents which were to be collected by the defendant she received $532.20, thereby reducing her contribution to equal that of the plaintiff; that it was agreed that after payment of the $532.20 to the defendant, all net profits were to be divided equally between the parties; that the plaintiff was in the military service of the United States from September, 1917, until December 20, 1918. The bill further alleges in substance that the defendant, with the intention of cheating the plaintiff while in the military service, secretly purchased the second mortgage and note, caused the same to be assigned to a relative for the purpose of concealment, caused the mortgage to be foreclosed in the name of the relative, and sold to her under the power of sale, and that later the relative conveyed the property to the defendant. The bill also alleges that the defendant has entered into an agreement to sell the property for $32,500 in cash. The bill seeks an accounting for the proceeds of the sale and for income from the property received by the defendant.

The master found that in September, 1917, the plaintiff was a real estate broker; that during that month he first met the defendant; that she told him she desired to find some investments; that he had several talks with her respecting the property above referred to and finally told her it could be purchased for $30,000, although he had previously stated to her that a much larger price was asked; that it was agreed they

would buy the property on equal shares and share equally in the profits at the price of $30,000, it being stated by the plaintiff that the bank would take first mortgages of $24,000, a second mortgage could be secured of $4,000, and that the balance of the purchase price, together with certain adjustments, was to be paid in cash equally by the parties.

The master also found that the plaintiff, when he made the agreement with the defendant, knew that the property could be bought for $28,000; that he secured an agreement from the bank to sell for that price and caused the agreement to be made to one Libby, his brother-in-law and office associate; that the plaintiff did not tell the defendant that Libby was to be a party to the transaction, but led her to believe that it was to be purchased directly from the bank for $30,000, and that the defendant relied upon the statements of the plaintiff and believed that he was acting in good faith in his representations to her; that as a part of the same transaction Libby, at the direction of the plaintiff, conveyed the property to Eliza J. Montgomery, mother of the defendant, and to the plaintiff as tenants in common of an undivided one-half interest subject to the two mortgages; that Mrs. Montgomery soon after conveyed her interest to the defendant for whose benefit she held it; that at the time of the transaction it appeared that certain deductions were made out of the amount realized on the second mortgage and that there was not sufficient money to pay the bank the full price as represented by the plaintiff and the defendant was obliged to pay the bank such balance; that she also paid certain adjustments due the bank, and certain other expenses which the plaintiff had told her were to come out of the purchase price.

The master further found that the defendant paid in cash at the direction of the plaintiff, on account of the purchase price, expenses and adjustments, the sum of $2,358.25 and that the plaintiff paid nothing on account of such price, expenses or mortgages; that the plaintiff told the defendant that he would not claim a commission but would pay one-half of the amount required above the mortgages.

It also appears that shortly before the plaintiff entered the military service, he conveyed his interest in the property to Jane C. Youatt, his wife's sister, to hold the same for the benefit of his wife and also to protect it from certain creditors; that at the same time Miss Youatt executed a deed of the property to him which was not recorded until just before his discharge on December 17, 1918.

The master also found that about October 15, 1918, the defendant procured an assignment of the second mortgage to her niece, Mabel F. Robbins, who held it for the benefit of the defendant, and that the latter paid the consideration amounting to $2,800; that the reason the defendant purchased and caused to be held for her benefit the second mortgage was that the mortgage required the payment of 12 per cent. for an extension, and also required the defendant to pay the cash advanced for the plaintiff's benefit on account of the purchase of the property. The second mortgage was not paid at maturity and on or about November 30, 1918, the defendant commenced foreclosure proceedings. Notice of the sale was given to Miss Youatt and to the plaintiff. The latter secured several postponements of the sale upon the promise to pay his share of the deficit in the purchase price and carrying charges and agreed that he would make no objection to the sale if such payments were not made.

The master found that the plaintiff failed to pay or offered to pay anything upon his share of the purchase price and deficit, although he had full knowledge of the same and that the defendant was in possession of the property and was endeavoring to sell it; and that the sale was made January 15, 1919 and title was taken by the defendant; thereafter, on or about July 12, 1920, she sold the property to one Rowe for $32,500.

The master has stated in detail the account between the parties and found that the total amount for which the defendant is accountable if the bill can be maintained is $2,908.33, and that if the plaintiff is not precluded as matter of law from recovery he is entitled to receive one-half of that sum.

[3] The contention of the plaintiff that the foreclosure sale under the second mortgage, made within three months after the period of his military service expired is invalid, cannot be sustained. The provisions of the Soldiers' and Sailors' Civil Relief Act, U. S. St. 1918, c. 20, s. 302, cl. 3 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3078¼ ff) did not prevent or make invalid such a sale when, as the master found, the plaintiff knew of it and made no objection thereto. It is a necessary inference from the finding that he expressly assented to it.

Nearly all of the exceptions are based upon the contention that the master's findings are unwarranted by the evidence, but as it is not reported, they must stand. It follows that the interlocutory decree overruling the exceptions was properly entered.

[4] On the appeal from the final decree, it is open to the plaintiff to argue from the facts found by the master that the defendant is not entitled to prevail. French v. Peters, 177 Mass. 568, 59 N. E. 449; Lyons v. Elston, 211 Mass. 478, 98 N. E. 93; Fay v. Corbett, 233 Mass. 403, 410, 124 N. E. 73.

[5] It is plain from the findings of the master that the plaintiff induced the defendant to enter into the agreement for the purchase of the property by reason of his misrepresentations and fraud, not only with reference to the purchase price, but in connection with

other matters relating to the transaction; that he paid nothing toward the purchase price of the property, nor did he pay any part of the money advanced by the defendant to carry it; and it is a rational inference from the findings that he never intended to make any of said payments in accordance with his agreement.

[6] The finding that the defendant relied on the plaintiff's statements and believed that he was acting in good faith in his representations to her, together with the findings of fraud and deception practiced by the plaintiff, preclude him from maintaining the bill. He stood in a relation of trust and confidence to the defendant. She apparently trusted him implicitly and believed that he would faithfully carry out the enterprise in which they had mutually agreed to engage, and would not violate the fiduciary obligations which he owed to her for his own profit and advantage to her detriment. A party who seeks relief in equity must be free from unconscionable conduct on his own part. The salutary rule of law that one who seeks the aid of a court of equity must come with clean hands is applicable to the case at bar. The false representations and deception practiced upon the defendant, being necessarily related to the matter for which the plaintiff seeks relief, is a bar to the maintenance of the bill. Lawton v. Estes, 167 Mass. 181, 45 N. E. 90, 57 Am. St. Rep. 450; Sawyer v. Cook, 188 Mass. 163, 169, 74 N. E. 356; Downey v. Charles S. Gove Co., 201 Mass. 251, 87 N. E. 597, 131 Am. St. Rep. 398; Wilson v. Jackson, 204 Mass. 432, 446, 90 N. E. 866; Hawkes v. Lackey, 207 Mass. 424, 432, 433, 93 N. E. 828; Verne v. Shute, 232 Mass. 397, 122 N. E. 315; Manufacturers' National Bank v. Simon Manufacturing Co., 233 Mass. 85, 123 N. E. 340; Howe v. Chmielinski, 237 Mass. 532, 130 N. E. 56.

Decree affirmed.

BRAUN v. BELL.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 14, 1924.)

1. Municipal corporations ⟸706(6, 7)—Negligence of pedestrian and automobile driver held for jury.

In an action for injuries to pedestrian, struck by automobile while standing in street to board approaching street car, *held*, that plaintiff's due care and driver's negligence were for the jury.

2. Husband and wife ⟸43—Wife may bind own estate to pay for medical services and recover in personal injury action.

A wife may bind her own estate to pay for medical services rendered, and when properly pleaded she may recover for this expense in an action by her for personal injuries suffered before her marriage, though the presumption is that her husband is liable for such medical services and the wrongdoer is liable to him.

3. Appeal and error ⟸231(2)—Objection to evidence should state inadmissibility under declaration.

Defendant, in order to rely on exception to evidence because inadmissible under the declaration, should have called the judge's attention specifically to the state of the pleadings, and he could not afterwards be heard in support of an exception on this ground.

4. Damages ⟸148—Injured wife cannot prove medical services, in absence of proper pleading.

In an action by a wife for personal injuries suffered before her marriage, she may not prove medical services rendered her after her marriage, in the absence of allegation in declaration that she bound her own estate to pay for such services, or suffered special damages because thereof.

5. Witnesses ⟸345(1)—Charge of commission of crime and acquittal inadmissible for impeachment.

A witness could not be discredited by asking him if he was charged with the commission of a crime and acquitted.

6. Witnesses ⟸370(1)—Charge and acquittal of crime, in prosecution wherein defendant testified for witness, not admissible to show bias.

In a personal injury action, a witness could not be discredited by asking him if he was charged with the commission of a crime and acquitted, on the theory that because, in such prosecution, defendant was a witness in his favor, witness was biased in defendant's favor.

7. Witnesses ⟸331½—Evidence as to liability insurance held inadmissible on question of defendant's credibility, in suit for injuries by automobile.

In an action for personal injuries by one struck by automobile, wherein plaintiff's witness testified that defendant admitted the authority of the driver of the automobile, and defendant denied that he made any such admission, testimony that he was insured and admitted that fact, and complained that the insurance company refused to take care of him, *held* not admissible as affecting defendant's credibility.

Exceptions from Superior Court, Suffolk County; Robert F. Raymond, Judge.

Action of tort by Sarah G. Braun against Henry C. Bell for personal injuries received when struck by defendant's automobile. Verdict for plaintiff for $4,300, and defendant brings exceptions. Exceptions sustained.

F. R. Mullin and P. F. Spain, both of Boston, for plaintiff.

J. F. Cavanagh, of Boston, for defendant.

CARROLL, J. The plaintiff was struck and injured by an automobile of the defendant, while standing on a public highway in Boston, near the inbound car rail, waiting

for an electric car. The accident happened about 5 o'clock on the morning of January 2, 1921. The plaintiff testified that she was on her way to her place of business; that when she left the curbstone, the electric car she was about to enter was nearly three car lengths away; that after crossing a portion of the highway she stood about 2 feet from the car rail "opposite the stop"; that when the electric car was about one length from her the defendant's automobile came from the rear of the car, passing to the right at the rate of 25 miles an hour, and struck her. The conductor of the electric car testified that the automobile was following the car on the inbound track; that it swerved to the right and passed him at the rate of 25 miles an hour; and that he heard no signal from the automobile.

[1] The plaintiff's due care was for the jury to decide on all the evidence. When she crossed the street she looked "up and down Harvard street." There were lights on the street, one at each side of the stopping place; "there were no vehicles on the street;" and as she was waiting for the car the automobile suddenly turned from the rear of the electric car, and, moving at the rate of 25 miles an hour, struck her. She stated that "the lights blinded me so I couldn't do anything," referring to the lights on the automobile. The driver of the automobile could have seen the plaintiff, and by the use of proper caution avoided her. His negligence was properly submitted to the jury. There was evidence of the defendant's admissions tending to show that the operator of the automobile was his agent, and engaged in his business.

[2-4] The plaintiff was married January 26, 1921. She was allowed to introduce evidence, subject to the exception of the defendant, that she had paid to doctors and to an osteopath the sum of $94. For medical services rendered to the plaintiff after her marriage the husband was presumed to be liable, and for this expense the wrongdoer was liable to him, Driscoll v. Gaffey, 207 Mass. 102, 108, 92 N. E. 1010; but the wife may bind her own estate to pay for medical services rendered her, and when properly pleaded she may recover for this expense in an action for personal injuries. See Baldwin v. Western Railroad, 4 Gray, 333; Charron v. Day, 228 Mass. 305, 117 N. E. 347; Sherry v. Littlefield, 232 Mass. 220, 122 N. E. 300. It does not appear that the plaintiff in her declaration alleged that she suffered any special damages because of these expenses. If this fact had been called to the attention of the judge it would have been error to admit the evidence; but the defendant, in order to rely on this exception to the evidence because inadmissible under the declaration, should have called the judge's attention specifically to the state of the pleadings; otherwise he could not be heard afterwards in support of an exception on this ground. Noyes v. Caldwell, 216 Mass. 525, 527, 104 N. E. 495.

[5, 6] An employee of the defendant, a witness called by him on cross-examination, testified that after the accident he had taken an automobile from the defendant's garage, "as a result of which there was some trouble." The witness was then asked, against the defendant's exception, if he was arrested because of this. He answered, "No." He admitted, however, that he had been summoned to court, and was acquitted of the charge; that the defendant was one of his witnesses, but was not "instrumental in having lenient disposition of the matter made for [him]." The witness could not be discredited by asking him if he was charged with the commission of a crime and acquitted. See Commonwealth v. Homer, 235 Mass. 526, 127 N. E. 517. The plaintiff contends that this evidence was admissible to show that the witness was biased in the defendant's favor because of the assistance given him by the defendant at the time he was on trial for the offense. This contention is fundamentally unsound. The evidence was not admissible and was harmful to the defendant. This exception is sustained.

[7] Francis J. Murray, a witness for the plaintiff, testified that the defendant called at his office. In relating the conversation between them the witness was instructed to omit certain parts of the conversation. He testified that the defendant said he was the owner of the automobile, that Pollock, who was driving the car when the plaintiff was injured, was directed by Johnson, the manager of the defendant's garage, to carry a passenger to a lunch room; that Johnson had authority to engage Pollock for this purpose. The defendant testified that in the conversation with Murray he admitted that the automobile involved in the accident belonged to him, and—

"I told him that she [the plaintiff] had an attorney; that * * * he had taken the testimony of the two men that were in the car; * * * he told me that there was not any case against me; that he did have a case against these two men who were in the car."

The defendant denied that he had any talk with Murray concerning Pollock or Johnson, and denied that he told Murray that Johnson had any authority to hire employees.

On cross-examination, the defendant was asked, against the defendant's exception, if he told Murray he was insured. He answered that he did. The plaintiff was then allowed to ask the defendant if he called on the insurance company, talked with the agent of the insurance company, told him of the accident and made a report to him. He was further interrogated concerning his dealings with the insurance company and its supply-

ing counsel for his defense. Murray was then recalled and testified, subject to the defendant's exception, that the defendant said to him that the insurance company denied liability, but had offered to furnish counsel to defend the case "at my expense"; that the defendant asked the witness if he thought that was fair, and the witness replied in substance, that if you have "paid $750 for insurance, and the insurance company now refuses to take care of you, that is a matter for you to protect yourself against." The judge instructed the jury that the evidence relating to insurance was admissible solely on the question of the defendant's credibility.

In our opinion this evidence relating to the insurance carried by the defendant, his conduct and conversation with the insurance agent, as well as the testimony of Murray when recalled, and his statement, "It is up to you to take care of your rights against the insurance company," was inadmissible and highly prejudicial to the defendant. We fail to see in what way it affected the credibility of the defendant. He admitted he owned the automobile; and Murray testified on direct examination, without exception, that the defendant admitted that Johnson had authority to hire Pollock to drive the automobile and that he was doing this when the accident took place. This aspect of the case is governed by Feins v. Ralby, 245 Mass. 228, 139 N. E. 530. The evidence was inadmissible and the exceptions thereto must be sustained.

There was no error in refusing the defendant's motion for a directed verdict, or in refusing the defendant's requests.

Exceptions sustained.

CURTIS et al. v. CITY OF BOSTON et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1924.)

1. Appeal and error ⟸694(1)—Findings of single justice conclusive.

Findings of fact of a single justice on unreported evidence are conclusive.

2. Eminent domain ⟸2(1)—Order establishing building lines held taking of private property for public use.

An order of street commissioners establishing building lines on a street in the city of Boston, under G. L. c. 82, § 37, *held* to operate, and intended to operate, as a taking of private property for public use under the power of eminent domain.

3. Eminent domain ⟸58—No more property condemned than public use requires.

Since private property cannot be taken except for a public use, no more property is to be condemned than the public use requires.

4. Eminent domain ⟸58—Building lines not to be imposed for only one year.

Authorities in the city of Boston could not impose building lines for one year, under G. L. c. 82, § 37, as chapter 79, § 1, contemplates that the taking of the same land for a highway shall not be at recurrent intervals until the way has been legally discontinued, and that damages for each taking shall be measured by the duration of each successive condemnation.

5. Eminent domain ⟸55—Order establishing building lines not divisible.

An order of street commissioners of the city of Boston establishing building lines, under G. L. c. 82, § 37, cannot be divided, so that part fixing permanent lines can be held valid and part illegally fixing temporary lines ignored.

Report from Supreme Judicial Court, Suffolk County.

Suit by Charles P. Curtis and others against the City of Boston and others, to enjoin payment from the treasury of awards made to abutters under an order of the street commissioners establishing building lines. On report by a single justice. Decree for plaintiffs.

C. H. Baesler and N. Matthews, both of Boston, for petitioners.

S. Silverman, Asst. Corp. Counsel, of Boston, for respondents.

BRALEY, J. [1] This is a bill or petition in equity by ten and more of the inhabitants and taxpayers of the city of Boston to enjoin payment from the treasury of the award made to abutters under an order of the street commissioners establishing building lines on Province street, a highway within the municipality. G. L. c. 40, § 53; St. 1885, c. 178, §§ 1, 2, 3. And the case is here on the report of a single justice whose findings of fact on unreported evidence are conclusive. Armstrong v. Orler, 220 Mass. 113, 107 N. E. 392. It appears that on July 11, 1922, the mayor transmitted a message to the city council stating that the

"importance of opening the block bounded by Tremont, Washington, School and Bromfield streets for the purpose of providing a highway for public travel and for the development of realty located within this lot of land before prohibitive realty development has been created makes it essential that action be taken at once, and I accordingly recommend the adoption of the accompanying order, providing for the establishment of a building line on Province street, between School street and Bromfield street."

The city council thereupon on August 15, 1922, passed an order approved by the mayor, that

"the sum of $250,000 be and the same is hereby appropriated for the establishment of a building line, on Province street, between School street and Bromfield, and that to meet said

appropriation the city treasurer be authorized to issue from time to time, upon the request of the mayor, bonds or certificates of indebtedness of the city to said amount."

It is found that on August 14, 1922, the borrowing capacity of the city was $382,050.65 and the order did not violate the prohibition of St. 1885, c. 178, §§ 1, 2, 3, limiting under certain conditions the borrowing capacity of the city. The board of street commissioners acting under statutory authority issued on August 17, 1922, a notice, that the board is of opinion

"that, in said city public convenience and necessity require that building lines be established on the northwesterly and southeasterly sides of Province street, Boston Proper, between School and Bromfield streets, substantially as shown on a plan in the office of this board, that it intends to pass an order for making said building lines, and that it appoints 11 o'clock a. m. August 31, 1922, and the office of this board as the time and place for a public hearing in the matter."

See St. Laws 1820–22, c. 110, §§ 5–8, 11–15; St. 1854, c. 448; St. 1870, c. 337; St. 1893, c. 462; St. 1906, c. 393, §§ 1, 2, as amended by St. 1913, c. 536, § 2, and Sp. Acts 1917, c. 318; St. 1893, c. 462, accepted by the city October 28, 1893, now G. L. c. 82, § 37, with prior amendments; Brimmer v. Boston, 102 Mass. 19, 22.

A copy of this plan is part of the record. The board on October 13, 1922, passed an order, approved by the mayor, which after recitals of the giving of notice, and that a copy of the order had been published in two daily newspapers of the city, and that a public hearing in accordance with the notice had been given, reads as follows:

"That building lines be, under the provisions of chapter 462 of the Acts of 1893 and the acts in amendment or addition thereto, established on Province street, Boston Proper, between Bromfield street and School street, as follows:

"On the southeasterly side of said Province street, between Province Court and the southwesterly boundary line of the property of the Boston Five Cents Savings Bank, substantially parallel with and distant approximately thirty-three (33) feet from the southeasterly exterior side line of said Province street.

"For one year from the date of this order: On the southeasterly side of said Province street, between Bromfield street and Province court, substantially parallel with and distant approximately thirty-six (36) feet from the southeasterly exterior side line of said Province street.

"For one year from the date of this order: On the southeasterly side of said Province street, between the southwesterly boundary line of the property of the Boston Five Cents Savings Bank and School street, substantially parallel with and distant approximately thirty-four (34) feet from the southeasterly exterior side line of said Province street.

"For one year from the date of this order: On the northwesterly side of said Province street, between Bromfield and School streets, substantially parallel with and distant approximately fifty (50) feet from the building lines hereinbefore established on the southeasterly side of said street.

"Said building lines are shown on a plan marked 'City of Boston, Province St., Boston Proper, August 7, 1922, * * *' and on file in the office of the street laying-out department.

"And this board further orders that existing buildings, steps, windows, porticos and other usual projections appurtenant thereto, as far as they lie between the building lines herein established and the present exterior side lines of said Province street, may remain as they are at the date of this order, intending hereby to sanction all existing projections over said building lines until the said projections shall have been removed therefrom or until said Province street is ordered relocated or widened by the city of Boston by and through its duly authorized officials under authority of the statutes in such cases made and provided."

On its face this order designated a continuous building line on each side of Province street. The line on the southeasterly side crossed the land of the Olympia Theater Company and of the Massachusetts General Hospital, who were awarded damages aggregating $175,000 on the basis of a permanent line, while the remaining abutters on that side, and on the northwesterly side, were awarded only nominal damages, because the line as to their lands was to be established only for one year from the date of the order. It is found that if the temporary lines had been permanent, the entire cost of the "development" would have been at least "$1,000,000." But it is unnecessary for our decision to determine whether the underlying purpose of the commissioners, as the plaintiffs contend, was to evade the provisions of St. 1885, c. 178, §§ 1, 2, 3. The parties agreed before the single justice "that there was no bad faith on the part of the commissioners." See Browne v. Boston, 179 Mass. 321, 332, 60 N. E. 934. The locating or establishment of building lines, as prescribed by the order, delimited the estates of the abutters so that they should conform to the street lines shown by the plan, even if under G. L. c. 82, § 37, "existing buildings, steps, windows, porticos and other usual projections appurtenant thereto, as far as they lie between the building lines herein established and the present existing side lines of said Province street, may remain as they are at the date of this order, intending hereby to sanction all existing projections over said building lines until the said projections shall have been removed therefrom or until Province street is ordered relocated or widened by the" city under the authority conferred by statute to relocate or widen highways. See Tyler v. Old Colony R. Co., 157 Mass. 336, 32 N. E. 227. The terms of the order are explicit. It contained the adjudication of the commissioners, that public

convenience and necessity required the establishment of the lines. It stated the intention of the board to establish them, and directed notice to the abutters of the time and place where the board would proceed to lay out the lines, and hear parties who were entitled to be heard in the matter of damages, and betterment assessments.

[2, 3] The board however determined that "there are no betterments; damages are as follows," and the names and amounts awarded to the abutters are annexed. It is plain, that the order operated, and was intended to operate, as a taking of private property for public use under the power of eminent domain delegated by the Legislature. Dwight v. Springfield, 6 Gray, 442, 443; Fuller v. Mayor and Aldermen of Springfield, 123 Mass. 289, 290, 291; Murray v. Norfolk, 148 Mass. 328; Morse v. Stocker, 1 Allen, 150, 157; Dorgan v. Boston, 12 Allen, 223; Durgin v. Minot, 203 Mass. 26, 28, 89 N. E. 144, 24 L. R. A. (N. S.) 241, 133 Am. St. Rep. 276; Comisky v. Lynn, 226 Mass. 210, 212, 115 N. E. 312; Zeo v. City Council of Springfield, 241 Mass. 340, 135 N. E. 458; Eubank v. Richmond, 226 U. S. 137, 144, 145, 33 Sup. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192; G. L. c. 79, § 1; G. L. c. 82, § 37. St. 1893, c. 462. And as private property cannot be taken except for a public use, no more property is to be condemned than the public use requires. Simonds v. Walker, 100 Mass. 112, 113; Lowell v. Boston, 111 Mass. 454, 463, 15 Am. Rep. 39; Doon v. Natick, 171 Mass. 228, 230, 50 N. E. 616. The procedure of the commissioners accordingly must rest on the statute, and they had no authority to appropriate private property for use as a highway except as therein provided. Hellen v. Medford, 188 Mass. 42, 73 N. E. 1070, 69 L. R. A. 314, 108 Am. St. Rep. 459. See Weeks v. Grace, 194 Mass. 296, 298, 80 N. E. 220, 9 L. R. A. (N. S.) 1092, 10 Ann. Cas. 1077. By G. L. c. 82, § 37, a building line can be established and discontinued in the manner prescribed for the laying out and discontinuance of highways and town ways. The Legislature has enacted special statutes providing for the taking of existing easements, as well as taking in fee of land, of which St. 1913, c. 700, an act to provide an additional water supply for the cities of Salem and Beverly, and the Metropolitan Water Act, St. 1895, c. 488, are sufficient examples. And by Special Acts 1919, c. 115, the cities of Lynn, Peabody, Beverly and the town of Danvers, which by St. 1901, c. 508, and St. 1913, cc. 698, 699, and 700, had been authorized to take water from the Ipswich river, were "further authorized, in case of emergency, to take water from said river or its tributaries during the months from June to November, inclusive, in the years 1919, 1920, 1921, or any of said years, in quantities not exceeding those which may be taken from December to May, inclusive, * * * whenever, in the opinion of the state department of health, the taking of water during the months aforesaid in the years mentioned, * * * it is necessary to provide an adequate water supply for the cities and town herein mentioned. * * *" See also St. 1902, c. 351.

[4] But our attention has not been called to any general statute or law for the laying out, or discontinuance of highways, which empowered the commissioners to lay out or discontinue a public way for the period of one year. If they could not lay out, and take land for a highway which was to exist for one year only they could not impose building lines for one year. The taking does not purport to be in fee, and the abutters were entitled to compensation for all damages suffered by a perpetual easement imposed for the public use. Dingley v. Boston, 100 Mass. 544, 560. The statute contemplates that the taking of the same land for a highway shall not be at recurrent intervals until the way has been legally discontinued, and that damages for each taking shall be measured by the duration of each successive condemnation. Boston v. Richardson, 13 Allen, 146, 160; Dingley v. Boston, 100 Mass. 544, 560; Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; Page v. O'Toole, 144 Mass. 303, 10 N. E. 851; Titus v. Boston, 161 Mass. 209, 36 N. E. 793; Doon v. Natick, 171 Mass. 228, 230, 50 N. E. 616; Winnisimmet Co. v. Grueby, 209 Mass. 1, 95 N. E. 293; G. L. c. 79, § 1.

[5] It is contended by the defendants that, even if the temporary lines were unauthorized, the commissioners established several building lines, and the permanent line was within the statute. The notice of the commissioners was for a hearing on the establishment of building lines "shown on a plan in the office of this board." The message of the mayor referred to, and the appropriation of the city council, provided "for the establishment of a building line on Province street between School street and Bromfield street." The order of the board, however, divides the southeasterly line into two distinct portions, so that, in the taking, one part covers the estates of the realty company and the hospital, while the other part covered the estates of the remaining abutters on that side. The appropriation manifestly does not provide for two lines on the southeasterly side of Province street. The order of the commissioners cannot be divided. It is not capable of a double construction, which sustains the permanent taking, and disregards the taking for one year. Preston v. Newton, 213 Mass. 483, 485, 486, 100 N. E. 641. The valid and invalid parts moreover are so mutually connected with and dependent upon each other as to war-

rant the conclusion in substance of the single justice, that the board intended them as a whole, and he rightly ruled that if all could not be given effect, the entire layout must fail. Warren v. Mayor and Aldermen of Charlestown, 2 Gray, 84, 98, 99.

It follows, that a decree for the plaintiffs is to be entered with costs, enjoining the expenditure of the appropriation for any of the purposes specified in the order of the street commissioners, the details of which are to be settled in the county court. Welch v. Emerson, 206 Mass. 129, 91 N. E. 1021.

Ordered accordingly.

KILDUFF et al. v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 19, 1924.)

1. Partnership ⇐76—Title to property in firm and not individual.

While a partner has an interest in the partnership property, yet the title to the personal property of the partnership is not in the individual members of the firm, but in the firm as an entirety.

2. Partnership ⇐77 — Members have equal right to possession of property.

Ordinarily every partner has an equal right with his copartner to the possession of the firm property for partnership purposes, under Uniform Partnership Act, §§ 24, 25.

3. Licenses ⇐20—Partner not "owner" of automobile entitled to registration and automobile trespasser on highway.

Where legal title to automobile truck was in partnership and not in an individual member thereof, the latter was not "the owner" within G. L. c. 90, § 2, providing that application for registration of motor vehicles may be made by the "owner" thereof, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Owner.]

4. Street railroads ⇐83—Negligent injury to automobile truck improperly registered not actionable.

Where automobile truck owned by partnership was registered in the name of an individual partner, and was therefore illegally upon the highway under G. L. c. 90, § 2, no recovery could be had for negligent injuries to it in a collision with a street car.

5. Street railroads ⇐83—Wanton or willful injury distinguished from negligence.

Reckless, wanton, or willful conduct, warranting recovery for injuries to automobile trespassing on the highway because not properly registered under G. L. c. 90, § 2, is something different in kind from negligence or gross negligence.

Appeal from Municipal Court of Boston, Appellate Division; J. H. Burke, Judge.

Action by George M. Kilduff and Frank J. O'Hara, copartners, doing business under the style of the Farm & Sea Food Shops, against the Boston Elevated Railway Company for damage to Ford automobile truck. From an order of the appellate division vacating a finding for plaintiffs and entering judgment for defendant, plaintiffs appeal. Affirmed.

J. A. Waters, of Boston, for appellants.
J. I. Krafsur, for appellee.

CROSBY, J. This action is brought by the plaintiffs as copartners, doing business under the firm name of the Farm and Sea Food Shops, to recover for damage to an automobile truck, resulting from a collision on September 20, 1922, with one of the defendant's cars.

The record shows that at the time of the accident the truck and the merchandise in it were owned by the partnership, and that the bills for repairs after the accident were made to the Farm and Sea Food Shops. It also appears from undisputed testimony that the original application for registration of the truck was by the plaintiff Kilduff, who made oath that it was owned by him as an individual; that the word "partner" did not appear anywhere in the application; and that the truck was registered in the name of George M. Kilduff. In the municipal court of the city of Boston the trial judge refused to make certain rulings requested by the defendant and found for the plaintiff. The case was thereafter reported to the appellate division which ordered the entry: "Finding vacated—judgment for defendant."

[1] G. L. c. 90, § 2, provides that application for the registration of motor vehicles may be made by the owner thereof, and that the certificates of registration issued thereon shall contain, in addition to other particulars, a statement of the name, place of residence and address of the applicant. It appears that the automobile was registered by the plaintiff Kilduff in his own name, not as a partner but as an individual, and that no reference was made to the partnership as owner, in the original application or otherwise. While a partner has an interest in the partnership property, yet the title to the personal property of the partnership is not in the individual members of the firm, but in the firm as an entirety. Pratt v. McGuinness, 173 Mass. 170, 53 N. E. 380. See, also, Steele v. Estabrook, 232 Mass. 432, 440, 122 N. E. 562.

[2, 3] In partnerships, ordinarily each partner has an equal right with his copartners to the possession of the firm property for partnership purposes. See Uniform Partnership Act (St. 1922, c. 486) §§ 24, 25. As the legal title to the truck was in the

partnership and not in Kilduff, the latter was not the owner within the meaning of G. L. c. 90, § 2. It follows that it was a trespasser on the highway.

In Rolli v. Converse, 227 Mass. 162, 116 N. E. 507, a motor truck was registered in the firm of a partnership consisting of two persons. Subsequently one of them assigned his interest in the firm, including the truck, to another person who was admitted to the partnership. It was held that as no new registration was taken out the truck was a trespasser upon the highway.

It was decided in the recent case of Hanley v. American Railway Express Co., 244 Mass. 248, 138 N, E. 323, that a motor vehicle registered in the name of "the International Brotherhood of Steam Shovel and Dredge Men" as owner was not lawfully registered, if it appeared that it was owned in common by over three hundred members of a voluntary unincorporated association known as "Local No. 60."

In Shufelt v. McCartin, 235 Mass. 122, 126 N. E. 362, a motor vehicle was registered in the name of a part owner but was operated by the other part owner; it was held that registration was required in the name of any part owner who should operate the vehicle by himself or his agents, and that it was not properly operated by the part owner in whose name it was not registered.

Harlow v. Sinman, 241 Mass. 462, 135 N. E. 553, relied on by the plaintiff, is distinguishable from the case at bar. In that case the automobile was registered in the name of the plaintiff but was owned in common by her and her daughter; at the time of the accident it was being operated by the daughter. It was held that registration in the plaintiff's name, she being an absolute owner in part, constituted a valid registration and protected the plaintiff's rights, "at least so long as she operated or was in control of the car." In the present case the legal title to the car was not in the plaintiff Kilduff as owner, but was in the partnership; besides, it was being operated in the absence of Kilduff by a person not under his control, but by a servant and agent of the partnership in the conduct of its business. In these circumstances the facts in the present case are quite different from those in Harlow v. Sinman. It follows that a partnership which owns a motor vehicle must register it in the partnership name. Pierce v. Hutchinson, 241 Mass. 557, 562, 136 N. E. 261; Hanley v. American Railway Express Co., supra; Emerson Troy Granite Co. v. Pearson, 74 N. H. 22, 64 Atl. 582.

[4, 5] As the truck which came in collision with the defendant's car was not lawfully registered, it was illegally upon the highway. That circumstance, upon the facts disclosed, prevents a recovery upon the ground of negligence of the defendant. As it is not pleaded we need not consider whether the defendant might be held liable for reckless, wanton or willful conduct, which is something different in kind from negligence or gross negligence. Adamowicz v. Newburyport Gas & Electric Co., 238 Mass. 244, 130 N. E. 388. We may say, however, that the evidence falls far short of warranting a finding of such conduct.

As the defendant's first request for a ruling should have been given, entry must be:

Order, "Finding vacated—judgment for defendant," affirmed.

CAINES v. CAINES COLLEGE OF PHYSICAL CULTURE, Inc.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 8, 1924.)

Corporations ⇐45—One founding corporate business held not entitled to restrain use of his name by corporation.

One who founded a business, permitted the organization of a corporation, and transferred his business to it, and became president, treasurer, general manager, and a director, and signed all stock certificates, among which were shares of preferred stock sold for cash through his personal efforts, was not in equity entitled to restrain the use of his name as a part of the corporate name, notwithstanding G. L. c. 110, § 4, prohibiting use of name of person without his consent in writing.

Appeal from Superior Court, Suffolk County; F. T. Hammond, Judge.

Suit by Richard J. R. Caines to restrain and enjoin Caines College of Physical Culture, Inc., from using in its business the name of the plaintiff. From a decree dismissing the bill, plaintiff appeals. Affirmed.

J. B. Studley and E. E. Ginsburg, both of Boston, for appellant.

G. R. Farnum, of Boston, for appellee.

CARROLL, J. The plaintiff seeks to restrain and enjoin the defendant from using in its business the name of the plaintiff either alone or in connection with any other designation, or as a part of its corporate name, or otherwise, under G. L. c. 110, § 4, which prohibits a person conducting business in this commonwealth from assuming or continuing to use in his business the name of a person formerly connected with him in partnership, or the name of any other person without his consent in writing or the consent in writing of his legal representative. No exceptions were filed to the master's report. The plaintiff appealed from a final decree dismissing the bill.

The plaintiff was the manager of a school of physical culture in Boston. In 1904 he established a school in that city under the name of "Caines' School of Physical Culture" which he conducted until 1907, when a corporation was formed under the laws of the state of Maine with a capital stock of $10,000. The name adopted was "Caines' College of Physical Culture, Inc." The master finds that the corporation was formed with the knowledge and consent and under the direction of the "real parties in interest"; that at a meeting of the directors of the corporation, held 14 days after the first meeting of the signers of the articles of association, a communication from the plaintiff to the directors was read in which the plaintiff agreed to sell to the corporation for the sum of $9,600, payable in the capital stock of the corporation, "the business, * * * rights, franchises, and good will of the business now owned by [him], known as Caines College of Physical Culture"; that this offer was accepted and certificates of stock were issued in accordance with the vote of the directors; that five days later the plaintiff was elected president, treasurer, general manager, and a director, which position he held until he entered the army and went to France in 1917; that during a part of the year 1919, he resumed his former position with the defendant company; that in 1920 he was discharged by the company, but he still retains his interest as a stockholder; that the school was organized and built up during the first 10 years of its existence largely through the efforts of the plaintiff, and his name has been identified with the business of the corporation; that he knew the name was to be adopted by the corporation and approved its selection.

The master also found that the plaintiff as general manager ordered and used letter heads bearing the names "Caines School of Health Exercise," "Caines 175 Massachusetts Avenue, Boston, Richard J. R. Caines, M. D., Director," and used, in connection with the work of the school, pamphlets with the heading "Caines 175–177 Massachusetts Avenue," "Caines Health Institute"; that while the plaintiff remained with the corporation he made no objection to the use of the name, but approved of it, used the name himself and directed its use by others; that the public understood that the word "Caines," used alone or in combination with other words as hereinbefore set out, indicated the institution and business conducted by the defendant corporation; that the word "Caines" has attained a secondary meaning, separate and apart from the plaintiff as an individual, it is known to the public as designating the defendant's place of business and course of instruction, and it has acquired a valuable good will in connection with the use of its corporate name.

It was further found that during the time the plaintiff was president and treasurer all the stock certificates were signed by him; that in 1911 the capital stock was increased to $35,000, of which $25,000 was preferred. About $10,000 of the preferred was sold for cash, "in small blocks of a few shares, and most, if not all, of the sales being made through the personal effort of Dr. Caines."

From this recital of the pertinent facts found by the master, it is manifest that it would be unjust and contrary to equity and fair dealing to give to the plaintiff the relief he asks. The corporation was formed under his direction; he promoted its business under its corporate name; the name "Caines" had been identified with its pursuit, it was used with his approval and direction, and the public understood that it indicated the business conducted by the defendant. The stock certificates bore the plaintiff's name as president and treasurer, and he promoted the sales of these certificates to the general public. The decree dismissing the plaintiff's bill was right, and the decree is affirmed with costs.

So ordered.

ALLEN, Commissioner of Banks, v. COSMOPOLITAN TRUST CO. et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 4, 1924.)

1. Banks and banking ⇐313—Commissioner may sue to enforce liability of stockholders in own name.

The commissioner of banks in possession of property of trust company may bring suit to enforce individual liability of stockholders in his own name, joining the trust company as a defendant, under G. L. c. 167, § 24, in view of the practice under Rev. St. U. S. § 5234 (U. S. Comp. St. § 9821).

2. Banks and banking ⇐313—Commissioner need not sue in behalf of himself as creditor to enforce liability of stockholders.

In a suit by the commissioner of banks to enforce individual liability of stockholders of trust company, it is not necessary that he allege that it is brought "in behalf of himself and all other creditors," under G. L. c. 167, § 24, and chapter 158, § 49, the commissioner not being a creditor himself.

3. Banks and banking ⇐313—Pleading in suit to enforce stockholders' liability.

A bill by the commissioner of banks to enforce individual liability of stockholders of a trust company need not allege that it is brought against all persons who were stockholders at the time of the commencement of the suit in which judgment against trust company was recovered under G. L. c. 158, § 49, and chapter 167, § 24, as suit need not be brought against stockholders who have already paid without suit.

4. Banks and banking ⟸313—Bill to enforce stockholders' liability held to sufficiently set forth liability.

A bill by the commissioner of banks to enforce individual liability of stockholders of a trust company, under G. L. c. 167, § 24, set forth sufficient facts to warrant the enforcement of such liability, where it alleged "it is necessary to enforce the individual liability of the stockholders as described in the first sentence of section 24 of chapter 172 of the General Laws" to the full amount, "in order to pay the liabilities of said trust company," the express reference to the statute showing that the word "liabilities" was used as including only "contracts, debts and engagements."

5. Banks and banking ⟸313—Liability of stockholders for all "contracts, debts and engagements"; "debts."

The liability of stockholders for all "contracts, debts and engagements" of a trust company, under G. L. c. 172, § 24, is not restricted further by the words of chapter 167, § 24, whereby the commissioner of banks in possession of a trust company is empowered to enforce the stockholders' liability "if necessary to pay the debts of any such trust company," the word "debts" as used in the latter statute being a generic word to include every kind of liability of stockholders established under G. L. c. 172, § 24.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Debt.]

6. Banks and banking ⟸313—Bill to enforce stockholders' liability need not set forth every preliminary step.

It is not essential that a bill to enforce individual liability of stockholders of a trust company set out with excessive accuracy of detail every preliminary step taken or conclusion reached by the commissioner of banks before deciding to bring suit to enforce such liability, under G. L. c. 167, § 24, and chapter 172, § 24.

7. Banks and banking ⟸313—Allegation as to insolvency and necessity for suit to enforce liability of stockholders.

While an allegation that trust company was insolvent and that its assets were insufficient to pay its obligations would not have been out of place in suit by commissioner of banks to enforce individual liability of stockholders, it was not essential, and it was sufficient to simply allege that the commissioner determined that it was necessary to enforce the individual liability of stockholders under G. L. c. 172, § 24, such allegation importing inevitably a previous ascertainment of the fact that other assets were insufficient to meet obligations, in view of chapter 214, § 12.

8. Banks and banking ⟸313—Liability of stockholders established by determination of commissioner.

The liability of the stockholders of a trust company is established by the determination of the commissioner of banks that it ought to be enforced, under G. L. c. 167, § 24, and chapter 172, § 24.

9. Banks and banking ⟸313—Necessity of enforcing liability of stockholders not open to inquiry.

The question of the necessity of enforcing the liability of stockholders of a trust company and the extent to which that liability shall be enforced are not open further to judicial inquiry in a proceeding to enforce that liability under G. L. 167, § 24, and chapter 172, § 24.

10. Banks and banking ⟸313—Time for determination as to necessity for enforcement of liability of stockholders.

Neither by statute, nor on reason, is there any requirement that determination of necessity for enforcing individual liability of stockholders of a trust company, under G. L. c. 167, § 24, and chapter 172, § 24, cannot be made until after the occurrence of other conditions precedent to the actual enforcement of the liability, it being the execution of the determination, and not the determination itself, which must wait upon the arising of the prerequisites established by chapter 158, §§ 46 and 49, and such determination may be made prior to return unsatisfied of execution issued on judgment against the trust company.

11. Banks and banking ⟸317—Trust company remains corporate entity though in possession of commissioner.

A trust company remains in existence as a corporate entity even though the commissioner of banks has taken possession of its property and business, and is subject to actions and suits, under G. L. c. 158, §§ 46, 49.

12. Banks and banking ⟸313—Allegation as to nature of judgment against trust company unnecessary in suit against stockholder.

In suit by commissioner of banks, under G. L. c. 167, § 24, and chapter 172, § 24, to enforce individual liability of stockholders, it is not necessary to aver that the judgment in an action against the trust company was recovered upon a cause of action for which a stockholder would be liable; the only requirement of chapter 158, § 46, being that a judgment should be recovered.

13. Banks and banking ⟸313—Suit to enforce stockholders' liability may be brought before return day of execution; "unsatisfied."

Commissioner of banks need not delay until return day of execution against trust company before bringing suit to enforce individual liability of stockholders, under G. L. c. 167, § 24, and chapter 172, § 24; the words of chapter 158, § 46, requiring that the execution be returned unsatisfied not meaning that such return cannot take place until 60 days after its date, in view of chapter 235, § 23, which permits return of execution before that time.

[Ed. Note.—For other definitions, see Words and Phrases, Unsatisfied.]

14. Banks and banking ⟸313—Allegation as to demand on execution in suit to enforce stockholders' liability.

In suit by commissioner of banks, under G. L. c. 167, § 24, and chapter 172, § 24, to enforce individual liability of stockholders of a trust company, an allegation as to demand on execution to the effect that demand was made

on the corporation and on a person named as its assistant treasurer was sufficient to comply with chapter 158, §§ 46, 49.

15. Banks and banking ⟸313—Commissioner of banks may enforce stockholders' liability as to judgment obtained while in possession of property.

A judgment obtained against a trust company, when its property and business were in the possession of the commissioner of banks, was such judgment as is intended by G. L. c. 158, § 46, and the commissioner could rely upon it as basis for a suit to enforce individual liability of stockholders under chapter 167, § 24, and chapter 172, § 24.

16. Banks and banking ⟸313—Approval of court not prerequisite to suit to enforce stockholders' liability.

Approval of the Supreme Judicial Court is not a prerequisite to the bringing of a suit by the commissioner of banks to enforce the individual liability of stockholders of a trust company, under G. L. c. 167, § 24, and chapter 172, § 24.

17. Equity ⟸150(6)—Bill to enforce liability of stockholders not multifarious.

A bill by the commissioner of banks, under G. L. c. 167, § 24, and chapter 172, § 24, to enforce individual liability of stockholders of a trust company, *held* not multifarious.

18. Appeal and error ⟸1078(1)—Points not argued treated as waived.

Certain federal questions referred to in briefs were waived where not argued, though there was a prayer in the brief that they be saved.

Report from Supreme Judicial Court, Suffolk County.

Suit in equity by Joseph C. Allen, Commissioner of Banks of the Commonwealth of Massachusetts, in possession of the property and business of the Cosmopolitan Trust Company, against the corporation and its stockholders, to enforce individual liability of the stockholders. On report. Order overruling demurrers affirmed.

D. L. Smith and R. W. Nason, both of Boston, for plaintiff.

M. M. Horblit, of Boston, for certain defendants.

Philip N. Jones and F. D. Healy, both of Boston, for certain defendants.

J. A. Boyer, of Boston, for certain defendants.

RUGG, C. J. This is a suit in equity by the commissioner of banks, in possession under authority of the statutes on and since September 25, 1920, of the property and business of the Cosmopolitan Trust Company, against that corporation and numerous persons alleged to be holders of stock therein. The allegations of the bill are in brief that judgment was obtained against the Trust Company on July 5, 1921, for a large sum, that execution issued therein on which demand of payment was made on the Trust Company, that it neglected for 30 days thereafter to pay the amount due thereon or to exhibit real or personal property subject to be taken on execution sufficient to satisfy the same, and that the execution was returned unsatisfied on May 23, 1922; that the commissioner of banks on October 31, 1921, determined that it was necessary to enforce the individual liability of the stockholders of the Trust Company under G. L. c. 172, § 24, to the full amount, in order to pay the liabilities of the Trust Company, and that such necessity still exists. Then follows an allegation that on September 25, 1920, and also on the date of the beginning of the action in which the judgment was obtained, the persons set forth in a schedule were stockholders in the Trust Company and owners of the number of shares of stock set against their respective names. The prayers are for an assessment and order for payment against the shareholders, and for general relief.

Demurrers have been filed by several of the defendants. Without stating in detail their grounds, they will appear as they are discussed.

[1] 1. The commissioner of banks may bring this suit in his own name, joining the Trust Company as a defendant. The relevant words of G. L. c. 167, § 24, are, "He may * * * enforce the individual liability of the stockholders." These words import that he may perform that duty in any appropriate way, one of which is suit in his own name. Commissioner of Banks v. Cosmopolitan Trust Co., 240 Mass. 254, 133 N. E. 630; Commissioner of Banks v. Prudential Trust Co., 242 Mass. 78, 136 N. E. 410. This has been the practice under the federal National Bank Act, which our statute follows. U. S. Rev. St. § 5234 (U. S. Comp. St. § 9827); Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476; Studebaker v. Perry, 184 U. S. 258, 22 Sup. Ct. 463, 46 L. Ed. 528; Christopher v. Norvell, 201 U. S. 216, 26 Sup. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740.

[2] 2. It is not necessary that the commissioner of banks in bringing this suit allege that it is brought "in behalf of himself and all other creditors." G. L. c. 158, § 49. That averment is inapplicable in the circumstances here disclosed. The commissioner is not a creditor himself but acts in behalf of the creditors entitled to share in the proceeds of the suit. The allegations are adapted to his duties and the liabilities which he may enforce. The distribution of the amounts recovered must be in accordance with the statutes.

[3] 3. The bill is not defective because not alleging that it is brought against "all persons who were stockholders * * * at the time of the commencement of the suit in

which such judgment was recovered." See G. L. c. 158, § 49. Manifestly suit need not be brought against stockholders who have already paid without suit. The commissioner of banks is enforcing liability under the power conferred by G. L. c. 167, § 24, and not as a creditor. The allegations are sufficient in this particular. There is no defect of parties.

[4] 4. The bill sets forth sufficient facts to warrant the enforcement of stockholders' liability. The allegation in this particular is that the commissioner of banks has determined that "it is necessary to enforce the individual liability of the stockholders as described in the first sentence of section 24 of chapter 172 of the General Laws" to the full amount "in order to pay the liabilities of said Trust Company." Fairly construed, this allegation means that he has determined to enforce the kind of liability established by the statute for the purposes authorized by the statute, and for no other purposes. The liability of stockholders is limited by G. L. c. 172, § 24, to which reference is expressly made in the allegation of the bill, to "contracts, debts and engagements of the corporation." Manifestly these words do not comprehend every kind of liability. Savage v. Shaw, 195 Mass. 571, 81 N. E. 303, 122 Am. St. Rep. 272, 12 Ann. Cas. 806. While the word "liabilities" in some connections includes other forms of legal responsibility than "contracts, debts and engagements," it is plain that the pleader in the case at bar has in fact narrowed his averment to the particular kind of obligations for which stockholders may be liable under the words of said section 24. The express reference to that section in the allegation of the bill shows that the word "liabilities" is there used as including only "contracts, debts and engagements."

[5] The liability of stockholders for all "contracts, debts and engagements" of the Trust Company under G. L. c. 172, § 24, is not restricted further by the words of G. L. c. 167, § 24, whereby the commissioner of banks in possession of a trust company is empowered to enforce the stockholders' liability "if necessary to pay the debts of any such trust company." In other connections the word "debts" has a more constricted significance. Kilbourne Co. v. Standard Stamp Affixer Co., 216 Mass. 118, 103 N. E. 469. But it is used in G. L. c. 167, § 24, as a generic word to include every kind of liability of stockholders established under G. L. c. 172, § 24; Lothrop v. Reed, 13 Allen, 294, 296.

[6-9] 5. It is not essential that the bill set out with excessive accuracy of detail every preliminary step taken or conclusion reached by the plaintiff before deciding to bring suit to enforce stockholders' liability. While an allegation that the Trust Company was insolvent and that its assets were insufficient to pay its obligations would not have been out of place, it was by no means essential. A determination that it is necessary to enforce the individual liability of stockholders under G. L. c. 172, § 24, imports inevitably a previous ascertainment of the fact that other assets of the Trust Company are insufficient to meet its contracts, debts and engagements as and when they ought to be met. The existence of that fact is an irresistible inference from the other facts alleged and need not be set out. The ground of equitable remedy sufficiently appears without the further specific averment of insolvency of the Trust Company. The bill in this respect conforms to G. L. c. 214, § 12, by stating briefly the "material facts and circumstances relied on" and by omitting superfluous matters. The liability of the stockholders is established by the determination of the commissioner of banks that it ought to be enforced. Allegation of that fact is sufficient as matter of pleading. Commissioner of Banks v. Prudential Trust Co., 242 Mass. 78, 136 N. E. 410. It was held in that case that the power to determine whether to enforce the liability of stockholders and the power to decide finally the amount of such liability to be enforced, up to the full limit permitted by the statute, are referred to the judgment and discretion of the commissioner and cannot be controverted by the stockholders in any litigation that may ensue. The question of the necessity of enforcing the liability of stockholders and the extent to which that liability shall be enforced are not open further to judicial inquiry in a proceeding to enforce that liability. That proposition is supported by a large number of decisions of the Supreme Court of the United States interpreting the similar provisions of the National Bank Act, on which our statute was framed. Those decisions there were reviewed, beginning with Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476, and ending with Christopher v. Norvell, 201 U. S. 216, 26 Sup. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740. It was supported, also, by the persuasive authority of numerous state decisions there collected construing statutes similar to our own. That proposition was reaffirmed in Cosmopolitan Trust Co. v. Cohen, 244 Mass. 128, 138 N. E. 711. This ground need not be gone over again. It is not open to further discussion. Decisions of a contrary tenor by federal district or circuit judges in Bowden v. Morris, 1 Hughes, 378, Fed. Cas. No. 1,715, and Moss v. Whitzel (C. C.) 108 Fed. 579, can have no weight under these conditions. The allegations of the bill are sufficient in this respect.

[10] 6. The allegation that the determination of the necessity to enforce the liability of stockholders under the statute was made by the commissioner of banks on a date prior to the return unsatisfied of the execution issued on the judgment against the Trust Company, and the further allegation "that it is necessary so to enforce the said individual

liability of said stockholders," sufficiently state the material facts essential to the liability of stockholders under the statute. The liability of the stockholders cannot be enforced unless and until and a judgment has been recovered against the corporation and it has neglected for 30 days after demand made on the execution to pay the amount due with officers' fees, or to exhibit real or personal property subject to be taken on execution sufficient to satisfy the same, and the execution has been returned unsatisfied. Cosmopolitan Trust Co. v. Cohen, 244 Mass. 128, 132, 133, 138 N. E. 711. There is no express designation in the statute of the time when the commissioner of banks in possession of a trust company must reach the determination that it is necessary to enforce the liability of the stockholders in order to pay the contracts, debts and engagements of the trust company. There is no definite time prior to the bringing of suit for such determination arising by fair implication from the terms of the statute or the general circumstances of the situation. It well may be that a hopelessly insolvent condition will become apparent at once upon examination of the assets and liabilities of the Trust Company. Evidence may be overwhelming forthwith that there must be enforcement of the liability of stockholders in order to meet the contracts, debts and engagements of the Trust Company. There is no reason why the commissioner of banks may not determine to enforce stockholders' liability as soon as he becomes convinced of its necessity and to await the rendition of the judgment, the failure to pay the execution and its return unsatisfied before taking legal steps to effectuate that determination. There is no logical connection between the determination by the commissioner of banks to enforce the liability of the stockholders and the recovery of judgment with the subsequent factors connected therewith. They are dissociated and unrelated. They are distinct facts, both of which are conditions precedent under the statute to the enforcement of the stockholders' liability, but neither is precedent to the other. Neither by statute nor on reason is there any requirement that the determination cannot be made until after the occurrence of other conditions precedent to the actual enforcement of the stockholders' liability. It is the execution of the determination, not the determination itself, which must wait upon the arising of the prerequisites established by G. L. c. 158, §§ 46, 49.

[11] 7. The bill alleges a sufficient compliance with the requirements of G. L. c. 158, §§ 46, 49, as to recovery of judgment, demand on execution and failure to pay or to exhibit sufficient property subject to be taken on execution to pay the same. The Trust Company remains in existence as a corporate entity even though the commissioner of banks has taken possession of its property and business. It is subject to actions and suits. American Express Co. v. Cosmopolitan Trust Co., 239 Mass. 249, 132 N. E. 26; Beecher v. Same, 239 Mass. 48, 131 N. E. 338.

[12] It is not necessary to aver that the judgment in the action of the American Express Company against the Trust Company was recovered upon a cause of action for which a stockholder would be liable. The only requirement of G. L. c. 158, § 46, is that a judgment shall be recovered. The pleading need not go beyond the statute.

[13] The averment as to demand and return of the execution is adequate. The commissioner of banks need not delay until the return day of the execution before bringing suit to enforce stockholders' liability. The words of said section 46, requiring that "the execution has been returned unsatisfied," do not mean that such return cannot take place until 60 days after its date, which is the common return day of executions. That is not the effect of G. L. c. 235, § 23. The execution may be returned before that time. Chesebro v. Barme, 163 Mass. 70, 39 N. E. 1033, where Niles v. Field, 2 Metc. 327, and like cases are distinguished. Treasurer of the City of Boston v. Schapero, 217 Mass. 71, 75, 104 N. E. 440, Ann. Cas. 1915D, 399.

[14] The allegation as to demand on the execution is that such demand was made on the corporation and on a person named as its assistant treasurer. That is sufficient.

[15] Another argument of defendants in substance is that, because the judgment against the Trust Company could not be collected by the means described in G. L. c. 158, § 46, for the reason that the commissioner of banks had taken possession of its property and business, therefore the judgment was not such judgment as is intended by the section. Further arguments are that, because it was the duty of the commissioner of banks to defend actions against the Trust Company, he cannot rely upon a judgment obtained in such an action as basis for the present suit, and also that there can have been no default to meet the execution since the commissioner of banks had taken possession of all its property and business. All these and kindred and similar arguments are unsound. The corporate activities of the Trust Company were greatly curtailed by the commissioner of banks in taking possession of the property and business. But its corporate existence continued. Doubtless its property in the possession of the commissioner could not be seized on execution. It probably could not exhibit to the sheriff property not exempt from being taken on execution. Greenfield Savings Bank v. Commonwealth, 211 Mass. 207, 97 N. E. 927. But the statute requires compliance with the conditions set forth in G. L. c. 158, §§ 46, 49, before suit can be brought to enforce the liability of stockhold-

ers. That requirement must be given an interpretation reasonably consistent with the underlying facts likely to exist when possession is taken of the property and business of a trust company by the commissioner of banks. The statute must be so construed that it may be adapted to the accomplishment of a substantial result for the benefit of those creditors of the Trust Company entitled to share in the property to be secured by the stockholders' liability. The intention of the Legislature was to make stockholders' liability in trust companies a genuine thing. It is unthinkable that the legislative purpose was so to hedge its enforcement by such mutually retarding and conflicting processes as to render that liability of no financial value toward paying the obligations of the Trust Company. The statute can be reasonably interpreted so as to benefit the depositors and other designated creditors of the Trust Company. Very likely, it was not framed with a view to all the conditions which have arisen in connection with the recent failures of trust companies. But, so far as reasonably possible, it must be made a workable statute toward the end of bringing about its ultimate purposes, one of which was to make available the liability of stockholders to reduce the losses flowing from failure to meet its contracts, debts and engagements.

[16] 8. The approval of this court is not necessary as prerequisite to the bringing of this suit by the commissioner of banks in possession of the property and business of the Trust Company.

[17] 9. That the bill is not multifarious is too plain to require discussion.

10. The conclusions here reached in the main are supported by Commissioner of Banks v. Prudential Trust Co., 242 Mass. 78, 136 N. E. 410, and Cosmopolitan Trust Co. v. Cohen, 244 Mass. 128, 138 N. E. 711, and the numerous decisions cited and reviewed in those judgments.

11. It becomes unnecessary to consider St. 1922, c. 488, because the averments of the bill are sufficient without reference to it.

[18] 12. It is stated in one of the briefs for defendants:

"These defendants raise the following federal questions; to wit: That the rights and powers contended for by the commissioner under his bill are violative of those articles of the Constitution of the United States which provide against the impairment of obligations, and against assumption of judicial authority by an administrative officer, and against proceedings and decrees without due process of law; and they pray that their rights to such federal questions be saved."

Nothing further is said about that matter. Of course, that is not an argument. It is the settled practice of this court to treat as waived all points not argued. It is not enough for parties to say that a point is not waived although not argued. The court does not ordinarily consider questions in support of which parties do not present any argument. Such conduct is the equivalent of waiver. Commonwealth v. Dyer, 243 Mass. 472, 508, 138 N. E. 296, and cases there collected; Attorney General v. Pelletier, 240 Mass. 264, 298, 134 N. E. 407; Commonwealth v. Dascalakis, 246 Mass. 14, 140 N. E. 470.

Order overruling demurrers affirmed.

ALLEN, Commissioner of Banks, v. HANOVER TRUST CO. et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 4, 1924.)

1. Banks and banking ⟸313—Remedies of commissioner against stockholders stated.

To enforce liability of stockholders of a trust company, the commissioner of banks, in so far as forms of remedy are concerned, must follow G. L. c. 158, §§ 46, 47, 49–54.

2. Banks and banking ⟸313—Stockholders who are individually liable for debts.

Under and independent of St. 1922, c. 488, stockholders of a trust company in liquidation by the commissioner of banks, under G. L. c. 167, are liable in a suit by the commissioner to enforce stockholders' liability if they held stock when he took possession of the property and business; chapter 158, § 49, not relating to such suits, but to suits by creditors.

3. Banks and banking ⟸313—Liability of representative of stockholder in trust company held not barred.

The short statute of limitations, G. L. c. 197, § 9, is not a bar to a suit against a personal representative of a stockholder of a trust company under chapter 167, § 24, and chapter 172, § 24, to enforce individual liability of stockholders, where the liability had not accrued at the death of the stockholder because the commissioner had not then taken possession, and had not determined to enforce stockholders' liability, and the judgment against the trust company required by chapter 158, § 46, had not then been entered, the personal representative being the holder of the legal title at the time the liability accrued, and in that capacity being liable to assessment, especially in view of chapter 197, §§ 10 and 29.

4. Banks and banking ⟸313—Commissioner may treat decedent as owner of stock in absence of transfer on books.

Commissioner of banks had right to treat deceased stockholder of trust company as owner, where no transfer of the stock appeared on the books of the corporation, and it was not material that demand for payment of liability on stock was made in notices addressed to him at his last-known residence, under G. L. c. 167, § 24, and chapter 172, § 24.

Case Reserved from Supreme Judicial Court, Suffolk County.

Suit in equity by Joseph C. Allen, Commissioner of Banks of the Commonwealth of Massachusetts, in possession of the property and business of the Hanover Trust Company, to enforce the individual liability of stockholders thereof. Reservation of questions as to demurrers and pleas. Decrees ordered entered overruling demurrers and adjudging plea insufficient.

F. H. Smith, Jr., of Boston, for plaintiff.

J. J. Russo, of Boston, for certain defendants.

Philip N. Jones and F. D. Healy, both of Boston, for certain defendants.

H. D. McLellan and W. R. Sears, both of Boston, for Cunningham, trustee in bankruptcy of Charles Ponzi.

RUGG, C. J. This is a suit in equity by the commissioner of banks in possession of the Hanover Trust Company to enforce the liability of its stockholders. The suit is similar in nature to Allen, Commissioner of Banks v. Cosmopolitan Trust Co. (Mass.) 141 N. E. 100. That decision settles most of the points presented on this record and is adopted as here applicable without discussion.

The questions in the case at bar not there decided remain to be considered.

1. The bill alleges that the several defendants named as stockholders in the Hanover Trust Company were such stockholders on August 11, 1920, the date on which the commissioner of banks took possession of its property and business. There is no allegation that they were stockholders when the judgment was recovered against the trust company under G. L. c. 158, § 46, as to which there are adequate averments.

[1, 2] The commissioner of banks in possession of the trust company brings this suit by virtue of the powers conferred upon him by G. L. c. 167, § 24. As to forms of remedy so far as applicable he must follow G. L. c. 158, §§ 46, 47, 49 to 54 inclusive. There is no specific time prescribed by the statute for the ascertainment of those stockholders who are liable for the contracts, debts and engagements of a trust company in liquidation by the commissioner of banks under G. L. c. 167. It is provided in G. L. c. 158, § 49, that suits by creditors to enforce stockholders' liability shall be against "persons who were stockholders * * * at the time of the commencement of the suit in which such judgment was recovered." That provision is applicable to suits by creditors to enforce stockholders' liability. It was framed originally with reference to such suits alone. It is not applicable in substantive effect to the situation presented by this record. The commissioner of banks does not bring this suit as a creditor. He sues in his official capacity for the benefit of the creditors designated in other sections of the law as beneficiaries. Their identity and their rights to share in the assets are in general fixed as of the date when the commissioner takes possession of the trust company. The vital point of time in most matters concerning the administration of the affairs of a trust company in liquidation by the commissioner of banks is the date when he took possession of its property and business. It was said in Gerold v. Cosmopolitan Trust Co., 245 Mass. 259, 262, 139 N. E. 624:

"As a practical matter, the purposes of the statute will be best accomplished by adjusting the rights of parties as of the date when the commissioner took possession of the trust company, and that rule has been adopted in other cases."

It has been applied generally to a considerable variety of cases. Cosmopolitan Trust Co. v. Ciarlo, 239 Mass. 32, 131 N. E. 337; American Express Co. v. Cosmopolitan Trust Co., 239 Mass. 240, 132 N. E. 26; Commissioner of Banks, in re Prudential Trust Co., 244 Mass. 64, 77, 138 N. E. 702. It applies to the ascertainment of stockholders who may be held liable to suit by the commissioner of banks for the relief of beneficiary creditors.

This conclusion is reached without reference to St. 1922, c. 488, which makes specific provision to the effect that suit to enforce liability shall be brought against persons who were stockholders at the time of taking possession of the trust company by the commissioner. It follows that the demurrers must be overruled.

2. The demurrer of the trustee in bankruptcy of the estate of Charles Ponzi has not been argued. Another suit is pending presenting issues between him and the commissioner of banks. That demurrer is overruled but without prejudice to whatever questions rightly are raised in that other suit.

3. Michele Russo appeared by the records of the trust company to be the owner of 21 shares of its stock at the time the commissioner of banks took possession of its property and business in 1920. Michele Russo had died and Addolorata Russo had been appointed administratrix of his estate in 1918. The inventory of his estate filed September 30, 1919, showed 21 shares of the stock of the trust company belonging to the decedent. The first account of the administratrix filed in November, 1920, showed these shares among the assets of the estate. The estate has not yet been distributed nor has the administratrix been discharged. Demand for payment of the liability on this stock standing in the name of Michele Russo was made in notices addressed to him at his last Boston residence by the commissioner of banks in October and November, 1921. No specific demand was made on his administratrix. The stock was held by his estate when and since the commissioner of banks took possession of the trust company and is still so

held. The suit at bar was entered April 18, 1923. The administratrix of Michele Russo has voluntarily appeared in this suit and has filed a plea wherein she sets forth the short statute of limitations and thus raises the question of the liability of his estate under these circumstances.

[3, 4] The short statute of limitations, G. L. c. 197, § 9, is not a bar to this proceeding. The liability of the holder of these shares of stock was not extinguished by the death of Michele Russo in 1918. The liability had not then accrued, because the commissioner of banks had not then taken possession of the trust company and he had not determined to enforce the stockholders' liability and the judgment against the trust company required by G. L. c. 158, § 46, had not then been entered. The earliest of these events did not occur until nearly two years after the death of Michele Russo. The stock did not cease to have an owner because of the death of Michele Russo. It continued to exist and to have an owner. When each of these events took place, the administratrix of his estate was the holder of the legal title to these shares. She continues to be such holder. She as such administratrix is therefore the shareholder. She is in that capacity liable to the assessment decided upon by the commissioner of banks and being enforced by the present suit. The commissioner of banks had a right to treat Michele Russo or his estate as owner for the reason that there had been no transfer of the stock on the books of the corporation. The liability of a stockholder or his estate continues after his death until there is such transfer or demand therefor. Matteson v. Dent, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571.

The short statute of limitations is a bar to ordinary debts of a decedent. Wells v. Child, 12 Allen, 330; Rich v. Tuckerman, 121 Mass. 222; Leach v. Leach, 238 Mass. 100, 130 N. E. 262. But the claim here sought to be enforced is not of that nature, as has been pointed out. It was not a debt of the decedent. It is a claim springing into vitality long after the death of Michele Russo and arises by virtue of the ownership of stock at the time when possession of the trust company was taken by the commissioner of banks. Provision is made for the establishment of claims against estates of deceased persons even after the period of limitations has run. G. L. c. 197, §§ 10, 29. The estate of the deceased stockholder may be held. This conclusion is supported by the principle of numerous decisions. Grew v. Breed, 10 Metc. 569, 577. Matteson v. Dent, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571; Johnson v. Libby, 111 Me. 204, 88 Atl. 647, Ann. Cas. 1916C, 681; Davis v. Weed, 44 Conn. 569, Fed. Cas. No. 3658; Rankin v. Miller (D. C.) 207 Fed. 602; Zimmerman v. Carpenter (C. C.) 84 Fed. 747; Parker v. Robinson, 71 Fed. 256, 18 C. C. A. 36; Mortimer v. Potter, 213 Ill. 178, 72 N. E. 817.

Decrees are to be entered overruling the demurrers and adjudging the plea insufficient.

So ordered.

ROCKLAND TRUST CO. et al. v. BIXBY.

(Supreme Judicial Court of Massachusetts. Plymouth. Jan. 14, 1924.)

1. Wills ⇐116—Stockholder of executor and trustee not disqualified as a witness.

A stockholder in a trust company named as executor and trustee in a will was not disqualified as a witness to the will; the trust company not being a legatee or devisee.

2. Wills ⇐116—Competency of witnesses determined as of time of execution, and only present vested interest disqualifies.

The competency of a witness to a will is to be determined as of the time of the execution of the instrument, and the interest which disqualifies a witness must be a present vested interest, and not one which is uncertain and contingent.

3. Wills ⇐116—Member of lodge named in will not incompetent witness.

A member of a lodge of Masons was not incompetent as a witness to a will giving certain income to the lodge after the death of testator's wife; the gift to the lodge being a public charity, and any interest of the witness being so indirect as not to disqualify him, and this without consideration of St. 1918, c. 257, § 436 (G. L. c. 191, § 2).

Petition from Probate Court, Plymouth County; L. E. Chamberlain, Judge.

In the matter of the estate of Hans G. Dick, deceased. Petition by the Rockland Trust Company and others, as against Anna Sophia Dick Bixby, to have will admitted to probate. Will allowed.

T. H. Buttimer, of Boston, for petitioners.
G. J. Weller, of Boston, for respondent.

CARROLL, J. The testator, Hans G. Dick, died March 14, 1923. His will, executed on August 26, 1916, was offered for probate. One of the three witnesses to the will was Walter Shuebruk, whose competency was objected to because he was at the time of the execution of the will a stockholder in the Rockland Trust Company, named as one of the executors and trustees, and because he was a member of the Konohassett Lodge of Masons, interested in the trust fund created by the will. The testator's wife, Abbie A. T. Dick, predeceased him.

Certain bequests of household furniture, books and household property were given to his wife in case she survived him; and after

the payment of his debts and funeral expenses, the remainder of his estate was left to the trustees named in the will, the income to be paid to his wife during her life, and after her death the trustees were to expend a certain part of the income for the benefit of the Konohassett Lodge and its members, for the benefit of other Masonic lodges, and for public charities and improvements in Cohassett and Scituate. At the expiration of 200 years the income of the entire fund was to be used for the benefit of the Konohassett Lodge, its members, and the charities and improvements mentioned.

[1] The Rockland Trust Company was not a legatee or devisee under the will. It was merely named as executor and trustee. The witness Shuebruk was not disqualified as a witness to the instrument because he was a stockholder in that company at the time of the execution of the will. As an owner of stock in the trust company he had no direct pecuniary interest in the will, such as would render him incompetent as a witness. Sears v. Dillingham, 12 Mass. 358; Loring v. Park, 7 Gray, 42; Wyman v. Symmes, 10 Allen, 153. There is nothing in the case of Boston Safe Deposit & Trust Co. v. Bacon, 229 Mass. 585, 118 N. E. 906, which tends to support the contention of the respondent that Shuebruk was an incompetent witness because he was the owner of stock in the Rockland Trust Company.

[2] The competency of a witness to a will is to be determined as of the time of the execution of the instrument. Hawes v. Humphrey, 9 Pick. 350, 20 Am. Dec. 481. The interest which disqualifies a witness must be a present vested interest, and not one which is uncertain and contingent. In Hawes v. Humphrey, supra, the testator gave a life estate to his wife. After her decease the real and personal property were given to trustees for the benefit of the inhabitants of South Boston, one-half of the income to be used for the support of the gospel ministry of the Congregational Church in South Boston, and one-half of the income for the purpose of supporting public schools in South Boston, in such a way as should best tend to the benefits of its inhabitants. The witnesses of the will were inhabitants of South Boston. It was held that they were not on this ground disqualified. In the course of the opinion it was said at pages 357–358 (20 Am. Dec. 481):

"Where the interest is of a doubtful nature, the objection goes to the credit, and not to the competency, of the witness. * * * The interest must be pecuniary. * * * Whatever interest they had, was contingent. * * * Here the contingency was remote and was not determinable by the death of the testator, a life estate being given to the testator's wife, and the estate to the trustees was not to vest in possession in them until her decease."

See Renwick v. Macomber, 233 Mass. 530, 124 N. E. 670.

[3] The witness Shuebruk had no present, direct vested interest in the estate at the time of the attestation of the will. The lodge of which he was a member was not to share in the income until the death of Mrs. Dick, and although she died before the testator, she was alive when the will was made, and the benefit to the lodge was to accrue after her death. His interest was entirely contingent and uncertain. He might not survive the life tenant.

The gift to the Konohassett Lodge of Masons for the purpose named in the will was a public charity. Masonic Education & Charity Trust v. Boston, 201 Mass. 320, 87 N. E. 602. His membership in the organization at the time the will was made, and his payment of annual dues, did not make him an incompetent witness to the will. Not only was his interest contingent, but it was not such a direct interest as would disqualify him. Whatever benefits he might share if he continued to be a member of the lodge were so indirect that he was not disqualified on this ground. Hawes v. Humphrey, supra; Northampton v. Smith, 11 Metc. 390; Hitchcock v. Shaw, 160 Mass. 140, 35 N. E. 671.

Jacobs v. Whitney, 205 Mass. 477, 91 N. E. 1009, and Crowell v. Tuttle, 218 Mass. 445, 105 N. E. 980 relied on by the respondent, are not in conflict with the conclusion here reached. In Crowell v. Tuttle the gift was to a church upon the express condition that it was to be applied to the reduction of the mortgage on the church property. One of the witnesses of the will was one of the guarantors of the note held by the mortgagee. It was decided that his interest, although small, was a direct pecuniary interest in the subject-matter of the bequest.

The will was executed in August, 1916. We have not thought it necessary to consider whether Stat. 1918, c. 257, § 436 (G. L. c. 191, § 2), is applicable. This statute provides in effect that a person of sufficient understanding shall be deemed a competent witness to a will, notwithstanding common-law disqualification for interest or otherwise; but a legacy or devise to a subscribing witness, or to the husband or wife of such witness, shall be void unless there are three other subscribing witnesses who are not similarly benefited thereunder. See Swan v. Sayles, 165 Mass. 177, 42 N. E. 570. The will should be admitted to probate. A decree is to be entered allowing the will.

So ordered.

MUSTO v. TUTELLA et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 5, 1924.)

1. Trusts ⟸373—Finding of relationship of trust sustained by facts.

In a suit against one to whom plaintiff entrusted money for investment and care, facts found *held* to justify master in his inference that plaintiff reposed confidence in the defendant, and that his relationship of trust existed, with the legal duties attendant on such relation.

2. Equity ⟸412—Remedy for omission from a report is motion to recommit.

A remedy for failure of master to find specifically on certain matters should have been sought through a motion to recommit.

3. Trusts ⟸373—Finding of master held not inconsistent.

In a suit against one to whom plaintiff entrusted money for investment and care, findings of master *held* not inconsistent.

4. Trusts ⟸373—Conclusions of master held supported by facts.

Conclusions of master as to income of plaintiff, the earnings of defendant, and conduct of defendant which "was not compatible with the relationship of trust," *held* supported by facts found.

5. Estoppel ⟸78(1)—Taking of note in connection with replacing of mortgage held not to estop assertion of claim to land.

The fact that plaintiff advanced defendant money and took his note therefor in connection with replacement of a new first mortgage on certain property did not estop her to assert any claims which in law or equity she had against the defendant and the property; it being plaintiff's claim that she entrusted money to the defendant, part of which was invested in such property, and that he refused to account for the same.

Appeal from Superior Court, Suffolk County; Wait, Judge.

Suit in equity by Pasqualina Musto against Dominico Tutella and another. Decree for plaintiff, and defendants appeal. Affirmed.

A. C. Lurie, of Boston, for appellants.
J. E. Crowley, of Boston, for appellee.

PIERCE, J. This is a suit in equity wherein the plaintiff in her complaint charges that she entrusted to the defendant Dominico Tutella moneys aggregating $9,200 for investment and care, and that the defendant has refused and neglected to account for the same, although he often has been requested so to do by the plaintiff; that the defendant Dominico purchased with the money of the plaintiff a lot of land described in paragraph 8 of the bill of complaint; that he caused the title to the purchased property to be taken in the name of the defendant Elisa B. Tutella and the name of the plaintiff as tenants in common; that the defendant Elisa B. Tutella paid no money for an interest in the real estate; that the entire purchase price was from moneys of the plaintiff; and prayed in substance that the defendant Dominico Tutella be ordered to account, and to pay the plaintiff the amount found due to the plaintiff as an accounting; and that the defendant Elisa B. Tutella be ordered to execute to the plaintiff a deed of the interest in said property now standing of record in the name of Elisa B. Tutella. The defendants answered that they were ignorant of the matters charged in the second paragraph of the bill so far as they relate to $4,000 deposited in savings banks in the city of Boston, and specifically denied seriatim the charges in each and every paragraph of the complaint.

The case was referred to a master to hear the parties and their evidence, and to report his findings to the court together with such facts and questions of law as either party request. Hearings before the master were begun prior to the entry of the United States into the World War, were suspended until May, 1922, and concluded with the filing of the report on February 16, 1923. The defendants filed twenty exceptions based on objections seasonably taken, and moved that the report be recommitted to the master to receive evidence which he had refused to receive after the close of the hearings and the delivery of draft reports to counsel. The defendants duly appealed from an interlocutory decree overruling the exceptions, denying the motion to recommit, and confirming the report of the master. The court in a final decree found for the plaintiff and the defendants duly appealed therefrom.

As stated by the defendants the issues raised by their appeal are as follows:

"a. The master's findings of fact are plainly wrong and unwarranted.

"b. The account as stated by the master on page 18 of the record is plainly wrong.

"c. That it is apparent from the face of the report that the plaintiff was estopped from claiming that the defendant holds the undivided half interest in 46 North Bennett street as trustee for her.

"d. That certain of the defendants' exceptions to the master's report should have been sustained."

The evidence is not reported.

[1] In support of issue "a" the defendant contends that upon the facts the master was not warranted in his manifest conclusion of fact that there was in the confidence reposed in the defendant Dominico a relation which in effect was a relationship of trust with the legal duties attendant on such re-

in substance, that the plaintiff is a wholly unlettered Italian woman over seventy years of age, who earned her living as the proprietor of a small store and by peddling vegetables and oils; that the defendant Dominico is a barber by trade but from time to time has undertaken various brokerage transactions, mainly in connection with real estate and loans; that Dominico is the son-in-law and Elisa is the daughter of the plaintiff; that the relations between the plaintiff and Dominico prior to July 1, 1910, were pleasant, and without strain; that there existed an affectionate family relationship which led to the plaintiff entrusting to Dominico the execution of various acts pertaining to the investment of moneys belonging to her, and in sundry other ways relying upon the advice, assistance and direction of Dominico in respect to business dealings; that the plaintiff relied upon the judgment, good faith and honest dealing of Dominico in accepting and following his advice in respect of making investments and permitting her moneys and assets to be invested as Dominico recommended; that Dominico did not fulfill the obligations of this trust and confidence placed in him; that he was the son-in-law of the plaintiff, was versed in American customs and ways of business, spoke the English language, and was accepted by the plaintiff as competent to advise her, and to act for her best interest.

The master further found on the whole evidence, which is not reported, and viewing the transaction as a whole that it was clear that the plaintiff practically entrusted all her moneys to the defendant for investment; that the usual course in respect to each investment was for the defendant Dominico to disclose what appeared to be a profitable investment, and then for the plaintiff to advance, in some instances from a bank account, but generally from money carried on her person. In this regard the master specifically found that, though there was no specific agreement establishing a trust relationship, there was a well-established belief that because of the illiteracy of the plaintiff she needed the advice and guidance of her son-in-law and she in good faith relied upon him as an adviser.

[2] The defendant Dominico complains that the master makes no specific statement that at any time the plaintiff entrusted specific amounts to the defendant for the purposes of investment and that there appears no specific statement as to any investments which were made by the defendant with the plaintiff's funds and which the defendant took in his own name, with the exception of is that a remedy for such an omission should have been sought through a motion to recommit. However, looking at the report as a whole, it does appear that specific sums were invested in mortgages and otherwise by the defendant in the name of an attorney at law, who acted as attorney for the plaintiff while the defendant's attorney.

[3] The complaint of the defendant under issue "b" that the finding of the master, that the plaintiff was worth $9,200 when her bill of complaint was filed, is inconsistent with other findings in this regard, cannot be sustained, the amount traced to the defendant being in excess of what is claimed by the plaintiff. As regards the North Bennett street property the master found that it was purchased in the names of the plaintiff and Elisa B. Tutella, wife of Dominico, as tenants in common; that it was purchased for $11,500, of which price $3,500 was in cash and $8,000 in a first mortgage; that it was admitted by the defendant that $1,906.30 of the $3,500 was money of the plaintiff; that the defendant Dominico claimed the balance, or $1,593.70 belonged to him. This last sum the master finds was also of moneys which "equitably were part of funds belonging to the plaintiff." The master finds in reference to the claim of the defendant that the balance of the purchase price was of moneys earned, that neither Elisa nor Dominico invested any of their own money in this enterprise and that therefore he does "not believe it is necessary for me to analyze what became of these earnings, as a means of balancing conjectural inferences as to whether he might or might not have saved sufficient moneys to total $1,593.70."

[4] The defendant further complains of the conclusions of the master as to the income of the plaintiff, the earnings of the defendant, and the conduct of the defendant which the master found "was not compatible with the relationship of trust." In each of these respects the reported facts warrant the conclusions of the master; at least it cannot be said of any one of them that such finding is erroneous. Daniels v. Daniels, 240 Mass. 380, 134 N. E. 235.

[5] We find nothing in the fact that the plaintiff advanced the defendant $613.75 and took his note therefor in connection with a replacing of a new first mortgage on the North Bennett street property which estops her to assert any claim which in law or equity she has against the defendant and the property. We have carefully examined all the exceptions and are of opinion that each of them must be overruled.

Decree affirmed.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 14, 1924.)

1. Brokers ⟸44—Contract held without consideration, and revocable before performance.

Real estate owner's promise to pay broker commission for sale was unilateral, and without consideration until the performance of the condition, and could be revoked at any time before performance by the broker, though the broker was appointed "exclusive agent," and was to be paid a regular broker's commission "in any event when a sale is consummated."

2. Brokers ⟸44—Promise to pay commission revoked by sale by owner.

Promise to pay commission for sale of real estate was revoked by a sale of the property by the owner, though the broker had at such time procured a purchaser of which the owner had no knowledge, and owner's offer to broker was to pay the commission "when a sale is consummated."

3. Brokers ⟸44—Notice of revocation of agency unnecessary.

Broker's appointment was revoked when owner sold to purchaser of his own procurement, and no notice of revocation was essential to bar broker's claim to commission for procuring a purchaser before the owner's sale without notice to the latter.

Appeal from Municipal Court of Boston, Appellate Division.

Action by Ulysses F. Des Rivieres against Marie M. Sullivan to recover a broker's commission. Case reported to the appellate division, where the report was dismissed, and defendant appeals. Order reversed, and judgment entered for defendant.

B. E. Carvin and R. J. Hartford, of Roxbury, for appellant.

Edwin B. Cox, of Boston, for appellee.

CARROLL, J. The defendant signed and delivered to the plaintiff, a real estate broker, this writing:

"Boston, January 18, 1923.

"I hereby employ W. F. Des Rivieres as exclusive agent to sell my houses at 389 and 391 Salem street, Medford, Mass., for a price of not less than twelve thousand ($12,000.00) dollars, and I agree to pay him a regular broker's commission, in any event, when a sale is consummated.

"W. F. Des Rivieres is to do his advertising and showing of the property at his own expense. Marie M. Sullivan."

The declaration alleges that the defendant agreed to make the plaintiff her exclusive agent, as stated in the agreement, and that the plaintiff secured a purchaser, but was informed the defendant had already sold the property.

There was evidence tending to show that the plaintiff submitted several offers of less which theirs were refused; that on Sunday February 25, 1923, the plaintiff submitted to the defendant an offer of $12,000 for the purchase of the property, only a few hundred dollars of which was to be paid in cash, the remainder to be on mortgage, and that this offer was refused; the defendant then informed the plaintiff "not to bother about the property any more, I will sell it myself"; that on February 27 defendant made a written agreement to sell the real estate to her own purchaser; that on February 28 the plaintiff was notified by the defendant's attorney that a sale had been made by the defendant; that on March 1 the plaintiff was informed by the defendant's daughter that her mother had sold the property to her own purchaser. On February 27 the plaintiff secured a purchaser able, ready and willing to buy the real estate for $12,000.

[1] The writing signed by the defendant was an offer on her part to pay the plaintiff a broker's commission when the transaction contemplated was performed by him. The defendant's promise was unilateral; it was without consideration until the performance of the condition; the promise could be revoked at any time before performance by the plaintiff.

"Where one promises to pay another a certain sum of money for doing a particular thing, which is to be done before the money is paid, and the promisee does the thing, upon the faith of the promise, the promise, which was before a mere revocable offer, thereby becomes a complete contract, upon a consideration moving from the promisee to the promisor; as in the ordinary case of an offer of reward." Cottage Street Church v. Kendall, 121 Mass. 528, 530 (23 Am. Rep. 286); Bornstein v. Lans, 104 Mass. 214; Wellington v. Apthorp, 145 Mass. 69, 13 N. E. 10; First National Bank v. Watkins, 154 Mass. 385, 28 N. E. 275; Auerbach v. International W. Lampen A. Gesellschaft (C. C.) 177 Fed. 458; Train v. Gold, 5 Pick. 380.

It is a general rule that, by employing a broker to secure a customer, the principal, in the absence of an agreement to the contrary, has the right to revoke the appointment and make the sale himself. Cadigan v. Crabtree, 179 Mass. 474, 61 N. E. 37, 55 L. R. A. 77, 88 Am. St. Rep. 397; Cadigan v. Crabtree, 186 Mass. 7, 12, 70 N. E. 1033, 66 L. R. A. 982, 104 Am. St. Rep. 543; Kimball v. Hayes, 199 Mass. 516, 520, 85 N. E. 875.

The plaintiff was appointed the "exclusive agent" of the defendant to sell the real estate, but the term "exclusive" did not deprive the defendant of the power to revoke the agent's authority and sell the property herself without liability to pay a commission to the broker if the purchaser was not procured by him. Dole v. Sherwood, 41 Minn. 535, 43 N. W. 569, 5 L. R. A. 720, 16 Am. St. Rep. 700.

As explained by Hand, J., in Auerbach v. International W. Lampen A. Gesellschaft, supra, where there was an exclusive agency given to sell certain patents, that notwithstanding an exclusive agency was given to sell, the promise by the owner was unilateral and the agency revocable. See Chambers v. Seaym, 73 Ala. 372; Beck v. Howard, 43 S. D. 179, 178 N. W. 579; Levander v. Johnson (Wis.) 193 N. W. 970 (June 5, 1923); Kolb v. Bennett Land Co., 74 Miss. 567, 21 South. 233.

In Harris v. McPherson, 97 Conn. 164, 115 Atl. 723, 24 A. L. R. 1530, the plaintiff was given "the exclusive sale" of the defendant's property, and not merely the "exclusive agency" to find a customer. As was pointed out in the majority opinion, a contract employing a broker as an exclusive agent "does not preclude the owner from selling to a purchaser of his own procuring." Ingold v. Symonds, 125 Iowa, 82, 99 N. W. 713.

In Wier v. American Locomotive Co., 215 Mass. 303, 102 N. E. 481, Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 N. E. 221, and Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 N. E. 695, the agent was given the exclusive agency to sell the defendant's product in a certain territory under a contract between the parties founded upon a sufficient consideration. These decisions are not in conflict with the rule that where a unilateral promise is made to pay a broker a commission when a sale is made by him, and he is appointed the exclusive agent, a sale by the owner to a customer secured by himself revokes the authority of the agent. "A regular broker's commission" was to be paid the plaintiff "in any event, when a sale is consummated." The payment of a broker's commission "in any event" was to be made when the sale was effected by the plaintiff, but the words "in any event" did not make the defendant liable to pay the commission, unless the plaintiff was the efficient cause of the sale, and did not impose liability upon the defendant when the sale was the result of her own efforts.

[2] There was evidence that the defendant made a written contract to sell the real estate to her own purchaser on February 27, 1923; the plaintiff was notified of this agreement on February 28. While the plaintiff had a purchaser able, ready and willing to buy the property for $12,000 on February 27, there was no evidence that the defendant knew of this, when she made the agreement to sell to the purchaser whom she procured. Assuming but not deciding that the revocation attempted on February 25, 1923, when the plaintiff was informed by the defendant "not to bother about the property any more" was ineffectual, because made on the Lord's Day—see Kryzminski v. Callahan, 213 Mass. 207, 100 N. E. 335, 43 L. R. A. (N. S.) 140; Stevens v. Wood, 127 Mass. 123; Rheem v. Carlisle Deposit Bank, 76 Pa. 132; Chrisman v. Tuttle, 59 Ind. 155—the owner by her sale revoked the authority of the plaintiff before she knew the plaintiff had a purchaser. The offer appointing the plaintiff to secure a customer, and giving him the exclusive agency, was revocable and was in fact revoked by the sale to one whom the plaintiff did not produce. The broker's power was not coupled with an interest; it came to an end when the subject-matter of the agency was disposed of by the principal. Ahern v. Baker, 34 Minn. 98, 24 N. W. 341; Walker v. Denison, 86 Ill. 142; Dolan v. Scanlan, 57 Cal. 261; Beck v. Howard, supra; Gilbert v. Holmes, 64 Ill. 548, 561.

[3] The plaintiff had no notice of this sale by the defendant until February 28. The defendant's offer to the plaintiff was to pay the commission "when a sale is consummated." Even if this language means no more than the production of a purchaser able, ready and willing to buy, until the customer was produced or the owner had notice of the completion of the negotiations with the broker, the owner was free to sell to her own customer without liability to the plaintiff. The mere making of the contract with his customer did not entitle the plaintiff to a commission; he was required to produce the purchaser and bring the transaction to the defendant's notice. Tinges v. Moale, 25 Md. 480, 90 Am. Dec. 73; Gilbert v. Holmes, supra. See Wylie v. Marine National Bank, 61 N. Y. 415. Mechem on Agency (2d Ed.) § 2460. See also Goodnough v. Kinney, 205 Mass. 203, 204, 91 N. E. 295; Cohen v. Ames, 205 Mass. 186, 188, 91 N. E. 212; Taylor v. Schofield, 191 Mass. 1, 4, 77 N. E. 652. Since no notice was given to the defendant that the plaintiff had secured a purchaser able, ready and willing to buy, when she had made sale of the property, the agency was revoked and notice of this revocation was not essential to bar the plaintiff's claim. See Wylie v. Marine National Bank, supra; Mechem on Agency, supra.

The trial judge ruled that the plaintiff was entitled to his commission if the defendant sold the real estate and based his findings on the sale made by her; this was error, and it was error to refuse the defendant's requests that the defendant "was not precluded from selling property herself, without liability for commissions to plaintiff." "Contract * * * was terminated without liability for commission, by principal's sale of the property."

The order of the appellate division must be reversed and judgment entered for the defendant.

So ordered.

DUCKWALL v. DAVIS. (No. 23884.)

(Supreme Court of Indiana. Jan. 18, 1924.)

1. Malicious prosecution ⇐16 — Elements stated.

In an action for malicious prosecution, plaintiff must prove that defendant maliciously instituted the prosecution, or caused it to be instituted, without probable cause, and that it has terminated.

2. Malicious prosecution ⇐24(7)—Indictment presumptive evidence of probable cause.

That an indictment was returned is presumptive evidence of probable cause, though subject to rebuttal by proof that it was induced by false testimony or other improper means.

3. Appeal and error ⇐525(3)—Rulings on instructions held sufficiently presented.

Under Burns' Ann. St. 1914, § 561, exceptions taken orally to the giving and refusal of instructions, and entered on the record, together with the instructions and recitals as to which were given and which refused, sufficiently presented the court's rulings thereon for review, though the instructions were not incorporated in a bill of exceptions, and memoranda as to which were given and which refused and the exceptions taken were not indorsed thereon in compliance with sections 560, 561.

4. Trial ⇐257—Exceptions to refusal of instructions not tendered until conclusion of argument not available.

Exceptions to refusal of instructions not tendered to the court with a request that they be given until the argument was concluded are not available under Burns' Ann. St. 1914, § 558, cl. 4, and section 559.

5. Trial ⇐259(2)—Signing request for instructions held sufficient signature of latter.

Signing a request for instructions which was attached to and fully identified them *held* a sufficient signing of the instructions by counsel.

6. Trial ⇐253(8)—Instruction that certain facts would not constitute probable cause held erroneous as ignoring return of indictment.

In an action for malicious prosecution, an instruction that certain facts would not constitute probable cause *held* erroneous as ignoring the admitted fact that an indictment had been returned.

7. Trial ⇐191(5)—Instruction held erroneous as assuming fact.

In an action for malicious prosecution, which defendants denied having caused, the court erred in charging that the question was whether defendants had probable cause "when they caused the prosecution to be begun," and discussing the conditions under which they did so.

8. Malicious prosecution ⇐71(2)—Probable cause question for court on facts.

Whether a given state of facts establishes probable cause is for the court, not the jury.

9. Appeal and error ⇐882(12) — One asking erroneous instruction cannot except to like instructions.

One inviting error by asking an instruction erroneously declaring a rule of law cannot except to other instructions so declaring it.

10. Malicious prosecution ⇐67—Mistreatment in jail held not ground for compensatory or exemplary damages.

That one indicted for crimes was confined in a filthy jail, and denied proper food and a bed, in violation of Burns' Ann. St. 1914, §§ 2412, 2414, 9429, 9814, and was the victim of unnecessary personal violence, which constitutes an assault and battery, were not proper elements of compensatory or exemplary damages for malicious prosecution, in the absence of any showing that defendant procured or induced the officials, in whose custody plaintiff was, to so mistreat him, or had reason to anticipate such violations of law.

11. Appeal and error ⇐843(3)—No opinion expressed on sufficiency of evidence or excessiveness of damages in case to be retried.

Where the case must be tried again, no opinion as to the sufficiency of the evidence or excessiveness of the damages need be expressed.

12. Appeal and error ⇐843(1)—Rulings unlikely to be repeated on new trial not considered.

Rulings which will probably not be repeated on retrial need not be considered.

Appeal from Circuit Court, Hendricks County; Z. Dougan, Judge.

Action by Henry P. Davis against Herbert R. Duckwall and others. From a judgment against the named defendant, he appeals. Reversed, with directions.

Eph. Inman, of Indianapolis, Otis E. Gulley, of Danville, and Urban C. Stover, of Indianapolis, for appellant.

Clarence E. Weir and Chas. W. Richards, both of Indianapolis, and Geo. W. Brill, of Danville, for appellee.

EWBANK, C. J. Appellee sued appellant and two others for damages for alleged malicious prosecution, and recovered a verdict and judgment for $10,000 against appellant alone. Overruling the motion for a new trial is the only error assigned.

The complaint alleged that the defendant Zenite Metal Company was a corporation engaged in manufacturing (among other things) mouldings stamped out of metal and filled with lead, for use in finishing automobile bodies; that appellant was the president, and his codefendant Bates was the secretary, of said company; that plaintiff lived in the city of New York, and was engaged in the manufacture and sale of lead-filled mouldings by a secret process originated and owned by him; that at the request of defendants plaintiff came to Indianapolis for the purpose

plaintiff's said secret process; that he commenced work for the defendant company and continued in its service two or three weeks, when he returned to New York because of his inability to agree with defendants on a contract for permanent and continuous employment, and because of the illness of his family back there; that, having tried, without success, to induce plaintiff to return to Indianapolis and continue in said employment, defendants maliciously and without probable cause, and by means of false testimony submitted and given by them to the grand jury, caused two indictments against plaintiff to be returned in the criminal court of Marion county, Ind., which charged that plaintiff had feloniously stolen two described checks of the value of $50 and $50 in money, and had feloniously embezzled $50 in money, each item so charged to have been taken being alleged to have been the property of said company; that by means of a warrant issued thereon and extradition proceedings plaintiff was caused to be arrested and imprisoned for a week in New York, and brought from there to Indianapolis and placed in jail, where he remained until released on bail in the sum of $1,000 the next day; that more than three months later plaintiff was tried on said charges and was acquitted; that plaintiff was put to great expense for attorneys and for traveling between Indianapolis and New York, and sustained humiliation, disgrace, and discomfort, and was damaged $10,000 by said wrongful acts.

The answer was a denial, and a second paragraph alleging that all which defendants did was done on the advice of a reputable and competent practicing attorney, to whom they made a full statement of the facts, in good faith, and for the honest purpose of being advised as to the law in relation to the alleged offense; also special denials of having acted with malice, and of having presented any false testimony to the grand jury, were pleaded. The reply was a general denial.

There was no evidence that appellant appeared in person before the grand jury that returned the indictments against plaintiff (appellee), but the undisputed evidence of witnesses called by both sides was that, except for some papers brought to the grand jury by an attorney who had visited plaintiff in New York in the interest of the Zenite Metal Company, and who was shown to have received fees from it for that and other special employments by the company as its attorney, and who testified that when he went to see plaintiff in New York he went "for Mr. Duckwall" (appellant), the testimony of said attorney was the only evidence heard by the grand jury. It also appeared without dispute that the indictments were returned, and that the papers referred to were from the files of the Zenite Metal Company, some of them being letters and telegrams by plaintiff addressed to said company, some to plaintiff on behalf of that company, written by its secretary, others on its behalf written by appellant as its president, and one that purported to be from appellant individually. To establish liability on the part of appellant the plaintiff relied on evidence by which he sought to raise an inference that the deputy prosecuting attorney was the attorney and agent of appellant, and by appellant's authority procured the indictments to be returned, and that, acting for appellant, he concealed part of the material facts, and so manipulated the others in presenting them as to give the grand jurors a wholly false understanding of the case, and that appellant thereafter ratified and adopted all that had been so done. Appellant insists that there was no evidence tending to prove that he had anything to do with the investigation by the grand jury or the return of the indictments, or otherwise to prove the allegation in the complaint that the defendants (including appellant) "by means of false testimony submitted and given and caused to be submitted and given by them to the grand jury * * * caused and procured said grand jury to return two certain indictments against this plaintiff." That the indictments were returned was clearly proved, without dispute, and appellant testified that he had nothing to do with instituting the prosecution, that he counseled against it, and did not know of it until after plaintiff had been indicted. It was also proved without dispute that there was some agreement that a sum of money should be advanced by the Zenite Metal Company to plaintiff to pay the cost of bringing his family to Indianapolis, and that he received money from the company in excess of his wages to the amount of about $50, which he did not return on going back to New York.

[1, 2] The facts which must be established in order for plaintiff to be entitled to recover were: (1) That appellant instituted the prosecution or caused it to be instituted; (2) that he acted maliciously in so doing; (3) that there was no probable cause for instituting it; and (4) that the prosecution had terminated. Bitting v. Ten Eyck, 82 Ind. 421, 423, 42 Am. Rep. 505; Johnson v. Brady, 60 Ind. App. 556, 559, 109 N. E. 230.

"The fact that an indictment was returned by the grand jury was in itself presumptive evidence of probable cause, though subject to be rebutted by proof that it was induced by false testimony or other improper means. Terre Haute, etc., R. Co. v. Mason (1897) 148 Ind. 578, 581, 46 N. E. 332; Scotten v. Longfellow (1872) 40 Ind. 23, 27; 19 Am. & Eng. Ency.

of Law (2d Ed.) 668." Miller v. Willis (1920) 189 Ind. 664, 670, 128 N. E. 831, 833.

Assuming, without deciding, that there may have been evidence fairly tending to prove each material element of plaintiff's case, as well as evidence to the contrary, we proceed to the examination of the reasons assigned for asking a new trial.

[3] The giving of each of certain instructions and the refusal to give each of certain others were specified as reasons for a new trial. Appellee insists that no question is presented by these specifications, because the instructions were not incorporated in a bill of exceptions, and the attorneys and judge did not indorse thereon statements indicating which were given and which refused, and what exceptions were taken, in compliance with the statutes (sections 560, 561, Burns' 1914; section 535, R. S. 1881; section 1, c. 283, Acts 1907, p. 652), which authorize exceptions to be noted by making such memoranda. But the act of 1907 also provides that—

"All instructions requested whether given or refused, and all instructions given by the court of its own motion, shall be filed with the clerk of the court at the close of the instruction of the jury. Exceptions to the giving or refusing of instructions may be taken * * * and [our italics] the *same may be taken orally and entered upon the record or minutes of the court.* * * * All instructions requested as herein provided, whether given or refused, and all instructions given by the court of its own motion, together with all exceptions taken to the giving or refusing of instructions as herein prescribed, and *all entries upon the minutes or records of the court in respect to such instruction and exceptions, shall be a part of the record* without any bill of exceptions and as such *may be included in the transcript on appeal.*" Section 561, Burns' 1914; section 1, c. 283, Acts 1907, p. 652.

Exceptions to the giving of the instructions complained of seem to have been taken in the case at bar in strict compliance with the provisions of the statute above quoted. The record recites that plaintiff tendered instructions numbered 1 to 8, both inclusive, that the court gave of said tendered instructions numbers 1, 2, 3, 4, 5, and 6, and refused to give the others, and that to the giving of each of those so given each one of the defendants at the time excepted; that the defendants tendered instructions numbered 1 to 17, both inclusive, of which the court gave numbers 6, 8, 9, 14, 15, and 17, and refused to give each of the others; that the court gave of its own motion instructions numbered from 1 to 13, inclusive, to the giving of each of which severally the defendants severally excepted at the time; that all the instructions so requested by plaintiff and defendants, respectively, were signed by the court and ordered filed, and were filed, and were as follows (setting them out); and that all those given by the court of its own motion were signed by the court in open court, and were "ordered filed, which is now done, and are as follows" (setting them out). Under the statutory provision that exceptions to the giving or refusal of instructions "may be taken orally and entered upon the record," that "all entries upon the minutes or records of the court in respect to such instructions and exceptions shall be a part of the record" on appeal, and that all instructions requested, whether given or refused, and all given on the court's own motion, shall be filed, and shall likewise be part of the record, we do not think that appellee's objections because no memoranda of the exceptions were indorsed on the instructions, themselves, are well taken. And we think the record above referred to sufficiently shows exactly which instructions were given, and that all of those given are in the record. The authorities holding that certain acts are necessary in order to reserve exceptions by indorsements on the margin or at the close of the instructions are not controlling in this case, where the exceptions were taken orally at the time the instructions were given, and were noted on the record in the order book.

[4, 5] Appellant's exceptions to the refusal of certain instructions asked by him and his codefendants below are not available, although the record recites that exceptions were taken at the time, because it appears from the record that these instructions were not tendered to the court, with a request that they be given, until after the argument was concluded. Section 558, cl. 4, and section 559, Burns' 1914; sections 533, 534, R. S. 1881; Ransbottom v. State, 144 Ind. 250, 255, 43 N. E. 218; Stamets v. Mitchenor, 165 Ind. 672, 676, 75 N. E. 579. But counsel for appellee are mistaken in stating that the requested instructions were not sufficiently signed by counsel. Signing a request that they be given which was attached to and fully identified them was a sufficient signing of the instructions. Indiana U. T. Co. v. Sullivan, 53 Ind. App. 239, 244, 101 N. E. 401.

[6] By instruction No. 2 given at the request of the plaintiff, the jury were told that certain enumerated facts "would not constitute probable cause for instituting a criminal prosecution against the plaintiff." But the instruction did not mention the fact, proved by undisputed evidence introduced by plaintiff, himself, that an indictment charging him with the commission of the crimes for which he was prosecuted had been returned by the grand jury, although that fact, in itself, was presumptive evidence of probable cause (Miller v. Willis, supra); and it ignored the fact that by his pleadings plaintiff had admitted the return of the indictments, but had undertaken to establish that the defendants procured them to be returned by false testimony caused to be given.

the evidence, as applied to the issues, the jury might find all of the facts enumerated in this instruction, and yet the return of the indictment would establish the existence of probable cause unless rebutted by evidence to which the instruction contains no reference whatever.

[7] It is further objected that this instruction opened with the statement (our italics) that—

"One of the questions submitted for your consideration is the question as to whether or not the defendants or either of them had probable cause to believe the plaintiff guilty of a criminal offense *when they caused the prosecution to be begun.*"

The defendants having introduced evidence that none of them had anything to do with causing the prosecution to be commenced, and appellant having specifically denied, under oath, that he was a party to causing it, the court erred in thus assuming as a fact that "they caused the prosecution to be commenced," and discussing the conditions under which they did so.

[8, 9] Appellant challenges certain instructions which erroneously submitted to the jury the general question whether or not there was probable cause for the alleged prosecution, while appellee insists that the error was waived by asking and procuring the court to give defendants' instruction No. 17 to the same effect. It is true that the question whether a given state of facts does or does not establish the existence of probable cause is for the court, and not for the jury. Miller v. Willis (1920) 189 Ind. 664, 669, 128 N. E. 831; Hutchinson v. Wenzel (1900) 155 Ind. 49, 54, 56 N. E. 845; Cleveland, etc., R. Co., v. Dixon (1912) 51 Ind. App. 658, 662, 96 N. E. 815. But one who invites error by asking an instruction that erroneously declares a rule of law cannot successfully except to other instructions declaring it the same way. Jackson v. Rutledge (1919) 188 Ind. 415, 426, 122 N. E. 579; Marion Trust Co. v. Robinson (1915) 184 Ind. 291, 292, 110 N. E. 65. And the instruction No. 17 given at appellant's request clearly invited the errors referred to.

[10] Evidence was admitted to the effect that a jail in Indiana in which plaintiff was confined after his arrest was in a filthy and unlawful condition, and that he was denied food fit to eat or the use of a bed, and that he was put into a cell that was filthy, and full of vermin, which got on his person and into his clothes, and that he was treated in a rough and brutal manner by his jailers and was otherwise unlawfully mistreated. But there was no evidence that the defendants knew or had reason to believe that any such things would be done. No exceptions were reserved to the introduction of this evidence. But the court gave an instruction the jury that, in addition to other matters to be considered by them in fixing the amount of damages to be awarded (our italics), they *"would have the right to consider the discomfort inflicted on his person* as a result thereof and the *humiliation endured by him while under arrest* and as a result thereof"; and that, if they found the defendants liable to exemplary damages "in determining such additional sum (by way of punishment) you may take into consideration the financial worth of the defendant or defendants, as shown by the evidence, and, after consideration *of all the evidence in the case bearing upon the subject of damages*, and the instructions of the court as have been given you, you may award such damages as you may deem him entitled to receive."

The authorities are in conflict on the question whether or not the bad condition of the jail and personal affronts to the prisoner by the public officers to whose custody he was committed may be considered as an element of compensatory damages or for the purpose of enhancing the exemplary damages in an action for malicious prosecution. But, in the absence of any showing that the defendant procured or induced the officers to be guilty of such mistreatment, or knew or had reason to anticipate that plaintiff would suffer from violations of the law on the part of officers of this state while in their custody, we do not think acts done by them in violation of law were a proper element of compensatory damages; and without such a showing it clearly could not be the basis for an award of exemplary or punitive damages. Zebley v. Storey, 117 Pa. 478, 12 Atl. 569; Baer v. Chambers, 67 Wash. 357, 121 Pac. 843, Ann. Cas. 1913D, 559; Seidler v. Burns, 84 Conn. 111, 79 Atl. 53, 33 L. R. A. (N. S.) 291; Laing v. Mitten, 185 Mass. 233, 70 N. E. 128; Flam v. Lee, 116 Iowa, 289, 90 N. W. 70, 93 Am. St. Rep. 242; Redman v. Hudson, 124 Ark. 26, 186 S. W. 312; Vansickle v. Brown, 68 Mo. 627; Garvey v. Wayson, 42 Md. 178.

It is a criminal offense for the keeper of a jail or other lawful place of confinement to suffer it to become foul or unclean. Section 2412, Burns' 1914; section 500, Acts 1905, c. 169, p. 702. It is made the official duty of the sheriff having charge of a jail to "provide proper meat, drink and fuel for prisoners." Section 9814, Burns' 1914; section 6118, R. S. 1881. He is required to "take care of the jail and the prisoners therein." Section 9429, Burns' 1914; section 5868, R. S. 1881. A sheriff who shall refuse or neglect to perform any duty he is required by law to perform is liable to punishment by a fine and imprisonment. Section 2414, Burns' 1914; section 508, Acts 1905, c. 169, p. 703. And the unnecessary infliction of personal violence on a prisoner constitutes an assault and bat-

tery. Plummer v. State, 135 Ind. 308, 313, 34 N. E. 968. And while one who institutes a prosecution maliciously and without probable cause is clearly liable for all consequences of his act which may be expected in the ordinary course to result therefrom, he is not bound to anticipate that sworn officers of the law will be guilty of criminal offenses in violation of their official duty while the person so prosecuted is in their custody. It was error to give this instruction.

[11] Since the case must be tried again we do not think it advisable to express an opinion concerning the sufficiency of the evidence, nor whether the damages were excessive.

[12] The other rulings alleged to have been erroneous, so far as they are presented for review, are of such a character that they probably will not be repeated when the case is again tried.

The judgment is reversed with directions to sustain the motion for a new trial.

MYERS, J., concurs on ground that plaintiff's requested instruction No. 5 was erroneous.

KOEHRING v. BOWMAN et al. (No. 24542.)

(Supreme Court of Indiana. Jan. 9, 1924.)

1. Mechanics' liens ⇐20—Interest of lessee having an option to purchase subject to mechanic's lien.

The holder of a lease with an option to purchase has an interest in real estate to which a mechanic's lien will attach under Burns' Ann. St. 1914, § 8296, and Acts 1921, c. 56, giving a lien on the interest of the owner in the property improved by him or by his authority and providing for its enforcement against leaseholds.

2. Husband and wife ⇐14(2)—Law authorizing creation of estates by entirety will not be enlarged by construction.

An estate by the entirety being one of an anomalous character created by the common law and preserved by statute when the law of real property and the alienation thereof was first reduced to a Code in Indiana (Rev. St. 1843, c. 28, §§ 18, 19) and re-enacted without change when the statutes were revised in 1852, as part of "an act concerning real property and the alienation thereof," which is still in force (1 Rev. St. 1852, c. 23, §§ 7, 8; Rev. St. 1881, §§ 2922, 2923; Burns' Ann. St. 1914, §§ 3953, 3954), and not being in harmony with any other part of the law of Indiana governing the legal rights of husband and wife, the law authorizing their creation will not be enlarged by construction.

3. Husband and wife ⇐14(2)—Estates by entireties do not exist as to personal property; exception thereto stated.

Estates by entireties do not exist as to personal property except when such property is directly derived from real estate held by that title, as crops produced by the cultivation of lands owned by entireties or proceeds arising from the sale of property so held.

4. Landlord and tenant ⇐113—Lease at monthly rental subject to termination for conditions stated held to give lessee interest in lands but not estate.

A mere current lease of lands at a monthly rental in advance, subject to termination at any time for nonpayment of the agreed rent or for violation of other conditions, does not convey to the lessee an estate in the lands, but it does give the lessee an interest therein.

5. Husband and wife ⇐14(2)—Unexercised option to purchase lands cannot vest any title by entireties or otherwise in holders.

A mere option to purchase lands could not vest in the holders any title, whether by entireties or otherwise, so long as the option had not been exercised.

6. Mechanics' liens ⇐20—Contractor held to have right to lien on husband's interests in land, held under a lease.

Where defendant husband ordered a furnace installed in a home in which he and his codefendant wife were living under a lease at a monthly rental, and expressly agreed in writing to pay for it, the contractor acquired a right to a lien on the husband's interest at least, and the refusal of the trial court to admit evidence that notice of a lien had been filed by plaintiff was reversible error.

Appeal from Superior Court, Marion County; A. R. Robinson, Judge.

Action by Charles Koehring against Guy E. Bowman and another. From a judgment granting insufficient relief, plaintiff appeals. Transferred from Appellate Court under Subdivision 2, § 1394, Burns' 1914 (section 10, c. 247, p. 567, Acts 1901). Reversed, with directions to sustain motion for new trial.

Superseding former opinion in 137 N. E. 767.

Wilson S. Doan and James C. Mathews, both of Indianapolis, for appellant.

J. Fred Masters and Wm. E. Jeffrey, both of Indianapolis, for appellees.

EWBANK, C. J. This was an action by appellant to recover on a contract with the appellee, Guy E. Bowman, and to foreclose a mechanic's lien upon a dwelling occupied by said appellee and his wife, for the value of a furnace installed therein pursuant to said contract. Appellant recovered a personal judgment against the said Guy for the agreed price of the furnace, but was denied a lien.

Overruling the motion for a new trial is assigned as error, under which appellant complains of the refusal to admit in evidence his notice of a mechanic's lien. It was proved, without dispute, that appellees were husband and wife; that the wife was living with her husband and coappellee upon the premises at the time the contract sued on was made and at the time the furnace was

tered into a written contract by which appellant undertook to install a furnace in said dwelling for a price named, and that appellant fully performed his contract, and there was due him the sum of $283; that appellees held possession of and were occupying said dwelling under a contract in writing, dated something more than a year before, by which the owner leased it to them at a rental of $30 per month, in advance, upon the conditions usually inserted in a lease of residence property, reserving to the lessor the right to declare the lease forfeited for nonperformance of any conditions after 30 days' notice in writing, but with the further recital that in consideration of $50 paid the lessor granted to the lessee an option at any time while such lease was in effect to purchase the leased premises for $3,256 and interest thereon at 7 per cent. from the date of the contract, and that in case of such a purchase all payments of rent, with interest thereon, should be credited on the purchase price, and the lessor should then convey said real estate to the lessees by a general warranty deed, in fee simple, subject to liens for taxes and municipal assessments attaching after the date of the option contract. Appellant then offered to introduce and read in evidence a notice of a mechanic's lien, duly filed and recorded, signed by appellant and addressed to appellees, and purporting to notify them that appellant intended to hold a mechanic's lien for $283 on said house in which the furnace was recently installed, and the lot on which it was situated, for work and labor done and materials furnished within the last 60 days. But an objection by appellees for the alleged reason that "there is no showing that the defendant Guy E. Bowman is the owner of the real estate described therein" was sustained.

[1] In support of this ruling, counsel for appellees insist that the holder of a lease with an option to purchase does not have an interest in real estate to which a mechanic's lien will attach. Counsel are mistaken. The statute gives a lien "on the interest of the owner" in the property improved by him or by his authority, and expressly provides for its enforcement against "leaseholds." Section 8295, Burns' Supp. 1918; Acts 1915, c. 50, p. 106 (see Acts 1921, c. 56, p. 135); section 8296, Burns' 1914; section 2, Acts 1909, c. 116, p. 296; McCarty v. Burnet (1882) 84 Ind. 23; National Lumber Co. v. Hobbs (1920) 74 Ind. App. 476, 129 N. E. 255.

[2] But counsel further insist that under the lease and option whatever interest the appellees had in the real estate was owned by entireties, as husband and wife, and say there was no evidence that the wife ever became a party to the contract under which the furnace was installed, so as to subject their joint estate to a lien. An estate by entirety is preserved by statute when the law of "real property and the alienation thereof" was first reduced to a Code in Indiana (sections 18, 19, c. 28, R. S. 1843, p. 417), and re-enacted without change when the statutes were revised in 1852, as part of "an act concerning real property and the alienation thereof," which is still in force. Sections 7 and 8, c. 23, 1 R. S. 1852, p. 232; sections 2922, 2923, R. S. 1881; sections 3953, 3954, Burns' 1914.

[3] Such statutes are not in harmony with any other part of the law of Indiana governing the legal rights of husband and wife, and the law authorizing their creation will not be enlarged by construction. Estates by entireties do not exist as to personal property (Abshire v. Williams, 53 Ind. 64, 66) except when such property is directly derived from real estate held by that title, as crops produced by the cultivation of lands owned by entireties or proceeds arising from the sale of property so held. Patton v. Rankin, 68 Ind. 245, 247, 34 Am. Rep. 254; Mercer v. Coomler, 32 Ind. App. 533, 69 N. E. 202, 102 Am. St. Rep. 252; Frost v. Frost, 200 Mo. 474, 98 S. W. 527, 118 Am. St. Rep. 689; 13 Ruling Case Law, 1106, § 128.

[4] A mere current lease of lands at a monthly rental in advance, subject to be terminated at any time for nonpayment of the agreed rent or violation of other conditions, does not convey to the lessee an "estate" of any kind in the land, though it does give the lessee an interest therein. Kokomo Natural Gas, etc., Co., v. Matlock, 177 Ind. 225, 228, 97 N. E. 787, 39 L. R. A. (N. S.) 675; Spiro v. Robertson, 57 Ind. App. 229, 234, 235, 106 N. E. 726.

[5] And a mere option to purchase lands could not vest in the holders any title at all, whether by entireties or otherwise, so long as the option had not been exercised. Ohio Oil Co. v. Detamore, 165 Ind. 243, 249, 73 N. E. 906; Risch v. Burch, 175 Ind. 621, 629, 95 N. E. 123.

It has been held that married women are so completely emancipated in Indiana that a wife may even be the partner of her husband in all business transactions, except so far as restrained by the law relating to the ownership and conveyance of real estate. Anderson v. Citizens' Nat. Bank, 38 Ind. App. 190, 193, 76 N. E. 811; Wasem v. Raben, 45 Ind. App. 221, 225, 90 N. E. 636.

[6] Counsel for appellee deny the sufficiency of the evidence to prove that the wife authorized the improvement or consented to it with knowledge, under such circumstances as to make her interest subject to a lien. But it was proved without dispute that the husband ordered the furnace installed, and expressly agreed, in writing, to pay for it, which gave the contractor a right to acquire a lien on his interest at least. And the refusal of the trial court to permit the introduc-

been filed was therefore error, for which the judgment must be reversed. That being true, it is not necessary to consider the sufficiency or insufficiency of the evidence as against the wife. The questions discussed by counsel may not arise when the case is again tried.

The judgment is reversed, with directions to sustain appellant's motion for a new trial.

CENTRAL STATES GAS CO. v. PARKER-RUSSELL MINING & MFG. CO. et al. (No. 24357.)

(Supreme Court of Indiana. Jan. 15, 1924.)

1. Action ⇐56—Trial court held empowered to consolidate actions on motions made.

It was within the power of the trial court to sustain motions by separate plaintiffs to consolidate the two actions.

2. Appeal and error ⇐508—Record held to show appeal bond in consolidated action was filed in time, and failure to mention both numbers of causes was not material.

Where two actions, one styled "cause No. 3120," and the other "No. 3606," were consolidated and "tried under cause No. 3120," in which the court made a special finding, stated conclusions of law thereon, rendered the judgment appealed from, by which it assumed to adjudicate all the issues in both of the original cases, overruled appellant's motion for a new trial, granted an appeal on the filing of an appeal bond in an amount named, with a designated surety, within 60 days, and received a bond executed in compliance with such order, when presented on the fifty-ninth day, and entered an order approving it in which the fact of its presentation to the court is recited and the bond is set out at length, *held*, that the filing of the appeal bond in the consolidated action within the time allowed was sufficiently shown, and the failure to mention cause No. 3606 in appealing from the judgment in the consolidated cause which the court had ordered to be known as cause No. 3120 was not material.

3. Appeal and error ⇐395—Failure to name in appeal bond all appellees held not ground for dismissing appeal.

Failure of an appeal bond to name some of appellees *held* not cause for dismissing appeal where the appeal bond was in the penal sum required, was signed by the surety company named, and was filed within the time fixed, all as ordered by the court; any other defects having been cured by Burns' Ann. St. 1914, § 1278.

4. Appeal and error ⇐415—Notice of appeal to all parties to judgment appealed from held unnecessary where transcript was filed within time limited after filing of appeal bond.

Where, in appealing from a judgment rendered in favor of each of appellees in a consolidated action, the appeal bond recited only the recovery by one of the appellees of its judgment, notice to other parties to the judgment *held* unnecessary where the transcript was filed in the Appellate Court less than 60 to Burns' Ann. St. 1914, § 679.

5. Appeal and error ⇐801(4)—Alleged insufficiency of transcript to present alleged errors held not ground for dismissing appeal on preliminary motion.

The alleged insufficiency of the transcript to present for consideration certain of the alleged errors *held* not cause for a dismissal of the appeal on preliminary motion, since matters of that kind will be passed on when the appeal is considered on its merits.

6. Appeal and error ⇐661—Clerk's return to writ of certiorari commanding him to correct certificate to transcript in particulars named held not compliance with writ.

Where a writ of certiorari, based upon an affidavit alleging the incorrectness of the clerk's certificate to the transcript, commanded the clerk "to certify to the transcript and to include in his certificate that the transcript contains the entire record * * * and embraces the original bill of exceptions containing the evidence, and that said certificate be attached to the transcript as provided by law," clerk's return transmitting a detached sheet of paper, which as so detached could not be considered for any purpose, with a certificate written thereon which did not refer to "the above and foregoing transcript," as required by Burns' Ann. St. 1914, § 667 (Acts 1903, c. 193, § 7), but referred to a transcript that he had prepared six months before, and was not shown to have been seen by him since, *held* not a sufficient compliance with the writ, as the amended certificate should have been written into or appended to the transcript it authenticated, and should have referred to it as being so certified.

Appeal from Circuit Court, Gibson County; Robt. C. Baltzell, Judge.

Suit by the Parker-Russell Mining & Manufacturing Company against the Central States Gas Company and others in which the Gas Machinery Company, as plaintiff, intervened, and upon motion made the causes were consolidated. From a judgment against it, the Central States Gas Company appeals. On appellees' motion to dismiss. Motion overruled, and order of directions made.

Baltzell & Baltzell, of Princeton, W. M. Alsop, of Vincennes, and P. R. Taylor, of Toledo, Ohio, for appellant.

Calverley & Judah, of Vincennes, Embree & Embree, of Princeton, D. W. Robert, of St. Louis, Mo., and Emison & Hoover, of Vincennes, for appellees.

PER CURIAM. [1] In March, 1919, the Parker-Russell Mining & Manufacturing Company brought an action in the Knox circuit court against appellant and others, to foreclose an alleged mechanic's lien on certain real estate, which action was ultimately removed by change of venue to the Gibson circuit court, and became known as

cause No. 3120. Nearly two years later the Gas Machinery Company brought an action in the Knox circuit court against all the parties to said first suit, plaintiff and defendants, to foreclose an alleged mechanic's lien against the same real estate. By proper motion the transfer of the second action for the purpose of consolidation with said cause No. 3120 was asked, and it was removed to and filed in the Gibson circuit court and was there designated as No. 3606. Motions by the two plaintiffs to consolidate the two actions were presented and sustained, and the record recites that—

"It is therefore ordered by the court that said cause No. 3606 be and the same now is consolidated with cause number 3120."

It was within the power of the court to do this. Atkinson v. Disher, 177 Ind. 665, 673, 674, 98 N. E. 807.

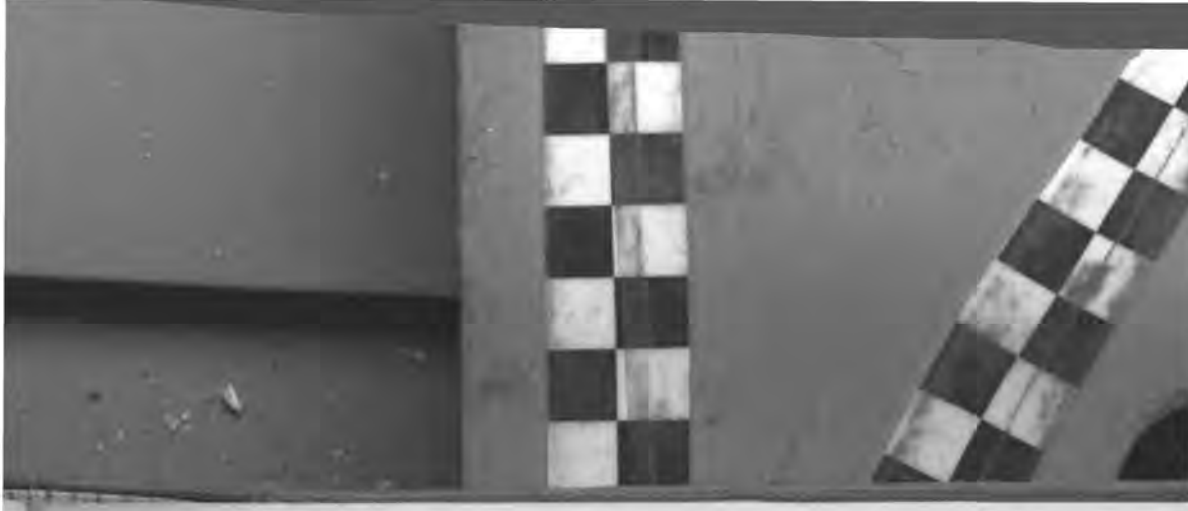
[2] Thereafter the actions so consolidated were "tried under cause No. 3120," in which the court made a special finding, stated conclusions of law thereon, rendered the judgment appealed from, by which it assumed to adjudicate all of the issues in both of the original cases, overruled appellant's motion for a new trial, granted an appeal on the filing of an appeal bond in an amount named, with a designated surety, within 60 days, and received a bond executed in compliance with such order, when presented on the 59th day, and entered an order approving it, in which the fact of its presentation "to the court" is recited, and the bond is set out at length.

We think (a) that the filing of the appeal bond in the consolidated action within the time allowed is sufficiently shown, and (2) that the failure to mention cause No. 3606 in appealing from the judgment in the consolidated cause, which the court had ordered to be known as "cause No. 3120," is not material.

[3-5] The judgment was for the foreclosure of a mechanic's lien on certain real estate of appellant, the sale thereof, and payment therefrom of judgments rendered against appellant for costs in favor of each of the four appellees, and of personal judgments rendered against appellant of $13,090.53 in favor of the Parker-Russell Mining & Manufacturing Company and $17,149.74 in favor of the Gas Machinery Company. The appeal bond recited only the recovery by the Parker-Russell Mining & Manufacturing Company of its judgment for $13,090.53, and the taking of an appeal therefrom. Failure to name the other appellees in the bond is not cause for dismissing the appeal. Since it was in the penal sum required, was signed by the surety named, and was filed within the time fixed, all as ordered by the court, any other defects are cured by the statute. Section 1278, Burns' 1914 (section 1221, R. S. 1881); Corey v. Lugar, 62 Ind. 60; Shroyer v. Simons, 14 Ind. App. 631, 43 N. E. 275; Ewbank's Manual (2d Ed.) § 176. The transcript was filed in this court less than 60 days after the appeal bond was filed. Section 679, Burns' 1914 (section 638, R. S. 1881). Notice to other parties to the judgment, therefore, was not necessary, and we shall not consider the questions discussed by counsel as to the alleged insufficiency of certain notices that were served below. Ewbank's Manual (2d Ed.) § 165. The alleged insufficiency of the transcript to present for consideration certain of the alleged errors is not cause for a dismissal of the appeal on preliminary motion. Matters of that kind will be passed on when the appeal is considered on its merits.

[6] A writ of certiorari was obtained by appellant upon an affidavit which alleged that the clerk's certificate to the transcript was incorrect, and asked that the clerk of the circuit court be ordered "to certify to the transcript and to include in his certificate that the transcript contains the entire record * * * and embraces the original bill of exceptions containing the evidence, and that said certificate be attached to the transcript as provided by law." A writ was issued commanding that the certificate be made correct in the particulars mentioned. By way of a return the clerk has transmitted a detached sheet of paper, which, as so detached, cannot be considered for any purpose, with a certificate written thereon which does not refer to "the above and foregoing transcript" (section 667, Burns' 1914 [section 7, c. 193, p. 341, Acts 1903]), but refers to a transcript that he had prepared six months before, and is not shown to have seen since. This was not a sufficient compliance with the writ. The amended certificate should be written into or appended to the transcript it authenticates, and should refer to it as being so certified. Ewbank's Manual (2d Ed.) §§ 115d, 115e.

Each motion of the appellees to dismiss this appeal is overruled, and the certificate of the clerk is ordered corrected in obedience to the writ of certiorari heretofore issued, in conformity with the facts as shown by the records in his office.



SIMS et al., State Board of Tax Com'rs, v. FLETCHER SAVINGS & TRUST CO.
(No. 24541.)

(Supreme Court of Indiana. Jan. 9, 1924.)

1. Appeal and error ⟸1040(7)—Sustaining demurrer to argumentative paragraph of answer averring evidentiary facts admissible under general denial not available error.

Sustaining a demurrer to an argumentative paragraph of answer, averring evidentiary facts admissible under a general denial, also pleaded, is harmless, and hence not available error, though appellant withdrew his general denial and refused to plead further.

2. Taxation ⟸381—Accrued interest on deposits but not reserve for taxes held deductable in assessing capital stock of trust company.

Accrued interest on deposits alleged to be a bona fide indebtedness existing on March 1st, but not a reserve for taxes not alleged to be a debt then existing, held deductable, under Tax Law 1919, § 76, from the gross value of a trust company's capital stock in assessing it for taxation.

3. Taxation ⟸379—Trust company's investment in leasehold deductable in assessing capital stock; "ownership."

A leasehold is an interest in realty and hence an "ownership" therein, within Tax Law 1919, § 76, requiring deduction of so much of the value of an investment in real estate by a trust company acquiring "ownership" therein as may be carried in its capital stock account in assessing taxes on such stock.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ownership.]

Appeal from Circuit Court, Hamilton County; Fred C. Gause, Special Judge.

Action by the Fletcher Savings & Trust Company against Fred A. Sims and others, constituting the State Board of Tax Commissioners. Judgment for plaintiff, and defendants appeal. Transferred from Appellate Court under Burns' Ann. St. 1914, § 1394. Affirmed.

Superseding opinion of Appellate Court, 136 N. E. 26.

Woolen, Cox & Welliver, Chas. N. Thompson, Vinson Carter, and Donald S. Morris, all of Indianapolis, for appellants.

U. S. Lesh, Atty. Gen., and Myers, Gates & Ralston, of Indianapolis, for appellee.

WILLOUGHBY, J. The appellee is a trust company organized and doing business under the laws of the state of Indiana, and in this action seeks to have certain deductions made from the total assessed value for taxation of its capital or capital stock, which was denied by appellants, who constitute the state board of tax commissioners of Indiana.

The complaint is in substance as follows:

The plaintiff is a trust company incorporated under the laws of the state of Indiana and that it exists, operates, and does business as such trust company under and pursuant to the laws of the state of Indiana in the city of Indianapolis, Marion county, in said state.

The defendants are the duly appointed, qualified and acting members of the state board of tax commissioners of Indiana and as such members constitute said board by virtue of their said appointment pursuant to the provisions of the statutes of the state of Indiana, embodied in an act of the General Assembly of said state, approved March 11, 1919 (Laws 1919, c. 59) and entitled "an act concerning taxation repealing all laws in conflict therewith and declaring an emergency."

That under the provisions of said tax law said defendants as such board of tax commissioners are charged with the duty of valuing and assessing for taxation the capital or capital stock of plaintiff and other trust companies of said state according to certain rules and regulations by said law provided and specified.

That to aid and enable said defendants to so value and assess the capital or capital stock of plaintiff, said law required of plaintiff that it should between the 1st day of March and the 1st day of April of each year make out a statement under oath in duplicate amongst other things showing the true cash value of the entire capital stock of such plaintiff trust company as of the 1st day of March of the current year and deliver the said statement to the auditor of the county wherein said plaintiff trust company is located which said statement said auditor was by said law required to forward to said state board of tax commissioners.

The plaintiff did, pursuant to said tax law and to section 76 thereof, between the 1st day of March and the 1st day of April, 1919, make its said statement under oath as aforesaid showing amongst other things required by said statute, the amount of its entire capital stock and the true cash value thereof, as of the 1st day of March of said year, and did deliver the same to the auditor of Marion county, Ind., wherein plaintiff is located as aforesaid; that such statement was by said auditor duly transmitted to said state board of tax commissioners so constituted as aforesaid for the assessment thereon by said state board of plaintiff for taxation for said year; that said statement showed the gross value of the entire capital stock of said plaintiff trust company as represented by and comprising capital, surplus, undivided profits, current profits, and reserves for contingencies, rent, interest, and taxes to be the sum of $2,094,410.87; that

for accrued interest on deposit set forth therein as a reserve for interest in the sum of $112,435.16, and in the further sum of $21,972.31 set forth therein as a reserve for taxes, which items of bona fide indebtedness did in fact then and there exist; that said statement further showed that plaintiff trust company had acquired an ownership in real estate, namely, its bank building in which it transacts its business, by the investment therein of the sum of $639,135.92, which statement in said particular was true; that plaintiff holds a leasehold title to the real estate on which its banking house is situated at the northwest corner of Market and Pennsylvania streets in the city of Indianapolis, under which plaintiff has the exclusive right of possession, use, enjoyment, and disposition for a period of 99 years with the privilege of renewal for a further term of 99 years; that on said real estate plaintiff has caused to be erected and maintains and occupies a banking house in the erection of which banking house it has invested the aforesaid part of its capital, namely, $639,135.92; that said building is assessed for taxation by the taxing officers of Marion county in the sum of $625,000, and said real estate in the sum of $530,000.

That said tax law and said section 76 thereof provide that, in arriving at the true cash value of the entire capital stock of a trust company for the purposes of assessment for taxation, credit shall be given and the bona fide indebtedness of such trust company shall be deducted from aforesaid gross value; that by reason of such provision in said law it became and was the imperative duty of defendants as such state board of tax commissioners, at its first annual session for the current year of 1919 began and held on the first Monday of April for the purpose of making original assessments of the property of certain classes of persons and corporations including trust companies, to value and assess for taxation the capital or capital stock of plaintiff as shown by the statement hereinabove referred to, together with such other evidence as might be before said board in the premises; and it became and was then and there the imperative duty of defendants as such board under said law in finding the true cash value for assessment for taxation of plaintiff's capital or capital stock to deduct from the gross cash value thereof the bona fide indebtedness of said trust company as shown by said statement as hereinabove set out, and to deduct from said gross cash value the investment of plaintiff in its bank building hereinabove set forth.

That defendants as such state board of tax commissioners at its said first session for the current year of 1919 did consider the aforesaid statement of plaintiff and the matter to be the sum of $2,094,400; that at said first session said defendants as such board, contrary to the express mandate of said tax law and section 76 thereof, did fail and refuse to deduct from said gross value of plaintiff's capital or capital stock the bona fide indebtedness hereinabove averred, namely, the sum of $112,435.16 for accrued interest and the sum of $21,072.31 for taxes for 1918 accrued and payable, and that at said first session said defendants as such board, contrary to the express mandate of said tax law and section 76 thereof, did fail and refuse to deduct from said gross value of plaintiff's capital or capital stock the sum of $639,135.92 thereof invested in its said bank building as hereinabove set forth; but that said defendants, as such board, did at its said first session contrary to the express intent and purpose of said tax law value and assess for taxation the capital or capital stock of plaintiff at said gross sum of $2,094,400.

That thereafter plaintiff did pursuant to the provisions of said tax law and the rule and regulations of said tax board apply to said board by its petition in writing for a rehearing and a change and revision of said valuation and assessment by making aforesaid deductions and each of them severally, to be presented and heard at the second session of said board for the current year begun and held July 8, 1919, and continuing 12 days; that said petition for such change in plaintiff's assessment came on to be heard and was, by said defendants as such board, on the 19th day of July, 1919, denied, and said tax board then and there finally refused to make said deductions or any of them, and plaintiff's assessment for the current year was finally and definitely and contrary to their clear import and purpose of said law fixed at said gross sum of $2,094,400.

That unless enjoined by law and the process of this court defendants will immediately certify said assessment to the auditor of Marion county, who will place the same on the tax duplicate for the collection of the same by the treasurer of said county, and if the taxes on the whole of said assessment are not paid plaintiff's property will be levied upon and sold therefor and plaintiff will suffer great and irreparable injury for which it has no legal remedy; that in failing and refusing to make said deductions and each of them severally said defendants said tax board were and are acting without right or jurisdiction, and said assessment is wholly void.

Prayer that a preliminary writ may be issued forthwith against defendants as such state board of tax commissioners enjoining them from certifying said assessment to the

auditor of Marion county until the final hearing of this cause and that upon such final hearing plaintiff be awarded a mandatory injunction requiring defendants as such tax board to make said deductions and each of them from said gross sum of $2,094,400, and to certify to the auditor of Marion county the sum remaining as the lawful and proper assessment of plaintiff's capital and capital stock for the current year.

A demurrer was filed to the complaint alleging that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled and exceptions taken. The appellants then filed an answer in two paragraphs. The first paragraph being a general denial and the second an argumentative denial of that part of the complaint which alleges that the plaintiffs were the owners of a 99-year lease. The appellee demurred to the second paragraph of answer, for the reason that said second paragraph did not state facts sufficient to constitute a cause of defense to plaintiff's complaint or to any part thereof. The court sustained the demurrer, and defendants reserved an exception. After this demurrer had been sustained the appellants withdrew their first paragraph of answer, which was a general denial, and refused to plead further. Judgment was then rendered for plaintiff on demurrer that:

"* * * Said defendants as members of and constituting said board of tax commissioners of the state of Indiana be and they are hereby required to deduct from the total assessed valuation of the property of plaintiff, for taxation made and fixed by them in the sum of $2,094,400, the sum of $112,435.16, the amount reserved by said plaintiff for interest accrued on deposits as averred in its said complaint and the further sum of $639,135.92, the amount of its capital invested by said plaintiff in acquiring an ownership in real estate as averred in its said complaint, and that said defendants as said tax board be permanently and forever enjoined from certifying to the auditor of Marion county for placing on the tax duplicate of said county said assessment of $2,094,400 until said deductions therefrom have been made and that they be permanently and forever enjoined from certifying said assessment as made other than in the sum of $1,342,828.92, the amount of said gross assessment of plaintiff's property after said deductions have been made."

From such judgment this appeal is taken.

[1] No error can be predicated on the ruling of the court in sustaining appellee's demurrer to appellant's second paragraph of answer. At the time the court made this ruling there were two answers addressed to appellee's complaint. The first answer was a general denial, and the second was a partial answer to the complaint addressed only to that part of it alleging that appellee had acquired an ownership in real estate by investing in its bank building in which it transacts its business the sum of $639,130.92 of its capital stock, which building was erected on ground on which it was averred appellant held a 99-year leasehold with the privilege of a renewal for a further term of the same length. In this second paragraph of answer it is averred argumentatively and by what are purely evidentiary facts that appellee did not have a 99-year leasehold and hence had not acquired an ownership in the real estate on which its bank building was erected.

Under the averments of that part of the complaint, to which the second paragraph of answer was addressed, it was incumbent on appellee under an issue formed by a general denial to prove that it had acquired an ownership in the real estate involved as alleged. In refuting such ownership all of the evidentiary facts averred in the second paragraph of answer, if admissible at all in law to negative ownership would be admissible under the general denial. This paragraph of answer was simply an argumentative denial of the complaint. At the time the court sustained appellee's demurrer to this second paragraph of answer, no error was available on appeal by its ruling even if the answer was good.

It has often been held by the Supreme Court that there is no available error in sustaining a demurrer to a good special paragraph of answer when the general denial is pleaded and all the evidence admissible under the special answer is admissible under the general denial. 1 Watson's Works, Practice, § 668, and cases cited.

In such cases it is equally well settled that, the error being harmless at the time the ruling was made, it cannot be made harmful by withdrawing the general denial and refusing to plead further. This was what was done in the instant case. After the demurrer had been sustained to the second paragraph of answer, the appellant withdrew the first paragraph of answer which was a general denial, and refused to plead further.

In Pittsburgh, etc., Ry. Co. v. Hawks, 154 Ind. 547, 55 N. E. 258, it is held that where all evidence admissible under a special answer could have been given under the general denial, which was pleaded, sustaining a demurrer to the special answer is not rendered harmful by the subsequent withdrawal of the general denial. In that case in discussing this question, on page 548, 154 Ind., on page 259 of 55 N. E., the court says:

"Appellee Hawks insists that the first paragraph of appellant's answer to the cross-complaint was a mere argumentative general denial, and all the evidence that could have been admitted under said paragraph was admissible under the second paragraph of said answer, which was a general denial, and that there was, therefore, no available error in sustaining the demurrer to said paragraph. * * * The proper practice in such case is to move to strike out such a paragraph, but it has been uniformly held by this court that, even if a paragraph

to sustain a demurrer thereto, if the general denial is pleaded and the same evidence is admissible thereunder that could have been given under said special paragraph, and that the subsequent withdrawal of the general denial will not make said ruling, which was harmless when made, a harmful or available error."

It is unnecessary, therefore, in the instant case, to determine whether or not said second paragraph of answer was sufficient to withstand the demurrer, for the reason that, under the practice in this state, all the defenses that could have been made thereunder could have been made under the general denial and all the evidence admissible thereunder was admissible under the general denial. Sustaining the demurrer to said paragraph of answer was, therefore, harmless, and the subsequent withdrawal of the general denial did not render a ruling harmful and available error that was harmless when made. Board, etc., v. State ex rel., 148 Ind. 675, 680, 48 N. E. 226; State ex rel. v. Osborn, 143 Ind. 671, 680, 42 N. E. 921; Smith v. Pinnell, 143 Ind. 485, 487, 40 N. E. 798; Baltes v. Bass Foundry, etc., Works, 129 Ind. 185, 191, 28 N. E. 319; Cincinnati, etc., Ry. Co. v. Smith, 127 Ind. 461, 464, 26 N. E. 1009; Kidwell v. Kidwell, 84 Ind. 224, 228; Reeder v. Maranda, 66 Ind. 485, 487; Watson v. Lecklider, 147 Ind. 395, 397, 45 N. E. 72; Jeffersonville, etc., Co. v. Riter, 146 Ind. 521, 526, 45 N. E. 697; Harness v. State ex rel., 143 Ind. 420, 42 N. E. 813; Bonebrake v. Board, etc., 141 Ind. 62, 40 N. E. 141; Board v. Nichols, 139 Ind. 611, 618, 38 N. E. 526; Hoosier Stone Co. v. McCain, 133 Ind. 231, 233, 31 N. E. 956; Matchett v. Cincinnati, etc., Ry. Co., 132 Ind. 334, 31 N. E. 792; Racer v. State, 131 Ind. 393, 401, 31 N. E. 81; Butler v. Thornburg, 131 Ind. 237, 238, 30 N. E. 1073.

Section 76 of the Tax Law of 1919, among other things, provides as follows:

"Whenever any such bank, banking association or trust company, or mortgage guarantee company, individual, partnership or unincorporated association shall have acquired an ownership in real estate so much of the value of such investment in real estate as may be carried in the capital stock account (capital stock, surplus or undivided profit accounts) on the first day of March of the current year and shown in the statement of assets and liabilities to be filed as herein provided, shall be deducted from the valuation of the capital stock of such bank, banking association, or trust company, or mortgage guarantee company, individual, partnership or unincorporated association.

"In making such statement of the true cash value of such shares the credits shall be given and the bona fide indebtedness of such bank, banking association or trust company or mortgage guarantee company, individual, partnership or unincorporated association shall be deducted therefrom as in the case of individuals; and in giving such credits and such deductions such bank, banking association or trust company shall file a true statement of all the assets and the liabilities of such bank, banking association or trust company, or mortgage guarantee company, individual, partnership or unincorporated association the same as carried in its daily statement or balance sheet as of said first day of March of the current year."

In the complaint it is alleged that a debt and liability against the gross value of the entire capital stock of said plaintiff trust company exists for accrued interest on deposits in the sum of $112,435.16, which item of bona fide indebtedness did in fact then and there exist, and in the further sum of $21,972.31 as a reserve for taxes. It is further averred that the plaintiff trust company had acquired an ownership in real estate, consisting of its bank building in which its business is transacted, by the investment therein of the sum of $639,135.92; that the plaintiff holds a leasehold title to the real estate on which its banking house is situated and has the exclusive right and possession, use and enjoyment and disposition of the same for a period of 99 years with the privilege of renewal for a further term of 99 years, and that it has caused to be erected and maintains a banking house on said real estate, in the erection of which banking house it has invested the aforesaid part of its capital stock, namely, $639,135.92; that said building is assessed for taxes by the taxing officers of Marion county in the sum of $625,000, and that said real estate is taxed in the sum of $530,000.

[2, 3] The first question arising is this:

"Is appellee entitled to have a deduction from the assessment for the purpose of taxation of the item of $112,435.16, accrued interest on deposits?"

From the allegations in the complaint as above set forth, this amount was a bona fide indebtedness existing at the time, which appellee sought to have deducted from the gross value of the capital stock and which appellants failed and refused to deduct. We think that section 76 of the Tax Law of 1919 expressly provides for such deduction; therefore the appellee was entitled to have it made. As to the deduction of $21,972.31, claimed as a reserve for taxes, it does not appear from the allegations in the complaint that it was a debt then existing against appellee for which it was entitled to a deduction under section 76 of the Tax Law of 1919. Bradford v. Storey, 189 Mass. 104, 75 N. E. 256; City of Boston v. Turner, 201 Mass. 190, 87 N. E. 634; Lane County v. Oregon, 7 Wall. 71, 19 L. Ed. 101; Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197. If appellee is entitled to have a deduction of $639,135.92, in its assessment for purposes of taxation on account of its alleged investment in real estate, it must do so because such investment is within the provision of that part of section 76 of the Tax Law of

1919, above quoted. The question then to be determined is:

"Is this amount alleged in the complaint to have been invested in real estate an ownership in real estate within the meaning of the statute?"

It will be observed that the words used in the statute are "shall have acquired an ownership in real estate" and "so much of the value of such investment in real estate as may be carried in the capital stock account on the first day of March of the current year * * * shall be deducted from the valuation of the capital stock of such bank. * * *"

Appellant claims that it should not be deducted, because it is personal property and not real estate, and should be taxed as personal property. It appears from the allegations in the complaint that the real estate upon which the building stands is held on a 99-year lease with the privilege of renewal. This is a chattel real.

A leasehold is an interest in real estate. Comer v. Light, 175 Ind. 367, 375, 93 N. E. 660, 94 N. E. 325; Sanders v. Partridge, 108 Mass. 556; Hyatt v. Vincennes Bank, 113 U. S. 408, 5 Sup. Ct. 573, 28 L. Ed. 1009; Moulton v. Long, 243 Mass. 129, 137 N. E. 297; State v. Wheeler, 23 Nev. 143, 44 Pac. 430; Coombs v. People, 198 Ill. 586, 64 N. E. 1056; Binhoff v. State, 49 Or. 419, 90 Pac. 586; Bennett v. Seibert, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071; State ex rel. Marshall v. Leuch, 155 Wis. 500, 144 N. W. 1122; Baltimore & Ohio Ry. Co. v. Walker, 45 Ohio, 577, 16 N. E. 475; Chiesa v. Des Moines, 158 Iowa, 343, 138 N. W. 922, 48 L. R. A. (N. S.) 899; Higgins v. San Diego, 131 Cal. 294, 63 Pac. 470; Schott v. Harvey, 105 Pa. 222, 51 Am. Rep. 201. See, also, digest of cases collected in 2 A. L. R. beginning on page 778. This was so at common law. Blackstone defines chattels real to be such as concern or savor of the realty as terms for years, and says they are called real chattels as being interests issuing out of or annexed to real estate. 2 Blackstone, Comm. 386. Chancellor Kent says (2 Kent, 342):

"Chattels real are interests annexed to or concerning the realty as a lease for years of land and the duration of the term of the lease is immaterial provided it be fixed and determinate and there be a reversion or remainder in fee in some other person."

Appellants, in their brief cite us to a Wisconsin case, State ex rel. v. Leuch, 155 Wis. 500, 144 N. W. 1122, decided under a statute of that state, and say that the legal import of the Indiana statute and the Wisconsin statute are precisely the same. A reference to these two statutes will completely dispel this idea. The Wisconsin statute (St. 1911, § 1057) provides that—

"If the building in which such bank maintains its offices and transacts its business be owned by such bank, the assessed value thereof, including the land upon which [the bank] is located if owned by such bank, shall be deducted from the total value of such shares."

While in the Indiana statute, section 76 of the Tax Law of 1919, the interest to be deducted is referred to as "an ownership in real estate," and again in the same section it says "so much of the value of such investment in real estate as may be carried in the capital stock account * * * shall be deducted. * * *"

Under the Wisconsin statute no authority was given for deducting the value of real estate from the capital stock of the bank unless such real estate and such building were owned by the bank. The Indiana statute does not confine the deduction to be made from the gross value of the capital stock to the land or building owned by the bank; it is sufficient under the Indiana statute if a part of the capital stock has been invested in an interest in real estate. In the Wisconsin case, State ex rel. v. Leuch, supra, it does not appear that any of the capital stock of the bank was invested in the building in which the bank was doing business, while in the instant case it is alleged that the amount for which a deduction is asked was invested in an interest in real estate. Such investment gave the bank an ownership in real estate within the meaning of section 76 of the Tax Law of 1919, and the amount should have been deducted as demanded by appellee. It was not error for the trial court to overrule the demurrer to the complaint.

Judgment affirmed.

GAUSE, J., not participating.

GOLDBERG v. HAUER. (No. 11610.)

(Appellate Court of Indiana, Division No. 1. Jan. 18, 1924.)

Appeal and error ⇐773(5)—Where appellant's brief made prima facie showing of error, failure of appellee to file brief held confession of error.

Where appellant's brief made a prima facie showing of error in overruling motion for new trial, because amount of recovery was too large, failure of appellee to file brief in support of judgment was confession of error justifying reversal.

Appeal from Circuit Court, Hamilton County; Fred Hines, Judge.

Action by Kenneth Hauer against Irving I. Goldberg. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

L. Roy Zapf, of Indianapolis, and Christians & Waltz, of Noblesville, for appellant.

Newberger, Simon & Davis, of Indianapolis, for appellee.

BATMAN, J. This is an action by appellee against appellant, based on an alleged breach of a written contract, in which a judgment was rendered against the latter for the sum of $800. Appellant filed a motion for a new trial, alleging among the reasons therefor, that the assessment of the amount of recovery is erroneous, being too large. The action of the court in overruling this motion is assigned as error on appeal. We have carefully considered appellant's brief, and have reached the conclusion that it discloses prima facie, that the court erred in overruling said motion for the reason stated above. Appellee has not filed a brief in support of the judgment, and therefore under the circumstances stated, such failure will be taken as a confession of error, justifying a reversal, without considering other reasons on which such motion is based. Union Traction Co. of Ind. v. Wolf (1920) 73 Ind. App. 392, 127 N. E. 564; Glencoe, etc., Mills v. Capitol, etc., Co. (1920) 74 Ind. App. 239, 128 N. E. 699; Roberts v. Fesler (1920) 74 Ind. App. 333, 128 N. E. 359; Robertson v. Ewing (1922, Ind. App.) 135 N. E. 491.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

NICHOLS, J., not participating.

STONER et al. v. AMERICAN TRUST CO. (No. 11801.)

(Appellate Court of Indiana, Division No. 1. Jan. 18, 1924.)

1. Jury ⇐14(7)—Suit to set aside fraudulent conveyance held not triable by jury.

In view of Burns' Ann. St. 1914, § 418, and Rev. St. 1881, § 400, a suit to set aside as fraudulent a conveyance of land from defendant husband to codefendant wife and to subject the land to the payment of plaintiff's judgments *held* one belonging exclusively to equity jurisdiction and not triable by jury.

2. Fraudulent conveyances ⇐118(2)—Debtor may in good faith prefer wife as creditor.

A debtor may in good faith prefer one creditor to another even if the creditor is the debtor's wife.

3. Fraudulent conveyances ⇐162(2)—Wife accepting transfer of legal title to land which she owned participated in fraud against creditors.

Where land was purchased with the wife's money, but the legal title was taken in the name of her husband, and plaintiff bank in good faith extended loans to the husband on the strength of the record title, and the wife knew the loans were extended on the face of the husband's apparent ownership of the land, she, in accepting a deed from the husband transferring the legal title to her, and knowing the husband was insolvent, participated in the fraud of the husband against plaintiff bank.

Dausman, P. J., dissenting.

Appeal from Superior Court, St. Joseph County; L. J. Oare, Judge.

Suit by the American Trust Company against Jacob F. Stoner and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. R. Arnold and Thad M. Talcott, Jr., both of South Bend, for appellants.

Jones, Montgomery & Obenchain, of South Bend, for appellee.

REMY, C. J. Appellee, having recovered certain judgments against appellant Jacob F. Stoner, upon which executions were returned unsatisfied, commenced this suit against appellants to set aside as fraudulent a conveyance of real estate from Jacob F. Stoner to his wife and coappellant, Laura Etta Stoner, and to subject the real estate to the payment of the judgments. To the complaint the defendants each answered by denial. Laura Etta Stoner also filed what she denominated a cross-complaint to quiet title to the real estate, making appellee and Jacob F. Stoner parties defendant. To the cross-complaint Jacob F. Stoner filed a disclaimer, and appellee filed a demurrer, which was sustained. Laura Etta Stoner refusing to plead further, judgment on her cross-complaint was taken against her. Requests for a jury trial by each of the appellants having been denied, the cause was submitted to the court for trial upon a statement of the facts stipulated by the parties, which stipulation is, in substance, as follows: On March 3, 1920, and April 2, 1921, respectively, appellant Jacob F. Stoner executed two promissory notes which were purchased by appellee before maturity, and on December 7, 1922, were by appellee reduced to judgments. At the time of the purchase of the notes, the title to the real estate described in the complaint was vested in Jacob F. Stoner, and continued so to be vested until December 30, 1921, when by warranty deed it was conveyed to his wife, Laura Etta Stoner. The consideration named in the deed was $12,000, which was at the time the actual cash value of the real estate over and above a $2,600 mortgage thereon which had previously been executed by appellants. Appellee bank at the time it purchased the notes knew that the record title of the real estate was vested in Jacob F. Stoner, and in making the purchase relied thereon, but had no knowledge whatever of any claim to the real estate on the part of Laura Etta Stoner.

At the time of the conveyance of the real estate to his wife, Jacob F. Stoner did not have, nor has he since had, sufficient property subject to execution to pay his debts. The father of Laura Etta Stoner from time to time after her marriage advanced to her sums of money which she loaned to her husband, Jacob F. Stoner, for the purpose of establishing a home and making a living, which money was never repaid. After the death of her father, Laura Etta Stoner, in 1916, received an additional sum of money from her father's estate, and it was with this money that the real estate in controversy was purchased. At the time of the purchase, Laura Etta insisted that the title be taken in her name; but, upon objection by her husband, she consented that it be taken in his name. Laura Etta at all times knew of the notes held by appellee bank which had been executed by her husband, and remonstrated with him, and after becoming alarmed about her husband's involvement in these and other obligations, she consulted an attorney to whom she said:

"This property is really mine; he promised that he would preserve it for our home, and he is getting into a lot of obligations from which he is receiving nothing from the boys, and against my wishes. How can I secure myself now?"

The attorney said:

"If they ever get a judgment against Mr. Stoner, there will be liens on the real estate you cannot get away from; the thing to do before he becomes involved in any judgments is for him to convey it to you."

Following this, on December 30, 1921, appellants had a settlement in the office of the attorney. It was found that appellant Jacob F. Stoner owed his wife a balance of $22,000, and he was prevailed upon by the attorney to execute the deed conveying to his wife the real estate in controversy. Besides conveying the real estate, he gave to his wife his promissory note for $10,000 due one year after date, which note has not been paid. The parties made the further stipulation that—

"Upon the foregoing facts the parties pray the judgment of the court as to the law herein irrespective of any insufficiency of pleading by way of complaint or answer."

On the facts stipulated, the court found for the plaintiff, and, over a motion for a new trial, rendered judgment for plaintiff setting aside the conveyance as to appellee, and subjecting the real estate to the payment of the judgments.

The important questions for consideration, and the only questions properly presented, arise on the alleged error of the trial court in overruling appellants' separate and several motion for a new trial. The reasons for a new trial are that the court erred in refusing to grant a trial by jury, that the decision of the court is not sustained by sufficient evidence, and is contrary to law.

[1] This suit is in the nature of what was formerly designated a judgment creditor's bill—a proceeding which, prior to June 18, 1852, belonged exclusively to equity jurisdiction, and is therefore not triable by jury. Evans v. Nealis (1882) 87 Ind. 262; Towns v. Smith (1888) 115 Ind. 480, 16 N. E. 811; Wild v. Noblesville Building, etc., Inst. (1899) 153 Ind. 5, 53 N. E. 944; section 418, Burns' 1914; section 409, R. S. 1881.

[2, 3] It is earnestly contended by appellants that, under the facts as stipulated, the conveyance by Jacob F. Stoner, to his wife was in consideration of $12,000 which was paid by the cancellation of an old obligation, and that the conveyance amounted to nothing more than a good-faith preference to his wife as a creditor, which preference he had a right to make. It is of course, the law that a debtor may in good faith prefer one creditor to another, and this is true, though the creditor be the debtor's wife. If therefore the facts stipulated by the parties compel the conclusion that the conveyance of Jacob F. Stoner amounted to a good-faith preference of his wife as his creditor, the contention of appellants must prevail. On the other hand, if the facts stipulated as the evidence in the case are sufficient to uphold the finding of the trial court that the conveyance, as to appellee, was fraudulent, the judgment must be affirmed. The stipulation shows that the money which paid for the real estate was the money of Laura Etta Stoner, money which came to her from the estate of her father; and that according to her statement made to her attorney shortly before the conveyance to her, the real estate was in fact hers, though the title had, by her consent, been placed in the name of her husband. Under such circumstances, the land, after it had been purchased with her money, was the property of Laura Etta Stoner, with the bare legal title in her husband. The effect of the deed, as between her and her husband, was but the transfer of the legal title. The attempted cancellation of $12,000 of the debt due from her husband was without consideration. Her claim to the ownership of the land does not rest on the deed from her husband, but upon the fact that she paid the purchase price, and at all times treated it as her own with the legal title in her husband in trust for her. It also appears from the stipulation that appellee purchased the notes in reliance upon the fact that the record title was in Jacob F. Stoner. If the conveyance is not set aside as to appellee, the effect will be to defeat the collection of appellee's claim by preventing appellee from realizing satisfaction for

ed, formed the basis for such credit; the credit having been extended because appellee, by reason of the conduct of appellants, was led to believe that the land was the property of Jacob F. Stoner. Equity will not permit a wife to clothe her husband with the indicia of ownership to her land while he is obtaining credit on his apparent ownership of such land, and then claim the land as her own free from the consequences of the credit so extended. Pierce v. Hower (1895) 142 Ind. 631, 42 N. E. 223; Le Coil v. Armstrong-Hunt Co. (1894) 140 Ind. 256, 39 N. E. 922. See, also, English v. Brown (D. C. 1914) 219 Fed. 248, 263. By taking the deed from her husband, Laura Etta Stoner participated in the fraud against her husband's creditors. Pierce v. Hower, supra. The evidence stipulated supports the decision of the trial court that, as to appellee, the conveyance was fraudulent, and that the real estate should be subjected to the payment of the judgments.

Affirmed.

DAUSMAN, P. J., dissents.

SMITH v. SMITH. (No. 11744.)

(Appellate Court of Indiana, Division No. 1. Jan. 16, 1924.)

1. Parent and child ⇐11—Unemancipated minor could not recover damages for torts of father during minority.

Neither at common law nor under any statute of Indiana could an unemancipated minor living in his father's family recover damages from his father after arriving at majority for cruel treatment, failure to educate, or other tort committed during such minority, since the criminal law was adequate protection.

2. Common law ⇐14—Rules adopted and binding on Indiana courts.

The common-law rules having been adopted are binding on Indiana courts, except as limited by treaties, Constitutions, and statutes.

3. Parent and child ⇐11—Reasons for rule against recovery for parent's torts to child during minority held not to have disappeared.

From the court's own knowledge of contemporaneous social life and tendencies of unrestrained youth, *held*, that the reasons for the rule against permitting an unemancipated minor after becoming of age to recover from his father for torts committed during minority have not disappeared.

4. Courts ⇐92—Discussion of point not involved in opinion held "obiter dictum."

A discussion in an opinion, which appeared to indicate a point not involved in the case, constituted "obiter dictum" as to such point.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dictum.]

Action by Otis P. Smith against Ambrose E. Smith. Judgment for defendant, and plaintiff appeals. Affirmed.

G. R. Estabrook, of Indianapolis, for appellant.

Ira M. Sharp, of Thornton, for appellee.

BATMAN, J. This is an action by appellant against appellee, a son against a father, to recover damages alleged to have been sustained by the former as the result of the wrongful acts of the latter. The complaint is in two paragraphs. The first is based on acts of personal violence, inflicted during appellant's minority, while he was a member of appellee's family, which are alleged to have been continued over a period of years, and to have been "cruel, inhuman, excessive, unreasonable, unwarranted, and malicious." The second is based upon the failure, neglect, and refusal of appellee, without any excuse whatsoever, to send appellant to school, or otherwise provide for his education during the years of his minority, while a member of the former's family, thereby violating the laws of this state, and unlawfully depriving him of an education, from which he has sustained damages. Each paragraph of the complaint shows that this action was commenced after appellant has reached the age of 21 years, and had ceased to be a member of appellee's family, but before he had reached the age of 23. Demurrers for want of sufficient facts were filed to each paragraph of the complaint, which were sustained, and, appellant refusing to plead further, judgment was rendered against him. The actions of the court in sustaining said demurrers constitute the only errors properly assigned on appeal.

[1] An examination of the briefs in this case discloses that the determination of a single question will be decisive of this appeal. It may be stated thus: May a child maintain an action against its father for damages, arising out of tortious acts of such parent, which occur during such child's minority, while it is unemancipated and a member of the parent's family? The common law gives the child no such right of action. The reasons for denying such redress have been summarized in a standard legal treatise as follows:

"It is well established that a minor child cannot sue his parent for a tort. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. An unkind and cruel parent may and should be punished at the time of

custody and suffering criminal penalties, if need be; but for the minor child who continues, it may be for long years, at home and unemancipated, to bring a suit, when arrived at majority, free from parental control and under counter influences, against his own parent, either for services accruing during infancy or to recover damages for some stale injury, real or imagined, referable to that period, appears quite contrary to good policy. And this rule has been applied, not only in cases of excessive punishment, or other assault and battery, but to the most extreme case possible, that of the ravishment of a minor daughter by her father." 20 R. C. L. 631.

The following decisions fully support the text quoted: McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664, 64 L. R. A. 991, 102 Am. St. Rep. 787, 1 Ann. Cas. 130; Roller v. Roller, 37 Wash. 242, 79 Pac. 788, 68 L. R. A. 893, 107 Am. St. Rep. 805, 3 Ann. Cas. 1; Foley v. Foley, 61 Ill. App. 577; Hewlett v. George, 68 Miss. 703, 9 South. 885, 13 L. R. A. 682.

[2] As said in a note to the second case cited, the absence of a more extended list of decisions would indicate that the rule stated has been so generally recognized that courts have seldom been called upon to give it application. The rules of the common law, having been adopted in this state, are binding upon its courts, as has often been declared, except as limited by treaties, Constitutions, and statutes. Sopher v. State (1907) 169 Ind. 177, 81 N. E. 913, 14 L. R. A. (N. S.) 172, 14 Ann. Cas. 27; Atkinson v. Disher (1912) 177 Ind. 665, 98 N. E. 807; State ex rel. v. Ellis (1915) 184 Ind. 307, 112 N. E. 98.

[3] No limitation on the rule stated from any of these sources is cited, and we assume there is none. Certainly no statute has ever been enacted in this state conferring such a right of action. But, if it be contended, that the reasons for the rule which denies such right never existed in this state, or at least that they do not now prevail, and hence the rule itself does not exist, by reason of the familiar maxim in that regard, we would be compelled to withhold our concurrence. See Ketelsen v. Stilz (1915) 184 Ind. 702, 111 N. E. 423, L. R. A. 1918D, 303, Ann. Cas. 1918A, 965, where the court discusses the effect of an absence of the reasons on which the common-law rule is based. The Supreme Court of this state has never declared that the reasons for such rule have never existed in this state, or that they do not now exist, and we find no grounds upon which to base such a conclusion. From our knowledge of the social life of today, and the tendencies of the unrestrained youth of this generation, there appears to be much reason for the continuance of parental control during the child's minority, and that such control should not be embarrassed by conferring upon the child a right to civil redress against the parent, tion we are now considering. In our opinion, much reason exists for maintaining the sound public policy, which, as stated, underlies the rule which denies such redress. Extreme cases may arise, where it may seem harsh to deny the right, but we are governed by recognized rules, which must be uniformly applied. On the whole it seems far better to rely upon the criminal law and the equity powers of the court to protect the child, where parental affection fails, even if they afford no redress for past wrongs, than to abandon the rule under consideration. At least it impresses us as being a matter for legislative consideration, rather than judicial determination. For the reasons stated we conclude that the question under consideration must be answered in the negative. This conclusion is controlling as to each paragraph of the complaint, and hence we need not consider the special reasons urged by appellee in support of the court's action in sustaining the demurrer to the second paragraph.

Appellant, in an effort to lead the court to a different conclusion, has cited the following cases, which we will now consider: Hinkle v. State (1890) 127 Ind. 490, 26 N. E. 777; Hornbeck v. State (1896) 16 Ind. App. 484, 45 N. E. 620; People, etc., v. Green, 155 Mich. 524, 119 N. W. 1087, 21 L. R. A. (N. S.) 216; Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640, 5 Ann. Cas. 112; Treschman v. Treschman (1901) 28 Ind. App. 206, 61 N. E. 961.

[4] The first three involve criminal actions, and hence are not applicable in an action for damages. The next is a Nebraska case, in which the question we have before us is not fully considered, but it appears to have been assumed that a parent is liable to his child in damages, where he inflicts an excessive injury through malice, and from wicked impulses. However, we cannot accept it as a controlling authority. The last case cited is one from this court, but is clearly distinguishable from the instant case in this, that the one charged with the tortious acts was the stepmother of the minor involved, and no showing appears that she stood in loco parentis to such minor at the time of the infliction of the injury on which the action is based—the mere existence of the relation shown not establishing such fact. True, the opinion in that case contains a discussion, which appears to indicate that a minor child, under certain extreme circumstances, might maintain an action against its parent for damages arising from the infliction of personal injuries, but so much of the opinion as appears to so hold is purely obiter dictum, as no such question was involved in that action. However, it will be noted that no recognition is given to the right of an adult child, as in

the instant case, to maintain an action for personal injuries inflicted by the parent during its minority, as shown by the following statement quoted from the opinion:

"We are not here concerned with the right of an adult child to sue a parent for a tort committed during infancy. There may be good reasons for denying this right, where the minor child, after the injury, continues, possibly for many years, at home and unemancipated, and upon arriving at majority seeks to recover damages for such injury. And it may be admitted that there may be good ground for questioning an infant child's right of action against its father, or against the mother as head of the family, but we are not prepared to say that in no case should such an action be allowed."

The conclusion reached by the court in that case appears to have been based on a process of reasoning, supported by a quotation from a single authority—Reeve's Domestic Relations—in which it is said that for injuries inflicted under certain conditions, the parent ought to be liable for damages. These conditions are such as would subject the offender to criminal punishment, and on this the author has merely based an opinion that redress through civil damages should also be allowed, without declaring that such is the law. For the reason stated, the case last above cited cannot be accepted as controlling. We conclude there was no error in the action of the court in sustaining the demurrer to either paragraph of the complaint.

Judgment affirmed.

WINSKI et al. v. CLEGG. (No. 11693.)

(Appellate Court of Indiana, Division No. 1. Jan. 15, 1924.)

1. Trial ⇐359(2)—Rule stated as to matters considered on motion for judgment non obstante.

In considering a motion for judgment non obstante, the court can look only to the pleadings, the verdict and the answers to the interrogatories.

2. Negligence ⇐142—Denial of motion for judgment non obstante on ground answers to interrogatories showed contributory negligence held not error.

In an action for negligence, denial of motion for judgment non obstante, on the ground that the answers to interrogatories showing contributory negligence were in irreconcilable conflict with the general verdict for plaintiff, *held* not error, in view of allegations raising last clear chance issue not covered by interrogatories.

3. Municipal corporations ⇐706(6) — Negligence of truck driver held for jury.

In an action for death of a bicycle rider struck by a truck at street intersection, the question of the driver's negligence was one of fact for the jury.

4. Appeal and error ⇐1001(1) — A verdict supported by any evidence not disturbed.

A verdict will not be disturbed for insufficiency of evidence, if there is any evidence legitimately tending to sustain it.

5. Municipal corporations ⇐706(5)—Verdict for injuries to bicycle rider struck by truck held not sustained by evidence.

In action for death of bicycle rider struck by defendant's truck at street intersection, evidence which, if sufficient to show negligence of truck driver, likewise showed contributory negligence of bicycle rider, was not sufficient to sustain verdict for plaintiff.

6. Evidence ⇐471(17)—Testimony that bicycle rider was careful at crossings incompetent.

Testimony that a bicycle rider was "very careful at crossings" and "was a very careful rider" *held* incompetent, being merely the conclusion of the witness.

Appeal from Circuit Court, Tippecanoe County; Homer W. Hennegar, Judge.

Action by Hiram M. Clegg against Oscar Winski and others. Judgment for plaintiff, and defendants appeal. Reversed.

Parkinson & Parkinson, of LaFayette, and Fenton, Steers, Herbst & Klee, of Indianapolis, for appellants.

Randolph, Milford & Randolph, of LaFayette, for appellee.

ENLOE, J. On the 23d day of September, 1919, one George K. Clegg, aged 16 years, and the son of the appellee herein, while riding his bicycle westward on Main street in the city of Lafayette, was, at the intersection of Main and Second streets, in said city, struck by a truck, driven by an employee of appellants, and then and there received injuries from which he died the next day. This action was brought by the father to recover damage sustained—services lost and medical expenses—by reason of the death of his said son.

The issues, formed by a complaint in one paragraph and answer in denial thereto, were submitted to a jury for trial, and resulted in a verdict for the appellee in the sum of $2,000. With this verdict the jury returned their answers to certain interrogatories submitted to them. The appellants unsuccessfully moved for judgment in their favor upon said answers, and also for a new trial, and these rulings are the only matters presented on this appeal.

[1, 2] The appellants first insist that the answers returned by the jury are in irreconcilable conflict with the general verdict, in that they conclusively show that said deceased was guilty of contributory negligence. If we should concede this point, still, as a mat-

flict as contended for. It is well settled that in considering a motion for judgment non obstante, the court can look only to the pleadings, the verdict, and the answers to the interrogatories. In this case, if we look to the complaint, we find its allegations broad enough to admit evidence showing that the driver of said truck was guilty of negligence under what is designated as the doctrine of last clear chance. This matter was not covered by any interrogatories submitted, and the court did not err in overruling said motion.

[3, 4] The appellants next urge that the verdict is not supported by sufficient evidence, because, they say, there is no evidence of any negligence on the part of the driver of said truck, at the time in question. This was a question of fact for the jury, and, if there is any evidence legitimately tending to prove such negligence, this is sufficient.

[5] We have read this record in an endeavor to find such legitimate evidence, and can find none. The competent evidence in this record concerning the conduct of the driver of said truck, at the time in question, if it can be said to in any way indicate negligence on the part of said driver, would equally apply to the son of appellee, who was killed; if it may be said to establish or show negligence on the part of said driver, it can also be said to equally show negligence on the part of said deceased, such as to preclude any recovery in this case. We are compelled to hold that said verdict is not sustained by sufficient evidence.

Complaint is also made that certain testimony was permitted, over the objection of appellants, to go to the jury. It appears from the record that on Sunday, prior to the date on which deceased was injured, he, in company with two other boys of about his own age, was riding his bicycle; that he and one of the boys rode out to the Soldiers' Home; that all three of these boys were riding their bicycles about the city of Lafayette on that day. Each of these boys, so riding with the deceased, was asked this question:

"On the last Sunday prior to the death of Kenneth Clegg, when you took the ride with him on bicycles, as you have already told the jury, you may state to the jury what his manner and conduct were in riding and managing his bicycle on that occasion, as you observed it, as to his being watchful, careful, and observant, or careless, not watchful, and not observant."

To which question after an objection thereto had been overruled, the witness answered:

"Well, he was very careful and he watched —very careful at crossings, is all I could say. He was a very careful rider."

[6] The objection to this question should have been sustained, and the testimony excluded. The question called for the opinion of in which the deceased rode and managed his bicycle on the day mentioned in said question; it was asking for an opinion in a matter which, if competent at all, was for the jury exclusively. Cincinnati, etc., R. Co. v. Cook, 44 Ind. App. 303, 88 N. E. 76; Ambre. v. Postal Cable Co., 43 Ind. App. 47, 86 N. E. 871; Sherfey v. Evansville, etc., R. Co., 121 Ind. 427, 23 N. E. 273; Staser v. Hogan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

Appellants also complain of certain instructions given in this cause; but, after a careful reading of all the instructions given, we are convinced that the court did not err in this regard.

For the reasons stated, this cause is reversed, with directions to the trial court to sustain appellant's motion for a new trial, and for further proceedings.

Judgment reversed.

DOBBS et al. v. ROYER. (No. 11566.)

(Appellate Court of Indiana, Division No. 2. Jan. 17, 1924.)

1. Appeal and error ⟸302(6)—Assignment of error challenging part of finding of facts held to present no question.

An assignment of error in a motion for a new trial, challenging a certain definite part of the finding of facts as not being sustained by sufficient evidence, presents no question.

2. Appeal and error ⟸761—Technical defects in assignment of errors held to not prevent consideration.

Where appellants in good faith attempted to present errors relied upon, the appellate court is loath not to consider them, so far as they can be determined because of technical defects in points and authorities.

3. Appeal and error ⟸842(3)—Question of fraudulent intent is one of fact.

Under Burns' Ann. St. 1914, § 7483, the question of fraudulent intent in conveying property is one of fact.

4. Bankruptcy ⟸303(3)—Evidence held to show grantee joined in grantor's fraudulent intent.

Evidence *held* to show that grantee joined in grantor's fraudulent intent in conveying property, in violation of Burns' Ann. St. 1914, §§ 7479, 7480, and Bankruptcy Act, §§ 60a, 60b.

5. Fraudulent conveyances ⟸301(1)—Fraudulent intent of grantee may be proved by circumstantial evidence surrounding transaction.

Grantee's fraudulent intent in conveyance of property to hinder and defraud creditors, which is made a question of fact by Burns' Ann. St. 1914, § 7483, need not be proved by positive evidence, but may be established by circumstantial evidence surrounding the transaction, notwithstanding grantee's positive denials of knowledge of grantor's fraudulent intent.

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6. Bankruptcy ⇐175—Contemporaneous contract executed in fraud of creditors could not stand.

Where, in a suit by a trustee in bankruptcy to set aside a conveyance of property and a contemporaneous agreement, it was established that the deed and the agreement were executed by defendants with intent to defraud creditors in violation of Burns' Ann. St. 1914, §§ 7479, 7480, and Bankruptcy Act, §§ 60a, 60b, they could not stand.

7. Appeal and error ⇐272(3)—Assignment challenging conclusion of law held to present no question.

An assignment of error challenging trial court's conclusion of law, which challenge was made first and only under the motion for a new trial, and without even an exception to the conclusion, *held* not to present a question.

8. Bankruptcy ⇐304—Finding that certain deed was executed in fraud of creditors held within issues raised by pleading.

In a suit by a trustee in bankruptcy to set aside as fraudulent a deed and contemporaneous contract of December 18, 1918, in which the court granted relief, not only as to that deed, but also as to one executed in May, 1917, even if there was no specific averment that the deed of May, 1917, was fraudulent and void, an allegation that defendant was the owner of the whole real estate on December 18, 1918, which could not have been had the deed of May, 1917, been effective, brought trial court's finding and conclusion of law with reference to the deed of May, 1917, within the issues.

9. Appeal and error ⇐1071(5)—If trial court's conclusion was error, such error was harmless.

In a suit by a trustee in bankruptcy to set aside as fraudulent a deed and contract executed in December, 1918, in which the trial court granted relief, not only as to that deed, but also as to a deed dated May, 1917, *held*, that, even if the trial court's conclusions that the deed of May, 1917, was fraudulent and should be set aside was error, because not within the issues, such error was harmless, where defendant testified that the first deed was to be destroyed, and the undisputed evidence showed that that deed was never delivered.

10. Appeal and error ⇐1058(1)—Exclusion of evidence was cured by subsequent admission of excluded evidence.

If the exclusion of evidence was error, such error was cured by the subsequent admission of the excluded evidence.

Appeal from Circuit Court, Owen County; Frank A. Symme, Special Judge.

Suit by Samuel M. Royer, trustee in bankruptcy of David Walter Jones, bankrupt, against Hattie B. Dobbs and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Joseph E. Henley and George W. Henley, both of Bloomington, for appellants.

Inman H. Fowler and Hickam & Hickam, all of Spencer, for appellee.

NICHOLS, J. Action by appellee to set aside a conveyance of certain real estate as fraudulent.

It is averred in the complaint, briefly, that appellant Jones was on December 18, 1918, the owner of certain real estate of the value of $12,000, which, with $300 of personal property, comprised the whole of his estate. That he owed divers persons a total of $9,157.39, and claimed to owe in addition thereto $1,500 to appellant Hattie B. Dobbs, who was his adopted daughter, and who with her husband, appellant James A. Dobbs, resided with him on the land involved. That for the unlawful purpose of hindering, postponing, and delaying his creditors, and of preferring said Hattie in the payment of her claim of $1,500, and of preferring certain other creditors, said Jones on said day executed his warranty deed to said Hattie, thereby paying her said $1,500 in full; from the proceeds paid certain other creditors in full, including a mortgage indebtedness of $2,637.50; and appropriated the remaining portion to his own use. He thereby exhausted the whole of the consideration for said real estate, was insolvent, and made no payment on certain of his debts above included, aggregating $6,219.89. This was done by connivance and collusion between said Jones and said Dobbs and Dobbs. Jones reserved the right to live on the land, and appellants Dobbs and Dobbs agreed to furnish him a home, to board him, to do his washing, to pay doctor bills and nurse and medical bills, and $25 monthly. The deed was accepted and placed of record, and ever since said Hattie has claimed the ownership of said land. Within four months from the date of said deed, said Jones was adjudged a bankrupt, and appellee was thereafter appointed trustee in bankruptcy, and duly qualified as such. After averments as to waste, there was a prayer for a decree that the pretended deed was fraudulent and void as to creditors, for an order for the sale of the land, and an order restraining the waste. The restraining order, though granted, is not here involved.

[1] There was an answer in general denial, a trial with special findings of fact and conclusions of law, and judgment thereon in favor of appellee, from which, after motions for a venire de novo and for a new trial were overruled, this appeal. The errors assigned are the overruling of said respective motions. Of the reasons for a new trial, those numbered respectively 2, 3, and 7 to 14, inclusive, each challenge a certain definite part of the finding of facts as not being sustained by sufficient evidence. That such an assignment presents no question has been numerously decided both by this court and by the Supreme Court. Federal Life Insur-

ance Co. v. Maxam, 70 Ind. App. 266, 289, 117 N. E. 801, 118 N. E. 839; Beard v. Payne, 64 Ind. App. 324, 329, 115 N. E. 782; Vandalia Coal Co. v. Price, 178 Ind. 546, 97 N. E. 429; Scott v. Collier, 166 Ind. 644, 78 N. E. 184.

The first reason assigns that the special findings of the court are not sustained by sufficient evidence, and the sixth that they are contrary to law.

In the Scott Case cited last above, the first and second reasons for a new trial were the same as the first and sixth in the instant case, and the court says of them that "the first and second assignments cover the entire ground, and fully serve to challenge the sufficiency of the evidence to support the special finding of the court as to any and all of the material facts therein embraced, and to raise the question in regard to the finding being, under the evidence, contrary to law." The evidence in this case is voluminous, covering approximately 750 pages of the record. After having read the statement thereof as set out in both appellants' and appellee's briefs, we are fully satisfied that it sustains all of the material facts found by the court, which facts, so far as here involved, are as follows:

That about the year 1905, appellant Jones, then a married man, purchased and moved on the 242 acres of land involved, which constituted a valuable grain and stock farm worth on December 18, 1918, $14,520, on which there was a mortgage of $2,500 with $137.50 interest due thereon; that said Jones resided upon said farm, and conducted it, to all appearances, in a prosperous and successful manner; that said Hattie, who is 29 years of age, before she was one year old was duly adopted by said Jones and his wife, who had no children of their own, and thereafter she resided with the said Jones and wife as their daughter; that Mrs. Jones died in the year 1914; that in March, 1912, said Hattie was married to appellant James A. Dobbs, who was then and ever since, until the last year, has been a saloon and poolroom keeper, restaurant owner, or drug store owner in Jasonville or in Terre Haute; that after their marriage they a great part of the time made their home with said Jones, the said Hattie keeping house for him; they were at all times and still are on confidential and intimate terms personally, and each had the full friendship and confidence of the other; that in about 1912 Jones moved to Spencer, Indiana, and engaged in the feed, ice and coal business, in which he lost heavily, and on May 25, 1917, he had no other property subject to execution except said farm then worth $14,520, and personal property thereon worth $300, in all $14,820, and he then owed debts which, including $3,898.14 to the Exchange Bank of Spencer, Ind., $1,590 to the Spencer National Bank, $500 to one Lucy Hill, and $1,909 claimed to be due Hattie, amounted to $11,859.14; that during the period from May 25, 1917, to December 18, 1918, Jones was making and renewing notes as they severally became due to said banks every three months and obtaining credit from time to time on the faith of said banks in his ownership of said farm and the personal property kept on it; that he and said Hattie and James A. Dobbs all treated said property, so far as the creditors of said Jones had any knowledge, as the property of said Jones; that during the period between said May 25, 1917, and December 18, 1918, while said James A. Dobbs was engaged in his said business, he or his friends were often arrested and imprisoned on criminal charges in the state courts and in the federal court at Indianapolis, and that, for the purpose of enabling said Jones to sign for the release of said Dobbs and his friends and associates when so imprisoned at different times, said Jones, James A. Dobbs, and Hattie B. Dobbs, at different times, represented that said Jones was the sole owner of said 242 acres of land; that it was worth more than $12,000 above all incumbrances and exemptions, and that said Jones was worth more than $15,000 above all exemptions and incumbrances; said Jones did, during said period, procure the acceptance of six recognizance bonds in the Greene circuit court for the personal friends of said James A. and Hattie B. Dobbs, and one bond in the federal court at Indianapolis, Ind., for the release of said James A., who was then held in custody upon a criminal charge pending in said court, on the faith and belief that he was still the owner of the whole of said lands, subject only to the mortgage; that on May 25, 1917, after borrowing from said banks and making notes to the amount of over $5,000 to said banks, and after renewing them every three months for several years, and while indebted to all of said parties as hereinabove found, said Jones signed a warranty deed for one-third of said farm to said Hattie upon an expressed consideration of $4,000, with a contemporaneous written contract by the parties, providing that said deed should not be recorded or delivered to the grantee, but was to be placed in an envelope and left with the cashier of said Exchange Bank, and that said Hattie should pay $1,000 in cash, and as much as $500 each succeeding year, without interest until all the consideration was paid, the deed not to be delivered until all payments were made through said bank, after which the deed was to be delivered to said Hattie by the bank, but, if said payments were not so made, the deed was to be returned to said Jones, the deed not

to be recorded until after all payments should be made through said Exchange Bank, and the deed delivered; that said deed and contract were placed in an envelope and delivered to the cashier of said bank, who received it without reading the same or receiving knowledge of the contents; that neither said Exchange Bank nor said Spencer National Bank ever received any knowledge of the contents of the envelope containing said deed and contract until after the 18th day of December, 1918, but that said banks, each being kept in ignorance of said deed and contract, and believing that said Jones was in fact the owner of said lands, continued to accept renewals of said notes and extend credit to said Jones therefor, until said December 18, 1918, on which date, and while said deed for one-third of said farm was still undelivered in said Exchange Bank, by deed and contract said Jones then sold the remaining two-thirds of said farm to said Hattie with all personal property thereon, amounting to $300 in value, for the consideration as expressed in deed of $5,000, and executed a warranty deed for the whole of said lands to said Hattie, and the same was on said day recorded; that by the terms of said contract made contemporaneously with said deed and as part of the terms of said sale, it was further agreed between said Jones and appellants Dobbs and Dobbs, as a part of the consideration, that the said Hattie should not sell said land during the lifetime of said Jones, but that she and her husband should furnish to Jones a home with them thereon, and that they should board, nurse, and care for him, pay his doctor bills, and pay him $25 in cash every month thereafter during his lifetime; that the life expectancy of said Jones at said time was 11 years and 8 months; that it was worth $1 per day to board him and furnish him a home upon said land, and that his board and maintenance and said $25 per month during his said life expectancy aggregates a further consideration for said lands in the sum of $7,200, which amount of said consideration said Jones reserved to himself by the terms of said sale and deed; said Jones, after conveying said land to said Hattie December 18, 1918, and after preferring, allowing, and paying said two claims of said Hattie in full as part payment of the consideration in the amount of $1,909, and after preferring and paying certain other creditors and appropriating to himself about $900, and reserving his life maintenance aforesaid, was left and is left wholly insolvent, and without any property whatever subject to execution, or from which said banks or said Hill might collect their said debts or any part thereof; that upon the execution of said deed on December 18, 1918, said Hattie paid $2,637.50 in satisfaction of the mortgage, which was a first lien on said land. The court finds that the deed and contract of May 25, 1917, and the deed and contract of December 18, 1918, were each executed, and all payments which have been made thereon have been made in pursuance of a fraudulent scheme and conspiracy, except the payment of said mortgage, and that by such payment no creditor was defrauded or damaged, but that said payment prevented a possible foreclosure; that all acts performed and all payments made by said Dobbs and Dobbs, or either of them, in carrying out and making said contract and deed effectual, have been paid and performed for said fraudulent purposes, and with notice of the insolvency of said Jones, and his said fraudulent purposes, and that said creditors not paid were thereby hindered, delayed, and defrauded, except as to the payment of said mortgage indebtedness; that, after the execution of said deed and contract on December 18, 1918, said Jones and said Hattie B. and James A. Dobbs continued to remain in the home on said farm, said Jones receiving his board and maintenance and said sum of $25 per month until the 20th day of March, 1920, when the residence upon said farm was destroyed by fire, after which the Dobbses and said Jones moved to Gosport, Ind., where they have ever since resided in the same home, the Dobbses furnishing said Jones his personal maintenance, including his board and room and paying him $25 per month, as stipulated for in said contract and deed of date of December 18, 1918.

[2] Appellee contends that appellants have failed to present any question for our consideration, for the reason that each of their points and authorities is merely an abstract proposition of law. While there is much merit in appellee's contention, yet believing as we do that appellants have in good faith attempted to present errors relied upon, we are loath not to consider them so far as they can be determined, because of technical defects, and we shall therefore consider such substantial questions as we are able to discern.

[3-5] Appellants' first proposition is that a conveyance cannot be avoided when made for a valuable consideration, because of the fraud of the grantor in which the grantee did not participate. But appellants correctly state as a second proposition that the question of fraudulent intent under the statute (Burns R. S. 1914, § 7483) shall be deemed a question of fact. The trial court in this case has found from the evidence that the grantee joined with the grantor in his fraudulent purpose, and we hold that there is ample evidence to sustain such a finding. Fraudulent intent need not be proved by positive evidence. In fact it is

sometimes most difficult so to prove it. Appellant Hattie testified affirmatively that she had no knowledge of her adoptive father's unpaid indebtedness here involved, or of his fraudulent intent, but the court from the facts and circumstances surrounding the transaction has found otherwise, and such evidence, though it be circumstantial, is sufficient to sustain the court's conclusions. That fraudulent intent may be so established see Farmer v. Calvert, 44 Ind. 209; Hoffman v. Henderson, 145 Ind. 613, 44 N. E. 629; Milburn v. Phillips, 136 Ind. 680, 34 N. E. 983, 36 N. E. 360; Bump on Fraud, 3 Ed. 5759.

The Milburn Case cited above mentions numerous badges of fraudulent intent, and is especially valuable in the consideration of the questions here involved.

Having determined that there was a fraudulent intent on the part of both the grantor and the grantee in the transaction here involved, the statute leaves nothing further for us to decide. Section 7479, R. S. 1914, provides:

"All conveyances or assignments, in writing or otherwise, of any estate in lands, or of goods, or things in action, every charge upon lands, goods or things in action, and all bonds, contracts, evidences of debt, judgments, decrees, made or suffered with the intent to hinder, delay or defraud creditors or other persons of their lawful damages, forfeitures, debts or demands, shall be void as to the persons sought to be defrauded."

Section 7480 provides:

"All deeds of gift, conveyances, * * * assignments, verbal or written, of goods or things in action, made in trust for the use of the person making the same, shall be void as against creditors, existing or subsequent, of such person."

Section 60, clause (a), of the U. S. Bankruptcy Act (32 Stat. 799), provides:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

And clause (b) of the same section provides:

"If a bankrupt shall have given a preference and the person receiving it, * * * or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

[6] Under these statutes it is clear that the deed and contemporaneous contract of December 18, 1918, cannot stand. No question is presented in the motion for a new trial as to the deed of May 26, 1917. It is true that one of the reasons for a new trial was that the special findings are contrary to law, but nothing is presented on this question under points and authorities.

[7-10] Appellants attempt to challenge conclusion of law No. 1, which states that appellee is entitled to judgment declaring all deeds and contracts between appellants covering the real estate involved fraudulent and void, but this attempted challenge is made first and only under the motion for a new trial, and without even an exception to the conclusion. We hardly need to say that nothing is presented. We may state, however, that while it is true that no specific averment is made in the complaint to the effect that the deed of March 26, 1917, was fraudulent and void, it is averred therein that Jones was the owner of the whole of the real estate on December 18, 1918, which could not have been had the former deed been effective. Evidence was heard which was tendered by both the appellants and appellee concerning the transaction of May 26, 1917, out of which the first deed grew, without objection from any one, and Jones himself testified that it was the understanding that the first deed was to be destroyed. Further, it appears by the undisputed evidence that such deed was never delivered. It follows that, even if the finding and conclusion that the first deed was fraudulent and void was error, because not within the issues, such error would be harmless. No question is presented with reference to error in the exclusion of certain evidence tendered by appellants, but, if such exclusion of evidence had been error, such error was cured by the subsequent admission of the excluded evidence.

The only question attempted to be presented by the venire de novo is that the special findings of fact, the substance of which are set out above, are so uncertain, indefinite, and ambiguous that no judgment or conclusion of law could be rendered thereon. We do not agree with this contention, and we therefore hold that the motion for a venire de novo was properly overruled.

We find no reversible error. Judgment affirmed.

MONTGOMERY v. PIERSON. (No. 11738.)*

(Appellate Court of Indiana, Division No. 2. Jan. 17, 1924.)

1. Appeal and error ⇐1010(1)—Finding supported by some evidence not disturbed.

The appellate court will not disturb a finding of the trial court where there is some evidence to sustain it.

2. Appeal and error ⇐1051(5)—Admission of opinion evidence as to sanity of grantor harmless in view of presumption of sanity.

In a suit to set aside a deed because of undue influence exerted on grantor, the admission of testimony of witnesses as to their acquaintance with the grantor, and their observations of her, and that she was a person of sound mind, if error, was harmless, such evidence being only confirmatory of the presumption of sanity.

3. Deeds ⇐203—Physical and mental condition of grantor admissible on issue of undue influence.

In a suit to set aside a deed because of undue influence, where plaintiff by his averments coupled the charge of undue influence with the weakened physical and mental condition of grantor, it was proper to show the grantor's mental and physical condition at the time of the execution of the deed.

4. Witnesses ⇐159(14)—Grantee not prohibited by statute from testifying as to mental capacity of grantor, since deceased.

In a suit to set aside a deed for undue influence, grantee may testify as to her observations of grantor on the question of grantor's mental capacity; Burns' Ann. St. 1914, § 522, not prohibiting parties from testifying upon the subject of the mental capacity of decedent.

5. Evidence ⇐123(7)—Statements of grantor made after execution of deed held not res gestæ.

In a suit to set aside a deed because of undue influence, the court did not err in excluding testimony that grantor had stated to a witness a month after the making of the deed that grantee had deviled her to death to get it; such statement not being a part of the res gestæ, and it being incompetent for the purpose of sustaining the issue of undue influence.

Appeal from Circuit Court, Bartholomew County; J. W. Donaker, Judge.

Action by Otto C. Montgomery against Goldie E. Pierson. Judgment for defendant, and plaintiff appeals. Affirmed.

Fae W. Patrick and Clarke & Clarke, all of Indianapolis, Edward P. Elsner, of Seymour, and Rynerson & Long, of Columbus, for appellant.

Seba A. Barnes, of Seymour, for appellee.

NICHOLS, J. Action by appellant against appellee to set aside a deed for 13 acres of land upon the ground that the same was procured by undue influence. Appellant is the son and appellee is a granddaughter of Elizabeth Montgomery deceased, who was the grantor in the deed involved.

It is averred in the complaint that said grantor was 80 years of age, that for many years prior to the execution of the deed she had been sick and greatly impaired both in mind and body, and by reason thereof susceptible to the influences, arts, and persuasions of others; that during said period of time appellee, well knowing of the grantor's weak and feeble condition and corruptly contriving and intending to profit thereby and to defraud her out of the land involved, made frequent visits to her and by means of continuous, persistent, and undue persuasions and importunity, and undue and overpowering influences, so wrought upon her mind as to induce her to make the conveyance involved. There was an answer in denial, and a trial by the court which resulted in a finding for appellee.

The error presented in this court is the action of the court in overruling appellant's motion for a new trial which presents the questions hereinafter considered.

Appellant, presenting as error that the finding of the court was not sustained by sufficient evidence, contends that the proof of undue influence exerted by appellee and operating upon Elizabeth Montgomery as grantor in the deed to appellee at the time of its execution was overwhelming and makes a forceful argument to sustain his contention. We have carefully examined the evidence as the same appears in appellant's brief, and, while we are not ready to join with appellant in saying that the evidence in his favor is overwhelming, it must be conceded that there is some evidence to sustain his contention.

[1] In Wiley v. Gordon, 181 Ind. 252, on page 266, 104 N. E. 500, 505, which involved a will contest, the court says that—

"Undue influence, in order to make a will void, must be directly connected with its execution and must operate at the time it is made. It must be an influence of such compelling force that the apparent testator is but the instrument by which the mastering desire of another is expressed, so that the supposed will, or the particular part in question, is not the will of the testator except in the sense that he has consented to put his name to it in the form in which it appears. There is an entire absence of evidence before us to show that when the testator executed the codicil in question he was under any coercive influence that is undue under the statute and our decided cases."

Numerous authorities are there cited to sustain the court's holding. With this holding before it the trial court in this case has found by its general finding that the deed here involved was not induced by undue influence exercised on the part of the appellee over the grantor. There is certainly some

*Rehearing denied 142 N. E. 874.

evidence to sustain the court's finding, and, such being the case, this court will not disturb the same.

[2] Appellant complains that appellee, over the objection of appellant, was permitted to give evidence by a number of witnesses, after they had testified to their acquaintance with the grantor and their observations of her, that she was a person of sound mind. Even if it were error to admit such testimony because there was no issue of sanity or insanity, as appellant contends, it was harmless to appellant, for it is elementary that all persons are presumed to be of sound mind, and, in the absence of evidence to the contrary, the evidence adduced was only confirmatory of the presumption of sanity. There being no contention by appellant that the grantor was of unsound mind, appellant could not be harmed by such evidence.

[3] It will be observed, however, that the allegation of the complaint was that for many years prior to the execution of the deed the grantor had been sick and greatly impaired both in mind and body, and that by reason thereof she was susceptible to the influence, arts, and persuasions of others, and that because of this condition of mind and body appellee was able to and did unduly influence the grantor to execute the deed involved.

Appellant by these averments had coupled his charge of undue influence with the weakened physical and mental condition of the grantor. It is a rule, with but few exceptions, that the condition of the mind is so blended with questions of undue influence as to make it practically impossible to separate them. And where an issue of undue influence is presented it is always proper to show the physical and mental condition of the person whose deed or act is challenged. Murphy v. Nett, 47 Mont. 38, 130 Pac. 451; In re Wiltsey's Will, 135 Iowa, 430, 109 N. W. 776; Walls v. Walls, 99 S. W. 969, 30 Ky. Law Rep. 948; Cooper v. Harlow, 163 Mich. 210, 128 N. W. 259; Linebarger v. Linebarger, 143 N. C. 229, 55 S. E. 709, 713, 10 Ann. Cas. 596; Robinson v. Robinson, 203 Pa. 400, 53 Atl. 253; Hayes v. Candee, 75 Conn. 131, 52 Atl. 826.

Appellants, to sustain his averments as to the weakened condition of the grantor, both physically and mentally, gave evidence of her condition in that regard. Appellee in rebuttal by numerous witnesses showed their acquaintance with the grantor, and their observations of her, after which, over the objection of appellant, they testified that she was of sound mind. While such opinion evidence need not have been given, we can see no reason for excluding it, and it was harmless to appellant because of the presumption of sanity above mentioned. But certainly for the purpose of enabling the court to determine the mental condition of the grantor, it was proper for witnesses to give evidence of their acquaintance with her and their observations of her. From such evidence it was proper for the court to form its own independent conviction of the mental and physical condition of the grantor, and to decide accordingly regardless of any opinion by witnesses as to the grantor's mental condition.

[4] Appellee was one of the witnesses that so testified to her acquaintance with, and observations of, her grandmother, the grantor. The court expressly stated that such evidence was heard solely on the question of the soundness or unsoundness of mind of the grantor. Appellant challenged the right of appellee to testify for the reason that she was an heir at law, and a party to the action, and that therefore under the provisions of section 522, Burns' R. S. 1914, she was not a competent witness as to any matter which occurred prior to the death of the ancestor. Numerous authorities are cited to sustain appellant's contention. We do not question any of the authorities cited, but they are not authority under the circumstances of this case.

It has been repeatedly held in cases similar to this that the statute relied upon does not prohibit parties from testifying upon the subject of the mental capacity of the ancestor. Such condition is open to the observation of all of the friends and acquaintances of the one under investigation, and it was not intended by the statute to exclude parties from testifying to such facts. Studabaker v. Faylor, 170 Ind. 498, 83 N. E. 747, 127 Am. St. Rep. 397; Lamb v. Lamb, 105 Ind. 456, 5 N. E. 171; Belledin v. Gooley, 157 Ind. 51, 60 N. E. 706; Wallis v. Luhring, 134 Ind. 447, 452, 34 N. E. 231.

[5] Appellant complains of the action of the court in excluding a certain conversation between witness Mary Copeland and grantor which was had more than a month after the execution of the deed here involved. The witness would have testified, had she been permitted to do so, that in this conversation the grantor said to the witness that she made the deed in question to appellee because she had to do so as appellee deviled her to death to get the deed, that appellee and Ulysses Montgomery were quarrelling with her over the property all the time, and that she had to do something to get rid of it. Had this statement been made at the time of the execution of the deed, it would have been admissible as a part of the res gestæ; but, remote as it was from the time of the execution of the deed, it clearly was not res gestæ. Runkle v. Gates, 11 Ind. 95. The issue presented by the pleadings in this case was that of undue influence, and such evidence could have been presented only for the purpose of sustaining that issue. For such purpose it was not competent. Hayes v. West, 37 Ind. 21; Vanvalkenberg v. Van-

valkenberg, 90 Ind. 433; Goodbar v. Lidikey, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296. The evidence was properly excluded. We find no reversible error.

Judgment affirmed.

TOWN OF HOBART v. CASBON.
(No. 11665.)

(Appellate Court of Indiana, Division No. 1. Jan. 18, 1924.)

1. Trial ⇐341—Denial of motion for venire de novo held proper in view of appellant's contention that verdict was good as to certain amount.

Denial of motion for venire de novo, on the ground that the verdict for plaintiff "in the sum of twenty-two fifty dollars (2,250)," was defective, *held* not error, in view of appellant's contention that the verdict was good as an assessment of damages in the sum of $22.50, since such motion is proper only when the verdict is so defective that no judgment can be rendered thereon.

2. Trial ⇐341—Motion for venire de novo on ground that verdict defective proper only when no judgment can be rendered thereon.

A motion for a venire de novo on the ground that the verdict is defective as to the amount thereof is proper only when the verdict is so defective that no judgment can be rendered upon it.

3. Trial ⇐340(5)—Verdict held properly corrected to show amount intended.

Verdict for plaintiff "in the sum of twenty-two fifty dollars (2,250)" *held* properly corrected so as to read "twenty-two hundred fifty dollars," in view of affidavits of jurors that such amount was intended.

4. Trial ⇐344—Affidavits of jurors admissible to correct clerical defect in verdict.

Affidavits of jurors *held* admissible on motion to correct verdict reading "twenty-two fifty dollars (2,250)" to read "twenty-two hundred fifty dollars," such affidavits being received not to contradict but to perfect the verdict.

5. Municipal corporations ⇐817(1)—Burden of proving negligence alleged on plaintiff.

In an automobile driver's action for injuries sustained in collision with unlighted traffic post at night, in which it was claimed that defendant city was negligent in failing to repair the post, the top and lighted part of which had been broken off, and in failing to place a light on and to construct barricades around the concrete base, the plaintiff had the burden of proving such negligence.

6. Municipal corporations ⇐822(1)—Instruction held not to require automobile driver to pass other automobile overtaken by him.

In an automobile driver's action against a city for injuries sustained in collision with unlighted traffic post at a street intersection, while attempting to pass to the left of automobile going in the same direction, instruction that "it is the law of the state of Indiana that any person driving a motor vehicle on a public highway in the state shall, upon overtaking a horse, draft animal or other vehicle, pass on the left side thereof," *held* not objectionable as against contention that instruction required an automobile driver to pass other automobile overtaken by him.

7. Municipal corporations ⇐817(3)—Plaintiff not required to prove freedom from contributory negligence.

Automobile driver suing city for injuries caused by street obstruction did not have burden of proving freedom from contributory negligence.

8. Trial ⇐251(1)—Refusal of abstract instructions held proper.

Refusal of instructions constituting abstract statements of propositions of law not involved in the case *held* proper.

9. Municipal corporations ⇐819(1)—Finding of negligence in permitting unlighted traffic post in street sustained.

In an automobile driver's action for injuries sustained in collision with a traffic post at a street intersection, on the ground that defendant city was negligent in failing to repair the post after the upper part had been broken off, and in leaving post unlighted without barricade, evidence *held* to sustain verdict for plaintiff.

10. Municipal corporations ⇐819(7)—Finding automobile driver not negligent in colliding with unlighted traffic post sustained.

In an automobile driver's action for injuries sustained in collision with unlighted traffic post, in which there was evidence that there were other lights on the four street corners, and that plaintiff struck the post while trying to pass to the left of another automobile going in same direction at street intersection, and in which it was claimed that the plaintiff was contributorily negligent, evidence *held* to sustain verdict for plaintiff.

11. Damages ⇐132(3)—$2,250 verdict for permanent internal injuries to liver and spine held not excessive.

$2,250 verdict for internal injuries, producing a permanent malignant condition of the liver and curvature of the spine, *held* not excessive.

Appeal from Superior Court, Porter County; H. L. Crumpacker, Judge.

Action by Thomas Casbon against the town of Hobart, a municipal corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

The obstruction alleged to have caused the plaintiff's injuries consisted of a traffic post with concrete base at intersection of two streets. The plaintiff claimed that the city was negligent in failing to keep traffic post in repair, and in permitting such obstruction to remain in the street without barricades, danger signals, or lights thereon to warn drivers of vehicles thereof. The city denied that it was negligent, and claimed that the plaintiff was himself negligent in colliding with such traffic post.

The evidence showed that the defendant had constructed a traffic post in the center of its street at the point of the accident; that the upper part of the traffic post had been broken off, leaving the concrete base or abutment; that the city had no light upon or barricade around the concrete block; that the concrete block was almost identical in color with the street itself, and ordinarily was marked by the light on top of the traffic post; that the accident occurred during the night when there was no such light; that there were other street lights on the four corners; and that plaintiff was driving his automobile cautiously, but did not see the obstruction in time to avoid it, while passing to the left of an automobile being driven in the same direction across street intersection.

The plaintiff sustained internal injuries causing a serious and malignant condition in his liver. The muscles and ligaments of his right side and back were so torn that a curvature of the spine was produced. There was expert testimony that the injuries were permanent.

Following are instructions 1 and 10, referred to in opinion, and appellant's proposition 1 under assignment of error No. 1, relating to instruction 10:

"No. 1. In this case the plaintiff, Thomas Casbon, claims that at or about the hour of 6:35 on the evening of the 18th of October, 1920, he was driving his automobile, to wit, a Ford touring car, in a westerly direction on Main street in the town of Hobart, Lake county, Ind., in a careful and prudent manner, and, as he crossed the intersection of Second street with said Main street, he ran against a cement column about 18 inches high and about 18 inches in diameter, and imbedded in the street for a distance of about 18 inches, which said cement column was in the center of the intersection of said Main and Second streets, and as a result of such collision he was thrown violently forward against the steering wheel of his said automobile, whereby his fifth, sixth, and seventh ribs were fractured, his right side depressed against the superior surface of his liver to such an extent that the functions of his said liver were interfered with; that said injuries are permanent, and as a result thereof he has suffered great pain, and will continue to suffer great pain during his natural life; that he has become weak and anæmic, and has been deprived of his earning power. He also claims as a result of said collision his automobile was demolished and rendered a total wreck, and he asks damages for both the injuries to his person and to his automobile in the sum of $10,000. The complaint proceeds upon the theory that it is the duty of the defendant, town of Hobart, to keep its streets in a reasonably safe condition for travel; that the presence of said cement column at or near the center of the intersection of Second and Main streets in said town of Hobart was a dangerous obstruction, and rendered the said streets unsafe for travel; that said defendant town had knowledge of the presence of said dangerous obstruction in said streets and carelessly and negligently permitted the same to be and remain in said streets for a period of 30 days, and wholly failed and neglected to place any barricades, danger signals, or lights upon or about said obstruction to protect the traveling public from the danger of colliding therewith, and that, by reason of the negligence of the defendant town, as above described, the plaintiff was injured.

"To this complaint the defendant has filed an answer in general denial, and upon the issues thus joined the burden rests upon the plaintiff of proving all the material allegations of his complaint by a fair preponderance of the evidence."

"No. 10. It is the law of the state of Indiana that any person driving a motor vehicle on a public highway in the state shall, upon overtaking any horse, draft animal, or other vehicle, pass on the left side thereof. In this case, if you find from the evidence that the plaintiff, Thomas Casbon, at the time of the accident in question had overtaken a horse-drawn vehicle on a public street in the town of Hobart and was endeavoring to pass the same, it was his duty under the law to pass on the left side of said vehicle, provided, however, he could do so with reasonable safety to himself and the vehicle which he was about to pass. The mere fact, if you find it to be a fact, that the plaintiff in this case turned to the left directly into the base of the traffic post in question in itself cannot be charged as negligence on his part as the law made it his duty to turn in that direction. If, however, you find from the evidence that by the exercise of reasonable and ordinary care for his own safety he could have learned of the presence of such obstruction in time to have avoided collision therewith, then his act in turning to the left, if you find such to be the fact, was negligence on his part, and it was his duty under such circumstances to refrain from passing or to pass in some other direction."

"Proposition No. 1. The trial court gave to the jury instructions numbered from 1 to 13, both inclusive, to the giving of each of which appellant at the time excepted, and in its motion for a new trial, under specifications Nos. 5, 6, and 7 thereof, appellant calls in question the action of the trial court in giving each of said instructions to the jury. In this connection appellant says that the trial court's instruction No. 10 was an incorrect statement of the law as applicable to the facts of this case; it charges, in part, that; 'It is the law of the state of Indiana that any person driving a motor vehicle on a public highway in the state shall, upon overtaking a horse, draft animal, or other vehicle, pass on the left side thereof.' * * * The undisputed evidence shows that appellee at the time of his injury had attempted to pass and was in the act of passing, at a street crossing or intersection, another vehicle which had been previously immediately ahead of him and traveling in the same direction. The portion of the instruction quoted is peremptorily to the effect that it was appellee's duty, upon overtaking such other vehicle, to pass the same. This is not a correct statement of the law. There is nothing in the law which required appellee to pass the vehicle that preceded him. He had a right to pass the same while using due care for that purpose, but the law cast upon him no obligation so to do. His right to pass another vehicle at a street

crossing is challenged, as this instruction makes it mandatory upon the part of the traveler to pass a vehicle in front of him whenever he encounters the same. We submit that this is not a correct statement of the law, either as an abstract proposition or as applied to the evidence in this case."

E. E. Pierson, of Hobart, and Grant Crumpacker and Owen L. Crumpacker, both of Valparaiso, for appellant.

Daniel T. Kelly and T. P. Galvin, both of Valparaiso, and F. J. Galvin, of Hammond, and Oliver M. Loomis, of Valparaiso, for appellee.

ENLOE, J. Action by the appellee against the appellant to recover damages for personal injuries alleged to have been sustained, and for damages to his automobile, all alleged to have been occasioned by a collision of appellee's automobile with an alleged obstruction in a public street of said town.

A complaint in four paragraphs was answered by a general denial, and the issues thus formed were submitted to a jury, resulting in a verdict for the plaintiff.

The appellant seasonably filed its motion for a new trial which was overruled. It thereupon filed its motion for a venire de novo, upon the ground that the verdict of the jury, as returned by them, was so defective and uncertain that no judgment could be rendered thereon. Upon this motion being filed, the appellee filed his motion, supported by the several affidavits of nine of the jurors who tried the case, and by the affidavits of appellee and one of his attorneys, alleging that there was a clerical mistake in said verdict, and asking that the same be corrected, and that judgment be entered thereon as corrected.

The verdict returned by the jury, as shown by the transcript of the record, was as follows:

"We, the jury find for the plaintiff and assess his damages in the sum of twenty-two fifty dollars (2,250). Henry Pahl, Foreman."

In the affidavits filed in support of the said motion to correct said verdict by inserting the word "hundred" after "twenty-two," it was stated that upon said verdict being returned into court it was by the court read as a verdict in favor of the appellee in the sum of $2,250; the several jurors, who made affidavits concerning said matter, each and all averred that the verdict upon which the jury agreed was one in favor of appellee in the sum of $2,250; and that it was by mistake and oversight that the word "hundred" had been omitted therefrom in reducing this said verdict to writing.

The court overruled the motion of the appellant for a venire de novo, and the appellant thereupon filed its motion in arrest of judgment based upon the said alleged defect in said verdict. This motion was also overruled. The court then sustained the motion of appellee to correct said verdict, and ordered said verdict to be corrected as prayed. Judgment was thereupon duly rendered in favor of the appellee upon said amended verdict.

The appellant next filed a motion to modify said judgment by striking out the words: "Two thousand two hundred and fifty dollars ($2,250)," and inserting in said judgment, in lieu thereof the words: "Twenty-two and fifty hundredths dollars ($22.50)." This motion was also denied, and this appeal followed.

The errors assigned and presented to this court are: (1) Error in overruling motion for venire de novo; (2) error in sustaining motion of appellee to correct verdict; (3) error in overruling motion in arrest of judgment; and (5) error in overruling motion for a new trial.

Waiving the question as to whether or not appellant's motion for a venire de novo was timely filed (see Jenkins v. Parkhill, 25 Ind. 473; Shaw v. Merchants' National Bank, 60 Ind. 83), we shall consider the alleged error in overruling said motion.

[1, 2] In Kelley v. Bell, 172 Ind. 590, 88 N. E. 58, it was said:

"The rule in this state is that a motion for a venire de novo will not be sustained, unless the verdict is so defective and uncertain upon its face that no judgment can be pronounced upon it. A verdict, however informal, is good if the court can understand it. It is to have a reasonable intendment, and is to receive a reasonable construction, and must not be avoided, except from necessity."

In this case the verdict was for the appellee; there was no uncertainty as to that feature thereof; if there was any uncertainty therein, it was as to the amount of the damages assessed, and we find the appellant herein in his fourth assigned error insisting that this verdict was good as an assessment of damages in favor of the appellee in the sum of $22.50, and that the court committed reversible error in not modifying said judgment as requested by it. If said verdict was sufficient as to the amount of damages assessed, to authorize a judgment against appellant, in any sum, a motion for a venire de novo would not lie; such motion is proper only when the verdict is so defective that no judgment can be rendered upon it. Watson's Rev. of Work's Practice, § 1879, and authorities cited. The court did not err in overruling said motion.

[3, 4] It is next insisted that the court erred in sustaining the motion of appellee to amend and correct said verdict. We cannot concur in this contention. In the case of McGlone v. Hauger, 56 Ind. App. 243, 104 N. E. 116, the court was considering a situation very similar to the one presented by the instant case, and in that case it was held that no substantial right of the complaining party had been violated by the receipt of affidavits in support of a motion to correct a cleri-

cal defect in a verdict. The affidavits were received, not to contradict, but to perfect the verdict in question and such practice is well sustained by the authorities. McGlone v. Hauger, supra.

What we have already said herein disposes also of appellant's third and fourth assignments and they need not be further considered.

Finally appellant insists that there was error in overruling its motion for a new trial. Under this assignment, appellant complains of the action of the court in giving two certain instructions, Nos. 1 and 10, of the instructions given by the court of its own motion, and in refusing to give to the jury instructions numbered 12, 13, 16, and 18 of instructions requested by appellant; it also contends that the verdict of the jury is not supported by sufficient evidence, is contrary to law, and that the damages awarded are excessive.

[5, 6] As to said instructions, Nos. 1 and 10, we do not think that they are subject to the objection made to them; we think they are each fair statements of the law as applied to the facts in evidence in this case.

[7-11] As to the instructions tendered by appellant and refused, of which complaint is made, said instructions 12 and 13 were not correct statements of the law. As to the damage alleged to have been sustained by the appellee on account of personal injury, the burden was not on him to show freedom from contributory negligence; said instructions would have placed upon him that burden, and were therefore properly refused. As to said instructions, Nos. 16 and 18, they were simply abstract statements of propositions of law not involved in this case, and the giving of them could only tend in this case to confuse the jury. The verdict is well sustained by the evidence, and is not contrary to law, and, if the plaintiff was injured to the extent claimed by him in his testimony, the amount of damage awarded is quite moderate.

Judgment affirmed.

STATE v. CHAMPION. (No. 18029.)

(Supreme Court of Ohio. Jan. 15, 1924.)

(Syllabus by the Court.)

1. Homicide ⇐116(1)—Bona fide belief and ground therefor essential to right of self-defense.

The right of self-defense, to repel actual or threatened force, requires that defendant shall bona fide believe herself to be in danger of death or great bodily harm, and shall bona fide believe her only means of escape from such danger to be in using the force she used, and that she have reasonable grounds for such belief. (Marts v. State, 26 Ohio St. 162, approved and followed.)

2. Homicide ⇐116(3)—No right to claim self-defense, in absence of evidence of bona fide belief of necessity of using force.

Where defendant entirely fails to testify as to such bona fide belief, she has no right to claim justification by way of self-defense.

3. Homicide ⇐109—Evidence that shooting was unintentional held inconsistent with right of self-defense.

In a case of homicide, where defendant testifies that she did not intend to fire the fatal shot, and that she did not knowingly "pull the trigger," such testimony is entirely inconsistent and irreconcilable with the right of self-defense.

4. Homicide ⇐310(4)—When charge of assault and assault and battery improper in murder case stated.

Where, under the evidence, it is clear and convincing that the force and violence complained of by the state killed the deceased, a charge of assault and assault and battery is improper. (Bandy v. State, 102 Ohio St. 384, 131 N. E. 499, 21 A. L. R. 594, approved and followed.)

5. Homicide ⇐325—Defendant could not complain of instruction as to accidental homicide, in absence of exception where general charge correct.

Where, at the close of the general charge of the trial judge in a case of murder, defendant's counsel makes a special request for the court to charge on (1) self-defense, (2) assault, (3) assault and battery, and (4) accidental homicide, and the court refuses to charge as to self-defense, assault, and assault and battery, but does charge as to accidental homicide, and defendant's counsel thereupon excepts to the special request refused as to self-defense, assault, and assault and battery, but takes no exception as to accidental homicide, as given, and makes no further request in that behalf, the defendant may not thereafter complain as to what the court said or omitted to say as to accidental homicide, if the general charge correctly places the burden of proof beyond a reasonable doubt upon the state.

Error to Court of Appeals, Cuyahoga County.

Mabel Champion was convicted of manslaughter in the court of common pleas. The conviction was reversed by the Court of Appeals, and the State brings error. Reversed, and judgment of court of common pleas affirmed.—[By Editorial Staff.]

Mabel Champion was indicted by the grand jury of Cuyahoga county, Ohio, on a charge of murder in the first degree. In the trial of the cause in the court of common pleas, before Judge Bernon, she was found guilty of manslaughter.

Motion for a new trial was duly filed and overruled, judgment entered, and sentence pronounced upon the verdict. Error was prosecuted to the Court of Appeals, which reversed the judgment of the court of common pleas and remanded the case for a new trial.

Error is now prosecuted to this court, to reverse the judgment of the Court of Appeals and affirm the judgment of the court of common pleas.

Edward C. Stanton, Pros. Atty., and James T. Cassidy, Asst. Pros. Atty., both of Cleveland, for the State.

Reed, Meals, Orgill & Maschke and L. A. Tucker, all of Cleveland, for defendant in error.

WANAMAKER, J. The journal entry of the Court of Appeals shows that—

"Judgment of the said court of common pleas is reversed, for error of the court in not charging self-defense, for error in not properly charging the jury on accidental shooting, and for error in the admission of evidence, no other error appearing in the record, and this cause is remanded to said court of common pleas for further proceedings."

[1] (1) Under the evidence in this case, especially the testimony of the defendant herself, was she entitled to a charge on the law of self-defense? The essential prerequisites to invoking the right of self-defense have been so clearly and convincingly stated again and again by our Ohio courts that it would seem unnecessary to detail at length the settled law on this subject. The parent case, which has been often approved and reapproved, is that of Marts v. State, 26 Ohio St. 162, decided nearly a half century ago. The second paragraph of the syllabus is definite and decisive:

"Homicide is justifiable on the ground of self-defense, where the slayer, in the careful and proper use of his faculties, *bona fide believes*, and has reasonable ground to believe, that he is in imminent danger of death or great bodily harm, and that his only means of escape from such danger will be by taking the life of his assailant. * * *"

(a) Defendant must "*bona fide believe*" that she is "in imminent danger of death or great bodily harm."

(b) Defendant must *bona fide* believe that her "only means of escape from such danger" will be by taking the life of her assailant.

(c) The defendant must have "reasonable grounds" for such *bona fide* belief.

[2] Nowhere in the defendant's evidence does she testify that she *bona fide* believed either of said propositions. Upon the contrary, the record shows that she testified that she did not intend to shoot the deceased nor to do him any harm whatsoever.

These essential prerequisites to invoking the right of self-defense are of such a nature as to require personal, specific testimony from the defendant herself as to her belief in the premises. Who else could testify as to her belief? It is not a question of inference or circumstantial evidence. The facts and circumstances outside of her personal testimony may be used to corroborate her belief, or overcome the same, but are clearly wholly insufficient as the basis of an inference of such belief, in the absence of her personal testimony that she then entertained and had reasonable ground to entertain such belief.

When the Marts Case, supra, was decided this court was composed of such eminent judges as Chief Justice Welch, who wrote the opinion, White, Rex, Gilmore, and McIlvaine. The pronouncement of the syllabus, and the opinion of Judge Welch supporting it, is unanswerable as to what need be shown in order to invoke the doctrine of the right of self-defense. The evidence in no wise, not even by suggestion as to the defendant's belief, measures up to these requirements. This right is not a speculative one, but a substantial one, when these prerequisites are fairly and fully met. The court would have committed error against the state had it charged upon the law of self-defense.

(2) Error "in not properly charging the jury on accidental shooting."

The bill of exceptions in this case, near the close, makes the following record, at the close of the general charge of the court:

"Mr. Meals: If the court please, I wish to make some requests of the court before the jury retires. I wish to ask that the court appropriately instruct the jury on the subject of assault and battery, and assault, as it relates to this case under this indictment, first. Second, I ask the court to instruct the jury on the subject of accidental shooting. Thirdly, I request the court to instruct the jury relative to the law of self-defense as it relates to this case.

"The Court: The first request to charge assault and battery, and assault, is refused. The request to charge on the law of self-defense is refused. Exceptions may be noted.

"Mr. Meals: And as to accidental homicide.

"The Court: As to accidental homicide, I think it my duty to inform the jury that if, upon a consideration of all the evidence in this case, they find that the death of O'Connell was due to an accident, then it is your duty to find the defendant not guilty.

"The Court: You may take the case.

"Mr. Meals: The defendant excepts generally to the charge of the court, as provided by the statute, and also specifically excepts to the refusal of the court to charge, as requested, with reference to assault and battery, and assault, and self-defense."

It is to be observed that both the state and the defense were represented by unusually able counsel, both industrious, diligent, and capable of safeguarding the rights both of the state and the accused, and the presumption is that they did.

Now, let us observe what counsel for the defense excepted to. The last several lines of the record specifically except to the refusal of the court to charge as requested "with reference to assault and battery, and assault, and self-defense."

[5] No exception is here made to what the court said on accidental homicide; no further request was made to the charge upon accidental homicide, clearly indicating that counsel were content with the charge under the evidence, the argument that had been made, and with what the court had said in the general charge in that behalf.

It must be remembered that counsel owe some duty to the court as well as to their clients, and that duty is to aid the court in presenting pertinent and proper instructions as to the law fitting the issues and the evidence offered on both sides touching such issues. The court might well have said something further touching accident or misadventure in the discharge of the gun, but the fact remains that counsel for the prisoner were content with what the court did say, taken in connection with what the court had theretofore said in the general charge touching the burden of proof upon the state throughout to establish all the elements of the offense beyond a reasonable doubt; and it is too late now to further complain in this behalf.

[3] The very fact that requests were asked both on accidental homicide and self-defense, under the same evidence, presents a most peculiar paradox—a direct contradiction in terms and truth. Self-defense presumes intentional, willful use of force to repel force or escape force. Accidental force or shooting is exactly the contrary, wholly unintentional and unwilful. It is similar to a person saying in one breath, "I was insane at the time of the homicide," and in the next breath, "I shot in the exercise of my right of self-defense, with reasonable grounds therefor, as they appeared to me."

If the evidence warrants, the defendant has a right to one request or the other. By no manner of logic, law, or legerdemain is he entitled to both.

[4] (3) As to the refusal of the trial court to charge on assault, or assault and battery. Undoubtedly, in cases of homicide, convictions may be had for assault and battery, but they may be rightfully had only where there is a "reasonable doubt," or evidence suggesting the same, that the force and violence used did not cause the death of the deceased. Where it is clear and conclusive that the force and violence used by the defendant did cause the death of the deceased, it would be a travesty on truth, and a mere mockery of justice, for the court to charge or the jury to find as to the minor offenses. It would simply furnish an additional loophole in the law, another legal labyrinth through which atrocious crimes would be converted into police court offenses. The defendant was guilty of some degree of murder or guilty of nothing. The jury is not a pardoning board.

The doctrine as to minor offenses is fully considered in State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L. R. A. 1918B, 945, Ann. Cas. 1918E, 1137, and in the later case of Bandy v. State, 102 Ohio St. 384, 131 N. E. 490, 21 A. L. R. 594, which cases upon this point are followed and approved.

The court was right in refusing to charge as to these minor offenses.

(4) It is claimed, however, that, if the Court of Appeals is wrong as to these grounds of reversal, the reversal is justified upon error in the admission of evidence in behalf of the state, in rebuttal.

The evidence complained of related chiefly to the clothing of O'Connell, the dead man, which was offered in rebuttal. It is elementary that such evidence should have been offered in the state's case in chief; but the court gave the defense an opportunity, not only to cross-examine the witnesses, but, in addition thereto, to offer any evidence they chose to rebut this evidence, and it is impossible to conceive how this constituted prejudicial error for which a new trial should be granted.

(5) The defendant further insists that the reversal is justified upon the misconduct of counsel and the argument to the jury. The argument of counsel takes a somewhat wide range, especially with the controversial and eloquent talent on both sides of the case. The presumption is, of course, that the court properly restrained counsel upon both sides, and error in this respect to be the basis of a reversal must clearly appear.

While the argument of counsel for the state is in the record, the argument of counsel for the prisoner is not in the record, and we are unable to say how much of the argument of counsel for the state was in direct reply to the counsel for the prisoner.

The chief complaint, however, is addressed to inferences drawn from the testimony and from the absence of certain witnesses in this cause, who presumably were friends of the accused—at least they were present and friendly at the place and time of the homicide.

Wide latitude must be allowed counsel in the inferences and deductions they draw and in their consideration of the testimony of record. Naturally and necessarily they differ as to their views, but it is for the jury to determine the saner view and to give the testimony such weight as they deem best under the evidence and the charge of the court.

As to the absence of the defendant's husband, and Mr. and Mrs. Williams, who were present at the scene of the homicide, and the absence, as well, of any depositions from them, that may properly be the subject of comment by counsel for the state, unless their absence be reasonably accounted for by the defendant. It is the presumption in fact as well as law that, if the witness known to be present at the time a vital event takes place is available to testify, and

falls to be called, or to have his deposition taken, or his absence accounted for by the party in whose favor he would naturally be expected to testify, it is not improper for counsel upon the other side to infer that his testimony would be unfavorable to the defendant; that the defendant's story of the transaction in question would not be corroborated if such witness was present and testified, or his deposition taken. This is the common sense of common experience in every day life, and is not forbidden by any law as the proper subject of comment in a court of justice.

We find no reversible error prejudicial to the substantial rights of the prisoner; indeed, she may count herself most fortunate in not being found guilty of a more serious offense.

Judgment of the Court of Appeals reversed, and judgment of the court of common pleas affirmed.

Judgment reversed.

MARSHALL, C. J., and DAY and ALLEN, JJ., concur.

WYANT v. RUSSELL. (No. 17841.)

(Supreme Court of Ohio. Dec. 26, 1923.)

(Syllabus by the Court.)

1. **Appeal and error ⇐948—Abuse of discretion must appear from record.**

Abuse of discretion will not be presumed, but must appear from the record.

2. **Appeal and error ⇐346(1)—Granting of motion to substitute new order denying new trial held not to extend time to bring error.**

The granting of a motion, after judgment, to vacate a former order of the court overruling a motion for a new trial, and an entry of a new order overruling the motion for a new trial, are not effective to postpone the date from which the statute limiting the time within which a proceeding in error may be commenced begins to run, where the judgment upon the verdict antedates such entry, and has not been vacated.

Error to Court of Appeals, Lucas County.

Action by Emma Russell against Claude Wyant. Judgment for plaintiff, and defendant brought error. The cause was dismissed by the Court of Appeals, and defendant brings error. Affirmed.—[By Editorial Staff.]

Claude Wyant, of Toledo, in pro. per.

Marshall & Fraser and Harold A. Kesler, all of Toledo, for defendant in error.

ROBINSON, J. The error here assigned is that the Court of Appeals erred in sustaining the motion of the defendant in error to dismiss the petition in error and in rendering judgment dismissing the petition in error.

The transcript of the docket and journal entries of the Court of Appeals discloses: September 14, 1922, plaintiff in error filed his petition in error, summons was issued, and service made; December 1, 1922, the cause dismissed for want of prosecution; December 20, 1922, application for a rehearing denied; December 27, 1922, "This cause being on November 22, 1922, called for trial, and the plaintiff failing to appear in person or by attorney, the action is hereby dismissed for want of prosecution;" December 20, 1922, "this cause came on for hearing on application for rehearing, and the court on due consideration denied said application. To which ruling exceptions are taken."

[1] This meager record brings nothing here upon which we could base a conclusion that the Court of Appeals has abused its discretion in dismissing the petition in error.

[2] An examination of the docket and journal entries of the court of common pleas and of the bill of exceptions allowed by that court, all of which are filed in this court, but do not appear to have been filed in the Court of Appeals, discloses that on May 29, 1922, judgment on the verdict of a jury was rendered; that on the 7th day of July, 1922, an entry was made vacating the order overruling the motion for a new trial and granting a rehearing of the motion, and, at the same time and in the same entry, again overruling the motion for a new trial. No entry, however, appears vacating the judgment of May 29, 1922, but, at the same time, and in the same entry which granted the motion for a rehearing of the motion for a new trial and overruled the motion for a new trial, judgment was again rendered upon the verdict of the jury.

It thus appears that the proceeding to vacate the judgment was begun in the Court of Appeals on the hundred and seventh day after judgment and that plaintiff in error had filed no bill of exceptions in the Court of Appeals at the time his cause was dismissed for want of prosecution, therefore, by virtue of the fact disclosed by the record here that the judgment of May 29, 1922, had never been vacated, plaintiff in error was, on the date he filed his petition in error in the Court of Appeals, barred by section 12270, General Code, from beginning a proceeding in that court to vacate the judgment of the court of common pleas. Wells v. Wells, 105 Ohio St. 471, 138 N. E. 71.

Were we able from the record to determine that the Court of Appeals abused its discretion in dismissing the petition in error, which we are not, we would be driven to find that plaintiff in error was not prejudiced thereby, since he did not bring his action to reverse the judgment within the time limit fixed by statute.

While the record in the Court of Appeals did not disclose this impediment to the

prosecution of plaintiff in error's cause, had the cause been retained there, its existence must eventually have been disclosed, and, since it existed, no error which could have occurred in that court could have prejudiced his rights, he having no right to have his cause there for review, because of the provision of section 12270, General Code.

Judgment affirmed.

MARSHALL, C. J., and WANAMAKER, JONES, MATTHIAS, DAY, and ALLEN, JJ., concur.

WIDMER v. STATE. (No. 17863.)

(Supreme Court of Ohio. Jan. 15, 1924.)

(Syllabus by the Court.)

1. Statutes ⇐241(1)—Statute strictly but reasonably construed as to offenses included.

Criminal statutes are strictly but reasonably construed in determining what offenses are included within them, and whether or not the essential facts stated in the charge constitute an offense under such statute.

2. Statutes ⇐241(1)—Criminal statute clear as to meaning not subject to construction.

Where such statute is clear as to its meaning, taking the entire context at its four corners, there is nothing for a court to construe.

3. Weapons ⇐15—Shooting at "target" within corporate limits construed; shooting at birds to protect property not violation of statute against discharging firearms at target.

Section 12635, General Code, by means of the words, "at a target within the limits of a municipal corporation," qualifies both shooting and firing either gun or pistol.

Day and Jones, JJ., dissenting.

Error to Court of Appeals, Stark County.

F. W. Widmer was convicted of unlawfully discharging firearms within the corporate limits of a city. Conviction was affirmed by the court of common pleas and the Court of Appeals, and defendant brings error. Reversed and rendered.—[By Editorial Staff.]

The facts are stated in the opinion.

Emmons & Emmons, of Alliance, for plaintiff in error.

Curtis M. Shetler, of Alliance, for the State.

WANAMAKER, J. [1-3] F. W. Widmer was found guilty in the municipal court of Alliance upon an affidavit charging him with "unlawfully discharging firearms within the corporate limits of the city of Alliance," alleged to be in violation of section 12635, General Code, which reads:

"Whoever runs a horse, or shoots or fires a gun or pistol at a target within the limits of a municipal corporation, shall be fined not less than five dollars nor more than fifty dollars."

This is an old statute, enacted in 1831.

The following facts appear from the state's brief:

"The plaintiff in error is the owner of a small tract of land within the corporate limits of the city of Alliance, Ohio, upon which place he has attempted to raise goldfish by the construction of a number of artificial ponds.

* * *

"The evidence shows that plaintiff in error was troubled at times with kingfishers preying, as he claims, upon the goldfish which he was raising on his premises."

The evidence shows that when these kingfishers made an attack upon his ponds and the goldfish therein he would discharge his gun for the purpose of either killing the kingfishers or driving them away, with the object of saving his property.

Upon such a state of facts, was Widmer guilty of the violation of section 12635, no matter how artfully or adroitly the affidavit was drawn? Do such facts constitute an offense under that statute? The courts below all held that they do. This brings us to an examination of the statute. By common consent the first four words, "Whoever runs a horse," drop out of consideration, and we have left the following: "Whoever shoots or fires a gun or pistol at a target within the limits of a municipal corporation." If the language were "Whoever fires a gun or pistol at a target," there would be no question as to the meaning. The gun must be aimed at a target. A "target" is so well understood that it is unnecessary to define it. It does not require a sportsman to determine that a target is a mark fixed, at which aim is taken with a gun or other weapon. No one would think of calling a bird flying in the air a target, and the statutes certainly had no such purpose. If a bird in the air could be held to be a target, then anything at which aim was taken would be a target, and the language "at a target" would be wholly unnecessary.

It is a matter of rather common knowledge that in 1831, when this statute was enacted, horse racing and prize and practice shooting at targets were very common sports; the people from the rural districts, joining with the people of the towns and villages, would gather at stated intervals and have their contests. The Legislature, realizing the dangers from such sports within the municipality, made it an offense, compelling the parties that desired to indulge in these sports to go beyond the municipal limits, where the public would not be endangered by "horse racing" and "target shooting."

Now what are the limitations of the statute? First. So far as firearms are con-

cerned there must be "a target." Second. To commit the crime one must shoot a gun or fire a gun or pistol at such target.

That this was the clear intention of the Legislature is obvious from the simple language it used. It is unnecessary and unprofitable to draw any hairline distinction between "shooting a gun at a target" and "firing a gun or pistol at a target." They are in substance one and the same thing. The weapon must be a gun or pistol. It must be shot or fired at a target, and it must be within the limits of a municipal corporation.

The original form of the statute, when first enacted, did not include the word "pistol." The pertinent part then was:

"If any person or persons shall shoot or fire a gun at a target within the limits of any recorded town plat in this state."

Would anybody claim that when the charge was "fire a gun," the words "at a target" need not be added as qualifying the firing and the gun? Some things are so self-evident they neither admit nor permit argument.

If, now, the charge be in the words "shoot a gun," instead of "fire a gun," are not the same words "at a target" equally essential to constitute the offense? Can it be in common sense held that when you fire a gun it need be "at a target," under the statute but when you "shoot a gun" it need not be "at a target," but may be any promiscuous shot, including defense of person, property, thieves, rattlesnakes, or birds, or animals of prey.

Now, when the word "pistol" was added, did that in any wise change the language or the meaning of the statute save and except that when a pistol is used it must conform to the same qualifications as a gun? There is entirely too much twist and technicality given to the statutes. If they are not complete, it is not the duty of this court to amend; that remedy remains in the Legislature.

If the contention claimed by the state is sound, then the simple, straightforward statement in the statute to the effect that "whoever shoots a gun or pistol within the limits of a municipal corporation" is all the language needed, because it is all the language that is given popular or legal effect. The presumption is the Legislature put the words "at a target" in the statute to be applied in their usual and ordinary sense, and to qualify all that went before, just as in a statute relating to frauds, where the statute very often concludes "with intent to defraud," which qualifies all that precedes it.

Take for illustration the statute on receiving stolen property (section 12450, General Code). The pertinent part reads:

"Whoever buys, receives or conceals anything of value which has been stolen, taken by robbers, embezzled or obtained by false pretense, knowing it to have been stolen, taken by robbers," etc.

It is clear that this latter qualification modifies not only the words, "conceals anything of value," a phrase immediately preceding it, but also qualifies the word "receives" and the word "buys." It is quite unnecessary to repeat this qualifying phrase after each of the several words characterizing an act which is made criminal by the statute. So, here, in this case, it was unnecessary, when the words "or pistol" were inserted before the words "at a target" in the statute as it originally read to also insert the words "at a target" either after the word "gun" or after the word "shoot."

Surely and sanely it must be admitted that "at a target" qualifies the word "pistol" immediately before it. With equal force and reason it must be conceded that it likewise qualifies the word "gun" before the words "or pistol." But the gun or pistol in itself does not constitute an offense. It is the firing of the gun or pistol at a target that constitutes the offense. If the word "or" in "gun or pistol" does not cut off the words "at a target" from qualifying "gun," then with even equal or greater force the word "or" in "shoots or fires" does not cut off the words "at a target" from modifying "shoots," any more than it cuts off the words "at a target" from the word "fires." Common sense in the construction of statutes was never so much needed as to-day, whether it applies to the rights of the state or the defendant.

It might be contended that the word "unlawfully" in the charge is broad enough to include the language "at a target." For the purpose of argument let it be conceded, but that does not relieve the state from the obligation of proving by evidence the unlawfulness of the shooting, showing that it was at a target; and there is no proof whatsoever that the shooting was done at a target, unless a flying bird may, by strained, forced, and unnatural construction, be claimed to be a target, and no such contention is made by the minority.

It appears that this section of the statute is under the head of Immoral Practices." That in itself would suggest that there must be some species of criminality, immorality, or wrong contemplated by the statute to be prohibited.

Upon the charge and the evidence, it clearly does not appear that any wrong, moral or legal, was committed by Widmer; that he was guilty of any offense against the laws of man or God. The judgments of the courts below are therefore reversed, and final judgment rendered in favor of the plaintiff in error.

Judgment reversed, and judgment for plaintiff in error.

MARSHALL, C. J., and ROBINSON, MATTHIAS, and ALLEN, JJ., concur.

JONES and DAY, JJ., dissent from proposition 3 of the syllabus and from the judgment.

DAY, J. (dissenting). In view of the fact that this case deals with the sufficiency of a charge under an important misdemeanor statute of our Criminal Code, it is deemed advisable to state the reasons why the minority are unable to concur in the conclusions announced.

It is well established in this state that an indictment or affidavit in a criminal case should contain a complete description of the offense charged. It should set forth the facts constituting the crime, so that the accused may have notice of what he has to meet; of the act done, which it behooves him to controvert; and so that a court, applying the law to the facts charged against him, may see that a crime has been committed. Lamberton v. State, 11 Ohio, 282.

We are also not unmindful of the rule that a statute defining a crime or offense cannot be extended by construction to persons or things not within its descriptive terms, though they appear to be within the reason and spirit of the statute. State v. Meyers, 56 Ohio St. 340, 47 N. E. 138.

Tested by these rules, we think the affidavit filed in the municipal court of Alliance charged an offense under section 12635, General Code. This statute is a very old one, having been passed February 17, 1831, 29 Ohio Laws, 161, 162. It is section 6 of "an act for the prevention of certain immoral practices," and the original section read as follows:

"That if any person or persons shall play bullets along or across any street in any town or village within this state; or if any person or persons shall run any horse or horses within the limits of any such town or village; or if any person or persons shall shoot or fire a gun at a target within the limits of any recorded town plat in this state: Every person or persons so offending shall be fined in a sum not exceeding five dollars, nor less than fifty cents."

Later it was amended by inserting the word "or pistol," and also by changing the penalty of not more than "five dollars nor less than fifty cents" to five dollars for the minimum and fifty dollars for the maximum.

The charge made against the plaintiff in error, defendant below, was that on the date named he "did willfully and unlawfully shoot or discharge a gun within the corporate limits of the city of Alliance, Ohio."

It is contended that, if the words "at a target" were contained in the affidavit, the offense would be correctly charged, but that the omission of said words is fatal. With this construction of the affidavit and statute we do not agree. The statute should be construed as though the word "gun" followed immediately the word "shoots"—the offense being the *shooting* of a gun within a municipality. The word "shoots" is clearly to be regarded as distinct from "fires," because these are acts undoubtedly the same in so far as the discharge of a firearm is concerned, and, if it was the intention to confine the statute to *shooting at a target*, what was the purpose of using both words when but one would suffice?

The language is "shoots *or* fires a gun." The use of the disjunctive "or" indicates an intention on the part of the Legislature to express an alternative, and not the same act; that is to say, whoever shoots a gun in a municipality is guilty of an offense, or whoever fires a gun at a target in a municipality is likewise guilty.

The construction of the majority requires the conclusion that the same act, to wit, shooting or firing a gun at a target, is the offense. This we do not think was the legislative intent, because the use of different words to describe exactly the same act would be unnecessary, but the intention is clearly apparent to our mind that, by the use of the disjunctive "or," it was intended to create two different methods by which the offense could be committed.

The object of the statute was doubtless, as recited in its title, for the prevention of certain immoral practices, such as Sabbath breaking, selling spirituous liquor on Sunday, disturbing religious societies, profane swearing, inciting disturbances at public meetings of citizens, and a number of other acts going to make up offenses against the peace and quiet and orderliness of a neighborhood and community. It is as reprehensible to indulge in miscellaneous, heedless, and careless shooting within the limits of a municipality as it is to shoot at a target, for the safety, peace, quiet of a neighborhood and community are quite as much disturbed thereby, and probably safety much more so, than if the shooting took place at a fixed target, as contended by the majority; and, so far as the word "target" is to be construed as a fixed object, such a construction is far too narrow, for it is well known that shooting at inanimate targets that are moving is a very common practice in the use of guns.

Entertaining the view that the affidavit filed in this case states an offense under the statute, and that, under the conceded facts, no constitutional rights of the accused were invaded, we are of opinion that the three courts below, to wit, the municipal court of Alliance, the court of common pleas of Stark county, and the Court of Appeals, were right, and that the judgment should be affirmed.

JONES, J., concurs in the dissent.

DUNBAR et al. v. BROOMFIELD et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1924.)

1. **Appeal and error ⟸694(1)—Conclusions by master on unreported evidence must stand.**

Conclusions of fact by master on unreported evidence must stand, where no exceptions were taken.

2. **Equity ⟸196—Question as to liability of property or defendants to codefendants not determined in absence of cross-bill.**

In suit by trustees of a business trust against subscribers wherein mortgagees of property were made defendants solely that they might be bound by such decree as might be entered, *held*, that question whether mortgagees could reach the assets of the trust in satisfaction of demands for expenses incurred in the care of the property or compel the subscribers to pay could not be determined in the absence of a cross-bill.

3. **Joint-stock companies and business trusts ⟸6—Subscribers held liable to trustees for amount agreed with mortgagees to be subscribed.**

Persons who covenanted with mortgagees of property that a business trust would be created, and who without signing the delaration of trust made partial payments on their agreed subscriptions, *held* liable to trustees of the trust for the amount remaining unpaid in order to pay creditors, though the mortgagees were not parties to the declaration of trust.

4. **Joint-stock companies and business trusts ⟸6—Failure to affix signatures to declaration of trust immaterial where partial payment of subscription made.**

By a partial payment of their subscriptions and receipt of certificates, subscribers *held* to have acted under a business trust to which they had caused equity in property to be conveyed, and it is of no consequence that they did not affix their signatures to the declaration of trust.

5. **Joint-stock companies and business trusts ⟸18—Laborers, materialmen, and money lenders could reach trust property on foreclosure of mortgage terminating trust.**

Where trustees were required to engage in business of reconstructing a building and were empowered to make contracts for this purpose, even though they were not to be personally bound, foreclosure of mortgages on the property not only extinguished the equity of redemption, but terminated the trust in so far as further building operations were concerned, and creditors who had not been paid for labor and materials or for money lent could reach in equity any remaining trust property in payment of their debts.

6. **Trusts ⟸225—Estate must bear expenses of administration.**

A trust estate must bear the expenses of its administration.

7. **Joint-stock companies and business trusts ⟸6—Subscribers to trust held liable for interest from date payments due.**

In action by trustees of business trust to recover subscriptions necessary to liquidate indebtedness of trust incurred in carrying on building operations prior to foreclosure of mortgage and termination of the trust, defendants were liable for interest at the rate of 6 per cent. from the date an amount was due on the subscription to the date of entering decree.

Report from Supreme Judicial Court, Suffolk County.

Bill in equity by William H. Dunbar and others, trustees under a trust known as the Washington Essex Building Trust, against Reuben Broomfield and others. On report by a single justice after order for decree confirming the master's report. Decree for complainants against certain defendants, but bill dismissed as to others.

E. F. McClennen, of Boston, for plaintiffs.

B. B. Jones, of Boston, for defendants Broomfield and Prager.

G. L. Mayberry, of Boston, for defendants John Hancock Mut. Life Ins. Co. and President and Fellows of Harvard College.

BRALEY, J. [1] The John Hancock Mutual Life Insurance Company, and the President and Fellows of Harvard College against whom no relief is sought but who are joined as defendants "so that they may be bound by such decree as may be entered in this suit," held mortgages dated February 12, 1903, on the real property described in the record, which were given by the trustees of an association known as the Department Store Trust, the principal of which aggregated three and one half million dollars. The master to whose report no exceptions were taken, and whose conclusions of fact on unreported evidence must stand, finds, that the individual defendants, hereafter referred to as the subscribers, with one Lassor Agoos, since deceased, desired to acquire ownership of the equity of redemption. Armstrong v. Orler, 220 Mass. 112, 113, 107 N. E. 392. The mortgages had been extended for ten years from the original date of maturity, and foreclosure proceedings having been begun because of the "arrears of taxes unpaid mortgage interest and other charges," the subscribers entered into an agreement February 12, 1920, with the mortgagees which as correctly summarized by the master contained the following material provisions. The subscribers on or before March 1, 1920, were to "cause to be paid out of the cash capital of the real estate trust which" they were to form to be known by the name of "Washington Essex Building Trustees," the unpaid interest with interest thereon from the respective dates of maturity to the date of payment,

with repayment of the amount advanced by the mortgagees on account of insurance, taxes and expenses incurred since October 10, 1919, with interest in accordance with an agreement made December 24, 1918, between the mortgagees and the Department Store Trustees. They also were to pay the expense of the foreclosure proceedings, and the taxes assessed for the year 1918, with certain other municipal charges. The proposed real estate trust was to be organized February 12, 1920, to which on or before March 1, 1920, the subscribers were to procure a conveyance of the equity held by the department store trustees pursuant to a vote adopted by the shareholders of that trust. And they expressly agreed "severally and not jointly" to provide funds for this purchase apart from the amount which they also covenanted to subscribe and pay as the cash capital of the trust $1,900,000, fifty per cent thereof to be paid on or before March 1, 1920, to the trustees, and the remaining fifty per cent was to be paid at such time or times as the trustees might require, but in any event the last payments were to be made within one year from March 1, 1920. The trust to be formed was to begin forthwith the construction of a theatre in the rear portion of the mortgaged property at an estimated cost of $750,000, and the trustees were at once to alter the exterior of the building not required for the theatre, but forming part of the addition, so that it could be leased for mercantile purposes. If an amount in excess of $750,000 was necessary to build, equip and complete the theatre free from liens of every description, and to make the outside changes the subscribers undertook to provide the necessary funds in addition to the cash capital. The plans and specifications were to be furnished by the trustees and approved by the mortgagees before any alterations were begun. A corporation was to be formed by the subscribers to which the theatre was to be leased for a term corresponding at least with the term of the proposed extension of the mortgages to which reference will subsequently be made. The lease was to be subject to the mortgages, and the annual rental was not to be less than $100,000, and the tenant was to give a bond in the penal sum of $200,000, satisfactory to the mortgagees as security for payment of the rent, and for the restoration of the building to its original condition if the rent was not paid. The mortgagees were to be given a lien or mortgage upon the furnishings and equipment of the theatre as additional security for the performance of the conditions of the mortgages as extended. The trustees were to make an agreement without personal liability, that the trust, but not in excess of its capital assets, should perform all the conditions of the extended mortgages "except as changed or modified by this agreement," and should pay to the mortgagees on account of the purchase $50,000 on March 1, 1921, and a like amount on March 1 in each succeeding year up to and including 1930, and thereafter $60,000 up to and including 1940, and $70,000 thereafter, until the indebtedness was discharged. The mortgagees covenanted that upon compliance by the subscribers with all of the precedent conditions they would discontinue the foreclosure, and extend the mortgages at the expiration of the extended period which had been first granted for a further term of twenty years, or until October 1, 1943. We shall refer to this instrument as the extension agreement. It contemplated for the development of the property an elaborate and thoroughgoing plan which upon completion with the proposed changes and enlargement would benefit the mortgagees by giving them additional security, and the subscribers by the enhancement in value of the equity of redemption. But the extension agreement could not become operative unless the Washington Essex Building Trustees was duly organized by the subscribers and by the subscribers alone, and it is unnecessary to consider here what the rights of the mortgagees would have been if nothing more had been done after the extension agreement had been executed. The plaintiffs, who had been named therein as the proposed trustees, executed on February 12, 1920, after the extension agreement had been signed as the master reports, a declaration of trust under the name of the "Washington Essex Building Trustees." The mortgagees indorsed thereon that—

"The foregoing is the real estate trust organized pursuant to the requirements of the agreement of February 12th, 1920, between John Hancock Mutual Life Insurance Company and President and Fellows of Harvard College and Max Mitchell, Benjamin A. Prager, Lassor Agoos and Reuben Broomfield."

But this indorsement did not make the mortgagees parties to the declaration of trust. The master states that the trustees immediately began the performance of their duties, and he sets forth at length the proceedings of the plaintiffs in the execution of the trust. It is found that apart from the amount subscribed as the cash capital, the subscribers procured the conveyance of the equity of redemption to the trust, and formed the "Capitol Theatre Trust" which was accepted in place of a corporation, and on March 1, 1920, the plaintiffs leased the proposed theatre to that trust, and a bond to secure payment of the rent was given by the theatre trustees and approved by the mortgagees. The plaintiffs also on June 25, 1920, began the necessary alterations for commercial uses, and entered into agreements for labor and materials, although they did not bind themselves personally. The subscribers furthermore caused the trustees to employ architects and to undertake pre-

liminary work in connection with the construction of the theatre. The declaration of trust or trust agreement consisted of thirty-five articles. By articles twenty-nine and thirty the plan of organization and of operation are described as follows:

"The Trustees shall at the instance of Max Mitchell and others who have executed a contract of this date with the mortgagees aforesaid (a copy of which identified by the signatures of these Trustees is filed with the records of the Trustees), receive conveyance directly or indirectly from the Trustees of the Department Store Trust created by Declaration of Trust recorded with the Suffolk Registry of Deeds at Book 2924, page 274, covering the real estate and buildings now or heretofore held by them bounded by Washington Street, Hayward Place, Harrison Avenue and Essex Street, subject to the mortgages and encumbrances thereon, and in return for said conveyance and for the obligations undertaken by the said contractors Max Mitchell and others to the John Hancock Mutual Life Insurance Company and the President and Fellows of Harvard College, mortgagees as aforesaid, for the benefit of this Trust, by said contract, the Trustees shall assume the obligations contemplated to be performed by them in said contract and shall issue to the order of said Max Mitchell 25,000 cumulative preferred shares of a par value of $100 each, and 25,000 ordinary shares of no par value, both of said classes of shares to be issued as fully paid and non-assessable; and each of said preferred shares shall (subject to the obligations of said contract) be entitled out of any income as above described to 8 per cent (or such lesser rate as said contractor Max Mitchell shall before issue determine) per share anually, payable in equal parts semi-annually on February 1st and August 1st cumulatively, and to preference to the extent of their par value and any accrued and unpaid dividends over the ordinary shares in distribution of capital, and the holders of ordinary shares shall be entitled to receive all distributions of income and capital above that required for the preferred shares as aforesaid. Additional issues for cash or otherwise may be made and this plan may be modified in any manner, by vote of the Trustees without amendment of this Declaration of Trust."

"A portion of said premises shall be altered into a theatre and leased for thirty (30) years to a separate corporation or trust in which the shareholders in this Trust may be interested and at a rental of One Hundred Twenty-five Thousand Dollars ($125,000) a year, the tenant to provide its own heat and inside repairs but to pay nothing toward interest, taxes or insurance on the building or theatre. This plan may be modified in any manner by vote of the Trustees without an amendment of this Declaration of Trust, but any modification shall be subject to the rights of the John Hancock Mutual Life Insurance Company and the President and Fellows of Harvard College under said contract of Max Mitchell and others with them of even date herewith."

The subscribers did subscribe for $1,900,000 as the cash capital of the trust. But out of $1,193,116.12, the total amount contributed in discharge of all their obligations, they paid directly to the City of Boston, and to the mortgagees amounts aggregating $596,789.78, leaving a balance of $706.883.88 due on their subscriptions. The result as alleged in the bill and found by the master was that the alterations although begun, never were completed, and the anticipated income was not realized. The creditors of the trust who furnished labor and materials until further construction had to be suspended and never was resumed, remain unpaid because the plaintiffs have no funds to meet the indebtedness of the trust. It is shown by the report, that the mortgagees in July, 1921, took possession of the premises for non-payment of interest due April 1, 1921, and foreclosed by sale September 29, 1921, when the property brought $3,500,000, the principal of the mortgages. While certain work had been done in beginning alterations for commercial purposes, the only new construction called for by the erection of the theatre was laying the foundations for the partition walls. A large part of the interior had been removed, but the reconstruction had "scarcely begun." The mortgagees with the consent of all parties completed certain unfinished work so that two floors of the building could be utilized and leased. They contended before the master to be entitled to unpaid interest to September 29, 1921, with the expenses of foreclosure, the cost of work necessary to make the floors tenantable, the expenses incurred in the care of the building while the mortgagees were in possession before the foreclosure sale, and the amount paid architects representing the mortgagees which the subscribers agreed in the extension agreement to pay, a total amount of $260,382.92, which the mortgagees conceded might be reduced if they were paid $91,264.12 under a bond given by a security company covering the second item of their claim.

[2, 3] We do not decide whether the subscribers under the extension agreement are liable to the mortgagees for the whole or any part of this claim. It is plain that the trustees are not responsible, and in the absence of a cross-bill the question whether the mortgagees can reach the assets of the trust in satisfaction of their demands or compel the codefendants to pay cannot be determined in the present suit. Forbes v. Thorpe, 209 Mass. 570, 583, 95 N. E. 955; Pickard v. Clancy, 225 Mass. 89, 95, 113 N. E. 838. The plaintiffs ask that the amount remaining unpaid on the subscriptions of the defendants Broomfield, Prager and Mitchell may be ascertained and ordered paid to them as trustees. The defendant Mitchell although filing an answer and appearing once without counsel at the hearings before the master, did not appear at the argument and has not filed a brief. But Broomfield and Prager contend that the subscribers having cove-

nanted solely with the mortgagees in the extension agreement to which the trustees were not parties, the covenants entered into by them with the mortgagees cannot be enforced by the trustees and therefore the bill must be dismissed. The mortgagees however covenanted only to extend the mortgages for twenty years if the defendants performed their covenants. It needs no discussion to show that if this position is well grounded the creditors of the trust must go unpaid for labor and materials furnished under contracts with the trustees which were authorized by the subscribers. It may be conceded as all the defendants contend, that only the parties to the extension agreement which was under seal can maintain an action at law or a suit in equity thereon for non-performance by the individual defendants who were parties of the second part, Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1; Borden v. Boardman, 157 Mass. 410, 32 N. E. 469; New England Structural Co. v. James Russell Boiler Works, 231 Mass. 275, 120 N. E. 852; Empress Engineering Co., 16 Ch. Div. 125, 129, 130. But the intention of the parties to the extension agreement as to what they intended to accomplish and the mode or instrumentality by which it was to be effectuated is manifest. A trust was to be created under the title of the Washington Essex Building Trustees, and the persons, who were to act as Trustees were named. The declaration of trust to which the mortgagees were not to be parties was to come into potential existence only through the positive and original action of the subscribers who when they became certificate holders are expressly designated in articles three, four and eighteen, which provide for the distribution of principal and income, as the "cestuis que trust," to whom certificates when they paid for shares were to be issued. The subscribers could, and did covenant with the mortgagees, that a trust should be created, but no provisions are found in the extension agreement prescribing the form of organization of the trust, or the powers of the trustees, or the reciprocal obligations to the trustees of the subscribers who became the beneficiaries under the trust. The general powers of the trustees are shown by article eleven.

"The Trustees shall have no power to bind the Trustees or any of them or the trust assets unless it be by instrument in writing signed in the manner hereinafter set forth or as from time to time determined by recorded vote of the Trustees and sealed with the seal of the Trustees and executed in accordance with a special or standing vote recorded on books of the Trustees, and by documents so executed the Trustees shall have the power to take, receive, collect, acquire, buy, sell, borrow, lend, mortgage, pledge, encumber, lease, release, contract for or concerning, compromise concerning, or otherwise deal with or concerning any property of or for the trust, or in any way connected with its interests as the sole and absolute owners thereof at law and in equity and with as full powers as if such absolute owners at law and in equity and without leave or intervention of any court, and in whole or in parcels and at public auctions or at private sales, or otherwise, and to make partition with co-owners or joint owners outside the trust having any interest in any properties in which the Trustees are interested, and to make such partition either by sale or by set off or by agreement, or otherwise, and to make such leases even if the term thereof extend beyond the duration of the trust, and to make distributions in money or in property of the trust, and for such purposes to determine the value of such properties, and when anything is dependent upon the value of property and/or upon the existence of any fact to determine such value and/or such fact, and the certificate of such Trustees to such determination shall be conclusive in favor of anyone acting thereon in good faith, and the Trustees shall not be limited to investments which are lawful for Trustees."

The reference to the extension agreement in article twenty-nine is coupled and used with the words "the trustees shall assume the obligations contemplated to be performed by them in said contract * * * and shall issue" certificates to Mitchell of a certain number of cumulative preferred shares and of common shares of no par value, "fully paid and non-assessable," which do not appear in form or substance in the extension agreement where no provision is found that the trust to be organized should issue certificates in which the subscribers as cestuis were to be shareholders, and who were to receive certificates of their respective holdings. The provisions of the extension agreement defining the obligations of the subscribers to the mortgagees as previously stated are adopted by reference in the declaration of trust, not as covenants made by the subscribers with the mortgages, but as if the declaration of trust by appropriate language had for the first time specifically enumerated all of them as forming part of the terms and obligations under the trust which on their part were to be performed. Lipsky v. Heller, 199 Mass. 310, 85 N. E. 453; Abbott v. Frazier, 240 Mass. 588, 593, 134 N. E. 635, 21 A. L. R. 1551. The mortgagees did not bind themselves, or authorize the trustees to bind them, to pay any of the expenditures which must be made before an extension of the mortgages was to be given, and the instruments of extension which were to be executed, sealed and acknowledged were of necessity to be delivered not to the subscribers, but to the trust which held title to the equity of redemption. A covenant to create a trust, and a trust created thereunder, are as widely different as a covenant to convey, and an executed conveyance. Dennison v. Goehring, 7 Pa. 175. If it became necessary, the beneficiaries could have brought suit in equity under article twenty-five for an accounting

by the trustees of their administration, and for other adequate relief. Newell v. Hadley, 206 Mass. 335, 92 N. E. 507, 29 L. R. A. (N. S.) 908.

[4, 5] It is no consequence that with the exception of Mitchell the beneficiaries did not affix their signatures to the declaration of trust By the partial payment of their subscriptions, and the receipt of certificates as shown by the report, the subscribers acted under the trust, to which they had caused the equity to be conveyed, and they became as defined in article five and eight "cestuis que trust," and the "trust beneficiaries." Directly and at once upon the creation of the trust and its acceptance in the manner and form shown by the record a fiduciary relation resting wholly on the declaration of trust existed between them and the trustees, who were to conduct the affairs of the trust free from the direction or control of the certificate holders. Gerrish v. New Bedford Institution for Savings, 128 Mass. 159, 161, 35 Am. Rep. 365; Welch v. Henshaw, 170 Mass. 409, 49 N. E. 659, 64 Am. St. Rep. 309; Williams v. Milton, 215 Mass. 1, 102 N. E. 355; Frost v. Thompson, 219 Mass. 360, 365, 106 N. E. 1009; Howe v. Chmielinski, 237 Mass. 532, 130 N. E. 56. In the performance of their duties they were required to engage in the business of reconstructing the building, for which detailed plans and specifications had been prepared, and they were empowered to make contracts for this purpose in the name of the trust under article eight, even if they were not to be personally bound. The foreclosure of the mortgages not only extinguished the equity of redemption but terminated the trust in so far as further building operations of every description "were possible," and creditors who the master reports never have been paid for labor and materials or for money lent could on the record reach in equity any remaining trust property in payment of their debts. Mason v. Pomeroy, 151 Mass. 164, 167, 24 N. E. 202, 7 L. R. A. 771; Woddrop v. Weed, 154 Pa. 307, 26 Atl. 375, 35 Am. St. Rep. 832.

[6, 7] But, "It is a general principle that a trust estate must bear the expenses of its administration." Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157. And if the necessary funds can only be obtained by payment to the trustees but not to the mortgagees of the overdue obligations of the defendant subscribers which from the beginning formed part of the capital assets of the trust, the trustees can maintain the bill to compel payment respectively by them of so much of their unpaid subscriptions as will enable the trustees to satisfy the obligations of the trust to creditors who have furnished labor and supplied materials for the benefit of the trust, and for money borrowed by the trustees for the benefit and use of the trust. Mason v. Pomeroy, supra; New v. Nicoll, 73 N. Y. 127, 29 Am. Rep. 111; Williams v. Gibbes, 17 How. 239, 15 L. Ed. 135. See Tuttle v. First National Bank of Greenfield, 187 Mass. 533, 535, 73 N. E. 560, 105 Am. St. Rep. 420. While the defendants are not chargeable with the estimated excess cost of the proposed theatre which never has been built, they are liable for the balance of the cash capital amounting to $706,883.33 in so far as that balance is necessary to enable the plaintiffs to liquidate the indebtedness of the trust incurred in carrying on building operations prior to foreclosure as well as for $200,000 borrowed by the trustees for its use. The master after an exhaustive computation of the amount recoverable, to which neither the defendants nor the plaintiffs excepted and which need not be repeated, finds there was due the plaintiffs on March 1, 1921, from the defendant Broomfield $278,333.34, and from the defendants Mitchell and Prager jointly $349,460.97, to which interest computed at the rate of six per cent from March 1, 1921, to the date of entering the decree should be added. De Cordova v. Weeks, 244 Mass. 100, 140 N. E. 269.

A decree against Broomfield, Mitchell and Prager, with costs, for the respective amounts is to be entered in the county court, where all necessary details are to be adjusted, but as to the defendant mortgagees the bill is to be dismissed.

Ordered accordingly.

SILVERMAN et al. v. ROTHFARB et al.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 19, 1924.)

1. Vendor and purchaser ⇐306—Fraud a defense to action on note given as deposit.

If vendor intentionally made false statements of material facts in a sale of real estate, as distinguished from matters of opinion and dealer's talk, which were believed and relied on by the purchasers to their damage, they had a defense in an action on the note given as a deposit.

2. Trial ⇐29(2)—Vendor and purchaser ⇐44—Testimony held admissible as part of conversation, and to show reliance on representation and remark of court proper.

Where defense was fraud in sale of real estate, testimony of a defendant that he wanted to look over the property, but that one of the plaintiffs insisted that the agreement must be signed at once, *held* competent as a part of the conversation in which the specific misrepresentations were made, and also on the issue as to whether the defendants relied on the misrepresentation, and a remark of the court in admitting the testimony that the urgency of the sellers in trying to push the bargain to completion without giving the buyers a chance to look at the property was a circumstance en-

titled to consideration was not open to exception.

3. Vendor and purchaser ⇐315(2)—Witnesses ⇐236(1)—Questions properly excluded as improper in form and irrelevant.

In an action on a note given as deposit on purchase of land, where defense was fraud, court properly excluded the questions to the broker, "You all agreed between yourselves that Mr. Z. was to write down in the agreement all the promises and all the obligations of the parties, did you not?" and "Now, so far as you have heard them say there, at the time they negotiated this transaction, they relied upon your recommendation, is that right?" being irrelevant and improper in form.

4. Appeal and error ⇐205—No complaint of exclusion of questions, in absence of offer of proof.

Complaint cannot be made of exclusion of questions, where no offer of proof was made as to the expected answers.

5. Appeal and error ⇐1078(4)—Matters not argued treated as waived.

Requests for instructions, which were denied, and exceptions to the charge, not having been argued, may be treated as waived, notwithstanding statement that all exceptions are relied on.

Exceptions from Superior Court, Middlesex County.

Action of contract by Benjamin Silverman and others against H. Rothfarb and others on a promissory note. Verdict for defendants, and plaintiffs bring exceptions. Exceptions overruled.

The court excluded the following questions to witness Rothfarb, Sr., the broker:

"You all agreed between yourselves that Mr. Zintz was to write down in the agreement all the promises and all the obligations of the parties, did you not?" and "Now, so far as you have heard them say there, at the time they negotiated this transaction, they relied upon your recommendation, is that right?"

S. Brenner, of Boston, for plaintiffs.
A. J. Berkwitz, of Boston, for defendants.

PER CURIAM. [1] This is an action of contract by the payees against the makers of a promissory note for $300 dated on June 15, 1922, payable the next day, and given as part of a deposit for the purchase of real estate. The main defense is that the defendants were induced to agree to buy the real estate and consequently to sign the note by reason of the fraud and misrepresentations made to them by the plaintiffs. There was ample evidense to prove such fraud, and misrepresentations, as the inducement to the signing and delivery of the note. It need not be recited. The jury might well have found on the evidence that the plaintiffs intentionally made false statements of material facts as distinguished from matters of opinion and from dealers' talk, which were believed and relied on by the defendants to their damage. If these were found to be the facts a defense to the note was established. Kilgore v. Bruce, 166 Mass. 136, 44 N. E. 108; Bates v. Cashman, 230 Mass. 167, 168, 119 N. E. 663.

[2] The testimony of one of the defendants that he said to the plaintiffs that he wanted to look over the property, but that one of the plaintiffs "insisted that the agreement must be signed then and there or there would be no sale," was competent as a part of the conversation in which the specific misrepresentations were made. The remark of the court in admitting this testimony, to the effect that the urgency of the sellers in trying to push the bargain to completion without giving the buyers a chance to look at the property was a circumstance entitled to consideration was not open to exception. This evidence also was competent on the issue whether the defendants relied on the misrepresentations.

[3, 4] There was no harmful error in the exclusion of the questions to the broker. They were irrelevant in substance, and improper in form. Moreover no offer of proof was made as to the expected answers.

[5] The requests for instructions which were denied and the exceptions to the charge have not been argued and may be treated as waived notwithstanding the statement of the plaintiffs that all exceptions are relied on. Commonwealth v. Dyer, 243 Mass. 472, 508, 138 N. E. 296; Allen, Commissioner of Banks, v. Cosmopolitan Trust Co., 142 N. E. 100. Careful examination of the entire record reveals no reversible error.

Exceptions overruled.

CEREGHINO v. GIANNONE.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1924.)

1. Trial ⇐252(18)—Request properly refused as assuming fact not shown by evidence.

In a will contest, court properly refused to rule that "the amount of influence necessary to dominate mind impaired by age or disease is obviously less than that required to control a strong mind," because the request assumed as a fact that the testator's mind was impaired by age or disease, which was not shown to exist.

2. Wills ⇐163(1)—Burden on contestant to prove undue influence.

The burden of proof is on contestant of will to prove undue influence affirmatively.

3. Wills ⇐166(1)—Fraud and undue influence must be shown by preponderance of evidence.

On contest of a will it is necessary to prove fraud and undue influence, not merely by evidence, but by a fair preponderance of the evidence.

4. Trial ⇐260(1)—Request to rule, covered by instruction given, properly refused.

A request to rule was rightly refused, where the court fully and accurately instructed the jury regarding the matter involved.

5. Trial ⇐252(18)—Instruction assuming facts not shown to exist properly refused.

In will contest, where there was no evidence to show secrecy in the execution of the will or suppression by the beneficiaries of its existence, a request to rule that secrecy and suppression, or other matters, could be considered, was properly refused as assuming facts.

6. Wills ⇐166(8)—Physical and mental weakness not evidence of undue influence.

In will contest, court properly refused request to rule that "undue influence may be deemed established, when there is evidence that the testator's mind has been impaired or weakened by age or disease, and the will is inconsistent with a prior intent expressed in his declarations, or combined with evidence of a unilateral disposition."

7. Wills ⇐166(1)—Proof required to establish undue influence same as in other civil actions.

The degree of proof required to establish undue influence is the same as exists in civil cases generally, namely, proof by a fair preponderance of the evidence.

8. Trial ⇐296(8)—Error in instruction cured by subsequent instruction.

Error of court in will contest in instructing that contestant must prove undue influence beyond a reasonable doubt was corrected, when the judge said to the jury, "You have got to prove enough by way of fact, so that a reasonable inference that the will of the person has been overcome is properly drawn from the testimony," etc.

9. Trial ⇐295(5)—Instruction, considered as whole, held proper.

A charge: "It would, of course, be an outrage to the [testator's] memory if a will which he had intended carried out for the disposition of his property should be lightly set aside. * * * On the other hand, I want to point out to you again it would be equally a fraud upon him, if he made this will under the influence, undue influence, of any one of these three persons or all of them. * * *"—taken as a whole, cannot be regarded as an attempt to impress the jury that the court decided the will should not be set aside.

10. Trial ⇐278—Exception to entire charge does not lie.

An exception to an entire charge does not lie.

Exceptions from Superior Court, Suffolk County; A. R. Weed, Judge.

In the matter of the estate of Agostino B. Dondero, deceased. Contest of will by Elizabeth Giannone against Emilio Cereghino, executor. The jury found in favor of the will, and contestant brings exceptions. Exceptions overruled.

The contestant made the following requests for rulings:

"(1) The amount of influence necessary to dominate a mind impaired by age or disease is obviously less than that required to control a strong mind.

"(2) A discrepancy between the fixed purpose of the testator, expressed in his declared intentions, and the provisions of a will which are favorable to those in close relation to him at the time of its execution, and who have opportunity to unduly influence him, casts upon the beneficiary the burden of showing that the will was not the product of undue influence.

"(3) Direct proof of fraud and undue influence is not required; all that is necessary to establish these issues is that there be affirmative evidence of facts and circumstances from which their existence and exercise may be reasonably inferred.

"(4) Direct evidence of fraud or undue influence is rarely obtainable, and the issues are generally determined by inferences drawn from a large number of facts and circumstances, no one of which is of great weight and conclusive when considered alone, but is of some weight when combined with other facts.

"(5) Secrecy in the execution of the will and suppression by the beneficiaries of the fact of its existence, or the fact that the testator lived with the beneficiary, the presence or absence of the person alleged to have exercised the undue influence at the execution of the will, are proper facts to be considered in connection with other circumstances of the case.

"(6) Undue influence may be deemed established when there is evidence that the testator's mind has been impaired or weakened by age or disease and the will is inconsistent with a prior intent expressed in his declarations or combined with evidence of an unnatural disposition."

C. H. Frost and A. L. Doggett, both of Boston, for petitioner.

H. W. Packer, of Boston, for respondent.

CROSBY, J. This case is before us on exceptions taken at a trial in the superior court of an issue framed by the probate court respecting the allowance of an instrument offered for probate as the last will of Agostino B. Dondero. The issue was whether the alleged will was "procured to be made by the fraud or undue influence of Angelo Pensa, Angela Pensa, sometimes called Angelina Pensa, and Emilio Cereghino, or any of them, exercised upon the said Agostino B. Dondero." The jury found for the proponents. The appellant's exceptions are to the refusal of the presiding judge to give certain rulings requested, to certain parts of his charge, and to the charge in its entirety. They will be considered in that order.

[1] 1. The first request was properly refused. It assumed as a fact that the testator's mind was impaired by age or disease which was not shown to exist; on the other hand, there was much evidence to the contrary.

Beckles v. Boston Elevated Railway, 214 Mass. 311, 313, 101 N. E. 145.

[2] 2. The burden of proof was on the contestant to prove affirmatively undue influence; accordingly, the second request was rightly refused.

[3] 3. The third request was properly refused, as it was necessary to prove fraud and undue influence, not merely by evidence, but by a fair preponderance of the evidence. Boston Safe Deposit & Trust Co. v. Bacon, 229 Mass. 585, 591, 118 N. E. 906.

[4] 4. The fourth request was rightly refused; the court fully and accurately instructed the jury respecting circumstantial evidence, its weight and effect.

[5] 5. The fifth request could not properly have been given, as it assumes facts which were not shown to exist. There was no evidence to show secrecy in the execution of the will or suppression by the beneficiaries of its existence. Millen v. Gulesian, 229 Mass. 27, 118 N. E. 267; Duart v. Simmons, 231 Mass. 313, 321, 121 N. E. 10.

[6] 6. The refusal to give the sixth request was not error. There was no evidence that the testator's mind was impaired or weakened by age or disease at the time the will was executed, nor that he made an unnatural disposition of his property. Besides, if this request had been given, the jury could have found that undue influence had been established, if there was any evidence, however slight, which tended to prove such influence.

[7, 8] 7. The judge, in referring to undue influence instructed the jury:

"It must be proved by circumstances brought together from which no reasonable inference can be drawn other than that the person whose will is in question has been unduly influenced by another so that his will does not express his judgment but his will has been overcome against his judgment."

The instruction, in effect, was that in order to prevail the burden rested upon the contestant to prove beyond a reasonable doubt that the testator was unduly influenced in the making of his will. This was error. Manifestly the degree of proof required to establish the contestant's contention was the same as exists in civil cases generally, namely, proof by a fair preponderance of the evidence. Grella v. Lewis Wharf Co., 211 Mass. 54, 97 N. E. 745, Ann. Cas. 1913A, 1136. It seems plain, however, that the error was afterwards corrected by the judge, when he said to the jury:

"You have got to prove enough by way of fact so that a reasonable inference that the will of the person has been overcome is properly drawn from the testimony."

Later, as his final instruction respecting the burden of proof, he said:

"I want to say before I close my instructions to you, I want to say and make more emphatic of what you must be satisfied—that by a fair preponderance of all the evidence, because in this case and on these questions the contestant of this will has the burden of satisfying you, you must be satisfied by a comparison of this will in all its provisions, and under all the influences which surrounded Mr. Dondero at the time of its making, that such a will could not be the result of his free and uncontrolled action. * * *"

We are of opinion that taking this charge in its entirety the jury could not have been misled as to the degree of proof resting on the contestant to enable her to prevail. Dewey v. Boston Elevated Railway, 217 Mass. 599, 604, 105 N. E. 368; Boston Safe Deposit & Trust Co. v. Bacon, supra; Cronin v. Boston Elevated Railway, 233 Mass. 243, 246, 123 N. E. 686.

8. The eighth, ninth and tenth exceptions to the charge need not be considered in detail. They cannot be sustained. They were correct statements of the law and appropriate to the issue to be determined.

[9] 9. In the course of the charge the jury were told that:

"It would of course be an outrage to his [the testator's] memory if a will which he intended to have carried out for the disposition of his property should be lightly set aside. * * * On the other hand, I want to point out to you again it would be equally a fraud upon him if he made this will under the influence, undue influence, of any one of these three persons or all of them. * * *"

Taking the charge as a whole, it cannot be regarded as an attempt to impress the jury that the court desired the will should not be set aside, as the contestant argues. The instructions above quoted would seem to be equally emphatic and fair to both parties, and are not subject to exception.

[10] 10. The exception to the charge in its entirety must be overruled. It is well settled that an exception to an entire charge does not lie. Curry v. Porter, 125 Mass. 94; Gibney v. Everson, 192 Mass. 228, 77 N. E. 1155.

Exceptions overruled.

(236 N. Y. 488)

AMERICAN BANK v. GOSS.

(Court of Appeals of New York. Nov. 20, 1923.)

1. Statutes ⇐230—Amendment of subdivision theretofore incorporated in another subdivision affects latter.

If one section or provision of a statute adopts and incorporates by reference the provisions of another section or subdivision, amendment of the latter affects the entire statute, including the subdivision making the adoption.

2. Statutes ⇐230—Code Civil Procedure regarded as single statute in determining effect of amendment of sections incorporated in other sections.

Code Civil Procedure, enacted in two parts by Laws 1876, c. 448, and Laws 1880, c. 178, as single acts, providing by section 3355 that different provisions with respect to each other are deemed to have been enacted simultaneously, amended by acts "to amend the Code" rather than particular sections thereof, and repealed by Civil Practice Act, § 1577, repealing Laws 1876, 1880, and all amendatory and supplementary statutes "which constituted the Code," must be regarded as a single statute in determining whether a section adopting provisions of another section includes and is affected by subsequent amendments of the adopted section.

3. Attachment ⇐209(6)—Service outside state may be made without order of publication where attachment is levied on defendant's property in state.

Under Code Civ. Proc. § 443, subd. 3, permitting service of summons outside the state without an order of publication in the cases specified in section 438, subd. 5, which was subsequently amended in 1920 (Laws 1920, c. 478) by adding the words "or where it appears by affidavit that a warrant of attachment * * * has been levied upon property of the defendant within the state," service of summons in such case may be made without the order of publication required by section 638.

4. Attachment ⇐209(6)—Act requiring affidavit that attachment was levied on defendant's property where summons is served outside state does not require order of publication.

Code Civ. Proc. § 438, subd. 5, as amended by Laws 1920, c. 478, requiring that where summons is served outside the state without an order of publication it must appear by affidavit that a warrant of attachment has been levied on defendant's property in the state, specifies no time for making, filing, or serving the affidavit, and hence does not require an order of publication, since the affidavit need not be filed before the summons is served, but may be filed as part of the judgment roll.

5. Attachment ⇐209(6)—Sheriff's certificate ordinarily equivalent to affidavit that warrant was levied.

The sheriff's certificate that a warrant of attachment was levied on defendant's property within the state is ordinarily equivalent to the affidavit required by Code Civ. Proc. § 438, subd. 5, where summons is served outside the state.

6. Constitutional law ⇐312—Failure to serve affidavit with summons served outside state does not deprive defendant of notice to which constitutionally entitled.

Attachment being a provisional remedy, proceedings under which must abide the result of the action in which it is granted, failure to file the affidavit required by Code Civ. Proc. § 438, subd. 5, with a summons served outside the state, would not deprive defendant of notice to which he is constitutionally entitled, since the levy would not deprive him of his property unless judgment was finally recovered against him, nor preclude him from thereafter questioning the validity of the warrant by attacking the court's jurisdiction.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the American Bank against Edith Otis Goss. From an order of the Appellate Division (204 App. Div. 759, 198 N. Y. Supp. 857) reversing an order of the Special Term, denying a motion to vacate service of summons, and granting the motion, plaintiff appeals by permission. Reversed and order of Special Term affirmed.

The following questions were certified:

"1. In an action instituted against a nonresident by the issuance of a warrant of attachment on February 26, 1921, and the levy of said attachment upon the defendant's property within this state on or before March 4, 1921, and the due filing of a sheriff's certificate of such levy, is personal service, after the making of the levy and the filing of the certificate and within thirty days after the issuance of the warrant of attachment, of the summons and verified complaint attached without the state, without obtaining an order for service by publication, valid service so as to authorize the entry of a judgment upon the defendant's default in appearing or answering?

"2. Personal service of the summons with verified complaint attached having been made upon the defendant without the state within the period of thirty days after February 26, 1921, is the defendant upon the record in this case entitled, as a matter of law, to have the judgment heretofore entered herein vacated?"

John A. McManus and Charles L. Cole, both of New York City, for appellant.

Louis C. White and Percy L. Klock, both of New York City, for respondent.

HISCOCK, C. J. This action was brought to recover a sum of money only, and in it a warrant of attachment was issued and levied upon the property of the defendant. Based upon these features, service of the summons and complaint was made upon the defendant without the state and without any order for service by publication. The defendant seeking by her motion to set aside such service as invalid, because no order for service was obtained, has presented for our consideration several questions.

The most important of these is the one whether a section of the Code of Civil Procedure adopting as part of itself the provisions of another section will include and be affected by amendments of the adopted section made after the adoption occurred. This question arises in connection with sections 438 and 443 of the Code. Section 438 being entitled "Cases in Which Service of Summons by Publication, etc., may be Ordered," provided, prior to 1920, that:

"An order directing the service of a summons upon a defendant, by publication, may be made in either of the following cases: * * *

"5. Where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in or lien upon, specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined, or limited; or otherwise affecting the title to such property."

While the section thus read, section 443 relating to service of a summons without the state was amended (Laws 1916, c. 439) so as to provide in subdivision 3:

"In the cases specified in subdivision five of section four hundred thirty-eight [just quoted] the summons may be served *without an order* upon a defendant without the state in the same manner as if such service were made within the state, except that a copy of the complaint shall be annexed to and served with the summons."

In 1920 and subsequent to the adoption by section 443 of subdivision 5 of section 438 and before the service of the summons in this action, said subdivision 5 of section 438 was amended by adding thereto the words:

"Or where it appears by affidavit that a warrant of attachment, granted in the action, has been levied upon property of the defendant within the state." Laws 1920, c. 478.

Thus it is seen that, at the time of its incorporation into section 443, subdivision 5 of section 438 did not by such incorporation authorize service of summons in this action without the state without an order of publication, and that, on the contrary, and subject to consideration of other questions hereafter to be made, if section 443 is to be regarded as including amendments made to section 438 after its adoption, service without an order of publication was proper at the time this summons was served.

[1] We shall assume that the general rule is as claimed by the respondent and that ordinarily an independent statute absorbing or incorporating by proper reference the provisions of another and independent statute would not be affected by amendments made to the latter after the incorporation. On the other hand, we think it must be equally clear that if one section or provision of a statute adopts and incorporates by reference the provisions of another section or subdivision of the same statute, a subsequent amendment of the latter will be regarded as affecting the entire statute including the subdivision which made the adoption. In such a case the entire statute will be regarded as reenacted at the time of the last amendment, and all of its provisions will be affected by the latter. Lyon v. Manhattan Ry. Co., 142 N. Y. 208, 303, 37 N. E. 113, 25 L. R. A. 402; Blair v. Chicago, 201 U. S. 400, 475, 26 Sup. Ct. 427, 50 L. Ed. 801; State v. Moon, 178 N. C. 715, 716, 100 S. E. 614; Walsh v. State, 142 Ind. 357, 363, 41 N. E. 65, 33 L. R. A. 392.

[2] We thus come to the ultimate question in this connection whether the Code of Civil Procedure for the purposes now under consideration is to be regarded as a single statute composed of many sections or whether each section is to be regarded as a separate and distinct statutory enactment. It seems to us that there can be little doubt of the answer which must be made to this question. As is well known the Code as originally adopted consisted of two parts, the first 13 chapters being enacted as a single act by chapter 448 of the Laws of 1876, and chapters 14 to 22 being similarly enacted by chapter 178 of the Laws of 1880, and it was provided by section 3355 of the Code itself that—

"For the purpose of determining the effect of the different provisions of this act with respect to each other, they are deemed to have been enacted simultaneously."

As somewhat interpretative of the intent of the Legislature it is to be observed that the title consistently given to subsequent amendatory acts has been "An act to amend the Code of Civil Procedure" rather than an act to amend some particular section thereof and that section 1577 of the Civil Practice Act in repealing the Code provides that certain chapters of the Laws of 1876 and 1880 "and all statutes amendatory thereof and supplementary thereto *which*

constitute the Code of Civil Procedure are hereby repealed," thus indicating the legislative idea that the Code was a single entire statute composed of many sections or subdivisions. This same view was adopted by this court in Comey v. United Surety Co., 217 N. Y. 268, 276, 111 N. E. 832, 835 (Ann. Cas. 1917E, 424) where we said in speaking of the Code: "The exceptions established in 1888 must, of course, vary automatically with the changes of section 432" subsequently made. See, also, Matter of Humfreville, 154 N. Y. 115, 47 N. E. 1086; Central Ry. Co. v. State, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518; Gibbons v. Brittenum, 56 Miss. 232, 241; Brayton v. Merithew, 56 Mich. 166, 22 N. W. 259; Bank v. Holland, 99 Va. 495, 504, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898; Black on Interpretation of Statutes (2d Ed.) p. 587.

We also think that the argument of practical convenience urgently demands this view and that if not adopted there must result much confusion in the interpretation of the Code and of its successor, the Civil Practice Act. Taking the present case as an illustration it would be requiring a good deal of the courts and the bar if on a consideration of sections 443 and 438 in 1921, finding that service of the summons without the state was permissible as those sections then read without an order of publication, they were then compelled to trace the history of the two sections and of their various amendments for the purpose of ascertaining whether some one of the cases enumerated in subdivision 5 of section 438 had been specified before the adoption by section 443 of that subdivision or had been subsequently added.

[3] Adopting the view which we have, we think that the service made of the summons in this case without an order of publication was sufficient. Prior to the adoption of the amendment to subdivision 5 of section 438 already referred to, service of the summons under an order of publication would have been necessary. Code, § 638. But when the amendment of 1920 was adopted provision for such service without such order was clearly and unmistakably made. This resulted in a repeal or modification of the theretofore obligatory requirements of section 438.

[4, 5] Then coming to other considerations urged by respondent we do not think that any argument against the sufficiency of the service of the summons can be based upon the provision as it now stands that where service of the summons is made without the state without an order of publication it must appear by affidavit that a warrant of attachment granted in the action has been levied upon property of the defendant within the state. By reference to the practice and requirements before this amendment of 1920 was adopted it is argued that this affidavit must be made and presented before the summons is served and that that only could be done in case an order of publication was being obtained and that therefore the Legislature could not have intended to abolish the requirement for an order of publication. We do not take this view of this requirement of the statute. No time for making, filing, or serving this affidavit is specified, and we think that this requirement can be complied with by filing the affidavit as part of the judgment roll based upon service of the summons without the state and that when so filed as part of the judgment roll it will authorize and justify a judgment entered upon such service. The fact that in this case a warrant of attachment had been granted and levied upon the property of the defendant within the state was made to appear both by the certificate of the sheriff, such official certificate ordinarily being equivalent to an affidavit, and also by the affidavit of the appraisers, which indicated that such a warrant had been issued and property seized thereunder.

[6] It is in substance suggested rather than seriously argued that unless the affidavit specified in the statute is served with the summons outside the state the defendant would not receive such notice of the attachment as constitutionally he would be entitled to. We think there is nothing in this. The attachment is a provisional remedy in the action, and proceedings under it must abide the result of such action. Presumably a defendant would learn whether a levy under the attachment upon his property had been made and be fully advised in respect thereto. But independent of this he would not be deprived of his property under such a levy unless judgment in the action was finally recovered against him, and it would always be open to him by attacking the jurisdiction of such judgment to bring in question the validity of the warrant of attachment and secure relief from a levy thereunder if he was entitled thereto. There is nothing unconstitutional about this. Cook v. Gregg, 46 N. Y. 439.

Therefore, the order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in this court and the Appellate Division, and, of the questions certified to us, the first one should be answered in the affirmative and the second one in the negative.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Ordered accordingly.

(236 N. Y. 497)

BROWN v. TREGOE et al.

(Court of Appeals of New York. Nov. 20, 1923.)

1. Pleading ⇐34(3)—Liberally interpreted in favor of pleader.

A complaint challenged for insufficiency is entitled to a liberal interpretation in favor of pleader.

2. Libel and slander ⇐80—Complaint held to state a cause of action for libel if libelous per se.

In an action for libel, a complaint *held* to allege that plaintiff, under the names of "certain bureaus," was carrying on a mercantile agency business, and in connection therewith acted as manager of a similar business conducted by a corporation, and that while thus engaged defendant circulated a libelous statement which injured him, and to allege a cause of action, if the statement was libelous per se, though also alleging injury to the corporation's business.

3. Libel and slander ⇐89(1)—Statement must be libelous per se where no special damages alleged.

Where no special damages are alleged in an action for libel, the statement complained of must be libelous per se, in order to afford a recovery.

4. Libel and slander ⇐6(2)—Statements held to affect plaintiff's standing in business, and, if untrue, to be libelous per se.

Statements that plaintiff's business history had been subject to criticism, and that on at least one occasion he had lost his position, and that defendant's information tended "to criticize the paying qualities of plaintiff," and that he had been guilty of ungentlemanly practices, and that his mercantile agency was a proper subject for thorough investigation by prospective clients, would probably affect plaintiff's standing, honesty, and reliability in his business, and, if untrue, would be libelous per se.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Franklin H. Brown, trading as Creditors' Audit Collection Bureau and as Attorneys' Bureau of Collections, against J. Harry Tregoe and another. From a unanimous order of the Appellate Division (204 App. Div. 875, 197 N. Y. Supp. 901) affirming a judgment dismissing plaintiff's complaint, plaintiff appeals. Reversed, and motion denied.

Grant Hoerner, of New York City, for appellant.

Julius Henry Cohen, Theodore B. Richter, W. Randolph Montgomery, and Kenneth Dayton, all of New York City, for respondents.

HISCOCK, C. J. [1] This action is one of libel, and a motion was made to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. This motion was granted upon the grounds: First, that the action was brought to recover damages to a business owned and conducted by a corporation rather than to plaintiff individually; and, second, that the article complained of was not libelous per se. We are not able to accept the view thus taken, although it is not strange that the courts should have been misled by the rather confused assembly in the complaint of disjointed and irrelevant allegations. Arranging, however, these allegations in a more systematic and connected manner than was done by the pleader, and disregarding those which are irrelevant, and giving to the complaint thus framed that liberal interpretation to which it is entitled when challenged for insufficiency, we have, as we think, a pleading which does place the complainant individually in the status of a plaintiff.

[2] We have first a series of allegations which under permissible transposition are quite plain. They are to the effect that plaintiff was and for several years had been engaged in the mercantile agency business furnishing, publishing, and distributing mercantile reports, business reviews, and adjusting and collecting bills and accounts for his patrons; that he was "trading" as the Creditors' Audit Collection Bureau and as Attorneys' Bureau of Collections which, we suppose, may be interpreted to mean that he was carrying on his mercantile agency and collection business under those names. Then follow allegations to the effect that the American Protective & Credit Service Corporation is a domestic corporation and that the good will and business of the above-named "bureaus," although managed, conducted, and operated by the plaintiff, were "owned by the American Protective & Credit Service Corporation." Of course, it is difficult to understand how the good will and business of an occupation conducted by a private individual could be owned by a corporation, but that allegation is probably immaterial and at most only menaces the capacity of plaintiff to prove his cause of action as alleged. Then still farther follow a series of allegations that the American Protective & Credit Service Corporation established a branch office at Havana, Cuba, "which was operated by the plaintiff in connection with the Attorneys' Bureau of Collections and Creditors' Audit Collection Bureau," and that plaintiff "operating for and in conjunction with" said corporation "was

competing with the defendant in a similar business in the United States and Cuba"; that the defendants who were conducting the business of furnishing mercantile reports being envious of the success of the plaintiff "acting for and in conjunction with" the corporation above named and "with the intent and for the purpose of injuring the business, credit and good name of the plaintiff" and that of the corporation above named, maliciously published and circulated and distributed the alleged libel.

[3] When we extract from all of these allegations their material substance, we think they may be interpreted as meaning that plaintiff, under the names of the "bureaus" above specified, was carrying on the business described in the complaint, and that in connection with the conduct of this business which he himself owned and operated he was also acting as the manager of a similar business conducted by the American Protective & Credit Service Corporation, and that, while thus engaged, the defendants circulated a libelous statement which injured him and also (that being utterly irrelevant) the business of the corporation. The allegations thus interpreted allege a cause of action in behalf of plaintiff provided that the statement complained of was libelous per se, for no special damages are alleged.

[4] This article, after purporting to quote a long statement made by plaintiff, said about him, amongst others, the following things:

"We have not learned anything about the antecedents of Franklin H. Brown before he came to New York. He was for some years creditman for S. Stein & Co. * * * and lost his position there. Then * * * he became secretary of the Creditors' Audit & Adjustment Association which had been organized to look after embarrassed concerns, help them out, or put them through bankruptcy. * * * The information derived by our investigator relative to the personal characteristics of Franklin H. Brown * * * indicated that the house with which he was formerly connected, S. Stein & Co., were very critical, and inquiry should be made of them by anyone interested in the agency or who might use it in large transactions. This information tended also to criticize the paying qualities of Brown and that he had been guilty of ungentlemanly practices, but it was merely information coming into the hands of our investigator, and we have no means at all of verifying or disapproving it. What interests prospective users of the agency more than anything else is the manner in which its work is conducted, * * * and the promptness with which its remittances are made. In our judgment, in summing up this report, prospective users of the agency should satisfy themselves thoroughly as to its abilities and the character of the men back of it."

These allegations suggest that plaintiff's business history had been subject to criticism and that on at least one occasion he had lost his position; that people intending to use such an agency as he was conducting were interested more than in anything else in the manner in which its work was conducted and the promptness with which its remittances were made, and that defendants' information tended "to criticize the paying qualities of Brown"; that he had been guilty of ungentlemanly practices and that his agency was a proper subject for thorough investigation by prospective clients. Under proper innuendoes, we think that a jury at least would be permitted to say that when defendants, with the surrounding statements, reported that "the paying qualities" of Brown had been criticized, this would mean, either that he was in financial straits and thus unable to pay promptly, or else that he intentionally and improperly retained moneys which came into his hands in his collection business. The possession and exhibition of either of these qualities by plaintiff undoubtedly would impair his standing and character in his business where, as the article stated, promptness of remittances was especially important, and thus the article might be found to contain charges affecting plaintiff's standing, honesty, and reliability in the business which he is pursuing, and, if untrue, they would be libelous per se. Townsend on Slander, § 191; Moore v. Francis, 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810; Woodruff v. Bradstreet Co., 116 N. Y. 217, 22 N. E. 354, 5 L. R. A. 555; Hartnett v. Plumbers' Supply Ass'n of New England, 169 Mass. 229, 235, 47 N. E. 1002, 38 L. R. A. 194.

Thus we reach the conclusion that the disposition made of defendants' motion in dismissing plaintiff's complaint was erroneous, and that the orders appealed from should be reversed, with costs in all courts, and defendants' motion denied, with costs.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Orders reversed, etc.

(310 Ill. 534)

PEOPLE ex rel. EGAN, Bailiff, v. CITY OF CHICAGO et al. (No. 15673.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 8, 1924.)

1. Municipal corporations ⇐956(1)—Judges of municipal court of Chicago are "corporate authorities."

Corporate authorities being officers who are either directly elected by the people to be taxed or appointed in mode to which the people consent, judges of the municipal court of Chicago, under Acts 1905, p. 165, § 17, authorized by Const. art. 6, § 1, and article 4, § 34, and amended by Laws 1907, p. 225, are "corporate authorities," not with power to assess and collect taxes, but with control of the court's expenses, and empowered to incur indebtedness on the part of the city for that purpose, for which the council must provide by appropriation and levy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corporate Authorities.]

2. Statutes ⇐142—Act incidentally amending general law by implication held not invalid for failure to insert amended sections.

If Municipal Court Act (Laws 1907, p. 225), establishing a court in Chicago, and providing for its officers, being an act in relation to a municipal court in the city of Chicago, incidentally affected by implication previous existing general laws (Cities and Villages Act) in relation to the city and authorities, such incidental amendment by implication was not a violation of Const. art. 4, § 13, which requires the section amended to be inserted in the amendatory act; it being only where the law professes to be amendatory, or is so in its nature, that section 13 applies.

3. Statutes ⇐35½—Amendment to Municipal Court Act not adopted by popular vote held void.

Amendment of Laws 1919, p. 409, to Municipal Court Act (Laws 1907, p. 225) authorized by Const. art. 6, § 1 and article 4, § 34, and creating municipal court for Chicago, and creating office of bailiff, which was not adopted by popular vote, is void, and not authority for an order of the municipal judges fixing salary of assistant chief bailiff of the court at $3,000, nor of other bailiffs in amounts varying from $1,650 to $2,000, and hence mandamus will not lie to compel the city to pass appropriation for payment thereof.

Appeal from Superior Court, Cook County; Joseph B. David, Judge.

Petition for mandamus by the People, on the relation of Dennis J. Egan, Bailiff, against the City of Chicago and others. Judgment for relator, and defendants appeal. Reversed.

Francis X. Busch, of Chicago (Leon Hornstein and Ruth C. Nelson, both of Chicago, of counsel), for appellants.

John F. Power, of Chicago, for appellee.

DUNN, J. The superior court of Cook county overruled a demurrer of the city of Chicago and its mayor and aldermen to a petition praying for a writ of mandamus requiring them to pass an additional appropriation ordinance for the payment of the salaries of 24 deputy bailiffs of the municipal court of Chicago, and upon their election to stand by their demurrer it entered a judgment awarding the writ, from which they appealed.

The municipal court of Chicago, now consisting of 36 judges elected in the city of Chicago, was created by an act of the Legislature in 1905 (Laws 1905, p. 157) under the authority of section 1 of article 6 of the Constitution and the amendment proclaimed adopted on December 5, 1904, and known as section 34 of article 4. The act creating the court created the office of bailiff, and section 17 provided that the bailiff should appoint deputies of such number and at such salaries as might be fixed from time to time by orders signed by a majority of the judges and spread upon the records of the court, the salaries to be payable out of the city treasury in monthly installments, provided the salary of the chief deputy bailiffs should not exceed $2,500 per annum, and the salary of no other deputy bailiff should exceed $1,500 per annum. This act was submitted to a vote of the people, and was consented to by a majority of the voters at the general election held in November, 1905, in accordance with the requirement of section 34 of article 4. Section 17 was amended in 1907 so as to provide that the salary of the chief deputy bailiff should be $4,000 per annum and the salary of the assistant chief deputy bailiff should be $2,500 per annum, but leaving the provision in regard to the salaries of other deputy bailiffs unchanged. Laws of 1907, p. 225. This amendment was also submitted to a vote of the people, and was consented to by a majority of the voters. An act for further amending this section by raising the maximum for the salaries of deputy bailiffs other than the chief deputy and assistant chief deputy to $2,000 was passed by the Legislature in 1919, but no provision was made for submitting it to a vote of the people, and therefore it did not become effective. Laws of 1919, p. 409. On March 2, 1923, an order signed by a majority of the judges of the municipal court was spread upon the records of the court authorizing the bailiff to appoint a chief deputy bailiff at a salary of $4,000, an assistant chief deputy bailiff at a salary of $3,000, and 212 deputy bailiffs at various salaries ranging from $1,650 to $2,000. The city council was notified of this order and requested to make an appropriation of the amounts mentioned, but the appropriation ordinance passed contained appropriations

for the salaries of the chief deputy bailiff, the assistant chief deputy bailiff, and only 191 deputy bailiffs, instead of 212. The petition set forth these facts and prayed for a writ of mandamus requiring the council to make appropriations for the salaries of the omitted deputy bailiffs.

The objections which are made to the petition are that section 17 violates sections 9 and 10 of article 9 of the Constitution, because it imposes obligations and taxes for local purposes by other than the corporate authorities upon the people of the city; that it violates section 13 of article 4 because it amends various provisions of the Cities and Villages Act (Smith-Hurd Rev. St. 1923, c. 24) in relation to the fixing of salaries and the number of employees of the city without setting out the sections amended; and that the amendment of 1919 is unconstitutional because not submitted to a referendum.

Sections 9 and 10 of article 9 provide that the General Assembly may vest the corporate authorities of cities, towns, and villages with authority to assess and collect taxes for corporate purposes, but shall not itself impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes. Similar provisions in section 5 of article 9 of the Constitution of 1848 were held to be a prohibition to the Legislature from granting the power to assess and collect taxes to any other than the corporate authorities of the municipality to be taxed or from compelling a municipality to incur a debt without its consent. People v. Mayor of Chicago, 51 Ill. 17, 2 Am. Rep. 278; People v. Salomon, 51 Ill. 37; Harward v. St. Clair & Monroe Drainage Co., 51 Ill. 130. Since the adoption of the Constitution of 1870, sections 9 and 10 of article 9 have received the same construction, and have always been held to prohibit the Legislature from imposing taxes on the people of any district or granting power to do so to any other than corporate authorities of the district to be taxed, and the corporate authorities intended are such as have been elected directly by the people of the district or appointed in some mode to which they have given their consent. Updike v. Wright, 81 Ill. 49; Dunham v. People, 96 Ill. 331; Cornell v. People, 107 Ill. 372; Wetherell v. Devine, 116 Ill. 631, 6 N. E. 24; Herschbach v. Kaskaskia Island Sanitary District, 265 Ill. 388, 106 N. E. 942.

[1] The appellants contend that the judges of the municipal court fix the number of deputies and the amount of their salaries, and by that act impose upon the city an obligation which can only be removed by taxation, but that they are not corporate authorities, and the city cannot be compelled to meet by taxation the debt thus sought to be forced upon it. Corporate authorities have been defined in the decisions of this court as those officers who are either directly elected by the population to be taxed or are appointed in some mode to which the people have given their consent. Harward v. St. Clair & Monroe Drainage Co., supra; Cornell v. People, supra; Wetherell v. Devine, supra. The Municipal Court Act was adopted by a vote of the people of the city of Chicago. By this action they consented to the manner in which the number and salaries of the deputy bailiffs were to be fixed, and the judges to whom was committed that power became for that purpose the corporate authorities contemplated by the sections of the Constitution cited. It was said in People v. Salomon, supra:

"There is no prohibition which we have been able to discover, and we have been pointed to none, against the creation by the Legislature, of every conceivable description of corporate authority, and when created to endow them with all the faculties and attributes of other pre-existing corporate authorities. Thus, for example, there is nothing in the Constitution of this state, to prevent the Legislature from placing the police department of Chicago, or its fire department, or its waterworks, under the control of an authority which may be constituted for such purpose by a vote of the people, and endow it with power to assess and collect taxes for their support, and confide to it their control and government. Section 5 of article 9, would not be violated thereby, because the authority thus established, would be a corporate authority, and the purposes for which taxes could be assessed, are, undeniably, corporate."

The judges of the municipal court have by the consent of the people become corporate authorities, not with power to assess and collect taxes, but with control, so far as the law has confided it to them, of the expenses of the court and with power to incur indebtedness on the part of the city for that purpose, for which it is the duty of the city council to provide by the appropriation of money to pay it and the levy of taxes for that purpose.

The case of People v. Salomon, supra, involved the extension of the taxes of the South Park Commissioners, while People v. Mayor of Chicago, supra, involved the issue of bonds of the city of Chicago on the demand of the commissioners of Lincoln Park, and the two cases illustrate the application of the principle now under consideration; for as was said in the former case, the Legislature undertook in the Lincoln Park Case to compel the people of Chicago to incur a debt without either their own consent or that of their corporate authorities, for it was impossible to hold that the commissioners of that park were corporate authorities of the city of Chicago; while in the South Park Case the people of the towns of South Chicago, Hyde Park, and Lake, by voting for the law, made the commissioners corporate

authorities of the towns and empowered them to assess the requisite tax upon the property of the towns. The tax was really self-imposed by agents not directly named by the people, but by the Governor, by virtue of authority conferred by their vote.

The amendment of the Constitution (section 34 of article 4) authorized the General Assembly to pass any law, local, special, or general, providing a scheme or charter of local municipal government for the city of Chicago. It recognized the municipal courts authorized to be created in the city of Chicago as a part of the local municipal government and provided that—

"No law based upon this amendment to the Constitution, affecting the municipal government of the city of Chicago, shall take effect until such law shall be consented to by a majority of the legal voters of said city voting on the question at any election, general, municipal or special."

Section 29 of article 6 of the Constitution requires all laws relating to courts to be general and of uniform operation. One object in the adoption of the amendment was to authorize local and special legislation in relation to a municipal court in Chicago, to the abolishment of the offices of justices of the peace, police magistrates and constables within the city, and to the jurisdiction of justices of the peace in Cook county. The act in relation to a municipal court in the city of Chicago is local and special, and acts which are merely amendatory of it are necessarily local and special. They relate to a department of the municipal government of the city, and therefore affect the municipal government, and they are based upon the amendment of the Constitution, because without that amendment no special law relating to the municipal court can be passed. Therefore no amendment of the Municipal Court Act can take effect until it shall have been assented to by a majority of the legal voters of the city voting at a general, municipal or special election. The General Assembly acted upon this hypothesis for many years, and attached the requirement of a referendum to all proposed amendments until 1919. Amendments were submitted to the people, voted on and adopted in 1907 (Laws of 1907, p. 225), and in 1917. Laws of 1917, pp. 329, 333. Other amendments were submitted, voted on and defeated in 1911 (Laws of 1911, pp. 255, 260) and in 1915 (Laws of 1915, p. 360), and in 1913 a general revision of the act was passed by the Legislature, approved by the Governor, and submitted to the people, but was defeated (Laws of 1913, p. 212). In 1919, 1921, and 1923 amendments were passed by the General Assembly omitting the formality of a referendum. Laws of 1919, pp. 409, 411; Laws of 1921, p. 393; Laws of 1923, pp. 307, 310. These acts of the General Assembly are ineffective. In passing them it assumed an authority expressly denied to it by the amendment to the Constitution. The intention of the amendment is manifestly that the powers conferred by it on the General Assembly shall be exercised subject to the right of the people of the city to reject the result. The General Assembly has not the final power, but its legislation, so far as it is based on this amendment, is subject to a veto by an adverse popular vote.

It is argued that, although the original law required a favorable vote before going into effect, yet when it did go into effect it was the act of the Legislature, and is subject to amendment or repeal by the Legislature without such vote. Waugh v. Glos, 246 Ill. 604, 92 N. E. 974, 138 Am. St. Rep. 259, and Fields v. Leuders, 274 Ill. 562, 113 N. E. 916, are cited in support of this contention. In the former case the validity of an amendment to the Torrens Law (Hurd's Rev. St. 1909, c. 30, § 61) was questioned. That act provided that it should not apply to land in any county until adopted by a vote of the people of the county, and it was contended that a subsequent amendment was subject to the same proviso, but it was held not so. The Legislature had power to pass the law without any vote, and it derived its force from the act of the Legislature. The vote merely complied with a condition which the Legislature had required to the going into effect of the law. The principle is the same in the other case. It has no application here, where the Legislature is powerless to give effect to the law without a vote of the people. The amendment requires both the act of the Legislature and the vote of the people before any law based upon the amendment affecting the municipal government can take effect. The same act and vote must again concur before a law changing the previous one can take effect. It would be an entire perversion of the amendment, which was intended to confer on the people of Chicago control of legislation affecting their local government, if they should now learn that the whole power of such control is now in the Legislature; that having once adopted an act, they were without power to prevent the Legislature from entirely changing their scheme of government. The necessity of the referendum if they would retain the control of local government is shown by the legislation which has been cited which has been rejected.

[2] It is contended that section 17 amends the Cities and Villages Act (Smith-Hurd Rev. St. 1923, c. 24) in clauses 1 and 2 of section 1 of article 5 (section 65), section 2 of article 7 (section 101), section 1 of article 8 (section 123), and section 3 of part 2 of article 12 (section 172), in violation of the prohibition contained in section 13 of article 4 of the Constitution, against the

amendment of a section of an act without inserting the amended section in full in the new act. If section 17 amends by implication any of the sections or clauses referred to, it is still not subject to the objection made to it. The Municipal Court Act was an independent piece of legislation, and was complete in itself. It established a court within the city of Chicago, and provided for its officers, the manner of their selection, their terms of office and salaries, and the manner of their payment. All these things were a part of the single purpose of the act whose title was: "An act in relation to a municipal court in the city of Chicago." Incidentally, the act may have affected various general laws in relation to the city and its authorities. Such incidental amendment by implication of previously existing law is not a violation of the constitutional provision which requires the section amended to be inserted in the amendatory act. It is only where the law professes to be amendatory, or is amendatory in its nature, that the constitutional provision applies. People v. Wright, 70 Ill. 388; Hollingsworth v. Chicago & Carterville Coal Co., 243 Ill. 98, 90 N. E. 276; People v. Crossley, 261 Ill. 78, 103 N. E. 537.

[3] Section 17 as it is in force in the city of Chicago is the section which was passed by the Legislature in 1907 and adopted by the popular vote that year. The subsequent amendments are void. This section provides that the salary of the assistant chief deputy bailiff shall be $2,500 per annum, and the salary of no other deputy bailiff shall exceed $1,500 per annum. The order of the judges is that the salary of the assistant chief deputy bailiff shall be $3,000 per annum and the salaries of the other deputy bailiffs shall be amounts fixed for them severally and varying from $1,650 to $2,000 per annum. There is no authority of law for such an order, and the petition did not show any right to a writ of mandamus. The demurrer should have been sustained instead of overruled.

The judgment will be reversed.

Judgment reversed.

(310 Ill. 643)

PEOPLE v. CARRICO. (No. 15565.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 7, 1924.)

1. Criminal law ⇐190—Conviction for manslaughter after acquittal of murder by abortion not precluded by statute.

Where one charged with murder by abortion has by a conviction for manslaughter been acquitted of the offense of murder and granted a new trial, the fact that Cr. Code, § 145, defining involuntary manslaughter, contains the provision that, if such involuntary killing is committed in the prosecution of a felonious intent, the offense shall be deemed murder, and that criminal abortion is a felony, does not preclude a conviction for manslaughter.

2. Criminal law ⇐193½—Conviction for manslaughter acquittal of murder.

A conviction for manslaughter constitutes an acquittal on a charge of murder growing out of the same transaction.

3. Indictment and information ⇐189(8)—Person producing death by abortion may be convicted of manslaughter.

Where death results from a criminal abortion, the person committing the act may be placed on trial for manslaughter in the first instance, or may be convicted under an indictment for murder.

4. Homicide ⇐268—Evidence held for jury in prosecution for manslaughter by abortion.

Evidence *held* to raise question of guilt for jury in prosecution for manslaughter by abortion.

5. Criminal law ⇐470—Testimony that infection causing death was caused by abortion admissible.

In a prosecution for murder by abortion, medical testimony that infection resulting in death was caused by abortion *held* not inadmissible as being upon the ultimate issuable fact for the jury's determination.

6. Criminal law ⇐656(5), 1166½(12)—Remarks of court as to partisanship of witness error though not reversible.

In a prosecution for murder by abortion, colloquy between counsel and court and between medical witness and court, wherein the court expressed an opinion that the witness was not partisan in the case, *held* error though not ground for reversal, where the witness' testimony in no way tended to connect defendant with the crime charged.

7. Criminal law ⇐656(5, 9)—Court should express no opinion on veracity of witness or weight of testimony.

The court should express no opinion on the veracity of a witness or the weight of testimony, and should exercise care not to convey his opinion on the merits of the case to the jury.

Error to Circuit Court, Coles County; Walter Brewer, Judge.

Preston O. Carrico was convicted of manslaughter, and he brings error. Judgment affirmed.

Clark & Hutton and Acton, Acton & Snyder, all of Danville, for plaintiff in error.

Edward J. Brundage, Atty. Gen., Charles H. Fletcher, State's Atty., of Mattoon, and George C. Dixon, of Dixon (Harry I. Hannah, of Mattoon, of counsel), for the People.

PER CURIAM. Plaintiff in error was indicted for murder at the April term, 1922, of

the circuit court of Coles county. Several counts of the indictment charged murder by abortion by the use of instruments, and certain other counts charged murder by abortion by means of drugs. At the April term the case was tried, and the jury were unable to agree. The case was again tried at the following October term, and the jury returned a verdict of guilty of manslaughter. On motion of defendant a new trial was allowed, and at the April term, 1923, the jury found him guilty of manslaughter and also found his age to be 65 years.

[1] While the indictment in this case is unnecessarily prolix, it is clearly sufficient to sustain a conviction for murder under section 3 of the Criminal Code (Smith-Hurd Rev. St. 1923, c. 38), or a conviction for involuntary manslaughter under section 145 (section 363). The latter section provides:

"Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner."

There is a proviso added to this section which states:

"That where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder,"

—and plaintiff in error contends that this proviso prohibits a conviction for manslaughter in this case because criminal abortion is made a felony by the laws of this state. It is true that plaintiff in error might have been convicted of murder under either section 3 or section 145, but it is well settled that he cannot complain because the jury convicted him of the lesser offense of manslaughter. The verdict finding him guilty of manslaughter on the second trial in effect found him not guilty of murder.

[2, 3] A new trial having been granted he could not again be placed on trial for murder, but he could be tried for manslaughter. Brennan v. People, 15 Ill. 511. The law is well settled in this state that where death results from a criminal abortion the person committing the act resulting in the death may be placed upon trial for manslaughter in the first instance (Yundt v. People, 65 Ill. 372), or he may be convicted of manslaughter under an indictment for murder (Earll v. People, 73 Ill. 329; Howard v. People, 185 Ill. 552, 57 N. E. 441). The contention of plaintiff in error that he could not be put on trial for manslaughter under the indictment charging murder, after he had been granted a new trial under the circumstances appearing in this record, is without merit. The indictment charged manslaughter and the evidence offered by the people sustained the charge.

The conclusion of this court heretofore on this matter is not controlled or seriously modified by cases from other jurisdictions, such as Walker v. State, 123 Miss. 517, 86 South. 337, Parker v. State, 22 Tex. App. 105, 3 S. W. 100, and State v. Pruett, 27 N. M. 576, 203 Pac. 840, 21 A. L. R. 579. In this last case the argument contended for is given an exhaustive examination with a full review of authorities, but a review of these authorities will show that the facts and the law in the special cases are different from those presented here, and it is clear that the doctrine in the Pruett Case, even if admitted, is not directly applicable here, for there the defendant was indicted for murder and twice convicted of voluntary manslaughter. On the third trial he was convicted of involuntary manslaughter, and the court held that this was an acquittal of all higher offenses, and that the facts proved could not convict of involuntary manslaughter as defined by the statute. As we construe the Illinois statutes, they do not take the offense here charged out from under the definition of manslaughter, but define this and similar offenses, under certain conditions, to constitute also the more serious offense of murder. The greater offense includes the lesser. If the two offenses are so different, as contended by counsel for plaintiff in error, it would be practically impossible to support a conviction of manslaughter as the result of an indictment and trial for murder, yet under the wording of the statute the legality of such action is fully established.

We do not think there is any basis for the contention of counsel for plaintiff in error that the instructions given by the trial court in any way tended to intimate that the plaintiff in error was on trial for murder. Reading all the instructions together, we think it is very clear that under the court's instructions plaintiff in error could not be convicted of murder but only of manslaughter, and we do not think the jury could have been misled by the instructions given on that point, or that there was any error in the refusal or modification of instructions requested by the plaintiff in error with reference to the charge in the indictment. In our opinion the instructions showed with clearness that the plaintiff in error could not on this trial be convicted of murder and that the issue before the jury was that of manslaughter.

[4] The evidence in the case shows that the prosecuting witness, Harley Glenn Hutson, testified to acts of sexual intercourse with Irma Miller, as a result of which she became pregnant. He further testified that on February 23, 1922, he took her to the office of the plaintiff in error, Dr. Carrico, at Ashmore, telling the doctor that the witness' name was Harris and that Irma Miller was his wife, but that they did not desire to have

children at that time; that she was then taken into Dr. Carrico's private office, where she remained for some time. Hutson further testified to another similar visit to Dr. Carrico's office at Ashmore on February 28, and to a third visit on March 5. He further stated that at the first visit medicine was given the girl. With reference to the third visit he testified that when he went into the doctor's office he smelled chloroform and saw an instrument. The natural conclusion from his testimony, if it is to be believed, is that the girl had been operated upon. Hutson at the time of his testimony had an indictment pending against him by reason of the death of Irma Miller and before testifying had been promised immunity from prosecution. The girl died on May 15, 1922, Hutson marrying her several days before her death.

Two physicians called by the state testified that on the basis of their examination of the girl before she died she had been pregnant and that her death resulted from an infection caused by an abortion. The plaintiff in error testified that he never saw Irma Miller in her lifetime and that he had never seen Hutson before the first trial, and that Hutson was not in his office on the days to which Hutson testified. On the other hand, one witness testified to having seen Hutson and a girl in plaintiff in error's office. Another testified to seeing Hutson in a car with a girl and to being asked by Hutson where Dr. Carrico lived. Another testified to seeing Dr. Carrico talking to the occupants of a car on March 5, one of whom was Hutson. Another testified to seeing Hutson in front of Dr. Carrico's office on March 5. To meet this evidence the plaintiff in error called several witnesses, whose testimony as to the time they were with Dr. Carrico does not necessarily conflict with that of the witnesses who supported Hutson's testimony that he visited Dr. Carrico's office with the girl.

Upon a careful consideration of the evidence we are of the opinion that the issue here presented is fully covered by what was said by this court in People v. Haas, 293 Ill. 274, on page 275, 127 N. E. 740:

"The question of the guilt of the defendant was a question for the jury. Where evidence is conflicting, depending upon the credibility of opposing witnesses, the verdict will not be set aside as against the weight of the evidence unless it is so palpably conflicting as to indicate that the verdict was based upon passion or prejudice."

[5] It is further contended by counsel for plaintiff in error that the trial court erred in admitting testimony by physicians to the effect that the infection resulting in the death of Irma Miller was caused by an abortion. It is urged that the witnesses were thus permitted to give opinions on an ultimate fact determinable only by the jury. That there had been an abortion may be, and perhaps is, necessarily a conclusion by medical witnesses from other more detailed facts, but the existence of an abortion is in itself a physical fact and one upon which opinion evidence may be asked of medical men. The mere fact of an abortion is not itself the crime. The physical commission of the abortion is, however, one of the elements of the crime. We do not think it necessary that a competent witness should, in describing what he found as a physical fact, as to which testimony is properly admissible, be required to use phraseology other than that ordinarily employed for the description of such a fact. The evidence submitted in this case we think was properly admitted under the rulings and reasoning of this court in People v. Hagenow, 236 Ill. 514, 86 N. E. 370, and People v. Patrick, 277 Ill. 210, 115 N. E. 390. The issue here is not the same as that in People v. Schultz, 260 Ill. 35, 102 N. E. 1045, where the offense charged was that of rape, and the medical witness was permitted to testify that in his opinion the injury had been occasioned by rape. There the witness was testifying as to the conclusion that the offense charged had been committed; here he is testifying as to one of the physical elements to be proven in order to establish the commission of the offense. We do not think reversible error was committed by the trial court in admitting the testimony of the medical witnesses that is objected to by plaintiff in error.

[6, 7] It is also urged by plaintiff in error that the trial judge committed prejudicial error in his comments upon the testimony of one of the medical witnesses. At one point the following colloquy took place:

Mr. Lee: "We object. This witness is a partisan in this case."

The Court: "No; I don't think so."

At another point, when the same witness was on the stand, the following colloquy took place:

The Witness: "Judge, I want it understood that I am no partisan in this case."

The Court: "Yes, Doctor; I have taken care of that."

We have often said that a judge should express no opinion concerning the veracity of a witness or the weight of evidence and that he should exercise care not to convey to the jury his opinion of the merits of the case. People v. Lurie, 276 Ill. 630, 115 N. E. 130; Synon v. People, 188 Ill. 609, 59 N. E. 508; Lycan v. People, 107 Ill. 423. If the witness to whom the judge in this case directed the remarks had been one who was connecting plaintiff in error with the crime, it would have been serious error for the judge to indicate that he thought the witness was not a partisan. These two remarks occurred during the examination of Dr. Nathan Starr, who was called to attend Irma Miller during

her last illness. He described her condition, but did not give any testimony that connected plaintiff in error with the conditions he found. He testified that it was his opinion that the girl had been pregnant and that she had suffered an abortion, but, he specifically stated that he could not tell whether it was induced or spontaneous. He stated specifically that he did not find any wounds or lacerations of the genital organs and that the septic poisoning which caused the girl's death might have been introduced from the outside or it might have been created on the inside of the body. It was for the jury and not the judge to determine whether the witness was a partisan or was interested ar prejudiced, and the judge should not have expressed any opinion on that question. Under other circumstances it might have required a reversal of the judgment, but in view of the character of the testimony given by the witness we do not think that plaintiff in error was prejudiced by the statements of the judge.

While the evidence is conflicting, two juries who saw and heard the witnesses have found plaintiff in error guilty of the criminal act charged. We find no error in the record which justifies setting aside the judgment of conviction, and it is therefore affirmed.

Judgment affirmed.

(310 Ill. 506)

PEOPLE ex rel. RICKER, County Collector, v. CHICAGO, M. & ST. P. RY. CO. (No. 15612.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 7, 1924.)

1. Highways ⇐127(1)—Submission to voters need not specify proportions of tax for road or bridge use.

Under Counties Act, § 27, the proposition submitted to the voters as to whether taxes in excess of those otherwise authorized shall be levied for road purposes need not specify the proportions of such tax intended to be used for roads or bridges.

2. Highways ⇐127(1)—Vote authorizing tax does not constitute levy thereof.

A vote by taxpayers authorizing the levy of additional taxes for road purposes does not constitute a levy of the tax, a resolution by the board designating the several purposes being necessary to constitute the levy.

3. Highways ⇐127(1)—Validity of tax not affected by prior ineffective levies.

That two attempted tax levies for road purposes were ineffective, because of failure to comply with Revenue Act, § 121, does not affect the validity of a subsequent levy pursuant to the same authority.

4. Schools and school districts ⇐103(1)—Tax levied after first Tuesday in August void; curative act inapplicable.

A tax levied by a school board after the first Tuesday in August is void, the invalidity of which is not cured by Laws 1923, p. 612, or School Law, § 190, validating such tax levies previously made, though the certificate of levy has not been returned to the township treasurer until after that date; such act being inapplicable where the levy itself was not made before the required date.

Appeal from Kane County Court; S. U. Hoover, Judge.

Proceeding by the People, on the relation of D. D. Ricker, County Collector, against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed in part, and reversed in part.

John A. Russell, of Elgin (Edgar R. Hart and Sidney F. Blanc, both of Chicago, and Glenn T. Johnson, of Aurora, of counsel), for appellant.

Charles L. Abbott, State's Atty., and Roy R. Phillips, both of Elgin, for appellee.

THOMPSON, J. Pursuant to the provisions of a statute authorizing a system of state aid roads in the several counties of the state, Kane county designated certain roads to form its part of said system. In order to build, improve, and maintain its system of state aid roads, its board of supervisors decided that it was necessary to procure authority from the voters to levy an excess tax of $300,000 a year for a period of five years, which amounted to an annual tax of 50 cents on each $100 assessed valuation of all property in the county. Resolutions submitting to the people the question of levying the additional tax of 50 cents for the purpose of aiding in the construction of roads and bridges in the county were duly passed. The proposition carried, and the county board levied the additional tax. Appellant filed objections to the additional tax for 1923 extended against its property, in response to an application for judgment and order of sale. These objections were overruled, judgment was entered against the property of appellant, and it appealed.

At the September, 1920, meeting, the board of supervisors adopted a resolution levying a tax of $300,000 against all taxable property in the county, "to aid in the construction of roads and bridges in Kane county." This court sustained objections to this levy for the reason that it was not made in conformity with the requirements of section 121 of the Revenue Act (Smith-Hurd Rev. St. 1923, c. 120, § 109). People v. Chicago, Milwaukee & St. Paul Railway Co., 302 Ill. 347, 134 N. E. 744. At its September meeting in 1922 the board of supervisors of Kane county

adopted a resolution which in effect directed the county clerk to extend against all the taxable property in Kane county a tax at the rate of 49 cents on each $100 assessed valuation for roads and at the rate of 1 cent for bridges.

[1] Appellant contends that the resolution adopted at the December meeting in 1919, submitting to the people the question of levying the additional tax for the construction and maintenance of state aid roads in Kane county, is void, for the reason that this resolution should have stated how much of the additional tax was to be used for the construction and maintenance of roads and how much for bridges. This contention cannot be sustained. Section 27 of the Counties Act (Smith-Hurd Rev. St. 1923, c. 34) provides that, whenever the county board shall deem it necessary to assess taxes in excess of those otherwise authorized by law, it may submit the proposition to the voters of the county by adopting a resolution setting forth substantially the amount of the excess tax required, the purpose for which the same will be required, and the number of years such excess will be required to be levied. The resolution adopted by the county board of Kane county conformed to these requirements. The purpose for which the additional tax was required was stated to be "the construction of roads and bridges" theretofore designated as state aid roads in Kane county. A map indicating such roads was on file in the office of the county clerk and in the office of the state highway commission. Reading the entire resolution, it is clear that the additional tax was to be levied for the purpose of improving this entire system. This general designation of the purpose was sufficiently specific in the resolution calling the election. After the voters of the county authorized the county board to levy the additional tax for the general purpose of improving the state aid roads of the county the taxpayers had the protection of section 121 of the Revenue Act, because the additional tax could not be extended or collected until the annual tax levy had been made.

[2] Section 121 of the Revenue Act provides that the county board shall annually, at its September session, determine the amount of all county taxes to be raised for all purposes, and that when the levy is for several purposes the amount for each purpose shall be stated separately. The authority of the county board to levy taxes is limited by the constitution and by statute, and the only way this limit can be extended is by the authorization by the voters of an additional tax for a specified purpose for a specified period. A favorable vote on the proposition to authorize the board to levy an additional tax does not levy the tax. It simply authorizes the county board to levy a tax in addition to taxes otherwise authorized by law. The board must adopt a resolution making the tax levy (Chicago & Eastern Illinois Railroad Co. v. People, 218 Ill. 463, 75 N. E. 1021), and it is this tax levy resolution that must designate the several purposes for which the taxes are levied (People v. Chicago, Burlington & Quincy Railroad Co., 301 Ill. 270, 133 N. E. 764).

[3] The fact that the county board in 1920 and in 1921 failed to conform to the requirements of section 121 of the Revenue Act has no bearing on the question of whether the 1922 levy is valid. The voters have authorized the county board to extend an additional annual tax of $300,000 against the taxable property in Kane county for the purpose of improving the roads designated as state aid roads, and the county board must specify each year the amount of tax that is to be used for the construction of roads and the amount that is to be used for the construction of bridges. As different sections of road are to be built each year, these amounts will probably vary. If any taxpayer feels that the county board is not making a proper division of the additional tax, he has the opportunity to appear before the board and present his views. The 1922 tax levy, while irregular in form, met the requirements of the statute and was properly sustained.

[4] Appellant also objects to the tax extended against its property by school district No. 39. It is stipulated that the annual tax levy was made by the board of directors at a meeting held August 7, 1922, which was after the first Tuesday in August. This court has held repeatedly that a tax levied by a school board after the first Tuesday in August is void. People v. Rich, 301 Ill. 80, 133 N. E. 671; People v. Chicago & Alton Railroad Co., 306 Ill. 525, 138 N. E. 105. Appellee contends, however, that this tax is legalized by an act which provides that:

"Wherever, before the passage and approval of this act, a board of directors or a board of education of a school district has returned its certificate of tax levy to the township treasurer after the first Tuesday of August of any year and the township treasurer has returned the certificate to the county clerk before, on or after the second Monday of August, any such certificate of tax levy shall be considered valid and of the same effect as if the certificate had been returned to the township treasurer on or before the first Tuesday of August and had been returned by the township treasurer to the county clerk on or before the second Monday of August." Laws 1923, p. 612.

This act does not meet the situation presented here. If the board of directors had met and made the tax levy as the statute directs it to do, but had failed to return the certificate within the time required, the situation presented under those circumstances would be the situation covered by the act quoted. Provision is made in section 190 of the School Law (Smith-Hurd Rev. St. 1923, c. 122, § 213) for the situation covered by the

act quoted, so the act of 1923 adds nothing to the laws that already existed. In this case it is stipulated that the meeting at which the tax was levied was not held before the first Tuesday in August, and so there was no valid levy made. It is the action of the board of directors in ascertaining the amount necessary to be raised by special tax for educational and building purposes for the ensuing year in a school district which constitutes the levy of the tax, and the certificate of the tax levy is merely evidence of such action, upon which the county clerk is authorized to act in the extension of the tax. People v. Cox, 301 Ill. 130, 133 N. E. 705.

The act on which appellee relies does not purport to validate a tax levy, where the levy was not made at a meeting held before the first Tuesday in August. There is nothing said in People v. Illinois Central Railroad Co., 301 Ill. 288, 133 N. E. 779, in conflict with this holding. It does not appear from the published opinion that the levy was not actually made prior to the first Tuesday in August. The record in that case only shows that the certificates were not made, dated, and certified until after the time designated in section 190 of the School Law, and it was properly held that such neglect did not vitiate the assessment. This record shows that the tax levy is void because it was made at a meeting held after the first Tuesday in August, and the validating act does not purport to cure this defect. The objection to the school tax should have been sustained.

The judgment is reversed as to the school tax, and affirmed as to the special county road tax.

Reversed in part.

(310 Ill. 493)

PEOPLE v. KAWOLESKI. (No. 15624.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 7, 1924.)

1. Criminal law ⇐94—First offense under Illinois Prohibition Act is misdemeanor of which county court had jurisdiction; information not alleging former conviction.

The first offense under Prohibition Act is a misdemeanor, punishable by a fine or imprisonment in a local place of detention, and where an information based on a first offense did not charge the former conviction which would have been required to warrant punishment or imprisonment in the penitentiary, the county court had jurisdiction.

2. Criminal law ⇐950(4)—Affidavit for new trial on ground constitutional rights were denied in entering plea of guilty held insufficient.

Affidavit in support of motion for new trial, on the ground accused was deprive of his constitutional rights at the time he entered his plea of guilty, in that he had no attorney, and did not understand the English language, *held* insufficient to require reversal.

3. Criminal law ⇐1206(2)—Illinois Prohition Act does not violate constitutional requirement requiring penalties to be proportioned to nature of offense.

The Prohibition Act, providing for auxiliary penalties, such as confiscation of vehicle or enjoining use of building, in addition to the penalty of fine and imprisonment, is not invalid as violating the constitutional provision requiring penalties to be proportioned to the nature of the offense.

4. Costs ⇐285—Provision authorizing state's attorney's fees to be taxed and applied on salary held not invalid.

The statutory provision, authorizing state's attorney's fees to be taxed and applied when collected, on payment of his salary (Smith-Hurd Rev. St. 1923, c. 53, § 19), is not invalid merely because of the statutory provision putting state's attorneys on a salary basis.

Error to Kankakee County Court; Henry F. Ruel, Judge.

Frank Kawoleski was found guilty of violating the Illinois Prohibition Act, and brings error to review the judgment overruling motions to vacate and set aside the judgment and for new trial, and in arrest. Affirmed.

Frank J. Burns, of Kankakee, for plaintiff in error.

Edward J. Brundage, Atty. Gen., Anker C. Jensen, State's Atty., of Kankakee, and George C. Dixon, of Dixon, for the People.

FARMER, C. J. An information sworn to by M. N. Hextell was filed by the state's attorney June 21, 1923, in the county court of Kankakee county, charging Frank Kawoleski with violating the Illinois Prohibition Act (Smith-Hurd Rev. St. 1923, c. 43, §§ 1–50). The information contained 13 counts. The first 11 counts charged him with unlawfully selling intoxicating liquor, the twelfth count charged him with unlawfully possessing intoxicating liquor for the purpose of sale, and the thirteenth count charged him with unlawfully keeping intoxicating liquor for sale in prohibition territory. On the same day the information was filed a warrant was issued, and Kawoleski was arrested, and brought before the court on the charges. He signed a jury waiver, and, the record states, in his own proper person he pleaded guilty after being duly warned and fully advised as to the consequences of his plea; that he persisted in the plea, and the court found him guilty as charged, sentenced him to jail for 90 days, and to pay a fine of $400 and costs of prosecution, and to stand committed to jail until the fine and costs were

paid. Defendant was at once placed in jail. July 11, he, by counsel, filed a motion to vacate and set aside the judgment, also a motion for new trial and in arrest. All of said motions were overruled. Defendant filed a motion to tax costs, and the court taxed $150 state's attorney's fees ($15 under each of 10 counts), $5 clerk's fees, and $1.55 sheriff's fees, to all of which rulings of the court defendant excepted. He sued a writ of error out of this court to review the judgment, on the ground constitutional questions are involved.

Counsel claims (1) the Illinois Prohibition Act is unconstitutional; (2) the prosecution should have been by indictment instead of information; (3) the law under which the state's attorney's fees were taxed is invalid; (4) defendant was denied his constitutional rights when his plea was entered; and (5) the information was insufficient, in that the charges were not specifically stated, without the aid of a bill of particulars, and no bill of particulars was furnished defendant.

[1] The information did not allege the defendant had been previously convicted of violating the Prohibition Law. The statute (section 34) provides that for the first offense the offender shall be fined not less than $100 nor more than $1,000, "or be imprisoned not less than sixty days nor more than six months." For any subsequent offense the offender shall be fined not less than $500 nor more than $1,500, "and be imprisoned in the state penitentiary not less than one nor more than two years." Defendant contends that, as the statute does not say where the offender is to be imprisoned for the first offense, and for the second offense he is required to be imprisoned in the penitentiary, the first offender may be imprisoned in the penitentiary; that to say, the imprisonment for the first offense is to be in jail renders the statute incomplete and ambiguous, and for that reason invalid. We held in People v. Chepanio, 306 Ill. 35, 137 N. E. 393, that the words "or be imprisoned," applying to the first offense, could not be construed to mean imprisonment in the penitentiary, but should be construed to mean a local place of detention. That this is so clearly appears from the provision as to punishment for the second offense, which requires the imposition of a largely increased fine, "and imprisonment in the penitentiary." The offense was a misdemeanor, and the information gave the county court jurisdiction. There was no charge in the information of a former conviction, which would have been required to warrant the punishment of imprisonment in the penitentiary. People v. Boykin, 298 Ill. 11, 131 N. E. 133.

There is no merit in the contention that the information is insufficient in form.

[2] It is contended defendant was deprived of his constitutional rights at the time he entered his plea. This is based solely on his affidavit made in support of his motion for a new trial, in which he says he had no attorney at the time he entered his plea; that he did not understand the English language well, and does not "read or write it fluently"; that he cannot comprehend English, except a few common phrases; that no interpreter was present; that he did not understand the proceedings in the county court, and was unable to procure witnesses and properly present his case, by reason of which matters he was greatly prejudiced and was at great disadvantage. He does not say he did not know what he was arrested for or that he did not know he was taken before the court on a charge of the violation of the Prohibition Law. He does not say he wanted an attorney or that he asked permission to consult one, and he does not say he had any defense to the charge, if he had secured an attorney and been given time to prepare for trial. It would be a dangerous precedent to reverse the judgment for the reasons set forth in the affidavit. We have no inclination to do so on the showing here made.

[3] It is claimed as the Prohibition Act provides for auxiliary penalties, such as confiscation of vehicle or enjoining use of building, in addition to the penalty of fine and imprisonment, the act violates the constitutional provision, which requires penalties to be proportioned to the nature of the offense. This contention cannot be sustained. People v. Elliott, 272 Ill. 592, 112 N. E. 300, Ann. Cas. 1918B, 391.

[4] The court taxed as costs $15 state's attorney's fees under 10 counts of the information—a total of $150—which defendant claims was contrary to law. It is argued that, since the act putting state's attorneys on a salary basis, the provision authorizing state's attorney's fees to be taxed and applied, when collected, on payment of the salary is invalid. Smith's Stat. 1923, c. 53, § 8, p. 1019. The question was considered and treated as valid by this court in Hoyne v. Danisch, 264 Ill. 467, 106 N. E. 341, and Hoyne v. Ling, 264 Ill. 506, 106 N. E. 349. The act concerning state's attorney's fees as an entirety was sustained in Butzow v. Kern, 264 Ill. 498, 106 N. E. 338. Defendant's argument has not convinced us we were wrong in thoses cases or, even if it were a case of first impression, that the act in the respect claimed is not valid.

The judgment is affirmed.

Judgment affirmed.

(310 Ill. 490)

NORTON v. GOODWINE. (No. 15596.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 7, 1924.)

1. Wills ⟸288(1)—Where attestation clause incomplete certain presumptions not indulged in.

Certain presumptions will be indulged in, when attestation clause is in due form and complete in substance, that do not obtain when incomplete and requiring additional facts.

2. Wills ⟸121—Attestation clause reciting all requisites of execution not necessary.

To make a valid will, it is not necessary that a formal attestation clause reciting all the facts necessary to a correct execution be added.

3. Wills ⟸302(1)—Execution of will determined by circuit court under ordinary rules.

On a hearing in the circuit court on question of the due execution of an alleged will, the question of fact presented is determined by the same rules and presumptions which control the trial of other questions of fact, and the instrument should be admitted to record if its genuineness and due execution are established by evidence competent to establish the will in chancery.

4. Wills ⟸302(1)—Will established in circuit court by evidence competent to establish in chancery.

Though the proof did not meet the requirements of section 2 of the Wills Act when will was offered for probate in the probate court, under section 13, on hearing in the circuit court, the party seeking probate may support the same by any evidence competent to establish a will in chancery.

5. Wills ⟸294—Secondary evidence admissible to prove will.

In case of the death of a witness to a will, secondary evidence introduced under section 6 of the Wills Act was sufficient proof that the witness signed the document.

6. Wills ⟸302(5)—Proof of will established by attestation clause, evidence, and inferences.

A will is entitled to probate, although there is no direct statement in the attestation clause, to comply with section 2 of the Wills Act, that witnesses saw testator sign will in their presence; but the proof may be based on the attestation clause, the evidence, and inferences legally arising therefrom.

7. Wills ⟸304—Execution of will sufficiently proved.

Where Smith-Hurd Rev. St. 1923, c. 148, § 2, provides that will shall be admitted to record on declaration of two witnesses that testator signed in their presence, etc., and section 6 provides for proof of handwriting of dead witnesses, although attestation clause failed to state that witnesses saw testator sign and acknowledge same in their presence, and the only witness alive testified that she did not remember testator signing the will, and did not think one of the three witnesses was present when she signed as witness, but when genuineness of testator's and other two witnesses' signatures was proved, although none of such witnesses saw testator execute the will, nor saw witnesses sign, such proof *held* sufficient that testator acknowledged the instrument.

Appeal from Circuit Court, Vermilion County; Augustus A. Partlow, Judge.

Proceeding for the probate of the will of Lafayette Goodwine. From a decree admitting the will to probate, Julia Anna Norton appeals, adversely to Frank S. Goodwine, executor. Affirmed.

Gunn, Penwell & Lindley, of Danville, for appellant.

G. H. Couchman, of Hoopestown, and O. M. Jones, of Danville, for appellee.

CARTER, J. The probate court of Vermilion county admitted to probate the purported last will and testament of Lafayette Goodwine, whose death occurred April 3, 1923. On appeal to the circuit court of that county, the will was admitted to probate, and from that order this appeal was taken.

The only issue in this case is the sufficiency of the evidence of the due execution of the will in view of the testimony offered, taken in connection with the wording of the attestation clause, which is as follows:

"We, the undersigned, hereby subscribe our names as witnesses to the foregoing instrument, in the presence of the testator, and at his request, and in the presence of each other, we, and each of us believing the said testator, at the time of so signing his name thereto, to be of sound mind and memory.

"[Signed] Jacob S. McFerren. [Seal.]
"Mamie B. Kavanaugh. [Seal.]
"C. M. Briggs. [Seal.]"

At the time the will was offered for probate, Jacob S. McFerren and C. M. Briggs were dead. Mamie B. Kavanaugh, the other witness to the will, testified that she signed her name to the same, but she could not remember the testator signing the will, and she did not think McFerren was there at the time she signed as a witness. Evidence was introduced to prove that the signatures of the testator and the two deceased witnesses were in their respective handwriting and were genuine, but none of such witnesses saw the will executed by the testator, nor signed by the witnesses thereto, and they knew nothing directly about the execution of the will. There is no direct statement in the attestation clause that the testator signed the will in the presence of the witnesses.

Section 2 of the chapter on wills provides:

"All wills * * * shall be reduced to writing, and signed by the testator * * * and attested in the presence of the testator * * * by two or more credible witnesses, two of whom, declaring on oath or affirmation, before the county court of the proper county, that

they were present and saw the testator * * * sign said will * * * in their presence, or acknowledged the same to be his * * * act and deed, and that they believed the testator * * * to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of said will * * * to admit the same to record." Smith-Hurd St. 1923, p. 2134.

Section 6 of the same chapter provides:

"In all cases where any one or more of the witnesses of any will * * * shall die, * * * it shall be lawful * * * to admit proof of the handwriting of any such deceased * * * witness, * * * and such other secondary evidence as is admissible in courts of justice, to establish written contracts generally in similar cases; and may thereupon proceed to record the same, as though such will * * * had been proved by such subscribing witnesses, in his, her or their proper persons." Id. p. 2135.

[1-5] It seems to be admitted that, if the attestation clause had been in due form, the testimony presented in this case was sufficient to justify the admission of the will to probate, but counsel for the appellant contend that, as the attestation clause did not recite that the testator signed the instrument in the presence of the witnesses, or acknowledged the will to be his act and deed in the presence of the witnesses, the presumptions which obtain where the attestation is in due form do not obtain here. It is necessary, under the statute, to prove that a will is legally executed. It is also true that, where there is an attestation clause in due form and complete in substance, certain presumptions will be indulged in (Kuehne v. Malach, 286 Ill. 120, 121 N. E. 391) that do not obtain where the attestation clause is not in due form or is otherwise incomplete, in which latter case additional proof is required.

"It is not necessary, however, that a formal attestation clause reciting all the facts necessary to a correct execution of the will be added to the instrument to make it a valid will." Schofield v. Thomas, 236 Ill. 417, 86 N. E. 122; Mead v. Presbyterian Church, 229 Ill. 526, 82 N. E. 371, 14 L. R. A. (N. S.) 255, 11 Ann. Cas. 426.

"It has been repeatedly held by this court that, on the hearing in the circuit court on the question of the due execution of the instrument involved, the question of fact presented is determined by the same rules and presumptions which control the trial of other questions of fact, and that the instrument should be admitted to record, if its genuineness and due execution are established by evidence competent to establish the will in chancery." In re Will of Porter, 309 Ill. 220, 140 N. E. 856.

Even though the proof in this case did not meet the requirements of section 2 of the Wills Act when offered for probate in the probate court, under section 13 (Smith-Hurd Rev. St. c. 148, § 15), on a hearing in the circuit court, the party seeking probate may support the same by any evidence competent to establish a will in chancery. In case of the death of a witness, or of two witnesses, secondary evidence is provided for and may be introduced under section 6 of the Wills Act. Such evidence was furnished in this case and was sufficient proof that the witnesses signed the document. (Hobart v. Hobart, 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151; More v. More, 211 Ill. 268, 71 N. E. 988); and it also appeared that the document bore the genuine signature of the testator.

[6] It is not required that there be a direct statement in the attestation clause in order to comply with section 2 of the statute on wills, and the proof need not be direct in supplying the requirements of said section but may be based upon the attestation clause, the evidence and the inferences legally arising therefrom. More v. More, supra. In this last case there was no direct written statement in the attestation clause, or anywhere else, that the witnesses believed the testator to be of sound mind, but it was held that inferences were properly drawn from the evidence as to that fact and as to the testator's signing the will in the presence of the witnesses. The reasoning in that case would justify the conclusion, on the facts proved in this record, that this will was signed or acknowleged by the testator in the presence of the witnesses. In the present case the attestation clause recited that the witnesses had signed the instrument at the testator's request, in his presence and in the presence of each other, and that they believed the testator at the time of "so signing his name thereto" to be of sound mind and memory; the only deficiency in the attestation clause being that they failed to state in so many words that they saw the testator "so sign." The court had the right to weigh and consider the evidence produced and the circumstances surrounding the execution of the instrument, and if the evidence justified, the instrument could be admitted to probate notwithstanding the fact that two witnesses were not produced who swore they saw the instrument signed by the testator or heard him acknowledge that the instrument was his act and deed. In re Will of Porter, supra; Mead v. Presbyterian Church, supra.

[7] Taking the attestation clause as a whole, together with the proof offered as to the genuineness of the signatures of the testator and the witnesses, we think there is sufficient proof that the testator acknowledged the instrument as his act and deed. There was no evidence of any other will having been drawn. The evidence introduced was proper under section 13 of the Wills Act, and in our judgment was sufficient to justify the circuit court in directing that the will be admitted to probate.

The judgment of the circuit court will therefore be affirmed.

Judgment affirmed.

(310 Ill. 568)

WINKELMAN v. WINKELMAN.
(No. 15597.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 7, 1924.)

1. Judgment ⟸584 — Upholding validity of deed held conclusive in subsequent action.

Judgment upholding validity of father's deed to daughter, in action involving question of whether daughter had exerted undue influence over father, *held* conclusive as to validity of deed in subsequent action between same parties, involving same issue.

2. Judgment ⟸720—Determination as to fact conclusive as to parties or privies in subsequent action.

When a fact or question has been actually and directly in issue in a former suit, and a judicial determination has been had on such issue by a domestic court of competent jurisdiction, the judgment of that court is conclusive so far as concerns the parties to that action and their privies, and cannot again be litigated in a future action between such parties or their privies in the same court, or in any other court of concurrent jurisdiction on the same or a different cause of action.

3. Judgment ⟸743(1)—Determining title conclusive in subsequent action.

Where the title to property is directly put in issue in a suit at law, or in equity, whether it be by the pleadings or in the course of litigation, and such issue is tried and determined, the judgment is conclusive in all other litigation between the same parties or their privies, whatever may have been the nature or purpose of the action in which the judgment is rendered, or of that in which the estoppel is set up.

Appeal from Circuit Court, Cook County; Ira Ryner, Judge.

Bill by John E. Winkelman against Laura M. Winkelman. Decree of dismissal, and plaintiff appeals. Affirmed.

Fassett, Abbott & Hughes, of Chicago (John E. Hughes and Edwin H. Abbott, both of Chicago, of counsel), for appellant.

Winston, Strawn & Shaw, of Chicago (T. Irving Christopher, of Chicago, of counsel), for appellee.

STONE, J. Appellant filed a bill in the circuit court of Cook county to set aside a deed to certain real estate made by Frederick A. Winkelman to his daughter, Laura M. Winkelman, appellee. A demurrer was sustained to this bill, and an amended bill was by leave of court filed. This bill was likewise demurred to, and the demurrer was sustained. Appellant abided his amended bill, and the same was dismissed for want of equity. He brings the cause here for review.

Appellee contends that this case is settled by a previous decision of this court in a case between the same parties on the same facts and subject-matter, and that the previous case constitutes a complete bar to this suit. The grounds of the demurrer sustained by the court are that the bill alleges no ground sufficient in law for setting aside the deed, and that it shows no equitable or legal title in the complainant.

This case was before this court in Winkelman v. Winkelman, 307 Ill. 249, 138 N. E. 637. Appellant states in his brief that the parties have agreed that this court shall pass upon the question whether the decision in that case is a bar to the maintenance of this action, and as both parties have argued that question we will decide it. This appellant there filed a bill to declare the conveyance to Laura M. Winkelman to be a constructive trust for the benefit of herself and the other children of the grantor. The facts concerning the making of the deed in question, as set out in both bills, are to be found in the statement of facts in the opinion filed in the case on previous hearing here. The bill in the original case alleged that the grantor was 77 years old, weak and feeble in body and mind, and easily susceptible to the influence and persuasion of appellee, and that she, with intention to defraud and deprive the complainant of enjoyment of the property, by undue persuasion, importunity, and the overpowering influence exercised by her, and by means of fraudulent representations, caused her father to execute to her the deed in question; that appellee was living with the grantor in his home, keeping it for him, assisting him in his business transactions, acting as his agent, supervising the care and nursing of him; and that he reposed in her complete confidence and trust. That bill also alleged that because of the grantor's age, health, situation, and the confidential relation to his daughter, and because of the confidence he reposed in her, he was induced by false representations and undue influence to convey the property to her; that the deed was not the act of the grantor, but was procured by gross abuse of trust and confidence; that his will and intent were overpowered and controlled; that she represented to him that she would divide the income among herself, her sister, and the complainant, and would on demand deed each a one-third interest therein; and that the grantor was, by reason of her influence and such representations, induced to convey the property to her, and that she therefore held the same in trust for said three persons.

The allegations of the bill in the present case are that the grantor was feeble in body and mind, and that his mentality was somewhat impaired; that appellee was at his home, managing the same for him, conducting all his business transactions, and was his nurse during his illness, and dominated and controlled him; that she had acquired and he had reposed in her his complete confidence and trust; and that a confidential relation

existed between them. The bill alleges that the deed in question was made as the result and solely by virtue of the confidential relation existing between the grantor and appellee. The bill further charges that, while the grantor was not mentally incompetent to make the deed when it was executed, yet by reason of his weakened mentality and his ill health, and the confidential relations between him and appellee, the deed was made and would not have been executed but for those reasons; that the making of the deed was induced solely by the confidential relations existing between the grantor and appellee. The bill prays that the deed be set aside, and appellee be decreed to make full and complete accounting of the income received by her from the property.

This court in the opinion filed in the original case herein referred to found:

"The proof abundantly shows the grantor was in full possession of his mental faculties and that he was engaged many years in the real estate business. That he was recognized as a man of good business ability and judgment is shown by the fact that he had been for many years chairman of the finance committee of the Universalist General Convention. That committee was composed of men of high standing, representing several states, and had charge of the property and investments of the Universalist church throughout the country."

The opinion also held that:

"Even if a fiduciary relation existed between grantor and grantee, as contended by appellee, the proof, to our minds, was wholly insufficient to authorize the decree. It is very clear Laura's father had great affection for her, and trusted her as any parent would love and trust a dutiful child. During his illness she attended to some business matters for him by his direction, and he gave her access to his safety deposit box in the Northern Trust Company. She collected checks given her father for rent, and deposited the money to her account in the bank; also paid the household expenses and the expenses of her father's illness, and did other things for her father of similar character. The proof does not show that the father was subject to the dominion and control of his daughter, but it does show the deed was the voluntary act of the grantor, that he had full knowledge of its nature and effect, and that it expressed his desire and purpose. In such case, even if a fiduciary relation existed, unless by reason of that relation undue advantage was taken of the grantor, the conveyance would not be affected. Pillsbury v. Bruns, 301 Ill. 578; Roche v. Roche, 286 Ill. 336; Kellogg v. Peddicord, 181 Ill. 22."

[1-3] It will be seen that this court found, on practically the same allegations of fact in the two bills, and the proof made on the former, as to the condition of the grantor and the relations of the parties, that the deed was not made through undue influence or lack of mental capacity on the part of the grantor, but because of the affection which he held for appellee, and a desire and purpose on his part that she should have the property in question. While it is contended by appellant that in this suit the deed is assailed on grounds different from the attack made in the previous case, we are unable to agree with that contention. In addition to the finding by this court that the proof did not show a promise on the part of Laura to divide this property among the other children of the grantor, the opinion explicitly finds and holds that the proof shows the grantor to have been of sound mind and free from undue influence on the part of his daughter Laura, and that the deed was not made by any undue influence arising out of a fiduciary relation existing between Laura and her father, if such did exist. The rule is that, when a fact or question has been actually and directly in issue in a former suit, and a judicial determination has been had upon such issue by a domestic court of competent jurisdiction, the judgment of that court in such case is conclusive, so far as concerns the parties to that action and persons in privity with them, and cannot again be litigated in a future action between such parties or their privies in the same court, or in any other court of concurrent jurisdiction, upon the same or a different cause of action. Reynolds v. Mandel, 175 Ill. 615, 51 N. E. 649; Wright v. Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773; 23 Cyc. 1215. Where the title to property is directly put in issue in a suit at law or in equity, whether it be by the pleadings or in the course of litigation, and such issue is tried and determined, the judgment is conclusive in all further litigation between the same parties or their privies, whatever may have been the nature or purpose of the action in which the judgment was rendered or of that in which the estoppel is set up. Peterson v. Nehf, 80 Ill. 25; Kelly v. Donlin, 70 Ill. 378.

It is of first importance, both in the observance of private rights and the public good, that a question once adjudicated by a court of competent jurisdiction shall be considered as finally settled and conclusive upon the parties, subject only to proceedings in a court of review. Fayerweather v. Ritch, 195 U. S. 276, 25 Sup. Ct. 58, 49 L. Ed. 193. Practically all of the grounds now urged as reasons for setting aside the deed in question in this case were urged in the original case, where appellant here sought to have the deed declared a constructive trust. This court held against appellant in all of his contentions. The question, so far as he is concerned, is settled, and the decree of the circuit court will therefore be affirmed.

Decree affirmed.

(310 Ill. 432)

PEOPLE v. ENSOR. (No. 15580.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 7, 1924.)

1. Receiving stolen goods ⇐1—Elements of crime stated.

Before there can be a conviction for receiving stolen property, it must be shown (1) that the property has in fact been stolen by a person other than the one charged with receiving it; (2) that the one charged with receiving it actually received the property stolen, or aided in concealing it; (3) that the receiver knew the property was stolen when he received it; (4) and that he received it for his own gain, or to prevent the owner from again possessing it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Receiving Stolen Goods.]

2. Receiving stolen goods ⇐8(1)—Proof of automobile theft and possession by defendant later held not to raise presumption of.

Proof that an automobile was in fact stolen, and was shortly afterwards found in defendant's possession, raised the presumption that he stole it himself, and therefore excluded the presumption that he was the receiver of the stolen property.

3. Receiving stolen goods ⇐7(6)—Proof of larceny of goods held not to sustain conviction for receiving them.

Proof of guilt of larceny of automobiles in question *held* not to sustain a conviction of receiving stolen goods.

4. Criminal law ⇐369(9)—Proof of larceny, disconnected with offense, held inadmissible.

Proof of a larceny wholly disconnected with the offense of receiving stolen goods, which was charged, was inadmissible, because not tending to establish the fact in controversy.

Error to Circuit Court, Peoria County; Theodore U. Green, Judge.

Marion Ensor and another were convicted of receiving stolen goods, and the named defendant brings error. Reversed.

George W. Sprenger, of Peoria, for plaintiff in error.

Edward J. Brundage, Atty. Gen., Ernest J. Gabraith, State's Atty., of Peoria, Virgil L. Blanding, of Moline, and Ren L. Thurman, of Peoria, for the People.

THOMPSON, J. Marion Ensor and Charles Bour were charged, by an indictment returned at the March term, 1923, of the circuit court of Peoria county, with burglary, larceny, and receiving stolen property. At the conclusion of all the evidence the state nolled all the counts, excepting the one charging receiving stolen property. Both were convicted on this count, and Ensor prosecutes this writ of error to reverse the judgment of conviction.

George Flora owned a Ford sedan, which he kept in a garage some distance from his home in Peoria. Saturday, January 27, 1923, he loaned his automobile to a man known by him as "Cheesal." He knew that this man lived in Peoria, and had seen his house, but he did not know his name, nor his street address. Cheesal returned to Flora the key to the garage, and reported to him that he had returned the automobile. The following Monday Flora discovered that the automobile was not in the garage, and on Wednesday he found it in a public garage at Glasford, in Peoria county. He went to Glasford with a deputy sheriff, after Ensor and Bour had been arrested in the garage where the automobile was found. The motor number had been filed off recently, and dies for cutting new numbers were found in a bag near the sedan. Plaintiff in error denied all knowledge of the larceny of the car, denied that the car was in his possession, and claimed that he called at the garage to see the owner on business having no connection with the automobile in question. Cheesal did not testify, and there is no competent evidence in the record that he returned the car to Flora's garage.

[1-4] Before there can be a conviction for receiving stolen property, it must be shown (1) that the property has, in fact, been stolen by a person other than the one charged with receiving it; (2) that the one charged with receiving it has actually received the property stolen, or aided in concealing it; (3) that the receiver knew that the property was stolen at the time he received it; and (4) that he received the property for his own gain, or to prevent the owner from again possessing it. Granting that the evidence justifies the conclusion that the automobile in question was in fact stolen, and that it was found shortly thereafter in the possession of plaintiff in error, the presumption against plaintiff in error would be that he stole it himself. One person cannot be both the thief and the receiver of the stolen property. He cannot receive stolen property from himself. This record is entirely barren of any proof that plaintiff in error received the automobile in question from another person. There being no evidence in the record showing plaintiff in error guilty of the crime for which he has been convicted, the conviction cannot stand.

In his opening statement to the jury the state's attorney related, over the objection of plaintiff in error, facts which indicated that he had stolen another automobile from the streets of Peoria a few days before Flora missed his automobile. On the trial, evidence of all the facts in the possession of the state's attorney regarding this second larceny was received. It was apparent from the time the state's attorney made his opening statement to the conclusion of the trial that,

if plaintiff in error was guilty of any offense, it was the offense of larceny. If the evidence proved anything, it proved that he had stolen both automobiles. There was never at any time anything said by the state's attorney in his opening statement, or proven by the evidence offered by him on the trial, that showed that plaintiff in error received either of these automobiles from another person. It is elementary that evidence of a larceny wholly disconnected with the offense charged is not admissible, for the reason that it does not tend to establish the fact in controversy. People v. Spaulding, 309 Ill. 292, 141 N. E. 196.

The judgment is reversed.

Judgment reversed.

(310 Ill. 495)

PEOPLE ex rel. EASTMAN, County Collector, v. CHICAGO, B. & Q. R. CO. et al.
(No. 15695.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 7, 1924.)

1. Schools and school districts ⟸103(1)—Statute held not to validate school tax made after time allowed.

Where school tax was not levied on or before the first Tuesday in August, as required by School Law, § 190, a levy made after that time was illegal, and was not validated by the curative act approved June 27, 1923 (Laws 1923, p. 612), which purports only to validate a tax when the certificate of levy has not been returned within the time specified by the statute.

2. Highways ⟸127(2)—Certificate of levy of road and bridge tax should state amount required.

A certificate of levy of road and bridge tax of a town will not authorize levy of a greater rate of taxes than 50 cents on the $100 where it does not state the amount required to be levied, but only certifies the rate.

Appeal from Lee County Court; John B. Crabtree, Judge.

Proceeding by the People, on the relation of Charles H. Eastman, County Collector, against the Chicago, Burlington & Quincy Railroad Company and others. From a judgment of county court sustaining objections of defendant to judgment for certain taxes, the County Collector appeals. Affirmed.

Mark C. Keller, State's Atty., H. A. Brooks, and E. E. Wingert, all of Dixon, for appellant.

Dixon & Dixon, of Dixon (J. A. Connell and C. S. Jefferson, both of Chicago, of counsel), for appellees.

FARMER, C. J. This appeal is prosecuted by the county collector of Lee county from a judgment of the county court sustaining objections of appellees to judgment for certain taxes for school purposes and certain taxes for road and bridge purposes.

[1] The objections to the school taxes were that no levy was made until after the first Tuesday in August. Section 190 of the School Law (Smith-Hurd Rev. St. 1923, c. 122, § 213) requires the levy to be made on or before the first Tuesday in August, and a certificate of the levy returned to the township treasurer, who is required to file it with the county clerk on or before the second Monday in August. That no levy was made until after the time fixed by statute is not disputed, but appellant contends the tax was validated by the curative act approved June 27, 1923 (Laws 1923, p. 612). That act does not purport to validate a tax which was never attempted to be levied until after the time required by the statute had passed, but only purports to validate a tax when the certificate of levy has not been returned to the township treasurer or county clerk within the time specified by the statute. We have held that any action of the board in levying the tax must be taken before the first Tuesday in August; otherwise, there can be no tax legally levied. People v. Wabash Railway Co., 296 Ill. 518, 129 N. E. 823; People v. Chicago & Alton Railroad Co., 306 Ill. 525, 138 N. E. 105. Failure to file the certificate of levy within the time prescribed by the statute will not affect the validity of the tax. People v. Cox, 301 Ill. 130, 133 N. E. 705. The act relied on by appellant was not intended to and could not validate a tax when the levy was unauthorized.

[2] The objection to the road and bridge tax of Lee Center township was that the certificate of levy did not state the amount required to be levied. The certificate states that the majority of the board of auditors had consented to levying a greater rate of taxes than 50 cents on the $100; that the board, in writing, consented to a levy of 66 cents, and the commissioner certified he determined to levy for roads and bridges 66 cents. It is nowhere stated in the certificate of levy the amount necessary to be raised for the purposes for which the tax was levied. It was held in People v. Ross, 272 Ill. 63, 111 N. E. 548; People v. New York Central Railroad Co., 271 Ill. 231, 110 N. E. 848; People v. Cairo, Vincennes & Chicago Railway Co., 266 Ill. 557, 107 N. E. 779; and People v. Chicago, Indiana & Southern Railroad Co., 265 Ill. 622, 107 N. E. 229, that such levy was not a compliance with section 56 of the Road and Bridge Act (Smith-Hurd Rev. St. 1923, c. 121, § 62), which requires the commissioner to determine and certify the amount necessary to be raised. A certificate of the rate, only, is not sufficient. On the hearing of the objections to the road and bridge tax the commis-

sioner testified that the amount it was determined to levy was the same as the amount levied the previous year; that he did not have the figures of the previous levy, but that it was between $7,000 and $8,000; that his intention was to get the maximum amount a 66-cent rate would produce. Appellant moved to amend the record to show that a levy of 66 cents would produce the amount of $7,500, and that the words "66 cents" in the certificate of levy where the amount should have been stated be stricken out, and $7,500 inserted. The record does not show appellant secured any ruling of the court on the motion, and the record was never amended. Under the decisions above referred to, the levy of the additional tax above 50 cents on the $100 was void, and the court properly so held.

The judgment is affirmed.

Judgment affirmed.

(310 Ill. 454)

SLATER et al. v. SLATER. (No. 15139.)

(Supreme Court of Illinois. Dec. 19, 1923. Petition for Rehearing Stricken, Feb. 6, 1924.)

1. Dower ⇐41—Antenuptial contract in lieu of dower is binding.

Where one spouse by an antenuptial contract agrees to accept in lieu of dower the provision made in the contract, such contract is binding.

2. Husband and wife ⇐34—Antenuptial contract, with no provision for wife, not binding on her.

Where a wife has entered into an antenuptial contract, in which no provision is made for her, or, if it is made, it is disproportionate to property of intended husband, presumption exists that its execution was procured by designed concealment of the husband's property, and those claiming against her have burden of showing full knowledge by her at time of execution, or circumstances from which she ought to have had knowledge.

3. Husband and wife ⇐34—Evidence held to overcome presumption of concealment of husband's property in antenuptial contract.

In suit to free land from widow's claim of dower, evidence *held* to sustain antenuptial contract, and to overcome presumption of fraudulent concealment on the part of the husband as to the character, value, and extent of his property.

Farmer, C. J., and Cartwright and Duncan, JJ., dissenting.

Appeal from Circuit Court, Livingston County; Frank Lindley, Judge.

Partition by Walter Guy Slater and others against Mary E. Slater. Decree for plaintiffs, and defendant appeals. Affirmed.

C. F. H. Carrithers, of Fairbury, and Adsit, Thompson & Herr, of Pontiac, for appellant.

Livingston & Whitmore, of Bloomington, and E. A. Simmons, of Pontiac, guardian ad litem (Stella E. Whitmore, of Bloomington, of counsel), for appellees.

STONE, J. Appellees filed a bill in the circuit court of Livingston county, seeking to partition certain real estate owned by Chester G. Slater in his lifetime, and to free the same from any claim of dower by his widow, Mary E. Slater, appellant. The bill sets out an antenuptial contract between Slater and appellant, then Mary E. Gregg, dated August 21, 1918, by which appellant, for the consideration therein named, agreed to waive and release all interest which she might have in the property of Slater. The bill alleges that the contract was entered into with full understanding on the part of the widow. She answered the bill, denying all its material allegations, and alleging that the contract was without consideration and void, and that she was not fully informed as to Slater's property at the time she executed the contract. The chancellor sustained the antenuptial contract, dismissed the cross-bill of appellant, and decreed partition among the heirs of Slater, as prayed in their bill, free from dower right in appellant.

The question involved in this case is whether or not this contract barred the appellant's right of dower in the lands of Slater. They were married on August 26, 1918. At that time Slater was 69 years old and appellant was 51. He died on April 24, 1920. At the time of his death he was seized of 320 acres of land in Livingston and McLean counties, some lands in Indiana and Louisiana, and town lots in Livingston and McLean counties, besides several thousand dollars in personal estate. He executed a will on December 16, 1915, which was presented for probate, but probate was denied, because it was held by the probate court to have been revoked by his subsequent marriage to appellant. No appeal from this holding appears to have been taken, but his heirs later filed the bill for partition under consideration here. On reference to the master the latter found that the contract was void for want of valid consideration, and that it was a fraud on appellant's marital rights, and recommended that she be decreed to be entitled to dower in the land. The chancellor, however, sustained exceptions to the master's findings, and held that appellant had full knowledge and information as to the amount and value of Slater's property, and that there was no fraud or concealment practiced on her by Slater, or by any one acting for him.

Slater was a farmer, living about two miles from the village of Fairbury. Appellant lived in Fairbury, and for a number of

years prior to their marriage she and Slater were intimately acquainted. The record shows that in December, 1915, he deeded her two pieces of real estate in Fairbury, and that the contract in question was executed on August 21, 1918, just prior to their marriage. Appellees contend that the deed to these two properties was the consideration for her signing the antenuptial contract. Appellant says that this deed was a gift, pure and simple, and bore no relation whatever to the contract, though the contract recites that such deed is the consideration therefor. During the time in which Slater and appellant were acquainted, and during their marriage, Slater's real estate consisted of the same items, which fluctuated in value, as other items of real estate did during those years. Appellant had been the wife of Peter Gregg, a teamster living in Fairbury, and neither she nor her husband owned any property. She contributed to the maintenance of the household by doing laundry work for others. Slater's wife died in 1911. In 1912 Slater purchased the property in which the Greggs lived and the lot adjoining it, on each of which was a four-room house. Appellant was divorced from her husband in 1914 on the ground of habitual drunkenness.

The evidence of appellees consists of the testimony of E. A. Agard, an attorney at law of Fairbury, who drew Slater's will and the antenuptial contract in question, and numerous letters by Slater to the appellant. Except as to matters of formal proof, Agard was the only witness of appellees in their case in chief. He testified that he was Slater's attorney in his lifetime; that he had known him for a number of years; that he had taken the acknowledgment to the deed executed in December, 1915; that he had called the appellant to his office on December 9, 1915, prior to the making of the deed, and told her that Slater had called him to his house and told him that he wanted to make a will; that he had prepared a deed conveying the Fairbury property to the appellant; that he and the appellant were to be married as soon as his health permitted; that appellant had agreed to enter into an antenuptial contract, releasing all rights she might acquire in his property by virtue of the marriage and in consideration thereof. He testified that Slater directed him to deliver the deed to appellant but to keep it from record until some future time; that Slater asked the witness to see appellant, and see if that was her understanding concerning their marriage. Agard also testified that when he called appellant to his office he asked her if it was her understanding that she was to receive none of Slater's property, and that she stated that it was; that he asked her if she realized that she was giving up a good deal; that Slater owned four 80's of land in Livingston county, an acre in Cropsey, three-fifths of 150 acres in Indiana, three-fifths of the same amount of land in Mississippi or Louisiana, and from $5,000 to $20,000 worth of personal property; and that witness gave her the approximate values of the property. He also stated that appellant told him that she understood that, but that she was not marrying Slater for his money. Witness stated that he then delivered the deed to her, and had her acceptance thereof witnessed, and that she gave it back to him in accordance with Slater's request that it be put in witness' custody and not recorded until later, and that in case Slater died appellant was to go to Agard and get the deed and have it recorded. The witness also testified that he drew the antenuptial agreement and the will; that he had the antenuptial contract at the time the deed was executed and had delivered it to Slater at that time.

The original contract has been certified to this court for inspection. It appears to have been just as originally written, except that the date has been erased and the date of actual execution, August 21, 1918, has been inserted. Appellant claims that the statement of Agard that he had drawn the contract at the time the deed was delivered, in December, 1915, could not be true, because a close examination of the original contract shows it had been previously dated in October, 1916, nearly a year after the date of the deed.

Appellant testified that she went to Agard's office in December, 1915, that he told her that Slater was very ill and had asked him to prepare his will, that Slater had made a deed to her of the Fairbury lots, and that Agard asked her if she would accept the deed. She testified that she said she would, and that Agard called two witnesses and delivered the deed to her. She stated that Agard did not say at that time that Slater told him that they had agreed to enter into an antenuptial contract, or that the deed was to be the consideration for that contract; that nothing was said about that matter. She testified, also, that Agard said nothing about the property that Slater owned, but that she knew Slater intended to divide his property among his children.

Mary Romig, a witness for appellant, testified that she was staying at appellant's house when the latter and Slater were married; that Slater said he was taking appellant away a poor widow, but would bring her back a rich woman; that Slater told her that appellant did not realize how much he was worth.

In rebuttal Agard testified that he had discussed Slater's property and the antenuptial agreement with appellant at least three times; that the first time was when the deed was delivered; that the second time was in his office, four to six months later, when appellant and Slater were present; that at that time Slater had the antenuptial contract with him, and said that they had come to

have the witness tell appellant what the effect of the antenuptial contract would be if she signed it; that he told her then what Slater's property consisted of, and asked Slater if it was correct, and that the latter said it was; that appellant then said it made no difference what property he had—she was not marrying him for his property. Agard also testified that the third time the agreement was discussed was immediately prior to their marriage, when the same was executed; that appellant was then told that she would sign away all rights to Slater's property, and that he was counted a wealthy man, but that she stated she was not marrying him to get his money; that he had given her a home and that was all she wanted; that at that time the contract was signed, and the witness acknowledged the same and put it in an envelope and gave it to Slater. He also testified that Slater then asked him if the signing of the contract would prevent his (Slater's) giving appellant anything he wanted to, and that the witness told him it would not.

Appellant in surrebuttal produced a letter written by Slater from Logansport, Ind., dated December 29, 1916, in which he stated that he would do all he had promised her; that the contract would be ready to sign when he got back. She also testified that about a week after receiving this letter she and Slater went to Agard's office, and there they talked about Slater's property and the contract. She also testified that Slater gave the contract to Agard, and Agard asked if he had told her what property he owned, and Slater said that he had; that when they told Agard that they were not ready to be married at that time, he advised them not to sign the contract, but to wait until they were ready to marry, and come up with the contract. She testified that at that time Agard said something to her about the property which Slater owned but not its value; that at that time Slater told her she would not regret signing the contract as he would make provision for her in his lifetime. It is seen, therefore, that the testimony of appellant and the witness Agard is in conflict as to the time of making the antenuptial agreement and as to her understanding concerning the amount of Slater's property.

Slater wrote numerous letters to the appellant, many of which were introduced in evidence. In all of these Slater made strong protestations of love, and spoke of their marriage and numerous other matters. On November 15, 1915, he wrote:

"I have every confidence in you, dear. I want to get things arranged for you as we have always talked. I want you to have the little place on the corner."

On December 3, 1915, he wrote concerning his health, and further as follows:

"I am going to arrange my will. I want each one to have a share of my property, you included. I am going to give each of the children 80 acres, designating the places to each one. At the same time I do not relinquish the control of it. While I live they will have to pay me rent. It is theirs at my death—not before. I made a deed to you for both places where you live, last Monday. It is deeded the same way. It will be under my control while I live, but will be yours absolutely at my death. In disposing of it, I mean to the children, in retaining possession while I have it will give me just as much income as now. I have considerable other property—some in partnership with Tom. I shall not dispose of it now, only as to how it shall go, if I should be called suddenly. So you will see I am not going to put myself at the mercy of any of my children. They will be sure of their inheritance, and I of my living, for they will kick over the traces when I make you my wife; but you will be provided for, so we can enjoy ourselves together comfortably, without going out to wash by the day, if you prove out to be the wife I trust you will be to me."

On December 9, 1915, he wrote that Agard came on the 8th and made a memorandum of his will and took the same to his office; that Agard took the deed which he (Slater) had made for appellant and would call on her and have her accept it, and give custody of the deed to Agard until such time as it can be recorded; that he did not want the deed recorded at that time, because of inquisitive gossips; that in case he should die appellant was to go to Agard and get the deed. He also writes concerning the division of his property among his children:

"I did not give each one deeds as I thought I would, as Agard advised me not to do it. I made a will designating each piece of land I wanted each one to have, and all the way through with my other property. * * * I wrote Tom a 10-page letter, sent it to him, telling him just what disposition I made of everything. I told him I had given you a deed to these two little places, and if God saw fit to spare my life I would marry you, in all probability, and if I did I wanted to be friendly with all the children, as my marrying you would not deprive them of their inheritance. The rents from the land would more than keep me, and I could save up from this source, so I could leave something for my wife, if she outlived me."

On December 15, 1915, he wrote appellant:

"I want to get done with the will, so, if anything should happen sudden, I will have things as I want them. You don't know, Mary, how much better I feel to know you are provided for, if I should be called sudden. You will have a home, and you will always keep it clear of debt and in your own name."

On February 18, 1916:

"The way I am planning is to give you a good visit, then to come back here to look after things, and if my strength will permit will come often to see you until we get this crop raised. If you are willing to some arrangement like this, will get a marriage cont. made between us, so the children can't say you want me just

to get my property. After this contract is made, we can marry when we please. You will understand what a marriage contract means. It is simply this: Whatever I and you agree to give you will be all you can get, as you sign away your right to my property as my wife. It won't be a very bad one on you, as I want to fix things so out of the income from the property we can save up, so you will have something to go on after I am gone, and this amount will depend how saving and considerate you will be in the matter."

On March 11, 1916:

"I don't think Mrs. Hines has any designs on me. She draws a pension of $12 a month, and has for the last 27 years. I told her in our talk you were not wanting to marry me for money, as I had made my will, and you had always told me you did not want to come in to take their inheritance, and before we are married I should make a marriage contract with you, so you cannot take any share of my property, other than that named in the marriage contract. She said this ought to satisfy them of your love for me being honorable and not of a mercenary character."

On May 14, 1916:

"I wish we had married as soon as the law would have permitted us to do so. I believe in your sincerity of being willing to sign the contract, and you will never regret it. I told Tom all about our engagement, and of what you said in regard to signing the contract. You will not be a portionless bride by any means, as I shall arrange so we can save up from my income, so we can have something for you after I am gone. I love you too well to be stingy with you, but we will be comfortable and saving as we can, so as to have some money left to you. * * * I have written Agard a letter to-day about making out the marriage contract when I am well enough to come."

In his letter to her of September 29, 1916, he says:

"When I get back to you, the contract will be ready to sign as we have talked; provided you love me and want me, I will do all I promised you."

[1, 2] Where one spouse by an antenuptial contract agrees to accept in lieu of dower the provision made in the contract, such contract is binding; but where a wife has entered into such contract, and no provision is made in it for her, or if the provision made is disproportionate to the property of the intended husband, a presumption exists that the execution of the instrument was procured by designed concealment on the part of the husband of the amount of his property, and those who claim against her have the burden of showing that at the time she executed the instrument she had full knowledge of the nature, character, and value of her intended husband's property, or that the circumstances were such that she reasonably ought to have had such knowledge. Dickason v. English, 272 Ill. 368, 112 N. E. 65; Colbert v. Rings, 231 Ill. 404, 83 N. E. 274; Murdock v. Murdock, 219 Ill. 123, 76 N. E. 57; Kroell v. Kroell, 219 Ill. 105, 76 N. E. 63, 4 Ann. Cas. 801; Dunlop v. Lamb, 182 Ill. 319, 55 N. E. 354; McGee v. McGee, 91 Ill. 548. Parties to an antenuptial contract occupy a confidential relation toward each other. Taylor v. Taylor, 144 Ill. 436, 33 N. E. 532; Pierce v. Pierce, 71 N. Y. 154, 27 Am. Rep. 22; Kline's Estate, 64 Pa. 124; Hessick v. Hessick, 169 Ill. 486, 48 N. E. 712; Achilles v. Achilles, 151 Ill. 136, 37 N. E. 693; Graham v. Graham, 143 N. Y. 573, 38 N. E. 722.

[3] Much argument is devoted to the controversy as to whether or not the deed given by Slater to appellant in December, 1915, was a gift, or was intended as a consideration for the antenuptial contract executed nearly three years thereafter. Whether the deed was a gift by reason of the relations existing between them, or a part consideration for the contract, is of no consequence, if, as a matter of fact, appellant, at the time she entered into the contract with appellee, knew and understood the extent and value of Slater's property, and with that understanding signed the contract.

While the testimony of appellant and the witness Agard as to her knowledge concerning the extent of Slater's property is in conflict, much information on her part concerning that matter is shown throughout the record. In the first place, as we have seen, appellant testifies that on one occasion prior to the execution of the contract in Agard's office Agard told her about Slater's property. She says, however, that he did not speak about amounts or personal property. In Slater's letters to her, however, constant reference was made to the fact that he desired that his property be given to his children, that he proposed to retain a life interest in it, and that when they married they would be able to accumulate from the income of it something for her after his death. This is shown by his letter of December 3, 1915, and others. His letter of December 9, 1915, tells her plainly that he had willed not only certain lands to his children, but had done the same "all the way through with my other property"; that he had written his son Tom "just what disposition I made of everything." His letter of December 3, 1915, tells her about giving his real estate to his children, and that he had "considerable other property" which he would likewise will to them. His many references in letters to appellant to his different properties, coupled with their intimate relationship and frequent discussion of the marriage contract between them, show clearly that he made no attempt at concealment concerning the extent and value of his property, and that neither he nor any one for him practiced any fraud upon her. It is also evident, from the various passages in his letters to her, that she knew that the only property she was to receive

from him, aside from the two pieces already deeded to her, was such as they would save from the income of his property during his lifetime. In his letter of December 9, 1915, he told her that the rents from the land would more than keep him, and that he could save from this source, so that something might be left to her, if she outlived him. In his letter of February 18, 1916, after reminding her of the meaning of an antenuptial contract, he again told her that he hoped to save something for her from the income from his property, saying:

"And this amount will depend how saving and considerate you will be in the matter."

To the same effect is his letter of May 14, 1916.

These letters show that appellant must have understood, when she entered into the contract, not only the nature of Slater's property, but that she was waiving her right to any other than that which she had received or would receive as a result of their saving, and that she would receive nothing more. By his letter of December 9, 1915, he told her he had written Tom (his son), telling him of the disposition he had made of everything by will. She knew she was not included in that will, and does not now claim otherwise. We are of opinion that the presumption concerning concealment or want of knowledge on her part is entirely overcome by the evidence in the record. There is no evidence whatever of concealment on his part. On the contrary, his letters freely discuss his property.

Appellant says she understood that the real estate, only, was to be given to the children, and not the personal property, that she did not know what the personal property was, and that there was no representation to her that the personal property would go to the children. This contention is not borne out by the record. There is nowhere in the record any evidence that he ever represented to her that she would get any real estate whatever or that she would get any personal property other than what they might save out of his income. The only reference to personal property is that contained in his letters, telling her that he had willed all his property, other than real estate, to his children, and his representation to her that they would endeavor to accumulate out of his income something for her. This arrangement was evidently satisfactory to her. The record is silent as to whether or not there were such accumulations during the two years in which they lived together.

So it may be said that, without regard to whether the deed to appellant was a gift or constituted an executed consideration for the contract, the latter is nevertheless binding, for the reason that the record overcomes any presumption of fraudulent concealment on the part of Slater as to the character, value, and extent of his property. The chancellor, therefore, was right in dismissing appellant's cross-bill and decreeing partition of the land free from claim of dower by appellant.

The decree of the circuit court is therefore affirmed.

Decree affirmed.

FARMER, C. J., and CARTWRIGHT and DUNCAN, JJ., dissenting. We cannot agree with the decision of the court in this case. As we view it, the opinion is contrary to law, and it is certainly contrary to the principles of justice. To our minds the deed to appellant of the property of small value conveyed to her was never intended to form any part of a marriage settlement but was a gift by the grantor to her and was made more than two and a half years before the antenuptial agreement was executed. The evidence, as we view it, clearly shows that appellant knew she was relinquishing any right she might have as widow in her husband's property, especially the land; but it as unmistakably shows that appellant was promised that if she did sign the agreement her husband would make provision for her out of property other than the land. He was amply able to do so, as his personal estate was worth approximately $20,000, and he had the use of and income from the land. There can be no question that the evidence shows Chester G. Slater promised appellant if she would sign the agreement he would make provision for her if she survived him, and that she relied on his promise. Agard, Slater's attorney, testified that at the time the agreement was signed Slater asked him if the signing of the agreement would prevent him from giving appellant anything he wanted to, and Agard told him it would not. Slater made no provision whatever for appellant, and when, after his death, she went to his attorney to inquire what provision had been made for her, she was nonchalantly told that none had been made and that she could return to her washtubs.

It would serve no useful purpose for us to enter into an elaborate discussion of the testimony and the authorities, but in our opinion appellant was entitled to the relief she sought.

(310 Ill. 502)

CHICAGO & ALTON R. CO. v. INDUSTRIAL COMMISSION et al. (No. 15409.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 7, 1924.)

1. Master and servant ⟸405(4)—Evidence in compensation case held to prove lifting contributed to employee's death.

In workmen's compensation proceedings, following the death of employee as result of adhesions, evidence *held* to prove that injury from strain in lifting and handling heavy coupler contributed to employee's death.

2. Evidence ⟸127(4)—Manifestation of pain by holding hand on stomach held competent to prove injury.

In workmen's compensation proceeding, involving question as to whether the employee sustained injuries from strain in lifting heavy coupler, which contributed to his death, testimony that the employee manifested pain by holding his hand on his stomach just after his injury *held* competent, though not part of res gestæ.

3. Master and servant ⟸376(2)—Death from disease, aggravated by "accident," held compensable.

The death of an employee from pre-existing disease or condition, aggravated or accelerated under circumstances which can be said to be accidental, *held* death from injury by "accident" under the Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.]

Error to Circuit Court, Sangamon County; E. S. Smith, Judge.

Proceeding under the Workmen's Compensation Act by Martha J. Grant for compensation for death of her husband, James W. Grant, opposed by the Chicago & Alton Railroad Company, employer. Award of Industrial Commission was reversed by circuit court on certiorari, and claimant brings error. Judgment reversed, and award confirmed.

Andrus, Trutter & Crow, of Springfield, for plaintiff in error.

Henry L. Patton, of Springfield (William L. Patton, of Springfield, and Silas H. Strawn, of Chicago, of counsel), for defendant in error.

DUNCAN, J. Plaintiff in error, Martha J. Grant, widow of James W. Grant, deceased, was awarded compensation of $12 per week for 291⅔ weeks, amounting to $3,500, for the death of her husband while working at defendant in error's shops at Springfield. The award was confirmed on review by the Industrial Commission. A writ of certiorari was sued out of the circuit court of Sangamon county, and upon a hearing the circuit court reversed the finding of the Industrial Commission and set aside the award. This court allowed a writ of error.

The deceased had worked steadily for defendant in error for a year and a half prior to March 8, 1921, the date of his injury, without losing a day. Between 3 and 4 o'clock in the afternoon of the day on which he was injured he assisted in carrying a coupler weighing about 300 pounds. The coupler was about five feet long. Grant carried the small end, and two other employees the large end. Grant threw the coupler under the car to which it was carried. Within a very few minutes after Grant had performed this service, he passed around the end of a car, where another employee was at work, with his hand on his stomach. The employee, who was under the car, seeing Grant with his hand on his stomach, asked him what was the matter, and Grant replied that he was hurt. This witness stated that that was all Grant said to him, and that Grant then went to what the witness denominated "the shanty," and that was the last that he saw of Grant. He fixes the time he saw Grant as about 10 minutes to 4 o'clock. Another employee of defendant in error testified that Grant passed him about 3:30 or 3:35, and asked the witness what he was doing, and that he replied that he was putting some bolts in the "swing end"; that Grant was walking about as usual, and said to witness, "I must have hurt myself"; and that he then walked on. One of the employees who helped carry the coupler testified that they carried it about 50 feet, and that nothing out of the ordinary happened while they were carrying it; that after they had carried the coupler, and after Grant had thrown it under the car, he "told us to put the coupler up in there and walked away"; that the place "where the coupler was lifted and the car where Mr. Ruhm was working was about half a block;" and that he did not observe what Grant did after leaving and walking away.

The widow of the deceased testified that her husband came home that evening and said that he was suffering, and that he apparently suffered pain all night. He did not sleep that night. She kept hot water on him all night, and the next morning she called Dr. Meyer. Her husband died on Sunday morning, March 13, at 1:30 o'clock, leaving surviving him two children, Roy, 19, and Kenneth, 17, years of age, and the witness as his widow.

Dr. Meyer testified that early in the morning of March 9, 1921, he was called to the residence of the deceased and found him suffering from extreme abdominal pain, paroxysmal pains; that he was not in much shock at the time, but suffered from abdominal pains, which are characteristic of any intestinal irritation possible; that he gave

the usual medical treatment and left; that about 3 or 4 o'clock in the afternoon of the same day he was again called, and found him not so well, and suggested sending him to the hospital for further treatment; that he saw him that night, and his condition was worse; that he knew he had some abdominal pathology, because he had extreme pain and no bowel movement, and was beginning to show signs of shock; that when he saw the aggravated condition he decided to, and did, perform an operation on him at the hospital that evening, which revealed that the head of the large bowel, the cecum, and the appendix attached to it, had worked their way into the left inguinal region and had become adhered in that region; that he found a large mass of adhesions, and in trying to liberate the cecum brought out a mass of thick, yellow, creamy pus, which he drained, and then put the patient to bed again; and that he died the following Sunday, March 13. He further testified that the adhesions and the denseness of them proved that the deceased had had those conditions for weeks, and maybe months, the time being hard to determine, and that the conditions were such as could be aggravated or accelerated by a strain. In answer to a hypothetical question based on the facts proved, the doctor testified that, with the accumulation and adhesions and the abscess in his side at such a vital area, deceased's condition would naturally be aggravated by any jar or strain, or lifting, and that such jar, strain, or lifting would probably increase the conditions he found. He also testified that the bowels were obstructed by the adhesions and by kinks in the cecum, and for that reason there had been no evacuation of the bowels; that in attempting to evacuate the bowels, if it should be occasioned with difficulty and strain, that could have the same effect as a strain by lifting.

The foregoing is a complete summary of the evidence up to the date of Grant's death and from the time of the accident, so far as the record discloses. The testimony further shows that just after the death of the deceased, and on the day of such death, a clerk of the defendant in error called up one of the employees who had assisted Grant in carrying the coupler, and told him that Grant had died, and that he wanted the employee to make a statement and give him the facts as to how the accident occurred; that he did so, and that the clerk made up the report, and said he would have to send a report to every man on the C. & A.

It is the claim of the defendant in error that the record shows no competent evidence that there was an accident to Grant which arose out of and in the course of his employment; that, assuming that there was an accident, and that it arose out of and in the course of the employment, there is no evidence that it caused or contributed to the death of Grant; that no other conclusion can be reached, unless resort is had to conjecture and surmise purely. It is also claimed that the declarations of the deceased above disclosed are not admissible, because hearsay evidence or self-serving declarations, and are not part of the res gestæ. It is also argued that the evidence shows that the deceased's death, or the strain which aggravated his condition and contributed to his death, if his death was produced or contributed to by a strain, is attributable as well to a severe strain by the deceased while attempting to evacuate his bowels as to that of a strain by lifting and carrying the coupler and throwing it under the car. It is therefore claimed that the evidence leaves it in doubt as to whether the accident was the direct cause of the injury, and the cause or a contributory cause of his death. This last claim is not supported by the evidence, as the evidence does not show that there was an attempted evacuation of the bowels by the deceased, and it is all mere assumption on the part of the defendant in error that there was such an attempt made. The evidence clearly and circumstantially shows that the only strain to which the deceased was subjected was by the lifting and handling of the heavy coupler.

[1] The evidence in this case evidently could and should have been made much more definite than it appears in this record. This lack of definiteness, as is clearly apparent, is in not fully showing just what the deceased and the other two employees were intending to do, or were ordered to do, with the coupler. It is certain that it was the duty of these three employees to make some further use and disposition of the coupler, but all we get out of the evidence is that, after the deceased threw the coupler under the car, he told the other two employees to put the coupler "up in there and walked away." It would have been very material to show that there was something further for the deceased to do with this coupler in connection with the other two employees. However, the evidence sufficiently shows, circumstantially, that at this particular time he walked away from the other two employees after giving the instruction aforesaid; but why he walked away and did not further help them with their work is not disclosed. It is disclosed, however, that he did walk away very unceremoniously, and that from that place he walked by another employee, Ruhm, who testified that he passed him with his hands on his stomach and he said he was hurt. If all this evidence were competent, it would tend to show, with the rest of the evidence that followed, that he walked away from the two employees who were handling the coupler, because of the fact that he had sustained an injury, and was not able or did not feel like doing anything further with the coupler. The evidence does show circum-

stantially that he had an accident or an injury or severe strain, through handling the coupler, and that was what gave him the pain, and the rest of the evidence, including that of the physician, justifies the conclusion of the commission that he sustained an accident or a severe pain through a strain in handling the coupler, which contributed to his death in a little less than five days thereafter. This court has repeatedly ruled that facts may be proved by circumstantial evidence. The case was made out by circumstantial evidence, and we think the lower court erred in setting aside the award of the commission.

[2, 3] Conceding that the verbal statements made by the deceased, which are shown in the record to have been made after his injury, are not a part of the res gestæ, and therefore not admissible, still it was competent for the plaintiff in error to prove that he manifested pain by holding his hand on his stomach when he passed the employee who so testified, just after his injury. In Cicero Street Railway Co. v. Priest, 190 Ill. 592, 60 N. E. 814, this court held that it is proper to permit a witness to state how the plaintiff in a personal injury suit appeared with reference to pain and suffering. Such a witness may testify that the injured person appeared to be suffering pain, and state any natural manifestation of pain exhibited by him in connection with the injury, whether by groans, expression of the features, or in other ways. The deceased, by his action in holding his hands on his stomach, clearly manifested to the employee whom he passed just after he was injured that he was in pain, and this appears from the fact that the employee he was passing was so impressed with the idea that he was suffering with pain that he asked him the direct question as to what was the matter with him. So, excluding all the declarations of the deceased to the effect that he was injured, or that he must have hurt himself, or that he was hurt, the weight of the evidence shows that he was injured in the handling of the coupler; that he had suffered an accident within the meaning of that term in the Compensation Law (Smith-Hurd Rev. St. 1923, c. 48, §§ 138–172); that as a result of that injury, or the aggravation of his condition by the strain in handling the coupler, he died within five days of his injury—that is to say, that the accidental injury contributed to his death. Where a workman dies from a pre-existing disease or condition, if the disease or condition is aggravated or accelerated under circumstances which can be said to be accidental his death results from injury by accident. Acceleration or aggravation of a pre-existing disease is an injury caused by accident. Peoria Railway Terminal Co. v. Industrial Board, 279 Ill. 352, 116 N. E. 651; Baggot Co. v. Industrial Com., 290 Ill. 530, 125 N. E. 254, 7 A. L. R. 1611.

The judgment of the circuit court is reversed, and the finding and award of the commission are confirmed.

Judgment reversed and award confirmed.

(310 Ill. 550)

BAKER v. INDUSTRIAL COMMISSION et al. (No. 15548.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 7, 1924.)

1. Master and servant ⇐⇒416—Stenographic report in compensation case must be filed within time.

On petition to the Industrial Commission to review the decision of the arbitrator awarding compensation, while the stenographic report is not required to be filed simultaneously with the petition, both must be filed within the proper time to give jurisdiction to review the award.

2. Master and servant ⇐⇒416—Method of review under Compensation Act exclusive.

The method of review required by the Workmen's Compensation Act from decisions of the arbitrator is exclusive.

3. Master and servant ⇐⇒416—Delay in filing transcript in compensation case may be waived.

By not objecting that the stenographic report was not filed in time, and by participating in the proceedings thereafter, a party to a workmen's compensation suit may waive that question.

4. Master and servant ⇐⇒416—Arbitrator's decision in compensation case held to have become final, precluding trial de novo.

Where the petition for review of the arbitrator's decision was filed with the Industrial Commission in time, but objection to the failure to file the stenographic report in time was not waived, the arbitrator's decision became final, and the timely filing of the petition did not confer jurisdiction on the commission to hold the case open and grant a trial de novo, under Workmen's Compensation Act, § 19e, as amended by Hurd's Rev. St. 1919, c. 48, § 144, and Laws 1921, p. 456, amending the same section, to provide for a trial de novo, has no application, since it did not become effective until July 1, 1921.

Error to Circuit Court, St. Clair County; George A. Crow, Judge.

Proceeding under the Workmen's Compensation Act by John Baker, claimant, opposed by the East St. Louis Cotton Oil Company, employer. An award of compensation by the arbitrator was annulled by the Industrial Commission, and reinstated on certiorari by the circuit court, and the employer brings error. Judgment of circuit court affirmed.

Kramer, Kramer & Campbell, and Roland H. Wiechert, all of East St. Louis, for plaintiff in error.

M. R. Sullivan, of Granite City, for defendant in error.

CARTER, J. The defendant in error was injured on January 14, 1920, while in the employ of plaintiff in error in its plant in St. Clair county, by being struck on the head by a piece of iron or rock, which it is alleged in the application fell from a chain conveyor running overhead across the bin where he was working. The arbitrator found in favor of the applicant, and the Industrial Commission set aside such award. The circuit court set aside the order of the Industrial Commission, and made the order of the arbitrator final, and the case is now brought here by plaintiff in error for further review.

It is not admitted that the accident arose out of and in the course of the employment. There is a dispute in the testimony as to whether the evidence showed that the injury was the result of an accident, and in this connection there is a claim that the evidence does not show that the injury was directly the result of Baker's employment, but that it occurred as the result of an assault by a third person. The conditions surrounding the defendant in error's work were substantially as follows:

The building where he worked was about 400 by 90 feet, and contained 10 bins on one side, over which a chain drag ran, 10 feet from the floor, carrying cotton seed hulls, which were deposited in the bins, from which a conveyor conveyed the hulls into the mill. Defendant in error was in bin No. 3, and it was his duty to feed the hulls into the conveyor. Under the continuous chain drag there was a V-shaped trough, which, it is contended on behalf of plaintiff in error, prevented pieces of rock or coal from falling into the bin. The defendant in error, however, testified that the chain drag carried a rock in it to make it heavy, and that he was struck by such rock falling on his head when he was bending over, using his fork. According to certain testimony offered on behalf of plaintiff in error, the applicant, after the injury, stated that he thought he had been struck by some person, sometimes saying it was by Tag Hopkins, and sometimes that it was by Jimmie Hopkins, a brother of Tag. One of the witnesses testified to overhearing a conversation in the toilet of the plant between defendant in error and Jimmie Hopkins in which he heard Hopkins say to defendant in error:

"You go ahead; I will get you; I will sure get you."

The evidence shows that Tag Hopkins was not present at the plant on the day of the accident, or at least at the time of the injury, and it also appears that he was arrested at the instigation of plaintiff in error, but was apparently discharged on the trial. The evidence also discloses that no rock or other article was found in the bin where defendant in error worked, but that there was found near the doorway of the bin, some 5 feet distant from where he was working, a bolt with a small amount of fresh blood on it. The defendant in error was apparently knocked unconscious at the time of the injury, and was first taken to his boarding place and afterwards to the hospital, where he remained until about March 1, following. The physician for plaintiff in error testified that he had examined the defendant in error, previous to the time of the injury, for a syphilitic condition, although it is not shown that this condition had anything to do with the injury or its resulting effect. At the time of the injury the physician found a compound fracture of the skull, with pressure symptoms developing and the pulse getting worse, and he testified that he trephined the skull, after which the pressure symptoms continued, but the pulse improved. The patient developed severe spasms, for which he was treated, and there was a left-side paralysis, which continued for some time, and while the witness testified that the applicant was rational when he talked with him at his office, and witness did not think he was suffering from mental trouble, he also stated that he did not think he would improve over the condition as it existed at the time of the hearing. The defendant in error testified that at the time of the hearing he suffered pain; that his sleeping was affected; that he had fits or spells, when he would fall down, and his memory and mind had been affected; that since the time of the injury he had for a time washed dishes in a restaurant, but had to quit on account of his head.

The arbitrator found that defendant in error was employed by plaintiff in error, and that the work was carried on under the Workmen's Compensation Act (Laws 1913, p. 335); that defendant in error sustained the injury complained of, which arose out of and in the course of the employment; that his annual earnings were $1,350 for the preceding year, or an average weekly wage of $25.96; that first aid, medical, surgical, and hospital services had been furnished; that the applicant was entitled to receive $12 per week for 291 weeks and $8 for 1 week, as provided in paragraph (f) of section 8 of the act as amended (Laws 1921, p. 452), for the reason that the injuries sustained resulted in complete disability, rendering him wholly and permanently incapable of work, and thereafter a pension for life of $320 per annum, payable $23⅓ per month; that at the date of the decision the applicant was en-

titled to receive $720 compensation, accrued from January 15, 1920, to date of hearing.

The decision of the arbitrator was received by the Industrial Commission March 29, 1921. There were several motions to extend the time to file the stenographic report, made each month from April of that year until October, and the stenographic report was actually filed November 19, 1921. A petition for review was filed April 7, 1921. On December 13, 1921, counsel for the defendant in error appeared specially, objecting to the jurisdiction of the Industrial Commission to hear the petition for review, and moving to dismiss the plaintiff in error's petition for review, on the ground that the decision of the arbitrator was entered on the 29th day of March, 1921, and the stenographic report or agreed statement of facts had not been filed within the time required by the statute, and that therefore the decision of the arbitrator was final. Thereafter, on February 9, 1922, plaintiff in error filed a petition for a trial de novo, for the reason that the stenographic report had not been furnished, by the reporter who took the evidence at the hearing before the arbitrator, within 30 days of the filing of the petition for review. This motion was based upon amended paragraph (e) of section 19 of the Workmen's Compensation Act, passed in 1921, which act became effective July 1, 1921. Laws 1921, p. 456.

The defendant in error moved to strike the petition for a trial de novo from the files. This motion was overruled, and a trial de novo was granted, and the applicant was directed to introduce evidence and prove his case de novo, but he did not introduce any evidence or swear any witnesses. The award of the arbitrator was therefore set aside, vacated, and annulled, and it was held that the applicant was not entitled to compensation. The case was then taken by defendant in error to the circuit court, where a motion was made by plaintiff in error to dismiss the cause for the reason that the bond filed by defendant in error was not in accordance with the order of the Industrial Commission. The plaintiff in error also moved to quash the writ of certiorari. The circuit court set aside the order of the Industrial Commission, and held that the order of the arbitrator had become final at the time of the hearing and order entered by the commission, and that the commission was without power and jurisdiction over the award of the arbitrator. The court further held that plaintiff in error had waived any error which it had presented in its motion to quash the writ of certiorari as to the stenographic report of the additional proceedings presented before the Industrial Commission on the hearing on review not being filed within the time required by statute, by submitting itself to the jurisdiction of the court and arguing the case on its merits.

The petition for review, as stated, was filed April 7, 1921, which was within the time required by statute, and this, it is contended by counsel for plaintiff in error, gave the Industrial Commission jurisdiction of the particular case, and it is argued that, even though the stenographic report was not filed within 50 days from the time the arbitrator's decision was received by the Industrial Commission, the right given under the amendment to section 19, which went into effect July 1, 1921, accrued to plaintiff in error because it affected only the remedy or procedure in the particular case.

[1-4] While the stenographic report was not required to be filed at the same time the petition for review was filed, both the petition and the agreed statement of facts or stenographic report are required to be filed with the commission within the proper time in order to give it jurisdiction to review the award. Oelsner v. Industrial Com., 305 Ill. 158, 137 N. E. 116; St. Louis Pressed Steel Co. v. Schorr, 303 Ill. 476, 135 N. E. 766. The method of review required by the Workmen's Compensation Act was exclusive at the time the application and award by the arbitrator were filed. St. Louis Pressed Steel Co. v. Schorr, supra. By not objecting that the stenographic report was not filed within the time required, and by participating in the proceedings thereafter, a party to a workmen's compensation suit may waive that question. Taylor Coal Co. v. Industrial Com., 301 Ill. 381, 134 N. E. 169; Pocahontas Mining Co. v. Industrial Com., 301 Ill. 462, 134 N. E. 160. But neither of those cases holds that jurisdiction is obtained and retained if the stenographic report is not filed within the prescribed time, and the party entitled to make the objection does object and does not waive the question. The defendant in error had not waived the question of the time within which the stenographic report should be filed, but clearly showed his intention not to do so, and the award of the arbitrator had become final and binding upon the public authorities. Illinois Glass Co. v. Industrial Com., 302 Ill. 388, 134 N. E. 712. There was no pending procedure or remedy to which the amendment providing for a trial de novo could apply.

The amendment to paragraph (e) of section 19, passed in 1921, under which plaintiff in error claims the right to a de novo hearing, did not go into effect until July 1, 1921 (Laws 1921, p. 450). Some time prior to that date the award of the arbitrator had become final under paragraph (e) of section 19 as amended in 1919. Hurd's Stat. 1919, p. 1462. Without construing the amendment of 1921 referred to, it is sufficient to say that it has no application to this case.

Our attention has been called to no other authority, and we find none, which holds that the Industrial Commission has the right to make an order which would have the effect of holding the case open simply because the petition for review was filed in time under the circumstances here shown, so that the amendment providing for a trial de novo could apply. We think the circuit court rightly held that the Industrial Commission was without jurisdiction to make an order which had the effect of reviving a case which had already been finally determined.

In view of our conclusion, it is unnecessary to pass upon the evidence, or other questions raised in the record and briefs.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

(316 Ill. 467)

PEOPLE v. QUESSE et al. (No. 15558.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 6, 1924.)

1. Conspiracy ⟸43(1)—Indictment designating group against whom conspiracy directed sufficient.

Where an indictment designates a class or describes a group of individuals against whom a conspiracy is directed, it is not necessary that the names of such individuals be included in the indictment.

2. Conspiracy ⟸43(1)—Indictment charging conspiracy against owners of apartment buildings sufficiently describes class.

An indictment charging a conspiracy against all or a large part of the owners of apartment buildings in Chicago sufficiently describe a class or group against whom the conspiracy is directed.

3. Criminal law ⟸304(1)—Cognizance taken that owners of apartment houses in Chicago are numerous.

A court will take cognizance of the fact that Chicago is a large city, and that there are a large number of people there owning apartment houses.

4. Conspiracy ⟸43(1)—Count held to allege criminal conspiracy.

A count alleging a conspiracy to persuade janitors to quit work, unless owners of apartment houses would pay defendants large sums of money, *held* to allege a criminal conspiracy.

5. Criminal law ⟸878(3)—Counts held not identical; hence acquittal as to one not acquittal as to other.

A count charging a conspiracy to extort money from certain specified persons in addition to other persons whose names were unknown *held* not identical with a count alleging a conspiracy against owners of apartment buildings in Chicago; hence an acquittal as to one of the counts is not an acquittal as to the other.

6. Criminal law 878(1)—Verdict not too uncertain to sustain conviction.

A contention that a verdict finding defendants guilty as charged "in the seventh count or counts of the indictment" is too uncertain to sustain a judgment on the seventh count, in that it may mean guilty as charged in the seventh count, or some other count not specified, is without merit.

7. Criminal law ⟸893—Whether jury's intention can be ascertained, test as to sufficiency of verdict.

The test as to the sufficiency of a verdict is whether jury's intention can be ascertained with reasonable certainty, and in applying this test all reasonable intendments are indulged in to sustain the verdict.

Error to Second Branch Appellate Court, First District, on Error to Criminal Court, Cook County; John A. Swanson, Judge.

William F. Quesse and others were convicted of conspiracy, and they bring error. Affirmed.

Willard M. McEwen, of Chicago, for plaintiffs in error.

Edward J. Brundage, Atty. Gen., Robert E. Crowe, State's Atty., of Chicago, and George C. Dixon, of Dixon (Edwin J. Raber and Edward E. Wilson, both of Chicago, of counsel), for the People.

STONE, J. Plaintiffs in error, William F. Quesse, Eugene Fosdick, John D. Sullivan, Claude F. Peters, Robert Osterberg, Frank McWatters, George Watters, John Mattis, Peter Lagey, and Gus Anderson, were indicted in the criminal court of Cook county on a charge of conspiracy. There were 12 counts in the indictment. The last 2 were nolle pros'd. A separate verdict was returned as to each of the 10 defendants, finding him guilty in manner and form as charged "in the seventh count or counts of the indictment." The cause comes here on the common-law record.

The grounds upon which the plaintiffs in error seek reversal are, first, that the seventh count of the indictment is insufficient to sustain the verdict; second, that the verdict is uncertain and insufficient to sustain the judgment; and third, that counts 7 and 8 are identical in legal effect, and, since the jury returned no specific verdict as to the eighth count, the effect of the verdict is a finding of not guilty as to both the seventh and eighth counts.

The seventh count charges that on January 10, 1921, in Cook county, Ill., and for a long time prior thereto, divers large numbers of individuals owned and possessed apartment buildings and apartment hotels in the city of Chicago, which they leased to divers individuals as dwellings, and that in the business of conducting such apartments the owners thereof had in their employ persons known as jan-

itors; that the defendants, with intent to extort from the persons owning these apartment buildings and hotels large sums of money for their own use, did unlawfully conspire together and with divers other persons whose names are unknown, with intent to wrongfully induce and persuade the janitors to cease work as such, and to boycott the owners of the buildings and prevent their furnishing janitor service to their tenants, unless the owners of the apartment buildings and hotels should pay to defendants large sums of money, and that by means of the conspiracy the defendants unlawfully and knowingly obtained from the owners of the apartment and hotel buildings divers large sums of money. The eighth count is similar to the seventh, except that it charges that the conspiracy was directed against and money was extorted from four certain named individuals and divers other persons whose names were unknown to the grand jury.

[1-3] The first objection is that relating to the sufficiency of the seventh count of the indictment; it being urged that this count does not charge an offense, that the act charged is not a criminal offense, and that the count is insufficient, in that it neither designates a class nor describes a group of individuals against whom the conspiracy was directed, or specifically names them. Where an indictment designates a class or describes a group of individuals against whom the conspiracy is directed, it is not necessary that the names of such individuals be included in the indictment. Lowell v. People, 229 Ill. 227, 82 N. E. 226; People v. Smith, 239 Ill. 91, 87 N. E. 885; United States v. Stone (D. C.) 188 Fed. 838; Collins v. Commonwealth, 3 Serg. & R. (Pa.) 220; McKee v. State, 111 Ind. 378, 12 N. E. 510; Queen v. Peck, 36 Eng. C. L. 362. The indictment alleges that there were divers large numbers of individuals who were the owners and possessed of apartment buildings and apartment hotels in the city of Chicago. This court will take cognizance of the fact that the city of Chicago is a large city, and that there are doubtless a large number of buildings of the class referred to in the indictment, and therefore a large number of people who own, possess, and conduct the same. It would be unreasonable to expect the state to name the owners of all such buildings in an indictment where it charges conspiracy against all of such owners, or a large portion thereof. We are of the opinion that the indictment sufficiently charges or describes a class or group.

[4] Counsel's contention that the combination set out in the seventh count of the indictment does not show a criminal conspiracy is settled adversely in People v. Curran, 286 Ill. 302, 121 N. E. 637, where a similar count was held good. Nor can it well be doubted that a conspiracy on the part of a group of individuals to extort money, as charged in this case, is a conspiracy to do an unlawful act. Whether one may lawfully induce another to quit a particular service, or refrain from applying for such service, is not an issue in a case, where the one seeking to induce such conduct on the part of the employee does so, not for the benefit of the employee, but for the unlawful purpose of extorting money from the employer. The seventh count of the indictment is sufficient.

[5] Considering next the third point of plaintiffs in error, that counts 7 and 8 are identical in legal effect, we are of the opinion that that contention cannot be sustained. The eighth count charges conspiracy to extort money from certain specified persons, in addition to other persons whose names were unknown. While others whose names are unknown are referred to in this count, the language is not broad enough to include apartment and hotel owners as a class, as does the language of the seventh count. The eighth count does not, in our opinion, charge conspiracy against a class, and the counts are not identical. It follows that, while it may be said that a verdict of guilty on the seventh count is, in effect, a verdict of not guilty as to all other counts, a verdict of not guilty as to the eighth count is not in legal effect a verdict of not guilty as to the seventh count.

[6, 7] The principal contention of plaintiffs in error is that arising on the second assignment—that is, that the verdict is too uncertain to sustain the judgment; that, since it finds the defendants guilty as charged "in the seventh count or counts of the indictment," the same is uncertain, in that the language of the verdict may mean guilty as charged in the seventh count, or some other count not specified. The people urge that such objection to the verdict must be raised in the trial court, if it is to be available in a court of review. Plaintiffs in error admit that this is true as to objections to the form of the verdict, but they insist that this verdict is insufficient in substance, and that therefore it was a void verdict, and one to which objection may be raised at any time. We are unable to see the force of the argument of counsel for plaintiffs in error concerning the insufficiency of the verdict. The test as to the sufficiency of a verdict is whether or not the intention of the jury can be ascertained with reasonable certainty. If it can be, the verdict will be sustained. Lyons v. People, 68 Ill. 271; Stoltz v. People, 4 Scam. 168. In applying this test, a verdict is not to be construed with the same strictness as pleadings in criminal cases, but all reasonable intendments will be indulged in to sustain it. People v. Buckman, 279 Ill. 348, 116 N. E. 835; People v. Patrick, 277 Ill. 210, 115 N. E. 390; People v. Brown, 273 Ill. 169, 112 N. E. 462, Ann. Cas. 1918D, 772; People v. Tierney, 250 Ill. 515, 95 N. E. 447; People v. Lee, 237 Ill. 272, 86 N. E. 573.

It appears from the supplemental record filed on behalf of the people that the form of

verdict submitted to the jury contained the words, following a blank space, "count or counts," and the people contend that the words "or counts" were through inadvertence allowed to remain in the form given to the jury. Whether this be true or not, there is no uncertainty in the verdict finding the plaintiffs in error guilty on the seventh count, and the fact that the words "or counts" remained in the verdict is not sufficient to indicate any other intention on their part as to that count. The words "or counts" do not sufficiently describe or refer to any other count of the indictment to be construed as a finding of guilt on any such other count. Applying the rule that a verdict should be sustained where the intention of the jury can be ascertained with reasonable certainty, we are of the opinion that there is no sound basis for the contention that it may have been the intention of the jury to return a verdict of guilty on any count other than the seventh. The verdict, in not finding the plaintiffs in error guilty on any count other than the seventh, was tantamount to a verdict of not guilty on all other counts. The judgment was entered on the seventh count.

No errors are presented on the record, and the judgment of the criminal court will be affirmed.

Judgment affirmed.

(310 Ill. 486)

MEISTER v. CARBAUGH et al. (No. 15724.)

(Supreme Court of Illinois. Dec. 19, 1923. Petition for Rehearing Stricken Feb. 7, 1924.)

1. Constitutional law ⇐46(2)—Constitutionality of act not determined upon admissions.

The constitutionality of an act cannot be determined upon admissions and stipulations.

2. Statutes ⇐14—Amendment consisting of omissions from bill must be printed prior to passage.

An amendment consisting of omissions from a printed bill is within Const. art. 4, § 13, requiring the bill and all amendments thereto to be printed before the final vote is taken.

3. Statutes ⇐64(2)—Section containing exemptions to act cannot be held invalid and rest of act sustained.

Park Civil Service Act, § 11, relating to exemptions, having been considered at length by both houses, cannot be held invalid and the rest of the act sustained.

4. Constitutional law ⇐43(1)—Parties precluded from contesting validity of act after lapse of 12 years.

After a lapse of 12 years, parties have lost any right to contest the validity of an act on the theory it was passed in violation of Const. art. 4, § 13, requiring a bill to be printed before the final vote is taken, though there had been no prior judicial contest of the act's validity.

Appeal from Circuit Court, Cook County; Hugo M. Friend, Judge.

Bill by Frank Meister against H. C. Carbaugh and others. From a decree dismissing the bill plaintiff appeals. Affirmed.

Elmer J. Schnackenberg, of Chicago, for appellant.

Freeman, Mason & Igoe, of Chicago, for appellees.

Jay Clifford McCally and George A. Curran, both of Chicago (Werner W. Schroeder, of Chicago, of counsel), amici curiæ.

CARTER, J. This is a bill in equity praying that "An act relating to civil service in part systems" (Smith-Hurd Rev. St. 1923, c. 24½ §§ 78–113) be declared unconstitutional and void, and that the civil service board of the South Park Commissioners be restrained by injunction from proceeding thereunder. Appellees filed a general demurrer, which the lower court sustained, dismissing the bill for want of equity. From this decree the case has been brought to this court by appeal.

The validity of the act is contested on the ground that in its passage there was a violation of section 13 of article 4 of the Constitution requiring that "the bill and all amendments thereto shall be printed before the vote is taken on its final passage."

[1] It is charged by the bill and admitted by demurrer that the conference committee report recommending that the senate recede from its amendment to the extent that the three words, "chief of police," be stricken out of section 11 of the bill was not printed in either house before the vote on the final passage of the bill. It is an established rule that the constitutionality of an act cannot be determined upon the admissions or stipulations of the parties to a suit. Nakwosas v. Western Paper Stock Co., 260 Ill. 172, 102 N. E. 1041, Ann. Cas. 1914D, 467. We shall, however, assume the facts to be as alleged by appellant and as conceded by appellees in this case.

[2] It is contended by appellant that the issues raised here have already been fully decided by the cases of Neiberger v. McCullough, 253 Ill. 312, 97 N. E. 660, and McAuliffe v. O'Connell, 258 Ill. 186, 101 N. E. 419. In those cases we took the view that the constitutional provision here involved contained no ambiguity, and that the disregard of this provision would render an act invalid. Appellees seek to distinguish those cases by asserting that all of the bill had been here printed before final passage and that the amendment merely omitted three words therefrom. We cannot construe the constitutional requirement in such a manner as to

except from its application an amendment to a bill which consists of an omission from the bill itself.

[3] It is also urged that the omission of the words "chief of police" does not invalidate the entire section or entire act. The act here involved is a park civil service act. Section 11 is a section containing exemptions. Before the report of the conference committee the exemptions as altered by senate amendment read as follows:

"All elective officers, the general superintendent, the attorneys, the chief of police and one confidential clerk or secretary."

After the action by the two houses on the unprinted report of the conference committee the words "chief of police" were omitted. Section 11 of this act cannot be held invalid and the remainder of the act sustained. The omission of these words as the result of the conference committee action appears to have been a material consideration of the two houses in the enactment of the law. The issue here presented is not like that in People v. Brady, 262 Ill. 578, 105 N. E. 1. Nor, if the constitutional objections are here properly taken, is it possible for us to hold section 11 constitutional.

[4] But another issue presents itself in this case. The act here involved was passed by the General Assembly in 1911. It has been acted upon since that time, has been amended by the General Assembly at a succeeding session, and has for a number of years constituted a part of the state's legislative policy. The constitutional provision here involved was adopted for the purpose of preventing surprise in the enactment of legislation. We have often said that—

"Where a statute has long been treated as constitutional and important rights have become established thereunder, the courts may thereafter refuse to consider its constitutionality." Gregory Printing Co. v. De Voney, 257 Ill. 399, 100 N. E. 1066; Richter v. Burdock, 257 Ill. 410, 100 N. E. 1063; Gifford v. Culver, 261 Ill. 530, 104 N. E. 147.

The authorities just cited dealt with an act long in force and acted upon, where issues of constitutionality with respect to such act had been passed upon in cases already presented to this court. In the present case there are no prior decisions upon the constitutionality of the act involved, but we do not regard the doctrine announced in these cases as so limited in its application. We have here a constitutional provision dealing with the process of legislation and intended to prevent surprise in the enactment of law. The present law has gone into operation and has been applied for substantially 12 years without contest. We do not lay down a principle that constitutional provisions of this character regarding legislative procedure must be availed of promptly, but we do regard it as improper for us to upset, on a basis such as this, a law long applied without constitutional question. We are of the opinion that under facts such as these parties seeking to contest the validity of a law have lost by some 11 or 12 years' delay any standing that they might otherwise have in this court.

The principle here announced is not limited to cases in which there have been prior judicial contests of the validity of an act, though the decisions of this court cited above related to facts of that character. We regard the issue here presented as not dissimilar from that presented in the cases of Nesbit v. People, 19 Colo. 441, 36 Pac. 221 and Weston v. Ryan, 70 Neb. 211, 97 N. W. 347, 6 Ann. Cas. 922. The Nesbit Case involved a contest of the validity of an amendment to the Colorado Constitution adopted in 1884, and extending the legislative sessions in that state from 40 to 90 days. This Colorado amendment was attacked in 1894 as invalid on the ground that there had not been compliance with a constitutional requirement that a proposed amendment be entered in full on the journals of each house. The court declined to hold the amendment invalid for noncompliance with this constitutional requirement. The Nebraska case involved the validity of a Nebraska constitutional amendment of 1886 lengthening the sessions of the Legislature and increasing the compensation of members of the two houses. The amendment was first declared lost, and then, upon a recount of the popular vote, was declared adopted. Some 16 years later the validity of this amendment was contested, and the court said that "after sixteen years it is too much to ask us to set it aside." In the Colorado case it appeared that a constitutional requirement regarding the form of adopting a constitutional amendment had been violated, but the court held that lapse of time prevented an attack upon this ground. On the reasoning of these cases in other courts, as well as on the decisions of this court heretofore cited, we think the validity of this statute should not be permitted to be contested at this date.

The decree of the circuit court will therefore be affirmed.

Decree affirmed.

(310 Ill. 599)

VYVERBERG v. VYVERBERG et al.
(No. 15609.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 8, 1924.)

1. Equity ⟸442—"Bill of review" is nature of writ of error.

A "bill of review," pure and simple, and as distinguished from a "bill of review" for newly discovered evidence, or a bill in the nature of a bill of review, is in the nature of a writ of error, and is brought for error of law apparent upon the face of the decree itself, the decree for the purpose of the review including not only the adjudication but also the pleadings and the facts as found in the original cause.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill of Review.]

2. Equity ⟸464—Court precluded from investigation of evidence on bill of review for errors apparent on face of record.

On a bill of review for errors apparent on the face of the record, the court is precluded from an investigation of the evidence, since the decree to be examined in such case includes only the adjudication, pleadings, and the facts as found in the original cause, and, if the findings of the court upon matters of fact are not supported by the evidence, the remedy is by appeal or writ of error, and not by a bill of review.

3. Equity ⟸442—Bill of review a collateral attack upon decree, so far as purchaser of property concerned.

An attack upon a decree by a bill of review is collateral, so far as a purchaser of property involved, who was not a party to the suit, is concerned, and his title will be protected, if the court had jurisdiction of the parties and the subject-matter.

4. Courts ⟸33—Equity ⟸431—Jurisdiction of court in exercise of special authority complete and entitled to full faith and credit.

The jurisdiction of a court, in the exercise of special authority conferred by statute, must be made to appear by its record, but the jurisdiction of the court in the exercise of such special authority is complete, and its orders, when they appear to be entered in the exercise of such jurisdiction, are entitled to as full faith and credit as those of a court of general jurisdiction.

5. Equity ⟸442—Sufficiency of bond given to secure sale of land released of interests of insane wife held not to be considered on bill of review as against purchaser.

Whether court ordering sale of land released of dower and homestead rights of insane wife properly estimated the extent and value of her interest in the property in fixing bond required by Smith-Hurd Rev. St. 1923, c. 68, § 20, is not a question to be considered on a bill of review as against purchasers in good faith and for value.

6. Insane persons ⟸71—Rule stated as to when husband may have property sold released of dower and homestead of insane wife.

Smith-Hurd Rev. St. 1923, c. 68, § 17, permitting court to order sale of land released from homestead and dower rights of insane wife, where she has been insane continuously for a period of not less than one year before the filing of the petition, does not require that she must have been adjudged insane for that length of time.

7. Insane persons ⟸71—Purchaser of land, free from dower and homestead rights of insane wife, not party to proceeding.

The purchaser of land, free from homestead and dower rights of insane wife, under Smith-Hurd Rev. St. 1923, c. 68, § 17, is not a proper party to the proceeding, and, if he acts in good faith without knowledge of any fraud in regard to the proceeding, he may rely upon the decree the same as any other stranger to an adjudication.

Appeal from the Circuit Court, Cook County; George Fred Rush, Judge.

Bill of review by Bessie Vyverberg against William A. Vyverberg and others to review a decree. From the decree, defendants Schulz appeal. Reversed and remanded, with directions.

Frank F. Aring, of Chicago, for appellants.

A. W. Martin and Edward H. S. Martin, both of Chicago, for appellee.

DUNN, J. On a bill of review of a decree of the circuit court of Cook county, entered on February 8, 1906, in the case of William A. Vyverberg against Bessie Vyverberg, which directed the release of the rights of dower and homestead of Bessie Vyverberg in certain real estate in Cook county, the court reversed the decree, set aside two deeds made subsequent to the decree so far as they affected Bessie Vyverberg's dower and homestead rights, and ordered an accounting of rents and profits. Emil F. Schulz and Robert Schulz, two of the defendants, have appealed.

William A. Vyverberg and Bessie Vyverberg were married on July 3, 1895. On March 12, 1900, he bought the real estate in question for $2,500, $1,000 of which he paid with his own money, assuming a mortgage for $1,500, upon which he afterward paid $200. He occupied the premises with his wife and three children as a homestead until September 15, 1904. On that date Mrs. Vyverberg was adjudged insane by the county court of Cook county, and was committed to the hospital for the insane at Kankakee, where she remained until 1912. On April 7, 1912, it was adjudged by the county court of Cook county that she had been restored to her reason. The decree of February 8, 1906, which the bill of review sought to reverse,

was rendered upon the petition of Vyverberg filed on November 8, 1905, under section 17 of chapter 68 of the Revised Statutes, praying for a decree empowering him or some other person to execute a deed relinquishing Mrs. Vyverberg's right of dower and homestead in the premises. A summons was issued and returned served, a guardian ad litem was appointed for the defendant, who filed an answer, a replication was filed, the cause was heard, and a decree was entered authorizing and directing John C. Wilson to execute, jointly with the petitioner, a deed of conveyance to Ludwig Schulz of the real estate in question, releasing and waiving all right of dower and homestead of Mrs. Vyverberg in the premises. It was further ordered that Vyverberg enter into bond in the sum of $400 to the people of the state of Illinois, with good and sufficient surety, conditioned that he would from time to time within the next five years pay or cause to be paid the sum of $200 for the proper support and maintenance of Mrs. Vyverberg. The bond which was executed and filed in the cause was dated December 19, 1905, and recited that the decree was entered on that date. On March 12, 1906, Vyverberg and Wilson executed a deed of the premises to Ludwig Schulz, releasing and waiving dower and homestead of Mrs. Vyverberg. The deed was filed for record March 13, 1906, and Schulz having afterward died, two of his heirs, Emil F. and Robert Schulz, by a conveyance of the other heirs, became vested with Ludwig's title. The bill alleged that the appellee remained insane continuously from her commitment to the hospital at Kankakee until 1912, and Vyverberg did not, during the five years succeeding the entry of the decree, pay or cause to be paid for the support and maintenance of the appellee any sum whatsoever, and that the deed executed by Vyverberg and Wilson to Ludwig Schulz, and the deed to Emil F. and Robert Schulz by the heirs of Ludwig, were null and void as to the appellee. Emil F. and Robert Schulz, as well as Vyverberg and Wilson, were made defendants to the bill, and answered it.

The bill of review was based upon error apparent on the face of the record, and some of the findings of fact, such as that since the appellee's release from the hospital her husband had not provided her any homestead, but had abandoned her, and refused to live with her, have nothing to do with error in the record of the proceedings on the petition. By the filing of the petition and service of process the court acquired jurisdiction of the subject-matter and the parties, and a guardian ad litem was duly appointed for the appellee. No complaint is made of the regularity of these proceedings. The errors alleged in the bill of review were that the bond was incapable of enforcement, because it was dated before the entry of the decree, and recited that the decree was rendered on the day of its date, December 19, 1905, instead of the true date, and did not conform to the decree, because it was conditioned for the payment of $200 within five years from December 19, 1905, instead of February 8, 1906; that the decree is erroneous, because it finds that the appellee was adjudged insane September 15, 1905, which was less than a year before the filing of the petition; because it provided that Ludwig Schulz should not be required to see to the application of the purchase money; because it provided for the approval of the bond by the clerk; and because it required the payment of the $200 from time to time within five years, without providing definitely at what times and in what amounts the sums should be paid. The court found that the decree should be reversed for these alleged errors, and also for the reason that the court found that the homestead right of the wife in the homestead estate of her husband is a present vested right, and is valued at $1,000, and in the absence of her competency and consent to relinquish it cannot be less than $1,000, and it was error for the court to omit to require security for the homestead right of $1,000, and in addition for the dower interest and support of the appellee.

The errors alleged and those found by the court are all merely questions of procedure, and not jurisdictional questions. They do not affect the right of the court to hear and decide, but only go to the question of the correctness of the court's decision. Neither the appellants nor Ludwig Schulz, their father, who was their predecessor in title, were parties to the suit.

[1-3] "A bill of review, pure and simple, and as distinguished from a bill of review for newly discovered evidence or a bill in the nature of a bill of review, is in the nature of a writ of error, and it is brought for error of law apparent upon the face of the decree itself, the decree, for the purposes of the review, including not only the adjudication, but also the pleadings and the facts as found in the original cause. Griggs v. Gear, 3 Gilm. 2. Such a bill may be brought as a matter of right, and without leave of court." Allerton v. Hopkins, 160 Ill. 448, 43 N. E. 753. On a bill of review for errors apparent on the face of the record the court is precluded from an investigation of the evidence, since the decree to be examined in such a case includes only the adjudication, pleadings, and the facts as found in the original cause. Clark v. Waggoner, 283 Ill. 199, 119 N. E. 273. The questions open for examination are such questions as arise on the pleadings, proceedings, and decree. Palenske v. Palenske, 281 Ill. 574, 118 N. E. 46. The question is not whether the facts found in the decree under review are in accordance with the evidence, but whether the court

correctly applied the law to the facts found by it. If the findings of the court upon matters of fact are not supported by the evidence, the remedy is by appeal or writ of error, and not by a bill of review. Ebert v. Gerding, 116 Ill. 216, 5 N. E. 591. An attack upon a decree by a bill of review is collateral, so far as a purchaser who was not a party to the suit is concerned, and his title will be protected if the court had jurisdiction of the parties and the subject-matter. Hedges v. Mace, 72 Ill. 472; Teel v. Dunnihoo, 221 Ill. 471, 77 N. E. 906, 112 Am. St. Rep. 192.

[4] The appellee contends that the decree is void, because the bond given by the petitioner was not such as the statute required, and that, even if the court had jurisdiction of the parties and the subject-matter, its decree exceeded its jurisdiction, since the court was exercising a special statutory jurisdiction, which authorized the rendition of a decree upon certain conditions, which must appear before the court has jurisdiction to order the sale. The jurisdiction of a court in the exercise of special authority conferred by statute must be made to appear by its record, but the jurisdiction of a court in the exercise of such special authority is complete, and its orders, when they appear to be entered in the exercise of such jurisdiction, are entitled to as full faith and credit as those of a court of general jurisdiction.

It is contended that the statute requires the execution of a bond as a condition precedent to the entry of the decree, and the cases of Frothingham v. Petty, 197 Ill. 418, 64 N. E. 270, and Blake v. Blake, 260 Ill. 70, 102 N. E. 1007, are cited as sustaining this position, and as illustrating the distinction where the giving of a bond is jurisdictional and where it is not. The former case involved a decree for the sale of lands of the decedent, upon the petition of his administrator, for the payment of debts. The statute directed that, when it becomes necessary to sell the real estate of an intestate for the payment of debts against his estate, the court should require the administrator to give further and additional bond, with good and sufficient security. The court made no order requiring such additional bond, and none was given. It was held that the oversight of the court in failing to require the additional bond was a mere irregularity, which did not render the administrator's sale void, and did not defeat the title of the purchaser, who was not a party to the record. In the latter case the sale involved was by a guardian, and the statute provided that the court should make no order for sale upon petition of the guardian until the guardian should have executed and filed a bond. Therefore it was said that the filing of the bond was a jurisdictional prerequisite to judicial action by the court. A bond was filed which was forged, but it was approved by the court, and it was further said that it appeared from the face of the record that the statute had been complied with, and the fact that the bond was forged did not affect those subsequently dealing with the property. A purchaser would be protected if the facts necessary to give the court jurisdiction appeared on the face of the record.

[5] In this case section 20 of the statute directs that the court shall require the petitioner at the time, and as one of the conditions of granting the decree, to give such security for the protection of the interests and for the proper support of such insane person as the court shall deem satisfactory, and may from time to time renew or change the same or require additional security, or the court may order such portion of the money received from the sale of the property as the court shall deem equitable and just to be set apart in such manner as the court shall direct, for the use and benefit of such insane person. Whether jurisdictional or not, this requirement of the statute was complied with. The court required the petitioner to give such security for the protection of the interests and for the proper support of his insane wife as the court deemed satisfactory. Whether the court correctly estimated the extent and value of the appellee's interest in the property is not a question to be considered on a bill of review as against purchasers in good faith for value under the decree. The court had jurisdiction, and was authorized to decide, and did decide, upon the security that was necessary, and did decide that the bond presented was satisfactory.

[6] A further objection which the appellee makes to the original decree is that the requirement of section 17 of the statute that the wife must have been insane continuously for a period of not less than one year before the filing of the petition means that she must have been adjudged insane in a proceeding where she might have the right of trial by jury at least one year prior to the filing of the petition, and, inasmuch as the decree sought to be reviewed found the date of adjudication was less than a year prior to the filing of the petition, the court was lacking in jurisdiction. The language of the section is, "when the husband or wife is insane and shall have been insane continuously for a period of not less than one year," and has no reference to an adjudication.

[7] It is contended that Ludwig Schulz was a privy to the record, because the only purpose of the proceeding was to obtain the appointment of some one to sign the appellee's name to a deed to him in performance of the contract, which her husband had made with him before the petition was filed, and that the petition was filed as much for his benefit as if he had been the petitioner

by name. The object of the proceeding authorized by section 17 is to enable the husband or wife whose spouse has become insane to sell the real estate of the insane spouse when circumstances require it and to convey the title free of any claim of the insane spouse. The purchaser is not a proper party to the proceeding. He has no rights to be enforced, and the proceeding is not for his benefit, but is for the benefit of the owner of the property. He has nothing to do with it, and, if he acts in good faith without knowledge of any fraud in regard to the proceeding, he may rely upon the decree the same as any other stranger to an adjudication. The proceeding being in his chain of title, he is bound by a knowledge of what the record shows to the extent that it shows jurisdiction or lack of jurisdiction, but only so far. If the record shows jurisdiction of the subject-matter and the parties, he is under no obligation to inquire further as to whether the question has been correctly decided in the court. The record shows that the court had jurisdiction in the original proceeding, and mere errors, if any occurred, are not sufficient to justify the reversal of the decree to the destruction of the rights acquired by the appellants.

The decree is reversed, and the cause will be remanded, with directions to dismiss the bill.

Reversed and remanded, with directions.

(310 Ill. 515)

CHANCE v. KINSELLA. (No. 15711.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 8, 1924.)

1. Deeds ⟸211(1)—Finding that grantor not of sound mind held not justified by evidence.

In an action to set aside a deed, evidence although showing weakened physical and mental powers of grantor, *held* not to justify a finding that she was not of sound mind, nor that she did not understand the effect of the deed and will which she executed.

2. Deeds ⟸211(4)—Evidence held to show no undue influence to procure execution.

In an action to set aside a deed from mother to son evidence *held* not to show actual undue influence to procure execution of the deed.

3. Witnesses ⟸324—Party not bound by testimony of adversary called as witness.

Where plaintiff called defendant as her own witness, she was not for that reason bound by his testimony, but might show the truth by any competent evidence, even in direct contradiction of what defendant testified.

4. Evidence ⟸591—Party calling adversary as witness cannot impeach his credibility.

Favorable testimony to himself given by a party called as witness by his adversary must be considered, and, if there is no countervailing testimony, it must be taken as true.

5. Deeds ⟸206—Fiduciary relationship between mother and child held not shown.

In an action to set aside a deed from mother to child, *held*, that evidence did not show that any fiduciary relation existed between them.

6. Deeds ⟸196(2, 3)—No presumption of undue influence or fraud in conveyance from parent to child.

There is no presumption that a conveyance from a parent to a child was procured by fraud or undue influence.

Appeal from Circuit Court, Peoria County; John M. Niehaus, Judge.

Bill by Mary Chance against John J. Kinsella to set aside a deed. From a decree for complainant, defendant appeals. Reversed and remanded, with directions.

McGrath, Stone, Daily & Michel, of Peoria, for appellant.

Cameron & Anderson, of Peoria (George W. Hunt, of Hennepin, of counsel), for appellee.

DUNN, J. Mary Chance filed a bill in the circuit court of Peoria county to set aside a deed executed by Hannah Kinsella on May 21, 1920, to John J. Kinsella, for a city lot in Peoria. There was a decree for the complainant, from which the defendant appealed.

Hannah Kinsella was the mother of the appellant and the appellee, and the city lot conveyed is all the property she owned. On it were two small houses in a bad state of repair, one of which she rented for $13 a month, the other for $8 a month, except one room in which she lived. The property was worth about $1,200. She could neither read nor write, and the evidence indicates that her age, which was not certainly known, was at least 80 years, as the master found. She died on June 10, 1920, leaving as her only heirs the appellant and the appellee and another daughter who lived in Tazewell county. The appellee lived almost a mile and the appellant six or seven blocks from their mother, who visited, or was visited by, the appellee almost every day. The appellant in September, 1912, had filed a petition in the county court for the appointment of a conservator for his mother on the ground that because of her excessive use of intoxicating liquors she had become a spendthrift. A short time before she had received $1,300 insurance on account of the death of another son. No conservator was appointed, but for a time Mrs. Kinsella was very resentful toward the appellant. A few days before making the deed, on April 26, 1920, Mrs. Kinsella executed her will, by which she gave legacies of $5 each to the appellant and her other daughter and devised all her real estate

to the appellee for life, with remainder to the heirs of her body, and bequeathed all the residue of her property to the appellee. The bill of complaint alleges that on May 21, 1920, Mrs. Kinsella was an invalid, in poor health, infirm physically and mentally, about 84 years of age, uneducated, unable to read or write, and by reason of her physical and mental condition incapable of transacting her ordinary business affairs and mentally incapable of making the deed; that the appellant, for the purpose of defrauding Mary Chance out of her rights in the premises, through trick, artifice, and undue influence then practiced upon Mrs. Kinsella, induced her to execute the deed, representing to her that in consideration of his kindness and attention to her shown during her lifetime, he, alone, was entitled to her bounty to the exclusion of his sisters, and that she was under legal and moral obligation to convey the lot to him in consideration of his kindness and attention to her.

The evidence shows that Mrs. Kinsella was an active woman, who frequently called upon and visited her neighbors, rented her own property without assistance, collecting the rent and giving receipts therefor which had been signed in her name by the appellee, and after collecting the rents sometimes forgot that she had done so and claimed that the rent had not been paid. In such cases the matter was usually adjusted by the appellee. Mrs. Kinsella could not count her money and would give the bills which she owed to the appellee, who would take what money was needed from her mother and pay them. Mrs. Kinsella frequently became confused as to the day of the week, and several instances were testified to of her preparing meat to eat on Friday though she was a Catholic, thinking the day was Thursday or Saturday. She would not eat the meat when her attention was called to her mistake. Sometimes she overstocked her pantry with perishable food and would forget that she had anything to eat. She would forget where she had left her keys and pocketbook, and would think that she had lost them, though she had merely left them in the house on coming out. Sometimes when she had been visiting until after dark she would become confused as to the way home, passing her house without going in. Sometimes in going to a neighbor's she would pass the house. She would begin talking about one thing and abruptly change to another apparently without any connection. She sometimes imagined events had occurred which had no existence. Once she said she had some geese and some one killed them and put the feathers in the house, though she had no poultry at the time. Mary Bimmerle, whose mother had been dead for five years, testified that Mrs. Kinsella, though she knew of her mother's death, would ask how her mother was, and on being told that she was dead would say she forgot. Mary Huerter, whom Mrs. Kinsella frequently visited and who usually called for her on the way to the church, testified that Mrs. Kinsella did not do anything crazy or irrational, but was childish.

There was testimony to acts of forgetfulness or absence of mind by a number of witnesses, some of whom expressed the opinion that Mrs. Kinsella was not right in her mind. Other witnesses who had an equal opportunity of observation testified that they saw no sign of mental unsoundness. There was no evidence of any irrational act. Her life was quiet and uneventful, and there was nothing in her actions to occasion remark or notice except her forgetfulness, her confusion at times about localities and getting lost, her losing her keys or other articles, what some of the witnesses regarded as her disconnected conversations, and her failure at times to recognize people. There is no evidence that she did not know her relatives and friends and what property she had. She was ignorant, but not unintelligent. Because she could not read, write, or count, she was dependent in the payment of her bills on the honesty of those with whom she dealt and the assistance of others. The master found that Mrs. Kinsella was at the time of her death at least 80 years of age, that she was wholly illiterate, unable to read or write or to correctly count or compute amounts of money or attend to business of any character in a safe or businesslike manner, and that she was, as charged in the bill of complaint, at the time of the execution of the deed in her dotage, and by reason of her age, forgetfulness, and lack of knowledge of business affairs was wholly unable to reasonably comprehend and appreciate the character of the deed or the steps necessary to protect her rights and interests in the property; that the appellant had filed a petition for the appointment of a conservator and that she was greatly incensed against him therefor for several years, but that a short time prior to the execution of the deed she had become reconciled to him and he had made some gifts of money to her and assisted her in obtaining the necessaries of life.

The appellant was called as a witness by the appellee, and testified as to the circumstances under which the deed was made, and the master made these findings:

"That it further appears from the evidence of said John J. Kinsella that about a week prior to the time of the execution of said deed he visited his said mother at her residence aforesaid and there learned from her that she had executed her said last will and testament and of the contents thereof and that she was dissatisfied with the terms and provisions of said will, and that thereupon, after talking the matter over with her, his said mother asked him if he would take care of her and pay her bills if she deeded said property to him, and that he said he would, and that thereupon his said mother requested him to have a deed prepared for said

premises, and that pursuant to her instructions in the matter he did procure Nathan Weiss, an attorney at this bar, to come to his, the defendant's, dwelling house and meet his mother there on the date said deed was executed; that he, the defendant, was not present at the time said deed was executed, but that said Weiss on said occasion interviewed his mother there, at the defendant's dwelling house, alone, and there prepared said deed and procured the execution thereof by her, and that the said deed, after being so executed, was delivered to him, the defendant, who thereupon caused the same to be recorded by the said Weiss as his agent. Said defendant further distinctly testifies that the consideration for said deed was that he, the defendant, should thereafter take care of his said mother and look after her for the rest of her life, and that pursuant to said agreement he did thereafter permit her to use and occupy said premises in the same manner that she had used and occupied the same prior to the execution of said deed, and that after her death he paid all bills left by her and all expenses of her last illness, the amount of which said bills and expenses so paid by him does not appear from the evidence."

These findings are in accordance with the evidence, except that the master's report of the evidence shows that the appellant did not testify that he learned from his mother of the making of her will or that she was dissatisfied with the will, but only that his mother told him she had made a mistake which she wished to correct. His testimony was uncontradicted. The master concluded that a confidential relation existed between the appellant and his mother which cast upon him the burden of showing that the transaction was fair, equitable, and reasonable, and that Mrs. Kinsella at the time of making the deed was competent to understand, and did understand, the nature, character, and effect of the transaction. This burden the master found that the appellant had failed to sustain by a preponderance of the evidence, and therefore he recommended a decree setting aside the deed. It is upon this last finding that the recommendation of the master and the decree of the chancellor are based and not on the mental incapacity of Mrs. Kinsella.

The deed and the will were prepared by different lawyers, and the interval between them was 25 days. Joseph F. Bartley, who drew the will, had known Mrs. Kinsella all his life, having been born and lived in childhood in the neighborhood in which she lived. He testified:

"I was called to her home about 10 o'clock and found her in bed in the rear room of her home, on McBean street. There were several people in the room. I think Mary Chance was there, some next-door neighbor, and some other woman I didn't know. Mrs. Kinsella said she wanted to make her will. Mrs. Chance and the other women left the room at my request. I then talked to her about her will and what she wanted to do by it. She said she'd had a fall that morning early, had injured herself, and wanted to fix up her affairs. I asked her what property she had, and she said the little house where she was then living and the house next door, both on one lot. She told me she had three children, which I knew. I knew John Kinsella, and was friendly with him. When she told me she wanted to make her will leaving everything to Mary Chance, I asked her if there was any trouble between herself and John, because if there was I didn't wish to have anything to do with the transaction. She told me there was no trouble, that John had done reasonably well, and that Mary Chance had married a worthless husband, and she wanted Mary Chance's children taken care of and to receive a Catholic education. I asked her where she kept her papers, and she told me. She said these papers were kept in a tin box, and asked me to get them. I got them, and we went over them; got the deeds, tax receipts, and she explained to me all about her property. During the conversation she talked about my mother and our family—a general conversation—and reverting to John I asked her again if any unfriendly feeling existed between her and John, and she said, 'No;' that she was sure John would be satisfied; what she had did not amount to anything, and she wanted to give it that way. I have an opinion with reference to her mental soundness on that date, and in my opinion she was of sound mind and able and competent to transact ordinary business. She seemed no different from the lady I had known in previous years. I had no question; otherwise I would not have made her will."

Nathan Weiss, who prepared the deed 25 days later, testified:

That he "was acquainted with Hannah Kinsella. First became acquainted with her through proceedings in probate court seven to ten years ago with reference to appointment of conservator. I met her on several occasions after that. I was present at the home of Hannah Kinsella on the day that the deed which forms the basis of this suit was executed. I prepared the deed. John Kinsella phoned me shortly before, asking whether I could come to his home; that his mother wanted some papers drawn. That was a day or two, possibly three or four days, previous to its execution. I went to his house as per appointment, met Mr. Kinsella, who was in the yard, went in and found the old lady in the home. I was there possibly half or three-quarters of an hour—maybe an hour. I told her I had received this call; wanted to know if she wanted some papers made out. She said she did; that she wanted to make a deed of the property in question to her son, John. I talked the thing over and asked if that was what she wanted to do and if she understood the transaction, and asked her why she wanted to do it. She said John had always taken care of her and helped her when she needed anything and had been good to her, and she wanted to make the deed to him. So the deed was prepared, and she signed it by mark. I witnessed the mark and took the acknowledgment as notary. She told me to give the deed to Mr. Kinsella. I did as I went out, and he asked me to have it recorded, and I did. During the time I had the conversation with her and prepared the deed in question I was

alone with her. There was nobody else present in the house. I talked to her generally. I had in mind the previous trouble in the family, and took pains to converse with her and get a line on the situation generally. I found her quite alert, keen, sharp-witted old lady. She had been in past times addicted to the use of intoxicating liquor. That formed the basis of the petion in the probate court. At the time she executed the deed in question she was absolutely sober and her mental condition was very good. I formed an opinion from my conversations with her during the time I knew her, and including the one on the date the deed was made, and my observations of her during my acquaintance with reference to her mental condition. She was unquestionably of sound mind."

Dr. Trewyn, Mrs. Kinsella's family physician for five years, who attended her on various occasions, treated her approximately six months before her death, and testified that he talked with her and observed her general condition, and that she was then of sound mind and capable of transacting ordinary business.

[1] The evidence does not justify a finding that Mrs. Kinsella was not of sound mind. It shows only that she was old and childish, with weakened physical and mental powers, but not that she did not understand what property she had, or the effect of the deed or the will which she executed. Old age and feeble health do not constitute unsoundness of mind even when accompanied by defective memory and mental sluggishness.

[2-8] There is no evidence in the record of any actual undue influence exerted to procure the execution of the deed. The decree is based upon undue influence presumed to have been exercised by reason of the confidential relation between the mother and her son which imposed upon him the burden of rebutting the inference of undue influence arising from the relation. The only evidence in regard to the circumstances under which the deed was executed is derived from the testimony of the appellant and the attorney who drew the deed. The appellee called the appellant as her own witness. She was not for that reason bound by his testimony, but might show the truth by any competent evidence, even in direct contradiction of what the appellant testified, but she could not call in question the appellant's credibility. The part of his testimony which is in his favor must be considered, and if there is no countervailing testimony it must be taken as true. Luthy & Co. v. Paradis, 299 Ill. 380, 132 N. E. 556. There is no evidence contradicting the testimony of the appellant that he did not know that his mother had made a will; that she told him she had made a mistake but did not tell him what it was; that the consideration of the deed was his agreement to take care of his mother and pay her bills; that the idea of making the deed originated with her; that he never collected any rent from the tenants in his mother's lifetime; that he telephoned for the lawyer to go to his mother's house, but that she did not want him to come there and for that reason the appellant telephoned him to come to the appellant's house. There is no evidence that the appellant ever transacted any business for his mother in her lifetime or that she ever asked, or he ever gave her, any advice, that he ever sought to influence her in any way to make the deed, or that any fiduciary relation existed between them. There is no presumption from the mere fact of relationship that a conveyance from a parent to a child is the product of fraud or undue influence. Hudson v. Hudson, 237 Ill. 9, 86 N. E. 661; Smith v. Kopitzki, 254 Ill. 498, 98 N. E. 953.

The decree of the circuit court will be reversed and the cause remanded, with directions to dismiss the bill.

Reversed and remanded, with directions.

(310 Ill. 618)

CITY OF EDWARDSVILLE v. ILLINOIS BELL TELEPHONE CO. (No. 15698.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 7, 1924.)

1. Constitutional law ⇐242, 298(1)—Public utility company cannot be compelled to serve public without reasonable compensation.

The state cannot compel a corporation engaged in operating a public utility to serve the public without reasonable compensation, as to do so deprives it of its property without due process of law and equal protection of the law.

2. Constitutional law ⇐70(1)—Fixing rates of public utility legislative function subject to review by courts as to whether rates confiscatory.

It is a legislative power to fix rates, but the power of the Legislature is not absolute, and it is a judicial question whether the rates fixed deprive the public utility company of its property without due process of law.

3. Appeal and error ⇐917(2)—On appeal allegations of answer to which exceptions were sustained assumed true.

On appeal from a decree perpetually enjoining a telephone company from collecting higher rates, it must be assumed that defendant could have proved allegations of the answer to which exceptions were sustained.

4. Telegraphs and telephones ⇐33(1)—Permanent suspension of proposed schedule of rates without determining reasonableness void.

Under Public Utilities Act, § 36, orders of Public Utilities Commission suspending for a period longer than 120 days a schedule of proposed rates filed by a telephone company, and thereafter permanently suspending the schedule, without making any finding that the rates were unjust and unreasonable and without determin-

ing what were just and reasonable rates, were void; and, although the Commerce Commission could still proceed with its investigation and determine just and reasonable rates and the company would be bound to observe these rates, until such finding, the company was entitled to put the new rates into effect.

5. Injunction ⇐119—Demurrer to cross-bill praying that city be restrained from attempting to have old telephone rates continued held properly sustained.

In a suit by a city to restrain a telephone company from putting into effect a proposed schedule of rates, a demurrer to defendant's cross-bill, praying that the city be restrained from attempting to compel the company to continue in force the original rates, was properly sustained, since the only attempts to continue such rates were being made through legal tribunals.

Appeal from Circuit Court, Madison County; J. F. Gillham, Judge.

Suit by the City of Edwardsville against the Illinois Bell Telephone Company. From a decree for complainant, defendant appeals. Reversed in part and remanded, with directions.

Cutting, Moore & Sidley, of Chicago (William D. Bangs, of Chicago, and Philip Barton Warren, of Springfield, of counsel), for appellant.

J. F. Eeck, of Edwardsville, for appellee.

DUNN, J. This is an appeal by the Illinois Bell Telephone Company from a decree of the circuit court of Madison county perpetually enjoining it from collecting in the city of Edwardsville the advanced rates stated in rate schedule I. P. U. C. 1, or collecting a higher rate than was charged by it in the city prior to August 1, 1921, or from disconnecting telephones and discontinuing or interfering with telephone service in the city by reason of telephone subscribers refusing to pay higher rates than were charged prior to August 1, 1921, all unless and until the consent and approval of the Illinois Commerce Commission was procured for the charging and collecting of such higher rates. The record presented the issue whether or not the rates prior to August 1, 1921, were confiscatory, and on account of the constitutional question thus raised the appeal was taken to that court.

The appellant is an Illinois corporation which owns and operates a telephone exchange in the city of Edwardsville. On January 1, 1914, the Central Union Telephone Company, which was then the owner of the exchange, filed its schedule of rates for local exchange service in the city and vicinity with the Public Utilities Commission, designated I. P. U. C. Original, which continued in effect until August 1, 1921. On September 1, 1920, the company filed its schedule of increased rates designated I. P. U. C. 1, to become effective October 1, 1920. On September 20, 1920, for the purpose of investigating the reasonableness and propriety of the latter rate schedule, the Public Utilities Commission suspended its effective date until January 30, 1921, and on February 1, 1921, entered another order suspending the effective date until July 30, 1921, and on July 19th entered another order suspending the effective date until January 27, 1922. In the meantime the appellant, which had acquired the property from the Central Union Telephone Company, was substituted for the latter company in the proceedings, and hearings were had from time to time, which resulted on October 31, 1921, in an order by the Commission permanently suspending, canceling, and annulling schedule I. P. U. C. 1 without finding the rates unjust and unreasonable and without finding or fixing any other rates as just and reasonable. The appellant filed a petition for rehearing, which was denied, and the appellant thereupon prosecuted an appeal to the circuit court of Sangamon county and afterward to the Supreme Court, which on October 21, 1922, adjudged the order of the Commission to be null and void, reversed the judgment of the circuit court, and remanded the cause to that court, with directions to remand it to the Commission to determine whether or not the proposed schedule of rates is just and reasonable, and, if it finds it is not, to find what are reasonable rates and to fix the same. On August 1, 1921, the appellant put into effect its schedule I. P. U. C. 1 without the consent of the Commission and without a finding of the Commission that the increase was justified, began to charge and collect the increased rates fixed in that schedule, and continued to do so until December 3, 1921, when, without notice and without bond, it was restrained by the injunction in this case from collecting such rates. The city of Edwardsville filed its bill on December 2d, setting out the facts which have been stated, praying for an injunction against charging and collecting the increased rates, and a preliminary injunction was issued. The appellant filed an answer on February 27, 1923, showing that on account of the greatly increased cost of labor and material resulting from the war the revenue derived from the original schedule of rates was on January 1, 1919, and had ever since continued to be, insufficient to pay the cost of operating the exchange; that such cost exceeded the revenue derived from such schedule of rates during years 1919, 1920, 1921, and the first nine months of the year 1922, as shown by an exhibit attached to the bill setting out the revenue and the operating expenses for each of those years. The exhibit showed a deficit for those years, respectively, of $7,253.82, $11,-

583.63, $12,649.24, and for the first nine months of 1922 of $10,472.23. The answer set out the proceedings before the Commission and in the courts which have been referred to, and stated that so long as the injunction was continued in force it would continue to suffer great and irreparable loss and its property would be taken without due process of law, in violation of its constitutional rights. The complainant excepted to all the allegations of the answer concerning revenue and operating expenses and concerning the loss to the appellant in operating under the old schedule, and the court sustained the exceptions. The appellant also filed a cross-bill setting out substantially the same facts as in the answer, and praying for an injunction against the city of Edwardsville attempting to compel it to collect only the rates prescribed in the rate schedule I. P. U. C. Original. A demurrer to the cross-bill was sustained, there was a hearing on the original bill, pleadings, and stipulation of facts, and a decree making the injunction on the original bill perpetual and dismissing the cross-bill.

[1, 2] The state has no power to compel a corporation engaged in operating a public utility to serve the public without a reasonable compensation. The power of the Legislature over rates to be charged is not absolute, but is limited. It is the power to regulate and not to confiscate. It is a legislative power to fix rates, but it is a judicial question whether the rates fixed are such as to deprive the public utility affected of its property without due process of law. The owners of property invested in public utility corporations are entitled to the equal protection of the law which is guaranteed to all, and they are deprived of it and of their property if the rates fixed by law are so low as to prevent the companies from earning any compensation for the use of the property after keeping it in repair and paying the expenses of operation. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; St. Louis & San Francisco Railway Co. v. Gill, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; Covington & Lexington Township Turnpike Road Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Public Utilities Com. v. Chicago & West Towns Railway Co., 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50; Public Utilities Com. v. Springfield Gas & Electric Co., 291 Ill. 209, 125 N. E. 891; Mt. Carmel Utility Co. v. Public Utilities Com., 297 Ill. 303, 130 N. E. 693, 21 A. L. R. 571.

[3, 4] On the hearing the appellant offered to prove the allegations of its answer to which exceptions had been sustained, but the offer was, of course, refused, since all the allegations were stricken out. It must be assumed on this hearing that the appellant could have proved the allegations, and it is manifest, therefore, that it is suffering a daily loss from the confiscatory rate under which by the injunction it is compelled to transact its business. On September 1, 1920, it filed a new schedule of rates in accordance with section 36 of the Public Utilities Act (Smith-Hurd Rev. St. c. 111⅔). This schedule was to go into effect on October 1, 1920, unless suspended, as it might be, by the Public Utilities Commission for not more than 120 days beyond that time, unless the Commission, in its discretion, should extend the period of suspension for a further period not exceeding six months. The Public Utilities Commission undertook to suspend the schedule for a longer time, and finally permanently suspended it without making any finding that the rates were unjust and unreasonable or what were just and reasonable rates; but these orders were void. Illinois Bell Telephone Co. v. Commerce Com., 304 Ill. 357, 136 N. E. 676. Therefore, on August 1, 1921, the schedule I. P. U. C. 1 was no longer suspended, but the appellant had a right to put it in force. The Commerce Commission might still proceed with its investigation and inquiry and pass upon the schedule and find what were just and reasonable rates, and the appellant would be bound to observe those rates; but until such finding and determination it was legally entitled to put in force the rates fixed by schedule I. P. U. C. 1.

Section 36 of the Public Utilities Act provides that all rates or charges not suspended by the Commission shall, on the expiration of 30 days from the date of filing, or such lesser time as the Commission may grant, go into effect and be the established and effective rates or charges, subject to the power of the Commission, after a hearing had upon its own motion or upon complaint, to alter or modify the same. The right of the public utility to fix its rates, subject to the power of the Commission to suspend or alter them, is recognized. The power of the Commission to suspend is limited to 120 days beyond the time when the rate or charge would otherwise go into effect, unless the Commission, in its discretion, extends the period of suspension for a further period not exceeding six months. That time having expired the rates are legally in effect, subject to the power of the Commission to alter or change them. The Commission may still establish just and reasonable rates, but until that is done the company may charge the rates named in the schedule.

Since the schedule I. P. U. C. 1 is now the lawful schedule of rates in the city of Edwardsville, the decree enjoining the appellant from charging and collecting such rates was erroneous. If the Commerce Commission shall hereafter alter the rates, this action may affect the rights of the parties; but so long as the rates charged by the appellant

are those of a lawful schedule, the appellee has no right of action in equity.

[5] The demurrer to the cross-bill was properly sustained. Its prayer was that the appellee be restrained from any attempt to compel the complainant to continue in force the rates prescribed by rate schedule I. P. U. C. Original. The only attempts the appellee was making were through the tribunals established by law to require the appellant to comply with what the appellee regarded as the appellant's obligations to the public including the appellee. No reason was shown why the appellee had not the right to appeal to the Commerce Commission or the courts to enforce such rights as it believed it lawfully possessed.

The decree dismissing the cross-bill will be affirmed, and the decree on the original bill will be reversed, and the cause will be remanded, with directions to dismiss the original bill.

Reversed in part and remanded, with directions.

(310 Ill. 524)

AMERICAN HIDE & LEATHER CO. v. SOUTHERN RY. CO. (No. 15449.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 8, 1924.)

1. Railroads ⇐33(2)—Employee of foreign company held "agent" on whom process could be served.

An employee of a foreign railroad corporation, maintaining an office and assistants for the purpose of soliciting business for the railroad, which did not run through the county, but ran through other counties of the state, though he made no contracts on behalf of the railroad, issued no bills of lading, sold no tickets, and collected no money, was an "agent" on whom process could be served, within Practice Act, § 8.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Agent.]

2. Corporations ⇐662—Foreign corporation, operating in state by means of agent, constructively present and suable by service on agent.

A foreign business corporation is constructively present in any state, where it has property and carries on its operations by means of agents, and may be sued by obtaining service of process on an agent.

3. Carriers ⇐131—Unnecessary to allege or prove bills of lading were issued without receiving goods in action against carrier for value.

In action agninst carrier by consignee of hides purporting to have been shipped under bill of lading, in reliance on which it paid therefor, it appearing that only a small part thereof reached the destination, it was not necessary, under Uniform Bills of Lading Act, § 23, to allege or prove that the bill of lading purchased by the plaintiff was issued by defendant without receiving the hides.

4. Carriers ⇐180(1)—In absence of blanks in bill of lading, carrier cannot claim limitation of liability.

Carrier is in no position to claim liability was limited to loss occurring on its own line, under Uniform Bills of Lading Act, § 8, where the bill of lading contained no blank forms for objections required by section 10.

5. Carriers ⇐59—Statute rendering carrier liable to consignee, giving value relying on bill of lading, creates no new cause of action, and is not invalid.

Uniform Bills of Lading Act, § 23, providing that a carrier shall be liable to a consignee named in a bill of lading, who has given value in good faith relying on the description therein, does not create a new cause of action, but merely deprives the carrier of a defense which it was allowed to make before its enactment, and is not subject to any constitutional objection.

6. Carriers ⇐70—Consignee held not to have title to shipment before loading, so as to prevent reliance on bill of lading.

Where dealer sent an agent to select and grade hides to be purchased, the dealer not intending to pay for the hides until they were in the possession of the railroad, *held*, that the title to the hides did not pass to the dealer prior to loading, so as to preclude liability under Uniform Bills of Lading Act, § 23, permitting a consignee to rely on description of goods contained in bill of lading; it appearing that all of the hides described had not been delivered to the railroad.

Error to Second Branch, Appellate Court, First District, on Appeal from Superior Court, Cook County; Oscar Hebel, Judge.

Action by the American Hide & Leather Company against the Southern Railway Company. From a judgment of the Appellate Court (228 Ill. App. 305), affirming a judgment for plaintiff, defendant brings certiorari. Affirmed.

Edward C. Kramer, Rudolph J. Kramer, and Bruce A. Campbell, all of East St. Louis, and Edward D. Pomeroy and Henry T. Martin, both of Chicago (Edward P. Humphrey, of Louisville, Ky., of counsel), for plaintiff in error.

Winston, Strawn & Shaw, of Chicago (Walter H. Jacobs and Silas H. Strawn, both of Chicago, of counsel), for defendant in error.

FARMER, C. J. This action was brought by the American Hide & Leather Company in assumpsit against the Southern Railway Company, in the superior court of Cook county, to recover the value of two carloads of green hides for which bills of lading were issued to the plaintiff by the defendant at Mt. Vernon, Ill., June 25, 1920. The bills recite that one car contained 2,105 bundles and the other 1,908 bundles of salted green hides, to be transported to Chicago. When the cars

arrived at their destination, they contained but 16 bundles of hides. The remainder of them was never received. The hides were purchased by plaintiff from Max Cornick & Co. at Mt. Vernon. Plaintiff paid Cornick & Co. $23,921.67, relying upon the bills of lading. The hides which reached their destination were worth $98.70, and plaintiff sued to recover the difference between the amount paid Cornick & Co. and the value of the hides received. The court instructed the jury to find the issues for plaintiff and assess its damages at $23,822.97, and rendered judgment on the verdict so returned. Defendant prosecuted an appeal to the Appellate Court, where the judgment was affirmed, and this court granted a writ of certiorari to review the judgment.

The facts are, that some time in June, 1920, plaintiff had some correspondence with, Max Cornick & Co., dealers in green hides, about the purchase of a quantity of hides, and sent its agent, Cooper, to Mt. Vernon on June 21. The hides were in the warehouse of Cornick & Co., which was near a sidetrack of defendant. Cooper spent three or four days in the warehouse separating, grading, and weighing the hides which were to be shipped to plaintiff. They were put up in bundles and loaded by employees of Cornick & Co. on its wagons and driven from the warehouse to the cars they were to be loaded in. They were weighed by Cornick under the observation of plaintiff's agent, Cooper, before they were removed. Cooper made invoices of the hides, their weight, and prices, in the warehouse as they were inspected, graded, weighed, and loaded out. These invoices were signed by Cornick & Co. and O. K.'d by Cooper. Cooper did not superintend the loading of the hides into the cars. He saw the wagons leave the warehouse, drive along the side of the cars, and some hides thrown into them. He saw some hides in the door of one or both cars. After they were hauled away from the warehouse to the cars, and ostensibly loaded in them, the cars were closed and sealed, the doors were nailed at the bottom, and a 2x4 timber spiked behind each of the doors, so that they could not be opened without drawing the nails and removing the timbers. They were sealed by defendant's agent. After that was done, Cornick procured two bills of lading from defendant's agent and exhibited them to Cooper, who thereupon gave Cornick two drafts on plaintiff, one for $12,469.01, the other for $11,452.66, payable at New York and dated June 25, 1920. Cooper retained a duplicate copy of the bills of lading. Cornick attached the drafts, together with the invoices, to the original bills, and they were sent through his bank at Mt. Vernon to a bank in New York for payment by plaintiff. Plaintiff's cashier, on their presentation, checked the amount of the invoices and bills of lading, and thereupon paid the drafts, amounting to $23,921.67.

The suit was begun in Cook county, and summons served on defendant by delivering a copy to R. H. Morris, agent of the corporation. Defendant filed a plea to the jurisdiction of the court, alleging Morris was not its agent; that defendant is a railroad corporation organized under the laws of Virginia, having its principal office at Richmond, in that state, and owns, operates, and controls a line of railroad running through the counties of Wabash, Edwards, Wayne, Jefferson, Clinton, and St. Clair, in the state of Illinois, in each of which it had an agent upon whom process could be served, and that defendant was not found or served with process in Cook county. Plaintiff filed a replication, alleging Morris, at the time of service of process and before, was the agent of defendant and was served in Cook county. That issue was tried before the court without a jury. The court found that issue against defendant, and held the service of summons to be sufficient and in accordance with law. The evidence on the issue of jurisdiction was that Morris was employed to solicit freight shipments to be transported in connection with carriers, so that the freight would move over defendant's railroad. He had 10 or more stenographers, clerks, and soliciting agents employed under him in an office at 35 West Jackson boulevard, Chicago. Their salaries were paid by defendant. It operates a railroad through the state of Illinois, from Mt. Carmel to East St. Louis (about 140 miles), no part of which is in Cook county. The name "Southern Railway System" was on the door of the office at 35 West Jackson boulevard. The bills of lading showed they were issued by defendant at Mt. Vernon for transportation of the property described from that place to Chicago, where one of the cars arrived July 13 and the other July 16, and when opened each car contained only 8 bundles of hides.

[1, 2] Morris occupied an office of two rooms furnished by defendant, and his salary and the salaries of his assistants were paid by defendant. He was not employed as soliciting agent for any other company. He made no contracts on behalf of defendant, issued no bills of lading, sold no tickets, and collected no money for defendant. Defendant insists Morris had no power to exercise any of defendant's corporate powers and was not an agent, within the meaning of section 8 of the Practice Act (Smith-Hurd Rev. St. 1923, c. 110), but was a mere employee to solicit business. Reliance is placed on Booz v. Texas & Pacific Railway Co., 250 Ill. 376, 95 N. E. 460. In that case service was had on a man as agent of the defendant railroad corporation. A limited appearance was entered, and motion to quash the return was made, alleging Pither, the man on whom

summons was served, was an employee of one Staley, a soliciting freight agent, and Farnsworth, a soliciting passenger agent, of several foreign railroads, including defendant, operating railroads outside of the state; that all the employees and business were under control of Edward B. Boyd, who was not an officer of the corporation, although called assistant to the vice president; that the only business transacted through the Chicago office by employees there was soliciting shipments over the lines of the corporation and soliciting passengers to purchase tickets to pass over its lines outside the state. This court held that whether Pither was the agent of defendant, on whom process was authorized to be served, depended on whether defendant had extended its business into this state, so as to be constructively present here, and was transacting that business through Pither as agent; that defendant, being a foreign corporation, could only be served in this state if it was doing business here, and no one would be its agent unless he had power to represent it in the transaction of some part of the business contemplated by its charter. No one in this state could make a contract to bind defendant, and the court said the mere solicitation of business by one who had no other authority did not constitute doing business in this state. Such solicitors were not agents within the meaning of the statute. The court further held the statute was not confined to domestic corporations; that if a foreign corporation is present in this state, and has an agent here, process may be served on it. "A business corporation is constructively present in any state where it has property and carries on its operations by means of agents, although the domicile of the corporation is in another state. If a foreign corporation does business in the state through agents, it may be sued there by obtaining service on the agent." We do not think that decision supports defendant in this case. Here defendant was doing business in this state. It operates 140 miles of its railroad in Illinois, and is subject to service in the same manner as an Illinois corporation. The court did not err in holding it had jurisdiction.

[3] Defendant contends the declaration states no cause of action, and the trial court erred in not so holding and rendering judgment in its favor. The cause was tried on an amended additional count to the declaration and pleas thereto. The count alleged, in substance, that defendant issued bills of lading, which are set out in full, by which it acknowledged receipt of the hides at Mt. Vernon from Max Cornick & Co. in apparent good order, and promised to safely transport them to Chicago and deliver them to plaintiff within a reasonable time. It is insisted the declaration does not state a cause of action at common law on the theory that plaintiff delivered the hides to defendant and defendant negligently failed to transport them; also that it does not state a cause of action for which defendant would be liable under section 23 of the Uniform Bills of Lading Act, because it was not alleged the bills of lading were issued by defendant without receiving the hides. Section 23 of the Uniform Bills of Lading Act (Smith-Hurd Rev. St. 1923, c. 27) provides, in part, that when a carrier, by its agent or employee, the scope of whose employment includes the issuing of bills of lading, has issued a bill of lading, it shall be liable to the consignee named in a nonnegotiable bill, or the holder of a negotiable bill, who has given value in good faith, relying on the description therein of the goods, for damages caused by the carrier or a connecting carrier of all or part of the goods, or their failure to correspond with the description in the bill. Prior to the enactment of the Uniform Bills of Lading Act, in 1911, a carrier who had issued a bill of lading acknowledging receipt of goods could defend against the action by showing the goods had not been received by it. Lake Shore & Michigan Southern Railway Co. v. Live Stock Bank, 178 Ill. 506, 53 N. E. 326. Section 23 deprived the carrier of that defense.

We do not think it was necessary for plaintiff to allege and prove that defendant did not receive the hides. It would be difficult, if not impossible, in many cases for the holder of the bill, who had in good faith parted with value in reliance upon its correctness, to prove the carrier did not receive the goods described in the bill, the receipt of which had been acknowledged by the carrier. The purpose of the statute was to give security to bills of lading in the hands of those who parted with value in good faith, relying on them being true. A federal Bill of Lading Act contains a provision substantially like section 23, applicable to interstate commerce. These laws were enacted because of the fraudulent acts of agents of carriers issuing bills of lading without receiving the goods described in the bill and receipting for them. 1 Roberts on Federal Liabilities of Carriers, § 351. The proof showed plaintiff's agent, Cooper, had nothing to do with the actual loading of the hides. He inspected, graded, and superintended the bundling and weighing of the bundles in the warehouse of Cornick & Co., and the hides were hauled by Cornick's men and teams to the cars on defendant's track. He made invoices, which were signed by Cornick and O. K.'d by him, and, when Cornick procured and exhibited the bills of lading, Cooper gave him the drafts on plaintiff in payment for the hides. The evidence, we think, tends to show that only the small number of hides in the cars when they were received in Chicago were in the cars when they were sealed at Mt. Ver-

non. It is needless to speculate on how the hides happened to be missing when the cars were sealed, but there is no evidence tending in any way to show Cooper had any knowledge they were not in the cars, or that he in any manner connived with any one to seal and ship the cars without the hides being in them.

No case involving section 23 of our Uniform Bills of Lading Act has been heretofore adjudicated by this court, and we are referred to no decision of a court of last resort where the direct question here presented was involved, although many states have statutes like ours. In Johnson Lumber Co. v. Great Northern Railway Co., 104 Wash. 354, 176 Pac. 343, 181 Pac. 932, the action was to recover the value of a carload of shingles described in a bill of lading issued by an agent of the railroad company. The defense was that the shingles had never been received or shipped by the railroad company. The court held the company, by issuing the bill of lading acknowledging the receipt of the shingles, made it possible for an owner of the bill to believe the company had received the property and pay value therefor, and the court said one who makes it possible to cause a loss should bear it, where otherwise it would fall upon an innocent party.

[4, 5] Defendant further contends, as its line of railroad in this state only extends from Mt. Carmel to East St. Louis, its liability was limited to loss occurring on its own line, and relies on section 3 of the Uniform Bills of Lading Act in support of that contention. Section 10 of the same act, among other things, binds a person receiving a bill of lading to the terms and conditions of the bill not contrary to law or public policy, unless objected to in writing within three hours after receiving it, and requires that all bills of lading shall have blank forms attached for such objections. The bills of lading issued by defendant contained no such blank forms. They did contain provisions that no carrier in possession of the property should be liable for the act or default of the shipper, or for loss or damage not occurring on its own line or portion of the through route, nor after the property had been delivered to the next carrier. The hides were consigned to plaintiff at Chicago, "Route C., B. & Q. via C. & N. W., North Avenue station." The evidence does not show the loss occurred by the default of plaintiff, nor that the bills of lading contained the blank forms for objections required by section 10 of the statute. Defendant is not in a position to claim its liability was limited to loss occurring on its own line, if that were a material question; but under the facts proved we do not think that material to the decision of the case, for, as we have said, the conclusion is justified from the evidence that the hides were not in the cars when the bills of lading were issued and the cars shipped. In our opinion the declaration stated a good cause of action. Section 23 does not create a new cause of action, but merely deprives the carrier of a defense which it was allowed to make before that enactment, and the statute, in our opinion, is not subject to any constitutional objection.

[6] It is also contended by defendant that the hides had been purchased by plaintiff by correspondence before it sent its agent to Mt. Vernon to receive them; that the title passed to plaintiff in the warehouse as soon as they were inspected and separated, before the bills of lading were issued, and, if Cornick procured the bills of lading, he did so as agent of plaintiff in shipping its own property. We do not think this position sustained by the proof. Plaintiff never paid for or intended to pay for the hides until they were in possession of defendant. Its agent, so far as the proof discloses, thought they were loaded in the cars on defendant's track. Cornick secured and presented to plaintiff's agent the bills of lading, whereupon he gave Cornick the drafts, which plaintiff in good faith paid, relying on the bills. It is not shown by the proof that defendant's agent at Mt. Vernon inspected the cars before they were sealed, to ascertain whether the hides were in them, or whether he relied on Cornick's representations. At all events, Cornick procured him to issue the bills and exhibited them to plaintiff's agent before the latter would pay for the hides. There was no proof to sustain defendant's plea that plaintiff's agent, Cooper, was guilty of any fraud in securing defendant's agent to issue the bills of lading after the cars were sealed and fastened, without knowing whether the hides described in the bills were in the cars.

We are of opinion there was no error committed in the admission and rejection of evidence, and in directing a verdict for plaintiff.

The judgment is affirmed.

Judgment affirmed.

(310 Ill. 558)

PEOPLE v. LOVE et al. (No. 15570.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 8, 1924.)

1. Licenses ⟸42(6)—Conclusion in certificate made prima facie evidence of noncompliance with Securities Law held not ground for reversal.

In prosecution for violation of the Illinois Securities Law, in which the undisputed evidence and competent portions of the certificate of the secretary of state as to defendants' noncompliance with act, made prima facie evidence of noncompliance with the act by section 37, par. 5, conclusively proved the defendants' guilt, the fact that the certificate contained a conclusion which was incompetent as evidence, was not ground for reversal.

2. Constitutional law ⟸55—Statute making certificate as to compliance with Securities Law prima facie evidence held not unconstitutional.

Illinois Securities Law, § 37, par. 5, making certificate by secretary of state showing compliance or noncompliance with the act prima facie evidence as to compliance or noncompliance therewith *held* not violative of the constitutional rights of a defendant charged with the violation of the act, in view of sections 2 and 18.

3. Constitutional law ⟸55—Legislature cannot declare what is conclusive evidence.

The Legislature cannot declare what shall be conclusive evidence.

4. Constitutional law ⟸109—Statute changing rule of evidence not unconstitutional.

No one has a vested right in a rule of evidence either in a criminal or civil case, and there is no constitutional prohibition against the Legislature changing it so long as it leaves a party a fair opportunity to make his defense and to submit all the facts to the jury.

5. Criminal law ⟸662(4)—Statute making certificate prima facie evidence not denial of right to confront witnesses.

Illinois Securities Law, § 37, par. 5, making certificate of secretary of state as to compliance or noncompliance with such act prima facie evidence, *held* not unconstitutional as against contention that it deprives one who is accused of the violation of such act of the right to meet witnesses face to face, the doctrine that a defendant is entitled to meet witnesses face to face being inapplicable to documentary evidence of such character.

6. Licenses ⟸42(4)—Evidence held to prove sale of securities to persons other than stockholders in violation of Securities Law.

In a prosecution for selling securities of a certain corporation, in violation of Illinois Securities Law, §§ 9, 29, prohibiting the sale of such securities unless certain statements and documents shall have been filed, in which the defense was that the securities were sold to a stockholder, as permitted by section 5, par. 2, evidence *held* to prove that the alleged stockholder was in fact an agent of the corporation in the sale of stock to persons other than stockholder.

7. Criminal law ⟸369(2)—Evidence as to other sales held admissible in prosecution for violation of Illinois Securities Law.

In prosecution for violation of Illinois Securities Law defended on the ground that the sale was to a stockholder, permitted by section 5, par. 2, evidence as to sales to persons other than purchaser named in indictment *held* admissible, to prove that the stock was not being distributed to stockholders, and that the sale complained of was not an isolated sale under section 5, par. 1.

8. Indictment and information ⟸110(2)—Rule as to sufficiency of indictment stated.

Averments in an indictment, when laid in the language of the statute, are sufficient, but it is not necessary that an indictment contain all the language of the statute, and an indictment is sufficient, if it states the offense in language sufficiently explicit that the defendant may know the nature of the charge against him, and the jury hearing the cause may understand it.

9. Licenses ⟸42(3)—Indictment charging violation of Securities Law held sufficient.

Indictment charging a violation of the Illinois Securities Law, §§ 9, 30, prohibiting the sale of securities, unless certain statements shall have been filed *held* sufficient.

10. Indictment and information ⟸111(2)—Need not negative exemptions.

Indictment charging violation of Illinois Securities Law need not negative the exemptions enumerated in section 5.

11. Criminal law ⟸858(3)—Jury may take exhibits with them to jury room.

In criminal cases, the jury may take with them to the jury room those exhibits which are directly connected with the subject of the judicial investigation, and what constitutes such subject is a matter resting in the sound discretion of the trial court.

Thompson, J., dissenting.

Error to Winnebago County Court; Fred E. Carpenter, Judge.

Malcolm A. Love, Ernest E. Lewis, and Charles F. Buman were convicted of violating the Illinois Securities Law, and they bring error. Affirmed.

Harry B. North, Early & Early, William D. Knight, and B. J. Knight, all of Rockford, for plaintiffs in error.

Edward J. Brundage, Atty. Gen., William Johnson, State's Atty., of Rockford, and Edward C. Fitch, Asst. Atty. Gen. (A. B. Louison, of Rockford, of counsel), for the People.

STONE, J. Plaintiffs in error, Malcolm A. Love, Ernest E. Lewis, and Charles F. Buman, were indicted in the circuit court of Winnebago county for selling and offering to sell securities known as class D under the Illinois Securities Law (Smith-Hurd Rev. St. 1923, c. 121½, §§ 96–137) without complying with that law. The cause was certified to the county court of that county for trial

and comes here for review, a constitutional question being involved.

Plaintiffs in error Love and Lewis were president and secretary of the American Engineering & Development Company. The indictment consists of three counts. The first charges that plaintiffs in error, as agents of the American Engineering & Development Company, a corporation, the issuer of certain securities in class D, unlawfully sold and offered to sell to John W. Howard 10 shares of the capital stock of said corporation without compliance with the provisions of the Illinois Securities Law. The second count charges the sale of such stock to Howard. The third count is in substance the same, except that it charges more fully the failure to comply with the Securities Law on the part of the corporation. A motion to quash the indictment was overruled. A bill of particulars was ordered filed. This described the American Engineering & Development Company more in detail, alleging also that the defendants employed Marion F. Ambrosius, of Rockford, Ill., to act as their agent and the agent of the corporation in the sale and disposition of the stock, and that the defendants in various ways aided, abetted and assisted Ambrosius to sell to Howard the 10 shares of capital stock referred to in the indictment and received the proceeds from such sale; that the stock was signed by Love as president and Lewis as secretary; that, while the purported face value of the stock was $10 a share, it was, in fact, at the time of the sale of no market value, but was purely speculative and worthless.

The contentions of the plaintiffs in error are, that paragraph 5 of section 37 of the Securities Law (section 132) is unconstitutional as applied to criminal cases, that the facts did not bring the sale within the prohibition of the statute, and that the court erred in instructions to the jury and in the admission of evidence. The form of the certificate of the secretary of state appears not to have been objected to.

Concerning the first contention, it is argued that the act denies a defendant the right to be confronted by the witnesses against him and gives to the secretary of state the right to prove defendant guilty without testifying; that he may thereby decide the ultimate fact in dispute without appearing in court. The certificate of the secretary of state put in evidence stated that he is the keeper of the records filed under the Securities Act, and further as follows:

"I have searched the said records and documents and find that the American Engineering & Development Company has not complied with the provisions of the Illinois Securities Law * * * respecting its securities and has not filed the statements and documents specified and required in and by said acts."

Paragraph 5 of section 37 provides that:

"In any prosecution, action, suit or proceeding before any of the several courts of this state based upon or arising out of or under the provisions of this act, a certificate under the seal of state, duly signed by the secretary of state, showing compliance or noncompliance with the provisions of the Illinois Securities Law, respecting the securities in question or respecting compliance or noncompliance with the provisions of the act by any issuer, solicitor, agent, broker, dealer or owner, shall constitute prima facie evidence of such compliance or of such noncompliance with the provisions of this act, as the case may be, and shall be admissible in evidence in any action at law or in equity to enforce the provisions of this act."

The certificate required by the act does not call for the secretary's conclusions concerning the guilt or innocence of one accused of a breach of the law, but is a certificate of the condition of the records in his office concerning the documents required to be filed and is to be taken as prima facie evidence of such state of his records. By this section the Legislature said, in effect, that the certificate of the secretary of state shall be taken as prima facie evidence of the facts therein stated. Its evident purpose is to avoid the necessity of transporting the records from one part of the state to another, or calling individuals out of the office of the secretary of state to travel to different parts of the state to act as witnesses in cases brought under the law. To so require would place an unreasonable burden upon the state.

The act requires that the filing of certain statements specified therein shall constitute compliance with the act, and, unless they are such statements as the act requires, the secretary of state is not allowed to file them. His certificate, therefore, in cases where the documents required by the act have not been filed, is to the effect that the records in his office do not show the filing of the statements required by the statute. If, on the other hand, the statute has been complied with, a defendant in a criminal or other case is entitled to have the certificate of the secretary of state as to statements filed. Conclusions of the secretary of state as to whether or not statements and documents filed in his office by the officers of any corporation constitute a compliance with the law have no place in the certificate here referred to. If the statements comply with the law, the secretary of state is required to file them; if they do not, the statute provides that they shall not be filed. Section 2 of the act (section 97) provides that the word "file" or "filing" shall mean the indorsement of the word "filed" on any statement or document received, for the purpose of showing that in the opinion of the secretary of state the provisions of the act have been complied with. The discretion

required to be exercised by him lies in determining, before filing, whether the statements offered are such as the act requires. By section 18 of the act (section 113) his decision may be reviewed by the circuit court of Sangamon county. Until such statements are filed no one has any right to sell class D stock of such corporation.

[1] Plaintiffs in error do not contend that they filed with the secretary of state the documents required by law. They say they delivered papers to one James A. Davis in Chicago, who told them to go ahead and sell their stock, and if they had any trouble to come and see him. He was not shown to be connected with the office of the secretary of state or authorized to receive papers for filing in that office. One Arthur G. Davis testified that he had searched the records of the office of the secretary of state and found no documents specified in the act to be filed. There is no evidence of such filing. The certificate of the secretary of state in this case contains a conclusion, and was not in that condition competent as evidence, and should not have been admitted in that form. As noncompliance with the statute is obvious from the undisputed evidence in the case, we are unable to see wherein defendants were injured by the admission of that part of the certificate offering a conclusion. Though it was error to admit the certificate in the form presented, we are of the opinion that this error is not sufficient to require a reversal of the judgment in this case.

[2-5] While the Legislature does not have power to declare what shall be conclusive evidence (People v. Rose, 207 Ill. 352, 69 N. E. 762), no one has any vested right in a rule of evidence either in a criminal or civil case, and there is no constitutional prohibition against the Legislature changing it so long as it leaves to a party either in a criminal or civil case a fair opportunity to make his defense and to submit all the facts to the jury. The fact that the statute makes the certificate of the secretary of state prima facie evidence of the facts therein stated does not make such act void, as contravening the Constitution. People v. Beck, 305 Ill. 593, 137 N. E. 454; People v. Falk (No. 15527) 141 N. E. 719; Johnson v. Pendergast, 308 Ill. 255, 139 N. E. 407. Nor is the section void as depriving the accused of a right to meet witnesses face to face. Such doctrine has no application to documentary evidence of this character. Sokel v. People, 212 Ill. 238, 72 N. E. 382; Tucker v. People, 122 Ill. 583, 13 N. E. 809. The certificate of the secretary of state is an official act under the seal of the state, required of a public officer by the statute, certifying to what the records of his office show. It is within the category of documentary evidence referred to in these cases. The act is not open to the constitutional objections urged.

Section 8 of the act (section 103) provides that all securities other than those falling within classes A, B, and C shall be known as securities in class D. Section 9 (section 104) provides that no securities in class D—i. e., no securities based on a prospective income—shall be sold or offered for sale until there shall have been filed in the office of the secretary of state the certain statements and documents required by section 9. Section 29 (section 124) provides that any solicitor, agent, or broker selling or offering to sell any securities in class D without compliance with the provisions of the act shall be deemed guilty of a misdemeanor and punished according to the provisions of that section. Securities in class D are subject to the provisions of the act, and can be sold only upon compliance with the terms of the act—i. e., by filing in the office of the secretary of state a statement, verified by oath, setting forth in detail the description of the securities intended to be sold and detailed information which is specified in the law in regard to the issuer of the securities—the law under which it is organized; if a corporation, the names and addresses of its officers, directors, or trustees, or persons composing the issuer; if it is a nonincorporated association, a statement of its assets and liabilities and of its income, and certain other information specified in the act. This provision is to protect the public from fraud in the sale of wild-cat or blue sky securities. Stewart v. Brady, 300 Ill. 425, 133 N. E. 310.

[6] Counsel for plaintiffs in error argue that securities which fall under class D may be treated as under class B where the circumstances of the sale are such as to come within some one provision of section 5 (section 100) relating to sales of securities in class B; that there is no violation of the statute in this case, because the only sale charged in the indictment was made to John W. Howard, who was a stockholder in the issuer corporation; and that under paragraph 2 of section 5 of the act plaintiffs in error were entitled to sell the stock to him without first filing a statement with the secretary of state. Paragraph 2 of section 5 defines certain sales of securities which by section 5 are made not subject to the provisions of the act in case of original sale. This paragraph refers to "capital stock of a corporation when sold or distributed by it among its stockholders without the payment of any commission or expenses to agents, solicitors or brokers, and without incurring any liability for any expenses whatsoever, in connection with the distribution thereof," and plaintiffs in error contend that since this stock was sold to Howard, who was a stockholder of the corporation it was exempt from the provisions of the act. Howard testified that he received the certificate of stock from Ambrosius. Ambrosius, who was separately indicted and had pleaded guilty, testified that he got the stock from the com-

pany by mail; that he received from Howard the sum of $100, which he sent by his check to defendant Lewis; that during the summer previous to this transaction he had arranged with plaintiffs in error to sell the stock of the corporation. It is evident from his testimony that he had acted as agent of the corporation and plaintiffs in error for the sale of this stock. He testified that he did not receive any commission at the time he sold to Howard the 10 shares charged in the indictment. He, however, testified that he made a number of sales of stock for this corporation; that he frequently consulted with plaintiffs in error as officers of the corporation, and distributed their advertising matter; that he received stock through the mails, made out in the names of the purchasers, and collected the money therefore and sent it to the company. His sales were to others than those already stockholders of this corporation. While he stated that on the whole he did not make any money out of handling the stock of the company, he testified that the American Engineering & Development Company assumed a note for $1,000 for him at the Rockford National Bank, upon which he, with a Dr. Pierce, was liable as surety for another corporation. It is evident that he received compensation for his services in the sale of this stock, that the stock was not distributed to stockholders of the corporation as contemplated by paragraph 2 of section 5, and that the sale to Howard was not within the exemption of that paragraph of the act. Without deciding whether class D securities may be exempt as under class B, the record does not show the sale to come within the provisions of paragraph 2 of section 5 of the act.

[7] It is objected that evidence of transactions of plaintiffs in error concerning sales of stock other than the sale to Howard was not competent and that the court erred in admitting it. This evidence was admissible on more than one ground. Paragraph 1 of section 5 of the act exempts isolated sales, and this evidence was competent to show that the sale charged was not an isolated sale. Such evidence was also competent to show the relation of Ambrosius in his dealings with the corporation and plaintiffs in error, as tending to show that the sale charged was not a distribution of stock by the corporation to its stockholders.

Other objections are urged to the admission of evidence, but upon examination of the record we find no error in the court's rulings thereon.

[8-10] Plaintiffs in error contend that the indictment does not state a cause of action; that, while the rule is that averments in an indictment when laid in the language of the statute are sufficient, the language of the statute embraced within the indictment in this case does not define the offense or charge a crime. The indictment charges that plaintiffs in error unlawfully sold and offered to sell 10 shares of stock of the American Engineering & Development Company without full compliance with the Securities Law. Section 9 of the act provides that no securities in class D shall be sold or offered for sale until certain statements have been filed with the secretary of state. Section 30 of the act (section 125) provides that any issuer of securities, or any officer, director, trustee, or agent thereof, selling or offering to sell any securities in class D without full compliance with the provisions of the act, shall be deemed guilty of misdemeanor and fined or imprisoned in the county jail, or both. The indictment charges that plaintiffs in error sold the stock in question as agents of the American Engineering & Development Company. It is not necessary that an indictment contain all the language of the statute on the subject, but it is sufficiently technical and correct if it states the offense in the terms and language of the statute creating the offense, or states the offense in language sufficiently explicit that the defendant may know the nature of the charge against him and the jury hearing the cause may understand it. People v. McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 904; People v. Weil, 244 Ill. 176, 91 N. E. 112; Du Bois v. People, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183. Nor is it necessary that the indictment negative the exemptions enumerated in section 5 of the statute. The offense lies in selling class D securities without full compliance with the Securities Law. If there has not been a compliance with the law plaintiffs in error are guilty. If they did not make such sales, or in making them complied with the statute, such is a matter of defense, which will defeat the action. The indictment is sufficient.

[11] It is also charged that it was error to permit the jury to take the exhibits to the jury room with them. In criminal cases, the jury may take with them to the jury room those exhibits which are directly connected with the subject of the judicial investigation. What exhibits constitute those specified in the rule is a matter resting in the sound discretion of the trial judge. People v. Clark, 301 Ill. 428, 134 N. E. 95; Dunn v. People, 172 Ill. 582, 50 N. E. 137. The exhibits bore directly on the charge, and there was no abuse of discretion in permitting them to go to the jury room.

Objections are also raised to certain instructions given for the people, and refusal of certain instructions offered by plaintiffs in error. We have examined these instructions, and are of the opinion that no error was committed in giving or refusing the same.

The jury heard the testimony in this case and were amply justified by the record in returning a verdict of guilty. The record

contains no reversible error, and the judgment of the county court will be affirmed.

Judgment affirmed.

THOMPSON, J., dissents.

(310 Ill. 472)

PEOPLE v. BRAUTIGAN. (No. 15538.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 6, 1924.)

1. Grand jury ⟸30—Order continuing grand jury to following term held void.

Since the grand jury expired with the term of the court, at common-law, and since the common-law rule has not been changed by statute, the authority of a grand jury expired on the last day of the term, and an order of the court that the grand jury be continued to the following term was void, in view of Cr. Code, div. 11, §§ 1-3; Laws 1915, p. 353, § 19; Smith-Hurd Rev. St. 1923, c. 78, § 19.

2. Officers ⟸79—"De jure officer" defined.

An "officer de jure" is one who is in all respects legally appointed and qualified to exercise the office.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, De Jure Officer.]

3. Officers ⟸39—Officer or public body cannot have de facto existence if de jure officer or body is functioning.

If the duties of an office or public body are performed by the officer or body de jure, another officer or body, though claiming under color of title, cannot become an officer or body de facto by undertaking to perform official acts or duties.

4. Grand jury ⟸30, 36—Grand jury attempting to function at time when grand jury de jure was performing duties did not have de facto existence.

A grand jury continued to following term by void order of court, and attempting to function during such other term at a time when a grand jury de jure was performing the duties of the grand jury during such term, was not a grand jury de facto; and therefore a witness who refused to answer questions before such unauthorized grand jury was not precluded, on theory that it had a de facto existence from questioning its authority.

5. Grand jury ⟸36—Want of jurisdiction not waived by failure to object on ground thereof on refusal of witness to answer question.

Where grand jury had no legal existence, the failure of a witness called before it for examination to base refusal to answer questions on the ground that the grand jury was without authority did not constitute a waiver of such objection precluding him from interposing such objection in contempt proceedings, since he could not waive want of jurisdiction.

6. Contempt ⟸66(3)—Failure to object to want of jurisdiction held not to preclude witness from raising question on writ of error.

Failure of witness called before grand jury to raise question of the want of jurisdiction of the grand jury in proceedings in which he was adjudged in contempt for refusal to answer questions did not preclude him from raising the question on writ of error to review order adjudging him in contempt, since the want of jurisdiction could not be waived.

7. Courts ⟸23—Consent cannot give jurisdiction.

Consent cannot give jurisdiction.

8. Courts ⟸37(1)—Act done without jurisdiction may be called in question in any proceeding.

Every act done by a body or a court without jurisdiction is void and may be called in question, or disregarded, in any proceeding and by any person at any time.

Error to Criminal Court, Cook County; M. L. McKinley, Judge.

Arnold H. Brautigan was adjudged in contempt of court, and he brings error. Reversed.

John C. Farwell and Nash & Ahern, all of Chicago (Michael J. Ahern, Thomas E. Swanson, Edward R. Litsinger, and Lorin C. Collins, all of Chicago, of counsel), for plaintiff in error.

Edward J. Brundage, Atty. Gen. (Frederick A. Brown, William P. MacCracken, Jr., and George L. Wire, all of Chicago, of counsel), for the People.

DUNN, J. Arnold H. Brautigan, the plaintiff in error, while a witness in the criminal court of Cook county before the grand jury, refused to answer certain questions on the ground that the answers might incriminate him and subject him to fines, penalties, and forfeitures. He was brought into open court and persisted in his refusal. An order that he be released from all liability to prosecution or punishment in accordance with section 35 of division 1 of the Criminal Code (Smith-Hurd Rev. St. 1923, c. 38, § 82) was entered by the court, and he was sent back to the grand jury room. He again refused to answer the questions for the same reason he had given before, and having been again brought before the court persisted in his refusal, whereupon the court adjudged him guilty of contempt of court and sentenced him to imprisonment in the county jail for four months. He sued out a writ of error and by his assignments of error avers that it is apparent that answers to the questions asked might incriminate him; that the order entered was not broad enough to protect him from prosecution for crimes which his answers might tend to prove; that the section of the Criminal Code in question does not apply to investigations by grand juries; that the grand jury was not legally organized

and all of its proceedings were void; and that there were various irregularities of procedure which denied to the plaintiff in error due process of law and rendered all the proceedings void.

The terms of the criminal court of Cook county are held monthly, beginning on the first Monday of the month. The record shows that at the August term, 1922, on the first Monday of the month, a grand jury was duly impaneled, sworn, and charged by the court, and that the same thing occurred in each succeeding month, to and including May, 1923. On the last day of the August term, 1922, an order was entered on the motion and petition of the state's attorney of Cook county, reciting that the court finds that it is for the best interest of public justice that the regular grand jury of Cook county be continued to the September term of the criminal court, in order, and for the sole purpose, that the grand jury may be enabled to complete its investigation of the alleged violations of criminal law by present and former members of the board of education of the city of Chicago and by present and former employees of said board, and by persons and firms doing business with said board or who have heretofore done business with said board, and by any persons acting in criminal concert with any of the aforesaid persons or firms; and it was therefore ordered that the regular grand jury of Cook county for the August term, 1922, was thereby continued to the September term, 1922, of the criminal court of Cook county, and was directed to continue its investigation in relation to the alleged violations of criminal law by the persons recited in the previous part of the order. A like order was entered on the last day of the September term and of the October term continuing the grand jury to the next term. Similar orders were entered on the last day of the November term on the motion of the state's attorney and the Attorney General, and on the last day of the January term on the motion of the Attorney General. On the last day of the February term on motion of the Attorney General a like order was made, which also directed the grand jury, in addition to the investigations which it had been engaged upon, "to investigate alleged violations of criminal law by present and former officers, employees and agents of the city of Chicago, Ill., and by persons and firms doing business with the said city of Chicago, its officers, agents and employees, or who have heretofore done business with said city of Chicago, its officers, employees or agents, and with persons and firms acting in criminal concert with any of the aforesaid persons or firms, and to consider no other matters whatsoever." The same order was entered on the last day of the March term and of the April term. It was at the May term, 1923, that the plaintiff in error appeared before the grand jury and the events which are the subject of this proceeding occurred.

At common law the sheriff of every county was bound to return to every session of the peace and every commission of oyer and terminer and of general gaol delivery 24 good and lawful men, who were sworn to the number of 12 at least and not more than 23, and constitute the grand jury, to whom indictments were presented for their consideration and action. 4 Blackstone's Com. 302. Though the statute of this state does not in express language require a grand jury to be summoned at every term of the circuit court or at any term, such requirement has been assumed, in accordance with the proceedings at common law, unless the statute has expressly provided that no grand jury be summoned. The first three sections of division 11 of the Criminal Code (sections 711–713) direct that the grand jury, having been impaneled and instructed by the court, shall retire to their room to consider such matters as may be brought before them; that they shall present all offenses cognizable by the court at which they attend; and that if they are dismissed before the court adjourns they may be summoned again on any special cases at such time as the court directs. The act of May 2, 1873, "concerning circuit courts, and to fix the times for holding the same in the several counties in the judicial circuits in the state of Illinois, exclusive of the county of Cook" (Rev. Stat. 1874, p. 334), made no reference to either grand or petit jury, except to provide in section 2 that when in the opinion of the judge it should not be necessary for the speedy administration of justice to summon a grand and petit jury, or either of them, he might by an order dispense with either or both of such juries for any term or part of a term. The act of 1915, "to revise the law concerning the time of holding the terms of circuit court and of the calling of juries in the several judicial circuits exclusive of Cook county" (Laws of 1915, p. 353), retains section 2 substantially as section 19 of the latter act, fixes the time for holding the circuit courts in the various counties of the state except Cook, and establishes special regulations as to calling grand and petit juries in certain counties. It provides that at certain terms of court in certain counties no grand jury or no petit jury, or neither a grand nor petit jury, shall be summoned unless by the order of the court or judge, and as to all other terms of court and all other counties there is no provision of any statute requiring a grand jury to be summoned, but the requirement is left as at common law by which a grand jury was summoned. The powers of the criminal court of Cook county and the judges thereof, and the proceedings, process, and practice in the court, are the same as those of the circuit court and the judges thereof. Rev. Stat. 1874, p. 339.

The grand jury at common law sat through

the term unless its duties were sooner completed, and its existence ceased with the term. Two grand juries were summoned in the county of Middlesex and in the county of Suffolk, while in Yorkshire one panel of 48 freeholders and copyholders only could be returned to serve in the assizes, and at the sessions only 40 could be returned on the panel. 1 Chitty on Crim. Law, 157, 310, 311. These were special exceptions, there being under the common law of England, except in these instances, but one grand jury, consisting of not less than 12 or more than 23 men. 1 Chitty on Crim. Law, 310. Another grand jury might be summoned on two occasions, the first when before the end of the sessions the grand jury, having brought in its bills, was discharged by the court and after its discharge either some new offense was committed and the party taken and brought into gaol, or when, after the discharge of the grand inquest, some offender was taken and brought in before the conclusion of the sessions. The other instance of a new grand jury being sworn was when it was to inquire, under the statute 3 Henry VII, ch. 1, of the concealment of a former inquest. This was anciently the proper mode of punishing the grand jurors if they refused to present such things as were within their charge of which they had sufficient evidence. This latter case may be disregarded, for it fell into disuse many years ago, and the practice which has been since followed, instead of impeaching the grand jury who failed to find a true bill, was to present an indictment to another grand jury. The common-law power of the court to call a special grand jury, since the practice of impeachment of the grand jury has been abandoned, has been limited to cases of offenses committed after the grand jury has been discharged or when some offender has been arrested after the discharge of the grand jury.

[1] Our statute (Smith-Hurd Rev. Stat. chap. 78, § 19) has provided a method of summoning a special grand jury, as follows:

"The judge of any court of record of competent jurisdiction may order a special venire to be issued for a grand jury at any time when he shall be of opinion that public justice requires it. The order for such venire shall be entered on the records of the court by the clerk thereof; and such clerk shall forthwith issue such venire under his hand and the seal of the court, and deliver the same to the sheriff, who shall execute the same by summoning, in the same manner now provided or that may hereafter be provided by law for summoning jurors, twenty-three persons, qualified by law, to constitute a grand jury. Such venire shall state the day on which such persons shall appear before the court."

No attempt was made to comply with this section, and no claim of compliance is made by the Attorney General. The people rely upon the fact that the record shows that the grand jury of the August term, 1922, was never discharged, but was continued from term to term because its work was not completed. At common law the grand jury expired with the term, and no statute has changed this rule or authorized any court to continue a grand jury beyond the adjournment of the term. Therefore the grand jury's authority ceased on the last day of the August term with the adjournment of the court, and the order purporting to extend its powers was void.

It is contended, however, that the plaintiff in error did not refuse to testify because of the illegality of the orders continuing the grand jury, and that a witness cannot question the authority of the grand jury, since it had a de facto existence. "The de facto doctrine was introduced into the law as a matter of policy and necessity, to protect the interest of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of an office, without being lawful officers." State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; State v. Poulin, 105 Me. 224, 74 Atl. 119, 24 L. R. A. (N. S.) 408, 134 Am. St. Rep. 543. The doctrine has been applied to sustain the acts of officers acting as such though without legal title, and the obligations, contracts, and acts of municipal corporations and of public bodies incurred, undertaken, or done by such officers. In State v. Carroll, supra, it is said that a person is a "de facto officer" where the duties of the office are exercised:

"First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

"Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like.

"Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

"Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

This definition has been approved by many courts. Erwin v. Jersey City, 60 N. J. Law, 141, 37 Atl. 732, 64 Am. St. Rep. 584; Wendt v. Berry, 154 Ky. 586, 157 S. W. 1115, 45 L. R. A. (N. S.) 1101, Ann. Cas. 1915C, 493; Walcott v. Wells, 21 Nev. 47, 24 Pac. 367, 9 L. R. A. 59, 37 Am. St. Rep. 478; State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105; Van Amringe v. Taylor, 108 N. C. 196, 12 S. E. 1005, 12 L. R. A. 202, 23 Am. St. Rep. 51.

[2-4] An "officer de jure" is one who is in all respects legally appointed and qualified to exercise the office. If the duties of an office or public body are performed by the officer or body de jure, another officer or body, though claiming under color of title, cannot become an officer or body de facto by undertaking to perform official acts or duties, and cannot be a de facto officer or body while a de jure officer or body is exercising the functions of the office or body. Howard v. Burke, 248 Ill. 224, 93 N. E. 775, 140 Am. St. Rep. 159; McCahon v. Commissioners, 8 Kan. 437; In re Gunn, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519; Powers v. Commonwealth, 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L. R. A. 245. The grand jury, because the court had no power to continue it, was acting under color of an authority which was void; but it could not become a grand jury de facto, because there was a grand jury de jure which was performing the duties of that body. The acts of the so-called grand jury of the August term, 1922, continued to May, 1923, were mere usurpations of authority, and were void.

[5] The Supreme Court of Wisconsin, in the case of State v. Noyes, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 776, 41 Am. St. Rep. 45, held that indictments returned at the October term by a grand jury which had been summoned for the September term and had been continued through the October term were not void, and that the grand jury was not without jurisdiction to return them at the October term. The ground of the decision was that the grand jury was a grand jury de facto. In that case, however, no grand jury had been summoned for the October term, there was no grand jury de jure, and the court held that the indictments were not void but were good and valid so far as the proceeding in question, which was a habeas corpus on behalf of the defendants in the indictments, was concerned, because found by a grand jury acting under color of lawful authority and a good and sufficient grand jury de facto. That case was cited in People v. McCauley, 256 Ill. 504, 100 N. E. 182, and quoted from at some length; and People v. Morgan, 133 Mich. 550, 95 N. W. 542, was also cited as approving its doctrine and extending it to hold that under the statutes of Michigan an indictment found by a de facto grand jury could not be questioned by motion to quash or challenge to the array. In neither of those cases does it appear that there was a grand jury de jure in existence at the time the indictments were found. In this state the rule in regard to objections to the organization of the grand jury was announced in People v. Gray, 261 Ill. 140, 103 N. E. 552, 49 L. R. A. (N. S.) 1215, which held that irregularities in the constitution of the grand jury are waived by pleading to the indictment, and that this doctrine applies to all informalities in the drawing or summoning of the jury and questions regarding its qualifications, but does not extend to cases where because of a fundamental defect the grand jury was without jurisdiction to act. Consent could not give the court jurisdiction to sentence the plaintiff in error in that case on a charge made otherwise than by the indictment of a grand jury. He could waive objections to the qualifications of individual jurors, but he could not waive the charge by an actual grand jury. So here, the plaintiff in error could not waive the existence of an actual grand jury with authority to examine him and to charge him with contempt. He was not indicted. He was merely a witness before the so-called grand jury. If this body was not a grand jury but was a mere body of men without authority, it had no jurisdiction to examine him as a witness or to bring him before the court for contempt in refusing to answer questions, and the court got no jurisdiction of him by the action of the supposed grand jury.

[6-8] It is contended that the plaintiff in error not having raised the jurisdictional question in the criminal court has waived it and cannot raise it now. This question goes to the jurisdiction of the grand jury and of the court and cannot be waived. Consent cannot give jurisdiction, and every act done by a body or a court without jurisdiction is void and may be called in question or disregarded in any proceeding and by any person at any time.

In People v. Cochrane, 307 Ill. 126, 138 N. E. 291, the plaintiff in error was adjudged guilty of contempt of court for refusing to answer questions before this same so-called grand jury at the September term, 1922, and was committed to the county jail for a term of 10 days. Upon a writ of error the judgment was affirmed, and it was said that if the order of the court to the grand jury to continue its investigation to the September term had been erroneous, it would not have been without jurisdiction, and the grand jury was a grand jury in fact, performing the functions of a grand jury as a part of the court. The abstract of the record presented to the court in that case did not show that a grand jury was impaneled at the September term, 1922, the case was presented as if the grand jury had been continued from the August term and no grand jury had been summoned for the September term, and there was no intimation that a grand jury de jure was in existence at the time the grand jury before which Cochrane appeared was conducting its investigations. The case as it was presented was in all respects similar in its facts to State v. Noyes, supra, and People v. Morgan, supra. The last sentence of the opinion concludes with these words:

"A witness called to testify before a court would not on a writ of error be permitted to try the title of the judge to his office, the or-

ganization of the court, or any question concerning the legality of the grand jury."

This statement is correct as applied to the judge, the court, or a grand jury de jure or de facto. It has no application to the acts of mere usurpers undertaking to perform the duties of an office while the actual de jure officers are in the performance of those duties.

Various irregularities of procedure are alleged for error; but, since the objection to the organization of the grand jury is fatal to the proceedings, they need not be considered.

The judgment of the criminal court was unauthorized by law, and it will be reversed.

Judgment reversed.

(310 Ill. 614)

PEOPLE v. BRADY. (No. 15554.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 6, 1924.)

Grand jury ⇐36—Witness could not be adjudged in contempt for refusal to answer question before void grand jury.

A witness cannot be adjudged in contempt for refusal to answer a question before the grand jury, where the organization of the grand jury was void and it was without jurisdiction.

Error to Criminal Court, Cook County; M. L. McKinley, Judge.

Edward J. Brady was adjudged in contempt of court, and he brings error. Reversed.

John F. Tyrrell and Thomas E. Swanson, both of Chicago, for plaintiff in error.

Edward J. Brundage, Atty. Gen. (Frederick A. Brown and George L. Wire, both of Chicago, of counsel), for the People.

FARMER, C. J. Edward J. Brady, plaintiff in error, was a witness before the grand jury in the criminal court of Cook county and was sentenced to imprisonment in jail for 60 days for refusal to answer questions propounded to him by the grand jury. The grand jury before which he was a witness was the same grand jury held to be an illegally organized grand jury in People v. Brautigan (No. 15538) 141 N. E. 208. In that case we held the grand jury was an illegal and void organization. The same objection to the grand jury is raised in this case, and we must hold it had no jurisdiction to summon plaintiff in error as a witness and that he could not legally be adjudged guilty of contempt for refusing to answer questions.

The judgment is reversed.

Judgment reversed.

(310 Ill. 557)

PEOPLE v. KOCH. (No. 15537.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 6, 1924.)

Grand jury ⇐36—Witness could not be adjudged in contempt for refusal to answer question before void grand jury.

A witness cannot be adjudged in contempt for refusal to answer a question before grand jury, where the organization of the grand jury was void and it was without jurisdiction.

Error to Criminal Court, Cook County; M. L. McKinley, Judge.

Frank J. Koch was adjudged in contempt of court, and he brings error. Reversed.

Litsinger, Healy & Reid and Thomas E. Swanson, all of Chicago (Edward R. Litsinger and Lorin C. Collins, both of Chicago, of counsel), for plaintiff in error.

Edward J. Brundage, Atty. Gen. (Frederick A. Brown, William P. MacCracken, Jr., and George L. Wire, all of Chicago, of counsel), for the People.

DUNN, J. Frank J. Koch, the plaintiff in error, was a witness before the grand jury in the criminal court of Cook county, who for his refusal to answer questions was sentenced for contempt of court to imprisonment in the county jail for four months. The grand jury was the same grand jury whose organization and jurisdiction were the subject of consideration in the case of People v. Brautigan (No. 15538) 141 N. E. 208. The same objections to the grand jury which were made in that case are made in this, and we hold, as we did there, that the organization of the grand jury was void and it was without jurisdiction to summon the plaintiff in error as a witness or to present a complaint against him for contempt in refusing to answer questions.

The judgment will be reversed.

Judgment reversed.

STATE ex rel. LYNCH COAL OPERATORS' RECIPROCAL ASS'N v. McMAHAN et al. (No. 24370.)

(Supreme Court of Indiana. Jan. 17, 1924.)

1. Master and servant ⟸417(2)—Court's answer to Industrial Board's question under Compensation Act advisory and not an adjudication.

The Appellate Court's answer to question propounded by the Industrial Board of Indiana under Workmen's Compensation Act, § 61, is advisory only and is given for the guidance of the Board and to expedite its business, in the same manner that Attorney General gives opinions concerning the duty of officers under Burns' Ann. St. 1914, § 9275, and does not constitute an adjudication conclusive upon court in a case involving the same question.

2. Constitutional law ⟸46(3)—Courts ⟸89—Mandamus ⟸53 — Constitutionality of statute not decided in proceeding to require Appellate Court to vacate opinion given in response to Industrial Board's inquiry.

The Supreme Court will not require the Appellate Court to vacate an opinion that Acts 1923, c. 76, is in violation of Const. art. 4, § 21, given in answer to question propounded by the Industrial Board under Workmen's Compensation Act, § 61, on the ground that the court acted in excess of its jurisdiction in passing on constitutionality of statute, since such opinion does not constitute an adjudication binding upon the court in a case involving the question, and the constitutionality of the statute and the correctness of the Appellate Court's answer cannot be decided in such proceeding.

3. Constitutional law ⟸46(3) — Prohibition ⟸5(3)—Supreme Court will not prohibit Appellate Court from giving opinion on constitutionality of statute in response to inquiry of Industrial Board.

The Supreme Court will not prohibit the Appellate Court from declaring a statute unconstitutional in response to inquiry of the Industrial Board under Workmen's Compensation Act, § 61, since the Appellate Court's opinion in such case is advisory only and does not constitute an adjudication conclusive on the court in subsequent case involving same issue, and since the Supreme Court cannot decide question of constitutionality of the statute in such a proceeding.

Original proceedings by the State of Indiana, on the relation of the Lynch Coal Operators' Reciprocal Association, against Willis McMahan and others for writ of mandate and for writ of prohibition. Petition denied.

Hays & Hays, of Sullivan, and Miller, Dailey & Thompson, of Indianapolis, for appellants.

U. S. Lesh, Atty. Gen., for appellee.

PER CURIAM. This is an original action filed in this court, in which the petitioner asks that a writ of mandate be issued against the Appellate Court and the judges thereof directing them to vacate a certain opinion and decision of said court rendered on May 18, 1923, and asks that a writ of prohibition be issued prohibiting them from exercising any jurisdiction to declare as unconstitutional and void chapter 76 of the Acts of the Indiana General Assembly of 1923.

It appears from the petition that on the ——— day of ———, 1923, the Industrial Board of Indiana, purporting to act under section 61 of the Indiana Workmen's Compensation Act (Acts 1915, p. 392), of its own motion propounded to the Appellate Court a question as to whether chapter 76 of the Acts of 1923 (Acts 1923, p. 244) was unconstitutional, because of being in violation of section 21 of article 4 of the Constitution of the State of Indiana; that the Appellate Court on May 18, 1923, answered said question in the affirmative and rendered a decision, or gave to said Board an opinion that said act was unconstitutional.

The petition alleges that said court is without any power or jurisdiction to pass upon or determine that said act is unconstitutional, on a question of law certified to said court, by said Board; that the petitioner is engaged in writing insurance, agreeing to pay compensation to injured employees and dependents of deceased employees of employers coming under said Compensation Act; and that if it writes insurance agreeing to pay any compensation not provided for by the acts relating to compensation, that said Industrial Board will revoke its certificate of authority to engage in such business, because of a rule of said Board prohibiting any such association from contracting for any risks other than included in the Industrial Compensation Law.

[1] The Appellate Court has held, and we think correctly, that when it answers a question propounded by said Board, as in this case, that the answer to such question is not an adjudication of any question, but that said answer is for the guidance of said Board, and to expedite the business of said Board. Bimel Spoke Co. v. Loper (1917) 65 Ind. App. 479, 117 N. E. 527. It was held in the above case that the answer such court made to such a question would not be binding upon said court in a case involving the facts upon which the question was based. The effect, then, of an answer to such a question propounded, is advisory only.

If this is the effect of such a proceeding, then it is not different from an opinion given by the Attorney General, to a state officer concerning the duties of such officer, as provided by section 9275, R. S. 1914. Certainly no court would have jurisdiction to issue a writ commanding the Attorney General to withdraw or set aside an opinion he had given to a state officer as to the validity of a law relating to such officer's duties. If the

Appellate Court cannot be required nor authorized by law to answer such a question because it is not a judicial proceeding, as is alleged by petitioner, then that court could refuse to answer the same, and if, in that view of the case, it did answer the question, its answer would have no effect, at least so far as the petitioner is concerned.

[2, 3] The question of the validity of the act of 1923 can be raised by a legal proceeding, as is pointed out by petitioner in its brief filed with the petition herein, but it cannot be raised in this proceeding, and neither can we decide whether the Appellate Court answered the question of the Industrial Board correctly.

The petition for a writ of mandate and for a writ of prohibition, asked for in the petition is denied.

QUILLIAM et al. v. UNION TRUST CO. OF INDIANAPOLIS et al. (No. 24551.)

(Supreme Court of Indiana. Jan. 16, 1924.)

1. Perpetuities ⇐6(5)—Provision in will suspending power to alienate real estate held void.

A provision in a will prohibiting alienation of testator's real estate for a period of 50 years violates the rule against perpetuities, and Burns' Ann. St. 1914, § 3998, prohibiting suspension of power of alienation except during a life or lives in being, and is void.

2. Wills ⇐81—Invalid part will be eliminated where intent preserved.

Where the valid part of a will will carry out the testator's main scheme and intention, an invalid part will be eliminated without destroying the will.

3. Wills ⇐545(3)—"Dying without issue" held to refer to death within testator's lifetime.

Disposing words, sufficient under Burns' Ann. St. 1914, § 3123, to create a fee, *held* not limited by a later clause, "Provided, however, that if my said daughter should die without issue, then it is my will that the property she may have derived from my estate at the time of her death shall have descended to my nephews and nieces from my own blood," since the latter clause had reference to the death of the daughter in the lifetime of testator; there being ambiguity in the use of the tenses in the quoted phrase, and provisions in the will as to management of the estate after testator's death being ascribable to a provision held void as creating of perpetuity.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Die Without Issue.]

4. Wills ⇐439—Construction must give effect to testator's intention.

Wills must be construed to give effect to testator's intention when clearly expressed; and when such intention is not clearly expressed or is couched in ambiguous phraseology so that reasonable differences of opinion arise, it is the court's duty to apply well-recognized rules of construction.

5. Perpetuities ⇐4(14)—Wills ⇐607(1)—Devise limited on death without issue held too remote; estate tail converted into fee simple.

A devise to testator's daughter and on her death without issue, to testator's nephews and nieces is a limitation over after an indefinite failure of issue, and is void under Burns' Ann. St. 1914, § 3998, as being too remote, and the daughter would take a fee tail at common law and fee simple under Burns' Ann. St. 1914, § 3994, abolishing estates tail.

Appeal from Circuit Court, Marion County.

Suit by Elsie Delzell Quilliam and others against the Union Trust Company of Indianapolis and others. Judgment for defendants and plaintiffs appeal. Transferred from Appellate Court under section 1394, cl. 2, Burns' Ann. St. 1914. Affirmed.

Superseding former opinion, 131 N. E. 428, and rehearing, 132 N. E. 614.

Geo. W. Galvin, of Indianapolis, for appellants.

Geo. Young, Charles Remster, Henry H. Hornbrook, Albert P. Smith, Paul Y. Davis, and Kurt F. Pantzer, all of Indianapolis, for appellees.

GAUSE, J. This is an action instituted by the appellants, who are nephews and nieces and descendants of nephews and nieces of Samuel Delzell, deceased, in which appellants seek to quiet their title to certain real estate in Marion county, Ind., which was owned by said deceased at his death, and to prevent the appellees from interfering with the appellants' rights to said real estate.

The appellees are the Union Trust Company of Indianapolis, as executor under the will of Anna D. Hughes, deceased, and the same company as trustee of express trusts created by the will of said Anna D. Hughes. Said Anna D. Hughes was the daughter of said Samuel Delzell.

The determination of this cause involves the construction of the will of said Samuel Delzell. The appellants claim that by the terms of said will, under which they are asserting title, said daughter was given a determinable fee in such real estate, which vested in the nephews and nieces and the descendants of the nephews and nieces of Samuel Delzell upon the death of said daughter without leaving any issue surviving at her death. The appellees contend: First, that, on account of an attempt in said will to suspend the power of alienation of the property therein devised, and the particular wording of the will in that respect, the entire will is void, and said daughter, being the only heir, took the estate by inheritance; second, if it is not void, that, by the terms of said will, she took a fee-simple estate.

The lower court held the complaint insufficient on the ground that by the will of said Samuel Delzell a fee-simple estate was devised to the daughter, Anna D. Hughes. The daughter survived her father, Samuel Delzell, and before the bringing of this suit she died without leaving issue surviving her.

The will of said Samuel Delzell was as follows:

"I, Samuel Delzell, of Indianapolis, Indiana, make and publish this my last will and testament, hereby revoking all former wills by me made.

"Item 1st: I will and direct that all my just debts and funeral expenses be paid out of the first moneys received from my estate that come into the hands of my executrix.

"Item 2: I will and direct that all of my improved real estate in Leavenworth, Kansas, and in Marion county, Indiana, including my farm in Washington township, and my land near Brightwood remain unsold during the lifetime of my daughter, Anna D. Hughes, and during the lifetime of her child or children, should any be born to her, and during the lifetime of her grandchild or children, or their heirs or descendants, until the expiration of a period of fifty years, after the date of the probate of my will, and at the expiration of said fifty years I will and direct that said property be sold and the proceeds divided among those who, by the terms of this will, will be entitled to it; and further that no rental for more than one year in advance shall be collected for any of said real estate and that any and all payments and receipts for rental for more than one year in advance shall be void. My purpose in prohibiting the sale of the above-mentioned real estate for fifty years, is because I believe no better investment can be made, and that no better way could I provide for my beloved daughter, and protect her and her children and grandchildren from want. My unimproved real estate in Marion county, Indiana, may be sold by my executrix, and also so much of my land near Brightwood as may be needed for railroad switching purposes; and in the event of my daughter's death without heirs of her body born to her, then, in this event all of my real estate improved or unimproved, lying south of the line of latitude of Maryland street, Indianapolis, whether inside or outside of said city in Marion county, Indiana, may also be sold and the proceeds divided among those at that time entitled to it by the terms of this will that is entitled to it at the time of such sale.

"Item 3: It is my will that for the period of fifty years after the probate of my will, the sum of fifteen dollars each and every year shall be paid to the managers of Crown Hill Cemetery, of Marion county, Indiana, to provide and pay for a flower bed and for sprinkling and for general care of my burial lot in said cemetery, and also ten dollars per year for the same purpose for the burial lot of my brother, Hugh Delzell, in said cemetery, said sum to be paid annually on the first day of April in each year for said period of fifty years, out of the rentals of my storeroom property, at number 37 East Washington street, Indianapolis, and the same shall be a lien and first charge on said real estate for said period of fifty years.

"Item 4: It is my will that my executrix in a reasonable time, cause to be erected on my real estate at number 37 East Washington street, Indianapolis, a four or five story substantial brick building of modern architecture and construction, and whereas I now have on deposit in the Exchange Bank of Macon, Georgia, the sum of twenty-thousand ($20,000) dollars I will and direct that so much of this sum as shall be on deposit at the time of my death, shall be expended in the construction of said building, and that out of the rents and income of my estate after the specified payments above provided for, my executrix shall appropriate and apply such additional sum as may be necessary to carry out the interest of this item of my will, and in the erection of such building having regard to prospective value and the receipts of the largest practical amount of rents, I also direct she shall keep all the buildings insured and in good repair.

"Item 5: I will and direct in reference to a certain lot owned by me in the town of Vineville, Bibb county, Georgia, situated in the Forsyth road, conveyed to me February 21st, 18—, by the executor of the estate of Peter Solomen, to wit, that said lot descend to my daughter, Anna D. Hughes, as hereinafter provided in item number six (6) of this my will, with the further proviso, that should my daughter Anna D. Hughes die before her husband Daniel G. Hughes, and without a surviving child or children born to her, then the said Daniel G. Hughes shall have the right to use and occupy said premises for one year after the death of my said daughter free of rent, but should she have a child or children surviving her, then the said Hughes shall have the right to use and occupy said premises free of rent until the youngest shall have become twenty-one years of age and until the last survivor of said child shall arrive at the age of twenty-one years, but should children all die before arriving at the age of twenty-one years, then the said Hughes shall have the right to use the said premises for one year after the death of said last surviving child, such use to include use and enjoyment of lot and improvements.

"Item 6: Subject to the foregoing provisions and conditions I devise and bequeath to my beloved daughter, Anna D. Hughes, all my real and personal estate forever, provided, however, that if my said daughter should die without issue, then it is my will that the property she may have derived from my estate at the time of her death shall have descended to my nephews and nieces from my own blood, and the income and provisions derived therefrom divided equally among them and their descendants for the period of fifty years after the date of the probate of my will, and at the expiration of fifty years, all of said property shall be sold and the proceeds divided equally among my nephews and nieces of my own blood and their descendants shall share and share alike.

"Item 7: Should my daughter, Anna D. Hughes, leave a child or children, the issue of her body, surviving her, then it is my will that all of the real and personal estate by her owned, derived from my estate, shall descend equally to her child or the survivors of them, being my grandchildren and such grandchildren or grandchild, shall not have the power or right to sell, incumber or convey the same, but the same

shall descend in equal proportion to my great-grandchildren if any there be, or the survivors of them, and should my grandchildren die without children, heirs of their bodies, then it is my will that the real estate derived from my estate shall descend to the descendants of my nephews and nieces of my own blood or the survivors of them.

"Item 8: It is my will more fully expressed, that neither my daughter nor any of her children or grandchildren shall ever sell, convey or in any way incumber the real estate herein derived from my estate situated in Leavenworth, Kansas, Vineville, Georgia, and Marion county, Indiana, except as above accepted, nor anticipate the rental thereof for more than one year in advance until at the expiration of the period of fifty years after my death, and then said property shall be sold and the proceeds thereof divided among those entitled to it as above provided.

"Item 9: It is my will that my daughter, Anna D. Hughes, subject to the specifications and bequests herein mentioned, during her lifetime, shall have the sole and exclusive possession and control of my real and personal estate, and shall receive and control all incomes and proceeds derived therefrom, to be by her kept and retained, for her own use and benefit, in her own discretion, without accounting to any one, and after her death then to whom the property may descend by the terms of my will, shall, during the period of fifty years during which time the property cannot be sold, be entitled to receive the income and proceeds for their own use and benefit.

"Item 10: I hereby nominate my beloved daughter, Anna A. Hughes, executrix of this my last will and testament, and without being required to give bond any further than the court may deem necessary to protect the creditors of my estate."

[1] It is admitted that so much of the above will as attempts to suspend the power of alienation of such real estate for a period of 50 years is void on account of the rule against perpetuities and the statute prohibiting the suspension of the power of alienation. Section 3998, Burns' 1914; Fowler v. Duhme (1896) 143 Ind. 248, 42 N. E. 623. The appellants contend that the parts of the will which offend in the above respect can be disregarded, and a valid disposition of the property remain, while the appellees insist that the void parts of said will are so interwoven with the other parts as to render the whole instrument void. Because of our conclusions hereinafter stated upon the other questions raised, it is not necessary that we discuss this question at length.

[2] The general rule is that, where part of a will is valid and part invalid, if the invalid part may be eliminated and the remaining part will carry out the main scheme and intention of the testator, and cast his property where he intended it to go, then such invalid part will not be held to destroy the whole will. Darling v. Rogers, 22 Wend. (N. Y.) 495; Tilden v. Green, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487; Greenough v. Osgood, 235 Mass. 235, 126 N. E. 461; Fowler v. Duhme, supra. We view the will under consideration as being within the rule above stated, and that we may disregard that part which offends the rule against perpetuities and the statute against suspending the power of alienation, and the general intent of the testator will not be destroyed, but will be given effect.

[3] The question then is: What estate did the daughter, Anna D. Hughes, take under the will of her father?

By item 6 of the above will, there is no question but that the following language: "Subject to the foregoing provisions and conditions, I devise and bequeath to my beloved daughter, Anna D. Hughes, all my real and personal estate forever"—if that were all of said item, would be sufficient to devise a fee simple in the real estate. Section 3123 Burns 1914; Roy v. Rowe (1883) 90 Ind. 54; Gibson v. Brown (1916) 62 Ind. App. 460, 110 N. E. 716, 112 N. E. 894.

It is necessary, then, for us to determine what effect should be given to the part immediately following the above, namely:

"Provided, however, that if my said daughter should die without issue, then it is my will that the property she may have derived from my estate at the time of her death shall have descended to my nephews and nieces from my own blood."

[4] It is the universally recognized rule that the intention of the testator, when it is clearly expressed, must be given effect, in the construction of a will.

It is also a well-recognized rule that where that intent is not clearly expressed, or is couched in ambiguous phraseology, so that reasonable differences of opinion may exist as to what the testator's intention was, then resort should be had to established rules of construction.

As said in this court in the case of Aldred v. Sylvester (1916) 184 Ind. 542, 111 N. E. 914:

"In such cases the declared results must necessarily vary with the elasticity of imagination of the various judges that may be concerned in the determination, if only the language of the will may be considered. Viewed, however, in the light of rules evolved from the observation and experience of centuries, it may be asserted with confidence that the real intent is more apt to be revealed."

The testator's intention must be given effect when clearly expressed, but, if his intention is in doubt, then it is the duty of the courts to apply recognized rules of construction, even though that may result in a construction different from what the testator may have had in his own mind, but failed to clearly express.

As has been said:

"The law presumes that a testator knows when executing his will that uncertain language

used by him may be subjected to the well-recognized rules of construction." Boren v. Reeves (1919) 73 Ind. App. 604, 123 N. E. 359.

When the testator said in his will, "provided however, that if my said daughter should die without issue," did he refer to or have in mind her dying before his death, or did he refer to her death at any time, whether before or after his death? If he meant the former, then the estate vested absolutely in the daughter at his death, she being living at that time. If he referred to her death at some time after his death, then the vesting of the estate would be postponed until her death. In view of the fact that the law favors the vesting of estates at the earliest possible moment, and, if possible, will so construe a will as to vest the entire estate at the time of the testator's death, we cannot say that his intention in this respect is clearly expressed. As his intention is not clearly expressed, then we should resort to well-recognized rules of construction to aid us.

A well-established rule in this state is that words of survivorship, used in disposing of an estate, are presumed to relate to the death of the testator, rather than the death of the first taker, and that, where real estate is devised to one, in terms sufficient to give a fee-simple, and a devise over is made conditioned upon the first taker dying without issue, the phrase "dying without issue" is construed to refer to a death in the lifetime of the testator, unless a contrary intention is clearly expressed. Aldred v. Sylvester, supra; Harris v. Carpenter (1887) 109 Ind. 540, 10 N. E. 422; Hoover v. Hoover (1888) 116 Ind. 498, 19 N. E. 468; Heilman v. Heilman (1891) 129 Ind. 59, 28 N. E. 310; Wright v. Charley (1891) 129 Ind. 257, 28 N. E. 706; Borgner v. Brown (1893) 133 Ind. 391, 33 N. E. 92; Fowler v. Duhme, supra; Moores v. Hare (1896) 144 Ind. 573, 43 N. E. 870; Aspy v. Lewis (1899) 152 Ind. 493, 52 N. E. 756; Campbell v. Bradford (1906) 166 Ind. 451, 77 N. E. 849; Boren v. Reeves, supra. The language used in some of the cases above cited, and held to refer to a death in the lifetime of the testator, follows:

In the case of Aldred v. Sylvester, supra:

"Item III. I further order and direct, that at the death of said Margaret McDaniel (above named) that the said 80-acres tract of land above described be sold at private or public sale as may be most advisable, and for the best price that can be procured for the same, and that the proceeds of such sale be equally divided among my brothers and sister [naming them]. But if any or either of said brothers and sisters last named shall die previous to the termination of such life estate, and the sale of said 80-acre tract, then in that case, the descendants of such deceased devisees are to have the same share as their ancestors would have had if then living."

In Harris v. Carpenter, supra, after giving a life estate to his wife:

"And at her death the same shall be the property of and pass to my daughter, Laura Carpenter, * * * in fee; but if she, said Laura, be not living, then to her heirs forever."

In the case of Heilman v. Heilman, supra:

"Seventh. After the death of my dear wife all my estate, excepting the bequests herein made, shall be divided in equal shares among all my children, and should any of my children be dead, and have left children, then they shall be entitled to the distributive share of their parents."

In the case of Borgner v. Brown, supra:

"At the death of my said wife, the real estate aforesaid I give and devise to my son James Helms and his heirs. If my said son should die without issue, then the above-named real estate one-third to descend to his wife, if living, and the remainder to go to my children."

In Fowler v. Duhme, supra:

"3. I give, devise and bequeath the remaining undivided two-thirds in value of all my real estate, wheresoever situate, to my three children, James M. Fowler, Annis E. Chase and Ophelia M. Fowler, share and share alike, in equal portions and to their respective heirs forever, subject to the following conditions, to wit: (a) In the event of the death of any of my said children without lawful issue living at the time of the death of such child, then the share of such deceased child shall vest in, and become the absolute property in fee-simple, in equal portions, of such of my said children as shall then be living, and the living descendants of such, if any, as may then be dead. * * *"

In Moores v. Hare, supra, the will of Stoughton A. Fletcher gave certain real estate to his daughter, Maria F. Ritzinger, for life, and then contained the following:

"At the death of her, said Maria F. Ritzinger, all the said real estate so devised to her for life shall go to her children in fee-simple. If any child of hers shall have died, leaving a child or children, then the portion of said real estate that would have gone to the parent shall go to such child or children."

In the case of Aspy v. Lewis, supra, after giving a life estate to the widow:

"And I direct further that the above estate that is bequeathed to my wife shall be in the full possession of my only daughter, Maria Louisa, at the death or marriage of my wife, provided she shall be living; and if she is not living, at the death or marriage of my wife then the estate to go to the use of my brothers and sisters or their heirs."

In the case of Campbell v. Bradford, supra:

Sixth. "At the death of my wife, I direct that all my real estate shall descend and go to my two sons, * * * and if either of them shall be deceased leaving children surviving him then such child or children shall inherit all

their father's interest in my real estate, and in case of either of my sons being deceased and leaving no child or children living then the surviving son shall inherit all my real estate at the death of my wife."

In the case of Boren v. Reeves, supra, after devising all his property to his daughter, the will contained the following:

"If my said daughter shall die, without issue alive, then at her death, I hereby direct and will that whatever remains shall be equally divided, between the children of my deceased brother Albert Boren [naming them]."

The rule that words of survivorship will be construed as relating to a death preceding the death of the testator, unless otherwise clearly expressed, has been recognized so long by this court that it cannot be questioned, and such rule has been applied in so many cases where the language used was of similar effect to that used in the case at bar that such construction has the force of a rule of property, and should not be disturbed.

It is suggested that the following clause in item six: "Then it is my will that the property she may have derived from my estate at the time of her death shall have descended to my nephews and nieces"—is an indication that he referred to her death after his death, because of the use of the words "may have derived." This is followed later by the words "shall have descended," and it is evident that he could not have used the correct tense in both of these phrases. It is not unlikely that he failed to use the tense which would correctly express his intent in either case. This is only another evidence of the ambiguity of his language, and makes more necessary the resort to settled rules of construction. It is also suggested that certain provisions contained in his will as to the management of his property after his death are an indication that he did not intend her to have a fee simple absolute, but that he contemplated her surviving him, and that the limitation over might take effect at her death following his. Such provisions are not so much an indication of this as they are an indication that he thought his limitation as to alienation for a period of 50 years was valid and his directions were in contemplation of that. We are of the opinion that the limitation over to the nephews and nieces and their descendants, contained in item 6 of said will, referred to the death of said daughter, Anna D. Hughes, before death of the testator, and that upon his death she took an estate in fee simple.

[5] Even if we were to hold with appellants that the limitation over to the nephews and nieces is conditioned upon said daughter dying without issue either before or after his death, it would not avail appellants anything, because, if such limitation over is not restricted to her dying without issue before the testator, it is then a limitation over after an indefinite failure of issue, and is void as being too remote. In that event the daughter took what would formerly have been an estate tail, which under our statute (section 3994, Burns' 1914) is a fee-simple estate.

The clause, "die without issue," with no words to limit it, is held to denote an indefinite failure of issue, and is void, and a limitation over, conditioned upon such an event, cannot take effect, but the first taker is held to take an estate tail. Huxford v. Milligan (1875) 50 Ind. 542; Outland v. Bowen (1888) 115 Ind. 150, 17 N. E. 281, 7 Am. St. Rep. 420; Cain v. Robertson (1901) 27 Ind. App. 198, 61 N. E. 26. If, connected with the clause "die without issue," there is used some word or words that denote a definite time for the failure of issue to take place, such as where the clause is "die without issue living at his death," or "die without leaving issue," or "die without issue surviving," then it is held to denote a definite failure of issue. Granger v. Granger (1896) 147 Ind. 95, 112, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190.

As said in the case of Outland v. Bowen, supra:

"Ordinarily, an estate tail is created by a conveyance or devise in fee to some particular person, with a limitation over, in the event of the death of the person named without issue, or upon an indefinite failure of issue. The doctrine of the books seems to be, that whenever it appears in the instrument creating the estate that it was intended that the issue of the first taker should take by inheritance in a direct line, and in a regular order and course of descent, so long as his posterity should endure, and an estate in fee or in tail is given in remainder, upon an indefinite failure of issue, then the estate first created will be construed to be an estate tail."

If the failure of issue referred to in this will means a failure of issue within the lifetime of the testator, or a failure of issue at the time of the death of the daughter, then it is a definite failure of issue. If the will refers to a failure of issue at any time which might be subsequent to her death, that is, if it means that, although she had children living when she died, but that if these children and their descendants all died later, after the death of the testator, then the limitation over was to take effect, it would clearly be a limitation upon an indefinite failure of issue. In that event it might not take effect until after the period allowed by our statute. Section 3998, Burns' 1914. In view of the construction generally given to language similar to that used in item 6 of the will of Samuel Delzell, and considering the reference to grandchildren and descendants of grandchildren in item 2, and the language used in item 7 postponing the vesting of the estate in the nephews and nieces until the daughter's grandchildren should all die without children, it is evident, if we do not hold that in item 6 he referred to his daughter's death

and a failure of her issue in his own lifetime, that he then referred to a failure of issue at any time it might occur, even long after her death, which would be an indefinite failure of issue, in which event the daughter, under the statute and decisions above cited would take a fee simple.

The court committed no error in sustaining the demurrer to the complaint.

The judgment is affirmed.

EWBANK, C. J., not participating.

DONNELLY v. STATE. (No. 24271.)

(Supreme Court of Indiana. Jan. 15, 1924.)

1. Criminal law ⟸935(1)—Proof of possession held sufficient proof of ownership as against motion for new trial in larceny prosecution.

In a prosecution for larceny, proof that goods were stolen out of a warehouse of alleged owner *held* sufficient proof of ownership, on motion for new trial for insufficiency of evidence to prove ownership, the proof of possession being sufficient proof of ownership.

2. Larceny ⟸60—Evidence that goods were stolen from warehouse used by alleged owner held sufficient proof of ownership.

In prosecution for larceny of automobile casings, evidence that the casings were stolen from a warehouse used by alleged owner for storage of its goods *held* sufficient proof of ownership in such owner, under Burns' Ann. St. 1914, § 2061.

3. Criminal law ⟸1032(7)—Objection because of variance in description must be taken when evidence is offered.

An objection to evidence concerning the property alleged to have been stolen because of mere variance in the description to be available, must be taken at the time the evidence is offered.

4. Larceny ⟸40(6)—Variance in description of stolen goods held not fatal.

In prosecution for larceny of automobile casings from warehouse, variance between the indictment and proof of theft of tires other than those described *held* not of such character as to mislead the defense or expose the defendant to the peril of being put twice in jeopardy for the same offense.

Appeal from Marion Criminal Court, Marion County; Frank Coby (Sp.), Judge.

Patrick Leroy Donnelly was convicted of grand larceny, and he appeals. Affirmed.

Wm. N. Harding and Joseph T. Markey, both of Indianapolis, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward F. White, Deputy Atty. Gen., for appellee.

EWBANK, C. J. [1] Appellant was convicted of grand larceny. The indictment charged that he stole fourteen automobile tires of the value of $560, the property of Nordyke & Marmon Company, a corporation. A motion for a new trial for the alleged reason that the verdict was not sustained by sufficient evidence was overruled, and that ruling is assigned as error, the particular point urged by counsel being that the alleged ownership was part of the description of the property alleged to have been stolen, and that there was no evidence that Nordyke & Marmon Company owned the property proved to have been stolen. There was evidence that a witness had a conversation with appellant "relative to some tires that belonged to Nordyke & Marmon Company, a corporation," in which a statement made by another party was read to the effect that he and appellant went to the Waverly plant on South East street, at night, that appellant had a key with which they entered and took five tires, and took them away, that they afterward went there twice more in ten days, each time at night, and took nine more tires, and that they sold eight of the tires and appellant received part of the money, and that appellant said that the said statement made by the other man was true; that appellant signed a statement in writing of substantially the same facts; that one of the tires was recovered from appellant's house and others from different places named; that the assistant treasurer of Nordyke & Marmon Company was called over to police headquarters and talked with appellant; that the watchman at the Waverly plant was brought to police headquarters and questioned, and a few days after appellant's arrest he was "let out of the employ of Nordyke & Marmon"; that appellant had been employed by Nordyke & Marmon Company for nearly two years, as a member of their special police force, assigned to the main office, but had left the employ of said company about three months before his arrest; that he said he had a gate key which was turned in by some watchman, and that he kept it when he "left the plant," and it was used to get into the Waverly plant; that as an employé he never had any right to a master key; that the Waverly plant was in the possession of the Nordyke & Marmon Company, and they stored their property there; that its gates were fastened with padlocks, and the key appellant had was a key to the gate system that would open any of their gate padlocks; and that a representative of the Nordyke & Marmon Company receipted for the tires at police headquarters, and took them away with him. It is not claimed that this evidence falls short of proving that appellant stole the fourteen tires, as alleged, and it seems clear that they were stolen out of a warehouse of Nordyke & Marmon Company. But counsel

for appellant insist that it fails to prove, beyond a reasonable doubt, that the stolen tires were the property of that company, as they were described in the indictment. We think counsel are mistaken. Proof of possession is sufficient proof of ownership to withstand such a motion as this. Smith v. State, 187 Ind. 253, 118 N. E. 954, L. R. A. 1918D, 688; Lucas v. State, 187 Ind. 709, 121 N. E. 274.

[2] And we think that the court might reasonably infer that tires stolen from the warehouse used by a company in which to store its goods answered the description of being its property, within the meaning of the criminal law. Section 2061, Burns 1914, § 190, ch. 169; Acts 1905, p. 625; Edison v. State, 148 Ind. 283, 47 N. E. 625; Griffiths v. State, 163 Ind. 555, 72 N. E. 563; State v. Tillett, 173 Ind. 133, 89 N. E. 589, 20 Ann. Cas. 1262.

[3] An objection because of a mere variance in the description of the property stolen, to be available, must be taken at the time the evidence is offered. If appellant thought the state was offering proof that he stole other tires than those described in the indictment he should have interposed a seasonable objection during the trial of the criminal court, and in case of an adverse ruling should have assigned it as a reason for a new trial. Kruger v. State (1893) 135 Ind. 573, 35 N. E. 1019; Bradley v. State (1905) 165 Ind. 397, 402, 75 N. E. 873; Miller v. State (1905) 165 Ind. 566, 568, 76 N. E. 245.

[4] But if there be any variance in this case it is not of such a character as would mislead the defense or expose the defendant to the peril of being put twice in jeopardy for the same offense. Oats v. State, 153 Ind. 436, 439, 55 N. E. 226.

The judgment is affirmed.

GILLESPIE v. STATE. (No. 24301.)

(Supreme Court of Indiana. Jan. 18, 1924.)

1. False pretenses ⇐28—Indictment charging obtaining signature to check need not name owner of money obtained thereby.

Indictment charging defendant with obtaining the signature of a person to a check by false pretenses in violation of Burns' Ann. St. 1914, § 2588, was not defective for failure to allege the name of the owner of the money obtained by the false pretense.

2. False pretenses ⇐13—Indictment charging obtaining of signature to check need not allege that money obtained thereon.

An indictment charging defendant with obtaining the signature of a person to a check by false pretenses in violation of Burns' Ann. St. 1914, § 2588, was not required to allege that the defendant obtained money on the check, the offense being complete when defendant obtained the signature to the check by false pretenses with intent to defraud.

3. False pretenses ⇐34—Allegation that prosecuting witness executed check sufficient.

In a prosecution for obtaining the signature of a person to a check by false pretenses in violation of Burns' Ann. St. 1914, § 2588, the allegation that the prosecuting witness executed the check implies that he signed and delivered it and did everything necessarily included in an execution thereof.

4. False pretenses ⇐14—Actual loss to person induced to sign check need not be shown.

In a prosecution for obtaining the signature of a person to a check by false pretenses in violation of Burns' Ann. St. 1914, § 2588, it was not necessary to show actual loss or prejudice, the check being such an instrument as was capable of working an injury to person who signed it.

5. False pretenses ⇐30—Indictment held to charge knowledge of falsity of pretenses.

Indictment for obtaining the signature of a person to a check by false pretenses in violation of Burns' Ann. St. 1914, § 2588, alleging that defendant "did then and there unlawfully, feloniously, knowingly, and falsely pretend * * * with intent then and there, by such false pretenses, to cheat and defraud," *held* to sufficiently charge that defendant knew that the pretenses were false.

6. False pretenses ⇐8—Representation that cloth sold was "pure and genuine linen" false, where it contained a large quantity of cotton.

A representation by a seller that material sold to prosecuting witness was "pure and genuine linen" meant that it was woven from flax and was false, when in fact the material contained a large quantity of cotton.

7. False pretenses ⇐49(5)—Evidence held to justify finding that prosecuting witness relied on false representations.

In prosecution for obtaining a signature to a check in violation of Burns' Ann. St. 1914, § 2588, by misrepresentation as to cloth purchased by prosecuting witness, evidence *held* to justify jury in finding that the prosecuting witness was induced by the false representation to execute the check.

8. False pretenses ⇐9—Must have entered into transaction and constituted a material inducement.

The false pretenses charged must have entered into the transaction and constituted a material inducement to the transfer of the property or the execution of the instrument.

9. Criminal law ⇐1032(7), 1063(2)—Variance held not available on appeal in absence of objection and assignment of ruling as ground for new trial.

In prosecution for obtaining the signature of a person to a check by false pretenses in violation of Burns' Ann. St. 1914, § 2588, variance between indorsements on back of check and check as set out in indictment was not available on appeal, in the absence of objection to

the introduction of the check in evidence and the assignment of the court's ruling thereon as a cause for a new trial.

10. Criminal law ⟸427(2)—Testimony as to conversation with defendant's coconspirator out of defendant's presence admissible notwithstanding failure to charge conspiracy.

In a prosecution for obtaining a signature to a check by false pretenses in violation of Burns' Ann. St. 1914, § 2588, as to a conversation with a third person out of the immediate presence of the defendant, *held* admissible in view of evidence showing that the defendant and such third person acted together in urging prosecuting witness to buy the goods for which the check was given, notwithstanding failure to charge a conspiracy.

11. Criminal law ⟸1088(11) — Instructions must be made part of record by bill of exceptions.

The only way instructions can be made a part of the record in a criminal case is by a bill of exceptions properly presented to and signed by the judge and filed.

12. Criminal law ⟸1088(11)—Instructions not made part of record not considered on appeal.

Instructions not brought into the record by a bill of exceptions will not be considered on appeal.

Appeal from Circuit Court, Rush County; E. Ralph Himelick, Special Judge.

James Gillespie was convicted of obtaining the signature of a person to a written instrument by false pretense with intent to defraud, and he appeals. Affirmed.

Shake & Kimmell, of Vincennes, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward Franklin White, Deputy Atty. Gen., for the State.

GAUSE, J. This is an appeal from a judgment convicting the appellant under an indictment seeking to charge a violation of section 2588, Burns' 1914, which is the statute defining the crime of obtaining the signature of any person to a written instrument, or obtaining money or other property, by false pretense, with intent to defraud.

The appellant filed a motion to quash the indictment, which motion was overruled and an exception reserved. The appellant assigns this ruling as one of the errors relied upon, and in his brief points out three objections which he has to the indictment, so these are the only questions we will consider in reference thereto.

[1] The appellant first says that the indictment is defective for failing to allege who was the owner of the money charged to have been obtained by the false pretenses. We think this objection is urged because of a misconception of the charge. As we view the indictment, it charges the obtaining of the signature of the prosecuting witness to a written instrument, namely, a bank check, by false pretenses.

[2] True, the indictment does allege that appellant afterwards obtained money on this written instrument, the purpose of which averment evidently was to show that the instrument was one that could result and did result in a damage to the person signing the same; but this averment was unnecessary, and the offense was complete when appellant obtained the signature of the prosecuting witness to the check, if it was obtained by false pretenses, with intent to defraud, as alleged, and if it was such an instrument as could be used to work an injury to the signer.

The indictment, after charging the pretenses and the falsity thereof, and the intent to defraud, charges that the prosecuting witness relied upon such false pretenses and, being deceived thereby and by reason of such reliance and belief, did then and there "buy the aforesaid three sets of tablecloths, toweling of and from the said James Gillespie, and did then and there execute a certain check made payable to the said James Gillespie in the amount of fifty-five and fifty hundredths dollars in payment for the aforesaid three sets of tablecloths, toweling; that a true and correct copy of the aforesaid check is as follows, to wit." And then follows a copy of the check, being a bank check in the usual form, signed by the prosecuting witness and payable to the appellant.

[3] The allegation that the prosecuting witness executed said check implies that he signed and delivered it and is a charge that he did everything necessarily included in an execution thereof. State v. Butler (1891) 47 Minn. 483, 50 N. W. 532.

[4] The offense being complete when the prosecuting witness executed the check, and it being such an instrument as was capable of working an injury to the person whose signature was obtained, then actual loss or prejudice to such person need not be shown. People v. Galloway (1837) 17 Wend. (N. Y.) 542; People v. Sully (1860) 5 Park. Crim. (N. Y.) 142, 170; People v. Genung (1833) 11 Wend. (N. Y.) 19, 25 Am. Dec. 594; State v. Butler, supra; State v. Jamison (1888) 74 Iowa, 613, 38 N. W. 509. It was therefore not necessary to allege whose money the appellant obtained when he cashed the check, and the indictment is not defective for not alleging such fact.

[5] It is also contended by the appellant that the indictment is defective because it fails to allege that the appellant knew that the pretenses were false when he made them. It is alleged that the appellant "did then and there unlawfully, feloniously, knowingly and falsely pretend, * * * with intent then and there, by such false pretenses, to cheat and defraud," etc. This is clearly sufficient to charge knowledge. State v. Snyder (1879)

66 Ind. 203; 2 Bouvier's Law Dictionary (3d Revision) p. 1809, the word "Knowingly."

[6] It is next contended by appellant that the indictment is defective because it alleges that appellant represented the material which he sold to the prosecuting witness to be "pure and genuine linen, when in truth and fact the said goods as aforesaid was not pure and genuine linen, but was a material containing a large quantity of cotton," etc., the appellant claiming that the fact it contained cotton was not inconsistent with its being pure and genuine linen. We think otherwise. The common and accepted meaning of the word "linen," when used alone, is that it is a material woven from the fibers of flax. Standard Dictionary. This would be the only meaning accorded it when referred to as pure and genuine linen. When qualified by being described as table linen, bed linen, etc., it might be understood as having a different meaning, because of such terms being used to denote materials not composed of pure linen.

If only the word "linen" was used to describe the material, there would be more of a question presented; although, even then, we think it would mean the product of flax only. If it is described as pure and genuine linen, the person using such a description would necessarily be understood as excluding the idea that it was a substitute or impure article, composed in part of cotton.

We do not think the indictment is defective for any of the reasons urged against it.

The appellant has assigned as error the overruling of his motion for a new trial.

[7] One of the grounds of such motion was that the verdict was not sustained by sufficient evidence. He insists that the evidence is not sufficient, because it fails to show that the false representations made by appellant were the controlling cause whereby he was induced to buy the goods, but that the evidence shows and the prosecuting witness testified that he relied to some extent upon his wife's judgment in buying the goods.

The prosecuting witness answered a question as to whether he did not rely on the judgment of his wife in buying this linen, as follows: "Well to some extent, but then he represented it to be real linen manufactured in Ireland." He further testified directly to the representations as charged, and that he believed them and bought the goods on the representation that it was genuine linen.

[8] The false pretenses charged must have entered into the transaction and constituted a material inducement to the transfer of the property or the execution of the instrument. State v. Conner (1886) 110 Ind. 469, 11 N. E. 454; McCrann v. State (1920) 189 Ind. 677, 128 N. E. 848.

As to whether the prosecuting witness was induced to execute the check because of the false pretenses of the appellant was a question of fact for the jury. There was sufficient evidence to justify the jury in believing that he was so induced. Appellant says the evidence is not sufficient to sustain the verdict, because there was a variance between the indorsements on the back of the check as introduced in evidence, and the check as set out in the indictment.

[9] If there was such a variance, the appellant, in order to avail himself of any question in relation thereto, must have objected to the introduction of the check in evidence and then have assigned the ruling of the court thereon as a cause for a new trial. The ruling in admitting such check in evidence is not presented by an assignment that the verdict is not sustained by sufficient evidence. Bradley v. State (1905) 165 Ind. 397, 75 N. E. 873; Miller v. State (1905) 165 Ind. 566, 76 N. E. 245; Donnelly v. State (No. 24271) 142 N. E. 219 decided by this court January 15, 1924.

[10] It is insisted by appellant that the court erred in permitting the prosecuting witness to testify to a conversation had with a third person out of the immediate presence of appellant, regarding the quality and place of manufacture of the goods sold by appellant.

The evidence showed that appellant and this third man, whose name is not disclosed by the record, came to the home of the prosecuting witness together in an automobile; that this third person first talked to the prosecuting witness about the goods and made some statements about its quality; that this conversation occurred at the barn, out of the presence of the appellant; that all three of them then went in the house where appellant made statements similar to those made by the third person at the barn; that appellant and the third person both talked in the house about the quality of the goods and where it was made, stating that it was pure linen, made in Ireland. The evidence shows that both of them joined in urging the sale and that they acted together; that the third person introduced appellant as his cousin, and it was stated by one in the presence of the other that they were selling these goods in order to get acquainted with the farmers in that community, as they were going to start a factory at Columbus. The evidence clearly shows that these men were confederates working to accomplish a common purpose, and the statements of either in furtherance of that purpose were admissible against the other. The fact that they were not jointly charged, or that appellant was not charged with a conspiracy, does not change the rule. Pierce v. State (1887) 109 Ind. 535, 10 N. E. 302; Brunaugh v. State (1910) 173 Ind. 483, 90 N. E. 1019.

The only other alleged errors pointed out by appellant in his brief relate to instructions given by the court, but the instructions given are not in the record.

[11] The only way instructions can be

made a part of the record in a criminal case is by a bill of exceptions properly presented to and signed by the judge, and filed. Tribbey v. State (1918) 189 Ind. 205, 126 N. E. 481; Peacock v. State (1910) 174 Ind. 185, 91 N. E. 597; Donovan v. State (1908) 170 Ind. 123, 83 N. E. 744.

[12] No effort has been made to bring the instructions into the record by a bill of exceptions, and we cannot consider any questions relating thereto.

The appellant not having pointed out any error, the judgment should be affirmed.

Judgment affirmed.

FEDERAL LIFE INS. CO. v. SAYRE.
(No. 24553.)

(Supreme Court of Indiana. Jan. 18, 1924.)

1. Insurance ⟸369—Surrender of policy unnecessary, in view of insurer's denial of liability.

Where life insurance policy provided that, if after three years it became void for nonpayment of premium, insured, on surrender of it, was entitled to its cash surrender value, an offer to surrender after default became unnecessary, when insurer denied all liability thereunder.

2. Insurance ⟸369—Payment of 40 per cent. of premium as provided in contract concurrent with issuance of policy held sufficient.

Where, concurrently with execution of life insurance policy, insured entered contract with insurer, which was inducement to insured's acceptance, stipulating that 40 per cent. of the premium should be paid in semiannual installments no greater amount should be called for unless to meet unexpected losses, and such contingency never arose, payment by insured of the semiannual installments was sufficient to support recovery of cash surrender value.

3. Insurance ⟸369—That unpaid part of premium, exceeded cash value no defense, in view of contract requiring part payment only.

Where concurrently with execution of life insurance policy the parties made contract that only 40 per cent. of the yearly premium was to be paid by insured, unless insurer required the balance to meet unexpected losses, in insured's action for cash surrender value of $1,051.80, it was no defense that the unpaid portion of the premiums at the time of the suit was $1,879.52.

4. Insurance ⟸370—Answer held not to negative waiver of surrender of policy.

Where life insurance policy provided that on surrender of policy its cash value would be paid, and in action for cash value complaint averred that insured made demand on insurer for the cash value and offered to surrender the policy, but insurer denied liability, averment in answer that the policy was not surrendered nor offered for surrender did not avoid averment of denial of liability, and hence failed to show that insurer did not waive surrender.

5. Appeal and error ⟸1040(7)—Not error to sustain demurrer to paragraph of answer, facts of which are provable under the general denial.

It is not reversible error to sustain demurrer to a paragraph of answer; all the facts alleged therein being provable under the general denial.

6. Appeal and error ⟸882(12)—Error in requested instruction invited, and conflict cannot be complained of.

Where life insurance policy provided for 30 days' grace in which payment of premiums could be made, and for payment of cash surrender value on surrender within 30 days after policy became void, an instruction requiring surrender within 30 days after the due date was erroneous, but insurer, having requested it invited the error, and could not complain of conflict between it and other correct instructions.

7. Trial ⟸296(2)—Instruction on waiver of surrender of policy not objectionable and cured by others if defective.

In insured's action for cash value of a life insurance policy, where other instructions correctly stated the time for surrender of the policy after default, an instruction as to waiver of surrender *held* not objectionable as informing jury that, if insurer denied liability at any time before the case was submitted to the jury, insured was not required to surrender the policy, and, if open to criticism, cured by the other instructions.

8. Trial ⟸295(1)—Instructions as a whole fairly stating the law, inaccuracy or omission not cause for reversal.

Where instructions, considered as a whole, fairly state the law, even an inaccuracy or omission in a particular instruction is not cause for reversal.

9. Trial ⟸253(5)—Instruction omitting element of waiver of surrender of policy properly denied.

Where policy provided that, after insured's default after the third year, insured, on surrender of it, could have cash value, and in action therefor there was issue as to whether insurer had denied liability and thereby waived surrender, an instruction that omitted the element of waiver and required surrender in any event was properly denied.

10. Insurance ⟸183—Insured held not indebted to insurer for part of premium payable on contingency.

Under contract concurrent with issue of policy requiring insured pay only 40 per cent. of the annual premiums, except in a contingency which never occurred, insured *held* not indebted to insurer for the unpaid portion of the premiums.

11. Evidence ⟸518—Objection to evidence as to construction of life insurance policy sued on properly sustained.

In action to recover cash value of a life insurance policy, the interpretation of the contract *held* for the court, and there was no error in sustaining objection to evidence of an actuary as to the meaning of the term "level

premium" or the "reserve net value" of a policy such as the one in issue.

12. Insurance ⟸155—Construction of life insurance policy by state insurance department held inadmissible.

In action to recover cash value of a life insurance policy, where the construction of the policy was for the court, it was not error to sustain objection to evidence as to the interpretation of the policy by insurance departments of the states of Indiana and Illinois.

13. Appeal and error ⟸1001(1)—Evidence sufficient if every essential fact is supported.

If there is any evidence tending to support every essential fact necessary to support the verdict it is sufficient.

14. Evidence ⟸595—Court or jury may draw reasonable inferences from facts in evidence.

A court or jury may draw any reasonable inference of facts from the evidence.

15. Appeal and error ⟸1001(1)—Sufficient that fact may be reasonably inferred.

It is not essential that a fact be proven by direct or positive evidence, and, where it may reasonably be inferred from facts and circumstances which the evidence tends to establish, it is sufficient on appeal.

16. Insurance ⟸665(8)—Slight acts or circumstances construed as waiver to prevent forfeiture.

Slight acts or circumstances on the part of insurer will be construed as waiver to prevent a forfeiture, where the condition of the contract is in favor of insurer.

Appeal from Circuit Court, Wabash County; C. R. Rolland, Judge.

Action by Warren G. Sayre against the Federal Life Insurance Company. Judgment for plaintiff, and defendant appeals. Transferred from Appellate Court under section 1394, Burns' Ann. St. 1914. Affirmed.

Superseding opinion 128 N. E. 850.

Appellee's instruction No. 10, mentioned in the opinion, was as follows:

10. I instruct you, gentlemen, that under the law in this state, where an insurance company denies liability upon a contract of insurance, it thereby waives the surrender of said contract upon the part of the insured.

So in this case, if you find from the evidence that the defendant insurance company was denying and did deny liability upon said contract of plaintiff, it, by such denial of liability, waived the provisions of said contract for the surrender of said policy as a condition of the payment of said cash surrender value, and, by such denial of liability upon the part of the defendant, plaintiff was not required to surrender said policy of insurance.

Chas. A. Atkinson, of Chicago, Ill., and Edward E. Eikenbary, of Wabash, for appellant.

Frank O. Switzer and Walter S. Bent, both of Wabash, for appellee.

WILLOUGHBY, J. This was a suit upon a life insurance policy issued by the Interstate Life Assurance Company on the life of appellee, and a writing designated as a premium bond executed by the appellee, which, together with the policy, constitute the contract of insurance in this case sued upon.

The case was tried upon an amended complaint, which is in substance as follows:

"That the defendant is a corporation, organized and existing under the laws of the state of Illinois, and for at least six years last past has been engaged in the general life insurance business. That upon the 14th day of April, 1898, there was in existence a life insurance company or corporation, organized under the laws of the state of Indiana, with its principal place of business at Indianapolis, Ind., named the Interstate Life Assurance Company. That on said 14th day of April, 1898, the said Interstate Life Assurance Company issued to appellee a policy on his life in consideration of the annual or semiannual payment of the premiums for the term of 20 years, pursuant to the contracts then entered into between the plaintiff and said insurance company, by its written policy of that date, duly signed, executed, and delivered, did thereby insure the life of the appellee in the sum of $2,000, for the term of his natural life (a copy of which policy is filed herewith and made a part of the complaint, marked Exhibit A)."

That concurrently with the execution of said policy and as a part of the said contract of insurance then entered into between the plaintiff and said Interstate Life Assurance Company, and as the inducement to plaintiff to accept said insurance, the said Interstate Life Assurance Company, and the plaintiff entered into a contract in writing, whereby it was agreed and stipulated that plaintiff should be required to pay but 40 per cent. of the annual premium, so stipulated and provided in said policy to be paid, and which 40 per cent. of said annual premium should be paid in semiannual installments of 20 per cent. of such payments each six months during the premium term of 20 years, and in said contract and as a part of the contract of insurance so entered into on said date between the said Interstate Life Assurance Company and this plaintiff it was expressly stipulated and agreed that no amount in excess of said 40 per cent. shall be called for by the company from the insured, unless to meet unexpected business losses which may arise in the transaction of the company's business (a copy of which contract is filed herewith and made a part of this complaint, marked Exhibit B).

Plaintiff avers: That said concurrent contract was prepared by the said Interstate Life Assurance Company, and is upon a printed blank furnished by said company, except as to the filling in of plaintiff's name, address, amount of premium, and amount of insurance in the blanks left for that purpose.

That said concurrent contract was the inducement to plaintiff to accept said insurance, and formed the consideration upon which plaintiff entered into said contract of insurance. That plaintiff acted thereon and paid and continued the payment of the premiums upon said policy to the said Interstate Life Assurance Company pursuant to the provisions of said latter contract to, and including, the premiums falling due on the 14th day of October, 1909, by the payment of 40 per cent. of the annual premium stipulated in said policy, in semiannual installments of 20 per cent. thereof each, and which payments of premium so made were accepted and retained by the said Interstate Life Assurance Company. That at the time of entering into said contract of insurance the Interstate Life Assurance Company accepted said concurrent contract (a copy of which is so marked Exhibit B), which, together with said policy, formed the contract of insurance between the plaintiff and said Interstate Life Assurance Company, and promised and agreed with plaintiff that all plaintiff should be required to pay upon said contract of insurance would be the said 40 per cent. of the stipulated annual premiums thereon, unless in case of epidemic or unnexpected death losses he should be assessed his pro rata share, of such additional sum above the said 40 per cent. as might be necessary to meet such unexpected death losses, if any, but in no event should said assessment exceed the said designated annual premium, and by said contract of insurance further agreed that, in event of default in the payment of any premiums by the plaintiff after three annual premiums had been paid at 40 per cent. of the designated annual premium, the plaintiff should and would receive the cash surrender value stipulated and set forth in the table of surrender values contained in said contract of insurance for the year in which said default if any, should occur, and, acting upon said inducements, representations, and agreements, and in consideration thereof, plaintiff entered into said contract of insurance.

That on the 11th day of December, 1909, the said Interstate Life Assurance Company and the defendant company entered into a contract in writing, whereby the said Interstate Life Assurance Company assigned and transferred its franchises, assets, and good will to the defendant, Federal Life Insurance Company, and reinsured its outstanding contracts of insurance, including the contract of insurance upon which this action is predicated, in the defendant company, and thereon and thereby the defendant reinsured, assumed, and guaranteed the policies and contracts of the said Interstate Life Assurance Company, so in force on said date, including the said contract of insurance with plaintiff (a copy of which contract of reinsurance between the said Interstate Life Assurance Company and the defendant is filed herewith and marked Exhibit C), and made a part of this complaint.

That thereafter the plaintiff continued the payment of the premiums upon said contract of insurance to the defendant company in semiannual installments of 20 per cent. each, of the annual premium designated in said policy, pursuant to the terms of his said contract with the said Interstate Life Assurance Company, to and including the premiums for the years ending on the 14th day of October, 1914, and which premiums were received, accepted, and retained by the defendant company.

That he paid the premiums under said contract of insurance for 16 full years, and the first semiannual installment of the seventeenth year. That, by the terms of said contract of insurance, the plaintiff was entitled, at the end of the sixteenth policy year, upon default in the payment of further premium, to receive in cash, upon the surrender of said contract of insurance, the sum of $1,051.80. That the plaintiff made default in the payment of the second installment of the seventeenth annual premium when due, and within 30 days thereafter, agreeable to the terms of said contract of insurance, made demand upon the defendant for the said $1,051.80, cash value under the terms of said insurance contract, and offered to surrender his said contract of insurance to the defendant, agreeable to the terms thereof, but the defendant refused to pay to the plaintiff said cash value, agreeable to its said contract of insurance, or any part thereof, and denied any and all liability under said contract of insurance.

That at no time during the existence of said contract of insurance has a sum in excess of said 40 per cent. of the annual premiums designated in said contract been called for or levied by the defendant company nor by the said Interstate Life Assurance Company, from the plaintiff, to meet unexpected losses, nor have any such unexpected losses arisen in the transaction of the business of the said Interstate Life Assurance Company, or the defendant company, requiring a levy of a sum against the plaintiff in excess of said 40 per cent. of the designated annual premiums so paid by him, pursuant to the terms of said contract. That he has performed all the conditions of his said contract of insurance on his part to be performed, and that there is now due and owing to him, from the defendant company, the sum of $1,051.80, with 6 per cent. interest thereon from and after the 14th day of October, 1914, and he now brings said contract of insurance into court and offers to surrender the same to the defendant upon the payment, by the defendant, of said sum. Prayer for judgment against the defendant, Federal Life Insurance Company, in the sum of $1,500.

Clause 3 in said policy provides that—

"This policy shall be indisputable after one year from its date of issue, for the amount due, provided the premiums are duly paid as set forth above, except that military or naval service in time of war without a permit are risks not assumed by the company at any time, but the reserve on this policy will be due and payable in case of death from such service."

Concurrently with the issuance of said policy and as a part of the insurance contract between the parties, appellee executed to said Interstate Life Assurance Company a premium bond, promising to pay it $129 annually for 20 years on certain conditions, among which are the following:

"(1) The true intent and purport of this bond is that I hold myself bound to pay for said policy of insurance, a sum of money annually, the minimum amount of which shall be forty (40%) per cent. thereof, twenty (20%) per cent. payable on the execution of this bond, and an additional twenty (20%) per cent. each six months thereafter; the maximum amount that can be called for annually shall in no case exceed the face value of this bond. No amount in excess of said forty (40%) per cent. shall be called for by the company from the insured unless to meet unexpected losses which may arise in the transaction of the company's business, it being understood that any levy made herein shall be due and payable at the home office of the company within sixty days from date thereof, and if not paid within said sixty days the insurance herein referred to shall cease and determine, except as provided in the policy."

"(3) This bond will not be liable to any levy in excess of the twenty (20%) per cent. above stipulated, each six months, except when the death claims against the company are in excess of the mortuary funds in the hands of the company and then only for an amount equal to the pro rata share of the premium bonds and other securities held by the company, to make good the sum necessary to pay such death claims; and such levy or levies shall not exceed the face of this bond annually, as above stated."

"(5) The payments on this bond shall terminate upon the surrender to the company of the policy upon which it is predicated or at the expiration of twenty years from the date hereof."

To the amended complaint a demurrer was filed, alleging that the amended complaint does not state facts sufficient to constitute a cause of action. This demurrer was overruled, and appellant excepted. Appellant then filed an answer in two paragraphs. The first paragraph was a general denial, and the second was in substance as follows:

"Defendant admits that at the time plaintiff alleges default was made in the second cash installment of the seventeenth annual premium on the policy sued on, there was payable to plaintiff by the terms of said policy, upon demand therefor and surrender of said policy, the cash surrender value of $1,051.80; that defendant alleged it is expressly provided in said policy that any existing indebtedness on account thereof should reduce the amount of such cash value so payable; that plaintiff pursuant to the terms and provisions of Exhibit B filed as a part of the amended complaint, elected, instead of paying the full sum of each annual premium in cash, to pay and did pay but 40 per cent. thereof in cash, and that the balance of each such premium, to wit, 60 per cent. remained unpaid and constituted a loan to plaintiff and an indebtedness against said policy, which with interest compounded at 4 per cent. as provided in said Exhibit B is deductible from the amount of the cash value of said policy, so payable to plaintiff; that the amount of said premiums so remaining unpaid with interest as aforesaid was at the time of said default $1,879.52, which amount was and is an indebtedness against said plaintiff and against said policy and is in excess of the cash surrender value specified in said policy and because of which defendant owes plaintiff nothing."

A demurrer was filed to this paragraph of answer, alleging it did not state facts sufficient to constitute a cause of defense to appellee's amended complaint, and the cause of action therein stated, which demurrer was sustained.

The defendant then filed an additional and third paragraph of answer to the amended complaint, and says that in paragraph 8, entitled "Termination and Surrender," on the second page of the policy, a copy of which is attached to the amended complaint with the following provisions, to wit:

"If this policy shall become void by the violation of any stipulation of agreement, all payments made or accepted herein shall be retained by and shall belong to the company, except that, if three full years' premiums shall have been paid on this policy, it shall cease or become void solely by the nonpayment of any premium when due, the owner will be entitled on legal surrender of this policy within thirty days thereafter, to one of the methods of settlement, provided in the table on the third page hereof at the date of surrender, as follows: (1) Receive a paid-up life policy for the amount specified in said table; or, (2) receive the amount specified in the said table as the cash value of this policy."

The plaintiff admits in his amended complaint that he made default in the second installment of the seventeenth annual premium when due and within 30 days thereafter, and that said second installment has never been paid by plaintiff or by any one for or on his behalf, and that by reason of such default said policy lapsed; that in order to entitle plaintiff to the cash surrender value set forth in the table of loans and of surrender values, either in cash, extended, or paid-up insurance and additions at death, in accordance with the provisions of said paragraph 8 of said policy, it was necessary and plaintiff was required to legally surrender to defendant within 30 days from date of said default of said policy, and that neither said plaintiff nor any one for or in his behalf surrendered or offered to surrender said policy within said 30 days as provided in said paragraph 8, wherefore defendant says that

plaintiff is not entitled to the surrender value mentioned in his amended complaint, nor any part thereof.

A demurrer was filed to this third paragraph of answer, on the ground that it did not state facts sufficient to constitute a cause of defense to appellee's complaint and cause of action therein stated. This demurrer was sustained and exceptions taken, and the cause was tried on the issue stated in the amended complaint and the general denial thereto. A verdict was returned in favor of appellee for the sum of $1,256.87, upon which judgment was rendered, from which appellant appeals.

[1] The first error relied on for reversal is that the Wabash circuit court erred in overruling appellant's demurrer to the amended complaint of appellee. The memorandum attached to the demurrer to the complaint alleges that in the amended complaint it is admitted by appellee that he made a default in payment of the second semiannual cash installment of the seventeenth annual premium, due October 14, 1914, and that because of such default said policy ceased to be in force.

The appellant says that the complaint does not contain any averment that appellee surrendered said policy to the appellant within the time required by the provisions thereof, and that the offer to surrender the policy was not a compliance with the terms of the policy nor of said averment of the complaint; but the complaint does allege that by and agreeable to the said contract of insurance the plaintiff made demand upon defendant for the said sum of $1,051.80, cash value under the terms of said insurance contract, and offered to surrender the said contract of the defendant agreeable to the terms thereof, but defendant refused to pay to plaintiff said cash value agreeable to the said contract of insurance or any part thereof, and denied any and all liability under said contract of insurance. It is further averred in the complaint that the plaintiff has performed all conditions of the said contract of insurance on his part to be performed. The law does not require any one to do any unnecessary or useless thing. When the appellant denied any and all liability under said contract of insurance it was unnecessary for the appellee to surrender or attempt any further surrender of the policy. See New York Life Insurance Co. v. Lahr (Ind.) 137 N. E. 673; Equitable Life Assur. Society v. Perkins, 41 Ind. App. 183, 80 N. E. 682.

[2] Appellant also says that the amended complaint is insufficient because in it appellee admits that he only paid 40 per cent. of $129.60, for 16½ years, and admits that he never paid 60 per cent. of this annual premium or any part of said 60 per cent. But the complaint avers that, concurrently with the execution of said policy and as part of said contract of insurance then entered into between the plaintiff and said Interstate Life Insurance Company, by inducement of said plaintiff to accept said insurance, it entered into a contract in writing whereby it was agreed and stipulated that 40 per cent. should be paid in semiannual installments of 20 per cent. every six months; and in said contract, as a part of said contract of insurance so entered into on said date, it was expressly stipulated and agreed that no amount in excess of said 40 per cent. shall be called for by the company, unless to meet unexpected losses.

By the allegations in the complaint it appears that this contract was executed concurrently with the issuing of the policy, and was the inducement to the plaintiff to accept said insurance; that he did accept such insurance and did pay the 40 per cent. required under the contract each six months until the first six months of the seventeenth year after the issuing of the policy, and that at no time during the existence of said contract of insurance had a sum in excess of said 40 per cent. of the annual premium designated in said contract been called for by the company to meet unexpected losses, nor has any such unexpected loss arisen in the transaction of the business in the said company, requiring the levy of the designated amount of the annual premium paid by him pursuant to the terms of the said contract.

The appellant relies on the case of Federal Life Insurance Co. v. Kemp, 257 Fed. 265, 168 C. C. A. 349. In that case the contract executed at the time of the policy and called a premium loan certificate, provided that the true intent and purpose of this loan certificate is that "I hold myself bound to pay for said policy of insurance a sum of money annually, the cash part of which shall be 50 per cent. of the premium thereon" and "in order that the terms and conditions of this loan certificate shall be made good, the company shall have a lien upon the policy of insurance upon my life * * * to the extent of the annual" dividends "compounded and computed in accordance with insurance law and mathematics."

It will be observed that in that case the policy was issued upon the payment of an annual premium of $182.50, one half to be paid in cash, and providing that the remaining half of the premium shall become an indebtedness secured by a lien against the policy.

In the instant case no such provision is found in the bond or policy. In the instant case the amount to be paid each year was 40 per cent. of $129.60, and that this amount should be paid semiannually in installments of 20 per cent. each; that the remaining 60 per cent. should not be paid except upon certain contingencies alleged in the complaint, and which the complaint alleges never happened. So the case of Federal Life

Insurance Co. v. Kemp, supra, cannot be considered as controlling in this case.

In Federal Life Insurance Co. v. Petty, 177 Ind. 256, 97 N. E. 1011, it is held that, pursuant to section 4753, Burns' 1914, providing for the transfer and reinsurance of a company's business, the rights of the assured cannot be reduced by the provisions of the reinsuring contract entered into between the companies. On that point see, also, Federal Life Ins. Co. v. Kerr, 173 Ind. 613, 89 N. E. 398, 91 N. E. 230; Federal Life Ins. Co. v. Frazer (Ind.) 137 N. E. 273, 25 A. L. R. 1530.

It was not error to overrule the demurrer to the amended complaint.

[3] The first paragraph of defendant's answer is a general denial. The second paragraph alleges that the cash surrender value of $1,051.80 is not equal to the amount due and owing the company on account of premiums unpaid and interest thereon, that the amount of premiums unpaid at the time of bringing this suit, with interest thereon, amounts to $1,879.52. From what we have said in discussing the overruling of the demurrer to the complaint, this paragraph of answer is insufficient to constitute a defense to said action.

[4] In the third paragraph of the answer the defendant says that neither said plaintiff nor anyone for or on his behalf surrendered or offered to surrender said policy within said 30 days as provided in paragraph 8. A demurrer was filed to said third paragraph, and from the memorandum filed therewith the plaintiff alleges said paragraph is not sufficient, and says that it fails to negative the averment in the complaint that defendant denied liability upon the policy in suit. It fails to show that defendant did not waive a surrender of the policy after a default in payment of premiums. It fails to negative the averment of the complaint that plaintiff made demand upon the defendant for the cash surrender value of said policy and that defendant denied liability thereon.

The complaint avers that the plaintiff made default in the payment of the second installment of the seventeenth annual premium when due, and within 30 days thereafter made demand upon defendant for said sum of $1,051.80, cash value, and offered to surrender said contract of insurance agreeable to the terms thereof, but defendant refused to pay said cash value and denied any and all liability under said contract of insurance. These averments show a waiver by the company of the surrender of the policy. This paragraph of answer fails to avoid the averment of the complaint that defendant denied liability upon the contract in suit, and fails to show that the defendant did not waive the surrender of the policy.

[5] It is also apparent that all the facts stated in this paragraph, if admissible at all, were admissible under the general denial. When the general denial has been filed it is not error to sustain a demurrer to a paragraph of answer; all the facts alleged therein being provable under the general denial. No error can be based on sustaining the demurrer to this paragraph of answer. Watson's Works, Practice, § 668; Butler v. Thornburg, 131 Ind. 237, 30 N. E. 1073.

The third error relied on for reversal is that the Wabash circuit court erred in overruling appellant's motion for a new trial. The specifications of said motion are as follows: (1) The verdict of the jury is not sustained by sufficient evidence. (2) That the verdict is contrary to law.

The motion also avers error in giving to the jury instruction No. 9 requested by appellee, and also instruction No. 10, requested by appellee.

Instruction No. 9, requested and tendered by appellee and given by the court is a correct interpretation of clause 8 of the policy, and therefore a correct statement of the law of the case, and no error was committed in giving this instruction. It is claimed by appellant that instruction No. 9 is in conflict with instruction No. 4, given by the court to the jury and requested by appellant. Instruction No. 9, given at request of appellee, is not erroneous.

[6] Instruction No. 4, given at the request of appellant, was erroneous, in that it stated that, before the plaintiff is entitled to recover in this action, he must prove by a preponderance of the evidence that he has complied with all the terms and provisions on his part to perform, among which provisions is the following:

"To surrender to defendant company the policy of insurance herein sued on within 30 days after the date of default of payment, which in this case the court instructs you would mean 30 days after October 14, 1914."

This part of said instruction No. 4, was erroneous because the contract of insurance provides for a grace of 30 days in which plaintiff could make payment after the due date, provided interest be included on payment made during the period of grace. This grace did not extend the due date, but was grace within which the defendant would accept a payment already overdue. But the error in giving this instruction was invited and procured by appellant, and it cannot be heard to complain that the disagreement between an erroneous instruction given at its request, with correct instructions given by the court of its own motion, or on the request of the appellee, produces inconsistency in the instructions. Lake Erie, etc. R. Co. v. Cotton, 45 Ind. App. 580, 91 N. E. 253; Domestic Block Coal Co. v. De Armey, 179 Ind. 592, 100 N. E. 675, 102 N. E. 99; Kingan & Co. v. Clements, 184 Ind. 213, 110 N. E. 66; Marion Trust Co. v. Robinson, 184 Ind. 291, 110 N. E. 65; Daywitt v. Daywitt, 63 Ind. App. 444, 114 N. E. 694; Penn Co. v. Stalker,

67 Ind. App. 329, 119 N. E. 163; Orient Ins. Co. v. Kaptur, 176 Ind. 308, 95 N. E. 230.

[7] The appellant claims that instruction No. 10, requested by appellee, was erroneous, and says that it informed the jury that, if it found that appellant denied liability at any time before the case was submitted to the jury, the appellee was not required to surrender the policy. This instruction is not open to the objection urged against it. It is one of a series of instructions. The court had theretofore, in instruction No. 7, informed the jury that, it they found from the evidence that the appellee had paid the premiums for 16 years and the first installment of the seventeenth year, and made default in the payment of the second installment of the seventeenth year, under the contract of insurance he would be entitled to receive the cash surrender value provided therein for that particular year, upon legal surrender of said contract of insurance within 30 days after the default in the payment of said premium. This instruction clearly told the jury that the appellee would be entitled to the cash surrender value upon the surrender of the policy within 30 days after default, and he was not in default until the expiration of the 30 days of grace. In both of these instructions the jury were told that the condition upon which the appellee could receive the cash surrender value was upon the surrender, or offer to surrender and waiver thereof, within the 30 days after the expiration of the 30 days of grace.

By instruction No. 8 the court told the jury that, under the provisions of the contract for grace in the payment of premiums, appellee could not be held to be in default for the payment of premium falling due on October 14, 1914, until after the expiration of 30 days from said date, and that defendant could not declare a forfeiture of said policy until after the expiration of 30 days from said date. The appellant did not except to the giving of this instruction.

The jury had been informed that appellant had 30 days after the policy ceased or become void for nonpayment of premium, within which to make the surrender, by three instructions, one procured to be given at the request of appellant, and two given at the appellee's request, to one of which no exception was reserved.

[8] Instruction No. 10 was a correct statement of the law upon the subject of the waiver of surrender, and the jury could not have been misled thereby. Even if the instruction standing alone were open to the criticism offered against it, the subject of the criticism was embraced within other instructions given. When the instructions, considered as a whole, fairly state the law, even an inaccuracy or omission in a particular instruction is not cause for reversal. Chicago R. Co. v. Dinius, 180 Ind. 596, 103 N. E. 652; Southern Ry. Co. v. Friedley, 52 Ind. App. 192, 100 N. E. 481; Indianapolis, etc., Transit Co. v. Haines, 33 Ind. App. 63, 69 N. E. 187.

It does not appear from the record that any exceptions were reserved by appellant to the refusal of the court to give either of appellant's tendered instructions, 3, 5, and 6. However, it may be observed that each of said instructions are defective.

[9] Instruction No. 3 omits the element of waiver and asks the court to instruct the jury that the appellee would be required to yield up or surrender his policy in any event, notwithstanding the issue of whether or not appellant had denied liability and thereby waived such surrender.

[10] Instructions Nos. 5 and 6 were upon the theory that appellee was indebted to appellant under the premium bond to the extent of 60 per cent. of $129.60 each year. This is an erroneous construction of the contract of insurance as we have pointed out in the discussion of the demurrer to the amended complaint in this case. It was not error to refuse to give these instructions.

[11] The defendant placed a witness on the stand, who had testified that he was an actuary for the American Central Life Insurance Company, and asked of him the following question: "Is there a term used in the life insurance business known as level premium policies?" to which the witness answered, "Yes, sir." He was then asked, "What is meant by the level premium policy?" to which question the plaintiff objected.

The defendant then offered to prove, in answer to the question propounded to this witness, that a level premium policy is a policy where the premiums are fixed for and during the life of the insured, or for a certain number of years, as may be provided in the policy; and that in a level premium policy, the number of years, or the number of semiannual or quarterly payments, as they may be payable, are unchangeable, neither to be increased nor decreased. The court then sustained the objection of the plaintiff to the question.

The witness was then asked, "What is meant by the reserve net value of a policy such as is issued to Mr. Sayre, and sued on in this case?" to which plaintiff objected for the reason that the parties' rights under this contract are determined by the contract itself; and it expressly fixes the reserve and the cash value, and the premium to be paid. The contract here provides in itself for the payment of the premiums, and fixes the amount, and by its express terms provides that only a certain sum should be required of the plaintiff, except upon the happening of a contingency which is not now shown to have existed or to have ever existed, and it is not a question for an actuary, or a question of interpretation by an actuary, but it is a question of the interpretation of the contract itself as a matter of law by the

court. The court then sustained the objection.

Other similar questions were asked the witness, and objections were made by the plaintiff, but all such questions were pertaining to the construction to be placed upon the policy and contract of insurance herein. The interpretation of the contract itself is a matter for the court, and the objections were properly sustained to the evidence tendered by the defendant on that subject.

[12] A witness was then placed on the stand by the defendant and the defendant offered to prove by him that the company had been making deposits with the insurance department of the state of Indiana, and what intrepretation the insurance department of the state of Indiana put upon the papers so deposited by such company, and of the length of time the premium bond was deposited in the insurance department of the state of Indiana, and what construction the insurance department of the state of Indiana and the state of Illinois put upon such premium bond. Objection to this evidence was correctly sustained. The construction of the insurance contract is a matter for the court and not for the jury.

[13-15] The appellant contends that the verdict is not sustained by sufficient evidence, and says that the plaintiff failed to prove either that he surrendered the policy or facts showing that such surrender was waived. The rule applicable to that question is that, if there is any evidence tending to support every essential fact necessary to support the verdict, it is sufficient evidence. It is also the rule that the court or jury trying the case may draw any reasonable inference of facts from the evidence. It is not essential that a fact be proven by direct or positive evidence, and where it may be reasonably inferred from the facts and circumstances which the evidence tends to establish it will be sufficient on appeal.

[16] Appellant is seeking a forfeiture, and is asking this court to enforce a forfeiture, against the verdict of the jury and the decision of a trial court, finding that the appellant had waived the surrender of the policy, and is asking the court to enforce such forfeiture in contravention of the established rule that slight acts or circumstances upon the part of the insurer will be construed by the courts as a waiver to prevent a forfeiture, where the condition in the contract is in favor of the company. National Masonic, etc., Ass'n v. McBride, 162 Ind. 379, 70 N. E. 483.

From a careful examination of the evidence in this case we conclude that there is some evidence tending to support every material fact necessary to sustain the verdict.

The appellee has assigned cross-errors in this action, bringing under review the action of the trial court in excluding certain evidence, but in our view of the case it is not necessary to consider them. No reversible error appears in the record.

Judgment affirmed.

EASTERN ROCK ISLAND PLOW CO. v. HINTON et al. (No. 11554.)

(Appellate Court of Indiana, Division No. 2. Jan. 31, 1924.)

1. Partnership ⇐218(4) — Facts found by court held to warrant finding that there was no partnership.

In an action for the price of merchandise sold, the facts found by the court *held* sufficient to warrant a finding that there was no partnership between a dealer and one who financed him for a share of the profits.

2. Trial ⇐398—Uncontradicted findings control.

Contradictory findings must be ignored and the uncontradicted findings control.

3. Partnership ⇐218(3)—On conflicting evidence existence of partnership is question of fact.

Even if a contract of partnership may be implied or arise by operation of law, though the parties do not intend to become partners or agree that they are not to be partners, where the evidence is conflicting or different inferences may be drawn therefrom, the question as to existence of a partnership is one of fact.

4. Partnership ⇐49—Refusal to admit trade acceptance signed by one of alleged partners held not error.

In an action involving question as to existence of partnership, *held*, that it was not error to refuse to admit a trade acceptance, accepted by one of defendants, in the absence of evidence that the other defendant ever saw or knew anything about it.

5. Appeal and error ⇐230—Showing as to exclusion of testimony held insufficient.

Where the only showing of the exclusion of certain evidence was in the specifications made on motion for new trial, no question was presented for review.

Appeal from Circuit Court, Delaware County; W. A. Thompson, Judge.

Action by the Eastern Rock Island Plow Company against Grant C. Hinton and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Gavin & Gavin, of Indianapolis, for appellant.

Francis A. Shaw, of Muncie, for appellees.

McMAHON, J. Complaint by appellant to recover for certain merchandise which it is

alleged was sold to Grant C. Hinton and William L. Allison, as partners doing business under the name of Matthews Implement Company, and to set aside as fraudulent a conveyance of certain real estate made by Grant C. Hinton through a trustee to himself and his wife, Delcina Hinton. William L. Allison and Delcina Hinton each filed an answer of general denial. Grant C. Hinton filed an answer of general denial. He also filed three special paragraphs of answer, in which he alleged payment, non est factum as to one instrument which was made the foundation of one paragraph of complaint, and another paragraph in which he stated at great length the business relationship existing between him and Allison. Since the facts were found specially and no question raised as to the sufficiency of any of the pleadings, it is not necessary to set them out in detail.

[1] The facts as found by the court are in substance as follows:

On and prior to October 31, 1918, Allison had been engaged in selling fertilizer and agricultural implements at Matthews, Ind. On and prior to said day Allison and Grant C. Hinton had been in some business ventures together and were intimate personal friends. Allison was financially involved and unable to buy goods on credit. On or about October 31, 1918, Grant C. Hinton, who for brevity will hereafter be designated as Hinton, agreed with Allison that he (Hinton) would by his credit and money buy a small stock of farm implements and machinery for Allison so that he could continue to operate a farm implement store in Matthews, and on said day Hinton and Allison ordered from appellant through an agent, a bill of goods amounting to $782.40.

When Hinton and Allison entered into said agreement, it was agreed between them that Allison should have exclusive control of the goods to be bought by Hinton, that he alone should sell the same, collect the money for which such goods were sold, and turn the money over to Hinton, who should have the custody and control of the money for the purpose of applying it, as collected, upon the purchase price of the goods so bought. Hinton advanced of his own money sufficient sums, together with what was received from time to time from the sale of the goods bought October 31, 1918, to pay for said goods; that Hinton in and about the business of said Allison, which was carried on and conducted in the name of the Matthews Implement Company, pursuant to said agreement signed his name to papers as treasurer of said company and signed the name Matthews Implement Company, by G. C. Hinton, treasurer, to certain written instruments and papers in relation to his (Hinton's) liability and responsibility in connection with the purchase of said goods and merchandise for said company and for his work and labor in and about the management of the financial interests of said Matthews Implement Company.

Allison and Hinton never had any contract of partnership between themselves or community of interest in the property or profits of the Matthews Implement Company, but Hinton was to have 50 per cent. of the profits as compensation for moneys advanced for his services, and rendered in the management of the finances of said concern so long as he continued to act in that capacity.

The purchase of said bill of goods by Hinton and Allison was made from one Black, traveling salesman of appellant. At the time of the sale of said goods such salesman tried to sell Hinton a larger amount of goods than this bill, at which time Hinton informed Black that he would buy no larger amount of goods than the amount he had already bought, and he also said that he would pay for the goods that he had bought that day and advised Black not to sell Allison any more goods on his (Hinton's) credit; that he (Hinton) would pay for no more goods. Hinton told Black he was doing this for the accommodation of Allison and that if Allison made good with this purchase he could then buy for himself. When said bill of goods was bought, the order was signed in the personal names of G. C. Hinton and W. L. Allison. Hinton never at any time after that bought anything of appellant for the said Matthews Implement Company, or for himself or any other person. All goods purchased from appellant for the Matthews Implement Company, subsequent to said dates, were purchased by Allison alone. Soon after the arrangements were made for the purchase of said goods, Hinton made arrangements with the Gaston Banking Company for the opening of an account of the Matthews Implement Company, and the same was carried in said bank in the name of "Matthews Implement Company, G. C. Hinton, treasurer," and was carried in that way so that Allison could not check against such account.

After October 31, 1918, and before May 13, 1919, Hinton had made payments upon the bill of goods so ordered by him through said Black. On May 13, 1919, one Snyder, an agent and salesman of appellant, settled with Hinton for the goods so ordered and bought by Hinton October 31, 1918, and May 13, 1919. Hinton had no key to the store building at Matthews, which Allison occupied with the goods bought by Hinton and other goods bought by Allison. There were no partnership books kept and there were no partnership accounts. Hinton had nothing to do with the sale of any part of the goods and stock of merchandise held by Allison in the storeroom at Matthews. There were no letter heads, circulars, or advertisements in which it appeared that Hinton was a partner in said business. Under the arrangements made between Hinton and Allison, Al-

lison was to and did turn over to Hinton the moneys realized from the sale of the goods and merchandise in his store at Matthews, and out of such moneys turned over to Hinton he paid some of the debts of Allison other than the debt incurred by the contract entered into by Hinton and Allison on October 31, 1918.

Grant O. Hinton never held himself out as a partner with Allison in the Matthews Implement Company to appellant or to any one else, and neither appellant nor any one else ever trusted or extended credit to the Matthews Implement Company on account of or because they believed Hinton to be a partner in said concern, or trusted the implement company on account of or because they believed Hinton to be a partner in said concern, or trusted the implement company upon the financial standing of Hinton. Hinton and Allison never were in fact as between themselves partners, and Hinton never in any way assumed any liability for and on account of the purchase of any goods from appellant except said first bill of October 31, 1918, and he never promised or agreed to pay any part of any bill for goods furnished by appellant to the Matthews Implement Company, except said bill of October 31, 1918. Appellant at the time of said purchase and at all times thereafter was advised and knew that Hinton was not a partner with Allison in the Matthews Implement Company and was fully advised that he was in no way liable for any bills made for goods purchased from it after said order of October 31, 1918.

Allison agreed to pay Hinton one-half of the profits derived from the business of the implement company, if Hinton would advance moneys to make such purchase, or to extend his credit for such purpose and for his work and labor in the management of the financial interest of the implement company; but Allison never paid Hinton anything as profits from the business of the implement company, nor did Hinton receive anything for the use of his money or credit or for his work and labor in the management of financial interests of the company from Allison or the implement company or from any other source. Hinton at the time of the commencement of this action did not owe and was not indebted to the appellant at the time this case was tried. Allison is indebted to appellant in the sum of $3,897.84.

On May 1, 1919, Hinton was the owner of the real estate described in the complaint and on that date made the conveyances mentioned in the complaint, and afterwards on May 13, 1919, paid appellant $919.10; that being in full for the order of October 31, 1918, and in full of all debts and demands of appellant against him and that said conveyances were not made for the purpose of hindering and delaying appellant in the collection of any bill or with the intent or purpose of cheating and defrauding appellant out of any sum of money owing by him to appellant; that the said conveyances in no way hindered, delayed, deferred, or interrupted the collection of said indebtedness of Hinton to appellant.

Upon these facts the court stated its conclusions of law as follows: (1) That Hinton was not a partner with Allison, at the time of the purchase of any of the goods and merchandise from appellant for which recovery is sought in this action. (2 and 3) That Hinton was not owing appellant any sum of money whatsoever, and was entitled to recover his costs. (4) That appellant is entitled to a judgment for $3,897.84 against Allison.

From a judgment in accordance with the conclusions, appellant appeals and contends the court erred in each conclusion of law and in overruling motion for a new trial.

Appellant contends that the facts as found by the court show as a matter of law that Hinton and Allison were in fact partners notwithstanding the court found there was never any agreement of partnership and that as a matter of fact they never were partners and never had any community interest in the property or profits of the implement company.

In addition to these specific findings that they were not partners, the court found many facts in support of the ultimate finding on that question. For instance, it is found that Hinton agreed with Allison that the former would by his credit and money buy a small stock of goods for the latter so that he could continue to operate an implement store; that they ordered goods from appellant of the value of $782.40, at which time Hinton refused to give an order for more goods and told appellant's salesman not to sell any more goods to Allison on his (Hinton's) credit, and also informed such salesman that he would not be responsible for any goods sold to Allison without his consent; that Allison had complete control over the stock of goods, he alone selling them and giving the money when collected to Hinton, who deposited it in a bank in such a way that Allison could not check it out or use it for any purpose. Hinton never had a key to the store building and never had anything to do with the sale of any of the goods in the storeroom. There was no partnership books kept, nor were there any partnership accounts. There were no letter heads, circulars, or advertisements in which it appeared that Hinton was interested in the business. It was also found that Hinton never held himself out to any one as a partner of Allison's, and that appellant when it sold the goods was advised and knew that Hinton was not a partner and was not liable for any goods purchased after October 31, 1918, that being the day when the first bill of goods was purchased and which the court finds was paid in full before the commencement of this suit.

[2] The question as to whether Hinton and Allison were partners was one of fact, and the court found against appellant on this issue. Not only did the court make a specific finding against appellant on the question, but it found many facts from which it could be inferred as a matter of fact that there was no partnership. It is true, as contended for by appellant, that many facts were found indicating there was a partnership; but it is settled that where contradictory facts are found, such facts must be ignored. In such cases the uncontradicted facts control. And the uncontradicted facts as found are sufficient to show as a fact that there was no partnership, or at least to sustain the court in its finding as an ultimate fact that there was no partnership.

Whether the first conclusion of law which was to the effect that there was no partnership was a proper conclusion is not necessary for us to determine. We have, however, heretofore held that the question as to whether there was a partnership was one of fact. The first conclusion might have been omitted. If the facts found are sufficient to and do show the existence of the partnership when the merchandise in question was sold, it would follow as a matter of course that conclusions 2 and 3 were erroneous. If, on the contrary, the facts show there was no partnership and that appellee Hinton paid appellant in full for all goods ordered for which he was liable, conclusions 2 and 3 would not be erroneous. Since the court found the facts in favor of Hinton on the issue of partnership and that he had paid for all the goods for which he was liable, there was no error in the second and third conclusions.

[3] It is true that a contract of partnership may be implied or arise by operation of law, even though the parties do not intend to become partners or agree they are not to be partners. But where the evidence is conflicting and different inferences of fact can be drawn therefrom, the ultimate question as to the existence of a partnership is always one of fact. Where the facts found are not contradictory and are such that the only reasonable inference that can be drawn therefrom is that there is a partnership, it might be proper for the court so to state a conclusion of law to that effect, although that question is not now before us and we express no opinion on that question. The court did not, on the facts found, err in either of its conclusions of law.

Appellant next contends that the finding of facts is not sustained by sufficient evidence. Its claim is that many facts were established by the uncontradicted evidence, and that the court failed to find the existence of such facts. The special finding is unnecessarily lengthy and contains many evidentiary facts which could well have been omitted. Many of the facts which appellant contends were proven, but omitted, were evidentiary matter and would have added nothing to the effect of the facts found. If all of the facts which appellant contends were proven had been stated in the finding, they would not, when considered in connection with the other facts found, have rendered the conclusions of law erroneous.

One of appellant's contentions is that the evidence without conflict shows that appellee Hinton had not paid all that was due and owing on account of the merchandise for which he admits he agreed to pay. The evidence upon this question was contradictory and is sufficient to sustain the finding of the court in that regard.

[4] Appellant contends that the court erred in sustaining appellee's objection to the admission of a certain trade acceptance in favor of the Hoover Allison Company. There was no evidence showing that appellee ever saw this acceptance or knew anything about it. It was accepted by appellee Allison. There was no error in refusing to admit it.

Appellant in response to a question asked the witness Alley as to what Hinton said about being behind Allison in the business, and offered to prove that Hinton stated to the witness that he and Allison were partners. An objection to this question was sustained, but later the same witness said that Hinton had not said anything to him about the existence of a partnership.

[5] Specifications 11, 12, 16, 17, 24, 25, 26, 27, 28, 32, 33, 34, 35, and 36 in the motion for a new trial relate to the exclusion of certain testimony. There is no showing that the questions referred to were in fact asked the witnesses, or that any offers to prove were made. The only place where we find any reference to these matters is in the motion for a new trial, and it has been many times held that is not sufficient to present any question. There was no error overruling the motion for a new trial.

After appellee Hinton ceased to have anything to do with the business, Allison continued in possession of the stock of goods for some time, when he moved from Matthews to Muncie, and left the stock of goods in the storeroom without any one to look after them and without any insurance. He testified he abandoned the goods upon the theory that they belonged to appellant. Upon the filing of the complaint herein the court appointed a receiver who took possession of the stock of goods and who at the time of the trial was in possession of all of such stock except what had been released by order of court. In so far as the record discloses, this cause is still pending in so far as the receivership is concerned, and, without attempting to direct the trial court as to what proceedings should be had in so far as the receivership is con-

cerned, we deem it proper to suggest that the court should take such steps in that matter as may be proper.

Judgment affirmed.

NORMAN v. STATE. (No. 17951.)

(Supreme Court of Ohio. Jan. 15, 1924.)

(Syllabus by the Court.)

1. Criminal law ⇐875(1), 893—Verdicts not to be avoided unless of doubtful import, irresponsive to issues, or manifestly tending to work injustice; when verdict sufficient in form stated.

Verdicts are to have a reasonable intendment and to have a reasonable construction and are not to be avoided unless from necessity originating in doubt of their import or irresponsiveness to the issues submitted, or unless they show a manifest tendency to work injustice. A verdict is sufficient in form if it decides the question in issue in such a way as to enable the court intelligently to base a judgment thereon.

2. Parent and child ⇐17(7)—Verdict of guilty of "abandoning" child held sufficient under statute against "neglect."

In a trial upon an indictment charging a violation of section 13008, General Code, providing against "neglect" of a minor child, a verdict in the following form, "We, the jury in this case, duly impaneled and sworn, and affirmed, find the defendant, Herschell Norman, guilty of abandoning legitimate child in the manner and form as he stands charged in the indictment. C. T. Robinson, Foreman," is responsive to the issue tendered, and a judgment of conviction rendered, and sentence thereon, are not erroneous.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Abandon—Abandonment; Neglect.

3. Criminal law ⇐1001—Powers of court to suspend sentence in prosecution for neglect of minor child stated.

In a prosecution under section 13008, General Code, the power of the court to suspend sentence, provided in section 13010, General Code, is not exclusive by virtue of that statute, but the court may also suspend sentence under section 13703, General Code, providing for probation in criminal cases generally.

4. Holidays ⇐5—Trial and conviction on legal holiday held not invalid.

The 12th day of October, by virtue of section 8301, General Code, is made a legal holiday for the purposes of the "Negotiable Instruments Act," but a trial and verdict of conviction in a criminal case are not rendered invalid because taking place on that day.

5. Criminal law ⇐871(2)—Verdict held not invalid because of difference in name of juror.

Where, in a criminal case, a juror called to the panel as "Chas. Robinson" is accepted and sworn as a member of the jury, and trial proceeds, and upon retiring is chosen foreman, and a verdict is returned signed "C. T. Robinson, Foreman," such verdict is not invalid by reason of such difference in the name; it not appearing that there was any question as to the identity of the juror.

6. Criminal law ⇐198—Conviction for neglecting minor child no bar to subsequent prosecution based upon another period of time.

Where defendant is convicted of neglect of a minor child under 16 years of age, for the period between August 10, 1917, and September 11, 1917, under the provisions of section 13008, General Code, and sentence suspended under section 13706, General Code, providing for suspension of sentences generally, conditioned that he make weekly payments for such child's support, and afterward default in such payment is made, and subsequently such person is again indicted under section 13008, General Code, for neglect and refusal to support the same child for the period between October 1, 1919, and September 1, 1920, the fact of such prior indictment, trial, conviction, and sentence, and suspension thereof, is no bar to a proceeding under the second indictment, even though the amount for which defendant was in default under the first indictment be tendered for the support of such child.

Error to Court of Appeals, Gallia County.

Herschell Norman was convicted for failing to support a minor child. The conviction was affirmed by the Court of Appeals, and he brings error. Affirmed.—[By Editorial Staff.]

The plaintiff in error, Herschell Norman, was indicted in the county of Gallia, at the September term of the common pleas court, 1917, for violation of section 13008, General Code, to wit, for failure to support his legitimate minor child for the period between August 10, 1917, and September 11, 1917. He was tried and found guilty by a jury, and sentenced to the penitentiary at Columbus, Ohio, for an indeterminate period of one to three years. This sentence was suspended by the court; it appearing of record as follows:

"And it appearing to the court that the defendant has never before been imprisoned for a crime, and it appearing to the satisfaction of the court that the character of the defendant and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and that the public good does not demand or require that he shall suffer the penalty imposed by the law, the execution of the sentence herein imposed is suspended, and the defendant is placed on probation in the manner provided by law.

"A condition of said probation is that defendant pay $1 per week to the clerk of the court for the use of said minor child; said sum to be paid to the mother of said child by the clerk."

It appears that the defendant, Norman, complied with this order until November, 1919, at which date he became in default for his payments under the order. Two years later, November 7, 1921, he was indicted a second time for violation of section 13008, General Code, for failure to furnish his minor child of the age of 4 years with necessary and proper care, home, food, and clothing, for the period of time from October 1, 1919, to September 1. 1920.

On June 3, 1922, the defendant, Norman, filed a plea in abatement, stating therein the former conviction on the 8th day of October, 1917, sentence and suspension of sentence, and his compliance with the terms of the suspension until the 18th day of November, 1919; that on May 23, 1922, he duly tendered to the mother of the child $132, being the amount of weekly payments from November 18, 1919, up to June 1, 1922; that the mother of the child refused to accept the same; that thereupon the defendant tendered the same amount to the clerk of the courts of Gallia county for the use and benefit of the said minor child, Naomi Norman, to be paid by the clerk in accordance with the order of the court in such cause No. 3317, but that the clerk of the court refused to accept the same; and that defendant further represented that he was ready and willing to pay said sum of $132, and to continue the payments of $1 a week until the child, Naomi Norman, reached the age of 16, in accordance with the orders of the common pleas court made in cause No. 3317.

And as a further ground in said plea in abatement, the defendant set forth that before the returning of the indictment in the case at bar by the grand jury of Gallia county he had filed an action for divorce and the custody of the child, Naomi Norman, in the circuit court of Pocahontas county, W. Va., that said court in that action on September 12, 1921, had granted him the custody of the minor child, Naomi Norman, and that since the granting of the custody of the child, to wit, on the 19th of April, 1922, Bertie Norman, the mother of Naomi Norman, entered her personal appearance in such action in Pocahontas county, W. Va., and was contesting the action for divorce and custody of the child, by reason of which such circuit court of Pocahontas county had jurisdiction to dispose of the custody of the child, and that the matter is still pending in that court.

To this plea in abatement a demurrer was filed by the state, and the demurrer was sustained. Exceptions were noted by the defendant.

On October 12, 1922, a plea in bar was filed, setting up the indictment, trial, conviction, sentence, and suspension of sentence granted on the 8th day of October, 1917, and Herschell Norman further represented that he had fully complied with the order of the court in that cause, and that the judgment, verdict, findings, and orders of the court were still in full force and effect at the time covered by the indictment in the case at bar.

To this plea in bar a demurrer was filed on behalf of the state, which was sustained. Exceptions were noted by the defendant.

Whereupon the defendant entered a plea of not guilty. A jury was thereupon called, duly impaneled, and sworn, and upon the issue tendered by the indictment, and the plea of not guilty thereto, the cause proceeded to trial, resulting in the return of a verdict in the following form:

"We, the jury in this case, duly impaneled and sworn and affirmed, find the defendant, Herschell Norman, guilty of abandoning legitimate child, in manner and form as he stands charged in the indictment.

"C. T. Robinson, Foreman."

A motion for a new trial was filed, and a supplemental motion for a new trial, both of which were overruled, and judgment was pronounced by the court by imposing sentence in the Ohio penitentiary for not less than two nor more than three years. Exceptions to all of these proceedings having been taken by Norman, error was prosecuted to the Court of Appeals, wherein the judgment of the court of common pleas was affirmed. To reverse that judgment error is now prosecuted to this court.

James C. Nicholson, of Columbus, and Hollis C. Johnston, of Gallipolis, for plaintiff in error.

A. M. Barlow, Pros. Atty., and Henry W. Cherington, both of Gallipolis, for the State.

DAY, J. A number of alleged errors are assigned as grounds for reversal of the judgment of conviction in this case, and they may be grouped under the following heads:

(1) That the verdict is not responsive to the charge set forth in the indictment.

(2) That the court erred in sustaining the demurrer of the state to the plea in abatement.

(3) That the court erred in sustaining the demurrer to the plea in bar.

(4) That the court erred in impaneling a jury, and in trying the case and submitting it to the jury and receiving a verdict on the 12th day of October, 1922; it being claimed that the same was a legal holiday.

(5) That there was absolutely no evidence introduced with reference to the ability of Norman to provide for his minor child during the period covered by the indictment.

(6) That Norman was a resident of West Virginia during the entire time laid in the indictment, and was not subject to the jurisdiction of the common pleas court of Gallia county.

As to the first contention that the verdict is not responsive to the issue tendered, it is necessary to give consideration to the section of the statute under which the proceeding was brought, and the nature thereof, and to the indictment and the form of the verdict.

The purpose of the statute (section 13008), and the sections *in pari materia*, is well stated in the language of Clark, J., in Seaman v. State, 106 Ohio St. 177, 184, 140 N. E. 108, 110:

"The intent of this legislation was to compel persons charged by law with the support of designated dependents to meet the full measure of their obligation to such dependents and society. The converse of the proposition may be stated that it was the purpose to relieve society of a burden that properly belonged to one charged by law with its obligation."

A history of the section is set forth in that opinion, and it is interesting to note that the original and basic section, 3140—2, Revised Statutes, passed April 16, 1890 (87 Ohio Laws, 216), was entitled "To prevent *abandonment* and pauperism."

It is quite true that on April 28, 1908 (99 Ohio Laws, 228), the Legislature repealed the original act of 1890 and passed an act entitled "An act to compel parents to maintain their children," and, under the codification of February 14, 1910, this act of April 28, 1908, was carried into the codification as sections 13008 to 13021, inclusive. The language with which the offense is charged in the indictment can leave no doubt that the charge is preferred under section 13008, General Code. The material parts of the indictment follow:

"The jurors of the grand jury of said county, on their oaths, in the name and by the authority of the state of Ohio, do find and present that Herschell Norman, late of said county, on the first day of October in the year of our Lord one thousand nine hundred and nineteen, and from that day till the first day of September 1920, at the county of Gallia aforesaid, unlawfully did neglect and refuse to provide one Naomi Norman with necessary and proper home, care, food and clothing; she, the said Naomi Norman, then and there being the legitimate child of him the said Herschell Norman under sixteen (16) years of age, to wit, the said Naomi Norman being four years of age, and then and there living in the said county of Gallia and the said state of Ohio, and he, the said Herschell Norman, being the father of said child aforesaid duly charged by law with the maintenance thereof, and he, the said Herschell Norman, being then and there able, by reason of having property and by reason of personal services, labor and earnings, to provide said child aforesaid with necessary and proper home, care, food and clothing, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Ohio."

A comparison of the language of the indictment and that of section 13008, General Code, discloses that the indictment follows almost verbatim the language of the statute.

Now section 13009, General Code, provides for an offense of a father of a legitimate child under 16 years of age who "leaves, with intent to abandon, such child." It cannot therefore be claimed that the indictment contains a charge under any other section than 13008. It does not set forth the offense created by section 13009. We do not understand that counsel claim anything different, but they do urge most strenuously that the verdict returned in the case at bar is not responsive to the charge contained in the indictment returned. The language of the verdict is as follows:

"We, the jury in this case, duly impaneled and sworn and affirmed, find the defendant, Herschell Norman, guilty of abandoning legitimate child, in manner and form as he stands charged in the indictment.

"C. T. Robinson, Foreman."

Was this verdict responsive to the issue tendered? The language of the indictment is "unlawfully did neglect and refuse to provide one Naomi Norman with necessary and proper home, care, food, and clothing." Was the verdict of the jury, that the defendant was "guilty of abandoning legitimate child in the manner and form as he stands charged in the indictment," a responsive verdict to the charge in the indictment that he "unlawfully did neglect and refuse to provide said child," and so forth?

The word "abandon," as defined in the Century Dictionary, is "to detach or withdraw one's self from; leave; to desert; forsake utterly; as, to abandon duty," and the word "neglect," by the same authority, is defined as being "remiss in attention or duty toward."

[1] It would therefore seem that, if the defendant had a duty to perform towards his minor child, Naomi Norman, he would be guilty of neglect of that duty if he should abandon the child in the manner and form set forth in the indictment. A verdict is sufficient in form if it decides the question in issue in such a way as to enable the court to intelligently base a judgment thereon.

Verdicts are to have a reasonable intendment, and a reasonable construction, and are not to be avoided unless from necessity originating in doubt of their import or irresponsiveness of the issues submitted, or unless they show a manifest tendency to work injustice.

[2] We are of opinion that section 13008, General Code, charges a form of *abandoning the duty* that a parent owes to his child, and that the verdict returned in this case was responsive to the issues submitted by the trial judge.

In the charge this language appears:

"Two forms of verdict will be handed to you —one to be signed in the event you find the defendant guilty, and one to be signed in the event you find the defendant not guilty."

This language is clear, concise, and readily understandable, and the verdict returned by this jury was undoubtedly responsive to the issues submitted to it; that is, was the defendant guilty or was he not guilty? The verdict was a general one and not special.

"The verdict on the issue of not guilty is regulated by the oath which the jury is required to take, and that is to well and truly try and true deliverance make between the state and the prisoner." Smith v. State, 59 Ohio St. 350, 367, 52 N. E. 826, 829.

[5] Another objection to this verdict is that the same is signed by one "C. T. Robinson, Foreman," the name appearing on the panel, as drawn, as "Chas. Robinson." It is of course not contended that the man drawn on the panel as "Chas. Robinson" is in fact not the same individual, C. T. Robinson, who signed the verdict, and it is well established that, where the verdict is signed by a juror, a slight variance in the name signed from that by which the juror was sworn will not affect the verdict. 16 Corpus Juris, 1101. There is no showing in the record that the plaintiff in error was misled as to the identity of the juror, and we can see no prejudicial error in this regard.

Entertaining the view that this verdict was responsive to the issue tendered, a reversal of the judgment below upon that ground must be denied. Reaching this conclusion, it is unnecessary for us to pass upon the question urged by counsel, that the objection to the verdict comes too late when raised for the first time in this court.

The second and third grounds of alleged error involve a consideration of the sustaining of the demurrers by the trial court to the plea in abatement and to the plea in bar.

[3, 6] At the outset of the discussion of the points raised by this ground of error, we are required to answer whether the suspension of sentence granted in cause No. 3317 (the first indictment) was under and by virtue of section 13706, or under and by virtue of section 13010, General Code. The former section relates to the power of the court to suspend in misdemeanors or felonies, when the defendant has never before been imprisoned for crime, either in this state or elsewhere, and it appears to the satisfaction of the court or magistrate that the character of the defendant and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct.

The latter section, section 13010, General Code, relates to the suspension granted for violation of section 13008, and when construed in conjunction with sections 13015 and 13019 relates to a suspension that is granted before sentence is passed, and, further, the mandatory language of section 13010 requires that the defendant enter into a bond to the state of Ohio, conditioned that he will furnish—

"such child * * * with necessary and proper home, care, food and clothing, or will pay promptly each week for such purpose to a trustee named by such court," etc.

An examination of the record discloses that the suspension granted in this case was under and by virtue of section 13706, for the entry provides:

"And it appearing to the court that the defendant has never before been imprisoned for a crime, and it appearing to the satisfaction of the court that the character of the defendant and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and that the public good does not demand or require that he shall suffer the penalty imposed by the law, the execution of the sentence herein imposed is suspended, and the defendant is placed on probation in the manner provided by law."

It is true that the court added a condition that the defendant pay $1 per week to the clerk of the court for the use of his minor child, but the court did not exact a bond as provided in section 13010, and we are therefore constrained to the conclusion that the manifest intention of the court was to make the suspension under the general section (section 13706), and that the same was not made under section 13010, which section, when taken in connection with 13015, might have granted to the court a continuing jurisdiction. The court had, however, already passed sentence, and no bond was exacted, nor tendered by the defendant.

We are therefore of opinion that the court of common pleas was right in sustaining the demurrer to the plea in abatement.

The plea in abatement raises the further point that Herschell Norman had filed an action for divorce and the custody of the child, Naomi Norman, in Pocahontas county, W. Va.; that in said cause, on September 12, 1921, he was granted custody of such minor child by the said circuit court; that on the 19th day of April 1922, Bertie Norman, the mother of Naomi Norman and wife of plaintiff in error, entered her appearance in said action in Pocahontas county, W. Va., whereby the circuit court of Pocahontas county

was given jurisdiction to dispose of the custody of the minor child. Granting all these facts to be true, for the sake of the argument, the indictment in the case at bar charges an offense committed between the 1st day of October, 1919, and the 1st day of September, 1920, in the county of Gallia and state of Ohio. What transpired in the circuit court of Pocahontas county, W. Va., on the 12th day of September, 1921, and on the 19th day of April, 1922, would not be defensive to a crime committed in the state of Ohio a year before. Whether the courts of West Virginia have jurisdiction of the parties in the divorce case, and, incident thereto, the custody of the child, is not connected with the issue tendered under the present indictment, to wit, Was the defendant guilty or not guilty of the offense of neglecting and refusing to support his minor child between the 1st of October, 1919, and the 1st of September, 1920?

We are, therefore, of opinion that the demurrers to both plea in abatement and plea in bar were properly sustained by the common pleas court.

[4] The fourth assignment of error relates to the trial of the case on the 12th of October, 1922, which is made a holiday under the "Negotiable Instruments Acts" (section 8301, General Code).

It has been held in this state that it is not unlawful to hold common pleas court on Labor Day; the judges having under section 1533, General Code, fixed that day for the commencement of the term, and that an indictment returned by a grand jury impaneled on that day is valid. State v. Thomas, 61 Ohio St. 444, 56 N. E. 276, 48 L. R. A. 459.

It has also been held that the mere fact that the jury is required to consider a case for 48 hours, including part of Thanksgiving Day, does not render such proceedings invalid. State v. Young, 73 Ohio St. 372, 78 N. E. 1138, affirming Young v. State, 6 Ohio C. C. (N. S.) 53.

It has generally been held that, in the absence of a statute containing a mandatory provision forbidding the judges of courts to hear and determine matters on a legal holiday, a judicial proceeding upon such day is not void. 10 L. R. A. (N. S.) 791, note, and cases cited.

We are unable, upon search of the statutes, to find any provision of the General Code which in criminal cases renders void the proceedings of courts of October 12. Further, we fail to see in an examination of the record where there is any affirmative showing that the defendant objected to being tried upon that day. We find the following in the bill of exceptions:

"By the Court: Are you ready for trial?
"The Prosecutor: The state is ready.
"By the Court: Is the defendant ready?
"Mr. Johnston: The defendant is ready."

And thereupon the cause proceeded.

The record failing to disclose affirmatively any objection on the part of the plaintiff in error to the conduct of the trial upon this day, we do not see how we can disturb the judgment of the courts below upon that ground.

The fifth ground of error is that there was absolutely no evidence introduced with reference to the ability of Norman to provide for his minor child.

The record shows that the defendant was a young man 25 or 26 years old at the time of the trial of this indictment; that he had worked with his father upon a farm; that he had worked in a sawmill; that he was about 180 pounds in weight; and that the jury might well have reached the conclusion that he was physically able to perform work sufficient to provide his minor child with "necessary home, food, care, and clothing." It is quite true that his physical appearance at the time of the trial, in the presence of the jury, might not have been proof of his condition during the period covered by the indictment, but the admissions by plaintiff in error to the witness Fraley, who accompanied plaintiff in error from West Virginia, at the time of his extradition, show that during part of the time he had been employed in West Virginia at various occupations; plaintiff in error pointing out to the witness where he had worked at a sawmill in the vicinity of Marlington, and further telling the witness of having worked at a tannery. So when all the testimony and the circumstances of the case, as disclosed by the record, coupled with the fact that there is no testimony offered showing or tending to show that the defendant below was physically incapable of earning money, are considered we cannot say that the verdict of the jury is not sustained by sufficient evidence.

The last ground of error assigned is that the plaintiff in error, during the period of time laid in the indictment was a resident of the state of West Virginia. Now, it affirmatively appears that the child, Naomi Norman, was a resident of Gallia county during the period covered by the indictment, and by virtue of section 13011, General Code, the venue of such an offense is properly laid in the county wherein the child may be at the time such complaint is made.

The decision of this court in State v. Sanner, 81 Ohio St. 393, 90 N. E. 1007, 26 L. R. A. (N. S.) 1093, holds as follows:

"As to some crimes, the physical presence of the accused, at the place where the crime is committed is not essential to his guilt.

"A parent may be guilty of the crime of failing to provide for his minor children, de-

fined by the act entitled, 'An act to compel parents to maintain their children,' passed April 28, 1908 (99 Ohio Laws, 228), although he is a resident of another state during the time laid in the indictment, and the venue of the crime is in the county where the child is when the complaint is made."

We are content with the conclusion reached in the Sanner Case, and hold it to be applicable in the present instance. A reversal upon this ground is therefore denied.

Upon the whole case we are of the opinion that the plaintiff in error had a fair trial; that his rights were properly safeguarded by the trial court upon the questions arising during the progress of the trial; that the verdict of the jury and the judgment of the trial court are sustained by the law and the evidence; and that the Court of Appeals was right in affirming such judgment. Therefore the judgment of the Court of Appeals should be, and hereby is, affirmed.

Judgment affirmed.

MARSHALL, C. J., and WANAMAKER, JONES, MATTHIAS, and ALLEN, JJ., concur.

STATE ex rel. RYAN et al. v. PATTON, President of Board of Education.
(No. 18156.)

(Supreme Court of Ohio. Dec. 26, 1923.)

(Syllabus by the Court.)

1. Schools and school districts ⟸97(5)—Highest bid for school bonds must be accepted.

Under section 2294, General Code, where a board of education advertises for bids for purchase of bonds issued under section 7630—1, General Code, it is mandatory upon such board to accept the highest bid therefor.

2. Schools and school districts ⟸97(5)—Bid for bonds requiring showing of legal issuance not unconditional or unlawful.

A bid which contains a qualification that the board shall furnish "a certified transcript showing said bonds to be legally issued in accordance with section 7630—1 of the General Code of Ohio" is not conditional, or unlawful.

Original proceeding for mandamus by the State, on the relation of Frank L. Ryan and others, against R. L. Patton, President of the Board of Education of the Burlington Township, Rural School District, Licking County. Writ denied.—[By Editorial Staff.]

Charles L. Flory, of Newark, and Knepper & Wilcox and P. E. Dempsey, all of Columbus for relators.

F. S. Monnett, of Columbus, for defendant.

MARSHALL, C. J. This is an action praying the allowance of a writ of mandamus, begun as an original action in this court. The petition alleges that by virtue of the provisions of section 7630—1, Gen. Code, the board of education of Burlington township, Licking county, proceeded to provide funds for repairing and rebuilding a school house; that all necessary proceedings were entered into, and it was duly resolved to sell bonds in the sum of $55,000; that the board advertised for bids for such bonds; and that upon opening the bids the board accepted the bid of relators. The petition further alleges that bonds have been printed, signed by the clerk of the board, and are ready for delivery except, that the same have not been signed by R. L. Patton, as president of the board, and that the president refused and still refuses to sign the same. It is sought by the writ of mandamus to compel him to sign the bonds, in order that the same may be delivered to relators.

The president of the board has filed an answer alleging many irregularities, but in this opinion we will notice only that portion thereof which relates to the point upon which the cause has been decided. The answer alleges that the relators were not the highest bidder for said bonds, but, on the contrary, that another bidder, W. L. Slayton & Co. offered a higher premium therefor.

It is provided by section 2294, General Code, that—

"All bonds issued by * * * boards of education * * * shall be sold to the highest bidder after being advertised once a week for three consecutive weeks and on the same day of the week, in a newspaper having general circulation in the county where the bonds are issued. * * *"

It is not claimed by relators that they were the highest bidder, but it is sought to justify the action of the board by showing that the advertisement for bids contained the provision that "said bids must be unconditional." And it has further been shown by the testimony that the board of education was of the opinion and had declared that the bid of W. L. Slayton & Co. was not unconditional.

The pertinent parts of that bid, and the only parts which this court has considered in the disposition of this case, read as follows:

"For your $55,000 Burlington township rural school district 5½% Bonds, *upon your having furnished us with a certified transcript showing said bonds to be legally issued in accordance with section 7630—1 of the General Code of Ohio*, we will pay you * * * par and accrued interest and a premium of $1,001.00."

[2] The part printed in italics, and the only part which has been considered, is the part

which the board of education was advised constituted a condition to the bid. It is quite certain that that language was a part of the language of the bid, and therefore a part of its terms, and the question arises whether that language constituted the bid a conditional bid, and therefore in violation of the requirements of the legal advertisement.

[1] It is not an unusual requirement, and it is not in fact claimed that the requirement of furnishing a certified transcript rendered the bid a conditional one, because it is conceded that section 2295—3, General Code, requires such a transcript to be furnished to the successful bidder. It is claimed, however, that the requirement that the "certified transcript showing the bonds to be legally issued in accordance with section 7630—1 of the General Code" becomes a condition, and this is evidently upon the theory that it was intended to impose upon bidders the risk of the validity, regularity, and legality of the proceedings. If the proceedings were in all respects regular and legal, the language referred to would not operate as a conditon, because there would be no risk. There would only be a risk, and therefore there would only be a condition in fact, in the event the proceedings were found so defective as not to constitute a valid obligation of the board, but it would be wholly contrary to the plainest principles of justice to require a bidder to carry out the terms of his bid knowing that it would result in a total loss of the amount paid. Full compliance with the terms of the bid could in any event be compelled upon a showing that the proceedings were entirely regular and in full compliance with the section of the statutes, notwithstanding the language which the board found objectionable; and, on the other hand, if that language had been omitted from the bid, performance could not have been compelled if the proceedings lacked regularity and legality. If the objectionable language had been omitted from the proposal, it would nevertheless have been fully implied, and quite as effective as though expressed. If it was intended by the board to create a binding obligation on the part of the bidder to perform its terms, even though the proceedings did not create a legal obligation upon the board, then we do not hesitate to say that no form of advertisement and no requirement made upon bidders would be effective to produce such a result. It it was attempted to extend by contract the doctrine of caveat emptor to such a transaction, the answer of this court is that its process may not be invoked to bring about the consummation of such an unjust result. In this controversy the difference in the amount of the premium between the bid of relator and the bid of Slayton & Co., is not large, but there is a principle involved in the matter which is not in any way controlled by the amount which may be saved or lost. The language of the statute is that the board must accept the highest bid; and that statutory provision is mandatory. Having failed to accept the highest bid, there is no legal duty on the part of the president of the board to sign the bonds in favor of a bidder offering a smaller premium. The writ of mandamus will therefore be denied, and the petition dismissed.

Writ denied.

WANAMAKER, ROBINSON, JONES, and DAY, JJ., concur.

ALLEN, J., took no part in the consideration or decision of the case.

(310 Ill. 607)

PEOPLE ex rel. HENRY BROS. et al. v. DODDS et al. (No. 15081.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 13, 1924.)

1. Quo warranto ⇐48—Information need only charge usurpation.

An information in quo warranto need only charge the usurpation and call on the respondents to disclaim or justify.

2. Quo warranto ⇐52—Objection that information improvidently filed, how made.

Objection that information in quo warranto was improvidently ordered filed cannot be raised by demurrer to the information, but must be raised by motion to strike or vacate the order allowing the information to be filed.

3. Quo warranto ⇐52—Information demurrable, if grounds stated do not constitute cause of action.

The information in quo warranto need not set out the grounds on which illegality is claimed, but, having set out such grounds, it is open to demurrer, if the grounds stated do not constitute a cause of action against the respondents.

4. Schools and school districts ⇐30—School district divided by river not "contiguous" and "compact."

A school district, divided into two portions by river, making it practically impossible a good portion of the school year for children of high school age living on one side of the river to attend school located on the other, *held* not "contiguous" and "compact," as required by the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Compact; Contiguous.]

5. Quo warranto ⇐52—Truth of averments assumed on demurrer.

Averments of information in quo warranto must be assumed to be true on demurrer.

6. Quo warranto ⇐48—Information attacking legality of high school district held to require plea as to contiguity of territory.

In quo warranto, attacking the legality of a community high school district organization, allegation of information that district was divided into two portions by a river and its tributaries, making it practically impossible a good portion of the school year for children of high school age living on one side of the river to attend school located on the other, *held* to require a plea properly tendering an issue of fact as to whether or not the territory is contiguous and compact, as required by the statute.

7. Quo warranto ⇐48—Averments that territory in one school district constituted parts of other districts held averments of evidentiary facts.

Averments, in information attacking the legality of high school district organization, that portions of the territory of the district are parts of other communities, *held* averments of evidentiary facts, affecting the question of the compactness and contiguity of the district.

8. Quo warranto ⇐48—Information charging in general terms usurpation requires respondents to justify or disclaim.

Information in quo warranto, stating in general terms the usurpation by respondents of the office of board of education of named high school district, *held* sufficient to call on respondents to justify or disclaim.

9. Quo warranto ⇐43—Leave to file information, or vacation of order granting leave, discretionary.

Whether leave to file an information in the nature of quo warranto be granted, or, if granted, whether such order shall be vacated, is a matter resting largely in the discretion of the court.

10. Quo warranto ⇐48—Information attacking legality of high school district held sufficient.

Information in quo warranto, attacking legality of high school district organization, alleging that the election as to the creation of the district was not conducted as required by the Australian Ballot Law, filed prior to amendment thereof by Laws 1921, p. 803, *held* sufficient.

11. Quo warranto ⇐56—Failure to pass on pleas in abatement to information dismissed held not error.

Where relators in quo warranto dismissed first information, it was not error for the court to enter judgment of ouster without passing on pleas in abatement filed to the first information, since the dismissal of the first information disposed of all pending motions and pleas concerning it.

12. Schools and school districts ⇐42(2)—Validating act not applicable to district not compact.

The validating act of 1921 (Laws 1921, p. 797) does not apply to high school district which is not compact and contiguous.

Dunn and Thompson, JJ., dissenting.

Error to Circuit Court, Saline County; A. E. Somers, Judge.

Quo warranto by the People, on the relation of Henry Brothers and others, against George B. Dodds and others. Judgment for respondents and relators bring error. Affirmed.

Fowler & Rumsey and A. G. Abney, all of Harrisburg, for plaintiffs in error.

Charles H. Thompson, State's Atty., of Harrisburg (W. C. Kane and W. W. Wheatley, both of Harrisburg, of counsel), for defendants in error.

STONE, J. Plaintiffs in error bring this cause to this court by writ of error from the circuit court of Saline county to review a judgment of said court holding community high school district No. 103 in said county to be illegally organized and ousting plaintiffs in error from the office of board of education of said community high school district.

There are 26 assignments of error attached to the record reciting alleged errors by the trial court in overruling motions to strike the original and amended petitions and the original and amended informations from the files, in overruling objections to the filing of amended informations, and in allowing relators to file amended and second amended informations, but under our view of the pleadings in this case it will not be necessary to consider such errors.

After certain amendments were allowed by the trial court to be filed to the petition for leave to file an information, and after the original information had been filed and amended, and certain pleas in abatement had been filed to the amended information, the relators dismissed the information, and obtained leave to file what is known in this record as the second amended information, but which was, in fact, a new information consisting of three counts. To this information the respondents filed a general and special demurrer, which was sustained as to the first count, and overruled as to the second and third counts. The respondents elected to abide their general and special demurrers to the second and third counts, and refused to further plead in the cause. The court entered judgment, holding the district illegally organized, and ousting the respondents from the office of members of the board of education. The questions necessary to be reviewed are whether or not the second and third counts of the second amended information were sufficient, and whether the court erred in refusing to set aside the order granting leave to file the information.

[1] The second count of the information charges usurpation of the office of board of education of the purported high school district, and avers the district is 9 miles in length by 6 miles in width, containing 54 sections of land; that the territory thereof is composed of separate and distinct communities, having separate and distinct community centers, specifically setting forth certain villages around which the information alleges a community exists; that extending across the district, north and near to a certain public highway, is a valley through which flow the Bankston fork of the Saline river and its tributaries; that said streams frequently overflow, thereby rendering the village of Carrier Mills, where the schoolhouse is located, inaccessible to the north portion of the district for a greater portion of the school year; that the roads or highways extending from the north portion of the district are poorly kept dirt roads, which are difficult to travel during the greater portion of the school year; and that by reason of these facts the district is not compact and contiguous, as required by law. The information then concludes with the usual charge of usurpation. The third count contains the usual charge of usurpation against the respondents, with a prayer that they make answer by what warrant they claim to hold and execute said office. Numerous grounds of special demurrer were alleged, most of which are fully answered by the fact that an information in quo warranto need only charge the usurpation and call upon the respondents to disclaim or justify.

[2] It is also urged as a ground of demurrer that the information was improvidently ordered filed. Such objection cannot be raised by demurrer to the information, but by motion to strike or vacate the order allowing the same to be filed. As such motion was made and denied, and the ruling thereon was assigned as error, that assignment will be hereinafter considered.

[3-6] The chief ground of the demurrer is that the information does not show that the district is illegal. As herein stated, it is not necessary in quo warranto that the information set out the grounds upon which illegality is claimed, but, having set out such grounds, as was done in the second count of the information, it is open to demurrer if the grounds stated do not constitute a cause of action against respondents. This count charges that the territory in question is divided into two portions, on either side of the Bankston fork of the Saline river and its tributaries; that these streams frequently overflow, making it practically impossible a good portion of the school year for children of high school age living north of said streams to attend the school, which is located in the village of Carrier Mills, and that it would be equally inaccessible were the schoolhouse located at any point south of said streams. Assuming these averments to be true, as we must under the demurrers in this case, the district is not contiguous and compact. In People v. Kirkham, 301 Ill. 45, 133 N. E. 696, this court said:

"If a district be so organized as to include within its boundary lines an impassable area of hilly, forest, or swamp land of considerable extent, or an unbridged river, it would not be compact and contiguous within the spirit of the law."

See People v. Moyer, 298 Ill. 143, 131 N. E. 280; People v. Simpson, 308 Ill. 418, 139 N. E. 890.

This averment of the information is sufficient to require a plea properly tendering an issue of fact as to whether or not said territory is contiguous and compact. Whether or not the conditions caused by the streams of this fork of the Saline river are sufficient, as a matter of fact, when taken with all the other facts and circumstances incident to the topography of the territory in question, to show that this territory is not compact and contiguous, is not presented to this court by the record for consideration as no pleas

were filed. The only question presented here is whether or not these averments are sufficient to require of the respondents a plea of justification. We think they are.

[7] The averments in the second count that portions of the territory of the district are parts of other communities are averments of evidentiary facts affecting the question of compactness and contiguity of the district. It has been held that the term "community," as used in the School Law, refers to a community for school purposes. People v. Drennan, 307 Ill. 482, 139 N. E. 128.

[8] The third count of the information is in the usual form, and states in general terms the usurpation by respondents of the office of board of education of community high-school district No. 103 in Saline county. This count is good, and sufficient to call upon the respondents to justify or disclaim. People v. Kelgwin, 256 Ill. 264, 100 N. E. 160.

[9, 10] It is objected that the order granting leave to file the information was improvidently issued, and that it was error to refuse to set the same aside on motion. Whether leave to file an information in the nature of quo warranto be granted, or, if granted, whether such order shall be vacated, is a matter resting largely in the discretion of the court. People v. Wanmer, 276 Ill. 460, 114 N. E. 1015. The petition sets forth that the election called for the creation of the district was held April 9, 1921, and was not conducted as required by the Australian Ballot Law (Laws 1891, p. 107). Prior to the amendment of 1921 (Laws 1921, p. 803), this was held to be a valid objection. People v. Williams, 298 Ill. 86, 131 N. E. 270. The averments of the second count of the information, if true, likewise justified the filing thereof. The court did not abuse the discretion vested in it in refusing to vacate the order granting leave to file the information.

[11] It is also urged that, plaintiff in error having filed certain pleas in abatement to the first information as amended, which was later dismissed by defendants in error, it was error for the court to enter judgment of ouster without passing on these pleas in abatement. The dismissal of the first information as amended disposed of all pending motions and pleas concerning it. The so-called second amended information appears from the record to have been a new information filed on leave granted. Pleas in abatement were not filed to it, and therefore were no longer in the record for disposition.

[12] It is also urged that the validating act of 1921 (Laws 1921, p. 797) should have been applied to the issues in this case and the district held legally organized. The validating act of 1921 has no application to a district which is not compact and contiguous. People v. Young, 309 Ill. 27, 139 N. E. 894.

The averments of the information showing that the district was not compact and contiguous, as required by law, and these averments being admitted by the demurrer which plaintiffs in error abided, the validating act in that condition of the record is not applicable. Whether or not a good defense to this information can, in fact, be shown, does not arise, as plaintiffs in error have rested their case on their demurrers to the information.

For the foregoing reasons, the judgment of the trial court is affirmed.

Judgment affirmed.

DUNN and THOMPSON, JJ., dissent.

DUNCAN, J., took no part in the decision of this case.

(310 Ill. 624)

SMITH et al. v. DUGGER. (No. 15468.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 16, 1924.)

1. Specific performance ⇐95—Unwarranted, if reasonable doubt of validity of title of realty offered exists.

The court will not specifically enforce a contract for the purchase of realty, where a reasonable doubt as to the validity of the title offered exists; it being incumbent on a vendor seeking specific performance to show that the title is not doubtful, or such as will expose the vendee to litigation with parties not bound by the decree.

2. Deeds ⇐134—Fee held determinable only on death unmarried and without issue in grantor's lifetime.

A deed to three sons of the grantor, which reserved to him a life estate, and provided, "in case of the death of either of the above vendees before marriage and legitimate heirs, * * * the above-described lands shall vest in the vendee or vendees that are living," *held* to convey a fee determinable only on their dying, before marriage, without issue, within the life of the grantor, so that title in them became absolute upon the grantor's death, though one remained unmarried and without issue.

3. Specific performance ⇐8—Fair contract for conveyance of land will be specifically enforced.

Specific performance of a contract for the conveyance of land will be enforced as matter of right, if fairly and understandingly made.

4. Vendor and purchaser ⇐134(2)—Mortgage held not to preclude vendor's right to specific performance.

A mortgage on land, a release of which by the mortgagee was tendered by the vendor, *held* not such a defect of title as to warrant denial of specific performance of a contract to convey "clear of all incumbrance whatever."

Thompson, J., dissenting.

Appeal from Circuit Court, Macoupin County; Frank W. Burton, Judge.

Bill by Martha M. Smith and others against E. A. Dugger, to compel specific performance of a contract to purchase realty. From a decree of dismissal, plaintiffs appeal. Reversed and remanded, with directions.

Harry De Frates, of Palmyra, and Jesse Peebles, of Carlinville, for appellants.

Murphy & Hemphill, of Carlinville, for appellee.

FARMER, C. J. December 27, 1919, by a written contract duly executed, appellants agreed to "convey and assure to the party of the second part in fee simple, clear of all incumbrance whatever, by a good and sufficient warranty deed and an abstract to date," a farm of 162 acres in Macoupin county, and appellee agreed to pay for the same $35,640 on or before March 1, 1920, at which time possession was to be given. Appellee, claiming that the title was defective, refused to carry out the agreement, and appellants filed their bill, seeking specific performance of the contract. A decree was entered, dismissing the bill for want of equity, and this appeal followed.

[1] This being a bill by the vendor for specific performance of a contract for the sale and conveyance of land, to entitle him to a decree he must show that the title which he offers to convey is not a doubtful title, and is not one which will expose the vendee to litigation with parties not now before the court, and therefore not bound by its decision. Where there is reasonable doubt as to the validity of the title, the court will not sepcifically enforce a contract of this character. Weberpals v. Jenny, 300 Ill. 145, 133 N. E. 62; Close v. Stuyvesant, 132 Ill. 607, 24 N. E. 868, 3 L. R. A. 161.

[2] The abstract furnished disclosed that the title to 70 acres of the land involved was in 1873 in Joseph Crum, and that in that year he conveyed it by warranty deed to Frederick, Charles, and Isaac Crum, the consideration being $3,600. The deed contained this provision:

"Now, in case of the death of either of the above vendees before marriage and legitimate heirs, then and in that case the above-described lands shall vest in the vendee or vendees that are living and in no other person or persons whomsoever; and further, the above-named vendees being my legitimate heirs, I reserve the exclusive control and right to use in any way for my benefit the above-described lands during my natural lifetime."

The grantees named, by their several warranty deeds, have conveyed their interest in the 70 acres involved to appellants' predecessor in title. An affidavit of Fred O. and C. O. Crum, attached to the abstract of title, shows that Joseph Crum died in 1888; that Frederick and Charles are children of Joseph; that Frederick is now 62 years of age and has never been married; that Charles is now 62 years of age, is married, and has six living children; that Isaac, the third grantee named in the deed of 1873, was married twice, the first time in 1888, and the second time in 1894; that two children of the first marriage and four children of the second marriage are now living; that Isaac died in 1918.

The deed conveyed to the three sons of the grantor a fee determinable upon their dying before marriage and having children born, in which event the interest of the one dying should go to the survivor and to no other person. Appellee does not question the validity of appellants' title to the interest of Charles and Isaac Crum, but his contention is that, if Frederick should die after the death of Charles without having married and had issue born, the heirs of the grantor, Joseph Crum, would have an interest in the share of Frederick. The decision of this case we think depends on whether the death of the grantees without marriage and legitimate children, referred to in the deed, meant death before the grantor died, or death at any time. If the deed had been a direct conveyance to the grantees, and if any of them died without marriage and birth of a child, then to go to the survivors, the reference as to death would mean death at any time, before or after the death of the grantor. Fifer v. Allen, 228 Ill. 507, 81 N. E. 1105; Ahlfield v. Curtis, 229 Ill. 139, 82 N. E. 276. In this case the remainder conveyed to the grantor's three sons vested in interest but not in possession, for it was preceded by a life estate in the grantor and falls within the rule announced in Lachenmyer v. Gehlbach, 266 Ill. 11, 107 N. E. 202:

"If a particular estate precedes a gift over, the latter will usually take effect if the contingency happens at any time during the period of the particular estate. In such a case, death without issue means death before the death of the life tenant, unless the will shows that the testator intended to refer to a later date than the termination of the life estate."

That rule has been approved in numerous subsequent decisions. On this question this case cannot be distinguished from Harder v. Mathews (No. 14244) 141 N. E. 442, where the rule above quoted was discussed and all the cases referred to in which that rule was involved. The Harder Case was a conveyance by deed reserving a life estate to the grantor of a fee to the grantee, with limitation over that if she died without leaving a child or descendant of a child the land was to go to the grantor's living grandchildren. It was held in that case, which is in harmony with previous decisions cited, that death of the grantee meant death during the continuance of the life estate reserved to the grantor, and, the grantee having survived the gran-

tor, her title became indefeasible. There is no language in the deed to take this case out of the rule of construction sustained in the Harder Case and the cases cited in the opinion, and it was held in that case the rule applies to a conveyance by deed the same as to a devise by will. Frederick Crum and his two brothers having survived the grantor, their title in fee became indefeasible at his death, and it follows that appellants have good title to the 70 acres in question.

[3] Where a contract for the conveyance of land is fairly and understandingly made, specific performance will be decreed as a matter of right. Riemenschneider v. Tortoriello, 287 Ill. 482, 122 N. E. 799; Woodrow v. Quaid, 292 Ill. 27, 126 N. E. 583. The only objection raised by appellee to the specific performance of the contract is that, to say the least, the title of appellants' acquired under the deed of Frederick Crum is doubtful. As we have held in repeated decisions on precisely similar questions, Frederick's became indefeasible on the death of his grantor. The title he conveyed is good and free from doubt.

[4] There was a mortgage on the land, and it is said the vendor was unable to make a clear title. This is barely referred to in the briefs and the testimony preserved in the abstract. The proof shows, without question, appellant tendered appellee a release of the mortgage executed by the mortgagee. What little proof there is on that question warrants the conclusion that appellee knew all about the mortgage; that he was to borrow as much money on the land as he could, and for what he lacked of borrowing enough to pay the purchase price appellant agreed to accept appellee's note. It was not material to appellee whether the mortgage had been paid off or not, if he had the mortgagee's release. It is apparent appellee did not refuse to perform the contract on account of the mortgage. His objection to the title was based on the question above discussed, and which is the only question argued in the briefs.

The decree is reversed, and the cause remanded, with directions to grant the relief prayed in the bill.

Reversed and remanded, with directions.

THOMPSON, J. (dissenting). In construing any written instrument, words ought to be given their ordinary meaning, and the intention of the parties ought to be gathered from the language used by them. By the deed of 1873 the grantor conveys the fee to the grantees, and then provides for the shifting of the fee upon the happening of a certain contingency. This leaves the fee of the several grantees base or determinable. As the fee is to shift "in case of the death of either of the above vendees before marriage and legitimate heirs," the question is: To what time does death refer? Death in the lifetime of the grantor, or death at any time? "Before" is a word denoting time, and means "prior to" or "preceding." Prima facie, the language used by the grantor means death at any time. The grantor has definitely fixed the event on the happening of which the fee shall shift. The rule declared by this court for the first time in Lachenmyer v. Gehlbach, supra, which says that, if a particular estate precedes a gift over, the latter will usually take effect if the contingency happens at any time during the period of the particular estate, and that in such a case "death without issue" means death before the death of the life tenant, unless the will shows the testator intended to refer to a later date than the termination of the life estate is, of course, a rule of construction, and will not be applied where the language of the instrument being construed indicates that the maker of the instrument referred to death at any time, either before or after his own death. Fullwiler v. McClun, 285 Ill. 174, 120 N. E. 458; Gavvin v. Carroll, 276 Ill. 478, 114 N. E. 927.

The object to be attained in construing an instrument is to give it the interpretation and meaning which the maker intended, and his intention will be carried out whenever it can be done without violating some established rule of law or public policy. All artificial rules of construction yield to the intention of the maker plainly expressed. Fifer v. Allen, supra. Notwithstanding the fact that a life estate precedes the gift over, the language here used by the grantor clearly indicates that he referred to a death before marriage, whether that death occurred before or after his own death. My views on this subject are set forth fully in a dissenting opinion in Harder v. Mathews, supra.

The language used in the deed is unusually confusing. The deed provides that all the lands shall vest in the surviving vendee or vendees, where there is a death of one or more before marriage and legitimate heirs ("heirs" must be construed to mean "children"), but it makes no provision for the contingency which may happen in this case. One of the grantees is dead, but he left surviving him a widow and six children. If Frederick should die before he is married, will all of the lands pass to Charles, the surviving vendee, or will Frederick's share only pass to Charles, or will his share pass to Charles and the heirs of Isaac? The grantor declares in his deed that the grantees are his legitimate heirs, but does not declare that they are his only heirs, nor is there any evidence in the record to show that he did not leave surviving him other heirs, who may make claim to a part or all of this land in the event Frederick remains unmarried and is the last survivor of the three grantees.

Appellants' title may not be disturbed, but it is clear to me that it is a doubtful one and may subject the owner to expensive litigation in its defense. Under these circumstances, I am of the opinion the chancellor properly denied specific performance.

(310 Ill. 613)

PEOPLE v. HARRINGTON et al.
(No. 15531.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 12, 1924.)

1. False pretenses ⟸9—Obtaining confidence of victim gist of crime.

Obtaining the confidence of the victim of a confidence game by false representations or device is the gist of the crime.

2. False pretenses ⟸49(4)—Falsity of representations may be established by circumstances.

The falsity of representations in a confidence game may be established by circumstantial evidence.

3. False pretenses ⟸7(1)—That swindle assumes form of business transaction immaterial.

That a swindling operation assumes the form of a lawful business transaction is immaterial.

4. Criminal law ⟸370—Testimony of other victims competent to show guilty knowledge.

In a prosecution for obtaining money by a confidence game, where receipt by defendants of money of the complaining witness was established, testimony by others who had been swindled is competent to show guilty knowledge.

5. False pretenses ⟸49(1)—Evidence of confidence game held to sustain conviction.

Evidence in a prosecution of several defendants for obtaining money by a confidence game *held* to justify the conclusion that a conspiracy between them existed, and sustain conviction.

6. False pretenses ⟸23—Co-conspirators are liable for acts of associates.

Co-conspirators in a confidence game are each liable for the acts and representations of his associates.

7. Criminal law ⟸938(2)—Denial of new trial held not error.

In a prosecution of several defendants for having obtained money by means of the confidence game, denial of a motion for a new trial, which for the first time presented the defense that certain defendants were mere employés of the other, *held* not error; there being no proof in the record that they were mere employés, and the evidence not being newly discovered.

Error to Criminal Court, Cook County; Philip L. Sullivan, Judge.

Leslie Harrington and others were convicted of obtaining money by means of the confidence game, and they bring error. Judgment affirmed.

Forrest Garfield Smith and Robert E. Turney, both of Chicago (Thomas E. Swanson and C. P. R. Macaulay, both of Chicago, of counsel), for plaintiffs in error.

Edward J. Brundage, Atty. Gen., Robert E. Crowe, State's Atty., of Chicago, and Floyd E. Britton, of Springfield (Edward E. Wilson and Clyde C. Fisher, both of Chicago, of counsel), for the People.

THOMPSON, J. This writ of error is prosecuted to review the judgment of the criminal court of Cook county finding plaintiffs in error guilty of obtaining the money of Alex Rutkauskas by means of the confidence game.

Rutkauskas testified that he was born in Lithuania; that he came to this country in 1909, and to Chicago in 1915; that he had known Anthony Lebecki about three years, and Leslie Harrington and Peter Zilvitis about one year; that in March, 1921, Lebecki asked him if he wanted to make a good investment, that would give a good return; that he told Lebecki that he had no money then, but that he could come back in a week or two; that Lebecki returned and said that Harrington had an investment which would pay a return of 50 per cent. in six weeks' time; that after further conversation Lebecki told him to try the investment, and that he would make money, because Harrington bought and sold stock at a profit; that later he called at Harrington's office, at 36 South State street, Chicago; that he told Harrington that Lebecki had sent him; that Harrington said he was a broker, and did business in Wall street, New York, and that he bought buildings, stocks, and other things; that he saw Harrington again, and Harrington told him he had a special open that would pay 50 per cent. and for every $100 invested he would receive $150 at the end of six weeks; that he told two of his friends about the investment; that he invested $150, and his brother and John Stapits each invested $100; that he gave $350 to Harrington, who gave him a receipt; that Harrington said, "This is a good investment; you will make lots of money;" that the receipt given him was a note, which stated as the principal the amount invested, as well as the interest which was to be paid; that the notes were paid when due; that he invested his money and that of his friends with Harrington from time to time; that Harrington always gave him receipts for the money invested; that he paid these receipts or notes several times; that on one occasion Zilvitis said that he had a special which would be paid in five weeks; that when he took the money to the office to be invested, the receipts or notes were sometimes given to him by Harrington, and sometimes by Lebecki or Zilvitis; that Harrington, Lebecki, and Zilvitis were in business together, and occupied the same office; that on one occasion Zilvitis and Lebecki told him they had received a telegram from Harrington, who was in New York, which stated

that he had a special which would pay $30 for an investment for a month; that he told his friends, and collected their money, and delivered it to plaintiffs in error; that in December, 1921, Harrington called a meeting of those who had been securing investments for him, and told them that he had a special in New York which would pay them 100 per cent., and those who had worked well for him and who had brought in good business could invest as much as $500, while their friends could each invest $250; that Harrington told them his associates in New York said that the special would pay a good Christmas present; that large amounts were invested in this special; that the notes given as receipts for these amounts were due in February, March, and April, 1922; that he saw Harrington in his office in the North American building February 7; that he was in the building again February 11, but found that the office had been vacated; that he returned several times but did not see Harrington after February 7; that on several occasions when he visited the building he saw other Lithuanians looking for Harrington; that the amount he and his friends invested with Harrington totaled more than $30,000; that of this amount he himself lost $1,200. Several other persons testified to similar transactions with plaintiffs in error, their losses totaling several thousand dollars.

[1-4] Plaintiffs in error contend that the state has not proved that the statements made by them to their victims were false, and that the story told by Rutkauskas does not establish a confidence game. The gist of the crime is the obtaining of the confidence of the victim by some false representation or device (People v. Peers, 307 Ill. 539, 139 N. E. 13), but the fact that the representations made were false may be proven by circumstantial evidence (People v. Strosnider, 264 Ill. 434, 106 N. E. 229). The returns which plaintiffs in error promised were many times larger than returns ordinarily expected form legitimate undertakings, and the natural inference to be drawn by any well-informed person would be that the proposition offered by plaintiffs in error was fraudulent. Plaintiffs in error represented to their customers that they had connections with Wall street, and that they made these extraordinary returns by dealing in stocks and real estate. If these statements were true, plaintiffs in error could have proven their truth. With nothing but the description of the scheme before them, the jury were fully warranted in believing that the statements were false. The confidence game statute covers any scheme whereby a swindler wins the confidence of his victim and then swindles him of his money or property, by taking advantage of the confidence fraudulently obtained. If the transaction is, in fact, a swindling operation, it is immaterial that the form assumed is that of a lawful business transaction. Having established that plaintiffs in error obtained the money of the complaining witness by means of the confidence game, it was competent, for the purpose of showing guilty knowledge, to receive the testimony of other persons swindled by plaintiffs in error in similar schemes.

[5-7] Lebecki and Zilvitis contend that they were merely employees of Harrington, and that, if Harrington's scheme was fraudulent, they were ignorant of the fact. They did not testify on the trial, and there is no proof in the record that they were mere employees. This defense was first presented on the motion for a new trial. It was not newly discovered evidence, and the court properly refused to grant the motion. All the persons who invested money with them testified that all of plaintiffs in error were occupying the same office, and that whichever one of them was in the office receipted for the money invested. Employees in the office testified that, while they were employed there, the three of them were working together and conducting the business jointly. The evidence of the people, standing uncontradicted in the record as it does, justifies the conclusion that plaintiffs in error conspired to obtain the money of people unskilled in business methods and unfamiliar with American customs. Having joined in the common scheme, each of the co-conspirators was liable for the acts and representations of his associates.

Complaint is also made of the argument of counsel for the people and of the rulings of the court in giving and refusing instructions. We have considered the contentions of plaintiffs in error on these points, and find that the record is free from prejudicial error.

The judgment of the criminal court is affirmed.

Judgment affirmed.

(310 Ill. 574)

PEOPLE v. SCHAEFFER. (No. 14736.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 13, 1924.)

1. Courts ⟸219(9)—Appeal involving constitutional question direct to Supreme Court.

In action of debt against a physician for violation of the Medical Practice Act of 1899, where the constitutionality of the act was set up in affidavit of defense, appeal from judgment is direct to the Supreme Court.

2. Statutes ⟸168—Attempt to repeal statute by void act ineffective.

In case there is an attempted repeal of an act by a statute which is void, the former act remains in force.

3. Constitutional law ⟸136, 205(5), 206(4), 238(1), 275(1) — Physicians and surgeons ⟸2—Statute regulating medical practice invalid, as discriminating against osteopaths.

Medical Practice Act 1899, which fixes as the minimum requirement for the practice of medicine and surgery that applicant be a graduate of an approved medical college, but provides that for the practice of any drugless system or method of treatment applicant must be a graduate of a school teaching such system which requires as a prerequisite to graduation four years of instruction, and under definition of practicing medicine an osteopath is practicing medicine when he treats or professes to treat, operates on, or prescribes for any physical ailment, is discriminatory as to osteopaths, in that it does not provide whereby he may be licensed to practice osteopathy and surgery unless he is also a graduate of a medical school, and is invalid as contravening the Fourteenth Amendment of the federal Constitution, as abridging privileges or immunities, depriving them of equal protection, and violating the due process clause of the Bill of Rights, impairing the obligation of contracts, and granting special privileges.

4. Constitutional law ⟸45—Courts required to declare unconstitutional statutes void.

The courts are required to declare every statute which permits unlawful discrimination to be void, when it conclusively appears that such statutes are unconstitutional.

Farmer, C. J., and Thompson, J., dissenting.

Appeal from the Municipal Court of Chicago; Theodore F. Ehler, Judge.

Action by the People, for the use of the Department of Registration and Education, against Robert E. Schaeffer. Judgment for plaintiff, and defendant appeals. Reversed.

McCormick, Kirkland, Patterson & Fleming, of Chicago (Perry S. Patterson and Louis G. Caldwell, both of Chicago, of counsel), for appellant.

Edward J. Brundage, Atty. Gen. (Clarence N. Boord, of Springfield, of counsel), for the People.

DUNCAN, J. The municipal court of Chicago rendered a judgment of $100 in favor of appellee, the people of the state of Illinois, for the use of the department of registration and education, against Robert E. Schaeffer, appellant, in an action of debt in a trial before the court without a jury. The statement of claim charged the violation of the Medical Practice Act of 1899 (Laws 1899, p. 273), section 9 of which provides:

"Any person practicing medicine or surgery or treating human ailments in the state without a certificate issued by this board in compliance with the provisions of this act * * * shall, for each and every instance of such practice or violation, forfeit and pay to the people of the state of Illinois, for the use of said board of health, the sum of one hundred (100) dollars for the first offense and two hundred (200) dollars for each subsequent offense, the same to be recovered in an action of debt," etc.

[1] The two defenses made before the municipal court were, first, that appellant's act, which he conceded to be practicing surgery without a license so to do, is not penalized by the statute; and, second, that the Medical Practice Act of 1899, and particularly sections 2, 3, and 7 thereof, are invalid or unconstitutional—which latter defense was specifically set up by his affidavit of defense. The appeal is therefore direct to this court.

The facts constituting the violation of the statute, briefly stated, are that in February or March, 1921, in the city of Chicago, appellant treated Mrs. Blanche Mehlen for a uterine hemorrhage. In the operative work he performed on Mrs. Mehlen he used a vaginal speculum, a vaginal bracing forceps, a curette, and an electric light. He removed a couple of clots of blood out of the cervix, inside of the uterus, but did not make a complete curettage. He directed the attending nurse to cleanse the external parts and the parturient canal with antiseptics.

As section 9 of the act imposes a penalty upon any person practicing surgery without such certificate, the appellant is within the prohibition of the statute, and the judgment must stand, unless his second claim that the statute denies to him a constitutional right is maintained.

Section 2 of the act of 1899 is as follows:

"No person shall hereafter begin the practice of medicine or any of the branches thereof, or midwifery in this state without first applying for and obtaining a license from the state board of health to do so. Application shall be in writing and shall be accompanied by the examination fees hereinafter specified, and with proof that the applicant is of good moral character. Applications from candidates who desire to practice medicine and surgery in all their branches shall be accompanied by proof that the applicant is a graduate of a medical college or institution in good standing, as may be determined by the board. When the application

aforesaid has been inspected by the board and found to comply with the foregoing provisions the board shall notify the applicant to appear before it for examination at the time and place mentioned in such notice.

"Examinations may be made in whole or in part in writing by the board, and shall be of a character sufficiently strict to test the qualifications of the candidate as a practitioner. The examination of those who desire to practice medicine and surgery in all their branches shall embrace those general subjects and topics, a knowledge of which is commonly and generally required of candidates for the degree of doctor of medicine by reputable medical colleges in the United States. The examination of those who desire to practice midwifery shall be of such a character as to determine the qualification of the applicant to practice midwifery. The examination of those who desire to practice any other system or science of treating human ailments who do not use medicines internally or externally, and who do not practice operative surgery shall be of a character sufficiently strict to test their qualifications as practitioners.

"All examinations provided for in this act shall be conducted under rules and regulations prescribed by the board, which shall provide for a fair and wholly impartial method of examination: Provided, that graduates of legally chartered medical colleges in Illinois in good standing as may be determined by the board may be granted certificates without examinations."

The material parts of sections 3 and 7 of said act, so far as applicable to this case, are the following:

"Sec. 3. If the applicant successfully passes his examination, or presents a diploma from a legally chartered medical college in Illinois of good standing, the board shall issue to such applicant a license authorizing him to practice medicine, midwifery or other system of treating human ailments, as the case may be: Provided, that those who are authorized to practice other systems cannot use medicine internally or externally or perform surgical operations: Provided further, that only those who are authorized to practice medicine and surgery in all their branches shall call or advertise themselves as physicians or doctors: And provided further, that those who are authorized to practice midwifery shall not use any drug or medicine or attend other than cases of labor."

"Sec. 7. Any person shall be regarded as practicing medicine, within the meaning of this act, who shall treat or profess to treat, operate on or prescribe for any physical ailment or any physical injury to, or deformity of, another: Provided, that nothing in this section shall be construed to apply to the administration of domestic or family remedies in cases of emergency, or to the laws regulating the practice of dentistry or of pharmacy. And this act shall not apply to surgeons of the United States army, navy or marine hospital service in the discharge of their official duties, or to any person who ministers to or treats the sick or suffering by mental or spiritual means, without the use of any drug or material remedy."

On the second point raised by appellant, his testimony and the testimony of Dr. George A. Still established, without contradiction, the following facts: Appellant entered the American School of Osteopathy, at Kirksville, Mo., in which Still was professor of surgery and chief surgeon of its hospitals, on January 29, 1911, and completed the four-year course of that institution in January 1915, and received the degree of Doctor of Osteopathy. His course of studies embraced surgery, which he studied during the last two years of his attendance in said school, and also embraced the subjects of obstetrics and gynecology. The text-books on surgery that are used and taught at the school are the same text-books that are used and taught at all modern schools that teach the doctrine of healing by the use of drugs and medicines or the modern schools of the allopaths, who ordinarily style themselves "the Regulars," to wit: The text-books of Rose-Carless, Buck & Bryant, Whorton, Da Costa, Foote, Lovett, and Young. Surgery is taught and practiced in the same manner at said school as it is taught and practiced in the modern schools of the Regulars and by their graduates, and the course of surgery in the school is as thorough and as complete as it is in such modern schools. This was positively testified to by Dr. Still, who is himself a graduate from Northwestern Medical College of Chicago, and who by investigation has ascertained said facts. The evidence specifically shows that appellant in his course aforesaid studied and passed courses in anatomy, histology, general and physical chemistry, physiology, bacteriology, organic and physiological chemistry, embryology, demonstrative anatomy, pathology, hygiene, public health, dietetics, toxicology, dissection, regional and applied anatomy, physical diagnosis, neurology, special pathology, general surgery, eye, ear, nose, and throat, obstetrics, clinical practice, skin and venereal diseases, pediatrics, operative surgery, gynecology, laboratory diagnosis, and also osteopathic therapeutics, to wit, the principles of osteopathy, practice of osteopathy, osteopathic mechanics, and osteopathic clinics. This course includes the subjects taught by medical schools in good standing except the therapeutics of those schools and materia medica. Appellant's education and training necessarily embraced the study of various drugs that are used in connection with surgical operations, such as disinfectants, antiseptics, narcotics, etc., and other drugs or medicines applied externally. After graduating from the Kirksville school, appellant began practice in Minnesota as an osteopath until he went into the army, in June, 1918. He was in the rehabilitation or development department of the army for six months, after which he returned to his practice in Minnesota. He was licensed as an osteopath in Illinois on No-

vember 17, 1920, by reciprocity as to the written part and by examination as to the practical. He attended high school in his home town for two years, and thereafter entered the Leander Clark College at Toledo, Ohio, and left there in 1911. He has a degree of Bachelor of Arts, as well as of Doctor of Osteopathy, and a special diploma for a fellowship in bacteriology from the American School of Osteopathy.

[2] It is not the claim of the people that appellant was not competent to perform the operation that he did perform on Mrs. Mehlen, or that he did not perform it in the same manner and by the same means as it would have been performed by any physician and surgeon licensed to practice medicine and surgery in all their branches under the act aforesaid. There is no complaint of the results obtained by this operation. The simple charge and claim of the people is that he violated the statute by performing the act of surgery without the certificate or license required by the act. Appellant's claim is that the act of 1899 is void, because it discriminates against applicants for license to treat human ailments in this state who are educated and are graduates in osteopathy, and in favor of those who are educated in medicine and surgery in the medical colleges, and that the act is therefore in contravention of the Constitution of this state and also of the federal Constitution. Appellant also contends that the Medical Practice Act of 1917 (Laws 1917, p. 579) was in substance and in fact declared void by the decision of this court in the case of People v. Love, 298 Ill. 304, 131 N. E. 809, 16 A. L. R. 703. This position or contention is questioned by the people in this case. In that case the act of 1917 was declared void as to those who practice any system of treating human ailments without the use of drugs, or medicine, and without operative surgery. The question now before us is whether or not the act of 1899 is binding on appellant.

Under the definition of practicing medicine, as given in section 7 of the act, an osteopath, or any one practicing in the various branches of osteopathy, is practicing medicine when he treats or professes to treat, operates on, or prescribes for any physical ailment or any physical injury to or deformity of another; yet he cannot practice surgery in Illinois under the provisions of the act, or be examined for license to do such practice, unless he is a graduate of a medical college or institution in good standing, no matter how great may be his attainments in this branch of the treatment of human ailments, or how high the standard of the school in which he received his surgical training. Sections 2 and 3 of the act specifically provide that no applicant can be permitted to take an examination to practice medicine and surgery in all their branches, or be permitted to practice medicine and surgery in all their branches, unless he is a graduate of a medical college in good standing, as may be determined by the board. The second sentence of the second paragraph of section 2 indicates clearly that such candidates or applicants for license must be graduates of a reputable medical college or colleges in the United States that teach the practice of medicine and surgery by the use of drugs and medicines and surgical instruments, which colleges do not, as is well known, teach any other system of healing, particularly the system of healing as taught and practiced by osteopaths and the various branches of that system. It is, perhaps, also true that nine out of every ten of such medical colleges teach and practice the system commonly known as allopathy, whose practitioners style themselves "the Regulars." At any rate, it is made clear by the provisions of sections 2 and 3 that one who is licensed to practice medicine and surgery in Illinois in all their branches under this statute is licensed and authorized to practice medicine, midwifery, and surgery in all their branches and in all the systems of treating human ailments, including the system taught by osteopaths, without being required to be a graduate of a school of osteopathy, or even to study the principles or the system of osteopathy. This is made clear also by the first sentences of sections 3 and 7.

Under the definition given in section 7 there can be no doubt that the words "medicine and surgery in all their branches," as used in section 2, mean medicine and surgery as taught and practiced by allopaths, homeopaths, eclectics, osteopaths, and all other known practitioners treating human ailments, and that one who is licensed to practice medicine and surgery in all their branches is licensed to practice all of said systems. There is no provision in this act whereby a graduate of a college of osteopathy may be licensed to practice osteopathy and surgery, including midwifery, or whereby he may be examined to practice the same, unless he is also a graduate of one of the medical schools aforesaid. He cannot practice osteopathy in Illinois unless he be examined under the provisions of this act, although he may be a graduate of a reputable college in Illinois in good standing that teaches the system of osteopathy. A graduate of a medical college of Illinois in good standing, as determined by the board, may practice medicine and surgery in all its branches without having to take an examination. The act does not even indicate in any manner the subjects upon which an osteopath must be examined to practice osteopathy. His examination for such practice "shall be of a character sufficiently strict to test their qualifications as practitioners," and his entire examination is at the pleasure of the board, while the character of the examination of a student of medicine is suffi-

ciently indicated and specified by the act. The act even assumes that the osteopath does not use medicines of any kind externally and does not study or practice operative surgery. This record shows that osteopaths have, and particularly the appellant has had, training and education in the practice of surgery and obstetrics equal to that of graduates of the medical colleges, and that osteopaths are taught in their schools to administer certain drugs or medicines externally. To make the discrimination against osteopaths and their humiliation complete, section 8 of the act provides that only those who are authorized to practice medicine and surgery in all their branches shall call or advertise themselves as physicians or doctors.

We think there can be no question whatever that this statute discriminates against appellant as an osteopathic physician, and in favor of the graduates of the medical schools, as contended by him. It requires him or a graduate of his school, after spending four years in such graduation, to continue his college education for a further time, and perhaps four years longer, until he has become a graduate of a medical school, before he can even be permitted to be examined for license to practice osteopathy and surgery, while a graduate of a medical college is permitted, without further study, to practice medicine and surgery. In the second place, he is required to study the therapeutics of the allopaths or other medical schools, which he does not desire to use in his practice, before he can practice osteopathy and surgery, while the graduate of a medical school is not required to graduate in osteopathy, or to study osteopathic therapeutics, and yet he may be licensed to practice, and may practice, osteopathy. In the third place, if an osteopath attends a medical college for the purpose of graduation, the probabilities are that he will be required to repeat in the medical college the study of all those subjects, including surgery, midwifery, and gynecology, and all the other studies that we have above enumerated as having been passed by him in his own school, before he can begin the practice of surgery. The very great prejudice existing among many physicians of the medical schools against the osteopaths, and of the osteopaths against those of the medical schools, is well known. This statute recognizes both systems as meritorious, because it allows both to treat human ailments according to their system, and it discriminates against the osteopath and seems to place the examinations of osteopaths to practice osteopathy entirely at the will and discretion of a medical board, as no one other than those educated in the medical system are qualified, under the act, to conduct the examinations provided for by it. This statute therefore tends to deprive the osteopaths of their constitutional right to practice surgery, who are, so far as this record shows, just as efficient and as well prepared by college and hospital training to practice surgery as are the physicians of the medical schools. The act is therefore void as to such physicians so deprived.

[4] We are only concerned with the question whether this act is unconstitutional by reason of unlawful discrimination, as charged. As we have previously said in other cases, we have no leaning for or against either system or either practitioner. It has been demonstrated over and over again that there is merit in both systems, and neither should be unjustly penalized by statutes which permit unlawful discrimination. This statute is in contravention of the Fourteenth Amendment of the federal Constitution, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law. It also violates the provisions of our Bill of Rights (article 2, § 2) that no person shall be deprived of life, liberty or property without due process of law, and that no law impairing the obligation of contracts or making any irrevocable grant of special privileges or immunities shall be passed (article 2, § 14). In the passage of this statute the Legislature evidently overlooked the fact that it discriminates against osteopaths, as already shown. It is a fundamental principle of this government that its people have the right to make constitutions that will guard them against the tyranny of statutes that permit unlawful discrimination, however innocently or inadvertently made, and courts are required to regard their constitutional oaths and declare every such statute void when it conclusively appears that such act is unconstitutional.

Our attention has been called to the fact by the people in this case that said act has been held constitutional in the case of People v. Gordon, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165, and cases there cited. In those cases no question of discrimination between the various systems of the practice of medicine or of healing was raised, and they are not decisive of the issues raised in this case. We place this decision, however, on the distinct ground that the act is clearly shown to be invalid as to those who are denied their constitutional rights, and that the issues here involved were not involved or passed on in the cases referred to. We are to be further understood as holding that this act is merely void as to those persons who are denied constitutional rights, and that neither this decision nor the decision in the Love Case in any way affects the legality of any license issued under any medical practice act of this state.

For the foregoing reasons, the judgment of the municipal court is reversed.

Judgment reversed.

FARMER, C. J., and THOMPSON, J., dissent.

(310 Ill. 591)

CITY OF DECATUR v. GERMAN et al. (No. 15702.)

(Supreme Court of Illinois. Dec. 19, 1923. Rehearing Denied Feb. 14, 1924.)

1. Statutes ⇐212—Legislature presumed to have known of decision construing statute subsequently re-enacted.

The Legislature in re-enacting in 1923 the provision of the act of 1915, amending Local Improvement Act 1897, § 6, which the Supreme Court in 1919 held was superseded by the amendment of 1917 to the Commission Form of Government Act, is presumed to have known of the decision construing the amendment of 1915.

2. Statutes ⇐159—Implied repeal must result when terms of later act are repugnant to earlier act.

Though repeals are not favored by implication, an implied repeal must result when the terms of the later act are repugnant to and cannot be harmonized with the earlier act.

3. Statutes ⇐181(1)—Intent of statute is the law.

The intent of the statute is the law, and the object of all interpretation is to ascertain that intent.

4. Statutes ⇐190—If words are clear, other means of interpretation not available.

The intention of the statute is to be sought first in the language implied in the statute, and, if its words are free from ambiguity and doubt, other means of interpretation cannot be resorted to.

5. Statutes ⇐181(2)—Evil effects of statute are not avoidable by judicial construction.

If the meaning of a statute is clear but its consequences evil, the latter can only be avoided by change of the law by the Legislature and not by judicial construction.

6. Statutes ⇐181(1)—Statute cannot have intent its words do not express.

There can be no intent of a statute not expressed in the words of it.

7. Statutes ⇐190—Court may not declare that Legislature did not mean what plain language of statute imports.

A construction which will occasion public and private mischief will not be given the language of a statute, if it is capable of a construction which will avoid that result; but a court is not authorized to declare that the Legislature did not mean what the unambiguous language of the statute imports.

8. Constitutional law ⇐70(3)—Wisdom of statute not judicial question.

Whether an act is wise or will cause hardship is not a judicial question.

9. Statutes ⇐188—Statute cannot be held to have no meaning.

A court is not authorized to say that a Legislature did not mean anything by the enactment of statute.

10. Municipal corporations ⇐266—Amendatory statute held to restore boards of improvements in cities having commission form of government.

Though the amendment of 1917 to the Commission Form of Government Act superseded the amendment of 1915 to Local Improvement Act 1897, § 6, and eliminated local boards of improvements in cities having the commission form of government, the act of 1923, re-enacting the act of 1915 without words indicating that it should not operate to repeal the amendment of 1917, supersedes the amendment of 1917, and restores such boards of improvements, notwithstanding Smith-Hurd Rev. St. 1923, c. 131, § 2, as to construction of statutes as continuations of existing statutes.

Thompson, J., dissenting.

Appeal from Macon County Court, John H. McCoy, Judge.

Petition by the City of Decatur for confirmation of assessments for a local improvement, in which proceedings W. M. German and others filed objections. From a judgment sustaining the objections and dismissing the petition, the City appeals. Affirmed.

Lee Boland, Corp. Counsel, of Decatur, for appellant.

McDavid, Monroe & Hershey, of Decatur, for appellees.

FARMER, C. J. The city of Decatur has adopted and is operating under the Commission Form of Municipal Government Act. It has a population of less than 50,000. On the 17th day of July, 1923, the council adopted a resolution originating a public improvement, and such proceedings were had that a public hearing was held and a resolution adopted adhering to the proposed improvement; also an ordinance was passed and other steps taken, and an assessment roll was filed. At the hearing of the confirmation of the assessments, property owners who are appellees here filed objections to the confirmation. The county court sustained the objections and dismissed the petition, from which judgment the city of Decatur prosecuted this appeal.

The question material to a determination of the case is whether the improvement should have been originated by a board of local improvements or with the city council.

Section 6 of the Local Improvement Act of 1897 (Smith-Hurd Rev. St. 1923, c. 24, § 703) provided who should constitute the board of

local improvements. It was amended several times, and as amended in 1913 provided that in cities having a population of less than 50,000, and in villages and incorporated towns, the board of local improvements shall consist of the mayor or president of the village or town, who shall be president of the board, and the public engineer and the superintendent of streets, when such officers are provided for by ordinance, and if no such officers are provided for, the council or board of trustees shall by ordinance designate two or more members of such body, who shall, with the mayor as president, constitute the board of local improvements. In 1915 section 6 was again amended by re-enacting the section as amended in 1913 and adding a proviso that when cities having a population of less than 50,000, and villages and towns, had adopted or should adopt the Commission Form of Municipal Government Act, it shall be lawful to provide by ordinance that the board of local improvements should consist of the mayor and any two or more of the commissioners, regardless of whether or not the offices of public engineer and superintendent of streets are provided for by ordinance. In 1917 the Legislature amended the Commission Form of Municipal Government Act, and provided that in cites organized under or adopting that act "the council shall have and possess, and the council and its members shall exercise all executive and legislative powers and duties now had, possessed and exercised by the board of local improvements, provided for, in and by an act entitled 'An act concerning local improvements,' approved June 14, 1897, in force July 1, 1897, and all acts amendatory thereto," etc.

In City of Chrisman v. Cusick, 290 Ill. 297, 125 N. E. 290, the court considered objections to a local improvement. The city of Chrisman had adopted the commission form of government, and the scheme for the improvement originated with the board of local improvements and all the proceedings up to the passage of the ordinance were conducted by the board. It was contended in support of the validity of the proceeding that the act of 1917 contained no express repeal of the proviso to the act of 1915 amending section 6, and that proviso should not be held to have been repealed by implication. The court held the act of 1917 did not attempt to repeal the general provisions of the Local Improvement Act, but eliminated the board of local improvements in cities which had adopted the commission form of government and conferred the powers and duties of such board on the council. The court said, even if the question of repeal by implication was involved, the two acts could not be reconciled and the latest expression of the Legislature must prevail.

The material question presented by this record for decision is whether, under the present state of the law, the council of a city which is operating under the commission form of government may lawfully originate a local improvement or whether it must be originated by the board of local improvements. This court in the case above cited held the proviso to the amendment of section 6, in 1915, which provided for a board of local improvements in cities under the commission form of government to consist of the mayor and two or more commissioners, did not govern after the amendment to the Commission Form of Government Act in 1917, which eliminated the board and conferred its powers and duties on the council. Did the Legislature intend, by re-enacting the amendment of 1915, to repeal the amendment of 1917 abolishing the board of local improvements in cities under the commission form of government and conferring its powers and duties upon the council? The provisions of the act of 1923 for a board of local improvements in cities under the commission form of government are identical with the act of 1915, which we held in the Chrisman Case was superseded by the act of 1917.

Appellant contends the re-enactment in 1923 of section 6 as amended in 1915 could not affect the intermediate act of 1917; that the 1917 act remained in force and effect, and it cites section 2 of chapter 131 of Smith's Statutes, which reads:

"The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such prior provisions, and not as a new enactment."

[1-6] The situation we have to deal with is whether the act of 1917, as affecting cities under the commission form of government, is repugnant to and irreconcilable with the act of 1923. We held in the Chrisman Case the act of 1915 was superseded by that of 1917. That opinion was filed in December, 1919, and the Legislature is presumed to have known of that decision. Four years after the decision in that case the Legislature reenacted the identical provision which we held was irreconcilable with the act of 1917. The act of 1923 contains no express repealing clause, and, it is true, repeals are not favored by implication, but an implied repeal must result when the terms of the later act are repugnant to and cannot be harmonized with the earlier act. The primary rule of the construction of statutes is to ascertain and give effect to the intention of the lawmaking body. The intent of the statute is the law, and the object of all interpretation is to ascertain that intent. The intention is to be sought first in the language implied in the statute, and if its words are free from ambiguity and doubt, other means of interpretation cannot be resorted to. If its meaning is clear al-

though its consequences may be evil, they can only be avoided by a change of the law by the Legislature and not by judicial construction. There can be no intent of a statute not expressed in the words of it. These rules of statutory construction are laid down in Lewis' Sutherland on Statutory Construction and in numerous text-books and decisions on the subject. There are no words in the act of 1923 to indicate any intention that it should not operate to repeal the act of 1917 relating to boards of local improvement in cities under the commission form of government. The act of 1923, except for a paragraph of seven or eight lines relating to cities and villages organized under a special charter and not here material, inserted just before the proviso which contains the provision for boards of local improvement in cities under the commission form of government, is in the identical language of the act of 1915. If it was competent for the Legislature to repeal the 1915 proviso by the act of 1917 amending the Commission Form of Government Act, it would seem the Legislature could also repeal the 1917 act by re-enacting the proviso to the act of 1915. In plain terms, the act of 1923 provides for a board of local improvements in cities under the commission form of government, and that was the law prior to 1917. We know of no reason why the Legislature thought it advisable to take from the council the authority conferred upon it by the act of 1917 to exercise the powers and duties of a board of local improvements and require those powers and duties to be performed by a board of local improvements the same as the law required when the act of 1917 was adopted; but we are not permitted to say it did not intend what the statute plainly requires. It may be, as counsel for appellant argues, that the only purpose of amending section 6 in 1923 was to add the provision therein contained relating to cities and villages organized under a special charter, and that the addition to the act of the same provision of the act of 1915 which was superseded by the act of 1917 was an inadvertence; but there is nothing in the act to indicate that it was.

[7-10] Consideration of what is reasonable or what will cause hardship or injustice are potent influences where a statute is susceptible of two constructions without doing violence to its language. A construction which will occasion public and private mischief will not be given the language of the statute if it is capable of a construction which will avoid that result, but no rule of construction authorizes a court to declare that the Legislature did not mean what the plain and unambiguous language of the statute imports. Whether an act is wise or will cause hardship is not a judicial question. That the act of 1923 will cause hardship we think is altogether probable, as there are possibly other local improvements in cities under the commission form of government where the council has originated local improvements. This very case is an illustration of the hardship. The improvement here under consideration was originated 17 days after the law of 1923 went into effect and before it had been published. But those things afford no warrant to a court to say that it was not the intention of the Legislature that the act should be effective according to the purport and meaning of its terms. If we could see any legal ground upon which we could base a decision that the act of 1923 relating to boards of local improvement in cities under the commission form of government was not intended to take effect or to supersede the act of 1917, we would be very glad to do so. The portion of the 1923 act referred to is limited exclusively to the purpose of providing for boards of local improvement in cities of less than 50,000 population which are operating under the commission form of government. If we were to hold it was not intended that it should be effective in such cities, we would be compelled to say the Legislature had no purpose or intent of any kind in passing the act. This we cannot say, and have no authority to say, for the passage of the act was within the legislative power, and no court has any authority to say that a legislative body did not mean anything by the enactment of a statute. We must assume the Legislature believed a return to the board of local improvements, as required by the law in existence when the 1917 act was passed, was desirable. That we are unable to see any reason why that is so is immaterial. That question was one for determination by the Legislature, and its decision is not subject to review by courts.

It follows from the views we entertain and have expressed that the judgment must be affirmed.

Judgment affirmed.

THOMPSON, J. (dissenting). It is a familiar rule that, when the Legislature enacts an amendatory statute providing that a certain act shall be amended, so as to read as repeated in the amendatory act, and no change is made in the wording of the old act, such portions of the old law as are repeated in the new act are to be regarded as a continuation of the old law, and not the enactment of a new law on that subject. People v. Lloyd, 304 Ill. 23, 136 N. E. 505; Svenson v. Hanson, 289 Ill. 242, 124 N. E. 645. The Local Improvement Act is general in character and applies to all cities, while the Commission Form of Municipal Government Act is special in character and applies only to those cities adopting it. If there were no provision in the latter act concerning the board of local improvements, the general provisions of the former act would govern. The two acts do not conflict. They can be con-

strued together, and both given effect. If the Governor had vetoed the amendatory act of 1923, it would not have nullified the old statute repeated in the act, but it would have nullified only the paragraph inserted by the amendment, and so the approval of the Governor was only of the proposed amendment, and did not operate upon other portions of the statute printed in the act for the purpose of identifying the place of the amendment, and to enable the legislators and the Governor to form an opinion as to its fitness, relation to, and effect upon the whole statute.

Carelessness in drafting bills causes much needless confusion, but it is the duty of the court to declare the manifest intention of the Legislature if it can be ascertained. The amendatory act should not have contained the proviso applying to cities which had adopted the commission form of municipal government, because it was a dead letter, but I do not regard its repetition in the new act as indicative of a legislative intent to repeal the act of 1917, as the court holds.

FROIO v. EASTERN MASSACHUSETTS ST. RY. CO.

(Supreme Judicial Court of Massachusetts. Plymouth. Jan. 31, 1924.)

1. Carriers ⟸318(7) — Evidence of collision and absence of explanation held not to warrant finding of negligence.

In an action by a street car passenger for personal injuries in a collision with a motor truck, the facts that the car collided with the truck and that there was no explanation as to what the motorman was doing did not warrant the jury in finding negligence.

2. Carriers ⟸300—Operator of street car not required to sound warning and slacken speed on approaching intersection.

While the duty rests on the operator of a street car at all times and in all places to manage his car with a high degree of care, he is not required by law to give warning signals or slacken speed of his car and keep it under control, so that as he nears an intersecting street he will not be proceeding at an unreasonable rate of speed.

3. Carriers ⟸320(21)—Whether failure to warn and slacken speed at intersection negligence for jury.

Whether operator of street car was negligent in failing to sound his bell and slacken his speed at an intersection of a street, where a collision occurred, resulting in injury to passenger, *held* for the jury.

4. Trial ⟸296(3)—Erroneous instruction held not cured by another.

An instruction that the operator of a street car was under obligation to give warning and to slow down speed on approaching an intersection *held* not cured by general instruction that if by the exercise of reasonable care he could have avoided the accident, and he did not exercise reasonable care, but was negligent, then the company would be liable.

Exceptions from Superior Court, Plymouth County; Joseph Walsh, Judge.

Action of tort by Pantaleone Froio against the Eastern Massachusetts Street Railway Company to recover for personal injuries sustained while a passenger on one of defendant's cars. Verdict for plaintiff, and defendant brings exceptions. Exceptions sustained.

H. C. Thorndike, of Brockton, for plaintiff.
T. H. Buttimer, of Boston, for defendant.

CROSBY, J. This is an action to recover for personal injuries, received by the plaintiff while a passenger on one of the defendant's cars. The accident resulted from a collision of the car with a motor truck which was crossing the street railway track. The car in question was being operated by one person who acted both as motorman and collector of fares. The only questions presented for our decision arise by reason of certain exceptions to the charge of the presiding judge.

[1] The judge instructed the jury that if they found that the electric car collided with the motor truck and there was no explanation as to what the motorman was doing, or that it was a collision without explanation, and would not ordinarily have occurred if the motorman had been exercising reasonable care, they could find that there was some negligence.

This instruction evidently was based upon the assumption that the doctrine of res ipsa loquitur is applicable. "The mere occurrence of the collision on the highway was no evidence of the negligence of the defendant. This is the rule of our own cases." Reardon v. Boston Elevated Railway, 245 Mass. —, 141 N. E. 857, and cases therein collected.

[2] The judge also instructed the jury in substance that the operator of an electric car, on approaching corners or vehicles coming in the opposite direction, is under obligation to give warning by sounding a whistle or gong and to slow down the speed and keep his car under control so that as he nears an intersecting street he will not be proceeding at an unreasonable rate of speed.

[3, 4] This instruction was erroneous. While the duty rests upon the operator of an electric car at all times and in all places to manage his car with a high degree of care, he is not required by law to give warning signals or slacken the speed of his car as the jury were instructed, nor was he required to do so by any rule of his employer, so far as appears from the record. Whether in the circumstances as they existed in the case at

bar he should have sounded his bell and slackened his speed at the intersection of streets, were matters properly for the consideration of the jury upon the question of negligence. We are of opinion that the jury must have understood from this instruction that an absolute duty rested upon the motorman to do the things referred to in this part of the charge, and that the error was not cured by the general instruction which followed, that if by the exercise of reasonable care he could have avoided the accident, and he did not exercise reasonable care but was negligent, then the defendant would be liable.

The other exceptions need not be considered as the questions involved are not likely to arise in the same form at a new trial.

Exceptions sustained.

FLINT et al. v. CODMAN et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 23, 1924.)

1. Appeal and error ⟸860—Only questions of law presented on bill of exceptions.

When a case comes up on bill of exceptions, only questions of law are presented.

2. Appeal and error ⟸860—Matters considered in equity upon bill of exceptions.

When a suit in equity comes to the Supreme Judicial Court by bill of exceptions, and not by appeal, the only question of law as to findings of fact is whether there is evidence to support them.

3. Appeal and error ⟸860—Findings of facts stand, if warranted by evidence.

When a suit in equity comes to the Supreme Judicial Court by a bill of exceptions, findings of fact, if warranted by the evidence, stand.

4. Appeal and error ⟸860—Requests for findings of fact cannot be made basis for exceptions.

Requests for findings of fact, if proper under any circumstances, cannot successfully be made the basis for exceptions in a suit in equity coming to the Supreme Judicial Court by a bill of exceptions alone; the equity practice conforming to the practice in actions at law in this respect.

5. Appeal and error ⟸1009(7)—Findings of single justice not set aside, unless plainly wrong.

On appeals in equity with the report of the evidence, findings of single justice, based on oral testimony, cannot be set aside, unless plainly wrong.

6. Joint-stock companies and business trusts ⟸1—Trust held a partnership.

Where shares were sold under a trust agreement, whereby trustees were to purchase property and rent it and pay the profits to shareholders, and a small minority of shareholders could call a meeting, and shareholders at the meeting could terminate the transaction or remove the trustees, there was a partnership among the shareholders, even though the main corpus of the trust was real estate.

7. Joint-stock companies and business trusts ⟸23—Shareholders held entitled to terminate trust at any time and sell real estate.

Shareholders in a trust, owning real estate and renting it, *held* under the trust agreement to have the right to terminate the trust at any time by a vote, and to sell the real estate and distribute the assets.

8. Partnership ⟸70—Partners owe highest degree of good faith to one another.

Partners owe to each other the highest degree of good faith concerning partnership affairs, and cannot rightfully violate that duty for their own advantage.

9. Joint-stock companies and business trusts ⟸14—Majority shareholders cannot compel trustees to sell corpus of trust to them.

The law does not permit one or more partners to compel others of the partnership against their will to sell to them their fractional ownership in partnership assets, and this applies where there are a large number of members owning shares under a declaration of trust, so that majority shareholders cannot by vote cause corpus of trust to be sold to themselves, against the express dissent of any minority shareholders.

Exceptions from Supreme Judicial Court, Suffolk County.

Bill in equity by George M. Flint and others against Edmund D. Codman and others, wherein a small minority of shareholders in Lovejoy's Wharf Trust seek to enjoin a sale of the corpus of the trust by the trustees and a termination of the trust. Decree ordered dismissing the bill, and plaintiffs bring exceptions. Exceptions sustained.

D. J. Lyne, R. C. Evarts, and M. F. Hall, all of Boston, for plaintiffs.

J. P. Wright and F. King, both of Boston, for defendants Quincy Market Cold Storage & Warehouse Co. and others.

R. Homans, of Boston, and F. Adams, of Cambridge, for defendants Codman and others.

RUGG, C. J. This is a suit in equity. The plaintiffs, a small minority of the shareholders in the Lovejoy's Wharf Trust, so called, seek to enjoin a sale of the corpus of the trust by the trustees, who are the individual defendants acting pursuant to a vote of the majority of the shareholders, to the three corporate defendants who collectively hold a majority of the shares, and to enjoin the termination of the trust. After a hearing, findings of fact and rulings of law were made and the entry of a decree ordered dismissing the bill. The plaintiffs' exceptions bring the case here.

Of the facts thus found, only those relevant to the controlling principles of law need to be stated. The individual defendants are trustees under a declaration of trust dated in 1902, to continue for a period of 20 years after the death of the last survivor of numerous named individuals unless sooner terminated. The purposes of the trust were to acquire real estate and wharf property within a designated area in Boston, to erect upon it buildings, to lease the same and to pay dividends to the shareholders. The trust was organized by the sale and issuance of 18,000 shares represented by transferable certificates, each share being of the par value of $100.

The real estate was purchased in the name of the trustees and was held by them under the terms of the declaration of trust. The trustees caused to be constructed expensive buildings on the real estate and have leased them or parts of them from time to time. Each of the three corporate defendants at the time of the events here in issue was a tenant of part of the real estate of the trust. Together they occupied the greater part of it. At some time prior to April, 1923, the three corporate defendants by arrangement with each other and acting through a common agent purchased in the open market without fraud or deception 9,083 shares, being a majority of all the shares of the trust. There was no evidence that the trustees conspired or combined with the corporate defendants in making these purchases of shares, or that there was anything wrong about these purchases if the corporate defendants were authorized by law to become shareholders in such an enterprise. The corporate defendants then requested the resignation of one of the trustees and the substitution of a nominee of their own in his place. This request was denied by the trustees. Then it was proposed that the three corporate defendants purchase all the real estate of the trust and that the trust be terminated. Negotiations were had between the trustees and the three corporate defendants looking to that end. Finally a tentative agreement was reached, that the property should be sold to the three corporate defendants for $2,748,837, payment to be in cash. This agreement was reduced to writing and signed by the trustees and the three corporate defendants, but it was made subject to the condition that the trustees should first receive from the shareholders under the declaration of trust authority necessary to make the conveyance, meeting for that purpose to be called forthwith.

The trustees have managed the property for about 20 years, are men of large experience in knowing the values of such properties and were as familiar with its real worth as any one. In making this agreement the trustees acted in good faith throughout. They have not been influenced in any degree by appraisals of the property made at the instigation of the corporate defendants. Their conduct has been based entirely upon their independent and honest judgment, unaffected in any particular by improper inducements and controlled solely by a desire to obtain as large a price for the property as possible. They have not either consciously or unconsciously been moved by any other considerations. The price agreed upon was not less than the fair market value of the property. To quote from the findings:

"While a higher price possibly might be obtained, it did not appear that more could have been realized. If it was put up for sale at auction a higher or a lower bid might be obtained. * * * When the great value of this property is considered, it may fairly be assumed that a purchaser for cash could not readily be found; it did not appear at the hearing that any one is ready and willing to buy the property other than the corporate defendants, or that the trustees can obtain a higher price."

A meeting of the shareholders of the trust was held on April 13, 1923, at which a vote was passed authorizing and directing the trustees to sell the entire real estate held by them as such trustees to the three corporate defendants in accordance with the terms of the agreement between them and the trustees. The total number of shares represented by shareholders present in person and by proxies and voted on this proposition was 16,970, of which 15,976 were in favor of and 994 against the sale. The 9,083 shares held by the corporate defendants were voted in favor of the sale. The defendant Codman voted by proxies running to himself and his cotrustee on 6,027 shares in favor of the sale. The plaintiffs were present at the meeting and voted on their shares in opposition to the sale and took other steps to indicate their opposition to the sale.

These facts have been found by the single justice who heard the case. They are all which are material to the grounds of this decision.

[1-4] The case comes before us on a bill of exceptions and not by appeal. Hence only questions of law are presented. Dorr v. Tremont National Bank, 128 Mass. 349, 357. When a suit in equity comes to this court by a bill of exceptions and not by appeal, the only question of law as to findings of fact is whether there is evidence to support them. Such findings stand if they are warranted by the evidence. Requests for findings of fact, if proper under any circumstances, cannot successfully be made the basis for exceptions in such a case as the one at bar. The equity practice in this respect conforms to the practice in actions at law. Bills of exceptions in equity, as frequently has been pointed out, are not known in general chancery practice, and are a peculiarity of our practice. Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737. See in this connection Davis v. Boston Elevated Rail-

way Co., 235 Mass. 482, 494, 126 N. E. 841; Moss v. Colony Trust Co., 246 Mass. 139, 140 N. E. 803.

It is not necessary to narrate the evidence. It is too plain to require extended discussion that all the findings of fact which have been recited find support in the evidence. The finding that the trustees in agreeing to the sale were uninfluenced by any considerations except to obtain a fair price for the property cannot be said to be unwarranted. The testimony of the defendant Codman with the reasonable inferences which might have been drawn from it support the findings upon this point.

The testimony of the same witness was sufficient to support the findings that the trustees in the discharge of their duties exercised the skill and judgment due from them in their fiduciary relation.

[5] Even if the rule applicable to appeals in equity with the report of the evidence were followed, no error is disclosed because the findings of the single justice based upon the hearing or oral testimony could not be set aside as plainly wrong. Lindsey v. Bird, 193 Mass. 200, 79 N. E. 263.

An important part of the declaration of trust touching the rights, powers, duties and obligations of the shareholders and trustees is found in a part of article 10. Its crucial words are these:

"The trustees may call meetings of the shareholders at any time, and shall do so upon written request of the holders of one-twentieth of the shares outstanding. * * *" "At any meeting, the holders of a majority of the entire number of shares may fill any vacancy existing in the number of trustees, may depose any or all of the trustees and elect others in their places, may authorize the sale or mortgage of the property, or any part thereof, held by the said trustees, and may alter or amend this agreement or terminate the trusts hereunder. For all other purposes a majority of those shareholders present may decide on matters properly coming before them. Shareholders may vote by proxy, and for the purpose of voting at meetings each share shall be entitled to one vote. At any meeting five shareholders, or their proxies, representing one-fifth of all of the shares outstanding, shall constitute a quorum."

[6] It is manifest from these words that the shareholders have the ultimate control of all affairs of the trust. While there is no provision for meetings of the shareholders at fixed times, such meeting must be called at any time on request of a comparatively small minority. At such meetings the trustees may be removed, the frame of the declaration of trust may be altered or the entire transaction terminated and its affairs liquidated. The trustees thus are subject to the shareholders. This kind of an arrangement constitutes a partnership among the shareholders under numerous decisions, even though the main corpus of the trust is real estate. Williams v. Boston, 208 Mass. 497, 94 N. E. 808; Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009; Priestley v. Treasurer and Receiver General, 230 Mass. 452, 120 N. E. 100; Sleeper v. Park, 232 Mass. 292, 122 N. E. 315; Horgan v. Morgan, 233 Mass. 381, 124 N. E. 32; Howe v. Chmielinski, 237 Mass. 532, 130 N. E. 56; Neville v. Gifford, 242 Mass. 124, 136 N. E. 160. See, also, Dana v. Treasurer and Receiver General, 227 Mass. 562, 116 N. E. 941; Williams v. Milton, 215 Mass. 1, 102 N. E. 355, and cases there reviewed; Gleason v. McKay, 134 Mass. 419; Phillips v. Blatchford, 137 Mass. 510; Ricker v. American Loan & Trust Co., 140 Mass. 346, 5 N. E. 284.

It is provided by article 2 of the declaration of trust that "for the better adjustment of boundary lines" the trustees may "sell and convey portions of the trust property," and that except as otherwise provided the trustees shall have "the sole ownership, control, power of sale, leasing, letting and exclusive management of all the [trust] property." By article 14 provision is made for the continuance of the trust for a described period "unless the same shall be sooner terminated by the acts of the trustees or shareholders," and "upon the termination of the trust by the expiration of time or for any other cause, the trustees shall sell the trust property and divide the net proceeds among the shareholders, in proportion to their respective interests."

[7] It is not necessary to inquire whether under the declaration of trust power is conferred upon the trustees to make a sale of the entire real estate of the trust and terminate the trust before the expiration of the time limited by their own conveyance because there was an express vote of the stockholders authorizing the trustees to make the sale. As matter of construction these clauses of the declaration of trust authorize the shareholders to vote to terminate the trust at any time; to sell the real estate and to distribute the assets.

There is no provision in the declaration of trust to the effect that such sale may be made to any of the shareholders. Declarations of trust like that in the case at bar have been common in this commonwealth for many years. The decisions of this court for at least 40 years have held them to constitute partnerships among the shareholders. Those who become parties to such agreements must be governed by the settled principles of the law of partnership except as modified by the express terms and the inherent nature of the declaration of trust. It is to be presumed that they have entered into the agreement with the purpose to be subject to partnership obligations and limitations as well as to profit by partnership advantages and immunities.

[8, 9] Partners owe to each other the highest degree of good faith concerning partner-

ship affairs. They cannot rightfully violate that duty for their own advantage. Lovejoy v. Bailey, 214 Mass. 134, 154, 101 N. E. 63; Arnold v. Maxwell, 223 Mass. 47, 111 N. E. 687; Lindsay v. Swift, 230 Mass. 407, 412, 119 N. E. 787. In the absence of special agreement in the instrument governing the rights of partners between themselves, the law does not permit one or more partners to compel the others of the partnership against their will to sell to them their fractional ownership in partnership assets. It is contrary to the rights of minority partners for the majority to sell partnership property to themselves notwithstanding the protest of the minority. No partners by superior financial power or the compulsion of greater numbers rightly can force another partner or partners involuntarily to submit to a sale to themselves of partnership property. These principles are settled respecting ordinary partnership. Freeman v. Freeman, 136 Mass. 260; Stevenson & Son, Ltd., v. Aktiengesellschaft fur Cartonnagen-Industrie, [1918] A. C. 239, 246, 250-252; Wild v. Milne, 26 Beav. 504; Darby v. Darby, 3 Drewry, 495, 503; Featherstonhaugh v. Fenwick, 17 Ves. 289. The same principles are applicable to a partnership like that at bar. The circumstance that the legal title to the partnership property is vested in trustees instead of in all the partners can make no difference in this particular with partnership rights or partnership obligations. The trustees of course act in a fiduciary character toward all the partners. But they cannot be authorized by vote of a majority of the shareholders to make a conveyance to such shareholders against the protest of the minority. The relation established by the declaration of trust is a partnership notwithstanding the device of trustees to hold the legal title and of shares to represent the ownership of fractional parts of the property. If it had been the purpose and intent of the parties to permit a majority of the shareholders to compel a sale of the property to themselves it would have been simple to insert a paragraph to that effect in the declaration of trust. See Denholm v. McKay, 148 Mass. 434, 19 N. E. 551, 12 Am. St. Rep. 574.

Since this is a partnership the case at bar is distinguishable from cases where sales are made by a corporation by vote of its stockholders to directors. The corporation is a legal entity separate and distinct from its stockholders. Commonly the stockholders of a corporation occupy no fiduciary relation to their fellow stockholders or to the corporation. The relation of a director to a corporation is fiduciary; yet transactions made in good faith, fair and for the interest of a corporation between it and its directors although scrutinized with great strictness may be authorized or ratified by vote of the stockholders under appropriate conditions. Nye v. Storer, 168 Mass. 53, 46 N. E. 402; Northwest Transportation Co., Ltd., v. Beatty, 12 App. Cases, 589; Merriman v. National Zinc Corp., 82 N. J. Eq. 493, 500, 89 Atl. 764; Bjorngaard v. Goodhue County Bank, 49 Minn. 483, 487, 52 N. W. 48.

It follows that the twenty-first request of the plaintiffs for a ruling to the effect that the majority shareholders could not cause to be sold all or substantially all the assets of the trust to themselves against the express dissent of the minority ought to have been granted.

It is unnecessary to consider the other questions presented on the record.

Exceptions sustained.

In re ALLEN'S WILL.

HOXIE et al. v. MT. VERNON TRUST CO. et al.

(Court of Appeals of New York. April 24, 1923.)

Trusts ⇐318—Trustees cannot be allowed more than commissions to which sole trustee entitled when principal fund is less than $100,000.

Under Code Civ. Proc. § 2753 (Surrogate's Court Act, § 285), commissions allowed trustees cannot exceed those to which sole trustee is entitled when the principal of the estate was less than $100,000.

Appeal from Supreme Court, Appellate Division, Second Department.

In the matter of the construction of the last will and testament and codicil thereto of William Allen, deceased, and of the judicial settlement of the accounts of the proceedings of Annie B. Allen and others, as executors of such last will and testament and codicil. From an order of the Appellate Division (202 App. Div. 810, 194 N. Y. Supp. 913) affirming a decree of the Surrogate (111 Misc. Rep. 93, 181 N. Y. Supp. 398) construing the will and codicil of such deceased and settling the accounts of his executors and trustees, Eleanor A. Hoxie and another, individually and as executrix and executor of Isabella M. Capstick, appeal by permission. Modified and affirmed.

Herbert C. Brinckerhoff and John Patterson, both of New York City, for appellants.

Isaac N. Mills and Le Roy N. Mills, both of Mt. Vernon, for respondent Trinity Episcopal Church.

Frank M. Buck, of Mt. Vernon, for respondent trustees.

Odell D. Tompkins, of Mt. Vernon, for respondent White, as executor.

PER CURIAM. We are satisfied with the result reached in the courts below, except in one particular. The principal of the Allen estate was less than $100,000. Only in case "the gross value of the principal of the estate or fund accounted for amounts" to that sum or to more may the commissions allowed to trustees exceed those to which a sole trustee is entitled. Code Civ. Proc. § 2753; Surr. Ct. Act, § 285. The decree and order appealed from should therefore be modified by reducing the commissions therein allowed to the trustees to an amount equal to the commissions allowable to a sole trustee, and the proceedings should be remitted to the Surrogate's Court to determine and apportion such commissions. Otherwise the order and decree should be affirmed, with costs to all parties appearing or filing briefs on this appeal, payable out of the estate.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Ordered accordingly.

Anna J. M. LOCKWOOD, Appellant, v. Manice De F. LOCKWOOD, Individually and as Executor and Trustee of William B. E. Lockwood, Deceased, et al., Respondents.

(Court of Appeals of New York. April 24, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (201 App. Div. 657, 195 N. Y. Supp. 652), entered June 20, 1922, affirming a judgment in favor of defendants entered upon a verdict. The action was for the admeasurement of dower. It was stipulated that the only question to be determined by the jury was whether or not the plaintiff is the widow of William B. E. Lockwood. The court submitted this question to the jury in the following form: "Was the plaintiff married to William B. E. Lockwood on July 16, 1915?"—and the jury was directed to answer this question "Yes" or "No." The jury brought in a verdict answering the said question "No."

Jerome A. Strauss and Max D. Steuer, both of New York City, for appellant.

Middleton S. Borland and Percy F. Griffin, both of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

PEOPLE of the State of New York, Respondent, v. Mike COOK, Appellant.

(Court of Appeals of New York. April 24, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (197 App. Div. 155, 188 N. Y. Supp. 291), entered May 11, 1921, which affirmed a judgment of the Cattaraugus County Court, rendered upon a verdict convicting the defendant of the crime of violating the Liquor Tax Law.

H. P. Nevins, of Salamanca, and James P. Quigley, of Olean, for appellant.

Carl Sherman, Atty. Gen., and Archibald M. Laidlaw, Dist. Atty., of Ellicottville (C. T. Dawes, of Albany, of counsel), for the People.

PER CURIAM. Judgment affirmed.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

PEOPLE of the State of New York, Respondent, v. Nicholas ANCKNER, Appellant.

(Court of Appeals of New York. April 24, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (202 App. Div. 783, 194 N. Y. Supp. 965), entered June 6, 1922, which affirmed a judgment of the Cattaraugus County Court, rendered upon a verdict convicting defendant of the crime of maintaining a common nuisance under the provisions of section 1214-g of the Penal Law (as added by Laws 1921, c. 155).

H. P. Nevins, of Salamanca, and James P. Quigley, of Olean, for appellant.

Archibald M. Laidlaw, of Ellicottville, for the People.

PER CURIAM. Judgment affirmed.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Jennie TRACHTENBERG, Respondent, v. Bessie TRACHTENBERG, et al., Appellants.

(Court of Appeals of New York. April 24, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (203 App. Div. 895, 197 N. Y. Supp. 953), entered November 24, 1922, affirming a judgment in favor of plaintiff entered upon a verdict. The action was brought by the plaintiff against her mother-in-law and her father-in-law to recover for the alleged alienation by them of her husband's affections.

Edgar Treacy and Emanuel Schoenzeit, both of New York City, for appellants.

Samuel Dickstein and Ira J. Schuster, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Everett I. WEAVER, Respondent, v. PACIFIC IMPROVEMENT COMPANY, Appellant, Impleaded with Others. Frank S. SMITH, Individually and as Receiver of the Pittsburg, Shawmut & Northern Railroad Company, Respondent, v. PACIFIC IMPROVEMENT COMPANY, Appellant, Impleaded with Others. CENTRAL TRUST COMPANY OF NEW YORK, Plaintiff, v. The PITTSBURG, SHAWMUT & NORTHERN RAILROAD COMPANY et al., Defendants. Henry S. Hastings, as Receiver, Respondent; Central Union Trust Company of New York, as Trustee, et al., Appellants.

(Court of Appeals of New York. April 24, 1923.)

PER CURIAM. Motion for reargument or to amend remittitur denied, with $10 costs and necessary printing disbursements. See 234 N. Y. 418, 138 N. E. 42.

Nelson E. GRAVES, Respondent, v. James C. DAVIS, as Agent of the United States Railroad Administration, Appellant.

(Court of Appeals of New York. April 24, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 235 N. Y. 315, 139 N. E. 280.

Jennie M. OPPENHEIM, Appellant, v. Martha KRIDEL, Respondent.

(Court of Appeals of New York. April 24, 1923.)

Motion to dismiss an appeal from a judgment, entered February 2, 1923, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 305, 198 N. Y. Supp. 157), reversing a judgment in favor of plaintiff, entered upon a verdict and directing a dismissal of the complaint. The motion was made upon the ground that the reversal was upon the

facts as well as the law, and, there being a question of fact in the case, the Court of Appeals had no power of review.

See, also, 236 N. Y. 156, 140 N. E. 227.

Charles A. Brodek, of New York City, for the motion.

George Gordon Battle and Isaac H. Levy, both of New York City, opposed.

PER CURIAM. Motion denied, with $10 costs and necessary printing disbursements.

Llewellyn M. ALDRICH, Appellant, v. NEW YORK LIFE INSURANCE COMPANY, Respondent.

(Court of Appeals of New York. April 24, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 235 N. Y. 214, 139 N. E. 245.

Christopher G. PARNALL, Respondent, v. John FARSON, Appellant.

(Court of Appeals of New York. April 24, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 234 N. Y. 648, 138 N. E. 482.

PEOPLE'S TRUST COMPANY, as Trustee under the Will of Maurice O'Meara, Deceased, Suing on Behalf of Itself and Other Stockholders of Maurice O'Meara Company, Appellant, v. William O'MEARA et al., Respondents, Impleaded with Another.

(Court of Appeals of New York. April 24, 1923.)

Motion to dismiss a judgment, entered March 1, 1923, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (204 App. Div. 268, 197 N. Y. Supp. 795), modifying a judgment in favor of plaintiff entered upon the report of a referee, and remitting the case to the same referee to take further proof. The motion was made upon the ground that the judgment appealed from was not final, and that permission to appeal had not been obtained.

Clarence J. Shearn, of New York City, for the motion.

Raymond C. Thompson, of New York City, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and $10 costs of motion.

Patrick McGOVERN et al., Appellants, v. CITY OF NEW YORK, Respondent.

(Court of Appeals of New York. April 24, 1923.)

PER CURIAM. Motion for reargument denied, without costs. Motion to amend remittitur granted; return of remittitur requested, and, when returned, remittitur will be amended by striking out the provision directing a new trial of the first cause of action, with costs to abide the event, and substituting therefor a provision that the plaintiffs have judgment on the first cause of action for $20,974.78, with interest thereon from February 28, 1916, to July 27, 1920, and with interest since said date on the aggregate of principal and interest, with costs to the plaintiffs in this court. See 234 N. Y. 377, 138 N. E. 26. See, also, 235 N. Y. 275, 139 N. E. 266.

John H. E. SAND, Respondent, v. GARFORD MOTOR TRUCK COMPANY, Inc., Appellant.

(Court of Appeals of New York. April 24, 1923.)

Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (204 App. Div. 70, 198 N. Y. Supp. 43), entered January 15, 1923, modifying, and affirming, as modified, a judgment in favor of plaintiff entered upon a verdict. The motion was made upon the ground that the decision of the Appellate Division was unanimous and that permission to appeal had not been obtained.

Burt L. Rich, of Brooklyn, for the motion.

Frank H. Towsley, of New York City, opposed.

PER CURIAM. Motion denied, without costs and without prejudice to right to renew same at time of argument.

Edith BLOODGOOD, Appellant, v. Payne WHITNEY, Respondent.

(Court of Appeals of New York. April 24, 1923.)

PER CURIAM. Motion to amend remittitur denied, without costs. A decision in

this court awarding costs to appellant limits such costs to the costs on appeal in this court. See 235 N. Y. 110, 139 N. E. 209.

Vassila A. TOURIS et al., as Executors of Sotirios A. Touris, Deceased, Respondents, v. BREWSTER & COMPANY, Incorporated, Appellant.

(Court of Appeals of New York. April 24, 1923.)

PER CURIAM. Motion for reargument or to amend remittitur denied, without costs. See 235 N. Y. 226, 139 N. E. 249.

Albert G. DIMMERLING, Respondent, v. Archie M. ANDREWS, Appellant, Impleaded with Others.

(Court of Appeals of New York. May 1, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (205 App. Div. 855, 198 N. Y. Supp. 909), entered January 25, 1923, which affirmed an order of Special Term denying a motion to vacate a judgment, an attachment, service of the summons and complaint on said appellant and the order of publication of the summons. The following questions were certified:

"(1) Does section 232 of the Civil Practice Act require proof of the issuance of a warrant of attachment against the property of a nonresident defendant, and the levy thereof upon his property within the state, as a condition precedent to the granting of an order for service of the summons upon him by publication?

"(2) May a valid levy of an attachment against the property of a nonresident defendant be made more than 20 days after the completion of the service of the summons upon him by publication?

"(3) Did the entry of the judgment against the defendant Archie M. Andrews, under the circumstances disclosed by the record, constitute 'due process of law'?"

Henry L. Sherman and Lionel S. Popkin, both of New York City, for appellant.

Edwin J. Dryer and Raymond D. Thurber, both of New York City, for respondent.

PER CURIAM. Orders reversed, with costs in all courts, and motion granted, with $10 costs of the motion, on authority of Dimmerling v. Andrews, 236 N. Y. 43, 139 N. E. 774. First question certified answered in the affirmative; other questions not answered.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Archibald PALMER, as Trustee in Bankruptcy of Cypress Knitting Mills, Inc., Respondent, v. Paul SCHEFTEL, Appellant.

(Court of Appeals of New York. May 1, 1923.)

Appeal from a judgment, entered June 10, 1921, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (194 App. Div. 682, 186 N. Y. Supp. 84), reversing a judgment in favor of defendant entered upon a verdict and directing judgment in favor of plaintiff. The action was to recover the unpaid portion of defendant's subscription to the capital stock of the Cypress Knitting Mills. The amount claimed to be due represented the par value of stock issued for services to be rendered to the corporation. The answer set up as separate defenses that defendant had returned to the corporation a part of the stock issued to him, that certain other shares were sold and the corporation paid therefor, and that the balance of his stock had, prior to the time of the bankruptcy, been turned over to a third party and that defendant was not the owner thereof at that time.

I. Balch Louis, of New York City, for appellant.

Sidney J. Loeb and Harold R. Lhowe, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HOGAN, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

HISCOCK, C. J., and CARDOZO, J., dissent.

Michael TEMMER, Respondent, v. Leopold ZIMMERMAN et al., Doing Business under the Firm Name of Zimmerman & Forshay, Appellants.

(Court of Appeals of New York. May 1, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (202 App. Div. 832, 195 N. Y. Supp. 412), entered August 29, 1922, affirming a judgment in favor of plaintiff entered upon a verdict. The action was brought to recover damages sustained by the plaintiff for the alleged breach of a contract by the defendants in failing to make a credit within a reasonable time of 20,000 Austri-

an kronen purchased on December 13, 1916. The contract read as follows:

"Memorandum.

"Zimmerman & Forshay,

"Members of New York Stock Exchange,
9–11 Wall St.

"Payable Through Wiener Bank Verein, Vienna.

"No. 1616. New York, Dec. 13, 1916.

"Mr. Michael Temmer, 135 West 117 St.: In accordance with your request we will instruct our correspondents to remit to Ungarische Postsparkasse, at Budapest for acct. Mrs. Jacob Temmer Kr. 20,000—@ 11½..... $2300—

"It is important that you write to the payee to immediately acknowledge receipt of the money.

"Delivery guaranteed.

"Zimmerman & Forshay, by P."

Osmond K. Fraenkel and Louis Werner, both of New York City, for appellants.

Eugene Lamb Richards and Rutherford B. Meyer, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

CARDOZO, J., not voting.

Sam SAFIAN, Respondent, v. IRVING NATIONAL BANK, Appellant.

(Court of Appeals of New York. May 1, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (202 App. Div. 459, 196 N. Y. Supp. 141), entered July 21, 1922, affirming a determination of the Appellate Term (116 Misc. Rep. 647, 190 N. Y. Supp. 532), which affirmed a judgment of the Municipal Court of the City of New York in favor of plaintiff (115 Misc. Rep. 387, 188 N. Y. Supp. 393). The action was brought to recover for defendant's failure to transfer by cable to a designated payee in Poland 7,000 Polish marks. Defendant contended that it could be held liable only for the value of the marks in dollars on the day after the defendant demanded refund, at which time they had greatly depreciated in value. The Appellate Division held that plaintiff was entitled to recover in American dollars the exact amount paid by him to defendant, irrespective of any subsequent depreciation of Polish marks.

Eugene W. Leake and Edward A. Craighill, Jr., both of New York City, for appellant.

A. Delafield Smith and Sydney W. Davidson, both of New York City, for American Express Company, amici curæ.

Charles C. Peters, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Maude I. HARDING, Respondent, v. Charles E. HARDING, Appellant.

(Court of Appeals of New York. May 1, 1923.)

Appeal, by permission, from an order of the Appellate Divison of the Supreme Court in the Fourth Judicial Department (203 App. Div. 721, 197 N. Y. Supp. 78), entered December 23, 1922, which reversed an order of Special Term limiting the scope of an examination of the defendant before trial in an action to cancel and set aside a separation agreement entered into by husband and wife. The order of Special Term limited the examination of the defendant as to his income and property to a period immediately preceding the date on which the agreement was made. The following question was certified:

"Under the allegations of the complaint and answer in this case, is the evidence of defendant's income and property during the years 1915, 1916, 1917, 1918, 1919, 1920, 1921, and 1922 relevant, material, and proper?"

Edward L. Robertson, of Syracuse, for appellant.

Albert C. Rothwell, of New York City, for respondent.

PER CURIAM. Order affirmed, with costs. Question certified answered in the affirmative.

HOGAN, CARDOZO, POUND, and CRANE, JJ., concur.

HISCOCK, C. J., and McLAUGHLIN and ANDREWS, JJ., dissent.

In the Matter of the Probate of the WILL of Sophia GOERS, Deceased. Julius Goers, Appellant; Emma J. Whyte, Respondent.

(Court of Appeals of New York. May 1, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (199 App. Div. 953, 191 N. Y. Supp. 927), entered December 16, 1921, which reversed a decree of the Monroe County Surrogate's Court admitting to probate the will of Sophia Goers, deceased. The will gave $100 to a son and the balance of the estate to a daughter, with whom testatrix had resided for over two years before her death. The validity of the will was questioned upon the grounds of incapacity and undue influence. The Appellate Division held:

"The undisputed evidence shows that the testatrix was competent to make the will, and the contestant failed to make out a case of undue influence."

Eugene Van Voorhis, of Rochester, for appellant.

Ernest C. Whitbeck, of Rochester, for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Accounting of COLUMBIA TRUST COMPANY, as Ancillary Executor of Isabel F. CARTLEDGE, Deceased, Respondent. Charles F. Cartledge, Appellant.

(Court of Appeals of New York. May 1, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (203 App. Div. 899, 197 N. Y. Supp. 902), entered November 24, 1922, which unanimously affirmed a decree of the New York County Surrogate's Court (118 Misc. Rep. 131, 192 N. Y. Supp. 838), disallowing a claim of the appellant as creditor against the estate of Isabel F. Cartledge, deceased. The claim was for money advanced under an agreement, the material part of which recites that the testatrix owned 340 shares of stock of the Cartledge Realty Company, that assessments had been made upon the stock and were likely to continue to be made exceeding her ability to pay, and that in consideration of the appellant's payment of such assessment, the testatrix assigned to the appellant the shares in question as collateral security for such payments as have been or may be made by him. Should no sale of the property of the Cartledge Realty Company occur during the lifetime of the said Isabel F. Cartledge, the party of the first part, sufficient in amount to enable her to repay to the said Charles F. Cartledge, the party of the second part, the assessments paid by him, then and in that event the 340 shares of the Cartledge Realty Company shall be the property forever of the said Charles F. Cartledge, the party of the second part. No sale occurred during the lifetime of testatrix, who by her will bequeathed the shares in question to appellant. He claims that he may take the shares under the will and still recover the amount of the indebtedness from the balance of the estate.

Otto C. Wierum, of New York City, for appellant.

Martin A. Schenck, Charles E. Hotchkiss, and Alexander J. Feild, all of New York City, for respondent.

PER CURIAM. Order affirmed, with costs.

HOGAN, CARDOZO, POUND, and McLAUGHLIN, JJ., concur.

HISCOCK, C. J., and CRANE and ANDREWS, JJ., dissent.

Frederic S. MARSELL, Appellant, v. Samuel E. MAIRES, Respondent.

(Court of Appeals of New York. May 1, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (203 App. Div. 646, 196 N. Y. Supp. 739), entered November 22, 1922, which unanimously affirmed an order of Special Term granting defendant's motion for judgment on the pleadings. The complaint alleged that, the defendant herein requested plaintiff to assist him in electing and having appointed certain trustees of a bankrupt corporation, and to thereafter aid in procuring the appointment of the defendant as attorney for the said trustees, and to assist the said defendant in the event of his appointment as attorney for the said trustees in all matters of litigation which he might be called upon to do by the said defendant, and said defendant agreed with plaintiff herein that, in the event of such appointment as aforesaid as attorney for the said trustees, he would

pay to the plaintiff herein one-third of any and all fees and allowances that might be awarded to and received by him for his services as attorney for said trustees; that plaintiff carried out his part of the agreement; that defendant received $50,000 for his services as attorney for the trustees; that the plaintiff is entitled to the sum of $16,666.66 and prays for judgment in said amount. The court granted the motion for judgment upon the theory that the contract alleged in the complaint was against public policy, and therefore void.

John J. Fitzgerald and Herbert G. McLear, both of New York City, for appellant.

Harrington Putnam, of New York City, and J. Hunter Lack, of Brooklyn, for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Transfer Tax upon the ESTATE of Andrew CARNEGIE, Deceased. State Tax Commission, Appellant and Respondent; Home Trust Company, as Executor, et al., Respondents and Appellants.

(Court of Appeals of New York. May 1, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (203 App. Div. 91, 196 N. Y. Supp. 502), entered November 10, 1922, modifying, and affirming, as modified, an order of the New York County Surrogate's Court which assessed a transfer tax upon the estate of Andrew Carnegie, deceased. The appeal of the state tax commission was based upon three grounds: The exclusion by the courts below from the taxable estate of certain interest in a trust fund created by the decedent by deed inter vivos, the trust being known as the pension trust, the method approved by the courts below for computing the legacies to charitable corporations, and the exclusion by the courts below from the taxable property of certain real estate owned by the decedent and his wife as tenants by the entirety. The appeal of the executor and Louise W. Carnegie was based upon the refusal of the courts below to deduct the federal estate tax paid by the executor.

John B. Gleason and Lafayette B. Gleason, both of New York City, for State Tax Commission, appellant and respondent.

Elihu Root, Jr., Robert P. Patterson, and Wilkie Bushby, all of New York City, for executor et al., respondents and appellants.

PER CURIAM. Order affirmed, without costs.

HISCOCK, C. J., and HOGAN, POUND, CRANE and ANDREWS, JJ., concur.

CARDOZO and McLAUGHLIN, JJ., dissent from so much of order as denies deduction of federal tax before imposition of state tax.

In the Matter of the Transfer Tax upon the ESTATE of Lena McMULLEN, Deceased. State Tax Commission, Appellant; Bankers' Trust Company et al., as Executors, Respondents.

(Court of Appeals of New York. May 1, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (199 App. Div. 393, 192 N. Y. Supp. 49), entered January 13, 1922, which reversed an order of the New York County Surrogate's Court assessing a transfer tax upon the estate of Lena McMullen, deceased. Decedent died a resident of the state of Connecticut, leaving a will probated in that state. At the time of her death she was the owner of 500 shares of the preferred stock of the Atlantic, Gulf & Pacific Company, a corporation organized under the laws of West Virginia, which was engaged in the business of dredging, and owned real property within this state. The 500 shares were actually physically within the state of New York when the decedent died. The right to impose the tax in question is asserted under section 220 of the Transfer Tax Law, as amended by section 1, chapter 626, of the Laws of 1919.

Schuyler C. Carlton, of New York City, for appellant.

Joseph F. McCloy, Thomas A. S. Beattie, and James J. McDermott, all of New York City, for respondents.

PER CURIAM. Order affirmed, with costs, on ground that there was no transfer of property within this state.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

PEOPLE of the State of New York, Respondent, v. Rosario TARANTOLO, Appellant.

(Court of Appeals of New York. May 1, 1923.)

Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (202 App. Div. 707, 194 N. Y. Supp. 672), entered June 9, 1922, which affirmed a judgment of the Court of Special Sessions of the City of New York convicting the defendant of having in his possession a pistol without a license therefor. The motion was made upon the ground of failure to file return.

Charles J. Dodd, Dist. Atty., of Brooklyn, for the motion.

Edward J. Reilly, of Brooklyn, opposed.

PER CURIAM. Motion granted, unless return is filed and cases served on or before May 5, 1923, in which case motion is denied, and case set down peremptorily for argument May 10, 1923.

I. TANENBAUM, SON & CO., Respondent, v. ROTHENBERG & CO., Appellant.

(Court of Appeals of New York. May 8, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (201 App. Div. 272, 194 N. Y. Supp. 315), entered May 19, 1922, which reversed an order of Special Term overruling a demurrer to a separate defense in the answer and sustained said demurrer. The action was to recover for breach of a written contract whereby defendant agreed to procure through the plaintiff as its agent fire insurance policies on certain buildings for a period of five years. The defense demurred to read as follows:

"That the contract or agreement alleged to have been made between the plaintiff and the defendant was a contract made and entered into in violation of the Insurance Law of the state of New York, and was unlawful and illegal under the laws of the state of New York, and contrary to the public policy of the state of New York."

The following question was certified:

"Is the separate and distinct defense contained in paragraph fourth of the answer herein insufficient in law upon the face thereof?"

Nathan D. Stern, of New York City, for appellant.

David Leventritt, Alexander L. Strouse, Terence J. McManus, and Mayer L. Halff, all of New York City, for respondent.

PER CURIAM. Order affirmed, with costs; question certified answered in the affirmative.

HISCOCK, C. J., and POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

HOGAN and CRANE, JJ., dissent.

CARDOZO, J., not voting.

In the Matter of the Claim of Christina YOUNGMAN, v. TOWN OF ONEONTA et al., Respondents. State Industrial Board, Appellant.

(Court of Appeals of New York. May 8, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (204 App. Div. 96, 198 N. Y. Supp. 217), entered January 10, 1923, reversing an award of the state industrial board and directing dismissal of a claim under the Workmen's Compensation Law. Claimant's intestate was superintendent of highways of the town of Oneonta. While in the performance of his duties as such he received personal injuries from which he died. The Appellate Division dismissed the claim on the ground that intestate was not the agent or servant of the town.

Carl Sherman, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for appellant.

George L. Bockes, of Oneonta, for claimant.

Edward P. Mowton, of New York City, for respondents.

PER CURIAM. Order affirmed, with costs against State Industrial Board.

HISCOCK, C. J., and CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

HOGAN and CRANE, JJ., dissent.

In the Matter of the Claim of Max WEISS v. BAKER-WEISS PACKING BOX COMPANY et al., Respondents. State Industrial Board, Appellant.

(Court of Appeals of New York. May 8, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (201 App. Div. 97, 193 N. Y. Supp. 800), entered May 3, 1922, reversing an award of the State Industrial

Board, and directing dismissal of a claim under the Workmen's Compensation Law. Claimant was secretary, treasurer, and general manager of defendant packing box company and owned about one-half of its stock. While in the performance of his duties he was injured, and seeks compensation therefor. The Appellate Division directed a dismissal of the claim upon the ground that the salary of claimant was not included in the total remuneration of employees upon which the premium of the insurance carrier was based.

Carl Sherman, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for appellant.

Barnett Cohen and Frank J. O'Neill, both of New York City, for respondents.

PER CURIAM. Order affirmed, with costs against State Industrial Board.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Claim of Rose BRISKIN, Appellant, v. Morris HYMAN et al., Respondents. State Industrial Board, Respondent.

(Court of Appeals of New York. May 8, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (203 App. Div. 275, 197 N. Y. Supp. 111), entered November 15, 1922, reversing an award of the State Industrial Board and directing dismissal of a claim made under the Workmen's Compensation Law. Claimant's decedent, the temporary or substitute manager of a garage in Brooklyn, died as the result of burns received in a fire which destroyed the garage at about 2:30 a. m. There was evidence that decedent went to the garage on the night in question to sleep there rather than take the long trip to his home in the Bronx and back again the next morning. The Appellate Division held that there was no evidence to support the finding that at the time of the accident the deceased was engaged in the regular course of his employment.

Jeremiah F. Connor, of New York City, for appellant.

Alfred W. Meldon and Joseph Force Crater, both of New York City, for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Accounting of Katherine W. SPAULDING, as Administratrix of the ESTATE of Lucy A. WEED, Deceased. Fred Spaulding, Appellant; Warren T. Weed, Respondent.

(Court of Appeals of New York. May 8, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (202 App. Div. 763, 194 N. Y. Supp. 6), entered May 9, 1922, which affirmed a decree of the Saratoga County Surrogate's Court disallowing a claim by the son-in-law of intestate for her board and care during the last three years of her life, on the ground that the evidence did not show an express contract or warrant the finding of an implied contract.

James M. Dunlavey, of Saratoga Springs, for appellant.

Edward D. Eddy, of Saratoga Springs, for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Transfer Tax upon the ESTATE of Frances A. COSSITT, Deceased. Joseph W. Taylor, as Executor of Frances A. Cossitt, Appellant; State Tax Commission, Respondent.

(Court of Appeals of New York. May 8, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (204 App. Div. 545, 198 N. Y. Supp. 560), entered March 7, 1923, which affirmed an order of the Monroe County Surrogate's Court assessing a transfer tax upon the estate of Frances A. Cossitt, deceased. The only question at issue was as to the tax upon a bond and mortgage given on the 29th day of March, 1920, by the Rochester Brass & Wire Works to decedent and Emma A. Laurin, "as joint tenants with the right of survivorship." It appeared that this mortgage was given to secure a part of the purchase price of premises on Exchange street, Rochester, which had been owned since 1897 by the mortgagees as such joint tenants. The surrogate and the Appellate Division held that under subdivision 7 of section 220 of the Tax Law, as amended in 1915 (McKinney's Consol. Laws and Supp.), this security was subject to tax upon the en-

tire amount unpaid thereon at the time of the death of said Frances A. Cossitt. The executor contended that the transfer of this bond and mortgage upon the death of one of the joint tenants was of property owned prior to the enactment of chapter 664 of the Laws of 1915, because of the fact that the real estate, upon which the mortgage was a lien, was owned jointly by the mortgagees before that date.

Clarence P. Moser and Chas. Raymond Bentley, both of Rochester, for appellant.

William T. Plumb, of Rochester, for respondent.

PER CURIAM. Order affirmed, with costs, on opinion of Sears, J., below.

HOGAN, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

HISCOCK, C. J., and McLAUGHLIN, J., dissent.

In the Matter of the Accounting of Burt JACKSON, as Executor of Frank Jackson, Deceased, Appellant. Caroline Jackson, Respondent.

(Court of Appeals of New York. May 8, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (201 App. Div. 878, 193 N. Y. Supp. 938), entered April 7, 1922, which affirmed a decree of the Orleans County Surrogate's Court settling the accounts of the executor of Frank Jackson, deceased. This appeal presented the single question: Can the surrogate, after finding that attorneys' services necessarily performed in the defense of the will and codicil were reasonably worth the sum of $2,000, reduce such charge against the estate to $800, leaving the executor to individually pay the remaining $1,200?

Irving L'Hommedieu, of Medina, for appellant.

S. Wallace Dempsey, of Niagara Falls, and Harry Cooper, of Medina, for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

PEOPLE of the State of New York, Respondent, v. ATLANTIC MUTUAL INSURANCE COMPANY, Appellant, Impleaded with Another.

(Court of Appeals of New York. May 8, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (204 App. Div. 899, 197 N. Y. Supp. 936), entered December 28, 1922, which affirmed an order of Special Term denying a motion to bring in the city of New York as a party and to stay certain condemnation proceedings. The action was brought to vacate certain grants of land under water in Richmond county for failure of defendant, appellant, to make certain improvements as required by such grants. The amended answer alleged that as a result of condemnation proceedings by the city of New York "the title to all the lands described in and affected by said condemnation proceedings, including the lands described in the complaint herein, became duly vested in the city of New York, on or about October 11, 1919." The following questions were certified:

"(1) Should the city of New York be made a party to this action?

"(2) Should the condemnation proceedings which are pending in the Supreme Court, Kings county, and which are described in the order to show cause herein of Hon. David F. Manning, dated the 4th day of December, 1922, be stayed pending the determination of the issues in this action, in so far as the said proceedings relate to or affect the lands and lands under water of the Atlantic Mutual Insurance Company described in the complaint herein and in Exhibits A, B, and C thereto annexed?

"(3) Should the city of New York be enjoined and restrained from prosecuting the trial of said condemnation proceedings pending the determination of the issues in this action, in so far as the said proceedings relate to or affect said lands and lands under water of the Atlantic Mutual Insurance Company?"

Edwin De T. Bechtel and Sidney Wetmore Davidson, both of New York City, for appellant.

George P. Nicholson, Corp. Counsel, of New York City (Charles J. Nehrbas and Henry W. Mayo, both of New York City, of counsel), for the People.

PER CURIAM. Order affirmed, with costs. Questions certified not answered, be-

cause, as we interpret them, they present questions of discretion rather than of law.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Application of the PUBLIC SERVICE COMMISSION for the FIRST DISTRICT of the State of New York, Relative to Acquiring Easements under Land at FULTON, WILLOUGHBY AND ADAMS STREETS IN THE BOROUGH OF BROOKLYN. City of New York, Appellant; Brooklyn Citizen, Respondent.

(Court of Appeals of New York. May 8, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (205 App. Div. 848, 198 N. Y. Supp. 943), entered January 12, 1923, which unanimously affirmed an order of Special Term awarding damages in condemnation proceedings to acquire an easement in perpetuity for the construction, maintenance, and operation of the Brooklyn rapid transit subway under property of the respondent herein. Appellant contended that the award was based upon an erroneous measure of damages.

George P. Nicholson, Corp. Counsel, of New York City (Charles J. Nehrbas and Edward J. Kenney, Jr., both of New York City, of counsel), for appellant.

John Woodward, of Jamestown, and Thomas F. Twyford and William Van Wyck, both of New York City, for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

U. T. HUNGERFORD BRASS & COPPER COMPANY, Respondent, v. Walker B. HINES, as Director General of the United States Railroad Administration, Appellant.

(Court of Appeals of New York. May 8, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (205 App. Div. 873, 198 N. Y. Supp. 953), entered March 2, 1923, which affirmed an order of Special Term denying a motion by defendant to vacate service of the summons as resettled by an order of said court; also appeal, by permission, from an order of said Appellate Division in the First Judicial Department, entered February 2, 1923, which affirmed an order of Special Term granting plaintiff's motion to amend said summons. Upon the first appeal the following question was certified:

"Should the service of a summons on February 28, 1922, upon Frank E. Hall, the designated agent of the New York, New Haven & Hartford Railroad Company, a foreign corporation, and authorized by James C. Davis, the Agent designated by the President, under section 206a of the Transportation Act of 1920, to accept service, in an action entitled 'U. T. Hungerford Brass & Copper Company v. Walker B. Hines, as Director General of the United States Railroad Administration, Defendant,' be vacated and set aside?"

Upon the second appeal the following question was certified:

"In an action begun by the service of a summons on February 28, 1922, the action being entitled 'U. T. Hungerford Brass & Copper Company, against Walker B. Hines, as Director General of the United States Railroad Administration, Defendant,' the summons having been served on Frank E. Hall, who was authorized by James C. Davis, the Agent designated by the President under section 206a of the Transportation Act of 1920 to accept service, should a motion made by plaintiff to amend the summons to read, 'U. T. Hungerford Brass & Copper Company, against James C. Davis, Director General of Railroads, as Agent under Section 206 of the Transportation Act of 1920, Defendant,' be granted?"

Edward R. Brumley and William L. Barnett, both of New York City, for appellant.

James H. Garmesey and Thomas L. Green, both of New York City, for respondent.

PER CURIAM. Order affirming order denying motion to vacate service of summons affirmed, with costs, and question certified answered in the negative. Order affirming order granting motion to amend summons affirmed, without costs, and question certified answered in the affirmative.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

HISCOCK, C. J., not voting.

PEOPLE of the State of New York ex rel. J. Frederic KERNOCHAN et al., as Committee of the Estate of Marie Marshall, an Incompetent Person, Appellants, v. Walter W. LAW, Jr., et al., Constituting the State Tax Commission, Respondent.

(Court of Appeals of New York. May 8, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (204 App. Div. 167, 197 N. Y. Supp. 652), entered January 19, 1923, which confirmed, on certiorari, a determination of the state tax commission refusing to allow as a deduction, in estimating the income tax of Marie Marshall, an incompetent person, a sum paid from the incompetent's income to the committee of her person as their compensation as fixed by an order of the Supreme Court.

Henry F. Miller, of New York City, for appellants.

Carl Sherman, Atty. Gen. (C. T. Dawes and Laurence Graves, both of Albany, of counsel), for respondent.

PER CURIAM. Order affirmed, without costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

PEOPLE of the State of New York ex rel. WOODHAVEN GASLIGHT COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, Respondent.

(Court of Appeals of New York. May 8, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (203 App. Div. 369, 196 N. Y. Supp. 623), entered November 17, 1922, which dismissed a writ of certiorari and confirmed the proceedings of the Public Service Commission in directing the relator to extend its gas mains and service in the Fourth ward of the borough of Queens, so as to reasonably serve with gas the residents of Locust Manor, Locust Lawn, South Jamaica Place, Springfield, and Laurelton. The Appellate Division found upon the record that there was sufficient evidence to sustain the finding that there was a necessity and a demand for the extension of the relator's service in question and that there was a duty upon the relator to supply the needs of the residents of the communities in question, if practicable, and on the review of all the evidence in the case it was shown that it was practicable for the relator to make the extension of the service in question and dismissed the writ of certiorari. On this appeal from the order dismissing said writ, the relator contended that the order of the Public Service Commission was illegal and void, in that it was contrary to the provisions of the federal and state Constitutions, which provide that the relator's property shall not be taken without due process of law.

William N. Dykman and Jackson A. Dykman, both of Brooklyn, for appellant.

Edward M. Deegan, of New York City, and Ledyard P. Hale, of Albany, for Public Service Commission, respondent.

James E. Finegan, of New York City, for Central Gas Committee, intervening.

PER CURIAM. Order affirmed with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Application of Edwards D. EMERSON et al., Constituting the Board of Education of the City of Buffalo, Appellants, v. Frank X. SCHWAB et al., Constituting the Council of the City of Buffalo, Respondents.

(Court of Appeals of New York. May 8, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (206 App. Div. 647, 198 N. Y. Supp. 911), entered March 7, 1923, which unanimously affirmed an order of Special Term denying a motion for a peremptory order of mandamus to compel the defendants to issue bonds of the city of Buffalo for the purpose of obtaining funds for the erection of certain school buildings. The basis of the application was a resolution of defendant council adopted in January, 1919, approving a resolution of the board of education recommending the purchase of sites and erection of 12 intermediate schools. The application was resisted by the respondents on the ground, first, that the time and method of issuing bonds was vested in the sound discretion of the council, and that no abuse of such discretion arose until there was a default of some kind, i. e., until the city was called upon to pay an obligation and the funds were not forthcoming; second, on the ground that the project referred to in the resolution of 1919 had been abandoned and rescinded and another building program substituted for it,

which substituted program had been carried out and the moneys intended to be devoted to the original program expended for such substituted program; third, that the resolution relied upon by the petitioners was never legally adopted.

Simon Fleischmann, of New York City, and Martin Clark, Louis E. Desbecker, and Charles B. Hill, all of Buffalo, for appellants.

Hamilton Ward, Jeremiah J. Hurley, and William S. Rann, all of Buffalo, for respondents.

PER CURIAM. Order affirmed, with costs, on ground that the resolution of January 15, 1919, was abandoned and canceled by the council with the consent and approval of the board of education.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Frank CONTI, as Administrator of the Estate of Anna Conti, Deceased, Appellant, v. OPPENHEIMER CASING CO., Inc., Respondent, Impleaded with Others.

(Court of Appeals of New York. May 8, 1923.)

Appeal from a judgment, entered June 2, 1922, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (202 App. Div. 743, 194 N. Y. Supp. 925), reversing a judgment in favor of plaintiff, entered upon a verdict and directing a dismissal of the complaint in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant. Intestate was caught between the tail of a truck which was being backed by the driver of another truck bearing the name of defendant, respondent, and a loading platform and received the injuries from which she died. The Appellate Division dismissed the complaint upon the ground that at the time of the accident the truck was owned, operated and controlled by an independent contractor.

See, also, 235 N. Y. 556, 139 N. E. 733.

George W. Smyth and Edgar R. Kraetzer, both of New York City, for appellant.

F. A. W. Ireland and R. M. McCormick, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, and McLAUGHLIN, JJ., concur.

CRANE and ANDREWS, JJ., dissent.

Edward B. LA FETRA, Respondent, v. HUDSON TRUST COMPANY, Appellant.

(Court of Appeals of New York. May 8, 1923.)

Appeal from a judgment, entered January 3, 1923, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (203 App. Div. 729, 197 N. Y. Supp. 332), reversing a judgment in favor of defendant entered upon a verdict directed by the court and directing judgment in favor of plaintiff. The action which was in conversion was brought by an attorney at law to recover 40 per cent. of certain bonds received on a sale of three tort claims which had been liquidated by the attorney for the claimant. The claimant subsequently assigned these claims to defendant as collateral for a loan and thereafter they were exchanged by claimant and defendant for the bonds. Plaintiff claimed an assignment of a 40 per cent. interest in the tort claims and, therefore, the right to recover 40 per cent. of the bonds.

Victor E. Whitlock, of New York City, for appellant.

Joseph A. Warren, James J. Walker, and John V. Downey, all of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

HISCOCK, C. J., not voting.

PEOPLE of the State of New York, Appellant, v. Rocco CARNAVALLE, Respondent.

(Court of Appeals of New York. May 8, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (202 App. Div. 156, 196 N. Y. Supp. 56), entered July 27, 1922, which reversed a judgment rendered at a Criminal Trial Term for the county of New York upon a verdict convicting the defendant of the crime of murder in the second degree, and granted a new trial.

See, also, 235 N. Y. 551, 139 N. E. 731.

Joab H. Banton, Dist. Atty. of New York City (Robert C. Taylor, of New York City, of counsel), for the People.

Lloyd Paul Stryker, of New York City, for respondent.

PER CURIAM. Order affirmed.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.
CARDOZO, J., absent.

James TIEDEMANN, Respondent, v. Maria TIEDEMANN, Defendant, and William Fisher et al., Appellants.

(Court of Appeals of New York. May 8, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (201 App. Div. 614, 194 N. Y. Supp. 782), entered June 13, 1922, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. The action was brought by the plaintiff, James Tiedemann, against his wife, the defendant Maria Tiedemann, and against William Fisher and Ruth C. Fisher, to procure a judgment directing the defendant Maria Tiedemann to reconvey to the plaintiff certain premises situated at Queens, N. Y., theretofore conveyed by the plaintiff to said defendant, and to have a certain conveyance of said premises, made by the defendant Maria Tiedemann to the defendants Fisher, declared null and void, upon the ground that plaintiff conveyed the premises to his wife to avoid the payment of a possible claim upon her oral promise to reconvey and that she in violation of said agreement had sold the premises to the defendants Fisher without his knowledge or consent.

Henry C. Frey and Elmer J. Ashmead, both of Jamaica, for appellants.
Rawdon W. Kellogg and Charles H. Street, both of Jamaica, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.
CARDOZO, J., absent.

Henry SHERMAN et al., Doing Business under the Firm Name of Sherman & Shagan, Appellants, v. Franz MERZ, Respondent.

(Court of Appeals of New York. May 8, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (202 App. Div. 736, 194 N. Y. Supp. 980), entered May 23, 1922, reversing upon the facts and the law a judgment in favor of plaintiffs entered upon a verdict and granting a new trial.

Maximilian Bader and Isadore Shapiro, both of New York City, for appellants.
James A. Davis and William G. Decker, both of New York City, for respondent.

PER CURIAM. Appeal dismissed, with costs.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.
CARDOZO, J., absent.

Evelyn C. SCOTT, Respondent, v. PRESS PUBLISHING COMPANY, Appellant.

(Court of Appeals of New York. May 8, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (203 App. Div. 894, 196 N. Y. Supp. 951), entered November 28, 1922, affirming a judgment in favor of plaintiff entered upon a verdict in an action for libel. The complaint alleged that defendant published in one of its papers an article purporting to describe an incident which took place in a Magistrate's Court of the city of New York wherein plaintiff, under her former stage name, was falsely described as living a dissipated and disreputable life. The defendant's amended answer, in addition to a general denial of the material allegations of the complaint, set forth certain affirmative defenses, to wit, that of privilege based upon a fair and substantially true report of a judicial proceeding and a partial defense in mitigation and also reduction of damages setting forth the history of the plaintiff's career, and the appropriation by the woman in the Night Court of the plaintiff's life story and the name "Evelyn Granville," which led to the publication complained of. The amended answer then alleged and set forth the subsequent publication by defendant of a retraction.

Charles B. Brophy, of New York City, for appellant.
Andrew Byrne and Mirabeau L. Towns, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.
CARDOZO, J., absent.

PEIERLS, BUHLER & CO., Inc., Appellant, v. MARKS GOLDSTEIN et al., Respondents.

(Court of Appeals of New York. May 8, 1923.)

Appeal from a judgment, entered July 22, 1922, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (202 App. Div. 471, 195 N. Y. Supp. 142), reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint. The action was brought to recover for goods sold and delivered. The answer was a general denial and set up, as affirmative defenses: First, that in April of 1921 an agreement was entered into, under which the plaintiff's assignor, the Saxonia Dress Goods Mills, agreed to sell and deliver to these defendants 20 pieces of merchandise at a specified price per yard; that, after they had delivered only 7 pieces, they, without any justification, refused to deliver the balance, and did, on July 20, 1921, notify these defendants that they did not intend to deliver, and canceled the agreement, and that thereupon the defendants offered to return the 7 pieces, which are the 7 pieces the purchase price of which the plaintiff is seeking to recover. Second, that the plaintiff's assignor agreed to take back the 7 pieces.

David Weinstein and Douglass Newman, both of New York City, for appellant.

Jacob H. Corn, of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

CARDOZO, J., absent.

INTERNATIONAL RAILWAY COMPANY, Respondent, v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Appellant.

(Court of Appeals of New York. May 8, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (202 App. Div. 784, 194 N. Y. Supp. 946), entered May 29, 1922, reversing a judgment in favor of defendant entered upon a verdict directed by the court and granting a new trial. The action was brought to recover damages sustained by the plaintiff in a collision between one of its street cars and a train owned and operated by the defendant, upon the ground that the same were caused solely by the negligence of the defendant. The defendant counterclaimed against the plaintiff to recover the damages it sustained in the collision, upon the ground that the same were caused solely by the negligence of the plaintiff. The Appellate Division held that the questions of negligence and freedom from contributory negligence of each of the parties were for the jury.

Evan Hollister, of Buffalo, for appellant.

Olin T. Nye, of Buffalo, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered against appellant on the stipulation, with costs in all courts.

HISCOCK, C. J., and HOGAN, POUND, CRANE, and ANDREWS, JJ., concur.

McLAUGHLIN, J., not sitting.

CARDOZO, J., absent.

PEOPLE of the State of New York, Respondent, v. Key P. SMITH, Appellant.

(Court of Appeals of New York. May 8, 1923.)

Appeal from a judgment of the Supreme Court, rendered November 27, 1922, at a Trial Term for the county of Kings upon a verdict convicting the defendant of the crime of murder in the first degree.

William Matthews, of New York City, for appellant.

Charles J. Dodd, Dist. Atty., of Brooklyn (Henry J. Walsh and William F. X. Geoghan, both of Brooklyn, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

CARDOZO, J., absent.

PATHÉ EXCHANGE, Inc., Appellant, v. George H. COBB et al., Constituting the Motion Picture Commission of the State of New York, Respondents.

(Court of Appeals of New York. May 8, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (202 App. Div. 450, 195 N. Y. Supp. 661), entered August 28, 1922, in

favor of defendants upon the submission of a controversy under sections 546–548 of the Civil Practice Act. The question was whether chapter 715 of the Laws of 1921, which created a commission known as the "motion picture commission," investing it with certain power and authority in the regulation of the exhibition of motion pictures, was in violation of section 8 of article 1 of the Constitution of the state of New York and of the Fourteenth Amendment to the United States Constitution, in so far as the same compelled the producers of motion picture reels commonly known as "Current Events Film" under the designation of "Pathé News," to submit such reels to the motion picture commission of the state of New York to be censored prior to the exhibition thereof in a public place of amusement. The Appellate Division held that said chapter 715 of the Laws of 1921 did not contravene the provisions of the Constitution of the United States and the Constitution of the state of New York relative to the liberty of the press.

Frederic R. Coudert, Howard Thayer Kingsbury, and P. A. Shay, all of New York City, for appellant.

Carl Sherman, Atty. Gen. (Arthur E. Rose, of Albany, of counsel), for respondents.

PER CURIAM. Judgment affirmed, without costs.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

CARDOZO, J., absent.

Jerome F. COX, an Infant, by Martin B. COX, His Guardian ad Litem, Appellant, v. ROBINS DRY DOCK & REPAIR COMPANY, Respondent.

(Court of Appeals of New York. May 8, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (202 App. Div. 818, 194 N. Y. Supp. 926), entered July 11, 1922, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. Plaintiff was at work in the floating dry dock of the defendant, and his principal duties were to "pass" heated rivets from the "heater boy" to the "holder on"; that is, from the person who heated the rivets red hot in a small forge, to the person who placed them through the rivet holes in the plates of the ship, and held them while the riveter riveted them fast. A part of his duties was to procure coal for the heater. While doing this he was struck by a flying piece of metal occasioning the loss of his left eye. The complaint was dismissed on the grounds that the injury arose from a risk of the employment, which plaintiff had assumed, and that there was no failure to furnish a safe place to work or safe appliances.

Jay S. Jones, Edward J. Fanning, and Ralph G. Barclay, all of Brooklyn, for appellant.

Thomas J. Brennan, of Brooklyn, and A. G. Maul, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

CARDOZO, J., absent.

COUNTY OF ST. LAWRENCE, Appellant, v. STATE of New York, Respondent.

(Court of Appeals of New York. May 8, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (199 App. Div. 944, 191 N. Y. Supp. 951), entered November 25, 1921, unanimously affirming a judgment of the Court of Claims refusing to claimant interest upon the amount of its claims from the date of its filing to the date of judgment. The claim herein was for the refunding to the county of St. Lawrence of taxes paid by the town of Hammond from the year 1872 to the date of the filing of the claim, and by the town of Morristown from the year 1875 to the date of the filing of the claim, upon assessments therein of the real and personal property of the Black River & Morristown Railroad Company. The state contended that the statute under which the claim was filed (Laws 1904, c. 163) provided that awards should be "without interest."

Ledyard P. Hale, of Elmira, and Charles M. Hall, of New York City, for appellant.

Charles D. Newton, Atty. Gen., and W. J.

Wetherbee and Carey D. Davie, both of Albany, for the State.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, POUND, CRANE, and ANDREWS, JJ., concur.
McLAUGHLIN, J., dissents.
CARDOZO, J., absent.

Elizabeth A. REILLY, Appellant, v. WATERSON, BERLIN & SNYDER COMPANY, Respondent.

(Court of Appeals of New York. May 8, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 235 N. Y. 580, 139 N. E. 742.

George DASHNAU, Respondent, v. CITY OF OSWEGO, Appellant.

(Court of Appeals of New York. May 8, 1923.)

Motion to dismiss an appeal from a judgment, entered January 23, 1923, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (204 App. Div. 189, 198 N. Y. Supp. 226), which unanimously reversed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and granting a new trial and directed reinstatement of said verdict. The motion was made upon the ground that permission to appeal had not been obtained, that no constitutional question was involved, and that appellant had failed to stipulate for judgment absolute in case of affirmance.

Francis D. Culkin, of Oswego, for appellant.

D. P. Morehouse, Jr., of Oswego, for respondent.

PER CURIAM. Motion granted, and appeal dismissed, with costs and $10 costs of motion.

Tripo KRSTOVIC, Respondent, v. Charles H. VAN BUREN et al., Copartners under the Firm Name of C. H. Van Buren & Company, Appellants.

(Court of Appeals of New York. May 8, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 235 N. Y. 96, 138 N. E. 749.

William N. CARY et al., Appellants, v. HOME INSURANCE COMPANY, Respondent.

(Court of Appeals of New York. May 8, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 235 N. Y. 296, 139 N. E. 274.

ENO et al. v. KLEIN.

(Court of Appeals of New York. May 11, 1923.)

Appeal and error ⟸1175(6)—Appellate Division without power to dismiss complaint when motion to dismiss or direct verdict not made.

Where defendant made no motion at close of the case for dismissal of complaint or direction of verdict, he conceded that there was evidence justifying submission to the jury, and Appellate Division, under Civil Practice Act, § 584, had no power to dismiss the complaint upon reversal.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Alfred J. Eno and another against Joseph M. Klein. From a judgment of the Appellate Division (204 App. Div. 840, 197 N. Y. Supp. 910) reversing a judgment for plaintiffs and dismissing the complaint, plaintiffs appeal. Modified.

Appeal from a judgment, entered November 27, 1922, upon an order of the Appellate Division of the Supreme Court in the second judicial department reversing a judgment in favor of plaintiffs entered upon a verdict and directing a dismissal of the complaint.

The action was brought to recover broker's commissions alleged to have been earned by the plaintiffs in connection with the procurement for the defendant of a lease of certain premises on Fulton street, Jamaica, known as the Mansion House property.

Charles H. Street, of Huntington, for appellants.

H. H. Nordlinger and Samuel H. Hofstadter, both of New York City, for respondent.

PER CURIAM. The judgment of the Appellate Division reversing on the law and the facts the judgment of the trial court and dismissing the complaint is modified by granting a new trial. No motion having been made at the close of the case by the defendant for a dismissal of the complaint or for a direction of a verdict, it constituted in this case a concession or admission upon his part that there was evidence which justified a submission of the case to the jury.

The Appellate Division therefore had no power to dismiss the complaint. Civil Prac

tice Act, § 584; Murtha v. Ridley, 232 N. Y. 488, 134 N. E. 542.

Section 457 of the Civil Practice Act, for the same reason, is not in question.

The judgment appealed from should be modified so as to order a new trial instead of dismissing complaint, with costs to appellant to abide event.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur.

ANDREWS, J., absent.

Judgment accordingly.

Charles L. ALLERS, Respondent, v. Olga S. ALLERS, Appellant.

(Court of Appeals of New York. May 11, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (200 App. Div. 838, 839, 191 N. Y. Supp. 913, 914), entered December 16, 1921, modifying, and affirming, as modified, a judgment in favor of defendant entered upon a decision of the court on trial at Special Term in an action for a separation by reducing the amount of alimony allowed to appellant therein; also appeal from an order of said Appellate Division, entered December 16, 1921, which reversed an order of Special Term granting a motion by defendant, appellant, for an allowance for counsel fees and denied said motion.

See, also, 236 N. Y. 54, 139 N. E. 777.

Warren Leslie, Harry W. Alden, and Charles F. Bliss, all of New York City, for appellant.

Jesse Fuller, Jr., of Brooklyn, and Leo R. Brilles, of New York City, for respondent.

PER CURIAM. Appeal from judgment modifying amount allowed as alimony affirmed, without costs. Appeal from order reversing order allowing counsel fees and denying motion for such fees dismissed, without costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Sarah A. HOPKINS, Appellant, v. Charles H. HOPKINS et al., Respondents.

(Court of Appeals of New York. May 11, 1923.)

Appeal from a judgment, entered September 14, 1922, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (202 App. Div. 606, 195 N. Y. Supp. 605), reversing a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury and directing a dismissal of the complaint. In October 27, 1899, Benjamin W. Hopkins and his wife adopted the plaintiff. In 1910 Benjamin W. Hopkins died intestate, leaving no descendants other than the adopted daughter. On March 4, 1920, Harrison L. Hopkins, a brother of Benjamin W. Hopkins, died intestate, leaving him surviving a brother and a sister, his only blood relatives, heirs at law and next of kin. The adopted daughter of Benjamin brought this action to partition certain lands in which the said Harrison had an undivided one-fourth interest at the time of his death, claiming she was an heir of Harrison. The trial court so held and directed judgment accordingly. The Appellate Division reversed the decision of the trial court and dismissed the complaint.

James O. Sebring, of Corning, for appellant.

John Colmey, of Canandaigua, and Hosmer H. Thompson, of Lima, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

CARDOZO, J., absent.

Blanche WILLETT, Respondent, v. UNITED STATES RUBBER COMPANY, Appellant.

(Court of Appeals of New York. May 11, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 875, 197 N. Y. Supp. 957), entered December 30, 1922, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. The complaint alleged that on March 24, 1919, defendant was engaged in laying rubber treads upon certain stairways in premises known as No. 229 West Forty-Sixth street, in the borough of Manhattan, city of New York; that defendant negligently permitted paste, grease and rubbish to be and remain upon said stairways; that plaintiff, who was employed as a housekeeper in said building, in proceeding from the first floor to the ground floor, without fault on her

part, was precipitated down said stairway by reason of said alleged negligence of defendant; and that plaintiff thereby sustained the injuries complained of. Defendant answered, denying the material allegations of the complaint, and alleging that plaintiff's injuries were the result of her contributory negligence.

Adolph Ruger and Kennedy M. Thompson, both of Brooklyn, for appellant.

William B. Shelton and David Batt, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HISCOCK, C. J., absent.

Harris R. CHILDS et al., Copartners under the Firm Name of Childs, Parr & Joseph, Respondents, v. C. E. RILEY COMPANY, Appellant.

(Court of Appeals of New York. May 11, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (203 App. Div. 895, 197 N. Y. Supp. 903), entered November 29, 1922, affirming a judgment in favor of plaintiffs entered upon a verdict. The action was to recover for breach of two alleged contracts for the sale of cotton sheetings. The answer was a general denial and set up as a separate defense the statute of frauds.

Frederick N. Van Zandt and Richard H. McIntyre, both of New York City, for appellant.

James Allison Kelly and William Henry Corbitt, both of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HOGAN CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HISCOCK, C. J., absent.

Edna D. JOHNSON, Respondent, v. SUPREME COUNCIL, CATHOLIC BENEVOLENT LEGION, Appellant.

(Court of Appeals of New York. May 11, 1923.)

Appeal by permission, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (204 App. Div. 841, 197 N. Y. Supp. 922), entered November 23, 1922, in favor of plaintiff upon the submission of a controversy under section 546 of the Civil Practice Act. The action was brought by a beneficiary to recover the face amount of a benefit certificate in a fraternal assessment society. The liability of the defendant was conceded, the point in issue being as to the amount of benefit payable upon the certificate in suit. The defendant contended that by reason of amendments to the by-laws, adopted subsequent to the time that the contract was entered into, the amount payable upon the certificate was only $622.47. The difference between $1,000, the face of the certificate, and $622.47 or $377.53, being the amount of a reserve deficiency lien which defendant claimed was chargeable against the certificate.

Harry J. Frey and Edward J. Connolly, both of Brooklyn, for appellant.

Frank E. Johnson, of Brooklyn, for respondent.

Joseph K. Ellenbogen, of Brooklyn, for Lawrence Everett et al., certificate holders, intervening.

Hervey J. Drake, of Buffalo, for superintendent of insurance.

PER CURIAM. Judgment reversed, and judgment granted, dismissing plaintiff's claim, without costs, on authority of Everett v. Supreme Council C. B. L. 236 N. Y. 62, 139 N. E. 780.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HISCOCK, C. J., absent.

Edward LA GOY, as Administrator of the Estate of Nelson La Goy, Deceased, Appellant, v. DIRECTOR GENERAL OF RAILROADS, Respondent.

(Court of Appeals of New York. May 11, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (204 App. Div. 849, 196 N. Y. Supp. 935), entered November 24, 1922, affirming a judgment in favor of defendant entered upon an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and directing a dismissal of the complaint in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant. The death of the plaintiff's in-

testate resulted from a collision between an automobile in which he was riding, and one of the defendant's trains, at a private crossing. This is the second action brought by the plaintiff against the defendant. The first action resulted in a nonsuit by the Trial Term, which nonsuit was reversed by the Appellate Division. The defendant then took an appeal to the Court of Appeals, and the Court of Appeals reversed the Appellate Division, and sustained the trial court, holding that the plaintiff's intestate was guilty of contributory negligence as a matter of law, and dismissed the complaint. La Goy v. Director General, 231 N. Y. 191, 131 N. E. 886.

John E. Judge, of Plattsburgh, for appellant.

John M. Cantwell, of Malone, and E. W. Lawrence, of Rutland, Vt., for respondent.

PER CURIAM. Judgment affirmed, with costs.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HISCOCK, C. J., absent.

Anna BARRY, as Administratrix of the Estate of William J. Barry, Deceased, Appellant, v. RUTLAND RAILROAD COMPANY, Respondent.

(Court of Appeals of New York. May 11, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (203 App. Div. 287, 197 N. Y. Supp. 432), entered November 24, 1922, affirming a judgment in favor of defendant entered upon an order of the Trial Term setting aside a verdict in favor of plaintiff and directing a dismissal of the complaint in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant. On the morning of July 8, 1921, at about 8:45 a. m., intestate was proceeding westerly along a highway which ran parallel with the Rutland Railroad, and about 66 feet southerly therefrom, for a distance of upwards of a quarter of a mile. He was riding on the seat of an open milk wagon drawn by a horse which he was driving; 44½ feet southerly from the crossing upon which the accident occurred, the road upon which he was traveling runs into another road running from the south to the north and over the crossing. At this corner he turned to the right and proceeded toward the crossing, where the wagon was struck by one of defendant's trains and intestate was killed. The complaint was dismissed on the ground that plaintiff was guilty of contributory negligence as matter of law.

John E. Judge, of Plattsburgh, for appellant.

John M. Cantwell, of Malone, and E. W. Lawrence, of Rutland, Vt., for respondent.

PER CURIAM. Judgment affirmed, with costs.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HISCOCK, C. J., absent.

FRANK McWILLIAMS, Inc., Appellant, v. ÆTNA INSURANCE COMPANY, Respondent.

(Court of Appeals of New York. May 11, 1923.)

Appeal from a judgment, entered January 17, 1923, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (202 App. Div. 845, 194 N. Y. Supp. 935), reversing a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term, a jury having been waived, and directing a dismissal of the complaint. The action was to recover upon a policy of marine insurance covering plaintiff's dry dock and which insured it against "perils of the harbors, bays, sounds, seas, rivers and other waters," excepting claims arising from "derangement or breakage of machinery, unless caused by stress of weather, stranding, collision or burning." While the policy was in force the dry dock sunk owing to a failure of electric power used to operate its pumps caused by an accident at the power plant on land a mile away, and the question litigated was whether the damage occasioned by such sinking was covered by the policy. The Appellate Division held that "the policy issued by defendant to plaintiff did not insure plaintiff against damage due to such sinking."

See, also, McWilliams v. American Ins. Co., 236 N. Y. 551, 142 N. E. 280.

Pierre M. Brown, of New York City, for appellant.

George S. Brengle and D. Roger Englar, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HISCOCK, C. J., absent.

FRANK McWILLIAMS, Inc., Appellant, v. AMERICAN INSURANCE COMPANY, Respondent.

(Court of Appeals of New York. May 11, 1923.)

Appeal from a judgment, entered December 6, 1922, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (202 App. Div. 846, 194 N. Y. Supp. 935), reversing a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term, a jury having been waived, and directing a dismissal of the complaint. The action was to recover upon a policy of marine insurance covering plaintiff's dry dock and insuring it against "perils of the harbors, bays, sounds, seas, rivers and other waters," excepting claims arising from "derangement or breakage of machinery, unless caused by stress of weather, stranding, collision or burning." While the policy was in force the dry dock sunk owing to a failure of electric power used to operate its pumps caused by an accident at the power plant on land a mile away, and the question at issue was whether the damage occasioned by such sinking was covered by the policy. The Appellate Division held that the damage was wholly caused by derangement or breakage of machinery, to wit, the derangement of the apparatus, machinery, facilities, etc., supplying the power machinery to raise and lower the dry dock, that such derangement or breakage of machinery was not caused by stress of weather, stranding, collision or burning, and that the damage was exclusively due to a cause expressly excepted from the policy by the terms thereof.

See, also, McWilliams v. Ætna Ins. Co., 236 N. Y. 550, 142 N. E. 279.

Pierre M. Brown, of New York City, for appellant.

George V. A. McCloskey and William J. Martin, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HISCOCK, C. J., absent.

Emerson P. JENNINGS, Respondent, v. PRESIDENT & DIRECTORS OF THE MANHATTAN COMPANY, Appellant.

(Court of Appeals of New York. May 11, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (203 App. Div. 802, 197 N. Y. Supp. 401), entered December 22, 1922, unanimously affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury. This action was brought to recover the sum of $5,000 on a check drawn by Brown Bros. & Co. on the National Bank of Commerce in New York in favor of the plaintiff, Emerson P. Jennings, the proceeds of which defendant collected and has failed and refused to pay to the plaintiff, the payee thereof. Plaintiff claimed that his indorsement on the check was forged prior to its being deposited with the defendant bank for collection. The main question was whether a power of attorney from the plaintiff Jennings to one Wright was sufficiently broad to authorize Wright to indorse the check of Brown Bros. & Co. with Jennings' name, so that the indorsement of said check would operate in law upon its delivery as a transfer of plaintiff's title to the proceeds thereof to the holder, the defendant bank.

Frederick C. Tanner and M. E. Kinnan, both of New York City, for appellant.

George E. Polhemus and Charles Pope Caldwell, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HISCOCK, C. J., absent.

EDWARD J. MOBERG COMPANY, Inc., Respondent, v. Charles MOHR, Jr., Appellant. RABLO CONSTRUCTION COMPANY, Inc., Respondent, v. Charles MARCK et al., Appellants. POTTER AVENUE REALTY CORPORATION, Respondent, v. Benjamin BURG, Appellant.

(Court of Appeals of New York. May 11, 1923.)

Appeal, in each of the above-entitled actions, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 710, 199 N. Y. Supp. 382), entered April 7, 1923, in favor of plaintiff upon the submission of a controversy under section 546 of the Civil Practice Act. The judgment in each case directed specific performance of a contract for the purchase of real property and adjudged that chapter 949 of the Laws of 1920 and chapter 444 of the Laws of 1921, exempting from taxation for 10 years the buildings on said premises, were constitutional and valid.

James F. Donnelly and John Kadel, both of New York City, for Charles Mohr, Jr., appellant.

Max Steinart, of New York City, for Charles Marck et al., appellants.

George P. Nicholson, Corp. Counsel, of New York City (William H. King and Isaac Phillips, both of New York City, of counsel), for City of New York.

Louis Marshall, Samuel Untermyer, and Charles C. Lockwood, all of New York City, for respondents.

PER CURIAM. Judgments affirmed, without costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur.

ANDREWS, J., absent.

HERMITAGE COMPANY, Appellant, v. Henry M. GOLDFOGLE et al., as Commissioners of Taxes and Assessments of the City of New York, Respondents.

(Court of Appeals of New York. May 11, 1923.)

Appeal from a judgment, entered April 6, 1923, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 710, 199 N. Y. Supp. 382), reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directing judgment in favor of defendants. The action was brought to restrain the defendants from exempting from assessment for purposes of taxation new buildings planned exclusively for dwelling purposes in the city of New York on the ground that the statutes authorizing such exemption (Laws 1920, c. 949, amended by Laws 1921, c. 444, and Laws 1922, c. 281) and the ordinances adopted by the city of New York thereunder were unconstitutional and invalid.

John Brooks Leavitt, of New York City, for appellant.

Henry M. Powell, of New York City, for R. S. S. Co., intervening.

Carl Sherman, Atty. Gen., and George P. Nicholson, Corp. Counsel, of New York City (Edward G. Griffin, of Albany, and William H. King and Isaac Phillips, both of New York City, of counsel), for respondents.

PER CURIAM. Judgment affirmed, without costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur.

ANDREWS, J., absent.

A. C. WICKE MANUFACTURING COMPANY v. Charles DINKEL et al., Appellants, Impleaded with Others.

(Court of Appeals of New York. May 11, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 235 N. Y. 612, 139 N. E. 756.

Louis H. SOULE, Appellant, v. BON AMI COMPANY, Respondent.

(Court of Appeals of New York. May 11, 1923.)

PER CURIAM. Motion for reargument and to amend remittitur denied, with $10 costs and necessary printing disbursements. See 235 N. Y. 609, 139 N. E. 754.

Francis R. STODDARD, Jr., as Superintendent of Insurance of the State of New York, Appellant, v. UNITED STATES FIDELITY & GUARANTY COMPANY, Respondent. Francis R. STODDARD, Jr., as Superintendent of Insurance of the State of New York, Appellant, v. MARYLAND CASUALTY COMPANY, Respondent.

(Court of Appeals of New York. May 11, 1923.)

See, also, 206 App. Div. 786, 200 N. Y. Supp. 951.

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements in one case, and printing disbursements only in the other. See 234 N. Y. 618, 619, 138 N. E. 470.

LUECHINGER v. EICHHAMMER et al.

(Court of Appeals of New York. May 29, 1923.)

Appeal and error ⇐237(4, 5)—Want of evidence to establish plaintiff's case must be raised at trial.

Where neither of two defendants, at the close of the evidence, moved for a dismissal of the complaint or the direction of a verdict, they conceded that there was evidence which justified a submission of the case to the jury, and the appellate division was therefore powerless, on appeal by one defendant, to reverse the judgment upon the law and hold as a matter of law that there was no evidence to establish plaintiff's cause of action.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Urban Luechinger, an infant, by his guardian ad litem, against Otto Eichhammer and another. Judgment for the plaintiff against both defendants was reversed as matter of law in the Appellate Division, on appeal by the named defendant only, and the complaint dismissed (202 App. Div. 845, 194 N. Y. Supp. 953), and plaintiff appeals. Judgment of the Appellate Division reversed, and that of the Trial Term affirmed.

Appeal from a judgment, entered January 16, 1923, upon an order of the Appellate Division of the Supreme Court in the second judicial department, reversing a judgment in favor of plaintiff, entered upon a verdict and directing a dismissal of the complaint in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendants. It was alleged that the infant plaintiff in response to a direction by the driver of a mowing machine, in defendants' employ, stepped in front of the knives and struck the horse. Both horses started up, and the blade of the machine was brought into contact with the infant's foot, severely cutting and injuring it.

Ralph G. Barclay and William V. Burke, both of Brooklyn, for appellant.

Albert A. Arnold, of Lindenhurst, for respondent.

PER CURIAM. This action was brought to recover damages for personal injuries. Defendants appeared separately. At Trial Term plaintiff recovered a verdict against both defendants. The defendant Reuther did not appeal therefrom. Defendant Eichhammer appealed to the Appellate Division, and that court reversed the judgment of the trial court as matter of law, and dismissed the complaint. Upon the trial at the close of the evidence, counsel for both defendants omitted to move for a dismissal of the complaint or a direction of a verdict, thereby conceding that there was evidence which justified a submission of the case to the jury. The Appellate Division was therefore powerless to reverse the judgment upon the law and hold as matter of law that there was no evidence in the case to establish plaintiff's cause of action. Murtha v. Ridley, 232 N. Y. 488, 134 N. E. 542; Caldwell v. Nicolson, 235 N. Y. 209, 139 N. E. 243; Eno v. Klein, 236 N. Y. 543, 142 N. E. 276. The record is barren of any meritorious exceptions taken to the admission of evidence on the trial.

The judgment of the Appellate Division should be reversed and the judgment of the trial term affirmed, with costs to appellant in this court and the Appellate Division.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Judgment accordingly.

CITY OF NEW YORK, Appellant, v. INTERBOROUGH RAPID TRANSIT COMPANY et al., Respondents.

(Court of Appeals of New York. May 29, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (205 App. Div. 842, 197 N. Y. Supp. 903), entered February 19, 1923, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. The action was in equity to procure a decree setting aside a determination of the chief engineer of the Public Service Commission approving certain expenditures made by the defendant toward the cost of subway construction under contract No. 3, dated March 19, 1913, upon the ground that the engineer improperly and erroneously allowed certain items.

George P. Nicholson, Corp. Counsel, of New York City (John F. O'Brien and Josiah A. Stover, both of New York City, of counsel), for appellant.

Delancey Nicoll, J. Tufton Mason, and James L. Quackenbush, all of New York City, for respondent Interborough Rapid Transit Co.

George H. Stover and George O. Redington, both of New York City, for respondent Robert Ridgway, as chief engineer.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur.
HOGAN, J., dissents.
ANDREW, J., absent.

PEOPLE of the State of New York, Respondent, v. AMERICAN COTTON EXCHANGE, Appellant, Impleaded with Others.

(Court of Appeals of New York. May 29, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 870, 197 N. Y. Supp. 936), entered July 24, 1922, which affirmed a judgment of the New York County Criminal Trial Term rendered upon a verdict convicting the defendant, appellant, of the crime of maintaining a "bucket shop" in violation of section 390 (as amended by Laws 1913, c. 236, § 1) and section 394 of the Penal Law.

Albert Massey, of New York City, for appellant.
Joab H. Banton, Dist. Atty., of New York City (John Caldwell Myers and Hugo Wintner, both of New York City, of counsel), for the People.

PER CURIAM. Judgment affirmed, under provision of section 542 of Code of Criminal Procedure.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur.
ANDREWS, J., absent.

MANHATTAN BRIDGE THREE-CENT LINE, Appellant, v. CITY OF NEW YORK, Respondent.

(Court of Appeals of New York. May 29, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (204 App. Div. 89, 198 N. Y. Supp. 49), entered January 30, 1923, modifying, and affirming, as modified, a declaratory judgment entered upon a decision of the court at Special Term construing a contract and declaring the rights of the parties thereunder, pursuant to section 473 of the Civil Practice Act. By contract dated July 10, 1912, the board of estimate and apportionment of the city of New York granted a franchise to the plaintiff company to construct, maintain and operate a street railroad in and through certain streets of the city and over the Manhattan bridge. The term of the franchise was limited and fixed to 10 years with a privilege of renewal for an additional 15 years upon the application of the company, upon a fair revaluation of the franchise. The original term being due to expire plaintiff made application for a renewal. The complaint alleged that the plaintiff had performed all the terms and conditions of the contract on its part to be performed, but that the defendant had failed to authorize the signing of either the proposed new contract or to appoint an appraiser.

Almet Reed Latson, of New York City, for appellant.
George P. Nicholson, Corp. Counsel, of New York City (Joseph A. Devery and Alexander I. Hahn, both of New York City, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur.
ANDREWS, J., absent.

CHEMICAL NATIONAL BANK OF NEW YORK, Respondent, v. NEW YORK DOCK COMPANY, Appellant.

(Court of Appeals of New York. May 29, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (203 App. Div. 108, 196 N. Y. Supp. 414), entered November 17, 1922, in favor of plaintiff upon the submission of a controversy under section 546 of the Civil Practice Act. Plaintiff, at the request of the Republic Trading Company, doing business in New York, issued its letters of credit in favor of a Canadian firm enabling it to draw a sight draft upon plaintiff for the invoice value of merchandise shipped to the trading company. The bank paid the draft and received an assignment of the shipping documents evidencing title to the merchandise. The trading company became bankrupt and paid nothing on account of the transaction. The bank in the meantime had intrusted the merchandise to the trading company for the purpose of storage and sale and the latter stored it with defendant with-

out disclosing plaintiff's ownership and received from defendant its non-negotiable warehouse receipt which it afterwards indorsed and turned over to plaintiff with an order for the goods. Plaintiff tendered the same to defendant with the amount of its charges in respect of the merchandise and demanded delivery thereof which was refused upon the ground that defendant claimed a lien thereon for an indebtedness owing to it by the trading company for warehouseman's charges in respect to other goods previously stored and withdrawn by said company.

Martin A. Schenck and Charles E. Hotchkiss, both of New York City, for appellant.

George L. Kobbe, of New York City, for respondent.

PER CURIAM. Judgment affirmed, without costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur.

ANDREWS, J., absent.

Barnett KEYSER, Respondent, v. Nathan J. MILLER et al., Appellants.

(Court of Appeals of New York. May 29, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 868, 197 N. Y. Supp. 923), entered December 20, 1922, affirming a judgment in favor of plaintiff entered upon a verdict. Plaintiff alleged that he subscribed for shares of stock in a certain corporation which defendants were marketing; that thereafter defendants in writing allotted to the plaintiff upon his subscription 100 shares of said stock at $12.50 per share; that the plaintiff agreed to said allotment, and delivered to the defendants as margin certain securities, which margin was received and accepted by defendants as satisfactory; that thereafter the defendants wrongfully canceled plaintiff's allotment and refused to deliver to him the stock purchased by him as aforesaid. For the damage occasioned by the alleged breach of contract this action was brought.

Mark G. Holstein and Jacob Schnebel, both of New York City, and Mark Jacobs, of Syracuse, for appellants.

Abraham P. Wilkes and Irving Katz, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur.

ANDREWS, J., absent.

ANNETTA GARMENT COMPANY, Respondent, v. KURLANDER BROS. & HARFIELD CLOAK AND SUIT COMPANY, Appellant.

(Court of Appeals of New York. May 29, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (202 App. Div. 804, 194 N. Y. Supp. 914), entered June 30, 1922, which affirmed a determination of the Appellate Term, affirming a judgment of the Municipal Court of the City of New York in favor of plaintiff. The amended complaint alleged that the plaintiff sold and delivered to the defendant certain goods, wares, and merchandise at the agreed price of $1,487.50, that about August 1, 1918, without consent of the plaintiff the defendant returned said merchandise, and that thereafter the plaintiff sold said merchandise for $1,000, sustaining a loss in the sum of $487.50. The answer of the defendant alleged that on or about May 8, 1918, an agreement was entered into, wherein the plaintiff was to manufacture and deliver certain ladies' garments, pursuant to certain fixed specifications and at a price certain. The plaintiff made up some garments, which upon their receipt and examination by the defendant were found not to be according to the specifications laid down, and when this fact was called to the attention of the plaintiff a subsequent agreement was entered into between the parties to return said merchandise to the plaintiff and this the defendant did. As a second defense, defendant alleged that the goods attempted to be delivered were not according to the specifications as set down, and that upon their examination they were found to be different from the agreement and specifications, and that the defendant immediately returned the same to the plaintiff.

Louis Sachs, of New York City, for appellant.

James S. Friedman, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur.

ANDREWS, J., absent.

HARWAY IMPROVEMENT COMPANY, Appellant and Respondent, v. Hugh R. PARTRIDGE, Defendant, and City of New York, Respondent and Appellant.

(Court of Appeals of New York. May 29, 1923.)

Cross-appeals, by permission, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (203 App. Div. 174, 197 N. Y. Supp. 166), entered January 4, 1923, modifying, and affirming, as modified, an interlocutory judgment entered upon a decision of the court on trial at Special Term. The action was brought to partition certain lands bordering Gravesend Bay in the city of Brooklyn. The Appellate Division held that the plaintiff and defendant Partridge owned the upland, that the land under water was owned by the city of New York, and that the act of the plaintiff in filling in the land under water did not affect its riparian rights. The following questions were certified:

"(1) Is the title to the land formerly under water, which was filled in by the plaintiff, vested in the city of New York?

"(2) Is the title to the upland described in the complaint vested in the plaintiff and in defendant Partridge?

"(3) Did the plaintiff by filling in the land under water in front of the upland described in the complaint lose its riparian rights?"

William N. Dykman, James R. Deering, and James J. Dunn, all of New York City, for plaintiff, appellant and respondent.

George P. Nicholson, Corp. Counsel, of New York City (Charles J. Nehrbas and John J. Mead, both of New York City, of counsel), for defendant, respondent and appellant.

PER CURIAM. Judgment affirmed, without costs. First and second questions certified answered in the affirmative; third question in the negative.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, and McLAUGHLIN, JJ., concur.
CRANE, J., not voting.
ANDREWS, J., absent.

MERCHANTS' NATIONAL BANK OF WORCESTER, MASS., Appellant, v. George B. LONG et al., Defendants, City of Buffalo et al., Respondents, and London Guarantee & Accident Company, Limited, Appellant.

(Court of Appeals of New York. May 29, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (204 App. Div. 856, 197 N. Y. Supp. 930), entered November 27, 1922, unanimously affirming a judgment in favor of defendants, respondents, entered upon a decision of the court on trial at Special Term. The action was brought to determine the validity and priority of various claims made by the different parties to moneys of the city of Buffalo applicable to the payment of the contract price for the construction of the public improvement known as the city hospital. Plaintiff claimed the moneys by assignment from the contractor, defendant Long. The defendant city of Buffalo answered that it had paid the moneys to the defendant United States Fidelity & Guaranty Company. The defendant United States Fidelity & Guaranty Company answered that it was surety on the contract bond of Long, that it held his assignment of the contract moneys, that upon his default it completed his contract, and paid out in so doing and on claims of persons who had furnished him materials, and for which claims it was liable under its bond, moneys in excess of those received from the city. The defendant London Guarantee & Accident Company claimed part of the moneys by virtue of a warrant of attachment against Long. The trial court awarded the entire fund to the defendant United States Fidelity & Guaranty Company.

Thomas C. Burke, of Buffalo, for plaintiff appellant.

George H. Kennedy, of Buffalo, for defendant appellant.

George P. Keating, of Buffalo, for respondent United States Fidelity & Guaranty Company.

William S. Rann, Corp. Counsel, of Buffalo, for respondent city of Buffalo.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur.
ANDREWS, J., absent.

Herbert S. JANES, Appellant, v. LAUREL RIVER LOGGING COMPANY, Respondent.

(Court of Appeals of New York. May 29, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (204 App. Div. 889, 197

N. Y. Supp. 921), entered December 20, 1922, reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial. The action was to recover commissions for obtaining a purchaser for certain standing timber belonging to defendant under a contract whereby he was to receive as such commission "3½ per cent. of the gross selling price." The contract of sale fixed the selling price per 1,000 feet of each of the various kinds and qualities to be paid for by the purchaser as and when cut over a period of years. Plaintiff was permitted to introduce testimony estimating the amount of timber on the property and on the evidence the jury returned a verdict in his favor. The Appellate Division reversed the judgment entered thereon upon the ground:

"That the contract is definite on its face and that the evidence offered is not admissible to alter or change the effect thereof; that plaintiff was to be paid a commission on the gross selling price of the timber, but in place thereof he has recovered judgment based upon an estimate made by some other person upon the amount of timber on the property."

William H. Janes and D. Theodore Kelly, both of New York City, for appellant.

Cornelius C. Webster, Paul Bonynge, and Werner Ilsen, all of New York City, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered against appellant on the stipulation, with costs in all courts.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur.

ANDREWS, J., absent.

William H. BALDWIN et al., Copartners under the Firm Name of Woodward, Baldwin & Company, Respondents, v. CARAVEL COMPANY, Inc., Appellant.

(Court of Appeals of New York. May 29, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (202 App. Div. 743, 194 N. Y. Supp. 915), entered June 2, 1922, unanimously affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court. The action was to recover for goods alleged to have been sold and delivered. The defense was rescission on the ground that the shipment was not made as required by the contract and that the merchandise was not in accordance with the specifications. The trial court held that delivery had been made, that the right of inspection had been waived and that defendant had lost the right to rescind.

Oswald N. Jacoby and Albert T. Scharps, both of New York City, for appellant.

Joseph Rowan, of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, and CRANE, JJ., concur.

CARDOZO, J., not voting.

ANDREWS, J., absent.

Nellie E. L. KEZER, Respondent, v. Myra SEELY et al., Appellants.

(Court of Appeals of New York. May 29, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (198 App. Div. 979, 190 N. Y. Supp. 934), entered December 2, 1921, unanimously affirming a judgment in favor of plaintiff entered upon the report of a referee. The action was to compel specific performance of an alleged oral contract between plaintiff and one Zina Sledge, deceased, whereby the said decedent promised to leave to plaintiff all of her property in consideration of plaintiff's agreement to live with the decedent as companion and attendant until her death. The complaint alleged performance on the part of plaintiff and demanded judgment that defendants execute and deliver to her a conveyance of their rights in real property left by said decedent. The answer denies the existence of the contract and the performance thereof, and as a separate defense averred that said contract or agreement was not in writing and, therefore, void under the statute of frauds.

Mortimer L. Sullivan, of Elmira, for appellants.

Benjamin F. Levy, of Elmira, for respondent.

PER CURIAM. Judgment reversed, and complaint dismissed, with costs in all courts, on authority of Burns v. McCormick, 233 N. Y. 230, 135 N. E. 273.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur.

ANDREWS, J., absent.

Norman J. ROSE, Appellant, v. PENNSYLVANIA RAILROAD COMPANY, Respondent.

(Court of Appeals of New York. May 29, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (199 App. Div. 949, 191 N. Y. Supp. 950), entered November 16, 1921, unanimously affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. The action was commenced by the plaintiff to recover for the alleged negligent destruction of certain buildings, trees and personal property as a result of a fire set by the defendant. Plaintiff's farm is bounded on the west by the defendant's railroad, which runs in a substantially north and south direction at this point, and is upon a side hill or embankment some fifteen or twenty feet above the plaintiff's land. Between the right of way and plaintiff's lands is a stream about 12 feet in width. West of the defendant's right of way is a ravine and pasture owned by one Edwards. West of this pasture are three fields of about 12, 6, and 7 acres, and beyond them about half a mile from the railroad there are woods. The fire originated on the right of way west of the track, and ran into the ravine on the Edwards farm, where there was heavy grass, and up to a pine stump fence on the Edwards place, which was at right angles to the railroad. There was a heavy wind blowing from the west at the time, which carried brands or sparks from the stump fence across the intervening lands of Edwards, the railroad right of way, and the stream to the east, igniting a straw stack on the land of the plaintiff, which was piled up against his barn, causing the destruction of the barn and contents and some fruit trees. The complaint was dismissed on the ground that defendant's negligence was not the proximate cause of the burning of plaintiff's property.

Mortimer L. Sullivan, of Elmira, for appellant.

Alexander S. Diven, of Elmira, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur.

ANDREWS, J., absent.

BELL CLOTHES SHOP, Inc., Appellant, v. Harry KAMBER, Trading as H. Kamber & Co., Respondent.

(Court of Appeals of New York. May 29, 1923.)

Appeal from a judgment, entered December 15, 1922, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 1, 197 N. Y. Supp. 244), reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint. The action was brought to recover damages for the failure of the defendant to deliver goods claimed to have been purchased by the plaintiff's assignors. The defense was the statute of frauds. Plaintiff relied upon a memorandum of sale given by the defendant's agent, which had upon the letterhead the defendant's name. It was not otherwise signed by any one. In this memorandum of sale was a provision that the sale was subject to the approval of the home office. There was no writing showing such approval, the plaintiff relying upon an oral statement made by defendant that the sale was all right and that the defendant would deliver the goods. The Appellate Division held that the memorandum was insufficient under the statute.

Samuel J. Rawak and Edward C. Weinrib, both of New York City, for appellant.

I. Maurice Wormser and Lazarus Joseph, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Constance GOODWIN, as Administratrix of the Estate of Alexander Goodwin, Deceased, Appellant, v. LAMPORT & HOLT, Limited, et al., Respondents.

(Court of Appeals of New York. May 29, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (204 App. Div. 888, 197 N. Y. Supp. 916), entered March 24, 1923, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term in action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendants. Intestate, an em-

ployee of defendant Atlantic Basin Iron Works, Inc., had been repairing boilers on a steamship belonging to defendant Lamport & Holt, Limited. At the noon hour, while he was sitting with other workmen on deck, his foreman warned the workmen not to go below decks, as the vessel was being fumigated, but to go aft and work on the winches. The fumigation was performed by state employees. Shortly after its completion intestate was found below decks dead, having been asphyxiated by the gas used in fumigation.

Sidney R. Fleisher, of New York City, for appellant.

William Paul Allen and Samuel C. Coleman, both of New York City, for respondent Lamport & Holt, Ltd.

Alfred T. Tompkins and J. Arthur Hilton, both of New York City, for respondent Atlantic Basin Iron Works, Inc.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

CRANE, J., dissents.

William E. HANNA, Appellant, v. COMMERCIAL TRAVELERS' MUTUAL ACCIDENT ASSOCIATION OF AMERICA, Respondent.

(Court of Appeals of New York. May 29, 1923.)

Appeal from a judgment, entered January 2, 1923, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 258, 197 N. Y. Supp. 395), reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint. The action was to recover upon a policy of accident insurance. The insured disappeared in 1913. His automobile in which he had been riding when last seen was in 1917 dragged up from the bottom of the Delaware river. The policy provided that an action thereon must be commenced within one year after the accident. This action was commenced the latter part of the year 1918.

W. Montague Geer, Jr., and William F. Allen, both of New York City, for appellant.

Henry C. Moses and Eliphalet W. Tyler, both of New York City, and M. W. Van Auken, of Utica, for respondent.

PER CURIAM. Judgment affirmed, with costs. Held, without considering any other questions, that plaintiff's action is barred by the provisions of the policy requiring action to be commenced within one year from the date of the accident.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Bernard MECHLER et al., Respondents, v. Frank DEHN et al., Appellants.

(Court of Appeals of New York. May 29, 1923.)

Appeal from a judgment, entered November 27, 1922, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (203 App. Div. 128, 196 N. Y. Supp. 460), reversing a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury. The action was in ejection and involved title to a strip of land in Middle Village, Queens county. Both plaintiffs and defendants derive title from a common source. Their original grantor divided a plat of land into lots and made and filed a map showing certain lots fronting on Williamsburg and Jamaica Turnpike road. The lot on the corner of Morton avenue extended along Morton avenue 111 feet 3 inches. The balance of the block fronting on Morton avenue was divided into four lots, purporting to be 25 feet front. Plaintiffs' predecessor in title purchased the corner lot and the one next adjoining, facing the Williamsburg and Jamaica Turnpike road. The boundary line was described as extending southerly 111 feet 3 inches along the westerly line of Morton avenue. Subsequently the lots on Morton avenue were conveyed by metes and bounds as described on the map, and defendants have become owners of the lot immediately in rear of plaintiffs' premises. It appeared that the block fronting on Morton avenue is 5 feet and 7/8 of an inch short of the distance shown on the map, and the question was whether that amount should be taken from plaintiffs' or defendants' land. The Appellate Division held that the original grantor, having conveyed to plaintiffs' predecessor in title 111 feet 3 inches on Morton avenue, could convey to defendants' predecessor only what was left and that plaintiffs were therefore entitled to the strip in dispute.

Leonard J. Langbein, of New York City, for appellants.

Joseph Danziger, of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Amos H. ANDREWS et al., Respondents, v. EQUITABLE FIRE & MARINE INSURANCE COMPANY OF PROVIDENCE, R. I., et al., Appellants.

(Court of Appeals of New York. May 29, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (202 App. Div. 858, 194 N. Y. Supp. 913), entered July 17, 1922, unanimously affirming a judgment in favor of plaintiffs entered upon a verdict. The action was to recover upon a policy of fire insurance. The policy in question dated May 28, 1917, effective for three years, was issued to Paul Perrault by Herman D. Walters, defendants' local soliciting agent. By a deed executed March 25 or 26, 1919, and recorded March 29, 1919, Paul Perrault, the insured, conveyed the insured premises to Amos H. Andrews and Rosa C. Andrews. It was testified that while Mr. Perrault and Mr. Andrews were in the office of John A. Brown, Mr. Brown called Mr. Walters on the telephone and informed him that the transfer had been made and asked him to make an indorsement showing the transfer. No rider showing the transfer was issued or attached to the policy until nearly a year thereafter and after a fire had occurred damaging the premises.

Thomas B. Kattell, of Binghamton, for appellants.

S. Mack Smith, of Binghamton, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Lee W. BEATTIE et al., Respondents, v. Isaac F. GARRISON et al., Appellants.

(Court of Appeals of New York. May 29, 1923.)

Appeal from a judgment, entered March 2, 1923, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (204 App. Div. 335, 198 N. Y. Supp. 71), reversing a judgment in favor of defendants entered upon a decision of the court on trial at Special Term and directing judgment in favor of plaintiffs. The action was to restrain an alleged trespass. The only question at issue was whether plaintiffs or defendants have title to the easterly portion of the tract in question. Plaintiffs' title was derived through the foreclosure of two certain mortgages made by Sylvester Owens to Stephen D. Morrison in 1856 and 1860. Defendants' claim of title was derived through inheritance from Owens, and was based upon the contention that these mortgages did not cover the entire tract of 24 acres owned by Owens at the time of the making thereof. The determination of the entire controversy rested upon the single question as to what land was covered by the description in the mortgages.

Graham Witschief, of Newburgh, for appellants.

Percy V. D. Gott and Joseph W. Gott, both of Goshen, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Newton JOHNCOX, Respondent, v. NEW YORK STATE RAILWAYS, Appellant.

(Court of Appeals of New York. May 29, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (203 App. Div. 877, 196 N. Y. Supp. 933), entered October 18, 1922, affirming a judgment in favor of plaintiff entered upon a verdict. The action was brought to recover property damage and damages for personal injuries resulting from a collision between an automobile operated by plaintiff and a street car belonging to defendant. The accident in question occurred at the intersection of Front street and Andrews street in the city of Rochester, on the 8th day of March, 1921, between 9 and 10 a. m. The plaintiff was proceeding southerly on Front street, and the street car was proceeding westerly on Andrews street. The plaintiff testified that he was driving not to exceed 7 or 8 miles per hour; that as he reached a point on a line with Andrews street he looked to the left, but did not see anything; that the next thing he knew he

was on the street car track, with the street car right onto him. He further testified that Andrews street is nearly a straight street, and that he could have stopped his car in 6 or 7 feet.

Earl L. Dey, of Rochester, for appellant.

P. Chamberlain, of Rochester, for respondent.

PER CURIAM. Judgments reversed, and new trial granted; costs to abide event. Held, that plaintiff was guilty of contributory negligence as matter of law.

HISCOCK, C. J., and HOGAN, CARDOZO, McLAUGHLIN, and CRANE, JJ., concur. POUND and ANDREWS, JJ., dissent.

Lorenz REICH, Appellant, v. Alexander S. COCHRAN et al., Individually and as Executors of and Trustees under the Will of William F. Cochran Deceased, et al., Respondents.

(Court of Appeals of New York. June 5, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (196 App. Div. 248, 187 N. Y. Supp. 53), entered April 7, 1921, unanimously affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at Special Term.

See, also, 234 N. Y. 606, 138 N. E. 465.

Alton B. Parker, F. A. Card, George N. Hamlin, and George E. Morgan, all of New York City, for appellant.

Samuel Untermyer, James L. Bishop, and Percy H. Stewart, all of New York City, for respondents.

PER CURIAM. Appeal dismissed, with costs.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

CARDOZO, J., not voting.

PEOPLE of the State of New York, Respondent, v. Loren F. PARSONS, Appellant.

(Court of Appeals of New York. June 5, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (204 App. Div. 903, 197 N. Y. Supp. 937); entered December 22, 1922, unanimously affirming a judgment of the Monroe County Court rendered upon a verdict convicting the defendant of the crime of arson in the second and third degrees.

P. Chamberlain and Heiby W. Ungerer, both of Rochester, for appellant.

William F. Love, Dist. Atty., of Rochester, (Ray F. Fowler, of Rochester, of counsel), for the People.

PER CURIAM. Judgment affirmed.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Helen M. RODGERS, Respondent, v. William J. RODGERS et al., as Executors of John C. Rodgers, Deceased, Appellants.

(Court of Appeals of New York. June 5, 1923.)

PER CURIAM. Motion to amend remittitur granted, return of remittitur requested, and when returned remittitur will be amended, so as to provide that sixth question be answered in negative, instead of affirmative. See 235 N. Y. 408, 139 N. E. 557.

Abram B. SMART, Respondent, v. MERCHANTS' MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY, Appellant.

(Court of Appeals of New York. June 5, 1923.)

Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (206 App. Div. 630, 198 N. Y. Supp. 949), entered March 22, 1923, unanimously affirming a judgment in favor of plaintiff entered upon an order of Special Term granting a motion to strike out the answer and for judgment in favor of plaintiff. The motion was made upon the ground that permission to appeal had not been obtained and that no constitutional question was presented by the record.

Claude J. Banigan, of New York City, and Owen B. Augspurger, of Buffalo, for the motion.

John J. McBride, of New York City, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and $10 costs of motion.

Harrison B. McGRAW, as Assignee for the Benefit of Creditors of George H. Worthington, Respondent, v. Frank A. HALLADAY, as Executor of Alice F. Halladay, Deceased, Appellant.

(Court of Appeals of New York. June 5, 1923.)

Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (204 App. Div. 901, 197 N. Y. Supp. 928), entered January 3, 1923, unanimously affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at an Equity Term, but reversing, by a divided court, certain findings and making new findings in lieu thereof. The motion was made upon the ground that the affirmance was unanimous and that permission to appeal had not been obtained.

Daniel J. Kenefick, of Buffalo, for the motion.

Wallace Thayer, of Buffalo, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and $10 costs of motion.

In the Matter of the Application of Edgar S. APPLEBY, Respondent and Appellant, for a Peremptory Writ of Mandamus against John H. DELANEY, as Commissioner of Docks of the City of New York, Appellant and Respondent.

(Court of Appeals of New York. June 5, 1923.)

PER CURIAM. Motion for reargument denied, without costs. See 235 N. Y. 364, 139 N. E. 477.

Edgar S. APPLEBY et al., Individually and as Executors of Charles E. Appleby, Deceased, Appellants and Respondents, v. CITY OF NEW YORK et al., Respondents and Appellants.

(Court of Appeals of New York. June 5, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 235 N. Y. 351, 139 N. E. 474.

Lawrence EVERETT, Respondent, v. SUPREME COUNCIL, CATHOLIC BENEVOLENT LEGION, Appellant.

(Court of Appeals of New York. June 5, 1923.)

PER CURIAM. Motion for reargument denied. Motion to amend remittitur granted. Return of remittitur requested, and, when returned, the same will be amended, so as to award plaintiff costs in Trial Term and appellant costs of appeal in this court and Appellate Division. See 236 N. Y. 62, 139 N. E. 780.

In the Matter of the Claim of STATE TREASURER, Respondent, v. R. E. SHEEHAN COMPANY et al., Appellants.

(Court of Appeals of New York. June 12, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (726 App. Div. 206, 199 N. Y. Supp. 951), entered May 8, 1923 unanimously affirming an award of the State Industrial Board, made under the Workmen's Compensation Law. An employee of defendant Sheehan Company was injured while in the performance of his duties, through the overturning of a wagon he was driving, and died as a result of such injury. He left him surviving no person entitled to compensation. An award was therefore made to the state treasurer, under section 15, subdivisions 8 and 9 of the Workmen's Compensation Law.

William H. Foster, of Syracuse, for appellants.

Carl Sherman, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of Proving the WILL OF George W. PARSONS, Deceased. Frederick Burgess et al., Appellants; Louis A. McMillan et al., Respondents.

(Court of Appeals of New York. June 12, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the second

Judicial Department (204 App. Div. 879, 197 N. Y. Supp. 935), entered December 1, 1922, which affirmed a decree of the Westchester County Surrogate's Court denying probate to a paper propounded as the last will and testament of George W. Parsons, deceased. The alleged will was dated March 1, 1873, was in the handwriting of the testator, and signed by testator and two subscribing witnesses. Across the face of the will testator had written, in letters of substantially the same size as those of the will,

"Will revoked.
"George W. Parsons.
"This will is hereby revoked.
"Geo. W. Parsons."

And underneath each signature a line was drawn. The surrogate found that the words and lines written by testator canceled, effaced, and obliterated the entire will.

Daniel Whitford and Clifton P. Williamson, both of New York City, for appellant Frederick Burgess.

George Zabriskie and George Gray Zabriskie, both of New York City, for appellant William T. Manning.

John G. Daniel, of Brooklyn, for respondents.

PER CURIAM. Order affirmed, with costs payable out of the estate.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Louise C. SMITH, Respondent, v. William E. SMITH, Appellant.

(Court of Appeals of New York. June 12, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (205 App. Div. 871, 198 N. Y. Supp. 949), entered February 2, 1923, which affirmed an order of Special Term denying a motion by defendant for judgment on the pleadings. Plaintiff and defendant, wife and husband, were divorced in 1911. The complaint alleged that on June 18, 1921, the defendant filed in the office of the city clerk of the city of New York a sworn application for a marriage license which contained the following matter alleged to have been libelous: "Number of marriage, 1; is applicant a divorced person? No;" that this affidavit became a public record and the details thereof were published to the world in various newspapers; that defendant thereby intended to mean that the intended marriage was the first marriage; that he had never been married to the plaintiff and had never been divorced from her; that the plaintiff had never been his wife and that during the time she lived with him she had been living with him as his mistress with a meretricious relationship.

I. T. Flatto, of New York City, for appellant.

Frederic C. Scofield and Ralph W. Thomas, both of New York City, for respondent.

PER CURIAM. Order affirmed, with costs. Question certified answered in the affirmative.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Petition of VILLAGE OF HOBART, Respondent, for an Order Determining How an Extension of Railroad Avenue Shall Cross the Railroad of the Ulster and Delaware Railroad Company, Appellant.

(Court of Appeals of New York. June 12, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (204 App. Div. 595, 198 N. Y. Supp. 638), entered March 26, 1923, which affirmed an order of the public service commission directing that Railroad avenue, in the village of Hobart, as extended by the board of trustees, cross the tracks of the Ulster & Delaware Railroad Company at the existing grade.

Harry H. Flemming, of Kingston, for appellant.

Donald H. Grant, of Oneonta, for respondent.

Ledyard P. Hale, of Albany, for Public Service Commission.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the WILL OF Charity C. MOULD, Deceased. Benjamin H. Sweet, Individually and as Executor, Appellant; Florence A. Coombs et al., Respondents.

(Court of Appeals of New York. June 12, 1923.)

Appeal by permission, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (204 App. Div. 889, 197 N. Y. Supp. 931), entered December 15, 1922, which unanimously affirmed a decree of the Westchester County Surrogate's Court construing the will of Charity C. Mould, deceased, and holding that general legacies given by the will were not charged upon real estate passing under the residuary clause of her will which read as follows:

"Ninth. All the rest, residue and remainder of my estate, both real and personal, of whatsoever nature and kind, including my lot in Greenwood Cemetery, I give, devise and bequeath to Florence A. Coombs who grew up as a child in my family and lived with me for many years, the same to have and to hold forever."

James M. Gray, of Brooklyn, and Thomas J. Towers, of Jamaica, for appellant.

Herman Aaron and C. Bertram Plante, both of New York City, for respondents.

PER CURIAM. Order affirmed, with costs payable out of estate.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the WILL OF Ransom PARKER, Deceased. Clark Parker Lattin et al., Appellants; Ransom J. Parker et al., Respondents.

(Court of Appeals of New York. June 12, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 876, 197 N. Y. Supp. 934), entered December 28, 1922, unanimously affirming a decree of the New York County Surrogate's Court construing the will of Ransom Parker, deceased. The question was whether the Eighth article of the codicil eliminated from the will the testator's grandson, Ransom J. Parker, and his issue, wherever their names appeared, or whether the effect of said article was merely to substitute the testator's two sisters for Ransom J. Parker as executor and trustee. The article is as follows:

"Eighthly. I hereby direct that the name 'Ransom J. Parker,' one of the executors and trustees named in my said last will and testament in subdivision marked 'Fifthly' thereof, be stricken out and eliminated from my said last will and testament, and that in place and stead of the said name 'Ransom J. Parker' there be substituted the names 'Mary Elizabeth Parker Place and Priscilla Townsend Parker Starin,' whom I hereby appoint in the place and stead of said Ransom J. Parker, as executors and trustees of my said last will and testament, hereby expressly granting unto these said executors and trustees, namely, Mary Elizabeth Parker Place and Priscilla Townsend Parker Starin, and to my other said executor and trustee named in my said last will and testament, full power and authority to grant, convey, sell at either public or private sale, lease or otherwise dispose of any and all real estate of which I may die possessed, and to that end and purpose I hereby grant unto my said executors and trustees full power and authority, and expressly authorize them to make, execute and deliver any and all deeds of conveyance, leases or other instruments in writing which may be necessary."

Alton B. Parker, of New York City, for appellants.

Frank C. Laughlin and John J. Kirby, both of New York City, for respondent Ransom J. Parker.

John J. Kirby, of New York City, for respondents Martha M. Parker and others.

David L. Weil, of New York City, for respondents Clark P. Lattin, Jr., and others.

Jesse Grant Roe, of New York City, for respondent George J. Gillespie, as trustee.

PER CURIAM. Order affirmed with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

CIOCCA-LOMBARDI WINE COMPANY, Respondent, v. Enrico FUCINI, Appellant.

(Court of Appeals of New York. June 12, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 392, 198 N. Y. Supp. 114), entered February 9, 1923, which reversed an order of Special Term denying a motion to strike out a defense and counterclaim set up in the answer and granted said motion. The action was to recover upon a contract for the sale of wine "for lawful use and under government permit." The defense was that the wines in question were intoxicating liquors; that at all times referred to in the com-

plaint and in the answers the National Prohibition Act (41 Stat. 305) and the regulations duly made thereunder by the Secretary of the Treasury and the national prohibition commissioner were in full force and effect; that it was therein provided that no wine or intoxicating liquors could be sold, purchased or transported unless permits for such sale, purchase and disposition had been first granted and allowed; that the appellant repeatedly made application to the national prohibition commissioner and his duly appointed subordinates, between the date of the signature of the contract and the 1st day of December, 1920, for permit to purchase and transport the wine referred to in the contract, and continued such efforts for a reasonable time after the 1st day of December, 1920, and made all due and diligent and reasonable efforts to obtain such permit and permits, but that the national prohibition commissioner and his duly appointed subordinates during all of said time refused and continued to refuse to grant or issue to the defendant said permit or permits to purchase or transport any or all of said wine, which refusal was not due to any fault, omission or any act whatsoever of defendant. The counterclaim repeated the foregoing allegations, referred to the deposit which had been made and the refusal to issue the permits, and demanded judgment for the return of the deposit on the theory of failure of consideration. The following questions were certified:

"(1) Is separate defense in the answer sufficient in law upon the face thereof?

"(2) Does the counterclaim contained in the answer state facts sufficient to constitute a cause of action?"

Samuel F. Frank and Arthur W. Weil, both of New York City, for appellant.

Meyer Kraushaar and Emanuel Celler, both of New York City, for respondent.

PER CURIAM. Order affirmed, with costs. Both questions certified answered in the negative.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

CARDOZO, J., dissents only as to question No. 1.

CRANE, J., dissents.

In the Matter of the Application of the INTEROCEAN MERCANTILE CORPORATION et al., Respondents, for the Appointment of an Arbitrator. Gertrude A. Buell, as Executrix of George C. Buell et al., Appellants.

(Court of Appeals of New York. June 12, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (206 App. Div. 658, 199 N. Y. Supp. 929), entered April 27, 1923, which affirmed an order of Special Term denying a motion for a commission to take testimony without the state. The following question was certified:

"Has the Supreme Court of the state of New York power to direct by order that an open commission issue to take the depositions on oral questions of witnesses residing outside the state of New York for use in an arbitration proceeding directed by an order of the said Supreme Court in which an arbitrator was appointed by the said court on the application of one of the parties to a written contract which provided that differences thereunder should be determined by arbitration but which said contract was not acknowledged or proved as required by section 1449 of the Civil Practice Act?"

Martin Conboy, of Riverdale-on-Hudson, and Edwin N. Moore, of New York City, for appellants.

Winthrop W. Aldrich, Edwin J. Johnson, and Otey McClellan, all of New York City, for respondents.

PER CURIAM. Order affirmed, with costs. Question certified answered in the negative.

HISCOCK, C. J., and HOGAN, CARDOZO, McLAUGHLIN and ANDREWS, JJ., concur.

POUND and CRANE, JJ., dissent.

In the Matter of the Application of the INTEROCEAN MERCANTILE CORPORATION, Respondent, for the Appointment of an Arbitrator. Herman W. Hoops et al., Appellants.

(Court of Appeals of New York. June 12, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 284, 197 N. Y. Supp. 706), entered January 17, 1923, which reversed an order of Special Term granting a motion for a commission to take testimony without the state and denied said motion. The following question was certified:

"Has the Supreme Court of the state of New York power to direct by order that a commission issue to take the testimony, upon interrogatories and cross interrogatories annexed thereto, of witnesses outside the state of New York, for use in an arbitration proceeding, directed by the order of the said Supreme Court, in which an arbitrator was appointed by the said court on the application of one of the parties to a written contract which provided that differences thereunder should be determined by arbitration, but which said contract was not acknowledged or proved as required by section 1449 of the Civil Practice Act."

Francis X. Carmody and Samuel Sculnick, both of New York City, for appellants.

Richard Krause and Edwin J. Johnson, both of New York City, for respondent.

PER CURIAM. Order affirmed, with costs. Question certified answered in the negative.

HISCOCK, C. J., and HOGAN, CARDOZO, McLAUGHLIN, and ANDREWS, JJ., concur.

POUND and CRANE, JJ., dissent.

Marie WAGNER, Appellant, v. Charles H. THIERIOT, Individually and as Executor of Otto Wagner, Deceased, Respondent.

(Court of Appeals of New York. June 12, 1923.)

Appeal, by permission, from a judgment of the Appellant Division of the Supreme Court in the First Judicial Department (203 App. Div. 757, 197 N. Y. Supp. 560), entered January 3, 1923, unanimously affirming a judgment in favor of defendant entered upon an order of Special Term granting a motion for judgment on the pleadings. The defendant's decedent during his lifetime took out two policies of life insurance naming his widow, the plaintiff herein, as beneficiary. In making settlement upon his death the insurers deducted the amount of certain loans made to insured in his lifetime upon the security of the policies. In this action the plaintiff beneficiary seeks to recover from the decedent's estate the amounts so deducted on the theory that they constituted an indebtedness of the decedent which should be paid out of his estate and not out of moneys due to her as beneficiary named in the policies.

Gustav Lange, Jr., of New York City, for appellant.

Victor E. Whitlock, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion of Merrell, J., below.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Application of Morgan J. O'BRIEN et al., as Executors of John D. Crimmins, Deceased, Appellants, for a Peremptory Writ of Mandamus against John P. O'BRIEN, as Corporation Counsel of the City of New York, Respondent.

(Court of Appeals of New York. June 12, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (200 App. Div. 914, 192 N. Y. Supp. 940), entered February 17, 1922, which unanimously affirmed an order of Special Term denying a motion, made under section 4 of the Street Closing Law (Laws 1895, c. 1006), for a peremptory writ of mandamus to compel the corporation counsel of the city of New York to apply for the appointment of commissioners of estimate to determine the compensation due to the estate of John D. Crimmins, deceased, by reason of the closing of Woolsey avenue between Barclay street and the East River in the borough of Queens. The application was denied upon the ground that the claim was barred under section 5 of the Street Closing Law.

See, also, 236 N. Y. 88, 142 N. E. 296.

Harry B. Chambers and James A. Lynch, both of New York City, for appellants.

George P. Nicholson, Corp. Counsel, of New York City (Joel J. Squier and William B. R. Faber, both of New York City, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Application of Morgan J. O'BRIEN et al., as Executors of John D. Crimmins, Deceased, Appellants, for a Peremptory Writ of Mandamus against John P. O'BRIEN, as Corporation Counsel of the City of New York, Respondent.

(Court of Appeals of New York. June 12, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (200 App. Div. 914, 192 N. Y. Supp. 940), entered February 17, 1922, which unanimously affirmed an order of Special Term denying a motion, made under section 4 of the Street Closing Law (Laws 1895, c. 1006), for a peremptory writ of mandamus to compel the corporation counsel of the city of New York to apply for the appointment of commissioners of estimate to determine the compensation due to the estate of John D. Crimmins, deceased, by reason of the closing of Potter avenue between Barclay street and the East River in the borough of Queens.

See, also, 236 N. Y. 87, 142 N. E. 295.

Harry B. Chambers and James A. Lynch, both of New York City, for appellants.

George P. Nicholson, Corp. Counsel, of New York City (Joel J. Squier and William B. R. Faber, both of New York City, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

NEW PALTZ, HIGHLAND & POUGHKEEPSIE TRACTION COMPANY, Appellant, v. COUNTY OF ULSTER, Defendant, and Town of Lloyd, Respondent.

(Court of Appeals of New York. June 12, 1923.)

Motion to dismiss an appeal from a judgment, entered July 24, 1922, upon an order of the Appellate Division of the Supreme Court in the Third Judicial Department (202 App. Div. 234, 195 N. Y. Supp. 623), reversing a judgment in favor of plaintiff and against defendant, respondent, and directing a dismissal of the complaint as to said defendant, respondent. The motion was made upon the ground of failure to prosecute the appeal.

See, also, 235 N. Y. 522, 139 N. E. 718.

John W. Eckert, of Kingston, for the motion.

Benjamin E. Messler, of New York City, opposed.

PER CURIAM. Motion denied, with $10 costs.

RUSSIAN SOCIALIST FEDERATED SOVIET REPUBLIC, Appellant, v. Jacques R. CIBRARIO et al., Respondents.

(Court of Appeals of New York. June 12, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 235 N. Y. 255, 139 N. E. 259.

WEAVER HARDWARE COMPANY, Plaintiff, v. Max SOLOMOVITZ et al., Defendants, George H. Stalker et al., Appellants, and Merchants' Bank of Rochester, Respondent.

(Court of Appeals of New York. June 12, 1923.)

PER CURIAM. Motion for reargument or to amend remittitur denied, with $10 costs and necessary printing disbursements payable to defendant Stalker. See 235 N. Y. 321, 139 N. E. 353.

George TRACY, Appellant, v. EASTERN LOADING CORPORATION, Respondent.

(Court of Appeals of New York. June 12, 1923.)

Motion to dismiss an appeal from a judgment, entered August 29, 1922, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (202 App. Div. 811, 195 N. Y. Supp. 83), reversing a judgment in favor of plaintiff and directing a dismissal of the complaint. The motion was made upon the ground of failure to file the required undertaking.

Harry H. Brown, of New York City, for the motion.

PER CURIAM. Motion granted, and appeal dismissed, with costs and $10 costs of motion.

In the Matter of the Application of Elizabeth J. STARR, as Committee of the Person and Property of Isabella Jordan, an Incompetent Person, Respondent, for Payment of an Award. Comptroller of the City of New York et al., Appellants.

(Court of Appeals of New York. June 14, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (198 App. Div. 859, 191 N. Y. Supp. 372), entered December 16, 1921, which affirmed an order of Special Term directing the comptroller of the city of New York to pay to the petitioner interest from the date of the report of the commissioners of estimate, in proceedings for the extension of Seventh avenue, from Greenwich avenue to Carmine street, in the borough of Manhattan, namely, July 24, 1919, to the date of the confirmation of the said report, namely, November 19, 1919, on the sum of $42,948.18, the total amount of the award therein made to unknown owner for parcel damage No. 26.

George P. Nicholson, Corp. Counsel, of New York City (Joel J. Squier and William B. R. Faber, both of New York City, of counsel), for appellants.

Michael J. Mulqueen and Charles Lamb, both of New York City, for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Application of BRONX PARKWAY COMMISSION, Respondent, for a Peremptory Order of Mandamus against John F. HYLAN et al., Constituting the Board of Estimate and Apportionment of the City of New York, Appellants. Proceedings Nos. 1 and 2.

(Court of Appeals of New York. June 14, 1923.)

Appeal in each of the above-entitled proceedings from an order of the Appellate Division of the Supreme Court in the First Judicial Department (206 App. Div. 688, 200 N. Y. Supp. 915), entered May 4, 1923, which affirmed an order of Special Term (119 Misc. Rep. 785, 198 N. Y. Supp. 271) granting a motion for a peremptory order of mandamus. In proceeding No. 1 the Bronx Parkway Commission sought a peremptory mandamus order which would require the board of estimate and apportionment to appropriate the sum of $801,000 for the purpose of paying the expenses of improving lands acquired by the commission, or to be acquired, during the year 1922, and in procuring surveys and preparing maps and plans in accordance with the estimate of the Bronx Parkway Commission, dated August 12, 1921, under the purported authority of section 16, chapter 594 of the Laws of 1907. In proceeding No. 2 the Bronx Parkway Commission sought a peremptory mandamus order to compel the board of estimate and apportionment to amend and alter the tentative or proposed budget of the city of New York for the year 1923, so as to have included therein the sum of $138,000 to be applied to the payment for the year 1923 of the salaries of the commissioners constituting the Bronx Parkway Commission, and office employees of the commission, including its secretary and counsel, and the expenses of maintenance and the wages of employees engaged in the maintenance of the Bronx river reserve and parkway, under the purported authority of section 18 of chapter 594 of the Laws of 1907, as amended by chapter 604 of the Laws of 1922.

George P. Nicholson, Corp. Counsel, of New York City (William E. C. Mayer, of New York City, of counsel), for appellants.

Theodosius Stevens and Clarence E. Pitts, both of New York City, for respondent.

PER CURIAM. Order in each proceeding affirmed, with costs.

HISCOCK, C. J., and CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

HOGAN, J., not voting.

In the Matter of the Application of the COLLEGE OF the CITY OF NEW YORK, Respondent, for an Order of Mandamus against John F. HYLAN et al., Constituting the Board of Estimate and Apportionment of the City of New York, Appellants. In the Matter of the Application of HUNTER COLLEGE OF the CITY OF NEW YORK, Respondent, for an Order of Mandamus against John F. HYLAN et al., Constituting the Board of Estimate and Apportionment of the City of New York, Appellants.

(Court of Appeals of New York. June 14, 1923.)

Appeal, in each of the above-entitled proceedings, from an order of the Appellate Division of the Supreme Court in the First Ju-

dicial Department (205 App. Div. 372, 199 N. Y. Supp. 804), entered May 4, 1923, which affirmed an order of Special Term granting a motion for a peremptory order of mandamus directing the board of estimate and apportionment of the city of New York to appropriate an additional sum to meet salary requirements of the petitioner for the year 1923, under the provisions of section 883 (as added by Laws 1919, c. 645, § 1, and amended by Laws 1920, c. 680, § 1, and Laws 1921, c. 120) and section 883-a (as added by Laws 1920, c. 680, § 2) of the Education Law.

George P. Nicholson, Corp. Counsel, of New York City (William E. C. Mayor, of New York City, of counsel), for appellants.

Charles H. Tuttle, of New York City, for respondent College of City of New York.

Carl E. Peterson, of New York City, for respondent Hunter College.

PER CURIAM. Order in each proceeding affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Application of John KAHABKA, Respondent, for an Order of Mandamus against Frank X. SCHWAB et al., Individually and as Constituting the Council of the City of Buffalo et al., Appellants.

(Court of Appeals of New York. June 14, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (205 App. Div. 368, 199 N. Y. Supp. 551), entered May 2, 1923, which reversed an order of Special Term denying a motion for a peremptory order of mandamus to compel defendants to remove certain gasoline pumps from the streets of the city of Buffalo.

William S. Rann, Corp. Counsel, of Buffalo (Charles S. McDonough, of Buffalo, of counsel), for appellants.

Franklin R. Brown, of Buffalo, for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

PEOPLE v. 1,400 PACKAGES CONTAINING SCOTCH WHISKY.

(Court of Appeals of New York. July 13, 1923.)

1. Intoxicating liquors ⇐251—Where unreasonable delay in giving notice to show cause to claimant of liquor seized without warrant, liquor must be returned on claimant's application.

Where there is unreasonable delay in giving notice to claimant of liquor seized without a warrant, under Code Cr. Proc. § 802-b, subd. 6, as added by Laws 1921, c. 156, to show cause why it should not be forfeited, the liquor must be returned on application made in the seizure action.

2. Intoxicating liquors ⇐251—Burden on claimant of liquor seized without warrant to prove ownership or right to possession.

Where, in a proceeding for the return of liquor seized without a warrant, under Code Cr. Proc. § 802-b, subd. 6, as added by Laws 1921, c. 156, bare allegations of ownership or right to possession of the liquor are controverted, the burden is on the moving party to sustain his claim by proof.

Appeal from Supreme Court, Appellate Division, Second Department.

Proceeding by the People against 1,400 Packages Containing Scotch Whisky. From an order of the Appellate Division (206 App. Div. 711, 200 N. Y. Supp. 941) reversing an order of the Queens County Court denying a motion for an order directing the property clerk of the police department of the city of New York to return to John Aloise, claimant, the intoxicating liquors and property seized by the police officers from premises No. 157 Fulton avenue, Astoria, Queens county, without a warrant for search and seizure, on November 11, 1922, and granting said motion, the People appeal. Order of Appellate Division reversed, and that of Trial Term affirmed.

Dana Wallace, Dist. Atty., of Long Island City (Joseph Lonardo, of Flushing, of counsel), for the People.

Otho S. Bowling, of New York City, and Wallace E. J. Collins, of Jamaica, for respondent.

PER CURIAM. [1] In People v. Diamond, 233 N. Y. 130, 135 N. E. 200, we held that, when liquor was seized without a warrant under the provisions of subdivision 6 of section 802-b of the Code of Criminal Procedure, as added by Laws 1921, c. 156, the no-

tice to show cause why the liquor should not be forfeited must be signed and served within a reasonable time; otherwise, upon an application made in the seizure action, the liquors must be returned to the place from which or to the person from whom they were taken. In the present proceeding the Appellate Division has held upon evidence justifying the result that there was unreasonable delay in this respect. Obviously, however, a stranger may not apply to the court for a return of the liquor seized.

[2] In the proceeding before us one John Aloise made an affidavit stating that the liquor in question was taken from premises occupied by him; that these premises were a private house; that liquors were stored in the cellar of such house, and that the liquor was his lawful property. In opposition to the application for a return of the liquor an affidavit was presented denying these allegations. Where, in such a proceeding, bare allegations of ownership or of possession of the liquor are controverted, the moving party must sustain his claim by proof. Doubtless the judge hearing the motion may, in his discretion, determine the fact upon affidavits setting forth the facts, or he may order a referee to take the evidence and report it to him with his opinion. Some proof there must be, and the burden is upon the applicant to present it. Here there is none.

The order of the Appellate Division should be reversed, and that of the Trial Term affirmed.

All concur; CARDOZO, J., in result.

Order reversed, etc.

Melissa DOEL, as Administratrix of the Estate of Samuel Doel, Deceased, Appellant and Respondent, v. GENERAL ELECTRIC COMPANY, Appellant, and Tonawanda Power Company, Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal by plaintiff, by permission, from so much of a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (204 App. Div. 902, 197 N. Y. Supp 908), entered December 23, 1922, as unanimously affirmed a judgment in favor of defendant Tonawanda Power Company entered upon a dismissal of the complaint as to it by the court at a Trial Term. Appeal by defendant General Electric Company, by permission, from so much of said judgment as unanimously affirms a judgment against it and in favor of plaintiff entered upon a verdict. The action was to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendants. Intestate was employed by the Niagara Falls Power Company which was engaged in installing two large current transformers purchased from the General Electric Company, at one of its stations. On completion of the work defendant Tonawanda Power Company turned high currents of electricity into the transformers, a short circuit occurred, and intestate was killed. It was alleged that the accident was caused by the presence in the transformers of a large "packing block" of wood fastened thereto by wire nails and that the General Electric Company was negligent in so placing the block of wood and in failing to call attention to its presence.

Welles V. Moot and Adelbert Moot, both of Buffalo, and Richmond D. Moot, of Schenectady, for appellant.

Hamilton Ward, of Buffalo, for plaintiff, appellant and respondent.

Thomas R. Wheeler, of Buffalo, for respondent Tonawanda Power Company.

PER CURIAM. Judgment affirmed, with costs, on authority of Rosebrock v. General Electric Co., 236 N. Y. 227, 140 N. E. 571.

HOGAN, CARDOZO, POUND, and CRANE, JJ., concur.

HISCOCK, C. J., and McLAUGHLIN, J., dissent on ground of errors in charge.

ANDREWS, J., not sitting.

PEOPLE of the State of New York, Appellant, v. FIVE PINT BOTTLES OF WHISKY, etc., Seized from Louis Weiss, Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (206 App. Div. 712, 200 N. Y. Supp. 941), entered May 18, 1923, which reversed an order of the Queens County Court denying a motion for the return of certain intoxicating liquor and granted said motion. It was alleged that the liquor was seized without a warrant and that notice to show cause why the seized liquors should not be forfeited was not served within the time required by the statute.

Dana Wallace, Dist. Atty., of Long Island City (Joseph Lonardo, of Flushing, of counsel), for the People.

Meyer Kraushaar and Emanuel Celler, both of New York City, for respondent.

PER CURIAM. Order affirmed.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Frank B. SHAMROCK, as Administrator of the Estate of Edward A. Shamrock, Deceased, Respondent, v. GENERAL ELECTRIC COMPANY et al., Appellants.

(Court of Appeals of New York. July 13, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (204 App. Div. 902, 197 N. Y. Supp. 948), entered December 23, 1922, unanimously affirming a judgment in favor of plaintiff entered upon a verdict. The action was to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendants. Intestate was employed by defendant Niagara Falls Power Company which was engaged in installing two large current transformers, purchased from defendant General Electric Company, at one of its stations. On completion of the work a high current of electricity was turned into the transformers, a short circuit occurred and intestate was killed. It was alleged that the accident was caused by the presence in the transformers of a large "packing block" of wood fastened thereto by wire nails and that the General Electric Company was negligent because it failed to advise the defendant Niagara Falls Power Company to remove the temporary packing blocks used for protection of the transformer in transit, and that the Niagara Falls Company was negligent in failing to inspect and test the transformers before using them with a deadly current; also in failing to discover the packing blocks and remove them without notice; also in failing to have automatic switches and other modern equipment.

Adelbert Moot and Welles V. Moot, both of Buffalo, and Richmond D. Moot, of Schenectady, for appellant General Electric Company.

Franklin D. L. Stowe, of Buffalo, for appellant Niagara Falls Power Company.

Hamilton Ward and Hubert Collins, both of Buffalo, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HOGAN, CARDOZO, POUND, and CRANE, JJ., concur.

HISCOCK, C. J., and McLAUGHLIN, J., dissent on ground of error in charge.

ANDREWS, J., not sitting.

Dominick RIVARA, Respondent, v. JAMES STEWART & COMPANY et al., Appellants.

(Court of Appeals of New York. July 13, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (204 App. Div. 890, 197 N. Y. Supp. 943), entered December 15, 1922, which affirmed an order of Special Term denying a motion for judgment upon the pleadings. Plaintiff sued to recover $23,518.87, with interest, being alleged payments on account of a conditional purchase of the steam tug James B. Stewart on April 17, 1919. The complaint showed that plaintiff made payments up to October 27, 1920, but prior to April 7, 1921, had defaulted in such payments; that defendants obtained possession of the tug by admiralty proceedings in which the United States marshal delivered the tug to them. Plaintiff's gravamen was that, although he had not redeemed the tug, nor made good his default, defendants did not comply with sections 65 and 66 of the Personal Property Law of the state of New York, in that after expiration of 30 days they did not give notice of the sale of the tug at auction or otherwise; also in defendants' failure to sell it within a period of 30 days. The following questions were certified:

"(1) Do the provisions of sections 63, 65, and 66 of the Personal Property Law of the state of New York (Consol. Laws, c. 41) apply to ships and vessels enrolled in a United States customs house?

"(2) Did the New York Legislature have power to require the filing with local officials, such as registers and county clerks, of contracts for conditional sale of vessels enrolled in a United States customs house?

"(3) Does the complaint herein state facts sufficient to constitute a cause of action?"

Harrington Putnam, John M. Woolsey, L. De Grove Potter and Albert H. Ely, Jr., all of New York City, for appellants.

Pierre M. Brown and James M. Gorman, both of New York City, for respondent.

PER CURIAM. Order affirmed, with costs. Third question certified answered in the affirmative; first and second questions not answered.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HISCOCK, C. J., not voting.

James J. O'BRIEN, Respondent, v. Walter B. LASHAR, Appellant, Impleaded with Others. James J. O'BRIEN, Respondent, v. Walter B. LASHAR, Appellant, Impleaded with Another.

(Court of Appeals of New York. July 13, 1923.)

Appeal, in each of the above-entitled actions, by permission from an order of the Appellate Division of the Supreme Court, in the Second Judicial Department, 199 N. Y. Supp. 34), entered May 1, 1923, which affirmed an order of Special Term denying a motion to set aside the summons in the above-entitled actions. The following question was certified in each action (206 App. Div. 671, 199 N. Y. Supp. 938, 939):

"Is the summons in this action subscribed by the plaintiff in person, he not being an attorney at law, a valid summons?"

Forrest M. Anderson, of New York City, and Charles L. Woody, of Brooklyn, for appellant.

Judson D. Campbell, of New York City, for respondent.

PER CURIAM. Order in each case affirmed with costs; question certified answered in the affirmative.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Petition to Set Aside the Election of Catherine F. FARRELL et al., as Directors of the Brooklyn City Savings and Loan Association. John D. Holsten, Appellant; Leo J. Hickey et al., Respondents.

(Court of Appeals of New York. July 13, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (205 App. Div. 443, 200 N. Y. Supp. 95), entered May 11, 1923, which reversed an order of Special Term holding that section 40 of the by-laws of the Brooklyn City Savings & Loan Association makes a nomination pursuant to the terms thereof a condition precedent to a valid election as director and that names of candidates written in on the ballot at the time of the election were not properly before the association for election to the board of directors, and that they were not legally elected, even though they had received a greater number of votes than had those nominated pursuant to the provisions of the by-laws.

Dominic B. Griffin, Peter P. Smith, and Joseph J. Reiber, all of Brooklyn, for appellant.

Leo J. Hickey and Edward J. Byrne, both of Brooklyn, for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

McLAUGHLIN, J., dissents.

PEOPLE of the State of New York, Respondent, v. Raffaele AMENDOLA, Appellant.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment of the Supreme Court, rendered April 14, 1922, at a Trial Term for the county of Oneida, upon a verdict convicting the defendant of the crime of murder in the first degree.

William F. Dowling and Salvador J. Capecelatro, both of Utica, for appellant.

Charles L. De Angelis, Dist. Atty., of Utica, for the People.

PER CURIAM. Judgment of conviction affirmed.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Transfer Tax upon the ESTATE OF Joseph R. DE LAMAR, Deceased. State Tax Commission, Appellant; William N. Cromwell et al., as Executors, et al., Respondents.

(Court of Appeals of New York. July 13, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (203 App. Div. 638, 197 N. Y. Supp. 301), entered December 26, 1922, which reversed so far as

appealed from an order of the New York County Surrogate's Court assessing a transfer tax upon the estate of Joseph R. De Lamar, deceased. Testator left a daughter as his sole heir at law and next of kin. He devised more than one-half of his estate to charitable institutions. The surrogate held that under section 17 of the Decedent Estate Law such portion of the estate so devised as exceeded one-half thereof passed to the daughter and was taxable as against her, notwithstanding there was no objection by the daughter to the devise of the residuary estate as aforesaid, and that there was submitted to the surrogate a waiver by said daughter of all her rights under said section 17.

Schuyler C. Carlton and Lafayette B. Gleason, both of New York City, for appellant.

Nathan L. Miller, of New York City, for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

PEOPLE of the State of New York ex rel. ROSEVALE REALTY COMPANY, Inc., Appellant, v. Albert E. KLEINERT, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn City of New York, Respondent; Midwood Manor Association et al., Interveners, Respondents.

(Court of Appeals of New York. July 13, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (204 App. Div. 883, 197 N. Y. Supp. 940), entered May 11, 1923, which unanimously affirmed an order of Special Term denying a motion for a peremptory order of mandamus. It did not appear that the order was denied upon the law.

Benjamin Reass, of Brooklyn, I. Henry Kutz, of Syracuse, and Hugo Hirsh, of New York City, and Emanuel Newman, for appellant.

George P. Nicholson, Corp. Counsel, of New York City (Charles J. Druhan and Joseph P. Reilly, both of Brooklyn, of counsel), for respondent superintendent of buildings.

J. George Silberstein and James Marshall, both of New York City, for intervening respondents.

PER CURIAM. Appeal dismissed, with costs.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

CARDOZO, J., dissents.

John FORD, Individually and as Justice of the Supreme Court, Appellant, v. John P. CLARKE et al., as a Board or Body Exercising the Power to Assign Justices to Hold Terms of the Supreme Court, Respondents.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (204 App. Div. 5, 197 N. Y. Supp. 424), entered December 28, 1922, affirming a judgment in favor of defendants entered upon an order of Special Term granting a motion by defendants for judgment on the pleadings. Plaintiff, a justice of the Supreme Court in the First judicial district, brought the action against the defendants, the Justices of the Appellate Division of the Supreme Court for the First Judicial Department, seeking a judgment that the defendants be directed "in making assignments of justices of the Supreme Court to do so in such manner as will afford plaintiff opportunity to perform all the functions of his office by doing his fair share of all the work of the Supreme Court," and that defendants be enjoined from discriminating against the plaintiff. The defendants demurred, on the ground that the court had not jurisdiction of the subject of the action, and that the complaint did not state facts sufficient to constitute a cause of action, and both parties moved for judgment. The court denied the motion of plaintiff, and granted that of the defendants, and judgment dismissing the complaint was thereupon entered.

Charles A. Collin and Joseph N. Tuttle, both of New York City, for appellant.

Elihu Root, Grenville Clark, and Cloyd Laporte, all of New York City, for respondents.

PER CURIAM. Judgment affirmed with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

PEOPLE of the State of New York ex rel. HOME TRUST COMPANY, as Executor of Andrew Carnegie, Deceased, Respondent, v. Walter W. LAW, Jr., et al., Constituting the State Tax Commission, Appellants.

(Court of Appeals of New York. July 13, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (204 App. Div. 590, 198 N. Y. Supp. 710), entered April 5, 1923, which reversed a determination of the state tax commission refusing to allow a deduction made upon an income tax return. The question was whether an executor in making a personal income tax return for the estate of a decedent during the period of administration may deduct from gross income, under subdivision 3 of section 360 of the Tax Law (as added by Laws 1919, c. 627, § 1), the amount paid as a transfer tax under article 10 of the Tax Law. The Appellate Division held that the deduction was proper.

Carl Sherman, Atty. Gen. (C. T. Dawes, James S. Y. Ivins and Laurence Graves, all of Albany, of counsel) for appellants.

Arthur A. Ballantine and Robert P. Patterson, both of New York City, for respondent.

C. Alexander Capron and Russell L. Bradford, both of New York City, for interveners, executors of Henry M. Tilford, deceased.

Burt D. Whedon, of New York City, and Nathaniel S. Robinson, all of Milwaukee, Wis., for intervener Hiram E. Manville.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Transfer Tax upon the ESTATE OF William D. BURNHAM, Deceased. Joseph D. Tomlinson et al., as Executors, Appellants; State Tax Commission, Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (205 App. Div. 893, 198 N. Y. Supp. 904), entered February 2, 1923, which affirmed an order of the Westchester County Surrogate's Court denying a motion to strike from a former order assessing a transfer tax upon the estate of William D. Burnham, deceased, certain taxes assessed under section 221-b of the Tax Law. The following questions were certified:

"(1) Was section 221 of the Tax Law, as amended by chapter 765 of the Laws of 1920, exempting certain charitable corporations from the additional transfer tax imposed by section 221-b of the Tax Law, and directing a refund of said tax assessed against transfers to such charitable corporations, in effect at the date of the entry of the order appealed from in this proceeding?

"(2) Are the appellants herein entitled to a refund under said section of the additional tax under section 221-b of the Tax Law imposed by the taxing decree herein, against the exempt corporations therein named?

"(3) Did the provisions of the Transfer Tax Law as they existed on February 13, 1920, the date of the entry of the taxing decree herein, authorize the Surrogate's Court of Westchester county to impose an additional tax under section 221-b of the Tax Law upon the transfer of 'investments,' as defined in section 330 of the Tax Law, to the exempt corporations named in this proceeding?

"(4) Should a deduction have been made for a proportionate share of the debts and expenses of the estate from the additional tax under section 221-b imposed by the taxing decree entered herein?"

Francis H. Warland, of New York City, for appellants.

Charles A. Curtin and John B. Gleason, both of New York City, for respondent.

PER CURIAM. Order affirmed with costs. First, second, and fourth questions certified answered in the negative; third question certified answered in the affirmative. Question No. 1 is answered simply as applicable to the particular facts of this case.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

PEOPLE of the State of New York ex rel. INTERSTATE LAND HOLDING COMPANY, Appellant, v. Lawson PURDY et al., as Commissioners of Taxes and Assessments of the City of New York, Respondents. (Taxes of 1915 and 1916.)

(Court of Appeals of New York. July 13, 1923.)

Appeal from two orders of the Appellate Division of the Supreme Court in the First Judicial Department (206 App. Div. 606, 198 N. Y. Supp. 940), entered March 2, 1923, which affirmed, on certiorari, two orders of Special Term reducing assessments for taxation upon real property of the relator for the years 1915 and 1916. Relator filed

applications requesting that the assessed value of its property be fixed at certain amounts. Defendants refused and this proceeding was commenced. The court found as a fact that the value of the property was less than the amounts to which relator requested that the valuations be reduced, but holding that relator could obtain no greater reductions than to the amounts claimed in its application fixed the assessment at those amounts. Relator contended that the assessed valuation should be at the amounts found by the court to be the true value.

John Larkin, of New York City, for appellant.

George P. Nicholson, Corp. Counsel, of New York City (William H. King and Charles E. Lalanne, both of New York City, of counsel), for respondents.

PER CURIAM. Order in each case affirmed, with costs.

HISCOCK, C. J., and HOGAN, CRANE, and ANDREWS, JJ., concur.

CARDOZO, POUND, and McLAUGHLIN, JJ., dissent.

PEOPLE of the State of New York, Appellant, v. Robert J. FOSTER, Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 295, 198 N. Y. Supp. 7), entered January 26, 1923, which reversed a judgment, rendered at a Criminal Trial Term of the Supreme Court for the county of New York upon a verdict convicting the defendant of a violation of section 1330 of the Penal Law in that he refused to produce, upon reasonable notice, material books, papers and documents in his possession and under his control before a committee of the Legislature authorized to summon witnesses.

Carl Sherman, Atty. Gen. (Stanley L. Richter and Robert S. Johnstone, both of New York City, of counsel), for the People.

Walter Gordon Merritt and Horace S. Manges, both of New York City, for respondent.

PER CURIAM. Order affirmed, on ground that the people did not discharge burden of proving that reports which defendant refused to produce were material; this court not agreeing with the interpretation placed on the word "willful" by the Appellate Division.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

McLAUGHLIN, J., not voting.

Edward J. COOK et al., Appellants, v. John R. MURLIN et al., Respondents.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment, entered September 5, 1922, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (202 App. Div. 552, 195 N. Y. Supp. 793), reversing a judgment in favor of plaintiff entered upon the report of a referee and directing a dismissal of the complaint. The relief sought in this action was an injunction restraining the defendants from the use and maintenance of a driveway constructed over lot No. 8, Golfside Acres, Brighton, N. Y., which driveway gave ingress and egress between East avenue and certain premises owned by the defendants. It was claimed that the use and maintenance of such a driveway constituted a violation of the covenant restricting the use of lot No. 8 to residence purposes only. The defense was that the covenant was not violated.

Paul Folger, of Rochester, for appellants.

George A. Carnahan, of Rochester, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Carrie BROWN, Individually and as Executrix of Manheim Brown, Deceased, Appellant, v. STATE of New York, Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (206 App. Div. 634, 198 N. Y. Supp. 773), entered March 19, 1923, which affirmed a judgment of the Court of Claims dismissing the plaintiff's claim. Appellant's husband and testator was a juror in the case of People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. It is alleged that the trial commenced in November, 1899, and lasted until in February, 1900; that in the latter part of January, as the

trial was approaching the end, the claimant's testator was taken ill with grippe, bronchitis, rheumatism, and lymphangitis; that said condition, sickness, and disease was caused by the unsafe, unsanitary, unwholesome, and ill-ventilated condition of the courthouse; that a two weeks' adjournment was necessary, and to obviate longer delay, the judge agreed to see that Mr. Brown had proper care while in the courtroom and proper conveyance when leaving the courthouse, and that the conditions complained of, as aforesaid, should be corrected; that this was not done, and that by reason of such illness and lack of care, he died October 6, 1913.

Edward M. Grout and Dean Potter, both of New York City, for appellant.

Carl Sherman, Atty. Gen. (W. J. Wetherbee, of Buffalo, of counsel), for the State.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, and McLAUGHLIN, JJ., concur.

CRANE and ANDREWS, JJ., absent.

William M. McLEAN, Appellant, v. F. W. WOOLWORTH COMPANY, Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment, entered February 15, 1923, upon an order of the Appellate Division of the Supreme Court in the Third Judicial Department (204 App. Div. 118, 198 N. Y. Supp. 467), reversing a judgment in favor of plaintiff entered upon the report of a referee and directing a dismissal of the complaint. The action was to have it adjudged that the defendant be perpetually enjoined, in virtue of a restrictive covenant in the deed of certain premises, from constructing any building thereon exceeding in height one story. The covenant read as follows:

"The building erected or to be erected on lot hereby conveyed to be only one story high."

The Appellate Division held that there was no covenant or easement in favor of grantor's remaining property.

Frederick Collin, of Elmira, for appellant.

H. D. Hinman, of Binghamton, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

PEOPLE of the State of New York, Appellant, v. William DE GOODE, Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (203 App. Div. 35, 196 N. Y. Supp. 418), entered October 13, 1922, which reversed a judgment of the Kings County Court, rendered upon a verdict convicting defendant of the crime of grand larceny in the first degree and granted a new trial.

Charles J. Dodd, Dist. Atty., of Brooklyn (Henry J. Walsh and William F. X. Geoghan, both of Brooklyn, of counsel), for the People.

Peter P. Smith, William H. Good, and J. G. Finklestein, all of Brooklyn, for respondent.

PER CURIAM. Order affirmed.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Samuel KOHN, Appellant, v. Jennie KOHN, Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment entered January 10, 1923, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (204 App. Div. 899, 197 N. Y. Supp. 924), reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directing a dismissal of the complaint. The action was to establish plaintiff's right to a half interest in certain premises in the borough of Brooklyn and to certain credits, profits, and income in connection therewith.

Almet F. Jenks, Almet F. Jenks, Jr., and Henry Pearlman, all of New York City, for appellant.

Sidney A. Clarkson, of Brooklyn, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Helen O'REILLY, Appellant, v. CITY OF NEW YORK, Respondent. Nellie ANGLIN, Appellant, v. CITY OF NEW YORK, Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal, in each of the above-entitled actions, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (205 App. Div. 888, 198 N. Y. Supp. 76), entered March 2, 1923, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. The actions were to recover for personal injuries alleged to have been sustained by plaintiffs through the negligence of defendant. The essential allegations with respect to both causes of action were that the plaintiffs while passengers upon a motor bus were severely injured when said bus ran into and collided with a telegraph or other pole on Clove road, Staten Island, N. Y. The defendant's answers denied ownership, operation or control of the motor bus, and denied the maintenance of the nuisance alleged.

Bertram G. Eadie, of St. George, and Guy O. Walser, of New York City, for appellants.

George P. Nicholson, Corp. Counsel, of New York City (John F. O'Brien, Willard S. Allen, and George E. Draper, all of New York City, of counsel), for respondent.

PER CURIAM. Judgment in each case affirmed, with costs.

HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

HISCOCK, C. J., not voting.

CRANE, J., dissents.

CITY OF NEW YORK, Appellant, v. NEW YORK TELEPHONE COMPANY, Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (202 App. Div. 796, 194 N. Y. Supp. 924), entered July 19, 1922, unanimously affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term. The action was brought to restrain the defendant from enforcing or collecting an increase in its rates in New York City, which had been consented to by the public service commission.

George P. Nicholson, Corp. Counsel, of New York City (M. Maldwin Fertig and Harry Hertzoff, both of New York City, of counsel), for appellant.

Edward L. Blackman and Charles T. Russell, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Oliver YETTO et al., Respondents, v. Lester PARKER, Appellant.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (205 App. Div. 859, 197 N. Y. Supp. 958), entered January 19, 1923, affirming a judgment in favor of plaintiffs entered upon a verdict. The action was to recover a sum deposited with defendant by plaintiffs under contract with defendant for the sale of automobiles by defendant to plaintiffs. The defense was a denial, nonperformance by plaintiffs of their part of said contract, performance and a counterclaim by defendant for damages alleged to have been sustained because of nonperformance of the terms of said contract by plaintiffs.

George L. Rifenburgh, of Albany, for appellant.

John T. Norton and Michael J. Deignan, both of Troy, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

William A. STUART, Appellant, v. Laura B. COSTELLO, Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (204 App. Div. 574, 198 N. Y. Supp. 828), entered March 12, 1923, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action

to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. Defendant furnished plaintiff, a painter, with an extension ladder to use in painting a house. The ladder not being long enough plaintiff placed it, without the knowledge or consent of defendant, upon a table which he found in the garden. When he had mounted near the top the table tilted, the ladder fell and he received the injuries complained of.

E. C. Sherwood, of New York City, and Joseph B. Handy, of Stapleton, S. I., for appellant.

Bertram G. Eadie, of St. George, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

William A. McDONNELL, Appellant, v. Berent C. GERKEN et al., Copartners under the Firm Name of Adler & Eckstein, Respondents.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment, entered August 4, 1921, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (197 App. Div. 446, 189 N. Y. Supp. 224), reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. The plaintiff was employed by the subtenant of the two upper floors of a building owned and constructed by the defendant Gerken and leased to the defendants Adler & Eckstein, who occupied the first and second floors. An elevator shaft of brick extended from the ground floor to the roof on the west side of the front of the building. On the opposite side was a stairway leading to all the floors of the building. In the wall of the street side of the shaft there was a window on each floor; the casement and sashes of these windows were set into the wall, so that the window panes were about 8 inches from the surface of the shaft wall. In this shaft was a freight elevator, the floor of which was 7 feet 5 inches by 5 feet 8 inches. The sides of the elevator were inclosed, but the front and rear were open, to allow entrance from the street and floors of the building. It was started and stopped by a cable on which was a safety clutch; when the clutch was closed it prevented the starting of the elevator. There was no one employed to operate the car. On the day in question the plaintiff brought furs that he had collected from the customers of his employer, and with the help of his assistant and his employer's shipping clerk loaded them on the elevator. The helper ran the elevator to the third floor, and the plaintiff rode up with the load. After his receipt book was signed, he returned to the elevator and stood looking out of the window in the elevator shaft while the furs were being transferred from the elevator. The elevator suddenly started up and the plaintiff was caught between the top of the window opening and the floor of the elevator and seriously injured.

See, also, 234 N. Y. 623, 138 N. E. 472.

Valentine Taylor, Vincent L. Leibell, and Joseph Force Crater, all of New York City, for appellant.

James J. Mahoney and George J. Stacy, both of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Owen SHANLEY, Respondent, v. TOWN OF STILLWATER, Appellant.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (201 App. Div. 232, 194 N. Y. Supp. 667), entered May 17, 1922, affirming a judgment in favor of plaintiff entered upon a verdict. The action was brought to recover damages for injury to an automobile truck, alleged to have been sustained by reason of a defect existing in one of the highways of the town of Stillwater by reason of the negligence of the town superintendent of highways of said town. The defect complained of consisted of a hole in the beaten and traveled part of the highway about 3 feet long, 2 feet wide, and 2 or more feet deep. It was alleged that said defect had existed for so long a time that the town superintendent of highways, and the other officers, agents, servants, and employees of the town should have known of the conditions.

Robert W. Fisher, of Mechanicville, and George B. Lawrence, of Stillwater, for appellant.

Edward J. Donohue, of Troy, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Archibald D. RUSSELL, Respondent, v. Frank G. PORTER, Appellant.

(Court of Appeals of New York. July 13, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (203 App. Div. 880, 196 N. Y. Supp. 429), entered November 3, 1922, which affirmed an order of Special Term denying a motion to vacate an order of arrest. The following questions were certified:

"(1) Were the original papers upon which the order of arrest was founded insufficient in law?

"(2) Had the Special Term, upon the motion to vacate, power to receive additional affidavits to supply the defects of the papers upon which the order of arrest was granted?

"(3) If the second question be answered in the affirmative were the original papers supplemented by the additional affidavits sufficient in law to uphold the order of arrest?"

C. Bertram Plante, of New York City, for appellant.

Clarence V. S. Mitchell, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs. Second and third questions certified answered in the affirmative; first question not answered.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Harry WEISS, Appellant, v. Clarence J. HOUSMAN et al., Respondents.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment, entered January 29, 1923, upon an order of the Appellate Division of the Supreme Court in the Third Judicial Department (204 App. Div. 152, 197 N. Y. Supp. 753), reversing a judgment in favor of plaintiff entered upon a verdict directed by the court and directing a dismissal of the complaint which alleged a contract of sale evidenced by the following writing:

"Received from Mr. Harry Weiss, 90 Congress street, Troy, N. Y., $7,450.08, in payment for £2,000 4½ Japanese bonds second series German-stamped (73⅛ net and accrued interest), the bonds to be deposited at the Dresdner Bank, Berlin, which institution will hold said bonds, free of charge, subject to the order of Mr. Weiss, and thus under his sole control.

"We further agree to furnish a receipt of the Dresdner Bank, setting forth the above, within a reasonable time.

"A. A. Housman & Co."

It was alleged that delivery was subsequently made to plaintiff of but 79, instead of 100, bonds, and that from each of the bonds delivered 7 coupons had been removed without his authority. This action was to recover the value of the missing bonds and coupons.

John T. Norton and Frederick C. Filley, both of Troy, for appellant.

Ira Skutch and Benjamin F. Feiner, both of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

A. W. SMITH & COMPANY, Appellant, v. LINCOLN TRUST COMPANY et al., as Executors of Chisholm Beach, Deceased, Respondents.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (206 App. Div. 610, 198 N. Y. Supp. 898), entered March 21, 1923, affirming a judgment in favor of defendants entered upon a verdict. The action was brought to recover a sum alleged to be due the plaintiff from the estate of defendants' testator for services rendered to the decedent during his lifetime by the plaintiff as expert accountant in connection with the investigation and inquiry into the handling of certai trust funds by decedent's uncle. The only issue was as to the terms of the employment. Plaintiff claimed that it was to receive the reasonable value of the services rendered. Defendants claimed that, by the agreement with decedent, plaintiff's compen-

sation was to be contingent upon a recovery, and that, if nothing was recovered from decedent's uncle, plaintiff would be entitled only to be reimbursed for actual disbursements made in connection with the investigation. Plaintiff admitted that such disbursements had been repaid.

De Coursey Fales and Benjamin H. Trask, both of New York City, for appellant.

Middleton S. Borland and Percy F. Griffin, both of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Donald McKELLAR, Respondent, v. AMERICAN SYNTHETIC DYES, Inc., Appellant.

(Court of Appeals of New York. July 13, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (204 App. Div. 890, 197 N. Y. Supp. 928), entered December 21, 1922, unanimously affirming a judgment in favor of plaintiff entered upon a verdict.

Charles E. Rushmore, Edgar T. Brackett, and Roger B. Hull, all of New York City, for appellant.

Charles H. Tuttle and Henry A. Uterhart, both of New York City, and Stephen C. Baldwin, of Brooklyn, for respondent.

PER CURIAM. Appeal dismissed, without costs, upon and in accordance with stipulation of parties.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Glen R. PATTON, Appellant, v. ARNOLD, HOFFMAN & CO., Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (203 App. Div. 887, 196 N. Y. Supp. 942), entered November 9, 1922, unanimously affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. The action was for damages for breach of contract arising out of the defendant's failure to deliver liquid chlorine. The plaintiff and his assignor, while copartners doing business under the firm name of Darnell & Patton, entered into a written agreement with the defendant corporation for the purchase and sale of liquid chlorine. The contract provided that the respondent agreed to sell to Darnell & Patton and that the latter agreed to buy from the respondent, Darnell & Patton's entire supply of liquid chlorine to be used in the treatment of flour and cereals from the date of the contract to March 15, 1917, not to exceed 50,000 pounds monthly, the price ranging from 9 cents per pound for the first 20,000 pounds to prices fixed for different amounts on subsequent deliveries. Near the end of the typewritten contract was a special clause written in ink as follows:

"Buyers to have the option of taking chlorine for other uses to be applied on above contract."

Defendant contended that the contract was void as lacking in mutuality.

Edwin A. Falk and Joseph R. Truesdale, both of New York City, for appellant.

Eugene W. Leake and Edward A. Craighill, Jr., both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

SMITH STORAGE & CARTING CORPORATION, Respondent, v. DIRECTOR GENERAL OF RAILROADS, Appellant.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (202 App. Div. 826, 194 N. Y. Supp. 981), entered July 5, 1922, affirming a judgment in favor of plaintiff entered upon a verdict. The action was to recover for damage to a truck which was struck by one of defendants' locomotives at a railroad crossing in the village of La Salle. The defendant's tracks at the point in question are double tracks running east and west between Buffalo and Niagara Falls, N. Y. The river road runs from Niagara Falls, east and west to the point of crossing. It then turns at nearly right angles in a northerly direction. The river road contains the two street car

tracks of the International Railway Company to the point where it turns north over the crossing in question. In turning north the river road crosses the double tracks of the New York Central, the single track of the Erie Railroad and the double tracks of the high speed line of the International Railway Company. The truck of the plaintiff was being driven by one of its employees. It was going east on the southerly side of the river road. In turning north to make the crossing, the truck crossed the two tracks of the International Railway in the river road before it reached the tracks of the defendant. Plaintiff alleged that the driver's view was obstructed; that the locomotive gave no signal of its approach and that the flagman was absent from his post.

Carlton A. Fisher, of Buffalo, for appellant.
Glenn A. Stockwell, of Niagara Falls, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Earl H. HENDERSON, Appellant, v. George A. GILLETTE et al., Respondents.

(Court of Appeals of New York. July 13, 1923.)

Appeal, by permission, from a judgment, entered January 9, 1923, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (203 App. Div. 877, 196 N. Y. Supp. 931), overruling plaintiff's exceptions ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing a judgment in favor of defendants upon the verdict directed by the court. The action was in replevin to recover possession of an automobile. One Charles M. Bridgeford made his promissory note to the order of Frank M. Goff, in the sum of $2,500, payable three months after date, with interest at the Union Trust Company. This note was indorsed by the defendant George A. Gillette for the accommodation of Charles M. Bridgeford. It was then indorsed by Frank M. Goff and delivered to the Union Trust Company. The note was not paid at maturity and notice of protest was given to George A. Gillette about January 12, 1921. At the time of making the note Charles M. Bridgeford executed and delivered to the defendant Gillette a collateral security chattel mortgage to secure Gillette on his indorsement, whereby he mortgaged three automobiles. One of them he thereafter sold to plaintiff. It having been seized under the chattel mortgage plaintiff brought this action to recover possession.

Glenn L. Buck, of Rochester, for appellant.
Arthur V. D. Chamberlain, George A. Gillette and William J. Baker, all of Rochester, and Sidney O'Brien, for respondents.

PER CURIAM. Judgment affirmed with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Louis COUGHLIN, Respondent, v. PARK ROW REALTY COMPANY, Inc., Appellant.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (206 App. Div. 610, 198 N. Y. Supp. 908), entered March 19, 1923, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. Plaintiff was severely injured between 9 and 9:30 a. m. on November 12, 1921, by being precipitated 33 feet down an elevator pit while delivering merchandise on a sidewalk elevator appurtenant to defendant's premises Nos. 13–21 Park Row, borough of Manhattan, New York, and used in connection therewith. The elevator ran from the sidewalk level in front of the building to the basement and subbasement and was at the time at the sidewalk level. After the plaintiff and another employee opened the gates, which covered the shaft, they placed the barrel of glucose in an upright position upon the elevator by rolling it along the outer side of the elevator shaft, so that one end projected a few inches over the elevator platform, which was 6 inches below the level of the walk, and then, lifting the other end up gradually; thereafter they stepped onto the platform of the elevator for the purpose of shifting the barrel toward the center of the platform, and when they put the barrel on or got on and were endeavoring to move it or had moved it a little, the platform tilted or sagged or inclined downward at the north end and immediately thereafter dropped north end first, carrying plaintiff, who was at the north end, with it to the bottom of the shaft.

E. C. Sherwood and Charles Stewart Davison, both of New York City, for appellant.

Frank C. Laughlin and L. H. Schleider, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Carmine GIBBIA, an Infant, by Salvatore Gibbia, His Guardian ad Litem, Respondent, v. Hyman SKLAMBERG, Appellant. Salvatore Gibbia, Respondent, v. Hyman Sklamberg, Appellant.

(Court of Appeals of New York. July 13, 1923.)

Appeal, by permission, in each of the above-entitled actions from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (203 App. Div. 850, 196 N. Y. Supp. 928), entered October 26, 1922, unanimously affirming a judgment in favor of plaintiff entered upon a verdict. The first action was to recover for personal injuries sustained by plaintiff through the negligence of the defendant. The second action was by the father of the plaintiff in the first action to recover for loss of services resulting from the same accident. The evidence showed that on March 12, 1919, while the infant plaintiff was playing on the sidewalk in front of the premises No. 1019 Second avenue, in the city of New York, he was struck and run over by the defendant's wagon, which ran up on the sidewalk while attempting to turn around, and sustained a compound fracture of his right arm, and injuries to his right leg, which necessitated its amputation twice above the knee.

Harold R. Medina, Murray G. Jenkins, William B. Shelton, and William Dike Reed, all of New York City, for appellant.

William J. Roche, of Troy, and George J. McDonnell, of New York City, for respondents.

PER CURIAM. Judgment in each case affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

McLAUGHLIN, J., dissents.

PEOPLE of the State of New York, Respondent, v. Rosario TARANTOLO, Appellant.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (202 App. Div. 707, 194 N. Y. Supp. 672), entered June 9, 1922, which affirmed a judgment of the Court of Special Sessions of the City of New York, convicting the defendant of unlawfully possessing a revolver.

See, also, 236 N. Y. 519, 142 N E. 267.

Edward J. Reilly, of Brooklyn, for appellant.

Charles J. Dodd, Dist. Atty., of Brooklyn (Harry S. Sullivan and Henry J. Walsh, both of Brooklyn, of counsel), for the People.

PER CURIAM. Judgment affirmed.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

SPENCER KELLOGG & SONS, Inc., Respondent, v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Appellant.

(Court of Appeals of New York. July 13, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (204 App. Div. 243, 197 N. Y. Supp. 380), entered May 22, 1923, affirming a judgment in favor of plaintiff entered upon a verdict directed by the trial court. This action was brought to recover $1,535.59 which the plaintiff asserted was due it for services performed for the benefit of the defendant in the elevation and storage of a certain quantity of grain between the 21st day of September and the 5th day of October, 1921. The defendant claimed it was not lawful or proper to pay this sum to the plaintiff by reason of the plaintiff's failure to comply with the tariff under which the grain moved.

Certiorari denied 44 Sup. Ct. 38, 68 L. Ed. —.

M. C. Spratt and Louis L. Babcock, both of Buffalo, for appellant.

W. C. Carroll, of Buffalo, for respondent.

PER CURIAM. Judgment affirmed with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, CRANE, and ANDREWS, JJ., concur.

McLAUGHLIN, J., not sitting.

Guy C. SMITH, Respondent, v. Isaac E. CHADWICK, Appellant.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (206 App. Div. 606, 198 N. Y. Supp. 949), entered March 5, 1923, affirming a judgment in favor of plaintiff entered upon a verdict. The action was brought to recover damages for alleged fraud in the making of a contract for the foreign exhibition rights of a motion picture. The complaint alleged that the defendant made certain statements and representations to the plaintiff; that each of such representations was untrue; that they were known by the defendant to be false when he made them; that they were made with the intent that the plaintiff should rely upon them; that the plaintiff relied upon said representations and in reliance thereon entered into said purported contract and was induced to do so by said representations.

Gerson C. Young, of New York City, for appellant.

Clarence M. Lewis and W. N. Seligsberg, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

NEW PALTZ, HIGHLAND & POUGHKEEPSIE TRACTION COMPANY, Appellant, v. COUNTY OF ULSTER, Defendant, and Town of Lloyd, Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment entered July 24, 1922, upon an order of the Appellate Division of the Supreme Court in the Third Judicial Department (202 App. Div. 234, 195 N. Y. Supp. 623), reversing a judgment in favor of plaintiff and against the defendant, respondent, and directing as to it a dismissal of the complaint. The action was to recover on a contract. The plaintiff is a street railway company, with tracks in the highway in the town of Lloyd, Ulster county, N. Y. A county highway was being constructed over and upon this highway. The tracks of the plaintiff, at the location in question, were partly upon the southerly and partly upon the northerly side of the highway. The plans for the county highway, prepared by the state highway commission, provided for changing plaintiff's tracks from the southerly side to the northerly side of the highway. Plaintiff claimed to own the lands on which its tracks were and demanded of the officers of defendants respectively that all its rights and exemptions be protected. On November 11, 1913, a certain six-party agreement was drafted, by which it was agreed that plaintiff should have absolute, indefeasible and perpetual right to enjoy and use the land to which its railroad tracks, ties, poles, brackets, wires and appurtenances should be removed. An abutting owner, claiming that the tracks as relocated encroached upon his land, brought an action of ejectment and recovered damages. This action was to recover the amount of said judgment and the expense of defending the action.

See, also, 236 N. Y. 590, 142 N. E. 296.

Benjamin E. Messler, of New York City, for appellant.

Andrew Wright Lent, of Newburgh, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

STEHLI SILKS CORPORATION, Respondent, v. Nathan J. KLEINBERG, Doing Business under the Trade-Name of Kleinberg Waist Company, Appellant.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (205 App. Div. 871, 198 N. Y. Supp. 950), entered February 13, 1923, affirming a judgment in favor of plaintiff entered upon a verdict. The action was to recover for goods alleged to have been sold and delivered and for breach of contract.

Charles A. Brodek, of New York City, for appellant.

H. Preston Coursen, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Katherine C. DEALY, Appellant, v. Edward C. KLAPP, Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment, entered December 13, 1922, upon an order of the Appellate Division of the Supreme Court in the Third Judicial Department (203 App. Div. 216, 196 N. Y. Supp. 702), reversing a judgment in favor of defendant entered upon a verdict and directing judgment in favor of plaintiff. The action was to compel specific performance of an alleged contract to purchase land. The order of the Appellate Division contained no provision requiring the plaintiff to specifically perform her part of the contract. Defendant moved to resettle and amend the order of the Appellate Division by incorporating in it provisions requiring the plaintiff also to specifically perform. The motion was granted and judgment nunc pro tunc as of December 13, 1922, was entered requiring not only defendant to perform his contract, but also granting to defendant affirmative relief and requiring that plaintiff perform the contract. From that judgment this appeal is taken.

J. H. Dealy, of Amsterdam, for appellant.

Christopher J. Heffernan, of Amsterdam, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

EMPIRE TRUST COMPANY, as Trustee under the Will of Harriet F. Van Zandt, Deceased, Respondent, v. Fannie F. WELCH et al., Appellants, and Park Mortgage Company et al., Respondents.*

(Court of Appeals of New York. July 13, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (206 App. Div. 663, 199 N. Y. Supp. 920), entered April 12, 1923, unanimously affirming a judgment entered upon the report of a referee in an action brought by Empire Trust Company, acting as successor trustee under the will of Harriet F. Van Zandt, deceased, against appellants, as owners and holders of two bonds and mortgages, originally made to the Park Mortgage Company by Daniel E. Seybel, as trustee for Harriet F. Van Zandt, under authority given to him by a trust agreement made by and between the said Harriet F. Van Zandt and the said Daniel E. Seybel and dated June 16, 1899, and also against the owners and holders of three other mortgages made by the said Harriet F. Van Zandt, the said Park Mortgage Company, the executors of the said Seybel, the Empire Trust Company acting as successor to said Seybel as trustee under said trust agreement, and James B. Ludlow and Annie Ludlow Winters, co-owners with said Harriet F. Van Zandt of undivided parts of most of the land affected by said trust agreement. The object of the action was to determine rights and liabilities of the respective defendants to certain real property, claimed by the plaintiff, as trustee under the will of Mrs. Van Zandt.

Almet F. Jenks and Eliot Tuckerman, both of New York City, for appellants.

Charles T. Payne, and F. Bayard Rives, both of New York City, for plaintiff respondent.

John A. Larkin, of Croton-on-Hudson, for respondents infant defendants.

William S. Woodhull, of New York City, for defendants respondents for Empire Trust Company and others.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Thomas McAULEY, Appellant, v. UNITED CIGAR STORES COMPANY OF AMERICA, Inc., Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal from a judgment, entered February 14, 1923, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 356, 198 N. Y. Supp. 154), reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint.

*Reargument denied 237 N. Y. —, 143 N. E. —.

The action was brought to recover damages for personal injuries sustained by the respondent in having fallen at the entrance to one of appellant's stores as he was leaving the same after making a purchase therein, by reason of an accumulation of snow and ice at such entrance. According to the records of the weather bureau, it had been snowing all day and up until 10:50 p. m. and continued sleeting thereafter, with a high wind blowing all the time. The accident happened at about 11 p. m., at which time there was an accumulation of snow and ice in front of the defendant's store, presenting an uneven, hummocky surface, made so by the feet of the persons passing in and out of the store. The Appellate Division held that defendant was not chargeable with negligence in failng to keep the doorway clear of snow under such circumstances.

William Macy and Joseph I. Green, both of New York City, for appellant.

Walter L. Glenney and Bertrand L. Pettigrew, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Claim of Charles D. FOX, Respondent, v. TRUSLOW & FULLE, Inc., et al., Appellants. State Industrial Board, Respondent.

(Court of Appeals of New York. July 13, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (204 App. Div. 584, 198 N. Y. Supp. 735), entered March 14, 1923, unanimously affirming an award of the state industrial board made under the Workmen's Compensation Law. The deceased was a machine attendant in the plant of the employer. She received a cut upon her wrist while cleaning a machine which was then in motion. Infection set in at the site of the cut, with the result that death soon after followed. The cleaning of a machine while in motion was strictly forbidden by the employer. The question in the case, therefore, was whether the deceased employee, by doing the thing forbidden, stepped out of her employment.

Clarence B. Tippett, of New York City, for appellants.

Carl Sherman, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

PEOPLE of the State of New York, Respondent, v. DOUGLAS PACKING COMPANY, Inc., Appellant.

(Court of Appeals of New York. July 13, 1923.)

PER CURIAM. Motion to amend remittitur denied, with $10 costs and necessary printing disbursements. See 236 N. Y. 1, 139 N. E. 759.

Minna G. HASKELL, Appellant and Respondent, v. William S. HASKELL, Respondent and Appellant.

(Court of Appeals of New York. Oct. 9, 1923.)

Appeal by plaintiff from a judgment entered June 6, 1922, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (201 App. Div. 414, 194 N. Y. Supp. 28), reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directing a dismissal of the complaint; also appeal by defendant from an order of said Appellate Division entered July 6, 1922, resettling said order of reversal. The action was brought by a wife to recover from her husband moneys advanced by her out of her separate estate for the support and maintenance of the infant son of the parties while the husband and wife were living separate and apart. The amended answer set up as an affirmative defense that the infant son of the parties, in pursuance of a separation agreement entered into between the parties hereto, was to be educated and supported by the husband under his sole direction and that the boy in September, 1917, refused to enter a school as ordered by the husband, and that the plaintiff thereafter assumed the direction and control of the said son, who entered upon a business career, from which he has received compensation and other benefits which were sufficient during said time to supply him with necessaries for his support

and maintenance and have been applied by him to that end with defendant's consent.

I. Maurice Wormser and Samson Selig, both of New York City, for appellant.

Francis G. Caffey and William S. Haskell, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, without costs.

HISCOCK, C. J., and CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

HOGAN, J., dissents.

ULTRAMAR COMPANY, Limited, Respondent, v. MINERALS SEPARATION, Limited, Appellant, Impleaded with Others.

(Court of Appeals of New York. Oct. 2, 1923.)

Motion to dismiss an appeal by permission from an order of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 795, 198 N. Y. Supp. 749), entered March 29, 1923, which reversed an order of Special Term granting a motion to set aside the service of the summons and complaint and dismissing the said complaint and denied said motion. The motion was made upon the ground of waiver by defendant of its special appearance. See, also, 236 N. Y. 647 142 N. E. 319.

Lindell T. Bates, of New York City, for the motion.

Emil Goldmark, of New York City, opposed.

PER CURIAM. Motion denied, with $10 costs.

MANHATTAN BRIDGE THREE-CENT LINE, Appellant, v. The CITY OF NEW YORK, Respondent.

(Court of Appeals of New York. Oct. 9, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 236 N. Y. 559, 142 N. E. 283.

Herman B. FERGUSON, Respondent, v. Raymond H. CHUCK et al., Appellants.

(Court of Appeals of New York. Oct. 9, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 236 N. Y. 149, 140 N. E. 225.

Benjamin R. KITTREDGE, Respondent, v. Arthur E. GRANNIS et al., Defendants, and Robert C. Lawrence, Appellant.

(Court of Appeals of New York. Oct. 9, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 236 N. Y. 375, 140 N. E. 730.

Albert GOLDSTEIN, Respondent, v. STANDARD ACCIDENT INSURANCE COMPANY, Appellant.

(Court of Appeals of New York. Oct. 9, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 236 N. Y. 178, 140 N. E. 235.

Etheline H. HINKLEY, Appellant, v. STATE of New York, Respondent.

(Court of Appeals of New York. Oct. 9, 1923.)

PER CURIAM. Motion to amend remittitur denied, with $10 costs. See 234 N. Y. 309, 137 N. E. 599.

In the Matter of the Application of Wallace H. EISS, Appellant, for an Order of Mandamus v. Charles E. SUMMERS et al., as Water Commissioners of the Village of Williamsville, Respondents.

(Court of Appeals of New York. Oct. 9, 1923.)

Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (205 App. Div. 691, 199 N. Y. Supp. 544), entered May 5, 1923, which reversed an order of Special Term granting a motion for a peremptory order of mandamus and denied said motion. The motion was made upon the ground that the determination of the Appellate Division was discretionary.

Wortley B. Paul, of Buffalo, for the motion.

Myron S. Short, of Buffalo, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs, and $10 costs of motion.

CLARK PAPER & MANUFACTURING COMPANY, Respondent, v. Edward D. STENACHER, Appellant.

(Court of Appeals of New York. Oct. 9, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 236 N. Y. 312, 140 N. E. 708.

UTICA PARTITION CORPORATION, Respondent, v. JACKSON CONSTRUCTION COMPANY, Appellant, Impleaded with Others.

(Court of Appeals of New York. Oct. 9, 1923.)

Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (201 App. Div. 376, 194 N. Y. Supp. 303), entered May 19, 1922, which unanimously affirmed an order of Special Term settling the accounts of a receiver. The motion was made upon the grounds that the order appealed from was intermediate and that permission to appeal had not been obtained.

J. Wilson Bryant, of New York City, for the motion.

R. S. Johnson, of Utica, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and $10 costs of motion.

Dennis F. CHAMBERS et al., Respondents, v. The SUPREME COUNCIL, CATHOLIC BENEVOLENT LEGION, Appellant.

(Court of Appeals of New York. Oct. 9, 1923.)

Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (206 App. Div. 717, 199 N. Y. Supp. 915), entered May 24, 1923, unanimously affirming a judgment in favor of plaintiffs entered upon a decision of the court at a Trial Term without a jury. The motion was made upon the ground that the affirmance by the Appellate Division was unanimous and that permission to appeal had not been obtained.

Joseph K. Ellenbogen, of New York City, for the motion.

Edward J. Connolly and Harry J. Frey, both of Brooklyn, opposed.

PER CURIAM. Motion granted, and appeal dismissed, without costs.

Gus MEYERS, Appellant, v. CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD COMPANY, Respondent.

(Court of Appeals of New York. Oct. 9, 1923.)

Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (183 App. Div. 453, 171 N. Y. Supp. 71), entered April 30, 1918, reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial. The motion was made upon the grounds of failure to file and serve the case and required undertaking on appeal.

M. N. Turner, for the motion.

PER CURIAM. Motion granted, and appeal dismissed, with costs and $10 costs of motion.

BANK OF ITALY, Respondent, v. MERCHANTS' NATIONAL BANK, Appellant.

(Court of Appeals of New York. Oct. 9, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 236 N. Y. 106, 140 N. E. 211.

Robert A. WATSON, Appellant, v. William GILLESPIE et al., Respondents.

(Court of Appeals of New York. Oct. 9, 1923.)

Motion to dismiss an appeal from a judgment, entered June 12, 1923, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (205 App. Div. 613, 200 N. Y. Supp. 191), reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint. The motion was made upon the ground that the reversal was solely upon the facts.

R. Randolph Hicks, of New York City, for the motion.

David Paine, of New York City, opposed.

PER CURIAM. Motion denied, with $10 costs.

NEW ATLANTIC GARDEN, Inc., Appellant, v. NEW ATLANTIC GARDEN REALTY CORPORATION, Respondent.

(Court of Appeals of New York. Oct. 9, 1923.)

Motion to dismiss an appeal from so much of a judgment of the Appellate Division of

the Supreme Court in the First Judicial Department (201 App. Div. 404, 194 N. Y. Supp. 34), entered January 25, 1923, as directs as follows:

"Ordered, adjudged and decreed that the first cause of action contained in the amended complaint be and the same hereby is dismissed upon the merits and it is further ordered, adjudged and decreed that the third cause of action contained in the amended complaint be and the same hereby is dismissed upon the merits."

The motion was made upon the ground that the first and third causes of action were dismissed, with the consent of the plaintiff.

Samuel Levy, of New York City, for the motion.

Hobart S. Bird, of New York City, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with $10 costs of motion.

Paul DICKEY, Appellant, v. Christopher A. GORTNER, Respondent.

(Court of Appeals of New York. Oct. 9, 1923.)

PER CURIAM. Motion for reargument denied, without costs. See 223 N. Y. 531, 120 N. E. 860; 226 N. Y. 620, 688, 711, 123 N. E. 862; 230 N. Y. 612, 657, 130 N. E. 914, 933; 231 N. Y. 518, 132 N. E. 870.

Jacob D. COHEN, Suing in Behalf of Himself and Others, Respondent, v. I. GOODMAN & SON, Inc., et al., Appellants.

(Court of Appeals of New York. Oct. 9, 1923.)

Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (205 App. Div. 312, 199 N. Y. Supp. 497), entered May 4, 1923, which unanimously reversed an order of Special Term denying a motion to adjudge appellant Goodman guilty of contempt, and granted said motion. The motion was made upon the ground of failure to file and serve the record on appeal.

Herbert Spencer Leman, of New York City, for the motion.

PER CURIAM. Motion granted, and appeal dismissed, with costs and $10 costs of motion.

Harry V. BUTLER, Appellant, v. Bertha M. BUTLER, Respondent.

(Court of Appeals of New York. Oct. 9, 1923.)

Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 602, 198 N. Y. Supp. 391), entered March 7, 1923, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term in an action to annul a marriage. The motion was made upon a ground that the action had abated owing to the death of the appellant.

Myle J. Holley, of New York City, for the motion.

Caruthers Ewing, of Memphis, Tenn., opposed.

PER CURIAM. Motion granted, and appeal dismissed, with $10 costs of motion.

Jennie M. OPPENHEIM, Appellant, v. Martha KRIDEL, Respondent.

(Court of Appeals of New York. Oct. 9, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 236 N. Y. 156, 140 N. E. 227. See, also, 236 N. Y. 507, 142 N. E. 261.

Dislanda GILL, as Administratrix of the Estate of Anthony Gill, Deceased, Respondent, v. UNITED AMERICAN LINES, Appellant.

(Court of Appeals of New York. Oct. 9, 1923.)

Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Jundicial Department (206 App. Div. 778, 200 N. Y. Supp. 924), entered July 3, 1923, unanimously affirming a judgment in favor of plaintiff entered upon a verdict. The motion was made upon the ground that permission to appeal had not been obtained. Appellant contended that a constitutional question was involved.

William S. Butler, of Brooklyn, for the motion.

E. C. Sherwood, of New York City, opposed.

PER CURIAM. Motion denied, without costs, and without prejudice to right to renew motion on argument of appeal.

Herman W. **ORTHEY**, as Substituted Trustee under the Will of Frederick Westphal, Deceased, Appellant, v. Abraham **BOGAN** et al., Defendants, and Charlotte P. Gunser, as Executrix of Appolonia Bowden, Respondent.

(Court of Appeals of New York. Oct. 9, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 236 N. Y. 351, 140 N. E. 722.

Corabel McCROSSEN, Appellant, v. Thomas A. MOORHEAD, Respondent.

(Court of Appeals of New York. Oct. 9, 1923.)

Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (205 App. Div. 497, 200 N. Y. Supp. 581), entered May 21, 1923, reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial. The motion was made upon the ground that the Appellate Division unanimously held that the verdict was not supported by the evidence.

Borden H. Mills, of Albany, for the motion.
Abram L. Jordan, of Albany, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and $10 costs of motion.

Philip **NOVICK**, as Trustee in Bankruptcy of the Capital Lamp & Shade Company, Appellant, v. Carl S. **DUCKOR**, Respondent, Impleaded with Another.*

(Court of Appeals of New York. Oct. 9, 1923.)

Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (206 App. Div. 626, 198 N. Y. Supp. 936), entered March 9, 1923, which reversed an order of Special Term adjudging the respondent herein in contempt of court. The motion was made upon the ground that the order was merely an order in the action and that permission to appeal had not been obtained.

Milton C. Weisman, of New York City, for the motion.
David Haar, of New York City, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and $10 costs of motion.

In the Matter of Lena SUGAL, Respondent, v. Samuel E. PELTZ, Appellant.

(Court of Appeals of New York. Oct. 9, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (206 App. Div. 719, 200 N. Y. Supp. 952), entered June 4, 1923, which modified, and affirmed, as modified, a final order of the Suffolk County Court in summary proceedings. The motion was made upon the ground that under section 1442 of the Civil Practice Act an appeal could not be taken to the Court of Appeals without permission from a final judgment of the Appellate Division in a summary proceeding.

Joseph T. Losee, of Patchogue, for the motion.
George W. Percy, of Southhampton, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and $10 costs of motion.

In the Matter of the Probate of the WILL of Henry C. SCHMIDT, Deceased. Wilhelmina C. Ehrsam et al., Appellants; Ida Schmidt, Respondent.

(Court of Appeals of New York. Oct. 9, 1923.)

Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (202 App. Div. 843, 194 N. Y. Supp. 978), entered July 21, 1922, which unanimously affirmed a decree of the Kings County Surrogate's Court admitting to probate a paper propounded as the last will and testament of Henry C. Schmidt, deceased. The motion was made upon the ground that permission to appeal had not been obtained.

John C. Stemmermann, of Brooklyn, for the motion.
Barnett E. Kopelman, of New York City, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and $10 costs of motion.

Jess **BRIEGEL**, Appellant, v. Arthur **DAY** et al., Defendants, and Nellie Kenefick, Individually and as Executrix of William Kenefick, Deceased, Respondent.

(Court of Appeals of New York. Oct. 9, 1923.)

Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (202

*Motion to amend remittitur denied 237 N. Y. —, 143 N. E. —.

App. Div. 484, 195 N. Y. Supp. 295), entered July 14, 1922, which unanimously affirmed an order of Special Term vacating and setting aside the service of the summons and complaint upon one of the defendants. The motion was made upon the ground that permission to appeal had not been obtained.

T. C. P. Martin, of New York City, for the motion.

William H. Griffin, of New York City, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and $10 costs of motion.

ULTRAMAR COMPANY, Limited, Respondent, v. MINERALS SEPARATION, Limited, Appellant, Impleaded with Another.

(Court of Appeals of New York. Oct. 16, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 795, 198 N. Y. Supp. 749) entered March 29, 1923, which reversed an order of Special Term granting a motion to set aside service of the summons and complaint. The following questions were certified:

"(1) Was the defendant, Minerals Separation, Limited, at the time of the service of the summons herein, doing business within the state of New York within the meaning of section 47 of the General Corporation Law?

"(2) Were the duties of and the authority conferred upon John Ballot by the powers of attorney such as to constitute him a managing agent for the said defendant corporation within the meaning of section 229, subdivision 3, of the Civil Practice Act?"

Emil Goldmark and Alfred A. Cook, both of New York City, for appellant.

Lindell T. Bates, of New York City, for respondent.

PER CURIAM. We think the defendant, Minerals Separation, Limited, a British corporation, was not engaged in business in this state at the time of the service of the summons (Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915; Holzer v. Dodge Bros., 233 N. Y. 216, 135 N. E. 268). The facts on which this conclusion is founded have been fully stated in the opinion of the Special Term, and no useful purpose would be promoted if they were to be repeated here. The order of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs in the Appellate Division and in this court. The first question certified should be answered in the negative, and it is unnecessary to answer the second question. Order reversed, etc.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

MT. VERNON COMPANY, SILVERSMITHS, Inc., Appellant, v. MT. VERNON METAL PRODUCTS COMPANY, Inc., Defendant. In the Matter of the Punishment of Harry A. Macfarland, Respondent, for Contempt.

(Court of Appeals of New York. Oct. 16, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (206 App. Div. 708, 200 N. Y. Supp. 936), entered May 4, 1923, which reversed an order of Special Term adjudging the respondent guilty of contempt of court, in that he did "from the 20th day of January, 1923, up to the 31st day of January, 1923, deliberately, willfully, and intentionally conceal himself with the purpose of evading the service of the process of this court, to wit, the said order to show cause why he should not be punished for contempt." The Appellate Division held that upon the facts disclosed, the court had not acquired jurisdiction of the appellant, the conclusive proof showing that personal service of the subpœna and order to show cause had not been made in the manner prescribed by statute.

Robert C. Beatty, of New York City, for appellant.

R. Randolph Hicks and Malcolm C. Law, both of New York City, for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Claim of Fred A. FROST v. H. H. FRANKLIN MANUFACTURING COMPANY et al., Respondents. State Industrial Board, Appellant.

(Court of Appeals of New York. Oct. 16, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (204 App. Div. 700, 198 N. Y. Supp. 521), entered March 7, 1923, which reversed an award of the State Industrial Board made under the Workmen's Compensation Law. Claimant, who was in charge of

defendant manufacturing company's tool department, was writing out an order for materials on a window shelf. A workman came and asked for wire which claimant handed to him. He began to file off a piece. Almost simultaneously with the act of handing out the wire, claimant greeted the said employee by pulling the peak of his cap down over his eyes, and the said employee attempted to lift the cap with the same hand in which he held a file, the file flew from its handle and struck claimant in the right eye causing loss of sight thereof. The Appellate Division held that the accident did not arise out of the employment.

Carl Sherman, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for appellant.

Clarence B. Tippett, of New York City, for respondents.

PER CURIAM. Order affirmed, with costs against State Industrial Board.

HISCOCK, C. J., and CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur. HOGAN and CRANE, JJ., dissent.

PEOPLE of the State of New York ex rel. DONNER-UNION COKE CORPORATION, Appellant and Respondent, v. William J. BURKE et al., as Assessors of the City of Buffalo, Respondents and Appellants.

(Court of Appeals of New York. Oct. 16, 1923.)

Cross-appeals from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (204 App. Div. 557, 198 N. Y. Supp. 601), entered April 24, 1923, which modified, and affirmed, as modified, an order of Special Term reducing an assessment upon real property of relator for purposes of taxation, on the ground that certain improvements thereon were the property of the United States government, and therefore exempt from taxation.

Dana B. Hellings and Frederick C. Slee, both of Buffalo, for relator, appellant and respondent.

William S. Rann, Corp. Counsel, of Buffalo (Herbert A. Hickman, of Buffalo, of counsel), for defendants, respondents and appellants.

PER CURIAM. Order affirmed, without costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Application of Henry J. HAASE, Appellant, for an Order of Certiorari against the COMMON COUNCIL OF THE CITY OF ELMIRA, Respondent.

(Court of Appeals of New York. Oct. 16, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (206 App. Div. 14, 200 N. Y. Supp. 419), entered June 26, 1923, which dismissed a writ of certiorari to review the proceedings of the common council of the city of Elmira in removing the petitioner from office as water commissioner.

Thomas M. Losie, of Elmira, for appellant.

H. L. Gardner, Corp. Counsel, of Elmira, (Harry Moseson and Boyd McDowell, both of Elmira), for respondent.

PER CURIAM. Appeal dismissed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Patrick J. DONOVAN, Appellant, v. CUNARD STEAMSHIP COMPANY, Ltd., Respondent.*

(Court of Appeals of New York. Oct. 16, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (206 App. Div. 751, 200 N. Y. Supp. 920), entered July 13, 1923, which unanimously affirmed a judgment in favor of defendant entered upon an order of Special Term granting a motion by defendant for judgment under rule 107 of the Rules of Civil Practice.

Joseph A. Burdeau and C. Fuller Williams, both of New York City, for appellant.

Thaddeus G. Cowell, of New York City, for respondent.

PER CURIAM. Appeal dismissed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

*Reargument denied 237 N. Y. —, 143 N. E. —. Certiorari denied 44 Sup. Ct. 332, 68 L. Ed. —.

PEOPLE of the State of New York ex rel. NORTHERN FINANCE CORPORATION, Appellant, v. Walter W. LAW, Jr., et al., Constituting the State Tax Commission, Respondents.

(Court of Appeals of New York. Oct. 16, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 236 N. Y. 286, 140 N. E. 700.

In the Matter of the Accounting of the FARMERS' LOAN & TRUST COMPANY, as Trustee under the WILL of Jabez A. BOSTWICK, Deceased, Respondent. Albert C. Bostwick et al., Appellants; Marie S. Gilbert, Individually and as Executrix of Albert C. Bostwick, Deceased, Respondent.

(Court of Appeals of New York. Oct. 16, 1923.)

PER CURIAM. Motion for reargument denied, with $10 costs and necessary printing disbursements. See 236 N. Y. 242, 140 N. E. 576.

In the Matter of the Petition of the TOWN BOARD OF THE TOWN OF CUBA et al., Respondents. Erie Railroad Company, Appellant.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (203 App. Div. 876, 196 N. Y. Supp. 955), entered November 22, 1922, which affirmed an order of the public service commission directing the alteration of a certain existing highway undercrossing of the Erie railroad in the town of Cuba, Allegany county, N. Y. The only question argued on the appeal was the question of the jurisdiction of the public service commission to make this final order directing the changes in this crossing. The question of jurisdiction involved the construction of sections 91 and 94 of the Railroad Law; it being the contention of the appellant that this being a state highway, the proceeding could only be instituted by a petition filed by the state commission of highways, and could not be so instituted by the petition of the town board of Cuba, representing a municipality which had no control over the highway, did not maintain it, and was not chargeable wth any part of the expense of the crossing change directed.

Halsey Sayles, of Elmira, for appellant.

Walter N. Renwick and Harry E. Keller, both of Cuba, N. Y., for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Juan CHEMELLO, Appellant, v. Emanuel ENDLICH et al., Respondents.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (206 App. Div. 757, 200 N. Y. Supp. 917), entered June 29, 1923, which affirmed an order of Special Term granting a motion for the consolidation of two actions. The following question was certified:

"Upon the record herein, was the court authorized, pursuant to the provisions of section 96 of the Civil Practice Act, to grant the motion made by the defendants herein to consolidate this action with an action pending in the same court entitled 'H. Bernard Cohen, Plaintiff, against Steneck Trust Co., Defendant'?"

Franklin Bien and Bennett E. Siegelstein, both of New York City, for appellant.

Gustave A. Teitelbaum and Louis Jay, both of New York City, for respondents Emanuel Endlich et al.

Edward D. Bryde, of New York City, for respondent Steneck Trust Company

PER CURIAM. Order affirmed, with costs. Question certified answered in the affirmative.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Application of Job E. HEDGES, as Receiver of New York Railways Company, Appellant, for an Order of Certiorari against George McANENY et al., Constituting the Transit Commission of the State of New York, Respondents.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (205 App. Div. 887, 198 N. Y. Supp. 920) entered February 23, 1923, which dismissed an order of certiorari and confirmed a determination of the transit commission of the state of New

York directing the New York Railways Company and its receiver to honor transfers issued by the Ninth Avenue Railroad Company and presented at Fifty-Third street and Seventh avenue, by carrying the passenger presenting such transfer at that point east from Seventh avenue to Sixth avenue and south along Sixth avenue, without charging, demanding or collecting any fare therefor.

Henry J. Smith and George Roberts, both of New York City, for appellant.

George H. Stover and William G. Fullen, both of New York City, for respondents.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of Samuel WELTMAN, an Incompetent Person. Joseph W. Gottlieb, as Committee of the Person, Appellant; Chase National Bank, as Committee of the Property, Respondent.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (206 App. Div. 716, 200 N. Y. Supp. 956), entered May 25, 1923, which modified, and affirmed, as modified, an order of Special Term reducing the amount allowed as compensation for services to a committee of the person of an incompetent.

Myron Krieger, of New York City, for appellant.

Meier Steinbrink and Frank E. Johnson, both of Brooklyn, for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

PEOPLE of the State of New York ex rel. Gus KATZ, Appellant, v. George P. RICHTER et al., Respondents.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (205 App. Div. 883, 198 N. Y. Supp. 940) entered February 16, 1923, which affirmed an order of Special Term dismissing a writ of habeas corpus. Appellant, a resident and citizen of Pennsylvania, was charged by his wife in the Domestic Relations Court of the city of New York with being a disorderly person on account of having abandoned her in Poland in 1919, and again in the city of New York, September 18, 1922, the day of on which she arrived in New York from Poland. He was adjudged a disorderly person, was required to pay $20 weekly for the support of his wife and children, and, in default of a bond for $1,040, was committed to the workhouse for one year. The question was whether the Domestic Relations Court had jurisdiction.

Max Schleimer, of New York City, for appellant.

George P. Nicholson, Corp. Counsel, of New York City (John F. O'Brien and Henry J. Shields, both of New York City, of counsel), for respondents.

PER CURIAM. Order affirmed, without costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Application of Grant CRABTREE, Appellant, for Vacation of a Subpœna Duces Tecum. Joseph E. Corrigan, Respondent.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (206 App. Div. 750, 200 N. Y. Supp. 918), entered June 26, 1923, which unanimously affirmed an order of the Special Term denying a motion to vacate a subpœna duces tecum.

George P. Nicholson, Corp. Counsel, of New York City (John F. O'Brien, William E. C. Mayer, John Lehman, and Russell Lord Tarbox, all of New York City, of counsel), for appellant.

John D. Lindsay, of New York City, for respondent.

PER CURIAM. Appeal dismissed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of Proving the WILL of David PRICE, Deceased. Leo Price et al., Appellants; Sadie Price, Respondent.

(Court of Appeals of New York. Oct. 28, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (204 App. Div. 252, 197 N. Y. Supp. 778), entered January 12, 1923, which unanimously affirmed a decree of the New York County Surrogate's Court admitting to probate the will of David Price, deceased. Probate was contested on the ground that execution of the will was procured by fraud and undue influence.

Almet F. Jenks and Louis Boehm, both of New York City, for appellants.

Benjamin G. Paskus, of New York City, Lawrence S. Colt, of Amityville, and Sylvan Gotshal, of New York City, for respondent.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of Proving the WILL of Mary J. PIERSON, Deceased. Marie Shotwell, Appellant; the Attorney General of the State of New York, Respondent.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (203 App. Div. 673, 197 N. Y. Supp. 312), entered December 22, 1922, which reversed a decree of the New York County Surrogate's Court admitting to probate a paper propounded as the last will and testament of Mary J. Pierson, deceased, and denied probate thereto. The Appellate Division held that the circumstances attendant upon execution of the will indicated that the paper was an incomplete and indefinite document which did not express the intention of testatrix, but was merely intended as a memorandum; also that the evidence justified the conclusion that the deceased did not state to those who acted as witnesses that the paper signed by her was her last will and testament and that the deceased did not regard the paper as her last will and testament.

Cornelius Huth, Herbert Noble, and Isidor M. Katz, all of New York City, for appellant.

Carl Sherman, Atty. Gen. (Robert P. Beyer, of New York City, of counsel), for respondent.

Max Altmayer, of New York City, special guardian, for unknown heirs.

PER CURIAM. Order affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

In the Matter of the Petition of Lewis N. CRANE et al., Appellants, for a Construction of the WILL of Ida C. POTTS, Deceased. Stephen F. Avery, Respondent.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (205 App. Div. 147, 199 N. Y. Supp. 880), entered May 14, 1923, which modified, and affirmed, as modified, a decree of the Columbia County Surrogate's Court construing the will of Ida C. Potts deceased, and held valid all the provisions contained in paragraph 26 of the will, which paragraph provided that the residue of her estate should be used for the construction, maintenance, and operation of a hospital and erected a trust in perpetuity for that purpose.

Francis D. McCurn, of Syracuse, for Lewis N. Crane et al., appellants.

John L. Crandell, of Hudson, for Mary Fisher, appellant.

Robert G. Patrie, of Livingston, for Albert Potts, appellant.

R. Monell Herzberg, of Hudson, for respondent.

PER CURIAM. Order affirmed, with costs to each set of parties filing a brief, payable out of estate.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HISCOCK, C. J., not voting.

THE CITY OF NEW YORK, Respondent, v. NATIONAL SURETY COMPANY, Appellant.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department (206 App. Div. 685, 199 N. Y. Supp. 723) entered May 18, 1923, which affirmed an order of Special Term granting a motion to strike out the defense consisting of new matter contained in

the answer. The action was to recover upon an undertaking on appeal. The separate defense alleged that because of certain injunction proceedings and appeals the right of the surety to pay the judgment and seek immediate reimbursement from the debtor was cut off for four years, and the risk of the surety was converted from a risk that the debtor would become insolvent within two years to a risk that the debtor would become insolvent in six years, and that the city's failure to take an appeal from an order granting a motion to cancel another surety's bond, pending an appeal, or to notify the first surety of the proceedings of the second surety in its endeavor to be judicially released from its undertaking, prevented the first surety exercising a right to call upon the second surety for reimbursement by subrogation after the first surety paid the city's judgment.

The following question was certified: "Is the defense consisting of new matter contained in the answer herein sufficient in law upon the face thereof?"

George Welwood Murray, Harrison Tweed, and Otey McClellan, all of New York City, for appellant.

George P. Nicholson, Corp. Counsel, of New York City (John F. O'Brien, Henry J. Shields, and Isaac F. Cohen, all of New York City, and John J. Haggerty, of Brooklyn, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs; question certified answered in the negative.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Joseph McSWEENEY, as Temporary Administrator of the Estate of Reuben Melenky, Respondent, v. Asher P. MELEN, Appellant.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 4, 1922, unanimously affirming an interlocutory judgment in favor of plaintiff entered upon the report of a referee. The action was brought to have certain deeds by which the title to four pieces of property in the city of Rochester was placed in the name of the defendant declared a mortgage to secure a loan of $27,000, made by the defendant to the plaintiff during a period when plaintiff was purchasing and improving said properties. The complaint also alleged that the defendant had been paid on said loan certain amounts of money, and that he had been in possession of the premises for upwards of five years, and asked for an accounting by the defendant and a determination of the amount, if any, remaining unpaid on said loan, and that the plaintiff be allowed to pay the same and retake title to said properties.

The following questions were certified:

"1. Did the act of the plaintiff in taking and recording the life estate deeds executed by defendant after a talk with his brother Nathan, and the execution of deeds of the remainder to his brothers and sisters, left with the attorney but not delivered, constitute, under the facts found, an accord and satisfaction between the parties?

"2. Was plaintiff, as matter of law, estopped from maintaining this action for the reason that he took and recorded the deeds of a life estate in the premises, executed by defendant?

"3. Was there a new and superior contract superseding and extinguishing the claims and rights upon which the plaintiff's complaint is based?

"4. Was plaintiff's conduct in taking and recording the life estate deeds so unconscientious and unjust that as a matter of law the trial court would be justified in refusing him relief?"

See, also, Melenky v. Melen, 206 App. Div. 46, 200 N. Y. Supp. 730; — App. Div. —, 201 N. Y. Supp. 924.

George S. Van Schaick, of Rochester, for appellant.

William F. Lynn, of Rochester, for respondent.

PER CURIAM. Judgment affirmed, with costs; questions certified answered in the negative.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur. CRANE J., dissenting: On the uncontradicted evidence an agreement for settlement was made and partially executed by the plaintiff and he is estopped from maintaining this action.

Florence L. RISK, Respondent, v. James RISK, Appellant.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal from a judgment, entered August 1, 1922, upon an order of the Appellate Division of the Supreme Court in the first judicial

department (202 App. Div. 299, 195 N. Y. Supp. 536) reversing a judgment in favor of defendant and directing judgment in favor of plaintiff in an action for a separation and remitting the matter to the Special Term to fix the amount of alimony.

Walter L. Glenney, Jerome A. Peck, and Everett W. Bovard, all of New York City, for appellant.

Henry W. Hardon, of New York City, for respondent.

PER CURIAM. Appeal dismissed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

William H. WHALEY, Appellant, v. MASSACHUSETTS BONDING & INSURANCE COMPANY, Respondent.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department (199 App. Div. 952, 191 N. Y. Supp. 958) entered November 25, 1921, unanimously affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. The action was to recover upon a policy of accident insurance. The defense was that notice of the accident had not been sent to the company within thirty days after the accident; and second, that plaintiff had not been immediately, continuously and wholly disabled and prevented from attending to any and every kind of duty pertaining to his occupation, as provided in the policy.

Louis E. Fuller, of Rochester, for appellant.

Thomas D. Powell, of Buffalo, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Frank BEST, as Administrator of the Estate of William Best, Deceased, Appellant, v. STATE of New York, Respondent.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the third judicial department (208 App. Div. 339, 197 N. Y. Supp. 69) entered December 4, 1922, affirming a judgment in favor of defendant entered upon a decision of the Court of Claims dismissing a claim against the state for the death of plaintiff's intestate alleged to have been occasioned through the negligence of the state in having loose gravel placed upon the shoulder of a state patroled highway and in failing to provide a sufficient barrier so as to prevent a bus in which decedent was riding as a passenger from going over an embankment after the breaking of its steering gear.

Daniel V. McNamee, of Hudson, for appellant.

Carl Sherman, Atty. Gen. (W. J. Wetherbee, of Buffalo, of counsel), for the State.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

The CITY OF NEW YORK, Appellant, v. Henry L. BELL, Respondent.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department (205 App. Div. 855, 198 N. Y. Supp. 905) entered March 23, 1923, affirming a judgment in favor of defendant entered upon a verdict. The action was in ejectment. Plaintiff makes its claim upon a deed dated May 1, 1878, but not recorded until June 28, 1917. Defendant claimed title under a deed from the same grantor dated September 13, 1906, and recorded November 16, 1906.

George P. Nicholson, Corp. Counsel, of New York City (John F. O'Brien, Elliot S. Benedict, and Robert J. Culhane, all of New York City, of counsel), for appellant.

Lynn C. Norris, of Brooklyn, and Arthur P. Hilton, of Jamaica, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

George M. JANES, Respondent, v. John P. H. JANES et al., Defendants, and William F. Janes et al., Appellants.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal by permission, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department (199 App. Div. 912, 190 N. Y. Supp. 932) entered November 5, 1921, unanimously affirming a judgment in favor of defendants entered upon a decision of the Oneida County Court on trial without a jury. The action was in partition. The trial court, holding that one of the defendants had established a valid and effective title to the premises by adverse possession, directed a dismissal of the complaint.

R. S. Johnson, of Utica, for appellants.

W. M. Gallagher, of Cleveland, for respondent.

PER CURIAM. Judgment affirmed, without costs.

HOGAN, CARDOZO, POUND, and CRANE, JJ., concur. HISCOCK, C. J., and McLAUGHLIN, and ANDREWS, JJ., dissent.

The PEOPLE of the State of New York, Respondent, v. George W. HACKER, Jr., Appellant.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal from a judgment of the Supreme Court, rendered July 10, 1923, at a Trial Term for the county of Broome upon a verdict convicting the defendant of the crime of murder in the first degree.

Thomas J. Mangan, of Binghamton, for appellant.

Urbane C. Lyons, Dist. Atty., of Binghamton (Ray T. Hackett and Frank L. Wooster, both of Binghamton, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ., concur.

Nicholas P. YOUNG et al., Copartners under the Firm Name of Young & Metzner, Respondents, v. ST. PAUL FIRE & MARINE INSURANCE COMPANY et al., Appellants.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department (204 App. Div. 807, 199 N. Y. Supp. 46) entered April 9, 1923, unanimously affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. The action was to determine the conflicting rights of the plaintiffs and the Inland Waterways Steamship Corporation to the proceeds of certain marine insurance and to fix the obligation of the insurers on their policy. The questions presented were whether the plaintiffs were entitled to maintain suit upon the carrier's policy of insurance set forth in the complaint and whether they were entitled to recover, under such policy, the full value of their goods, without deduction of premiums due and owing under the policy.

Dix W. Noel and D. Roger Englar, both of New York City, for appellants.

Charles A. Houston and Edwin M. Otterbourg, both of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur. ANDREWS, J., not voting.

John F. CONNELLEY, Respondent, v. NEW YORK CENTRAL RAILROAD COMPANY, Appellant.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department (206 App. Div. 652, 198 N. Y. Supp. 907) entered March 29, 1923, unanimously affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. The complaint alleged that the plaintiff was a passenger occupying a coach of the defendant, and that the defendant negligently and carelessly permitted its agent and servant, and agents and servants of the corporation with which defendant has a contract for the carriage of its, defendant's, passengers, to stab, cut, assault and wound this plaintiff with a knife, and this defendant did carelessly and negligently fail to afford and furnish to this plaintiff the protection the defendant is required to furnish its passengers. At the time of the alleged assault, the porter committing the same, who was concededly in the employ of the Pullman Company, had left the Pullman car to which he was assigned, for the purpose of assisting to a coach an intending passenger who did not have Pullman transportation, the assault occurring after said porter had left his said car, had walked the length of the station platform, and had boarded said coach.

Warnick J. Kernan, of Utica, for appellant.

M. William Bray, of Utica, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HISCOCK, C. J., not voting.

Hope L. BRAGG, Respondent, v. George C. TAYLOR, as President of the American Express Company, Appellant.

(Court of Appeals of New York. Oct. 23, 1923.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department (205 App. Div. 59, 199 N. Y. Supp. 156) entered April 13, 1923, unanimously affirming a judgment in favor of plaintiff entered upon a verdict. The action was to recover the value of goods, delivered to defendant, a common carrier, and damaged by fire while in one of defendant's warehouses. The answer set forth two special defenses. The first defense was that the shipment, when damaged, was being held by the defendant in its warehouse in New York in accordance with the instructions of the plaintiff for her convenience; that the defendant was not acting as a carrier but as a warehouseman at the time of the damage; that the damage was not caused by any negligence or fault on the part of the defendant, and that the defendant is not liable therefor. The second defense was that the shipment with the shipper's authorization was made under an agreed valuation of not exceeding fifty cents per pound; that the plaintiff received the benefit of the lower rates of transportation for a shipment of such value and cannot now assert that the shipment was of a greater value than that represented at the time of shipment.

Edwin DeT. Bechtel and A. Delafield Smith, both of New York City, for appellant.

J. M. Fiero, Jr., of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Clara M. CRAMER, Respondent, v. Melancthon W. PERINE et al., Appellants.

(Court of Appeals of New York. Oct. 23, 1923.)

Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the fourth judicial department (197 App. Div. 218, 188 N. Y. Supp. 148) entered May 12, 1921, reversing a judgment in favor

of defendants entered upon a decision of the court on trial at Special Term and granting a new trial.

The motion was made upon the ground of failure to prosecute and abandonment of the appeal.

George H. Wade, of Buffalo, for the motion.

J. Neil Mahoney, of Buffalo, opposed.

PER CURIAM. Motion granted and appeal dismissed, with costs and ten dollars costs of motion to respondent.

The PEOPLE of the State of New York, Respondent, v. Abraham BECKER, Appellant.

(Court of Appeals of New York. Oct. 26, 1923.)

Appeal from a judgment of the Bronx County Court, rendered December 26, 1922, upon a verdict convicting the defendant of the crime of murder in the first degree.

Alexander A. Mayper and Charles V. Halley, Jr., both of New York City, for appellant.

Edward J. Glennon, Dist. Atty., of New York City (Albert Cohn and George B. DeLuca, both of New York City, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

The PEOPLE of the State of New York, Respondent, v. Harry SANTANELLO, Appellant.

(Court of Appeals of New York. Oct. 26, 1923.)

Appeal from a judgment of the Supreme Court, rendered April 5, 1922, at a Trial Term for the county of Broome upon a verdict convicting the defendant of the crime of murder in the first degree.

H. J. Hennessey, Charles H. Burnett, and Anthony Fischette, all of Binghamton, for appellant.

Urbane C. Lyons, Dist. Atty., of Binghamton (Ray T. Hackett and Frank L. Wooster, both of Binghamton, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Max C. DEGEN, Respondent, v. Meier STEINBRINK et al., Appellants.

(Court of Appeals of New York. Oct. 26, 1923.)

Appeal from an order of the Appellate Division of the Supreme Court in the first judicial department (202 App. Div. 477, 195 N. Y. Supp. 810) entered February 14, 1923, reversing a judgment in favor of plaintiff entered upon the report of a referee and granting a new trial. The action was to recover damages alleged to have resulted to plaintiff's assignee because of the breach of an implied contract that attorneys, of which said assignee was a client, would file proper chattel mortgages in Connecticut and New Jersey, and a year later make a proper refiling of a chattel mortgage with the register of New York county, and also for negligence in the performance of the attorneys' duty to their client, the alleged breaches and alleged negligence which are claimed to have caused such damage being: That the defendants in the chattel mortgage filed in New Jersey in 1913 failed to use the proper form of acknowledgment required by the statutes of that state; that in the chattel mortgage filed in Connecticut in 1913 the defendants failed to cover the property described in such chattel mortgage, and that upon the copy of the chattel mortgage refiled in New York county in October, 1914, the defendants failed to place the number and date of filing of the original mortgage, as required by the laws of the state of New York.

Frank E. Johnson and Hunter L. Delatour, both of Brooklyn, for appellants.

Frederick Hulse, of New York City, for respondent.

PER CURIAM. Order affirmed and judgment absolute ordered against appellants on the stipulation, with costs in all courts.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Anna AMUNDSEN, as Administratrix of the Estate of Julius E. Amundsen, Deceased, Respondent, v. The CONSOLIDATED FORWARDING & BUILDING MATERIAL COMPANY, Appellant.

(Court of Appeals of New York. Oct. 26, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department (206 App. Div. 601, 198 N. Y. Supp. 704) entered March 27, 1923, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant. Intestate, while crossing One Hundred and Thirty-Second street near Walnut avenue in the borough of The Bronx, was run down by defendant's automobile truck and died as a result of the injuries received. Defendant denied negligence and set up as a defense contributory negligence on the part of intestate.

James B. Henney and Owen F. Hughes, both of New York City, for appellant.

George M. Curtis, Jr., of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Nettie F. VALENTINE et al., Appellants, v. The FIRE ISLAND BEACH DEVELOPMENT COMPANY, Respondent.

(Court of Appeals of New York. Oct. 26, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department (206 App. Div. 630, 198 N. Y. Supp. 954) entered March 26, 1923, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury. The action was in ejectment to recover an undivided one-fortieth part of certain premises on the Great South beach in Suffolk county known as lot 5 on the partition map filed in the action of Greene v. Sammis in 1878. The trial court held that any title which plaintiffs' mother, through whom they claim title, may have had in the land was cut off by the judgment in that action.

Abel E. Blackmar, of New York City, George H. Furman, of Patchogue, and P. L. Housel, of Riverhead, L. I., for appellants.

Benjamin Reass and Charles G. Stevenson, both of Brooklyn, and Hugo Hirsh and Emanuel Newman, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

George H. FLETCHER et al., Appellants, v. The MANHATTAN LIFE INSURANCE COMPANY, Respondent.

(Court of Appeals of New York. Oct. 26, 1923.)

Appeal from a judgment, entered April 12, 1923, upon an order of the Appellate Division of the Supreme Court in the first judicial department (204 App. Div. 814, 199 N. Y. Supp. 180) reversing an interlocutory judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term and directing a dismissal of the complaint. The action was to have it adjudged that defendant held certain real property as trustee for the plaintiffs and for an accounting of rents and profits. The complaint alleges that on March 17, 1914, the day before the said premises were to be sold in foreclosure, one of the appellants negotiated with the president of respondent an oral contract, the terms of which were in substance that the insurance company should buy in at the foreclosure sale and then resell the property to appellants at the cost of the property. Plaintiffs allege the foreclosure sale and the purchase of the property by respondent, and that they took no part in it, relying on the alleged contract. They allege their due performance that they were ready, able and willing at all times to perform their contract, that they tendered performance thereof, but that respondent resold the premises to a third party in violation of the alleged trust.

George C. Austin, of Brooklyn, for appellants.

James A. O'Gorman, D. Theodore Kelly, and Howard B. Harte, all of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

SCHWARTZ & COMPANY, Inc., Respondent, v. AIMWELL COMPANY, Inc., et al., Appellants.

(Court of Appeals of New York. Oct. 26, 1923.)

Appeal from a judgment, entered April 9, 1923, upon an order of the Appellate Division of the Supreme Court in the first judicial department (204 App. Div. 769, 198 N. Y. Supp. 838) reversing a judgment in favor of defendants entered upon a decision of the court at a Trial Term without a jury and directing judgment in favor of plaintiff. D. A. Schulte, Inc., was lessee for ten years of some real property in Bridgeport, Conn. It leased to the Aimwell Company, Inc., the said premises. The Aimwell Company made a contract with plaintiff for certain repairs on the property. This contract and these repairs were made with the consent of D. A. Schulte, Inc., as expressed in the lease itself, who, exacted a bond from the Aimwell Company to pay for all the material used and work put upon the premises in the making of these repairs. The repairs were not paid for by the Aimwell Company, and upon December 18, 1917, this plaintiff filed a mechanic's lien against the property. This lien was canceled in consideration of an assignment by the Schulte Company to the plaintiff of the bond, and this action is brought by the plaintiff as such assignee to recover thereon.

Otto A. Samuels and Horace G. Marks, both of New York City, for appellants.

Harrington Putnam and Abraham H. Sarasohn, both of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HISCOCK, C. J., absent.

The PEOPLE of the State of New York, Respondent, v. Stanley GORSKI, Appellant.

(Court of Appeals of New York. Oct. 26, 1923.)

Appeal from a judgment of the Supreme Court, rendered February 7, 1923, at a Trial Term for the county of Erie upon a verdict convicting the defendant of the crime of murder in the first degree.

Clark H. Timerman and William C. Warren, Jr., both of Buffalo, for appellant.

Guy B. Moore, Dist. Atty., of Buffalo (Walter F. Hofheins, of Buffalo, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HISCOCK, C. J., absent.

INTERNATIONAL FASTENER COMPANY, Respondent, v. FRANCIS MANUFACTURING COMPANY, Appellant.*

(Court of Appeals of New York. Oct. 26, 1923.)

Appeal by permission, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department (204 App. Div. 526, 198 N. Y. Supp. 455) entered March 15, 1923, unanimously affirming a judgment in favor of plaintiff entered upon the report of a referee. The action was upon contract to recover alleged unpaid royalties. The defense was failure of consideration for the reason that plaintiff was unable to give to defendant the sole and exclusive right to make and sell the articles mentioned in the agreement.

George W. Knox, of Niagara Falls, and J. William Ellis, of Buffalo, for appellant.

Irving W. Cole and Percival M. White, both of Buffalo, for respondent.

PER CURIAM. Judgment affirmed, with costs.

HOGAN, CARDOZO, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HISCOCK, C. J., and POUND, J., absent.

The PEOPLE of the State of New York, Respondent, v. Nicholas FREENEY, Appellant.

(Court of Appeals of New York. Oct. 26, 1923.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department (201 App. Div. 874, 193 N. Y. Supp. 946) entered March 8, 1923, which affirmed a judgment of the Erie County Court rendered upon a verdict convicting the defendant of the crime of criminally receiving stolen property.

George B. Doyle and Thomas L. Newton, both of Buffalo, for appellant.

Guy B. Moore, Dist. Atty., of Buffalo (W. Bartlett Sumner, of Buffalo, of counsel), for the People.

*Reargument denied 237 N. Y. —, 143 N. E. —.

PER CURIAM. Judgment affirmed.

HOGAN, CARDOZO, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur. HISCOCK, C. J., and POUND, J., absent.

The METALLOGRAPH CORPORATION, Respondent, v. ARMA ENGINEERING CORPORATION, Appellant.

(Court of Appeals of New York. Oct. 26, 1923.)

Appeal from a judgment entered April 26, 1923, upon an order of the Appellate Division of the Supreme Court in the first judicial department (205 App. Div. 100, 199 N. Y. Supp. 347) which unanimously reversed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and directed reinstatement of said verdict and entry of judgment thereon.

William Hayward, U. S. Atty., of New York City (Mary R. Towle, of New York City, of counsel), for appellant.

Mark Eisner and Irwin M. Berliner, both of New York City, for respondent.

PER CURIAM. Appeal dismissed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

The SAUGERTIES BANK, Appellant, v. The DELAWARE AND HUDSON COMPANY, Respondent.

(Court of Appeals of New York. Oct. 26, 1923.)

PER CURIAM. Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. See 236 N. Y. 425, 141 N. E. 904.

(237 N. Y. 1)

MISSISSIPPI SHIPBUILDING CORPORATION v. LEVER BROS. CO. et al.*

(Court of Appeals of New York. Nov. 20, 1923.)

1. **Shipping ⇐27—Noncompliance with construction contract will not preclude recovery, where ship accepted and retained.**

The purchaser of a ship, by accepting it and retaining possession, becomes liable for the contract price, notwithstanding failure of the builders to comply with their contract, though he may be entitled to damages for such breach of the contract, either in a separate action or by way of counterclaim in an action for the purchase price, if he has given notice thereof within a reasonable time, as required by Personal Property Law, § 130.

2. **Shipping ⇐27—Notice of defects in construction of ship held sufficient and within reasonable time.**

The service of an answer and bill of particulars in an action for a balance due for construction of a ship the same month that it returned disabled and unseaworthy from an attempted voyage, which alleged defects and faulty construction disclosed by an examination after its return, *held* sufficient notice, under Personal Property Law, § 130, to entitle the purchaser to damages, and within a reasonable time, if he did not have prior notice of such defects through agents who had supervised construction.

3. **Shipping ⇐27—Purchaser of ship may not retain possession and refuse to pay purchase price.**

Though the owner of realty may keep buildings erected thereon and refuse to pay the purchase price, where there has been a breach of the construction contract, the rule is less strictly applied in the case of personalty, such as a ship, which may be rejected or returned.

4. **Shipping ⇐27—Allegation of waiver of provisions of contract unnecessary, in action for purchase price by builders.**

Since the purchaser of a ship by accepting delivery and retaining possession of it becomes liable for the purchase price, notwithstanding failure of the builders to comply with their contract, it is unnecessary, in an action for such purchase price, to allege a waiver on the part of defendant of provisions of the contract.

5. **Shipping ⇐27—Complaint held to admit proof of waiver of provisions relating to construction of ship.**

In an action by builders for the balance due on the purchase price of a ship, allegations in the complaint that the plans had been changed and performance of all requirements of the construction contract had been waived by defendant, though undoubtedly made as a basis for proof relative to delays in delivery, *held* sufficiently broad to admit proof of the waiver of provisions requiring a particular manner of construction.

6. **Appeal and error ⇐1114—Court of Appeals must reinstate case erroneously reversed by Appellate Division on question of law, unless other errors appear.**

Where the Appellate Division has erroneously reversed a case upon questions of law, the Court of Appeals must reinstate it, unless there are errors which would otherwise have necessitated a reversal and new trial.

7. **Evidence ⇐317(8)—Testimony as to conversation with captain as to cause of damage to ship held inadmissible as hearsay.**

In an action by the builders for the purchase price of a ship which had proved unseaworthy, where plaintiffs contended that the damage had been caused by caustic soda which had escaped within the ship due to improper loading, testimony by a witness concerning a conversation had with the ship's captain relative to such matter *held* clearly hearsay, and its admission reversible error.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Mississippi Shipbuilding Corporation against the Lever Bros. Company and the Lever Transportation Company. The Appellate Division reversed as a matter of law a judgment of the Trial Term entered on a verdict in favor of plaintiff, and dismissed the complaint (205 App. Div. 569, 199 N. Y. Supp. 777), and plaintiff appeals. Determination of Appellate Division as to result affirmed, and judgment of First Term reversed, and new trial ordered.

Slade & Slade, of New York City (I. Maurice Wormser, Maxwell Slade, and Leonard Acker, all of New York City, of counsel), for appellant.

Larkin, Rathbone & Perry, of New York City (Albert Stickney, of New York City, and Hersey Egginton, of Brooklyn, of counsel), for respondents.

CRANE, J. On the 25th day of January, 1918, the Mississippi Shipbuilding Corporation, a corporation organized and existing under the laws of the state of Delaware, with offices at 32 Broadway, New York City, and Lever Bros. Company, a corporation organized and existing under the laws of the state of Maine, represented by W. H. Woolner, its agent and attorney in fact entered into a written agreement for the building and purchase of a four-masted auxiliary schooner of about 1,500 English tons total deadweight, to be completely equipped in all respects, ready for sea, except as to stores, and free of and from all liens, claims, and incumbrances. The ship was to be built at the shipyards of the builder at Biloxi, Miss. The contract provided that:

"Said schooner shall be approximately 193 feet over all, 37 feet beam, 18 feet moulded

*Reargument denied 237 N. Y. —, 143 N. E. —.

depth, equipped with two Fairbanks Morse marine oil engines of 100 horse power each, and built in accordance with the plans and specifications approved by and now in the possession of Lloyd's Register of Shipping and under the inspection of said Lloyd's Register. The builder shall furnish the purchaser a certificate of class of said schooner of highest class for this type of vessel of Lloyd's Register of Shipping at the time of delivery of said vessel. The said schooner shall be delivered to the purchaser completely equipped and ready for sea at Biloxi or Gulfport, Miss., at builder's option, not later than March 15, 1918, unless prevented by strikes," etc.

Section II of the contract reads as follows:

"The purchaser shall have the right to make any additions to or changes in the plans not substantially affecting the subject-matter of this contract and not delaying the delivery of the vessel as hereinbefore provided, on giving due notice in writing to the builder, and provided that the cost of any such changes shall be added to or deducted from the contract price according to the fair valuation thereof, and the increased or deducted cost resulting from such changes shall be adjusted and agreed to in writing before any changes shall be made."

Section VIII of the contract reads as follows:

"The purchaser and its representative shall have the right to inspect the schooner and materials assembled therefor and used thereon at all times during the construction and equipment of said schooner, and shall also have access to the yards and premises of the seller, with full liberty to examine both material and workmanship, and for that purpose the purchaser shall have the right to appoint a competent inspector, who shall at all times have the right to examine the workmanship upon and materials assembled for the construction and equipment of said schooner."

The purchase price of the schooner was to be $145 per English deadweight ton, gold coin of the United States of America.

The plaintiff, the Mississippi Shipbuilding Corporation, commenced the construction of the vessel at its yards in Biloxi, Miss., and completed it in August, 1918. Pursuant to section VIII of the contract above quoted the purchaser sent a Captain Kerr to Biloxi to supervise the work in its behalf. J. M. Buchanan of the city of New Orleans was a surveyor for Lloyd's Register of Shipping, who also at various times inspected the construction of the vessel to see that the work complied with the rules and regulations of the society. It was upon this report that the final certificate of Lloyd's Register was to be issued. An engineer, named Lodder, was also sent to Biloxi to work with Capt. Kerr.

The vessel put to sea on September 3, 1918, upon its maiden voyage, which proved disastrous. The engines failed to work properly, and heated to such an extent that they could not be used. The vessel sprang a leak and took in so much water that when out a few hundred miles on the Pacific the crew unanimously refused to proceed further, and Capt. Kerr had to put back to Balboa. Later the schooner was taken to Mobile and submitted to extensive repairs in order to make her seaworthy and fit for use.

In the meantime, plaintiff had commenced this action for the balance claimed to be due it under the contract for the purchase price, to wit, $43,230, and for the cost and value of extra and additional work and material furnished, amounting to $67,361.28, making a total of $110,591.28. The defendant, in addition to its denials, set up a counterclaim for defective construction and for damages suffered in consequence thereof in the sum of $400,000.

When I speak of the defendant, I refer to either the Lever Bros. Company or the Lever Transportation Company, as both are the same for the purpose of this opinion. Another contract was entered into on the 20th of May, 1918, with the Lever Transportation Company which took over the contract of the Lever Bros. Company and undertook to carry out its terms and obligations. By this later contract, the time of performance was extended to June 1, 1918. As I view it, this fact has no bearing upon the matters which I am about to discuss.

When the case came on for trial, it appeared that there had been many changes made at the suggestion of the owner in the construction of the vessel and many extras ordered in accordance with the terms and conditions of the contract. For the purposes of this case, W. H. Woolner, the agent and attorney in fact of the Lever Bros. Company or the Lever Transportation Company, was or would be considered the purchaser and owner, and directions, changes, and extras ordered by him or with his knowledge and consent would be binding upon the defendant.

The contract, it will be noted by the provisions above quoted, required that any changes in the plans or specifications for the building of the ship in accordance with Lloyd's Register of Shipping should be made in writing. Neither Capt. Kerr, Buchanan, nor the engineer Lodder had authority to change in any substantial way the plans of the vessel. This was fully understood by the parties.

On February 26, 1918, the plaintiff wrote to W. H. Woolner, as follows:

"We fully understaud the stand you take with regard to contemplated changes in the vessel,

and will proceed to institute changes only upon written recommendation from your office."

Mr. Dwyer, the president of the plaintiff company, testified that Mr. Woolner at the very beginning said to him:

"Mr. Dwyer, the contract calls for us to have a man on the job there to look after the work. Now, I cannot go there; my business is in Cambridge, Mass., and I cannot go down to Mississippi to look after this work. I have designated Capt. Kerr, the man who is down there now, and who inspected the vessel to act for me and to be on the job there from now on until this vessel is finished, to look after the construction of the work and pass on the material and to act on my behalf, and in addition to him we are sending down the engineer of the vessel to work with Capt. Kerr to look after the construction of the boat and see that the plans and so forth are carried out as called for."

The kind of supervision that Kerr and Buchanan had over the work is well indicated by Mr. Dwyer in testifying that Woolner said:

"I have given Capt. Kerr instructions to act in co-operation with Lloyd's man, Mr. Buchanan, and they will act together and take their orders from Mr. Buchanan. When Mr. Buchanan is not there he will transmit his orders to Kerr and Lodder, and in turn you will take your orders from them; whatever they say goes. If they want changes, if they want a certain piece of material taken out, if they won't pass on it, it is the same as if I was there; if they say you cannot do a certain thing and object to it, you will have to be guided by what they say."

From this it is apparent that Kerr and Buchanan had supervision over the class and kind of work that was being done and the material furnished, and not any authority or power to materially change the plans and specifications in the work of constructing the vessel. That Dwyer understood the necessity of having a writing to cover the material changes is evidenced by his testimony in which he said:

"I asked Mr. Woolner what he heard from Capt. Kerr regarding these changes he wanted. My brother who was at the plant had written me several times that Kerr wanted this and wanted that, I wanted to know from Woolner what changes he wanted. The contract called for the changes in writing, and I wanted to get them so I could go ahead and make them, as it was now getting late, and it would cost a great deal more to make them at a later date."

Frequently Mr. Dwyer's testimony refers to the necessity of procuring a writing for changes and Woolner's promise to send him letters directing the making of the proposed or required changes. We therefore come to the point where we can say, in viewing this contract and the work done under it, that Woolner represented the defendants and had authority to direct changes or to waive that provision of the contract requiring a writing for the changes. Capt. Kerr, Buchanan, and Lodder had no authority to make, direct, or to order any substantial or material changes.

The cross section plan of the schooner, Elizabeth Ruth, and the edge bolting plan as approved by Lloyd's called for the ceiling or sides of the ship to be edge bolted. These plans were Exhibit D–1 and Exhibit D–6 in the case. The plaintiff's president explained edge bolting as follows:

"Edge bolting is the bolting of the ceiling, which is the inside skin of the ship, by the bolts from the top right down through the ceiling. All fastening is important."

In order to save time and some other difficulties this was omitted and a different kind of fastening substituted. Again Dwyer testified:

"Instead of putting these edge bolts in, they stop where they were at the time of the edge bolting and put through bolts through the ceiling all the way through the frame, clinch them on the outside of the frame and clinch them on the inside of the ceiling. Now, by clinching, I mean using malleable iron galvanized washers about as wide as my two fingers and about as thick as my finger. These were put over the head of the bolts and with a pneumatic hammer hitting about a thousand blows a minute, the head is fastened over this washer."

No written authorization or direction was given for this change. The change was extremely important and very substantial. The defendant's witnesses testified that the leaking of the ship resulting in the disaster at sea was due to the absence of this edge bolting. All or much of the expense to which the defendant was put in order to make the vessel seaworthy was caused by this change in the plans.

Who authorized this modification? Dwyer says Kerr authorized it and Buchanan acquiesced. Woolner says that he knew nothing about it. Buchanan denies that he ever gave his permission to such a change.

[1] We have a situation thus far presented where the plans and specifications called for edge bolting. Edge bolting was omitted without the written authorization of the defendants. In this particular the plans were departed from in a very material and substantial respect, which caused much damage to the defendant. What would be the legal situation and the right of the parties under these conditions? The Appellate Division was of the opinion that, as the plans had not been followed, the plaintiff could not recover anything for its work and services under the

contract or for its large amount of extra work and material furnished. This no doubt would be the law if the defendant had rejected the ship and had returned it to the plaintiff. The fact is the defendant accepted the ship and still has it in its possession. Under these circumstances it cannot keep the ship and refuse to pay the plaintiff the balance due it over and above the damage sustained.

[2] Section 130 of the Personal Property Law (Consol. Laws, c. 41) says:

"In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

The defendant was therefore required to give notice. This action was commenced February 6, 1919. Defendant served its answer on March 12, 1919. The vessel set out upon it voyage in September of 1918 and returned after its disastrous attempts to make a voyage in March of 1919, when upon examination the absence of the edge bolting and the other alleged defects and departures were discovered. The service of the answer and the bill of particulars, calling attention to the absence of the edge bolting, was sufficient notice of a breach of the plaintiff's warranty within this provision of the Personal Property Law, provided that the first knowledge that the defendant had of the defective and faulty work was upon the return and examination of the ship. But was this the first time it had knowledge of the omission of edge bolting? Capt. Kerr was its servant and agent to watch the building of the vessel, to see that the plans were complied with and the edge bolting used in accordance with the drawings and specifications. Did he know that there was this change made in the work? Was his knowledge the knowledge of the defendant? Kerr was not called as a witness. Buchanan swears he did not know of the omission and so does Woolner. If Kerr knew all about it and attempted to authorize it, his knowledge might be that of the defendant, and then the reasonableness of the time in which to notify the plaintiff of its breach of warranty might be a different question. We suggest these matters without attempting to decide them, as we cannot tell what the evidence may be in a new trial. Kerr may appear as a witness. The point has not been briefed or argued.

[3, 4] The Appellate Division, therefore, in this case were in error in dismissing this complaint. As above stated, the defendant, by accepting the ship and failing to return it, had a right to sue for the damages occasioned by departures from the plans and specifications upon giving the required notice. These damages could be offset against the plaintiff's claim under his contract for the work which was performed and for the extras furnished. The rule does not apply as strictly regarding personal property as it does regarding real property. When buildings have been constructed upon real estate, as the owner cannot return the buildings, he may keep them and refuse to pay the contract price, if there has been a breach. Personal property, however, like a ship (Rivara v. Stewart & Co., 236 N. Y. 601, 142 N. E. 300), can be rejected or returned or its acceptance refused (Cawley v. Weiner, 236 N. Y. 357, 140 N. E. 724; Mack v. Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. Rep. 534; Spence v. Ham, 27 App. Div. 379, 382, 50 N. Y. Supp. 960). Where this is not done, the purchaser must pay the contract price unless he gives notice of a breach of warranty in the contract. Upon giving such notice he has his claim for damage which may be prosecuted by action or set up as a counterclaim when sued for the price. This being the law, the plaintiff did not have to allege in its complaint a waiver, but could have sued for its contract price. This it could have recovered if there had been no notice of the breach of any promise or warranty given within a reasonable time after the defendant knew of it.

[5] It attempted, however, to set forth in its complaint a waiver. No doubt it had in mind a waiver as to the time of performance, there being penalties attached for delays. It stated as the cause of the delay the changes which had been required by the defendant. The plans, the complaint said, had been changed, and the performance of all the requirements waived by the defendant. These changes caused delay. We think these allegations were sufficient to enable the plaintiff to prove a waiver of the plans as stated in the bill of particulars and also prove that the defendant or its authorized agent had changed the edge bolting to clinch bolting. We do not agree with the Appellate Division that the pleading of this particular was insufficient. We think it was broad enough to cover the subject in point. The difficulty, however, remains that according to the proof the plaintiff was unable to show a waiver of the edge bolting, as neither Kerr nor Buchanan had authority to make this change. In fact, the judge in his charge to the jury instructed them that neither Kerr nor Bu-

chanan had authority to waive this provision of the contract.

[6] The Appellate Division reversed this case upon questions of law, dismissing the complaint. As they were in error as to the law, for the reasons above stated, we would be required to reinstate the verdict for the plaintiff if it were not for errors which would have necessitated a reversal anyhow, and a new trial.

[7] That the absence of edge bolting caused the leak was strongly contested. It was claimed by the plaintiff that the ship had been loaded with caustic soda, that this was improperly loaded, that it escaped and caused all the damage to the ship. Some witnesses saw the effects of the soda discharged in the pumping; others denied that any caustic soda escaped at all. Capt. Kerr was in charge of the vessel. He was not a witness. Buchanan was asked, however, if in a talk he had had with Capt. Kerr the captain had not admitted that caustic soda caused the damage. The matter thus appears:

"Q. I will stand correction, whatever the date may be, if I am wrong, whatever date it was, I have here the 19th, you had a talk with Capt. Kerr? A. Yes. Q. In reference to the leaking of the schooner? A. Yes. Q. And in order to make your survey at that time you wanted to get as much information as you could, outside of your own knowledge? A. Yes. Q. Did Mr. Kerr and this engineer, Mr. Lodder, tell you that the vessel leaked by reason of the caustic soda? What is your answer to that? A. They told me that the vessel had leaked considerably on her initial voyage, and that they had pumped a great deal of caustic soda in solution through the pump."

This evidence was clearly hearsay. The exception to the ruling admitting it presents reversible error.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

HISCOCK, C. J., absent.

Judgment reversed, etc.

(237 N. Y. 13)

KLEIN v. SMITH.

(Court of Appeals of New York. Nov. 20, 1923.)

Appeal and error ⇐1056(1)—Exclusion of evidence showing that on former trial plaintiff had admitted warranty of goods, which he denied on later trial, was prejudicial error.

In an action for the price of goods, the sole issue being whether plaintiff had given a warranty, defendant's evidence that on the first trial, in reply to the question, "Did you sell that merchandise as absolutely perfect?" the plaintiff answered, "Yes, sir," might properly bear the interpretation that plaintiff had changed his position on the later trial, and its exclusion was prejudicial error.

Cardozo, Crane, and Andrews, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Max E. Klein, doing business as Arrow Silk Mills, against William J. Smith, doing business as W. J. Smith Silk Company. From a judgment of the Appellate Division (206 App. Div. 662, 199 N. Y. Supp. 931), affirming a judgment entered on a verdict for plaintiff, defendant appeals. Reversed, and new trial granted.

I. Maurice Wormser, Leonard Acker and Samuel S. Kogan, all of New York City, for appellant.

Harold R. Medina, and I. Gainsburg, both of New York City, for respondent.

HISCOCK, C. J. This action was brought to recover the purchase price of goods sold by plaintiff to the defendant. The defense is that such goods were sold under a warranty, that they did not comply with the warranty, and were promptly rejected. The action has been tried three times. On the first trial the plaintiff recovered a judgment, which was reversed by the Appellate Division practically because the verdict was against the weight of evidence. On the second trial there was a disagreement of the jury, and on the third trial, involved in this appeal, plaintiff again recovered a judgment.

The defendant has at all times insisted that there was a warranty, and that the goods did not comply therewith, and he further insists that the plaintiff's position upon this point has changed between the first and the last trial; that whereas, on the last trial, he denied that any warranty was given and admitted that the goods did not comply with such a warranty if given, on the first trial he admitted that such a warranty was given and claimed that the goods complied therewith.

Since upon the last trial the sole issue litigated was the one whether a warranty had been given, the defendant was entitled to the benefit of any evidence which tended to show that his adversary had changed position and in some form had admitted a warranty which he was then denying. I think that he offered some evidence of this character which was erroneously excluded. He attempted to show that on the first trial

the plaintiff in reply to the question, "Did you sell that merchandise [the merchandise involved in this action] as absolutely perfect?" answered, "Yes, sir," but the evidence was excluded upon the objection that it was incompetent.

As I understand it, we are all agreed that the evidence was competent and that it was error to exclude it; the only difference of opinion being whether the error was so immaterial that it can be disregarded. I do not think that it was of such a character. As has already been pointed out, this litigation has been strenuously contested, and in its last stages took the form that the only dispute between the parties was over the single question whether a warranty had been given by plaintiff upon the sale of the goods. The evidence upon this issue was not very unevenly divided, and if the jury had been convinced that the plaintiff had changed his position, and had at one time admitted a warranty, which he was then denying, their verdict would quite probably have been affected by such evidence. I think that the testimony which defendant sought to introduce may bear the interpretation which he places upon it, and that, this being so, it was a substantial error to exclude it.

I therefore recommend that the judgment be reversed, and a new trial granted; costs to abide event.

HOGAN, POUND, and McLAUGHLIN, JJ., concur. CARDOZO, CRANE, and ANDREWS, JJ., dissent.

Judgment reversed, etc.

(237 N. Y. 16)

PRIORE v. SCHERMERHORN.*

(Court of Appeals of New York. Nov. 20, 1923.)

1. Contracts ⇐285(2)—Allowance to owner, under an agreement to arbitrate, held outside subject-matter of arbitration.

Where, in a contract providing for arbitration between contractor and owner, the arbitrators were limited to a consideration of payment for additional work or allowance for alteration, and loss caused by delay, the allowance to the owner of a sum for defective work, after the final certificate of the architect had been granted, was not matter of arbitration under the contract.

2. Contracts ⇐285(2) — Presentation of all claims to arbitrators held a waiver of restrictions in the agreement of arbitration

Where, under a contract providing for arbitration between contractor and owner, the arbitrators were limited to a consideration of payment for additional work, or allowance for alteration and loss caused by delay, but the contractor presented all his claims to arbitration, his conduct amounted to a waiver of the restrictions under the contract, and gave the arbitrators jurisdiction to determine all matters in dispute.

Appeal from Supreme Court, Appellate Division, Second Department.

In the matter of the arbitration between Michael J. Priore, contractor, and Arthur F. Schermerhorn, owner. From a judgment of the Appellate Division (204 App. Div. 332, 198 N. Y. Supp. 943) modifying and as modified affirming a judgment of the Special Term in favor of the contractor upon an award, the owner appeals. Affirmed.

Shiland, Hedges & Pelham, of New York City (Arleigh Pelham, of New York City, of counsel), for appellant.

Delafield, Thorne & Burleigh, of New York City (George H. Porter and George W. Burleigh, both of New York City, of counsel), for respondent.

CRANE, J. We agree with the appellant in the construction of the contract in question, which is referred to as the "uniform contract" provided by the American Institute of Architects.

Article III of the contract provides for payment or allowance where alterations have been ordered.

Article VIII provides for reimbursement of all loss occasioned by delay.

Article XII provides for arbitration in case the owner and the contractor cannot agree upon the amount to be paid under articles III and VIII.

[1] When the dispute between the plaintiff and the defendant in this case was submitted to arbitrators under this contract, there were only two items they could consider: (1) Payment for additional work or allowance for alterations under article III; (2) loss caused by delay. There was no jurisdiction under the terms of the contract over any other matters.

When the arbitrators had determined the amount due, if any, under either or both of these articles, the contractor would then have proceeded with the action at law which he had brought, and prove any of the claims which he had arising under the contract, including the arbitration award, and the owner could counterclaim for any loss or defend for any reason not embraced or covered by the arbitration. We therefore agree with the appellant that the item of $4,012.50 allowed to the owner for defective work discovered after the final certificate of the architect had been granted was not the

*Reargument denied 237 N. Y. —, 143 N. E. —.

subject-matter of arbitration under this contract, but was a matter to be litigated if the parties so desired in an action at law.

[2] To reverse the Appellate Division, however, and award this sum to the contractor would amount to an adjudication that he was entitled to it. The owner could not sue to get it back, as the subject-matter had already been passed upon by the arbitrators resulting in the courts awarding the amount to the contractor. The matter would thus have been adjudicated, whereas the arbitrators, having had no jurisdiction over it whatever, the question of defective work should have been left open for further litigation.

In the way in which this case was presented before the arbitrators, there can be only one conclusion. The contractor and owner were willing to submit all the matters in dispute under the contract to arbitration, irrespective of articles III and VIII, or else the contractor was willing to submit all his claims to arbitration while objecting to the determination of the owner's claims. When he presented all his claims to arbitration, not confining himself to articles III and VIII, he opened up the whole matter, and cannot now object because the owner also presented his claims. In other words, the method of procedure before the arbitration amounted to a waiver of the restrictions under the contract, and gave the arbitrators jurisdiction to determine all matters in dispute.

The judgment appealed from must therefore be affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Judgment affirmed.

(237 N. Y. 19)

GREENPOINT NAT. BANK OF BROOKLYN v. GILBERT.

(Court of Appeals of New York. Nov. 20, 1923.)

1. **Bills and notes ⟸113, 140—Defense of duress in signing note held waived by renewals and payments.**

The alleged defense of duress in signing a note *held* waived by renewals and payments on the notes extending over a period of several years.

2. **Trial ⟸168—Pending decision on motion for direction of verdict, court could submit to jury question raised by pleadings.**

In an action by a bank on a note against which lack of consideration was pleaded as a defense, where a motion was made for direction of verdict, the court could, in view of Civil Practice Act, § 459, pending its decision on the motion, submit to the jury the question of consideration.

3. **Bills and notes ⟸537(3)—Whether note was executed without consideration held for jury.**

Where there was a sharp conflict in the testimony as to whether the note defendant executed was without consideration, a question of fact was presented, which was for the jury to pass upon and it was error to direct a verdict for plaintiff contrary to the jury's special finding on the issue of consideration.

4. **New trial ⟸73—Special verdict could be set aside as against weight of evidence.**

Where the jury rendered its verdict on conflicting evidence in favor of defendant on the question submitted to it pending trial court's decision on a motion for direction of verdict under Civil Practice Act, § 459, court could set aside the verdict on the ground it was against the weight of evidence, though he could not, in view of the conflict, direct a verdict.

Crane, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by the Greenpoint National Bank of Brooklyn against Charles L. Gilbert. From a judgment of the Appellate Division, Second Department (204 App. Div. 889, 197 N. Y. Supp. 917), unanimously affirming a judgment entered on a directed verdict, defendant appeals. Reversed, and new trial ordered.

William Godnick, Louis R. Bick, and Fred Francis Weiss, all of Brooklyn, for appellant.

Herman S. Bachrach, Clarence G. Bachrach, and Julius Siegelman, all of Brooklyn, for respondent.

McLAUGHLIN, J. In September, 1913, the Gilbert Metals Selling Company, a domestic corporation, had an account with the plaintiff, a national bank. Defendant was a director of the bank and a member of its finance committee. His brother, Joseph M. Gilbert, was president of the selling company. On a certain day during the month named Joseph, as president of the corporation, deposited to its credit in the bank certain checks drawn on out of town banks. Whether these checks were drawn by itself or its customers does not clearly appear. About the time these checks were deposited the selling company drew its own checks on its account with the plaintiff, which were paid. A little later it was discovered that the checks deposited by the selling company were worthless, with the result that the

company had an overdraft in the bank for something like $3,800. When this discovery was made, the defendant, with various other officers of the bank, including its attorney, interviewed the president of the selling company, and, according to the testimony of defendant, unless this overdraft were at once made good, the bank, acting through its attorney, threatened to institute criminal proceedings against defendant's brother; that, if such proceedings were instituted, the same might result in disgracing Joseph and his family; and the suggestion was made that, to prevent such proceedings, defendant himself assume the payment of $1,800 of the overdraft, and the bank would take care of the balance, if Joseph would convey to it certain land mentioned, and also assign a claim which he or the selling company had against a third party; that defendant, believing the threats would be carried out, that his brother would be imprisoned, and his family disgraced, gave his promissory note to the bank for $1,800, and the bank took a deed from Joseph of the land in question and an assignment of the claim referred to; that the note was made payable four months after date; that at the expiration of that time the bank officers said to him—inasmuch as a federal examiner was about to examine the bank and might discover the transaction—defendant, instead of renewing the note for $1,800, should give a note for $3,800, the whole amount of the deficiency; that he would not have to pay more than the $1,800 represented by the original four months' note; that, relying upon these statements, he gave a note for $3,800, without consideration; that thereafter every three months this note was renewed, he paying $100 on the principal at the time of such renewal; that such payments were made and renewals given until the note was reduced to $2,000; that at the time the note had been reduced to this sum the officers of the bank had changed; that defendant was then a borrower of the bank, apart from this particular transaction, in something like $25,000; that when he was asked to renew the note which had been reduced to $2,000 he told the officers of the bank he had done all he was required to do, and he would not further renew the note or pay anything more upon it; that he was then told by the president of the bank that it did not recognize the agreement made by the prior officers, and unless he renewed the note it would call his loans, and require him to resign as a director; that upon such threat being made he continued renewals and payments until January 20, 1921, when the note in suit was given for $1,500; that when this note became due he had succeeded in paying off all his other indebtedness to the bank; that he thereupon resigned as a director, and refused to renew the note or make any further payments upon it, and this action was brought to recover thereon. He set up as a defense duress and want of consideration.

The evidence on the part of the bank tended to show that when defendant's brother Joseph's overdraft was discovered defendant assumed and agreed to pay its entire amount, $3,800, and as a consideration for the promise the bank obtained from the brother a deed of the land and an assignment of the claim to which reference has been made, and transferred them to the defendant; that it also transferred to him a judgment for upwards of $3,800 which had been obtained on its behalf against the brother and the selling company. Defendant denied that he accepted such deeds or assignments, or that he had ever received any consideration for the note.

[1] At the conclusion of the evidence plaintiff's counsel moved for the direction of a verdict in favor of the plaintiff. The trial court held, and I think correctly, that the alleged defense of duress was waived by the renewals and payments on the notes extending over several years, but that pending the motion for the direction of a verdict he would send the case to the jury to pass upon the question of whether there were any consideration for the note. No objection was made to his reserving decision on this motion until the jury had passed upon the question of consideration. The case was thereupon submitted to the jury to pass on that question. They found a verdict for the defendant. When the verdict was rendered plaintiff's counsel asked to have it set aside on various grounds, and, among others, that it was against the weight of evidence, to which the court responded, "I think so, counselor; I think it should be a verdict for the plaintiff," but he gave counsel a few days in which to file a memorandum. Thereafter he set aside the verdict and directed a verdict in favor of the plaintiff for the full amount claimed. To this direction an exception was duly taken.

[2] When the motion was made for the direction of a verdict the court had a right, pending its decision on such motion, to submit the question as to consideration to the jury. Section 459 of the Civil Practice Act expressly provides that, when a motion is made to nonsuit the plaintiff, or for the direction of a verdict, the court, pending the

decision of such motion, may submit any question raised by the pleadings to the jury, or require the jury to assess the damages; that, after the jury has rendered a special verdict upon such submission, or assessed the damages, the court may then pass upon the motion to nonsuit or direct such general verdict as either party may be entitled to.

[3, 4] I am of the opinion the court erred in directing a verdict for the plaintiff. There was a sharp conflict as to whether there was a consideration for the note. A question of fact was thus presented, which was for the jury to pass upon. Defendant denied he had ever received the assignment of the claim, the judgment, a conveyance of the land, or any consideration. He testified that he never saw the assignment of the judgment or the claim, and that when a deed of the land was sent to him he immediately returned it. When the jury had rendered its verdict the court could have set the same aside on the ground that it was against the weight of evidence, in which case there would have been a new trial, but he could not, in view of the conflict, direct a verdict as he did.

This conclusion renders it unnecessary to pass upon the question of whether or not section 457a of the Civil Practice Act be unconstitutional. The verdict was not directed under that section. No reference was made to it, and it is obvious from what the court did in reserving its decision on the motion to direct a verdict until the jury had passed upon the question of fact submitted to it that it acted under section 459, and not 457a.

The judgments appealed from should be reversed, and a new trial ordered, with costs to abide event.

HISCOCK, C. J., and HOGAN, POUND, and ANDREWS, JJ., concur.

CARDOZO, J., concurs in result.

CRANE, J., dissents.

Judgments reversed, etc.

(237 N. Y. 34)

IRA S. BUSHEY & SONS v. AMERICAN INS. CO.*

(Court of Appeals of New York. Nov. 20, 1923.)

1. Insurance ⇐146(3)—Policy susceptible of two interpretations construed most strongly against insurer.

A policy fairly susceptible of two interpretations, should be most strongly construed against insurer.

2. Evidence ⇐19—Judicial notice in construing builders' risk clauses of insurance policy that timbers are brought to site and shaped before being united.

In construing builders' risk clauses of a policy covering vessels completed or in process of completion, the court must take notice that, before the timbers are united so as to begin erection of the structure within the strict meaning of the words, they are brought to the site with the intention of putting the component parts together, and are shaped before being erected in place, whereupon the construction is begun and the builders' risk attaches.

3. Insurance ⇐146(1) — Policy containing builders' risk clauses read, if possible, to protect builder from loss of materials before being built into structure.

A policy containing builders' risk clauses should be read, if possible, without twisting words and rendering plain meanings nugatory, so as to make the scheme reasonable and protect the building if a loss to materials on the ground occurs before any of the timbers have been built into the structure.

4. Insurance ⇐146(1)—Court construing policy not bound by niceties of definition proper in construing statute.

In construing a policy containing builders' risk clauses, the court is not bound by niceties of definition proper in construing a statute conferring a privilege, such as exemption of a building in course of construction from taxation, where the burden is on the beneficiary to bring himself within the exemption.

5. Insurance ⇐162—Builders' risk policy covers loss of materials delivered on ground, and manifestly intended to be incorporated in building.

A builder taking out builders' risk insurance, delivering his materials on the ground, and doing some manifest act evidencing his intention to incorporate them into a building, need not protect himself by a general open policy on stock in order to cover a loss sustained before actually joining one timber to another.

6. Customs and usages ⇐15(1)—Evidence ⇐461(1)—Insurance ⇐146(2)—Parol evidence of intention and custom inadmissible to explain meaning of builders' risk policy; policy construed according to intention appearing from its language.

A builders' risk policy should be construed according to the intention appearing by the words, and parol evidence of intention and custom is inadmissible to explain the meaning of the policy.

7. Insurance ⇐146(3)—That language of policy follows that of application does not alter rule of construction in favor of insured.

That the language of a builders' risk policy follows ambiguous language of insured's application does not alter the rule that the policy should be construed according to the intention appearing by the words read in the light most favorable to insured.

*Reargument denied 237 N. Y. —, 143 N. E. —.

8. Insurance ⇐421—Policy covering loss by fire to shipbuilding materials in yard held not one against marine perils.

A policy covering loss by fire to materials in a shipyard for use in constructing vessels is not one against marine perils to such extent, but covers only an ordinary fire risk unrelated to navigation.

Hiscock, C. J., and Andrews, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second department.

Action by Ira S. Bushey & Sons against the American Insurance Company. From a judgment of the Appellate Division (206 App. Div. 715, 199 N. Y. Supp. 929) affirming a judgment of the Trial Term for plaintiff, defendant appeals. Affirmed.

George S. Brengle and Arthur W. Clement, both of New York City, for appellant.

Pierre M. Brown, of New York City, for respondent.

POUND, J. The question is whether the insurance policy sued on covered the loss sustained. Plaintiff has a shipyard in Brooklyn where it repairs vessels and builds barges. It carried a small stock of lumber for use in its repair business, which was covered by a policy of general stock insurance. Being about to begin the construction of several scows, it obtained a policy from the defendant and six other companies jointly insuring it "for account of whom it may concern" in the sum of $50,000 "to cover the legal liability of the assured, from any cause whatsoever, for loss and/or damage and/or expense, if any, to vessels and/or craft and/or their cargoes and/or their frieght, arising from or in connection with the operation of their plant, situated in Brooklyn, New York Harbor, including dry docks and/or marine railways used and operated in connection therewith." The policy also provides:

"This insurance is also extended to cover, subject to the terms of the builders' risk clauses, as attached, the interest of the assured in work on such vessels, completed or in process of completion."

These provisions are contained in a rider attached to the formal policy.

The first paragraph of the builders' risk clauses provides:

"This insurance is also to cover all risks, including fire while under construction and/or fitting out, including materials in buildings, workshops, yards and docks of the assured. * * *"

Plaintiff, before obtaining the policy, had contracted to build the scows. The contracts provided that it should furnish the necessary timber. As the work progressed payments were to be made by the owners in installments. After the first payment was made plaintiff was to protect the owner under a specific policy on each vessel. Plaintiff had procured the stock required for each vessel and piled it separately in its yard where the work was to be done, but had gone no further than to shape up some material to be used in the construction of the scows, when a fire destroyed a quantity of the lumber. The total amount destroyed was 674,914 feet of a total of 1,266,914 feet. Of this quantity about 19,000 feet was fabricated timber. The courts below have held that, within the meaning of the policy, the work had been begun on each vessel, and that the insurer was liable for the loss.

[1] The language of the policy is not as clear and unequivocal as it might be, but it relates to loss to vessels "completed or in the process of completion," including materials assigned to vessels under construction. If it is fairly susceptible of two interpretations, one of which being that contended for by the insured, it should be most strongly construed against the insurer. Herrman v. Merchants' Ins. Co., 81 N. Y. 184, 188, 190, 37 Am. Rep. 488; Janneck v. Metropolitan Life Ins. Co., 162 N. Y. 574, 576, 577, 57 N. E. 182; Michael v. Prussian Nat. Ins. Co., 171 N. Y. 25, 35, 63 N. E. 810; Paskusz v. Philadelphia Casualty Co., 213 N. Y. 22, 26, 106 N. E. 749, Ann. Cas. 1915A, 652; Thompson v. Phenix Ins. Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408.

[2, 3] The insurer contends that a vessel is not under construction or in the course of completion within the meaning of the policy until some of its parts are joined together in a definite manner, and that the mere fabrication of some of the timbers is not construction but preparation for construction. But, in construing the builders' risk covered by an insurance policy, we must take notice that, before the timbers are united so as to begin the erection of the structure within the strict meaning of the words, they are brought to the site with the intention in due course of putting the component parts together and are shaped before they are erected in place. When this work has begun, in a fair sense the construction of the building is begun and the builders' risk has attached. A proper consideration of the purpose of builders' risk insurance should be had. The policy should be read, if it can be without twisting words and rendering plain meanings nugatory, so as to make the scheme of the policy reasonable and to protect the builder if a loss to materials on the ground occurs before any of the timbers have been built into the structure.

"A construction which makes the contract fair and reasonable will be preferred to one

which leads to harsh or unreasonable results." Crane, J., in Aldrich v. N. Y. Life Ins. Co., 235 N. Y. 214, 224, 139 N. E. 245, 248.

[4] It was held in People ex rel. New York Cent. & H. R. R. Co. v. Purdy, 216 N. Y. 704, 111 N. E. 1097, reversing on dissenting opinion of Scott, J., 167 App. Div. 637, 642, 153 N. Y. Supp. 300, that the digging of an excavation within which to erect a structure is not an act in the construction of a building. That case, however, involved the exemption from taxation of "a building in the course of construction." Plainly it was the intent of the Legislature to encourage building by exempting from taxation a building actually and literally in the course of construction, and this purpose would not be met by the mere excavation of a cellar.

[5] We are not, however, construing a statute conferring a privilege where the burden is upon the beneficiary to bring himself within the terms of the exemption. We are construing a policy of insurance, and we are not bound by the niceties of definition that might otherwise be proper. When a builder takes out builders' risk insurance, delivers his materials on the ground, and does some manifest act evidencing his intention to incorporate them into a building, and when there is and can be no dispute about his intention, it would be a harsh rule to require that he should protect himself by a general open policy on stock in order to cover a loss sustained before he had actually joined one timber to another. It was reasonable for the insured to believe that it had covered the risk of loss by fire of its materials when it took out the policy in suit. The ordinary builder would agree with the plaintiff's witness that "the building of the boat starts just as soon as you start getting that material ready," and that such a construction of the policy expresses the fair and reasonable understanding of the risk.

[6] Evidence of intention and custom offered by the defendant to show and explain the meaning of the policy as contended for by it was properly excluded. Rickerson v. Hartford Fire Ins. Co., 149 N. Y. 307, 43 N. E. 856. The court should construe the policy according to the intention appearing by the words. One should not be left to learn whether he is insured or not until the verdict of a jury is rendered on disputed parol evidence. Herrman v. Merchants' Ins. Co., supra.

[7] The fact that the language of the policy follows the language of the application of the insured, does not alter the situation. When the insurer adopted the language of the application in covering the risk it became the author of the ambiguity, and the ultimate cause of doubt. It must bear the burden of having obscure phrases construed in favor of the insured. London Assurance Corp. v. Thompson, 170 N. Y. 94, 62 N. E. 1066, is not an authority to the contrary. It dealt with a contract of re-insurance. The description of the risk was wholly prepared by an insurer of wide experience, in the business since 1720. A fair and reasonable construction of the policy as written controls in any event.

[8] So far as the policy covers loss by fire to materials in the yard, it is not an insurance against marine perils. It is, to that extent, an ordinary fire risk, having no relation to navigation. City of Detroit v. Grummond, 121 Fed. 963, 971, 58 C. C. A. 301.

The judgment appealed from should be affirmed, with costs.

HOGAN, CARDOZO, McLAUGHLIN, and CRANE, JJ., concur.

HISCOCK, C. J., and ANDREWS, J., dissent.

Judgment affirmed.

(237 N. Y. 30)

HOISTING ENGINE SALES CO., Inc., v. HART.

(Court of Appeals of New York. Nov. 20, 1923.)

1. Evidence ⇐413—Proof that lessor knew all about contract for which he leased machinery held not to vary the written instrument.

Under a contract leasing machinery, "to be used by lessee on his contract at Singac," it did not vary the terms of the written instrument to show what lessee's contract was and that lessor knew all about it; the agreement implying that lessor knew of the contract and generally the kind of work it called for.

2. Evidence ⇐417(9)—Implied warranty may be proved, though written agreement contains no warranty.

If there is an implied warranty in the hiring of machinery for a special purpose that it is fit for such use, or at least will work, the warranty may be proved or implied though the written agreement contains no warranty.

3. Bailment ⇐9—Lessor held to warrant that machine would do work it was supposed to do.

Where a traveler with a hoist intended for digging and lifting work was leased for such work, the lessor impliedly warranted that the machine would do the work that it was supposed to do.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by the Hoisting Engine Sales Company, Incorporated, against John J. Hart. From a judgment of the Appellate Division

Second Department (205 App. Div. 897, 198 N. Y. Supp. 921), affirming unanimously a judgment of the Trial Term entered upon a verdict of a jury in favor of defendant on his counterclaim, plaintiff appeals by permission of the court. Judgment affirmed.

Stockton & Stockton, Kenneth E. Stockton and Edward R. Whittingham, all of New York City, for appellant.

Kellogg & Rose, William K. Hartpence and Franklin Nevins, all of New York City, for respondent.

CRANE, J. The plaintiff and the defendant entered into an agreement of which the material part is as follows:

"Lease.

"The Hoisting Engine Sales Co., Inc., lessor, hereby leases to John J. Hart, lessee, the following equipment subject to the following terms:

"One 40' boom, all steel Shannon Traveler with an 8½x10 D. C. D. D. Lambert hoist with swinger and counterweight drum.

"Delivery to be made at Nutley, N. J.

"Return delivery to be made to our yard at Long Island City with trucking charges prepaid to above yard or to an equal distance elsewhere if so directed. Lessee agrees to return equipment in as good condition as when received less wear incident to normal service in the hands of a competent operator.

"Equipment to be used by the lessee on his contract at Singac, N. J."

After the defendant had installed the traveler and hoist, it broke down completely and failed to do the work for which it was hired. The defendant had a subcontract with the Brady Company in the state of New Jersey to excavate a trench and lay about 10 miles of water pipe. The pipes were made of steel, 30 feet long and 72 inches in diameter, and weighed about 4½ tons each. With the derrick the defendant intended to operate an orange peel bucket to do the digging and also intended to use the same machine to put the pipe in the trench. The hoist could not be operated as it was designed to work, and the boom broke when attempting to lift one of the pipes. That the machinery was unfit for the purpose for which it was hired has been determined by the jury and the unanimous affirmance of its verdict by the Appellate Division concludes us from examining the question.

The defendant having returned the traveler and hoist, this action was commenced to recover the rental reserved in the lease. The defendant counterclaimed by setting up a breach of warranty and demanding the damages sustained in consequence thereof. From a judgment recovered by the defendant the plaintiff has appealed, presenting what it claims to have been errors in the admission of evidence to vary the terms of the writing as given above.

[1] The position the plaintiff takes is this: The writing contains no express warranty that the traveler and hoist will do the defendant's work; there is no implied warranty so there was no warranty at all. Therefore, if this be true, it was error to permit the defendant to give in evidence the conversation with the plaintiff's president, preceding the execution of the lease, wherein he was told the nature of the defendant's contract and the kind of machinery required. This, says the plaintiff, added an express oral warranty to the written lease, as no implied warranty arose out of the transaction.

When John J. Hart, the defendant, was on the stand, he was asked:

"Q. What was the general nature of that contract? A. It was laying a pipe line. Q. Well about how long a pipe line, and what kind of pipe? A. It was a steel pipe, 72 inches in height, 30 feet long, and about 10 miles of work. Q. Do you know Mr. Cist, the president of the plaintiff company? A. I do. Q. Did you have a conversation with Mr. Cist in regard to your contract over in New Jersey? A. I did in Mr. Cist's office. Q. Now state what you said to Mr. Cist and what Mr. Cist said to you? A. I told Mr. Cist what I wanted. I said: 'Have you got a traveling derrick? I want to use an orange peel on it to do the digging.' I also wanted to use the same machine to put in pipe. He said: 'I have got a rig that you can use; in fact, it is over in Jersey now.' I said, 'What kind of a machine is it?' and he said, 'It is a Lambert engine, 8½ by 16, with a swinger on it, and it is a Shannon traveler.' I says, 'What kind do you call a Shannon traveler?' and he said, 'It is a machine good for 10 tons.'"

This testimony was received over objection and exception.

In the first place, we must note that the written lease refers to a purpose for which this traveler and hoist were to be used. "Equipment to be used by the lessee on his contract at Singac, N. J." These are the written words. What do they signify without any oral testimony to explain them? First, they signify that the plaintiff knew that the defendant had a contract to do work at Singac, N. J. Second, they make clear that the plaintiff also knew that the equipment it was leasing to the defendant was to be used on that work. Third, that from the nature of the equipment the plaintiff knew that the work was to be the hoisting of dirt and materials. Where the writing is sufficiently specific to state all these things, I do not consider it a departure from the instrument to show a little more in detail what the defendant's contract was and that the plain-

tiff knew all about it. The plaintiff in writing says:

"I know that you want my hoisting machine for use on your contract in Singac, N. J."

Does this not reasonably imply that it also knew the nature of that contract and generally the kind of work it called for? It does not vary the terms of the written instrument to show by parol that the plaintiff knew what it was writing about when it referred to the defendant's contract.

[2, 3] This case was not tried on the theory of an express warranty, so let us proceed to consider the implied warranty if any. If there be an implied warranty in the hiring of machinery for a special purpose, that it is and will be fit for such use, or at least will work, then the warranty may be proved or implied even though the hiring was by written agreement, containing no warranty. "All implied warranties, therefore, from their nature, may attach to a written as well as an unwritten contract of sale." Carleton v. Lombard, Ayres & Co., 149 N. Y. 137, 146, 43 N. E. 422, 424. Thus there is an implied warranty in manufactured goods sold by the maker that they are free from any latent defect growing out of process of manufacture (Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Carleton v. Lombard, Ayres & Co., supra); also in the sale of seeds by the grower there is an implied warranty that they are free from any latent defect arising from improper cultivation (White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13). In the sale by a retail dealer of articles of food for immediate use there is an implied warranty that they are fit for human consumption. Race v. Krum, 222 N. Y. 410, 118 N. E. 853, L. R. A. 1918F, 1172; Rinaldi v. Mohican Co., 225 N. Y. 70, 121 N. E. 471. That the sale of any of these things was in writing, expressing no warranty, would not prevent the warranty by implication from attaching. By analogy there is an implied warranty in the hiring or bailment of certain kinds of property. In the hiring of a horse there is an implied warranty that he is fit for the purpose for which he was taken (Fowler v. Lock, L. R. 7 C. Pl., 272); in hiring a carriage that it will not fall apart (Hyman v. Nye & Sons, L. R. 6 Q. B. Div. 1880, p. 685). Where wharfingers agreed to permit a shipowner to discharge his vessel at their jetty in the Thames where vessels must of necessity ground in low water, there was an implied warranty that the bed of the river was not so uneven as to cause damage to the ship. The Moorcock, L. R. 14 P. D. 1888, p. 64. Shipowners agreeing to furnish the necessary cranes, chains, and gearing to a stevedore to discharge a cargo impliedly warrant that the chains are so far sound as to be sufficient for the work intended. Mowbray v. Merryweather, 2 Q. B. 640, L. R. 1895, p. 640. Sacks to be used in unloading a cargo of peas are warranted by implication to be fit for the purpose. Vogan & Co. v. Oulton, 81 Law T. Rep. (N. S.) 435. When a stablekeeper let a horse, knowing that it was to be used to take a family to a funeral, he was held liable for an injury caused by the unsuitableness of the horse for the purpose for which it was hired. Horne v. Meakin, 115 Mass. 326. See, also, Hadley v. Cross, 34 Vt. 586, 80 Am. Dec. 699; Williston on Contracts, p. 1956.

In Halsbury's Laws of England (volume 1, § 1117), we find this:

"The owner of a chattel which he lets out for hire is under an obligation to ascertain that the chattel so let out by him is reasonably fit and suitable for the purpose for which it is expressly let out, or for which, from its character, he must be aware it is intended to be used; his delivery of it to the hirer amounts to an implied warranty that the chattel is in fact as fit and suitable for that purpose as reasonable care and skill can make it."

This is the rule to be applied to the facts of this case. The plaintiff owned a traveler with a hoist for digging and lifting work. It hired it to the defendant to do such work on his contract in Singac, N. J. There was an implied warranty that the thing would work as it was supposed to do. Instead of this it broke down, came apart, and collapsed with the first heavy load. The defendant does not claim that there was a warranty that this machine would do a special class of work for which it might or might not be adapted; he claims on the usual and customary warranty implied in all such hiring, that the machine will work, will go, will do the thing for which it was built, the class of work which its nature indicates it was intended to perform.

We think, therefore, that the conversation above detailed by the defendant Hart was competent, or at least added nothing to what was already implied by the law from the nature of the lease and transaction.

It may be that the hiring of a chattel should be assimilated to the sale of goods and that section 96 of the Personal Property Law (Consol. Laws, c. 41) applies. Such is Mr. Williston's suggestion in his work on Contracts (section 1041, p. 1956). We do not deem it necessary to consider the point.

The case of Builders' Brick & Supply Co. v. Walsh Transportation Co., 106 Misc. Rep. 460, 174 N. Y. Supp. 690, affirmed 189 App. Div. 898, 178 N. Y. Supp. 881, is pressed upon our attention as an authority against an implied warranty in the hiring of chattels. Even if we approved of the law as applied

in that case—about which we express no opinion—we note the statement in the opinion that—

"The written agreement that memoralized the engagement of the parties contained no reference to the use to which the dredge was to be put," etc.

In the case we are deciding the written agreement mentioned the use.

The judgment appealed from must therefore be affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Judgment affirmed.

(237 N. Y. 38)

HORTON et al. v. NEW YORK CENT. R. CO.

(Court of Appeals of New York. Nov. 20, 1923.)

1. Appeal and error ⇐1091(1)—Evidence considered in light most favorable to plaintiff on appeal from reversal for contributory negligence as matter of law.

On appeal from an order reversing a judgment for plaintiff in a personal injury suit on the ground that he was negligent as a matter of law, the evidence must be considered in the light of the most favorable inferences for plaintiff.

2. Negligence ⇐122(1)—Burden of proving contributory negligence on defendant.

Under Civil Practice Act, § 265, the burden of proving contributory negligence is on defendant.

3. Railroads ⇐350(13)—Automobile driver held not negligent as matter of law under statute requiring him to reduce speed to "safe limit," and proceed "cautiously and carefully" with vehicle under "complete control."

The driver of an automobile, struck by a train completely hidden from his view until he was within 20 feet of the crossing, at which the gateman was not in attendance, and the gates were up, *held* not negligent as a matter of law in failing to look when at a point 19 feet away, from which he could have seen up the track 180 feet, where he slowed down to 5 or 6 miles an hour after passing a warning sign 300 feet from the crossing, and looked in both directions, and no whistle or bell was sounded; Railroad Law, § 539 (Cons. Laws, c. 49), which requires the driver of a vehicle approaching a crossing to reduce his speed to a "safe limit" on passing the sign, and proceed "cautiously and carefully" with the vehicle under complete control, placing no new duty on him with respect to employment of his senses, exercise of care and caution, and control of his vehicle.

McLaughlin, J., and Hiscock, C. J., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Mary A. Horton and another, as administrators of the goods, chattels, and credits of James W. Horton, deceased, against the New York Central Railroad Company. From a judgment of the Appellate Division (205 App. Div. 763, 200 N. Y. Supp. 365), reversing, as a matter of law, a judgment of the Trial Term on a verdict for plaintiff, and dismissing the complaint, plaintiffs appeal. Reversed, and judgment of Trial Term reinstated.

J. S. Carter, of Albany (John T. Norton, of Troy, of counsel), for appellants.

Visscher, Whalen, Loucks & Murphy, of Albany (Robert E. Whalen, of Albany, of counsel), for respondent.

CRANE, J. The defendant maintains a railroad through the town of Colonie, Albany county, N. Y., known as the Troy & Schenectady line. At a place known as Dunsbach Ferry Station the railroad is crossed at right angles by a highway known as the Dunsbach Ferry road, running north and south. At this point the railroad runs east and west.

On the 29th day of May, 1921, the plaintiffs' intestate was driving an Essex touring car across the track while proceeding south, and was struck by a train going east and killed. This action was brought to recover damages on the ground that the death of James W. Horton was caused by the negligence of the railroad company, and resulted in a verdict for the plaintiff. The judgment in her favor, however, entered upon this verdict has been unanimously reversed by the Appellate Division, and the complaint dismissed on the ground that the deceased was guilty of contributory negligence as a matter of law.

[1, 2] The order states that the reversal was on the law. In considering this case, therefore, we are obliged to take the evidence most favorable to the plaintiff and see whether it makes out a question of fact for the jury or whether, considered in the light of the most favorable inferences, it fails to justify a recovery. That is, on all the evidence and the reasonable inferences to be drawn therefrom most favorable to the plaintiff, does it appear as a matter of law that the deceased was guilty of contributory neglect? The burden of proving contribu-

tory negligence was on the defendant. Section 265 of the Civil Practice Act. The facts surrounding the accident are as follows:

James W. Horton was a married man, 52 years of age, living in Cohoes. On the 29th day of May, 1921, at about 15 minutes past 10 on a Sunday morning, he was driving on the Dunsbach Ferry road in a southerly direction, approaching the track of the Troy & Schenectady line of railroad. This was a single track. The train was approaching from his right, and was completely hidden from view until the traveler was almost upon the track. Alongside of the roadway, hiding the approaching train, was an embankment 5½ feet high, covered with grass a foot or more high. This bank extended down to within about 9 feet of the northerly rail of the track. The top of the bank or mound was about 15 feet from the track. This is the estimate given by John Flynn, Jr., a civil engineer. Other witnesses said that the view to the right or to the west was obstructed to even a greater extent. A witness, Robert Wilson, said:

"You have got to be close to the track before you can see a train."

A witness named William Trimble testified:

"Q. How close has the south-bound traveler got to be to the defendant's tracks, going south out of the Dunsbach Ferry Grove, before he has any view to the west? A. Well, you get right up on the tracks before you have any view. Q. It is so blind they cannot see, isn't that true? A. Yes; it is a bad crossing there."

Another witness, Joseph Stevenson, presented the situation as follows:

"Q. Now your view to the west as you go south along that road from the Grove is obstructed all the way along, is it not? A. Yes, sir. Q. How close do you say you have to be to the defendant's tracks as you go south along that road before you can see a train approaching from the west? A. You have got to be pretty close. Q. Well, what is your best judgment? A. Two or three feet."

These witnesses for the plaintiff are corroborated by the defendant's fireman who was on the train, Francis Barrington. He was asked:

"Q. Did you continue to look straight ahead from the time you got back into your cab until this collision occurred? A. Well, I kept glancing sideways, and ahead, both. Q. Well, you could not see anything by glancing sideways, could you? A. Well, not very far; no. Q. You could not see this highway by glancing sideways? A. Not until you got within 20 feet of it."

If the man on the engine could not see the highway until he got within 20 feet of it, the people on the highway could not see the engine until it got within 20 feet of the crossing.

This being the situation on this Sunday morning in question, James W. Horton drove his car down towards the track at about 10 miles an hour until he approached the disc or railroad sign erected 300 feet from the track pursuant to section 53a of the Railroad Law. Consol. Laws, c. 49. He then slowed down to about 5 or 6 miles an hour, and proceeded cautiously as described by Albert Cushan and Charles W. Carter.

Carter was in a Ford car drawn up on the westerly side of the road about 20 feet north of the railroad track. He was talking to Cushan, who stood with a foot on the step of his car. Horton passed these men. Fifteen or more cars were also stationed in the vicinity alongside the road. There was a church near by which the occupants of these cars were to attend. Cushan says:

"I was standing there, and Mr. Horton came up the road, blowing his horn—well, as he was approaching up towards me I got out of the way. My back was turned toward the crossing and facing Mr. Carter's machine, and as Mr. Horton passed me I came back again and I faced the crossing. Well, as I faced the crossing Mr. Horton approached the track with his front wheels, and at that I see the engine, or cowcatcher of the engine, coming out of the cut, and it struck Mr. Horton's automobile just by the door and his seat there, about there. * * * Q. When you say a 'cut' what do you mean, this bank on the west side of the highway? A. This bank on the west side of the highway; yes. Q. How far was the cow catcher of this engine from the Horton automobile when you first saw it stick out from behind that bank? A. Oh, probably 6 or 7 feet. * * * He was coming slow as I call it, because there is so much traffic on that road that a man has got to be very careful. Q. Have you any idea about what speed he was going at down at Rowe's house (600 feet north)? A. Well, probably he was going 10 or 12 miles an hour. Q. From the time you first saw him until you stepped out of the way to let him go by, did the speed of his automobile change any? A. Well, yes; it slackened up. Q. And at about what speed would you say he was going when he passed where you were standing? A. Well, I should judge about 6 or 7 miles. Q. As Mr. Horton came along that road, from the time that you first saw him, in which direction was he looking? A. Well, he was looking more this way (ind.) towards the west there, as I would call it, coming along. * * * Well, he was coming right along. * * * He was looking kind of sideways going along, * * * looking towards the west."

Charles W. Carter gives the same testimony. He says that he was 20 feet from the track when Horton passed him, and that when he first saw the engine, as it came out from behind the bank, it was only 5 or 6 feet from the crossing.

"Q. Did the speed of his automobile change any from the time you saw him at Rowe's house until he got up where he passed your machine? A. Yes; he slowed up considerably. He couldn't go any faster, for he could not get through. Q. Now, as he passed your automobile which way was he looking? A. To the west. I spoke to him. Q. About what speed would you say he was going at as he passed your automobile? A. About 5 or 6 miles an hour; very slowly. I had time to speak to him."

Taken in conjunction with this testimony, we must also consider these additional facts: There was no regular passenger train on Sundays until 5 o'clock in the afternoon. There was one freight train which ran in the morning. The gateman was not in attendance, and the gates were left up all Sunday. From 300 to 1,000 people attended Dunsbach Ferry Grove on Sundays at this time of year, using this crossing. The train which struck the deceased was an extra running at 25 to 30 miles an hour without signaling by bell or whistle of its approach.

[3] Given these set of circumstances, the contributory negligence of James W. Horton would be a question for the jury unless the rule which has heretofore existed covering these crossing cases has been modified by section 53a of the Railroad Law. Consol. Laws, c. 49. I take it, from reading the briefs and the opinions below, to be conceded that without this statute there would be ample evidence to justify a recovery. The Appellate Division, however, has given to section 53a a meaning which changes very materially the rules of the common law as they have heretofore existed, and places all the risk of an accident in crossing a railroad track upon the driver of any kind of vehicle. It has been said that, because of the provisions of this section, the plaintiff was guilty of contributory negligence as a matter of law because he did not stop his automobile before crossing at a point where he could have seen the train. This calls for an analysis and interpretation of section 53a.

This section is part of article III, which relates to the construction, operation, and management of railroads. Section 53 provides for signboards, flagmen, and gates at crossings. Then comes section 53a, adopted in 1919 (chapter 438, Laws of 1919), which provides that every municipality or political subdivision shall install and maintain an approach warning sign on each side of each railroad grade crossing at a distance therefrom of not less than 300 feet. The sign shall consist of a circular metal disc 24 inches in diameter, with a white field, and a black border line one inch wide, and with black perpendicular and horizontal cross lines 2½ inches wide, the reverse side of each disc colored black. In each of the upper quarterings shall appear in black the letter R, five inches high, 3¾ inches wide, lines one-inch stroke. Then comes the provision in question:

"It shall be the duty of the driver of any vehicle using such street or highway and crossing to reduce speed to a safe limit upon passing such sign and to proceed cautiously and carefully with the vehicle under complete control."

It is said that this has placed a new and additional duty upon the drivers of vehicles. Let us see. It applies to the driver of any vehicle using the road. This includes wagons, carriages, bicycles, automobiles. It has no special reference to automobiles, for if it had we would find the provision under the Highway Law applicable to motor vehicles. The provision is in the Railroad Law having reference to the operation of trains and the maintenance of railroads.

In the next place the driver, in passing the disc 300 feet from the crossing, has to reduce his speed to a safe limit. So far as this applies to the point 300 feet from the railroad crossing it is new. At this point drivers must reduce their speed to that which is considered to be safe. Without the statute no driver was permitted to cross railroad tracks at an unsafe limit of speed. Whether under this statute or under the common law the safety of his speed must of necessity depend upon the circumstances, the place, and the surroundings. The statute does not say what a safe limit is. Who is to determine it? Shall we say, as has the Appellate Division, that, because a collision occurred, the speed was necessarily unsafe? In one sense this is true; but surely this cannot be the meaning of the statute. The Legislature never intended to place upon the farmers and upon automobilists the entire risk in crossing a railroad track. If this were the law there could never be a recovery for an accident at a crossing. The vehicle could not get across unless it were in motion, and, whatever its speed, it would be an unsafe limit because it proved to be unsafe. The Railroad Law never intended that the vehicle slowing down to a safe limit should always stop before crossing the track.

If this is what the Legislature had intended it would have said so. It did say so specifically in section 56 of the Railroad Law, which required all locomotives to stop where railroads crossed each other.

The use of the words "reduce speed to a safe limit" indicates that the vehicle is to keep going, but at such a speed as to be reasonably safe under all the surrounding circumstances and conditions. This is nothing more or less than was required at common law and prior to the statute. No man could drive recklessly irrespective of speed in crossing a railroad track. He was bound on approaching it to have his vehicle under control and to reduce it to a speed which would be reasonably safe under all the conditions. As I say, the only thing new in this statute is that the speed shall be reduced 300 feet from the track.

Now what are the other requirements? The driver is "to proceed cautiously and carefully with the vehicle under complete control." This is the same duty that rested upon him at all times and prior to the statute. In order to be free from contributory negligence a driver was obliged to proceed cautiously and carefully in view of all the circumstances, and he was always compelled to have his vehicle under complete control. The following authorities justify this statement.

A driver must employ his senses of hearing and seeing to avoid danger. If not he is negligent as a matter of law. Dolan v. Delaware & Hudson Canal Co., 71 N. Y. 285; Kellogg v. New York Cent. & H. R. R. Co., 79 N. Y. 72. That he must exercise care and caution, see Greany v. Long Island Railroad Co., 101 N. Y. 419, 5 N. E. 425. In Carr v. Pennsylvania R. R. Co., 225 N. Y. 44, 121 N. E. 473, it was noted that the driver in crossing the railroad track had his horse under control and his mind on the danger. And in Avery v. New York, O. & W. Ry. Co., 205 N. Y. 502, 507, 99 N. E. 86, 87 (42 L. R. A. [N. S.] 158), we find the rule stated in 1912, some years before the passage of this section 53a of the Railroad Law, to be the following:

"The rider of a bicycle should have it under full control and, especially, when the circumstances are such as, within human probability, to make his control a reasonable assurance against danger, as well to himself, as to others. A person driving a horse, or driving a bicycle, would, in neither case, be required to get down at a railroad track, in order to look before crossing; for that would be requiring extraordinary care, rarely exercised by the most prudent. But he must approach with ordinary care and with horse, or wheel, under such complete control, as to permit of stopping within a reasonable time, if by so doing injury could be averted."

What has the Railroad Law added to this? Does the word "carefully" mean more than ordinary care? Does the word "cautiously" suggest anything more than ordinary care under circumstances which suggest danger? Do the words "with the vehicle under complete control" indicate more than the words I have quoted above written by Gray, J., "under such complete control as to permit of stopping within a reasonable time?" Unless we permit the imagination to furnish a purpose which has not been expressed, we can find nothing in this provision of section 53a of the Railroad Law which places any greater duty or burden upon the driver of a vehicle crossing a railroad track than existed at common law. There is this one exception, as above stated, that at the 300-foot mark he must slow down his vehicle. This is peremptory. To what speed is not stated.

Applying this law, therefore, to James Horton, we find that as he passed the railroad disc coming from Rowe's farm he slowed down from 10 miles an hour to 5 or 6 miles an hour; that he looked in both directions as he approached the track; that if he had listened he would not have heard any sound, as no whistle or bell was rung, and that his automobile, even going at the low rate of 5 miles an hour, which is the speed of a man walking, would almost be on the track before he could see whether a train were coming. Remember the fireman had said that the road could not be seen until the engine was 20 feet from the crossing; that other witnesses had stated that the train could not be seen on account of the bank alongside of the highway until within 15 feet of the rail, at which time the front of the automobile would have been 8 feet from the track and still going. Other witnesses had indicated that the train could not be seen until even nearer than 15 feet. Assuming, however, as does the defendant, that Horton could have seen up the track 180 feet when 19 feet from the rail, he was not called upon as a matter of law to look at his peril exactly 19 feet from the northerly rail. Kellogg v. New York Cent. & H. R. R. Co., supra. It would be for the jury to say whether he was proceeding cautiously and carefully with his vehicle under complete control, even if he did not happen to look until he was nearer the track than 19 feet. He was obliged to look both ways. It was care and caution which he was called upon to exercise, and these are relative terms. The act itself only prescribes one specific thing to be done; that is to slow down.

Also, as bearing upon the question of Horton's care and caution, we may take into con-

sideration the absence of any warning or notice of the approach of the train to a crossing which was well known to have been a dangerous crossing and hidden from view. Wall v. International Ry. Co., 233 N. Y. 309, 312, 135 N. E. 512; Carr v. Pennsylvania R. R. Co., supra; Barthelmas v. Lake Shore & M. S. Ry. Co., 225 Pa. 597, 601, 74 Atl. 556. I cannot find in the acts of Horton, as I have given them above, any evidence that he violated section 53a of the Railroad Law, and I find nothing in the entire case to justify the courts in saying so as a matter of law. Whether he did was a question for the jury.

The rule in Pennsylvania requires a driver to stop before crossing a railroad track. Yet it does not require him to get off his wagon and go forward to get a view when he cannot see from the place he has stopped. Barthelmas v. L. S. & M. S. Ry. Co., supra. The court said:

"The law requires vigilance and care with every step taken, and these rise in degree with the risk. Therefore, if the proper place at which one stops admits of but a restricted view of the track, and the conditions are such as to deaden the sound or signal of an approaching train, it is the traveler's duty in entering on the crossing to be all the more cautious and observant; but the law defines no particular act in this connection which at his peril he must do or refrain from doing. If it be shown that he stopped at a place as good as any other for observation, and looked and listened without seeing or hearing warning, whether he was negligent in entering upon the crossing would depend entirely upon the circumstances under which he made the attempt. In this case the circumstances proper to be considered would be the open gates * * * and the silence of the bell. * * * Certainly the conditions invited the plaintiff to attempt the crossing."

The defendant requested the court to make this charge, which was refused, and to which an exception was taken:

"(1) If, as he was approaching the crossing, Mr. Horton, at a distance of 19 feet north of the north rail, had a view of 180 feet, measured from the center of the crossing, in the direction of the on-coming train it was a duty imposed upon him by section 53a of the Railroad Law, not merely to have his automobile under such degree of control and to proceed therein at such rate of speed that he could stop in time to avert a collision, but actually to bring his automobile to a stop, if necessary to avert a collision.

"(2) Such was his duty, also, if, as he approached the crossing, Mr. Horton, at a distance 12 feet north of the north rail, had a view of 445 feet, measured from the center of the crossing, in the same direction."

What I have stated above about the 19-foot point is applicable here. This charge assumes that, if the deceased could have seen up the track 180 feet when 19 feet away from the track, then he was bound to do so, and could not recover if an accident happened. In other words, the court was asked to charge that, if Horton could see up the track when 19 feet from it, then he was bound to stop his car and prevent the collision. As I have above stated, the Railroad Law places no such burden upon him. It does not charge a driver with the entire responsibility for crossing accidents. The statute does require care, caution, control, a safe limit of speed in passing the disc, all of which things are dependent upon circumstances and surroundings, making in this case, a question for the jury. The collision itself is no evidence that the deceased had not reduced the speed of his automobile to a safe limit or was not proceeding cautiously and carefully with his vehicle under complete control.

For these reasons the judgment of the Appellate Division, reversing the judgment of the Trial Term as a matter of law and dismissing the complaint, must be reversed, and the judgment of the Trial Term reinstated with costs in the Appellate Division and this court.

McLAUGHLIN, J. (dissenting). I dissent. The undisputed facts show as a matter of law that the plaintiffs' intestate was guilty of contributory negligence. The accident occurred between 9 and 10 o'clock in the morning, with nothing to prevent his seeing or hearing the approaching train, had he looked or listened before he drove upon the railroad tracks. Care to this extent, at least, he was legally bound to take, prior to the passage of chapter 438 of the Laws of 1919, which is section 53a of the Railroad Law. The Legislature, undoubtedly having in view the great and increasing number of accidents caused by collisions between automobiles and railroad cars or trains at grade crossings, passed the act in question. Its manifest purpose was to prevent, or at least reduce, the number of such accidents by imposing a greater degree of care upon drivers of automobiles than had theretofore been imposed. It is especially directed to such drivers. The act requires that disc signs, of the size and having the markings specified, must be furnished by the railroad company and be installed by the municipality, or, in case of a state highway, by the state commission of highways, and that the signs must be placed in a conspicuous position at a point or place determined by the public service commission, and 300 feet from the crossings, or as near that as possible. The top of such signs "shall not be more than five nor less than four feet

above the grade of such highway, the exact height to be fixed so that the circular disc shall be most readily illuminated by the headlights of passing automobiles." Having made provisions for the placing of the disc signs, the Legislature then provided what the driver of an automobile shall do when he passes the same. The language as to him is imperative:

"It shall be the duty of the driver of any vehicle using such street or highway and crossing to reduce speed to a safe limit upon passing such sign and to proceed cautiously and carefully with the vehicle under complete control."

But it is said that this provision of the statute does not impose any greater degree of care on the driver of an automobile than was required prior to its enactment. I think it does. I am unable to ascribe to the Legislature an intent to pass a perfectly useless act. This is precisely what it did if the reasoning adopted in the prevailing opinion be correct. A fair and reasonable construction of the language used, however, indicates that the Legislature intended to impose upon the drivers of automobiles in passing such crossings a greater degree of care than was theretofore required. The statute requires that the driver, after passing the sign, shall "reduce speed to a safe limit," and then "proceed cautiously and carefully, with the vehicle under complete control." The requirement that he is to proceed with the vehicle "under complete control" indicates that there is a continuing obligation resting upon him after he passes the disc until he reaches the railroad tracks, and especially so when these words are read in connection with the other words that he must "proceed cautiously and carefully." This language means, if it means anything, that he is to approach the tracks with his vehicle under such control that he can stop it instantaneously or at will before going upon the tracks. Had the intestate exercised the degree of care thus imposed, the accident would have been avoided. He was entirely familiar with the crossing. He knew as well as any one could that a train might be approaching. He knew the gates were not operated on Sunday, not only by reason of his familiarity with the crossing, but by reason of a printed sign to that effect, conspicuously posted.

The facts are undisputed that as the intestate approached the disc sign he was driving his automobile about 10 miles an hour; that as he passed it he slowed down to about 6 or 7 miles an hour. There is some proof that he looked to the west, the direction from which the train was coming, but could not see the train until he was within 19 feet or less from the tracks, by reason of an embankment or other obstructions. Of course it did him no good to look if he could not see, and if he could not see then it was his duty to listen, and had he done so he would have heard the freight train approaching a few feet from the crossing. But, had he looked when he was 19 feet or a little less from the tracks, and had he then had his car under complete control, the accident would have been avoided. In this connection I think the court erred in refusing to charge, at the request of defendant's counsel, that if, as he approached the crossing, at a distance of 19 feet north of the north rail, he "had a view of 180 feet, measured from the center of the crossing in the direction of the on-coming train, it was a duty imposed upon him by section 53a of the Railroad Law, not merely to have his automobile under such degree of control and to proceed therein at such rate of speed that he could stop in time to avert a collision, but actually to bring his automobile to a stop if necessary to avert a collision."

Upon the facts as assumed in this request, instead of complying with the statute in this respect by proceeding cautiously and carefully, and having his car under complete control, he heedlessly and carelessly, without looking when he could have seen or listening when he could have heard the approaching train, drove upon the tracks. The fact that the automobile was struck when it was only partially over the tracks justifies but one inference, viz. that the train was almost upon him when he attempted to cross. Frese v. Chicago, B. & Q. R. Co., 263 U. S. 1, 44 Sup. Ct. 1, 68 L. Ed. ——.

For the reasons given, I vote to affirm the judgment.

HOGAN, CARDOZO, POUND, and ANDREWS, JJ., concur with CRANE, J.

McLAUGHLIN, J., reads dissenting opinion, and HISCOCK, C. J., concurs.

Judgment reversed, etc.

(237 N. Y. 85)

SCHAEFER v. THOMPSON.

(Court of Appeals of New York. Nov. 20, 1923.)

1. Landlord and tenant ⇐92(3) — Tenant bound to exercise option before lease expired.

Under a lease giving the lessee an option to purchase the premises at any time before the expiration of the lease, time was important, and it was the lessee's duty to insist upon her option and tender full performance before the expiration of the lease, unless excused.

2. Landlord and tenant ⇐92(1)—Unpaid assessment and mortgage on property held not to excuse tender of purchase price named in option to purchase.

Under an option in a lease to purchase real estate, that an unpaid assessment and mortgage incumbered the property did not excuse a tender of the purchase price, where the amount of the assessment was a matter of public record, and there was no agreement to take title subject to the mortgage.

3. Landlord and tenant ⇐92(1) — Purchaser held not excused from making complete tender of purchase price named in option.

Under an option in a lease to purchase real estate, *held*, that vendor, in refusing the proffered tender, which was less than the purchase price named in the option, did nothing to indicate a general repudiation of the contract, and that purchaser was not excused from making a full and complete tender of the purchase price.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Marie Therese De La Perriere Schaefer against Henrietta F. Thompson. From a unanimous judgment of the Appellate Division, Second Department (206 App. Div. 680, 199 N. Y. Supp. 947) reversing on the facts and law a judgment of the Special Term dismissing the complaint and granting a new trial, plaintiff appeals. Order of the Appellate Division reversed, and judgment of the Trial Term affirmed.

Lewis E. Carr, of Albany, for appellant.

Arthur I. Strang, of White Plains, for respondent.

HISCOCK, C. J. This action was brought to enforce the specific performance of an option given by defendant to plaintiff for a valuable consideration to purchase certain real estate, and which was set forth in a lease given by defendant to plaintiff of the premises in question for a term of three years expiring April 30, 1921. The agreement reads as follows:

"And the party of the first part [the defendant] gives to the party of the second part [the plaintiff] privilege of purchasing the premises [those in question] at any time before the expiration of this lease for the sum of $7,500."

Plaintiff, having decided to take advantage of this option, sent to defendant a communication dated March 7, 1921, and reading, so far as material, as follows:

"Please let me know as soon as you can your conditions for a contract of sale of the house in which we have lived for three years. Your price was $7,500. What about the assessment for the road?"

In order to understand the correspondence which then followed it should be stated that at this time there was an unpaid assessment upon the premises in question and also a past-due mortgage for $4,500 and interest. The defendant answered plaintiff's communication, saying:

"In reply to your letter we would want all cash and you to pay the assessments. Please let me know if this is satisfactory."

These communications were followed by some additional ones in which plaintiff stated that she would like to know how much actual money was required for the transaction, the amount of the mortgage, and the terms for which it had been given, and whether there were any other "debts" besides the assessment, and in answer to which she was told that there was no other assessment than the one referred to, and that there was a mortgage for $4,500, but was not informed of the amount of the interest due thereon. Then, on April 29th, plaintiff wrote to defendant a letter in which she stated that, in accordance with the terms of the option already referred to, she gives "notice * * * that I am prepared, ready, willing and able to purchase said premises for the sum of $7,500 and therefore make tender of the sum of $500 on account of said purchase price, the balance to be paid in accordance with the terms of a contract to be prepared by you and submitted to me." This letter was delivered and the sum of $500 therein mentioned tendered to defendant on the following day by plaintiff's agent. The defendant "said she could not take it," and plaintiff's agent said "Mrs. Schaefer is ready to sign a contract to pay the ten per cent. down," and she (defendant) said "she would have to see her husband." Subsequently the same agent saw defendant and asked her if she had the contract ready, and she delivered to him a letter or statement directed to plaintiff, and reading:

"I desire to put in writing to avoid misunderstandings what I have already said a number of times to Mr. Daymon (plaintiff's agent) that I had and have no comment to make whatever upon the letter dated April 29th, 1921, and purporting to be signed by Mrs. Schaefer."

This ended communications between the parties, and on the theory that defendant had repudiated her contract plaintiff brought this action, and remained in possession of the premises.

[1] Unless plaintiff was relieved by acts and circumstances hereafter to be discussed she plainly did not take advantage of her option by a sufficient tender. Time was clearly of importance in the exercise of the privilege which was given to her under the lease. Unless she was excused therefrom it was her duty to insist upon her option and tender full performance on her part before the expiration of her lease as prescribed in the contract. This she did not do, and the only question left is the one whether she was so excused by conditions or conduct attributable to the defendant that the insufficiency of her tender was excused.

[2] I do not find that the assessment and mortgage upon the property created any such uncertainty in respect of the amount to be tendered as excused plaintiff from her obligations. The correspondence made it clear that plaintiff was to take the premises subject to an assessment, and this assessment and the amount thereof were necessarily matters of public record which would enable plaintiff to determine just how much she should deduct from the purchase price otherwise to be tendered. The mortgage created no obstacle to a complete tender because there was no agreement that plaintiff was to take the premises subject to this mortgage and therefore be entitled to know its exact amount. On tender of the purchase price less the amount of the assessment she was entitled to a title free and clear of the incumbrance of any mortgage.

[3] The remaining aspect of the question which we are discussing is the one whether defendant made such a general repudiation of her contract as rendered it futile for plaintiff to make a full and complete tender of the purchase price of the premises. We do not think that this was the case. When plaintiff tendered $500 defendant said that she could not take it, and, farther, that she would have to see her husband, and on the second occasion, when she was asked whether she had a contract ready, wrote the letter already quoted, stating that she had no comment to make upon the letter purporting to be signed by plaintiff indicating a desire to exercise her option. So far as we can see, all of this language and all of defendant's conduct were entirely applicable to a declination to accept the tender which was made. The defendant neither said nor did anything which predicated her refusal to accept the tender on a general repudiation of her contract. She did not by any such general repudiation distract the attention of plaintiff's agent from the size and sufficiency of the tender and allow him to think that she regarded this as sufficient, and that she based her refusal upon some other ground. In view of the fact that plaintiff's contract undoubtedly called upon her to make a tender of $7,500 less the amount of the assessment, there was some duty resting upon her to ascertain whether an insufficient tender was satisfactory to defendant. This could easily have been ascertained or the defendant put in the attitude of waiving any insufficiency and objecting upon some other ground. Nothing of this kind was done, and we think that the plaintiff must suffer as the result of her incomplete conduct and insufficient efforts.

The judgment of the trial court contained certain provisions giving relief because of the occupancy of the leased premises which plaintiff continued after the lease expired. There is no suggestion that these provisions were not suitable and complete in case plaintiff should fail to secure a judgment for specific performance, and therefore we reverse the order of the Appellate Division granting a new trial, and affirm the judgment of the Trial Term, with costs in this court and in the Appellate Division.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Ordered accordingly.

(237 N. Y. 60)

STREAT COAL CO., Inc., v. FRANKFORT GENERAL INS. CO.

(Court of Appeals of New York. Nov. 20, 1923.)

1. Dismissal and nonsuit ⇐=73—Court's remark that "your rights are secured" construed.

On motion to dismiss the complaint before the trial commenced, court's remark to defendant's counsel, after deferring decision on the motion, that "your rights are very amply secured," was equivalent to saying the motion was entertained and decision reserved, and if adverse an exception would be recorded.

2. Insurance ⇐=514—Indemnity contract held not to permit insured to recover payments in excess of policy.

Under a policy indemnifying against accidents to the extent of $5,000, and giving insured the right to settle only at his own cost, insurer to have a choice of settling or controlling the defense, insured could not recover payment in excess of $5,000 on judgments covered by the policy, though insurer did not notify him of an offer to settle for $5,000, since no

obligation to inform him could be read into the contract, and defendant's privilege was paramount.

3. Pleading ⇐8(7)—Allegation that insurer's contract impliedly included duty to inform insured of offer to settle held conclusion of law.

In an action on an indemnity policy for insurer's failure to inform insured of injured party's offer to settle, allegation in the complaint that the duty to inform insured was impliedly imposed as part of the confidential relation between the parties was a legal conclusion of the draftsman, and not an allegation of fact.

4. Contracts ⇐143—Implied conditions not added in absence of fraud or bad faith.

In the absence of fraud, negligence, or bad faith, alleged and established, it is not the court's duty to read into contracts conditions or limitations which the parties have not assumed.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Streat Coal Company, Inc., against the Frankfort General Insurance Company. Judgment dismissing the complaint on the merits and an order setting aside a verdict for plaintiff were reversed as a matter of law, and the verdict reinstated by nonunanimous decision of the Appellate Division (205 App. Div. 41, 199 N. Y. Supp. 124), and defendant appeals. Reversed, and judgment of the trial term affirmed.

Daniel Miner and James B. Henney, both of New York City, for appellant.

Neilson Olcott and Monroe M. Schwarzschild, both of New York City, for respondent.

HOGAN, J. On March 16, 1916, defendant issued to plaintiff a policy of indemnity insurance limited to the sum of $5,000 against loss or expense arising or resulting from claims upon the assured for damages on account of bodily injuries or death suffered by any person or persons other than employees of the assured, in consequence of any and every accident. The policy contract provided that defendant would defend in the name and behalf of the assured any suit brought against it for damages on account of bodily injuries or death as a result of [illegible] subject to certain conditions [illegible] in the policy contract, among [illegible] were in substance the following: The company covenanted to [illegible] and in investigating and [illegible] claim, and in defending any [illegible] against the assured, including [illegible] against the assured in any legal proceeding defended by the insurer, together with interest accruing upon any judgment as shall not be in excess of the company's liability.

The assured was to give to the company, immediately, upon the occurrence of an accident, written notice thereof, with the fullest information obtainable at the time concerning the same, also immediate written notice of any claim made on account of such accident. The assured was prohibited from settling any claim or incurring any expense save at its own cost. The insurer was permitted at its own cost to undertake the settlement of any claim or suit. In the event of a suit brought against the assured to enforce a claim, immediate written notice thereof was required to be given the company, and any process served on the assured was to be forwarded to the company, and the latter covenanted to defend the suit, reserving to itself entire control of such defense; the assured to render all reasonable assistance, and furnish all evidence under its control, but was denied the right to admit any liability for an accident, and no loss arising from a liability which has been voluntarily assumed by the assured by contract or otherwise shall be covered under the policy.

On January 18, 1917, one Bella Turetzkin met with an accident in connection with the unloading of one of plaintiff's vehicles. To recover damages alleged to have been sustained thereby, she commenced an action against the plaintiff, and her husband also brought an action for loss of consortium. The summons and complaints were duly delivered to the defendant, the insurer, and the latter undertook the defense of the actions. Judgments were recovered in favor of the plaintiff in each action in the aggregate for upwards of $12,000. Upon appeal the judgments were affirmed, and plaintiff was on January 6, 1919, obliged to pay in discharge of the judgments $13,007.66, [illegible].

On January 25 defendant paid to plaintiff the sum of $5,752.42, the [illegible] of its indemnity, $5,000, the balance on account of interest, costs, etc.

This action was thereafter brought to recover from defendant the sum of $7,345.24, amended upon the trial to $7,436.24, for which sum the jury returned a verdict for plaintiff. The verdict was set aside by the trial justice, and judgment entered in favor of defendant against plaintiff. Upon appeal the Appellate Division by a nonunanimous decision reversed the judgment, and reinstated the verdict of the jury in favor of plaintiff.

The foregoing summary [illegible] set forth in the amended complaint, and are followed by allegations, in substance as follows: Prior to the trial of the actions brought by the Turetzkins, their attorney communicated

with Mr. Jones, an attorney employed by defendant to defend the action, an offer to settle and compromise both suits for $5,000. "By reason of the premises and the relation of trust and confidence existing between the plaintiff and the defendant arising therefrom, there was implied in the contract between the plaintiff and defendant an obligation on the part of defendant to inform the plaintiff of any matter affecting its rights or interest, including any offer of compromise, and it became and was the duty of the defendant and of its said attorney to communicate said offer of settlement to plaintiff, and had said offer been so communicated for plaintiff's acceptance plaintiff would have accepted the same;" that defendant in violation of the rights of plaintiff refused the offer of settlement, and plaintiff, by reason of the breach of duty of defendant, was deprived of the opportunity of settling the claims to its damage.

At the opening of the trial counsel for defendant moved to dismiss the complaint, for the reason that it fails to state facts sufficient to constitute a cause of action. It fails to set forth any claim of negligence on the part of defendant in preparation for trial of the action brought against plaintiff, or negligence in the conduct of the trial. No claim of oppression, fraud, or bad faith and failure to allege facts sufficient to constitute a cause of action.

Counsel for plaintiff was inquired of by the court:

"Do you attempt to read into the contract any provision that is not specifically and expressly covered by the terms of it?"

Counsel replied:

"We do; an agreement on the part of the insurance company to communicate to its principal all facts in connection with the litigation. We contend that the relation of principal and agent, as well as attorney and client are brought about by this policy, and that the same duties that apply to both agent and attorney apply to the insurance company here.

"The Court: I will reserve decision on the motion.

Counsel for plaintiff then started to open the case to the jury. Counsel for defendant inquired:

"Do I understand counsel is opening now on an issue of bad faith?"

Counsel for plaintiff replied:

"I have not suggested bad faith.

"Counsel for defendant: Or without stating any fact which might as a matter of law constitute bad faith, there being no allegation in the complaint of bad faith.

"The Court: He is going to the jury on the question of whether the insurance company received an offer of settlement from the injured person which it did not communicate to the insured, that is all. Your rights are very amply secured.

"Counsel for defendant: I take an exception."

[1] The trial justice did not dismiss the complaint. He deferred decision on the motion made to dismiss the same, assuring counsel, "Your rights are very amply secured." That statement was equivalent to a statement: "Your motion is entertained and decision reserved, and upon the decision of the motion, if adverse to you, an exception will be recorded." Counsel for defendant, however, noted an exception. The motion was renewed at the close of plaintiff's case, and at the close of the evidence decision was reserved as before. The reasonable conclusion deducible from the record is that the trial justice intended to, and did by his assurance to counsel that his rights "are very amply secured," recognize the right of defendant to an exception to the rulings thereafter made. The complaint sets forth the written contract between the parties to the action and the facts arising thereunder. It contains no allegations of any negligent act, fraud, imposition, or bad faith on the part of defendant.

[2] A right of recovery is sought upon the grounds that defendant, having assumed under its contract the defense of the action brought against plaintiff, received an offer from counsel in said actions to settle the same before trial for the sum of $5,000, the amount against which defendant had contracted to indemnify plaintiff; that defendant declined the proposition, and did not notify plaintiff of the same, and plaintiff was thereby deprived of settling the suits as it would have been willing and ready to do.

By the terms of the contract between the parties the defendant had the right to undertake the settlement at its own cost of any claim or suit. The plaintiff, however, could not settle any claim or suit except at its own cost. Had the proposition of settlement been made to plaintiff, plaintiff would not under the contract become obligated to notify defendant of such proposition. It might settle, but at its own cost.

Defendant, however, was privileged at its own cost to settle any claim or suit. It was not obligated so to do, neither was it required to consult plaintiff in regard thereto. It had the right to defend any action brought, and to control the defense thereof. Its privileges were paramount to the right of plaintiff to a degree [illegible] the event of recovery against plaintiff defendant under its contract would be liable in the first instance to respond to the extent of $5,000 besides interest and costs, and assume in addition the expenses of a defense of the action.

[3, 4] The allegation of the complaint to which attention has been called that certain obligations were impliedly imposed upon defendant in the contract between the parties is not an allegation of fact, but simply a legal conclusion reached by the draftsman of the pleading, without setting forth facts upon which the conclusion is based. The contract between the parties was not made a part of the complaint, but excerpts from the same were set forth in the pleading, and the contract was received in evidence when offered by counsel for plaintiff. It is in the general form of contracts in use by indemnity companies. The provisions of the same are numerous, plain, and unambiguous. The parties entered into the contract presumably aware of the contents thereof, and are bound by the same. In the absence of fraud, negligence, or bad faith, alleged and established, it is not the duty of the court to read into contracts conditions or limitations which the parties have not assumed. Negligent acts on the part of defendant to the injury of plaintiff are not charged in the complaint, as was the case in McAleenan v. Massachusetts Bonding & Ins. Co., 219 N. Y. 563, 114 N. E. 114, where the defendant assured the plaintiff that an appeal had been taken, but without the knowledge of plaintiff permitted the time to take an appeal to expire, and as heretofore stated the complaint does not allege facts tending to show bad faith or fraud. The case at bar is alike to the case of Schencke Piano Co. v. Philadelphia Casualty Co., 216 N. Y. 662, 110 N. E. 1049. In that case the casualty company defended an action brought against the piano company which the casualty company by a contract similar to the one in this case had indemnified. While the jury upon the trial was deliberating, an offer to settle the action for $2,500 was made and declined. The jury rendered a verdict for plaintiff in the action against the piano company upon which judgment was entered for $5,290.76. The casualty company thereupon over the protest of the piano company took an appeal from the judgment, and was successful as the judgment was reversed and a new trial granted. No attempt was then made by the casualty company to settle. Upon the second trial the plaintiff in the action recovered a judgment for upwards of $9,000, which upon appeal was affirmed. The casualty company thereupon paid $5,000, the amount of its indemnity, and the piano company $5,543.94, which it sought to recover against the casualty company. The latter admitted liability to the extent of $731.83, amount of costs for which it was liable, and the court directed a verdict for plaintiff for that amount, and held that for failure to make the settlement at $2,500, which was within its policy limit, in the absence of fraud or bad faith, the company was not liable. The judgment was affirmed by the Appellate Division and by this court.

Having reached the conclusion that upon the allegations of fact set out in the complaint the pleading did not state a cause of action, and that the sufficiency of the pleading was properly challenged upon the trial, the judgment of the Appellate Division should be reversed, and that of Trial Term affirmed, with costs in this court and the Appellate Division.

HISCOCK, C. J., and CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Judgment accordingly.

(237 N. Y. 69)

SLEETH v. SAMPSON et al.

(Court of Appeals of New York. Nov. 20, 1923.)

1. **Frauds, statute of ⇐56(4)—Mortgage is conveyance of "interest in real property" within statute.**

A mortgage is a conveyance of an "interest in real property" within Real Property Law, § 242, providing that an estate or interest in real property cannot be created, granted or assigned unless by act or operation of law or by a deed of conveyance in writing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest (In Property).]

2. **Frauds, statute of ⇐56(4)—Contract to give mortgage is contract for sale of "interest in real property" within statute.**

A contract to give a mortgage is a contract for the sale of an "interest in real property" within Real Property Law, § 259, providing that a contract for the sale of an interest in real property is void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing subscribed by grantor.

3. **Frauds, statute of ⇐129(5) — Payment alone held not to show part performance sufficient to establish contract to give mortgage.**

Part performance of an oral contract to give a mortgage is insufficient to take the case out of the statute (Real Property Law, § 259) unless it is unintelligible, or at least extraordinary, unless related to the contract, and payment of money, especially where the bulk of the indebtedness was antecedent to the promise, is insufficient unless followed by other acts, such as possession or improvements.

4. **Mortgages ⇐30—Delivery of deeds for preparation of mortgage held insufficient to establish equitable mortgage.**

To what extent, if at all, an equitable mortgage by deposit of title deeds is permitted

New York, is in doubt; but, even if the doctrine were followed, the delivery of deeds and abstracts of title under an oral agreement to give a mortgage for an antecedent debt would be insufficient to give an equitable lien.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by William H. Sleeth against Cornelia A. Sampson, individually and as administratrix of the estate of Ernest P. Sampson, deceased, and others. From so much of a judgment of the Appellate Division (205 App. Div. 797, 199 N. Y. Supp. 603) reversing a judgment for plaintiff entered on a referee's report as dismissed the complaint, except as to named defendant, plaintiff appeals. Affirmed.

Collin McLennan, of Hornell, and George E. Mull, and Leon A. Murphy, both of Syracuse, for appellant.

Robert H. Gere, of Syracuse, for respondents Shepard.

Frank Hopkins, for respondent Sampson.

CARDOZO, J. The action is brought for the specific performance of an oral agreement to execute a mortgage upon land as security for a loan.

Ernest P. Sampson was the owner of a farm in the county of Onondaga. He died December 5, 1921, intestate, leaving his mother, the defendant Cornelia A. Sampson, and two nephews, the defendants Shepard, his sole heirs at law. Letters of administration were granted to the mother.

Sampson, according to the testimony, asked the plaintiff on November 15, 1921, for a loan of $100. Plaintiff responded that he had already loaned enough without security. The existing indebtedness was figured at about $1,200. Sampson offered to give security in the shape of a mortgage on the farm if plaintiff would make the loan. Some money was then handed to the borrower, though exactly how much the witness who overheard the conversation was unable to state. Thereupon Sampson produced the deed under which the farm had been conveyed to him in 1904, and an abstract of title, saying at the same time: "You look these over, and see what you can do, and we will go down to the lawyer's in a few days and draw this up." Nothing more was said or done. Upon Sampson's death a few weeks later this action was brought against those succeeding to his title.

[1, 2] An estate or interest in real property (other than a lease for a term not exceeding one year) cannot be created, granted, or assigned "unless by act or operation of law, or by a deed or conveyance in writing." Real Property Law (Consol. Laws, c. 50), § 242. A contract "for the sale, of any real property, or an interest therein," is void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the grantor Real Property Law, § 259. A mortgage is a conveyance of an interest in real property within the meaning of section 242. Bogert v. Bliss, 148 N. Y. 194, 199, 42 N. E. 582, 51 Am. St. Rep. 684. A contract to give a mortgage is a contract for the sale of an interest in real property within the meaning of section 259. No doubt the word "sale," when applied to such a transaction, is inexact and inappropriate. Our present statute comes to us by descent from the English statute (29 Car. II, c. 3, § 4), which speaks of "any contract or sale of lands, tenements or hereditaments or any interest in or concerning them." The change of phraseology has not worked a change of meaning. One who promises to make another the owner of a lien or charge upon land promises to make him the owner of an interest in land, and this is equivalent in effect to a promise to sell him such an interest. The meaning is fixed by an unbroken series of decisions. Stoddard v. Hart, 23 N. Y. 556; Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000; Burdick v. Jackson, 7 Hun, 488; Brown v. Drew, 67 N. H. 569, 42 Atl. 177; Bloomfield State Bank v. Miller, 55 Neb. 243, 75 N. W. 569, 44 L. R. A. 387, 70 Am. St. Rep. 381; Claiborne v. Byerly, 7 Gill (Md.) 354, 48 Am. Dec. 575; Matter of Whitting, Ex parte Hall, 10 Ch. Div. 615; Driver v. Broad, 1893, 1 Q. B. 744; Williston, Contracts, § 491; Page, Contracts, § 1260; Browne, Statute of Frauds, § 267.

[3] The question remains whether there have been acts of part performance sufficient to relieve from the production of a writing. To be thus effective they must be of such a nature as to be "unintelligible or at least extraordinary," unless related to a contract to convey an interest in land. Burns v. McCormick, 233 N. Y. 230, 232, 135 N. E. 273. The payment of money is not enough, unless followed by other acts, as, for example, possession or improvements. Russell v. Briggs, 165 N. Y. 500, 505, 59 N. E. 303, 53 L. R. A. 556; Williston, Contracts, § 494. We see no distinction in this respect between a payment for an alleged conveyance and a payment for a mortgage. Matter of Whitting, Ex parte Hall, 10 Ch. Div. 615; Bloomfield State Bank v. Miller, 55 Neb. 243, 255, 75 N. W. 569, 44 L. R. A. 387, 70 Am. St. Rep. 381. A different holding would open wide the door to the entry of the evils against which the statute is directed. Any one who had made a loan would be free to transmute it into a

loan with a lien upon the land. The danger is emphasized in this case where the bulk of the indebtedness was antecedent to the promise. Dicta in Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000, and Smith v. Smith, 125 N. Y. 224, 26 N. E. 259, may seem to suggest that the doctrine of part performance has been extended more liberally to contracts to mortgage than to contracts to sell. They lose their significance when read in relation to the subject-matter of the controversy. In the one case a mortgage had actually been given, and the court gave relief against an erroneous description. In the other the lender had gone into possession and had put improvements on the land. We conclude that payment without more does not obviate the necessity for a writing.

[4] The deficiency in the acts of part performance is supplied, it is said, by the delivery of title deeds and abstract. Equitable mortgages by the deposit of title deeds have long been recognized in England, though the security is frowned upon as contravening the policy of the statute. Stoddard v. Hart, 23 N. Y. 556, 560; Norris v. Wilkinson, 12 Ves. Jr. 192. To what extent, if at all, this form of equitable mortgage is permitted in New York, is involved in some obscurity. Stoddard v. Hart, supra; Chase v. Peck, 21 N. Y. 581, 584; Bowers v. Johnson, 49 N. Y. 432, 435; Jackson v. Dunlap, 1 Johns. Cas. 114; Rockwell v. Hobby, 2 Sandf. Ch. 9, 10; Bloomfield State Bank v. Miller, 55 Neb. 255, 75 N. W. 573, 44 L. R. A. 387, 70 Am. St. Rep. 381, supra; 2 Reeves, Real Prop. pp. 1037, 1038. Even in England, however, the deposit must have been made for the purpose of creating a present or immediate security, and not merely as a preliminary step to the preparation of a mortgage which will be security thereafter. Norris v. Wilkinson, 12 Ves. Jr. 192; Ex parte Bulteel, 2 Cox Ch. 243. We find no suggestion here of the existence of a purpose to create a present lien. "You look these over, and see what you can do, and we will go down to the lawyer's in a few days and draw this up." Far from suggesting a present lien, the implication is that something more, either through an additional loan or in some other way, is to be done by the lender. At best, the case is within the rule that acts merely ancillary or preliminary to performance are not acts of part performance within the equitable doctrine. The delivery of abstracts, putting a deed in the hands of a solicitor to prepare a conveyance, even the preparation of the conveyance, if not followed by the signing, these and like acts have been held to be inadequate. Nibert v. Baghurst, 47 N. J. Eq. 201, 205, 20 Atl. 252; Brown v. Drew, 67 N. H. 569, 42 Atl. 177; Williston, Contracts, § 494, p. 962.

The judgment should be affirmed, with costs.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Judgment affirmed.

(237 N. Y. 76)

BOXBERGER v. NEW YORK, N. H. & H. R. CO.

(Court of Appeals of New York. Nov. 20, 1923.)

Release ⇐55—Defendant pleading release as new matter held to have the burden of establishing it as plaintiff's act.

Defendant, in action for negligence, pleading release as new matter, and this being deemed to be controverted by traverse, under Civil Practice Act, § 243, defendant has the burden of establishing as plaintiff's act a purported release by plaintiff which defendant introduced, plaintiff testifying that he signed the instrument, not as a release, but, under misrepresentations of defendant, as a receipt for wages; in which case it would be void.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Mitchell Boxberger against the New York, New Haven & Hartford Railroad Company. From judgment of the Appellate Division (206 App. Div. 768, 200 N. Y. Supp. 915) affirming a judgment of the Trial Term entered on a verdict for defendant, plaintiff appeals. Reversed and new trial granted.

Sydney A. Syme, of Mt. Vernon, for appellant.

Madison G. Gonterman, of New York City, for respondent.

POUND, J. Plaintiff sued to recover damages for personal injuries sustained by the negligence of the defendant. Defendant pleaded as a separate defense a release. Without moving for an order directing plaintiff to reply to the new matter (Civil Practice Act, § 274) defendant obtained, under Civil Practice Act (section 443, par. 2), an order for a separate trial of the issue.

On the trial the court properly ruled, without objection, that this was an affirmative defense. To establish defendant's prima facie case, a purported release, executed by plaintiff, was offered and received in evidence. Plaintiff then testified to facts tending to show that the writing, although in terms a

release, was signed by him, not as a release, but, under misrepresentations of the defendant, as a receipt for wages. Defendant called a witness who testified to facts tending to show that the release was given in settlement of plaintiff's claim with full knowledge on his part that he was releasing the defendant from liability.

The court charged the jury, over plaintiff's exception, that the burden of proof was upon the plaintiff to establish that the release was not his act. This was error.

"There is a material and manifest distinction between a meeting of the minds of parties through deceit on the part of one of them, and a writing excusably and justifiably executed by the one which, through the deceit of the other, does not express the agreement of the parties. The distinction has been expressed thus: 'Fraud in the factum renders the writing void at law, whereas fraud in the treaty renders it voidable merely.'" Whipple v. Brown Brothers Co., 225 N. Y. 237, 241, 121 N. E. 748, 749.

The plaintiff did not attempt to rescind a contract induced by fraud. He denied that he had made such a contract. He charged, not that the contract was obtained by fraud, but that the instrument which purported to represent the contract was obtained by fraud. The allegation of new matter in the answer was deemed to be controverted by traverse. "An allegation of new matter in the answer to which a reply is not required * * * is deemed to be controverted by the adverse party, by traverse or avoidance, as the case requires." Civil Practice Act, § 243; Cleary v. Municipal Electric Light Co., 19 N. Y. Supp. 951[1], affirmed on opinion below 139 N. Y. 643, 35 N. E. 206; Wilcox v. American T. & T. Co., 176 N. Y. 115, 68 N. E. 153, 98 Am. St. Rep. 650.

The burden of establishing, therefore, unquestionably rested on the defendant (Conkling v. Weatherwax, 181 N. Y. 258, 270, 73 N. E. 1028, 2 Ann. Cas. 740), and the jury should have been so instructed. Confession would have met this burden of proof and cast the burden on the plaintiff of avoidance by establishing fraud in the treaty.

The judgments should be reversed and a new trial granted, with costs to abide the event.

HOGAN, CARDOZO, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.
HISCOCK, C. J., not voting.

Judgments reversed, etc.

[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 65 Hun, 621.

(237 N. Y. 79)

WELLS v. FISHER.

(Court of Appeals of New York. Nov. 20, 1923.)

1. Appeal and error ⇐1175(7)—Judgment for specific performance on reversal of judgment denying reformation held erroneous.

In an action for reformation of a lease giving plaintiff lessee "the first privilege of purchasing," on the ground that it did not express the agreement to give him an unqualified option, the Appellate Division erred in reversing a judgment for defendant on such theory, and giving plaintiff a judgment for specific performance on the ground that the option fully and clearly expressed the parties' intention.

2. Appeal and error ⇐1175(1)—Appellate court slow to give final judgment on different theory.

Appellate courts should be slow to change the theory of an action and give final judgment, unless it is quite apparent that the parties have not been misled, and have had full and adequate opportunity to meet and answer the new view.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by William Wells against George Fisher. From a judgment of the Appellate Division (205 App. Div. 212, 199 N. Y. Supp. 594), reversing a judgment of dismissal by the Special Term, and directing judgment for plaintiff, defendant appeals. Reversed, and judgment of Special Term reinstated.

Welch & Welch, of Syracuse (Walter J. Welch, of Syracuse, of counsel), for appellant.

J. Kent Wright, of Syracuse (Wordsworth B. Matterson, of Syracuse, of counsel), for respondent.

CRANE, J. The defendant, George Fisher, on the 3d day of October, 1914, leased Nos. 138 and 140 James street, Syracuse, N. Y., to the plaintiff, William M. Wells, for the terms of 10 years. The lease contained the following clause:

"It is hereby agreed by and between the parties hereto that the party of the second part is to have the first privilege of purchasing said building and premises of the party of the first part on the 1st day of October of any year during the term of this lease for the sum of twenty-three thousand dollars ($23,000), plus the cost of the building of the water closet hereinbefore mentioned, the said twenty-three thousand dollars ($23,000), plus the cost of building the closet, to be paid as follows: The said William Wells is to pay George Fisher, his heirs, executors, administrators, or assigns the sum of five thousand dollars ($5,000) at the

time of purchasing said property, at which time the said George Fisher agrees to take back a bond and mortgage for eighteen thousand dollars ($18,000), plus the cost of building the closet herein mentioned, to secure the balance of said purchase price, which mortgage is to bear interest at the rate of 6 per cent. per annum, payable annually, the principal sum of which mortgage is to be paid as follows: The sum of fifteen hundred dollars ($1,500.00), together with interest on the unpaid principal, on the 1st day of October on each and every year after the date thereof, the said William Wells to have the privilege of paying as much more than fifteen hundred dollars ($1,500.00) on the principal sum as he desires in any year, provided he pays the same when the interest becomes due and payable as herein specified."

In the month of August, 1921, during the life of the lease, the plaintiff notified the defendant that he had determined to exercise his option on the 1st day of October, 1921, and that he was ready and willing to comply with the terms of said option, and demanded a deed. The defendant having refused to give a deed and insisting that the plaintiff had no option which he could exercise, in the absence of the defendant's willingness to sell, this action was commenced.

Apparently there was something in the wording of the option which created a doubt in the mind of the plaintiff. It may have been caused by the phrase of the option, "the first privilege of purchasing." Why the word "first" was used is not quite clear. The action which the plaintiff commenced was not the ordinary action for specific performance, which is the customary way of enforcing a valid option to purchase. The plaintiff brought this action for reformation. Quoting from and referring to the lease and that portion of it containing the option, the complaint states in the fourth paragraph the following:

"That said lease did not express or contain the agreement to give this plaintiff the unqualified privilege of purchasing said property as above described, and did not give an unqualified option to this plaintiff, but same was inadvertently or by mistake qualified to such an extent as to render such option and privilege inoperative or to give the plaintiff any option which could be exercised by him during the term of said lease to purchase the property according to the terms of said written agreement specified."

If this lease did not contain the agreement of the parties, the plaintiff would be likely to know the fact. If he says that the writing was by mistake so qualified as to render the privilege inoperative, and his lawyer says the same thing, why should the courts determine for the plaintiff that it means what he says it does not mean? The defendant, on the other hand, says that the agreement does contain what the parties had in mind, and that the plaintiff was to have the first privilege of purchasing, should he (the defendant) conclude to sell.

On the trial of the action, the following statements were made:

"The Court: I am going to deny your motion with reference to the reformation of the contract, and give you an exception. I will reserve decision with reference to specific performance until I hear the proof.

"Mr. Matterson: The action is not brought for specific performance.

"The Court: I am giving Mr. Welch the benefit of the doubt on that. I will reserve decision until after I hear the proof.

"Mr. Matterson: If it is necessary for us to eliminate specific performance in this action we desire to do it."

[1] The complaint was for reformation. The action was tried as one for reformation; the court giving judgment for the defendant.

The Appellate Division reversed the Trial Term, and gave to the plaintiff a judgment for specific performance, assigning as a reason that the option needed no reformation, but expressed fully and clearly the intention of the parties. We doubt whether this can be so in the face of the statement of the plaintiff and his counsel that the option does not state what was intended; on the contrary states what the defendant claims it to mean.

We are not wholly agreed that the clause in question has the meaning which the Appellate Division has given to it. In the opinion that court states:

"The practical effect of the agreement was that, on any October 1, the plaintiff having given notice, had the 'first privilege' or option to buy on the terms stated. If he failed to exercise the right, the defendant was at liberty to sell to another on his own terms. If he did not sell, the life of the privilege continued during the term, and defendant was bound to sell if the option was exercised."

In other words, on one day of each year, for a period of 10 years, the defendant might sell his property, first to the plaintiff, and if he did not want it, to anybody else. It may be that the clause has this meaning. Then again it may not. There must be some doubt about it, or else the plaintiff would never have brought this action to reform the contract.

Whatever else may be said, the fact remains that by the use of the word "first" some uncertainty exists in the meaning of the option. Due to this uncertainty the action was brought and tried as one for reformation and the defendant has had judgment upon that theory.

The Appellate Division has found no uncertainty in the meaning of the lease, and

has given judgment for specific performance. We think the defendant should have his day in court to defend such an action. There might be equities which would cause the court to refrain from decreeing specific performance. In an action which was declared by the plaintiff and his attorney to be one for reformation and not for specific performance, it may be that the defendant had been misled regarding his rights. We think that, in view of what is here stated, the purpose of this action as stated by plaintiff's counsel, and the issue framed by the pleadings, the action was one for reformation, and must be so considered by the appellate courts.

[2] Appellate courts should be slow to change the theory of an action and give final judgment, unless it is quite apparent that the parties have not been misled, and that they have had full and adequate opportunity to meet and answer the new view.

For these reasons the judgment appealed from must be reversed, and that of the trial court reinstated, with costs in this court and the Appellate Division.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Judgment accordingly.

(237 N. Y. 85)

ABELL v. CLARKSON, President of Village of Cornwall, et al.

(Court of Appeals of New York. Nov. 20, 1923.)

Statutes ⟸120(5)—Special act authorizing annexation of territory to village held unconstitutional.

Laws 1923, c. 20, authorizing annexation of territory to a village organized under the Village Law, sections 33 and 348 of which make provision for the territory to be included therein and subsequent extension of its boundaries, *held* invalid as amending the latter section by special act in violation of Const. art. 3, § 18, prohibiting private or local acts incorporating villages, and article 8, § 1, which cover not only the orginal incorporation but the subsequent existence of villages.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by George S. Abell against John H. Clarkson, President of the Village of Cornwall, and others. From a judgment for defendants by the Appellate Division (206 App. Div. 172, 200 N. Y. Supp. 570) on submission of the controversy with an agreed statement of facts, plaintiff appeals. Reversed, and judgment directed for plaintiff.

Henry Hirschberg, of Newburgh, for appellant.

Graham Witschief, of Newburgh, for respondents.

ANDREWS, J. The village of Cornwall attempted to annex some neighboring territory. The proceedings taken were defective and an action was brought to test their validity. The Legislature while this action was pending and in 1923 passed an act which provided that the territory in question should be included in the village and ratified the proceedings already taken to that end. The plaintiff then began a taxpayer's action, claiming the act was unconstitutional. The controversy was submitted to the Appellate Division upon an agreed statement of facts. In that court judgment was rendered for the defendants.

Section 18 of article 3 of the Constitution provides that the Legislature shall not pass any private or local bill "incorporating villages," but shall pass general laws providing therefor. Accordingly the Village Law (Consol. Laws, c. 64) was enacted. Laws of 1909, c. 64. It fixed the method for their incorporation and detailed the powers and duties of the village and its officers. Among other matters provision was made for the territory to be included in the village (section 33), and for later action extending its boundaries (section 348). This act formed the charter of all villages organized under it, as was the village of Cornwall.

Should a strict construction be given to the Constitution, all that was forbidden was the original incorporation of a village by a special act—not the subsequent alteration of its charter. In like manner section 1 of article 8 might be held to apply only to the original creation of corporations. To do so, however, would destroy the entire meaning and spirit of these provisions. The intent obviously was to provide a uniform charter for villages. If the day after a village is incorporated the Legislature may under the guise of an amendment alter its charter by a special act this purpose is frustrated. The prohibition must in reason cover not only the original incorporation but the subsequent existence of villages. Their charter may not be amended by special laws. That is what was done in the case before us. Chapter 20 of the Laws of 1923 is in effect an amendment by a special act of section 348 of the charter of the village of Cornwall. We hold it, therefore, to be unconstitutional.

As bearing upon the practical construction given to this constitutional provision by the Legislature various acts are called to our attention passed between 1903 and 1922 changing the boundaries of certain villages. In all these acts, however, with two excep-

tions, the villages referred to were incorporated by special acts passed before the constitutional provision took effect. In the two remaining cases the acts of the Legislature were not called to the attention of the courts.

The judgment appealed from must be reversed, and judgment directed for the plaintiff in accordance with the terms of the submission, with costs in this court and in the Appellate Division.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur.

Judgment accordingly.

(237 N. Y. 88)

ROSENBLATT et al. v. BERGEN.

(Court of Appeals of New York. Nov. 20, 1923.)

Brokers ⇐63(1)—Owner having accepted purchaser cannot urge that purchaser's financial capacity was inadequate.

Where owner was aware that title to property was to be taken in name of corporation, and accepted it as a purchaser, without objection as to its solvency, and embodied its name in proposed contract, he cannot complain for first time in trial of action for broker's commissions that the financial capacity of corporation was inadequate.

McLaughlin, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Benjamin Rosenblatt and others against William C. Bergen. Judgment of the Appellate Division (202 App. Div. 220, 195 N. Y. Supp. 276) reversed on the facts and law a judgment of the Trial Term, and dismissed the complaint, and plaintiff appeals. Judgment of Appellate Division modified, so as to grant new trial, and, as modified, affirmed.

Alexander Pfeiffer and Seth V. Elting, both of New York City, for appellants.

John J. O'Grady, of New York City, for respondent.

HOGAN, J. The plaintiffs are real estate brokers. They allege that together with one Goldstein, also a broker, made a defendant in this action, having refused to join as plaintiff therein, they were employed by the defendant, Bergen, to negotiate a sale of real property in the county of Bronx, and as a result of their employment, a corporation, ready, able, and willing to purchase the property upon the terms and conditions fixed by defendant, Bergen, was procured by them, and the defendant Bergen refused to consummate the sale. The judgment demanded was $3,335, or 1 per cent. on the sale price of the property as fixed by defendant, Bergen.

The trial justice, at the request of counsel for defendant, Bergen, charged the jury that plaintiffs must prove that they procured a corporation ready, able, and willing to buy the property upon the terms and conditions fixed by defendant, Bergen. The jury found for plaintiffs. The Appellate Division reversed upon questions of fact and law, and dismissed the complaint.

Certain facts appear in this case about which there exists no controversy. The defendant, Bergen, agreed to sell the real property for $333,500, payable as follows: $10,000 on the signing of a contract; $40,000 in cash or certified check on the delivery of a deed; the assumption of mortgages on the property amounting to $258,500, and a purchase-money mortgage for $25,000.

The defendant, Bergen, was told that the proposed purchaser was the Anam Realty Company, and that the corporation would be composed of four men, viz. Gens, Fein, Shapiro, and Spodek; that the reason for putting the title in the name of the corporation was because the individuals did not wish to go upon the bond. He said that the sale in that form would be satisfactory.

The plaintiffs arranged a meeting at the office of Mr. Rabinovitsch, the attorney for the proposed purchasers. The defendant was present. All parties adjourned to the office of the attorney for defendant, Bergen, to prepare a contract. The proposed contract is a voluminous document. It is said to have been prepared by the attorney for defendant, Bergen, and in detail was intended to protect the interests of said defendant. It is dated January 10, 1919, and the parties named are defendant, Bergen, as seller and Anam Realty Company, Inc., as purchaser. The real estate, consisting of several parcels, is described by metes and bounds. The several mortgages thereon are enumerated, the interest and due date, and amount stated in detail, as well as the rate of interest on each mortgage. Then follow the terms hereinbefore mentioned. The deed to be delivered February 3, 1919, at 2 o'clock, at the office of the attorney for the defendant, Bergen. Many additional provisions are contained in the proposed contract, unnecessary to detail here. The contract does not bear the signature of any of the parties. The date of the same indicates that it was prepared on January 10th.

Present in the office of the attorney for defendant, Bergen, were the four men, Gens, Fein, Shapiro and Spodek, the parties in-

terested as purchasers. Gens had requested the defendant to attach a statement of receipts and expenditures for the previous year to the contract, which plaintiffs assert Bergen agreed to do, but after consultation with his attorney declined to do. The four proposed purchasers each had in his possession and displayed a check for $2,500, the down payment of $10,000. Fein was the president of the Anam Realty Company, and each check was payable to the order of that company. After Mr. Bergen declined to give a statement of earnings and expenses, the hour then being about 7:30 p. m., the parties were to make an examination of the valuation and assessments on the property and were to meet at Mr. Bergen's office at 10 o'clock the following morning. The parties were at Mr. Bergen's office as agreed, but Mr. Bergen did not appear there, though the parties awaited his presence some hours, and he has not since been ready to perform his contract.

The foregoing facts, about which there is no controversy, establish that the defendant, Bergen, was aware of the fact that the title to the property was to be taken in the name of the Anam Realty Company. In that conclusion we are confirmed by the opinion of the Appellate Division, wherein it is stated:

"It is true that the defendant, Bergen, was perfectly willing to take the corporation instead of the individual purchaser. That is the usual way in which those matters are carried out in New York."

Having thus accepted the corporation as the purchaser, and never having made objection thereto, or to the solvency of the corporation, or even suggested to the plaintiff any criticism of the corporation, defendant, Bergen, ought not now be heard to complain for the first time upon the trial of the action for commissions that the financial capacity of the corporation was inadequate. The objection might have been obviated if seasonably made. Silence and acquiescence, having at least the force of an admission that calls for objection, did not exist. The justice of this view is emphasized when we consider Bergen's true motive in failing to carry out his contract, as tersely stated in the opinion of the Appellate Division:

"The defendant, apparently, before the transaction was closed, backed out of the proposition and demanded $10,000 more, which those interested in the purchase refused to give, and the matter fell through."

It is argued that the capital stock of the corporation was $10,000, with only $1,000 paid in, and hence, since the purchaser was to give a mortgage for $25,000 as a part of the purchase money, accompanied by a bond, that there would be lacking security to the seller. Concededly, the corporation was organized for the purpose of buying the property. Defendant, Bergen, was aware of that fact, and of the individuals who were behind the venture; nevertheless he accepted the corporation as the purchaser, and embodied its name in the proposed contract.

He was to be paid $10,000 upon the signing of the contract and $40,000 in cash upon delivery of the deed. Had the contract been signed he would have the first payment of $10,000, and if he later delivered the deed the additional sum of $40,000. That the individuals who had formed the corporation were individually financially responsible and worth upwards of $350,000 above all liabilities was established on the trial. That they were ready to pay $10,000 on the signing of the contract was also established as a fact. That the purchasers intended to and were ready to pay the $40,000 on delivery of the deed appears in the record. The provision as to the mortgage for $25,000 was provided for in the proposed contract submitted to the proposed purchasers at the office of counsel for defendant, Bergen. No question was at that time raised as to the sufficiency of the same, or in reference to the terms of sale as agreed upon. As to any tender of $10,000 by the purchasers as the first payment, we need not dwell upon that subject further than to call attention to the fact that defendant, Bergen, was aware that the individual purchasers were to pay the amount, and the fact that they were able, ready, and willing to do so, if afforded an opportunity, cannot upon the record be gainsaid. The inference is permissible that, in view of the solvency of the promoters, and the substantial payment they were making, the seller was satisfied with any corporation which they were financing, and by his conduct, if not by his words, he so notified the brokers.

We fail to discover any justification for a reversal of the judgment as matter of law which resulted in a dismissal of the complaint.

The judgment of the Appellate Division should be modified so as to grant a new trial, and, as so modified, affirmed, with costs in this court and the Appellate Division to abide the event.

HISCOCK, C. J., and CARDOZO, POUND, and CRANE, JJ., concur.

ANDREWS, J., concurs in result.

McLAUGHLIN, J., dissents.

Judgment accordingly.

AMAZON RUBBER CO. v. MOREWOOD REALTY HOLDING CO. (No. 18020.)

(Supreme Court of Ohio. Jan. 29, 1924.)

(Syllabus by the Court.)

Appeal and error ⟸347(1)—Decision reduced to journal entry approved and filed for record constitutes "entry of judgment" limiting time for error proceedings.

Where the decision of a court has been reduced to a journal entry, approved by the judge and counsel for the interested litigants, and the same has been filed for record with the clerk, such filing becomes an "entry of the judgment" within the meaning of section 12270, General Code, and proceedings in error must be commenced within 70 days after the date of such filing.

[Ed. Note.—For other definitions, see Words and Phrases First and Second Series, Enter—Entry (In Practice).]

Error to Court of Appeals, Summit County.

Action by the Morewood Realty Holding Company against the Amazon Rubber Company. Judgment for plaintiff, new trial was denied, defendant brought error, and, upon suggestion of an imperfect record, the record of entry of judgment was corrected in the trial court. On error the Court of Appeals reversed a judgment of the trial court, and rendered judgment restoring the record to its original condition, and defendant brings error. Affirmed.—[By Editorial Staff.]

This is an action for money judgment by the realty company, which secured a verdict on April 17, 1922. On the following day the rubber company, the defendant below, filed its motion for a new trial. The docket entry discloses that on May 20, 1922, the motion for a new trial was overruled, to which defendant excepted. On May 23, 1922, a journal entry was filed with the clerk of the court of common pleas, specifically overruling the motion for a new trial and rendering judgment in favor of the realty company for the amount of the verdict and for costs. On the back of that entry were the following indorsements:

"O K Musser, Kimber & Huffman for Pltff," and "O K Bacon, Burch, Bacon & Denlinger, Attorneys for Dft."

It also contained the indorsement of "S. D. Kenfield, Judge."

On August 7, 1922, being more than 70 days from the filing of the judgment entry, the rubber company filed its petition in error in the Court of Appeals, seeking to reverse the judgment. In that court the realty company moved to dismiss the petition in error because it appeared to be filed more than 70 days after the date of judgment; whereupon, on the application of the rubber company, suggesting an imperfect record, the Court of Appeals ordered that a certified and complete record be transmitted to it from the trial court. In the trial court the rubber company therefore moved for an order correcting the record so as to make it appear that the judgment was entered on June 2, 1922, instead of May 23 of that year.

This proceeding in error is based on the supplemental proceedings occurring in the trial court on the hearing to correct the record in that respect. Upon that issue the trial court, stating separately its findings of fact and its conclusion of law, found that "the entry of the judgment rendered by Judge Kenfield on May 23, 1922, in this case was on June 6, 1922," and ordered its clerk to change the record so that it should appear that the entry of judgment was June 6, 1922, instead of May 23 of that year. From this order error was prosecuted to the Court of Appeals, which reversed the judgment or order of the trial court, and, proceeding to render the judgment which that court should have rendered ordered the clerk of the court of common pleas to restore the date of May 23, 1922, on its journal, as the date when judgment was rendered. Error is now prosecuted to this court seeking a reversal of the judgment of the Court of Appeals.

Burch, Bacon & Denlinger, of Akron, for plaintiff in error.

Musser, Kimber & Huffman, of Akron, for defendant in error.

JONES, J. The facts found by the trial court relating to the entry of May 23, 1922, are substantially undisputed. The action was for a money judgment. A verdict was rendered on April 17, 1922, and on May 20, 1922, a motion for a new trial was marked overruled on the docket entries of the trial court. On May 23, 1922, a journal entry was filed with the clerk, specifically overruling the motion for a new trial and rendering judgment for the amount of the verdict and the costs. This entry contained indorsements showing the approval of counsel for both plaintiff and defendant as well as approval of the trial judge. Because of the press of work, caused in a measure by the number of entries filed for record, the actual recording of entries in the journal was often necessarily delayed, and for that reason, in this particular instance, the entry of May 23 was not recorded in the journal until about June 6, following.

Section 12270, General Code, provides:

"No proceedings to reverse, vacate or modify a judgment or final order shall be commenced unless within seventy days after the entry of the judgment or final order complained of."

The petition in error from the original judgment was filed in the Court of Appeals 76 days after the filing of the approved entry on May 23. The question presented is, Was such entry an "entry of the judgment" within the purview of the Code section, and did the 70 days begin to run from that time?

A judgment is defined to be the judicial act of the court; its entry on the journal merely evidences the judgment and is wholly the ministerial act of the clerk. In Industrial Commission v. Musselli, 102 Ohio St. 10, 130 N. E. 32, this court held that a judgment was not rendered until it was reduced to a journal entry. Section 11604, General Code, provides that all judgments must be entered on the journal of the court and specify clearly the relief granted or order made. Section 11599, General Code, requires the judgment to be immediately entered by the clerk upon the overruling of a motion for a new trial. So that within the contemplation of these statutes the judgment should be immediately entered when the motion for a new trial is overruled by the court. When a judgment is pronounced, reduced to an entry, and approved by the trial judge, it at once becomes effective between the parties whose rights have been finally concluded thereby. However, a stranger to the record, such as a bona fide purchaser without notice, is not bound by an approved and filed entry until the same is actually spread upon the journal. Coe v. Erb, 59 Ohio St. 259, 52 N. E. 640, 69 Am. St. Rep. 764.

Originally, section 6723, Revised Statutes, provided that the limitation for error proceedings should run "after the rendition of the judgment." This was later changed by codification to read as it now does, that proceedings in error must be commenced within 70 days "after the entry of the judgment" complained of. It is extremely doubtful whether the Legislature intended to change the period of limitation within which error proceedings should be instituted. The present statute does not say, in express terms, that the proceedings in error shall be commenced after the entry of the judgment has been spread upon the journal. In view of the ambiguity employed it might well be construed to mean, as we hold it to mean, that such proceedings should be commenced after the date of filing the entry of judgment. It is within the common knowledge of the legal profession that there are many occasions when it is possible for the clerk to perform the ministerial duty of spreading upon the journal all the entries that may be filed with him on the same day, yet, within the contemplation of law, in so far as the parties thereto are effected, they are deemed to be entered on the journal at the time of filing. Were we to hold otherwise we would place it in the power of the clerk to fix the time when a judgment entry would become operative, and permit his neglect or delay to toll the statute of limitations for an indefinite time.

We therefore hold that, when the parties to the judgment, or their counsel, approve a written journal entry, and the same has been signed and approved by the trial judge, the date of filing the entry with the clerk of court is an "entry of the judgment" within the purview of section 12270, General Code, and proceedings in error must be commenced within 70 days after that time. If occasion should arise where one of the litigants would suffer unjustly from an approved journal entry, the court has full power over its journals during the term, whereby relief may be granted; or, it may vacate or modify its judgment after the term for the causes enumerated in section 11631, General Code. The general rule seems to be that, as between the litigants, their rights become established as soon as a judgment is rendered, and that in such case it is not necessary, as between them, that the judgment should be entered or recorded.

"As between the parties the validity of a judgment properly rendered is not affected by the delay of the clerk in entering it in the court records, nor by his omission altogether to record it in pursuance of statutory provisions making it the duty of the clerk to enter all judgments of record." 15 Ruling Case Law, 581, and Quareles v. Seattle, 26 Wash. 226, 66 Pac. 389.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

MARSHALL, C. J., and WANAMAKER, ROBINSON, DAY, and ALLEN, JJ., concur.

MATTHIAS, J., concurs in the judgment.

SPITZER et al. v. STILLINGS et al.
(No. 18153.)

(Supreme Court of Ohio. Jan. 29, 1924.)

(Syllabus by the Court.)

1. Witnesses ⟸219(3)—When party may be cross-examined concerning communications with his attorney stated.

The common-law rule of privilege concerning communications between attorney and client is so far modified by statute in Ohio that if the client testifies in any proceeding in which he is a party such party may be cross-examined by the opposing party concerning communications with an attorney, in that relation, on any subject pertinent to his cause or defense testified to by him in chief, even though the fact of communications having passed between them has not been referred to by such party in his direct examination.

2. Witnesses ⟸219(3), 389(2)—When attorney may be compelled to testify as to communications made to him by his client stated; proper foundation must be laid to impeach testimony of party by attorney as witness.

By virtue of section 11494, General Code, if a party voluntarily testifies as a witness in his own behalf any attorney to whom communications may have been made by such party, in the relation of attorney and client, may be compelled to testify upon the same subject concerning which such party has voluntarily offered testimony, even though no reference was made in the testimony of such party to any communications having been made. In the event the attorney is called to testify, he becomes the witness of the party calling him, and, if it is desired to impeach the testimony of the party by the testimony of the attorney, a proper foundation must first be laid for such contradiction. King v. Barrett, 11 Ohio St. 261, approved and followed.

3. Witnesses ⟸185—Privileged communications between attorney and client subject to statutory regulation.

The doctrine of privilege concerning communications between an attorney and client, in that relation, is subject to statutory regulation and limitation.

4. Statutes ⟸230—Construction of statute presumed adopted by Legislature in amending other portions.

Where a statute is construed by a court of last resort having jurisdiction, and such statute is thereafter amended in certain particulars, but remains unchanged so far as the same has been construed and defined by the court, it will be presumed that the Legislature was familiar with such interpretation at the time of such amendment, and that such interpretation was intended to be adopted by such amendment as a part of the law, unless express provision is made for a different construction.

Error to Court of Appeals, Hardin County.

Action by Joseph P. Spitzer and another against James Ray Stillings, as executor of the last will and testament of Harley A. Moninger, deceased, and another. Judgment for plaintiffs was reversed by the Court of Appeals, and plaintiffs bring error. Affirmed.—[By Editorial Staff.]

This was an action by Spitzer & Coats to recover from Harley A. and Grover F. Moninger the value of a car of corn which plaintiffs claimed they had sold to the defendants, doing business as Moninger Bros. Grover F. Moninger made no defense, but Harley A. Moninger answered, denying that he was a member of the defendant firm, or that he participated in any way in the purchase of the corn. Issue being thus joined, the trial resulted in a verdict and judgment for plaintiffs, which judgment, upon error prosecuted to the Court of Appeals, was reversed upon the sole ground of the alleged error of the trial court in the exclusion of certain evidence.

At the trial the plaintiffs, Joseph P. Spitzer and Ulrich J. Coats, voluntarily testified in their own behalf, and detailed at great length facts and circumstances which if believed clearly established Harley A. Moninger as a member of the firm of Moninger Bros., and further clearly established his participation in the particular transaction upon which this controversy is predicated.

Harley A. Moninger testified upon his own behalf in defense, and denied in detail all the testimony offered by the plaintiffs, and further, to maintain the issues, on his part endeavored to subject the plaintiffs to cross-examination concerning admissions which it was claimed plaintiffs had made to an attorney whom they had consulted immediately after the purchase and sale of the corn, in the course of which consultation it was claimed that plaintiffs had made statements indicating that their transaction was with Grover F. Moninger, and with him alone. The court sustained objections to such cross-examination, and the legal question was saved by stating what was expected to be proven. Thereupon the attorney who was consulted, Mr. U. J. Pfeiffer, was called to the stand, and questions were propounded to him as to the substance of those communications, and again the court sustained objections, and statements were made as to what it was claimed would be the attorney's testimony. Assuming that the witnesses would have testified as expected, the testimony would have been such as tended to defeat plaintiff's cause of action; and, if the testimony was competent, error intervened.

Henderson & Roof, of Kenton, for plaintiffs in error.

Stillings & Johnson, of Kenton, and Crissinger, Guthery & Strelitz, of Marion, for defendants in error.

MARSHALL, C. J. [1] This proceeding presents the single question whether a confidential communication made by a party to his attorney loses its privilege if such party becomes a voluntary witness at the trial and testifies generally to matters necessary to establish his cause of action, without referring in any way to the communications between him and his attorney. It is assumed that the general testimony of the party would establish the liability of the opposing party, and that the testimony of the attorney, if he were permitted and required to divulge the communications, would tend to contradict the testimony of the party already offered, and therefore tend to disprove his cause of action. The question involves the interpretation and application of section 11494, General Code, which reads in part as follows:

"The following persons shall not testify in certain respects: * * * An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient. But the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testifies, the attorney or physician may be compelled to testify on the same subject."

If the testimony of the attorney is "on the same subject" as the testimony of the party, then the testimony must be received. It is insisted, however, that the phrase "on the same subject" refers only to the communications as such, and that the attorney may not be compelled to testify if the general testimony offered by the party does not refer in any way to the attorney or to the communications which passed between them; that, even though the testimony of the party is in certain respects directly contradicted by the testimony of the attorney, it cannot be held to be on the same subject unless the party has voluntarily testified definitely and particularly to the fact of communications having passed.

It is apparent that the testimony of the attorney, as well as the testimony of the party, could have no value to the defendant unless there was a contradiction, and it seems equally apparent that there could be no contradiction unless the testimony of both pertained to the same subject-matter. It is contended, however, by counsel for Spitzer & Coats, that the statute refers to the subject of the communications between client and attorney, and not to the subject of the controversy. The answer to this proposition is that, if it is sought to limit the scope and application of the word "subject," such limitation should have been defined by the Legislature itself, and that, in the absence of any limitation, it should be taken in an unlimited and unrestricted sense. If the Legislature meant the word "subject" to be confined to the subject of the communications between the client and attorney, it could easily have so stated, and, in the absence of that limitation, it is more probable that it was intended to include the subject-matter of his testimony generally. Counsel for Spitzer & Coats insist that the statute should be construed as if it read thus:

"If the client voluntarily testifies to such communication or advice, the attorney may be compelled to testify on the same subject."

Such a construction would be nothing short of judicial legislation, and would be putting into the language of the statute something which the Legislature omitted. The subject upon which Spitzer & Coats testified was in part the relation of Moninger to the firm, and the subject of the testimony sought to be developed by the communications between attorney and clients would tend to disprove that relation.

[2] If this case were to be decided according to the principles of the common law, a very different situation would be presented. For approximately 350 years the rule of exclusion of communications between attorney and client had been in force in the English and American courts, with varying degrees of strictness, and based upon theories which have been changed from time to time. It was first established out of consideration for the oath and honor of the attorney, without regard to the rights and privileges of the client. That theory was entirely repudiated more than 200 years ago, and, while the obligation of the attorney not to violate the secrets of his clients is as binding to-day as it ever was, and while attorneys are neither privileged nor permitted to testify concerning matters which came to their knowledge from a client in that relation, the policy of the privilege became grounded on subjective considerations, and was designed to promote greater freedom of consultation between clients and their legal advisers. This theory has become firmly established and is still maintained as a common-law rule of evidence. A rule of evidence seldom ripens into a right of property, and this is necessarily true of the so-called privileged communication between attorney and client. It is in any event clearly a matter of policy, and within the power of legislators to change, or even abrogate entirely. This controversy involves the interpretation of a legislative act. No one questions the power of the Legislature, and we are only concerned with determining the legislative intent. It would perhaps be more accurate to say that it is rather a question of the application of language entirely free from ambiguity to a given state of facts.

A large number of cases have been cited

by industrious counsel, all of which have been carefully examined, but the difficulty with the authorities cited is that they have been decided by courts of other states, whose statutes are entirely dissimilar to the Ohio statute, and require either the consent of the party that the attorney may testify, or that the waiver relate only to the subjetct of the communications, and not to the subject of the client's testimony. Only two other states in the Union, Wyoming and Oregon, have statutes similar to ours. We find no decision by the Wyoming courts, and only one decision by the Supreme Court of Oregon, to wit, Bryant v. Dukehart, 106 Or. 359, 210 Pac. 454. In that case the communication was held to be privileged, but in the opinion the court stated that the letter written by the client to the attorney was privileged in that case because the voluntary testimony of the witness in his own behalf did not have any bearing upon the subject-matter of the letter. It would therefore clearly not be an authority in favor of the contentions of plaintiff in error.

[2] This court has declared upon this proposition in no uncertain terms in the case of King v. Barrett, 11 Ohio St. 261. The facts of that case are almost exactly parallel to the facts in the instant case, and the court in that case declared the following syllabus:

"Communications made by a client to his attorney, with a view to professional advice or assistance, are privileged; and courts will not require nor permit them to be divulged by the attorney, without the consent of his client, whose privilege it is.

"But if a party to a suit offers himself as a witness, and gives evidence, generally, in the case, he thereby loses this privilege, and, under the Code of Civil Procedure (section 315), consents to the examination of his attorney touching such admissions as are pertinent to the issue.

"At whatever stage of the trial a party thus offers himself as a witness, he may, on cross-examination, be interrogated as to such admissions or communications made to his counsel, and they may be proved by the attorney, either as evidence in chief, or for the purpose of impeachment."

That decision was based upon section 315 of the Code of Procedure adopted March 14, 1853 (51 O. L. 109), which at the time of that decision read as follows:

"If a person offer himself as a witness, that is to be deemed a consent to the examination also of an attorney, clergyman or priest, on the same subject, within the meaning of the last two subdivisions of the preceding section."

A comparison of section 315 of the original Code with section 11494, General Code, shows that where there has been no change of language which would make the above-quoted syllabus inapplicable to the statute as it now exists. That decision having been rendered in 1860, only seven years after the adoption of the Code of Civil Procedure, and the law having existed since that date without amendment of that particular feature, it will be presumed that the Legislature has been satisfied with the interpretation given in King v. Barrett, supra, and it being entirely a question of policy, it would amount to judicial legislation upon the part of this court to make a change of interpretation or application at this late date.

[4] The situation is even much stronger than this. On May 14, 1878, 18 years after the decision of King v. Barrett, the Ohio Legislature made many sweeping amendments to the Code of Civil Procedure, and in the course of the amendments of that date did not overlook section 315, but amended it by excepting from its operation clergyman and priests, and by including physicians within its provisions, but in no wise modifying or limiting its provisions so far as they relate to attorneys. By the rules of construction of statutes, if a statute is amended in certain particulars, after the same has been interpreted and defined by the courts, without change in other respects, it will be presumed that the Legislature was satisfied with the court's interpretation upon those features, which were unchanged, but that the amended portions were intended to be excepted from the operation of the court's decision. This rule of construction is thus stated in 36 Cyc. 1153:

"Where a statute that has been construed by the courts has been reenacted in the same, or substantially the same, terms, the Legislature is presumed to have been familiar with its construction, and to have adopted it as a part of the law, unless it expressly provides for a different construction."

In support of that text a very large number of cases are cited as authority from courts of last resort of 23 states, from the United States Supreme Court, and from the English courts. Applying this rule to the instant case, by virtue of the amendment of 1878, communications to clergyman and priests again became privileged, according to the rules of the common law, and communications to attorneys remained subject to the provisions of the statute, as defined and interpreted by the decision of King v. Barrett.

The judgment of the Court of Appeals in the instant case could not be reversed without at the same time reversing the principles declared in King v. Barrett and repealing section 11494, General Code.

It is claimed by counsel that the case of Duttenhofer v. State, 34 Ohio St. 91, 32 Am. Rep. 362, decided in 1877, overruled the case of King v. Barrett. This claim is untenable, because of section 315, then in force, is a part of the Civil Code and has no relation whatever to criminal procedure. This distinction was clearly drawn in the opinion in that case. We agree with the opinion of the court

in King v. Barrett that a party should not only tell the truth, but the whole truth.

It is said that, if the rule of exclusion is not applied, parties many times would not dare to testify at all. This can only be so upon the theory that the client has not told his attorney the truth. A party has no right to call a witness to establish as facts matters which he himself knows to be untrue, and a party who knowingly calls a witness to the stand to testify falsely is guilty of subornation of perjury. If the waiver of the privilege as declared by the statute results in preventing a party from testifying falsely, after having made a truthful disclosure to his counsel, upon what principle can it be said that the policy of the statute is not sound?

It must be kept in mind that this statute does not permit the attorney to volunteer his testimony, or even permit him to testify, until after the client has voluntarily offered himself as a witness. The statute can serve no purpose except to expose perjury. If the client's testimony harmonizes with the communication to the attorney, it is to his advantage to have the attorney testify, and his cause is thereby advanced. If there is flat contradiction his cause is lost, but the cause of abstract justice is greatly enhanced. The just loss to one individual becomes the just gain to his adversary and to the community.

In this case we are only discussing the rule in its application to civil cases, and we are of the opinion that clients should make full disclosure to attorneys, and, if the facts thus disclosed do not justify litigation, they should not be encouraged to plead a different state of facts in order to establish a cause or defense, and, if they persist in doing so, and in further pursuance of that design voluntarily testify concerning the modified facts and circumstances, they should be made to suffer the consequences. A client has nothing to fear who makes a truthful disclosure to counsel, and who also offers truthful testimony on the witness stand. The rule of exclusion places a premium on perjury.

In affirming the Court of Appeals and remanding the cause to the trial court for further proceedings these matters will again come up for determination and full inquiry into the communications between attorney and client. We are not assuming that either the parties or the attorney will testify as counsel for the defendant in error have claimed; neither are we assuming that the plaintiffs below offered other than truthful testimony. These matters must be developed by the new trial uninfluenced by any expressions in this opinion.

The judgment of the Court of Appeals will be affirmed.

Judgment affirmed.

ROBINSON, JONES, MATTHIAS, DAY, and ALLEN, JJ., concur.

KLONOWSKI v. MONCZEWSKI.
(No. 17887.)

(Supreme Court of Ohio. Jan. 29, 1924.)

(Syllabus by the Court.)

1. Contracts ⟸22(2)—Receipt embodying new obligation may be a contract though signed by one party only.

A writing in the form of a receipt, but which embodies a new obligation, and purports to set out the purpose for which the money therein referred to is received, and the manner in which it is to be used, may constitute a written contract between the parties, though signed by one only; and the fact that a party not signing takes the same into his possession, control, and custody tends to establish his assent to its terms.

2. Appeal and error ⟸171(3)—After trial of issue founded on oral contract, contention that written contract was executed could not be made.

But where an issue is made by a claim upon the part of the plaintiff that an oral contract is entered into between the plaintiff and the defendant, setting forth the terms thereof and the particulars in which he claims it was violated by defendant, the defendant by answer admitting that such oral contract was entered into by the parties, but denying the terms thereof as alleged by plaintiff, and, upon trial of the issue, evidence is submitted by the parties without objection to sustain their respective contentions, the defendant cannot thereafter raise the question that a certain instrument in writing, signed by him and delivered to the plaintiff, embraced the contract between the parties, and cannot be enlarged, contradicted, or explained by parol.

Error to Court of Appeals, Cuyahoga County.

Action by Franciszek Monczewski against Stanley Klonowski, doing business as the Klonowski Savings Bank. Judgment for plaintiff was affirmed by the Court of Appeals, and defendant brings error. Affirmed.—[By Editorial Staff.]

This action was instituted in the municipal court of Cleveland, where the defendant in error was plaintiff and the plaintiff in error was defendant. For convenience the parties will be designated as plaintiff and defendant, respectively, as they appeared in the trial court. The action was to recover the sum of $827.65, which the plaintiff alleged he paid under the verbal agreement of defendant to purchase 42,000 marks of Polish money therewith, and to forward the same to the bank in Warsaw, and return to plaintiff the official bank book of such bank within 10 weeks from date, which was November 28, 1919, which sum stated included compensation for defendant's services in purchasing and transmitting the marks. Plaintiff fur-

ther alleged that the defendant failed to procure said bank book or any other evidence that he had complied with the terms of the contract; that demand was made on January 3, 1921, that the bank book be delivered to the plaintiff, but defendant claimed not to have the same, and did not know when it could be procured, and that plaintiff thereupon informed the defendant that he desired to, and did, revoke said agreement, and demanded the return of his money, which was refused.

The defendant admitted that he entered into a verbal agreement with plaintiff to purchase 42,000 Polish marks, and to forward the same and return to the plaintiff the official bank book of said bank, as alleged in the petition, and that he received the sum of money therein set forth, but he denied any agreement to return the bank book within 10 weeks from that date, and asserted that his agreement was to purchase and transmit such money, and return to plaintiff the bank book evidencing such deposit as soon as the same should be received by him; that since the institution of this suit he had received the bank book and was willing and ready to turn it over to the plaintiff. The plaintiff's statement of claim was filed January 3d, and the defendant's statement of defense was filed January 29, 1921.

The trial resulted in a verdict for the plaintiff for the full amount of the claim, and judgment was rendered therefor, which was affirmed by the Court of Appeals.

Stearns, Chamberlain & Royon, of Cleveland, for plaintiff in error.

Victor J. Conrad, of Cleveland, for defendant in error.

MATTHIAS, J. Upon the trial of this case the vital disputed issue between the parties was whether the contract entered into embraced an agreement that, if defendant did not complete within 10 weeks the entire transaction undertaken by him, he would return to plaintiff the money which plaintiff had paid to defendant. At the time of the transaction the following receipt was given plaintiff by defendant:

"No. 554. Cleveland, Ohio, Nov. 28, 1919.

"Received from Franciszek Monczewski eight hundred twenty seven and 65/100 dollars for (foreign money) marks 42,000/00. To be remitted to Warszawski Bank. Residence (Na Oszezednose).

"$827.65 Klonowski Savings Bank, Per SK."

[1, 2] The principal contention made by the defendant is that the trial court committed prejudicial error in disregarding the receipt above set forth, which was introduced in evidence, or did not give it proper legal effect, this claim being based upon the theory that, having been signed by one and delivered to and accepted by the other, it constituted a written contract, binding upon the parties, and that evidence of a verbal contract wherein any obligations were imposed in addition to those set forth in the receipt was not admissible. It may be stated as a general proposition that, where a writing in the form of a receipt embodies a new obligation, and purports to set out the purpose for which the money is received, and the manner in which it is to be used, it may constitute a written contract between the parties, though signed by one only; and the fact that the party not signing takes the instrument into his possession, control, and custody may establish his assent to its terms. Wigmore On Evidence, § 2432; Stone v. Vance, 6 Ohio, 246; Bird, Adm'r, v. Hueston, 10 Ohio St., 418. However, it is to be noted that such question is not presented by the record in this case; for not only was the evidence of the oral agreement introduced and received without objection by the defendant, but the pleadings of the parties were in accord in that respect, the one averring and the other admitting that the agreement entered into by them was verbal, and evidence was submitted upon the trial by each of the parties to sustain his contention as to the terms of that agreement. In such situation the defendant cannot thereafter raise the question or make the contention that the instrument signed by him and delivered to the plaintiff embraced a contract between them which cannot be enlarged, contradicted, or explained by parol.

It is the view of counsel for defendant, as stated in their brief, that, under the terms of this receipt, as it stands, the defendant would be liable for the value of 42,000 marks after the expiration of a reasonable time within which to deposit the same in the Warsaw bank, while under the oral agreement testified to he was liable for the return of the entire amount paid. There was a sharp conflict in the evidence as to the terms of the agreement. The court gave the jury proper instructions as to the basis of recovery if they found in accordance with the contention of plaintiff, and the evidence adduced by him tending to support the same to the effect that a part of the contract was to complete the transaction within 10 weeks, placing the money to the credit of the plaintiff in the bank named, and delivering to him the book of that bank evidencing the deposit in the name of and to the credit of plaintiff. The court also instructed the jury on the theory of the case as presented by the claim of the defendant, and that the plaintiff could recover only the loss he sustained by reason of the failure of the defendant to complete the transaction within a reasonable time, if there had been such failure on the part of the defendant. It is claimed, however, that the trial court committed prejudicial error in the statement to the jury that

the plaintiff could recover if the defendant did not transmit the money, but kept the same for speculation, subject to the fluctuation of the market, etc. If the defendant retained the money instead of forwarding as agreed, his purpose is immaterial so far as the plaintiff was concerned. The record does disclose that the defendant undertook to make this transaction through a New York bank, but that no amount was placed to the credit of plaintiff in the bank of Warsaw or elsewhere, until the expiration of a year, and the Polish mark had then depreciated to such an extent that its value had almost reached the vanishing point. The manner of completing the transaction and the agencies through which the same was to be done were those of the defendant, and with their selection plaintiff could have nothing to do. He and he alone was under obligation to plaintiff, and to no one else could the plaintiff look for the money which he had paid, or for its equivalent.

It is complained that the court erred in its instructions to the jury with reference to waiver by the plaintiff of his right to require performance of the contract within the time when it should be performed according to his contention. The trial court did attempt to charge the jury on the subject of waiver; but no waiver was pleaded by the defendant, and he was therefore not entitled to any charge upon that subject. If waiver was claimed, that was a matter of defense, the burden of establishing which would be upon the defendant. Under the facts disclosed by this record the charge of the court in that respect could not have been prejudicial to the defendant. Portions of the charge are somewhat confused, but in respect to the subject of waiver the charge is favorable to the defendant, rather than prejudicial.

Judgment affirmed.

WANAMAKER, ROBINSON, JONES, DAY, and ALLEN, JJ., concur.

KUHN v. CINCINNATI TRACTION CO.
(No. 17895.)

(Supreme Court of Ohio. Jan. 29, 1924.)

(Syllabus by the Court.)

1. Master and servant ⇐117—Employer entitled to show compliance with statutory duty.

In an action for damages for personal injury against an employer who has paid into the workmen's compensation fund, for alleged violation of subdivision 4 of section 1027, General Code, providing that an employer "shall make suitable provisions to prevent injury" and shall "examine frequently and keep in sound condition the ropes, gearing and other parts of elevators," and for failure to provide a safe place to work, and for failure to use safety devices and safeguards, as provided in sections 871—13, 871—15, and 871—16, General Code, it is error to refuse such employer opportunity to show compliance with such statutory duty.

2. Master and servant ⇐117—Statutory duty to keep elevator in "sound" condition defined; "safe."

While it was the duty of the employer to "examine frequently and keep in sound condition the ropes, gearing and other parts of elevators," that statutory duty would be discharged if there was frequent examination by the employer, and the ropes, gearing, and other parts of the elevator were kept as free from danger to the life, safety, and welfare of the employee using the elevator as the nature of the employment would reasonably permit, and if the employer furnished, provided, and used safety devices and safeguards and adopted and used methods reasonably adequate to render the use of such elevator safe within the meaning of the statute. The word "sound," as used in subdivision 4 of section 1027, has the same significance as the word "safe," as defined in section 871—13, to wit, as free from danger to the life, safety, and welfare of the employee as the nature of the employment will reasonably permit.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Safe; Sound.]

3. Master and servant ⇐117—Statutory requirement as to safety of elevators held not insurance of safety.

Subdivision 4 of section 1027, General Code, does not create an absolute liability, nor constitute an insurance of the safety of an employee, but, in an action based upon a violation of such subdivision, an employer may show by way of defense that he has met the degree of care required by statute.

4. Master and servant ⇐117—Instruction on employer's duty to maintain safe elevators held erroneous.

In an action for violation of subdivision 4 of section 1027, an instruction that "it was the duty of the defendant to provide and maintain an elevator sufficient in all its parts so that when used for the purpose intended and in the manner intended it would not break," is erroneous unless the jury be further instructed that such breaking was due to some violation by the employer of a statutory duty in that regard.

Robinson, Jones, and Matthias, JJ., dissenting.

Error to Court of Appeals, Hamilton County.

Action by George Kuhn against the Cincinnati Traction Company. Judgment for plaintiff was set aside by the Court of Appeals, and plaintiff brings error. Modified and affirmed.—[By Editorial Staff.]

The plaintiff in error, George Kuhn, brought suit in the court of common pleas of

Hamilton county, Ohio, against the Cincinnati Traction Company, defendant in error, seeking to recover damages for personal injuries sustained by him from the fall of a freight elevator, which was being operated by him, in one of the plants of the defendant in error, in Cincinnati, Ohio. At the time of the accident plaintiff in error was an employee of the traction company, and he was injured in the course of his employment. The traction company is an Ohio corporation, and at the time of the grievances complained of employed more than five employees regularly in the same business. It duly made payments into the state insurance fund and had otherwise complied with all the provisions of the Workmen's Compensation Law, and was authorized to directly compensate its employees for injuries received in the course of their employment.

Plaintiff in error, Kuhn, refused to accept compensation under the Workmen's Compensation Act and elected to bring suit against the traction company for damages, and it was and is necessary for him, in order to maintain his action, to show that the traction company failed to comply with a "lawful requirement," as the term is used in section 1465-76, General Code, and that the traction company violated the provisions of sections 1027, 871-13, 871-15, and 871-16, of the General Code.

The petition recites:

"Plaintiff says that the defendant failed and neglected entirely to examine frequently and to keep in sound condition the ropes, gearing, and other parts of said elevator, and particularly the part hereinafter set forth; * * * and plaintiff states that he relied entirely upon defendant to provide him with a safe place in which to work and to protect him against any danger or injury that might result from the failure of the defendant to comply with the laws of Ohio aforesaid. * * *

"Plaintiff states further that the injuries so suffered by him arose from the willful act of the defendant in failing to comply with the laws of Ohio, 104 Ohio Laws, at page 194, in that it failed to provide the protection and safety due plaintiff under said laws in this, to wit, that it failed to provide a suitable safety brake, and that it failed to provide a socket of sufficient strength to hold the elevator cable to the cab, and that said elevator was defectively constructed in this, to wit, that the guides or tracks thereof were made of wood and were not of sufficient strength to permit the safety device to operate so as to prevent the car from falling when the accident hereinbefore complained of occurred, and plaintiff says further that by long and excessive use of said elevator the same had become weakened and of not sufficient strength to perform the work required of it in elevating the coal as aforesaid."

The answer of the defendant claimed the rights authorized by the Workmen's Compensation Act of Ohio, and, having made certain admissions as to the kind of work that Kuhn was doing, entered a general denial of every allegation of the second amended petition not specifically admitted to be true.

Upon the issues thus tendered the parties went to trial.

The position of the trial court is shown by the following excerpts from the charge:

"The court charges you that it was the duty of the defendant to provide and maintain an elevator sufficient in all its parts so that when used for the purpose intended and in the manner intended it would not break, and if the elevator was thus sufficient and the plaintiff was injured while operating it through some happening not attributable to any such insufficiency in any part of the elevator, then the defendant would not be liable.

"On the other hand, should you find that through some defect in the appliance coupling the cab to the cable, or through some insufficiency in the tracks or guides used in connection with the safety brakes, either because the timber was not of sufficient strength or was not securely fastened, or should you find that through the combination of said causes the cab fell while being operated for the intended purpose and in the manner intended, then the court charges you that the defendant is liable to the plaintiff for such damages as resulted proximately to him therefrom.

"If you find that the defendant did furnish an elevator sufficient as aforesaid, then your verdict will be for the defendant. If the evidence is evenly balanced on that point, your verdict must likewise be for the defendant.

"On the other hand, if you should find by a preponderance of the evidence that there was a defect in the socket or clevis coupling the cab to the cable, or if you should find that the tracks or guides aforesaid were so insecurely fastened, or the material was so weak that they broke when subjected in the manner intended by the defendant to a load not greater in weight than said elevator was designed and intended to carry by the defendant, or if you should find by the preponderance of the evidence that through the combination of said causes and as a proximate result thereof the cab fell and plaintiff, falling with it, was injured, then the defendant is liable to the plaintiff and your verdict must be for him. In that event you will consider the question of damages which the evidence shows the plaintiff has sustained as the direct and proximate result thereof."

It also appears that before argument counsel for the traction company made the following requests for instructions to the jury, all of which the court refused:

"5. If you find that the injuries of the plaintiff were caused directly and solely by a defect in the clevis of the elevator upon which the plaintiff was riding at the time he was injured, and that said defect could not have been discovered by frequent examinations, then I charge you that it is your duty to return a verdict for the defendant. * * *

"7. Unless you find by the greater weight of evidence that there was an unsound condition of some part of the elevator which could have been discovered by frequent examinations, then

I charge you that it is your duty to return a verdict for the defendant.

"8. Unless you find by the greater weight of evidence that there was an unsound condition in the clevis of the elevator which could have been discovered by frequent examinations, then I charge you that it is your duty to return a verdict for the defendant."

An examination of the general charge discloses no instruction upon the question of inspection by the traction company, nor any instruction as to the duty of the employer to make suitable provisions to prevent injury to persons who used such elevator, nor any instruction concerning the statutory duty of the traction company, as set forth in sections 1027, 871—13, 871—15, and 871—16, General Code.

The trial court also refused to admit testimony offered by the traction company as to repairs made in different parts of the elevator from time to time, of frequent examinations and inspections, some of these being made three or four times a week, and as recently as the Friday preceding the accident, which took place on Saturday:

"Q. State what, if any, inspections were made of the elevator by the defendant before this accident in which Kuhn was hurt.

"Mr. Street: We object.

"The Court: Objection sustained.

"Mr. Rogers: If allowed to answer, the witness would say that on May 7, 1919, the elevator was examined by the elevator inspector of the city of Cincinnati, and that at all times up to the time of the injury to Kuhn the witness, two or three or more times a week, made a careful inspection of all parts of the elevator. * * *

"Q. * * * State what, if any, repairs or replacements had been made upon the elevator before the time at which Kuhn was injured.

"Mr. Roettinger: We object to the question as not being material to the case.

"The Court: The objection is sustained.

"Mr. Rogers: The defendant offers to show, if the witness were allowed to answer, that prior to the accident to Kuhn repairs and replacements were made to parts of the elevator whenever it was found that any parts were weak or worn."

The view of the trial court is further shown at the time of the overruling of the motion for a directed verdict at the close of plaintiff's case:

"The Court: The court holds that a violation of section 1027 of the General Code constitutes negligence per se, that is, negligence as a matter of law rather; that that section 1027 is a lawful requirement within the meaning of those terms as used in the Ohio Constitution and in the Workmen's Compensation Act; and that a cause of action for damages resulting proximately from a violation of section 1027 may be instituted and maintained against the employer notwithstanding the Workmen's Compensation Act.

"Mr. Rogers: Does your honor so construe that section and rule that where it appears that the plaintiff has been injured by reason of a defect or unsoundness in any part of the elevator, and that as a direct result the plaintiff has been injured, the defendant is liable in damages *without regard to the question of the care which the defendant may have exercised in inspecting or maintaining the elevator?*

"The Court: Yes.

"Mr. Rogers: Then I except to your honor's interpretation or construction of that statute. * * *"

Upon the overruling of the motion for a new trial, the trial court expressed himself, we are advised by the brief of counsel, as follows:

"It was the opinion of the court at the trial of this case that by the terms of section 1027, General Code, an absolute duty was imposed upon the defendant to 'keep in sound condition the ropes, gearing and other parts of elevators,' and that the defendant could not by proof of the exercise of reasonable or *even extraordinary care* in making inspections relieve itself from the criminal liability following the failure to 'keep in sound condition the ropes, gearing and other parts of elevators'; and by parity of reasoning could not escape the civil liability resulting therefrom in the event of an injury to an employee proximately resulting from such violation. Accordingly the court charged the jury that 'it was the duty of the defendant to provide and maintain an elevator sufficient in all its parts so that when used for the purpose intended and in the manner intended it would not break, and if the elevator was thus sufficient and the plaintiff was injured while operating it through some happening not attributable to any such insufficiency in any part of the elevator, then the defendant would not be liable.'"

Upon the issues tendered, the parties went to trial, resulting in a verdict for plaintiff for $15,000. Error was prosecuted to the Court of Appeals, and that court held that there was error upon the record in the proceedings of the court of common pleas to the prejudice of the traction company; that substantial justice had not been done; and that the court of common pleas erred in overruling the motion of the traction company to direct the jury to return a verdict in its favor, for the reason that the record failed to show that the traction company had failed to comply with a "lawful requirement," within the meaning of that term as used in section 1465—76, General Code, and in article 2, § 35, of the Constitution of the State of Ohio. The judgment rendered by the common pleas court was set aside, and the Court of Appeals proceeded to render final judgment in favor of the traction company. To reverse this judgment of the Court of Appeals error is now prosecuted to this court.

Roettinger & Street, of Cincinnati, for plaintiff in error.

H. Kenneth Rogers, of Cincinnati, for defendant in error.

DAY, J. In the brief for plaintiff in error we are advised there is "but one issue, and this issue is not complicated either by an election of any kind on the part of Kuhn to submit to the Workmen's Compensation Board or by contributory negligence or assumed risk"; that plaintiff in error "stands clearly upon sections 871—15 and 871—16, Supplement of the Code, and section 1027, paragraph 4, of the General Code."

It is the claim of defendant in error that—

"The trial court held that this case was governed by the provision of subdivision 4, section 1027, * * * and not only that that provision was a 'lawful requirement' within the meaning of that term as used in section 1465—76, but that it made the traction company an insurer against any injury to Kuhn directly resulting from any unsound conditon of any part of the elevator; that no matter how carefully or frequently the elevator had been inspected or repaired or what measures had been taken to maintain it in a safe and sound condition, the company was liable to Kuhn for any injury directly to him from any unsoundness in any part of the elevator, even though the unsoundness were latent and not discoverable by the exercise of the greatest care."

It is therefore apparent that the paramount question in this case is: Does subsection 4 of section 1027, General Code, create an absolute liability on the part of an employer for an injury to an employee due to the fall of an elevator, regardless of whether the employer has made "suitable provisions to prevent injuries to persons who use" such elevator, regardless of whether such employer has had said elevator "examined frequently" in order to keep "in sound condition the ropes, gearing and other parts of said elevator," regardless of what steps the employer may have taken to make the employment and place of employment as free from danger to the life, health, safety, or welfare of employees as the nature of the employment would reasonably permit, and regardless of whether the employer has furnished safety devices and safeguards and adopted and used methods reasonably adequate to render such employment and place of employment safe, under the meaning of the statute?

The sections of the General Code relied upon are in substance as follows:

"Sec. 1027. The owners and operators of shops and factories shall make suitable provisions to prevent injury to persons who use or come in contact with machinery therein or any part thereof as follows: * * *

"4. They shall case in all unused openings of elevators and elevator shafts and place automatic gates or floor doors on each floor where entrance to the elevator carriage is obtained. They shall keep such gates or doors in good repair and examine frequently and keep in sound condition the ropes, gearing and other parts of elevators."

"Sec. 871—13. The terms 'safe,' and 'safety,' as applied to any employment or a place of employment, shall mean such freedom from danger to the life, health, safety or welfare of employés * * * as the nature of the employment will reasonably permit."

"Sec. 871—15. And shall furnish and use safety devices and safeguards, * * * and shall do every other thing *reasonably necessary* to protect the life, health, safety and welfare of such employés. * * *"

"Sec. 871—16. No such employer shall fail to furnish, provide and use safety devices and safeguards, * * * and no employer shall fail or neglect to do every other thing *reasonably necessary* to protect the life, health, safety and welfare of such employees. * * *"

To state the contention of the plaintiff in error in another form, it may be said that it is claimed that when an elevator falls with the operator, and he is injured as a proximate result of such fall, there is a liability, because it was the duty of the employer, as charged by the trial court, "to provide and maintain an elevator sufficient in all its parts so that when used for the purpose intended and in the manner intended it would not break," from which it is to be inferred that if it broke there was a violation of the expressions "safe," "safety devices" "safeguards," and in "sound condition," as used in sections 871—13, 871—15, 871—16 and section 1027, subd. 4, General Code. The effect of such a contention is to constitute the employer an absolute insurer of the safety of such employee, unless the employer is given an opportunity to show that he has met the statutory requirements.

Our attention is called by counsel upon both sides to the case of Ohio Automatic Sprinkler Co. v. Fender, 108 Ohio St. 149, 141 N. E. 269. Inasmuch as counsel upon both sides rely upon that case, it is well to understand what that case holds touching a "lawful requirement," and the following excerpt from the opinion, at page 170 of 108 Ohio St., 141 N. E. 276, makes that point clear:

"These provisions do not constitute an absolute liability nor make the employer an insurer against injuries to employees. The general requirement of 'suitable provisions to prevent injury' and the specific requirement that 'they shall guard' must be construed in the light of the definitions of 'safe' and 'safety' in section 871—13, General Code, and should be so administered as only to require 'such freedom from danger to the life, health, safety or welfare of employees or frequenters as the nature of the employment will reasonably permit.'"

[2] While it was the duty of the employer "to examine frequently and keep in sound condition the ropes, gearing and other parts of elevators," that duty would be discharged if there was frequent examination by the employer, and the ropes, gearing, and other parts of the elevator were kept as free from danger to the life, safety, and welfare of the employee using the elevator as the nature of the employment would reasonably permit,

and if the employer furnished, provided, and used safety devices and safeguards, and adopted and used methods reasonably adequate to render the use of said elevator safe, within the meaning of the statute. The word "*sound*," as used in section 1027, subd. 4, has the same significance as the word "*safe*," as defined in section 871—13, to wit, as free from "danger to the life, health, safety or welfare of employees * * * as the nature of the employment will reasonably permit." By recognized lexicographers the word "safe" is given the meaning of sound, and the word "sound" the meaning of safe.

It is claimed that this is simply a statement of the common-law rule of ordinary care. Much discussion has already taken place in this court on this subject, and, without adding thereto, it is sufficient to say that the rule of statutory care above stated is what the Legislature has seen fit to embody in the law.

If the statute is to be changed, the place to change it is in the Legislature. As indicating that the Legislature intended something different from ordinary care, reference may be made to section 6243, General Code, commonly called the Norris Act, wherein it is affirmatively provided that—

"The employer may show by way of defense that such defect was not discoverable in the exercise of ordinary care."

It is, of course, difficult to say as a matter of law when the physical conditions and acts requisite to satisfy the statute appear conclusively by the evidence; the question of the employer's compliance with the statutory duty must usually, but not always, be left to a jury. If there is no evidence tending to show a violation of a statutory duty, when that is relied upon as a basis of recovery, then of course it is the duty of the court to take the case from the jury. On the other hand, if there is evidence tending to show violation of duty prescribed by statute, the question should be submitted to a jury under proper instructions.

[1] It was this denial upon the part of the trial court to permit the defendant traction company to show, or to attempt to show, that it had complied with this statutory duty, that amounted to prejudicial error against the traction company.

This court in Variety Iron & Steel Works Co. v. Poak, 89 Ohio St. 297, 106 N. E. 24, held that a violation of section 1027 was negligence per se, and the trial court in the present instance correctly so interpreted the law. This doctrine of a violation of a statute constituting negligence per se has been heretofore recognized by this court. Schell v. Du Bois, Adm'r, 94 Ohio St. 93, 113 N. E. 664, L. R. A. 1917A, 710; Neave Bldg. Co. v. Roudebush, Adm'r, 96 Ohio St. 40, 117 N. E. 22; Krause v. Morgan, 53 Ohio St. 26, 43, 40 N. E. 886. But whether or not a violation of subdivision 4 of section 1027 was negligence per se was not the true question in this case. The paramount question may be stated thus: Was there a violation by the traction company of a *statutory duty*, which was the proximate cause of plaintiff's injury? The plaintiff claimed there was, and the defendant claimed there was not, and this record shows that the traction company was denied the right of showing its compliance with the lawful requirement.

Section 1027, subd. 4, General Code, enjoined a duty, but not an absolute liability, and a failure to observe the duty would be a violation of a "lawful requirement."

[3] This statute was enacted for the purpose of forestalling injuries and accidents, and not for the purpose of creating absolute liabilities. It was intended to be complied with by the employer for the manifest purpose of prevention of industrial casualties. If an employer is not permitted to show that he has complied with the provisions of the statute, it would seem that the purpose of its enactment had not been met, but that a plan of absolute liability had been created. This we do not think was the legislative intent.

This court has heretofore construed safety statutes of like character and reached the conclusion that the same do not create absolute liability.

In Krause v. Morgan, 53 Ohio St. 26, 43, 40 N. E. 886, 890, construing the statute passed to prevent explosions due to gas in coal mines, Judge Spear spoke as follows:

"While the statute, as we construe it, does not make the operator of the mine *absolutely* liable to a party injured by an explosion of gas where the operator has not complied with the statute, such conduct is negligence per se, and the employer cannot escape liability by showing that he took other means to protect the workmen equally efficacious. Proof of failure to obey the statute is all that is necessary to establish negligence on the part of the operator, but the statute does not change the well-established rule that where one has been guilty of negligence which may result in injury to others, still the others are bound to exercise ordinary care to avoid injury."

Now, the defendant, the traction company, had a right to show, if it could, that it had met its statutory duty—by proving that it had performed the duties required by statute.

[4] The charge of the court, in substance made the defendant liable if the elevator, or any part thereof, was unsound and the plaintiff's injury proximately resulted from such unsoundness when the elevator was being used in the manner and for the purpose intended. This view ignored the provisions of section 1027, which required the defendant to "*examine frequently* and keep in sound condition the ropes, gearing and other parts of elevators," and to "make suitable provisions

to prevent injuries"; and further ignored the traction company's right to show its compliance with the statutory duty required by sections 871—13, 871—15, and 871—16, General Code, with which section 1027 is in pari materia. The mere fact that an accident happens does not, in and of itself alone, constitute a cause of action entitling a plaintiff to recover for violation of a lawful requirement. It must also appear that some of these provisions of statute, looking toward the prevention of injury, have not been complied with by the employer, and this constitutes a failure to comply with a "lawful requirement." It would be a denial of justice not to permit an employer to show, if he can, that he has complied with the provisions of the statute constituting "lawful requirement."

We think the traction company, as shown by this record, was denied this privilege, and that therefore the reversal of the judgment of the court of common pleas was right.

We are not, however, in accord with the view of the Court of Appeals that there was no evidence tending to show violation of a "lawful requirement," and that final judgment should be rendered for the traction company, although by the decisions of this court, as then existing, such conclusion was correct. We hold that if the company violated subsection 4 of section 1027, General Code, it did violate a lawful requirement, and that if there was evidence tending to show that fact the question was one for the jury. Therefore, to that extent, the judgment of the Court of Appeals cannot be affirmed.

With the modification that the action of the Court of Appeals in rendering final judgment be reversed, and the cause remanded to the court of common pleas for a new trial, the judgment of the Court of Appeals is in all other respects affirmed.

Judgment modified, and affirmed as modified.

MARSHALL, C. J., and WANAMAKER and ALLEN, JJ., concur.

ROBINSON, JONES, and MATTHIAS, JJ. (dissenting). We concur in this judgment in so far as it affirms the judgment of the Court of Appeals, but dissent from the order remanding the cause to the court of common pleas, holding that this action cannot be maintained for the reasons set forth in the opinion in Patten v. Aluminum Castings Co., 105 Ohio St. 1, 136 N. E. 426. The defendant in error had fully complied with the requirements of the Workmen's Compensation Act, and plaintiff's only remedy was to seek compensation as therein provided. If the action were one based upon the violation of a lawful requirement, we agree that the rule stated in the syllabus would govern. However, it is disclosed that what was claimed to be the violation of a lawful requirement has developed into a case of negligence, wherein the degrees of care required are applied. Under the provisions of the Workmen's Compensation Act, the defendant in error is exempt from such action.

TOLEDO & O. C. RY. CO. v. GIHA.
(No. 17928.)

(Supreme Court of Ohio. Dec. 26, 1923. Application for Rehearing Denied Feb. 21, 1924.)

(Syllabus by Editorial Staff.)

Carriers ⟸96 — Reasonable diligence held shown by carrier, in establishing identity of car before delivery thereof to consignee.

A carrier was not liable for refusal to deliver the car after arrival at destination, because the number of the car did not correspond with the number of the order bill of lading, where it telegraphed the consignor for instructions, and before receiving an answer released the car; such act being an exercise of reasonable diligence in establishing the identity of the car before delivering it to the plaintiff.

Error to Court of Appeals, Lucas county.

Action by Jesse Giha, doing business as G. T. Giha, against the Toledo & Ohio Central Railway Company. Judgment for plaintiff was affirmed by the Court of Appeals, and defendant brings error. Reversed and rendered.—[By Editorial Staff.]

Jesse Giha, doing business at Toledo under the name of G. T. Giha, brought this action in the court of common pleas against plaintiff in error, for negligence in failing to deliver a car of potatoes after its arrival at destination. The potatoes were ordered from Addison Bros., at Norfolk, Va., who loaded them in a car designated G. A. No. 8615. At Norfolk, Va., this car was delivered to the initial carrier, and later was delivered to plaintiff in error, who transported it to its destination at Toledo. It was shipped on an order bill of lading, describing the car as G. A. No. 8616; the bill of lading containing the following notification: "Notify Geo. T. Giha at Toledo, State of Ohio." The bill of lading also contained the following statement: "The surrender of this original order bill of lading, properly indorsed, shall be required before the delivery of the property."

Giha was apprised of the shipment of the car, and on Saturday, June 30, 1917, found the same in the yards of plaintiff in error. After the intervening Sunday, to wit, on Monday morning, July 2, Giha paid the bank the draft represented by the bill of lad-

ing No. 8616, and at 9 o'clock a. m. presented to the agent of the plaintiff in error a bill of lading for car G. A. No. 8616. Its delivery was O. K.'d by the agent at that time, whereupon Giha proceeded to the yards of the railway company and demanded the delivery of car marked G. A. No. 8615. The yardman refused the delivery for the reason that the bill of lading presented called for a car with a different number from the one in the yards. Thereupon, about 9 a. m., on the morning of July 2, Giha again demanded the delivery of car No. 8615, offering to pay the invoice price therefor, and was again met with a refusal by the agent until its identity was established, which would relieve the company from responsibility. Thereupon, on July 2, between 9 a. m and noon, the railway company's agent telegraphed the shipper for instructions, and on the morning of July 5, received a telegram from the shipper, dated the preceding day, ordering the railway company to deliver the car No. 8615 to Giha. However, before the arrival of that telegram, the agent of the company, on his own responsibility, authorized the delivery of car G. A. No. 8615 to Giha. The delivery was made about 3 p. m. on Tuesday, July 3.

The petition, after reciting Giha's presentation of the bill of lading to the defendant company, alleges that the defendant neglected and refused to deliver the shipment of potatoes to Giha, and continued such neglect and refusal until after the close of business on July 3, 1917. On the trial, upon the facts stated, and which are substantially conceded, the defendant, at the close of its evidence, moved for a directed verdict, and renewed its motion at the close of the entire evidence. These motions were overruled by the trial court, and the cause was submitted to the jury, which returned a verdict for $262.50. A judgment for that amount in the trial court was affirmed by the Court of Appeals, whereupon the railway company instituted proceedings in error in this court.

Doyle & Lewis and Frederick W. Gaines, all of Toledo, for plaintiff in error.

James Harrington Boyd, of Toledo, for defendant in error.

PER CURIAM. The gravamen of plaintiff's action in the trial court was for negligence in failing to deliver the shipment after its arrival. The order bill of lading contained a provision that its surrender, properly indorsed, should be required before delivery of the property. It is conceded that no order bill of lading was presented to the railway company prior to 9 a. m. on July 2, 1917. It is further conceded that when the original order bill of lading was presented it was for a shipment consigned to Addison Bros., as consignees, and that, though describing the consignment as 175 barrels of potatoes, it called for a car other than that found in the company's railroad yards. That car was designated G. A. No. 8615, while the bill of lading presented called for G. A. 8616. The statement of facts preceding this opinion are all substantially conceded by the parties.

As we view this case, the question presented is whether such conceded facts preclude a recovery. It was conclusively shown that there was no negligence in failing to deliver on the part of the railway company. When on the morning of July 2 the bill of lading was presented calling for an entirely different car from that which stood in the railroad yards, it became the duty of the company to exercise reasonable diligence in the establishment of its identity before delivery. That reasonable diligence was thus used is disclosed by the fact that, when apprised of the variance in car numbering, it at once telegraphed the consignor for instructions with reference to delivery. More than this it could not have done. To exact the delivery without investigation, of a car differing in designation from that called for in the bill of lading, would be a requirement of an act that might subsequently prove to be hazardous for the railway company. Furthermore, not receiving an answer to his telegram, forwarded on the morning of July 2, the agent of the company, upon his own responsibility, on July 3 ordered the car delivered to the defendant in error. On July 5 a telegram dated July 4 was received from the shipper, ordering the car's release. What exercise of care under the circumstances could be more reasonably expected than that utilized by the railway company we are at a loss to perceive. The complaint of the plaintiff was that the delivery of car No. 8615, at about 3 p. m. on July 3, was so late as to preclude him from obtaining haulage for the potatoes on the holiday succeeding. However, the railway company should not be held accountable for this, where otherwise, under the circumstances presented, it had reasonably performed its public duty in securing the identification of the car in question.

For the reasons stated it is the opinion of this court that upon trial the motions for a directed verdict in favor of the defendant below should have been sustained. The judgments of the lower courts are therefore reversed, and, proceeding to render the judgment which the trial court should have rendered, this court renders judgment in favor of plaintiff in error.

Judgment reversed.

MARSHALL, C. J., and ROBINSON, JONES, MATTHIAS, and DAY, JJ., concur.

RIVERSIDE COAL CO. et al. v. NORTH INDIANAPOLIS CRADLE WORKS. (No. 24854.)

(Supreme Court of Indiana. Jan. 30, 1924.)

Courts ⇐488(1)—No reference to Appellate Court's opinion required in Supreme Court's opinion after transfer for erroneous declaration of law.

Where the Supreme Court transfers a case to its own docket from the Appellate Court because of error in a declaration of law by the latter, as authorized by Burns' Ann. St. 1914, § 1394, subd. 2 (Acts 1901, c. 247, § 10), the Appellate Court's judgment is vacated, and neither criticism of nor reference to it is necessary in the opinion of the Supreme Court, which decides the case as if transferred in any of the other ways provided by sections 1405, 1425, and 1429.

Appeal from Superior Court, Marion County.

On petition for rehearing. Petition overruled.

For former opinion, see 139 N. E. 674.

EWBANK, C. J. The petition for a rehearing filed by appellants seems to challenge the opinion of this court for not pointing out the reason for which the cause was transferred from the Appellate Court. In its opinion the Appellate Court had assumed to state a rule of law in terms which the Supreme Court deemed erroneous, and not proper to serve as a guide in deciding similar questions that may arise in other cases. Being convinced that the opinion of that court erroneously declared the law in some particulars the Supreme Court transferred the case to its own docket. Section 1394, subd. 2, Burns' 1914 (section 10, c. 247, p. 567, Acts 1901); Barnett v. Bryce Furnace Co., 157 Ind. 572, 62 N. E. 6; American Quarries Co. v. Lay, 166 Ind. 234, 76 N. E. 517.

Having done so, the court proceeded to decide the case as if it had been transferred in any other of the several ways provided by law (sections 1405, 1425, 1429, Burns' 1914), for removing a case from one court to the other. By such an order of transfer "the judgment of the Appellate Court is vacated," and in deciding the case neither criticism of nor reference to the opinion of the other court is necessary. Section 1394, subd. 2, Burns' 1914 (section 10, c. 247, p. 567, Acts 1901).

The petition for a rehearing is overruled.

UTLEY v. STATE. (No. 24380.)

(Supreme Court of Indiana. Jan. 31, 1924.)

Criminal law ⇐913(1), 915—Defendant's assignments held not grounds for new trial.

Under Burns' Ann. St. 1914, § 2158, defendant's assignments that the court erred in overruling his motion to quash the indictment, that the judgment is contrary to law and the evidence, did not constitute grounds for a new trial.

Ewbank, C. J., dissenting.

Appeal from Circuit Court, Vanderburgh County; Wm. O. Bohannon, Special Judge.

Ben Utley was convicted of unlawfully transporting intoxicating liquors, and he appeals. Affirmed.

Ernest J. Crenshaw, of Evansville, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward Franklin White, Deputy Atty. Gen., for the State.

GAUSE, J. This is an appeal from a judgment below convicting the appellant of the charge of unlawfully transporting intoxicating liquor.

The only error assigned is that the court erred in overruling appellant's motion for a new trial.

The only causes assigned in his motion for a new trial were:

"(1) The court erred in overruling defendant's motion to quash the indictment herein.

"(2) The judgment of the court is contrary to law.

"(3) The judgment of the court is contrary to the evidence.

"(4) The judgment of the court is not sustained by sufficient evidence."

None of the above reasons assigned in the motion for a new trial are grounds for a new trial under the statute. Section 2158, Burns' 1914; Nafe v. Leiter (1885) 103 Ind. 138, 2 N. E. 317; Lytle v. State (1920) 189 Ind. 690, 128 N. E. 836, and cases therein cited; Koby v. State (Ind. 1922) 136 N. E. 840.

The appellant in his motion for a new trial attacks the judgment of the court; but in his brief undertakes to discuss the sufficiency of the evidence to support the finding of the court.

It follows, upon the authority of the cases above cited, that appellant has presented no question to this court for decision.

The judgment is affirmed.

EWBANK, C. J., dissents.

CARR v. STATE. (No. 24280.)

(Supreme Court of Indiana. Jan. 29, 1924.)

1. Criminal law ⇐274—Overruling of motion to withdraw plea of guilty held not abuse of discretion.

Where motion to withdraw a plea of guilty to the charge of illegal possession of liquor merely stated that the arresting officer found liquor which was not kept for sale, barter, or to be given away, and that defendant had not violated any law because the officer did not have a proper search warrant, and the verified motion was the only evidence in its support, it was not an abuse of discretion to overrule the motion.

2. Criminal law ⇐274—Motion to withdraw plea of guilty addressed to discretion of the court.

A motion to withdraw a plea of guilty is addressed to the discretion of the trial court and, in absence of an affirmative showing that discretion was abused, overruling such motion is not error.

3. Criminal law ⇐905—No error to overrule motion for new trial where defendant pleaded guilty.

Where defendant filed a motion for new trial after judgment had been rendered on a plea of guilty, the overruling of such motion presents no question for review, there having been no trial.

4. Judges ⇐51(2)—Motion for change of judge too late after cause disposed of.

A motion for a change of venue to a different judge comes too late, where not made until the cause has been fully disposed of, except as to the formal rendition of judgment on the plea of guilty, such change being authorized in view of Burns' Ann. St. 1914, § 2074 (Acts 1905, c. 169, § 203), only where defendant cannot receive a fair trial of some issue that remains to be heard.

5. Criminal law ⇐1134(3)—Unnecessary to discuss questions on appeal, where their consideration would not lead to reversal.

The appellate court need not consider questions discussed by appellant, where, even if decided in his favor, they would not lead to a reversal of a judgment based on the plea of guilty.

Appeal from Circuit Court, Clay County; Thos. W. Hutchinson, Judge.

Neal Carr was convicted of the unlawful possession of intoxicating liquors, and he appeals. Affirmed.

B. V. Goshorn, of Clay City, and Gerdink & Gerdink, of Terre Haute, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward Franklin White, Deputy Atty. Gen., for the State.

EWBANK, C. J. The brief for appellant states the nature of the action as follows:

"This was an action by the state of Indiana against the appellant, Neal Carr, wherein the state did upon the 16th day of December, 1922, charge defendant by way of approved affidavit with the unlawful possession of liquors, white mule whisky, with the purpose and intent to barter, sell, exchange, give away, and otherwise dispose of the same, contrary," etc.

[1, 2] The record recites that on the 16th day of December, 1922, appellant was arraigned, and entered a plea of guilty, and was released on bond to appear for sentence on the 28th. But on the 27th day of December, 1922, being the day before the date fixed for imposing sentence, appellant filed a motion for leave to withdraw his plea of guilty. This motion did not aver that appellant was influenced to enter said plea by coercion, or by any mistake of fact, or by erroneous advice of counsel, or that he was deprived of the services of counsel, nor did it even assert that he was not guilty of the offense charged. But it merely stated that the arresting officer had found on his premises some liquor, which was not kept for sale, barter, or to be given away (not denying an intent to exchange or otherwise dispose of even that part of his liquor), and that he had since "discovered that he was not guilty of violating any laws of the state of Indiana as charged, for the reason that said arresting officer did not have a proper and valid search warrant." A bill of exceptions recites that there was a hearing on the motion, at which certain evidence was introduced, appellant's verified motion being all the evidence introduced in its support; that the court then overruled the motion; and that appellant excepted to the ruling, and he has assigned it as error. Appellant's guilt of the offense charged would not necessarily depend upon whether or not the search warrant under which any particular whisky was seized was lawfully issued. If he kept any at all with the alleged unlawful intent, he thereby violated the law. A motion asking leave to withdraw a plea of guilty is addressed to the sound legal discretion of the trial court, and, in the absence of an affirmative showing that its discretion was abused, overruling such a motion is not error. Monahan v. State, 135 Ind. 216, 218, 34 N. E. 967; Peters v. Koepke, 156 Ind. 35, 39, 40, 59 N. E. 33; Dobosky v. State, 183 Ind. 488, 491, 109 N. E. 742; Atkinson v. State, 190 Ind. 1, 128 N. E. 434; Rowe v. State (Ind. Sup.) 133 N. E. 2.

[3] The showing made in support of appellant's request that the plea of guilty be withdrawn was not such as to make it an abuse of discretion to overrule his motion. After judgment had been rendered on the plea of guilty, appellant filed a motion for a new trial. Overruling this motion is assigned as error. But such a motion presents no question for review where there has been no trial. Meyers v. State, 156 Ind. 388, 59 N. E. 1052;

Jackson v. State, 161 Ind. 86, 67 N. E. 690; Ewbank, Criminal Law, § 554.

[4] Immediately before judgment was rendered, but after the motion for leave to withdraw the plea of guilty had been overruled, at a time when nothing was before the court except the matter of rendering final judgment on the plea of guilty and imposing sentence, appellant filed a motion for change of venue from the judge. This motion was overruled, and appellant excepted. There was no available error in this ruling. Not being made until after the cause had been fully disposed of in all particulars except the formal rendition of judgment on the plea of guilty, the motion for a change of judge came too late. Ickes v. Kelley, 21 Ind. 72; Hunnel v. State, 86 Ind. 431, 433.

Such a change is authorized only where the party shows by his affidavit that he "cannot receive a fair trial" of some issue that remains to be heard. Section 2074, Burns' 1914, § 203 (Acts 1905, c. 169, p. 628); Shoemaker v. State, 189 Ind. 426, 432, 127 N. E. 801.

[5] The other questions discussed by counsel, even if decided in his favor, would not lead to a reversal of the judgment based on the plea of guilty, and need not be further considered.

The judgment is affirmed.

TRAVIS and WILLOUGHBY, JJ., concur in result.

William S. COOK v. STATE of Indiana. (No. 24281.)

(Supreme Court of Indiana. Jan. 29, 1924.)

Appeal from Circuit Court, Clay County; Thos. W. Hutchinson, Judge.

B. V. Goshorn, of Clay City, and Gerdink & Gerdink, of Terre Haute, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward Franklin White, Deputy Atty. Gen., for the State.

PER CURIAM. The facts of this case are the same as those of Carr v. State (No. 24280), 142 N. E. 378, decided on this date, and on the authority of that case the judgment is affirmed.

FAME LAUNDRY CO. of INDIANA v. HENRY. (No. 24567.)

(Supreme Court of Indiana. Jan. 29, 1924.)

1. Municipal corporations ⟸706(1)—Complaint held to seek damages for personal injuries and allegation negativing contributory negligence was unnecessary.

Complaint *held* to seek damages for personal injuries to plaintiff and not for injury to his bicycle and hence Burns' Ann. St. 1914, § 362, applied, and plaintiff was not required to negative contributory negligence.

2. Municipal corporations ⟸706(1)—Complaint held not to show contributory negligence of bicycle rider.

In an action for injuries to bicycle rider struck by defendant's truck, amended complaint *held* not affirmatively to show plaintiff was contributorily negligent.

3. Master and servant ⟸329—Complaint held not demurrable for failure to allege servant acted within scope of employment.

In an action for injuries amended complaint specifically alleging that the truck which struck plaintiff was one of defendant's trucks, and that it was in the possession and control of and was driven by one of defendant's servants, *held* not demurrable for failure to allege the servant was acting within the scope of his employment, in view of the presumption to that effect.

4. Appeal and error ⟸272(2)—Exceptions to instructions on first day of following term held taken too late for consideration.

Where instructions were given the jury on March 8, the fifty-fifth judicial day of the January term, and were made part of record without a bill of exceptions on March 25, which was the seventieth judicial day, but no exceptions were taken until April 5, which was the first day of the April term, the exceptions then taken were taken too late to be considered on appeal, under Burns' Ann. St. 1914, § 561.

5. Trial ⟸82—Grounds of objection to evidence must be fully and definitely stated.

Grounds of objection to the admission of evidence must be fully and definitely stated.

6. Appeal and error ⟸231(5)—Objection to admission of testimony held too indefinite, uncertain, and general to present question as to admissibility.

In an action for injuries in which plaintiff on cross-examination asked witness what, if anything, defendant's driver said when in the doctor's office after the accident happened, objection that driver's remarks would not be binding on defendant *held* too indefinite, uncertain and general to present any question as to the admissibility of the evidence.

7. Appeal and error ⟸232(2)—Objection not made in trial court will not be considered on appeal.

An objection to the admissibility of evidence not made in the trial court will not be considered on appeal.

Appeal from Circuit Court, Boone County; W. H. Parr, Judge.

Action by Bernard Henry by his next friend against the Fame Laundry Company of Indiana. Judgment for plaintiff, and defendant appeals. Transferred from Appellate Court under section 1394, Burns' Ann. St. 1914. Affirmed.

Superseding former opinion, 131 N. E. 411.

Featherngill & Drybread, of Franklin, for appellant.

A. G. Otto, of Indianapolis, for appellee.

WILLOUGHBY, J. An action was brought by the appellee, by his next friend, against appellant to recover damages for personal injuries alleged to have been suffered by plaintiff on account of a collision with one of defendant's delivery trucks.

The action was begun by the filing of the complaint in one paragraph, to which the defendant filed a motion to make more specific, which motion was sustained, and the plaintiff filed an amended complaint. To this amended complaint the defendant filed its demurrer, which was overruled by the court, and the defendant answered by general denial. Afterward the plaintiff filed what is designated as the second paragraph of complaint, to which defendant filed its answer in general denial. The cause was submitted to the jury for trial, and the jury returned a verdict in favor of the plaintiff for the sum of $750. Judgment was rendered on the verdict, from which this appeal is taken.

The errors assigned are: (1) The trial court erred in overruling appellant's demurrer to the complaint. (2) The trial court erred in overruling appellant's motion for a new trial.

The amended complaint, omitting the caption and signature, is substantially as follows:

"The plaintiff, Bernard Henry, suing by his next friend, Edward Henry, in his amended complaint complains of the defendant in the above-entitled cause of action and says:

"That the defendant, the Fame Laundry Company of Indiana, is a corporation organized and doing business under and by virtue of the laws of the state of Indiana, and as such is engaged in the laundry business in the city of Indianapolis, Indiana. That the defendant in order to carry on its business and to collect and deliver parcels and packages of laundry in and around, over and in the immediate vicinity of the city of Indianapolis, uses a number of automobiles that are thus operated and in charge of its servants, employees and agents and that during the month of August, 1918, the defendant had in its employment a certain number of drivers and chauffeurs to run and operate its automobiles in connection with its laundry business.

"Plaintiff says that on or about the 28th day of August, 1918, * * * as he was riding his bicycle along, over and upon Harding street in the afternoon of said day, while it was yet full daylight, at a reasonable rate of speed, he was obliged to pass a load of garden truck that had driven so close to the curb on the right side of the street that this plaintiff was obliged in passing said load of truck to turn out to the left; that before he had passed said load of truck a boy companion, who had preceded him, called out to him to look out, and, not knowing what the danger was and having no time to look, he ran his bicycle to the extreme other side of the street, next to the curb; that just as he reached or was about to reach that part of the street, one of the defendant's servants, employees, agents, operators, or chauffeurs having in his possession and under his control and driving one of the defendant's automobiles, came up behind this plaintiff while he was riding his bicycle and without plaintiff hearing or knowing that any one was behind him in any kind of an automobile, and that the defendant, without any warning and with a careless and negligent disregard of other persons on the street, carelessly failed to notice and failed to see this plaintiff and carelessly failed to give any warning to this plaintiff, and while running at an unusual, high rate of speed, carelessly and negligently failed to give warning to or to see this plaintiff and carelessly and negligently run defendant's automobile over, onto and upon this plaintiff and over plaintiff's bicycle, greatly injured this plaintiff, * * * and from such injuries plaintiff has not recovered.

"Plaintiff says that by reason of the defendant's carelessness and negligence in running the automobile at a high rate of speed, carelessly failing to look ahead to see where the automobile was going and failing to give any warning to this plaintiff, that he was injured; that his arm was broken, a large gash was inflicted over his eye; that his legs, arms, head, eye, face and body were greatly injured; that his hip was injured and he has been obliged to engage the services of a physician at a great outlay of money; that he has already paid for such medical services more than ten dollars and is even now under the care of a physician; that he was obliged to be confined to his bed for several days; that his arm was placed in splints for more than six weeks, and that his arms, legs and body were bruised and were black and blue for a long time; that he has lost much valuable time and has suffered and still suffers much pain and mental anguish all to his damage in the sum of one thousand dollars.

"Plaintiff says that Harding street, where the injury occurred, is a smooth street and sufficiently wide for the defendant to have passed plaintiff in safety; had he used ordinary care and had exercised the use of his eyesight he could not have failed to have seen the plaintiff and avoided injuring him. Wherefore plaintiff sues and demands one thousand dollars damages, costs of this action, and for all other proper relief in the premises."

[1] The defendant demurred to the amended complaint, alleging that it did not state facts sufficient to constitute a cause of action. It appears from the memorandum filed with such demurrer that the defendant pointed out as an objection to said complaint that it was a suit to recover damages for injury to personal property and that the complaint did not allege that the plaintiff was free from contributory negligence. There is no merit in this objection for the reason that said amended complaint did not seek to recover damages for injury to personal property, but sought damages on account of personal injuries, which plaintiff alleges he received by reason of the negligent conduct of the defendant. It is true that the complaint alleges

that the plaintiff was the owner of a very fine bicycle, and that it was in fair and good condition, and that by the collision with defendant's delivery truck plaintiff's bicycle was destroyed and that his clothing was torn, but no claim for damages is made for such injury in the complaint.

That part of the complaint in which damages are asked says that the plaintiff was injured, describing his injuries; that his legs, arms, head, eyes, face, and body were greatly injured; that he was obliged to engage the services of a physician, that he has paid out for such services the sum of $10; that he was confined to his bed for several days; that his arm was placed in splints more than six weeks; that his arms and back were black and blue and he has suffered and still suffers much pain and mental anguish—concluding with a demand for $1,000 in damages. This damage is claimed solely on account of the alleged personal injuries of plaintiff, therefore, the provision of section 362, Burns' 1914, prevails.

In that statute it is provided that contributory negligence on the part of the plaintiff or such other person shall be a matter of defense, and such defense may be proved under the answer of general denial.

[2] The defendant further claims that the facts stated in said amended complaint affirmatively show contributory negligence on the part of the plaintiff. A description of his injuries and the manner of their infliction is set out in full in the amended complaint and we find nothing therein which would warrant such conclusion of the defendant.

[3] It is argued by the defendant that it does not appear by the allegations in the complaint that the driver of the automobile was acting within the scope of any employment by the defendant.

Huddy on Automobiles (3d Ed.) § 281, p. 307, says:

"That where an automobile is operated by a person employed for that purpose, it will be presumed that he is acting within the scope of his authority and about his employer's business. * * * As to whether the chauffeur is acting within the scope of his employment, the rule is laid down that where a servant, who is employed for the special purpose of operating an automobile for the master, is found operating it in the usual manner such machines are operated, the presumption naturally arises that he is running the machine in the master's service. If he is not so running it this fact is peculiarly within the knowledge of the master, and the burden is on him to overthrow this presumption by evidence which the law presumes he is in possession of." Long v. Nute, 123 Mo. App. 204, 100 S. W. 511; Moon v. Matthews, 227 Pa. 488, 76 Atl. 219, 29 L. R. A. (N. S.) 856, 136 Am. St. Rep. 902; Guinney v. Hand, 153 Pa. 404, 26 Atl. 20.

In the complaint it is alleged that the defendant was engaged in the laundry business in the city of Indianapolis, Indiana; that in order to carry on its business and to collect and deliver parcels and packages of laundry in and around, over and in the immediate vicinity of the city of Indianapolis, it used a number of automobiles that are thus operated and in charge of its servants, employees, and agents, and that during the month of August, 1918, the defendant had in its employment a certain number of drivers and chauffeurs to run and operate its automobiles in connection with its laundry business; that one of defendant's servants, employees, agents, operators, and chauffeurs, having in his possession and under his control and driving one of the said automobiles, came up behind this plaintiff while he was riding his bicycle and without plaintiff hearing or knowing that any one was behind him in any kind of an automobile, and that the defendant did without any warning, and with a careless and negligent disregard for other persons on the street, carelessly fail to notice and failed to see this plaintiff, and carelessly failed to give any warning to this plaintiff, and, while running at an unusual high rate of speed, carelessly and negligently failed to give warning or to see this plaintiff and carelessly and negligently ran defendant's automobile over, onto and upon this plaintiff, etc.

The allegation is specific that it was one of defendant's automobiles that was run over the plaintiff, and that it was in the possession and control and was driven by one of the defendant's servants, employees, agents, operators, of chauffeurs. The amended complaint is not open to the objections urged against it, and no error was committed by the court in overruling the demurrer thereto.

No objection was made to the second paragraph of complaint. However, it may be stated that it contained all the material allegations of the amended complaint herein.

[4] It is argued by the appellant that certain instructions given by the court were erroneous, but there is no question before the court on the instructions. It appears from the record that the instructions were given to the jury on March 8, 1920, that being the fifty-fifth judicial day of the January term, 1920, but that such instructions were made a part of the record without a bill of exceptions on March 25, 1920, being the seventieth judicial day of the January term, 1920; that there were no exceptions taken to such instructions or any one of them until April 5, 1920, which was the first day of the April term of said court. The exceptions taken by appellant to the instructions were not taken in time, and such instructions cannot be considered on appeal. See Burns' 1914, § 561; Speck v. Kenoyer, 164 Ind. 431, 73 N. E. 896; Strong v. Ross, 36 Ind. App. 174, 75 N.

E. 291; Baker v. Gowland, 37 Ind. App. 364, 76 N. E. 1027.

[5, 6] The tenth paragraph in appellant's motion for a new trial is as follows:

"The court erred in permitting the witness, Carrie Henry, over the objection of the defendant to answer the following question, propounded to her by the plaintiff on direct examination, relative to the conversation of a driver of the automobile, in the doctor's office some time after the accident: 'What, if anything, did he (the driver) say?' To which the witness answered: 'He says to me, I think, I am through with automobiles now, I never saw the body. He said he saw the one chap, but didn't see the other one.'"

An examination of the record shows that the only objection made to this question was that the same "is and would not be binding on the defendant company." The objection was too indefinite, uncertain, and general to present any question as to the admissibility of the evidence.

When objections are made to the admission of evidence, the grounds of the objection must be fully and definitely stated. Indianapolis Traction Co. v. Howard, 190 Ind. 97, 128 N. E. 35; Underhill v. State, 190 Ind. 558, 130 N. E. 225; Marietta Glass Co. v. Pruitt, 180 Ind. 434, 102 N. E. 369.

[7] An entirely different objection to the question is urged by appellant in this court, but it is well settled that objections to the admission of evidence not made in the court below will not be considered on appeal. Musser v. State, 157 Ind. 423, 61 N. E. 1; Underhill v. State, 190 Ind. 558, 130 N. E. 225.

It is further contended by appellant that the verdict of the jury is not sustained by sufficient evidence, and is contrary to law. Appellant contends that neither paragraph of the complaint states a cause of action. We have held that the demurrer to the amended complaint was properly overruled. To the second paragraph of complaint no demurrer was filed. The appellant in its brief admits that "there is no substantial difference in the two paragraphs." An examination of the record discloses some evidence tending to support every material allegation in the complaint. The verdict is sustained by sufficient evidence, and is not contrary to law.

Judgment affirmed.

MENO v. STATE. (No. 24339.)

(Supreme Court of Indiana. Jan. 18, 1924.)

1. Intoxicating liquors ⇐211—Charge that defendant unlawfully kept liquor with the intent to sell and otherwise dispose of it held sufficient.

The charge that defendant unlawfully kept intoxicating liquors with intent to sell, barter, or give away, furnish, exchange, or otherwise dispose of it, in violation of Burns' Ann. St. Supp. 1921, § 8356d, *held* sufficient to support a judgment of conviction, notwithstanding failure to describe the acts showing how he committed the offense.

2. Indictment and information ⇐95—Pleading of ultimate facts sufficient.

The ultimate facts are all that are required in pleading an offense.

3. Indictment and information ⇐125(14)—Count alleging the manufacture, transportation, and possession with intent to sell held good.

Count alleging the unlawful manufacturing, transportation, and possession of intoxicating liquor with intent to sell, barter, give away, furnish, exchange, and otherwise dispose of it, in violation of Burns' Ann. St. Supp. 1921, § 8356d, *held* good as against contention that it charged several distinct offenses in one count.

4. Indictment and information ⇐86(3)—Affidavit charging maintenance of liquor nuisance need not designate place with certainty.

An affidavit charging the maintenance of a liquor nuisance, in violation of Burns' Ann. St. Supp. 1921, § 8356t, need not designate the place and describe the location of the nuisance with certainty, an allegation as to the commission of the offense within the county being sufficient.

5. Indictment and information ⇐203—In prosecution for two offenses, a general verdict supported by evidence not reversed because of unconstitutionality of one statute.

In a prosecution for unlawfully keeping intoxicating liquor with intent to sell, under Burns' Ann. St. Supp. 1921, § 8356d, and for maintaining a liquor nuisance, in violation of section 8356t, a general verdict of guilty will not be reversed on the ground that section 8356t is unconstitutional, where there was ample evidence to prove defendant guilty of violating section 8356d.

6. Criminal law ⇐878(2)—General verdict of guilty construed as being on offense proved where only one was proved.

Where affidavit charges two or more offenses, a general verdict of guilty will be construed as being upon the offense proved where only one was so proved.

7. Constitutional law ⇐46(1)—Constitutional questions not considered on appeal where decision not necessary.

Generally appellate courts will not decide constitutional questions when the case under consideration can be disposed of upon other grounds.

8. Criminal law ⇐394—Searches and seizures ⇐3—Evidence obtained in invited search admissible notwithstanding invalidity of warrant.

Where officers told defendant that they had a search warrant for his premises, and the defendant replied, "All right, go right on, * * * search all you want to," the evidence obtained was admissible, though the search warrant with

which the officers were armed was invalid, the search in such case being invited.

9. Criminal law ⟸957(1)—Juror not permitted to impeach verdict in support of motion for new trial.

A juror will not be permitted to impeach his verdict either by affidavit or oral testimony in support of a motion for a new trial.

10. Criminal law ⟸1178—Objections to evidence not set out in appellant's brief not considered.

Objections to evidence not set out in appellant's brief will not be considered on appeal.

11. Criminal law ⟸1186(4)—Instructions as to presumption and prima facie proof of intent held harmless in view of evidence.

In prosecution for possession of liquor with intent to sell or otherwise dispose thereof, instructions as to presumption of intent to sell from possession, and as to prima facie proof of intent from proof of possession, *held* harmless, and therefore not ground for reversal, under Burns' Ann. St. 1914, § 2221, in view of evidence other than that of possession, proving such intent.

12. Intoxicating liquors ⟸236(7)—Proof of possession not prima facie proof of intent to sell or dispose thereof.

In prosecution for unlawful possession of intoxicating liquor with the intent to sell or otherwise dispose thereof, proof of the possession of a quart of whisky was not prima facie proof of intent to sell or dispose thereof.

13. Criminal law ⟸1178—Objection not stated in appellant's brief not considered.

Objection to exhibit not stated in appellant's brief will not be considered.

14. Criminal law ⟸1038(3)—An appellant who did not tender more complete instruction on subject cannot complain that instruction given was incomplete.

An appellant cannot complain that an instruction is incomplete, where he did not tender a more specific instruction upon the subject.

Appeal from Circuit Court, Washington County; James Tucker, Judge.

Thomas Meno was convicted of manufacturing, transporting, and possessing intoxicating liquor, of keeping liquor with intent to sell, of the unlawful possession of a still, and of maintaining a liquor nuisance, and he appeals. Affirmed.

Robt. L. Mellen and Logan R. Browning, both of Bedford, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward F. White, Deputy Atty. Gen., for the State.

TRAVIS, J. This was a prosecution based upon an affidavit in four counts. The first and fourth counts charged, as to the first count, the unlawful manufacture, transportation, and possession of intoxicating liquor, the keeping intoxicating liquor with intent to sell, barter, give away, furnish, exchange, and otherwise dispose of the same; and, as to the fourth count, the unlawful possession of a certain still, devise, and property for the manufacture of intoxicating liquor intended for use in violation of the laws of this state, in violation of amended section 4; the second count charged the violation of section 15; the third count charged the unlawful maintaining and assisting in maintaining a common nuisance, a room, house, etc., where intoxicating liquors were unlawfully sold, bartered, given away, manufactured, and delivered, and where persons were permitted to resort for the purpose of drinking such intoxicating liquors, and that intoxicating liquors were kept in such house and room, and did use the same in maintaining such place, in violation of section 20 of the Prohibition Law, Acts 1921, p. 736, section 8356d, Burns' Supp. 1921, Acts 1917, p. 16, section 8356o, Burns' Supp. 1921, and Acts 1917, p. 25, section 8356t, Burns' Supp. 1921, respectively.

Count 2, which charged the unlawful possession of intoxicating liquor received from a carrier in this state, was dismissed after the close of the evidence and before the argument to the jury was commenced. The jury returned a general verdict of guilty, by which it fixed appellant's punishment at a fine of $500, and that he be imprisoned in the penal farm for 180 days, from which appellant appeals.

The errors assigned and which are relied upon to reverse the judgment are: (a) Overruling appellant's separate and several motions to quash each count of the affidavit; (b) overruling the motion for a new trial; (c) overruling motion in arrest of judgment.

The causes for a new trial which are relied upon in appellant's brief are: (a) The verdict is not sustained by sufficient evidence; (b) the verdict is contrary to law; (c) error in the admission of, and refusal to exclude, evidence; (d) error in giving instructions.

The scene of this action lies in the village of Reed's Station, Lawrence county, in the small dwelling, the barn, and outbuildings situate therein, where the illicit intoxicating liquor and part of a still were found. The chief of police of Bedford, sheriff, and federal prohibition officer, armed with a search warrant, on a Sunday afternoon went to the premises named. They found the ground floor front room of the dwelling was used for a dry beer saloon, which was fitted with a bar, drinking glasses, cash register, and a stock of pop and dry beer in cases. A part of the second floor was used for gambling rooms. At the time of arrival of the officers they found appellant with several men in an upstairs room, some of whom were playing poker. One of the officers informed appellant and the others that they had a search

warrant for the search of the premises, to which statement appellant replied, "All right, go right on. There is nothing about here, go right on, and search all you want to," and replied in answer as to whether he had charge of the premises, "I have." Appellant then proceeded with the officers in making the search, in the course of which 21 gallons of intoxicating liquor were found in bottles and jugs. Six or eight bottles were found in a woodpile in the cellar of the house. One quart bottle of the liquor was found in a room adjoining the barroom under a bed mattress. Some was found in an outbuilding used as a chicken house, and some was found under a manger in the barn, which was a part of the premises. Appellant's father had been sleeping in one of the rooms of the dwelling, and in answer to a question as to who owned the liquor appellant said the liquor was his father's, but before the conversation was completed stated that the liquor belonged to him. The officers also found a part of a still, a copper lid to a boiler, and a small copper coil in a closet under the stairway. Some of the liquor with the containers, and the return to the search warrant, together with the certified copies of the records of the Lawrence circuit court and city court of Bedford of former convictions of appellant for violation of the Prohibition Law, were admitted over the objection of appellant.

Appellant's motion to quash the several counts of the affidavit, for the reasons that they are defective in "not defining the offenses more particularly," and that "no acts of appellant are described," describing how he committed the offense, and "that several distinct offenses are charged with no particular facts alleged," was correctly overruled.

[1] The charge that defendant unlawfully kept the intoxicating liquor with intent to sell, barter, give away, furnish, exchange, and otherwise dispose of it is a sufficient description of his acts in violation of the law, and with such particularity that a finding or verdict of guilty of the offense will support a judgment. Lipschitz v. State, 176 Ind. 673, 96 N. E. 945.

[2] The objection that no acts of appellant are described showing how he committed the offense cannot be sustained, for the reason that so holding would be to hold it necessary to plead evidentiary facts. The ultimate facts are all that are required in pleading an offense.

[3] The objection that several distinct offenses are charged in count 1 is not well taken. It has been held that a count of affidavit which charges an offense is not erroneous, because it charges two or more distinct acts in violation of the statute, which acts are designated therein. Bishop's New Criminal Law, § 436; Lennard v. State (Ind. Sup.) 132 N. E. 677; Howard v. State (Ind. Sup.) 131 N. E. 403.

[4] Objection is made that the third count, which charges the maintenance of a common nuisance, does not designate the place and describe the location of the alleged nuisance with certainty. "Place," as contemplated by appellant in his objection, is not the essence of the offense. To allege the commission thereof as having taken place in the county is sufficient. Donovan v. State, 170 Ind. 123, 83 N. E. 744.

Finally, appellant says that his motion to quash ought to have been sustained, because section 20 and that part of amended section 4 which makes it an offense to have or possess any still for the manufacture of liquor intended for use in violation of the laws are unconstitutional.

[5, 6] Appellant does not challenge the constitutionality of that part of section 4 of the Prohibition Law enacted in 1917, re-enacted by amended section 4, so that a verdict of guilty of unlawfully keeping such intoxicating liquor with intent, etc., would be valid. It is to be remembered that the verdict was general. Under a prosecution for violation of sections 4 and 20, a judgment on a general verdict of guilty is not erroneous (Barksdale v. State, 189 Ind. 170, 125 N. E. 515), and where the affidavit, as in this case, charges two or more offenses, a general verdict of guilty will be construed as being upon the offense proved, where only one was so proved (James v. State, 190 Ind. 629, 130 N. E. 115). There was ample evidence to prove appellant guilty of unlawfully keeping intoxicating liquor with intent to sell the same.

Appellant is charged with three offenses in three separate counts. If it be granted that two of the counts were based upon statutes or parts of statutes that are unconstitutional, and that one count stated an offense, in considering alleged error in overruling the motion to quash the affidavit it will be presumed that the general verdict of guilty is based upon the good count of the affidavit. Stucker v. State, 171 Ind. 441, 84 N. E. 971; Wallace v. State, 189 Ind. 562, 128 N. E. 604; Walker v. State (No. 24287), 142 N. E. 16, this term; Barksdale v. State, supra.

The conviction in this case can be upheld, in so far as it is necessary that it be based upon a good count of the affidavit, for the first count charging the keeping, etc. with intent, etc., was good as against the motion to quash. It follows, considering alleged error at the trial, and the verdict being general, that the verdict was a conviction upon the good count only. So, it being possible to decide this case upon other than constitutional grounds, the court will not consider the constitutional questions.

[7] It may be stated as a general rule that appellate courts will not decide constitutional questions when the case under consideration can be disposed of upon other grounds. Regadanz v. State, 171 Ind. 387, 393, 86 N. E.

449; McElwaine-Richards Co. v. Wall, 166 Ind. 267, 76 N. E. 408; White v. Sun Pub. Co., 164 Ind. 426, 73 N. E. 890; Chicago Ry. Co. v. Railroad Com., 39 Ind. App. 358, 79 N. E. 927.

The judgment being upheld upon the count held good, and to which no constitutional question is raised, there is no imperative necessity that the constitutional questions be considered in order to decide the case at bar. Grand Lodge v. Clark, 189 Ind. 373, 127 N. E. 280; Poer v. State, 188 Ind. 55, 121 N. E. 83; Hunt v. State, 186 Ind. 644, 117 N. E. 856; School City v. Harrison Twp., 184 Ind. 742, 112 N. E. 514; Shafer v. Shafer, 181 Ind. 244, 104 N. E. 507.

[8] It is alleged that the verdict was not sustained by sufficient evidence, for the reason that all the evidence to sustain the verdict was procured through the execution of an invalid search warrant. The evidence that is most favorable to the appellee, as taken from the narration in appellant's brief, and as hereinbefore narrated, most convincingly proves that appellant made no objection to the search, but invited the officers to make the search, and accompanied them during a part of the search of the buildings and premises. It is unnecessary that the officers have a valid search warrant to make a search, when the search is invited and permitted by the one against whom the charge of violation of the law is made, even though the validity of the search warrant is questioned, and the accused having invited a search, it will be presumed that the search was made upon the invitation rather than upon the warrant. It is therefore unnecessary to consider the error predicated upon the search warrant. Hess v. State (Ind. Sup.) 133 N. E. 880.

[9] It is claimed that the verdict is contrary to law for the reason that three jurymen disregarded the instructions of the court without good and sufficient reason, as disclosed by their separate affidavits to that effect, which were filed with the motion for a new trial. This question will not be considered for the reason that a juror will not be permitted to impeach his verdict, either by affidavit or oral testimony, in support of a motion for a new trial. Houk v. Allen, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706.

[10] Appellant claims error in the introduction of certain evidence over his objection. The court cannot consider the question, for the reason that the objections are not set out in appellant's brief. Totten v. Am. Ry. Ex. Co. (Ind. App.) 135 N. E. 152; Union Trac. Co. v. City of Muncie (Ind. App.) 133 N. E. 160; Robinson v. State, 185 Ind. 119, 113 N. E. 306; Am., etc., v. Indpls., etc., Co., 178 Ind. 133, 98 N. E. 709.

Error is predicated upon the giving to the jury of each of six instructions tendered by the state. The first instruction said, "The charge in this case is an affidavit and reads as follows," then follows all four counts without eliminating the second count, which had been dismissed by the state, after which were quoted the sections of the statute upon which the counts were based. To say the least, instructing the jury that appellant was charged with violation of the law as alleged in count two, there being no such count in the affidavit after having been dismissed, was misleading. It was error to give it, but, inasmuch as it is held that count 1 is good as against the motion to quash, and that the verdict is general, it cannot be said that the verdict is based on count 2, which was dismissed, but it will be presumed the verdict is related only to the good count.

Instruction No. 2 was concerning the search warrant, and told the jury that, inasmuch as appellant invited the officers to search the premises, they had a legal right to make the search; it did not matter whether the search warrant was valid or not. Inasmuch as this opinion holds that it was not error to admit evidence procured in the search over the objection of appellant that the search warrant was not according to law, appellant having invited the officers to search, it is held that the instruction presents no error.

[11] Instruction No. 3 pretends to instruct concerning intent, and says that, finding that accused had possession of the intoxicating liquor unlawfully, the jury might then presume that such unlawful possession was with intent to unlawfully dispose of it. This instruction was not so worded that the jury would be guided to the correct application of the evidence to establish intent, from which it may be said it ought not to have been given in the form tendered, and it may be also said that the giving of it did not mislead the jury, therefore that it was not prejudicial to the accused.

[12] Instruction No. 4 is as follows:

"I instruct you that, if you find that the defendant had more than one quart of white mule whisky on or about February 12, 1922, in his possession, the statute makes it a prima facie case against him that he kept the liquor to sell, barter, give away, or otherwise unlawfully dispose of it."

Where, in the Prohibition Law of 1917 or amendments thereto, authority is found for this instruction, the court is unable to find. To instruct that possession of one quart of intoxicating liquor is prima facie proof of intent to sell, barter, give away, or otherwise unlawfully dispose of it is not the law. It might be unlawful to possess any quantity of intoxicating liquor less than one quart, when all the surrounding circumstances, proven by competent evidence, were sufficient to support an inference that the possession was with the intent to dispose of it unlawfully. The giving of this instruction was error, and it should not have been given.

If there was no evidence to sustain the verdict, other than that appellant had more than one quart of whisky in his possession, the giving of instruction No. 4 would have been undeniably prejudicial error. But, inasmuch as the evidence is so clear and undisputed, and also that evidence of the house, its use, the barroom, finding of the liquor, warrant the inference that the 21 gallons of liquor were kept by appellant as his property, with the intent to sell or otherwise dispose of the same unlawfully, the jury was warranted in its verdict of guilty, even though the instruction had not been given.

Instruction No. 5 relates to the third count, which charges the maintaining of a nuisance. Inasmuch as it is held that the general verdict may apply solely to count 1, which is good, and that the constitutionality of section 20 of the Prohibition Law is questioned, which question it is not necessary for the court to decide in this case, the question of the legality of this instruction is not decided.

Instruction No. 6 stated that evidence had been introduced to show convictions of appellant in other cases similar to the one on trial, and that such evidence was to be considered to determine intent, but that it could not be considered in determining guilt or innocence.

[13, 14] Appellant's proposition is that the instruction is erroneous, for the reasons that intent is not an element of offense, that exhibits are not proper evidence to prove intent, that the instruction was misleading, and that it assumes that the keeping of the liquor was unlawful. Appellant objected to the introduction of the exhibits upon the trial, but he does not state his objection in his brief, for which reason that question is not presented. The instruction is not misleading, unless it can be said to be so because it is not complete, for which appellant cannot be heard to complain; he did not tender a more specific instruction upon the subject. Phillips v. State, 190 Ind. 159, 129 N. E. 466; Flatters v. State, 189 Ind. 287, 127 N. E. 5; Corn v. State, 177 Ind. 158, 97 N. E. 421.

From the above it cannot be said that the instruction was misleading. The letter of the instruction does not assume that the keeping of the liquor was per se unlawful, and it may be said with as much assurance that an analysis of it will not develop such an interpretation.

Appellant maintains that his motion in arrest of judgment was erroneously overruled, for the reasons that each of the counts of the affidavit was insufficient to support a judgment rendered thereon, and for other causes which do not come within the statute in relation to motions in arrest. Counsel for appellant earnestly contend that the general verdict is a finding of guilty upon each count of the affidavit, for which reasons, some of the counts being bad, by just as earnest a contention, the verdict could not stand, and the judgment should be arrested. Even though it may be admitted for the sake of considering this motion that counts 3 and 4 are bad, count 1 being held to be good, the same rule might apply in deciding the question of the sufficiency of the criminal charge when attacked by a motion in arrest of judgment, as when attacked by a motion to quash. It is not neccessary to enter into the consideration of the third and fourth counts of the affidavit in relation to the motion in arrest. The verdict being general and not addressed to any particular one of the counts, and the evidence fully sustaining the charge in the first count, even though counts 3 and 4 be bad, appellant is afforded no available error, for the reason that the general verdict will be conclusively presumed to be upon the good count, so that, even though it were error to overrule his motion in arrest, it would be harmless. Stucker v. State, supra.

In the opinion of the court the verdict of guilty is sustained by the facts proven by undisputed competent evidence, and the verdict was neither induced by, nor did it depend upon, the instructions complained of.

The errors committed by the trial court did not prejudice the substantial rights of the defendant, and therefore will be disregarded. Section 2221, Burns' 1914; Walker v. State, supra; Mason v. State (1907), 170 Ind. 195, 83 N. E. 613.

Judgment affirmed.

HETRICK v. ASHBURN et al. (No. 11767.)

(Appellate Court of Indiana, Division No. 2. Jan. 31, 1924.)

1. Frauds, statute of ⇐73—Agreement to pay specified sum out of proceeds of sale of land held not within statute.

Though, under Burns' Ann. St. 1914, §§ 7463, 7466, requiring contracts for the sale of land and for commissions to be in writing, such contracts cannot be modified by parol agreement, an oral promise by vendor to pay vendee $1,000 out of the proceeds of a sale in the event that he sold the property to a third person *held* not within the statute.

2. Contracts ⇐65(3)—Release of interest held sufficient consideration for vendor's promise to repay payment on price.

An agreement by vendee under an installment contract to release his interest in the land, was sufficient consideration for extension of time by vendor and promise to repay the amount paid on the price if vendor should sell the land to a third person.

Appeal from Circuit Court, Wells County; Frank W. Gordon, Judge.

Action by Harry H. Hetrick against John N. Ashburn and others. From a judgment

for defendants, plaintiff appeals. Reversed with instructions.

Simmons, Dailey & Simmons, of Bluffton, for appellant.

E. C. Vaughn and John F. Decker, both of Bluffton, for appellees.

NICHOLS, J. The complaint in this action is in two paragraphs. The first paragraph avers, in substance, that on September 21, 1920, appellant and appellee entered into a written contract for the sale of certain real estate, by the terms of which appellee agreed to sell and appellant agreed to purchase said real estate for the price of $11,000, $1,000 of which was then paid by appellant to appellee as part purchase price, leaving a balance due of $10,000 to be paid in specified deferred payments; that by said agreement $1,500 was to be paid April 15, 1921. Before said time, and after the execution of said written contract, appellant and appellee entered into a verbal contract by which appellant was given an indefinite period of time in which to make said deferred payments, and appellant was given the privilege and right to close said contract and make said payments upon the consideration that, if appellee sold the same, he was to pay to appellant the sum of $1,000 out of the proceeds of said sale; that appellee was residing upon said real estate, held the title to the same, said contract was in full force and effect at the time said verbal agreement as above alleged was entered into, and appellee, by virtue of said verbal agreement, was to continue to occupy said farm and receive the rents and profits therefrom for the year 1921; that long prior to July 1, 1921, appellee sold, conveyed, and disposed of said real estate to one Johnson, and appellee is not now and has not been since said sale and conveyance the owner of said real estate. Appellant has performed every part of the contract to be performed by him, but appellee, after selling said real estate and receiving the purchase price therefor, has refused and neglected to pay appellant the said $1,000 agreed upon, or any part thereof, although appellant has demanded the same of him. Appellee Bertha A. Hetrick is made a party because of some claim or interest in said proceeds that she may defend.

The second paragraph, so far as here involved, is substantially the same as the first. A demurrer to each paragraph of complaint was sustained, appellant refused to plead further, and judgment was rendered in favor of appellee. The only error assigned is the action of the court in sustaining the demurrer.

[1] Appellee cites sections 7466 and 7463, Burns' R. S. 1914, which sections require contracts for the sale of land and for commission to be in writing, rightly contending that such contracts cannot be modified or altered by parol agreement, and as such enforced. The authorities which appellee cites sustain his contention, but they are not in point under the facts as alleged. The contract for the sale of the land, though set out verbatim in the complaint, is not the basis of the action. It is important only historically as explaining the relations of the parties. The action is based on the oral contract to pay $1,000 out of the proceeds of the sale of the lands described in the written contract. A promise or contract by one person to pay another a certain sum of money out of the proceeds of a sale of land is not within the statute. 27 C. J. 226; Parriss v. Jewell, 57 Tex. Civ. App. 199, 122 S. W. 399; Trowbridge v. Wetherbee, 11 Allen (Mass.) 361; Brown v. Hobbs, 147 N. C. 73, 60 S. E. 716; Randall v. Constans, 33 Minn. 335, 23 N. W. 530; Burns v. Vaught, 27 Okl. 711, 113 Pac. 906; Gwaltney v. Wheeler, 26 Ind. 415; Reyman v. Mosher, 71 Ind. 596; Mills v. Thomas (Ind. App.) 141 N. E. 314.

[2] There was a sufficient consideration for the oral agreement to pay $1,000 to appellant. At the time he had an enforceable interest in the land which he agreed to release in consideration of the extension of time, and of the agreement to repay him his $1,000 in the event that appellee should sell to a third party. The complaint states a cause of action, and the demurrer thereto should have been overruled.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

STATE ex rel. KINDER, Pros. Atty., v. SKINNER et al. (No. 11754.)

(Appellate Court of Indiana, Division No. 1. Feb. 1, 1924.)

1. Receivers ⇐142—Lien on insolvent's goods for unpaid taxes held not affected by receiver's sale.

Where a receiver did not sell "free from all liens" the goods in his possession, the lien on the goods for insolvent's unpaid delinquent taxes was not affected by the sale.

2. Receivers ⇐154(1)—Receivership costs held to have priority out of funds in receiver's hands over insolvent's delinquent taxes.

Where all the funds coming into a receiver's hands as disclosed in his final report were consumed in the costs of the receivership and in court costs, the court and its officers *held* entitled to priority for their legal fees and charges, over the county treasurer's claim for payment of insolvent's delinquent taxes.

Appeal from Circuit Court, Porter County; Charles E. Greenwald, Special Judge.

Action by the State at the relation of Kinder, Prosecuting Attorney, against Paul R. Skinner and others. The trial court sustained a demurrer to the complaint, and plaintiff appeals. Affirmed.

Bruce & Bruce, of Crown Point, for appellant.

Roe & Peterson, of East Chicago, for appellees.

ENLOE, J. On and for some time prior to the 2d day of November, 1921, one Steve Emplom was engaged in business in Lake county, Ind. On said mentioned date, said Emplom was, on petition duly filed in that behalf, adjudged to be insolvent, and the appellee, Paul R. Skinner, duly appointed as receiver for his property. The said receiver at once made his bond, in the sum as fixed by the court, with the other appellees herein as sureties thereon, and at once entered upon his duties as such receiver. Prior to the filing by the receiver of his inventory of property coming into his possession, he, upon the order of the court which had appointed him as such receiver, turned over and delivered to one William Badner, and to one Margaret Emplom, certain goods which had been, at the time said receiver was appointed, in the possession of said Steven Emplom. The receiver proceeded to sell the residue of the goods coming into his hands and realized therefor the sum of $155.47. On the 17th day of May, 1922, said receiver filed his final report in said cause, as such receiver, in which he accounted for the expenditure of all of said funds so coming into his hands—the whole of said sum being consumed in costs of said receivership and in court costs. This said report was duly approved.

On the 15th day of August, 1922, the treasurer of Lake county made a demand upon said Steve Emplom, and upon Willis E. Roe, one of the appellees herein and who was one of the attorneys for said receiver in said receivership matter, for the payment of delinquent taxes, against said Emplom, in the sum of $35.34, and payment thereof refused. Thereafter about September 12, 1922, the treasurer of Lake county filed, and presented to the court which had appointed said receiver, a petition addressed, "To the Honorable Allen Twyman, Judge City Court of East Chicago, Indiana," wherein he asked said court to order said receiver to pay to said petitioner the sum of $52.13, alleged to be due on account of delinquent taxes of said Emplom. No final action by said court has ever been taken on said petition.

This action was brought against the said receiver and his bondsmen to recover said taxes, penalty, attorneys' fees, and costs. The alleged breach relied upon being the failure of the said receiver to pay said taxes, so assessed against the said Emplom, and which were a lien upon the goods so passing into the hands of said receiver. The facts as above set forth are gleaned from the complaint filed herein, to which a demurrer was sustained. This ruling is the only question presented on this appeal.

[1, 2] It will be noted that the said goods were not sold by the said receiver free from all liens, and that the said treasurer, upon the record before us might have at once, after said sale, levied upon said goods in satisfaction of said lien. The lien for taxes unpaid was in no way affected by said sale. Mesker v. Koch, 76 Ind. 68; City of Logansport v. McConnell, 121 Ind. 416, 23 N. E. 264.

It will also be noted that, upon the record, the said treasurer did not "file exceptions to said report," prior to the approval of the same, and thus present the question involved in this case squarely to the court, but waited until after said report had been approved, and then filed the aforementioned petition addressed to the judge of said court. Although the question is only thus indirectly presented, we shall consider it. The controlling question then simply is this: Under the facts of this case, who are entitled to priority of payment, out of said fund, the court and its officers, for their legal fees and charges, or the representative of the state—the county treasurer—for taxes due and delinquent?

In the case of Knickerbocker v. McKindley, etc., Co., 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54, it was said:

"When it becomes the duty of a court of equity to take property under its own charge, through a receiver, the property becomes chargeable with the necessary expenses incurred in taking care of and saving it, including the allowance to the receiver for his services. He is the officer and agent of the court, and not of the parties; and it is a right of the court, essential to its own efficiency in the protection of things so situated, to keep them under its control, until such expenses and allowances are paid or secured to be paid."

In the case of Petersburg, etc., Co. v. Dellatorre, 70 Fed. 643, 17 C. C. A. 310, the court said:

"We consider the allowance as compensation to the receiver and his solicitors as part of the taxable costs in the case, and as such is preferred to the receiver's certificates, and entitled to prior payment."

If courts appointing receivers to take charge of property, particularly in the case of insolvents, could not be secure in the matter of costs and expenses incident to the care of such property, it would greatly hamper them in the exercise of their jurisdiction; men would not consent to give their time and services to the management of such property if the corpus thereof might be taken from them to satisfy some lien thereon to them unknown, and they be left entirely unremunerated for services rendered.

The trial court did not err in sustaining said demurrer.

Judgment affirmed.

McMAHAN, J., not participating.

UNION TRACTION CO. OF INDIANA v. GROHS. (No. 11684.)

(Appellate Court of Indiana, Division No. 2. Jan. 18, 1924.)

1. Railroads ⇐274(2)—Duty to keep depot and platforms safe not extended to premises not adapted to invitee's business.

The duty of a railroad company to keep its depot and platforms safe for persons having occasion to use them does not extend to such portions of the premises as are obviously not adapted to, or used for, or necessary for, the transaction of the business for which such person is on the premises, and if he goes to such places he puts himself outside the protection of his invitation upon the premises of the company, and it is not responsible for injuries sustained at such places, unless it inflicts them wantonly and purposely.

2. Railroads ⇐274(2)—Injuries received by invitee, seeking to purchase ticket, held not actionable.

Where the business of an invitee at a freight and passenger depot was to purchase a ticket and to check his baggage when same arrived, and when presenting himself at the ticket office the agent was absent on business to the basement, and there was no necessity for invitee to go upon an exclusive freight platform to search for the agent, a verdict for injuries from falling off the unguarded freight platform while looking for the agent cannot be sustained.

3. Trial ⇐260(8)—Refusal of instruction covered by ones given not error.

Where the question of contributory negligence was covered by instructions given, refusal of instruction thereon was not error.

Dausman, P. J., dissenting.

Appeal from Circuit Court, Wells County; Frank W. Gordon, Judge.

Action by Charles Grohs against the Union Traction Company of Indiana. Judgment for plaintiff, and defendant appeals. Reversed, with instructions to grant new trial.

J. A. Van Osdal, of Anderson, and Abram Simmons, Chas. G. Dailey, and Virgil M. Simmons, all of Bluffton, for appellant.

Aiken, Douglass & Aiken, of Ft. Wayne, and Eichhorn & Edris, of Bluffton, for appellee.

NICHOLS, J. Action by appellee for damages resulting from injuries suffered by appellee because of the alleged negligence of appellant in failing to maintain a guard rail on its freight platform and steps thereto, at its station in the city of Kokomo, Ind., from which platform or steps appellee fell and was thereby injured.

There was an answer in denial, a trial by jury which resulted in a verdict in favor of appellee for $1,000, on which after appellant's motion for a new trial was overruled there was judgment for appellee. The only error assigned in this court is the action of the court in overruling appellant's motion for a new trial, the reasons for which are hereinafter considered.

The undisputed facts as established by the evidence are that appellant in connection with its line of railroad owned and maintained a freight and passenger depot, waiting room, station, and ticket office in the city of Kokomo. The building used for the purposes above mentioned faced the west, and there was a street on the west of the building. There were four doors on the west side of the building used for a passenger station, waiting room, and ticket office, through which passengers and prospective passengers entered the waiting room. They were double doors, and the ticket office was about directly to the east of them. There was a door in the waiting room on the south side that led outside of the building, which door was about 10 feet from the ticket office. The waiting room was about 40 feet square. There was cement outside of the waiting room on the south side and south of the door on the south side, and there was a platform for handling freight, and a spur of the track, and a place south of the door on the south side, provided for trunks and for the handling of baggage and express. The platform extended east along the south side of the building and with the building and was 12 feet wide at the east and so continued up to within about 14 feet of the west end, where there was a jog in the building so that the platform from that point to the west end thereof was six feet wide. It was about 5 feet high all the way back, and was a board platform. There were steps at the west end leading from the surface up to the top of the platform. These steps, five in number, were located about 15 feet east of the door on the south side of the waiting room, were made of wood, and were 3 feet wide, and the platform extended south of the steps about 3 feet. Said platform was used for the storage of freight and for loading and unloading freight and for no other purpose, and the steps before mentioned were used for the purpose only of ascending said platform for the purpose of storing freight thereon and loading and unloading freight, and said steps and platform were never used for passengers or by passengers, or for or by prospective passengers. Appellee on the morning of October 15, 1919, was in the city of Kokomo, in connection with a vaudeville, doing a dancing act, and desired to become a passenger over appellant's line on the morning of October 16, 1919, from Kokomo to Ft. Wayne. Some time in the forenoon on said October 15th, appellee went to the station of appellant, entered the waiting room through one of the west doors, went to the ticket office and interviewed the ticket agent in reference

to the purchase of a ticket to become a passenger on the next morning. He was informed by the ticket agent that if he would come to the station between 11 and 12 o'clock that night he would be furnished a ticket and that his baggage would be checked. When appellee came to the station that night at the time mentioned, he went to the ticket window, but found no one in the ticket office. Thereupon he left the ticket window, went out of the waiting room through the south door and ascended the steps to the freight platform upon which he walked about 75 feet to near the east end thereof, where he inquired of some men who were handling freight as to where he might find the ticket agent. These men informed him that he might find such agent at the ticket office. He then walked back over the platform and at the west end walked off the same, falling to the surface on the cement, and was thereby injured. Appellee knew that the steps were there, having ascended them in going on to the freight platform. There were electric lights on the platform extending along the center of the same from one end to the other, and there were lights in the waiting room. Appellee testified that as he ascended the steps to the platform he felt his way very carefully with his hands. He also testified that he saw the lights along the center of the platform. The ticket agent was only absent from the office about five minutes, being upon business in the basement. Upon his return appellee came to the ticket window and purchased his ticket, and as soon as the baggage arrived had it checked.

In order that appellee may recover in this action it must appear by the evidence that there was a duty upon the part of appellant to protect him from the injury of which he complains, at the place where he received the same, that appellant failed to perform its duty in that regard, and as a result of such failure appellant was injured. The question is not whether appellant owed a duty to some one to place a guard rail upon the platform or steps, but whether it owed such duty to appellee. Unless it owed such duty to appellee there can be no recovery. Thompson on Negligence, vol. 1, § 2, p. 2; Salem Bedford Stone Co. v. O'Brien, 12 Ind. App. 217, 40 N. E. 430; South Bend Iron Works v. Larger, 11 Ind. App. 367, 39 N. E. 209; Evansville & Terre Haute R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783. The last case stated the rule to be that—

"The owner of premises is under no legal duty to keep them free from pitfalls or obstructions for the accommodation of persons who go upon or over them merely for their own convenience or pleasure, even where this is done with his permission. In such case the licensee goes there at his own risk, and, as has often before been said, enjoys the license with its concomitant perils."

[1] The rule is well settled that it is the duty of a railroad company to keep its depot and platform safe for those persons who have occasion to use the same, and failing so to do it is liable to persons who may be injured because of its negligence; but such a rule does not extend to such portions of the premises as are obviously not adapted to, or used for, or necessary for, the transaction of the business for which such person is on the premises, and if he goes to such place he puts himself outside the protection of his invitation, and the company is not responsible for injuries he may receive, unless it inflicts them wantonly and purposely. Price v. Pecos Valley R. Co., 15 N. M. 348, 110 Pac. 565, L. R. A. 1915B, 827; Masteller v. Chicago, etc., R. Co., 192 Iowa, 465, 185 N. W. 107; Burbank v. Illinois Central R. Co., 42 La. Ann. 1156, 8 South. 580, 11 L. R. A. 720; Louthian v. Ft. Worth, etc., R. Co., 50 Tex. Civ. App. 613, 111 S. W. 665.

In the Burbank Case, supra, there were platforms on all sides of the building, the one on the south side being used exclusively for freight. The floor of this platform had been taken up. There was a lamp on the north side which threw a light along the west platform intended for the use of passengers, but this light did not reach the freight platform. The plaintiff leaving the place intended for passengers ascended an inclined plane of the south platform and fell through the opening therein. She had no business that required her to go to the south or freight platform, and the court says:

"Being a freight platform, it was not to be expected that it would be used as a promenade. In repairing this part of the platform around the depot, on the south side, and leaving it unprotected, we are of the opinion that the opening was not in the nature of a trap, and the defendant company was not guilty of that degree of gross negligence that was equivalent to intentional mischief."

It was there held that plaintiff could not recover.

In the Louthian Case the plaintiff went to the freight depot to procure a car for shipping purposes and finding the freight clerk busily engaged in a car on the side track, endeavored to transact business with him there; while standing on a gang plank affording entrance to the car, an engine, in making a coupling, suddenly moved the car, throwing the plaintiff to the ground. A recovery was denied, the court holding in effect that an office was provided for the transaction of business pertaining to freight; and no invitation was extended to the plaintiff to follow the agent into a place of danger.

[2] In this case appellee unquestionably went to appellant's station on invitation, and clearly had a right to protection there in such place as he needed to be for the trans-

action of the business for which he was invited. This business was to purchase a ticket and to check his baggage when the same arrived. When he presented himself at the ticket office the agent was not present, being absent on business to the basement for about five minutes. Appellee's baggage had not yet arrived. The place for appellee to purchase his ticket and to transact his business was at the office of the ticket agent, and, if he needed to identify his baggage when it thereafter arrived, the place for him to do so was upon the concrete platform where it was to be received. The uncontradicted evidence shows that the platform from which appellant fell when he received his injury was used exclusively for freight, and there was no necessity for appellee being thereon in search of a ticket agent. We must hold that the verdict of the jury is not sustained by sufficient evidence.

Instructions 1 and 3, given by the court at the request of appellee, and instructions 9 and 10 given by the court of its own motion, were correct statements of the law, had appellee been injured at a place where at the time of such injury he had a right to be. But in the absence of instructions as to the duty of the jury in the event that it should find that appellee at the time of his injury was at a place where passengers would not by an ordinary prudent person be expected to be, or should it find that appellee was upon a platform which was used exclusively by appellant for loading and unloading freight in connection with its business and was not a platform to be used by passengers, the instructions so given were misleading. Instructions 12, 14, 15, and 16, requested by appellant and refused, would have instructed the jury as to its duty in this regard, and they should have been given.

[3] Appellant complains that the court refused to give its instructions 9, 10, and 11. These instructions pertained to the question of contributory negligence on the part of appellee, and they were covered by other instructions given by the court.

The judgment is reversed, with instructions to grant a new trial.

DAUSMAN, P. J., dissents.

SHEETS v. JONES. (No. 11762.)

(Appellate Court of Indiana, Division No. 1. Jan. 30, 1924.)

1. Appeal and error ⟸850(1)—In absence of request for special findings of facts, findings treated as general.

In the absence of any request for special findings of facts, they must be treated as general upon the material averments of the complaint, and as against defendant on the pleaded issues in affirmative answer and cross-complaint.

2. Mortgages ⟸608½—Grantee's refusal to account entitled grantor to sue for an accounting and to have deed declared mortgage.

A grantor, on refusal of the grantee to account, was entitled to maintain a suit to have his warranty deed declared a mortgage, for an accounting, and the right to redeem.

3. Mortgages ⟸608½—Allegation that secured debt had been fully paid held unnecessary to suit to declare deed a mortgage.

In a suit to have a deed declared a mortgage, the alleged mortgagee having refused an accounting, and the amount unpaid on the secured indebtedness being disputed, an allegation in the complaint that said indebtedness had been fully paid was unnecessary, since failure to make full payment was not conclusive in mortgagee's favor.

Appeal from Superior Court, Vigo County; C. A. Royse, Special Judge.

Suit by John L. Jones against Martin A. Sheets. Decree for plaintiff, and defendant appeals. Affirmed.

Duff Caldwell and Josiah T. Walker, both of Terre Haute, for appellant.

McNutt, Wallace, Harris & Randel and James H. Caldwell, all of Terre Haute, for appellee

ENLOE, J. This was an action by the appellee against the appellant by which he sought to have a certain warranty deed executed by himself to appellee, declared to be a mortgage, and for an accounting, etc.

It appears by the averments of the complaint that in 1907 the appellee was indebted to the appellant in the sum of $2,000, which was evidenced by a promissory note for that sum; that to secure the payment of said note he assigned and turned over to appellant certain promissory notes as collateral security; that in 1908 he turned over to the appellee certain additional notes as further collateral security; that in 1910, to further secure said indebtedness, the appellee, his wife joining therein, executed to the appellant a warranty deed for certain lands, under an agreement with the appellant to reconvey said lands when said indebtedness was paid. The complaint also set forth a number of transactions in which it was alleged that both of said parties were interested, alleged that a profit had been made in each of said transactions; that appellant had received and retained said profits; that an accounting had been demanded by appellee of said transactions and said indebtedness; and that the same had been refused. There was a prayer for an accounting, that said deed be declared to be a mortgage,

and the appellant ordered to reconvey said lands, and for all proper relief.

The complaint was met by an answer in general denial and in four affirmative paragraphs, and also by a cross-complaint by appellant, wherein he alleged that he was the owner of said lands, and asked to have his title thereto quieted. An answer in general denial closed the issues which were submitted to the court for trial and resulted in a finding and decree in favor of appellee. There was a motion to modify the judgment, also a motion to retax costs, each of which was overruled, and these rulings are the only matters presented on this appeal.

[1] There was no request for a special finding of facts, and the finding in this case, while amplified, must be therefore treated as simply a general finding for the appellee upon the material averments of his complaint, and as against the appellant, upon the issues tendered by his affirmative paragraphs of answer, and by his cross-complaint.

[2, 3] The complaint in this case was not an action at law, to recover money due, but was essentially a bill in equity, for an accounting and for the right to redeem the lands so conveyed by said deed, treating the same as a mortgage. When the appellant refused the appellee an accounting, as upon the record before us, we must presume he did, the appellee became at once entitled to bring this action, and he was entitled to have, not only an accounting to have the court state the balance due appellant, if anything, but also to a decree allowing him to redeem. The averment in the complaint that "said indebtedness had been fully paid." was not a necessary allegation in his said complaint, there being a dispute between the parties as to the amount, if any, remaining unpaid of said indebtedness, and the appellant having refused the demanded accounting. The fact that the said debt had not been fully paid was not conclusive in appellant's favor. The decree was in accordance with the general finding, and the court did not err in overruling either of said motions.

Judgment affirmed.

MAXWELL IMPLEMENT CO. v. FITZGERALD. (No. 11650.)

(Appellate Court of Indiana, Division No. 2. Jan. 18, 1924.)

1. Appeal and error ⇐1040(13)—Overruling of demurrer to paragraphs of answer not reversible error, in view of return of verdict entirely on counterclaim.

Where it affirmatively appeared from the record that the verdict for defendant rested entirely upon his counterclaim, the action of the court in overruling a demurrer to paragraphs of answer, if error, was not ground for reversal, under Burns' Ann. St. 1914, § 350.

2. Sales ⇐354(8) — Buyer's answer held to state good defense as to seller's refusal to accept defective machine and refund price paid.

In action by seller of tractor on note for balance of purchase price, answer, pleading provision of the sales contract making return of tractor to seller on failure of seller to make the machine operate satisfactorily after written notice from buyer, and refund to buyer of portion of purchase price paid, a settlement in full of the transaction, and alleging seller's failure to put the machine in working order after notice from buyer of defects, buyer's tender of machine to seller, and seller's refusal to accept machine and refund portion of purchase price paid, *held* to state a good defense.

3. Sales ⇐354(8)—Answer in seller's action on purchase price note held to state good defense on theory that original contract was extinguished by new agreement.

In action by seller of tractor on note for balance of purchase price, answer alleging that the parties agreed to compromise and settle their differences caused by failure of tractor to work satisfactorily, and buyer's tender of tractor to seller and demand for portion of purchase price paid, that seller agreed to take back the tractor and furnish buyer one of another make, that buyer agreed to pay note given for balance of purchase price of first tractor and pay an additional sum of a certain amount, that seller refused to comply with such agreement of settlement and to furnish other tractor, and that buyer has been ready and willing to pay such note and additional sum on seller's delivery of other tractor, *held* to state a good defense on theory that the original contract was superseded by a new and different agreement.

4. Appeal and error ⇐1170(1) — Error not ground for reversal unless prejudicial.

In view of Burns' Ann. St. 1914, §§ 400, 405, 407, 700, a judgment will not be reversed for mere defects, imperfections, or irregularities, but an error to constitute ground for reversal must have affected the substantial rights of the appellant to his injury.

5. Pleading ⇐367(3)—Allegation that buyer "notified" seller of defects held to plead compliance with contract requiring "written notice."

Allegation that buyer "notified" seller of failure of tractor to operate satisfactorily *held* sufficient pleading of compliance with provision of contract requiring "written notice," in the absence of a motion to make definite and certain, under Burns' Ann. St. 1914, § 385.

6. Pleading ⇐367(3)—Buyer's counterclaim held to state cause of action for damages caused by seller's refusal to accept defective machine and refund price paid.

In action by seller of tractor on note for balance of purchase price, counterclaim, pleading provision of the sales contract, making return of tractor to seller, on failure of seller to make the machine operate satisfactorily after

written notice from buyer, and refund to buyer of portion of purchase price paid, a settlement in full of the transaction, and alleging seller's failure to put the machine in working order after notice from buyer of defects, buyer's tender of machine to seller, and buyer's damage in specified sum, *held* to state a good cause of action, in absence of motion to make definite and certain, under Burns' Ann. St. 1914, § 385, notwithstanding buyer's failure to aver performance of the contract on his part in the language of section 376.

7. Appeal and error ⟸1047(4)—Refusal to award plaintiff the right to open and close held harmless in view of instruction.

In seller's action on note given for balance of purchase price in which buyer filed answer and counterclaim pleading provision of contract providing for final settlement, on failure of tractor to operate satisfactorily, by return thereof to seller and refund to buyer of portion of purchase price paid, and seller's refusal to accept tractor and refund price, notwithstanding failure of tractor to operate satisfactorily, and thereby assumed the burden of all issues except as to the value of attorney's fee, refusal to grant seller the right to open and close under Burns' Ann. St. 1914, §§ 558, 562, if error, was harmless, regardless of whether plaintiff's allegation as to what constituted a reasonable attorney's fee should be taken as true under section 392, in view of instruction requiring jury to include in their verdict amount so pleaded as attorney's fees, if they found for seller.

8. Appeal and error ⟸1033(5) — Appellant cannot complain of favorable instruction.

An appellant cannot complain on appeal of an instruction favorable to it.

9. Appeal and error ⟸671(3)—Questions depending on evidence not considered in absence of evidence.

On an appeal taken pursuant to the general provisions of the Civil Code and not pursuant to Burns' Ann. St. 1914, §§ 669, 691, questions depending for determination upon the evidence cannot be considered where the record does not contain the evidence.

10. Appeal and error ⟸900—Rulings of trial court presumably correct.

All presumptions are in favor of the correctness of the rulings of the trial court.

11. Appeal and error ⟸901—Appellant must show reversible error.

An appellant must show reversible error to entitle him to a reversal.

Appeal from Circuit Court, Lake County; E. Miles Norton, Judge.

Action by the Maxwell Implement Company against John Fitzgerald, in which the defendant interposed a counterclaim. Judgment for defendant on his counterclaim, and plaintiff appeals. Affirmed.

This action was instituted by the Maxwell Implement Company against John Fitzgerald to recover on a promissory note, executed by the latter to the former, in the principal sum of $600, with interest from maturity and attorney's fees. The complaint is in the usual form, and contains the averment that a reasonable fee for plaintiff's attorney is $250.

The defendant filed an answer in two paragraphs, and also filed a pleading denominated "cross-complaint," but which in truth is a counterclaim.

By the first paragraph of answer the defendant admitted the execution of the note, and then averred that at the time of the execution of the note he entered into a written agreement with the plaintiff whereby he purchased one Harry farmer tractor and one three-bottom engine plow, at the price of $1,300; that he paid therefor $500 in cash and $200 in the form of a Liberty bond, and executed the note for the balance; and that the written agreement contains the following:

"The seller hereby warrants the machine herein ordered to be well made, of good material, durable with proper care, and when properly operated to perform successfully the work for which it is designed. If within one year from date of purchase, a part proves defective, the new part to replace defective one will be furnished at factory on receipt of part showing defect. * * *

"If, upon trial with proper care, the machine fails to work properly, the purchaser shall immediately give written notice to the seller stating wherein the machine failed, shall allow reasonable time for a competent man to be sent to put it in good order, and render necessary and friendly assistance to operate it. If the machine cannot be made to work well, the purchaser shall immediately return it to the seller and the price paid shall be refunded, which shall constitute a settlement in full of the transaction. It is expressly agreed that the title to the property herein ordered shall not pass to the purchaser until full payment therefor shall have been made, whether notes have been given for the purchase price thereof or not."

Then follow averments showing in detail that there was a breach of the warranty; that notice thereof was given to the plaintiff; that thereupon the plaintiff, by one of its officers, endeavored to operate the tractor and to put it in condition to successfully perform the work for which it was designed, but in that effort wholly failed; that the machine was tendered back to the plaintiff; that the plaintiff refused to accept it; and that the plaintiff has failed to refund the purchase price.

The second paragraph of answer admits the execution of the note, and contains the same averments with respect to the purchase of the machine, the consideration therefor, and the execution of the written agreement as those contained in the first; but it is distinguished from the first by the following averments:

"That differences arose between the parties after the delivery and attempt to operate the tractor as to whether it complied with the warranty; that thereupon the plaintiff and the defendant agreed to compromise and settle their differences, by the terms of which agreement and compromise the plaintiff agreed to take back the tractor and to furnish in its place and stead a farm tractor commonly known and designated as a Moline tractor; that the plaintiff, in consideration of the right to furnish the Moline tractor and to settle the differences between the parties, was to keep the cash, the Liberty bond, and the note; the defendant agreed to pay the note and also agreed to pay an additional sum of $200; that the plaintiff has failed and refused to comply with the terms of the agreement of settlement and has failed to furnish a Moline Tractor, although the defendant at all times has been and now is ready and willing to pay the additional sum of $200 and to pay the note on the furnishing of a Moline tractor."

The counterclaim is substantially the same as the first paragraph of answer with the additional averment that the defendant has been damaged in the sum of $1,000.

Demurrers for want of facts, addressed respectively to each paragraph of answer and to the counterclaim, were overruled.

The defendant moved the court "that he be given the opening and closing and that he be permitted to assume the burden of proof herein." The motion was sustained. Thereupon the plaintiff moved the court "that it be permitted to assume the burden of proof herein and to open and close the case." This motion was overruled.

The jurors were peremptorily instructed to fix the amount of the attorney's fee at $250 if they found for the plaintiff. The following verdict was returned:

"We, the jury, find for the defendant on the cross-complaint and assess his damages at $8437.50, and that the plaintiff take nothing by its complaint herein. * * *"

Judgment was rendered on the verdict. Plaintiff's motion for a new trial was overruled. The errors assigned challenge the ruling on each demurrer and on the motion for a new trial. No attempt has been made to bring up the evidence or any part thereof.

Pattee & Johnson, of Crown Point, and Grant Crumpacker, of Valparaiso, for appellant.

Kelly & Galvin and Daly & Freund, all of Valparaiso, for appellee.

DAUSMAN, P. J. (after stating the facts as above). This appeal has been taken pursuant to the general provisions of the Civil Code. By that statement we mean that the appeal has not been taken pursuant to either of the special provisions of the Code. It has not been taken for the purpose of presenting "a reserved question of law" pursuant to section 669. Nor has it been taken solely for the purpose of presenting alleged error in giving or refusing to give instructions, pursuant to the proviso in section 691. (All sections cited in this opinion refer to Burns' Ann. St. 1914.)

The briefs and the argument (printed and oral) disclose that counsel for the appellant and also counsel for the appellee have been quite unmindful of the provisions of the Code. We must not forget that there is such a thing as the Civil Code. The various questions presented in this appeal involve a consideration of certain provisions of the Code, and to the Code we must look for a solution of each question.

[1-3] It is urged with much earnestness that the court erred in overruling the demurrer to each paragraph of the answer. Section 350 provides that—

"No objection taken by demurrer, and overruled, shall be sufficient to reverse the judgment, if it appear from the whole record that the merits of the cause have been fairly determined."

It affirmatively appears from the record that the verdict rests entirely upon the counterclaim. Therefore, the action of the court in overruling a demurrer to each paragraph of the answer would not constitute reversible error even if erroneous, and we would not need to consider the sufficiency of either paragraph. However, we have no hesitation in saying that each paragraph is sufficient. In view of the main objection urged against the second paragraph, we deem it advisable to say that we hold it good; not on the theory of accord and satisfaction, but on the theory that it shows an extinguishment of the original contract. In other words, it shows that the original agreement was supplanted and superseded by a new and different agreement.

Counsel earnestly contend that the court erred in overruling the demurrer to the counterclaim. In its memorandum accompanying the demurrer, the plaintiff specified 15 reasons why the counterclaim is deficient. Briefly stated, those reasons rest on the alleged failure to show by proper averments the following elements:

"That the note was given in payment for the tractor; that a written notice was given of the failure of the tractor to work properly; that the tractor was returned; the kind of work for which the tractor was designed; that the tractor was designed to do plowing; that the tractor was properly operated; wherein the plaintiff failed to operate the tractor after notice; wherein the plaintiff failed to put the tractor in good order; that the defendant's ground was in suitable condition for plowing; that the tractor was designed to plow the kind of ground on which it was used; that the tractor was operated by the defendant; that it was designed to pull drags and harrows; that the plaintiff agreed to return the purchase price; that the defendant returned the tractor; or that the failure of the tractor properly to

work was not due to the unskillful operation of it by the defendant."

[4] When we come to consider the ruling of this demurrer, we are confronted by certain provisions of the Code, in addition to the one above quoted. The provisions of §§ 400, 405 (as amended), 407, and 700, which need not be quoted here, lead irresistibly to the conclusion that it is not the policy of the Code that judgments shall be reversed for mere defects; imperfections, or irregularities. On the contrary, the wise policy of the Code is that no judgment shall be reversed except for reversible error; that is, for error which affected the substantial rights of the appellant, to his injury.

[5, 6] One reason for these provisions of the Code is well illustrated by the feature pertaining to the notice. The contract provides that if "the machine fails to work properly, the purchaser shall immediately give written notice" thereof. The averment in the counterclaim is that the defendant "notified the plaintiff and that thereupon one Leonard Maxwell, an officer of the company, responded within two days after the notice and endeavored to operate the tractor." Now, if the plaintiff was of the opinion that the defendant should have averred in his counterclaim whether the notice was oral or in writing, the way to have reached that point was by a motion to make definite and certain. But there was no motion for that purpose. That particular averment is sufficient as against the demurrer. The evidence may have shown that in truth the notice was in writing; or that if the notice was oral the plaintiff waived a strict compliance with that feature of the contract by recognizing and acting upon the oral notice. We need not discuss in detail the other specifications in the memorandum. It is sufficient to say that some are frivolous; some might properly have been presented by a motion to make definite and certain (section 385); and none is of such a character as to render the counterclaim fatally defective.

It is worth while to mention that the defendant might have obviated many of these objections by averring performance of the contract on his part in the language of the Code. Section 376.

[7] Under the assignment that the court erred in overruling the motion for a new trial, the appellant's main contention is that it was erroneously deprived of an important right—the right to open and close. The reasoning on this point is that the closing argument is a powerful weapon in the hands of him who has the privilege of wielding it, and that the plaintiff was disadvantaged by having that privilege erroneously conferred upon its adversary. Whether or not the contention is inherently meritorious we will not now attempt to determine. The Code prescribes the manner in which a jury trial shall be conducted. Section 558 prescribes the order in which the evidence shall be presented, unless the court for special reasons shall otherwise direct. Section 562 provides that the parties may argue the case to the jury or submit it to the jury without argument, and that, "In the argument, the party having the burden of the issue shall have the opening and the closing." This section contains other provisions making the right to open and close the argument conditional, and not absolute.

The appellant concedes that the defendant, by virtue of his pleadings, assumed the burden of all the issues except as to the value of the attorney's fee. The contention is that as to that feature the burden was on the plaintiff. The averment in the complaint is that "a reasonable attorney's fee for plaintiff's attorneys is two hundred fifty dollars." That averment stands wholly uncontroverted. Shall it then be taken as true? The Code provides:

"Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, shall, for the purpose of the action, be taken as true; * * * Allegations of value or amount of damage shall not be considered as true by the failure to controvert them. * * *" Section 392.

[8] It is clear that the averment must be taken as true unless it is an averment of value. The trial court adopted the view that the truth of the averment stood admitted, and peremptorily instructed the jurors that if they found for the plaintiff they should include in their verdict $250 as an attorney's fee. The court may have erred in that instruction (see McCloskey v. Davis, 8 Ind. App. 190, 35 N. E. 187, and cases there cited); but, right or wrong, the instruction stands unchallenged. Indeed the appellant is in no position to challenge an instruction so decidedly favorable to it. By that instruction any controversy which may have arisen concerning an attorney's fee was completely eliminated, and the error, if any, in awarding the opening and closing to the defendant, is rendered harmless.

[9-11] All other questions presented under the ruling on the motion for a new trial depend upon the evidence, and in the absence of the evidence they cannot be considered. All presumptions are in favor of the correctness of the rulings of the trial court, and an appellant must show reversible error to entitle him to a reversal. Usually an error is prima facie harmful; but an examination of the entire record may show that in truth it did not affect the substantial rights of the party complaining of it, and that therefore it is not a reversible error. For this reason an appellant cannot bring up a record which contains no evidence, and procure a reversal on alleged errors which for their final determination depend upon the evidence.

Judgment affirmed.

WESTERN CONST. CO. v. EARLY.
(No. 11808.)

(Appellate Court of Indiana, Division No. 2. Feb. 1, 1924.)

1. Master and servant ⟸405(6)—Finding of Industrial Board as to extent of compensable disability sustained.

A finding of the Industrial Board that a servant had sustained an injury which resulted in the permanent loss of 98 per cent. of the use of his arm below the elbow was warranted, where the surgeon who had charge of the servant since the injury so testified without dispute.

2. Master and servant ⟸403—Extent of compensable disability must be proved.

There is no presumption that the members of the Industrial Board have the requisite knowledge and skill to enable them to determine without assistance the disability that will result from a physical injury, and the extent of a permanent partial impairment and resulting diminution of earning power must be proved as an ultimate fact.

3. Master and servant ⟸385(12)—Duty of Industrial Board to determine extent of impairment of use of "hand" when several fingers injured.

Where a servant sustained injuries to the several fingers of his "hand," it was the duty of the Industrial Board, under Workmen's Compensation Act, § 31, subds. (a) and (c), as amended by Acts 1919, c. 57, to determine the extent of permanent partial impairment of the use of the "hand," as for the purpose of fixing compensation, the statute treats all parts below the elbow joint as an entirety under the name "hand," and not to ascertain the total compensation period by adding the several periods fixed for the respective injuries under subdivisions (a) and (b).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Hand.]

4. Master and servant ⟸417(5)—Award within limitations of compensation act final.

The court will not disturb an award of the Industrial Board of compensation to an injured servant, where the award is within the limitations of the subdivisions of the statute applicable to the injury.

Appeal from Industrial Board.

Proceeding under the Workmen's Compensation Act by Manuel Early, opposed by the Western Construction Company, employer. From an award of the Industrial Board, the employer appeals. Award affirmed.

James E. Rocap and John J. McShane, both of Indianapolis, for appellant.

Edmund L. Craig, of Evansville, for appellee.

DAUSMAN, P. J. The Industrial Board found that the employé sustained an injury which "has resulted in the permanent loss of 98 per cent. of the use of his right arm below the elbow;" and on that finding awarded him compensation for 196 weeks.

The undisputed evidence shows that the employé, Mr. Early, sustained the following injuries to his right hand: The entire first finger has been removed; two joints of the second finger have been removed; the third finger is permanently stiff in all its joints; the little finger is in the same condition as the second. All the finger joints which remain on the right hand, including the joints connecting the fingers to the metacarpus, are ankylosed. The thumb is normal. The wrist joint is normal. (The evidence as to the condition of the various joints is somewhat obscure, owing to the fact that the surgeon testified with reference to the injured hand which he exhibited to the Board; but the foregoing statement is substantially correct.)

[1, 2] The appellant contends (1) that there is no evidence to support the finding that the workman has sustained a permanent loss of 98 per cent. of the use of his right arm below the elbow; and (2) assuming that the first contention is impregnable, then it necessarily follows that the award should have been made pursuant to subdivisions (a) and (b) of section 31 of the Compensation Act (Acts 1915, c. 106, as amended by Acts 1919, c. 57), and not under subdivisions (a) and (c).

It is true that the members of the Board were bound to know from the evidence the nature and extent of the physical injuries sustained by Mr. Early. But, if they had nothing more before them than a bare statement of the physical injuries, would they be bound to know the extent of the resulting disability? The law does not require that members of the Board shall possess any special qualifications. There is no presumption that they have the requisite knowledge and skill to enable them to determine, without assistance, the extent of the disability that will result from a given physical injury or any given combination of physical injuries. There must be evidence on that feature (Studebaker Corporation v. Warner [Ind. App.] 139 N. E. 604); and the extent of a permanent partial impairment and resulting diminution of earning power must be proved as an ultimate fact. Centlivre Beverage Co. v. Ross, 71 Ind. App. 343, 125 N. E. 220. The necessary evidence was adduced. Dr. McCool, the surgeon who took care of the hand since the injury, testified that Mr. Early has sustained a permanent impairment "from the elbow down," to the extent of 98 per cent. He repeated that testimony on cross-examination, and gave the reasons for his conclusion. The appellant made no attempt to dispute Dr. McCool's testimony.

[3] In view of that evidence we are forced to infer that what counsel really mean to say is that the Board should have ignored the doctor's testimony concerning the extent of

permanent partial impairment, and should have proceeded to ascertain the total compensation period by adding the several periods fixed for the respective injuries by subdivisions (a) and (b). They assume that the statute imperatively requires that the compensation to be awarded in this case shall be ascertained on that theory. That assumption is erroneous. Kenwood Bridge Co. v. Stanley, 66 Ind. App. 563, 117 N. E. 657.

[4] There is nothing in the record expressly indicating what particular provision of the statute the Board followed in making the award. That feature is determinable by inference only; and the legitimate inference is that the award was made pursuant to subdivisions (a) and (c). Since the award is within the limitation prescribed by those subdivisions, we know of nothing that would justify this court in disturbing it.

The confusion seems to be due to the unusual sense in which the word "hand" is used in the statute. Anatomically the hand is that part of the limb below the wrist joint, the bones of which are the carpus, the metacarpus, and the phalanges; and the forearm is that part of the limb between the wrist joint and the elbow joint, the bones of which are the ulna and the radius. Cent. Dic. But for the purpose of fixing compensation in certain cases the statute treats all the parts below the elbow joint as an entirety under the name "hand." Therefore it was the duty of the Board to determine the extent of "the permanent partial loss of the use of" the hand; and the Board's conclusion in that respect is properly stated in its finding.

The award is affirmed.

ZAINEY v. RIEMAN. (No. 11680.)

(Appellate Court of Indiana, Division No. 2. Feb. 1, 1924.)

1. Master and servant ⟸367—Contractor held an "independent contractor."

Where owner of a house to be constructed employed a contractor to do the carpenter work, who engaged the men, the owner furnishing the material and paying the men on orders from the contractor but otherwise exercising no control over them, *held*, that contractor was an "independent contractor."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

2. Master and servant ⟸318(2)—Owner not liable for negligence of independent contractor.

Where one lets a contract to another to do a particular work, reserving no control as to how the work shall be done except that it shall conform to a particular standard when completed, he is not liable for any injury occurring to others by the negligence of the person to whom the contract is let, and Employers' Liability Act, § 4, does not deprive an owner of such defense.

3. Master and servant ⟸367—Owner may be liable for compensation for injuries to servant of independent contractor.

Where a servant sustained injuries while working for an independent contractor doing carpenter work on owner's home, he could recover compensation against the owner only before the Industrial Board under Workmen's Compensation Act, § 14, as amended by Acts 1919, c. 57, in the event that owner failed to require his contractor to produce a certificate from the Industrial Board, showing that he had complied with section 68 (as amended by Acts 1919, c. 57).

Appeal from Superior Court, Marion County; James E. McDonald, Special Judge.

Action by David Rieman against Abraham F. Zainey. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

C. E. Fenstermacher, of Indianapolis, for appellant.

Chas. A. Messmore, of Indianapolis, for appellee.

NICHOLS, J. Action by appellee against appellant for damages resulting from personal injuries.

It is averred in the complaint that on February 16, 1922, appellee was employed by appellant as a workman, a carpenter, in the erection of a certain building in the city of Indianapolis. It was the duty of appellant to provide a safe and secure place for appellee to work about said building and to provide appellee with a safe and secure scaffold on which he was to work. During the progress of the erection of the building, appellant caused a certain scaffold to be erected at the side of the building upon which appellee and other workmen were to stand while working upon the building; but wholly disregarding his duty appellant caused the scaffold to be erected in a negligent and improper manner, and it was unfit for the purposes for which it was constructed. Appellee did not participate in the construction of the scaffold and did not know its weak and unsafe condition, and appellant did not know it was unsafe and insecure. On said day appellant was ordered to go upon said scaffold to work, and when thereon, without any fault of his, but owing solely to the carelessness and negligence of appellant, the scaffold broke, and appellee was thereby precipitated to the ground below, receiving injuries for which he seeks damages in this action.

There was an answer in denial and a trial by jury which resulted in a verdict in favor of appellee for $4,500. With the verdict the jury returned answers to certain interroga-

tories propounded to it. Appellant's motion for judgment non obstante was overruled, as was also his motion for a new trial, after which this appeal.

[1, 2] Appellant assigns, with other errors, that the court erred in overruling appellant's motion for a new trial, and under this assignment contends that the verdict of the jury is not sustained by sufficient evidence for the reason that it appears that appellee was an employee, not of appellant, but of one Hickman, an independent contractor. Hickman's evidence stated in narrative form is as follows:

"I did all the carpenter work on the building and then left; I employed and discharged all men under me. Mr. Zainey furnished all the materials, but had nothing to do with the work other than the house as completed. There were a few changes made from the original contract for which I got paid extra. Mr. Zainey contracted and paid me the sum of $550 for doing all the carpenter work, out of which I paid my hired help. I employed all my help and had them paid out of the $550. I employed all the carpenters and fixed their wages and then gave them an order on Mr. Zainey to pay them and deduct the same from my contract price."

Later he testified as follows:

"I am the same Hickman that testified before in this case. I am the Hickman that did the carpenter work in the building. Before I started to work, I had a verbal contract with Mr. Zainey to do only the carpenter work according to the blueprints furnished for $550. I employed my help, and they were paid through Mr. Zainey, and after the house was completed I had a settlement with Zainey, and he paid me the difference between the amount paid out for my help and the contract price. I kept the hours the men worked and turned it in to Mr. Zainey. The work was to be done according to the blueprints. Mr. Zainey made no changes from the blueprints. The only talk I had with Zainey was whether I was doing the work according to the blueprints."

This evidence is corroborated by appellant, and is undisputed by any other evidence. Appellee testified that he himself arranged with Mr. Hickman to go to work at 50 cents per hour. It is undisputed that appellant had nothing to do with the construction of the scaffold, the breaking of which caused the injury; the same being constructed by Hickman or his employees. It is also undisputed that appellant furnished all material for the building. As it seems to us, this case is very similar to the case of Marion Shoe Co. v. Eppley, 181 Ind. 219, 104 N. E. 65, Ann. Cas. 1916D, 220, and, in harmony with that case, we are constrained to hold that appellee was not an employee of appellant but was an employee of Hickman, who was an independent contractor of appellant. It is well settled that where one lets a contract to another to do a particular work, reserving to himself no control over the manner in which the work shall be done, except that it shall conform to a particular standard when completed, he is not liable for any injury which may occur to others by reason of negligence of the person to whom the contract is let, and that section 4 of the Employers' Liability Act, being section 3862d, Burns' Ann. St. 1914, does not deprive an owner of the independent contractor defense. Marion Shoe Co. v. Eppley, supra; Leete v. Block, 182 Ind. 271, 106 N. E. 373, 20 A. L. R. 654; Switow v. McDougal, 184 Ind. 259, 111 N. E. 3; Kawneer Mfg. Co. v. Kalter, 187 Ind. 99, 118 N. E. 561; Bedford Stone & Construction Co. v. Hennigar, 187 Ind. 716, 121 N. E. 277.

[3] It is clear from these authorities, and from the uncontradicted evidence as above set out, that appellee's action in the superior court, if any he had, was against the independent contractor instead of appellant; such right of action against the contractor in the superior court depending, as to one element thereof, upon whether such contractor had not complied with section 68 of the Workmen's Compensation Act. Under the facts in this case, appellee could recover compensation from appellant only before the Industrial Board, and there only under section 14 of the Workmen's Compensation Act (Acts 1919, p. 159, being section 8020x, Burns' Supp. 1921), in the event that appellant had failed to require his contractor to produce a certificate from the Industrial Board showing that such contractor had complied with said section 68 of the act.

Judgment reversed, with instructions to grant a new trial.

BUTLER BROS. v. SNYDER. (No. 11759.)

(Appellate Court of Indiana, Division No. 1. Jan. 30, 1924.)

1. Pleading ⇐49—Complaint for fraudulently inducing contract of sale of merchandise held in tort.

A complaint alleging a void contract of sale of merchandise, induced by defendant having fraudulently represented genuineness of a forged guaranty, though containing allegations to the contrary, must be *held* a tort action in the light of its leading averments.

2. Infants ⇐62—Action will lie for merchandise obtained by fraudulent representations for loss actually sustained.

An action will lie against an infant who has obtained property on the faith of a fraudulent representation, for loss actually sustained by one dealing with him in good faith and exercising reasonable diligence, providing recovery can be had without giving effect to a contract of the infant.

3. Infants ⇐47—Contract of sale of merchandise induced by infant's fraud held void from beginning.

A contract of sale of merchandise, induced by representation of an infant that a forged guaranty was genuine, was void from the beginning, and the infant's repudiation was unnecessary to render it so, though not involving necessaries.

Appeal from Circuit Court, Howard County; John Marshall, Judge.

Action by Butler Bros. against Kenneth P. Snyder. Judgment for defendant, and plaintiff appeals. Reversed with directions.

Homer R. Miller and Rex E. Ballenger, both of Kokomo, for appellant.

Joseph C. Herron, of Kokomo, for appellee.

BATMAN, J. [1] Appellant filed a complaint against appellee, which, when construed according to its general scope and tenor, in the light of its leading averments, must be held to be an action in tort, although it contains some allegations indicating the contrary. It is based upon the fraud of appellee, in representing to appellant that a certain forged guaranty was genuine, thereby inducing it to furnish appellee certain merchandise under a void contract of sale. Appellee filed an answer in two paragraphs; the first being a general denial. Appellant filed a demurrer to the second paragraph of answer, which was overruled, and it thereupon filed a reply in general denial. A trial followed, resulting in a judgment in favor of appellee. Appellant filed a motion for a new trial, which was overruled, and is now prosecuting this appeal on an assignment of errors, based on the two adverse rulings stated.

[2, 3] Appellee seeks to avoid liability for the wrongful acts charged, by alleging in his second paragraph of answer that he is and was a minor at all times mentioned in the complaint, that he acquired the articles of merchandise in question under a contract with appellant, and that they were not necessaries. He does not deny in such paragraph that the contract was induced by the fraudulent representation alleged, but expressly admits therein that he may have forged the guaranty in question, but avers that he has never repudiated such contract. It is settled in this state that an action will lie against an infant who has obtained property on the faith of a false and fraudulent representation, for the loss actually sustained by a party who has dealt with him in good faith, and in the exercise of reasonable diligence, providing recovery can be had without giving effect to a contract of the infant. Rice v. Boyer (1886) 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53. The complaint in this case presents such an action, and hence an answer of infancy is not a bar thereto. The contract being induced by fraud, as appellant alleges, was void from the beginning, and hence required no repudiation on the part of appellee to render it so. The fact that the merchandise involved did not consist of necessaries is of no consequence. It follows that the court erred in overruling appellant's demurrer to the second paragraph of answer.

The judgment is reversed, with directions to the trial court to sustain appellant's motion for a new trial, and the demurrer to appellee's second paragraph of answer, and for further proceedings consistent with this opinion.

CRAIG v. LEE. (No. 11772.)

(Appellate Court of Indiana, Division No. 2. Jan. 31, 1924.)

1. Sales ⇐481—Conditional seller in possession entitled to sue for injury to automobile.

Where a buyer of an automobile under a conditional sale contract has paid part of the sale price and is in possession of the automobile, he may sue for an injury to it.

2. Highways ⇐176—Statutory rule of the road not applicable to automobile passing another motor vehicle.

Burns' Ann. St. 1914, § 10476a, prohibiting any person operating or driving a motor vehicle or bicycle from maintaining a speed greater than 15 miles an hour when passing any person riding, leading, or driving a horse or horses or any other vehicle, has no application to an automobile passing another motor vehicle.

3. Appeal and error ⇐1068(3)—Trial ⇐295(1)—Where evidence supports verdict, judgment not reversed for error in instruction.

A judgment will not be reversed for error in an instruction, if, considered as a whole, the jury was fairly instructed and the verdict is right upon the evidence.

Appeal from Circuit Court, Huntington County; Sumner Kenner, Judge.

Action by Melvin Lee against Mark Craig. Judgment for plaintiff, and defendant appeals. Affirmed.

Cline & O'Malley, of Huntington, for appellant.

Bowers, Feightner & Bowers, of Huntington, for appellee.

NICHOLS, J. Action by appellee for damages to his automobile resulting from the alleged negligence of appellant.

The substance of the complaint, so far as here involved, is that on October 29, 1922, appellee was the owner of an automobile used by him in the taxi business in the city of Huntington, Ind. Appellant herein was on the said day the owner of a Ford roadster. On said day appellee was driving his

said automobile along a public highway in said county, driving north about 9 o'clock p. m. at a moderate speed. Appellee approached the car driven by appellant and followed the same for approximately two miles. Appellee then signaled appellant that he desired to pass, and appellant turned slightly to the right in response to said signal, and turned his said automobile to the right side of the highway to allow appellee to pass, and as appellee's front wheels approached the rear of appellant's automobile, appellant carelessly and negligently turned his automobile sharply to the left and in front of appellee's automobile, without giving any warning or signal whatsoever, and without extending his hand and giving the signal required by law, and attempted to enter a lane at the left side of the highway without giving the proper signal for making such turn. Appellee, to avoid a collision, turned his automobile sharply to the left into a ditch, colliding with a post, a tree, and a gateway at the left side of the said highway, and thereby his automobile was greatly damaged. Appellee was on the left side of the highway and attempting to pass appellant's automobile, had his lights lighted, and was in a place where he had a right to be. He had given the proper signal, and the damage caused, as above set out, was caused solely by reason of the carelessness and negligence of appellant, and appellee was guilty of no negligence contributing to the damages complained of.

There was an answer in general denial, and a trial by jury, which resulted in a verdict and judgment in favor of appellee for $300.

The error assigned in this court is the action of the court in overruling appellant's motion for a new trial.

[1] It appears by the evidence that appellee had purchased the automobile involved under what is commonly known as a conditional sales contract, that he had paid $300 of the purchase price, and yet owed $400. At the time of the accident appellee had possession of the car and held the certificate of title thereto. The court by instruction No. 10, on its own motion, instructed the jury that under such facts appellee might bring an action to recover damages for injury to the car, stating that—

"It is the law that in case of an injury to a motor vehicle sold under a conditional contract of sale, that the vendee having possession of said car who would be the plaintiff herein, has the right to maintain an action against a third person for the injuries to the machine."

Appellant complains of this instruction, and contends that no title had passed to appellee, that he had only a bare possession, and that he therefore could not maintain the action. We are not in harmony with this contention. We hold that the purchaser of an automobile under a conditional sales contract having paid part of the sale price and being in possession of the property may sue for injury thereto. Huddy on Automobiles (5th Ed.) § 888, pp. 1087, 1088; Carter v. Black, etc., Co., 102 Misc. Rep. 680, 169 N. Y. Supp. 441; Stotts v. Puget Sound, etc., Co., 94 Wash. 339, 162 Pac. 519, L. R. A. 1917D. 214; Brown v. New Haven, etc., Co., 92 Conn. 252, 102 Atl. 573; Downey v. Bay State, etc., Co., 225 Mass. 281, 114 N. E. 207. There was no error in giving such instruction.

[2] It appears by the evidence that appellee was driving at a speed of 23 to 25 miles per hour when he attempted to pass appellant at the time of the accident. By instruction No. 11 given by the court on its own motion, the court told the jury that the fact that appellee was driving at a speed of more than 15 miles per hour would not prevent his recovery unless such failure to maintain a speed of 15 miles per hour contributed approximately to the injury. Appellant complains of this instruction; but, as we view it, it was harmful to appellee rather than to appellant. Appellant has not cited the statute containing the 15-mile provision, but appellee assumes, and this court with him, that it is section 10476a, Burns' R. S. 1914. The last part of that section provides:

"Every person operating or driving a motor vehicle or motor bicycle desiring to pass any person riding, leading or driving a horse or horses or any other vehicle, shall when at a distance of one thousand (1,000) feet slow down and when passing said objects shall maintain a speed not greater than 15 miles per hour."

This can have no application to the facts in this case. It can only apply where the motor vehicle desires to pass "any other vehicle" than a motor vehicle. It can have no application to an automobile passing another motor vehicle. The law permits a speed of 25 miles per hour, and to limit an automobile to 15 miles per hour when attempting to pass another motor vehicle would be equivalent to saying that there shall be no passing of automobiles on the public highway. The instruction was not harmful to appellant.

[3] Complaint is made of other instructions given; but while they may not be entirely free from criticism, after examining them and considering them as a whole, we conclude that the jury was fairly instructed as to the law governing the case. It has been many times held that a judgment will not be reversed for error in instructions when the verdict is right upon the evidence. In this case we hold that the right result was reached.

Judgment affirmed.

STATE ex rel. STANTON, Pros. Atty., v. POWELL. (No. 18229.)

(Supreme Court of Ohio. Feb. 12, 1924.)

(Syllabus by the Court.)

1. Statutes ⇐74(2)—Law providing for chief justice of court of common pleas held to have uniform operation.

Section 1558, General Code, as amended (110 O. L. 52), is a law of a general nature and has uniform operation throughout the state and does not therefore contravene section 26 of article II of the Ohio Constitution.

2. Judges ⇐3—Officers ⇐3—Statute providing for chief justice of the court of common pleas held not to create new office; imposition of additional duties held not "creation of new office."

The imposition of additional duties upon an existing office to be performed under a different title, does not constitute the creation of a new office.

Quo warranto by the State, on the relation of Edward C. Stanton, Prosecuting Attorney, against Homer G. Powell. Judgment for respondent.

Edward C. Stanton, Pros. Atty., and H. E. Parsons, Asst. Pros. Atty., both of Cleveland, for plaintiff.

Paul Howland, Homer H. McKeehan, and Louis H. Winch, all of Cleveland, for defendant.

MARSHALL, C. J. This is an original action in this court, in *quo warranto*, to inquire by what warrant the defendant exercises and enjoys the office of chief justice of the court of common pleas of Cuyahoga county, and praying that this court adjudge that he be not entitled thereto, and that he be ousted therefrom. The defendant demurs to the petition, and the petition and the demurrer thereto present for the consideration of this court three legal questions:

(1) Whether the amendment to section 1558, General Code, enacted March 13, 1923 (110 O. L. 52), is a law of a general nature, and, if so, whether it has uniform operation throughout the state, and whether it contravenes the provisions of section 26, art. II of the Ohio Constitution.

(2) Whether that amendment creates an "office" and provides for filling the office otherwise than by election, and therefore contravenes the provisions of section 2, art. X, and section 10, art. IV, of the Ohio Constitution, and also whether it is such "other office" as a judge of the common pleas court cannot hold by reason of the provisions of section 14, art. IV of the Constitution.

(3) Whether it contravenes the provisions of section 14, art. IV, which forbid diminishing the compensation of a judge of the court of common pleas during his term of office.

[1] The first of these questions will receive first consideration.

The question whether any law is of a general nature is not easily answered by any rule, but each law is necessarily in a measure *sui generis*. Counsel on both sides apparently agree that this law is of a general nature. Without attempting to lay down a rule for guidance of future cases we are content to observe that the subject-matter of this law is general, inasmuch as it relates to the administrative functions of courts of justice. It has specific application to judges of courts of common pleas, and all counties of the state have common pleas courts and common pleas judges. We entertain no doubt that this act is of a general nature. The only question on this branch of the case which challenges our serious consideration is whether or not it has uniform operation throughout the state.

By its terms it applies only to those counties having two or more common pleas judges, and inferentially and necessarily applies to all counties which may hereafter have more than one common pleas judge. The fact that the majority of the counties of the state have only one common pleas judge, and that there is therefore nothing upon which the act can operate in those counties, is not by any means conclusive of this inquiry. Section 26, art. II of the Constitution, was not intended to render invalid every law which does not operate upon all persons, property or political subdivisions within the state. It is sufficient if a law operates upon every person included within its operative provisions, provided such operative provisions are not arbitrarily and unnecessarily restricted. And the law is equally valid if it contains provisions which permit it to operate upon every locality where certain specified conditions prevail. A law operates as an unreasonable classification where it seeks to create artificial distinctions where no real distinction exists. It is true that in some counties of the state there is only one judge while in other counties there are two or more judges. This is a condition which has prevailed for many years, and this act which is now before us for construction has nothing to do with creating those unequal conditions. The act in question merely recognizes existing conditions and makes provision for dealing with those unequal conditions in a rational way rather than attempt to compel its application to conditions where the rule could have no possible operative effect.

In Cuyahoga county there are 12 resident judges, and a number of other judges from other counties are constantly sitting by designation. Many thousands of cases are filed, heard, and decided each year in that county. Each judge has authority to hear and decide causes independently of the action and concurrence of all other judges, and in each instance the decision becomes the judgment of

the court. Manifestly there could be no efficiency without system and elaborate administrative machinery. In 78 counties of the state there is a single resident judge, and in many counties a single judge is able to dispose of all business with little system or administrative machinery. In some counties an entire term transpires without the trial of a single jury cause. There is no economy or sound policy in installing a machine where it is not needed, or in providing one not designed to render the character of service required. Robinson Crusoe had no need of an elaborate machine shop to manufacture umbrellas in quantities, because he needed only a single umbrella. The trip hammer or the punch press cannot be employed in the manufacture of cloth, and the weaver's loom cannot be utilized in a steel mill. Without submitting any rule as a sure and final test of "uniform operation" it may be stated that a law should be capable of having force and operation in every part of the state upon every person and thing in the state. If a law is sufficiently general in its terms to comprehend all localities, persons, and things, it is not defeated and rendered void because there are certain localities in the state where conditions are such that there is no person or thing to which the law can be applied.

If this law were to be nullified upon such a theory, it would logically result that all laws relating to mines and mining are also invalid, because in certain counties there are no mines in operation. Very few laws have universal application to all persons and forms of property. Section 1558, General Code, as amended (110 O. L. 52), is peculiarly free from the taint of lack of uniform operation, because of the latitude given the Legislature by section 3, art. IV of the Constitution.

The Constitution itself makes provision for additional judges in each county, as may be provided by law, and that provision would be impotent indeed if the Legislature could not provide the administrative machinery which will permit two or more judges in any county to organize for co-operation and coordination of effort. The provisions of this law relate solely to matters of administration, and not in the remotest degree to the jurisdiction of the court.

The question of uniform operation of statutes has been considered by this court in many cases; but it would not be profitable to review the former declarations of this court, because each case is founded upon separate and distinct facts and those decisions cannot go much farther than to merely declare that upon the facts and circumstances of those particular cases the legislation is valid or invalid, as the case may be.

Counsel for relator has cited the following cases: Kelly v. State, 6 Ohio St. 269; Meyer v. Dempsey, Trustee, 62 Ohio St. 637, 58 N. E. 1100; and State ex rel. v. Ritchie, 97 Ohio St. 41, 119 N. E. 124.

In those cases the laws therein discussed related to the jurisdiction of the court, and not to the powers and duties of a single judge in a county having several judges. We find nothing in section 1558, General Code, as amended, which relates even remotely to the jurisdiction of the court. The law provides that one of the judges may be selected to perform certain specified additional duties, and that for the purpose of distinguishing him from the other judges of the court in and about the discharge of those duties he shall be called a chief justice. All those additional duties are purely administrative and not judicial. It is assumed that as to all other orders and judgments entered by him he acts under the title of judge, and that as to all administrative duties under this section he acts under the title of chief justice. The act requires him to make certain reports, and the act also requires each of the judges of such a court to make certain reports, and all such reports are administrative acts as distinguished from orders and judgments made in pending causes.

This court has many times upheld the power of the Legislature to impose additional duties and functions upon existing offices, but it is not necessary to cite or discuss any of them except the case of State ex rel. Hogan, Atty. Gen., v. Hunt, 84 Ohio St. 143, 95 N. E. 666, in which principles were declared which are absolutely decisive of the instant controversy. We quote the third syllabus:

"Neither section 1539, 1540, nor 1687, of the General Code, nor all taken together, constitute the judge therein designated as supervising judge, an officer holding an office separate and distinct from his office as judge of the court of common pleas. Such designation is mere *descriptio personæ*. And there being no such public office as supervising judge, there can be no intrusion by any one into such alleged office. Hence, *quo warranto* will not lie to oust such alleged intruder. This court, therefore, has no jurisdiction of the action sought to be brought."

The only distinction between that case and the instant case is that in the one the title "supervising judge" is employed and in the other the title "chief justice."

This question has been argued as a constitutional question, involving the power of the Legislature to thus amend section 1558, General Code. If the additional duties prescribed by section 1558 are incidental and inherent in the court in order to enable it to discharge its duties with system and dispatch, then no constitutional authority is necessary. But if those duties are more than incidental, and extend beyond its inherent power, then we are of opinion that constitutional authority is found in section 18, art. IV:

"The several judges of the Supreme Court, of the common pleas, and of such other courts as may be created, shall, respectively, have and

exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law."

The scope and breadth of that section is obvious and an analysis of its provisions is wholly unnecessary.

[2] The second question for determination is whether an office is created and provision is made for filling it otherwise than by election. It has been found impossible to discuss the first proposition without at the same time discussing the second. We have already found in discussing the first proposition that the mere fact of imposing additional duties does not create an office, and so long as the judges of the court merely select one of their number for the discharge of such additional duties it is clear that there has been no transgression of section 2, art. X, section 10, art. IV, or section 14, art. IV. The respondent in this case having been selected by his associates, and not having been "nominated and elected as chief justice of said court," we are of the opinion that we have no power to determine the validity of the title of one who may be nominated and elected as chief justice after the expiration of respondent's term of office. In the event that respondent or any other person should accept a nomination and be elected to the office of chief justice of a court of common pleas, that court being a constitutional court and the Constitution having made no provision for any member of that court other than a judge, a serious question would be presented, which would have to be disposed of in a *quo warranto* suit thereafter filed.

It may be suggested that there will be another session of the Legislature before that question can possibly arise, and that the matter can easily be obviated by proper legislation and there should therefore be no necessity for judicial determination.

Upon the third of the questions herein submitted, it should be stated that no judge has yet been denied any part of his compensation by reason of the failure to make proper reports, and that this court is without authority to determine that question except at the suit of a judge whose compensation has been limited or denied.

Judgment for respondent.

WANAMAKER, ROBINSON, JONES, MATTHIAS, DAY, and ALLEN, JJ., concur.

DAVIS, Director General of Railroads, v. ROBINSON. (No. 24026.)*

(Supreme Court of Indiana. Feb. 5, 1924.)

1. Master and servant ⟸264(1)—Failure to prove particular act of negligence held not to defeat liability.

In brakeman's action for injury, *held* that liability did not depend on negligence of defendant's employees in placing a car on a spur track, so that it swept plaintiff from the stirrup of a passing engine, other negligence alleged being proved.

2. Evidence ⟸20(2)—Judicial knowledge taken of operation of railroads by Director General.

Courts will take judicial knowledge that at time of injury to a brakeman on December 10, 1919, Director General of Railroads, as Agent of United States Railroad Administration, was operating the New York, Chicago & St. Louis Railroad Company that runs east from Ft. Wayne, especially where he appeared and defended without suggesting that he bore any other relation to the case.

Appeal from Superior Court, Allen County; Wm. N. Ballou, Judge.

Action by Edgar J. Robinson against James C. Davis, Director General of Railroads and others, for an injury sustained on December 10, 1919. Judgment for plaintiff, and defendant named appeals. Affirmed.

Olds & Thomas, of Ft. Wayne, for appellant.

O. E. Fuelber, of Ft. Wayne, Skiles & Skiles, of Shelby, Ohio, and Newcomb, Newcomb & Nord, of Cleveland, Ohio, for appellee.

EWBANK, C. J. Appellee recovered a judgment for personal injuries sustained while working as a brakeman, switching cars used in interstate commerce, at the town of New Haven, east of Ft. Wayne. Overruling the motion for a new trial is assigned as error. The motion for a new trial specified many alleged errors, of which all but about 80 were waived by the failure to support them by argument or authorities.

Appellant's brief sets out 85 "propositions," nearly every one of which challenges a different ruling, followed by what purports to be an "argument" in 69 separate parts, each based on a separate one or a very few of those propositions. The propositions and paragraphs of argument challenge separately each of 9 rulings admitting, and 17 excluding, as many separate items of evidence, the giving of 42 instructions, and the refusal to give 6, besides challenging the sufficiency of the evidence in several particulars. We have given consideration to each of these propositions, but it is not practicable to discuss each of them within the limits of an opinion of the court.

The complaint charged that the defendant Director General was operating the railroad of the New York, Chicago & St. Louis Railroad Company, pursuant to the Federal Control Act, approved March 21, 1918 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p); that at a point where a spur track led off from a siding a car was

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing overruled 143 N. E. 513.

set on the spur by defendant's servants so close to the junction of the two tracks that it only cleared a passing locomotive by 8 inches, and that, with full knowledge that it was there defendant's servants left it in that position over night; that plaintiff was in defendant's employ as a brakeman on a local freight train on said railroad, and in assisting to switch a car from the siding into the train on which he was employed was riding on a stirrup at the side of the tender of the locomotive engaged in such work of switching, as the locomotive ran backward into the siding; that no light was provided adequate for him to see the car as he approached it, and that he was unable to see it there on the spur track; that the locomotive was run on the siding past the car at a high and dangerous rate of speed, to wit, 18 miles an hour; that defendant and his servants knew of the location of the car and failed to warn plaintiff; and that defendant had placed the car in said position on the spur track and left it there. Placing the car so close to the siding, leaving it so close to the siding without lights or warning signals, after learning that it was there, failing to warn plaintiff of the danger after having learned of its position, and running the locomotive backward past the car at high speed, without furnishing lights on the locomotive or elsewhere adequate to disclose its presence to plaintiff, as the locomotive ran backward, was each alleged to constitute negligence by which plaintiff's injury was caused.

[1, 2] There was direct evidence tending to prove all the allegations of the complaint except the charge that appellant, the Director General, was operating the railroad by his employés, including plaintiff, and the charge that the railroad employés set the car where it was standing when it struck and injured plaintiff. Appellant's contention that the verdict is not sustained by sufficient evidence, and that a number of the instructions were erroneous, is based on the assertion that there was no evidence of any kind tending to prove either of those two facts. Under the evidence we do not think appellant's liability depends upon its servants having originally set the car in a dangerous position, as there was proof of the other alleged negligence. On the question whether appellant was operating the railroad, some of the witnesses, including plaintiff, testified that they were employed at the time by the "Nickle Plate Road," and that this was a name for the New York, Chicago & St. Louis Railroad Company. We have judicial knowledge that at the time of the injury the Director General, as Agent for the United States Railroad Administration, was engaged in operating the railroad of the New York, Chicago & St. Louis Railroad Company that runs east from Ft. Wayne, through New Haven, into Ohio, so far as running trains thereon was concerned, since the Act of Congress and proclamations by the President having the effect of law so provided and required.

And with full knowledge that he was the person charged with the alleged wrong, appellant appeared and defended, cross-examined plaintiff's witnesses as to minute details of the occurrence, called and examined many witnesses in his own behalf, and asked a large number of instructions declaring his rights, duties, and liability, as Director General, in case the injury was found to have occurred in the way that his witnesses testified, many of which instructions were given, and proceeded throughout on the theory that he had been plaintiff's employer, engaged in operating the railroad, and did not suggest that he bore any other possible relation to the case until after the verdict was returned. See Boehmke v. Northern Ohio T. Co., 88 Ohio St. 156, 102 N. E. 700.

The objection that the verdict is not sustained by sufficient evidence is not well taken.

Appellant complains that instructions were given, two or more of which repeated the same or similar propositions. But we do not think this was carried to an extent that was harmful to appellant.

Some instructions given at the request of appellant's codefendants Smith & McGrevy are complained of, but we do not think they could have influenced the return of the verdict against appellant.

A verdict in favor of Smith & McGrevy was returned, from which no appeal has been taken, and the correctness of such instructions, therefore, is not material in deciding this appeal.

The numerous exceptions to the admission and exclusion of evidence related to rulings which could not harm appellant, or which afterwards were rendered harmless by the evidence introduced later. Without taking up and discussing each of the many rulings separately, we have reached the conclusion that upon the whole case the judgment should be affirmed.

The judgment is affirmed.

EARLE v. STATE. (No. 24216.)

(Supreme Court of Indiana. Jan. 29, 1924.)

1. Criminal law ⇐395—Allegations of illegal seizure held insufficient against demurrer.

In a liquor prosecution, sustaining a demurrer to a plea or application to suppress evidence, averring that officers without the authority of a search warrant took possession of intoxicating liquor which the state proposed to introduce in evidence against the defendant, and that the acts of the officers were in violation of the unreasonable search and seizure clauses of the state and federal Constitution, *held* not a matter of which defendant could complain, there being no showing that the alleged illegal search and seizure concerned the person, house, papers, and effects of defendant.

2. Criminal law ⇐1031(4)—Answer not tested by demurrer, motion, or otherwise not questioned for sufficiency of facts upon appeal.

Where defendant's answer in bar to a liquor prosecution was not tested by a demurrer, motion, or otherwise, its sufficiency is not presented on appeal.

3. Criminal law ⇐294—Pleadings held sufficient to admit evidence of former jeopardy.

In liquor prosecution, an averment that defendant had previously been charged in a city court with the identical offense for which he was now on trial, and that the same was on the motion of the prosecuting attorney dismissed, under the liberal rule of pleading, would admit evidence to sustain a defense of former jeopardy.

4. Criminal law ⇐290—Plea of former jeopardy equivalent to plea of former acquittal, and may be pleaded specially.

Former jeopardy being equivalent to an acquittal, a good plea of former jeopardy is the equivalent of pleading former acquittal and a defense which, in view of Burns' Ann. St. 1914, § 2069, may be pleaded specially.

5. Criminal law ⇐296—Defendant entitled to be tried separately on special plea of former jeopardy.

In a liquor prosecution, the court erred in denying defendant's motion for a separate trial on his special plea of former jeopardy, in view of Burns' Ann. St. 1914, § 2069, the plea presenting a distinct issue, which defendant was entitled to have tried separately from the question of his guilt or innocence.

6. Criminal law ⇐296—Separate trial of issue of former acquittal pleaded specially may be waived.

A separate trial of issue of former acquittal pleaded specially may be waived, and the trial court may assume in the absence of an objection that accused is willing to have both issues tried at the same time.

7. Criminal law ⇐294—Questions involved in plea of former acquittal stated.

When a former acquittal is pleaded in bar, two kinds of matters are involved; those of record, consisting of the former proceedings and the acquittal; and those of fact, involving the identity of the offense and of the person alleged to have been guilty.

8. Criminal law ⇐951(1)—Motion in arrest of judgment held to cut off right to file motion for new trial.

Where defendant's motion in arrest of judgment was filed and overruled prior to the filing of his motion for a new trial, and it not appearing that any of the grounds for a new trial were unknown at the time the motion in arrest was made, it cut off the right to subsequently file the motion for a new trial.

Appeal from Circuit Court, Vigo County; John P. Jeffries, Judge.

Jack Earle was convicted of violating the prohibition law, and he appeals. Reversed, with instructions.

Miller & Kelley, of Terre Haute, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward F. White, Deputy Atty. Gen., for the State.

MYERS, J. The jury in the court below returned a verdict finding appellant guilty as charged in the second count of an affidavit filed in that court December 21, 1921, and obviously predicated upon the particular provision of the statute following:

"It shall be unlawful for any person to manufacture, transport, possess, sell, barter, exchange, give away, furnish or otherwise dispose of any intoxicating liquor." Acts 1921, p. 736; section 8356d, Burns' Supp. 1921, amending section 4, Acts 1917, p. 15.

Appellant met the charge thus preferred first, by filing what he termed a plea in abatement, to which, for want of facts, a demurrer was sustained; second, special answer of former jeopardy, and request in writing for a separate trial of that issue prior to a trial on the general issue. This request, over the objection and exception of appellant, was denied by the court. He was then arraigned, and pleaded not guilty. The jury returned its verdict May 31, 1922, and on June 5, 1922, appellant moved in arrest of judgment, which motion on the same day was overruled. Seven days later appellant filed his motion for a venire de novo, and also his motion for a new trial, and both were then overruled, and judgment rendered on the verdict assessing a fine of $500 and six months imprisonment in the Vigo county jail.

[1] Appellant is here seeking to avoid this judgment by alleging that certain rulings and acts of the trial court were erroneous. He first insists that the court erred in sustaining the state's demurrer to his plea in abatement. This pleading, while denominated a plea in abatement, was, in fact, an application to suppress certain evidence which the state proposed to introduce against him.

This evidence consisted of an exhibit of certain intoxicating liquor and statements by the sheriff of Vigo county and one of his deputies as to what they saw and did in the way of taking charge of an unattended automobile containing intoxicating liquor while the same was standing on the public highway near the traveled way and a short distance north of North Terre Haute. Generally speaking, it is averred that these officers, without the authority of a search warrant or warrant for the arrest of any one, upon seeing the automobile stop and persons leave it, thereupon took possession of the same, and upon a search thereof found that it contained intoxicating liquor, which the state proposed to introduce in evidence, as well as the statements of the officers; that these acts of the officers were in violation of the unreasonable search and seizure clauses of the Constitution of this state and of the Constitution of the United States. But there are no facts pleaded connecting appellant with the automobile or the liquor, or showing that he had any interest in either. Under these circumstances he cannot be heard to complain, even though the alleged acts of the officers were unauthorized and illegal. However, we are not to be understood as approving or disapproving these acts. It is sufficient to say that the pleading in question fails to state facts showing that the alleged illegal search and seizure concerned the person, house, papers, and effects of appellant. Consequently, he must be regarded as a stranger to the asserted wrong, and therefore without an interest supportive of his present contention. Walker v. State (Ind. Sup.) 142 N. E. 16.

[2, 3] Appellant next insists that the court erred in overruling his motion and request for a separate trial upon his answer in bar. The theory of this answer, while not carefully prepared, was former jeopardy. It was filed March 15, 1922, and, in substance, averred that this appellant on November 11, 1921, in the city court of the city of Terre Haute, Ind., was charged with the identical offense with which he is here charged, and for which the state is proposing to try him; that on December 20th, the day fixed for the trial of appellant on the charge filed against him in the city court, and before Hon. Robert R. Erwin, Special Judge, witnesses were sworn, and evidence heard on the merits, and the cause continued until the next day, when further evidence was introduced, and the cause again continued on motion of the state until December 23d when, on motion of the prosecuting attorney, it was dismissed, and appellant held on the affidavit filed in the circuit court December 21st.

Appellant's answer in bar was not tested by a demurrer, motion, or otherwise. Still the state is here insisting that it was insufficient for want of facts. While the question as to whether the answer states facts sufficient is not in reality before us, nevertheless we have examined the same and reached the conclusion that under our present liberal rule of pleading the facts averred and unchallenged before the trial would admit evidence sufficient to sustain the defense of former jeopardy. With these remarks we pass the point made by the state to the question of the right of appellant to have the defense of former jeopardy tried in advance of his trial on the charge to which he pleaded not guilty.

[4] Our Criminal Code (section 2069, Burns' 1914) permits an accused to plead the general issue orally and thereunder to prove former acquittal or former conviction, or any matter of defense except insanity, or he "may plead specially any matter of defense." In the instant case appellant attempted at least to plead specially former jeopardy in bar of the charge preferred against him in the circuit court. Former jeopardy being equivalent to an acquittal (State v. Reed, 168 Ind. 588, 81 N. E. 571), it follows that a good plea of former jeopardy is the equivalent of pleading former acquittal and a defense which, under the statute, may be pleaded specially.

[5, 6] In Clem v. State, 42 Ind. 420, 13 Am. Rep. 369, the court, referring to the statute (2 G. & H. p. 413, § 97), "In all criminal prosecutions the defendant may plead the general issue orally, which shall be entered on the minutes of the court, and under it *every matter of defense may be proved* [our italics]," held that while that statute conferred a privilege on the defendant of pleading orally any matter of defense, yet it did not impair his right to plead specially in bar the defense of former acquittal or former conviction, as was his right at common law. The right to so plead may be very important, but it may be just as important to have the issue thus presented tried separate and distinct from the question of guilt or innocence. These are rights which the accused may insist upon. For by such procedure his special plea would be tried according to legal rules, and uninfluenced by a trial at the same time of the general issue. That he may waive either of these rights we have no doubt (Toney v. State, 10 Ala. App. 220, 65 South. 92), but, unless he does so, it would be error to compel him to go to trial on both the general and special issues at the same time. In Commonwealth v. Merrill, 8 Allen (Mass.) 545, it is said:

> "But the defendant had a right to a trial of his special pleas according to legal rules, and, as he did not waive that right, a majority of the court are of opinion that he has suffered a legal injury by being deprived of such trial."

See, also, Gillespie v. State, 168 Ind. 298, 80 N. E. 829; Tindall v. State, 71 Ind. 314, 316; Weinzorpflin v. State, 7 Blackf. 186.

It thus appears that this jurisdiction has, by statute and by judicial opinion, declared

that a special plea of former acquittal or conviction presents a distinct issue which may or may not be tried along with the general issue of not guilty. Our present statute also not only confers a privilege on the defendant by expressly authorizing proof of former acquittal or former conviction as a defense under the general issue, but it further provides that he "may plead specially any matter of defense." At this point it may be well to notice Williams v. State, 169 Ind. 384, 82 N. E. 790; Lucas v. State, 173 Ind. 302, 90 N. E. 305; Barker v. State, 188 Ind. 263, 120 N. E. 593; and McCoy v. State, (Ind. Sup.) 139 N. E. 587. Without taking the time and space necessary to consider those cases separately by indicating the manner of reserving the question in the court below, or to give a résumé of each opinion on appeal, we regard it sufficient to say, in so far as the point in each of those cases involved a similar question to the one at bar now under discussion, there was no request for a separate trial of the special issue, nor was there any objection to the ruling of the court that the trial proceed on the general issue, after having sustained a demurrer to the special plea. Hence, since a separate trial of an issue pleaded specially may be waived (16 C. J. 428), the trial court may assume, in the absence of an objection or a request to the contrary, that the accused is willing to take his chances upon a trial of both issues at the same time. In the instant case there was no issue of law tendered on the special plea, and appellant's request for a separate trial on the merits of that issue was timely made, thereby clearly distinguishing the present case from the Williams and other cases to which we have referred.

[7] From what we have said, our conclusion pertaining to the validity of the judgment at bar may be readily foreseen, so that it may not be out of place to make a suggestion, using language found in Commonwealth v. Cabot, 241 Mass. 131, 153, 135 N. E. 465, 474:

"When a former acquittal is pleaded in bar, two kinds of matters are involved, those of record consisting of the former proceedings and the acquittal, and those of fact, which involve the identity of the offense and of the person alleged to have been guilty."

[8] For the error in refusing appellant's request for a separate trial on his special plea in bar, the judgment in this case must be reversed. Hence it will be unnecessary to consider the court's ruling on the motion in arrest, or the motion for a venire de novo. The record discloses that appellant's motion in arrest was filed and overruled prior to the filing of his motion for a new trial, and, it not appearing that any of the grounds of the motion for a new trial were unknown at the time the motion in arrest was made, the motion in arrest cut off the right to subsequently file the motion for a new trial. Page v. State (Ind. Sup.) 139 N. E. 143; Boos v. State, 181 Ind. 562, 105 N. E. 117; Barnett v. State, 175 Ind. 215, 93 N. E. 226; Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L. R. A. (N. S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034.

Judgment reversed, with instructions to the court below to sustain appellant's motion and request for a separate trial on his special plea of former jeopardy, and for further proceedings not inconsistent with this opinion.

ASHER v. STATE. (No. 24402.)*

(Supreme Court of Indiana. Feb. 6, 1924.)

1. Indictment and information ⇐110(31) — Affidavit charging offense in language of statute held sufficient.

In a prosecution for violation of the prohibition law, based on Acts 1923, c. 23, where the acts which constitute the crime are set out in the statute, an affidavit charging the offense in the language of the statute is sufficient.

2. Indictment and information ⇐110(3) — Charge in language of statute sufficient.

Where statute denounces a crime, and states what acts shall constitute a violation thereof, it is sufficient to charge it in the language of the statute.

3. Intoxicating liquors ⇐138 — Transporting liquor, within statute, not necessarily from one person to another; "transport."

For one to be guilty of unlawfully transporting intoxicating liquor, it is not necessary that it be transported from one person to another; "transport," as used in its ordinary sense, meaning conveying from one place to another.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Transport—Transportation.]

4. Intoxicating liquors ⇐198—Process used in manufacture not necessary to be set out.

In prosecution for unlawfully manufacturing intoxicating liquor, it is not necessary to allege the process used; but affidavit is sufficient, if it alleges defendant committed the acts which the statute sets out as constituting the crime.

5. Intoxicating liquors ⇐222—Not necessary to negative exceptions of statute.

It is not necessary, in an affidavit for unlawfully manufacturing intoxicating liquors, under Acts 1923, c. 23, to negative exceptions which are contained in other parts of the statute authorizing the manufacture of alcohol for certain purposes.

6. Criminal law ⇐878(2)—General verdict on two counts sustained, if evidence supported one.

In prosecution for violation of prohibition law, on affidavit in count for unlawfully trans-

*Rehearing overruled 143 N. E. 513.

porting, and count for unlawfully manufacturing, a general verdict, without finding as to which count it was based on, will be sustained, if there was evidence to support either count.

7. Intoxicating liquors ⟸138—Carrying jar of "white mule" whisky held to sustain conviction for transporting; "transport."

In prosecution for unlawfully transporting intoxicating liquors, evidence that, when approached by a policeman, defendant ran, and officers caught him and found a half-gallon jar of "white mule" whisky concealed inside his shirt, *held* to sustain conviction, it not being necessary, to constitute violation of the statute, that defendant transported the liquor in any kind of vehicle or conveyance, or was acting as carrier for some other person; "transport" being used in its ordinary sense of conveying from one place to another.

Appeal from Circuit Court, Delaware County; Clearance Dearth, Judge.

Court Asher was convicted of violating the prohibition law, and he appeals. Affirmed.

John T. Walterhouse and Thos. V. Miller, both of Muncie, for appellant.

U. S. Lesh, Atty. Gen., Mrs. Ed. Franklin White, Deputy Atty. Gen., and Fred I. King, of Indianapolis, for the State.

GAUSE, J. Appellant was tried and convicted in the court below upon an affidavit in two counts, the first of which charged that appellant, on or about April 21, 1923, at and in Delaware county, Ind., "did then and there unlawfully transport intoxicating liquor." The second count charged that appellant at said time "did then and there unlawfully manufacture intoxicating liquor." There was a general verdict of guilty, without indicating upon which count or counts the verdict rested. The verdict fixed his punishment, and upon the verdict judgment was rendered.

Appellant filed a motion to quash each count of the affidavit, upon the grounds that the facts stated did not constitute a public offense, and that the affidavit did not state the offense with sufficient certainty. His motion was overruled as to each of these two counts. He filed a motion for a new trial, in which he alleged that the verdict was contrary to law, and was not sustained by sufficient evidence. This motion was overruled. The rulings upon the motion to quash and upon the motion for a new trial are assigned as error.

[1] This prosecution was based upon chapter 23 of the Acts of 1923 (Acts 1923, p. 70), which provides:

"It shall be unlawful for any person to manufacture, transport, * * * sell, barter, exchange, give away, furnish or otherwise dispose of any intoxicating liquor, except as in this act provided," etc.

It will be observed that each count of the affidavit charges an offense in the language of the statute.

[2] Where a statute defines a crime, and states what acts shall constitute a violation thereof, it is sufficient to charge the offense in the language of the statute. Faulkner v. State (1923, Ind. Sup.) 141 N. E. 514; State v. New (1905) 165 Ind. 571, 76 N. E. 400; State v. Closser (1912) 179 Ind. 230, 99 N. E. 1057. This statute provides that transporting intoxicating liquor shall be a crime, and also that manufacturing intoxicating liquor shall be a crime. The acts which constitute the crime being set out in the statute, it is sufficient to use the language of the statute.

The charge here is not similar to a charge of an unlawful sale, where another person must be included in the transaction, and it is necessary to allege the person to whom the sale was made, in order to identify the transaction.

[3] For one to be guilty of unlawfully transporting intoxicating liquor, it is not necessary for it to be transported from one person to another, but the word "transport" is used in its ordinary sense, and means conveying from one place to another. Cunard S. S. Co. v. Mellon, 162 U. S. 100, 43 Sup. Ct. 504, 67 L. Ed. 894; State v. Pope, 79 S. C. 87, 60 S. E. 234. The first count, it should be borne in mind, is based upon Acts 1923, p. 70, defining a misdemeanor, and not upon Acts 1923, p. 108, defining a felony, where the transportation is required to be in a vehicle, as therein described.

[4, 5] It would not be necessary, in the second count, to allege the process he used in manufacturing it, but it was sufficient to allege he committed the acts which the statute sets out as constituting the crime. It was not necessary, in the second count, to negative the exceptions which are contained in other parts of the statute, authorizing the manufacture of pure grain alcohol for certain purposes. Crawford v. State (1900) 155 Ind. 692, 57 N. E. 931; Hewitt v. State (1889) 121 Ind. 245, 23 N. E. 83.

[6] The appellant claims that there was no evidence to justify a conviction, and that therefore the verdict is contrary to law. The verdict was general, without a finding as to which count it was based upon; so, if there was evidence to sustain the verdict upon either count, the judgment cannot be reversed, even though there was no evidence to sustain one of the counts. There does not appear to be any evidence to sustain the second count, charging appellant with manufacturing intoxicating liquor; so the inquiry then must be directed to the question as to whether there was evidence to sustain the charge of unlawfully transporting intoxicating liquor.

[7] The evidence disclosed that on the day

charged two policemen saw appellant walking along an alley in the city of Muncie; that, as he approached the policemen, one of them asked him "what he had on him"; that he started to run, and the officers caught him and found that he had a half-gallon jar of "white mule" whisky concealed inside his shirt. This was all the evidence given, and appellant claims that it does not show a transporting of intoxicating liquor, within the meaning of the statute.

We think otherwise. It was not necessary, to constitute a violation of this statute, for appellant to have transported the liquor in any kind of a vehicle or conveyance; nor was it necessary that he be acting as a carrier for some other person. The word "transport" is used in its ordinary sense. The Standard Dictionary defines "transport" as "to carry or convey from one place to another." Webster gives it substantially the same definition.

It is evident that the Legislature thought it would be wise to prohibit the conveying of intoxicating liquor from one place to another, in any manner, as one means of preventing the traffic. Then, evidently recognizing that the conveying of it in a vehicle probably would result in transporting larger quantities and be a more serious offense, the Legislature passed the other act heretofore referred to, making it a felony to transport it in a vehicle.

The Eighteenth Amendment to the federal Constitution prohibits "the manufacture, sale or transportation of intoxicating liquors within * * * the United States," etc. The Supreme Court of the United States construed the word "transportation" in the case of Cunard S. S. Co. v. Mellon (1923) 262 U. S. 100, 43 Sup. Ct. 504, 67 L. Ed. 894. The court said:

"* * * Transportation comprehends any real carrying about [Const. Amend. 18], or from one place to another. It is not essential that the carrying be for hire, or by one for another, nor that it be incidental to a transfer of the possession or title."

It is further said by the court in the same case that the word "transportation" is used in its ordinary sense, and not with a technical meaning. In the case of State v. Pope, 79 S. C. 87, 60 S. E. 234, the word "transport" was used in a statute similar to ours, and it was there construed as meaning a carrying from one place to another, and that carrying on the person was within the statute.

From the fact that appellant was carrying a jar of "white mule" whisky concealed under his shirt, through a public alley, the jury could reasonably draw the conclusion that he was unlawfully transporting it, within the meaning of the statute.

The judgment is affirmed.

CITY OF INDIANAPOLIS v. BARTHEL.
(No. 23801.)

(Supreme Court of Indiana. Feb. 8, 1924.)

Appeal and error ⇐525(2)—Instructions given and refused held not part of record.

While a record entry may be made to show that certain instructions were tendered, given, and refused, that the court gave others of its own motion, and that appellant reserved exceptions to the several rulings, if the instructions given and refused are sufficiently identified by the signatures of the judge and counsel and their position in the record (Burns' Ann. St. 1914, § 558, subds. 4, 6, and section 561), instructions not copied into the transcript in connection with requests signed by the party or his attorney or the record recital that certain numbered instructions were given and refused, but identified only by parenthetical notes prefixed to them in making up the transcript, and unsigned instructions of the court similarly identified, are not a part of the record.

Appeal from Circuit Court, Bartholomew County; John W. Donaker, Judge.

On petition for rehearing. Petition overruled.

For former opinion, see 141 N. E. 339.

EWBANK, C. J. It is true that a record entry may be made to show that certain instructions were tendered, that certain of them were given and others refused, that the court gave others of its own motion, and that appellant reserved exceptions to the several rulings of the court, if the instructions so given and excepted to and those refused and excepted to are sufficiently identified by the signatures of the judge and counsel and by their position in the record. Section 558, subds. 4, 6, and section 561, Burns' 1914; Duckwall v. Davis, 142 N. E. 113 (No. 23884, Jan. 18, 1924).

But the statutory requirement that requested instructions must be "signed by the party or his attorney asking the same," and that "all instructions given by the court must be signed by the judge," and other similar provisions are not wholly nugatory, but at the least have the effect of requiring identification of the instructions when copied into the transcript for an appeal.

The instructions requested in this case were not copied into the transcript in connection with the signed requests, nor in immediate connection with the record recital that instructions bearing certain numbers were given, and those bearing certain other numbers were refused, but they and the three unsigned instructions attributed to the court were identified only by parenthetical notes prefixed to them in making up the transcript. And the number of instructions which the request signed by counsel for plaintiff, as set out on page 26 of the tran-

script, purports to tender does not even correspond with the number set out on pages 30 to 33, under the headnote "instructions tendered by plaintiff."

The instructions have not been made part of the record in any manner provided by the statute.

The petition for a rehearing is overruled.

POEHLER v. STATE. (No. 24416.)

(Supreme Court of Indiana. Feb. 5, 1924.)

1. Criminal law ⇐1130(2)—Brief not containing evidence will not support assignment that findings were contrary to evidence.

Assignment of error in denying new trial on the ground that the court's finding was contrary to the evidence will not be considered, where the brief contains no "condensed recital of the evidence" as required by Supreme Court rule 22 cl. 5, but is confined to the question of the illegality of a search warrant.

2. Criminal law ⇐1064(1)—Only errors presented on motion for new trial are available on appeal.

The office of the motion for new trial is to present to the trial court alleged errors of law committed in the trial and only errors so presented are available on appeal, in view of Burns' Ann. St. 1914, § 2158, stating the grounds for granting a new trial.

Appeal from Criminal Court, Marion County; J. Collins, Judge.

Edward C. Poehler was convicted of violating the prohibition law, and he appeals. Affirmed.

Jones & Updike and Thomas C. Whallon, of Indianapolis, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward Franklin White, Deputy Atty. Gen., for the State.

TRAVIS, J. Appellant appeals from the judgment against him, imposing a fine and imprisonment, upon a finding of guilty, for having violated the prohibition law, and assigns as error, the overruling of his motion for a new trial, for the reason that the finding of the court is contrary to law and not sustained by sufficient evidence.

[1] Appellant's brief does not "contain a condensed recital of the evidence in narrative form so as to present the substance clearly or concisely," or any statement of the evidence whatever; and his brief does not contain any points in support of the error assigned (Supreme Court rule 22, cl. 5). Appellant's entire brief, as summed up in its final paragraph, is addressed to the proposition that the liquor which was introduced in evidence, as well as testimony of the officers in relation thereto, was procured and obtained in the execution of an alleged invalid search warrant. It is clear that the causes for the new trial do not present the question discussed by the brief. Neither does the brief disclose that objection was made upon the trial to the introduction of the evidence. In order to present upon appeal the question of the introduction of incompetent evidence at the trial, the alleged error of the trial court in excluding or admitting the evidence must be presented to the trial court by motion for a new trial. Section 2158, cl. 7, Burns' 1914.

[2] The office of the motion for a new trial is to present to the trial court alleged errors of law committed in the trial, and only such alleged errors as were thus presented to the trial court can be available upon appeal. Hougland et al. v. State, 43 Ind. 537; Rosenbaum et al. v. McThomas, 34 Ind. 331; State ex rel. Biddinger v. Manly, 15 Ind. 8; 3 Corpus Juris, § 881, p. 976.

Unless the motion for a new trial assigns rulings on the evidence as error, such alleged error will not be considered on appeal. Brunaugh v. State, 173 Ind. 483, 90 N. E. 1019; Simplex, etc., Appliance Co. v. Western, etc., Belting Co., 173 Ind. 1, 8, 88 N. E. 682.

The errors assigned do not present the alleged errors complained of in the brief, for which reason the judgment must be affirmed.

Judgment affirmed.

LOUISVILLE & SOUTHERN INDIANA TRACTION CO. v. MILLER. (No. 11604.)

(Appellate Court of Indiana, Division No. 2. Feb. 5, 1924.)

1. Judges ⇐39—Special judge's knowledge of facts held not to disqualify him in personal injury action.

In a personal injury action, a special judge selected to try the case was not disqualified by the mere fact that he may have known something about the physical condition of the plaintiff at the time of the injury, and may have been subpœnaed by plaintiff as a witness at a former term of the court, in the absence of a contention that he was present at the time of the accident, or that he knew the attendant circumstances.

2. New trial ⇐153—Court empowered to extend time for filing of affidavits in opposition to motion.

The trial court had power to extend the time for filing of affidavits in opposition to motion for new trial.

3. Appeal and error ⇐933(5)—Affidavits in opposition to motion for new trial on file at time of hearing presumed to have been filed within time as extended by court.

Where affidavits in opposition to a motion for new trial were on file when the court overruled the motion, it will be presumed on appeal

as against appellant's contention that the affidavits were not filed within the time fixed by the court, that the court extended the time for the filing of such affidavits, and that they were filed within the extended time.

4. Trial ⇐296(11)—Instruction mentioning amount of plaintiff's demand for damages held not reversible error.

The mere fact that the court in its instructions mentioned the amount of plaintiff's demand for damages *held* not reversible error in view of instruction that the fact that plaintiff asked for damages in such amount should not influence jury in determining amount to which he was entitled.

5. Trial ⇐191(9)—Instruction as to obligation of street railroad toward passenger held not to assume facts.

In a passenger's action for damages against street railroad, in which it was claimed that the railroad was negligent in starting the car while plaintiff was alighting therefrom and railroad claimed that the passenger attempted to alight at a place at which it had not stopped for discharge of passengers, instruction as to the railroad's obligation to discharge the passenger safely and properly at one of the usual places for the discharge of passengers or at a place at which the servants of the railroad had stopped the car for the purpose of allowing the passenger to alight therefrom *held* not objectionable as against contention that it assumed certain facts.

6. Trial ⇐191(9)—Instruction as to plaintiff's right to recover in personal injury action held not to assume facts.

In a passenger's action for damages against street railroad, in which it was claimed that the railroad was negligent in starting the car while plaintiff was alighting therefrom, instruction that, if plaintiff was injured as alleged in his complaint, and was not guilty of negligence contributing to such injuries, he was entitled to recover compensatory damages, even though defendant did not know or could not foresee that the special or particular injury, if any, sustained by plaintiff was greater than injuries a person in robust health would have sustained, *held* not objectionable as against contention that it assumed certain facts.

7. Trial ⇐191(9)—Instruction as to right to recover compensatory damages though wrongdoer could not foresee that injuries would be greater than to one in robust health held not to assume facts.

In a passenger's action for damages against street railroad, in which it was claimed that the railroad was negligent in starting the car while plaintiff was alighting therefrom, instruction that a person injured by the negligent acts of another may recover compensatory damages, although wrongdoer did not know or could not foresee that the special or particular injury would be greater to the person upon whom the wrong was actually inflicted than to one in full strength and robust health, *held* not objectionable as against contention that it assumed certain facts.

8. Trial ⇐191(9)—Instruction as to passenger's right to recover for injuries sustained while alighting held not to assume fact in issue.

In alighting passenger's action for damages against street railroad, in which the passenger claimed that the railroad was negligent in starting the car while the passenger was alighting therefrom, instruction that a passenger injured while alighting from car, because of railroad's negligence "at a place where the servants in charge of such car have stopped the same for passengers to alight therefrom," can recover damages, *held* not to assume that the passenger was injured at a street intersection where the car had stopped for the purpose of allowing passengers to alight, and not, as claimed by the railroad, at a switch which was not a place where passengers were received or discharged.

9. Carriers ⇐344—Passenger suing for injuries not required to prove freedom from contributory negligence.

A passenger suing a street railroad for injuries sustained while alighting from car was not required to prove himself free from contributory negligence.

10. Witnesses ⇐387—Witness who had testified as to circumstances surrounding accident was properly cross-examined as to contradictory statement as to how it happened.

In action against street railroad for injuries to alighting passenger, motorman who had testified as to the circumstances of the accident was properly cross-examined as to whether he had, following the accident, made a statement to a certain person contradictory to his testimony as to how the accident happened.

11. Witnesses ⇐389—Testimony that witness to accident who had denied contradictory statement in fact made such statement held admissible.

In a passenger's action against a street railroad for injuries, in which the motorman testified as to the circumstances of the accident, and stated on cross-examination that he did not have a conversation with a certain person following the accident, in which he made a statement contradictory to his testimony, testimony of such person that the motorman did in fact make such statement was admissible to impeach the motorman's testimony.

12. Damages ⇐132(6)—$5,000 verdict for fracture of hip bone and permanent injuries to knee held not excessive.

Where plaintiff sustained a fracture of the hip bone, and the ligaments and tendons about the knee were torn loose, and he was unable to walk at the time of the trial, 18 months after the accident, because of the condition of the muscles at the knee joint, and there was testimony of physicians that his injuries were permanent, a $5,000 verdict was not excessive.

Appeal from Circuit Court, Clark County; John M. Paris, Special Judge.

Action by Julian T. Miller against the Louisville & Southern Indiana Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Plaintiff sustained a fracture of the hip bone. The ligaments and tendons about the knee were torn loose. Plaintiff was unable to walk at the time of the trial, 18 months after the accident because of the condition of the muscles at the knee joint. There was testimony of two physicians that his injuries were permanent. He was awarded $5,000 damages. Instructions 8, 10, 11, and 12, given at appellee's request, are as follows:

No. 8. You are instructed that, if you find from the preponderance of the evidence that the plaintiff was a passenger upon one of the defendant's cars as charged in the complaint, the defendant's obligation was to carry and discharge him safely and properly to one of the usual places for the discharge of passengers, or at a place at which the servants of defendant, in charge of such car, had stopped said car for the purpose of allowing plaintiff to alight therefrom, as nearly as the same could be done by the exercise of reasonable and ordinary care under the circumstances care and diligence. If the defendant company intrusted this duty to its servants, the law holds defendant responsible for the manner in which the servants executed it. It is the established law that such a carrier is responsible for the negligence and wrongful conduct of its servants suffered and done in the line of their employment, whereby a passenger is injured without fault.

No. 9. You are instructed that stopping a reasonable time for a passenger to alight is not sufficient, but it is the duty of the conductor or other person in charge of a street car to use ordinary care to see and know that no passenger is in the act of alighting, or in a dangerous position, before putting the car of which he is in charge in motion again.

No. 10. Where a passenger alighting or attempting to alight from a car of a common carrier for the purpose of leaving such car, when at a place where the servants in charge of such car have stopped the same for passengers to alight therefrom, is injured by the negligence of a common carrier, or its employés in charge of the operation of such car, and while engaged within the line of their duty, such passenger, if free from fault, can recover damages from the common carrier for such injuries so received.

No. 11. If you find from a fair preponderance of the evidence that plaintiff was injured as alleged in his complaint, and you further find that plaintiff was not guilty of negligence contributing to such injuries, I instruct you that plaintiff is entitled to recover compensatory damages for such injuries as were sustained by him. And this is true, even though the defendant did not know, or could not foresee, that the special or particular injury, if any, sustained by plaintiff was greater than injuries that would have been sustained by a person in full strength and robust health, as a result of the negligent acts charged in the complaint.

No. 12. I instruct you that it is the law that, if a person is injured by the negligent acts of another, such person may recover compensatory damages for injuries sustained, although the wrongdoer did not know or could not foresee that the special or particular injury would be greater to the person upon whom the wrong was actually inflicted than to one in full strength and robust health. A person, feeble or strong, young or old, is entitled to recover full compensation for the injury actually sustained by the acts of a wrongdoer.

George H. Voigt, of Jeffersonville, for appellant.

Jonas G. Howard and Burdette C. Lutz, both of Jeffersonville, for appellee.

McMAHAN, J. Appellee filed his complaint in the Floyd circuit court, alleging that he, while a passenger on one of appellant's street cars, was injured through appellant's negligence in suddenly starting the car as appellee was alighting therefrom. The venue was changed to the Clark circuit court, and later, on appellant's application, there was a change of judge. The regular judge submitted the names of three lawyers from which to select a special judge. Among the names so submitted was that of the judge of the Floyd circuit court, and, after each of the parties had struck off one name, that of the Floyd circuit judge remained, and he was appointed. A few days later, the special judge having assumed jurisdiction of the cause, appellant asked that he decline to try the cause, and in support of such request filed an affidavit on information and belief that the special judge so appointed was acquainted with the physical condition of appellee at the time he was injured, and had been subpœnaed at a former term of court as a witness for appellee, and that, if such judge had been called as a witness at such prior term, he would have testified as to the physical condition of appellee. The request was denied. The cause was then continued to a day certain in the next term, when there was a trial which resulted in a verdict and judgment in favor of appellee.

The errors assigned challenge the action of the special judge in overruling appellant's request that he decline to try the case, and in overruling the motion for a new trial.

The specifications in the motion for a new trial relied on for a reversal are: (1) That appellant was prevented from having a fair trial on account of the special judge overruling appellant's request that he decline to try the cause; (2) that one of the jurors was guilty of such misconduct as to prevent appellant having a fair trial; (3) that appellant was prevented from having a fair trial because the court, in instructing the jury, first read the instructions tendered by appellant and followed the same by reading the instructions tendered by appellee, and then those given by the court on its own motion; (4) that the court erred in giving certain instructions; (5) error in admitting certain evidence; and (6) that the damages assessed are excessive.

[1] We see no error in the action of the special judge in denying appellant's request

that he decline to try the cause. The simple fact that the trial judge may have known something about the physical condition of appellee at the time of his injury, and that he may have been subpœnaed by appellee as a witness at a former term of court when the cause was set for trial, did not render the special judge incompetent. The affidavit filed in support of this request is made on information and belief. It fails to disclose the source of the party's information or when such information was received. It appears that the cause had been set for trial at the April term of court, but for some undisclosed reason was not then tried. At the next term of court a verified motion for change of judge was filed, and the judge of the Floyd circuit court was selected to try the case. In so far as the record discloses, appellant, at the time of such selection and appointment, was as fully advised concerning the subpœnaing the judge as a witness as it was when the request was made asking that he decline to try the case. There is no claim made that such judge was present at the time appellee was injured or that he knew anything about the circumstances attending the accident or appellee's injury. This is not a case where the trial judge testified as a witness. Indeed there is no positive statement or showing that he was, as a matter of fact, subpœnaed, or that he was possessed of any knowledge concerning any of the facts in controversy. If appellant, at the time when the special judge was selected, had any reason to believe that the party selected was for any reason disqualified to try the cause, he had an opportunity to strike his name from the list of names submitted.

One of the reasons assigned for a new trial is the alleged fact that one of the jurors was guilty of misconduct in answering questions asked him regarding his competency to serve as a juror. In support of this contention appellant filed the affidavits of its lawyers who were present and assisted in the impaneling of the jury. These four lawyers and an assistant each stated in his affidavit that the juror in question, when being examined as to his competency, was asked both by the trial judge and by an attorney for appellant whether he was a householder or freeholder, and that, in answer thereto, he stated that he was a legal voter, householder, and freeholder of the county, when as a matter of fact he was neither a freeholder nor householder of the county. Appellee filed the several affidavits of himself, of three lawyers who were present and represented him when the jury was impaneled, and of five of the jurors who tried the cause, including the juror whose competency was being questioned. In each of these affidavits the statements in the affidavits filed by appellant in support of the motion for a new trial were specifically denied.

Appellant insists that the affidavits filed by appellee in opposition to the motion for a new trial were not filed within the time fixed by the court, and for that reason cannot be given any consideration. The record shows that the verdict was returned March 10, 1922; that the motion for a new trial was filed in the clerk's office April 6, 1922, that being in vacation. On April 11, 1922, at an adjourned term of court, the motion for a new trial was presented to the court, and the court, after showing that the motion and affidavits in support thereof had been filed, gave appellee two weeks' time in which to file counter affidavits. On April 25, 1922, that being the 8th day of the next term of court, appellee filed his counter affidavits, heretofore referred to, in the clerk's office. On May 5, 1922, these counter affidavits were filed in open court, and the attention of the court called to the fact that the same had theretofore been filed in the clerk's office. On June 10, 1922, the motion for a new trial was overruled, to which ruling appellant excepted, and filed its special bill of exceptions showing the overruling of said motion. This bill of exceptions, however, has been omitted from the transcript, and we therefore do not know the contents of the same. When appellee filed his affidavits in opposition to the motion for a new trial the court was in session; but it is conceded that the special judge before the matter was pending was not present.

[2, 3] Appellant's contention is that these affidavits cannot be considered, because they were not filed in open court within the time fixed by the court. This contention cannot prevail. The trial judge had the right to extend the time within which appellee could file such affidavits, and the granting of such extension will be implied. There was no statute requiring these affidavits to be filed within a certain time, as is the case with motions for a new trial. These affidavits were on file when the court overruled the motion for a new trial. Appellee insists that no question is presented in relation to the incompetency of the juror, for the reason that the examination of the juror on his voir dire is not in the record. Without passing upon this question, the result must be the same if we should hold otherwise, and hold that the question was properly presented by the affidavits filed in support of the motion for a new trial and by the counter affidavits filed by appellee. On these affidavits it became a question of fact for the trial court to determine whether the facts surrounding the impaneling of the jury and the questions asked the juryman were as stated in the motion for a new trial. The court found against appellant on this question. There was no error in the action of the court in overruling the motion for a new trial in so far as it related to the alleged misconduct of the juror.

In instructing the jury the court gave 6 instructions on its own motion, 13 tendered by appellee, and 34 tendered by appellant. Those tendered by appellant were given first, then those tendered by appellee, and lastly those given by the court on its own motion. Appellant contends that this was an abuse of discretion on the part of the court, and had an undue influence on the jury. Appellant says the order of giving these instructions was an "unusual departure," and had the effect of grouping all the instructions most favorable to appellee, including a "four-time repetition of the demand" for $15,000. The thirteenth instruction given at the request of appellee related to the measure of damages, and ended by telling the jury, if it found for plaintiff, the amount of damages assessed should be in such sum as would in the judgment of the jury fairly compensate him for his injuries, if any, not to exceed $15,000. The first instruction given by the court on its own motion contained a recital of the allegations of the complaint, including ad damnum clause in which appellee alleged he had been damaged in the amount of $15,000, and demanding judgment for that amount. This instruction, after telling the jury that appellant had filed an answer of general denial, informed them that the burden was on appellee to prove the material allegations of the complaint by a fair preponderance of the evidence. The second instruction defined what was meant by a preponderance of the evidence, and instruction 3 told the jury, if they found for the appellee, it would be their duty to fix his damages at such sum as the evidence relating to damages entitled him, not exceeding $15,000. The only other instruction where the amount of damages demanded was mentioned or referred to was instruction 38, given at the request of appellant, and which is as follows:

"The plaintiff in the complaint seeks to recover damages in the sum of $15,000. But the fact that he has asked damages in such sum must not influence you in the least in determining whether he is entitled to any damages. And, when the court instructs you that the damages cannot exceed $15,000, it is done only in view of the fact that the plaintiff has named that amount in his complaint. The court must not be understood as intimating in the least degree whether or not you should assess any damages."

The appellant does not contend that either of these instructions is erroneous, or that the giving of either of them amounts to reversible error. It is said that the court reversed the usual order, and that in the instructions tendered by appellee and those given by the court attention of the jury was four times directed to the fact that appellee asked damages in the sum of $15,000.

The Supreme Court, in Robbins v. Fugit, 189 Ind. 165, 126 N. E. 321, said:

"When an instruction is once given which fully covers the subject, it should not be repeated. Such needless repetition amounts to an argument on the part of the court and may mislead the jury. It is not always reversible error, but it is always bad practice. It has been repeatedly condemned."

In Miller v. Coulter, 156 Ind. 290, 59 N. E. 853, it was said:

"But, even if the instruction transgressed the rule against needless repetitions in a charge, such fault, however censurable in some cases, would not, in this instance, amount to reversible error, although in a more aggravated form, and under some circumstances, it might have that effect."

And in Union, etc., Insurance Co. v. Buchanan, 100 Ind. 63, 80, it was said:

"It would not, perhaps, be available error to often repeat, but it would certainly be a censurable practice, for it would tend to confuse the jury, and might give undue emphasis and prominence to a particular fact, and this is not well to do."

In Chicago, etc., Ry. Co. v. Biddinger, 61 Ind. App. 419, 432, 109 N. E. 953, 957, the court, in discussing an instruction which consisted in reading the paragraph of the complaint, said:

"It is contended that there are many unnecessary averments in the first paragraph, as read to the jury, which were not proper in the pleading and upon which no evidence was offered, and which were inflammatory in their nature, intended to prejudice the jury, and thereby enhance the amount of the verdict. The practice of reading the complaint to the jury by the court, instead of stating the issues and the theory of the complaint, or each paragraph as the case might be, is a practice, no doubt, subject to criticism, but is not reversible error."

[4] In the case last cited it was contended that an instruction was erroneous and its giving reversible error because of the repetition of what was alleged to be unnecessary and inflammatory statements intended to prejudice the jury, upon which no evidence was offered, but where, as before noted, the court read the complaint to the jury. We do not think the fact that the court mentioned the amount of appellee's demand for damages can be held to be reversible error, especially in view of the fact that the court gave instruction 38, heretofore set out.

[5-7] Appellant complains of instructions 8, 11, and 12, given at the request of appellee, upon the ground that they assumed certain facts and invaded the province of the jury. This contention cannot prevail. There is no assumption of the existence of any fact in either of said instructions.

[8, 9] Appellant complains of instruction 10 given at request of appellee, which was to the effect that, where a passenger alighted from a car when at a place where the car was stopped for passengers to alight there-

from, and was injured by the negligence of the carrier, such passenger, if free from fault, can recover damages for injuries received. The objection to this instruction is that the court assumed that appellee was injured at a street intersection where the car had stopped for the purpose of allowing passengers to alight, and that it had not stopped at a switch which was not a place where passengers were received or discharged. There is no merit in this contention. The court did not in any way assume that appellee did or did not leave the car at a place where the same was stopped for passengers to alight therefrom. The instruction was applicable to the evidence, and, when taken in connection with all the instructions given, could not in any way have been prejudicial to appellant. Since appellee was not required to allege or prove want of negligence on his part, the expression "if free from fault" was more favorable to appellant than under the law it was entitled to demand, as in cases of this kind a plaintiff may recover unless the evidence shows that he was in fact at fault, that is, negligent.

[10, 11] Andrew James, the motorman in charge of the car, was a witness for appellant. He testified, in substance, that the car stopped on a switch to wait for a passing car; that when the other car came he rang the gong for a signal to the conductor; that he looked back through the car, and saw the conductor in the rear of the car on the ground; that he walked back through the car and saw the conductor and appellee back of the car; that he stepped down and asked what was the matter, and appellee said he fell; that the witness and the conductor took appellee to his home; that the car had not moved after it had stopped at the switch until after he found Mr. Miller on the ground; that appellee was not on the car that night when the car reached Lafayette street, that being the first street crossed after the car left the switch, and the street where appellee testified he was injured. On cross-examination the witness testified that the car stopped at the switch about 125 feet from Lafayette street; that he did not know how the accident happened, and did not have a conversation with Ray Miller at appellee's home that night in which he said, in substance, that he did not know any one was getting off the car until the conductor rang the bell for him to stop when he looked back and saw appellee lying back of the car on the street. In rebuttal Ray Miller testified as a witness for appellee, and over appellant's objection, in response to a question stated, that, on the night of the accident, when James and the conductor brought appellee home, Mr. James said to him in substance that he did not know that any one was getting off the car until the conductor rang the bell for him to stop, when he looked back and saw appellee lying back of the car on the street.

Appellant contends that the testimony of the witness James which appellee sought to impeach by the witness Ray Miller was brought out on cross-examination by appellee, was not proper cross-examination because the witness had not been interrogated on that subject, that the matter inquired about was not part of the res gestæ, and that it was a collateral issue, and appellee was bound by the answer of the motorman. There was no error in overruling the objection to the testimony of Ray Miller. It related to a matter which was properly brought out on cross-examination. The effect of this evidence was to impeach the testimony of the motorman.

[12] Appellant's next contention is that the damages assessed are excessive. We have carefully examined the evidence, and see no reason for disturbing the verdict on account of the amount of damages assessed.

Judgment affirmed.

KACZMARCZYK v. DOLATO et al.
(No. 11894.)

(Appellate Court of Indiana, Division No. 2. Feb. 7, 1924.)

1. Appeal and error ⟸1012(1)—Court not required to weigh evidence where in parol and evidence sustains findings.

Where the evidence is in parol and there is evidence to sustain the findings of fact, the court will not weigh the evidence, notwithstanding Burns' Ann. St. 1914, § 698, relating to weight of evidence on appeal.

2. Appeal and error ⟸757(3), 760(2)—Exclusion of evidence waived by failure to set out excluded evidence in brief.

Appellant waived any error in exclusion of evidence by failure to set out the excluded evidence in his brief or to refer in brief to where evidence could be found in record.

3. Appeal and error ⟸1048(5)—Overruling of objections to questions held harmless.

Action of court in overruling objections to questions propounded to witness *held* harmless in view of answers of witness that he did not know.

Appeal from Superior Court, Lake County; O. Ridgley, Special Judge.

Action by Veronica Kaczmarczyk against John Skerkowski, Joseph Wachawski, Steve Dolato, and another, in which last-named defendant filed a cross-complaint against the plaintiff and other defendants. From the judgment rendered, the plaintiff appeals. Affirmed.

George P. Rose and Thaddeus Menczynski, both of Gary, for appellant.

Henry F. MacCracken, of Gary, for appellees.

NICHOLS, J. This is the second appeal of this case, the first being to the Supreme Court, and is reported in 133 N. E. 829. After reversal of the judgment in the Supreme Court, an amended complaint was filed in the trial court and the issues reformed. There was a trial by the court with special findings of fact on which conclusions of law and judgment were rendered in favor of appellees on the complaint, and in favor of appellee Dolato on his cross-complaint giving him judgment upon the note sued on therein for $953.46, including $200 attorney's fees and a decree foreclosing his mortgage or trust deed. This note and the trust deed securing it are in controversy; appellant claiming that they were fraudulently executed, and that the trust deed was withheld from record, that she had no knowledge of them until the deal was closed, and that the property involved was conveyed to her subject to a mortgage for $2,000 and no more.

The only error assigned and presented in this court is the action of the court in overruling appellant's motion for a new trial.

The facts as found by the court are that on December 6, 1915, appellees Skerkowski and wife were the owners of certain real estate in Lake county, here involved. Immediately prior to that date appellee Dolato was acting as a real estate agent for appellant who owned a farm near Otis, Ind.; that on said December 6, 1915, appellant and appellees Dolato, Skerkowski, appellant's husband, and one Krause, and one or two other persons, met in the office of appellee Wachawski in the city of Chicago, Ill., for the purpose of effecting a triangular trade of properties, said Krause being then the owner of a building in Chicago which was involved in the trade. Such trade was made on that date, appellant taking the property above mentioned and belonging to Skerowski. By the terms of the exchange Skerkowski was to receive $500 from appellant as "boot" money. Appellant did not have the cash to pay such "boot," and it was therefore agreed that Skerkowski and wife should execute a note secured by mortgage or trust deed upon the property traded to appellants, and appellee Dolato agreed to and did purchase the note, being part of the purchase price at that time, and the remainder later. The deed to the property which was traded to appellant was duly recorded on December 24, 1915, and it contains the following recital: "Subject to incumbrances, $2,500.00, dated this 6th day of December, A. D. 1915." The mortgage and trust deed mentioned above was recorded December 13, 1916.

[1] We have examined the evidence in this case as set forth in appellant's brief, and we hold that there is evidence to sustain the court's findings of fact, the substance of which is set out above. Appellant insists that under section 698, Burns' R. S. 1914, it is the duty of this court to weigh the evidence, but it has been repeatedly decided otherwise where the evidence is in parol. Robinson v. Horner, 62 Ind. App. 456, 113 N. E. 10; Seybold v. Rehwald, 177 Ind. 301, 95 N. E. 235.

[2] Appellant's reasons 23 and 44 in her motion for a new trial relate to the action of the court in excluding certain alleged evidence of other fraudulent acts of appellee Dolato similar to the ones of which appellant claims that he was guilty in the transaction here involved. At No. 23 it appears that the question arose in the cross-examination of appellee Dolato. We do not find this evidence set out elsewhere in the brief, and there is no reference as to where it can be found in the record. At reason No. 44 not even the name of the witness who was being examined is given, and we do not find this evidence elsewhere in the brief nor any reference to where it may be found in the record. The question which appellant undertakes to present is therefore waived.

[3] At reasons 13 and 45 for the motion for a new trial, appellant complains of the court's action in overruling her objections to certain questions propounded to appellee Skerkowski. The respective answers to these questions are not given. If we have succeeded in locating them in appellant's narrative statement of the evidence, they were harmless, as the witness answered that he did not know. There is no reference to where they may be found in the record.

At reason 40 for the motion for a new trial, appellant complains of the court's action in overruling her objection to a certain question. The name of the witness is not given nor the answer to the question. We do not find the evidence elsewhere in the brief and there is no reference as to where it may be found in the record.

At reasons 46 and 47 for the motion for a new trial, appellant complains of the action of the court in overruling her objection to questions propounded to witness Skerkowski on cross-examination. No answers are given to the respective questions. We do not find the evidence elsewhere in the brief, and there is no reference to where it may be found in the record.

No reversible error is presented.

Judgment affirmed.

NORRIS v. GRAND TRUNK WESTERN R. CO. (No. 11802.)

(Appellate Court of Indiana, Division No. 1. Feb. 5, 1924.)

1. Limitation of actions ⟸180(4)—Rule as to sufficiency of complaint showing action not brought within statutory period, stated.

A complaint showing that action was not filed within the statutory period, to which there is no exception, is demurrable; but where there are exceptions the complaint is not demurrable, though it does not on its face show that plaintiff is within one of the exceptions, since to compel the plaintiff to make averments showing himself or his cause of action to be within the exception would tend to inconvenience and needless prolixity.

2. Limitation of actions ⟸180(4)—Complaint showing action not brought within two years from date of accident held not demurrable.

Employee's complaint for injuries *held* not demurrable on ground that it showed on its face that the action was not brought within two years from the date of the accident, since the cause of action may have been within one of the exceptions under Burns' Ann. St. 1914, §§ 298, 299, 301; the plaintiff in such case not being required to show himself or his cause of action to be within the exceptions.

Appeal from Superior Court, St. Joseph County; Lenn J. Oare, Judge.

Action by Harry A. Norris against the Grand Trunk Western Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

G. A. Farabaugh and Walter R. Arnold, both of South Bend, for appellant.

Anderson, Parker, Crabill & Crumpacker, Arthur L. May, and Woodson S. Carlisle, all of South Bend, for appellee.

ENLOE, J. Complaint by the appellant to recover damages for personal injuries. The complaint is in one paragraph and alleges that the appellant on the 24th day of May, 1920, was in the employment of the appellant as a "helper on a switching crew"; that appellee is a railroad corporation, and was on said day operating a railroad through St. Joseph county, Ind., and maintaining and operating railroad yards at the city of South Bend, in said county, in which yards the appellant, as such helper, was at work; that while engaged in such work he received an injury which finally resulted in a condition which necessitated the amputation of his left leg above the knee. This complaint, which asked damages in the sum of $15,000, was filed on the 17th day of February, 1923.

A demurrer was sustained to this complaint and final judgment rendered against the appellant.

In the memorandum of deficiencies, accompanying said demurrer, the appellee named five several alleged particulars in which said complaint was deficient. On this appeal only one of the alleged grounds is urged by the appellee, viz. that the complaint was not filed within two years from the time appellant received said injuries. As to each and all of the other alleged deficiencies the complaint is clearly good, and we have only to consider the matter of the statute of limitations.

In Potter et al. v. Smith et al., 36 Ind. 231, it was said:

"The statute contains various exceptions, as the disability of the plaintiff, nonresidence of the defendant, etc.; and where such is the case, it is the settled rule that the statute, if relied upon, must be pleaded, unless, indeed, the complaint shows affirmatively that the plaintiff is barred, notwithstanding the exceptions. The reason is, that the case may be within some of the exceptions, and the plaintiff is not bound to anticipate the defense of the statute and to show his case to be within the exception without knowing that such defense will be made. Upon the statute being pleaded, he may reply the exception."

[1] To compel the plaintiff to make averments showing himself or his cause of action to be within the exceptions would tend to inconvenience and needless prolixity. If there are no exceptions, as in Hanna, Adm'r, v. Jeffersonville, etc., R. Co., 32 Ind. 113, there can, of course, be no reply avoiding the statute, and the matter as to whether or not the action was timely brought, may be raised by demurrer. Hogan et al. v. Robinson, 94 Ind. 138; Swatts v. Bowen, 141 Ind. 322, 40 N. E. 1057.

[2] In our statute of limitations there are several exceptions (sections 298, 299, 301, Burns' 1914), and we cannot say, as a matter of law, upon the facts averred in the complaint before us, that, upon the statute of limitations being pleaded, the appellant could not avail himself of some one of the said exceptions named in the statute, in avoidance of said answer. We therefore conclude that said demurrer was wrongfully sustained.

The judgment is reversed, with directions to the trial court to overrule said demurrer, and for further pleadings.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

McNAUGHT v. STATE. (No. 24322.)

(Supreme Court of Indiana. Feb. 5, 1924.)

1. Criminal law ⇐1088(14)—Bill of exceptions not presented and filed within required time not part of record on appeal.

A bill of exceptions not presented to the judge and filed with the clerk of the trial court after being signed by the judge, within the time allowed, or, if time is granted beyond the term within the time so granted, as required by Burns' Ann. St. 1914, § 2163, cannot be considered as a part of the record on appeal.

2. Criminal law ⇐1088(14)—File mark of clerk not sufficient to show that bill of exceptions was filed after signed by judge.

Where nothing appears to show that the bill of exceptions containing the evidence was ever filed after being signed by the judge, except the file mark of the clerk, the bill of exception is not a part of the record on appeal.

3. Criminal law ⇐1090(8)—Sufficiency of evidence not considered in absence of bill of exceptions.

The sufficiency of the evidence to sustain the verdict will not be considered on appeal in the absence of a bill of exceptions containing the evidence.

4. Criminal law ⇐1088(11)—Instructions not considered on appeal unless made part of record by bill of exceptions.

Instructions in criminal cases must be made a part of the record by a proper bill of exceptions or they cannot be considered on appeal.

Appeal from Circuit Court, Owen County.

Thomas E. McNaught was convicted of having unlawful possession of intoxicating liquor with intent to sell, barter, exchange, give away, furnish, and otherwise dispose thereof and he appeals. Affirmed.

Slinkard & Slinkard, of Bloomfield, Hickam & Hickam, of Spencer, and James W. Noel, Hubert Hickam, and Alan Boyd, all of Indianapolis, for appellant.

U. S. Lesh, Atty. Gen., Mrs. Edward F. White, Deputy Atty. Gen., and O. S. Boling, of Indianapolis, for the State.

WILLOUGHBY, J. This was a prosecution commenced by affidavit filed in the Owen circuit court, charging appellant with the unlawful possession of intoxicating liquor with the intent to sell, barter, exchange, give away, furnish, and otherwise dispose of the same. The cause was submitted to a jury for trial upon a plea of not guilty, and the jury returned a verdict finding the defendant guilty. Judgment was rendered upon the verdict, and from such judgment this appeal is taken.

The only error relied upon for reversal is stated in appellant's brief as follows:

"The court erred in overruling appellant's motion for a new trial."

The specifications of said motion as presented by appellant's brief are as follows:

"The finding and verdict of the jury are contrary to law. The verdict of the jury is not sustained by sufficient evidence. Error of law occurring in the trial as follows: The court erred in refusing to give instructions numbered 1 and 3 tendered by defendant, before the beginning of the trial, and the court erred in refusing to give each of said instructions numbered 1 and 3. The court erred in giving instructions numbered 1 to 10, inclusive, on his own motion except No. 7. The court erred in giving each of said instructions numbered 1, 2, 3, 4, 5, 6, 8, 9, and 10."

It is claimed by the Attorney General that no question is presented for the decision of this court by the record in this appeal. He claims: That the record shows that appellant's motion for a new trial was overruled the 27th day of January, 1923, being the 28th judicial day of the January term, and appellant was granted 60 days from that date in which to file his bill of exceptions. The bill of exceptions containing the evidence was presented to the judge of the court on the 29th day of March, 1923, being the 10th judicial day of the March term, for settlement and signature, and was on that day approved and signed by the judge. That there is no record entry showing that such bill of exceptions was ever filed. That the instructions have not been brought into the record by a bill of exceptions.

An examination of the record discloses that the Attorney General is correct in his contentions. The record affirmatively shows that the bill was not presented to the judge for settlement and signature within the time allowed by the court to present it, and fails to show that such bill was filed after signing.

[1] Before a bill of exceptions can be considered as a part of the record on appeal it must be presented to the judge within the time allowed and filed with the clerk of the trial court after signing, or, if time is granted beyond the term, within the time thus granted. Section 2163, Burns' 1914; Bingle v. State, 161 Ind. 369, 68 N. E. 645; Donovan v. State, 185 Ind. 15, 111 N. E. 433; Bass v. State, 188 Ind. 21, 120 N. E. 657; Ewbank's Manual of Practice (2d Ed.) § 32.

[2] Where nothing appears to show that the bill of exceptions containing the evidence was ever filed after being signed by the judge, except the file mark of the clerk, it is not a part of the record. Donovan v. State, supra; Bass v. State, supra; Barker v. State, 188 Ind. 493, 124 N. E. 681.

[3] The sufficiency of the evidence to sustain the verdict will not be considered on appeal, in the absence of a bill of exceptions containing the evidence. Taylor v. State (Ind. Sup.) 132 N. E. 294.

An examination of the record shows the following entry in relation to the instructions to the jury:

"At the trial the court instructed the jury in writing and all the instructions given by the court, those tendered by defendant and given by the court, and those tendered by the defendant and refused by the court were all filed and made a part of the record by order of the court without a bill of exceptions."

[4] No question is presented as to the giving of or refusing of instructions because the instructions have not been made a part of the record by a bill of exceptions. Instructions in criminal cases must be made a part of the record by a proper bill of exceptions or they cannot be considered on appeal. Tribbey v. State, 189 Ind. 205, 126 N. E. 481; Taylor v. State, supra; Messel v. State, 176 Ind. 214, 95 N. E. 505; Goodman v. State, 188 Ind. 70, 121 N. E. 826.

Nothing is presented by the record for the decision of this court, and the judgment is therefore affirmed.

PRINCETON COAL CO. v. DOWDLE.
(No. 23912.)

(Supreme Court of Indiana. Feb. 8, 1924.)

1. Master and servant ⇐329—Complaint held sufficiently to allege assault and battery through servant.

A complaint in an action for assault and battery alleged to have been inflicted by defendant's foreman in attempting to exclude plaintiff from defendant's premises, where he had gone to adjust a dispute between defendant's miners and defendant as to the weighing of coal dug, plaintiff being employed by the miners as check weighman, alleging such facts and that "defendants by and through said B. undertook to eject plaintiff from said premises and assaulted and struck plaintiff with a pick handle," *held* sufficiently to aver that defendant inflicted the injury by the hands of a servant in absence of motion to make more specific, and in view of Burns' Ann. St. Supp. 1921, § 343a, Acts 1915, c. 62, § 1.

2. Master and servant ⇐330(1) — To hold master for assault by servant facts establishing liability must be shown.

In an action against an employer for personal injuries sustained through assault and battery committed by servant, evidence to establish facts out of which the employer's liability will arise is essential to cover damages.

3. Trial ⇐191(10) — Instruction assuming facts as to which evidence conflicting held erroneous.

In an action by a check weighman, hired by defendant's miners, for injuries sustained in assault and battery by defendant's foreman in ejecting him from the premises while attempting to settle a dispute as to the weight of coal dug, an instruction that to entitle plaintiff to recover he need not establish that the office or store where the controversy occurred was that of the defendant, nor that the foreman had a right to eject from the company's premises all persons whose presence he might deem prejudicial to the defendant, such allegations not being material, *held* error as invading the province of the jury and assuming facts as to which the evidence was in conflict.

4. Trial ⇐191(10), 194(19)—Instruction assuming truth of facts in issue held erroneous.

In an action for an assault and battery alleged to have been committed by defendant's foreman while attempting to eject plaintiff, who was endeavoring to settle a dispute between defendant and its miners, an instruction that, if the foreman himself was liable to plaintiff for the injuries inflicted, and that he was then an employé of defendant, and that the consideration of the controversy which plaintiff sought to settle was within the general scope of the foreman's business, verdict should be for plaintiff, *held* erroneous as invading the province of the jury and assuming truth of facts as to which the evidence was in conflict.

5. Trial ⇐191(10), 194(19)—Instruction invading province of jury and assuming facts held erroneous.

In an action for assault and battery committed by defendant's foreman on plaintiff, who was endeavoring to settle a dispute between defendants and its miners, the injuries being occasioned while defendant's foreman was attempting to eject plaintiff from the premises, an instruction that, if plaintiff at the invitation of the grievance committee accompanied it to assist in presentation of the controversy, plaintiff was not unlawfully on the premises, but was there to transact business with the foreman as an employé of the company, *held* erroneous as invading the province of the jury and assuming facts.

6. Master and servant ⇐302(3) — Employer not liable for torts of servant ejecting one from servant's own premises while attempting to settle a labor dispute.

An employer is not liable in damages for every willful and malicious injury which one of his employés may inflict upon one not his employé, at a store owned and controlled by the one inflicting the injury, merely because the injured person may have sought such employé to complain on behalf of other workmen about the practice followed in the conduct of the employer's business.

7. Master and servant ⇐332(4)—Instruction as to materiality of complaint for injuries caused by servant's tort held misleading.

In an action for assault and battery committed by defendant's foreman on plaintiff, who was employed by defendant's miners as a check weighman, while attempting to settle a dispute between the miners and defendant, an instruction that allegations as to the necessity of proving that the foreman had a right to eject persons from the company's premises and that the premises where the controversy occurred were those of the defendant, were not material, *held* misleading, as implying that plaintiff could recover without proof of such facts.

8. Master and servant ⇐330(2)—Declarations of foreman not competent proof of his agency.

In an action for assault and battery committed by defendant's foreman on plaintiff, who

was employed by defendant's miners as a check weighman, while attempting to settle a labor dispute, defendant denying the authority of the foreman to inflict personal injuries, an instruction that the foreman's declarations might be considered as proof of his agency or authority was error.

9. Trial ⇐253(9)—Binding instruction assuming to declare liability under enumerated facts must recite all essential facts.

In an action for assault and battery committed by defendant's foreman on plaintiff, who as a check weighman hired by defendant's miners was attempting to settle a labor dispute when he was ejected from the premises, an instruction assuming to declare liability under certain enumerated facts which omitted the element that the place from which plaintiff was ejected was one over which the foreman had control *held* erroneous, since it failed to recite all the facts on which the liability depended.

Appeal from Circuit Court, Gibson County; Thos. Duncan, Special Judge.

Action by Robert L. Dowdle against the Princeton Coal Company and another. Judgment for plaintiff, and named defendant appeals. Reversed, with directions.

Embree & Embree, of Princeton, for appellant.

T. M. McDonald, of Princeton, for appellee.

EWBANK, C. J. Appellee sued appellant and one Frank Buchanan for damages for personal injuries alleged to have been inflicted by an assault and battery, and recovered a verdict against both of them for $6,500, on which the judgment appealed from was based. Overruling appellant's demurrer to the complaint and its motion for a new trial are assigned as errors.

The complaint alleged that defendant company (appellant) owned and operated a coal mine, in which it employed as mine superintendent its codefendant, Buchanan, and gave to him the sole and exclusive charge and control of its said mine, with the right, power, and authority to exclude and eject from its premises any and all persons whose presence thereon he might consider detrimental or prejudicial to the best interests of his said employer; that plaintiff (appellee) was employed by the miners in said coal mine as check weighman, when a dispute arose between said miners and the defendant company concerning the weighing of coal dug from said mine and checked by plaintiff; that for the purpose of adjusting the dispute plaintiff went at the request of said miners by whom he was employed "to the office of said defendants at said mine"; that defendants, by and through said Buchanan, ordered plaintiff to leave the premises of the defendant company, which he refused to do "until his said business was completed," whereupon "defendants by and through said Buchanan undertook to eject plaintiff from said premises, and * * * assaulted and struck plaintiff with a pick handle * * * over the head with such force and violence as to fracture plaintiff's skull," and inflict certain injuries; that plaintiff offered no resistance and made no threats of violence against defendants and offered no violence to them; and that by reason of his said injuries plaintiff was damaged $20,000. Appellant's demurrer was for the alleged reason that the complaint did not state facts sufficient to constitute a cause of action, with memoranda charging that it failed to allege facts showing that in striking the blow Buchanan was acting in the line of his duties as superintendent of appellant's mine, or was acting for or on behalf of appellant, but that it showed, on the contrary, that in striking plaintiff he turned aside from his service as superintendent, and acted wantonly and willfully in carrying out a purpose of his own.

[1] By way of answer to these objections appellee relies on the averments that Buchanan was a servant of the defendant company to whom was given sole and exclusive charge and control of its premises, and that when plaintiff went upon such premises "defendants, by and through said Buchanan, ordered the plaintiff to leave the premises," and, upon his refusal to do so, "said defendants by and through said Buchanan * * * assaulted and struck plaintiff with a pick handle," as carrying the necessary implication that if the defendant company did the alleged acts "by and through Buchanan," its alleged servant in charge of the premises, they were within the scope of his duties and authority, however imperfectly the facts may have been stated from which the alleged conclusion was drawn that the defendant company did them by the hand of its servant. There was no motion to make the complaint more specific, and we are persuaded that it was sufficient in the particular challenged, as against a demurrer for want of facts. Section 343a, Burns' Supp. 1921, § 1, chapter 62, Acts 1915, p. 123.

After the demurrer was overruled appellant answered by a denial and by a special plea averring that the alleged assault and battery occurred in the store of the Princeton Merchandise Company, of which said Buchanan was a shareholder, agent, officer, and manager, in an attempt by Buchanan as such representative of the Princeton Merchandise Company to remove him when plaintiff refused to depart after being notified to do so because he was quarrelsome and boisterous. Plaintiff replied by a denial, and the cause was tried on the issues thus joined.

[2] While the plaintiff, as mere matter of pleading, was only required to state ultimate facts, and might be indulged in substituting an implied conclusion that the servant acted within the scope of his authority for facts

showing the nature and extent of his authority, and that the act complained of was done on behalf of the employer, within such authority, evidence to establish facts out of which a liability on the part of the employer would arise was essential in order to recover damages from such employer because of an act done by the servant. Pittsburgh, etc., R. Co. v. Adams, 25 Ind. App. 164, 173, 56 N. E. 101; Kohl v. H. P. Lenhart F. Co., 58 Ind. App. 7, 9, 106 N. E. 399; Oakland City, etc., Soc. v. Bingham, 4 Ind. App. 545, 550, 31 N. E. 383; Smith v. Louisville, etc., R. Co., 124 Ind. 394, 400, 24 N. E. 753; Louisville, etc., R. Co. v. Kendall, 138 Ind. 313, 315, 36 N. E. 415; Evansville, etc., R. Co. v. Baum, 26 Ind. 70, 72; Louisville, etc., R. Co. v. Gillen, 166 Ind. 321, 324, 76 N. E. 1058; Fisher v. Fletcher (Ind. Sup.) 133 N. E. 834, 22 A. L. R. 1392. "It is not questioned that a tortious * * * act resulting in injury, if done by an agent acting not within the course of his employment, is not the subject of recovery against the principal. Indeed, it is too well settled to admit of question that under such circumstances there can be no recovery." Louisville, etc., R. Co. v. Kendall, 138 Ind. 313, 315, 36 N. E. 415, 416, citing authorities.

The complaint "in effect averred that it was the defendant, acting through its agents and servants, which had injured the plaintiff. That was equivalent to an averment that the injury was inflicted by the defendant, acting through its duly authorized agents and servants. That made it at the trial a question of evidence as to whether the persons who performed the acts charged to have been injurious to the plaintiff were the agents and servants of the defendant, and acting at the time within the lines of their respective duties." Wabash R. Co. v. Savage, 110 Ind. 156, 159, 9 N. E. 85. Where defendant's servant had committed an assault and battery at the direction of a constable holding a writ of replevin, the court said:

"One of the material allegations of the complaint is that appellee committed an assault and battery on appellant by and through the act of its servant while acting in the line of his duty and within the scope of his employment. * * * There was no proof of the material allegation aforesaid, nor was there any evidence from which the fact might properly be inferred by the jury. There was therefore a total failure of proof to support a material allegation of the complaint. The court did not err in directing a verdict for the defendant." Kohl v. H. P. Lenhart, 58 Ind. App. 7, 9, 106 N. E. 399.

That the complaint merely stated a cause of action in general terms, without alleging the specific facts relied on to support such general averments, and that there was no motion to make it more specific, did not excuse plaintiff from the necessity of proving facts sufficient to make a cause of action in order to be entitled to recover damages. Prudential Ins. Co. v. Ritchey, 188 Ind. 157, 163, 164, 119 N. E. 369, 484; Jackson v. Rutledge, 188 Ind. 415, 425, 122 N. E. 582; Thompson v. Divine, 73 Ind. App. 113, 117, 126 N. E. 684; Citizens' L. & T. Co. v. Terre Haute, etc., Co. (Ind. App.) 135 N. E. 802.

Counsel for appellant do not deny that there was evidence which, if given credit, would fairly tend to prove all of the facts necessary to make out a cause of action, including Buchanan's authority, and that the wrongful act was within its scope. But they point out that there was no evidence whatever that the defendant company commanded or expressly authorized the blow to be struck, and that the parties had also introduced evidence to the following effect; that when the blow was struck neither plaintiff, nor Buchanan, who struck it, was on the premises of the defendant company, but both were in an old box car that stood on the right of way of the Southern Railway Company, and belonged to and was occupied as a storeroom by the Princeton Merchandise Company, which operated a general store therein; that the Princeton Merchandise Company was a corporation, in which the appellant company owned no interest, but all the capital stock of which belonged to three individuals; that defendant Buchanan owned one-fourth of the capital stock and had charge of the store and he and his wife waited on the trade, and were doing so at the time plaintiff came into the store, a few minutes before Buchanan struck him with the pick handle; that after some words had been exchanged Buchanan ordered plaintiff to leave the store, but plaintiff refused, and invited Buchanan to put him out, if man enough to do so, and then Buchanan struck him on the arm, and after they had grappled with each other struck him on the head, in the course of a fight that ensued there in the box car storeroom, and that the blow was struck for the sole purpose of enforcing the command to depart; that Buchanan was not the superintendent of the mine, but was only the "top boss," having control of the men above ground; that Charles F. Hill was the mine superintendent, and Buchanan was subordinate to him, and had no authority over the men below ground; that the weighing of the coal was done below ground, and the men who did it were under the control of Elza Malone, who was the "mine boss," and (subject to Mr. Hill) had immediate charge of the weighing and the settlement of disputes about weighing; and that the reason plaintiff came into the box car store and refused to leave it when ordered to do so was because he wished to take part in presenting some objections which the "mine committee" of employés of appellant had made to the manner in which the coal was weighed.

The court of its own motion gave a series of instructions, among which were the following:

"(8) To entitle the plaintiff to recover in this action it is not necessary for him to establish the fact that the office or store where the controversy occurred was the office of the coal company, nor is it necessary for him to prove that Buchanan had the right to eject from the company's premises all persons whose presence he might deem prejudicial to the company. The court directs you that these are not material allegations of the amended complaint.

"(9) If you find from a fair preponderance of the evidence that the defendant Buchanan inflicted upon the plaintiff the injuries complained of * * * and under such circumstances that he himself is liable in damages to plaintiff, as hereinbefore explained to you, and that said Buchanan was then and there an employé of said coal company, and was at the time said injuries were inflicted on the plaintiff engaged in settling a controversy that had arisen between the weighman and check weighman of such mine, and that the consideration of such controversy was within the general scope of the business the defendant Buchanan was employed to perform, then your verdict should be for the plaintiff and against each one of the defendants."

"(12) If you find from a preponderance of the evidence that, at the time the injuries complained of were inflicted, plaintiff, at the invitation of the grievance committee, accompanied it to assist such committee in the presentation of the controversy, then the plaintiff was not unlawfully at the store or office, at the time he received such injuries. Under the circumstances the plaintiff was there to transact business with Buchanan, as an employé of the company."

[3-6] Each of these instructions invaded the province of the jury and assumed as true certain facts to which plaintiff's witnesses testified, the existence of which defendant's evidence tended to disprove. It is not the law that an employer is liable in damages for every willful and malicious injury which one of his employés, at a place not upon the employer's premises, may inflict on a person not employed by him, in an effort to "put him out" of a store owned and controlled by the one inflicting the injury merely because the injured third person may have sought such employé in his store to complain on behalf of certain workmen in whom he was interested about a practice followed in the conduct of the employer's business. In the absence of any evidence whatever that the defendant company expressly authorized Buchanan to strike the blow, the general averment that the company struck plaintiff "by and through said Buchanan" could only be proved by evidence fairly tending to show that Buchanan was acting at the time within the scope of his authority in the transaction of business of the company, and struck the blow as a part of transacting that business. Plaintiff was not a passenger, customer, or employé of the defendant company, and the company owed him no special duty to protect him from violence if he should go to a place not upon its premises to seek one of its employés, and engage in a controversy with him, more especially if that controversy related to a matter not within his jurisdiction as "top boss" in charge of its premises above ground, as defendants' evidence tended to show was the case.

[7] In the absence of any evidence tending to show that Buchanan had authority from the defendant company to touch plaintiff for any purpose whatever, unless in the exercise of his control over its premises and his power to eject persons therefrom, the instruction that the allegations on that subject were not material was very misleading, as carrying the implication that plaintiff could recover without proof of those facts, whereas, if the evidence offered by defendant as to Buchanan's employment and the scope of his authority were believed, there was no proof of a liability on any other ground. And if defendant's evidence were believed the mere fact that plaintiff entered Buchanan's store not on the company's premises, by "invitation of the grievance committee," would not give him a lawful right to remain there and resist an attempt to eject him, after he had been commanded by the owner to depart.

The court also gave an instruction of its own motion, reading (in part) as follows:

"(10) The language of the law is that to establish the liability of the master for the acts of a servant the acts complained of must be done within the general scope of the servant's employment. In determining whether the acts of the defendant Buchanan that are complained of * * * were done within the general scope of his employment * * * you may consider the evidence as to what the defendant Buchanan said, if anything, touching the grievances then complained of by the grievance committee of the miner's union. * * *"

[8] This was error. The declarations of a person assuming to act for another are not competent as proof of his agency or the scope of his authority. Bankers' Surety Co. v. German, etc., Co., 189 Ind. 311, 322, 126 N. E. 6.

[9] The court gave an instruction (No. 2) asked by plaintiff which enumerated certain hypothetical facts as to Buchanan having been the superintendent in charge of appellant's property, with authority to eject persons from its premises, and as to his having struck the blow in attempting to eject plaintiff from "the place where he was assaulted," under which facts the jury was instructed that appellant was liable in damages. But it omitted the element of such place being a part of appellant's said property over which Buchanan had control, or a part of its premises from which he had authority to eject persons. This was error. A binding instruction which assumes to declare a liability under certain enumerated facts must recite all the facts on which such liability depends. Chicago, etc., R. Co. v. Glover, 154 Ind. 584, 57 N. E. 244; Terre Haute, etc., Co. v. Young, 56 Ind. App. 25, 104 N. E. 780.

The other questions argued by counsel may not arise upon a retrial of the case.

The judgment is reversed, with directions to sustain appellant's motion for a new trial.

JACKSON, Secretary of State, et al. v. STATE ex rel. SOUTH BEND MOTOR BUS CO. (No. 24548.)

(Supreme Court of Indiana. Feb. 8, 1924. Dissenting Opinion Feb. 9, 1924.)

1. Constitutional law ⇐70(3)—Supreme Court cannot pass on motives of Legislature.

The Supreme Court is not authorized to pass upon or question the motives actuating the Legislature in passing an act, the constitutionality of which is in question, the concern of the court being whether the act as finally passed is valid.

2. Statutes ⇐107(1)—Mode of determining what is subject of act stated.

In determining whether an act is valid under Const. art. 4, § 19, relating to subjects and titles of acts, the Supreme Court is bound to accept as the subject of the act what either is expressly stated or is spelled out by the details expressed.

3. Statutes ⇐107(1)—Act relating to motor vehicles and to inheritance taxes held void as embracing two unconnected subjects.

Acts 1923, c. 186, embracing two subjects not properly connected, one relating to the regulation, operation, and licensing of motor vehicles, and the other to the disposition of inheritance taxes, is double and void as violating Const. art. 4, § 19, providing that every act shall embrace but one subject and matters properly connected therewith.

4. Statutes ⇐64(10)—Act embracing different subjects in its body and title cannot be held valid in part.

Where an act is void as treating of two different subjects both in its title and in the body of the act, the court may not determine that one of the subjects can stand and the other be held void.

Ewbank, C. J., dissenting.

Appeal from Superior Court, St. Joseph County.

Mandamus action by the State, on relation of the South Bend Motor Bus Company, against Ed Jackson, as Secretary of State, and another. Judgment for relator, and defendants appeal. Affirmed.

U. S. Leah, Atty. Gen., for appellants.

Arthur L. Gilliom, of South Bend, for appellee.

GAUSE, J. This was an action brought by the appellee seeking to mandate appellants to issue to relator certificates of registration and license plates upon motor vehicles owned by said relator.

Briefly stated, the complaint shows that relator tendered to appellants the amount of the license fees required by the law, generally referred to as the "Motor Vehicle Law," as such law was prior to the passage of an act in 1923, being chapter 186 of the Laws of the 1923 Session of the Legislature (Acts 1923, p. 541); that appellants refused to issue certificates of registration and license plates, because the amount tendered was not the amount fixed by said act of 1923. The relator contends that said act is unconstitutional and void, and for that reason it was entitled to have its motor vehicles registered under the law as amended in 1921. Acts 1921, p. 579.

A demurrer was overruled to the complaint, and thereupon appellants filed an answer, which sought to plead the history of said act in the Legislature from the time it was introduced as a bill until it became a law, for the purpose of showing that said act did not contain more than one subject. It is not necessary to set out the details of the answer, which the court struck out on motion of appellee, because the questions contended for in the briefs are raised upon the demurrer to the complaint.

After appellants' answer was stricken out, they refused to plead further, judgment was rendered in favor of appellee, and requiring appellants to issue registration certificates and license plates upon payment of the fees required by the amendatory act of 1921 heretofore referred to.

The question for decision is whether chapter 186 of the Acts of 1923 (Acts 1923, p. 541), is unconstitutional under section 19 of art. 4 of the Constitution of Indiana, which section reads as follows:

"Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The act in question has a long title, because it purports to amend several other acts, all of which are amendments to the act passed in 1913 relating to motor vehicles, and in the title is set out in full the title of each act it is sought to amend.

The title in substance may be stated as follows:

"An act to amend sections 1, 7 and 10 of an act entitled 'An act defining motor vehicles and providing for the registration, numbering and regulation of same, defining chauffeurs and providing for the examination and licensing thereof, and providing for punishment for the violation of any of the provisions of this act,' approved March 15, 1913 [and then are designated many other sections of acts which amended the original act of 1913, which the title indicates are to be amended], * * * prescribing the gross weight of vehicles which may be

operated upon the highways and authorizing certain highway officials to prescribe the maximum weights of motor vehicles, trailers and the loads thereof which may be operated over the roads under their control, and defining auto busses and prescribing the fee for the registration thereof, and providing for the disposition of the proceeds of the inheritance tax."

All the provisions of this last act, except section 8 thereof, and all the provisions of the acts which it purports to amend, relate to the regulation, operation, and licensing of motor vehicles, and matters included within that subject. Section 8 provides that all the proceeds of the inheritance tax shall constitute a part of the general fund of the state.

Appellee claims that said act is void, because it is not restricted to one subject and matters properly connected therewith; that the title, instead of expressing one subject, expresses two, namely, the regulation and registration of motor vehicles, and the disposition of inheritance taxes, and that the body of the act embraces both subjects which are not properly connected. The appellants claim that the subjects expressed in the title and embraced in the act are germane, and constitute branches of only one subject. The parties substantially agree upon the legal principles involved, but, as is frequently the case, disagree as to the application of the principles.

This provision of our Constitution is found in the same or similar language in the Constitutions of many states, and has been the frequent subject of construction; but, because of the wide difference in the facts involved in each case, there is little of value in the precedents, except as they announce general principles, and in these they are in substantial accord, so there will be no benefit in reviewing many of the cases.

It is the duty of the courts to uphold an act of the Legislature, if it is possible to do so without violating the Constitution, and in doubtful cases to resolve the doubt in favor of the action of the Legislature; but, where it is clear that the law offends a constitutional inhibition, then it is the duty of the courts to uphold the Constitution rather than the statute which is in violation thereof.

The purpose of the constitutional provision in question has been stated by this court and courts of other states many times, and all point out the same evils which it was designed to prevent.

As said by this court in Grubbs v. State (1865) 24 Ind. 295:

"One of them [mischiefs to be prevented] was stated to be the enactment of laws under false and delusive titles, whereby measures had procured the support of legislators, who were thus deceived as to the character of the laws, and another was deemed to be the conjunction, in one act, of two or more subjects having no legal connection, for the purpose of procuring the passage of laws which might not, alone, command legislative sanction, upon the strength of popular measures embraced in the same act. To prevent these tricks in legislation, the Constitution absolutely, and in all cases, forbids the passage of any law, unless the subject of it be expressed in its title, and, in like manner, inhibits the embodying in the same act of two or more subjects, having no legal connection with each other.

"Whenever it is clear that this constitutional provision has been disregarded, or overlooked, we must not hesitate to pronounce the supremacy of the Constitution, and, by consequence, the invalidity of the act, to the extent that it may be in conflict with the fundamental law."

The purpose of this constitutional provision, as above announced, has been approved repeatedly by this court. See Henderson, Auditor, v. London, etc., Ins. Co. (1893) 135 Ind. 23, 34 N. E. 565, 20 L. R. A. 827, 41 Am. St. Rep. 410; State v. Closser (1912) 179 Ind. 230, 99 N. E. 1057, and cases cited therein.

Judge Cooley has stated the law relating to this as follows:

"It may therefore be assumed as settled that the purpose of these provisions was: First, to prevent hodgepodge or 'logrolling' legislation; second, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire." Cooley's Constitutional Limitations (7th Ed.) p. 205.

Another purpose of this provision of the Constitution has been stated as to aid in codifying the laws. Indiana, etc., R. Co. v. Potts (1856) 7 Ind. 681.

It should be possible for laws to be classified according to subjects, and those pertaining to any one subject compiled so that all the laws pertaining to that subject may be more easily ascertained.

The possible evils are apparent of permitting the supporters of one measure, which upon its own merit cannot command sufficient votes to pass it, to embrace in the same act other measures, which are by themselves unable to secure favorable action, but, by combining the minorities supporting each measure, thus secure a majority.

It is suggested by appellee that an examination of the journals of each branch of the Legislature which passed the act in question will reveal that its passage was secured in violation of the purpose of this constitutional provision.

[1] But we are not authorized to pass upon or question the motives which actuated the Legislature in passing the act, our concern being whether the act as finally passed is or is not valid.

We will now proceed to an examination of

the act involved to see if it offends the constitutional provision quoted. This provision limits the act to one subject and matters properly connected therewith, and requires that the subject be expressed in the title. That is, not only must the matters embodied in the act relate to the same subject, but the subject to which they relate must be expressed in the title.

The act in question, as passed by the session of 1923, is not an original act, but purports to be an amendment of the act of 1913, Acts 1913, p. 779, and of acts amendatory thereto and in addition makes the provision as to inheritance taxes. It is then apparent that the provision as to inheritance taxes must be connected with and germane to the subject of the act of 1913 and that subject must be the one expressed in the title. This, as we understand it, is the position of amicus curiæ in supporting the position of appellants, and it is argued that the provision as to inheritance taxes is germane to the subject of the act of 1913.

The title of the original act of 1913, and which is a part of the title to the act in question, was:

"An act defining motor vehicles and providing for the registration, numbering and regulation of same, defining chauffeurs and providing for the examination and licensing thereof, and providing for punishment for the violations of any of the provisions of the act."

It is clear that the subject of this act, as expressed in the title, is the regulation and licensing of motor vehicles. The brief of amicus curiæ states it to be the regulation of the use of motor vehicles upon the highways. In short, the subject as expressed in the title is "motor vehicles."

An examination of the body of the entire act, including the original and all amendments thereto, except section 8 of the act in dispute, discloses that all sections thereof, of which there are more than 30, relate exclusively to motor vehicles and matters relating to the operation, registration, and licensing thereof.

We held in the recent case of Baldwin v. State (1923, Ind. Sup.) 141 N. E. 343, which involved only the act as amended in 1921, that the subject of the act of 1913 and the amendments thereto, including the act of 1921, was motor vehicles, and that the act only embraced matters properly connected therewith, namely, the regulation and operation thereof. In that case it was contended that this act, before the act of 1923, involved in this case, was passed, and when there was no provision regarding inheritance taxes, offended against the constitutional provision under consideration, because it embraced provisions relating both to the regulation and to the licensing or taxing of motor vehicles, but it was held that both of these matters related to the general subject which was expressed in the title.

Appellants say that the subject may be expressed generally in the title, or may be spelled out from details which are expressed, and that it is sufficient if the general subject may be inferred from the details set out. If this rule is applied, then certainly the details which are expressed in the title of the original act and its amendments clearly spell out the subject of motor vehicles. This is its general subject, and it is permissible to embrace in the act matters properly connected with that subject, such as the regulation, registration, and licensing thereof. We cannot see, however, that inheritance taxes or their disposition are related to this subject.

Ask any lawyer or layman what this act is about, and he will tell you it is "motor vehicles." The Attorney General in his brief, in referring to the original act, characterizes it as "the original act relating to motor vehicles." In the brief of amicus curiæ, supporting the Attorney General, it is described as "the Motor Vehicle Registration Law."

It has been suggested that, as this act deals with revenues, then this may be taken as its general subject, and any matter properly connected with revenues may be included.

We do not see how it can be successfully contended that the general subject of this act is revenue. True, it deals with revenue derived from the registration of motor vehicles, but it does this only as incidental to the main subject of the act. As we held in the case of Baldwin v. State, supra, and as was held in the case of Tomlinson v. City of Indianapolis (1895) 144 Ind. 142, 43 N. E. 9, 36 L. R. A. 413, the authority to regulate includes the power to license; therefore it is proper for an act, the general subject of which is the regulation of motor vehicles, to also deal with the licensing thereof and the disposition of such license fees, but this would not make it proper, in an act on the subject of regulating motor vehicles to deal with the subject of licenses upon other rights or things.

If in an act relating to the regulation of motor vehicles we can have a provision relating to the disposition of inheritance taxes, then, as related thereto, we can also include a provision relating to the levying and collection of such taxes, and then, as related to that, we can have a provision relating to inheritances themselves.

By such a process of tracing relationship, we could find that most subjects of legislative enactments were related, just as by a similar process we can find the relationship of all of mankind. If the position of appellants is sustained, it would seem to follow that we could have one act which dealt with the operation of motor vehicles and also with the descent of property.

It is suggested that in the act in question the Legislature was exercising the power to tax, and that, as the provision relating to inheritance taxes was a proper matter to be dealt with under the taxing power, therefore the subject of inheritance taxes is related to the other provisions of the act. An answer to this is that the subject of an act is not governed by the power the Legislature seeks to exercise by the act. Frequently a law gets its validity under both the police power and the power to tax, as is true in the act under consideration.

Also the Legislature may, under the police power, legislate upon many different subjects, and the mere fact that they might all derive their authority from the police power would not permit the inclusion of different and unrelated subjects.

Of course, the Legislature may have been and probably was moved to enact this law, in part, because of the revenue that would accrue to the state, but this would not determine the subject of the act. This can only be determined from the act itself.

[2] We are bound to accept as the subject of the act what either is expressly stated or is spelled out by the details expressed. It has been said that in construing the body of the act, we should consider the title, and in construing the title we should consider the body, and from it all determine the subject.

If we follow this rule, then we find that of the more than 30 sections all but one relate to the general subject of motor vehicles, and the one exception (section 8) relates to inheritance taxes.

This section 8 amends, by implication, the State Highway Commission Law of 1919, (Acts 1919, p. 119), and it amends it in respect to a matter that has no relation to the regulation and operation of motor vehicles. There is no apparent relation between the subject of motor vehicles and the subject of inheritance taxes, and none is disclosed in either the title or the body of this act, and yet in both the title and the body each of these subjects is dealt with.

[3] The act is clearly double and embraces two subjects which are not properly connected, and because of said constitutional provision chapter 186 of the Acts of the 1923 General Assembly is void.

As heretofore stated, the facts of each case construing this provision of the Constitution are so different that no purpose would be served in reviewing them separately, their value being in the establishment of the general principles involved, and in this respect they are harmonious. The following are some of the cases in which the questions herein discussed are considered: Shoemaker, Auditor, v. Smith (1871) 37 Ind. 122; State v. Young (1874) 47 Ind. 150; Henderson, Auditor, v. London, etc., Ins. Co. (1893) 135 Ind. 23, 34 N. E. 565, 20 L. R. A. 827, 41 Am. St. Rep. 410; opinion of Elliott, J., in case of State ex rel. v. Hyde (1889) 121 Ind. 21, on page 48, 22 N. E. 644; Dolese et al. v. Pierce (1888) 124 Ill. 140, 16 N. E. 218; Sutter v. People's, etc., Co., 284 Ill. 634, 120 N. E. 562; Cote v. Village, 173 Mich. 201, 139 N. W. 69; Simms v. Sawyers, 85 W. Va. 245, 101 S. E. 467; Oxnard Beet Sugar Co. v. State, 73 Neb. 57, 102 N. W. 80, 105 N. W. 716; State v. Women's, etc., Hospital, 143 Minn. 137, 173 N. W. 402. See, also, 25 R. C. L. p. 834, and cases cited.

[4] It is contended, on behalf of appellants, that, even if the act in question does contain two unrelated subjects, yet the court may determine that one of those subjects can stand and the other be held as void, the contention being that the part of the act relating to motor vehicles should be allowed to stand as valid, and the part relating to inheritance taxes treated as void. This is not permissible where the act both in its title and in the body treats of two different subjects.

An act of such a character is absolutely void, because it is in direct conflict with the Constitution.

The Constitution does provide that, if only one subject is embraced in the title, then any subject not expressed in the title that is embraced in the body of the act may be rejected, and the part that is expressed in the title be allowed to stand; but that is not the case here, both subjects being in the title and the body. In such a case the courts cannot choose between the two subjects and eliminate one of them.

As said in Cooley on Constitutional Limitations (7th Ed.) p. 211:

"But if the title to the act actually indicates, and the act itself actually embraces, two distinct objects, when the Constitution says it shall embrace but one, the whole act must be treated as void, from the manifest impossibility in the court choosing between the two, and holding the act valid as to one and void as to the other."

As said by our court in Shoemaker, Auditor, v. Smith, supra:

"If the different particulars enumerated are to be regarded as so many different subjects, then the law is wholly void, because of a multiplicity of subjects."

A similar statement of the rule is found in the case of State v. Young, supra.

The rule that the whole act is void if both the title and the body of the act embrace two unrelated subjects is sustained by the following additional authorities: Sutherland Statutory Construction, vol. 1, § 144; Oxnard Beet Sugar Co. v. State, supra; Sutter v. People's, etc., Co., supra; Skinner v. Wilhelm, 63 Mich. 568, 30 N. W. 311; Cote v. Village, supra; Builders,' etc., Co. v. Lucas, 119 Ala. 202, 24 South. 416; State v.

Ferguson, 104 La. 249, 28 South. 917, 81 Am. St. Rep. 123; Simms v. Sawyers, 85 W. Va. 245, 101 S. E. 467; 25 R. C. L. 838, and cases cited.

To support his contention that the subjects of this act may be separated by the court and one subject be allowed to stand and one stricken out, the Attorney General cites two cases, namely, Reilly v. Knapp, 105 Kan. 565, 185 Pac. 47, and State v. Lancaster County, 17 Neb. 85, 22 N. W. 228.

In the Kansas case the Supreme Court of that state held that a rider to a general appropriation bill did not invalidate the appropriations, and its decision was put upon the ground that the appropriating of money for the support of the state government was the principal purpose for which the Legislature had met, and that the unrelated subject contained in the act could not have influenced the Legislature in passing the act. The court, however, recognized the general rule as we have stated it heretofore.

In the Nebraska case the court held that one of the provisions in the act was void for another reason, and that, with this void provision out, then the act was not void for duplicity. This case also stated the rule to be as laid down in the authorities above cited.

These are the only two cases found which can in any way be claimed as supporting the contention made that we can separate this act and hold one part valid and the other invalid.

The unanimous holding of all the authorities, unless the two cases above referred to can be classed as exceptions, is, where the act contains two separate subjects in both the title and body, it cannot be separated by the courts.

Much as we dislike to hold an act of the Legislature void, yet we are clearly of the opinion that this act violates a provision of the Constitution that is mandatory, and we have no alternative but to so declare.

The judgment is affirmed.

EWBANK, C. J. (dissenting). The Constitution of Indiana permits an act of the Legislature to embrace one subject expressed in the title, and "matters properly connected therewith." Article 4, § 19. The laws in force at the time the act in question was passed required that all revenues from fees for the registration of motor vehicles and all from inheritance taxes should be a part of the highway fund. Section 31, c. 53, Acts 1919, p. 136. And under the law then and previously in force the annual receipts from inheritance taxes were about $900,000, and from motor registration fees about $3,500,000. The act in question more than doubled the average of the motor registration fees, so that it was estimated they would produce $7,500,000 per year, and provided that the inheritance taxes should no longer be paid into the highway fund. Sections 2, 8, c. 186, Acts 1923, pp. 543, 550. I believe that taking out of the highway fund $900,000 of revenues derived from one source which were previously appropriated for use by the highway commission was a "matter properly connected with" the collection of $7,500,000 (being an increase of $4,000,000) from another source, all of which was payable into the highway fund, and was by law appropriated for the use of the highway commission.

The principal opinion holds otherwise. Therefore I respectfully dissent.

HUTTON v. SCHOOL CITY OF HAMMOND et al. (No. 23910.)

(Supreme Court of Indiana. Feb. 6, 1924.)

Injunction ⟸136—Interlocutory mandatory injunction held improper.

Where property in controversy never has been in plaintiff's possession, but defendant had for years had undisputed possession, claiming absolute ownership, interlocutory mandatory injunction for its surrender for use of plaintiff pending suit, because of provisions of a contract under which defendant had performed services years before, for which plaintiff had paid at the time, is improper, there being no extraordinary circumstances.

Appeal from Superior Court, Lake County; Walter T. Hardy, Judge.

Action by the School City of Hammond and others against Joseph T. Hutton. From adverse injunctive orders, defendant appeals. Reversed, with directions.

Wm. J. Whinery, of Hammond, for appellant.

Frederick C. Crumpacker and Edwin H. Friedrich, both of Hammond, for appellees.

EWBANK, C. J. This is an appeal from an interlocutory order granting a temporary injunction of a mandatory character, and from an order overruling a motion to dissolve such temporary injunction. The order recited a finding that defendant (appellant) should deliver forthwith to one Addison C. Berry, who, it stated, was an architect and a responsible and disinterested person, but who was not a party to the action in which such order was made, "all plans, drawings, specifications, explanatory and exemplifying data and memoranda, and all other records now in his possession prepared under the contracts between the said defendant and the plaintiff, in the construction and erection of an industrial high school building for the plaintiff, to be kept and held by said Berry until further order of court, * * * that the defendant should be enjoined from refus-

ing so to do, and that he be enjoined from destroying or mutilating" the same. And it decreed "that said defendant be enjoined from refusing to deliver said data to said Berry forthwith, and that he be enjoined from destroying or mutilating the same or any part thereof, and that said documents be kept and held by said Berry, all until further order of court."

The sufficiency of the evidence to sustain this finding and order is challenged. The evidence on which the order was granted consisted of the verified complaint by the school city of Hammond, hereinafter referred to as the plaintiff, an affidavit by appellant Hutton, hereinafter referred to as the defendant, a written contract between plaintiff and defendant, and the oral testimony of four witnesses, including a member of the school board of the plaintiff city, the attorney for said board, the architect (Mr. Berry) employed by the board, to whom the order appealed from directed that the plans, drawings, etc., should be delivered, and the defendant.

Under the construction tending most strongly to uphold the order, this evidence proved the following facts: That in 1910 plaintiff employed defendant to furnish all plans and specifications for the erection of an industrial high school building and that certain plans for a main building, with wings, were prepared and accepted, for which a partial payment was made; but after some years of litigation it was determined that the cost thereof would exceed the constitutional limit of municipal indebtedness; that in 1915 a contract in writing was entered into by plaintiff and defendant, that recited said facts, by which defendant undertook to prepare all plans and specifications for such industrial high school building and to revise them as needed, and upon their approval and acceptance by plaintiff "to furnish not less than ten (10) sets of plans and specifications for the use of" plaintiff, and of bidders and the contractor whose bid should be accepted; that this should be done by revising the original drawings, plans, and specifications in a manner to meet the approval of plaintiff, and after such revision the plaintiff should accept and adopt the plans already prepared under the first contract as so revised, to the end that it should not be necessary for defendant to prepare entire new plans and specifications, but only to revise and change the old ones to meet with plaintiff's approval; that defendant should release plaintiff from liability on the 1910 contract, and he should dismiss all pending suits based thereon; that the money he had received on that contract should apply in part payment of his total fee of 5 per centum of the lowest bid for constructing the building, which fee should include payment in full for services rendered under the original contract with 1½ per centum on all work actually constructed under his supervision; and, if any part of the work left uncompleted at that time should be completed in the future, defendant should superintend the completion of the building for a fee of 1½ per centum of the added cost of completing it; that under the latter contract defendant revised the original plans by cutting off the two wings, and thereupon the main building for an industrial high school was erected in accordance with such revised plans, under the supervision of defendant, and he received payment therefor as agreed; that ten sets of the plans and specifications for said building were prepared by defendant and delivered to plaintiff, and some fragments of them remained in plaintiff's possession at the time of the hearing, but most of them, as parts of all the others, had been lost or destroyed, and plaintiff did not have so much thereof as would furnish to an architect information from which he could gain knowledge of the depths or widths of the footings and foundations, the location of the sewers, and similar facts necessary to be known in planning wings to be added to the building, which knowledge could not otherwise be obtained in less than a month, nor without an expense of about $1,500 to locate these parts and dig down and take measurements; that at the time of the hearing defendant did not have any of the plans and specifications so prepared, nor any copies thereof, in his possession nor under his control, and had not had them at any time within five years before, but he did have data in his office from which he could reconstruct such plans and specifications, and also the details and drawings from which to complete the building by adding the two wings, which he had kept in the expectation that at some time he would be called on to complete the building under what he understood to be his contract with plaintiff; that defendant denied under oath his possession of anything whatever belonging to plaintiff, or plaintiff's ownership of anything that he had; that before this suit was commenced Mr. Berry visited defendant at his office and asked for the plans and specifications, but was refused; that Mr. Berry's hearing was defective, but he understood that defendant said he would be willing to give them to him, personally, but would never give them to the school board, and said that he still had a contract with the board; plaintiff's attorney then served notice on defendant, in its behalf, to deliver up to it a foundation plan for the industrial high school building, including all extensions and additions, a sewerage plan, plans of the several floors, and of the sections, a framing plan, with construction details, a cross-section, a longitudinal section, and the several elevations, with the heights thereof; that defendant answered that he had a contract to build that school, and that he would rather

see all that he had in connection with the plans and data thereof burned up than to deliver them to the school board.

To uphold the ruling of the court in granting an interlocutory mandatory injunction requiring the delivery of the books and papers to Mr. Berry pending suit, plaintiff relies on a supposed rule of law giving the employer of an architect complete ownership and control of the "general design, idea and plan" of a building after the architect shall have prepared the plans and specifications, supervised the construction of the building, and received his agreed compensation. The authorities cited by counsel were all from other jurisdictions than this, and none of them went further than to hold that after said acts had been done the architect had no such ownership or control of the plans and specifications as would give him the right to prevent his employer from afterward making use of them in having designs prepared and executed by other architects, without employing him to supervise such further building operations, or would authorize him to enjoin others from copying the plans of a building after they had been made public without being copyrighted, or would enable him to recover compensation from the employer for preparing plans and specifications, without letting the employer have a copy of them. Wright v. Eisle, 86 App. Div. 356, 83 N. Y. Supp. 887; Walsh v. St. Louis Expo., 101 Mo. 534, 14 S. W. 722; Gibbon v. Pease, 1 L. J. K. B. 1905, 810, 3 B. R. C. 460; Hill v. Sheffield (Sup.) 117 N. Y. Supp. 99; 5 Corpus Juris. 259. None of these authorities touch the question whether an architect who contracted in writing to furnish ten sets of the plans and specifications for a house, and to superintend its construction, and did so to the satisfaction of his employer, would be bound, on demand five years later, after the employer had lost those ten sets, to surrender for the use of another architect his books and papers containing the memoranda from which they were drawn. Nor have we found any authorities, either in Indiana or elsewhere, which expressly pass on that question.

It thus appears that plaintiff sought the possession of some books and papers of which it had never had possession, but which the defendant had made, and of which he had thereafter held and kept possession, of which he claimed to be the sole and absolute owner, and to which plaintiff laid claim under what he insisted was the proper construction of a contract that the parties had entered into five years before, which stipulated that defendant should furnish to plaintiff ten sets of the plans and specifications and superintend the erection of a building, and under which said work long ago had been done to plaintiff's satisfaction.

Leaving the proper construction of the contract for determination when the case shall hereafter be decided on its merits, and merely suggesting that plaintiff's ownership and right to possession of the books and papers which it demanded was not admitted nor so clear as to be beyond possible doubt, we come to the question whether the discretionary power of the court to issue an interlocutory mandatory injunction included the right to command the surrender of these books and papers.

It has been held that when a restraining order to preserve existing conditions has been issued and served, and in violation and defiance of such order the defendant had built a wall, or laid a pipe line, or torn up a railroad track, or otherwise changed the conditions to be preserved, an interlocutory mandatory injunction might properly issue, commanding those conditions to be restored which would have been preserved if the original order had been obeyed. Vicksburg S. & P. R. Co. v. Webster, etc., Co., 132 La. 1051, 62 South. 140, 47 L. R. A. (N. S.) 1155; Lovett v. West Virginia C. G. Co., 65 W. Va. 739, 65 S. E. 196, 24 L. R. A. (N. S.) 230; Daniel v. Ferguson (1891, Eng.) 2 Ch. Div. 27.

And where an act had been done by the defendant from which a continuing nuisance resulted, that each day or each hour produced a new invasion of rights apparently vested in plaintiff, which he had long enjoyed before and until the doing of that act, such as placing a dam where it would divert the stream of a water course, or cutting a flume or the bank of a race by which water was conveyed to plaintiff's mine or mill, or of an irrigation ditch leading to plaintiff's fields, or shutting off the water or gas from the premises where plaintiff or his tenants lived, or closing the flue in plaintiff's chimney, or placing obstructions in a street in front of plaintiff's premises, or tearing up and destroying a public street, or erecting an obstruction across a right of way long traveled by plaintiff, or maintaining a building in such bad repair that it threatened to fall upon plaintiff's railroad track, the courts have sometimes interfered by making interlocutory orders commanding that the nuisance be abated by doing affirmative acts to restore the conditions which existed before the alleged wrong was done. Corning v. Troy Iron & Nail Factory, 40 N. Y. 191; Nicholson v. Getchell, 96 Cal. 394, 31 Pac. 265; Isenberg v. East India House Estate (Eng.) 33 L. J. Eq. (N. S.) 392; Johnson v. Tulare County Superior Court, 65 Cal. 567, 4 Pac. 575; London & N. W. R. Co. v. Lancashire, etc., R. Co. (1867) L. R. 4 Eq. Cas. 174; Bourke v. Olcott W. Co., 84 Vt. 121, 78 Atl. 715, 33 L. R. A. (N. S.) 1015, Ann. Cas. 1912D, 108; Brauns v. Giesige, 130 Ind. 167, 29 N. E. 1061; Whiteman v. Fayette F. G. Co., 139 Pa. 492, 20 Atl. 1062; Hart v. Seattle, 45 Wash. 300, 88 Pac. 205, 13 Ann. Cas. 438; Attorney General v. Metropolitan Board (Eng.) 1 Hem. & Mil. 345; City of Moundsville v. Ohio River R. Co., 37 W.

Va. 92, 16 S. E. 514, 20 L. R. A. 161; Broome v. New York, etc., Tel. Co., 42 N. J. Eq. 141, 7 Atl. 851; Curtis M. Co. v. Spencer Wire Co., 203 Mass. 448, 89 N. E. 534, 133 Am. St. Rep. 307; Longwood Valley R. Co. v. Baker, 27 N. J. Eq. 166; Hodge v. Giese, 43 N. J. Eq. 342, 11 Atl. 484; Pennsylvania R. Co. v. Kelley, 77 N. J. Eq. 129, 75 Atl. 758, 140 Am. St. Rep. 541.

And where the defendant clearly was guilty of an unlawful trespass in doing an act complained of, and thereby in violation of law had changed a previously existing condition to the detriment of plaintiff, as by entering upon premises which plaintiff was occupying under claim of right, and driving him away by force, or going upon such premises and working at night and on Sunday to erect the walls of a building before an injunction could be obtained, or entering by virtue of the right to lay a pipe line in a right of way acquired by purchase or condemnation, and surreptitiously laying the pipes on another route, a mandatory injunction has issued immediately to compel a restoration of former conditions. Pokegama S. P. L. Co. v. Klamath, etc., Co. (C. C. 1898) 86 Fed. 528; Lynch v. Union Inst. for Savings, 158 Mass. 394, 33 N. E. 603; Shedd v. American Maize, etc., Co., 60 Ind. App. 146, 108 N. E. 610; Daniel v. Ferguson (1891 Eng.) 2 Ch. Div. 27.

And where the defendants admitted by their verified answer that plaintiff was the owner and entitled to possession of certain books and papers that had been in the custody of their decedent, but offered an excuse for not surrendering them forthwith, an interlocutory mandatory injunction requiring that plaintiff be given access to them pending their delivery to her was issued. Goodale v. Goodale, 16 Sim. (39 Eng. Ch.) 316.

But we have not been referred to any authority nor do we know of any holding that where the property in controversy never had been in the possession of plaintiff, but defendant had held undisturbed possession of it for a period of years and claimed to be the absolute owner, he could be required by an interlocutory order to surrender it for the use of plaintiff pending suit, because of the provisions of a contract under which defendant had performed certain services years before, for which plaintiff had paid in full at the time, even if it should be found that under a proper construction of the contract title to such property had been conveyed by defendant to plaintiff at the time the contract was executed.

The general rule is that mandatory injunctions will not issue to deprive a person of property of which he is in possession under claim of ownership, until after the cause has been fully heard, when it comes up for final decree. And in the absence of extraordinary circumstances, of a character not shown to exist in the case at bar, such an order should not issue. Shafor v. Fry, 164 Ind. 315, 319, 73 N. E. 698; Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1225; People v. Simonson, 10 Mich. 335; Toledo, etc., R. Co. v. Detroit, etc., R. Co., 61 Mich. 9, 27 N. W. 715; San Antonio W. Co. v. Bodenhamer, 133 Cal. 248, 65 Pac. 471; Kelly v. Morris, 31 Ga. 54; Minneapolis, etc., R. Co. v. Chicago, etc., R. Co., 116 Iowa, 681, 88 N. W. 1082; New Orleans, etc., R. Co. v. Mississippi, etc., R. Co., 36 La. Ann. 561; Adams v. Ball (Miss.) 5 South. 109; State ex rel. v. Graves, 66 Neb. 17, 92 N. W. 144; Forman v. Healey, 11 N. D. 563, 93 N. W. 866; Fredericks v. Huber, 180 Pa. 572, 37 Atl. 90; Gordillo v. Del Rosario, 39 Phil. Rep. 829; Hood v. Edens, 113 S. C. 185, 101 S. E. 822; Catholicon Hot S. Co. v. Ferguson, 7 S. D. 503, 64 N. W. 539; Cheever v. Rutland, etc., R. Co., 39 Vt. 653; Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. 659, 36 L. Ed. 368. Appellant's exception to the ruling on his demurrer to the complaint presents only the question whether or not any cause of action at all, for any relief whatever, was stated, and would not be well taken if it should be found that the complaint stated facts sufficient to constitute a cause of action in replevin, under section 1330, Burns' 1914 (section 1266, R. S. 1881), or for any other relief. A decision of that question is not necessary in disposing of this appeal. Risch v. Burch (1911) 175 Ind. 621, 626, 95 N. E. 123.

The judgment is reversed, with directions to set aside, vacate, and dissolve the temporary mandatory injunction, so far as it orders or assumes to order that defendant (appellant) shall surrender to another the possession of any of said property pending suit.

(237 N. Y. 93)

NEW YORK LIFE INS. & TRUST CO. v. WINTHROP et al.

(Court of Appeals of New York. Nov. 20, 1923.)

1. Wills ⇐687(2)—Future estate held to pass to surviving next of kin of beneficiary at time of distribution.

Under will directing trustee to pay income to testator's widow for life and on her death to testator's daughter (who died before the mother without issue), and on death of widow and daughter to convey trust property to lawful issue of daughter, or on default of such issue to daughter's next of kin, *held* that, since survivorship was a condition as to vesting of the trust property, survivorship at time of distribution was intended.

2. Wills ⇐687(6)—Next of kin of deceased beneficiary entitled to stirpital division.

Under will directing trustee to pay principal on death of testator's widow and daughter to the daughter's issue, share and share alike, or in default of such issue to her next of kin, where she died without issue, *held*, in view of Decedent Estate Law, § 47a, as added by Laws 1921, c. 379, that next of kin of deceased daughter took by stirpital division.

3. Wills ⇐506(2), 509—Gift to "heirs" or "next of kin" has same effect as one to "legal heirs" and "legal next of kin."

A gift to "heirs" or "next of kin" is the same in meaning and effect as one to "legal heirs" or "legal next of kin" and imports reference to the statute to determine who are to take and in what proportions.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs; Legal Heirs; Next of Kin.]

Appeal from Supreme Court, Appellate Division, First Department.

Action by the New York Life Insurance & Trust Company, as trustee under the will of Jabez A. Bostwick, deceased, against Egerton L. Winthrop, Jr., as executor, etc., and others. From judgment of Appellate Division (204 App. Div. 803, 198 N. Y. Supp. 755) reversing judgment entered on report of referee, defendants appeal. Judgment of Appellate Division reversed, and judgment on referee's report affirmed.

Frederick W. Stelle, Arthur E. Pettit and Robinson K. Bissell, all of New York City, for appellant Winthrop.

Albert Ritchie, of New Rochelle, for appellants New Rochelle Trust Co. et al.

James A. Dilkes, of New York City, for appellants Albert C. Bostwick et al.

Charles Angulo, of New York City, for respondent trustee.

Charles S. McVeigh, of New York City, for respondent De Pret.

Charles Green Smith and Lawrence Atterbury, both of New York City, for respondent Gilbert.

Garrett A. Brownback, of New York City, for respondents Francis et al.

CARDOZO, J. The action is brought for the settlement of the accounts of a trustee and for the construction of a will.

Jabez A. Bostwick, who died in August, 1892, divided his residuary estate into three equal parts.

One of "said equal third parts" he devised and bequeathed to the New York Life Insurance & Trust Company in trust to pay the income thereof to his wife, Helen C. Bostwick, during life, and "upon her death to pay the same" to his daughter Mrs. Nellie Bostwick Morrell during life, and upon the death of his "said wife and daughter to convey, assign and deliver the said estate real and personal so held in trust to the lawful issue of Mrs. Nellie Bostwick Morrell share and share alike, or in default of such issue to the next of kin of Mrs. Morrell."

A second share was given to another trustee upon like trusts, but for the benefit of another daughter.

A third share, disposed of upon trusts for the benefit of a son, was the subject of a litigation recently before us. Matter of Bostwick, 236 N. Y. 242, 140 N. E. 576. The trusts for the son were substantially the same as those for the daughters, except that one-half of the principal was to be paid to him when he attained the age of 21. We held that his right to this half, "whether it be classified as vested or contingent, was subject to be divested by his death before his mother." 236 N. Y. 242, at page 245 (140 N. E. 576). "The trustee at the appointed time was not merely to convey and assign. It was also to deliver. Conveyance and delivery were impossible while the trust for the mother was outstanding." 236 N. Y. 242, 246, 140 N. E. 576. "Majority did not give an indefeasible title to the half without survivorship at the end of the primary trust, and survivorship did not give it, without the attainment of majority." 236 N. Y. 242, 246, 140 N. E. 576, 577.

[1] The first of the three shares is the subject-matter of this action. Nellie Bostwick Morrell died without issue in January, 1906. Her mother, the testator's widow, died in April, 1920. The trustee was then under a duty to distribute the estate so held in trust among the next of kin of Mrs. Morrell. We are to determine the point of time which the testator had in mind as the one for the ascertainment of the class. On the one hand, it is asserted that the next of kin in being at the death of Mrs. Morrell acquired a title

that was indefeasible though they died before the end of the trust and so before the date of distribution. This was the view of the Appellate Division. On the other hand, it is asserted that the class was to be ascertained when there was a duty to convey and deliver, and that survivorship at that time was one of the conditions of the gift.

Much that was said in construing the trust for the benefit of the son is applicable here. The testator was mindful of the possibility that the daughter might die before the wife. Accordingly, he was careful to provide that only upon the death of both—"upon the death of my said wife and daughter"—was the trustee to convey and deliver the subject-matter of the trust. The mandate is to distribute among issue, and "in default of such issue" among next of kin. But in default of issue when? It happens that none were born. Plainly, if any had been born, their interests would have been defeasible, at least until their mother's death. This, indeed, is conceded by counsel for respondents. The very provision for the substitution of another class, the class of next of kin, is a token that survivorship was thought of as a condition of the gift. Salter v. Drowne, 205 N. Y. 204, 213, 98 N. E. 401; Bowman v. Bowman, 1899 A. C. 518, 523, 526. No doubt, it would have been possible by appropriate words, as, for example, by words of direct gift, coupled, it may be, with other tokens of intention (Matter of Bump's Will, 234 N. Y. 60, 136 N. E. 293), to clothe the issue, if any, with an indefeasible interest, which would have passed to their own successors in title, though they died before their mother. That is not what the testator did. We deal, therefore, with a gift which, at least up to a certain point, was contingent and defeasible, a gift to which survivorship at some time in the future was annexed as a condition. Since a contingency existed, since the testator did not intend that the interests of issue should vest as soon as they were born, his expectation must have been that the vesting would be postponed until the trust was at an end. Bowman v. Bowman, supra; Young v. Robertson, 4 Macq. 314, 319, 320; Vincent v. Newhouse, 83 N. Y. 505, 511. If it was postponed till then for issue, it was postponed for next of kin.

Whether the same construction would be appropriate if the ultimate remainder had been given, not to the next of kin of the daughter, but to those of the testator, we need not now determine. Such a gift is more readily interpreted as a declaration that the law shall take its course, that the estate shall be disposed of as if a will had not been made. Matter of Bump, supra; Whall v. Converse, 146 Mass. 345, 348, 15 N. E. 660; cf. 2 Jarman Wills, 138. Distinctions are also drawn, how effectively we need not say, between a gift to next of kin in substitution for another class, and a gift to next of kin as primary donees. At present, we confine ourselves to the holding that the point of time which fixes the ascertainment of the class of issue and the vesting of their interests, is the one to which we must look in defining the substituted class described as next of kin. Hutchinson v. National Refuges for Homeless & Destitute Children, 1920 A. C. 794. When we speak in this connection of the vesting of an interest, we mean, of course, a vesting that is absolute and final. The statutory definition of vested and contingent estates sheds little light upon the problem, for an estate may be vested within the definition of the statute, though defeasible by death before the moment of division. Moore v. Littel, 41 N. Y. 66; Campbell v. Stokes, 142 N. Y. 23, 30, 36 N. E. 811; Clowe v. Seavey, 208 N. Y. 496, 502, 102 N. E. 521, 47 L. R. A. (N. S.) 284; Doctor v. Hughes, 225 N. Y. 305, 310, 122 N. E. 221. The only significant distinction for the purpose now in view is between an estate that is absolute and one subject to conditions. Matter of Curtis, 142 N. Y. 219, 223, 36 N. E. 887; Matter of Seaman's Estate, 147 N. Y. 69, 75, 41 N. E. 401.

Survivorship being a condition, we hold that it is survivorship at the time of distribution. Vincent v. Newhouse, supra; Teed v. Morton, 60 N. Y. 502; Miller v. McBlain, 98 N. Y. 517; Bowman v. Bowman, supra; Young v. Robertson, supra; 2 Jarman Wills, pp. 733, 734, 736; 28 Halsbury's Laws of England, p. 725, § 1351. We are not blind to the fact that other readings of the will are possible and plausible. In such a situation, the canon of construction which distinguishes between a direct gift and one through the medium of a mandate to deliver and convey may fairly turn the scale. Matter of Bostwick, supra; Matter of Baer, 147 N. Y. 348, 41 N. E. 702; Salter v. Drowne, supra, 205 N. Y. 204, at page 215, 98 N. E. 401; Fulton Trust Co. v. Phillips, 218 N. Y. 573, 583, 113 N. E. 558, L. R. A. 1918E, 1070; Wright v. Wright, 225 N. Y. 329, 122 N. E. 213. A faint suggestion is in the briefs that the gift to next of kin, even though contingent upon survivorship at the date of distribution, must be confined, subject to that contingency, to those who were next of kin at the death of Mrs. Morrell, the person named as ancestor, with the result that the class might thereafter be diminished, but could not be enlarged. Brook v. Whitton, 1910, 1 Ch. 278. This construction, even if it could otherwise be accepted, becomes inadmissible when we consider that the next of kin are to take in substitution for the issue. Issue living at the daughter's death, had there been any, would

themselves have been next of kin, if the class of next of kin was to be determined at that time. The result would be that in the event of their death before the trust was ended, the substitutionary gift would fail. That is not what the testator meant. The next of kin were to be ascertained as if the daughter had lived up to the time prescribed for distribution. Hutchinson v. National Refuges for Homeless & Destitute Children, supra; Matter of Mellish, 1916, 1 Ch. 562; Salter v. Drowne, supra. "Where a testator gives property in trust for the benefit of the persons who at a time subsequent to his own death shall by virtue of the statute of distributions be his next of kin the class is an artificial class to be ascertained on the hypothesis that the testator had lived up to and died at the subsequent period of time." Per Viscount Finley in Hutchinson v. National Refuges for Homeless & Destitute Children, supra, 1920 A. C. 794 at page 805. The will, when read in its totality, is instinct with the desire to hold the ultimate gifts in abeyance until the termination of the trust, and thereupon to adapt and proportion them to the conditions then existing. We have already traced this purpose in the provisions for the son. Matter of Bostwick, supra. We think it has been maintained in the provisions for the daughter.

[2] The question remains whether distribution is to be made per capita or per stirpes. In April, 1920, at the termination of the trust, Mrs. Morrell's sister, who was then Mrs. Voronoff, was living. Her brother, Albert C. Bostwick, was dead, but he had five children, who survived. Both the referee and the Appellate Division included the brother's children in the class of next of kin. The referee limited them, however, to the share that would have been taken by their parent. The Appellate Division took the view that the division must be equal.

A stubborn rule of law bound the courts for many years to the holding that a gift to "issue" was to be treated as a gift per capita. The rule was often deplored. Petry v. Petry, 186 App. Div. 738, 175 N. Y. Supp. 30; 227 N. Y. 621, 125 N. E. 924; Matter of Union Trust Co. of New York, 170 App. Div. 176, 156 N. Y. Supp. 32; 219 N. Y. 537, 114 N. E. 1048. It yielded to "a very faint glimpse of a different intention." Matter of Farmers' Loan & Trust Co., 213 N. Y. 168, 174, 107 N. E. 340, 2 A. L. R. 910; Matter of Union Trust Co., supra. It was followed, when there was no escape, in submission to authority. A recent amendment of the Decedent Estate Law (L. 1921, ch. 379; Decedent Estate Law, [Cons. Laws, ch. 13] § 47a) has wiped it out for the future. The court is now asked to perpetuate and enlarge what has been felt to be a mischief by holding that there is a like implication of a per capita division upon a gift to "heirs" or to "next of kin." We are not yet committed to the declaration of such a rule. On the contrary, whenever we have been invited to declare it, we have refused the invitation, coupling our refusal with the statement that the question was still open. Thus, in Woodward v. James, 115 N. Y. 346, 22 N. E. 150, there was a gift to "legal heirs." We found a direction in the will that the shares were to be apportioned according to the statute of descents. This was held to import a stirpital division. We found it unnecessary to determine what the method of division would have been if this direction had been absent. "It may be that we should follow the rule prevailing in many other states, that a devise to heirs which compels a reference to a statute to ascertain who should take, makes the same statute the guide to the manner and proportion also." 115 N. Y. 346, at page 359 (22 N. E. 150 [152]). In Bisson v. West Shore R. R. Co., 143 N. Y. 125, 38 N. E. 104, the gift was to the testator's wife for life, remainder to his and his wife's heirs, "their heirs and assigns forever, share and share alike." We saw in this provision a purpose to create a single class with equality of interests. Rejecting a division by stocks because of the wording of the gift, we said at the same time that it was "a preferable construction when the context will permit." In the most recent case (Matter of Barker, 230 N. Y. 364, 130 N. E. 579), where there was a gift to "lawful heirs," we referred to the statute to determine, not only the members of the class, but also the extent and quality of their interests.

[3] We think a gift to "heirs" or "next of kin" is the same in meaning and effect as one to "legal heirs" or "legal next of kin," and that one as much as the other imports a reference to the statute. This is the view that has prevailed in many other jurisdictions. Allen v. Boardman, 193 Mass. 284, 286, 79 N. E. 260, 118 Am. St. Rep. 497, and cases there cited; Daggett v. Slack, 8 Metc. (Mass.) 450; Richards v. Miller, 62 Ill. 417; Kirkpatrick v. Kirkpatrick, 197 Ill. 144, 151, 64 N. E. 287; Knutson v. Vidders, 126 Iowa, 511, 102 N. W. 433; Bailey v. Bailey, 25 Mich. 185; Cook v. Catlin, 25 Conn. 387; Heath v. Bancroft, 49 Conn. 220, 222; Healy v. Healy, 70 Conn. 467, 39 Atl. 793; MacLean v. Williams, 116 Ga. 257, 42 S. E. 485, 59 L. R. A. 125; Matter of Swinburne, 16 R. I. 208, 212, 14 Atl. 850; Forrest v. Porch, 100 Tenn. 391, 45 S. W. 676; cf. Dwight v. Gibb, 145 App. Div. 223, 228, 129 N. Y. Supp. 961; s. c., 150 App. Div. 573, 135 N. Y. Supp. 401; affd., 208 N. Y. 153, 101 N. E. 851; Armstrong v. Galusha, 43 App. Div. 248, 257, 60 N. Y. Supp. 1. We find no

rule of property forbidding its adoption here. No doubt, decisions to the contrary can be cited from the English courts. They go to the extent of holding that upon a gift to next of kin, the court will not refer to the statute even for the purpose of defining the members of the class, 2 Jarman Wills, p. 107; 28 Halsbury's Laws of England, § 1387; Withy v. Mangles, 10 Cl. & F. 215. The words "next of kin," it is said, do not mean "next of kin according to the statute," but the relative or relatives nearest in blood to the propositus. Akers v. Sears, 1896, L. R. 2 Ch. 802, 804; Halton v. Foster, L. R. 3 Ch. App. 505. Upon a gift in that form, brothers and sisters take to the exclusion of the children of deceased brothers and sisters, though all would share together if the definition were broadened to accord with the definition of the statute. Akers v. Sears, supra. Such a construction would exclude altogether the children of Albert C. Bostwick, the son, and would give the entire share to Mrs. Voronoff, the daughter. It is significant that no one before us contends for such a method of division. Even the English courts, though in form adhering to their rule, have done so with avowed reluctance (Withy v. Mangles, 10 Cl. & F. 215, at page 256), and, by every refinement of distinction, have fought against applying it. The slightest reference to the statute is held to be sufficient evidence that the statute is to be followed in determining the members of the class. Jarman, supra; Halsbury, supra. The line is not drawn there. A gift to next of kin as a statutory class makes the statute, it is said, a guide to determine not only the persons who are to take, but the extent and manner of the taking. Martin v. Glover, 1 Coll. 269; Hutchinson v. National Refuges for Homeless & Destitute Children, supra, at pages 822, 823; 28 Halsbury's Laws of England, § 1389. In becoming the guide for one purpose, it becomes the guide for all.

We find no support in the decisions in New York for the rule that the next of kin who will take under a will are not the next of kin upon intestate succession. We ought not to incorporate into our law a rule so discredited in the jurisdiction of its origin. We have not done so yet. The English cases were cited and rejected in Slosson v. Lynch, 43 Barb. 147. This court, in Tillman v. Davis, 95 N. Y. 17, 47 Am. Rep. 1, adopted a definition assimilating membership in one class to membership in the other. "The proper primary signification of the words 'next of kin' is those related by blood, who take personal estate of one who dies intestate, and they bear the same relation to personal estate as the word 'heirs' does to real estate." 95 N. Y. at page 24 (47 Am. Rep.). We have made this breach at least in the English definition. Having gone so far, we are not to stop halfway. When once we reach the point of fitting the definition of the class to the definition of the statute, there is little left of the distinction between a gift to "next of kin" and one to "legal next of kin" or "next of kin under the law." If one form of gift imports a description of the interests as well as a description of the persons, so also do the others. The rule thus emerges that in the absence of clear tokens of a contrary intention, the statute is to be taken as the standard of division. Allen v. Boardman, 193 Mass. 284, 79 N. E. 260, 118 Am. St. Rep. 497. The acceptance of this formula supplies a test of simple application. A testator is still free, if he pleases, to direct division upon other lines. Often it will happen that he has no intention one way or the other. At such times, a division according to the statute is more likely than any other to correspond with what he would have wished if the subject were one that he had thought about at all. "The statute of distribution governs in all cases where there is no will; and where there is one, and the testator's intention is in doubt, the statute is a safe guide." Lyon v. Acker, 33 Conn. 222, 223.

We do not ignore the direction that the gift, if it passes to issue, is to be divided "share and share alike." The mandate is not repeated in connection with the gift to next of kin. We are asked to hold that repetition is implied. In some jurisdictions, a gift to issue with a direction that division shall be equal, is read as equivalent to a direction that it shall be equal between stocks. Hall v. Hall, 140 Mass. 267, 2 N. E. 700; Allen v. Boardman, supra; MacLean v. Williams, supra; Matter of Swinburne, supra. In our own court, slight circumstances have been enough to uphold a like construction. Matter of Farmers' Loan & Trust Co., supra, 213 N. Y. 168, at page 174, 107 N. E. 340, 2 A. L. R. 910. We have little reason to believe that in following the per capita rule, we were giving effect to a purpose genuinely willed. What we did was to enforce a rule of property which from the use of certain words imputed to the testator a particular intention, whether present in his mind or not, unless, indeed, a contrary intention was in some other way disclosed. A rule obeyed with reluctance under the compulsion of authority is not to be stretched by implication. The extension becomes even more anomalous to-day, now that the rule itself has been abrogated by statute for wills to take effect hereafter. The author of this will may have wished to impose restrictions upon one gift and not upon the other. In all likelihood, he simply failed to think the subject through. We find no reason for supposing that he had any intention either way ex-

cept the general one that his words should be interpreted in conformity with law. The question in such circumstances is one not of intention in the proper sense, but of the legal implications of one formula or another. When the problem of division is thus viewed as one of legal implications, there is seen to be a difference between a gift to heirs and to next of kin on the one hand, and a gift to issue on the other. The difference is that the one imports, and the other does not, or at any rate not so clearly, the adoption by the testator of a statutory plan. The appeal is to different standards. The word "issue," viewed alone, is neutral in its suggestion of division upon one plan or another. The words "heirs" and "next of kin" take their color and connotation from the schedules of the statute.

The judgment of the Appellate Division should be reversed, and the judgment entered upon the referee's report affirmed, with costs to all parties filing briefs in this court payable out of the estate.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Judgment accordingly.

(237 N. Y. 110)

SINGER v. KNOTT, Sheriff.*

(Court of Appeals of New York. Nov. 20, 1923.)

1. Sheriffs and constables ⇐104—"Jail liberties or limits" defined.

"Jail liberties or limits" consist of a delimited space of ground, adjacent to the jail and considered as an extension of the four walls thereof, within which certain civil prisoners may be allowed to go at large, without imposing liability on the sheriff for an escape, under Prison Law, § 362, as added by Laws 1920, c. 933, § 2.

[Ed. Note.—For other definitions, see Words and Phrases, Jail Liberties; Jail Limits.]

2. Arrest ⇐39—Extent of jail liberties or limits stated.

Jail liberties or limits, as established by resolution of the board of supervisors (Prison Law, §§ 359, 360), may be varied at discretion, but must not exceed 500 acres, or the counties, cities, and villages designated by section 357, and as applied to New York county includes all of the county, since Laws 1846, c. 32.

3. Sheriffs and constables ⇐138(1)—Burden of showing escape of prisoner released within jail liberties is on plaintiff.

The burden of proving the escape, within Prison Law, §§ 369-b, 369-c, as added by Laws 1920, c. 933, § 2, of a civil prisoner released by the sheriff within the jail liberties of New York county, which are the whole county, under section 357, is on plaintiff; there being no presumption that, because the prisoner was outside the jail, he left the county.

4. Appeal and error ⇐909(1)—Nothing can be inferred, unless plain and irresistible, to charge sheriff with liability for escape.

The appellate court cannot infer anything, unless plain and irresistible, to charge the sheriff with liability under Prison Law, § 369-c, as added by Laws 1920, c. 933, § 2, for escape of a civil prisoner released within the jail liberties.

5. Evidence ⇐48—Court not bound to take judicial notice that jail limits have been definitely established under general statutes.

The court takes judicial notice of general statutes, but is not bound to take such notice of jail limits legally and definitely established thereunder.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Helen Singer against David H. Knott, individually and as Sheriff of New York County. From a judgment of the Appellate Division (203 App. Div. 556, 196 N. Y. Supp. 565), reversing a judgment of the Trial Term, which set aside a verdict for plaintiff and dismissed the complaint, defendant appeals. Reversed, and judgment of Trial Term affirmed.

John Godfrey Saxe, George W. Olvany and John Ingle, Jr., all of New York City, for appellant.

Barnett E. Kopelman, of New York City, for respondent.

POUND, J. Defendant is sued as the sheriff of New York county for an escape. He permitted, it is alleged, one Singer to go at large on June 21, 1918, after he had taken him into custody on an order of arrest granted in an action brought by plaintiff for a separation. On that day the prisoner was released by the sheriff within the jail liberties of the county of New York, and plaintiff offered no proof that he left such liberties, except by showing that he had been seen in Atlantic City in July, 1920. As the trial justice said: "For all we know, he was in New York county for a year and a half after" June 21, 1918.

The question is whether a prima facie case of an escape has been proved. The trial court, after taking the verdict of a jury on the question of arrest, dismissed the complaint, holding that the burden of showing that the prisoner was off the jail liberties at the date of the alleged escape was upon the plaintiff as a part of her prima facie case.

*Reargument denied 237 N. Y. —, 143 N. E. —.

The Appellate Division reversed and granted a new trial, holding that, when the plaintiff had established that the prisoner was released from the actual custody of the sheriff, a prima facie case of escape was proved.

[1, 2] Jail liberties or limits consist of a delimited space of ground adjacent to the jail, which is considered as an extension of the four walls of the prison, within which certain civil prisoners may be allowed to go at large wtihout imposing liability upon the sheriff for an escape. Prison Law (Consol. Laws, c. 43), § 362. Originally established under general laws by order of the Courts of Common Pleas, and later by resolution of the board of supervisors (Prison Law, §§ 359, 360), they might be varied at discretion. Under the present statute liberties thus established must not exceed 500 acres in quantity.

Statutes have from time to time been passed to mitigate the hardships of imprisonment and enlarge the freedom of the prisoner by expanding the liberties so as to correspond to the boundaries of the county, city, or village in which the jail was located. Prison Law, § 357. Thus the liberties of the jail for New York county have been since 1846 the whole of the county. Laws 1846, c. 32.

[3] Escape and the sheriff's liability for escape are defined by Prison Law, §§ 369-b and 369-c, as follows:

"Sec. 369-b. *What Constitutes an Escape. The going at large, within the liberties of the jail* in which he is in custody, of a civil prisoner who has executed such an undertaking, or *of a prisoner who would be entitled to the liberties upon executing such an undertaking*, is not an escape. But the going at large, *beyond the liberties*, by such a prisoner, without the assent of the party at whose instance he is in custody, is an escape. * * *

"Sec. 369-c. *Sheriff's Liability for Escape.* Where a civil prisoner, in a sheriff's custody, goes or is at large *beyond the liberties of the jail*, without the assent of the party at whose instance he is in custody, the sheriff is answerable therefor. * * *"

[4] The plaintiff must make out her case. When she proves only that on the day of the alleged escape the prisoner was within the county of New York, she proves herself out of court. The presumption that, because he was on a certain day, outside the four walls of the jail in New York county, he left the county on that day, rests on no reasonable relation of the fact proved to the fact to be established by proof. "We cannot intend, or infer anything, unless it be plain and irresistible, to charge the sheriff." Visscher v. Gansevoort, 18 Johns. 496, 497.

In Bissell v. Kip, 5 Johns. (1809) 89, the question of escape was at issue. The sheriff sought to defend on the ground that the liberties were not properly defined according to law and that the prisoner was within the reputed limits. Kent, C. J., answering this contention, said that the sheriff could justify the prisoner's being at large, without the four walls of the prison, only by showing liberties established and defined by law; i. e. that it was not enough to show that the prisoner was within the reputed limits of the jail. In Stewart v. Kip, 7 Johns. (1810) 165, the court followed Bissell v. Kip, supra, as stating the correct rule on the burden of proof, but by way of dictum only, saying that the defendant had supplied the deficiency in proof.

These authorities are not in point. If the question of escape depends upon a decision of the disputed questions (a) whether liberties have been legally established; and (b) what the true boundaries of such limits are, it might be said that the burden should be shifted to the sheriff to offer evidence to justify the prisoner's being at large, when it is shown that he was without the jail walls. But the burden of proof on the whole case would not shift, and the law overcomes the burden of going on with the proof in a case where the liberties are defined by statute as being the county of New York.

[5] The court takes judicial notice of general statutes. It would not be bound to take judicial notice that limits have been legally and definitely established under general statutes. With no presumption that limits have been so established, plaintiff might rest a prima facie case on the presumption that the boundaries of the jail had not been expanded. The early cases decide nothing more than this, if they may reasonably be interpreted as going as far.

The statute defines what is an escape and what is not an escape. The burden is upon the plaintiff to establish affirmatively that on the date alleged the prisoner went at large beyond the county.

The order of the Appellate Division granting a new trial should be reversed, and the judgment of the Trial Term affirmed, with costs in this court and in the Appellate Division.

HISCOCK, C. J., and HOGAN, CARDOZO, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Order reversed, etc.

(237 N. Y. 115)

RUTTONJEE et al. v. FRAME et al.

(Court of Appeals of New York. Nov. 20, 1923.)

Sales ⇐384(2)—Seller's damage measured as of date of arrival of goods and not date of refusal to accept documents.

Where buyer, under c. i. f. contract, refused to accept draft and shipping documents when tendered, seller's measure of damages *held* the contract price less the market value when the goods actually arrived, and not at the time of tender of documents when the goods were still on the high seas, under Personal Property Law, § 145.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Parmanand Ruttonjee and others, trading under the firm name and style of Ruttonjee, Jeevandass & Co., against Gregor MacGregor Frame and others, trading under the name and style of Frame & Co. From judgment of Appellate Division (205 App. Div. 354, 199 N. Y. Supp. 523) modifying, and as modified, affirming judgment entered on verdict for plaintiffs, defendants appeal. Affirmed.

Stephen Van Wyck, of New York City, for appellants.

Abram I. Elkus, Donald C. Strachan, and Charles F. Bailey, all of New York City, for respondents.

PER CURIAM. This action was brought by a seller to recover damages against a buyer for nonacceptance of goods. November 27, 1918, plaintiffs at Bombay, India, delivered to a steamship company the goods for shipment to New York and received bills of lading therefor. Thereupon they cabled to their agent in New York to sell the goods, and upon receipt of said message on December 6, 1918, contract of sale was entered into between the agent of plaintiffs with defendants for said goods. The contract was c. i. f., New York; described the goods:

"Shipment: Goods afloat per S. S. Kasadomam. Terms: Buyer to pay on presentation of documents."

On February 21, 1919, the shipping documents were presented to defendants by the bank to which they had been forwarded and refused. Upon the arrival of the goods in New York the documents were again tendered and refused. The trial justice held that the measure of damages should be computed as of the date when the documents were presented on February 21, 1919. The amount of same was stipulated at $4,972.10, and plaintiffs recovered said amount and interest. Cross-appeals were taken to the Appellate Division, and that court modified the judgment by increasing the same to the sum of $12,572.41 and interest thereon, the amount stipulated as the difference between the contract price and the market price in New York, April 11, 1919, the date of the arrival of the goods and the second refusal by defendants of the shipping documents.

Upon the trial, counsel for both parties treated the action as one for breach of an executory contract and the remedy an action for damages, viz. the difference between the market value and the contract price. The only controversy was as to the time when the price should be calculated. Defendants contended, if liable at all, they were liable only at the time of the tender of documents when the goods were still on the high seas. Plaintiffs insisted that the calculation should be made as of the time of the tender of the goods upon their arrival. Both parties having adopted that theory of the trial, we need not stop to inquire as to the correctness of the same, the action having been tried upon the theory adopted by counsel for the parties.

We conclude that the Appellate Division properly estimated the damages as of the date of the arrival of the goods (Pers. Prop. Law [Consol. Laws, c. 41] § 145), and affirm the judgment of that court.

The judgment should be affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Judgment affirmed.

(237 N. Y. 117)

STEWART et al. v. TURNEY et al.

(Court of Appeals of New York. Nov. 27, 1923.)

1. Waters and water courses ⇐89, 111—Grantee in conveyance of land on stream or lake takes to thread.

In deeds from an individual owning to the center of a nontidal stream, or a lake or pond, of land said to be bounded by such stream or lake, or simply of a tract with reference to a map showing the land to be so bounded, the grantee takes to the thread of the stream or lake, and, if the grantor desires to retain title to land underneath the water, the presumption that he intended to convey such land must be negatived by express words or by such a description as clearly excludes it from land conveyed.

2. Navigable waters ⇐37(4) — Grant from state conveys merely to shore of navigable lake.

Generally a grantee from the state of land bordering on a stream or a lake takes to the center of the stream or lake, but such rule does not apply in the case of a navigable lake the size of Cayuga Lake, in which case the grant conveys land merely to some point on the shore.

3. Navigable waters ⇐37(4) — Grantee from state of lot on Cayuga Lake held to take to low-water mark.

Where patent from the state granted land bordering on Cayuga Lake described as "farm lot 86, Lake Cayuga Reservation, which lies on the east side of Cayuga Lake," and a map referred to showed the lot running to the water, the grantor takes to the ordinary low-water mark and not merely to the line of ordinary spring floods.

4. Waters and water courses ⇐111—Description as running along lake shore held to take line to low-water mark.

A conveyance of land by a description running to a lake and then along its shore carries the line to low-water mark, where the grantor owns to such mark.

Hogan, Cardozo, and Crane, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Samuel Stewart and others against Harry Turney and others. Judgment for plaintiffs (117 Misc Rep. 398, 191 N. Y. Supp. 342) was reversed, and the complaint was dismissed by the Appellate Division of the Supreme Court (203 App. Div. 486, 197 N. Y. Supp. 81), and plaintiffs appeal. Judgment of Appellate Division reversed, and that of Trial Term affirmed.

Frank S. Coburn and Harry Gleason, both of Auburn, for appellants.

Nelson L. Drummond, of Auburn, for respondents Harry Turney and others.

George B. Becker, of Syracuse, for respondent Robert Bausch.

Carl Sherman, Atty. Gen. (Irving I. Goldsmith, of Saratoga Springs, of counsel), for the State.

ANDREWS, J. Cayuga Lake is 38 miles long and from 1 to 3 miles wide. Lying east of the Massachusetts pre-emption line it is no part of the state's boundary. Not far away are ten other lakes of considerable size. Some—Canaderaga, Cazenovia, Onondaga, Otisco, and Cross—are but a few miles long and from one-half to two miles wide. Others—Otsego, Owasco and Skaneateles—are larger. One—Oneida—has more water surface than Cayuga. Further east are similar lakes—Lake George, Saratoga Lake, Cranberry, Saranac, Tupper, Schroon, and others.

All these lakes are alike in some respects. At irregualr intervals the water level is raised by spring freshets or heavy rains. Again in time of drought it is lower. So along each is a strip of land sometimes free of water—sometimes covered. On each also are points or beaches of gravel or sand washed up by the waves, lying between the line of inland vegetation and the water, and covered, if at all, only in times of extreme floods. All are in fact navigable, although in none does the tide ebb and flow. In a few instances title to the land about them is derived from colonial grants. Usually, however, its source is the state. Often, perhaps in most instances, the description of the land granted is of a lot represented on a certain map, and a reference to the map shows the lot running down to the water.

Such was the grant under which the plaintiffs claim. It was of "farm lot 86, Lake Cayuga Reservation, which lies on the east side of Cayuga Lake." The map of the reservation referred to shows this lot abutting upon the lake. The photographs in evidence give us an idea of the lake shore at this point. Stretching eastward from the water is a beach of gravel and boulders for some 30 feet. It terminates in a rise covered with vegetation. Beyond is said to be a marsh. The gravel beach for much of the year is free from water. When the lake is high, however, it is overflowed. So in extreme high water is the rise to the east, and small boats may pass over it directly to the marsh.

Upon this beach the defendants entered and did the acts which are claimed to be trespasses. Such they were in fact, if title to the beach is vested in plaintiffs' lessor. This is the question for our decision, for we do not think under the findings as made that any purely riparian rights which the plaintiffs may have possessed were interfered with. If, however, their lessor owned the fee to the beach in question, it is not disputed but that an injunction should issue.

[1, 2] Our answer to this question depends primarily upon the meaning and effect of the grant from the state. In deeds from an individual owning to the center of a highway or a nontidal stream or a lake or pond of land said to be bounded by such highway, stream, or lake or simply of a tract with reference to a map showing the tract to be so bounded, the grantee takes title to the center of the highway or to the thread of the stream or lake. A presumption founded originally upon the assumed intent of the parties, it has now become a rule of property. If the grantor desires to retain his

title to the land in the highway or underneath the water the presumption must be negatived by express words or by such a description as clearly excludes it from the land conveyed. And, at least, ordinarily the same rule applies to grants from the state except as to the Hudson and Mohawk rivers which, because of historical reasons, are governed by special rules.

"What then was the extent of the premises thus granted by the state? In the terms of sale, and in the terms employed in the patent, a phraseology has been adopted, which as between private individuals, would convey an interest to the middle of the river. And is the doctrine to be tolerated which shall assign one construction to a contract between private citizens, and a different one between an individual and the government? Would not the adoption of such a rule of construction operate as a fraud upon a purchaser who should pay an enhanced price for land adjacent to a stream of water upon the faith of a contract, which, as between private individuals, would have given him valuable hydraulic privileges? It seems to me that but one answer can be given to these questions." Varick v. Smith, 9 Paige, 547, 552; Ex parte Jennings, 6 Cow. 518, 16 Am. Dec. 447; Smith v. City of Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Fulton Light, Heat & Power Co. v. State of New York, 200 N. Y. 400, 94 N. E. 199, 37 L. R. A. (N. S.) 307; City of Oswego v. Oswego Canal Co., 6 N. Y. 257; Syracuse Solar Salt Co. v. Rome, W. & O. R. Co., 43 App. Div. 203, 60 N. Y. Supp. 40; affirmed 168 N. Y. 650, 61 N. E. 1135; Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; Lord v. Commissioners of Sydney, 12 Moore P. C. 473; Browne v. Kennedy, 5 Har. & J. (Md.) 195, 9 Am. Dec. 503; Berry v. Snyder, 66 Ky. (3 Bush) 266, 96 Am. Dec. 219; Lamprey v. State, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; Chandos v. Mack, 77 Wis. 573, 46 N. W. 803, 10 L. R. A. 207, 20 Am. St. Rep. 139.

While admitting, however, the general rule, it is said that it should be limited in the case of a lake the size of Cayuga. Based as it is on presumption as to what grantor and grantee intended, this presumption may be rebutted, and the results flowing from its application in the case of this lake would be so remarkable that we should hold the physical situation to be such as to show no such intention could have been present. It cannot, it is argued, be supposed that the grantee of 100 square feet upon the shore has attached to his property a strip of land under water 2 miles in length.

Yet there is much authority to the contrary. Bristow v. Cormican, L. R. 3 A. C. 641, 666; Johnston v. O'Neill, L. R. 1911, A. C. 552, 577. These cases deal with Lough Neagh, 18 miles long and 11 wide. Johnston v. Bloomfield, Irish Rep. 8 C. L. 68. Lough Erne is slightly smaller. Cobb v. Davenport, 32 N. J. Law, 369; Rice v. Ruddiman, 10 Mich. 125. Muskegon Lake is 6 miles by 2½.

In this state the question has never been determined. In City of Geneva v. Henson, 195 N. Y. 447, 88 N. E. 1104; 202 N. Y. 545, 95 N. E. 1125, we construed the meaning of deeds between owners describing the boundary as the shore of the lake. In Sweet v. City of Syracuse, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289, we noticed the contention that the fee of the land beneath Skaneateles Lake was in the state. In Smith v. City of Rochester, 92 N. Y. 463, 44 Am. Rep. 393, Judge Ruger said "in passing" that the doctrine that the bed of fresh water streams where the tide does not ebb and flow belongs in common right to the owners of the soil adjacent is inapplicable to the "vast" fresh water lakes and streams of this country. Just what he meant by "vast" is not stated. Certainly not Hemlock Lake, 7 miles long and half a mile wide, for there we held the general rule applied. In Canal Commissioners v. People, 5 Wend. 423, the question was as to the meaning of a grant from the state bounded by the Mohawk river. A statement of the chancellor that the common-law rule as to such grants does not embrace our large fresh water lakes or inland seas was purely dictum. In Ledyard v. Ten Eyck, 36 Barb. 102, the court held that the title of the abutting owners extended to the center of Cazenovia Lake.

Were it necessary we would hold, however, that with regard to a grant of land on Cayuga Lake an exception should be made to the common-law rule. We are aware of the statement of Judge Bradley in Hardin v. Jordan, 140 U. S. 371, 397, 11 Sup. Ct. 808, 838, 35 L. Ed. 428, that the Supreme Court does not think the argument ab inconvenienti is sufficient to justify an abandonment of this rule. That to do so is too much like judicial legislation. This is true where the law is clear. Where it is unsettled the result of a proposed rule may turn the scale. So with reference to such a body of water the ordinary rule is so impractical that we give weight to that consideration. Added also to the doubts that have been expressed by great judges is the fact that the claim has been often asserted by the state to ownership of the land under the water of these large lakes. A number of such grants have been made on Lake George, on Cayuga Lake, on the east shore of Seneca Lake and even on Otsego Lake. And one of the commonest modes of rebutting a presumption as to title is continued acts of ownership by the grantor. Further than that no claim to the contrary

seems to be made by the appellants in the case before us.

We will assume, therefore, that the grant of lot 86 did not carry title to the center of Cayuga Lake. Even so, however, the question as to the title of the land in dispute remains unanswered. Precisely what did the state grant and precisely what did it reserve? Where is the precise line of demarkation between the land retained and the land granted?

In passing upon this question we must realize that there is no analogy between this lake, where the water changes its level at uncertain and irregular intervals, and the seacoast, where daily the tide ebbs and flows, where the line of ordinary high and low tide is fairly definite. Even here the upper line is defined by "ordinary" high tides. High spring tides are not considered. Nor are extraordinary tides caused by storms. Nor are the tides which happen twice a month with the full and change of the moon. The line is governed by the neap tides (Hale, De Jure Maris, c. 6; Baird v. Campbell, 67 App. Div. 104, 73 N. Y. Supp. 617; Lowe v. Govett, 3 Barn. & Ad. 863; Teschemacher v. Thompson, 18 Cal. 11, 79 Am. Dec. 151), or at least by the line of medium high water between the monthly spring and neap tides. Attorney General v. Chambers, 18 Jur. 779; New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co., 44 N. J. Eq. 398, 15 Atl. 227, 1 L. R. A. 133; U. S. v. Pacheco, 69 U. S. (2 Wall.) 587, 17 L. Ed. 865. And this is true, although every spring the waters of tidal rivers may be raised by floods, exactly as is the case of inland lakes. On the lower Hudson the line of the state's ownership is not defined by the annual spring freshets rather than by ordinary high tide. It is also well to remember that under the assumption we made we are dealing with an exceptional case. The fact that this is so, the fact that the grantee may well desire complete and unrestricted access to the water, the fact that where the shore of the sea is granted, the lower boundary probably may not be restricted to the line of ordinary low tide, but to the line at its lowest ebb (1 Farnham on Water Rights, 228) may well be considered in deciding what the state has granted.

In speaking of such boundaries on lakes, courts have frequently said that they run to high or to low water mark. Usually exactly what is meant by these terms is not defined. Often the statement is made casually without examination, because not determinative of the case under discussion. Sometimes, as in California, Washington, North and South Dakota and perhaps elsewhere it rests upon a local statute or Constitution. Sometimes it is held that the bed of lakes is held by the state in trust for the people and may not be granted. Therefore a patent is given a narrow construction. Many cases in the United States Supreme Court depend upon the law of the states in which the land is situated. Hardin v. Shedd, 190 U. S. 508, 23 Sup. Ct. 685, 47 L. Ed. 1156. Foreign cases are, therefore, to be cited with caution.

In fixing the boundary of such a grant as the present there are four possible choices. We may take the line of extraordinary spring floods. We find, however, no support for this position, and we pass it by. We may take the line of vegetation or erosion. We do not think this is satisfactory. No such rule prevails upon the seacoast where barren sands or rocks often lie above the reach of ordinary tides. So it is with beaches of sand or gravel on these lakes which do not support vegetation yet which are rarely or never covered with water. The support of such a rule seems to be rested largely on Howard v. Ingersoll, 13 How. 381, 14 L. Ed. 189. In support of it are also cited Oklahoma v. State of Texas, 260 U. S. 606, 43 Sup. Ct. 221, 67 L. Ed. 428; Houghton v. Chicago, D. & M. R. Co., 47 Iowa, 370; Diana Shooting Club v. Husting, 156 Wis. 261, 145 N. W. 816, Ann. Cas. 1915C, 1148; and Matter of Minnetonka Lake Improvement, 56 Minn. 513, 514, 58 N. W. 295, 45 Am. St. Rep. 494. In Howard v. Ingersoll the court construed the meaning of language used in an instrument by which the state of Georgia ceded land from the "west bank" of the Chattahoochee river to the United States. This interpretation was not aided, the court said, by cases upon the rights of riparian proprietors holding under grants from a state having the entire ownership of a river. The case was one of two sovereignties, dealing for a cession of country from one to the other with a river between them, to be marked on a bank of it from which the ceded land was to commence. What under such circumstances did the word "bank" mean? At the point involved the river was about 600 feet wide, lying between abrupt banks 15 or 20 feet high. Much of the year the water was confined to a channel 30 yards wide, leaving exposed rocks with sloughs between them. Any endeavor to trace the line of cession by low water must fail. Such a term is only predicable of rivers within the ebb and flow of the tide. The word used was "bank." Rivers have banks, shores, water and a bed as all knew when the cession was made. By inspection the banks could be determined. It means those boundaries which contained the water at its highest flow. This case, therefore, seems to aid us little in deciding the meaning of the grant before us, except that possibly the distinction drawn between the "bed"

of a river and its "shores," meaning by the latter term that part of the river uncovered at low water, may be useful if what the state of New York retains is the bed of Cayuga Lake.

In Houghton v. Chicago, D. & M. R. Co. the court, following the Iowa rule, held that an abutter upon the Mississippi took only to high-water mark, and it defined this mark, not as determined by the highest point ordinarily reached by periodical rises in June and September, but by the edge of the bank—the portion of the earth which confines the river in its channel. The rises that came from storms and melting snows should be disregarded. They are temporary and uncertain. But the banks afford a certain line. They are impressed upon the earth itself by the attrition of the river current. Certainly what the river does not occupy long enough to wrest from vegetation is not river bed. All this is clearly true. A river with a defined current wears a bed which all may see. A lake does not. No more than the sea may it be said to have banks. In Matter of Lake Minnetonka Improvement, what was said was entirely applicable to the case under consideration. Around the lake were places where the banks were steep and abrupt. Elsewhere were meadows where the land was but slightly above the ordinary water level and subject to periodical overflow. The court rejected the claim that the state might, in aid of navigation, raise the water so as to permanently cover these low lands. "While the property of a riparian owner," it is said, "on navigable or public waters extends to ordinary low-water mark, yet it is unquestionably true that his title is not absolute except to ordinary high-water mark. As to the intervening space the title of the repairing owner is qualified or limited by the public right" of navigation, and the state may prevent any use of it, even by the owner of the land, that would interfere with this right. The court then continues that high-water mark does not mean the limits of spring floods or freshets but only that point reached by the water for such a length of time and so continuously as to wrest it from vegetation. This must be the principal test. In Diana Shooting Club v. Husting it was held that the public might fish or hunt upon any navigable stream below ordinary high-water mark, and that mark was defined as that point on the bank up to which the presence of the water is so continuous as to leave a distinct trace either by erosion, destruction of vegetation or other easily recognized characteristics. No question of title was involved. Indeed, the court expressly declined to decide whether the public might enter below high-water mark upon a strip which by the recession of the water becomes unnavigable or is left uncovered. This was settled in the negative, however, in Doemel v. Jantz, 180 Wis. 225, 193 N. W. 393, which case cites and explains the case to which we have referred. In Oklahoma v. Texas the controversy was again as to the meaning of a treaty which fixed a national boundary on the southern bank of the Red river. Here in most places there was a "cut" bank eroded by the water. This was the bank intended. Where no bank existed a level was to be taken of the height of the water when it washed the bank without overflowing.

None of these cases, therefore, aid us in the construction of the grant before us. At most some of them defined what is meant by high-water mark. A similar definition is given in decisions called to our attention in the courts of Maine, West Virginia, Arkansas, Oregon, Oklahoma, and Iowa, but some of these cases do also hold that such a grant as the present takes only to high-water mark as so defined. All of them are immaterial, therefore, unless we are prepared to hold that the grant before us is limited by the high-water line. Then, indeed, they might assist us in deciding where that line should be drawn. So the substantial question remains as to what is the limit of such a grant in our state. Is it the line of ordinary spring floods or the line of low water reached in the dry season?

[3] While this court has never definitely passed upon the question, the current of opinion is that it is low-water mark. In Canal Commissioners v. People, 5 Wend. 423, appears a dictum by the chancellor that the common law does not apply to our large fresh water lakes but as to them such a grant as the present takes to low-water mark. Such was the express ruling in Champlain & St. L. R. Co. v. Valentine, 19 Barb. 484. The same ruling was made in Sweet v. City of Syracuse, 60 Hun, 28, 38, 14 N. Y. Supp. 421. While we reversed this case we made no criticism of this particular statement. So as to a private grant in Child v. Starr, 4 Hill, 369. See, also, Chism v. Smith, 138 App. Div. 715, 123 N. Y. Supp. 691. Similar statements have been made by us. Halsey v. McCormick, 13 N. Y. 296; Wheeler v. Spinola, 54 N. Y. 377; Yates v. Van DeBogert, 56 N. Y. 526; Gouverneur v. National Ice Co., 134 N. Y. 355, 31 N. E. 865, 18 L. R. A. 695, 30 Am. St. Rep. 669, approving of Wheeler v. Spinola to this extent; City of Geneva v. Henson, 195 N. Y. 447, 465, 88 N. E. 1104. It is true that some of these cases refer to grants between individuals, but, as has been pointed out, where the state conveys its unappropriated lands for a consideration its grants are to be construed as

would be such deeds. It is true also that in Sisson v. Cummings, 106 N. Y. 56, 12 N. E. 345, we expressly refrained from discussing the question and that in People ex rel. Burnham v. Jones, 112 N. Y. 597, 20 N. E. 577, we noted the concession of both parties that the line of riparian proprietorship along Lake Ontario extends but to high-water mark, but that concession, even had we expressed approval of it, which we did not, was immaterial to any question involved in the case. In some of the cases quoted the statement as to low water may have been made without particular consideration of the question. In others it may not have been strictly necessary to the decision rendered. But even dicta repeated by many judges under varying circumstances, while not binding upon us, are most persuasive.

In other states we think the weight of authority is in favor of the same rule. State v. Korrer, 127 Minn. 60, 148 N. W. 617, 1095, L. R. A. 1916C, 139; City of Peoria v. Central Nat. Bank, 224 Ill. 43, 79 N. E. 296, 12 L. R. A. (N. S.) 687; Mariner v. Schulte, 13 Wis. 692; Martin v. City of Evansville, 32 Ind. 85; State ex rel. Citizens' Electric Lighting & Power Co. v. Longfellow, 169 Mo. 109, 69 S. W. 374; Lincoln v. Davis, 53 Mich. 375, 384, 19 N. W. 103, 51 Am. Rep. 116; Bates v. R. R., 12 Monthly L. Rep. (N. S.) 519; Stover v. Jack, 60 Pa. 339, 100 Am. Dec. 566; Brown Oil Co. v. Caldwell, 35 W. Va. 95, 13 S. E. 42, 29 Am. St. Rep. 793; Martin v. Nance, 40 Tenn. (3 Head) 649; Denny v. Cotton, 3 Tex. Civ. App. 634, 22 S. W. 122; Mobile Transportation Co. v. City of Mobile, 153 Ala. 409, 44 South. 976, 13 L. R. A. (N. S.) 352, 127 Am. St. Rep. 34; State v. Eason, 114 N. C. 787, 19 S. E. 88, 23 L. R. A. 520, 41 Am. St. Rep. 811; Thurman v. Morrison, 53 Ky. (14 B. Mon.) 367; Whitenack v. Tunison, 16 N. J. Law, 77; McBurney v. Young, 67 Vt. 574, 22 Atl. 492, 29 L. R. A. 539; Wood v. Kelley, 30 Me. 47; Handly's Lessee v. Anthony, 5 Wheat. 374, 5 L. Ed. 113; Paine v. Woods, 108 Mass. 160. The Massachusetts cases are sometimes said to be unimportant because where land is bounded by the sea that state treats low water as the boundary of title. They do not rest, however, upon any such analogy. In support of the rule announced in the case cited the opinion refers to the dictum of the Chancellor in 5 Wendell, to 30 Maine, and to 28 Vermont.

In view, therefore, of these decisions, in view of the fair presumption that it was the intention to give the grantee the benefit of the water wherever it may be, in view of the fact that under the assumption we have made we find an exception to our general rule which so far as possible should be minimized, we hold that under the grant from the state the grantee took to low-water mark on Lake Cayuga. Whether in high water the public has not the right of navigation wherever a boat may float we do not decide. Nor do we decide whether "low-water mark" means that mark to which the water may sink in extraordinary seasons, or simply at its ordinary and usual low level. Here such a decision is not necessary.

[4] The grantee from the state having acquired title to the line of low water on Cayuga Lake, this passed to one Gawger, who in 1872 conveyed it by a description running west to Cayuga Lake and then "along the east shore" of the lake. This would carry the line to low-water mark in case the grantor has title to that line. Child v. Starr, 4 Hill, 369; Gouverneur v. National Ice Co., 134 N. Y. 355, 31 N. E. 865, 18 L. R. A. 695, 30 Am. St. Rep. 669; Van Winkle v. Van Winkle, 184 N. Y. 193, 77 N. E. 33. Therefore, there passed to plaintiffs' lessor whatever title was acquired by the original grantee.

If this be so, concededly the defendants committed repeated trespasses upon the property held by the plaintiffs. What they did was done above ordinary low-water mark. The result therefore reached by the trial court was right.

The judgment of the Appellate Division must be reversed, and that of the Trial Term affirmed, with costs in this court and in the Appellate Division.

HISCOCK, C. J., and POUND and McLAUGHLIN, JJ., concur.

HOGAN, CARDOZO, and CRANE, JJ., dissent.

Judgment accordingly.

(237 N. Y. 131)

NEGLIA v. ZIMMERMAN et al.

(Court of Appeals of New York. Nov. 27, 1923.)

1. Courts ⇐237(2)—Appellate Division allowing appeal from final order need not state question to be reviewed.

Under Code Civ. Proc. § 190, subd. 4 (Civil Practice Act, § 588, subd. 4), the Appellate Division, in allowing an appeal from a final order, certifies generally that a question of law is involved which should be reviewed by the Court of Appeals, and need not state the question, as required by subdivision 3, where the order appealed from is not final, in which case the Court of Appeals can review the question certified only.

2. Courts ⇐237(2)—Amount of compensation award held reviewable on appeal by leave of Appellate Division, though not specifically certified.

An order of the Appellate Division, reversing an award of the Industrial Board, and remitting the matter to the Board, *held* a final order, on appeal from which, by leave of court, the Court of Appeals, under Code Civ. Proc. § 190, subd. 4 (Civil Practice Act, § 588, subd. 4), might review the amount awarded by the court, though such question was not specifically certified; there being nothing left for the Board to do except to change the amount allowed by it as directed by the Appellate Division.

3. Master and servant ⇐349—Compensation for loss of foot governed by law in force at time of injury.

A servant entitled to compensation for total disability under Workmen's Compensation Law, § 15, subd. 1, for loss of foot, in consequence of injuries sustained before subdivision 6, fixing the maximum compensation for disability at $20 per week, became effective, may recover, under subdivision 5 then in force no more than $15 per week; the $20 allowance under subdivision 5 being limited to the cases of permanent partial disability excepted by subdivision 3.

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding under the Workmen's Compensation Law by Philip Neglia, claimant, opposed by G. A. Zimmerman and others, employers. From an order of the Appellate Division (206 App. Div. 634, 198 N. Y. Supp. 596), reversing an award of the State Industrial Board and remitting the matter to the Board for an additional allowance, the employers appeal. Award and order reversed, and matter remitted to Industrial Board, with directions.

F. A. W. Ireland, of New York City, for appellants.

Carl Sherman, Atty. Gen. (E. C. Aiken, Asst. Atty. Gen., of counsel), for respondent.

CRANE, J. The only question involved in this appeal is the amount which has been awarded to the claimant. Some question has arisen over our jurisdiction, due to the form of the Appellate Division order. The order of reversal reads:

"Ordered, that the award of the State Industrial Board appealed from be and the same is hereby reversed, and the matter remitted to the said Board."

[1] On its face this would not be a final order. The Appellate Division, therefore, in certifying to us a question to review should have stated the question. This is the practice pursuant to subdivision 3 of section 190 of the Code of Civil Procedure and subdivision 3 of section 588 of the Civil Practice Act. In such a case this court can only review the question certified and no other. It must certify back to the Appellate Division its determination upon such question.

Where, however, the order of the Appellate Division is final, then when that court allows an appeal it certifies generally that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals. The question need not be stated. Such was the practice adopted in this case. The Appellate Division granted leave to appeal to this court and stated that questions of law were involved which should be reviewed by us. Subdivision 4, § 190, of the Code of Civil Procedure; subdivision 4, § 588, of the Civil Practice Act. The difficulty, however, is that on its face, as above stated, the order is not a final order. While we have determined, in view of the opinion and the proceedings, that this was intended to be a final order and has so been treated by the Appellate Division, yet we call attention to the requisites of the Civil Practice Act in order that the instances in which it is necessary to certify questions may not be overlooked.

[2] It is quite apparent, however, that, in sending this proceeding back to the State Industrial Board, the Appellate Division did so with the intention that that Board, without a further hearing, should make an order carrying out its views as expressed in the opinion, to wit, an allowance to the claimant of two-thirds of his average weekly wage, or $20. Where a matter has been remitted with directions to make the changes or modifications as directed by the Appellate Division, and there is nothing left to be done except to make the order as directed, we have treated the Appellate Division order as though it were final. Matter of Klenk, 165 App. Div. 917, 150 N. Y. Supp. 365, affirmed 214 N. Y. 715, 108 N. E. 1098. People ex rel. Standard Oil Co. of New York v. Law, 237 N. Y. 142, 142 N. E. 446, was a determination of the state tax commission annulled by the Appellate Division. The matter was remitted to the state tax commission to revise and fix the taxes as specified in the Appellate Division order. Such an order was considered by us as a final order.

There was nothing left for the State Industrial Board to do except to change its amount allowed to $20, as directed by the Appellate Division, as it was conceded that the injury was a permanent total disability. The Appellate Division's order in effect, therefore, was final.

[3] This determination that the claimant is

entitled to $20 a week for total permanent disability we think erroneous. He is only entitled to $15 a week. The law now reads (section 15, subd. 1, of the Workmen's Compensation Law [Cons. Laws, c. 67]):

"In case of total disability adjudged to be permanent sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability."

Subdivision 6 of this section fixes the maximum and minimum compensation for disability. It reads:

"Compensation for disability shall not exceed twenty dollars per week nor be less than eight dollars per week."

It is conceded that this case is one of permanent total disability, and the allowance directed by the Appellate Division was correct, if this present law were applicable. The law in force, however, at the time of this injury, which was on December 5, 1919, read differently. Section 15, subdivision 1, was the same as at present, but subdivision 5 of section 15 placed a different limitation, and read as follows:

"The compensation payment under subdivisions one, two and four and under subdivision three except in case of the loss of a hand, arm, foot, leg or eye, shall not exceed fifteen dollars per week nor be less than five dollars per week; the compensation payment under subdivision three in case of the loss of a hand, arm, foot, leg or eye, shall not exceed twenty dollars per week nor be less than five dollars a week." Laws 1917, c. 705, § 3.

The $20 allowance under this subdivision is limited to the cases falling under subdivision 3, amounting to the loss of a hand, arm, foot, leg, or eye. Subdivision 3 of section 15 applies to disability, partial in character, but permanent in quality. It does not apply to total disability. The limitation, therefore, of the allowance for total disability under subdivision 1 is $15 per week. "The compensation payment under subdivision 1 * * * shall not exceed $15 per week."

The reason, no doubt, why the larger sum of $20 a week was allowed in case of partial disability through the loss of a foot was that payment was limited to a specified number of weeks, whereas the smaller amount of $15 allowed for total permanent disability is payable during the continuance of such total disability or during life.

The award of the State Industrial Board and order of the Appellate Division should, therefore, be reversed, and the matter remitted to the State Industrial Board to proceed as herein directed, with costs against State Industrial Board.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Order reversed, etc.

(237 N. Y. 126)

WEIGEL et al. v. COOK et al.*

(Court of Appeals of New York. Nov. 27, 1923.)

1. Vendor and purchaser ⟸43(1)—Doctrine of election to ratify or rescind contract, stated.

The doctrine of election as applied to rescission or affirmance of a contract of purchase is one of substance and not of mere words, and hence using the property purchased may or may not be a ratification according to the circumstances; and only when it appears that the acts performed are inconsistent with the claim of repudiation can there be an election to confirm and adopt the contract.

2. Vendor and purchaser ⟸45—Use of mineral water spring property after action for rescission held not an election to confirm contract as matter of law.

Where plaintiffs had purchased certain premises containing alleged mineral water springs and subsequently discovered that the waters were not natural mineral waters, that after bringing an action for rescission and before judgment therein they made some use of the property, by bottling water for two months and repairing an automobile constituting part of the property sold was not fatal to their suit as a matter of law; the acts being slight and trivial ones in comparison with the large subject-matter.

3. Vendor and purchaser ⟸341(5)—Measure of recovery on rescission for fraud, stated.

Where the purchasers of property including mineral water springs brought an action for rescission on the ground of fraud, they were on a favorable finding entitled to the return of the purchase money paid in cash with interest from the date of payment and cancellation of the securities for the balance, but not to damages including general expenses in the operation and the installation of machinery, costs of new machinery purchased, and for labor paid.

McLaughlin, J., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Robert Weigel and others against Leslie Cook and others. Judgment for plaintiffs was modified and affirmed by the Appellate Division (206 App. Div. 727, 200 N. Y. Supp. 956), and defendants appeal. Modified and affirmed.

A. F. Walsh, of Saratoga Springs, for appellants.

*Reargument denied and remittitur amended 237 N. Y. —, 143 N. E. —.

Nash Rockwood, Harry P. Pendrick, and Carl L. McMahon, all of Saratoga Springs, for respondents.

CRANE, J. The findings of fact in this case have been unanimously affirmed, so that in reviewing it we cannot look beyond the findings and those made at the request of the appellants. The findings disclose that in the month of January, 1919, the defendant Leslie Cook was the owner in fee of certain real estate consisting of about five acres of land, together with the buildings thereon, situate in the town of Wilton, Saratoga county, N. Y. On the premises were two certain springs or wells of mineral water known as the Gurn and Crystal Rock springs, together with certain machinery owned by said Cook connected with same.

Leslie Cook sold the premises, including the springs, buildings, and personal property, to the plaintiffs for the sum of $15,000, representing that the waters were natural mineral waters and were bottled and sold as they flowed from the ground. He also stated and represented to the plaintiffs that the daily natural flow of water in the Gurn spring was 1,200 gallons and from the Crystal Rock spring 3,000 gallons available for bottling purposes.

The trial court found that these representations were false and fraudulent and made with intent to deceive, and gave judgment for rescission and the restoration of the purchase price together with the damages sustained by the plaintiffs.

The Appellate Division by consent of the parties modified the judgment by a certain reduction and the elimination of Margaret E. Cook as a party defendant. The costs recovered against Margaret E. Cook, the wife of the defendant, are also to be taken from the judgment.

In this court the defendant has challenged the correctness of the judgment, claiming that by reason of certain findings made by request in his favor there could be no rescission, as the purchaser had finally accepted the property and ratified the contract.

After the plaintiffs had entered into possession of the premises, they purchased and installed modern machinery and apparatus at considerable expense suitable for the bottling and distribution of said mineral waters in the amount which said Cook had represented would be the natural product of the springs.

After the plaintiffs had bottled and attempted to sell to the public, it was discovered that the water was not a natural mineral water, but fresh water from fresh springs with the addition of certain chemicals. The flow did not exceed 160 gallons.

On the 9th of June, 1919, this action was commenced to rescind the purchase and for the cancellation and discharge of the securities given as part of the purchase price.

At the request of the defendant, the appellant here, the court found that the plaintiffs began bottling and selling water from the springs in January, 1919, and continued the same until September, 1919; that until the works were destroyed by fire on the 22d of September, 1919, the plaintiffs continued in the actual use of all the property; that after this suit was begun they expended in the repair of the Acme truck part of the personal property conveyed, the sum of $210, and after its damage by fire the sum of $100; and that in the next year they took out a license for the truck in their own names. The court also found that after the commencement of this action the plaintiffs installed new machinery on this property and purchased lumber to build a garage.

From these findings the appellant insists that the plaintiffs had elected to retain the property and affirm the contract; that these acts of ownership were inconsistent with the claim of rescission.

[1] We take it that the doctrine of election is one of substance and not of mere words. Using the property may or may not be a ratification of the contract according to the circumstances. When it appears that the acts performed are inconsistent with the claim of repudiation, then, and then only, can there be an election to confirm and adopt the contract. A particular act for which an authority may be cited as indicating an adoption of a contract may under other circumstances have no such force and effect.

[2] We must consider in this case the nature of the property. The water flowed from springs underneath the ground. Its quantity was uncertain. Defects, as well as fraud, could only be discovered by continued use as well as patient waiting. The plaintiffs from January to June attempted to make good their purchase and the defendants' representations. When they finally discovered that this was impossible, they brought this action for a rescission. They did not rescind and tender back the property. They brought action for rescission and offered in the pleadings to return the property. When the issues came on for trial, the court had before it the entire transaction, including both the real and personal property conveyed, and the facts regarding the use which had been made of both. The fact that the plaintiffs after bringing the action for rescission and before judgment made some use of the property was

not fatal to their suit as a matter of law. Bottling water for two months after the bringing of the action and the repair of the automobile were such slight and trivial acts in comparison with the large subject-matter of the transaction as did not amount to an election and a confirmation of the contract as a matter of law.

With this part of the case we find no fault.

We do think, however, that there has been an error in the assessment of damages. The court not only returned to the plaintiffs the cash paid upon the purchase price and canceled the securities given for the balance, but also awarded items in the way of damages which included general expenses in the operation and installation of machinery, cost of new machinery purchased, and for labor paid. To this finding the defendants duly excepted.

[3] In this respect the judgment is wrong. The plaintiffs on discovering the fraud could do one of three things:

"A person who has been induced by fraudulent representations to become the purchaser of property, has upon discovery of the fraud three remedies open to him, either of which he may elect. He may rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract. * * * He may bring an action in equity to rescind the contract and in that action have full relief. (Allerton v. Allerton, 50 N. Y. 670). Such an action is not founded upon a rescission, but is maintained for a rescission, and it is sufficient therefore for the plaintiff to offer in his complaint to return what he has received and make tender of it on the trial. Lastly, he may retain what he has received and bring an action at law to recover the damages sustained." Vail v. Reynolds, 118 N. Y. 297, 302, 23 N. E. 301, 303; Davis v. William Rosenzweig Realty Operating Co., 192 N. Y. 128, 134, 84 N. E. 943, 944, 20 L. R. A. (N. S.) 175, 127 Am. St. Rep. 890.

A buyer cannot, however, recover both damages and purchase price when a case has been tried on the basis of rescission. Houser & Haines Mfg. Co. v. McKay, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925; Park v. Richardson & Boynton Co., 81 Wis. 399, 51 N. W. 572; Williston on Sales, § 612; Gilmore v. Williams, 162 Mass. 351, 38 N. E. 976; Gerli & Co. v. Mistletoe Silks Mills, 80 N. J. Law, 128, 76 Atl. 335; 23 Harvard Law Review, 141.

The judgment to which the plaintiffs were therefore entitled upon the findings in this case was for the return of their $5,000 purchase money paid in cash with interest thereon from the date of payment and the cancellation of the securities given for the balance.

The judgment of the Appellate Division must therefore be modified by deducting the sum of $4,365.46, the items making up the damage over and above the purchase price allowed to the plaintiffs, and as thus modified affirmed, with costs to appellants.

HOGAN, CARDOZO, POUND, and ANDREWS, JJ., concur.

HISCOCK, C. J., concurs in result.

McLAUGHLIN, J., dissents and votes to reverse.

Judgment accordingly.

(237 N. Y. 142)

PEOPLE ex rel. STANDARD OIL CO. OF NEW YORK v. LAW et al., State Tax Commission.

(Court of Appeals of New York. Dec. 4, 1923.)

Taxation ⇐376(1)—Corporation franchise tax computed on "entire net income."

Tax Law, § 209, as added by Laws 1917, c. 726, and amended by Laws 1918, c. 276, § 1, and Laws 1919, c. 628, § 3, provides a corporate franchise tax computed on "entire net income," which is presumably that on which federal income tax is paid, but does not define gross income. *Held*, that entire net income is to be ascertained by deducting from the gross income as defined by federal Income Tax Law, § 213 (U. S. Comp. St. Ann. Supp. 1919, § 6336¼ff), all proper business charges, except losses of other fiscal years and those United States taxes specified as nondeductible by section 234 (section 6336¼pp). Interest on bonds of the state or political subdivisions forms no part of gross income while interest on bonds of the United States should be included, unless of the character excepted by section 213, subsec. (b), subd. 4 (section 6336¼ff). Foreign taxes are a proper deductible expense.

Hogan, Cardozo, and Pound, JJ., dissenting in part.

Cross-Appeals from Supreme Court, Appellate Division, Third Department.

Certiorari by the People, on the relation of the Standard Oil Company of New York, against Walter W. Law, Jr., and others, constituting the State Tax Commission. From an order of the Appellate Division (205 App. Div. 531, 200 N. Y. Supp. 72) annulling a determination of the Commission assessing a franchise tax on relator, relator and defendants appeal. Affirmed as modified, and proceedings remitted to State Tax Commission.

Robert E. Whalen, of Albany, and Peter M. Speer and Courtland Palmer, both of New York City, for relator.

Dudley F. Sicher, of New York City, for A. C. Israel & Co., Inc., amicus curiæ.

Eustace Seligman, of New York City, amicus curiæ.

Carl Sherman, Atty. Gen. (C. T. Dawes, of Albany, of counsel), for defendants.

ANDREWS, J. In 1917 a tax was imposed upon corporations for the privilege of exercising their franchises and doing business within this state. It was based upon their net income, "upon which income such corporation is required to pay a tax to the United States." Tax Law (Consol. Laws, c. Co.), § 209, as added by Laws 1917, c. 726. We therefore necessarily accepted the definitions of "gross" and "net" income contained in the federal statute, purely arbitrary as those definitions were. It was soon seen, however, that no opportunity was given for a hearing to the taxpayer here, before the tax was imposed upon it, and during the next year the law was amended. The tax was still based upon net income, but now such income was only "presumably the same as the income upon which such corporation is required to pay a tax to the United States." The taxpayer was to report to the tax commission its return as made to the national government but if that return was claimed to be inaccurate it might be heard. So there might be correction for fraud, evasion, or error in the return. Laws 1918, c. 276, § 1.

In the statute there was no definition of "net income." The bare words were used, and there was a reference to the federal law. So we held that its definition as contained in that law was adopted by our Legislature. The commission was, because of the amendment—

"free to fix, from the return and any other information, the true and correct amount of the net income, but not to change the nature or definition of it." People ex rel. Barcalo Mfg. Co. v. Knapp, 227 N. Y. 64, 71, 124 N. E. 107, 108.

Taking the definition of net income contained in the federal statute, our Legislature also took the like definition of "gross income" therein contained. The one proposition involves the other.

As defined by the federal Income Tax Law, "gross income" includes all gains, profits, or income received, except interest on state and municipal bonds, on certain described obligations of the United States, and on certain obligations issued under its authority. Section 213, subds. (a) and (b) (U. S. Comp. St. Ann. Supp. 1919, § 6336¼ff). "Net income" is gross income less business expenses and certain other items that might also be deducted. Sections 232, 233 (sections 6336¼oo, 6336⅛p). After "net income" was so determined, some credits were allowed before the tax was imposed. In the case of corporations these were interest on some obligations of the United States, the amount paid during the year for war and excess profits taxes, and also $2,000. Section 236 (section 6336⅛qq).

The question then arose whether in this state such credits should or should not be deducted before we fixed the "net income" which was to be the basis of our tax. We held that no deduction should be made. Having adopted the federal definition of "net income" the meaning of these words was fixed. In defining net income the United States made no reference to such credits. After fixing what constituted "net income" that government might or might not allow further deductions before the tax was stated. Whether it did or did not the definition of "net income" was not affected. People ex rel. Barcalo Mfg. Co. v. Knapp, supra.

Again our statute was amended. Carefully, wherever mentioned, the term "net income" was changed to "entire net income." And for the first time the Legislature, feeling perhaps as had we that reference to a foreign statute for a definition was unsatisfactory, gave its own definition to the words it used.

"The term 'entire net income' means the total net income before any deductions have been made for taxes paid or to be paid to the government of the United States on either profits or net income or for any losses sustained by the corporation in other fiscal or calendar years whether deducted by the government of the United States or not." Tax Law, § 208, as amended by Laws 1919, c. 628, § 2.

No word was said as to the equally essential phrase "gross income." Evidently the definition of the federal statute which we had held to have been adopted by our own statute was thought to be satisfactory.

Turning, therefore, to the words "entire net income" and to their definition, what was the intent of the Legislature? It must have supposed that the use of the words "entire" and "total" had some significance. It must have supposed that the adoption of the definition was of some importance. It knew that the question as to the credits allowed under the federal act had arisen. It may well have desired to make less arbitrary the definition of the words "net income," yet it did not desire that this basis for the tax should be reduced by subtracting from it certain taxes paid to the United States and losses for other calendar or fiscal years. It may also have desired to clarify the situation as to dividends received from other corporations. People ex rel. Northern Finance Corp. v. Law, 230 N. Y. 286, 140 N. E. 700. As to

these we had already failed to follow the United States definition.

The idea was to replace the federal definition of "net income" by one of our own—one having, with the two exceptions specified and those two only, a meaning generally understood. Net income is gross income less proper deductions, a rule that may be readily applied by the commission and by the courts.

This conclusion is not inconsistent with other provisions of the statute. The corporation is to pay a tax measured by its entire net income, which is presumably the same as the entire net income reported to the United States (section 209), and it is to make a report of its return of such income to the United States. Section 211. Ordinarily this presumption would be correct. Gross income would include all proper receipts except interest on certain tax free bonds. Fed. Inc. Tax Law, § 213 (U. S. Comp. St. Ann. Supp. 1919, § 6336⅛ff). From that would be deducted under the federal law most business charges. Section 234 (section 6336⅛pp). Generally, therefore, the results would be the same. This is all that "presumably" now means.

In brief the present rule should be stated as follows: Take the gross income as defined by the federal statute. Deduct from it proper business charges except the United States taxes specified and losses of other fiscal years. The result is the entire net income as intended by our statute.

If this is so, the result reached below is not wholly correct. As there fixed there was included in gross income interest on bonds of the United States and also on bonds of New York and various political subdivisions. The interest on the United States bonds should have been included, unless they came within the exception mentioned in subdivision 4 of section 213 (b) of the federal statute. It does not appear that they do. Otherwise as to the other interest. It forms no part of the gross income and should not be considered. As to the foreign taxes they were a proper business expense to be deducted from gross to find net income.

The order of the court below should be modified as indicated, and as so modified affirmed, without costs, and proceedings remitted to state tax commission to proceed in accordance with opinion.

HISCOCK, C. J., and McLAUGHLIN and CRANE, JJ., concur.

HOGAN, CARDOZO, and POUND, JJ., dissent from exclusion from net income of taxes paid, and otherwise concur in result.

Ordered accordingly.

(311 Ill. 92)

PEOPLE, for Use of DEPARTMENT OF REGISTRATION AND EDUCATION, v. GRAHAM. (No. 15156.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Physicians and surgeons ⟸2—Legislature may regulate practice of medicine.

The Legislature, under its police power, may regulate and fix the qualifications of persons who practice medicine and surgery, and pursuant to such purpose may provide for classes, so long as the classification is general and bears reasonable relation to the purpose sought to be accomplished.

2. Physicians and surgeons ⟸2—Statute failing to provide for license to one qualified held invalid as to him.

There is no difference between persons practicing different methods of treating human ailments, which justifies a discrimination against any person of any class meeting all requirements of law, so that failure of the Medical Practice Act of 1899 to contain a provision under which a license to practice surgery could have been issued to one who had met all requirements of law and who was licensed to treat human ailments without the use of medicines, externally or internally, or without performing surgical operations, was as to him invalid.

3. Constitutional law ⟸43(1)—Failure to apply for license, which under statute could not be granted, does not preclude assertion of its invalidity.

Where the right to a license to practice surgery is by statute improperly limited to a class to which defendant does not belong, his failure to seek such a license does not preclude him from asserting the invalidity of the statute, when charged with the violation of it.

Farmer, C. J., and Thompson, J., dissenting.

Appeal from Grundy County Court; George Bedford, Judge.

Declaration in debt by the People, for the use of the Department of Registration and Education, against F. W. Graham. Judgment for plaintiff, and defendant appeals. Reversed.

McCormick, Kirkland, Patterson & Fleming, of Chicago (Perry S. Patterson and Louis G. Caldwell, both of Chicago, of counsel), for appellant.

Edward J. Brundage, Atty. Gen., and Frank L. Flood, State's Atty., of Morris (Clarence N. Board, of Springfield, of counsel), for appellee.

CARTWRIGHT, J. A declaration in debt in the name of the people of the state of Illinois, for the use of the department of registration and education, was filed in the county court of Grundy county, alleging that the appellant, F. W. Graham, on April 22, 1921, held licenses authorizing him to practice a system of treating human ailments without the use of medicines internally, or externally, and without performing surgical operations, and to practice midwifery without the use of any drug or medicine, or attend other than cases of labor, and that he practiced medicine and surgery on that date by treating the ailment of Beatrice Anderson by a surgical operation upon her and administering pituitrin and strychnine. The appellant demurred to the declaration on constitutional grounds, and his demurrer being overruled he filed pleas. The issues were heard by the court on a stipulation of facts, and judgment was rendered against the appellant for $200, from which he prosecuted this appeal.

The material facts stipulated were that the defendant, after a full and complete compliance with all statutory requirements, obtained a license authorizing him to practice any system of treating human ailments without the use of medicine internally or externally, and without performing surgical operations, and also obtained a license authorizing him to practice midwifery, but he never had a license to practice medicine and surgery in all their branches. The action was brought under the Medical Practice Act of 1899 (Laws 1899, p. 273), and the defendant had a preliminary education satisfying all the requirements requisite to admission to a medical school in good standing under the provisions of that act and under the rules and regulations of the state board of health and department of registration and education. After such preliminary education he attended the American School of Osteopathy, at Kirksville, Mo., and, having successfully completed a three years' course, he graduated in June, 1911, and received a diploma. The courses of study pursued by him were equal in every respect to the courses of instruction, requirements, and text-books of those taught in medical schools which were at that time and have since been considered reputable and in good standing, both by the state board of health and the department of registration and education. Among the courses of study pursued, and which he successfully completed, were courses in operative surgery, obstetrics, gynecology, antiseptics, antidotes, narcotics, stimulants, and anaesthetics. As a part of his courses of study he received instructions in the nature, use, operation, and effect of strychnine and pituitrin in connection with and incident to surgery. On April 22, 1921, the defendant performed an act of operative surgery on Beatrice Anderson, an unmarried girl about 20 years of age, by curetting her uterus for the removal of morbid matter,

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

consequent on an illegal act or operation performed by some other person. He did not administer any drug or medicine as a curative or remedial agency for a disease or ailment, but only as a part of and incidental to the surgical operation, either as a stimulant or by contraction of tissues, to secure successful results of the operation.

[1, 2] Assuming that the Medical Practice Act of 1899, under which the declaration was filed, was in force unless subject to some objection upon constitutional grounds, as the parties understand, it will be seen that the question presented is the same which was considered and decided in the case of People v. Schaeffer (No. 14738) 142 N. E. 248. The authority of the Legislature, under the police power, to regulate and fix the qualifications of persons who practice medicine and surgery, is not and cannot be denied. The Legislature may make such requirements as will qualify all classes of persons treating human ailments to thoroughly understand their profession and protect the public against those who are inefficient and unworthy. In the enactment of statutes for that purpose the Legislature may provide for classes, so long as the classification is general and bears a reasonable relation to the purpose sought to be accomplished; but any act of the Legislature which is merely arbitrary and discriminatory, where there is no substantial difference between the classes, and which abridges privileges of citizens or grants special privileges to classes, is in violation of constitutional rights. In the Schaeffer Case it was decided that there was no difference between the classes of persons practicing different methods of treating human ailments which justified discrimination against persons of any class meeting all requirements of the law, and that as applied to him the Medical Practice Act of 1899 infringed upon his constitutional right and was therefore void.

[3] The application of the same principles requires a reversal of the judgment in this case. There was no provision of the act under which a license to practice surgery could have been given to the defendant. The right to such a license was limited to a class to which he did not belong, and as the law does not require a useless act to secure a right, the defendant was not called upon to apply for a license that could not be granted. The act was not void as to any person not deprived of a constitutional right, but was void as applied to the defendant deprived of such right.

The judgment is reversed.

Judgment reversed.

FARMER, C. J., and THOMPSON, J., dissent.

(311 Ill. 115)

PEOPLE ex rel. GREGG, County Collector, v. LOUISVILLE & N. R. CO. (No. 15607.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Taxation ⇐438—County clerk cannot increase assessment returned by tax commission to accord with his theory of law.

The county clerk is not an assessing officer, and hence cannot assess property or increase the assessment returned by the tax commission to accord with his theory of the law, under his statutory authority to correct errors in assessments received from township assessors.

2. Taxation ⇐124½—Railroad having half interest in leased track cannot be assessed on whole track.

A railroad company, having a half interest in a track used jointly by it and another railroad under leases to them from the owner of the right of way, cannot be assessed on the whole track.

Appeal from Gallatin County Court; W. S. Sanders, Judge.

Application by the People, on the relation of J. G. Gregg, County Collector, for judgment against the property of the Louisville & Nashville Railroad Company for delinquent taxes. From the judgment entered, defendant appeals. Reversed and remanded.

Charles P. Hamill, of Belleville (Roedel & Roedel, of Shawneetown, of counsel), for appellant.

Joseph L. Bartley, State's Atty., of Shawneetown, for appellee.

CARTWRIGHT, J. Upon application to the county court of Gallatin county for judgment against the property of the appellant, the Louisville & Nashville Railroad Company, delinquent for taxes of 1922, the appellant filed a number of objections, some of which were sustained, and others overruled, and judgment was entered accordingly. Among the objections overruled was the ninth, and upon this appeal the only error assigned is the overruling of that objection.

The ninth objection was that the county clerk had increased, without authority of law, the assessed valuation of the main track of appellant's railroad in Gallatin county as fixed and determined by the state tax commission and returned to the county clerk, and that such unlawful increase was $33,189. The appellant made a return to the tax commission of its property in Gallatin county for the year 1922, giving the total length of main track as 71,918 feet, and stating that 28,038 feet of such main track was operated jointly with the Baltimore & Ohio Southwestern Railroad Company, and that one-half of the value thereof was deducted in the column giving the valuation of the main track. The tax commission as-

sessed the main track so returned for the full distance stated in the return, setting down the figures in the column for that purpose as 10 miles and 5,099 feet. The commission assessed the main track at $2.367424 per foot, amounting to $137,072.

The facts in regard to the portion of the main track as to which the appellant returned a half interest were stipulated and are as follows: About the year 1881 or 1882 the Southeast & St. Louis Railway Company, owner in fee of a right of way from McLeansboro to Shawneetown and across Gallatin county, by separate leases leased 28,018 feet of such right of way for 999 years to the appellant and the Baltimore & Ohio Southwestern Railroad Company for their joint and common use, and since that time the two railroad companies have operated their railroads over the 28,018 feet as part of their main tracks, respectively. The county clerk extended taxes against all of said 28,018 feet of right of way as main track of the appellant, at the valuation of $2.367424 per lineal foot fixed by the tax commission, as owner of the whole title, thereby increasing the assessment of main track $33,189, and likewise assessed the same 28,018 feet as main track of the Baltimore & Ohio Southwestern Railroad Company at the rate fixed by the tax commission, as owner of the whole.

[1] The county clerk, on the assumption that the tax commission had only assessed the appellant with one-half of the joint track and ought to have assessed it for the whole, multiplied one-half of the length of the joint track in feet by the assessed rate of the main track per foot as returned by the tax commission and added it to the assessment. The right to do this is claimed under the statutory authority given to county clerks, upon receipt of the assessments from township assessors, to correct all errors, of whatsoever kind, which he may discover. Whether that provision of the statute applies to this case or not, there was no error to correct, but the action of the clerk was based on the conclusion that the assessment by the tax commission was wrong, and that he had a right to supervise and change it according to his theory of the law.

Counsel for the appellee admits that an increase of the value of the appellant's property by the county clerk would be unconstitutional and void, but says that objection 9 in the county court did not raise a constitutional question, and therefore it cannot be raised here. There is no reason to refer to the Constitution, because the county clerk is not an assessing officer, and has no authority by law to assess property.

[2] There is a great deal of argument and authority respecting the duty and liability of owners of property to pay taxes on such property according to its value, but no authority is referred to which requires a person or corporation to do more than to pay taxes upon the property it owns. The evidence and stipulation showed that appellant only owned a one-half interest in 28,018 feet of main track, and it could not be assessed for taxation or required to pay taxes on the other half, owned by the Baltimore & Ohio Southwestern Railroad Company. People v. Baltimore & Ohio Southwestern Railroad Co., 310 Ill. 259, 141 N. E. 738.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

(311 Ill. 297)

BROOKS TOMATO PRODUCTS CO. v. INDUSTRIAL COMMISSION et al.
(No. 15681.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Master and servant ⟸356—Injury compensable regardless of employee's negligence.

To warrant employee's recovery under the Workmen's Compensation Act, it does not matter how bad his conduct may have been or how negligent he may have acted at the time he was injured, if the accident arose out of his employment.

2. Master and servant ⟸375(1)—Injuries held compensable as arising out of employment.

Where an employee of a canning plant was injured, after having been employed but a few days, while attempting to jump on a moving elevator to ascertain the cause of the stoppage of the flow of catsup from the floor above which had interrupted his work of capping bottles, *held*, that the injury arose out of his employment, in view of evidence that, though he was under no obligation to make the adjustment that would permit him to continue work, he was violating no instructions in seeking to ascertain the cause of the trouble.

Error to Circuit Court, Madison County; J. F. Gillham, Judge.

Proceeding under the Workmen's Compensation Act (Laws 1913, p. 335) by Joseph Rice for personal injuries, against the Brooks Tomato Products Company, employer. An award of the Industrial Commission confirming an award of the arbitrator was affirmed on certiorari to the circuit court, and employer brings error. Affirmed.

William P. Boynton, of Alton, for plaintiff in error.

W. J. MacDonald, of Chicago, for defendant in error.

THOMPSON, J. Defendant in error, Joseph Rice, a young man 17 years of age, was employed by plaintiff in error, the Brooks Tomato Products Company, which conducts a plant in the city of Collinsville where to-

mato products are manufactured. September 14, 1920, about 8 o'clock p. m., he was caught between the floor of a freight elevator and the second floor of the building in which he was employed and suffered an injury to his left hip. The arbitrator to whom the cause was referred for hearing found that the injury arose out of the employment of defendant in error; that he was entitled to $7.69 a week for 14⅓ weeks as compensation for the time he was totally incapacitated, and to the sum of $7.69 a week for a period of 70 weeks as compensation for injuries sustained which caused the permanent loss of 40 per cent. of the use of his left leg. Plaintiff in error, contending that there was no evidence showing that the injury arose out of the employment, obtained a review before the Industrial Commission. The Commission confirmed the award of the arbitrator, and its decision was sustained on certiorari by the circuit court of Madison county. This writ of error is prosecuted by leave to review the cause.

Rice testified that he had been employed by plaintiff in error five days when he was hurt; that at first he did odd jobs around the plant; that later he helped transfer tomatoes from the cars to the factory; that he also carried bottles from the cars into the factory and transferred them from one floor to another; that he carried bottles from the second floor to the first floor, where they were filled with catsup; that on the day he was injured he was operating a capping machine, which was located on the first floor; that the bottles were filled by an automatic filling machine and were carried by a conveyer to the capping machine, which he was operating; that he pressed a metal cap on each bottle by operating a lever; that he was working overtime at the time he was hurt; that the filling machine became clogged and there were no bottles to be capped; that Ossala, an employee who was operating a filling machine, started upstairs on the elevator, and that Rice ran and jumped onto it after it had left the floor; that the gate which protected the elevator shaft fell and caught him, and before he could release himself, or the elevator could be stopped, he was injured.

Russell Davis, foreman of the department where Rice was employed, testified that Ossala was the only employee who knew how to keep the catsup running into the filling machine and that he was the one who was expected to look after that part of the work; that Rice was not experienced in that work and that all he was expected to do on the day he was injured was to operate the capping machine; that his work that day did not call him to the second floor of the building and that he was not expected to go up there to ascertain the trouble when the catsup ceased to flow. Davis admits that he did not give Rice any instructions whatever with reference to whether he should go to the second floor to ascertain the cause of the stoppage and that it would have been all right for Rice to correct the trouble if he had been experienced in that line; that no instructions were given to any one regarding the matter, but that Ossala was expected to take care of the filler because he was the one who knew how to do it.

John Ossala testified that he was operating a filling machine on the first floor of the building and that Rice was working opposite him at the capping machine; that the flow of catsup stopped and he started upstairs to ascertain the trouble; that Rice attempted to jump onto the elevator after it had left the floor and was caught and injured; that he did not tell Rice to follow him, nor did he tell him not to come; that it was the custom for the different employees to use the elevator in going from one floor to another; and that whoever had occasion to use it operated it.

[1, 2] The sole question in this case is whether Rice by his conduct took himself outside the sphere of his employment. It does not matter how bad his conduct may have been nor how negligently he may have acted at the time he was injured if he was still within the sphere of his employment and if the accident arose out of it. Jobst v. Industrial Com., 303 Ill. 599, 136 N. E. 493; Union Colliery Co. v. Industrial Com., 298 Ill. 561, 132 N. E. 200, 23 A. L. R. 1150; Alexander v. Industrial Board, 281 Ill. 201, 117 N. E. 1040. The question in this case is: What was Rice doing at the time he was injured? Not: How was he doing it? The fact that he attempted to go to the second floor of the building to ascertain the cause of the stoppage of the flow of catsup which interrupted his work makes no difference. The question presented is just the same as if he had gone to a tank situated in the same room as the machine at which he was employed. Rice admits frankly that he had not been instructed to go to the second floor to find the cause of the interruption and admits that it was not a part of his duties to keep the catsup flowing into the filling machine. He does not seek to shield himself from blame in the matter, but admits freely that his careless act contributed to his injury. We are impressed with the frankness of his story of the accident. If he had not been so free in accepting blame for his misconduct, there would be little, if any, evidence in the record to support the contention of plaintiff in error. The foreman admits that he gave Rice no instructions whatever concerning his duties in the event his work was interrupted by a stoppage in the flow of catsup. Rice had been employed at the plant only a few days, and during that time he had worked on all the floors and all about the premises. The only reason the foreman assigns for Rice not being expected to correct

the trouble on the second floor is that he was inexperienced. He admits that it would have been all right for Rice to make the investigation and correction if he had known how to do it. If that be true, it cannot be said that Rice took himself out of the sphere of his employment when he followed his fellow workman to learn the cause of the interruption in his work and to learn how to correct the trouble. While Rice was under no obligation to go to the second floor and make the adjustment which would permit him to continue his work, he was violating no instructions of his employer in going there. He was promoting the interests of his employer in doing that which would permit him to resume his work, and we think that the record justifies the conclusion reached by the Commission that his injury arose out of his employment. This conclusion is in harmony with the principles of law announced in Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764, Fairbank Co. v. Industrial Com., 285 Ill. 11, 120 N. E. 457, and United States Fuel Co. v. Industrial Com., 310 Ill. 85, 141 N. E. 401, although the facts in those cases did not justify an award.

The judgment is affirmed.

Judgment affirmed.

(311 Ill. 224)

PEOPLE ex rel. SATORIUS et al. v. CHANDLERVILLE COMMUNITY HIGH SCHOOL DISTRICT NO. 62, CASS COUNTY. (No. 15706.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Quo warranto ⟸43—Leave to file information in nature of quo warranto not absolute right.

Under Smith-Hurd Rev. St. 1923, c. 112, leave to file an information in the nature of quo warranto is not an absolute right but within the judicial discretion of the court.

2. Quo warranto ⟸43—Filing of answer to petition for leave to file information unauthorized; court may enter rule nisi.

The filing of an answer to a petition for leave to file an information in the nature of quo warranto is unauthorized, though the court may enter a rule nisi, requiring respondents to show cause, and may hear affidavits and deny the petition, if facts properly influencing its discretion are presented.

3. Quo warranto ⟸43—Entry of rule nisi requiring respondent to show cause within court's discretion.

On petition for leave to file an information in the nature of quo warranto, it is within the court's discretion whether to grant leave on the showing of the petition or to enter a rule nisi requiring respondent to show cause.

4. Quo warranto ⟸43—On petition for leave to file information, any fact properly influencing judicial discretion considered.

On petition for leave to file an information in the nature of quo warranto, where rule nisi has been entered or respondent has appeared without such a rule, the court may consider any fact properly influencing its judicial discretion.

5. Quo warranto ⟸43—Denial of petition for leave to file information held error.

Denial of a petition for leave to file an information in the nature of quo warranto, which showed probable cause after a consideration of affidavits denying facts alleged in the petition or setting up other facts which would have been the proper subject-matter for pleas raising issues of fact, *held* error.

Appeal from Circuit Court, Cass County; Guy R. Williams, Judge.

Petition by the People, on the relation of William Satorius and others, for leave to file an information in the nature of quo warranto against the Community High School District No. 62 of Cass County. From a denial of the leave sought and dismissal of the petition, plaintiffs appeal. Reversed and remanded.

L. M. McClure, State's Atty., of Beardstown, Thompson & Thompson, of Mt. Vernon, and A. A. Leeper, of Virginia, Ill., for appellants.

A. T. Lucas, of Chandlerville, and J. J. Neiger, of Virginia, Ill., for appellee.

CARTWRIGHT, J. The state's attorney of Cass county presented to the circuit court an information in the nature of quo warranto, calling upon community high school district No. 62 of Cass county to answer to the people by what authority it claimed to exercise the franchises of a community high school district over territory claimed to have been annexed by virtue of a proceeding for the annexation of such territory, which was alleged to be illegal and void. Notice was given to the authorities of the district, who appeared and contested the application, and the court denied the leave asked for, dismissed the petition, and entered judgment for costs against the relators. From that judgment this appeal was prosecuted.

The petition accompanying the information alleged that community high school district No. 62 of Cass county was organized in 1918 and the community high school was established in the village of Chandlerville; that in 1920 the ex officio board entered an order purporting to annex to the district the territory in question, which is a very large body of land on the east side of the district, nearly as large as the original district, as shown by a map accompanying the petition; that the village of Chandlerville was 3¼ miles from the western boundary of the district

as originally organized, and about 8½ miles from the eastern boundary of the territory alleged to have been annexed; that the children traveling by legally established highway from the northeast corner of the territory in question would have to travel about 13 miles to the school, and those living in the southeast corner, traveling by such highways, would have to travel 10½ miles to the school. The petition also set forth the nature of the territory, existing streams, and other alleged conditions affecting travel, and charged that the district, as claimed to exist through the alleged illegal annexation, was not composed of compact and contiguous territory and not such as to furnish to all the children of the territory the privilege of receiving an education, as guaranteed by the Constitution.

Upon the appearance of the respondent a war of affidavits was begun. There was a great number of them, and the respondent made considerable use of a printed form of affidavit so that they could be furnished wholesale, and has filed an additional abstract to present some of the affidavits more particularly. The affidavits for the respondent embraced apparently about everything that had happened since the organization of the original district, including an election for the dissolution of the district, at which there were considerably more votes against discontinuing the district than there were in favor of it; the filing of a bill by some taxpayers to enjoin the collection of taxes on the ground that the statute providing for annexation was unconstitutional; the fact that the district had to pay $3,000 to attorneys in that suit and the decree denying the injunction was affirmed by this court in Millstead v. Boone, 301 Ill. 213, 133 N. E. 679, and other matters having no relation to the question before the court. The question before the court in the case referred to was whether the act authorizing annexation was unconstitutional, so that no territory could be annexed by virtue of it, while the question in the case presented was whether there had been an illegal exercise of the authority, in violation of constitutional rights. A law may be within the legislative power and not violate any provision of the Constitution, but when applied to persons and conditions the exercise of the authority given may destroy constitutional rights and render such application of the statute illegal and void.

[1-4] The statute in relation to quo warranto provides that the state's attorney, of his own accord or at the instance of any individual relator, may present a petition to any court of competent jurisdiction for leave to file an information in the nature of quo warranto in the name of the people of the state of Illinois, and, if such court shall be satisfied that there is probable ground for the proceeding, it may grant the petition and order the information to be filed and process to issue. Smith's Stat. 1923, p. 1640. Leave to file the information is not an absolute right, and the application is addressed to the sound judicial discretion of the court. The filing of an answer to the petition is not authorized by law, and if the petition shows probable cause the court may grant leave on the showing of the petition or may enter a rule nisi that the respondent show cause, and may hear affidavits and deny the petition if facts properly influencing the discretion of the court are presented, showing that the leave should not be granted. It is discretionary with the court whether leave shall be granted on the showing of the petition or a rule nisi shall be entered. People v. Drainage District, 193 Ill. 428, 62 N. E. 225; People v. Lease, 248 Ill. 187, 93 N. E. 783. If a rule nisi is entered or the respondent appears without such a rule, the court may consider any fact properly influencing the judicial discretion. People v. Schnepp, 179 Ill. 305, 53 N. E. 632; People v. Stewart, 306 Ill. 470, 138 N. E. 180. If the petition shows probable cause, the court has no authority to try the case on the application for leave to file the information upon facts which are proper subjects for pleas. Such facts must be set up by plea, so that the sufficiency of the facts alleged as a defense may be determined as in any other action at law. People v. Moss, 286 Ill. 589, 122 N. E. 93.

[5] No one can tell from the record in this case for what reason or upon what ground leave to file the information was denied. The petition shows probable cause, and it is apparent that the denial resulted from a consideration of affidavits denying the facts alleged in the petition or setting up other facts which would have been subject-matter for pleas so far as they could have any effect at all. Most of the matters set up in the affidavits either contradicted the facts stated in the petition or facts which would be proper to be presented by plea, forming issues of fact to be tried, and which could not influence the discretion of the court.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

(311 Ill. 266)

PERRY COUNTY COAL CORPORATION v. INDUSTRIAL COMMISSION et al. (No. 15665.)

(Supreme Court of Illinois. Feb. 19, 1924.)

Master and servant ⇐374 — Pneumonia held not compensable as result of injury.

Where a mine employee, injured on the right side of the chest by coming in contact with a jack pipe, continued at work and about three weeks thereafter, while taking a bath, contracted a cold, from which pneumonia resulted, *held*, in proceeding for compensation, that there was no causal connection between the pneumonia and the injury, entitling him to compensation.

Error to Circuit Court, Perry County; L. E. Bernreuter, Judge.

Proceeding under the Workmen's Compensation Act by William T. Heffington, claimant, opposed by the Perry County Coal Corporation, employer. An award by the Industrial Commission was affirmed in part, and the employer brings error. Reversed and remanded.

M. C. Young, of St. Louis, Mo. (Burton & Hamilton, of Peoria, of counsel), for plaintiff in error.

W. J. MacDonald, of Chicago, for defendant in error.

STONE, J. Defendant in error, William T. Heffington, on October 30, 1920, was injured in the mine of plaintiff in error by running into what is known as a "jack pipe," whereby he received an injury to the right side of his chest. It appears that while working in the mine his light went out, and in the darkness he ran against this iron pipe, receiving an injury which caused him to leave his work. He started out of the mine, and on the way out met Roberts, the face boss, and told him that he was injured in his side by running against a jack pipe. He returned to work the next day, and continued his work for some three weeks thereafter, although he said that his side was sore during all that time and that he occasionally spat up blood. On the 23d of November, some 24 days after the injury, he was taken ill with pneumonia. He testified on the hearing that on the evening of the 22d he had gone to the wash house to take a bath; that while so engaged the hot water was shut off, and he had to continue his bath with cold water; that as a result he took cold; that he came back to work the next day, but had to quit on account of illness; that he was thereafter severely ill with pneumonia, and confined to his bed for a number of weeks. He made application before the Industrial Commission for compensation. The arbitrator entered an award at the rate of $15 per week for 266⅔ weeks, a pension at the rate of $26.66⅔ per month, and an allowance of $85 for medical service. This award was confirmed by the Industrial Commission, and the circuit court of Perry county confirmed the finding and award of the commission, except as to the item of medical services.

Defendant in error testified on the hearing on review before the commission that he was still very sore in his right side and unable to work; that when he attempted to work he suffered great pain. The plaintiff in error contends that the finding of the commission that the applicant's disability resulted from injuries arising out of and in the course of his employment is unsupported by any competent evidence; that the employer is not responsible for any part of the disability that was occasioned by another independent agency that intervened after the accident; that in this case the applicant was struck on October 30, and continued work until November 22, on which day he took a cold bath, and within a day or two thereafter was stricken with pneumonia; that the cold bath as an intervening agency was the exciting cause of disability. The plaintiff in error cites Bunge Bros. Coal Co. v. Industrial Com., 306 Ill. 582, 138 N. E. 189, in support of its contention that no liability exists against it. The rule announced in that case and numerous others is to the effect that the employee can recover only for a disability that is caused entirely by the accident which he received in his employment, and that the employer is not responsible for any part of the disability that has been occasioned by another independent agency that has intervened after the accident. In Bailey v. Industrial Com., 286 Ill. 623, 122 N. E. 107, it was held that whether the accident was an independent interving cause of the injury is a question of fact, to be passed upon by the commission, and the question to be determined in this case is whether or not there was any causal connection between pneumonia and the injury received.

Dr. F. Reder, for plaintiff in error, testified before the arbitrator that his examination disclosed to him that defendant in error had not fully recovered from his injury when he took a cold bath on the 22d of November and became very ill with pneumonia. Dr. G. E. Hendrickson also testified for plaintiff in error that, while the defendant in error complained of pain when he examined him, he did not believe that the pain was due to traumatism. On review before the commission Dr. Reder testified that in his opinion the cause of the continued pain was chronic disease of the appendix; that it was not in any way connected with the injury; that the disability of which he complained at that time was due to this disease, and not to traumatism or pneumonia. There was no dispute of this evidence, other than the

fact that defendant in error was injured in the manner herein described.

In Springfield District Coal Co. v. Industrial Com., 303 Ill. 455, 135 N. E. 789, it was held that compensation for an injury as a cause of death, which injury was received a few days before the employee contracted pneumonia, is not justified where the only evidence for the applicant is that of the attending physician, who testified the sprain may possibly have been a disposing cause of the pneumonia, but that in his opinion the injury had no connection with the disease. In this case, while the defendant in error testified that he had not recovered from his injury at the time he took the cold bath, which, as it seems from all the evidence, was the immediate cause of a cold which developed into pneumonia, there is no medical or other testimony in the record that in any way otherwise connects that disease with the injury received. From the date of the injury, on the 30th of October, until the following 23d day of November, the defendant in error continued his employment without cessation, though, as he states, his side bothered him.

We are of the opinion that the rule laid down in the Bunge Bros. Coal Co. Case is applicable here, and that the record does not sustain the position of defendant in error that there is a causal connection between the pneumonia and the injury received.

The judgment of the circuit court, confirming the award, will therefore be reversed, and the cause remanded for further consideration by the commission.

Reversed and remanded.

(311 Ill. 123)

ILLINOIS POWER & LIGHT CORPORATION v. LYON et al. (No. 15595.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Eminent domain ⇐10(1)—Power and light corporation held authorized to exercise right of eminent domain.

Under Public Utilities Act, § 59, a power and light corporation may under right of eminent domain take or damage private property when necessary for the construction of any alterations, additions, extensions, or improvements ordered or authorized by the Commerce Commission.

2. Trial ⇐133(6)—Argument of counsel held reversible error.

In eminent domain proceedings by power and light company to condemn a right of way, argument of counsel for defendants: "* * * This corporation has the right to abandon this proceeding if it does not like the amount of damages that you assess. These defendants do not want to sell their land, but they will have to take whatever you allow them. You cannot hurt this corporation, because, if it does not like the amount of damages that you award, * * * it can abandon the proceeding," and further: "Here we have two corporations, one at one end and one at the other, and the farmers are in the middle. Corporations without souls"—*held* grossly improper and not cured by the court's direction that counsel should confine his argument to the evidence.

Appeal from Vermilion County Court; Walter J. Bookwalter, Judge.

Eminent domain proceedings by the Illinois Power & Light Corporation against E. E. Lyon and others. From judgment rendered, plaintiff appeals. Judgment reversed, and cause remanded.

Acton, Acton & Snyder, of Danville, for appellant.

Walter V. Dysert and Jinkins & Jinkins, all of Danville, for appellees.

CARTWRIGHT, J. The Illinois Light & Power Corporation, appellant, filed its petition in the county court of Vermilion county alleging that it was a public utility engaged in furnishing electricity by means of poles, wires, and appurtenances thereto, for light and power purposes to the people generally, under the Public Utilities Act and under the supervision, regulation, and control of the Illinois Commerce Commission, and that it was duly authorized by orders of the Commerce Commission to construct a line of poles, cross-arms, wires, and appurtenances to connect with its existing service line running south from Danville to Georgetown, and the said orders duly authorized it to condemn the right of way across private lands for that purpose. The petition prayed the court to cause to be ascertained the compensation to be paid to E. E. Lyon, W. V. Jones, and Lydia Morgan, owners of lands, and Logie Jones, a tenant, appellees, for land taken for the construction of the line authorized. The defendants moved to dismiss the petition for want of power or authority of the petitioner to exercise the right of eminent domain, and upon a hearing that motion was denied. Defendants then filed their several cross-petitions, alleging damage to adjoining lands by decrease of the cash market value thereof on account of taking the lands for the construction and operation of the line. There was a trial before a jury, resulting in verdicts finding compensation and damages to the owners and damages to the tenant. Judgment was rendered accordingly, and this appeal was prosecuted.

The appellant has assigned errors on the record on rulings of the court in the course of the trial, giving and refusing instructions, and denying a motion for a new trial because the verdict was contrary to the manifest weight of the evidence. The appellees filed an additional record and abstract containing the evidence on the motion to dis-

miss, and have assigned a cross-error on the denial of the motion.

The judgment must be reversed and the cause remanded for improper and prejudicial argument of the attorneys for the defendants and the failure of the court to sustain objections to such arguments, impose proper restraint, or take any action to obviate or prevent the injurious consequences resulting therefrom. Other errors alleged will not be considered, for the reason that the same questions will probably not arise on another trial.

[1] The appellant had a right, under section 59 of the Public Utilities Act (Smith-Hurd Rev. St. 1923, c. 111⅔, § 63), to take or damage private property in the manner provided for under the law of eminent domain, when necessary for the construction of any alterations, additions, extensions, or improvements ordered or authorized by the Commerce Commission under section 50. Chicago, Burlington & Quincy Railroad Co. v. Cavanagh, 278 Ill. 609, 116 N. E. 128; Public Service Co. v. Recktenwald, 290 Ill. 314, 125 N. E. 271, 8 A. L. R. 466; Public Service Co. v. Krumbach, 290 Ill. 489, 125 N. E. 274; Public Service Co. v. Ludwig, 290 Ill. 557, 125 N. E. 305. If the evidence on the hearing of the motion to dismiss was not the best kind of evidence, the defect may be supplied if the motion is renewed. It will also be assumed that if there were any erroneous rulings of the court they will not occur upon a second trial.

[2] In the argument for the defendants one of the attorneys said:

"Under the law of this state this corporation has the right to abandon this proceeding if it does not like the amount of damages that you assess. These defendants do not want to sell their land, but they will have to take whatever you allow them. You cannot hurt this corporation, because if it does not like the amount of damages that you award it won't have to pay them but it can abandon the proceeding."

The attorney for the petitioner objected to the argument, and the court said, "Counsel will confine himself to the evidence." The attorney continued as follows:

"I say that this corporation has a right, under the law, to abandon this proceeding, and they don't have to pay the damages that you award. If they don't like what you do they don't have to take this land. These defendants don't want to sell their land, anyway."

Objection again being made, the court said, "Counsel will confine his argument to the evidence in the case." Another attorney for the defendants in his argument to the jury said:

"Here we have two corporations, one at one end and one at the other, and the farmers are in the middle. Corporations without souls."

On objection the court again said, "Counsel will confine himself to the evidence in the case." The same attorney continuing, said:

"I say that here are two corporations—corporations without souls—and the farmers are between them, and this jury should give these farmers all the damages that they have proved by these witnesses in this case."

On objection the court repeated the same advice, "Counsel will confine himself to the evidence."

The statement that the defendants did not want to sell their land and the jury could not hurt the corporation, because if it did not like the amount of damages it would not have to pay them, was a direct invitation to the jury to assess damages that would be nothing but a proposition to the petitioner to take the land or leave it, as the petitioner might see fit, and whatever amount was assessed would not hurt the petitioner. It was grossly improper, and the argument of the other attorney that there were two corporations without souls, one at one end and one at the other, with the farmers between them, was a direct and improper appeal to arouse sympathy, passion, or prejudice in the jurors. When objections were made to such unfair and improper arguments, the court had a duty to perform, and the mere perfunctory statement on each occasion that counsel should confine himself to the evidence was not a ruling on the objection made or in response to it. It was not a discharge of the duty of the court as a factor in the administration of justice and nothing more than friendly advice to the attorney to be good. The attorneys were not talking about the evidence, but were attempting to create prejudice, and a judgment founded on a verdict tainted with such an argument cannot be permitted to stand. It was the duty of the court to rule on the objection, put a stop to the argument, and see that it was not repeated; and if it appeared from the verdict that the action of the court was not a sufficient remedy for the wrong done, a new trial should have been granted.

The judgment as to each tract is reversed, and the cause remanded.

Reversed and remanded.

(311 Ill. 278)

INDEPENDENT OIL MEN'S ASS'N v. FORT DEARBORN NAT. BANK. (No. 15240.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. **Banks and banking ⟸155—Payee of unaccepted check cannot sue drawee.**

Under Negotiable Instrument Act, § 188, the payee of an unaccepted check cannot sue drawee.

2. **Bills and notes ⟸66—Payee of unaccepted check cannot sue bank other than drawee for refusal to pay check.**

Under Negotiable Instrument Act, § 188, the payee of unaccepted check cannot sue a bank other than the drawee on such bank's refusal to pay the check on demand.

3. **Banks and banking ⟸174—Payee could bring action of trover against bank which cashed checks on forged indorsements and collected money from drawee banks.**

Where a bank cashed checks on forged indorsements and collected the amounts of the checks from the drawee banks, the payee could bring an action of trover against the bank for unlawful conversion.

4. **Action ⟸28—Payee could waive tort of bank which cashed checks on forged indorsements and collected the money from drawee banks and sue in assumpsit.**

Where a bank cashed checks on forged indorsements and collected the money from drawee banks, the payee could waive the tort of conversion and sue the bank in assumpsit for money had and received for its use.

5. **Estoppel ⟸68(2)—Suit against bank which had cashed checks on forged indorsements and collected amounts from drawees held to estop payee from making claims against drawers or drawees.**

Where a bank cashed checks on forged indorsements and collected the amounts thereof from drawees, the payee by suing the bank in assumpsit for money had and received ratified the collection of the checks by the bank from the drawees, and thereby released the drawers of the checks because the payee by such ratification is estopped from making a claim against either the drawers or the drawees.

6. **Evidence ⟸117—Memorandum of employment not granting employee authority to indorse checks held irrelevant in action involving issue as to such authority.**

In payee's action against a bank which had cashed checks on indorsement of payee's employee, who absconded with proceeds, after such bank had collected the money from drawee banks, involving an issue as to whether the employee was authorized to indorse checks, a memorandum of employment, which did not mention such authority, was irrelevant until other evidence was offered as to authority.

7. **Corporations ⟸432(5)—Bank which cashed and collected money from drawee banks had burden of proving indorsements by secretary of payee corporation authorized in payee's action for money had and received.**

Where a bank cashed checks payable to a corporation on the indorsement of the corporation's secretary, whose principal duties consisted of soliciting advertisement for corporation's publication, and who absconded with proceeds of checks, the bank in payee's action for money had and received had the burden of proving the secretary's authority to indorse the checks; such authority not being implied from his position as secretary nor from the character of his duties, in the absence of a showing that such duties could not be discharged without indorsement of checks.

8. **Banks and banking ⟸174—Bank which cashed checks on unauthorized indorsements of secretary of payee corporation held liable to corporation in action for money had and received.**

Where secretary of corporation without authority to so do indorsed checks payable to the corporation and absconded with the money, the bank which cashed the checks and collected the amounts thereof from the drawee banks was liable to the corporation for amounts of the checks in an action for money had and received.

9. **Evidence ⟸129(5)—Evidence that secretary of payee corporation had forged indorsement on other checks held inadmissible in corporation's action against bank for money had and received.**

In an action by payee corporation against a bank which had cashed checks and collected amounts thereof from drawee banks on unauthorized indorsements of the corporation's secretary, evidence that the secretary had forged the indorsement of the corporation on other checks of which neither the corporation nor the defendant bank had knowledge *held* properly excluded.

10. **Banks and banking ⟸174—Delay in giving bank notice of employee's defalcation after bank had cashed checks on forged indorsements held no defense in action against bank for money had and received.**

Where the secretary of a corporation forged indorsements on checks payable to corporation and cashed checks at bank which collected amounts thereof from drawees, the fact that the corporation did not notify the bank of secretary's defalcation until six months after it had knowledge thereof was no defense in corporation's action against bank for money had and received, since the corporation was under no legal duty to give the bank notice and its failure to exercise care in such respect was not negligence in law.

Writ of Error to Third Branch Appellate Court, First District; on Appeal from Superior Court, Cook County; Oscar Hebel, Judge.

Action by the Independent Oil Men's Association against the Fort Dearborn National Bank. Judgment for plaintiff was affirmed by the Appellate Court (226 Ill. App. 570), and defendant brings certiorari. Judgment of Appellate Court affirmed.

Campbell & Fischer, of Chicago (Carlton L. Fischer, of Chicago, of counsel), for plaintiff in error.

W. T. Alden, C. R. Latham, H. P. Young, and H. C. Lutkin, all of Chicago (Charles Martin, of Chicago, of counsel), for defendant in error.

THOMPSON, J. This case is here by certiorari to review a judgment of the Appellate Court affirming a judgment of the superior court entered on a directed verdict for defendant in error and against plaintiff in error for $1,514.08.

Defendant in error is a corporation maintaining its offices in the Westminster building, Chicago. Throughout the period covered by the transactions involved in this litigation, M. J. Byrne was president, G. I. Sweney was vice president, and E. E. Grant was treasurer. Pursuant to a resolution adopted by the board of directors October 11, 1917, J. A. Specht was employed by the corporation as its secretary. In February, 1919, Specht disappeared, and an audit of his accounts showed a shortage of about $10,000. Specht devoted most of his time to soliciting advertising for the Blue Book, published by defendant in error. Eleven checks issued to defendant in error in payment of the advertising accounts of eleven of its clients were indorsed by Specht, "Independent Oil Men's Association, J. A. Specht, Sec'y," and cashed by the Moir Hotel Company, which in turn deposited the checks with plaintiff in error and received credit for them. The checks ranged in amount from $40 to $161.25. The first was dated November 5, 1918, and the last February 10, 1919. In the regular course of business plaintiff in error collected the amounts named in the checks from the drawee banks.

[1-5] The basis of this action is that the indorsements were forged and the payments to Specht unauthorized. Plaintiff in error contends that this action cannot be maintained because of the provision of section 188 of the Negotiable Instrument Act (Smith-Hurd Rev. St. 1923, c. 98, § 210), which reads:

"A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

Conceding the forgery for the purpose, it argues that payment on the forged indorsements was no payment at all; that the drawee banks could not charge the amounts paid against the respective accounts of the drawers; that it is liable to reimburse the drawee banks; that the drawers and the payee were in no way affected by the payment of the money by the drawee banks to it on the forged indorsements; that the money paid to it was the money of the drawee banks, in which neither the drawers nor the payee had any interest; and that there is no contractual relation between it and the payee which establishes an obligation to pay. This suit is not brought on the checks. We agree that under the Negotiable Instrument Act the payee of an unaccepted check, who holds it, cannot sue the drawee, and he certainly could not maintain an action against a bank, other than the drawee, which refused to pay the check on demand. Defendant in error does not contend that it has a right to base its action on the check or on any contractual relation arising out of the check as such. It seeks to recover the value of its property which came into the hands of plaintiff in error and for which plaintiff in error refuses to account. Defendant in error might have brought an action of trover against plaintiff in error for unlawful conversion of its property, but it chose to waive the tort and to bring its action in assumpsit for money had and received for its use. That it had a right to do this is well established by the great weight of authority. Rauch v. Fort Dearborn Nat. Bank, 223 Ill. 507, 79 N. E. 273, 11 L. R. A. (N. S.) 545; Hamlin's Wizard Oil Co. v. United States Express Co., 265 Ill. 156, 106 N. E. 623; Talbot v. Bank of Rochester, 1 Hill (N. Y.) 295; Buckley v. Second Nat. Bank, 35 N. J. Law, 400, 10 Am. Rep. 249; Farmer v. People's Bank, 100 Tenn. 187, 47 S. W. 234; Crisp v. State Bank, 32 N. D. 263, 155 N. W. 78. Defendant in error ratifies the collection of the check for it, and by this act ratifies the assumed payment of the check. Both the drawer and the drawee of the check are released from paying it over again, because the payee, by ratifying the payment, is estopped from making a claim against either. United States Portland Cement Co. v. United States Nat. Bank, 61 Colo. 334, 157 Pac. 202, L. R. A. 1917A, 145, Annotation, 148.

[6] Plaintiff in error offered in evidence a memorandum under which Specht was employed which contained the following clause:

"The secretary shall endeavor to build up the association membership, shall keep collected promptly all moneys due the association from whatever source, and shall during the first week of each month furnish the directors with a trial balance or statement showing the financial condition of the association, including, first, cash received during month and from whom; second, cash expenditures, to whom paid; third, bills and accounts receivable and bills and accounts payable."

But the court excluded it. There is nothing in this contract of employment which grants to Specht authority to indorse checks, and until there was other evidence in the record tending to show that he had such authority it was irrelevant.

Grant testified that during all the time Specht was acting as secretary witness was the treasurer of defendant in error; that as such it was his duty to receive and disburse all funds of the association; that so far as he knew, Specht never signed or indorsed

checks with the knowledge or consent of the officers of the company; that Specht's indorsement of the checks in controversy was unauthorized and that the company had received no credit for them; that Specht was the only officer of the company devoting all his time to the company's business; that witness kept in touch with the company's business by meetings with the other officers; that he was in the Chicago office two or three times a month; that Specht was on the road most of the time in the interest of the company; that during the absence of the officers of the corporation the office was in charge of two young women, a bookkeeper and a stenographer; that witness had never indorsed a check for the company for deposit to its account; and that he did not know who did make the deposits. Plaintiff in error did not call the other officers of the corporation nor the office employees. The assistant cashier of the National City Bank testified that Specht, for the association, opened an account with said bank in February, 1918; that he handed Specht a signature card; that Specht took it away with him, and it came back the next day bearing the signature of E. E. Grant, treasurer; and that no officer of defendant in error except Grant ever had any authority to draw checks on that account.

[7, 8] The burden was upon plaintiff in error to show that Specht had authority to indorse the checks in question. This authority could not be implied from the mere fact that he was secretary (City of Chicago v. Stein, 252 Ill. 409, 96 N. E. 886, Ann. Cas. 1912D, 294), nor from the character of the duties which he was required to perform, without a showing that they could not be discharged without the exercise of such power or that the power was practically indispensable to the accomplishment of the object in view. Crabe v. Mercantile Savings Bank, 295 Ill. 375, 129 N. E. 120, 12 A. L. R. 92. There must have been some one connected with this corporation who had authority to indorse negotiable paper, because it is manifest that practically all its accounts were paid by check or draft; but plaintiff in error has failed to prove that that authority was vested in Specht. This being the case, the indorsements were void and the payments unauthorized. Jackson Paper Manf. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657, 93 Am. St. Rep. 113; Merchants' Nat. Bank v. Nichols & Shepard Co., 223 Ill. 41, 79 N. E. 38, 7 L. R. A. (N. S.) 752; Foster v. Graf, 287 Ill. 559, 122 N. E. 845; Gustin-Bacon Manf. Co. v. First Nat. Bank, 306 Ill. 179, 137 N. E. 793. There being no evidence tending to establish the defense, the court properly directed the verdict. Heinsen v. Lamb, 117 Ill. 549, 7 N. E. 75; Anthony v. Wheeler, 130 Ill. 128, 22 N. E. 494, 17 Am. St. Rep. 281; Libby, McNeill & Libby v. Cook, 222 Ill. 206, 78 N. E. 599.

[9, 10] Plaintiff in error sought to prove that Specht had forged the indorsement of defendant in error on other checks and had deposited them to his personal account in the Great Lakes Trust Company. There is no contention that either party to this litigation had knowledge of this fact, if it be a fact, and it was therefore immaterial and properly excluded. It also sought to show that defendant in error knew of Specht's defalcation in February and that it failed to notify plaintiff in error until July. Since defendant in error was under no legal duty to give notice to plaintiff in error, its failure to exercise care in that regard is not negligence in law. Crabe v. Mercantile Savings Bank, supra; Hamlin's Wizard Oil Co. v. United States Express Co., supra.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(310 Ill. 585)

ROBAR v. ISHAM. (No. 15116.)

(Supreme Court of Illinois. Jan. 16, 1924. Rehearing Denied Feb. 13, 1924.)

1. Contracts ⇐246, 247—Estoppel to deny efficacy of oral modifying agreement; proof of modification must be clear.

Where parties to a written contract mutually consent and acquiesce in oral modifications and in the nonperformance of certain provisions thereof, and later comply with the other terms of the contract, each party is estopped to deny the efficacy of the modifying agreement, and cannot set up such noncompliance with provisions thus waived, in order to defeat specific performance, providing the proof is strong that such waiver or modifications have been assented to.

2. Specific performance ⇐121(11)—Proof held to show waiver of tender of abstract.

In suit for specific performance of contract to purchase land, proof *held* clearly against defendant on the question of waiver of tender of abstract on certain date.

3. Appeal and error ⇐176—Grounds held waived below.

In suit for specific performance, where attorney for defendant stated positively to the court below that he thought the abstract showed title in plaintiff or that he was the owner of the land, the defendant cannot contend on appeal that the abstract does not show title.

4. Continuance ⇐40—Pleading ⇐258(4)—Court did not err in overruling motions to file amendment to answer and for continuance.

It was not error to overrule motions to file amendment to answer and for continuance coming at the close of the evidence in the case, and after defendant's attorney had been given a short time to secure the presence of witness-

es, whose depositions he afterwards desired to take, and upon an agreement that the evidence of the two witnesses should be the only evidence for which the case would be delayed.

5. Appeal and error ⇐173(1)—Defenses not made below waived.

Defenses not made below are waived.

Appeal from Circuit Court, Grundy County; Samuel C. Stough, Judge.

Suit by L. H. Robar against Elmer B. Isham. Decree for plaintiff, and defendant appealed. Defendant dying pending the appeal, his administratrix, Mary Isham, was substituted as appellant. Decree affirmed.

H. B. Smith, of Morris (Alfred Beck, of Chicago, of counsel), for appellant.

Frank H. Hayes, of Morris, for appellee.

DUNCAN, J. This is an appeal of Mary Isham, administratrix of the estate of Elmer B. Isham, deceased, from a decree of the circuit court of Grundy county, decreeing the specific performance of a contract for the sale of a tract of land located in the state of Wisconsin, entered into by L. H. Robar, appellee, as vendor, and Elmer B. Isham as vendee, and dismissing the cross-bill of Isham for want of equity. Isham died during the pendency of the appeal, and the administratrix aforesaid has been substituted as appellant.

The contract, which is set out in hæc verba in the bill, acknowledges the payment of $1,000 by note, and provides for the further payment of $27,160 as follows: $5,000 in cash March 1, 1921, $1,080 by note bearing 6 per cent. interest, due March 1, 1923, and the remainder by assuming two existing mortgages for $12,793.50 and $7,206.50. A deed and possession of the premises were to be delivered to Isham on March 1, 1921, and a merchantable abstract was to be furnished to Isham for examination by November 1, 1920. Isham was to have 30 days from the delivery of the abstract to examine it and to return it to appellee with his objections, and appellee was to have a reasonable time in which to perfect the same and complete the title if objections were made. Isham was a resident of Mazon, in the county of Grundy, Ill. He owned a farm near said town and had farmed practically all of his life, but at the time the contract was made he was engaged in no particular business. Appellee was a resident of Delavan, Wis., and was engaged in the real estate and insurance business. Isham had had previous dealings with appellee, and about a year before this contract was entered into he had purchased a farm from appellee and had resold it at a profit. About the middle of October, 1920, Isham was visiting his brother, Wilbur Isham, at Delavan, Wis., and while there accompanied appellee on several trips in the country, which were made for the purpose of showing prospective buyers the farms that appellee had for sale. Appellee and Wilbur Isham were jointly interested in the farm described in this case, but the deed and title had been taken in appellee's name. During their visits on those trips Isham became interested in the tract of land known as the Mills farm. About that time there was considerable exchange of property in that locality, and large numbers of prospective buyers were looking over the land, and prices had been advancing. It appears from the evidence that Isham's purpose was to resell for a profit any land that he bought, and the selling possibilities of the Mills farm were discussed between appellee and Isham. These two parties met at the home of Wilbur Isham on the evening of October 16, 1920, and after much discussion entered into the contract to which reference is above made. Isham then directed appellee to show the farm to prospective buyers and to resell it for a profit to him of about $20 an acre. On the last day previous to the signing of the contract, in the evening, Isham had directed appellee to show the farm to other prospective buyers as his farm and to sell it for him. While it was disputed by Isham in his testimony, we think it is clearly shown by the evidence that on the morning of the day after the contract was made Isham called at appellee's office, and while there appellee told him that he had the abstract ready to deliver to him at that time; that Isham stated to him, in answer to appellee's offer of the abstract, "If the abstract is good enough for you it is good enough for me;" that appellee then made a memorandum on a piece of paper, with the knowledge of Isham, and pinned it to the contract, reciting, in substance, that the examination of the abstract had been waived. This occurred on a Sunday. The note for $1,000 which Isham had given to appellee as part payment became due on November 16, 1920, and on that date Isham sent to appellee a check for $1,005 in payment of the note. The farm had previously been rented, at the request of Isham, in his name, and the tenants had delivered their notes to him for $1,399 in payment of the rent for one year. These latter two facts are strong corroboration of appellee's claim that Isham, at the time aforesaid, waived the presentation to him of the abstract for examination, in connection with the fact of the written memorandum being pinned to the contract. In December, 1920, Isham became ill and was confined in the hospital at Morris, Ill., for several months. A few days prior to March 1, 1921 (the day the deed and abstract brought down to date were to be delivered), appellee went to Morris, to the hospital where Isham was confined, but was informed that Isham was too ill to transact any business,

and the deed for that reason was not delivered according to the terms of the contract. Appellee testified that he had the deed prepared, signed, and witnessed, the taxes paid, and was ready to deliver the deed and abstract, brought down to date, on that day but was prevented from doing so because of the illness of Isham. Nothing further was done except the passing of several letters between the parties until June 6, 1921, when appellee went to Mazon to tell Isham he was ready to complete the deal. Isham refused to accept the deed and to carry out the contract, stating as his ground therefor that no abstract had been tendered, and when his attention was called to the fact that he had stated, in substance, that he did not desire to examine the abstract, he replied that any talk or agreement on his part not in writing could not affect the written contract. About December 1, 1920, land values in the vicinity in which the farm was located began to decrease. Isham about that time began a course of correspondence with appellee which shows that at first Isham was urging appellee to sell his farm immediately at a profit, as he did not care to keep it, and that appellee had promised that he would try to sell it for him. His later letters to appellee were to the effect that he desired to get out of the contract and wanted appellee to take the farm off his hands and return the money he had paid, and that he, in turn, would surrender the rent notes to appellee.

[1, 2] The first question that arises in this case is whether or not there was a waiver by Isham of the tender and examination of the abstract on the day mentioned in the contract for the delivery of the abstract. It is a well-settled principle of law that where parties to a written contract mutually consent and acquiesce in the oral modifications and in the nonperformance of certain provisions thereof, and later comply with the other terms of the contract, each party is estopped to deny the efficacy of the modifying agreement and cannot set up such noncompliance of provisions thus waived in order to defeat specific performance, provided the proof is strong that such waiver or modifications have been assented to. Ames v. Witbeck, 179 Ill. 458, 53 N. E. 969; Kissack v. Bourke, 224 Ill. 352, 79 N. E. 619; Zempel v. Hughes, 235 Ill. 424, 85 N. E. 641. The proof is clearly against appellant on this question of waiver in this case, and it leaves no doubt in the minds of the court that Isham made the statement to appellee aforesaid, and thereby, and by his subsequent acts, waived the requirement that appellee furnish the abstract for examination according to the terms of the written contract.

[3] On the trial below the attorney for Isham, when asked by the trial court if he found any fault with the title of appellee to the land in question, answered that he only found fault with the form of the abstract and not with the title. The objections to the abstract were, in substance, that the captions to the extensions found in the abstract did not properly describe the land, and also that the abstract was merely an index to the title rather than an abstract of title. The attorney for Isham stated positively to the court that he thought the abstract showed title in appellee, or that he was the owner of the land. On this appeal it is now sought by appellant to contend that the abstract does not show title. There are also several other contentions argued by appellant as grounds for reversing this decree, which were not made in the court below, and therefore cannot be made here because waived. Vincent v. McElvain, 304 Ill. 160, 136 N. E. 502.

[4] Appellant also raises the question that the lower court erred in overruling Isham's motion to file an amendment to his answer setting up the statute of Wisconsin, which declares transactions made on Sunday void. She also argues that the court erred in not continuing the case for the purpose of taking depositions on Isham's motion. Both of these motions came at the close of the evidence in the case, and after the attorney for Isham had been given a short time to secure the presence of the witnesses whose depositions he afterwards decided to take, and upon an agreement that the evidence of the two witnesses should be the only evidence for which the case would be delayed. Isham was disappointed in not getting the witnesses in court, but under the agreement aforesaid the court was warranted in denying both motions, for the reason that there was not due diligence used in making the additional defense and in procuring beforehand the depositions of the witnesses who were out of the state.

[5] The defense of fraud and conspiracy set up in the answer of Isham and also in his cross-bill is not sustained, as there is no evidence in the record to support it. The evidence is clear and strong that the contract was fairly entered into by both parties, and that Isham used his own judgment throughout the entire deal, and that the real reason for failing to comply with the contract was the fact that the value of the land had decreased since the contract was made. There does not appear to be any merit to any defense made by Isham below or by appellant in this court, and, if there was any, it was waived by the failure to make the defense below. The evidence clearly shows that appellee had done everything that he was required to do to perform his part of the contract that was not waived as aforesaid, and that he was entitled to specific performance of the contract under the law of Illinois and also under the law of Wisconsin, as the

law of both states is the same on the question of waiver of the contractual rights in this character of cases.

The decree of the circuit court is affirmed.

Decree affirmed.

(311 Ill. 228)

PEOPLE ex rel. PORTER et al. v. MINNIE CREEK DRAINAGE DIST. OF KANKAKEE COUNTY. (No. 15474.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Judgment ⟸570(10)—Supreme Court decision, holding petition against drainage commissioners insufficient, did not bar another petition.

A Supreme Court decision, holding an information by landowners of annexed territory against commissioners of a drainage district for usurping control over their land insufficient, for misjoinder of parties defendant, and affirming judgment of not guilty, did not bar another such proceeding.

2. Judgment ⟸584—Conclusive between parties and bar to further proceedings on same cause.

Where the subject-matter of a cause of action has been once determined by final judgment or decree of a court, having jurisdiction of parties and subject-matter, the adjudication will be conclusive between the parties, and a bar to any other proceeding on the same cause of action.

3. Judgment ⟸570(10)—Of dismissal because of misjoinder of defendant not a bar to subsequent suit.

A judgment of dismissal because the suit was brought against one not a proper party is not a bar to a subsequent suit for the same cause of action.

4. Drains ⟸15—Commissioners of drainage district not authorized to annex new territory on own procedure.

The Levee Act, § 58a, allowing drainage commissioners to enlarge the boundaries of their districts by attaching new areas of land involved in the same drainage system on petition, etc., but making no provision for notice or procedure, should be read as part of supplementary to section 58, giving jurisdiction to the county court or justice of peace, and providing the annexation procedure, and annexation by the commissioners on such petition was unauthorized and illegal.

Appeal from Circuit Court, Kankakee County; Arthur W. De Selm, Judge.

Information by the People, on the relation of Thomas A. Porter and others, against the Minnie Creek Drainage District of Kankakee County. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. R. Hunter, of Kankakee, for appellant.

Anker C. Jensen, State's Atty., John H. Beckers and E. A. Marcotte, all of Kankakee, and A. F. Goodyear, of Watseka, for appellees.

CARTWRIGHT, J. The state's attorney of Kankakee county, by leave of court, filed in the circuit court of Kankakee county an information in the name of the people of the state of Illinois, on the relation of Thomas A. Porter and other landowners, containing six counts, charging the Minnie Creek drainage district, organized under the Levee Act, with usurping jurisdiction over the lands of the relators under a claim that the lands had been annexed to the district by a proceeding which was alleged to have been unauthorized by law and conducted under a section of the Levee Act which was unconstitutional and void. The defendant demurred to the second, third, and sixth counts, and filed pleas to the first, fourth, and fifth. The demurrer to the second, third, and sixth counts was sustained. The first plea to the first, fourth, and fifth counts was a plea of justification, setting out proceedings had for the annexation of the lands to the district. The second plea alleged a former proceeding by information, in which the commissioners of the district were adjudged not guilty of the charges contained in the information relating to the same proceeding for annexation, which judgment was affirmed by this court, and alleged that such judgment was a final and conclusive adjudication of the matters involved in this proceeding, and operated as a bar against litigating the same questions against the district. The people demurred to these pleas, and the demurrer was sustained. The defendant electing to stand by its pleas, judgment of ouster was entered, from which this appeal was prosecuted.

[1] The first question to be considered is whether the court erred in sustaining the demurrer to the second plea, which set forth the former judgment, and alleged that it was a final and conclusive determination of the questions involved, since that plea, if good, would be a bar to this suit.

[2] Where the subject-matter of a cause of action has been once determined by the final judgment or decree of a court having jurisdiction of the parties and the subject-matter, the judgment or decree will be conclusive between the parties, and will be a bar to any other proceeding on the same cause of action. Stickney v. Goudy, 132 Ill. 213, 23 N. E. 1034. The proceeding set forth in the plea was an information by the state's attorney, on the relation of landowners in the territory claimed to have been annexed to the district, charging that H. F. Nordmeyer, Samuel Devere, and Adolph Maulbetsch unlawfully held and executed, without any right or lawful authority, the office and franchise of commissioners of the Minnie Creek drainage district, and as such commissioners

assumed jurisdiction and control over the several tracts of land therein described. These individuals were made defendants and filed a plea setting out proceedings by which they alleged the lands of the relators were annexed to the district and justified their assuming jurisdiction over the lands by virtue of such annexation proceedings. The people demurred to the plea, and the demurrer being overruled the people elected to stand by it, and the court found the relators not guilty and entered judgment accordingly. An appeal was prosecuted to this court, and the sustaining of the demurrer was assigned for error. No objection was made by any of the parties that the individuals were not proper parties defendant to the proceeding, but this court stated the settled rules of law that the district was the only proper party defendant, and that a demurrer to a pleading would be carried back to the first error in pleading. It was therefore held that the information was insufficient, and the court did not err in finding the defendants not guilty and entering the judgment. People v. Nordmeyer, 305 Ill. 289, 137 N. E. 87.

[3] Where a suit is dismissed because brought against one who is not a proper party, the judgment of dismissal is not a bar to a subsequent suit for the same cause of action. The case of Cochran v. McDowell, 15 Ill. 10, was of that character. A guardian ad litem filed a plea in bar of a suit in equity, alleging a former suit for the same cause by the same complainant, which was dismissed because the administratrix had not been made a party. To this plea a demurrer was filed, and this court said the proper practice would have been to set the plea for hearing instead of demurring to it, but, regarding the demurrer as equivalent to setting the plea for hearing, held there was no adjudication upon the merits of the controversy or matter in litigation because the bill was dismissed for want of proper parties. In Farwell v. Great Western Telegraph Co., 161 Ill. 522, 44 N. E. 891, it was held that a judgment upon demurrer by reason of defective pleading does not bar a subsequent suit founded upon the same cause of action well pleaded. In Farmers' & Mechanics' Life Ass'n v. Caine, 224 Ill. 599, 79 N. E. 956, it was held that a judgment for the defendant, upon sustaining a general demurrer to a bill in equity, is not a bar to a subsequent suit at law, where the ground for sustaining the demurrer is that the complainant has mistaken his remedy. Whatever the accepted rules of pleading may have been as applicable to the case when the former proceeding was before this court, and whether the defect of want of a proper party was one to have been alleged by demurrer, plea, or some other method, the substance of things will be considered, and the judgment of this court being that the information was not properly filed against individuals instead of the district, the judgment amounted to a dismissal of the proceeding because not against the proper party, which necessarily would not be bound by the proceeding. The former adjudication by this court was not a bar to this suit, and the court did not err in sustaining the demurrer to the plea.

[4] The facts alleged in the plea of justification by which the district claimed authority over the lands alleged to have been annexed are as follows: A petition of landowners was presented to the commissioners, alleging that certain lands were involved in the same system of drainage and required for outlets the drains of the district. At a meeting of the commissioners a resolution was adopted that the boundaries of the enlarged district should be as therein stated, and that a hearing upon the petition would be held at William Miller's residence at a time stated. The commissioners met at that residence at the time fixed and found that notice of the filing of the petition, with a copy of the resolution, had been published in a newspaper, and that notices had been posted at various places. The commissioners took the petition under advisement, so as to better examine the lands and consider the evidence, and adjourned to meet on December 2, 1920, at the office of their attorney, in Kankakee. At that meeting an order was entered reciting an examination of the lands by the commissioners, a consideration of the evidence, a finding that the commissioners had jurisdiction of the subject-matter, that notices had been given, and that the lands were involved in the same system of drainage and required for outlets the drains of the district made or proposed to be made. It was therefore ordered that the prayer of the petition should be granted and the district enlarged to include the lands described in the order.

The proceeding was had under section 58a of the Levee Act (Smith-Hurd Rev. St. 1923, c. 42, § 57). Section 58 (section 50) provided that where any land lying outside of the drainage district as organized, the owner or owners of which should thereafter make connection with the main ditch or drain or with any ditch or drain within the district, and whose lands would be benefited by the work of such district, should be deemed to have made voluntary application to be included in the district, and provided for a proceeding for annexation of such lands, giving jurisdiction to the county court or a justice of the peace and providing for the procedure necessary for the annexation. Section 58a was inserted in the act and contained provisions respecting the right of owners of land outside a drainage district to make connection with the ditches of the district, with a repetition of the provision of section 58 that if individual landowners outside the

district should so connect they should be deemed to have voluntarily applied to be included in the district. Then follows this provision:

"Drainage commissioners may at any time enlarge the boundaries of their districts by attaching new areas of land which are involved in the same system of drainage and require for outlets the drains of the district made or proposed to be made, as the case may be, on petition of as great a proportion of the landowners of the area to be added as is required for an original district."

Section 58a made no provision for notice or any procedure for annexation, but was evidently intended as an addendum to section 58. The manifest intention of the Legislature by adding section 58a was to extend the provisions of section 58 to cases where lands are involved in the same system of drainage and require the outlets of the district for drainage. As section 58a made no provision for notice, procedure, or method of obtaining or exercising jurisdiction, it should be read with and as a part of or supplement to section 58, which did contain all such provisions. It did not give jurisdiction to the commissioners to proceed, as they did, to annex the lands of the relators, and the court did not err in sustaining the demurrer to the first plea, which purported to justify the exercise of jurisdiction by the district over lands not lawfully annexed.

The judgment is affirmed.

Judgment affirmed.

(311 Ill. 26)

PEOPLE ex rel. HEATHERLY, County Collector, v. CLEVELAND, C. C. & ST. L. RY. CO. (No. 15817.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Counties ⇐190(2)—Tax rate extended higher than authorized by law, and taxpayer entitled to object.

Where valuation of taxable property in county valued for taxation by the State Tax Commission was $9,680,688, and the total valuation of the taxable property in the county as fixed by the county board of review was $9,991,850, and the county clerk, in ascertaining the maximum amount of taxes which could be raised by extending a rate of 50 cents on the $100, ascertained the amount which a rate of 50 cents on the $100 of the state valuation would produce and found the amount the county could lawfully raise was $48,403.44 and then extended a tax rate of 50 cents on the $100 against the state valuation, although a tax rate of .4844 extended against county valuation would have produced such maximum, the rate extended was higher than that authorized by law, the clerk having determined the amount of taxes which could lawfully be levied as required by Cahill's St. c. 120, par. 361, and a taxpayer may object thereto as against the contention that it was not required to pay any more than its just proportion of the tax, the state and county valuation of its property being the same.

2. Highways ⇐125—Consent of individual members of board of town auditors to levy additional rate held insufficient.

Where written consents were obtained from the individual members of the board of town auditors to levy tax in excess of 50 cents on each $100 valuation prior to the first Tuesday in September, at their respective places of business, there was not a compliance with the statute which would authorize levy of the additional rate.

3. Highways ⇐125—Lack of authority to levy additional rate not supplied by curative act.

Where the highway commissioner had no authority to levy a rate in excess of 50 cents on the $100 without the consent of the board of town auditors, the lack of such authority was not supplied by Act May 21, 1922; such consent being a condition precedent to any exercise of the power to levy an additional rate.

Appeal from Saline County Court; the Hon. A. G. Abney, Judge, presiding.

Proceeding by the people, on the relation of Ezra Heatherly, County Collector, to collect a tax. From a judgment overruling its objections to certain tax levies, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company appeals. Reversed.

P. J. Kolb, of Mt. Carmel, and W. W. Wheatley, of Harrisburg (L. J. Hackney and H. N. Quigley, both of Cincinnati, Ohio, of counsel), for appellant.

Edward J. Brundage, Atty. Gen., Charles H. Thompson, State's Atty., and Jacob W. Myers, both of Harrisburg, for appellee.

FARMER, C. J. This appeal brings here for review a judgment of the county court of Saline county overruling objections of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to parts of certain tax levies. The objections involved are to a part of the county tax and part of the road and bridge tax of the town of Carrier Mills. Appellant paid all the taxes assessed against its property except the portion to which it objected, aggregating in all, including penalties, interest and costs, $395.32. The court overruled appellant's objections, rendered judgment against its property for the tax objected to, and this appeal is prosecuted from that judgment.

[1] The county board made a levy of $70,000 for county purposes. The valuation of the taxable property in the county, including appellant's property, valued for taxation by the State Tax Commission, was $9,680,688, and the total valuation of the taxable property in the county as fixed by the county board of review was $9,991,850. The county clerk, in ascertaining the maximum amount of taxes which could be raised by extending

a rate of 50 cents on the $100, ascertained the amount which a rate of 50 cents on the $100 of the state valuation would produce and found the amount the county could lawfully raise was $48,403.44. Then he extended a tax rate of 50 cents on the $100 against the state valuation, which was a little over $300,000 less than the county valuation. The complaint of appellant is that having determined the maximum amount of taxes which could be lawfully levied in the manner required by statute (Cahill's Stat. c. 120, par. 361), the county clerk extended the maximum rate against the state valuation instead of ascertaining what rate extended against the county valuation would produce the same amount of taxes authorized to be collected. A tax rate of $.4844 extended against the county valuation would produce that amount, and appellant contends the rate extended wos $.0156 higher than was authorized by law. This contention of appellant was sustained in People v. Illinois Central Railroad Co., 310 Ill. 212, 141 N. E. 822.

It is not disputed that the county clerk extended a rate against the state valuation which was $.0156 on the $100 more than was required to produce the amount of tax it was lawful to levy, but appellee contends that by the rate extended appellant is not required to pay any more than its just proportion of the tax, as the valuation of its property by the board of review and by the Tax Commission was the same. This proposition has been decided contrary to appellee's contention. Chicago, Burlington & Quincy Railroad Co. v. People, 213 Ill. 458, 72 N. E. 1105; Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. People, 223 Ill. 17, 79 N. E. 17.

[2] The road and bridge tax in the town of Carrier Mills was extended against appellant's property at the rate of 66 cents on the $100 valuation, and appellant contends the consent of the board of town auditors, in writing, was not obtained by the commissioners of highways, in the manner required by law, to levy the maximum rate. The statute requires the consent, in writing, of the board of town auditors to levy an additional rate above 50 cents on the $100 be given at a meeting to be held the first Tuesday in September. The first Tuesday in September, 1922, was September 5th, but no written consent of the town auditors was given that day. The consent for the additional levy was given September 4th, but no meeting of the auditors was held that day. The commissioner of highways took the consent for the additional levy to the individual members of the board of town auditors at their respective places of business and they signed it. Such a consent was not a compliance with the statute and did not authorize the levy of the additional rate of 16 cents on the $100. People v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co., 307 Ill. 162, 138 N. E. 663.

[3] It is insisted by appellee the tax was validated by the act of May 31, 1922. We held to the contrary in People v. Illinois Central Railroad Co., supra.

The court erred in overruling the objections, and the judgment is reversed.

Judgment reversed.

(311 Ill. 149)

POVLICH v. GLODICH. (No. 15529.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Pleading ⇐129(1)—Defendant defaulted for want of plea admits facts well pleaded in declaration.

A defendant defaulted for want of a plea admits the facts well pleaded in the declaration.

2. Damages ⇐194, 196, 197, 199—Assessment of damages mere inquest of office; court may assess; writ of inquiry unnecessary; assessment need not be in term time.

At common law, an assessment of damages was a mere inquest of office, and the court might assess them with plaintiff's assent or direct the sheriff or other proper person to do so; it being unnecessary that a writ of inquiry of damages be executed in court unless so directed, nor in term time, but anywhere within the sheriff's bailiwick.

3. Damages ⇐199—Jury 16(1)—Court may assess damages without jury in action sounding in damages merely; "trial."

Under Practice Act, § 59, the court, in an action sounding in damages merely, where the law furnishes no legal rule for assessment, may hear the evidence and assess the damages without a jury; such assessment not being a trial within Const. art. 2, § 5, guaranteeing the right of trial by jury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trial.]

4. Damages ⇐203—Defendant defaulted cannot make defense nor introduce testimony on assessment of damages.

On assessment of damages by the court, in an action sounding in damages merely, a defendant who has suffered a default may appear and cross-examine witnesses, but can make no defense to the action nor introduce testimony.

5. Appeal and error ⇐1062(1)—Submission of case to jury after default held harmless error.

Where defendant, in an action for false imprisonment, suffered a default for want of a plea, he was not injured by submission of the question of his guilt to the jury or by the latter's verdict of guilty, being interested only in the assessment of damages, which was all that remained to be done.

6. Jury ⇐32(2)—Damages after default cannot be assessed by jury of less than twelve.

In actions governed by the common law, such as actions for false imprisonment, assessment of damages after default by a jury of

less than 12 men without the parties' consent cannot be considered as a verdict.

7. False imprisonment ⇐20(1) — Declaration held sufficient.

The declaration, in an action for false imprisonment, *held* sufficient as against a general demurrer.

Error to Circuit Court, Franklin County; Julius C. Kern, Judge.

Action by Joe Povlich against Sam Glodich. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

S. M. Ward, of Benton, for plaintiff in error.

Alexander Flannigen, of East St. Louis, for defendant in error.

CARTWRIGHT, J. Joe Povlich, defendant in error, recovered a judgment for $300 and costs in the circuit court of Franklin county against Sam Glodich, plaintiff in error, who sued out a writ of error from this court, assigning for error, among other things, that he was deprived of his right of trial by jury guaranteed by the Constitution.

Joe Povlich filed his declaration in the circuit court of Franklin county to the February term, 1921, against Sam Glodich and W. H. Buchanan, in what was called an action of trespass on the case. It is alleged that—

The defendants on December 22, 1920, "at Zeigler, in Franklin county, Ill., willfully and maliciously, and neither of the said defendants being at that time an officer of the law, proceeded and went to the home of the plaintiff and at a late hour of the night, and at a time when the plaintiff was in his bed and asleep, and defendants with drawn revolvers arrested the plaintiff and forced him to go with the defendants along the streets of Zeigler, in said county and state, and caused the plaintiff to be confined in the jail in Zeigler, in said county and state, for a long period of time, to wit, for the period of ten hours; and plaintiff further avers that the weather at that time was cold and there was no heat or fire in the said jail during the time of his confinement therein, and by reason thereof the plaintiff became sick and disordered and so continued from thence hitherto."

The defendants filed their general demurrer, and at the September term, 1921, withdrew the demurrer as to the defendant Glodich, and the plaintiff dismissed the suit as to the defendant Buchanan. Glodich was ruled to plead instanter and was defaulted for want of a plea. A year afterwards, at the September term, 1922, the record recites as follows:

"This cause having been set for trial, comes the plaintiff herein, announces ready for trial, and the defendant not appearing and no one for him, it is ordered that a jury be called, impaneled, and sworn to try this cause, and the plaintiff herein agrees to try this cause with eight jurors; and after hearing evidence adduced herein on the part of the plaintiff, and the argument of counsel and the instructions of the court, the jury retires in charge of a sworn officer of this court to consider of their verdict."

The jury returned the following verdict:

"We, the jury, find the defendant guilty and we assess the plaintiff's damages three hundred ($300) dollars."

And judgment was entered on the verdict in favor of plaintiff and against defendant for $300 and costs of suit.

[1-4] Section 5 of article 2 of the Constitution contains the provision that "the right of trial by jury as heretofore enjoyed, shall remain inviolate," which is the right as it existed at common law. George v. People, 167 Ill. 447, 47 N. E. 741. The argument that the right preserved by the Constitution to the defendant was violated is on the ground that the court submitted the issue in the cause to eight men, who did not constitute a jury, and that this was done without his consent. Although the court by its order directed a trial of the issue by a jury and the verdict found the defendant guilty, which was a finding upon a supposed issue of fact, there was no issue for the jury to try. The defendant had been defaulted for want of a plea, and he thereby admitted the facts well pleaded in the declaration. Nothing remained to be done except for the court to ascertain the amount of damages for the purpose of entering judgment. At common law an assessment of damages was a mere inquest of office, and the court might itself assess the damages with the assent of the plaintiff or direct them to be assessed by the sheriff or other proper person. It was not necessary that a writ of inquiry of damages should be executed in court unless so directed, nor in term time, but anywhere within the sheriff's bailiwick. Vanlandingham v. Fellows, 1 Scam. 233. Under section 59 of our Practice Act (Smith-Hurd Rev. St. 1923, c. 110) it is lawful for the court to hear the evidence and assess the damages without a jury. If the action is upon a bond or instrument of writing for the payment of money, only, and the damages rest in computation, the court may direct the clerk to assess and report the damages, but either party may have the damages assessed by a jury. In actions sounding in damages, merely, where the law furnishes no legal rule for the assessment, the court may either hear the evidence and assess the damages or submit the assessment to a jury. In any case, the assessment of damages is not a trial and does not come within the provision of the Constitution. Kassing v. Griffith, 86 Ill. 265; Phœnix Ins. Co. v. Hedrick, 178 Ill. 212, 52 N. E. 1034. Upon such assessment a defend-

ant who has suffered a default has a right to appear and cross-examine witnesses, but he can make no defense to the action or introduce testimony. Morton v. Bailey, 1 Scam. 213, 27 Am. Dec. 767. There was no violation of the constitutional right to a jury trial.

[5] The court made an order submitting the issue to a jury when there was no issue and took a verdict finding the defendant guilty, but the defendant being in default and having no right to make any defense to the cause of action, which he had confessed, was not injured by the submission to the jury or the verdict of guilty, which did him no harm. The only matter he had any interest in was the assessment of damages.

[6] The statute authorized the assessment of damages by a jury, which means 12 men. In all actions governed by the common law a less or greater number is not a jury unless by the consent of the parties. Without such consent the finding of any other number cannot be considered as a verdict of a jury. To hold that the eight persons who assessed the damages and returned the verdict constituted a jury would be equivalent to holding that the court could submit the assessment to one person or any number, and there was no lawful assessment of damages.

[7] It is argued that the declaration did not state a cause of action, but it was sufficient as against a general demurrer.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

(311 Ill. 87)

PEOPLE ex rel. PEPOON v. FARRAN et al. (No. 15801.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Schools and school districts ⟸22—Constitutional requirement as to thorough and efficient system of schools construed as prohibiting creation of districts not permitting children to attend in reasonable time and with reasonable comfort.

The provision of the Constitution requiring the Legislature to provide a thorough and efficient system of free schools, whereby all the children of the state may receive a good common school education, is a mandate and also a limitation on the exercise of the legislative power, and it is not a lawful exercise of the power to create a district which on account of its size or other conditions will not permit the children to attend school by traveling from their homes to the school in a reasonable length of time with a reasonable degree of comfort.

2. Schools and school districts ⟸42(2)—Community high school district held compact and contiguous.

A community high school district containing an area equal to 27 sections and practically square, except that in one corner it embraces a block of land containing 3½ sections extending two miles further east than the part of the district south of it, *held* not open to the objection that it is not compact and contiguous and in violation of the constitutional limitation on the power to create school districts.

3. Schools and school districts ⟸42(2)—High school district held not invalid as embracing several community centers.

Warren community high school district No. 122, in Jo Daviess county, *held* not subject to the objection that it embraces parts of other community centers of a character which would afford justification for the court to declare the district invalid.

Appeal from Circuit Court, Jo Daviess County; Oscar E. Heard, Judge.

Information in quo warranto by the People, on the relation of Louis Pepoon, against Robert Farran and others. Judgment quashing the writ, and relator appeals. Affirmed.

Harry C. Tear, State's Atty., of Warren (Paul Kerz, of Galena, of counsel), for appellant.

Frank T. Sheean, of Galena, for appellees.

FARMER, C. J. The circuit court of Jo Daviess county granted leave to the people, on the relation of Louis Pepoon, to file an information in quo warranto against Warren community high school district No. 122 in Jo Daviess county and the board of education of said district. The petition alleged the elections to organize the district and to elect a board of education were illegal. The petition also alleged the district was not compact and contiguous, was abnormal in size, and embraced territory belonging to other community centers. The case was heard on a stipulation of facts and affidavits, but at the hearing relator offered nothing to support his claim that the elections were illegal and relied on the claim that the district was not compact and contiguous and embraced territory belonging to other community centers. The circuit court quashed the writ and dismissed the information at relator's cost, and he has prosecuted this appeal from that judgment.

Principal reliance is placed by appellant on the contention that the district is not compact and contiguous and is therefore not a legal and valid high school district. The district contains an area equal to 27 sections and is practically square, except that in the northeast corner it embraces a block of land containing 3½ sections extending two miles further east than the part of the district south of it, and that territory is about 1¾ miles wide north and south. The distance from the north line to the south line of the district is about 5¼ miles, and from the west line to the east line except

at the northeast corner, is about 4½ miles. The high school is now being carried on in a school building rented by the board of education in the village of Warren, which has a population of 1,253 and is within a half mile of the north line of the district, which is the boundary line between Illinois and Wisconsin. The district includes parts of four townships—Warren, Nora, Apple River, and Rush—but the greater part of it is in Warren township. Apple River, a village with a population of 484, is approximately 5 miles substantially due west of the village of Warren and about 2 miles west of the west line of the district. Nora, a village in Nora township having a population of 213, is a half mile east of the district, a little south of opposite the center of the district north and south. Apple River has a three-year course high school and an attendance of 35. Nora has a two-year high school with an attendance of 8. In the southwesterly part of the district, which is the territory farthest from Warren, there are some small water courses or creeks and the surface is hilly. There are bridges on public highways crossing the streams, but in times of high water and muddy roads passage by vehicle to Warren is for several days hindered and made difficult. The farthest any one has to travel to get to Warren is approximately 7 miles. Practically all the people living in the remotest territory in the district sent their children to high school in Warren before the district was organized. There are some roads in that part of the district which have no bridges over the streams, and people cannot get to Warren by those roads when the waters are high.

The above is a very brief statement of what we regard as the most important facts relied on by appellant to establish his contention that the district is not compact. Some of the affidavits presented by appellant go into much greater detail in describing the situation when the roads are in bad condition, the purpose being to show the distance pupils would have to travel and that the condition of the roads for several days at a time was so bad that they were prevented from enjoying the benefits of the school. In almost every school district of any size, where the schoolhouse is reached over country roads, there are times when travel over them is difficult or impossible for short periods. The district here involved is not so large that the distance any of the children would be required to travel to go to school is so great as to amount to a denial to children of the privilege of the school. In People v. Swift, 270 Ill. 532, 110 N. E. 904, a district of nearly 67 sections, at its greatest length being 10 miles long by 9½ miles wide, was held valid. In People v. Herrin, 284 Ill. 368, 120 N. E. 274, a district embracing 50 sections and having a maximum length of 9 miles and width of 7 miles, with irregular boundaries, was regarded as compact and contiguous. In People v. Patterson, 305 Ill. 541, 137 N. E. 514, a district 9½ miles long by 8½ miles wide, where the school was approximately in the center, was sustained. In People v. Drennan, 307 Ill. 482, 139 N. E. 128, a district 7½ miles long by 6½ miles wide was held to be compact. In People v. Cowen, 306 Ill. 330, 137 N. E. 836, a district 7¾ miles long by 5¾ miles wide, where the schoolhouse was within a mile of the center of the district, was held to meet the requirements of compactness. In some or all of those cases it appeared from the remote parts of the district the children were required to travel several miles over dirt roads which crossed water courses, and that at times, on account of the condition of the roads and highwaters, they were rendered difficult or impossible for travel by vehicles of any kind.

[1, 2] We have held the provision of the Constitution requiring the Legislature to provide a thorough and efficient system of free schools, whereby all the children of the state may receive a good common school education, is a mandate and also a limitation on the exercise of the legislative power. The Legislature has no power to provide a system which shall deny a part of the children the opportunity of obtaining a good common school education. People v. Young, 309 Ill. 27, 139 N. E. 894. It is not a lawful exercise of the constitutional power to create a district which on account of its size or other conditions will not permit the children to attend school by traveling from their homes to the school in a reasonable length of time and with a reasonable degree of comfort. People v. Young, 301 Ill. 67, 133 N. E. 693. It is impossible that in a district of any size the schoolhouse can be reached by all the children within the same length of time and with the same degree of comfort. This subject was discussed in People v. Graham, 301 Ill. 446, 134 N. E. 57. No district could be organized which would afford the same convenience to all the children to attend the school. Necessarily some must travel greater distances and some must travel over worse roads than others. No doubt a small number of the children in the district here under consideration will encounter some difficulties, and possibly interruptions, in attending the school; but neither the size of the district, the remoteness of any of the children from it, nor their facilities for traveling to the schoolhouse, are of such a character as would justify holding that it is not compact and violates the constitutional limitation on the power to create school districts.

[3] Neither do we think the appellant's contention that the school district does not embrace one community center, but embraces

parts of other community centers, was shown to be of a character which would afford any justification for a court to declare the district invalid.

The judgment is affirmed.

Judgment affirmed.

(311 Ill. 170)

ALLEN v. McGILL et al. (No. 15501.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Appeal and error ⇐1078(1)—Assignment of errors, not argued, not considered.

Where no argument is addressed to assignment of error, it will not be considered.

2. Deeds ⇐72(3)—Fiduciary relation does not render void, unless advantage taken.

The existence of a fiduciary relation does not render a conveyance void, unless by reason of the relation undue advantage is taken of grantor.

3. Deeds ⇐196(3)—Burden on grantee to show fairness of transaction, where "fiduciary relation" exists.

Where a fiduciary relation exists between grantor and grantee in a deed, the burden of proof is on beneficiary of instrument executed during such relationship to show fairness of the transaction, and that it did not proceed from undue influence; a "fiduciary relation" existing where confidence is reposed on the one side, with resulting superiority and influence on the other.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fiduciary Relation.]

4. Deeds ⇐72(3)—If deed voluntary, existence of fiduciary relation does not render it void.

Where a deed is the voluntary act of grantor, with full knowledge of its nature and effect, and in accordance with his express desire and purpose, existence of a fiduciary relation between him and grantee does not render it void.

5. Deeds ⇐196(3), 211(1)—Capacity of grantor held proved; presumption of undue influence held rebutted.

Where at time of deed grantor was 84 years of age, and grantees at his invitation were living at his home to take care of him, evidence *held* to establish his mental capacity to make deed to them, and that presumption of undue influence, if fiduciary relation existed was overcome by evidence which established that the deed was in accord with grantor's voluntary intention, formed prior to time when grantees came to live with him.

6. Witnesses ⇐135—In suit between heirs to set aside deed by ancestor to one of them, complainants may testify generally.

Where one executes and delivers a deed to one of his children, and after his death other children as his heirs sue to set it aside, children not grantees, though heirs, may testify generally in such proceeding, because the grantee in the deed, though an heir, is a defendant as grantee.

7. Witnesses ⇐150(3)—In suit by heirs to vacate deed by ancestor to another heir, latter cannot testify generally.

In suit by heirs to vacate deed by ancestor to another heir, the grantee is not competent to testify generally, for the reason that the complainants sue as heirs of the grantor.

8. Witnesses ⇐177—In suit by heirs to vacate deed by ancestor to another heir, testimony by latter held competent in rebuttal to conversation.

In an action, after the death of the grantor in a deed to one of his children, by other children as his heirs to set aside the deed, the grantee may testify in rebuttal of evidence concerning conversations testified to by complainants, and may deny that he had such conversations.

9. Appeal and error ⇐931(6)—Presumed that chancellor considered only competent evidence.

It will be assumed on appeal that the chancellor considered only competent evidence.

10. Appeal and error ⇐1054(3)—Decree not reversed for error in admission of evidence, if competent evidence sustains it.

Where hearing was before the chancellor without a jury, his decree will not be reversed because of error in admission of evidence, if competent evidence in the record sustains the decree.

Appeal from Circuit Court, Hamilton County; Charles H. Miller, Judge.

Partition by Julia A. Allen against Russel R. McGill and others. From a decree granting partition of part only of property claimed, plaintiff appeals. Affirmed.

Harry Anderson and J. H. Lane, both of McLeansboro, for appellant.

Hogan & Hogan and Conrad Schul, of Mt. Vernon, for appellees.

STONE, J. Appellant, Julia A. Allen, together with other heirs at law of Francis Marion Johnson, deceased, filed a bill in the circuit court of Hamilton county for partition of the south half of the southeast quarter of section 17 and the northwest quarter of the northeast quarter of section 20, in town 6 south, range 6 east, in that county. By their bill they alleged that Johnson died seized in fee of this land; that during his lifetime he executed and delivered a pretended warranty deed purporting to convey the southwest quarter of the southeast quarter of section 17 to appellees, Russel R. McGill and Ancie B. McGill, as joint tenants, for the expressed consideration of one dollar, love and affection, and other good and valuable considerations. It was alleged that at the time of the making of the deed he was past 84 years of age, was in his dotage, and mentally incapable

of understanding the nature of the transaction and of transacting ordinary business; that one of the grantees in the deed, Ancie B. McGill, is a daughter of the deceased, and was, with her husband, Russel R. McGill, living at the home of the grantor; that the latter was under the influence of the grantees in the deed, and that they exercised undue influence in procuring the making of the deed; that the deed was made by their fraudulent arts, persuasions, and deceits. The bill prayed that the deed be set aside and that partition be had of the entire premises mentioned in the bill. Appellees were made defendants thereto and answered, admitting the material averments of the bill except as to the capacity of the grantor to execute the deed in question and as to allegations of undue influence. Hearing was had in open court before the chancellor, who found the issues concerning the deed in question for the appellees; that at the time of the making of the deed in question Johnson was of sound mind, and that by that deed the 40 acres of land in question passed in fee simple to the appellees and was not subject to partition. A decree in accordance with this finding and granting partition of the balance of the property was entered, and Julia A. Allen, a daughter, prayed and perfected her appeal.

[1] Error is assigned on the finding of the chancellor that Francis Marion Johnson was mentally capable of making the deed in question, and that it was not procured by undue influence on the part of the appellees. It is also contended that the court erred in permitting the appellees to testify in their own behalf, and in rejecting certain competent evidence offered on behalf of complainants. As no argument is addressed to the latter part of this objection, it will not be considered.

Francis Marion Johnson, the deceased, had lived on the tract of land in question for many years and at the time of the making of the deed was 84 years of age. He had been failing in health for some time prior to his death; had been treated by the family physician for kidney and bladder trouble, which developed into Bright's disease, from which he died on September 20, 1922. The family physician testified that by reason of this disease it was necessary to give him special attention in the matter of ordinary functions of the body for a period of about a month prior to his death; that at intervals, as he grew weaker, he at times seemed more or less irrational; that the disease affected his memory in the latter days of his life to such an extent that at times his mind would seem to be a blank, while at other times his mind and memory were very good; that during the last three months of his life he was confined most of the time to the house, though not to his bed; that he had arteriosclerosis, or hardening of the arteries; that such disease frequently accompanies old age and is progressive in its nature, affecting the mind and the body to a greater or less degree as the time of death approaches; that by reason of the lessening of nourishment carried to the brain the mind becomes more inactive as the disease progresses; that, however, a patient may have hardening of the arteries and Bright's disease, and still be capable of transacting ordinary business.

The uncontroverted evidence shows that about a year before the death of the grantor the appellees were induced, after some persuasion, to leave the farm of 60 acres on which they were living, about 3 miles from the Johnson home, and to move into the homestead with the deceased and his wife, the latter of whom died about a month after this change was made. The evidence shows that they were solicited by the deceased and his wife to move in with them, and that other members of the family were so situated that they could not well do so. The record contains some evidence to the effect that there was a contract that appellees were to receive $5 a week for taking care of the two elderly people. The record does not show with whom such contract was made, or by whom the consideration was to be paid, nor does the record show whether it was paid. After the death of Mrs. Johnson the appellees remained at the homestead and cared for the grantor until the time of his death. The deed in question was executed on the 8th day of July, 1922, about two months prior to the death of the grantor. The scrivener of the deed was one Cantrell, a justice of the peace, who lived in the neighborhood. After the deed was made, it was signed by the deceased by his mark and witnessed by two residents of the neighborhood, named Hicks and Oglesby. In the preparation of the deed the word "widow" was used, instead of "widower," and the letter "u" was omitted from the word "south" in the description of the land. A day or two after the delivery of the deed it was taken back to Johnson by the scrivener who originally prepared the deed, and these corrections were made at his direction; the grantor saying that he hoped that he got it right this time.

As is usual in these cases, much testimony was offered upon both sides pertaining to the mental condition of the grantor. Complainants offered the testimony of 12 witnesses, most of whom testified concerning that matter. The appellees offered the testimony of 32 witnesses, most of whom likewise testified concerning the mental condition of the grantor. No good purpose will be accomplished by lengthening this opinion to an extent sufficient to review all this testimony. It appears, from a reading of it as abstracted, that Johnson was an old man, in feeble physical condition, at the time of the execution of the deed, who required care and attention because of that fact. It appears that at times

the appellee Russel R. McGill transacted such business matters for the deceased as he desired or directed that he do. Three checks for small amounts were introduced in evidence, indicating that they had been drawn by McGill on behalf of the grantor. There was also testimony of some conversations between the appellant and other complainants in the bill and the appellees relative to having a conservator appointed for him, but no steps were taken in that direction. The evidence also shows that some time prior to making the deed the grantor told witnesses that he expected to make a deed to the appellees of some land; that during the spring or summer of 1921, prior to the time when the appellees moved in with the deceased and his wife, appellee Ancie B. McGill drove back and forth each day to wait upon their wants, although she had at her own home five small children; that during this time, and before the appellees moved into the Johnson home, Johnson and his wife both told these witnesses, in substance, that they were going to make a deed to the appellees, and that they desired them to move in with them. The some witnesses testified that after the deed was made the grantor told them that the deed had been made.

It thus appears from the evidence that, prior to the time when it is alleged in the bill that a fiduciary relation became established between the appellees and the deceased, the latter had declared his intention to deed land to them. Witnesses for appellees also testify that the deceased stated that he expected to make the deed to the appellees, regardless of the fact that they might get their pay, evidently referring to the contract, testified to by some witnesses, of $5 per week for services. The evidence shows that at the time Cantrell made the deed he was called by Russel R. McGill; that upon the arrival at the home of Johnson he found him sitting in a chair in his room; that he went in and asked him what he wanted, and was told by the grantor that he desired him to make a deed conveying the 40 acres of land in question to "Ancie and Russ," meaning the appellees; that the description of the land, was secured from an abstract produced by Johnson; that the deed was read to him before his signature, and that he stated that that was what he wanted. The scrivener and the witnesses to the deed, Hicks and Oglesby, all testified that they considered Johnson mentally capable of transacting ordinary business at the time of the making of the deed, and that he understood the nature and character of the transaction. They also testified that the appellees were both in the house when the deed was made, but had nothing to do with the transaction, further than indicated.

We are of the opinion that the greater weight of evidence concerning Johnson's mental condition shows that he understood the nature and character of the business that he was transacting and the effect that the instrument would have upon his property, that he knew of the claims that his other heirs had upon him, and that he acted of his own volition and directed the preparation of the deed without any interference. The finding of the chancellor, who heard and saw the witnesses, that the grantor was of sound mind at the time of the execution of the deed, is in accordance with the weight of the evidence.

[2, 3] It is also urged by appellant that a fiduciary relation existed between Johnson and the appellees, and therefore the deed is prima facie void. The rule is that, even though a fiduciary relation exists, the deed is nevertheless valid if entered into with full knowledge of its nature and effect, and through the deliberate and voluntary desire of the grantor. Pillsbury v. Bruns, 301 Ill. 578, 134 N. E. 103; Valbert v. Valbert, 282 Ill. 415, 118 N. E. 738. The existence of a fiduciary relation does not render a conveyance void, unless by reason of the relation undue advantage is taken of the grantor. Lang v. Lang, 284 Ill. 148, 119 N. E. 963. Where a fiduciary relation exists, the burden of proof is on the beneficiary of the instrument executed during the existence of such relationship to show the fairness of the transaction and that it did not proceed from undue influence. Rutherford v. Schneider, 307 Ill. 28, 138 N. E. 181; Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56; Kern v. Beatty, 267 Ill. 127, 107 N. E. 794; Hensan v. Cooksey, 237 Ill. 620, 86 N. E. 1107, 127 Am. St. Rep. 345.

[4] A fiduciary relation is said to exist where confidence is reposed upon the one side and resulting superiority and influence on the other. In all cases where such influence has been acquired and abused, where confidence has been reposed and betrayed, a court of equity will set aside an instrument made through such undue influence, and the burden is upon one in whom such confidence has been reposed to show that any contract entered into by other parties is not against equity and good conscience. Herczeg v. Weiss, 304 Ill. 543, 136 N. E. 714; Dougherty v. Duckels, 303 Ill. 490, 135 N. E. 737; Campbell v. Freeman, 296 Ill. 536, 130 N. E. 319; Bordner v. Kelso, 293 Ill. 175, 127 N. E. 337. Where, however, the deed is a voluntary act of the grantor, with full knowledge of its nature and effect, and is in accordance with his expressed desire and purpose, the existence of a fiduciary relation between him and the grantee does not render the conveyance void. Winkelman v. Winkelman, 307 Ill. 249, 138 N. E. 637; Pillsbury v. Bruns, supra; Roche v. Roche, 286 Ill. 336, 121 N. E. 621.

In Rutherford v. Schneider, supra, this court held that mental incapacity to execute a deed is not to be inferred from old age or feeble health, and in Dalbey v. Hayes, 267 Ill. 521, 108 N. E. 657, it was held that the facts

that the grantor was old and in feeble health, and had hardening of the arteries and a poor memory, do not justify setting aside his deed, if the weight of the evidence sustains the finding of the chancellor that he was mentally competent to make it.

[5] We are of the opinion that by far the greater weight of the evidence in this case establishes that the grantor was mentally capable of making the deed in question; that the presumption of undue influence, if any fiduciary relationship existed, is overcome by the evidence, which establishes that the making of the deed was in accord with his voluntary intention, formed even prior to the time when appellees came to live with him.

[6-8] Appellant further contends that the court erred in permitting the appellees to testify in their own behalf, that they were not competent witnesses, and that without their testimony the presumption of undue influence was not overcome. The rule is that where the ancestor executes and delivers a deed to one of his children, and after the deed a remaining child or children seek to set it aside, the children not grantees, although heirs, may testify generally in such proceeding, for the reason that the grantee in the deed, although an heir of the ancestor, is a defendant as grantee. Shipley v. Shipley, 274 Ill. 506, 113 N. E. 906; Mann v. Mann, 270 Ill. 83, 110 N. E. 345; Grindle v. Grindle, 240 Ill. 143, 88 N. E. 473. In such a case the child who is grantee in the deed is not competent to testify generally, for the reason that the complainants sue as heirs of the deceased ancestor. Johnson v. Fulk, 282 Ill. 328, 118 N. E. 706. Such grantee, however, may testify in rebuttal of evidence concerning conversations given in evidence by the complainants and may deny that he had such conversation. Vail v. Rynearson, 249 Ill. 501, 94 N. E. 942. In this case appellee Ancie B. McGill testified, over objection as to her competency, to matters other than those coming within the exceptions to the rule, and in that respect her testimony was incompetent, and its admission was error. The testimony of appellee Russel R. McGill, however, appears in the main to have been in relation to conversations testified to by complainants.

[9, 10] Aside from the testimony of appellees, however, we are of the opinion that the record, by far the greater weight of the evidence, sustains the finding of the chancellor. It will be presumed, on appeal, that the chancellor considered only competent evidence. Waggoner v. Clark, 293 Ill. 256, 127 N. E. 436; Drum v. Drum, 251 Ill. 232, 95 N. E. 1071. The hearing was before the chancellor without a jury, and in such a case the decree will not be reversed because of error in the admission of evidence, if the competent evidence in the record sustains the decree. Shedd v. Seefeld, 230 Ill. 118, 82 N. E. 580, 13 L. R. A. (N. S.) 709, 120 Am. St. Rep. 269; Fabrice v. Von der Brelie, 190 Ill. 460, 60 N. E. 835.

The decree of the circuit court will be affirmed.

Decree affirmed.

(311 Ill. 113)

PEOPLE ex rel. ADAMS, County Collector, v. ILLINOIS CENT. R. CO. (No. 15693.)

(Supreme Court of Illinois. Feb. 19, 1924.)

Courts ⇐90(3)—Highways ⇐122—Municipal corporations ⇐76—Act attempting to validate taxes illegally levied unconstitutional; former decisions controlling.

Laws 1923, pp. 265, 566, attempting to validate taxes illegally levied, is unconstitutional because the Legislature has no power to impose taxes for corporate purposes, and former decisions declaring such unconstitutionality are controlling.

Appeal from St. Clair County Court; William P. Green, Judge.

Proceeding by the People, on the relation of Ross C. Adams, County Collector, against the Illinois Central Railroad Company. From judgment overruling objections, defendant appeals. Reversed and remanded, with directions.

John G. Drennan, of Chicago, and Kramer, Kramer & Campbell, of East St. Louis (H. F. Driemeyer, of East St. Louis, of counsel), for appellant.

Hilmar C. Lindauer, State's Atty., and A. B. Davis, both of Belleville, Martin M. Drury and R. V. Gustin, both of East St. Louis, and L. N. Nick Perrin, Jr., and Theodore Kircher, both of Belleville, for appellee.

STONE, J. The county treasurer and ex officio collector of taxes of St. Clair county made application to the county court of that county at its June, 1923, term, against the appellant, for judgment for delinquent taxes against the St. Louis, Alton & Terre Haute Division of appellant. To this application for judgment appellant filed objections to the county highway tax, the road and bridge taxes in eight townships of that county, the streets and bridges, public benefit and police pension fund taxes of the city of East St. Louis, and the streets and bridges and public benefit taxes of the city of Belleville. Appellant's objections were overruled and judgment entered against it.

The questions involved in this case have been passed upon in People v. Illinois Central Railroad Co., 310 Ill. 212, 141 N. E. 822, People v. Chicago & Eastern Illinois Railway Co., 310 Ill. 254, 257, 141 N. E. 824, and People v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co., 307 Ill. 162, 138 N. E. 663, where taxes of the same character as those objected to here were attempted to

be levied and the same objections were passed upon and the taxes involved held void.

Appellee in his brief and argument says:

"We concede that prior to the acts of 1923 the taxes in controversy in the case at bar were illegal under the decisions of this court."

The acts referred to as having been passed in 1923 are certain validating acts by which the Legislature attempted to validate taxes illegally levied. In People v. Illinois Central Railroad Co. supra, and People v. Chicago & Eastern Illinois Railway Co., supra, the validating acts on which appellee here relies (Laws 1923, pp. 265, 566) were held unconstitutional for the reason that the Legislature does not possess the power to impose taxes on the people of any district for corporate purposes. Those cases are controlling here, and the county court erred in overruling appellant's objections.

The judgment of the county court is therefore reversed and the cause remanded, with directions to sustain appellant's objections.

Reversed and remanded, with directions.

(311 Ill. 263)

WHITTINGTON v. NATIONAL LEAD CO. (No. 15576.)

(Supreme Court of Illinois. Feb. 19, 1924.)

Courts ⇐219(8)—Supreme Court held without jurisdiction to issue writ of error to circuit court.

The Supreme Court is without jurisdiction to issue a writ of error to the circuit court, where the only question to be determined is whether a bill of particulars may be required in a case which alleges the violation of certain provisions of the Constitution but which mentions no statute or provision of the Constitution which has been violated, and, if a bill of particulars may be required, whether it was proper to make an order on account of any indefinite charges made in a declaration and not reasonably informing defendant of the cause of action, and whether the bill of particulars filed was a sufficient compliance with the order.

Error to Circuit Court, Cook County; David M. Brothers, Judge.

Action by J. A. Whittington against the National Lead Company. Judgment of dismissal, and plaintiff brings error. Cause transferred.

Marx Loehwing, of Chicago (John T. Murray, of Chicago, of counsel), for plaintiff in error.

Ashcraft & Ashcraft (E. M. Ashcraft, of Chicago, of counsel), for defendant in error.

CARTWRIGHT, J. J. A. Whittington, plaintiff in error, brought an action on the case in the circuit court of Cook county against the National Lead Company, defendant in error, and by his second amended declaration charged the defendant in four counts with willful violation of and willful failure to comply with the provisions of an act entitled "An act to promote the public health by protecting certain employees in this state from the dangers of occupational diseases, and providing for the enforcement thereof." Laws of 1911, p. 330. The several counts specified particular provisions of the act which it was charged the defendant willfully violated and willfully failed to comply with. The defendant filed a plea of not guilty, a plea of the statute of limitations (Smith-Hurd Rev. St. 1923, c. 83) as to the whole declaration, and a separate plea of the statute as to each count, alleging that the cause of action did not accrue to the plaintiff at any time within two years before the filing of the amended declaration on February 16, 1922. The plaintiff joined issue on the plea of not guilty and demurred to the pleas of the statute of limitations. The demurrer was sustained and the defendant elected to stand by the pleas. On motion of the defendant the plaintiff was ordered to file a bill of particulars, and a bill of particulars was filed in compliance with the order, specifying the failure of the defendant to comply with the statute in the several particulars therein stated. On motion of the defendant the court ordered the plaintiff to file a more specific bill of particulars, which the plaintiff refused to do, and the court dismissed the suit at the cost of the plaintiff for failure to comply with the order. A writ of error was sued out of this court for review of the judgment.

The plaintiff in error has assigned errors on the ruling of the court requiring a more specific bill of particulars and in entering judgment for failure to comply with the order, and the defendant in error has assigned a cross-error on sustaining the demurrer to the plea of the statute of limitations, which was based upon the ground that the amended declaration stated a different cause of action not before stated and that the statute had run before the filing of the amended declaration.

The record has been brought to this court because of alleged violations of the provisions of the Constitution that all laws relating to courts shall be general and of uniform operation and the practice of all courts of the same class or grade, so far as regulated by law, shall be uniform, the section securing the right of trial by jury, and the provision that no person shall be deprived of life, liberty, or property without due process of law. No statute is mentioned in the brief or argument relating to courts or regulating the practice, or the other provisions of the Constitution. Neither the errors assigned nor the cross-error relates in any

manner to any statute regulating practice or any constitutional right. The only question to be determined is whether a bill of particulars may be required in this class of cases, and if it may be required, whether it was proper to make an order on account of any general and indefinite charges alleged to have been made in the declaration not reasonably informing the defendant of the cause of action, and whether, if both these questions are answered in the affirmative, the bill of particulars filed was a sufficient compliance with the order. There is no ground upon which this court has jurisdiction by a writ of error to the circuit court.

The cause is transferred to the Appellate Court for the First District.

Cause transferred.

(311 Ill. 127)

PEOPLE ex rel. MARK et al. v. HARTQUIST et al. (No. 15807.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Quo warranto ⊂=43—Judge may enter rule to show cause or consider application on petition alone.

On presentation of petition for leave to file an information, in quo warranto a judge may enter a rule nisi against respondents to show cause why leave should not be granted or he may consider the application on the petition alone and grant or deny it.

2. Quo warranto ⊂=43—Petition granted if judge satisfied there is "probable ground" to justify it.

On presentation of petition for leave to file information, the statute requires the leave to be granted if the judge is satisfied that there is probable ground for the proceeding; "probable ground" meaning a reasonable ground of presumption that the charge is or may be well founded.

3. Quo warranto ⊂=43—Leave to file information granted under misapprehension may be vacated.

When leave to file information is granted in an ex parte proceeding, the court may vacate the order if it is made to appear that leave was inadvertently or improvidently granted or allowed under a misapprehension of the law or facts.

4. Quo warranto ⊂=43—Allegation of noncompliance with election notice requirement and ballot law held probable cause for granting leave.

Where School Law, § 89a, required an election on the proposition to establish a community high school district in certain territory to be called by posting notices for at least 10 days, petition for leave to file information in nature of quo warranto against defendants charged with usurping the offices of members of the board of education, alleging that there was no record with any official that notice was ever posted, was sufficient to show probable ground for the proceeding.

5. Elections ⊂=40—Voters not required to take notice of election, time of which is not fixed by law, unless notice is given.

Where the time for holding an election is not prescribed by law, but must be fixed by the authority vested with power to call it, voters are not required to take notice unless notice be given as required by statute, which notice is a condition precedent essential to the election.

6. Quo warranto ⊂=48—Office of information to require respondents to show warrant for right claimed.

The office of an information in nature of quo warranto is, not to tender an issue of fact, but only to call on respondents to show by what warrant they exercise the right claimed, and the people need not allege facts showing defendants' exercise of the right is without authority, but need only allege that they are exercising it without lawful authority.

7. Quo warranto ⊂=8, 48—Organization of district may be attacked by quo warranto; requirements of information attacking organization of school district, stated.

The organization of a school district may be attacked by an information in the nature of quo warranto, and in such case respondents must plead the proceedings by which the district was organized, must set out their title with particularity, and must state facts showing de jure title.

8. Certiorari ⊂=4, 64(1)—Before election of board of education, organization of school district attacked by certiorari.

Before the election of a board of education, the proceedings for the organization of a school district may be attacked by the common-law writ of certiorari, and validity thereof determined from inspection of record alone.

9. Schools and school districts ⊂=27—County superintendent of schools required to keep record of proceedings to organize districts.

Under School Law it is necessarily implied from the nature and effect of the acts required of a county superintendent of schools that he shall keep a record of action taken in the course of proceedings for organizing a school district.

10. Schools and school districts ⊂=22—Curative statute held insufficient to make election to organize district held without notice valid.

Since the Legislature cannot authorize a special election without notice to voters, it could not by Laws 1921, p. 797, make valid an election on proposition to organize a school district held without notice which it could not previously have authorized.

11. Schools and school districts ⊂=22—Omission to observe Australian Ballot Law may be cured by subsequent legislation.

Omission to observe the requirements of the Australian Ballot Law at election on question of organizing school district may be cured by subsequent legislation.

12. Quo warranto ⟸29—Delay of three years in action for quo warranto to question organization of school district held not to estop people.

Since mere lapse of time does not estop the people, a delay of three years in questioning organization of a high school district by information in nature of quo warranto was not laches justifying vacating of order of leave to file petition.

Stone and Thompson, JJ., dissenting.

Appeal from Circuit Court, Henderson County; George C. Hillyer, Judge.

Quo warranto by the People, on the relation of Elmer Mark and others, against William Hartquist and others. From judgment sustaining motion to vacate order granting leave to file information and dismissing the cause, relators appeal. Reversed and remanded, with directions.

M. E. Nolan, State's Atty., of Oquawka (Hartzell & Werts, of Oquawka, of counsel), for appellants.

W. C. Ivins, of Stronghurst, and Grier, Safford & Soule, of Monmouth, for appellees.

DUNN, J. On the relation of two citizens, taxpayers, property owners, and residents of supposed community high school district No. 104 of Henderson county, the state's attorney of that county presented to one of the judges of the circuit court a petition for leave to file an information in the nature of quo warranto against William Hartquist and four other individuals, who were charged with usurping the offices of members of the board of education of the supposed school district. The judge granted leave to file the information, and a summons was issued returnable to the October term, 1923. The respondents appeared at that term and made a motion to vacate the order, and the court sustained the motion and ordered the information stricken from the files and the cause dismissed at the relators' costs. The relators appealed from this judgment.

[1-5] No objection has been argued to the legal sufficiency of the information, which consisted of two counts; the first questioning the right of the respondents to hold the offices of members of the board of education, and the second questioning such right and specifically alleging that community high school district No. 104 is not an existing school district under the law. The correctness of the order vacating the leave to file the petition depends upon the sufficiency of the petition to show prima facie grounds for the ouster of the respondents from the offices which they are alleged to have usurped. Upon the presentation of the petition for leave to file an information a judge may, if he sees fit, enter a rule nisi against the respondents to show cause why leave should not be granted, or he may consider the application upon the petition, alone, and grant or deny the leave. The statute requires the leave to be granted if the judge shall be satisfied that there is probable ground for the proceeding, and if the petition showed such ground it was the duty of the court to grant its prayer. People v. Anderson, 239 Ill. 266, 87 N. E. 1019. The words "probable ground" mean a reasonable ground of presumption that the charge is or may be well founded. People v. Union Elevated Railroad Co., 269 Ill. 212, 110 N. E. 1. When leave is granted in an ex parte proceeding, the court may vacate the order if it is made to appear that the leave was inadvertently or improvidently granted or allowed under a misapprehension of the law or the facts. The probable ground alleged in the petition for leave was that there is no record in the office of the superintendent of schools of Henderson county, or of any other official, that notice of an election for the purpose of voting for or against the proposition to establish the community high school district was ever posted for at least 10 days in 10 of the most public places throughout the territory, as required by the statute, and that in the election which was held, as well as in the subsequent elections for directors, the requirements of the Ballot Law were not complied with. The petition which averred these facts was sworn to by the relators, and there was no contradictory showing made by the respondents. The cause was submitted on the motion to vacate the leave on precisely the same showing which was made on the motion for leave. There was no misapprehension of the facts, and the fact that there was no record of posting notices of the election was sufficient to show that there was probable ground for the proceeding. At the time of the attempted organization of this district, in March, 1920, the statute for the organization of community high school districts, section 89a of the School Law (Laws of 1919, p. 908), required an election upon the proposition to establish a community high school district in certain territory to be called by the county superintendent of schools upon the petition of 50 voters residing in the territory, by posting notices for at least 10 days in 10 of the most public places throughout the territory. The petition was a condition precedent to the calling of the election, and the posting of notices in the manner required by law was a condition precedent to the holding of the election. Where the time for holding an election is not prescribed by law, but must be fixed by the authority vested with the power to call it, the voters are not required to take notice unless notice be given as required by the statute. In such case the giving of notice

for the time and in the manner required by the statute is a condition precedent essential to the election. Roberts v. Eyman, 304 Ill. 413, 136 N. E. 736.

[8-9] The office of an information in the nature of quo warranto is not to tender an issue of fact but only to call upon the respondents to show by what warrant they exercise the right claimed. The people need not allege any facts showing that the exercise of the right by the respondents is without lawful authority, but it is enough to allege that they are exercising it without lawful authority. The respondents must then disclaim or justify, and if they justify must set out the facts which show their lawful authority to exercise the right claimed. People v. Central Union Telephone Co., 232 Ill. 260, 83 N. E. 829; People v. Barber, 265 Ill. 316, 106 N. E. 798. The organization of a school district may be attacked by an information in the nature of quo warranto, and in such a proceeding the respondents, if they justify, must plead the proceedings by which the district was organized, must set out their title with particularity, and must state the facts showing a de jure title. People v. Central Union Telephone Co., supra; Place v. People, 192 Ill. 160, 61 N. E. 354; Gunterman v. People, 138 Ill. 518, 28 N. E. 1067. Before the election of a board of education the proceedings for the organization of a school district may be attacked by the common-law writ of certiorari, in which case their validity must be determined from an inspection of the record, alone; no other evidence being admissible. Miller v. Trustees of Schools, 88 Ill. 26; Lafferty v. Moore, 275 Ill. 580, 114 N. E. 336; Fisher v. McIntosh, 277 Ill. 432, 115 N. E. 529; People v. Owen, 286 Ill. 638, 122 N. E. 132, 3 A. L. R. 447. In either form, quo warranto or certiorari, the case of the respondent depends upon the record and the validity of the proceedings shown by it. The conditions precedent essential to the action of the superintendent of schools and to the holding of the election must appear by the record. While there is no express requirement that the county superintendent of schools shall keep a record of the proceedings, it was necessarily implied from the nature and effect of the acts required of him that he should keep a record of the action taken in the course of the proceedings for organizing school districts. It was so held in McKeown v. Moore, 303 Ill. 448, 135 N. E. 747, in regard to the ex officio board, and the same argument requires the same conclusion in this case. The superintendent is required by section 15 of the School Law (Smith-Hurd Rev. St. 1923, c. 122) to keep in his office a map of his county and to indicate thereon the boundaries and numbers of the school districts. The acts of the superintendent and the elections held under his authority effect permanent changes and create liabilities and powers of vast importance, which must be recognized and submitted to by all persons living within the territory affected and all property owners and taxpayers therein. How can these persons know the changes in their school district and in their rights and liabilities if there exists no record of them?

The petition and the giving of notice of the election must be shown by the record. Since the petition was the foundation of the right to call an election to vote upon the organization of the district, it was essential that the record should show such petition. Trustees of Schools v. Hoyt (No. 15492), 143 N. E. 59. It was equally necessary that the record should also show that the notice, which was an essential preliminary to the election, was given. The object of the petition for leave to file the information is to satisfy the court that there is probable ground for the proceeding, and therefore it was proper for the petition to state that there existed no competent evidence of the giving of legal notice. Since a record must be kept of the proceedings, it is the only lawful evidence of the action taken, and cannot be contradicted, added to, or supplemented by parol. People v. Carr, 231 Ill. 502, 83 N. E. 269; O'Connell v. Chicago Terminal Railroad Co., 184 Ill. 308, 56 N. E. 355; Chaplin v. Highway Com'rs, 129 Ill. 651, 22 N. E. 484; People v. Madison County, 125 Ill. 334, 17 N. E. 802; Troxell v. Dick, 216 Ill. 98, 74 N. E. 694. When it is stated that no such record exists, probable ground is stated for the proceedings. On the motion to vacate the order granting leave, affidavits might have been filed for the purpose of bringing to the attention of the court any fact necessary to enable the court, in connection with the petition, to determine whether there was probable cause for granting the leave. People v. City of Chicago, 270 Ill. 188, 110 N. E. 366.

[10] On May 10, 1921, the Legislature passed an act providing:

"That in all cases where a majority of the inhabitants of any contiguous territory, voting on the proposition, have voted at an election called for the purpose by the county superintendent of schools, in favor of the organization of such territory into a community high school district, and where, at a subsequent election similarly called and held, a board of education has been chosen for such district, such territory is hereby declared legally and validly organized and established as a high school district, and a valid and existing school district and body politic and corporate of this state for the purpose of establishing and maintaining a high school." Laws of 1921, p. 797.

Section 2 of the act provided that—

"No irregularity, defect or omission whatsoever, in the time or manner of calling, hold-

ing or conducting any such elections or in the notice thereof, ballots used therein, or returns thereof, shall be held to invalidate any such elections."

It is insisted that this act was sufficient to cure any defects in the organization of the school district. Irregularities in the conduct of an election may be cured by subsequent legislation, but notice of the time and place of holding the election, when these are not fixed by law but are fixed by the authority calling the election, is a condition essential and precedent to the right to hold the election, and if such notice is not given for the length of time and by the number of notices required by the statute the election will be void and an expression of the will of the voters thus obtained will confer no authority. Roberts v. Eyman, supra. The Legislature may remedy some defects in proceedings where an act has been omitted which the Legislature might have dispensed with in the first place in respect to such proceedings, but it cannot by a curative act make valid void proceedings. It could not have authorized a special election without notice to the voters (Gaddis v. Richland County, 92 Ill. 119), and therefore it could not by a curative act make valid an election held without notice which it could not previously have authorized. Roberts v. Eyman, supra.

[11] The election upon the question of organizing the district was held on March 20, 1920, when the statute required the election to be held under the Australian Ballot Law. People v. Williams, 298 Ill. 86, 131 N. E. 270; Irwin v. Shepherd, 298 Ill. 100, 131 N. E. 278. The omission to observe the requirements of that law, it has been held, may be cured by subsequent legislation. People v. Benton, 301 Ill. 32, 133 N. E. 700; People v. Edvander, 304 Ill. 400, 136 N. E. 693. The failure to give notice, however, goes to the root of the whole proceeding. An election cannot be called, where the time and place are not fixed by law, without giving notice of the time and place of holding it. The election was void and incapable of validation.

[12] The appellee insists that the delay of three years in instituting these proceedings was laches which justified the vacation of the order for leave to file the petition. Mere lapse of time does not estop the people, and no facts appear which should estop them.

Some statements are made in the briefs concerning facts which the parties suppose to be relevant but which have no foundation in the record, and will therefore receive no consideration.

The court erred in setting aside the order granting leave to file the information. Its judgment will be reversed, and the cause remanded, with directions to deny the motion to set aside the order granting such leave.

Reversed and remanded, with directions.

STONE and THOMPSON, JJ., dissenting.

(311 Ill. 184)

DAILEY v. GRAND LODGE, BROTHERHOOD OF RAILROAD TRAINMEN. (No. 15574.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Witnesses ⇐380(6)—In suit on benefit certificate, declaration signed by beneficiary held admissible, though tending to impeach him after being called by defendant.

In an action on a benefit certificate, where plaintiff was called as a witness by defendant and shown a paper entitled "Declaration of Beneficiary," which indicated that deceased, at the time of application for certificate, was ineligible to receive it because of his age, which she admitted had been signed and sworn to by her, such paper was admissible in evidence, notwithstanding it tended to impeach plaintiff, who had been called as a witness by defendant.

2. Witnesses ⇐389—Letter, writing of which was denied by beneficiary, held properly excluded.

In an action on a benefit certificate, where plaintiff, called as a witness by defendant, denied writing a letter which was presented to her, it was not error for the court to refuse such letter in evidence.

3. Evidence ⇐333(1)—Registers of marriages pursuant to statute competent evidence.

Registers of marriages, made pursuant to a state statute, are competent evidence.

4. Evidence ⇐366(1)—Exclusion of copy of application for marriage license, in absence of proof of law requiring registry, held not error.

In an action on a benefit certificate, the exclusion of a certified copy of deceased's application for marriage license, offered on the issue of his age, *held* not error, in the absence of any proof of the law of the state where the application was made providing for the keeping of such a registry.

5. Evidence ⇐351—Church baptismal record competent evidence of fact, date of baptism, and prior birth of child.

Entries in church registers, kept in accordance with church law or usage, such as baptismal records, are admissible, though they are competent only as evidence of the fact, date, and place of baptism, and not as evidence of the age or date of birth of the child, except that it was born before the baptism.

6. Evidence ⇐158(1)—Baptismal record or copy thereof only admissible.

The baptismal record of a church, or a copy of it only, is admissible on the issue of fact and date of baptism; a mere written statement by a priest being not competent.

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7. Evidence ⟸343(1)—Exclusion of baptismal record, tendered as certified copy, held not error.

In an action on a benefit certificate, exclusion of a certified copy of deceased's baptismal record *held* not error, where such paper was tendered as a certified copy, since it does not come within the provisions of the act on evidence and depositions authorizing the admission of certified copies, though same would have been admissible as an examined copy, if sworn to by a credible witness and accompanied by proof that the record was found in the custody of the officer whose duty it was to keep and preserve it.

8. Trial ⟸267(3)—Modification of instruction on issue of accord and satisfaction held proper.

In an action on a benefit certificate, an instruction on the issue of accord and satisfaction, that if defendant had paid to plaintiff a particular sum "for the purpose of settling and adjusting her claim, 'which' sum was accepted by her for that purpose, then the plaintiff cannot recover," *held* properly modified by the substitution of the words "and if that" in place of "which."

Error to Appellate Court, Fourth District, on Appeal from Circuit Court, St. Clair County; George A. Crow, Judge.

Action by Mary Dailey against the Grand Lodge, Brotherhood of Railroad Trainmen. Judgment for plaintiff was affirmed by the Appellate Court, and defendant brings certiorari. Reversed and remanded.

See, also, 226 Ill. App. 164.

Wm. P. Launtz, of East St. Louis, for plaintiff in error.

Farthing & Farthing, of East St. Louis, for defendant in error.

CARTWRIGHT, J. Mary Dailey, defendant in error, brought her suit in the circuit court of St. Clair county against the Grand Lodge, Brotherhood of Railroad Trainmen, the plaintiff in error, upon a benefit certificate issued to her husband, Thomas P. Dailey, payable to her upon his death. The defendant is a fraternal beneficiary society, and membership is limited to persons not less than 18 and not to exceed 45 years of age on the date application is presented for membership. The declaration alleged that on May 2, 1913, Thomas Patrick Dailey, also known as Thomas P. Dailey, husband of the plaintiff, became a member of More Shade Lodge, No. 706, a subordinate lodge of the defendant, upon his application. The defendant filed a plea of the general issue and special pleas. The court sustained a demurrer to a special plea that the insured misrepresented his age in his application and was not eligible to membership, and a special plea setting up the defense of accord and satisfaction. The court sustained a demurrer to the pleas, and defendant standing by its pleas, judgment was rendered against it for $1,425.50. The defendant appealed to the Appellate Court for the Fourth District, and assigned errors in sustaining the demurrer to these special pleas. The Appellate Court decided that the pleas presented good defenses to the action, and the judgment was reversed and the cause remanded. The case was reinstated in the circuit court, and there was a trial by jury, resulting in a verdict for $1,425.50. Judgment was entered upon the verdict, and upon an appeal to the Appellate Court for the Fourth District the judgment was affirmed. On petition to this court for a writ of certiorari to the Appellate Court, the writ was granted.

The issues at the trial were whether Thomas P. Dailey in his application misrepresented his age as 44 years and 3 months, when in fact he was of the age of 48 years 8 months and 3 days, and not eligible to membership, and whether there had been an accord and satisfaction by the payment of $174.50 to the plaintiff, accepted by her in satisfaction of her claim.

The plaintiff introduced in evidence the application of Thomas P. Dailey for a beneficiary certificate, in which he gave the date of his birth as November 28, 1868, and his age 44 years and 3 months, the beneficiary certificate, dated April 24, 1913, evidence of the death of Dailey in 1919, correspondence between the plaintiff and officers of the defendant, and the payment to the plaintiff of $174.50.

[1] The defendant called the plaintiff, Mary Dailey, as a witness, and showed her a paper entitled "Declaration of Beneficiary," signed and sworn to by her on August 15, 1919, in which she certified that the answers therein contained were true and correct to the best of her knowledge, and were made for the purpose of securing the amount of benefits due upon the beneficiary certificate. That declaration gave the date of birth of Thomas P. Dailey as November 28, 1867, which would make his age at the time of his application more than 45 years. She said that the signature was her writing, and the defendant offered the paper in evidence, and the plaintiff objected that the purpose of offering it was to impeach the witness, who had been called by the defendant. The court did not rule on the objection, but said that the paper had no relevancy to the issue, and excluded it. The objection made was groundless, and could not have been sustained. The witness had answered, without objection, that she signed the paper, and, regardless of what she said, it was signed and sworn to by her. The defendant had a right to offer the declaration in evidence, to show that the age stated therein by the plaintiff would make Dailey ineligible to membership and the certificate void, and it

was in no sense a matter of impeachment. It was relevant to the issue, and there was no explanation made or offered with respect to it or its truth.

[2] The defendant also inquired of the plaintiff whether she wrote a letter presented to her, and she denied that she wrote it. The court did not err in refusing to admit that letter in evidence.

[3, 4] The defendant produced a paper purporting to be a copy of a record in the office of the recorder of deeds of St. Louis, Mo., of an application of Thomas P. Dailey and Mamie Madden to procure a license to marry, on July 3, 1890, in which Dailey stated his age to be 26 years. A witness was called, and the defendant attempted to prove that the paper was an examined copy of the original record. This was not permitted, and an objection to the paper was sustained. The paper also bore the certificate of the recorder of deeds, under his official seal, that it was a true copy of the application for marriage license by Thomas P. Dailey and Mamie Madden as the same remained in his custody. Marriage is a civil contract, regulated by statute, and registers of marriages made pursuant to the statute of any state are competent evidence. It is because they are made by public authority and under the sanction of official duty that they are received in evidence. 1 Greenleaf on Evidence, § 484. There was no evidence of any law of Missouri upon the subject of marriages, or any provision for keeping a registry or by whom, and for that reason the court did not err in excluding the paper. Tucker v. People, 117 Ill. 88, 7 N. E. 51.

A witness for the defendant testified that he examined the baptismal record in the Old Cathedral Church in St. Louis, Mo., and that a paper produced was a copy of such record by examination and comparison. The paper was then offered in evidence and is as follows:

"The Old Cathedral Church,

"St. Louis, Mo., Dec. 1, 1919.

"To Whom It May Concern—Dec. 2, 1866, I baptized Thomas, son of Patrick Dailey and Fanny Ives, both from Ireland. Born Nov. 25th, 1866.

"Sponsors: John Sweeny and Margaret Dailey.

"Ferrel Girardy, CSSR."

"I hereby certify the above to be an exact extract from the baptismal records as kept at the Old Cathedral Church, St. Louis, Mo.

"P. C. Schulze, Assistant Pastor."

[5] There is a class of records, not kept by public officials as a part of official duty, with the attending sanction, nor authorized by statute to be proved by a certified copy, and therefore not coming within any provision of the act on evidence and depositions, but which are admissible in evidence to prove the fact recorded. These records are of such a character and made under such conditions as to create confidence in their truth, and they are universally acted upon as evidence of the facts recorded. Entries in family Bibles are not made by any official, nor as a public official duty, but are evidence of the facts recorded, and entries in church registers, kept in accordance with church law or usage, are for similar reasons evidence of the facts therein stated. The duty of the church official to record the fact, its character in connection with a religious ceremony, and its general nature, create confidence in its truth recognized by the courts. Baptism is a solemn sacrament of the church, and the want of personal interest of the church official performing the ceremony, the duty under church law or usage to record the fact, and its moral nature, make the entry competent evidence of the fact and date of the baptism. Blackburn v. Crawford, 3 Wall. 175, 18 L. Ed. 186; Kennedy v. Doyle, 10 Allen (Mass.) 161; Hunt v. Supreme Council of Chosen Friends, 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855; Royal Society v. McDonald, 59 N. J. Law, 248, 35 Atl. 1061. 5 Chamberlayne on Evidence, § 3498; 1 Greenleaf on Evidence, § 493; 10 R. C. L. 1138; 22 Corpus Juris, 901. The register, however, is admissible only to show the fact, date, and place of baptism. It is not evidence of anything not a part of the act, such as the date of birth of the child, except, as a matter of course, that the child was born before the baptism.

[6, 7] The record, or a copy only, is admissible, and a mere written statement by a priest is not competent. People v. Cassidy, 283 Ill. 398, 119 N. E. 279. Such records do not come within the provisions of the act on evidence and depositions authorizing the admission of a copy certified as therein provided, but they are proved by the records or copies examined and sworn to by credible witnesses, with proof that the record was found in the custody of the officer whose duty it was to keep and preserve it. A copy of the baptismal register, with such proof, was competent evidence that Thomas Dailey was baptized on December 2, 1866, and it would necessarily show that he was born before he was baptized, although the statement that he was born November 25, 1866, would not be evidence of that fact. As offered, the paper was a certified copy of the baptismal register, certified by the keeper of the baptismal records of the church, and it was not admissible as a certified copy.

[8] On the issue of accord and satisfaction, there was evidence of correspondence between the plaintiff and the officials of the defendant, in which her claim was disputed and $174.50 was paid to her. The defendant asked the court to give the following instruction to the jury:

"The jury are instructed that if the plaintiff made a claim on the benefit certificate issued to her husband, Thomas P. Dailey, and the de-

fendant disputed its liability in good faith, that made it a fair subject of compromise, and if the defendant paid the plaintiff the sum of $174.50 for the purpose of settling and adjusting her claim, *which* sum was accepted by her for that purpose, then the plaintiff cannot recover, and the jury should return a verdict for the defendant."

The court struck out the word "which," and inserted in its place the words "and if that," and gave the instruction as so changed. The modification was proper to make it clear that the evidence should show the acceptance of the sum of money by the plaintiff for the specific purpose stated, and to obviate any possible inference that the court treated the sum as accepted as an accord and satisfaction.

The judgments of the Appellate Court and circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

(311 Ill. 265)

PEOPLE v. SHOCKLEY. (No. 15780.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Indictment and information ⟸41(3)—Affidavit on information and belief not sufficient.

An affidavit on information and belief is not sufficient to support an information.

2. Indictment and information ⟸41(3)—After amendment of information affiant must be resworn.

After a material amendment of an affidavit supporting an information, affiant must be resworn thereto.

3. Indictment and information ⟸41(3)—Information held not to be supported by affidavit nor state offense.

Where affidavit supporting an information on information and belief was amended by striking words of information and belief, but such affidavit was not sworn to after amendment, it was not verified as required by law, and motion to quash should have been sustained.

Thompson, J., dissenting.

Error to Hardin County Court; A. A. Miles, Judge.

Loy Shockley was convicted of violation of the Prohibition Law, and he brings error. Reversed.

Charles Durfee, of Golconda, for plaintiff in error.

Edward J. Brundage, Atty. Gen., Clarence E. Soward, State's Atty., of Elizabethtown, and George C. Dixon, of Dixon (James W. Gullett, of Springfield, of counsel), for the People.

STONE, J. The state's attorney of Hardin county filed an information containing six counts, charging the plaintiff in error with violating the Illinois Prohibition Act (Smith-Hurd Rev. St. 1923, c. 43, §§ 1–50). Supporting the information was the affidavit of Clarence E. Soward, which reads as follows:

"Clarence E. Soward, after being duly sworn, on his oath states that the within information against Loy Shockley is true, as he is informed and verily believes."

The county judge of that county certified that he had examined the information and the affidavit, and being satisfied that probable cause existed for filing the same, ordered it filed and a capias was issued. On a hearing the plaintiff in error moved to quash the information upon the ground that it was not supported by an affidavit and that it did not state an offense under the law. The state's attorney filed a cross-motion for leave to amend the information by striking from the affidavit thereto the words, "as he is informed and verily believes." The court sustained the cross-motion, and thereafter plaintiff in error renewed his motion to quash the information, which was overruled, and the cause proceeded to trial. The jury returned a verdict convicting the plaintiff in error on the fourth and sixth counts of the information. Plaintiff in error filed a motion for a new trial, assigning the grounds that the information did not state an offense under the law and that it was not supported by an affidavit. These motions were overruled, as was a motion in arrest of judgment, and judgment was entered on the verdict, assessing a fine of $100 on each of the two counts and committing the plaintiff in error to jail until the fine and costs were paid. Plaintiff in error brings the cause here on the theory that his constitutional right was violated by forcing him to trial upon an information not supported by affidavit.

[1, 2] An affidavit on information and belief is not sufficient. People v. Clark, 280 Ill. 160, 117 N. E. 432; Lippman v. People, 175 Ill. 101, 51 N. E. 872. While the rule in this state in relation to the amendment of affidavits is liberal (Keith v. Ray, 231 Ill. 213, 83 N. E. 152), yet the general rule is that after a material amendment of an affidavit the affiant must be resworn thereto, as he cannot otherwise be convicted of perjury if the affidavit as amended be false. Atlantic Bank v. Frankford, 61 N. C. 199; State v. Lavery, 31 Or. 77, 49 Pac. 852; Baker v. York, 65 Ark. 142, 45 S. W. 57; Pierson v. Wilcox, 44 Eng. Ch. 752; 2 Corpus Juris, 372.

[3] The affidavit prior to amendment did not state that the facts contained in the information were true, but merely that the affiant believed them to be true. This was not an affidavit of the truth of the matter

set up in the information, and the amendment striking out the words, "as he is informed and verily believes," does not constitute an affidavit as to the facts in the information. The affidavit was not sworn to after the amendment and the information was not verified as required by law, and plaintiff in error's motion to quash the same should have been sustained. For the error in overruling that motion the judgment is reversed.

Judgment reversed.

THOMPSON, J. (dissenting). The conclusion reached by the court in this case is based upon the decision in People v. Clark, supra. That case holds that section 6 of article 2 of the Constitution of 1870 requires that an information charging the commission of a crime must be supported by affidavit, and that that portion of section 117 of the County Court Act (Smith-Hurd Rev. St. 1923, c. 37, § 289) which authorizes a prosecution by information, supported by an affidavit on information and belief, is unconstitutional. Section 6 reads:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized."

As I read this section, there is no language in it which supports the conclusion reached in the case cited.

I agree with much of the argument in the opinion to the effect that prosecutions by information should not be permitted unless the information is supported by affidavit, but there is nothing in the Constitution which warrants the holding that an unsworn information will not support a judgment of guilty. The Constitution authorizes the prosecution of minor misdemeanors by information, and it leaves the details governing such prosecutions to the Legislature. It is true that "no warrant shall issue without probable cause, supported by affidavit"; but suppose the prisoner is arrested without a warrant, as he may be under the common law and under the statutes of this state, what is there in the Constitution that requires the complaint or information on which he is prosecuted to be supported by affidavit?

Plaintiff in error submitted to the jurisdiction of the court by filing his motion to quash the information. The court had jurisdiction of the subject-matter, and by entering his general appearance plaintiff in error gave the court jurisdiction of his person.

In my opinion the judgment should be affirmed.

(311 Ill. 40)

PEOPLE v. MEISNER et al. (No. 15773.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Homicide ⇐250—Conviction of murder held sustained by evidence.

Evidence *held* sufficient to sustain a conviction of murder.

2. Criminal law ⇐369(3)—Evidence as to offenses committed on nights preceding and following murder held incompetent.

In a murder prosecution, evidence as to a crap game between defendants and others two nights before the killing, and two holdups and a burglary by them on the following night, *held* incompetent as not connected with the crime charged.

3. Criminal law ⇐369(1)—Commission of series of crimes does not authorize admission of evidence of others than that charged.

That a man, or two or more together, committed a series of separate crimes, does not authorize admission, on a trial for one, of evidence of all or any of the others, as the evidence must be confined to the question in issue.

4. Criminal law ⇐369(2), 381—Bad character or commission of other crimes not ground for conviction.

One cannot be convicted of crime because he is a bad man generally or has committed other crimes for which he has not been punished, though evidence tending to prove the offense charged is not objectionable merely because it discloses other offenses; the test of admissibility being the connection of the facts proved with the offense charged.

5. Criminal law ⇐396(1)—Introduction of evidence of another crime by defendant held not authorized by latter's evidence.

In a murder prosecution, admission of immaterial evidence of defendant's purchase of an automobile, without objection by the state, did not authorize the latter's introduction of immaterial and incompetent testimony as to defendant's theft of an automobile, the body of which was on his car at the time of his arrest.

6. Homicide ⇐249—Conviction as accessory or conspirator held not authorized.

Evidence *held* insufficient to authorize a conviction of aiding, abetting, assisting, advising, or encouraging perpetration of a murder.

7. Criminal law ⇐1169(11)—Admission of incompetent evidence held reversible error in view of death penalty.

Admission of incompetent evidence of other crimes by defendant *held* reversible error, in view of the jury's infliction of the death penalty, even if the evidence of his guilt were so complete that no other verdict could have been returned without regard to the incompetent evidence.

8. Criminal law ⇐813—Abstract instructions on subject covered by instruction applying law to facts held improper.

Where the court gave an instruction applying the law of conspiracy to the facts as claim-

ed by the people, abstract instructions on conspiracy and the liability of each conspirator for the acts of all were improper as only tending to confuse the jury.

9. Criminal law ⟸814(11)—Instructions on alibi held properly refused as inapplicable to facts.

Where no alibi was claimed for one of two defendants charged with murder and the prosecution did not claim that the other, who was sought to be held as an accessory or conspirator, was present at the actual homicide, instructions applicable to the ordinary case of absence from the place when the crime was actually committed were properly refused, as inapplicable to the facts.

Error to Criminal Court, Cook County; Philip L. Sullivan, Judge.

John Meisner and James Hunter were convicted of murder, and bring error. Reversed and remanded.

O'Brien, Prystalski & Owen and Short & Guenther, all of Chicago, for plaintiffs in error.

Edward J. Brundage, Atty. Gen., Robert E. Crowe, State's Atty., of Chicago, and George C. Dixon, of Dixon (Edward E. Wilson and Clyde C. Fisher, both of Chicago, of counsel), for the People.

DUNN, J. John Meisner and James Hunter were indicted, jointly with Harold Splitt, for the murder of Joseph Schlessinger. Splitt entered a plea of guilty and testified on the trial of the other two. They were convicted. Meisner was sentenced to death and Hunter to imprisonment for life, and they have sued out a writ of error.

Schlessinger was a taxicab driver in Chicago and was hailed by Meisner on the night of February 6, 1923, about midnight, at Fifty-Fifth and Halsted streets. Meisner and Splitt got into the taxicab as passengers. Meisner had a .32-20 Colt revolver and Splitt a .45 automatic. Both belonged to Hunter. They drove east to a short distance west of Normal avenue, when Meisner got out on the running board, put the revolver he had to the driver's chest, and told him to stop and put up his hands. He did so. Meisner got out of the cab and stood beside it. William Mandell, the driver of another taxicab, saw Schlessinger's taxicab standing there, apparently in trouble, with the driver and two men standing beside it. Mandell stopped, got out of his car, and walked toward Schlessinger. When he got within a few feet of the car, he noticed that Schlessinger had his hands up and heard Meisner order Splitt to get Mandell and get him good. Splitt ran to Mandell, covered him with his revolver, made him get into his cab, and ordered him to drive to a dark street. He drove east to Princeton avenue, then south to Fifty-Sixth street, west to a north and south alley, into which he drove south about 100 yards, where Splitt ordered him to stop, put out his lights, and put up his hands. Splitt then took his money—several dollars—tied his hands to his belt, told him to get into the cab, broke out the dome light of the cab, and went home. Mandell quickly got loose and reported to the police. In the meanwhile two police officers going south on Racine avenue, when about 50 feet past Forty-Ninth street, heard a shot fired, which they located to the south. They ran in that direction and saw a crowd gathered at the southeast corner of Fiftieth street and Racine avenue. Schlessinger's cab was standing on Racine avenue a few feet south of the corner, and Schlessinger was lying on his back on the street a few feet from the cab, having been shot in the chest; the ball going through his heart. He was still breathing and was put in the cab and taken to the hospital, where he died within a few minutes. The policemen went through an alley to the rear of No. 5009 Racine avenue, where they saw Meisner ahead of them walking fast towards Racine avenue and ordered him to halt. He did not do so, but the officers caught him on the sidewalk. He did not have the revolver then. There was snow on the ground, and the officers searched for the revolver at that time and for the next two days. It was eventually found on February 9 by a boy, who hid it under the sidewalk and afterward showed it to a policeman. It had one empty and five loaded shells. The belt from Meisner's coat was found near the cab.

Splitt testified to the holdup of Schlessinger's cab by Meisner. Mandell identified Meisner as the man with the pistol, and the evidence leaves no doubt of Meisner's guilt.

[1] Testimony was introduced to show Meisner's actions during Monday and Tuesday, and it appears that Tuesday night he went to the house of his grandmother, at 5319 Emerald avenue, with Splitt and George Myers. They had been drinking moonshine whisky before that and Meisner was under its influence when he came. They drank more while they were in the house and left some time after 11 o'clock. Meisner testified on the trial that he did not remember what time he left his grandmother's house or anything that happened after he left; that the next thing he remembered was that he was over at the stockyards police station. He was 27 years old and had served in the army on the Mexican border and afterward in France, where he was in continuous active service at the front. He testified to some of the details of this service, the long period of fighting and the hardships endured, the fact that he was taken prisoner and escaped, but having no gas mask was gassed and was in the hospital. There was testimony as to his broken health physically after his return and as to peculiarities in his conduct,

but the evidence was not such as to justify a finding that there was clearly a reasonable doubt as to his soundness of mind and appreciation of the criminality of his acts. The verdict finding him guilty cannot be disturbed because it was not amply sustained by the evidence. The extreme penalty was imposed by the jury in fixing his punishment, and error was committed in the admission of evidence of such a character as to require a reversal of the judgment. Over the objection of the plaintiffs in error the state's attorney was permitted to prove by George Myers that on Monday night, which was the night before the murder, he and Meisner, at Seventy-First street and Racine avenue, held up a man at the point of a revolver and robbed him of $28; that on the same night Meisner, Splitt, and Myers held up another man at Sixty-Fifth and Honore streets and robbed him of $2; and that on the same night Meisner, Splitt, and Myers committed a burglary by entering the saloon of Joe Milewski after it was closed, through a window, and stole several boxes of cigars from the saloon.

Hunter was 31 years old. He lived with his mother at 6236 Seeley avenue and conducted a roadhouse, called the Hillside Inn, at Ninety-Fifth street and Eighty-Eighth avenue, at which Meisner and a woman named Frances Wilson were employed. On the night of Sunday, February 4, Hunter, Splitt, Myers, and a number of others were in Joe Milewski's saloon, at Sixty-Third and Lincoln streets, shooting craps. Splitt and Myers testified about what occurred there and the subsequent doings of themselves, Hunter, and Meisner for the next two days. Hunter, Splitt, and Myers all lost their money playing craps at the saloon Sunday night, and Hunter borrowed $20 from the keeper on a diamond pin which he pledged and then lost the $20. They left between 10 o'clock and midnight. The next morning the three, together with Charles Coles, went in Hunter's Ford coupé to Ryan's car shop, where the three, except Hunter, applied for employment and obtained it, to begin the next morning. Splitt and Myers returned to Hunter's home in his coupé and remained there while Hunter occupied himself during the rest of the forenoon going to various places in the coupé attending to his business. In the afternoon Hunter, Splitt, and Myers went to the Hillside Inn and got Meisner, who was at work there, and Hunter's two revolvers, and came back to Meisner's house, where all four sawed some wood for Meisner's father. Afterward, about 6 o'clock, Hunter drove the four to Myers' home, at Sixty-Fifth and Justine streets, and left Myers there, then to Splitt's home, at Sixty-Fifth and Seeley, and left Splitt there, and then to a grocery store at Sixty-Third and Winchester, where he left Meisner, and then drove to his own home. He testified that he had supper about 6:30, then drove to the home of a Miss Palermo and brought her to his home at his mother's request, where the three remained until about 11 o'clock, when he took Miss Palermo home and returned to his own home and went to bed. Myers, however, testified that about 7 o'clock that night Hunter drove him and Meisner to Seventy-First street and Racine avenue and left them there, and that after walking around the streets awhile they held up a fellow. After holding up another man at Sixty-Fifth and Honore, from whom they got $2, while they were waiting for Milewski's saloon to close, they returned to the saloon and robbed it. They then went to Hunter's house a little after midnight and saw him on his back porch. Myers spent the rest of the night at Meisner's house. During the afternoon of the next day, Meisner and Splitt telephoned to Hunter and asked him to come to Meisner's house. Hunter went there while they were at supper and after supper took the three men in the coupé to Sixty-Third street and Lincoln avenue, where the three got out and went to the house of Meisner's grandmother. They had had several drinks of moonshine whisky at Meisner's, and Meisner and Splitt also drank it at Meisner's grandmother's; but Myers was sick and did not drink any. They left the grandmother's house about 11 o'clock, and Myers, being sick, left Meisner and Splitt at Fifty-Third and Halsted streets and went home. Myers gave no testimony tending to show any conspiracy among any of the men to commit any crime.

Splitt testified that on the way back from the Hillside Inn on Monday afternoon Hunter said he would like to get back the pin he pawned; that they could make the saloon that night. He talked about going to the saloon and getting that pin. Splitt further testified that he and Myers met at the saloon about a quarter to 9 o'clock that night and walked over to Sixty-Third street, between Winchester and Lincoln, where they met Meisner, and the three agreed to go out and hold somebody up, and Meisner held up a fellow; that they went to Hunter's house about 11:30. Hunter was there and told them they should go to the saloon and get his diamond pin and the dough and told Splitt to take the automatic .45 pistol. Splitt declined because he did not know how to handle it. Hunter said he was yellow, and gave it to Meisner, who gave it to Myers. The three went to the saloon and entered it, stealing four boxes of cigars and cigarettes and two watches, and then went back to Hunter's and talked with him on the back porch. Meisner gave him the cigars, and Hunter told him they should go back and see if they could get the pin. They had gone into the saloon through a window. Myers told Hunter there was a key in the door leading upstairs, where Milewski kept his money. Hunter got his knife and wanted them to

get the key out so that a skeleton key could be used, but they did not go back. Splitt went to Meisner's house about 10 o'clock the next morning. Meisner and Myers were still in bed. They had the two pistols there. They sat around and drank moonshine all day. They telephoned to Hunter, and he came over about 6 o'clock in the evening. They went out in the coupé and Hunter had a talk with Meisner, in which Meisner said that he needed some dough and they were going out to get some dough. Hunter said: "I need some dough, too; when you get a good sock of dough let me take it." At Sixty-Third street and Hoyne avenue the three left the coupé, and Meisner told Hunter he would see him later. They went to Meisner's grandmother's and Myers went home later, and Meisner gave Splitt the .45 automatic.

Hunter testified to his purchase from Lauder Bros. of the coupé which he had, and put in evidence the bill of sale and other papers relating to it. After laying the foundation for it in the cross-examination of Hunter, over objections of the defendants the state's attorney introduced in rebuttal evidence to show that the body of the coupé had been damaged on January 1, 1923, by an accident in which Hunter's brother had been killed; that the Rev. M. H. Cloud, pastor of the West Pullman Methodist church, left his Ford coupé in front of the church, at Sixty-Fourth and Paulina streets, during the evening services and some one took it; that the body of his coupé, which he identified, was the body which was on Hunter's coupé at the time of the arrest. In rebuttal, Splitt testified also that on January 3, 4, or 5 Hunter and himself and some others stole a car from in front of the church and the body was taken from it and put on Hunter's car. Alvin Piper testified that on January 23 the change of the bodies was effected at his garage in Oak Lawn by Hunter and others. Meisner's name was mentioned as being one who helped steal the car. The answer in that respect was stricken out.

[2-4] All this evidence was incompetent and had nothing to do with the murder of Schlessinger, for which the defendants were on trial. The crap game Sunday night, the proceedings of the defendants and Splitt and Myers on Monday and Monday night, the two holdups that night, and the burglary of the saloon, were entirely disconnected with the murder which Meisner committed, in conjunction with Splitt, on Tuesday night. The tendency of the evidence of these facts was to show that the defendants were bad criminals; that they were prepared to commit, and had committed, violent crimes, but no one of the crimes had any tendency to throw any light on the one which was the subject of investigation on this trial. The fact that one man, or two or more in conjunction, committed a series of separate crimes, does not, on a trial for one of the crimes, authorize the admission of evidence of all or any of the others. The rule is universal that the evidence on a trial must be confined to the question in issue, and the fact that two men committed a robbery on Monday night at Sixty-Third and Winchester streets is not competent evidence in the trial of one of the men and another for a murder committed on Tuesday night at Fiftieth street and Racine avenue, where no connection is shown between the crimes. A man cannot be convicted of crime because he is a bad man generally or has committed other crimes for which he has not been punished, though evidence which tends to prove the offense charged is not objectionable merely because it discloses other offenses; the test of admissibility being the connection of the facts proved with the offense charged. Farris v. People, 129 Ill. 521, 21 N. E. 821, 4 L. R. A. 582, 16 Am. St. Rep. 283; People v. King, 276 Ill. 138, 114 N. E. 601; People v. Lane, 300 Ill. 422, 133 N. E. 267; People v. Hall, 308 Ill. 198, 139 N. E. 123; People v. Spaulding, 309 Ill. 292, 141 N. E. 196.

[5] The evidence in regard to the stealing of the preacher's Ford coupé was immaterial. The evidence which Hunter gave in regard to his purchase of the Ford coupé was not material, but it was not objected to by the state's attorney, and its admission did not authorize the introduction of evidence to contradict the immaterial testimony and thus introduce into the case evidence of another crime which was not competent. People v. Newman, 261 Ill. 11, 103 N. E. 589.

[6] There is no evidence except that of the two confessed criminals, Splitt and Myers, that Hunter had any knowledge of their crimes or their criminal purposes, and they do not testify that he was present when any of the crimes were committed except the stealing of the automobile, for which he was not on trial. The several robberies testified to, except Splitt's robbery of Mandell, were all separate and independent crimes having no connection with the holdup and murder of Schlessinger. Splitt's testimony tends to show that Hunter advised and encouraged the burglary of the saloon, but not any of the other robberies. The revolvers with which Meisner and Splitt held up Schlessinger and Mandell belonged to Hunter, but the evidence does not show that they were given to them to be used for such a purpose. They were brought in from the Hillside Inn on Monday before the burglary of the saloon, but if they were intended for use on that occasion there is no evidence that Hunter contemplated their use for other independent crimes or that any other independent crimes would be committed. Splitt testified that Meisner told Hunter in the coupé that he needed some dough and they were going out to get some, and Hunter said: "I need some dough, too; when you get a good sock of dough let me take it." If Meisner's remark

can be regarded as notice to Hunter that Meisner was going to commit a robbery, Hunter's answer was not aiding, abetting, assisting, advising, or encouraging the perpetration of the crime.

[7] Even if it could be said that so far as Meisner is concerned the evidence that he was guilty of murder was so complete that without regard to the incompetent evidence there could have been no other verdict than guilty, it cannot be said that the evidence was not prejudicial as to him. The jury had the right to fix the penalty, and they did fix it at the extreme limit authorized by law. Nobody can know what the jury would have done if they had fixed the penalty on the evidence of this crime alone. It is not for us to say what they ought to have done. The defendant had the right to have his case tried on competent evidence applicable to the crime for which he was tried and to have the penalty fixed with reference to that crime, alone, without having all his evil deeds submitted to the consideration of the jury in fixing the penalty for this one crime. Farris v. People, supra; People v. Lane, supra.

[8] Instructions 10 and 11 given for the people were abstract propositions of law on the subject of conspiracy and the liability of each conspirator for the acts of all. Instruction 12 was an instruction on the same subject which did apply the law to the facts as the people claimed them. The other instructions would only tend to confuse the jury and should not have been given.

[9] Three instructions as to the defense of alibi were asked by the defendants and refused. They were not applicable to the facts of the case. No alibi was claimed for Meisner, and the prosecution did not claim that Hunter was present at the actual homicide. He was sought to be held as an accessory or conspirator. The instructions applied to the ordinary case of absence from the place at the time of the actual commission of the crime and were properly refused.

For the errors in the admission of evidence the judgment is reversed and the cause is remanded.

Reversed and remanded.

(311 Ill. 179)

PEOPLE v. KLEIST et al. (No. 15569.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Criminal law ⟸274—When permission to withdraw plea of guilty is discretionary with trial court.

Where accused, with a full understanding of the nature of the charge against him, pleads guilty to an indictment, it is discretionary with trial court to permit a withdrawal of the plea.

2. Criminal law ⟸274—When permission to withdraw plea of guilty should be granted.

Where a plea of guilty is entered through a misapprehension of the facts or the law, or there is doubt of accused's guilt, or he has a worthy defense, or the ends of justice will be best served by submitting the case to the jury, the trial court should permit the withdrawal of the plea of guilty, and the substitution of the plea of not guilty.

3. Criminal law ⟸274—Hope for milder punishment by entry of plea of guilty not ground for permitting withdrawal of plea.

The mere fact that accused, knowing his rights and the consequences of his act of pleading guilty, believed that he would receive a milder punishment or some other favor by entering a plea of guilty than that which would fall to his lot after trial and conviction by a jury, presents no ground for permitting a withdrawal of the plea.

4. Criminal law ⟸593, 1151—Granting continuance by reason of counsel's engagement in another trial discretionary; discretion not disturbed, except for abuse.

Whether a continuance will be granted because counsel for accused is engaged in another trial rests largely in the sound judicial discretion of the trial court, and the exercise of that discretion will not be disturbed on review, except for abuse.

5. Criminal law ⟸998—Refusal to vacate sentence entered on plea of guilty held not abuse of discretion.

Facts *held* to show refusal of trial court, on motion, to vacate sentence of conviction on plea of guilty, was not an abuse of discretion; the affidavit in support of the motion not alleging defendants were not guilty, or that they have a meritorious defense, presentable at a trial.

Error to Criminal Court, Cook County; M. L. McKinley, Judge.

Tom Kleist and another were convicted of larceny on their plea of guilty. Their motion to vacate sentence was denied, and they bring error. Affirmed.

Raber, Kostner, Herr & Arvey, of Chicago, for plaintiffs in error.

Edward J. Brundage, Atty. Gen., Robert E. Crowe, State's Atty., of Chicago, and Edward C. Fitch, of Springfield (Edward E. Wilson and Clyde C. Fisher, both of Chicago, of counsel), for the People.

THOMPSON, J. Plaintiffs in error, Tom Kleist and Emil Knapp, by indictment returned March 12, 1923, to the criminal court of Cook county, were charged with larceny. April 6 the case was set for trial April 8. On the latter date the cause was continued, on motion of the defendants, until April 16. When the case was again called for trial, there was a further continuance to April 28. On the latter date the defendants secured a

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

third continuance to May 2. These three continuances were granted on the ground that counsel for defendants was engaged in the trial of other cases. May 2 there was a fourth continuance to May 8. The case stood on the call until May 11, when it was called for trial. By agreement of counsel the case was continued until May 15, the court informing Simon Herr, counsel for the defense, that there would be no further continuances granted. When the case was called for trial, Louis Fisher, employed by the firm of Raber, Kostner, Herr & Arvey, appeared in court and stated that Herr had become engaged in the trial of a criminal case in the municipal court, and asked that the case at bar be continued until the trial in the municipal court was concluded. This motion was denied, and the court directed Fisher to proceed with the trial. Fisher stated that he was not prepared to make a proper defense, that he had not conferred with the defendants, and that Herr was the only attorney who was familiar with the case. The court directed Fisher to prepare to defend the cause, and gave him an hour and a half for preparation. At 10:30 a. m. the court directed the trial to proceed, and counsel proceeded to the selection of a jury.

After eight jurors had been accepted by both sides, Fisher advised the assistant state's attorney that he would advise defendants to plead guilty. Theretofore the prosecutor had agreed to accept a plea of guilty to petit larceny. The defendants were brought to the bar of the court, and Fisher announced that they desired to withdraw their plea of not guilty, and to enter a plea of guilty to the indictment. Fisher told the court that he had explained to the defendants the consequences of a plea of guilty, and when they were asked by the court if they understood the consequences of their plea, and if they persisted in it, Fisher, in their presence, told the court that they did. Thereafter Jacob Arvey, of the firm of Raber, Kostner, Herr & Arvey, appeared in court and asked the court to continue the matter until Herr could give it attention. The court replied that he would set aside the plea of guilty, and that the cause could proceed to trial with Arvey and Fisher defending. After further conference Arvey declined this offer, and asked the court to continue the matter for consideration of an application for release on probation.

The court thereupon called to the witness stand three witnesses, employees of the company whose property had been stolen, and examined them. It appeared from their testimony that plaintiffs in error were employees of this company; that they had loaded copper wire belonging to the company into the wagon of a confederate; that this wire was to be sold and the money divided among the three involved in the theft. It appears, also, that plaintiffs in error testified; but their testimony is not incorporated in the bill of exceptions. When plaintiffs in error had concluded their testimony the court said to them:

"Well, you men know, and can tell us, if you wish, to whom you sold this merchandise."

Arvey thereupon replied:

"All through this case our Mr. Herr has been endeavoring to obtain from these men the names of the person or persons who purchased or were to purchase this material; but these defendants have absolutely no knowledge of the same. Their part in the transaction ended when they delivered the merchandise on the wagon to the driver of the same, and they do not know now, nor have they ever known, who these men were."

After further conference, the court refused to continue the case for a hearing on an application for release on probation, and sentenced plaintiffs in error to the penitentiary. May 22 a motion was made to vacate the sentence. This motion was supported by the affidavits of Herr, Kleist, and Knapp. Nowhere in these affidavits is it stated that plaintiffs in error are not guilty of the charge to which they have pleaded guilty, or that they have a substantial defense to the charge, or that there are any facts or circumstances which would in any way reduce the crime from a felony to a misdemeanor.

[1, 2] The record in this case shows that the defendants were fully advised of the effect of their plea of guilty, and that they persisted in said plea after due admonition by the court. Where the accused, with a full understanding of the nature of the charge against him, pleads guilty to an indictment, whether the plea will be permitted to be withdrawn is discretionary with the court. People v. Stamatides, 297 Ill. 582, 131 N. E. 137; People v. Bonheim, 307 Ill. 316, 138 N. E. 627. But where it appears that a plea of guilty was entered through a misapprehension of the facts or the law, or where it appears there is doubt of his guilt, or that he has any defense at all worthy of consideration by a jury, or that the ends of justice will be best served by submitting the case to a jury, the court should permit the withdrawal of the plea of guilty and the substitution of a plea of not guilty. People v. Byzon, 267 Ill. 498, 108 N. E. 685; People v. Walker, 250 Ill. 427, 95 N. E. 475; Krolage v. People, 224 Ill. 456, 79 N. E. 570, 8 Ann. Cas. 235.

[3] The law seeks no unfair advantage over an accused, but is watchful to see that the proceedings in which his life or liberty is at stake shall be fairly and impartially conducted. It holds in contemplation his natural distress, and is considerate in viewing the motive which may influence him to take one or another course. The mere fact, how-

ever, that an accused, knowing his rights and the consequences of his act, hoped or believed that he would receive a shorter sentence or a milder punishment, or some other favor, by entering a plea of guilty, than that which would fall to his lot after trial and conviction by a jury, presents no ground for permitting the withdrawal of the plea of guilty.

[4, 5] Whether a continuance will be granted because counsel is engaged in another trial rests largely in the sound judicial discretion of the trial court, and the exercise of this discretion will be disturbed on review only where it is shown that it has been abused. People v. Singer, 288 Ill. 113, 123 N. E. 327. In this case there had been repeated continuances because of counsel's engagement in other trials. When the last continuance was granted, it was with the distinct understanding that the case would be called for trial May 15. Notwithstanding this agreement, counsel permitted himself to become engaged in the trial of a cause in another court. While counsel's obligations to his clients ought to be respected by trial courts, favors cannot be granted to the point where the orderly conduct of the court's business will be disturbed.

The case at bar was a simple one, and it appears from the record that plaintiffs in error would have been ably represented by Messrs. Arvey and Fisher. As we have said, plaintiffs in error do not state in their affidavits that they are not guilty nor do they allege that they have a meritorious defense which they can present on a trial. With the hope that they might receive a light jail sentence, or that they might be released on probation, they entered their plea of guilty. They have been disappointed in their plea for leniency, but that does not justify setting aside the judgment that is entered against them. After a full review of the record, we are satisfied that the court did not abuse his discretion in denying the motion.

The judgment of the criminal court is affirmed.

Judgment affirmed.

(311 Ill. 258)

ASCHER BROS. AMUSEMENT ENTERPRISES v. INDUSTRIAL COMMISSION et al. (No. 15783.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Master and servant ⇐405(4)—Evidence held to show compensable injury to employee dying from tumor.

Evidence in support of a claim for compensation for a theater employee's death from a tumor after an injury to his leg *held* to show that the injury was the result of an accidental collision with a seat, and was received by him in the course of and arose out of his employment.

2. Master and servant ⇐415—Incompetent evidence, received without objection in compensation case, may be considered.

Statements of an employee, made after an accident to him, which were hearsay and incompetent, but which were received without objection, are to be considered and given their natural probative effect, as if they were legally admissible.

3. Trial ⇐105(1)—Incompetent evidence, received without objection, entitled to its probative value.

Incompetent evidence, where not objected to, may be received and given such probative value as it naturally carries.

4. Master and servant ⇐361—Moving picture theater employee held engaged in "extrahazardous" business within Compensation Act.

Where the business of operating a motion picture theater came within the terms of an ordinance (imposed for the protection and safety of employés and the public) prohibiting the operation of such a business, except under certain specified conditions, person operating that business *held* to come automatically within Workmen's Compensation Act, § 3 (Laws 1919, p. 539, § 1), declaring such an enterprise "extrahazardous," so that such person's employés were covered by the act, regardless of the nature of their duties.

Error to Circuit Court, Winnebago County; Robert K. Welsh, Judge.

Proceeding before the Industrial Commission, under the Workmen's Compensation Act, by John C. Bissekumer and his wife, claimants, for the death of their son, John P. Bissekumer, opposed by the Ascher Bros. Amusement Enterprises, employer. On certiorari the circuit court confirmed the award of the Industrial Commission, except as to certain features, and the employer brings error. Affirmed.

John A. Bloomingston, of Chicago, for plaintiff in error.

Hyer, Gill & Rang, of Rockford, for defendants in error.

DUNN, J. John P. Bissekumer died in October, 1920, and his parents filed with the Industrial Commission a claim for compensation against Ascher Bros. Amusement Enterprises, in whose employment he was at the time it was alleged he received the injuries which were the cause of his death. An award was made in favor of the claimants, which was reviewed and modified by the commission. Upon certiorari the circuit court of Winnebago county entered an order confirming the award of the commission, except as to the amount allowed for first aid, medical, hospital, and surgical services, which was reduced. On the petition of the em-

ployer a writ of error was awarded to review the record, and the cause is submitted by the plaintiff in error upon two contentions: (1) That there is no competent evidence in the record to support the award; and (2) that the plaintiff in error was not operating under the provisions of the Workmen's Compensation Act.

[1] The plaintiff in error was operating the Midway Theater, a moving picture theater in the city of Rockford. The deceased was employed as an usher and assistant to the manager of the theater. His duties were to oversee the ushers and direct the patrons of the theater in the evening, look after the work of advertising, place advertising posters around the theater and in the town, take tickets in the afternoon, and look after the detail work in general. In March, 1920, he had made a cut-out by pasting large posters on a cardboard to be placed in the lobby as an advertisement. It was a three-sheet cut-out, the size of a sheet being 28 by 41 inches. He was carrying this cut-out through the theater from the rear to the front, and in going down the aisle he struck against one of the seats and injured his leg. He continued at work, though he limped somewhat from the injury, and a few weeks later, in going down the aisle in the performance of his duties, he again came in collision with the end of the seat, and injured the same leg in the same place. He fell to the floor and suffered a good deal of pain, was finally removed to his home, but in a few days returned to work, and continued at work for several weeks. His injury getting worse, he was obliged to quit, and an examination by physicians disclosed that he was affected with a malignant tumor. His attending physician testified that in his opinion it was a traumatic sarcoma; that sarcoma is a malignant growth, a tumor which has a tendency to spread and an inherent tendency to destroy life; that in his opinion a person walking down a theater aisle and bumping his knee against a seat would not ordinarily produce sarcoma, but it is very common, following even the slightest injuries. He testified that the death was primarily due to the sarcoma.

No one saw the first accident. Charles F. House, the manager of the theater, testified that he did not have any conversation with the deceased that day, but the deceased told him about the accident shortly after. He was limping around, and mentioned that his leg was sore, and said that he bumped his leg on a seat in the aisle. The second time he was hurt, he was carrying a basket of flowers down the aisle, which was a part of his duties. He told House that he bumped the same sore spot that day. He said that it bumped him the second time, and it laid him out, and he suffered severe pain and was compelled to lie on the floor for a while. He complained of pain in his leg, and limped around for two or three weeks, and then quit working for the theater and went to a hospital. Joseph Smith was employed as an operator at the theater. He did not see the accident when the deceased was injured the first time, but the deceased showed him the injury above the knee and the condition of the leg. At the time of the second accident, Smith was standing in the aisle in which the accident happened, about 15 feet from the deceased, and heard him collide with the seat and saw him fall in the aisle. He ran to him, but the deceased lay there on the floor for possibly an hour. There was no other evidence in regard to the accident.

[2, 3] The abstract of the record shows no objection made to the testimony as to the statements made by the deceased. These statements were hearsay and incompetent, but, being received without objection, they are to be considered and given their natural probative effect, as if they were in law admissible. Steel Sales Corporation v. Industrial Com., 293 Ill. 435, 127 N. E. 698, 14 A. L. R. 274; Damon v. Carrol, 163 Mass. 404, 40 N. E. 185; Diaz v. United States, 223 U. S. 442, 32 Sup. Ct. 250, 56 L. Ed. 500, Ann. Cas. 1913C, 1138; Schlemmer v. Buffalo, Rochester & Pittsburg Railroad Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681. Incompetent evidence, when not objected to, may be received and given such probative value as it naturally carries. People v. Waite, 237 Ill. 164, 86 N. E. 572; Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958, 6 L. R. A. (N. S.) 729, 8 Ann. Cas. 1024. As to the second accident, it was sufficiently shown by the testimony of Smith, who heard the collision and saw the deceased lying in the aisle, suffering pain. There is no evidence of any obstruction in the aisle, or anything which could have caused the injury which the deceased clearly suffered, except the seat, against which it is not improbable that he might have come in contact while carrying before him the basket of flowers, which would have a tendency to obstruct his vision. The evidence justifies the conclusion reached that the injury was the result of an accidental collision with the seat, and that the injury was received by the deceased in the course of and arose out of his employment.

[4] The Midway Theater was a room about 100 feet wide and 140 feet long. It contained 2,000 seats and a stage 3 feet deep, which was used only for the curtain, singers, or speakers. The pictures were projected on the screen by a projecting machine through which the film ran in front of an electric arc, which generated heat sufficient to ignite the film when not in motion. The machine was at one end of the room, and in accordance with the city ordinance was in a fireproof booth. The booth is made of concrete, with shutters, and is constructed in compliance with the ordinances of the city. This is for the protection of the patrons in the theater

from the possible ignition of the film, which is made of celluloid and is inflammable. The ordinance of the city of Rockford provides for inspection by the fire marshal, and prohibits the use of moving picture machines in public buildings, unless the machine complies with specifications enumerated in the ordinance, and unless the machine is placed in a fireproof booth or inclosure of a certain size and of certain specifications as to material, doors, latches, and openings.

Section 3 of the Workmen's Compensation Act of 1919, which was in force at the time of the occurrence of the injury to the deceased, provides that the provisions of the act shall apply automatically to all employers and their employees engaged in any enterprise in which statutory or municipal ordinance regulations are imposed for the regulating, guarding, use, or placing of machinery or appliances, or for the protection and safeguarding of the employees or the public therein, and declares that each of such enterprises is extrahazardous. Laws 1919, p. 539. The business of operating a moving picture theater is clearly within the terms of the ordinance, which prohibits the use of moving picture machines in public buildings unless they comply with the specifications enumerated in the section and unless they are placed in fireproof booths or inclosures of the kind specified in the ordinance. These conditions are imposed for the safety of employees and the public, and the plaintiff in error being engaged in that business, was automatically brought within the terms of the Workmen's Compensation Act. Since it was engaged in a business declared extrahazardous by the act, its employees engaged in the conduct of such extrahazardous business, regardless of the character of their duties, were all brought within the terms of the act. Illinois Publishing Co. v. Industrial Com., 299 Ill. 189, 132 N. E. 511; McNaught v. Hines, 300 Ill. 167, 133 N. E. 53; Porter Co. v. Industrial Com., 301 Ill. 76, 133 N. E. 652.

The judgment is affirmed.

Judgment affirmed.

(311 Ill. 269)

MILLER v. WICK et al. (No. 15707.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Wills ⇐439—Testator's intention given effect, if not against law or public policy.

In construction of a will, effect must be given intention of testator, when not in violation of a rule of law or public policy.

2. Wills ⇐656—Condition of legatee taking principal, "lawful issue," not satisfied by adoption of child.

Under bequest by childless testator of income of a fund to a nephew for life or till "he shall have a child, his 'lawful issue,' who shall attain the age of three years," whereupon the principal should be paid to such nephew, with provision that, if he did not qualify to take the principal, it should, on the nephew's death, go to other relatives or their children, he did not qualify by adopting a child of the required age notwithstanding the status of an adopted child under the adoption statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lawful Issue.]

3. Wills ⇐463—Words rejected only from absolute necessity.

Words or a clause in a will cannot be rejected, except from absolute necessity.

Appeal from Third Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; Charles M. Foell, Judge.

Suit by William Mason Miller against Edward Mason Wick and others. Decree dismissing the bill was affirmed by the Appellate Court, and complaint appeals. Affirmed.

Wetten, Pegler & Dale, of Chicago, and Stewart Taylor, of Kansas City, Mo., for appellant.

Holdom, Pratt & Zeiss and McCulloch, McCulloch & Dunbar, all of Chicago, for appellees.

FARMER, C. J. Appellant, William M. Miller, filed his bill in the superior court of Cook county to construe the will of his uncle, William A. Mason, who died testate in October, 1910. A demurrer was sustained to the bill, and a decree was entered dismissing it for want of equity. Complainant appealed to the Appellate Court. That court affirmed the decree and granted a certificate of importance, and an appeal to this court.

The testator resided in Cook county, Ill., and the estate left by him consisted entirely of personal property. He left a widow, Frances H. Mason, but no child or descendant of a child. Henry H. and Charles H. Mason, his brothers, residing in Ohio, and a sister, Cordelia Miller, residing in Kansas City, Mo. (the mother of appellant), and a nephew, Edward M. Wick, as we understand the son of a deceased sister, survived the testator. By his will he bequeathed all his property to his wife, to be held by her in trust for her own use during her life, subject to an annuity to testator's brother Charles during his life, and to his daughters if he died during the lifetime of testator's widow. The widow was given power to consume or dispose of the property for her own use. One-fourth of what was not consumed by her was to go to his nephew, Edward M. Wick, with the condition that if he died before testator's widow the one-fourth was to go to the children of the nephew. The oth-

er three-fourths was put in trust, and one-third of the income was to be paid to testator's brother Charles during his lifetime, and at his death to his children until they were, respectively, 21 years old, when the proportionate share of the child in the principal of the trust fund was to be paid over. One-third of the income was to be paid Cordelia Miller during her life and one-third to Henry H. Mason during his life, under the same requirements as to ultimate disposition of the principal. As we have stated, appellant is the son of Cordelia Miller, and the question involved in this case is as to the construction of that part of the will relating to the one-third of the income which was bequeathed to Cordelia Miller during her life.

The will provided that on the death of Cordelia Miller one-third of the income from the property held in trust should be paid to the testator's nephew, William M. Miller, appellant.

"Said payments shall continue during the life of my said nephew or until such time in his life as he shall have a child, his lawful issue, who shall attain unto the age of three years, in which event the principal of one-third part of said property given, devised and bequeathed by this article fourthly shall thereupon be paid over, delivered and conveyed by my said trustee to my said nephew, William Mason Miller."

We understand both Edward M. Wick and Charles H. Mason had children born to them during the testator's lifetime. If appellant died without qualifying, as specified in the will, to take the principal of one-third of the trust fund, then one-third of said share of the fund was to go to testator's nephew, Wick, or his children, if he was dead; one-half of the remainder was to go to Charles H. Mason, or his children; and the other one-half of the remainder was to be held in trust and the income paid to Henry H. Mason during his life, to become his absolute property if he "shall have a child, his lawful issue, who shall attain unto the age of three years." If both appellant and Henry H. Mason died without qualifying to take the principal, one-half was to be paid to the nephew, Wick, or his children, if he was dead, and the other half to testator's brother Charles, or to his children, if he was dead. Cordelia Miller died, and the income from one-third of the trust property became payable to her son, appellant, during his life, or until such time as the contingency happened which under the will would entitle him to the principal of one-third of the trust fund. Appellant is married, but seems never to have had a child born to him, and the bill alleges that in March, 1912, which was more than a year subsequent to testator's death, appellant and his wife took into their family Elaine M. Tuttle, a child less than six months old, and afterwards, in April, 1915, adopted said child under the laws of the state of Missouri; that there was subsequently a change in the law of that state, and they again adopted it in 1917. Appellant claims by his bill that upon the legal adoption of the child the requirements of the will that "he shall have a child, his lawful issue, who shall attain unto the age of three years," were complied with, and that he thereupon became entitled to one-third of the principal of the trust fund. The question, therefore, presented for decision, is whether, upon the adoption of the child he became entitled to one-third of the principal of the trust fund, or whether, under the will, it was required that he must be the father of a child born to him and his wife in wedlock, which should live to be three years old.

[1-3] It is a fundamental rule of will construction that effect must be given to the intention of the testator, when not in violation of a rule of law or public policy. Appellant contends that it clearly appears from the will that the testator's chief concern was to provide for his nephew rather than his child; that he only required the child should be a lawful one and live to be three years of age, and that the Illinois statute of adoption (Smith-Hurd Rev. St. 1923, c. 4) should be considered in construing the will. Counsel contend the purpose of the Illinois statute of adoption is to give the adopted child the same status as if it had been born to the adoptive parents in lawful wedlock, but not that of an heir of the body. Under section 5 of the Illinois adoption statute an adopted child, "for the purposes of inheritance by such child, * * * and other legal consequences and incidents of the natural relation of parents and children," shall be deemed the same as if it had been born to the adoptive parents in lawful wedlock, "except that he shall not be capable of taking property expressly limited to the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation." We do not consider that statute as specially helpful in determining what the testator meant by the language used that appellant was to receive the income from the trust fund until such time "as he shall have a child, his lawful issue, who shall attain unto the age of three years," in which event he was to receive the principal of the one-third part of the fund. It is argued that if the testator had intended to exclude an adopted child he would have manifested that intention by using words indicating it, such as "bodily issue," "bodily heir," "born," or "begotten."

Appellant cites decisions of the courts of last resort of Massachusetts, Rhode Island, and Maine, where it is said the adoption statutes are like ours, holding that, with the exception that an adopted child cannot inherit property expressly limited to the body of the parent by adoption, or inherit from

the lineal or collateral kindred of the parents by adoption, such child is to be regarded the same as if he had been born to the adoptive parents in lawful wedlock; that its status is that of issue or lineal descendant, but not that of heir of the body. Whether the Illinois statute of adoption should be applied or not in construing this provision of the will, we can construe the will in no other way than that the testator meant by "have a child, his lawful issue," a child begotten by and born to him in wedlock. The decisions appear not to be in harmony, but we cannot agree that the requirement "have a child, his lawful issue," was met when appellant adopted a child. While an adopted child, for the purpose of inheritance from its adoptive parents, has the same status as a child born to them, it cannot take property expressly limited to the bodies of the parents by adoption or inherit from their collateral kindred. So the law makes a distinction between the status of an adopted child and a child born to the adoptive parents. There would have been plausible basis for appellant's contention if the will read, "have a child who attained the age of three years," but when the language that "he shall have a child" is immediately followed by the qualification that it shall be "his lawful issue," the qualifying words would have to be disregarded to construe the will in accordance wth appellant's contention. Words or a clause in a will cannot be rejected except from absolute necessity. "All the clauses and words of the will must be construed as intended to have some meaning, and to have been used for some purpose, and must be given effect in arriving at the intention. None can be arbitrarily rejected as meaningless or surplusage." Hollenbaugh v. Smith, 296 Ill. 558, 130 N. E. 364; Winter v. Dibble, 251 Ill. 200, 95 N. E. 1093.

Counsel for appellant have in an able brief, in which a large number of cases are cited, sought to show that "child," or "issue," used in a will, where there is a general adoption statute in force, in the absence of any words or language to the contrary, indicates a person who has by adoption obtained the status of a child of the parents. But if all the words of the will are to be given effect—and there is here no absolute necessity for disregarding them—then the words of the will must be given effect according to their usual and ordinary meaning. Appellant would not be entitled to the principal of the fund until he had a child which reached the age of three years, and to be more specific the testator attached the qualification that it should be appellant's "lawful issue." As here used, the term "lawful issue" means the child must issue out of appellant in lawful wedlock, or it is meaningless. As used in this will, if it is given any meaning whatever, it must be the same as if the testator had said "issue born in lawful wedlock" or "heir of appellant's body." The meaning to be attributed to the word "issue" in a will depends upon the testator's intention, as appears from the whole will. The ordinary meaning of the word "issue" is "to proceed out of"—offspring of a common ancestor—and includes, not only a child, but descendants of a child. It is true, the word may be used in a will in a different sense, if it appears the testator did not intend it to be given the meaning the word imports, and the word may be construed as a word of purchase or of limitation, according to which construction will carry out the testator's intention. 1 Abbott's Law Dict. 645.

It seems evident the testator did not have in mind that appellant might fulfill the requirements to entitle him to the principal of the fund by the adoption of a child which was at the time of adoption past three years of age. The language of the testator warrants the construction that he had in contemplation a child born to appellant in wedlock who should survive the perilous period in child life. The reasonable conclusion is that he had in mind the hope of perpetuating his own blood, which is further indicated by the similar requirement made in the provision for his brother Henry. The argument of appellant that this conclusion is not warranted because the child took no interest in the property when it became three years old, but it became absolute in appellant, is to our minds not convincing. We think the rational and reasonable understanding of testator's purpose, to be arrived at from the language employed in the will, is that he wished appellant to have a child born in lawful wedlock, in which event, if the child attained the age of three years, appellant should become the owner of the principal of the trust fund. Then there would be a reasonable expectation that, if appellant died, there would be some one of the testator's blood to inherit the property, if any was left. We think it significant that the testator did not intend appellant should have the property when "he shall have a child, his lawful issue," but the child must live to be three years old before the property could become the appellant's. This seems to plainly indicate that testator had no thought or intention appellant should take the property when a child should be born to him, "his lawful issue," but, on account of the first three years of a child's life being regarded as the period of greatest mortality, testator did not intend the property should become appellant's when a child was born, but only when it lived to attain the age of three years. At that age the child would have passed the period of greatest peril, and it was reasonable to expect that it would survive the parent. If appellant and testator's brother Henry

failed to qualify themselves, as the will required, to take the principal of the fund, it was to go to others of testator's blood.

We do not think we would be warranted in extending this opinion by a discussion of the authorities cited by counsel on both sides. None of them are to our minds conclusive of this case. The real question here, as was true in cases cited by counsel, is; What did the testator intend by his will? All courts recognize that, because of the variations of the language used in different wills, cases construing one will are usually not controlling precedents in the construction of another will. If there is substantial identity and expression, a prior case may be regarded as a precedent. Long v. Paul, 127 Pa. 456, 17 Atl. 988, 14 Am. St. Rep. 862. The court said in Redding v. Rice, 171 Pa. 301, 33 Atl. 330:

"Precedents are of little value in the construction of wills, because when used under different circumstances and with different context, the same words may express different intentions."

And that statement of the rule is universally recognized by all courts. No decision cited by counsel requires any other conclusion in this case than that the testator, William A. Mason, meant and intended that his nephew, the appellant, should become entitled to the property only when he had a child born in lawful wedlock who lived to attain the age of three years. Any other construction of the will would defeat the testator's intention, which can only be done when the intention is contrary to law or public policy, and the construction given this will violates neither.

The superior court properly sustained a demurrer to the bill and dismissed it for want of equity.

The decree is affirmed.

Decree affirmed.

(311 Ill. 211)

In re THURBER'S ESTATE.

CORPORATION OF FINE ARTS BUILDING v. CHICAGO TITLE & TRUST CO.

(Nos. 15584, 15585.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Executors and administrators ⇐109(3)—Expenditures not reasonably necessary for benefit of estate not allowable.

Before the personal representative of a deceased person can be allowed credit for sums expended for clerk hire, rents, etc., it must be shown that the expenditures were reasonably necessary for the benefit of the estate.

2. Executors and administrators ⇐109(1)—Personal representative incurs personal liability for costs of administration.

Costs attendant on the administration of a decedent's estate are debts of the decedent only in the sense of constituting a necessary incident to the post-mortuary disposition of his property, and the person having charge of the administration necessarily incurs a personal liability to discharge them.

3. Executors and administrators ⇐109(1)—Debts created by executor after testator's death not claims against estate, funeral expenses excepted.

An executor is without power to create a debt against the estate of the deceased, and debts so created cannot be filed as claims against deceased's estate, with the exception of funeral expenses, which is a charge against the estate imposed by law, because of the peculiar necessities of the situation.

4. Executors and administrators ⇐109(1)—Representative allowed credit for necessary disbursements in administering estate.

The proper mode of meeting legitimate expenses of administration is for the representative to make the necessary disbursements for which he will be allowed credit in his accounts.

5. Executors and administrators ⇐93(1)—Rental expense incurred by executrix in continuing deceased's business for 2½ years held not allowable as an expense of administration.

Personal representative of deceased's estate *held* not justified in continuing occupancy of a large building, only a portion of which was occupied by deceased's business under a lease, for 2½ years, in order to dispose of merchandise on hand worth $60,000, thereby incurring expenditures for rent of $60,000, and such rent could not be allowed as an expense of administration, in absence of showing rent charges incurred were beneficial to the estate or reasonably necessary, and especially where the lessors took no steps to close the estate and have their claims for rent settled.

Appeals from First Branch Appellate Court, First District, on Appeals from Circuit Court, Cook County; Thomas G. Windes, Judge.

In the matter of the estate of Winfield Scott Thurber, deceased. Claims were presented as administration expenses by the Corporation of Fine Arts Building and by trustees of the estate of Charles A. Chapin, deceased, which claims were opposed by the Chicago Title & Trust Company. On appeal from the probate court, the circuit court sustained demurrers to the petitions, and its judgments were affirmed by the Appellate Court, and petitioners appeal. Judgments of Appellate Court affirmed.

Tenney, Harding & Sherman, of Chicago, for appellants.

Bangs & Frankhauser and Judah, Willard, Wolf & Reichmann, all of Chicago (Arthur M. Cox, of Chicago, of counsel), for appellee.

THOMPSON, J. The Corporation of the Fine Arts Building filed a petition in the probate court of Cook county, in which it alleged, among other things, that it was on March 31, 1915, and for several years prior thereto, the owner of a building known as 408 South Michigan avenue, in Chicago; that Winfield Scott Thurber during his lifetime was a tenant in possession of said building, under a lease demising the building for a term of 10 years ending April 30, 1919, at a monthly rental of $2,166.67, payable in advance on the 1st day of each month; that a portion of the premises was occupied by Thurber for the exhibition and sale of paintings and other works of art; that the rest of the premises were sublet by Thurber to other tenants; that Thurber died September 24, 1913, and five days later his widow, who was the sole beneficiary under his will, qualified as executrix of his estate; that claims were filed against the estate on account of rent from September 1, 1913, to October 1, 1914; that these claims were allowed as of the seventh class, and that no question is raised concerning them; that there was entered October 1, 1913, in the probate court an order granting leave to the executrix to continue the business of deceased for a period of 60 days on condition that she would account for all profits and be personally liable for all losses; that no report of the conduct of the business has been filed; that thereafter, November 12, an order was entered authorizing the executrix to sell the stock of goods of deceased in said business for not less than the appraised value of $61,910.50; that no report of the sale has been filed, and that no sale was had in accordance with the terms of the order; that the executrix continued to occupy the premises, and displayed and offered for sale from day to day in the premises the merchandise belonging to Thurber's estate; that Thurber had established a good will, the value of which, on account of the peculiar nature of the business, would have been lost if the executrix had moved from the premises; that it was necessary, in order to conserve and protect the estate, for the executrix to continue to conduct the business in the same location; that the rental value of the premises exceeded the rent reserved in the lease, and that the lease was an asset of the estate which could be preserved only by continued occupancy; that April 1, 1915, petitioner conveyed the premises by warranty deed to the trustees of the estate of Charles A. Chapin, deceased. The petition prays that allowance be made—

"for the fair rental value of the said premises from October 1, 1914, to April 1, 1915, as an expense of administration arising out of the necessary use and occupation of said building by said executrix for the benefit of said estate, the fair rental value of which your petitioner states is at least equal the rent reserved in the said lease."

A similar petition was filed on behalf of the Chapin estate, asking that rent from April 1, 1915, to April 1, 1916, be awarded to it as an expense of administration; both petitioners praying that their claims be ordered paid prior to the claims of other creditors. The probate court held that the petitions were not sufficient in law to entitle petitioners to have the fair rental value of the premises allowed as an expense of administration. On appeal the circuit court sustained a demurrer to the petitions, and its judgments were affirmed by the Appellate Court. Certificates of importance having been granted, further appeals are prosecuted to this court. The appeals have been consolidated here for hearing.

[1-5] The subject-matter of this litigation has been before this court in Chicago Title & Trust Co. v. Fine Arts Building, 288 Ill. 142, 123 N. E. 300, and on the former hearing we held that it was the function of an executor to close up an estate, and not to continue to conduct a retail store business. The executrix in this case had no authority from the court to continue the business of deceased after December 1, 1913. Notwithstanding this, she continued the business for nearly 2½ years, and incurred, aside from other heavy obligations, an obligation for rent that exceeded by several thousand dollars the total appraised value of the stock of merchandise. Petitioners acquiesced in this wrongdoing of the executrix, and are certainly entitled to no special consideration. If they did not actually coerce her to continue the business by reason of the terms of the lease, they did not take steps to have the estate closed and their claims settled. Before the personal representative of a deceased person can be allowed credit for sums expended for clerk hire, rents, etc., it must be shown that the expenditures were reasonably necessary for the benefit of the estate. There are no facts alleged in the petitions before us which show that the rent charges incurred were beneficial to the estate, or that they were reasonably necessary, nor do we conceive of any state of facts which would justify a personal representative in continuing to occupy a large building, only a portion of which was occupied by the business of the deceased, for 2½ years, in order to dispose of the merchandise on hand. It seems obvious to us that no situation could justify the expenditure of $60,000 for rent in order to hold the premises while the personal representative disposed of $60,000 worth of merchandise.

On the former hearing we also held that an expense of administration was a matter which arose out of the action of the personal representative, and that it constituted a claim against the representative. The costs attendant upon the administration are debts of the decedent only in the sense of constituting a necessary incident to the post-mortuary

disposition of his property. Since they imply the act or contract of the person having charge of the administration, such person necessarily incurs a personal liability to discharge them. 2 Woerner on Administration (3d Ed.) § 356; Vincent v. Morrison, Breese, 227; Brown v. Quinton, 80 Kan. 44, 102 Pac. 242, 25 L. R. A. (N. S.) 71, 18 Ann. Cas. 290; Clark v. Sayre, 122 Iowa, 591, 98 N. W. 484; Brown v. McGee's Estate, 117 Wis. 389, 94 N. W. 363; Thomas v. Moore, 52 Ohio St. 200, 39 N. E. 803. An executor has no power, in such capacity, to create a debt against the estate of the deceased, and debts created after the death of the testator cannot be filed as claims against his estate. 3 Schouler on Executors (6th Ed.) § 2457; Dinsmoor v. Bressler, 164 Ill. 211, 45 N. E. 1086. A well-recognized exception to this rule is the claim for funeral expenses, which is not, strictly speaking, an expense of administration, and which is not a debt of the decedent, but is a charge against the estate, imposed by law because of the peculiar necessities of the situation. This is a proper and necessary exception, in view of the fact that burial must often be provided before an executor or administrator can be appointed. The proper mode of meeting legitimate expenses of administration is for the representative to make the necessary disbursements, for which he will be allowed credit in his accounts. The contrary view, expressed in Greene v. Grimshaw, 11 Ill. 389, is not supported by authority and has never been followed in this state.

The Appellate Court properly affirmed the judgments of the circuit court dismissing the petitions, and its judgments are therefore affirmed.

Judgments affirmed.

(311 Ill. 191)

HESS v. BARTMANN et al. (No. 15839.)

(Supreme Court of Illinois. Feb. 19, 1924.)

Courts ⇐219(34)—Suit to declare deed mortgage does not involve freehold.

A suit to declare a deed a mortgage and to redeem does not involve a freehold.

Appeal from Circuit Court, Du Page County; William J. Fulton, Judge.

Suit by Charles F. Hess against John Bartmann and others. Decree for defendants, and plaintiff appeals. Cause transferred to Appellate Court.

George W. Thoma, Bunge, Harbour & Schmidt, and Carnahan & Slusser, all of Chicago, for appellant.

Michael Kross, of Elmhurst (William F. Struckmann, of Chicago, of counsel), for appellees.

FARMER, C. J. Appellant, in February, 1922, executed to appellees a deed purporting to convey to them for $15,000 certain real estate in the city of Elmhurst, Du Page county, Ill. He filed the bill in this case to have the deed declared a mortgage and for the right to redeem. The bill alleges the deed was given to secure $15,000 advanced by the grantees to pay indebtedness of the grantor in that amount, part of which was secured by mortgage on the premises, part of it was in judgment, and a smaller amount for which appellant's unsecured notes were held by his creditors. The bill alleges it was agreed between him and the grantees that if he should within 18 months repay to the appellees $15,000, also the further sum of $1,000, and pay them $140 per month for the use of the money until the $16,000 was paid, then appellees would reconvey the premises to appellant. Appellees answered denying the deed was made as security for a loan and alleged the conveyance was made in consummation of an unconditional purchase. On a hearing the court dismissed the bill for want of equity, and this appeal brings the case to this court for review.

The theory upon which the appeal is brought direct to this court is that a freehold is involved. There is no other question raised by the assignment of errors which would give this court jurisdiction. We have held a suit to declare a deed a mortgage and to redeem does not involve a freehold. Hajicek v. Goldsby, 300 Ill. 372, 141 N. E. 140, and cases there cited; also Reagan v. Hooley, 247 Ill. 430, 93 N. E. 380, and cases cited in the opinion.

The case will be transferred to the Appellate Court for the Second District.

Cause transferred.

(311 Ill. 29)

PEOPLE ex rel. THAXTON, County Collector, v. COAL BELT ELECTRIC RY. CO. (No. 15688.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Taxation ⇐630—Certificate of publication held insufficient to confer jurisdiction to render judgment for delinquent taxes.

A certificate of publication of notice of intention to apply for judgment for delinquent taxes, reciting that the publisher of a regularly published newspaper within the meaning of the law, having been established more than six months, had published a list of all lands in the county which were delinquent, was insufficient to confer jurisdiction to render judgment against such delinquent lands for taxes, in view of Revenue Act (Laws 1871-72, p. 1) §§ 182, 186, and Laws 1909, p. 288, for failing to certify the relation of the person making the certificate to the newspaper, and that the newspaper had been regularly published for at least six months prior to the first publication of the notice.

2. Evidence ⟸5(2)—No judicial notice taken of who are newspaper publishers.

Courts do not take judicial notice of who are publishers of newspapers.

3. Taxation ⟸642, 643—Delinquent list serves as a declaration and the notice as process in tax proceedings.

Where an application for judgment and order of sale against lands for nonpayment of taxes is made, the delinquent list serves as a declaration and the notice as process.

4. Taxation ⟸630—Proof of publication of notice must be made in manner required by law to give court jurisdiction in tax proceedings.

Acts 1909, p. 288, § 1, stating the manner in which notices required by law shall be published is jurisdictional, and to give the county court jurisdiction to enter a judgment for delinquent taxes and order of sale, the notice of application for judgment must be published in the form and time required by law and proof of the publication made in the manner required by the statute.

5. Appeal and error ⟸4—Void judgment reviewable by appeal as well as by writ of error.

Where a judgment rendered in proceedings for the collection of delinquent taxes was void for lack of jurisdiction, it was reviewable by an appellate tribunal by appeal as well as by writ of error.

6. Appearance ⟸26—Court held bound to determine on the merits objections filed to rendition of default judgment without jurisdiction.

Where the court was without jurisdiction to enter a judgment by default for delinquent taxes and acquired jurisdiction of defendant only by its entry of appearance and filing objections thereto, the court erred in overruling the objections on the ground that the judgment by default was in full force and effect, no motion to set it aside having been made, and that the objections were filed too late, the court being bound to hear and determine the objections on the merits.

Appeal from Williamson County Court; A. D. Morgan, Judge.

Proceedings by the People on relation of Melvin Thaxton, County Collector, against the Coal Belt Electric Railway Company, Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Leon A. Colp, of Marion, and Josiah Whitnel, of East St. Louis (Edward J. White, of St. Louis, Mo., George B. White, of Marion, and L. O. Whitnel, of East St. Louis, of counsel), for appellant.

D. L. Duty, State's Atty., of Marion, Ray D. Henson, of Johnston City, and George T. Carter, of Marion, for appellee.

FARMER, C. J. This is an appeal from a judgment of the county court of Williamson county against the property of appellant for certain taxes delinquent for the year 1922.

The county collector caused publication to be made in a newspaper of Williamson county giving notice of his intention to make application to the county court, at the June term thereof, for judgment for the taxes and order of sale of delinquent lands in the county. The publication contained a description of appellant's lands in Williamson county and the amount of respective taxes thereon and other data. A certificate of the publication of such advertisement in the Herrin Journal on May 14 was signed and sworn to and was filed May 15, 1923, with "S. E. Storme, County Clerk." Application for judgment and order of sale was made by the collector, and on Monday, June 4, which was the first day of the June term of the county court, judgment by default was entered. on June 6 appellant filed objections to taxes in West Marion and Blairsville townships and the village tax of the village of Energy. Hearings were had, and on June 27 the court ruled that said objections were filed after the time allowed therefor by law and after judgment by default had been entered against the property; that no motion had ever been made to set aside or modify the default judgment; that the same was in full force and effect, and for those reasons it overruled each of appellant's objections and granted appellant's prayer for an appeal.

[1-3] It is contended by appellant that the court had no jurisdiction to enter the default judgment and that the judgment is void. The certificate of the publisher failed to certify that he was the publisher of the Herrin Journal, the paper in which the delinquent list was published, or that such newspaper had been regularly published for at least six months prior to the first publication of the advertisement. In McChesney v. People, 174 Ill. 46, 50 N. E. 1110, it was held that a certificate of publication is defective in failing to certify the relation of the person making it, to the newspaper. Courts do not take judicial notice of who are publishers of newspapers, and the fact should affirmatively appear. The certificate here involved is very similar to that held defective in the McChesney Case, supra.

Where an application for judgment and order of sale against lands for nonpayment of taxes is made, the delinquent list serves as a declaration and the notice as process. Smythe v. People, 210 Ill. 76, 76 N. E. 82; Wiggins Ferry Co. v. People, 101 Ill. 446. At the time the McChesney Case was decided, section 186 of the Revenue Act (Laws 1871–72, p. 1) required the publisher of the delinquent list to furnish to the collector four copies of the paper containing the delinquent list, to one of which such publisher must have attached his certificate, under

oath, of due publication. This copy and certificate the collector was required to present to the county court at the time judgment was prayed, and it was thereafter made a part of the county court records. Section 182 of the Revenue Act requires the publication of the delinquent list once "in a newspaper" printed and published in the county, at least three weeks previous to the term of the county court at which judgment is asked. Neither that section nor section 186 as amended gives any directions as to how proof of the publication shall be made. Section 1 of chapter 100, entitled "Notices," provides that when any notice required by law is to be published in a newspaper and no other mode of proving the same is provided, the certificate of the publisher, with copy of the notice attached, stating the number of times published, the dates of the first and last papers containing the same, shall be sufficient proof of publication. In 1909 the General Assembly passed an act which provided that when it is required by law that any legal notice shall be published in a newspaper, it shall be held to mean a newspaper which has been regularly published for at least six months prior to the first publication of the notice. Cahill's Stat. c. 100, par. 10. The certificate here recites: "I, D. C. Grear, publisher of the Herrin Journal, at Herrin, Williamson county, a regularly published newspaper within the meaning of the law, having been established more than six months, hereby certify that the attached copy of the said Herrin Journal contains a list of all lands and lots in Williamson county, Illinois, which were delinquent," etc., and that the list was published in every copy of the paper May 14, 1923. It was held in the McChesney Case a certificate of the purported publisher of the newspaper, substantially like the one in this case, failed to certify to the relation of the person making it to the newspaper. When that case was decided, section 186 of the Revenue Act required a certificate of the printer, publisher, or financial agent of the newspaper. As amended, section 186 does not contain the requirement for proof of publication, but section 1 of the chapter, entitled "Notices," requires proof of publication to be made by the certificate of the publisher, by himself or his authorized agent. If the certificate provided for under section 186 of the Revenue Act before its amendment in 1919 required that the publisher certify to the fact that he was the publisher, as held in the McChesney Case, the same is true of the requirement of section 1 of the chapter on Notices, and the certificate to the delinquent list here was not sufficient proof of publication.

There is another reason why the proof of publication was defective. Section 1 of the act of 1909 (Laws 1909, p. 288) on Notices defines a newspaper to mean a newspaper which has been regularly published for at least six months prior to the publication of the notice. The recital of the certificate here describing the Herrin Journal as "a regularly published newspaper within the meaning of the law, having been established more than six months," is not a statement that it had been regularly published for at least six months prior to the first publication of the notice. What D. C. Grear certifies to is not that he is the publisher of the Herrin Journal and that it had been regularly published for six months prior to the publication of the notice. He only certified that the attached copy of the Herrin Journal contained a list of the lands and lots which were delinquent for the taxes payable in 1923 and that the notice was published in each copy of the issue of May 14, 1923.

[4] A proceeding to sell lands for delinquent taxes is a proceeding in rem, and to give the county court jurisdiction to enter a judgment and order of sale the notice of the application for judgment must be published in the form and in the time required by law and proof of the publication made in the manner required by the statute. The publication and proof of the notice are the process by which the court obtains jurisdiction. It was held in City of Moline v. Chicago, Burlington & Quincy Railroad Co., 262 Ill. 52, 104 N. E. 204, that the statement required by section 1 of the act of 1909 on notices is jurisdictional. The proof of publication of the notice in this case did not meet the requirements of the law, and the court had no jurisdiction to render the judgment.

[5] Appellee contends that even if the judgment was void for want of jurisdiction it cannot be reviewed by appeal but only by writ of error. Here appellant objected to the taxes against it in certain municipalities two days after the judgment was rendered by default. It did not specifically ask in the written objections that the judgment be set aside, but as it objected to judgment for the taxes that objection could not prevail, however meritorious, unless the judgment was set aside. The court heard the evidence on the objections and overruled them, reciting in its judgment that the objections were filed too late and that the judgment was in full force and effect. Appellant prayed, and the court granted, an appeal to this court upon appellant giving bond in 30 days and filing bill of exceptions in 90 days. A void judgment may be reviewed by an appellate tribunal by writ of error or appeal. Goodsell v. Boynton, 1 Scam. 555; People v. Evans, 262 Ill. 235, 104 N. E. 646; 3 Corpus Juris, 467. The Goodsell Case, supra, was an appeal from a void judgment, and this court reversed it because "the proceedings were coram non judice."

[6] It is apparent from the judgment appealed from that the court did not base its

decision on the merits of the objections but upon the ground that a valid judgment had been rendered before the objections were filed. As the default judgment was void for want of jurisdiction, the court should have considered the objections, determined them on their merits, and rendered judgment accordingly.

The judgment is reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

Reversed and remanded.

(311 Ill. 59)

PEOPLE ex rel. THAXTON, County Collector, v. MISSOURI PAC. R. CO. (No. 15689.)

(Supreme Court of Illinois. Feb. 19, 1924.)

Appearance ⇐26—Court held bound to determine on the merits objections filed to rendition of default judgment without jurisdiction.

Where the court was without jurisdiction to enter a judgment by default for delinquent taxes and acquired jurisdiction of defendant only by its entry of appearance and filing objections thereto, the court erred in overruling the objections on the ground that the judgment by default was in full force and effect, no motion to set it aside having been made, and that the objections were filed too late, the court being bound to hear and determine the objections on the merits.

Appeal from Williamson County Court; A. D. Morgan, Judge.

Proceeding by the People, on relation of Melvin Thaxton, County Collector, against the Missouri Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Leon A. Colp, of Marion, and Josiah Whitnel, of East St. Louis (Edward J. White, of St. Louis, Mo., George B. White, of Marion, and L. O. Whitnel, of East St. Louis, of counsel), for appellant.

D. L. Duty, State's Atty., of Marion, Ray D. Henson, of Johnston City, and George T. Carter, of Marion, for appellee.

CARTWRIGHT, J. The county collector of Williamson county applied to the county court on the first day of the June term, 1923, for judgment against the property of the appellant, the Missouri Pacific Railroad Company, delinquent for taxes of 1922. To establish the fact of jurisdiction of the appellant to render the judgment prayed for, he presented a certificate of the publication in a newspaper of a list of lands and lots delinquent for taxes, and the court entered judgment by default against the appellant for the taxes. Two days later, on June 6, 1923, the appellant appeared and filed objections to various taxes. The court heard the objections and the evidence in support of them, and afterward, on June 27, 1923, entered a judgment reciting that the judgment by default was in full force and effect and the objections were filed too late and were therefore overruled. The objections could not be overruled for the reason stated, which would be a finding that they were not well taken, and the order was equivalent to striking them from the files because the appellant had no right to file them. An appeal from the judgment was allowed and perfected.

The appellant, by the brief and argument in its behalf, contends that the court was without jurisdiction to enter the judgment by default and the judgment was therefore void, and the court erred in not deciding the case on the merits. Counsel for the appellee state that the case is identical with that of People v. Coal Belt Electric Railroad Co. (No. 15688) 142 N. E. 495; that the decision in that case will be controlling in this, which is therefore submitted without argument to be so controlled.

The decision in the case referred to is that the county court was without jurisdiction to enter the judgment by default and acquired jurisdiction of the appellant only by its entry of appearance and filing the objections, which the court was bound to hear and determine on the merits. Accordingly, the judgment in this case is reversed and the cause remanded, with directions to consider the objections and determine them on the merits.

Reversed and remanded, with directions.

(311 Ill. 61)

CONSOLIDATED COAL CO. OF ST. LOUIS v. INDUSTRIAL COMMISSION et al. (No. 15744.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Master and servant ⇐385(15)—"Temporary disability" within compensation act defined; "permanent disability."

The period of temporary total disability is that temporary period after the accident during which the injured employee is totally incapacitated for work by reason of the illness attending the injury; "temporary disability" as distinguished from "permanent disability" being a condition that exists until an injured workman is as far restored as the permanent character of the injuries will permit.

[Ed. Note.—For other definitions, see Words and Phrases, Permanent Disability.]

2. Master and servant ⇐405(6)—Evidence in compensation case held to justify finding as to period of temporary total disability.

Evidence in compensation case *held* to justify the finding of the Industrial Commission as to the length of the period of temporary total disability.

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3. Master and servant ⟸405(1)—Compensation award must be supported by preponderance of evidence.

An award of the Industrial Commission cannot stand unless supported by a preponderance of the competent evidence in the record.

4. Master and servant ⟸417(7)—Court will give due weight to finding of fact in compensation case.

Where facts are controverted, and the determination of a disputed question of fact depends upon the credit to be given contradictory statements, the courts will give due weight to the finding of the Industrial Commission.

5. Master and servant ⟸417(8)—Lack of finding as to earning capacity held not to invalidate award of compensation for permanent partial incapacity.

Where the evidence of an injured employee is such, if believed, to justify a finding that he was wholly incapable of performing any work, an award of compensation for permanent partial incapacity in a less amount than was authorized by the statute, if a finding of total capacity had been made, will not be set aside because of failure of the commission to make a definite finding as to the amount the employee was able to earn.

Error to Circuit Court, Williamson County; D. T. Hartwell, Judge.

Proceedings under the Workmen's Compensation Act by Lee Montgomery against the Consolidated Coal Company of St. Louis. From a judgment of the Circuit Court confirming an award of the commission, the employer brings error. Judgment affirmed.

L. O. Whitnel and Edgar P. Holly, both of East St. Louis, for plaintiff in error.

A. W. Kerr, of Chicago, and George R. Stone, of Marion, for defendant in error.

THOMPSON, J. January 29, 1921, Lee Montgomery was accidentally injured while in the employ of plaintiff in error. He was awarded $15 a week for 33⁴/₇ weeks' temporary total disability and $9.15 a week for 382⁵/₇ weeks of permanent partial incapacity for work. The circuit court of Williamson county confirmed this award, and a petition was filed for writ of error. The reply to this petition, which is permitted by rule 43 of this court, was not filed, and the writ was awarded.

Defendant in error testified that he is 50 years of age; that he is married and is living with his wife; that he has five children, the eldest of whom is 9 years of age; that prior to the date of the accident his general health was good; that he had never required or received the services of a physician; that he had been loading coal in the mine for about 8 years; that on the morning of his injury he was pushing a car into place for loading; that he was pushing with all his might when the car moved suddenly and caused him to fall; that he struck the lower end of his spinal column on the bumper; that he was in such pain that he was not able to do anything for half an hour; that after resting he got up and loaded the car; that he suffered great pain, and when the car was loaded he quit for the day; that he reported to Dr. Evans, the company physician; that he continued to report to him almost daily until the last of June; that Dr. Evans applied liniments for some time and later gave him hypodermic injections; that later he was examined by other physicians for the company; that he has tried to do light work about the house and in his garden, but is unable to work more than 20 minutes at a time; that he can stoop over without suffering much pain, but can hardly straighten up again; that he suffers pain in his back and head all the time; that he has not been able to work since he was injured, and that his condition is not improving.

Dr. O. N. Evans testified that he is a practicing physician at Clifford; that he treats most of the employees injured in the mines; that he treated Montgomery; that Montgomery first came to him January 30, and reported that he had been injured January 12 by falling and striking his right flank against a bumper; that he made an examination and found a spasticity of the lumbar muscles; that there were no abrasions; that he strapped his back with adhesive plaster, and kept it on for about a week; that he tried local applications of liniments, and later gave him hypodermic injections; that when he first began treating him he concluded that he would be disabled about 2 weeks; that later he discovered that his conclusion was wrong; that he treated him until about the first of July; that his treatments were for a general rheumatic condition.

Three other physicians examined Montgomery at the request of plaintiff in error—Dr. J. B. Moore, May 23, 1921; Dr. W. H. Gilmore, May 24, 1921; and Dr. I. T. Roberts, May 22, 1922. They stripped Montgomery, and gave him a thorough physical examination with and without the use of the X-ray. They found his blood pressure high—systolic 164 and diastolic 100; his posture slightly stooped, with the trunk anteriorly inclined on the pelvis; his gait slow but unsteady; the organs of his body in a normal, healthy condition, although his general appearance did not indicate good health. The radiographs showed osteo-arthritis of the spine, with a bony proliferation, and compression of the left side of the second and third lumbar vertebræ. It was the opinion of the physicians that this diseased condition of the lumbar segments of the spinal column was due to a diseased condition of

several years' standing—probably since childhood; that a spine diseased as Montgomery's was would be more susceptible to strain than a normal spine; and that a trauma might excite a dormant diseased condition. Dr. Roberts expressed the opinion that Montgomery was able to load coal, though he might suffer some discomfort a part of the time. Dr. Moore did not think he was able to do such heavy work as loading coal, which would require stooping and lifting, but he was of the opinion that he could do light work. Dr. Gilmore expressed no opinion on the subject.

[1, 2] Plaintiff in error contends that there is no evidence in the record justifying the finding of the commission with respect to the length of the period of temporary total disability. This period is that temporary period immediately after the accident during which the injured employee is totally incapacitated for work by reason of the illness attending the injury. It is the period of the healing process. Temporary, as distinguished from permanent, disability is a condition that exists until an injured workman is as far restored as the permanent character of the injuries will permit. Stromberg Co. v. Industrial Com., 305 Ill. 619, 137 N. E. 462; Mt. Olive Coal Co. v. Industrial Com., 295 Ill. 429, 129 N. E. 103. It is easy enough to determine when this period begins, but it is not always possible to determine with mathematical exactness when it ends. The arbitrator designated by the commission to hear this case found that the period ended the day before the hearing was held. The evidence before him showed that the workman was up to that time wholly incapacitated for work, and that throughout most of the period he had been under the constant care of the company physicians. Up to that time no one seems to have known whether Montgomery's condition was temporary or permanent. This portion of the award finds substantial support in the record, and it will not be set aside.

[3-5] Plaintiff in error contends, further, that there is no evidence in the record to support the finding that $9.15 is the difference between the amount Montgomery earned each week before he was injured and the amount he is able to earn now. We have often held that the award of the Industrial Commission cannot stand unless it is supported by a preponderance of the competent evidence in the record. Groveland Coal Co. v. Industrial Com., 309 Ill. 73, 140 N. E. 29; Mt. Olive & Staunton Coal Co. v. Industrial Com., 301 Ill. 521, 134 N. E. 16. If the commission believed the testimony of Montgomery, it would have been justified in finding that he was wholly incapable of performing any work. The record shows that Montgomery earned on the average $33.60 a week before he was injured, and that he has earned nothing since. Where the facts are controverted and the determination of a disputed question of fact depends upon the credit to be given contradictory testimony, the courts will give due weight to the finding of the commission, which is qualified by experience and special study to weigh facts applicable to cases within its jurisdiction. Inland Rubber Co. v. Industrial Com., 309 Ill. 43, 140 N. E. 26; Field & Co. v. Industrial Com., 305 Ill. 134, 137 N. E. 121. The Industrial Commission has found, as contended by plaintiff in error, that Montgomery is able to earn something at some suitable employment, and has made an award which is less than that authorized by the statute, if the finding had been that Montgomery was wholly incapacitated for work. While the commissioner should have made a definite finding of the amount Montgomery is able to earn, this omission ought not to cause a reversal of the judgment and further delay. This cause has been dragging through the several tribunals provided by statute for 3 years, and further delay means a denial of justice. The award is well within the limits of the evidence, and it will be confirmed.

The judgment of the circuit court is affirmed.

Judgment affirmed.

(311 Ill. 299)

SOUTHERN ILLINOIS GAS CO. v. COMMERCE COMMISSION. (No. 15443.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Corporations ⟸588 — Corporation created by consolidation of other corporations, if public utility, must obtain commerce commission's authorization of bond issue.

A single corporation, created by the consolidation of two or more other corporations under General Corporation Act, §§ 65, 67, 69–71, cannot, if a public utility, issue bonds under section 72, authorizing the issuance of bonds by a corporation created by the consolidation of other corporations, without the authorization of the commerce commission, under Public Utilities Act, § 21.

2. Corporations ⟸586—Consolidation of two or more corporations under General Corporation Act dissolves original corporations and creates new one.

The effect of the consolidation of two or more corporations under General Corporation Act, §§ 65, 67, 69–72, is to dissolve the original corporations and to create a new one.

3. Corporations ⟸588 — Corporation created by consolidation of other corporations required to pay fees for organization as new corporation.

New corporation created by the consolidation of two or more corporations under General Corporation Act, §§ 65, 67, 69–72, is re-

quired to pay fees for its organization in the same manner as any other new corporation.

4. Corporations ⊂=588—Bonds issued by consolidated corporation held not subject to fee payable to commerce commission for authority to issue bonds; "refund."

Bonds issued by new public utility corporation created by the consolidation of existing corporations under General Corporation Act, §§ 65, 67, 69–72, for the payment and cancellation of bonds previously issued by constituent corporations, *held* not subject to the charge of 10 cents for every $100, under Public Utilities Act, § 31, providing for the payment of such fee to the commerce commission for authority to issue bonds under section 21, unless the bonds are issue to exchange, refund, discharge, or retire other bonds, since the new corporation assumed old corporations' obligations, and the issuance of bonds for payment and cancellation of such obligations constituted a refunding of bonds, within the Public Utilities Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Refund.]

Appeal from Circuit Court, Jackson County; Albert E. Somers, Judge.

Petition by the Southern Illinois Gas Company to the Commerce Commission for modification of Public Utilities Commission's order fixing petitioner's fee for permission to issue bonds. From a judgment reversing the Commission's order denying the petition, and granting the petition, the Commission appeals. Affirmed.

Edward J. Brundage, Atty. Gen., Albert D. Rodenberg, of Springfield, William E. Trautmann, of East St. Louis, and James W. Gullett, of Springfield, for appellant.

B. P. Alschuler, of Aurora, and Charles E. Feirich, of Carbondale, for appellee.

DUNN, J. The question for determination in this case is whether, upon the consolidation of two or more corporations and the issue of bonds by the consolidated corporation for the payment and cancellation of bonds previously issued by one of the constituent corporations, such bonds are subject to the charge of 10 cents for every $100 under section 31 of the Public Utilities Act (Smith-Hurd Rev. St. 1923, c. 111⅔), or are exempt from such charge under the proviso to that section.

On April 6, 1921, the Public Utilities Commission entered an order, which was modified by a supplemental order entered on June 21, 1921. As modified the order authorized the consolidation of the Southern Illinois Gas Company, the Murphysboro Waterworks and Electric and Gas Light Company, and the DuQuoin Light, Heat & Power Company, all domestic corporations, under the name of Southern Illinois Gas Company, authorized the new corporation to issue bonds of the par value of $940,000, directed that so much of the issue of bonds as should be required be used to discharge and cancel the indebtedness and liabilities of the constituent corporations, and required the payment of a fee of 10 cents for every $100 of bonds authorized by the order to be issued. On November 16, 1921, the consolidated corporation filed its petition with the commerce commission, showing that the constituent companies had issued $400,000 of bonds under the authorization of the Public Utilities Commission, and had paid the fee of 10 cents on the $100 required by law on such issue, and that $400,000 of the bonds issued by the consolidated company had been set aside to refund these bonds, and praying for a modification of the order of the commission by fixing the amount of the fee to be paid at $540 only, and by finding that the corporation was entitled to recover the excess which it had paid, $400. The commission denied the petition, but the circuit court of Jackson county on appeal reversed the order as to the fees, and modified and reduced the amount to $540, and the commission appealed.

The facts as alleged in the petition and found by the commission and the court are undisputed.

Section 21 of the Public Utilities Act provides that a public utility may issue bonds for the discharge or lawful refunding of its obligations, provided it shall first have secured from the commission an order authorizing it to do so. Section 31 provides that the commission shall charge every public utility receiving permission for the issue of bonds 10 cents for every $100 of the amount authorized, which shall be paid into the state treasury before any bonds shall be issued, provided that no fee shall be required for permission to issue bonds to exchange, refund, discharge, or retire any bonds, with certain exceptions, which are not applicable here.

[1] Section 65 of the General Corporation Act (Laws of 1919, p. 329), authorizes the consolidation of any two or more corporations. Section 69 provides that—

"when such merger or consolidation has been effected, the merged or consolidated corporations shall be a single corporation in accordance with the terms and provisions of the resolutions so adopted and approved, [as provided in section 67,] and shall be subject to all the duties and liabilities, and have all the rights and privileges, immunities and powers of a corporation formed under this act."

Section 70 provides:

"Such single corporations shall thereupon and thereafter possess all the rights, privileges, immunities, powers and franchises, as well of a public as a private nature, and all property, real, personal, and mixed, and all debts due on whatever account, as well as for stock subscriptions and all other things in action, of,

or belonging to, each of such corporation, and be subject to all the restrictions, liabilities and duties of each of such corporations so merged or consolidated. All property, rights, privileges, immunities, powers and franchises and all and every other interest shall thereafter be as effectually the property of the single corporation as they were of the several and respective merging or consolidating corporations."

Section 71 provides that—

"all rights of creditors and all liens upon the property of either of such merging or consolidating corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective corporations shall henceforth attach to such single corporation and may be enforced against it to the same extent as if such debts, liabilities and duties had been incurred or contracted by it."

Section 72 provides:

"When two or more corporations are merged or consolidated, the single corporation shall have power and authority to issue bonds * * * to an amount sufficient, with its capital stock, to provide for all the payments it will be required to make, or obligations it will be required to assume."

But in the case of public utilities a merger or consolidation may not be made nor may bonds be issued without the authorization of the commerce commission, as provided in the Public Utilities act. New York Central Railroad Co. v. Stevenson, 277 Ill. 474, 115 N. E. 633.

[2-4] The effect of the consolidation of two or more corporations is to dissolve the original corporations and create a new one, and the new corporation thus organized is required to pay fees for its organization as a new corporation. Scheidel Coil Co. v. Rose, 242 Ill. 484, 90 N. E. 221. The appellant argues that the creation of the new corporation was for the purpose of purchasing the three old corporations and continuing the public service. A consolidation is not a purchase, but is referred to in the statute as a merger. It has, perhaps, some of the qualities of a purchase, but it is a union of the rights and obligations of the original corporations which go out of existence, and for which the single new corporation is substituted. It succeeds to all the property, rights, privileges, immunities, powers, and franchises, and every other interest which had belonged to the merging or consolidating corporations, or to any or either of them, as provided in section 70 of the Corporation Act. Also, by the next section all debts, liabilities, and duties of the respective corporations upon the merger or consolidation attach to the single new corporation, and may be enforced against it to the extent as if such debts, liabilities, and duties had been incurred or contracted by it. Under this comprehensive language the $400,000 of bonds became by the consolidation the obligation of the appellee, for the discharge or lawful refunding of which it was expressly authorized by section 21 of the Public Utilities Act to issue bonds, subject to the provisions of the act and the order of the commission.

There is a difference between the stock tax involved in Scheidel Coil Co. v. Rose, supra, and the bond tax here, in that the law providing for the tax on the stock of a consolidated corporation was subject to no exception where there had been a previous issue of stock which had paid the tax, while the proviso to section 31 exempts from the tax bonds issued for exchanging, refunding, discharging, or retiring bonds which had paid the tax.

The case of Kansas City Railway Co. v. Public Service Com., 273 Mo. 173, 201 S. W. 74, has been referred to as sustaining the view of the appellant that the fee for issuing the bonds is a proper charge, but we do not regard the case in point. The corporation there purchased certain street railway property at a foreclosure sale, and the indebtedness against the property was extinguished by the sale. The purchaser, having procured authority for a new bond issue, claimed exemption from the tax on the issue of the bonds upon the ground that these bonds were substituted for the original bonds, and were, in effect, refunding bonds. The original bonds were extinguished by the sale, they never became a liability of the purchaser, and the court held they could not be regarded as refunding bonds.

The commission authorized the issue of $940,000 of bonds as a part of the plan of consolidation, but $400,000 of that amount was an obligation which the law imposed upon the appellee as the effect of the consolidation, and the substitution of the bonds of the consolidated company amounted to a refunding of bonds, which became by the consolidation the obligations of the appellee.

The judgment is affirmed.

Judgment affirmed.

(311 Ill. 319)

PEOPLE v. MASSIE. (No. 15561.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. False pretenses ⇐16—"Confidence game" defined.

An operation by which one obtains money of another by taking advantage of his confidence, for the purpose of betraying it and swindling him, is a "confidence game."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Confidence Game.]

2. False pretenses ⇐49(2)—Proof of intention to swindle by taking advantage of confidence necessary to convict.

One may be convicted of obtaining money by the confidence game only on proof beyond a reasonable doubt of his intention to swindle prosecuting witness out of her money by taking advantage of her confidence in him, but such confidence may be assumed.

3. Criminal law ⇐374—Evidence of false representations in similar transactions by agents of defendant's corporation held inadmissible.

In a prosecution of the president of an oil company for obtaining money for stock by the confidence game, evidence of false representations by agents of the corporation in similar transactions *held* inadmissible, in the absence of any showing that defendant authorized them.

4. Criminal law ⇐338(4, 5)—Evidence as to payments to others than defendant's company held incompetent.

In a prosecution of the president of an oil company for obtaining money for stock by the confidence game, checks offered to show that payment for oil from the company's lease was made to others than the company *held* incompetent; the transaction being between other parties.

5. Criminal law ⇐402(1)—Exclusion of testimony as to assignment of oil lease to defendant's corporation held error.

In a prosecution of the president of an oil company for obtaining money for stock by the confidence game, where it was shown that records of the corporation had disappeared and could not be found, the court erred in excluding defendant's testimony as to having seen an unrecorded assignment of an oil lease to the company by a director, to whom checks introduced by the state to show payment for oil from the lease to others than the company were made payable.

6. Criminal law ⇐402(1)—Testimony as to record of profit in corporate books held admissible.

In a prosecution of the president of an oil company for obtaining money for stock by the confidence game, where it was shown that the records of the corporation had disappeared and could not be found, and the people claimed that dividends paid by the company were paid out of the capital, defendant's testimony as to a record in a book of the company of a transaction resulting in a large profit was improperly excluded.

7. False pretenses ⇐49(2)—Intention to swindle held not shown.

In a prosecution of the president of an oil company for obtaining money for stock by the confidence game, evidence *held* insufficient to show an intention to swindle.

Error to Circuit Court, St. Clair County; George A. Crow, Judge.

John G. Massie was convicted of obtaining money by the confidence game, and brings error. Reversed.

P. C. Otwell and P. K. Johnson, both of Belleville, for plaintiff in error.

Edward J. Brundage, Atty. Gen., Hilmar C. Lindauer, State's Atty., of Belleville, and Edward C. Fitch, of Springfield (James A. Farmer and Louis Klingel, both of Belleville, of counsel), for the People.

DUNN, J. John G. Massie was indicted, jointly with Cyrus N. Noble, Herbert Todd, and Harry Springgate, for obtaining $140 of Anna Voellinger by the confidence game, was tried separately, convicted, and sentenced to the penitentiary, and has sued out a writ of error, contending that the evidence does not justify the conviction, and that the court erred in the admission and rejection of evidence, and in instructing the jury.

The plaintiff in error, at the time of the occurrences resulting in his indictment, was a physician, 42 years old, practicing his profession in Belleville, where he had resided for many years. In December, 1918, his sister wrote to him that early in that month she had married Herbert C. Todd, who was unknown to Massie. In the last week of December or first few days of January Massie sent $1,000 to Todd to invest in oil leases. On March 1, 1919, Todd came to Belleville, where Massie first met him at Massie's home, and gave Todd $1,000 more. In April, 1919, the Ilgahoma Oil Company was organized at Nowata, Okl., having a capital stock of $75,000, divided into $100 shares, with Todd, Massie, and P. D. Todd directors, and Massie was elected president. Massie had given Todd $4,200 in all, at the time, to invest in oil leases. These leases were assigned to the new company, which immediately began to develop them by drilling wells. The production of oil began in June, 1919, and after August constantly increased until January, 1920, for which month it amounted to $4,130.95. The wells were in what was known as the Shipley pool—a field of about 3,000 acres five miles west of Nowata. It contained the Wolfe lease and three Zelgar leases, which were operated by the Ilgahoma Oil Company.

Massie made his first visit to Nowata and the oil wells on October 4, 1919, when he first met P. D. Todd, Herbert C. Todd's father, as well as John F. Shipley, who

necessary equipment, power houses, pipe lines, jacks, and other supplies. There were four 100-barrel tanks, into which oil was being pumped from the wells. The company also owned the Zane 80-acre lease. His next visit was on October 28, when Clem Fisher and Albert Sainteve, two stockholders from Belleville, went with him, and they saw the oil being pumped from these wells and others which had been brought in later. He made another visit on November 18 with other Belleville stockholders, and after each of these last-mentioned visits the stockholders who accompanied him, or some of them, bought more stock and induced their friends to buy. In October the capital stock of the company was increased to $250,000. Massie received a telegram from Herbert C. Todd, containing an offer of $750,000 for the leases of the company in the Shipley pool, but it was refused, because the excess profits tax would take too large a part of the purchase money.

On October 18 a dividend of 1 per cent. was declared, payable on November 15, and on November 18 a dividend of 1 per cent. was declared, payable on the 25th days of November, December, and January to the stockholders of record on the 15th day of those months, respectively. Massie received checks for these dividends, as well as for $125 a month for his salary as president, but indorsed the checks and returned them to Todd, to be put back in the company. Other leases were purchased in Kansas and Texas, more wells were being put in, and in order to handle the leases acquired in Kansas and Texas, as well as their other fields in Oklahoma, it was resolved at a meeting of the stockholders to increase the capital stock from $250,000 to $1,500,000. In accordance with this plan, on January 28, 1920, the Ilgahoma Petroleum & Gasoline Company was organized, with a capital stock of $1,500,000, divided into $10 shares, which later took over all the property of the Ilgahoma Oil Company and issued to the stockholders of the latter company stock in the new company at the rate of three times the par value of the stock of the old company. The remaining $750,000 of stock in the new company was to be treasury stock, to be disposed of for the purchase of more leases and the payment for development. This is the history of Massie's venture in oil from its start to February 1, 1923, as narrated by himself and supported by the other evidence in the case.

On February 2 Massie was notified to come to Nowata, and he arrived there the next morning. Todd had called a meeting of the executive committee, and at that meeting a mortgage for $50,000, payable in 90 days, was executed to the Union Brokerage Company upon the Henderson, Zelgar, Zane, Tate, and Cochran leases, together with all the Ilgahoma Oil Company, and an assignment of the oil produced from those leases, as collateral security for the payment of the same indebtedness. On March 1, 1920, all the property of the Ilgahoma Oil Company was conveyed to the Ilgahoma Petroleum & Gasoline Company, and certificates of stock were issued to the stockholders of the Ilgahoma Oil Company at the rate of $3 for $1 of their stock in that company, which was canceled.

Massie had been the physician of Anna Voellinger's family for 20 years. He visited them, and his wife did so, and they were on terms of intimacy. About February 1, 1920, Anna Voellinger's brother was sick, and she was with him. Massie was attending him and talked to Anna about his good investment. She testified that he said to her, "You are five sisters, and each one ought to invest $300" with his thousands. He said:

"We are just growing richer and richer, but people don't know it; whenever you buy stock, if you don't want them, we will buy them back."

She served him a lunch, and as they sat at the table he said:

"It is a good investment; if you have any money, this is the time you can make a good investment; we pay 8 per cent., if you have any money to invest."

She testified that she saw Massie again on February 19, and he talked to her then about it. He pulled a dollar out of his pocket and said to her sister, as he laid it in her hand:

"If you give us $100, you are going to get $300 in a short time; you will get $300 for $100 in a short time."

Anna went with her sister, and she put in her $300. Anna said, "I would take stock, but I have no money on hand." She told Massie she first had to earn money. On April 9 Springgate called her on the telephone and said he was a salesman under Massie for the oil stock, and would like to see her, and within half an hour or so he was at the house. He told her he was the salesman and Massie had sent him; that he said she would like to buy some stock. She said:

"Yes, because I have great confidence in the doctor; I have known him for many years."

She bought 14 shares, for which she paid Springgate $140 cash. The certificate did not come for about four weeks, and she called up Massie's office and got her certificate on May 10. She never got any dividend. She testified that a day or two after that Massie called her on the telephone and said he would like to see her; that he and Springgate both came to her place, and Massie said he would like to sell her more stock, because "this is the place where you can invest your money and grow fat; this is the time." He

stock, because there were lots more oil wells; that he just came back from the fields, and he asked her to give him a check for $1,000. Her sister had just got a check by mail on May 8 for a dividend in a letter signed by Todd, who also signed the check. Massie asked her if she heard her sister got her dividend, and she answered that she knew it; that she went to the bank and collected it.

On May 10 Massie went to Nowata and met Todd there, who told him that the mortgage given in February was being foreclosed; that the production of the wells had dropped down to about 18 or 20 barrels a day; that the Union Brokerage Company demanded its money, and the only thing to do was to dispose of that batch of holdings for the price of $80,000. He said there were $30,000 in claims for supplies, labor, and materials due against the company. Massie asked him why he had been keeping him informed all the time that the production had been from 120 to 140 barrels a day, and Todd said, "It is not that now." He said that Hub Reed had offered $80,000 for the Newgin, Wolfe, and three Zelgar leases in the Shipley pool; that suits had been threatened against the company, and there was nothing to do but to accept the offer of $80,000 in order to save the other holdings. Massie acted on this information and joined the others in executing a conveyance of the property for $80,000, which was applied to the payment of the indebtedness of the Union Brokerage Company and on the other debts of the Ilgahoma Petroleum & Gasoline Company. The trustee to whom the leases had been assigned had received $12,000 or $13,000 from the production of oil during the three months, and this amount was also applied to the payment of the indebtedness of the company. Massie testified that he told Todd that he must stop Springgate and Noble, who were still making sales in Belleville. He went back to Belleville. Miss Voellinger never received any return upon her stock. Massie continued to practice medicine in Belleville until he was indicted, in October, 1920.

The plaintiff in error claims that the evidence does not show him to have engaged in any swindling operation or have been guilty of dishonest conduct, but that the record discloses the following facts: Massie was the president, both of the Ilgahoma Oil Company and of the Ilgahoma Petroleum & Gasoline Company; but there is no evidence that he had anything to do with the management of the property of these companies or any actual knowledge of their condition. He first invested $4,000 with his newly-acquired brother-in-law, with only such information of the venture in which he was engaging, so far as appears, as his brother-in-law gave him. He accepted the presidency of the corporation in the same state of ignorance, and never saw any of its property until six months later, on of operations, where he met Todd and John M. Shipley, who together with Massie constituted the executive committee of the corporations, and John F. Shipley, who opened up the field and for whom it was named. On his second visit, on October 28, a dividend of 1 per cent. was declared, and on each succeeding visit the production of oil had increased.

The apparent secured success of his speculation in oil became known in the community, and numerous sales of stock in the company were made. From time to time several of the stockholders visited the field of operations, saw the oil wells in which they had invested, were impressed with the opportunity of rapidly increasing their fortunes, and returned to Belleville to purchase more stock and induce their friends to invest. Meanwhile the actual managers of operations sought to increase their holdings by further purchases, and the $50,000 mortgage in February was made for the purpose of paying the remainder of the purchase price of a lease, a note in the bank for borrowed money, and other indebtedness. The increase in capital stock was for the purchase of new leases and new machinery and the expense of drilling new wells and new development. It covered substantially the producing property of the company, and when the production of the wells, instead of keeping up, fell off, as it did, to a comparatively small fraction of the first production, the company was unable to meet the mortgage debt, and the sale was necessarily made for $80,000, which enabled the company to pay its debts, but left it with only undeveloped leases, incumbered for the purchase price, and with no funds for development. No other course was possible.

There were some suspicious circumstances. Mike Cabulski testified that he bought stock of the par value of $1,000, for which he paid $1,250. His certificate was dated May 17, and Massie and Noble called on him about the 19th. Noble said it was a mistake of the company, and the witness said it looked like crooked work, and Massie said there was no crooked work. F. G. Baumann testified that he attended the meeting of the stockholders in June, over Ohms & Jung's drug store, where Massie was asked about the mortgage and sale and denied knowing anything about it. George Ruebel, Jr., on the other hand, testified for the people that he attended two meetings—one at the First National Bank and the other at the Commercial Club—where Massie told of the mortgage and sale. At a later meeting Massie was asked a lot of questions, and said that he had forgotten. William Schaumleffel invested in stock on December 3, 1919, and went to Nowata on December 27 or 28. Massie, although not invited, went also. Todd met them at Coffeyville, Kan., and

They then drove to Nowata, about 20 miles, and afterward to the oil fields. The oil was coming pretty well out of the 2½-inch pipe, but the next day the stream of oil coming out of the pipe was about as big as a finger. While they were there a well was shot on other property about 150 feet from the line, which proved a dry hole, and Massie said to Schaumleffel:

"Don't tell the parties back there that it is a dry hole; you will get them all balled up."

Schaumleffel wanted to see the books, but he was told they were kept in Tulsa, which was 80 or 90 miles away. He decided to go there, and after supper Massie informed him that he had just received a message that the bookkeeper was out of town and would be out until the 15th. One of the last things that happened before the train left was that Todd said to Massie, "Now, John, for God's sake get me $20,000!" A dividend was paid as of April 25 without authorization by the company, and at a time when the oil receipts were being held as security for the company's indebtedness.

[1, 2] The company may have been wrecked either by incompetence or dishonesty. The offense for which the plaintiff in error was indicted was obtaining the money of Anna Voellinger by means of the confidence game. A swindling operation, by which the swindler obtains the money of another by taking advantage of the other's confidence, for the purpose of betraying it and swindling him, is a confidence game, as it has been defined by our decisions. The plaintiff in error could properly be found guilty of the charge in this indictment only upon proof, beyond a reasonable doubt, of his intention to swindle Anna Voellinger out of her money by taking advantage of her confidence in him. The confidence may be assumed. Whether the intention to swindle existed was a question of fact, which depended upon circumstantial evidence, and while, as has been indicated, there were some suspicious circumstances, they were not of such character as to justify an inference that plaintiff in error intended to swindle Miss Voellinger out of her money.

[3] The only representations claimed to have been made by the plaintiff in error were made early in February, while the company was still operating its wells with apparent success. The sale was made by Noble in April. He was employed by the company to sell stock, and was using Massie's office in Belleville as his headquarters; but he was not by these facts authorized to make false representations in regard to the stock which he was employed to sell, nor was Massie bound by any representations made by him which Massie did not authorize. Evidence of other transactions of a like character as those charged in the indictment was competent to be received, but it must have been was involved. Evidence of false representations made by agents in such similar transactions was not competent against Massie, unless they were shown to have been made by his authority.

August Funk was permitted to testify, over the plaintiff in error's objection, that on May 21 or 22 Noble sold stock to him, and said he was sent there by Massie to sell the stock; that it was a good proposition, paying 2 per cent. a month; that it was a good investment, and he did not say anything about the company's having sold its oil wells on May 10. James Hausknecht also testified that, in selling stock to him in April, Noble told him they were paying 25 per cent. dividends. Arthur Seibert testified that Noble told him, in selling stock in May, that 2 per cent. a month was guaranteed; that they had 17 producing wells, producing 200 barrels a day, and were drilling 9 other wells; that Massie was president and had been offered $500,000 for his share. Noble told Joe Klotz in the first part of April that Massie had sent him; that the stock would triple itself in seven months; that they had 27 wells, producing about 8 barrels to the well—about 280 barrels a day, at $3 a barrel. Early in May, Noble told Henry Funk that he was Massie's right-hand man; that the stock was an awful good investment, paying 2 per cent. dividends a month. This evidence was inadmissible, for it was not competent to show representations made to induce sales of stock, without showing that Massie authorized the representations to be made.

[4-6] One of the leases which the company was operating was called the Newgin lease, and checks of the Prairie Pipe Line Company, to which the oil from this lease was sold, were introduced in evidence to show that payment for the oil was made to other persons than to the Ilgahoma Oil Company. This evidence was not competent. It was a transaction between other parties. Some of these checks were made payable to John M. Shipley, who was a director of the Ilgahoma Oil Company, and had been an owner of the lease. The defendant offered to testify that he had seen an unrecorded assignment of the lease by Shipley to the Ilgahoma Oil Company, but was not permitted to do so. It was shown that all the records of the corporation and the papers and books had disappeared and could not be found. It was error to refuse to permit the plaintiff in error to testify to the assignment of the lease, and it was also error to refuse to permit him to testify that, in a book of the company marked "Lease Sales, Profit and Loss," there was a record of a transaction which resulted in a profit of $27,000 to the company. The people claimed that the dividends paid by the company were not paid out of the profits, but out of the capital of the company, and it

was proper for the defendant to show his information, derived from the books of the company, that the company had made profits out of which to pay the dividends.

[7] It was erroneous to give the instruction in regard to the evidence of other offenses. Many of the other transactions referred to in the instructions were sales of stock made by Noble after the sale to the prosecuting witness, and Noble's statements and conduct in connection with these sales were detailed to the jury, though there was no evidence that the plaintiff in error had any knowledge of the means which Noble was using or the representations which he was making. The evidence was clearly insufficient to show any intention on the part of plaintiff in error to swindle. It rather tends to show that he was convinced of the value of the oil property and of the success of the venture, in which he was himself the heaviest loser. Even if he failed to exercise good judgment in investing in the stock, or in his action as director and president of the corporation, he could not properly be found guilty on this indictment, unless the evidence shows an intention to swindle, and this it fails to do.

The judgment will be reversed.

Judgment reversed.

(311 Ill. 35)

OLD BEN COAL CORPORATION v. INDUSTRIAL COMMISSION et al.
(No. 15745.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Master and servant ⟸385(16)—Employer of compensation claimant held precluded from claiming want of request for medical services.

Where employer, up to the time of hearing on writ of error, contended that it was not liable for injuries to an employee, it cannot there first recognize liability and make claim that no request for medical or surgical services was made.

2. Master and servant ⟸385(16)—Employer's duty under Compensation Act to furnish medical treatment stated.

While employer may prescribe where medical attention and hospital services provided for by Workmen's Compensation Act, § 8 par. (a), shall be procured so long as they are reasonably necessary and adapted to treating the injured employee, yet the employer cannot, because the employee goes to another hospital and thereafter demands medical and hospital services, avoid liability, without tendering other services of that character to him.

3. Master and servant ⟸385(16)—Employer held liable under Compensation Act for medical expenses of employee who left emergency hospital.

The fact that as an emergency employer had an injured employee taken to a certain hospital, from which he was next day taken by his family, does not, in absence of tender of competent hospital and medical services, after demand, relieve employer from liability under Workmen's Compensation Act, § 8, par. (a), for such services.

4. Master and servant ⟸405(6)—Evidence in compensation case held to show permanent total disability.

Evidence that claimant, a coal miner, was injured by electric shock resulting in paralysis of an arm and leg, on July 1, 1920, that on hearing July 30, 1921, he was still in a hospital and his condition had not improved, and that neither the physician for the employer nor for the claimant could say whether his condition was permanent, *held* to sustain an award for permanent total disability.

Error to Circuit Court, Franklin County; Charles H. Miller, Judge.

Proceedings under the Workmen's Compensation Act by Al Isgrigg, claimant, opposed by the Old Ben Coal Corporation, employer. Award by the Industrial Commission of compensation and a life pension was affirmed, and the employer brings error. Affirmed.

W. H. Hart, M. M. Hart, and W. W. Hart, all of Benton, for plaintiff in error.

A. W. Kerr and A. C. Lewis, both of Chicago, for defendant in error.

STONE, J. Defendant in error, Al Isgrigg, filed his application for claim with the Industrial Commission, alleging that he received an electric shock while working for plaintiff in error in its mine and that as a result his left arm and leg were paralyzed. The arbitrator, on hearing, entered an award for compensation of $13 per week for 46 weeks and $12 per week for 266½ weeks for temporary total incapacity for work, and the sum of $339.60 for first aid, medical, surgical, and hospital services. Both the applicant and the plaintiff in error appealed from the decision of the arbitrator, and on hearing before the Commission, upon the record of the proceedings before the arbitrator and additional evidence, the Commission entered an order awarding compensation at the rate of $13 per week for 46 weeks and $12 per week for 266½ weeks, and thereafter a pension during the life of the applicant of $25 per month, for the reason that the accidental injury resulted in total permanent disability, and also awarding the further sum of $537.10 medical and surgical bill. The employer brings the case here by writ of error.

While it was contended by plaintiff in error throughout the hearings before the arbitrator, the Commission, and the circuit court that there was no liability for the reason that the injury did not arise out of and in course of the employment of the applicant, yet that ground is abandoned entirely here; it being admitted that the greater weight of

the evidence shows the injury to have so occurred.

The grounds urged for reversal of the judgment of the circuit court affirming the award are: First, that there is no competent evidence to show that the applicant was totally and permanently disabled as a result of his injury; and, second, that the award for hospital and medical services was contrary to law, for the reason that the applicant selected his own hospital and his own doctor after having been furnished a doctor and hospital by the plaintiff in error.

[1] Defendant in error was injured while pushing a car along the rails in the mine after the same had been cut from a train of cars pushed into the mine by electric power. Having his hand on an iron handle of the car he was pushing, he stepped upon one of the rails and received a shock which caused him to fall. When he attempted to rise he found that his entire left side was paralyzed. He was found some time afterward by a motorman and taken to the top of the mine and thence in an ambulance called by the plaintiff in error to a hospital in Christopher. The record does not show whether he received treatment while there. The next day he was taken by his family and friends to a hospital in Belleville, where he remained for about a year. No compensation was paid during that time, nor were any medical services paid for or tendered; it being the contention of plaintiff in error that the injury did not arise out of the employment. He testified that he demanded hospital and medical attention, and there is evidence in the record tending to substantiate that claim. The fact that plaintiff in error has contended throughout all the hearings previous to this one that there was no liability rendered it of little avail to make demand upon it. It will therefore avail it nothing in this regard to at this time recognize such liability and then claim that no request for medical and surgical services was made.

Paragraph (a) of section 8 of the Compensation Act (Smith-Hurd Rev. St. 1923, c. 48, § 145) provides, concerning surgical and hospital aid, as follows:

"The employer shall provide the necessary first aid medical and surgical services; all necessary hospital services during the period for which compensation may be payable; also necessary medical and surgical services for a period not longer than eight weeks, not to exceed, however, an amount of $200, and in addition such medical or surgical services in excess of such limits as may be necessary during the time such hospital services are furnished. All the foregoing services shall be limited to those which are reasonably required to cure and relieve from the effects of the injury. The employee may elect to secure his own physician, surgeon or hospital services at his own expense."

In Chicago-Sandoval Coal Co. v. Industrial Com., 294 Ill. 351, 128 N. E. 567, it was held that since it cannot be presumed, in the absence of proof, that the employer knew the necessity for hospital services or medical treatment, the applicant should show knowledge on the part of the employer of facts from which he might reasonably be presumed to know or believe that such services were necessary, or the applicant should show a request therefor on his part.

Plaintiff in error contends that it was willing to provide hospital services and medical attention for defendant in error at Christopher, but that he voluntarily left and took a hospital and medical service of his own choosing. The evidence shows that he was at the hospital in Christopher but one day; that most of that time he was unconscious; that his family took him away; and that he thereafter demanded assistance for medical and hospital attention from plaintiff in error and that none was furnished or tendered. While it is stated in the argument for plaintiff in error that it had a staff of physicians at Christopher, there is nothing in the evidence proving that to be the case, nor is there any showing that the hospital treatment or medical services received were more expensive than at Christopher.

[2, 3] While the rule is, as often stated by this court, that the employer has a right to prescribe where the medical attention and hospital services shall be procured so long as they are such as are reasonably necessary and adapted to the purpose of treating the injured employee, yet the employer does not, because the employee goes to another hospital and thereafter demands medical and hospital services, avoid liability for such services without tendering other services of that character to him. In other words, the employer is not given the right, simply because the employee leaves the hospital to which the employer took him, to avoid all liability for hospital and medical treatment without tendering other services of like character, unless the facts show that the employee, by leaving the hospital, elected to secure a physician and hospital at his own expense. Whether the plaintiff in error, had it tendered competent service of that character after demand for assitance, would have had a right to have the employee treated by the means tendered, is not decided, for no such tender was made. The fact that as an emergency plaintiff in error had the employee taken to a certain hospital, from which he was the next day taken by his family, does not, in the absence of tender of competent service of that character after demand, relieve plaintiff in error from liability for such service.

[4] It is also contended that the record does not show the disability to have been permanent. Defendant in error was injured

At the latter date he was still in the hospital, and the evidence showed he was in no wise improved. Neither Dr. C. P. Renner for the applicant, nor Dr. H. J. Frein for the employer, was able to say whether his condition was permanent or not. In Spring Valley Coal Co. v. Industrial Com., 309 Ill. 215, 140 N. E. 858, this court held that where the record shows an injury to have been severe, the disability total, and that physicians are unable to say whether the total disability will be permanent, the award will be sustained where such disability has been shown to exist over an extended period of time. In that case the period of disability up to the time of the hearing was 6½ months. In this case a year has elapsed without improvement. We are of opinion that the Commission was justified in finding total disability and in awarding a pension.

The judgment of the circuit court confirming the award will therefore be affirmed.

Judgment affirmed.

(311 Ill. 157)

MILLER et al. v. MOSELEY et al. (No. 15534.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Appearance ⇐26—Court held to acquire jurisdiction of codefendant when she petitioned for vacation of sale for insufficiency of price.

Whether or not, in a partition suit, a codefendant was duly served by summons, the court acquired jurisdiction when she filed her petition to set aside the sale on the ground of insufficiency of price obtained, and did not then claim she had never been properly served with summons.

2. Appeal and error ⇐880(1)—Plaintiffs in error could not complain for other defendants as to lack of jurisdiction.

Plaintiffs in error, defendants below, could not complain for other defendants, who did not complain and who did not assign errors, that the court acquired no jurisdiction as to them.

3. Partition ⇐89—Decree ordering foreclosure of mortgage liens and payment of claims against estate held proper without cross-bill.

In a bill by heirs for a decree of sale of lands of deceased's estate, and for the payment out of proceeds of mortgage liens and allowed claims against deceased's estate, a decree authorizing payment of the mortgage liens and the allowed claims *held* proper, without the filing of a cross-bill.

4. Partition ⇐88—In suit by heirs, decree ordering payment of undisputed claims against estate, out of interest of each heir, held proper.

In a suit by heirs for a decree for the sale of the land of decedent's estate, and for the payment out of proceeds of mortgage liens and administrator of the undisputed claims allowed against the estate, out of the interest in the land which descended to the heirs.

5. Appeal and error ⇐223—Assignment of technical error in part of decree not objected to below held not ground of reversal.

In a suit for a decree for the sale of 360 acres of land and for the payment of mortgage liens, where it appeared that in codefendant's mortgage of her interest in the 360 acres, one 40-acre tract was not described in the mortgage, but that by mistake a 40-acre tract in which codefendant had no interest was described, provision of decree of sale ordering payment of the mortgage out of the sale of codefendant's interest in the 360 acres was not cause for setting aside the decree; she being the only party affected by the error and not objecting to that part of the decree below, and the alleged error being only technical, not wrongfully affecting her rights.

Error to Circuit Court, Perry County; George A. Crow, Judge.

Partition suit by Oma Miller and others against Kate Moseley and others. A decree was rendered approving a sale, and named defendant and defendants Emma Rees and Della Rees bring error. Affirmed.

S. M. Ward, of Benton, for plaintiffs in error.

H. F. Knox, of Benton, W. O. Edwards, of Pinckneyville, and Nelson B. Layman, of Du Quoin, guardian ad litem, for defendants in error.

FARMER, C. J. This is a writ of error to review a decree entered in a partition suit. The facts are complicated, and, as the briefs of neither party make any statement of them, we have been compelled to get them from the abstract of the bill.

The original bill appears to have been filed March 20, 1919, an amended bill November 9, 1921, and March 14, 1922, a second amended bill was filed, under which the decree was entered. The second amended bill is the only bill contained in the abstract, and it asks the partition of 360 acres of land and other incidental relief. The complainants in the bill are Oma Miller and Mildred Sappington, an infant, by Julia Sappington, her next friend. The bill alleges that on January 29, 1895, William Frye, who was then the owner of the land described in the bill, conveyed it to Kate Rees (now Moseley), Della Rees, Robert Rees, and Estella Rees (after wards Estella Churchill), subject to a life estate in Emma Rees. For convenience, as will hereafter be seen, the interests of the grantees of Frye will be referred to as eighthieths. Each of the grantees named became seized of twenty-eightieths of the 360 acres of land by the deed from Frye. Robert Rees,

one of the grantees, on September 13, 1913, executed a mortgage on his interest to his then wife (now complainant), Oma Miller, to secure a note for $600, due in 12 months, with interest at 5 per cent., which mortgage was subject to the life estate of Emma Rees. Robert Rees died intestate February 21, 1915, leaving no child nor descendants of a child, but leaving surviving him as his heirs, his widow (now Oma Miller), his mother, Emma Rees, and his brothers and sisters, Kate Moseley, Della Rees, Estelia Rees Churchill, Edward Rees, Lora Duty, J. M. Rees, E. A. Rees and Arizona Teaney; the last three being of the half-blood. Letters of administration were granted on the estate of Robert Rees, and claims aggregating over $600 were filed and allowed against his estate. By the death of Robert Rees his widow inherited ten-eightieths of his twenty-eightieths of the land, his mother two-eightieths, and each of his surviving brothers and sisters one-eightieth, but the bill alleges the interest so inherited by said parties were subject to the $600 mortgage given by Robert Rees to his wife, and also to the payment of the claims allowed against Rees' estate. The bill further alleges that on the 21st day of July, 1915, Kate Moseley gave a mortgage on her interest in all the lands to Wendell Berry, to secure a note for $2,000, due four months after date, with interest at 6 per cent., but that said mortgage was subject to the life estate of Emma Rees, and that the one-eightieth interest she inherited from Robert Rees was subject to the $600 mortgage to Oma Miller and to the payment of claims against the estate of Robert Rees; that August 20, 1918, Estella Rees Churchill executed a deed to Louis Reed of her interest in the land, which deed the bill alleges was made to secure a loan of $1,000; that the deed was subject to the life estate of Emma Rees, and the one-eightieth interest in the land conveyed by it was subject to the $600 mortgage made by Robert Rees and to the payment of claims allowed against his estate. Mrs. Churchill, on October 28, 1918, died testate, and by her will devised all her interest in the land to Mildred Sappington, an infant. The bill alleges Louis Reed on May 14, 1919, made a deed purporting to convey Mrs. Churchill's interest in the land to Jennie Reed; that the conveyance was a fraud, as the grantor's deed from Mrs. Churchill was made to secure a loan and was a mortgage, and that the deed amounted to an assignment of the mortgage lien to Jennie Reed, who became subrogated to the rights of her grantor; that the one-eightieth interest Mrs. Churchill inherited from Robert Rees was subject to its equitable proportion of the $600 mortgage and to pay its proportionate share in the payment of claims allowed against the estate of Rees. The bill prays that the mortgage liens and the claims against the estate of Rees be decreed to be paid by the owners of interests in the land subject to their payment, and that the land be partitioned; that in the event it could not be partitioned that it be sold and the sums found due on the mortgages and allowed claims against Rees' estate be decreed to be paid out of the sale of the interests of the parties which were liable to pay the same, in accordance with their respective rights and interests.

The guardian ad litem for the minor complainant filed a formal answer. No answer was filed by any defendant, but all were defaulted. Commissioners appointed to make partition reported the land was not susceptible of division, and a decree for its sale was entered, subject to the life estate of Emma Rees. The court decreed that out of the proceeds of the sale the amounts of the mortgages found due be paid out of the sale of the interests liable for their payment, and that the amount of the allowed claims against Robert Rees' estate be paid out of the sale of the interests inherited from him by his heirs, according to their respective shares. The land was sold under the decree on October 21, 1922. The complainants in the bill, Oma Miller and Mildred Sappington, and Kate Moseley and Emma Rees, defendants, were dissatisfied with the price it was sold for, which was $11,500, and filed their motion and petition to set aside the sale. They alleged the price the land brought was inadequate; that the sale subject to the life estate of Emma Rees prevented it bringing its value, and they asked the sale be set aside and another sale ordered. The petition alleged that Emma Rees desired to consent to the sale of her life estate and accept its value in money; that she had signed her consent in writing to its sale if the first sale was set aside; that she be given the value of her life estate, and asked that the property be reappraised and sold free from that incumbrance, and alleged they had two or more responsible bidders who would give as much as $22,800 for the land if sold free from the life estate of Emma Rees. E. A. Rees, Arizona Teaney, and J. M. Rees also filed exceptions to the sale on the same ground alleged by Kate Moseley, Emma Rees, and Oma Miller, as did also Della Rees. The court entered a decree disapproving the master's report of sale, setting the same aside, and ordering a resale of the land free from the life estate of Emma Rees. At the second sale it brought $15,850. Emma Rees filed objections to the master's report of the second sale, asked the court to set aside and strike from the files her consent in writing that the land be sold free from her life estate, asked to be allowed to plead to the merits of the bill, and set up various and sundry reasons why the master's report should be disapproved and the sale set aside.

The court denied the motion and approved the sale.

The only parties assigning errors and asking a reversal of the decree are Emma Rees, Kate Moseley, and Della Rees. They assign twenty-eight separate and distinct errors for which they claim the decree should be reversed.

[1] It is first complained that the court did not acquire jurisdiction of the person of Della Rees by service of process. We have not considered it necessary to ascertain whether she was duly served by summons or not. When she filed her petition to set the sale aside she submitted herself to the jurisdiction of the court, and she did not then claim she had never been properly served with summons. The only thing she complained of was that the land did not sell for enough money.

[2] Several of the errors assigned allege the court did not acquire jurisdiction of other defendants who are not complaining and have assigned no errors, and plaintiffs in error cannot complain for them.

[3, 4] Some of the errors assigned allege the court erred in decreeing the payment of the mortgages and the allowed claims against the estate of Robert Rees without the filing of a cross-bill by the parties interested. The bill set up all those matters and asked that their payment be decreed. No cross-bill was necessary. Roby v. South Park Comrs., 252 Ill. 575, 97 N. E. 225. We think the court was authorized to order payment to the administrator of Robert Rees the claims allowed against his estate, the validity of which claims was never disputed, out of the interest in the land which descended to his heirs. Brown v. Sunderland, 251 Ill. 523, 96 N. E. 345.

[5] It is also complained that the court erred in decreeing the payment of the Kate Moseley mortgage out of the sale of her interest in the 360 acres of land described. It appears one 40-acre tract was not described in the mortgage, but that 40 acres in which Kate Moseley had no interest were described. Evidently that was done by mistake. The decree does not so find, but ordered the mortgage paid out of the money arising out of the sale of her interest in the 360 acres. If the bill had alleged and the decree had found Kate Moseley intended to mortgage her interest in the entire 360 acres, but by mistake omitted one 40 and mortgaged 40 acres she had no interest in, it would have been entirely proper to decree the payment of the mortgage out of her interest in the 360 acres. She is the only party affected by that alleged error, and she did not raise that question at any time in the court below, although after the decree had been entered and the property sold she joined in a proceeding to set the sale aside because the land did not sell for enough money. So far as the record shows, she raises the question here for the first time. Besides, the error is only technical and does not in any wrongful way affect her real rights. Her land was ordered to pay the debt which she does not dispute she owed, and we do not think the decree should be reversed on that ground.

We have examined the other errors assigned, but do not regard them as of sufficient importance to justify discussing them in detail. A number of them in no way affect the rights of the only parties assigning error. It is apparent the real cause for suing out this writ of error is because the parties prosecuting the writ are dissatisfied with the price the land brought at the sale and hope by the writ of error to reverse the decree and procure another sale. As we have before stated, at the first sale the land sold for $11,500, subject to the life estate of Emma Rees. On the motion and petition to set that sale aside all three of the plaintiffs in error who are seeking to reverse the decree alleged the land sold for much less than its value because it was sold subject to the life estate of Emma Rees, who said she desired then to agree to accept the cash value of her life estate and have the land sold free from that incumbrance. They represented they had responsible bidders who had offered to pay $22,800 for the land if sold free from the life estate. The court set the sale aside, Emma Rees released her life estate and the land was again sold for $15,850. Emma Rees again objected to the sale and asked to withdraw her consent to the sale free from her life estate and plead to the merits. We are warranted in the conclusion that the only reason for suing out this writ of error is to secure another sale in the hope the land will bring more money. That would not justify affirming the decree if error had been committed prejudicial to the rights of the complaining parties, but we are of opinion no such errors were committed.

The decree is affirmed.

Decree affirmed.

(311 Ill. 234)

COOK COUNTY v. CITY OF CHICAGO.
(No. 15600.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Injunction ⇐118(1) — Bill for injunction held subject to general demurrer as stating conclusions.

A bill by a county against a city to enjoin the city from enforcing its fire and building ordinances against the county concerning the construction of a county jail within the city limits, alleging that "these ordinances and requirements are not suitable to the said jail and that it will be impossible to comply with the ordinances in the building of said jail," *held* demurrable as mere conclusions and as failing to set out the substance of the parts of the ordinances objected to, so that the court may say whether or not the claim that they were not suited and were unreasonable was well founded.

2. Municipal corporations ⇐603 — Fire and building ordinances applicable to county jail within city limits.

In a suit by a county against a city to restrain the city from enforcing its fire and building ordinances in the construction of a county jail within the city limits, *held*, that by enacting Cities and Villages Act, art. 5, § 65, par. 63, delegating police power and giving power to cause all buildings and inclosures in a dangerous state to be put into a safe condition, the Legislature intended to confer upon the city council such power over all buildings within the city, and hence it was error to overrule the city's demurrer to the bill.

Error to Third Branch, Appellate Court, First District, on Appeal from Superior Court, Cook County; Denis E. Sullivan, Judge.

Bill by the County of Cook against the City of Chicago for an injunction. A general demurrer to the bill was overruled, judgment affirmed (228 Ill. App. 498), and defendant brings error. Reversed and remanded, with directions.

Francis X. Busch, Corporation Counsel, of Chicago (Albert H. Veeder, of Chicago, of counsel), for plaintiff in error.

Robert E. Crowe, State's Attorney, and George E. Gorman, both of Chicago (Hayden N. Bell, of Chicago, of counsel), for defendant in error.

STONE, J. The county of Cook on December 10, 1921, filed its bill in the superior court of Cook county seeking to enjoin the city of Chicago from enforcing its fire and building ordinances against the county concerning the construction of a county jail located within the territorial limits of the city. The grounds upon which such injunction is sought are, that—

"These ordinances and requirements are not suitable to the said jail and that it will be impossible to comply with the ordinances in the building of said jail."

The injunction was also sought on the general ground that the city did not have a right to enforce its ordinances against the county. The city filed a general demurrer to the bill. Upon hearing thereon it was held that the city did not have police power over the construction of buildings erected by the county, and, evidently holding that the statement of the ordinances in the bill was sufficient, the court overruled the demurrer. Two questions, therefore, are presented here: First, is the unreasonableness of the city ordinances sufficiently pleaded? and, second, may the city, under its police power, regulate the construction of a county jail so far as fire hazards are concerned?

[1] The statement in the bill that the ordinances of the city of Chicago were not suited to the erection of a county jail, and that it would be impossible to comply with them in the construction of the jail, were mere conclusions of the pleader. The substance of the part of an ordinance objected to should be set out, so the court may see, on reading it, whether or not the claim that it is not suited and is unreasonable is well founded. The presumption is that an ordinance is reasonable. People v. Cregier, 138 Ill. 401, 28 N. E. 812; Illinois Central Railroad Co. v. Ashline, 171 Ill. 313, 49 N. E. 521. While it cannot be contended that either the county or an individual is amenable to an unreasonable ordinance, the court cannot take the statement of a conclusion in that regard as sufficient pleading on a bill of this character. The bill was therefore demurrable on that ground.

The principal question argued in the case is whether or not the city council has power to require an observance of its fire regulations by the county in the building of a county jail. This question has never been passed upon in this state, and but few cases have been cited by counsel representing the parties to this proceeding in which the matter has been passed upon in other states. It becomes necessary, therefore, to review some of the underlying principles governing the police power granted to cities and counties under the law.

Among the powers exercised by municipalities are what are known as the police powers of the state. These powers rest in the state and may be delegated to municipal corporations created by the state, to be exercised for the welfare, safety, and health of the public. Under the police power cities and villages may enact reasonable ordinances to preserve health, suppress nuisances, prevent fires, regulate the use and storing of dangerous articles, control markets, and similar uses and purposes. The police power is not impaired by the fourteenth amendment to the Constitution of the United States (Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923), but every citizen holds his

property subject to the proper exercise of the police power, either by the state Legislature or by public or municipal corporations, to which the Legislature has delegated that power. This power rests upon the principle that one may not so use his property as unreasonably to injure others. These regulations rest upon the maxim salus populi suprema est lex.

An ordinance prohibiting washing and ironing in public laundries within a specified district and within specified hours was held a valid exercise of the police power. Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145. In Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585 (known as the Slaughterhouse Case), the right of the city, under the police power, to regulate the operation of slaughterhouses was upheld. Under the police power, cities may destroy buildings to prevent the spread of conflagration. This right existed at common law, and the owner was entitled to no compensation. 2 Kent's Com. 339. The prevention of damage by fire is an object within the scope of municipal authority, either by express grant or by the power delegated to the city to make police regulations.

It was held in Pye v. Peterson, 45 Tex. 312, 23 Am. Rep. 608, that a general grant of power to a city to pass such ordinances, not inconsistent with the laws of the state, as shall be needful for the government, interest, welfare, and good order of the corporation, did not authorize the city to establish fire limits and regulate the character of buildings within such limits. It is, however, generally regarded that the prevention of fires in incorporated towns and cities is a matter for local regulation and that it belongs to the ordinary police powers of the city, and, unless such a course is inconsistent with the legislation of the state touching the subject, a general grant of police powers to pass ordinances for the welfare of the city will also include fire regulation. 1 Dillon on Mun. Corp. (4th Ed.) §§ 143, 405, note, and cases cited.

In Chicago Packing Co. v. City of Chicago, 88 Ill. 221, 30 Am. Rep. 545, where an ordinance by the city of Chicago prohibiting slaughterhouses within one mile of the city limits was attacked on the ground that it was not within the police power of the city, this court upheld the ordinance on the ground that to protect the health and lives of a large number of people living in one community the state had power to confer, and has conferred, on cities and villages the right to regulate such instrumentalities as slaughterhouses, even though the territory over which the jurisdiction of the ordinance extended embraced other municipalities.

Since the early case of Commonwealth v. Tewksbury, 11 Metc. (Mass.) 58, the right to restrain owners of lands in cities from erecting buildings contrary to fire regulations has been established by many decisions. Wadleigh v. Gilman, 3 Fairf. (12 Me.) 403, 28 Am. Dec. 188; King v. Davenport, 98 Ill. 305, 38 Am. Rep. 89. In the last case cited the court upheld an ordinance regulating fire limits, and the character of buildings to be erected within such limits, as a part of the police power delegated to cities. Such power was likewise recognized in Village of Louisville v. Webster, 108 Ill. 414, though it was held in that case that the ordinance was not within the police power given the city by the Legislature.

The Legislature, by statute in this state, has conferred on municipal corporations, such as cities, villages, and incorporated towns, the police power to prescribe fire regulations and to regulate buildings within their limits in respect to fire protection. Cahill's Stat. 1923, c. 24, art. 5, pars. 61, 62, 63.

There is a distinction to be borne in mind between municipal corporations proper, such as exist by charters issued by the state, as incorporated towns, cities, and villages voluntarily organized under the general Incorporation Act, and corporations, such as counties and townships, which are frequently referred to as involuntary quasi corporations. Municipal corporations are those called into existence either at the direct request or by consent of the persons composing them. Quasi municipal corporations, such as counties and townships, are at most but local organizations, which are created by general law, without the consent of the inhabitants thereof, for the purpose of the civil and political administration of government, and they are invested with but few characteristics of corporate existence. They are, in other words, local subdivisions of the state created by the sovereign power of the state of its own will, without regard to the wishes of the people inhabiting them. A municipal corporation is created principally for the advantage and convenience of the people of the locality. County and township organizations are created in this state with a view to aid in carrying out the policy of the state at large for the administration of matters of political government, finance, education, taxing, care of the poor, military organizations, means of travel and the administration of justice. The powers and functions of county and township organizations, therefore, as distinguished from municipal corporations, have a direct and exclusive bearing on and reference to the general, rather than local, policy of government of the state. Hamilton Co. v. Mighels, 7 Ohio St. 109; Askew v. Hale, 54 Ala. 639, 25 Am. Rep. 730; County v. Chattarol Railroad Co., 81 Ky. 225; Manuel v. Commissioners, 98 N. C. 9, 3 S. E. 829; Cathcart v. Comstock, 56 Wis. 590, 14 N. W. 833; 1 Dillon on Mun. Corp. (4th Ed.) § 23. Counties and towns, being purely auxiliaries

of the state, owe their creation to the general statutes of the state, which confer upon them all the powers which they possess and prescribe all the duties and liabilities to which they are subject. They have been referred to as ranking low in the scale or grade of corporate existence, and for that reason are frequently termed quasi corporations. Hamilton County v. Garrett, 62 Tex. 602; Union Township v. Gibboney, 94 Pa. 534.

Under the act to incorporate counties, approved January 3, 1827 (Rev. Code of Laws 1827, p. 107), counties are constituted a body corporate and politic, with power to make and enter into contracts and to sue and be sued in relation to such contracts, and by sections 24 and 25 of the Counties Act (Smith-Hurd Rev. St. 1923, p. 562), numerous other powers necessary to the exercise of corporate powers of counties are there granted, not, however, including police powers. It has been uniformly held that a right of action for damages does not lie against a county or township. The ground upon which this doctrine rests is that these organizations are not voluntary but compulsory; not for the benefit of individuals who have asked for such a corporation, but for the public generally.

The distinction between counties and townships, or quasi corporations, and incorporated cities, villages, and towns, was laid down in the early case of Russel v. Men Dwelling in the County of Devon, 2 Durn. & East, 311. It was there held that while an action would lie by an individual against another for injury the former had received, on the ground of personal liability therefor, and while for that reason an action for damages can be maintained against municipal corporations because of their voluntary character, yet as to quasi corporations, such as townships and counties, such action does not lie against them in the absence of a statute authorizing it. A distinction is drawn between the character of these organizations in Riddle v. Proprietor of Locks, 7 Mass. 186, where it was held that because of the limited character and powers and the involuntary nature of quasi corporations the same may not be sued for damages. A like conclusion is reached in Bartlett v. Crozier, 17 Johns. (N. Y.) 446, 8 Am. Dec. 428. This is likewise the rule in this state as established by a long line of decisions. Hedges v. County of Madison, 1 Gilman, 567; Browning v. City of Springfield, 17 Ill. 143, 63 Am. Dec. 345; Town of Waltham v. Kemper, 55 Ill. 346, 8 Am. Rep. 652; White v. County of Bond, 58 Ill. 297, 11 Am. Rep. 65; Symonds v. Board of Supervisors of Clay County, 71 Ill. 355; Hollenbeck v. County of Winnebago, 95 Ill. 148, 35 Am. Rep. 151. In the last-cited case attention is called to the fact that counties are clothed with but few corporate powers, and these are not of a private character, but rather a part of the political government of the state; that a county can, however, sue and be sued and has the power to purchase and hold real estate; that the county board has power to manage county funds and county business, settle accounts against the county, and collect taxes for county purposes. It is the duty of the county to erect or otherwise provide, when necessary and finances will justify it, and to keep in repair, a suitable courthouse, jail, and other necessary county buildings. These, with a few other similar provisions, constitute the duties and powers delegated to the county and county boards by the Legislature. There is no delegation of police power to the counties and townships of the state, and it would seem clear, therefore, that by the delegation of the police power to cities, villages, and incorporated towns the Legislature intended that the exercise of that power over the property and inhabitants within the limits of the city or village should be by that municipality, subject, of course, to the right of the state, of which it is never divested, to exercise the police power.

In Pasadena School District v. City of Pasadena, 166 Cal. 7, 134 Pac. 985, 47 L. R. A. (N. S.) 892, Ann. Cas. 1915B, 1039, the question arose as to whether or not the school district, a quasi municipal corporation, was governed by the fire and building ordinances of the city of Pasadena, a municipal corporation, and whether it was required to pay fees for inspection. Under the Constitution of that state power is conferred upon each county, city, town, or township to make and enforce, within its limits, police, sanitary, and other regulations not in conflict with the general laws. The school district contended that as it was an independent governmental agency of the state, created under the general law, by which school property within the district was committed to its control, its property was not subject to control by the police regulations of the city. The argument was that, since by general law the management and control of school property was given to such districts, including the power to build schoolhouses, which were required to be approved by the county superintendent of schools and the school board, there was to be inferred, as necessary to the application of such power, police power in the school district to regulate sanitation and fire protection within the district, and that such power being derived from a general law could not be interfered with by the municipality. It was not there contended that any general law existed which expressly conferred police powers upon the school district. It was there held that, school districts being quasi municipal corporations, their powers were limited to the express grants of power given by the Legislature; that since the Constitution had given to the city the right to impose reasonable po-

lice regulations, a school district desiring to build a school building within the limits of the city was subject to such regulations. In answer to the argument that if the power of the city authorities be sustained the effect would be to deprive the state of its power to regulate the building of schools, it was held that while the state, in the exercise of its police power, undoubtedly might provide a complete system of regulation for the protection of public health, safety, and comfort in the erection of the school buildings of the state, such had not been done, and that it was not intended by the Legislature to empower the trustees of school districts to exercise such police power; that a school district which embraces territory included in a densely populated city, or whose territory, as such, is exclusively within the city, should be made subject to reasonable regulations for the benefit of the entire city concerning fire protection; that the Legislature recognized that in the matter of public safety school districts should be subject to the same building regulations as governed others erecting structures in the city, and that the only way it could be relieved from such control would be by general law.

In Kentucky Institution for the Blind v. Louisville, 123 Ky. 767, 97 S. W. 402, 8 L. R. A. (N. S.) 553, it was held that the state of Kentucky was not subject to the police powers of the city of Louisville in the matter of erection and control of buildings for the state Institution for the Blind; that the giving of the police power by the Legislature to the municipality did not take that power from the state itself.

In Samuels v. Mayor of Nashville, 3 Sneed (Tenn.) 298, the plaintiff in error was sued to recover a fine for erecting horse racks around the courthouse in the city of Nashville, contrary to an ordinance of the city. The defense was that plaintiff in error was acting under the order of the county court of the county of Davidson to put the posts and hitch racks in the courthouse square for the hitching of horses. The question in the case was one of paramount authority between county and city. The argument was used that the public square belongs to the county and is under the control of the county court and therefore not subject to the police regulations of the city. It was there held, however, that ownership of the square was not material; that, regardless of who owned the land, the county could not exercise its power so as to inflict a nuisance upon the citizens of the city; that the power to prevent or abate a nuisance must abide in the local authorities where necessity for self-preservation exists; that the rule that every one must use his own property so as not to injure others was binding upon the county; that in the exercise of the police power the city controlled the matter of nuisances, and the fact that the plaintiff in error was authorized and directed by the county court to erect the hitching posts did not prevent the city from enforcing its ordinance against him.

In Village of Coulterville v. Gillen, 72 Ill. 599, an action was brought against Gillen to recover a penalty for violation of an ordinance of the incorporated village against the sale of intoxicating liquors. The defense was that the county had issued a grocery license to the defendant authorizing him to sell spirituous liquors in Coulterville for one year, under a statute in existence at that time. The act also provided that the president and trustees of incorporated towns should have the exclusive privilege of granting licenses to grocers within their incorporated limits, and it was held that the license issued by the county was not a defense, for the reason that the county had no authority to interfere with the village in the matter.

In Bowers v. Wright, 4 Wkly. Notes Cas. (Pa.) 460, a statute had been passed conferring upon the board of education of the city of Philadelphia power to erect a schoolhouse and build the same, provided "all matters in connection with the erection of said school house shall be under the direction of said board of public education." By another statute power was granted to the board of building inspectors of the city of Philadelphia to control the matter of granting permits for the erection of buildings, and the question was whether the board of education was required to obtain a permit from the board of building inspectors before erecting a school building. It was there held that the board was so required and that it was subject to the police power vested in the city and could not build a schoolhouse which did not comply with the regulations of the building inspectors.

In Llano v. Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008, it was held that the city may, under the police power, prevent the county from so using a courthouse square as to create a nuisance.

In People v. Board of Supervisors of La Salle County, 84 Ill. 303, 25 Am. Rep. 461, it was held that mandamus will lie to compel the county board to construct a jail. It was said, however, that the kind of jail to be provided must necessarily be left to the discretion of the board, the court there saying:

"They have the sole power to determine the size, cost, and quality of the material of which it shall be constructed, and the various other matters in relation to the construction of the same."

It was held that the court had no authority to compel the county to make the county jail sanitary. No question of the police power of the city arose in that case.

In County of Mercer v. Wolff, 237 Ill. 74, 86 N. E. 708, it was held that the duty resting on the board of supervisors to erect a county jail is imperative, but that the board has a discretion as to the kind, cost, size, and other conditions of the building.

Counties are quasi public municipal corporations created for the purpose of convenient local government, and exist only for public purposes connected with the administration of the state government. Millikin v. County of Edgar, 142 Ill. 528, 32 N. E. 493, 18 L. R. A. 447; Wetherell v. Devine, 116 Ill. 631, 6 N. E. 24; Marion County v. Lear, 108 Ill. 343. The duty to erect a county jail rests upon the relation of the county to the state. Its use concerns the public at large, for the whole state is interested in the enforcement of the law in each county, and the county acts in the building of the jail as an agency of the state. In Board of Commissioners v. Persons, 155 Ga. 277, 116 S. E. 538, it was held that a county may be mandamused to require it to make the county jail safe and sanitary and put it in a condition that would not jeopardize the lives or health of the prisoners.

The powers granted to the counties under the general law do not include the police power. That power is granted to cities and villages under the act concerning their incorporation, and by that statute it extends to all buildings within its limits. The county is not required to build a courthouse within the limits of any city, but may build it elsewhere if directed so to do by the people, or may maintain or condemn land of its own volition without a vote of the people. County of Mercer v. Wolff, supra. When the county builds a courthouse within the limits of a city, it may be held that in so doing it acts voluntarily. No good reason, therefore, is perceived why it should not be made amenable to the reasonable police regulations imposed by the city in the interest of the general welfare.

It is urged that the county is an arm of the state to which there has been committed the control of the county buildings, and that it is not, therefore, subject to the police power of the city. While the county is an agency of the state, it is likewise a creature of the state vested with only the powers conferred upon it by the state. It is not correct, therefore, to say that the county is a part of the state in the exercise of police power.

The police power of the state has been said to be the law of overruling necessity, for the preservation of the general welfare. In Chicago Packing Co. v. City of Chicago, supra, it was held, as we have seen, that the city has the right to require that slaughter and packing houses be maintained not less than one mile from the city limits, even though the town of Lake, which was an incorporated town, had given a permit to the packing company to operate its business in said town at a point nearer than one mile from the city limits of Chicago. This court there said:

"Did they [the Legislature] intend that the city should be annoyed and injured in health and comfort by the exercise of the power of a corporation with a comparatively sparse population, and to submit to have imposed on them such nuisances as the town of Lake might impose by licensing them? We cannot suppose the General Assembly so disregardful of the health and comfort of such great numbers of people, but, on the contrary, we must suppose it was intended that the people of Chicago, and other cities under like circumstances, should have the means of protecting themselves against such intolerable wrongs as might thus be inflicted upon them. We must conclude that the General Assembly, rather than subject our large cities to such hazards from smaller municipalities in their immediate vicinity, would have repealed the charters of the latter, or at least have curtailed their power."

[2] We are of the opinion that the police power delegated to the city must be construed, as between the county and the city, as a delegation of a power to the latter which the former is expected to observe. What was said in the cases of People v. Board of Supervisors of La Salle County, supra, and County of Mercer v. Wolff, supra, had to do with the general power of a county to determine the character, size, and location of a county courthouse and a jail. The matter of the police power or the obligation of the county to observe the reasonable exercise of that power delegated to cities in which county buildings are located was not there discussed. We are of the opinion that in enacting paragraph 63 of article 5 of the Cities and Villages act, and in using the language, "and to cause all such buildings and inclosures as may be in a dangerous state to be put in a safe condition," the Legislature intended to confer upon the city council such power over all of the buildings erected within the city as the words there indicate, including those of the county or other municipalities located therein.

It was error on the part of the superior court of Cook county to overrule plaintiff in error's demurrer to the bill. The decree of the court is therefore reversed and the cause remanded, with directions to sustain the demurrer. Reversed and remanded, with directions.

(311 Ill. 18)

REGAN et al. v. UPPER SALT CREEK DRAINAGE DIST. (No. 15669.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Drains ⇐16—In proceedings to dissolve district, objections of commissioners to jurisdiction held not reviewable upon appeal of district.

Where, in a proceeding to dissolve a drainage district, the commissioners entered a special appearance for the purpose of objecting to jurisdiction, the action of the court in overruling their objection is not subject to review upon the appeal of the district from the order of dissolution.

2. Appeal and error ⇐356—An appeal prayed but not perfected raises no question for review.

An appeal prayed but not perfected raises no question on the record concerning the action of the court.

3. Drains ⇐16—Petition for dissolution of drainage district held sufficient.

A petition for the dissolution of a drainage district consisted of a number of sheets bound together, signed by the different landowners of the district, all of which did not contain the heading that the signers were a majority of the landowners owning a majority of the land of the district, *held* sufficient in view of Levee Act, § 44, as amended by Laws 1919, p. 440, § 1, under which the proceedings were had, there being nothing in the statute requiring any particular form of petition, nor a statement that a majority of the landowners owning a majority of the land in the district had signed it and the affidavit attached to the petition showing that a majority of the owners had signed.

4. Drains ⇐16—Ownership of land by signers of petition for dissolution of district held sufficiently proved.

In a proceeding for the dissolution of a drainage district, there being no question raised as to the signatures of the landowners of the district signing the petition for dissolution, and there being an examination in open court of witnesses on the subject, and the court having before it the petition for organization and the assessment roll, which showed the acreage and the number of owners in the district, there was sufficient proof of the ownership of the signers of the petition.

5. Drains ⇐16—Averment in petition for dissolution of district that no contract for construction of improvements let held unnecessary.

In a proceeding for the dissolution of a drainage district, that it was not alleged in the petition that no contract for the construction of improvements had been let did not deprive the court of jurisdiction to order a dissolution of the district; such letting being a matter of defense, and the record showing that no contract for the construction of work had been let.

6. Drains ⇐16—Proof of notice of proceedings to dissolve district held to comply with statute.

In a proceeding for the dissolution of a drainage district, the certificate of the clerk showing the mailing and posting of the notices for dissolution and the certificate of the secretary and treasurer of the paper in which the notice was published, and who made affidavit that she was such officer of such paper, that such notice was published at least once a week for 3 successive weeks *held* a sufficient compliance with Levee Act, § 3, as to proof of notice, and was therefor sufficient.

7. Drains ⇐16—Notice of dissolution proceedings held not required 3 weeks prior to first day of term of county court.

In a proceeding to dissolve a drainage district, contention that the notice of dissolution should have been given 3 weeks prior to the first day of some term of the county court not sustained; the purpose of the Legislature being to fix a return day with reference to the date of the filing of the petition, and to permit the writ to be returned on any day which was far enough in the future to permit the statutory notice to be given.

8. Drains ⇐16—Striking of claim against drainage district in dissolution proceedings held not error.

In a proceeding for the dissolution of a drainage district, the district could not complain of the action of the court in striking the answer of a claimant who asserted a claim in the nature of a judgment against the district, where claimant did not perfect the appeal granted it, and did not complain on appeal of such action.

Appeal from Logan County Court; L. B. Stringer, Judge.

Proceeding by John F. Regan and others against the Upper Salt Creek Drainage District. Judgment for plaintiffs, and defendant appeals. Affirmed.

Harold F. Trapp, of Lincoln, for appellant.

Peter Murphy and Anderson & Mangas, all of Lincoln, for appellees.

STONE, J. This is an appeal from a judgment of the county court dissolving the appellant drainage district, located in Logan county. The district was organized in 1920, and comprised 7,622 acres. On December 23, 1922, the commissioners filed an assessment roll, with plans and specifications of proposed ditches and improvements, which it was estimated would cost $190.000. Thereafter, on March 6, 1923, the petition to dissolve the district was filed. On June 4 an order was entered dissolving the district, provided the costs in the amount of $207.05 were paid within 30 days thereafter. The appellant district brings the cause here for review.

[1] The drainage commissioners entered their limited appearance, and filed objections to the jurisdiction of the court, which objections were overruled. As the commissioners are not appellants here, the action of the

court in overruling their objections to jurisdiction is not subject to review.

The appellant district filed a plea to the jurisdiction of the court, by which it challenges its jurisdiction of the persons by reason of insufficiency of notice, but does not challenge its jurisdiction of the subject-matter or the sufficiency of the petition to confer jurisdiction on the subject-matter. The plea, on hearing, was overruled, and, the appellant district failing to answer, the parties defendant were defaulted, and the petition taken as confessed. The appellant district, however, contends that the petition was not sufficient to give the court jurisdiction, and that questions as to jurisdiction of the court to enter the order can be attacked even for the first time on review.

[2] The Lincoln National Bank of Lincoln, Ill., filed an answer to the petition to dissolve, setting up that it had a claim in the nature of a judgment against the district amounting to $2,000. This answer was, on motion of the appellees, stricken from the files, and the filing of the same was thereafter again refused by the court on application of the bank. An appeal was prayed but not perfected. Therefore no question arises on the record at this time concerning this action of the court.

The issues involved on this review are the sufficiency of the petition and of the notice. It is also contended by the appellant that the evidence did not justify the judgment of the court.

[3] Concerning the sufficiency of the petition, it is urged that it is insufficient in substance. It is not disputed that the petition was signed by the different landowners purporting to sign it. The petition consists of a number of sheets of paper bound together. The first sheet of the petition has the following heading:

"The undersigned petitioners respectfully represent that they are a majority in number of all the landowners of and in such district, and that they own more than one-half in area of all lands in said district, and respectfully pray that the whole system of proposed works in said district may be abandoned and the said district abolished, as provided by section 44 of the Drainage Act passed and in force May 29, 1879, and as amended thereafter."

Following this statement appear the names of 40 persons signed thereto as owners of the land. A number of other pages appear thereafter in the petition, which are headed in the following language:

"The undersigned petitioners respectfully pray that the whole system of proposed work in said district may be abandoned and said district abolished, as provided by section 44 of the Drainage Act passed and in force May 29, 1879, and as amended thereafter."

These sheets are bound together, and to them is attached the affidavit of Albert C. Forbis, who states that he is acquainted with the territory comprising the drainage district, and knows who own the several tracts of land, and asserts that the petition was signed by a majority of all the owners of land in the district, and that the signers own more than one-half of the land in area; also that no contract for the construction of any works or proposed works within or for said district had been made or entered into by it. Following the names of nonresident landowners appear the acknowledgments taken by each of them before notaries public.

It is contended that the petition is not sufficient, for the reason that the headings do not all contain the statement that the undersigned are a majority of the landowners owning a majority of the land of the district, and for the further reason that the petition does not state that no contract has been let; that these are jurisdictional matters, and that it is necessary that they be set out. Cases are cited holding that the jurisdiction of the county court in drainage matters is created by the statute, and that the statutory provisions must be followed. There is no denial of or doubt about this rule as laid down in the cases cited, but appellees contend that it is not necessary that the headings should contain the statement claimed by the appellant to be necessary, or that the signatures should be all under one heading where, as here, the different sheets of the petition are bound together, and the court is able to see from an examination of it that a majority of the landowners owning a majority of the land signed the petition for dissolution.

The dissolution in this case was ordered under section 44 of the Levee Act, as amended in 1919 (Laws 1919, p. 440, § 1), which provides that a majority in number of all the landowners of a drainage district organized under the act, owning more than one-half of the area of the lands in the district, may petition the county court, at any time before any contract for construction of the proposed work shall have been let, that the whole system of proposed works be abandoned and the district abolished, and that upon the presentation of such petition it is mandatory upon the county court to enter upon its records an order granting the prayer of the petition on condition that the petitioners pay all court costs within 30 days after the rendition of the order. There is nothing in the statute requiring any particular form of petition, nor is it an objection that the petition does not state that a majority of the landowners owning a majority of the land had signed it. As was said in Town of Somonauk v. People, 178 Ill. 631, 53 N. E. 314:

"Such an averment could not be truthfully made by any petitioner except the one whose signature would complete the requisite number and those who might afterwards sign—a con-

character of the objection."

In Hansmeyer v. Indian Creek Drainage District, 284 Ill. 458, 120 N. E. 321, this court again had before it the matter of the sufficiency of a petition prepared and circulated in different parts. It was there said:

"If a petition had been prepared in duplicate and some of the petitioners had signed one and the rest another of the duplicates and both had been filed, they would have constituted a single petition, and there is no substantial difference in what was done here."

The petition contains the signatures of 121 landowners out of a total of 154. The petition clearly asks a dissolution of the district under section 44 of the Levee Act. The affidavit attached thereto shows that the persons signing the consolidated petition represent more than one-half of the owners of the land, owning more than one-half thereof. There is no answer raising any question as to whether or not the purported signatures are true, or whether or not the signers are landowners, or whether they represent a majority of the land. The proof made by the affidavit therefore presented a prima facie case. Moreover, there was an examination in open court of witnesses on this subject, and the court had before it the petition for organization and the assessment roll, both of which showed the acreage and number of owners.

[4] It is contended that it was necessary, in order that the petition be valid, to make proof of the ownership of the land of the district as shown in the petition. No such issue was raised in the pleadings, and the proof made was sufficient. Cosby v. Barnes, 251 Ill. 460, 96 N. E. 282; Hollenbeck v. Detrick, 162 Ill. 388, 44 N. E. 732.

[5] Nor was it necessary that the petitioners set out in the petition that no contract for construction of the improvement had been let. That was a matter which was, of course, necessary to be determined by the county court before making the order, but the presence of such an averment in the petition was not necessary to give the court jurisdiction of the subject-matter. If a contract had been let, it was a proper matter of defense, and no such defense was raised. We are of opinion that the petition was sufficient. The record, on examination of witnesses, shows that no contract for the construction of the work had been let.

[6] It is also objected that proof of notice was not sufficient. It is not contended that the notice was not sufficient, but that the manner of making proof before the court did not show that statutory notice was given. The certificate of the clerk shows the mailing and posting of notices as required by law. There is a certificate of the Courier-Herald Company, which publishes a newspenter, secretary and treasurer, that a notice, of which a true copy was annexed, was published in the paper 19 times for 19 successive days; that the first publication was May 8, and the last publication was May 29. The notice required by section 44 is that provided in section 3 of the Levee Act for the length of time and in the manner there provided. Section 3 provides:

"The clerk of said county court shall cause three (3) weeks' notice of the presentation and filing of such petition to be given, addressed 'to all persons interested,' by posting notices thereof at the door of the court house of the county or counties in which the district is situated, and in at least ten (10) of the most public places in such proposed district, and also by publishing a copy thereof at least once a week for three successive weeks, in some newspaper or newspapers published in the county from which the larger part of said district is proposed to be formed. * * * The certificate of the clerk, or the affidavit of any other creditable person, affixed to a copy of said notice, shall be sufficient evidence of the posting, mailing and publication of said notices." Smith-Hurd Rev. St. 1923, c. 42.

Allyne V. Carpenter also filed with her certificate her affidavit that she is secretary and treasurer of the Courier-Herald Company, and that a notice, of which a true copy was attached, was published in the Lincoln Daily Courier-Herald at least once a week for 3 successive weeks, the first publication being May 8, 1923, and the last publication May 29, 1923. This proof of publication complies with the statute requiring that it be proven by the affidavit of a credible person, and the objection to it is without merit.

[7] It is also objected that the notice should have been to a succeeding term of court, and that the 3 weeks' notice required by the statute should have been three weeks prior to the first day of some term of the county court. It was held in People v. Munroe, 227 Ill. 604, 81 N. E. 704, where this question was raised, and where the statute provided that the clerk shall cause 3 weeks' notice of the presentation and filing of such petition to be given, that the legislative purpose of such language was to fix the return day with reference to the date of the filing of the petition, and that the writ might be returnable on any day which was far enough in the future to permit the statutory notice to be given. This objection to the notice cannot be sustained.

[8] Counsel for appellant appears to have assigned error on the action of the county court in striking the answer of the Lincoln National Bank from the files. As we have seen, the bank did not perfect the appeal granted it, and is not here complaining, and we do not understand wherein it is to the interest of the appellant district to have a judgment against it protected. Moreover,

that question has been definitely settled by the holding of this court in Deneen v. Deneen, 293 Ill. 454, 127 N. E. 700; Schewe v. Glenn, 302 Ill. 462, 134 N. E. 809, and Bossert v. Granary Creek Drainage District, 307 Ill. 425, 138 N. E. 726, and, while it is suggested that the court ought not to adhere to the ruling in those cases, we see no justification for modifying those decisions.

We find no reversible error in the record in this case. The judgment of the county court will therefore be affirmed.

Judgment affirmed.

(311 Ill. 11)

PEOPLE ex rel. PEARSALL, County Collector, v. CATHOLIC BISHOP OF CHICAGO. (No. 15722.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Taxation ⟸242(1), 244—Seminary preparing young men for priesthood held exempt as property used exclusively for "school or religious purposes."

A Catholic seminary conducted for the purpose of preparing young men for priesthood *held* exempt from taxation under Const. art. 9, § 3, and Cahill's Stat. 1923, c. 120, § 2, cl. 2, exempting property used exclusively for "school or religious purposes."

2. Taxation ⟸211—Primary use of property determines right to exemption.

In ascertaining whether property is exempt under a constitutional or statutory provision, the primary use of such property must be considered; the right to exemption being determined by its use.

3. Taxation ⟸203—Party claiming exemption must bring himself within constitutional and statutory provision.

A party claiming exemption from taxation must bring himself within the constitutional and statutory provision.

4. Taxation ⟸211—Property not devoted to exempt use at time of assessment does not become exempt because thereafter devoted to use contemplated at time of assessment.

Property not exempt from taxation on the day on which it is assessed under the Revenue Act does not become exempt because subsequently devoted to a use contemplated at the time of assessment.

5. Taxation ⟸242(2), 244—Property of seminary used for recreational purposes held exempt as property devoted to "school or religious purposes."

A lake which had been dredged and was used by a seminary preparing young men for priesthood for swimming, boating, and winter sports, and grounds surrounding seminary used exclusively for recreational purposes, *held* exempt from taxation under Const. art. 9, § 3, and Cahill's Stat. 1923, c. 120, § 2, cl. 2, exempting property used exclusively "for school and religious purposes."

Appeal from Lake County Court; Perry L. Persons, Judge.

Proceeding by the People, on the relation of Ira E. Pearsall, County Collector, for sale of land for nonpayment of taxes. Objections by the Catholic Bishop of Chicago were overruled, and the objector appeals. Reversed and remanded, with directions.

McNab, Holmes & Long and McCormick, Kirkland, Patterson & Fleming, all of Chicago (Samuel S. Holmes, Perry S. Patterson, and William H. Symmes, all of Chicago, of counsel), for appellant.

Ashbel V. Smith, State's Atty., of Waukegan (Sidney H. Block, of Waukegan, of counsel), for appellee.

FARMER, C. J. The county collector of Lake county made application to the county court for judgment against certain lands in that county returned delinquent for general taxes for the year 1922, and for an order of sale thereof. The Catholic bishop of Chicago, George W. Mundelein, a corporation sole, appeared and objected thereto for the reason that the premises in question were used exclusively for school purposes and school and religious purposes, and not leased or otherwise used with a view to profit, and were therefore exempt from taxation. The court overruled the objections, entered judgment and order of sale against the property, and an appeal therefrom has been prosecuted to this court.

Appellant owns approximately 950 acres of land near Area, Ill., a small town in Lake county, more than half of which acreage is taxable farm land, and not here involved. The property here in question comprises a tract of about 465 acres. A Catholic seminary is located upon the property and conducted for the purpose of preparing young men for the priesthood. During April, 1922, there were some 40 students in attendance. These students, their instructors, and several nuns who prepared the meals served at the school, and took care of the institution, resided in buildings located upon the property. The main buildings are situated upon blocks 1 and 2, containing about 65 acres, which were not assessed, and which it is conceded were exempt from taxation. The remaining property, of approximately 400 acres, joins the 65 acres last mentioned, and the whole premises form one large body of land, which is entirely fenced except along the boundary line of one tract. There are some buildings on other portions of the 400 acres. On one tract is the gardener's residence. On another is the summer home of the archbishop and a chapel. Other buildings are a summer school, dormitory, and refectory. Some 40 acres are in nursery for growing trees and shrubs to be used in beautifying the grounds. Several acres consti-

tute a baseball diamond and tennis courts, 80 acres are intended as a golf course, and 140 acres comprise a lake, where boathouse piers have been put in, and swimming, boating, and skating are indulged in. There is some wooded land, which has been cleared of underbrush and paths and trails cut through. Some four miles of roads, drives, and walks have been built upon the premises and the grounds otherwise beautified. All the buildings and improvements on the entire premises are used or intended to be used for the purpose of the institution alone, and no part of it is leased or otherwise used with a view to profit. The evidence shows the course of study to be six years. The scholastic training and study occupy 8 hours per day, and include English, philosophy, chemistry, biology, history, church history, scripture, public speaking, and foreign languages. Some subjects are taught in Latin, and recitations therein made in the same language. The moral training of the students occupies some three hours' time per day and consists of religious services. The physical training of the students requires about 3 hours' time per day and is in charge of one person, who directs the students' recreational exercise. The term for instruction extends from about the middle of September to the middle of June, during which period the seminarians are not permitted, except in extreme or urgent instances, to leave the seminary grounds. The students live in a dormitory having over 190 rooms, and pay nothing for their board, room, laundry, or training, except a small laboratory fee. The proof further shows the entire premises have not yet been completed and beautified, as additional drives, walks, gardens, buildings, and improvements of various kinds are contemplated, and some are in the process of construction.

Appellant contends the entire tract of approximately 465 acres, which constitutes the seminary grounds, is exempt from taxation under the law. It is the contention of appellee that the judgment should be sustained because appellant did not clearly show he was entitled to the exemptions; that all of the acreage is not being used exclusively for school and religious purposes, and some of the improvements had not been completed and put into use at the time of making assessment for taxes, on April 1, 1922.

Section 3 of article 9 of the Constitution authorizes the Legislature to exempt from taxation, by general law, all property used exclusively for school or religious purposes. Pursuant to such authority the Legislature passed such a statute, and has from time to time made amendments thereto, under which laws various decisions have been handed down by this court. The present statute exempting such property from taxation reads as follows:

"All property used exclusively for religious purposes, or used exclusively for school and religious purposes or for orphanages and not leased or otherwise used with a view to profit." Cahill's Stat. 1923, c. 120, § 2, cl. 2.

[1] Without a repetition of the scholastic curriculum of the seminary as shown by the proof, and a discussion thereof, it seems quite clear that under the authority of People v. St. Francis Academy, 233 Ill. 26, 84 N. E. 55, and People v. Deutsche Gemeinde, 249 Ill. 132, 94 N. E. 162, the seminary is such as would be termed an institution of learning or school as contemplated in clause 2 of section 2 of the Revenue Act heretofore quoted. This section, with the exception of a slight amendment not material here, is the same as it was when the case last above mentioned was decided, in which we held said section was within the grant of power to the General Assembly.

From the testimony produced on the trial it appears that the main buildings of the school were all in use, and other buildings located on different tracts were also used, in connection with the educational work. The entire acreage, from plans previously made, was undergoing a process of change from the raw or natural state, and being converted into school grounds or campus, with drives, walks, flower beds and other improvements. It is true, a large part was being devoted to recreation, the lake comprising some 140 acres for boating, swimming, and skating, the wooded land with its paths and trails, the proposed golf course, baseball diamond, and tennis courts for those who partake of such outdoor exercise. The record is entirely without proof or suggestion that any of the acreage was not used or to be used as a part of the grounds in connection with the school, and for no other purpose. The provision of the statute here under consideration has undergone various changes and amendments. The earlier provisions show some limitation as to the amount of ground to be exempted and included with the buildings. By the amendment of section 2 of the Revenue Act in 1909 (Laws 1909, p. 309) the language was materially changed. Since that date, and by subsequent amendments, there appears to have been no limitation as to the amount or extent of ground that may be exempted, provided such premises are used exclusively for school or religious purposes and not for profit. This court, considering this same section of the Revenue Act, in People v. Salvation Army, 305 Ill. 545, 137 N. E. 430, said:

"The only constitutional limitation on the power of the Legislature to exempt property used for religious purposes is that such use shall be exclusive."

The same expression would apply whether for religious purposes or for school purposes.

[2] In ascertaining whether property is exempt under a constitutional or statutory provision, the primary use of such property

must be considered, and the use of the property chiefly determines its right to exemption. First Congregational Church v. Board of Review, 254 Ill. 220, 98 N. E. 275, 39 L. R. A. (N. S.) 437; People v. Salvation Army, supra. Though it has been said that the statute must be strictly construed, and the finding against the exemption if there be any doubt about the matter, yet in arriving at a conclusion as to whether the use is exclusive those words are not to receive an unreasonably narrow construction. In a very recent tax case considered by this court it was said:

"The uses of property in these tax cases for the work of the institution are necessarily relative, and usually are not absolutely essential." Knox College v. Board of Review, 308 Ill. 160, 139 N. E. 56.

The conclusion in each case depends upon the facts applicable thereto.

[3-5] It is beyond dispute that the party claiming exemption from taxation must bring himself within the constitutional and statutory provision. People v. Watseka Camp Meeting Ass'n, 160 Ill. 576, 43 N. E. 716. By the Revenue Act property is required to be assessed "with reference to the ownership, amount, kind and value" on the 1st day of April. Property owned on that day which is not exempt is taxable, although it may thereafter be devoted to a purpose which would exempt it from taxation. People v. Deutsche Gemeinde, supra. The tract of 80 acres intended to be used as a golf course was not so used April 1, 1922. At that time it was in its natural state, and had never been used as a golf course or for purposes of recreation. That it was intended to use it for such purpose in connection with the school was not sufficient, even if it would have been exempt had it been devoted to the use intended before April 1. In re Petition of Allerton, 296 Ill. 340, 129 N. E. 801. Appellee contends that under the same rule the lake and other tracts were not exempt when assessed. The proof shows the lake has been dredged and cleaned and had prior to April 1 been used by the school for swimming, boating, skating and other winter sports. Piers had been built and the foundation for a boathouse laid before April 1, 1922. That tract was used for the purpose intended before that date, and the completion of the boathouse would only add to the convenience of its use by the school. The same is also true of the other tracts, except the golf course. It is true, the school contemplated constructing more driveways and paths on other tracts, but about 4 miles of such roads had been constructed through the grounds and wooded tracts, and were used exclusively for recreational purposes by the school.

We are of opinion appellant's objections should have been sustained as to all the land except the 80 acres intended for a golf course, and judgment should have been rendered against the tract or tracts intended for that use by the school.

The judgment of the county court is reversed, and the cause remanded, with directions to render judgment in accordance with the views expressed in this opinion.

Reversed and remanded, with directions.

(311 Ill. 291)

PEOPLE ex rel. GREER, County Collector, v. HUNT. (No. 15828.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Taxation ⇐362—Credits actually assessed for one year cannot be thereafter assessed for same year as omitted credits.

When credits are listed, assessed, and the tax paid for a given year, the property cannot for that year be again assessed in subsequent years as credits omitted.

2. Evidence ⇐83(1)—Public officials presumed to perform their duties.

The law presumes that public officers properly perform their duties.

3. Evidence ⇐158(16)—Where board of review makes no record of decision, oral testimony is competent.

As the only record the board of review keeps in determining whether property shall be assessed against a party is to note what it does on the tax books, where it does nothing about taxing the property, oral testimony of the hearing and determination of the board is competent.

4. Taxation ⇐108—Taxpayer held to have transferred contract for purpose of evading taxes thereon.

Evidence *held* to show that taxpayer had transferred a contract for the sale of land to a trustee for a nonresident for the purpose of evading taxes thereon, and therefore the property represented by the contract was properly taxed.

Appeal from Fulton County Court; J. D. Breckenridge, Judge.

Proceeding by the People, on the relation of Harry W. Greer, County Collector, against Bertha B. Hunt. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Floyd F. Putman, of Canton, for appellant.

Marvin T. Robinson, of Lewistown, for appellee.

FARMER, C. J. This appeal is prosecuted by the appellant from a judgment of the county court sustaining objections of appellee, Bertha B. Hunt, to judgment for a delinquent personal property tax which the collector extended against real estate of appellee. The board of review assessed for taxation as the property of appellee a contract

entered into June 2, 1920, between appellee and Tony Golick, by which appellee, the owner of certain land described in the contract, agreed she would convey it to Golick upon the payment of $27,000 according to the terms of the contract. A payment of $4,000 was made, and there remained in 1921 and 1922 a balance due on the contract of $23,000. The board of review in 1922 assessed the contract as appellee's property at a valuation of $13,800, and also assessed it for the previous year at the same valuation as an omitted credit taxable to appellee that year. The taxes extended amounted to $893.91. Appellee, on notice from the board of review, appeared before it and resisted the assessment. She refused to pay the tax, and it was extended against her real estate. She paid the taxes assessed against her land, and the collector extended the unpaid personal tax against her real estate. When he applied for judgment, appellee objected to judgment and order of sale for the personal property tax, and the county court sustained her objection and denied judgment.

Appellee filed eight objections, but it will not be necessary to set them all out or discuss them. The decision of the case depends upon whether for the years the property was assessed appellee was the owner of it on the 1st day of April, and also whether, in any event, it could have been taxed as a credit omitted in 1921.

[1, 2] The oral testimony shows the board of review investigated the liability of the contract for taxation in 1921, that appellee appeared before the board in answer to a notice, and that the board, upon a hearing, determined she was not liable to be taxed on the property and it was not assessed against her. There is no dispute of the truth of the testimony as to what the board did that year and of its decision that the property should not be taxed to appellee, but there was no record of the board of review showing what it did, other than that the tax books show the property was not assessed to appellee that year. We have held, when credits were disclosed for assessment and taxation, taxes extended and paid, and in a subsequent year the same party was assessed on omitted credits for the previous years in which credits were assessed and the taxes paid on the claim that the owner had not disclosed the true amount of his credits, the action of assessing the credits for the years they had been assessed and the taxes paid was unlawful and void. Warner v. Campbell, 238 Ill. 630, 87 N. E. 853. We have no doubt of the soundness of that decision. There must be some stability in the administration of the taxing laws by the tax authorities, and some security to the property owner in reliance on the official acts of the authorities. There might be circumstances which would justify the tax officer in disregarding the action in previous years as to assessing credits, but that could only be, if at all, under exceptional conditions. We think the general rule is, and should be, when credits are listed, assessed, and the tax paid, the property cannot for those years be again assessed in subsequent years as credits omitted. But that is not the precise question here presented. The question here is, the tax authorities having caused appellee to appear at a hearing when the object was to determine whether the contract was assessable against her as a credit, the hearing having resulted in a decision of the board of review that it was not taxable against her, whether the board's action in refusing to assess and tax the contract to appellee was in the nature of a judicial determination that year, and in effect a bar to a reconsideration of the question in a subsequent year.

We think the principle governing the question presented here is analogous in principle to the question decided in Warner v. Campbell, supra. The board of review heard and considered the facts presented on the question of the liability of appellee to be assessed on the property in 1921, and decided she was not. Appellee's claim was that she had prior to April 1, on notice to Golick, terminated and forfeited the contract. If the board of review in the following year could disregard the action and decision of the board in 1921, and on the same facts find the contract was assessable to appellee, then a new board of review in any year could disregard the previous board's action, and the taxpayer would always be in a state of uncertainty. The law presumes public officers properly perform their duties; and we think, in the interest of stability, when it does not appear that there was any concealment of the facts upon which the taxpayer bases his claim that the property should not be taxed to him, the action of the board should be a protection to the taxpayer against any action of the board in subsequent years to tax the same property against the same party which the former board had determined should not be assessed against him. That is not different in principle from the rule laid down in Warner v. Campbell, supra. Peirce v. Carlock, 224 Ill. 608, 79 N. E. 959, and Barkley v. Dale, 213 Ill. 614, 73 N. E. 325.

[3] The only record the board of review is required to keep of its action in determining whether property shall be assessed against a party is to note what it does on the tax books. As it did nothing about taxing the property here involved, the board made no entry on the tax books, and we think oral testimony of the hearing and determination of the board was competent. Our conclusion is that the board should not in 1922 have taxed the property as an omitted credit in 1921.

[4] Appellee contends she should not have been assessed, on account of the contract in question, for the year 1922, which she testified was reinstated in July, 1921, for the rea-

son that she was not the owner of it on April 1, 1922. Proof was offered before the court by several witnesses. Appellee testified she assigned the contract on March 16, 1922, to R. M. Kingsland, trustee, for A. T. Lane, of Hitchcock, Kan., who is an uncle of appellee; that she had not had in her possession or claimed any interest in the contract since that time; that the transfer was made in good faith, as she wanted to go west and stay indefinitely, and it was made for a valuable consideration, with no intention to avoid taxes. She testified, on cross-examination, the reason she disposed of the farm to Kingsland was that, after Golick had been told that she had assigned the contract, he was very abusive, and she did not care for any further dealings with him. She said she would rather take a less per cent. than be troubled with the contract any further. The assignment as executed by appellee and her husband was offered in evidence, and recited a consideration on its face of $1. On April 28, 1922, a warranty deed was made by appellee and her husband conveying the land described in the contract to the trustee mentioned in the assignment, with a provision that the deed was made subject to an agreement for a deed to Tony Golick, who was the other party to the contract here in question. This deed was also offered in evidence, and the consideration named therein was $1. Appellee further testified she was paid for the assignment of the contract in government bonds, and that she had no private agreement that the party would be transferred back to her. She admitted collecting payment of interest and taxes from Golick on the contract during the latter part of June, 1922, which was 3½ months after the date of her assignment, and over 2 months after her deed conveying the property, but stated she did so with the consent of the trustee, and immediately turned over the money to him in amount of $760.50, and took his receipt therefor dated July 1, which receipt was also introduced in evidence.

R. M. Kingsland testified he is a real estate, loan, and insurance man, residing in Canton, Ill.; that he made the assignment of the contract in his office on March 16, 1922; that he had no dealings with A. T. Lane on that day; did not know on the day of the assignment whom he was acting for as trustee; did not pay appellee any consideration for the transfer of the property, nor did he deliver any government bonds to appellee for the property on that day. He further testified he had delivered government bonds and securities to appellee since the time of the assignment of the contract, but could not state positively that such securities were in consideration of the property. Witness has a power of attorney from Lane to collect the rent. Witness said:

"Of course, in this particular matter I would prefer not to state who the owner is, but, of course, Mrs. Hunt testified it was Mr. Lane, and there is no reason for me denying it, but personally I prefer not to give that out."

Lane is an uncle of Mrs. Hunt, and also an uncle of Kingsland's wife.

Tony Golick, the purchaser of the property mentioned in the contract, testified that he is a druggist in Canton; that appellee had called him to her house and asked him not to give her away to the board of review; that the board of review was after her about taxes, and she wanted witness to help her out so the board would not tax her; that appellee had talked to him many times about it. Witness said he received no notice at the time of the assignment of the contract, in March, 1922, but appellee told him when he paid his interest after July he would have to deal with Kingsland. Witness said that he did not appear before the board of review at any time, but told the board when it called on him at his store that he did not want to make any statement about the contract, but would state the facts any time he had to do so. The contract was canceled January 15, 1923. Appellee denied making any request of or statement to Golick relative to keeping the contract from being taxed, or that the board of review was after her, and testified Golick threatened to cause her trouble with the board of review or federal tax collector if she did not give back to him the property which he had deeded to appellee, or its value, $4,000. A letter from appellee to the board of review, dated September 16, 1922, was introduced in evidence, wherein she stated that her reason for disposing of her interest in the farm was because of a lost or misplaced deed.

Counsel for appellee says that the case rests upon the facts as determined by the evidence, and, the lower court having heard the testimony of the witnesses, and having found for appellee, this court should not disturb such finding unless it is contrary to the weight of the evidence. It is true that the trial court is in a better position to form an opinion as to the relative merit and weight of the testimony given by the several witnesses, whom he sees and hears; but, as we view this record, we think there exists through all the testimony a persistent effort on the part of appellee to evade taxes upon the contract here involved. Her own testimony as to why she disposed of the farm property during the early part of 1922 is not consistent. Her assignee in the contract, who was named as trustee for her uncle, did not know at the time of the assignment for whom he was acting as such trustee, though he himself made out the assignment for appellee. The trustee did not corroborate appellee that any consideration had been paid her for such assignment or deed to the property. In fact, he testified he paid her no consideration whatever for the transfer of the property, and said he preferred not saying to

whom the title to the property actually belonged. It has well been said:

"When the state imposes the burden of taxation upon the property possessed by the citizen, it means both that of which he is the open holder and that which he has secreted and concealed. His cunning may, in practice, defeat the imposition upon the latter, but it is legally no less liable to the burden, and, when discovered, the duty will be exacted, no matter what the shifts and devices which may have been resorted to in order to escape." In re Appeal of People's Bank of Vermont, 203 Ill. 300, 67 N. E. 777.

From the state of the record we think the property represented by the contract was properly taxed for the year 1922, and the county court should have so held.

The judgment is reversed, and the case remanded to the county court, with directions to deny judgment for the tax on the assessment of 1921, and to enter judgment for the tax of 1922.

Reversed and remanded, with directions.

(311 Ill. 248)

CITY OF CENTRALIA v. KNOWLTON et al. (No. 15825.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Appeal and error ⇐878(1)—Questions not brought up by appellees, although argued, not considered.

Questions not brought up for review by appellees, although argued by them, will not be considered.

2. Municipal corporations ⇐302(1)—Resolutions for improvement held adopted by city council acting as such and not as board of local improvements.

Minutes of proceedings of the council of a city of less than 50,000 population operating under the Commission Form of Government Act, as amended by Laws 1913, p. 159, Laws 1915, p. 286, and Laws 1917, p. 284, the last of which conferred on the councils of such cities all powers theretofore exercised by boards of local improvements under Act June 14, 1897, and amendatory acts, *held* to show that the council, in providing for a drainage improvement, acted, not in the capacity of a board of local improvements, but in that of a city council exercising the powers theretofore had by such board, by yea and nay votes on each resolution or motion, as required in cities under the commission form by Cahill's St. 1923, c. 24, § 344.

Appeal from Marion County Court; W. G. Wilson, Judge.

Petition by the City of Centralia for confirmation of a drainage ordinance and assessment roll, to which Eva Knowlton and others filed objections. Petition dismissed, and petitioner appeals. Reversed and remanded, with directions.

L. H. Jonas, of Centralia (Frank F. Noleman, June O. Smith, and Andrew J. Dallstream, all of Centralia, of counsel), for appellant.

Charles H. Holt, of Salem, for appellees.

STONE, J. The city of Centralia, a city of less than 50,000 population, operating under the Commission Form of Government Act, filed its petition in the county court for the confirmation of an ordinance and assessment roll providing for an improvement known as the Northwest drainage district. A number of persons owning property within the proposed district filed objections. By statement of counsel in open court the objectors waived all legal objections except those relating to the description of the improvement and the district and those relating to the capacity in which the city council acted at the time it took the various steps in providing for the improvement. Of the first class of objections it was agreed that the only ones remaining for the consideration of the court were the sixth, tenth, eleventh, twelfth, and thirteenth. Those relating to the manner in which the city council acted in providing for the improvement were the second and third objections filed. The sixth, tenth, eleventh, twelfth, and thirteenth objections were, on hearing, overruled by the court. The second and third objections—i. e., those relating to the capacity in which the city council acted—were sustained and the petition for the improvement was dismissed. The city has appealed, and assigns error on the ruling of the court sustaining the second and third objections.

[1] Counsel for the objectors, although bringing no question to this court for review, have argued that the court erred in overruling their sixth, tenth, eleventh, twelfth, and thirteenth objections, relating to the description of the improvement and the district. As such questions are not before us they will not be considered.

[2] The question in the record here arises on the second and third objections, which are that the ordinance authorizing the improvement was passed and all preliminary steps taken prior thereto were taken by the city council while acting as a board of local improvements, and the argument is that under the 1917 amendment (Laws 1917, p. 284) to the Commission Form of Government Act the board of local improvements was abolished in cities of less than 50,000 population operating under the act and all the powers exercised by such board were directed to be exercised by the city council, and that in this case the city council illegally acted as a board of local improvements.

The Commission Form of Government Act was passed by the General Assembly in 1910 (Laws of 1910, p. 12). In 1913 (Laws 1913, p.

159) the act concerning powers conferred upon the city council under the Commission Form of Government Act was amended. By that amendment the council was given powers and duties theretofore had and possessed by the mayor, city council, president of the board of trustees, etc., including all executive, legislative, or administrative officers in cities and villages incorporated under the general law, except the board of local improvements, which was required to remain a separate and distinct body, with all the powers given to such a board under the Local Improvement Act. In 1915 the Legislature again amended the Commission Form of Government Act regarding the power of the city council and the board of local improvements. By this amendment it was provided that in cities of a population of less than 50,000 operating under the commission form of government the council may provide, by ordinance, that the board of local improvements shall consist of the mayor and any two or more commissioners, regardless of whether there is a public engineer and superintendent of streets provided by ordinance. Laws of 1915, p. 286. This act was again amended in 1917. By this amendment it was provided as follows:

"The council shall have and possess, and the council and its members shall exercise all executive and legislative powers and duties now had, possessed and exercised by the mayor, * * * and the council shall have and possess, and the council and its members shall exercise all executive and legislative powers and duties now had, possessed and exercised by the board of local improvements, provided for, in and by an act entitled, 'An act concerning local improvements,' approved June 14, 1897, in force July 1, 1897, and all acts amendatory thereto and in all such cities and villages that shall hereafter adopt this act, or that shall have heretofore adopted this act, in enforcing said act, concerning local improvements, herein set out, the person who spreads assessments shall be selected in each case by a majority vote of said council and its members, and all local improvements, contracts and bonds or warrants issued in pursuance thereof, or either of them, may and shall be signed by the mayor or by any three members of the council." Laws of 1917, p. 284.

The minute book of the proceedings of the city council as kept by the city clerk shows the following mode of procedure by that body: Under the heading "Regular Session," the minutes of the transaction of the city's business other than matters of local improvement were noted. Thereafter a minute of the following motion is made:

"That the council adjourn and reconvene immediately thereafter to exercise the executive and legislative powers formerly had, possessed and exercised by the board of local improvements."

The minutes then show the adoption of the motion by a yea and nay vote. Thereafter appear notes under the heading "Board of Local Improvements," followed by minutes of the business transacted in connection with the matters of local improvements. All action appears to have been taken on yea and nay vote, and at the close of such minutes appears a record of a written motion "that the council, acting in capacity of and exercising and discharging the powers and duties of a board of local improvements, adjourn," etc., which motion is shown to have been carried by a yea and nay vote. This is characteristic of the minutes entered on all occasions. There is no evidence, as we view the record, that the city council was acting in any other capacity than that of the city council. The motion to adjourn the city council and to reconvene was a motion to adjourn and reconvene that body, not as a board of local improvements, but as the city council. The language "adjourn and reconvene immediately thereafter to exercise the executive and legislative powers formerly had, possessed and exercised by the board of local improvements," shows plainly that it was the city council acting and exercising the powers formerly had and exercised by the board of local improvements. It will be noted, also, that in the adjournment, after consideration of matters pertaining to local improvements, the language was that "the council, acting in the capacity of and exercising and discharging the powers and duties of a board of local improvements," adjourn. This is in accordance with the provisions of the statute as amended in 1917. There is nothing in the record of the minutes of the city council showing any attempt to act in the capacity of a board of local improvements, but they plainly show that the city council was exercising the powers theretofore had by such a board.

Stress is laid upon the fact that the minutes of the clerk show the meetings of the board as being under the heading "Regular Session" and "Board of Local Improvments." The fact that the clerk may have used the words "Board of Local Improvements" as a heading to the minutes of the council when acting on improvement matters does not indicate anything more than a matter of convenience on his part in locating the minutes of the council that have to do with local improvements. The minutes themselves and the action of the city council plainly and specifically show that it was acting as a city council and not as a board of local improvements. The fact that it is recited in the clerk's minutes that the council was exercising the powers and duties formerly exercised by a board of local improvements does not tend to show that they were acting as such board. City of Olney v. Baker, 310 Ill. 433, 141 N. E. 750.

The purpose of the Legislature in the amendment of 1917 was to authorize the city

council to act and function as a board of local improvements without organizing as a distinct body. The amendment of 1917 to the Commission Form of Government Act eliminated the board of local improvements and conferred upon the city council in cities of less than 50,000 population under the commission form of government the powers and duties previously exercised by such board. Under that act schemes for local improvements were required to originate in and be carried forward by the city council. City of Dixon v. Atkins, 298 Ill. 494, 131 N. E. 643; City of Chrisman v. Cusick, 290 Ill. 297, 125 N. E. 290.

Appellees rely upon People v. Kaul, 302 Ill. 317, 134 N. E. 740. In that case it appears not to have been doubted or questioned that the improvement there in question, with its preliminary steps and ordinances, originated with those styling themselves a board of local improvements. It was argued that the persons acting as the board were the members of the village council and that the work was done by persons designated by law to do it; that while they style themselves the board of local improvements, such was a mere irregularity. The record in that case, however, showed that all the meetings and proceedings were as of a board of local improvements, and all proceedings except the final passing of the ordinance were certified by the village clerk as of such a board. A resolution that the improvement be made was adopted without a yea and nay vote at what purported to be a meeting of the board of local improvements. In cities under the commission form of government the yea and nay vote must be taken upon each resolution or motion. Cahill's Stat. 1923, c. 24, § 344. The estimate of costs was submitted as by a board of local improvements and was signed by Kaul as president of the board of local improvements, and the opinion holds that this is sufficient to establish that the persons acting considered themselves to be a board of local improvements and were acting as such and not the city council. Such is not the record in this case. As we have seen, every action taken in connection with the improvement in question shows that it was taken by the city council exercising the powers formerly had by a board of local improvements. This being true, the fact that the clerk may have kept minutes of local improvement matters separate from other business of the council in nowise tends to prove that the city council was acting as a board of local improvements. It was error, therefore, to sustain the second and third objections to this improvement. For this error the judgment of the county court is reversed, and the cause remanded to that court, with directions to overrule said objections.

Reversed and remanded, with directions.

(311 Ill. 153)

INDIAHOMA REFINING CO. v. INDUSTRIAL COMMISSION et al.
(No. 15782.)

(Supreme Court of Illinois. Feb. 19, 1924.)

Master and servant ⟸367—Compensation claimant held employee of independent contractor.

One employed and paid by, receiving his instructions from, and subject to discharge by one hired by a refining company to unload coal at a certain rate per ton *held* not entitled to compensation from the company for injuries suffered while unloading coal at its plant; he being an employee of an independent contractor.

Error to Circuit Court, St. Clair County; George A. Crow, Judge.

Proceeding under the Workmen's Compensation Act (Smith-Hurd Rev. St. 1923, c. 48, §§ 138–172) by John Bynum, claimant, opposed by the Indiahoma Refining Company. To review a judgment confirming an award of the Industrial Commission, the Refining Company brings error. Reversed, and award set aside.

John A. Bloomingston, of Chicago, for plaintiff in error.

W. J. MacDonald, of Chicago (John W. Freels and T. S. Morgan, both of East St. Louis, of counsel), for defendant in error.

THOMPSON, J. Defendant in error, John Bynum, an unmarried man suffered a broken leg by jumping from a railroad car from which he was unloading coal at the plant of the Indiahoma Refining Company. An award was made against said company, and this writ of error is prosecuted to review the judgment of the circuit court of St. Clair county confirming that award.

Bynum testified that he was 53 years old; that he was employed to shovel coal from the cars to the bin of plaintiff in error; that he had worked about three weeks; that he was hired by Walter King; that King paid him so much for each car he unloaded; that he worked when King had work for him to do; that King paid him at the end of his day's work; that he averaged $5 a day and worked from 3 to 5 days a week; that King was his boss, gave him all his instructions, and had the right to discharge him; that he had no conversation whatever with the officers of the refining company, and that he received no instructions from them; that he did not know what arrangements King had with the company, but that all his arrangements were with King; that on the day he was injured John Fry was working in the car with him; that they were working side by side, both shoveling coal in the same direction; that the floor of the car was defective where he was shoveling, and that he moved over toward Fry's side of the car in

order to shovel better until he passed the bad place in the floor; that Fry became angry, and told him to stay on his side of the car; that he tried to explain to Fry that he was working around the bad place in the floor, and that Fry told him he did not want any back talk; that Fry seized a pick that was in the car and started after him; that he ran to the end of the car, jumped out, and broke his leg when he alighted on the ground; that he was carried into the office of the refining company, and later was taken to his home; that King went to his home with him; that he explained to King how he had hurt himself.

John Fry testified that he was working with Bynum on December 14, 1921; that they were shoveling coal from a car into the bin of the refining company; that Bynum kept getting in his way, and he told him to cut less so that he could stay out of his way; that Bynum threw down his shovel, and said, "Well, I will get out of the car;" that he said to Bynum, "Well, get out;" that Bynum passed by him, going toward the end of the car; that he looked around and saw Bynum pull his knife from his pocket and open it; that when he saw this he picked up the pick, and Bynum jumped out of the car; that he paid no attention to him after that.

Walter King testified that he had a contract with the Indiahoma Refining Company to unload its coal; that he was paid 15 cents a ton for unloading the coal; that he had a similar contract with other companies; that he hired extra help when he needed it; that there were days when he would have little or no coal to unload and others days when he would have several cars ready for him; that he hired his men and discharged them without consulting the refining company; that he had full authority over them and directed them what to do; that no one else had anything whatever to do with the men that worked for him; that he paid the men so much for each car that was unloaded; that Bynum earned about $10 or $15 a week during the three weeks he worked for him; that he paid his men after they finished unloading the cars that were assigned to them; that he went to the office of the company and received pay for unloading the coal, and that he paid his men from the money he received from the company.

The superintendent of the company testified that he hired King to unload the company's coal at a certain rate a ton; that King had had the contract for several years; that at first he paid him 18 cents a ton, but later the price was reduced to 15 cents; that sometimes there would be a car a day, sometimes there would be no car for 3 or 4 days, and sometimes there would be several cars in a day; that when coal arrived and the company was ready to have it unloaded King was called; that he did not know any of the men employed by King; that he did not know how much King paid his men; that the refining company paid them nothing and had no authority whatever over the men working for King; that he did not employ King's men or discharge them, nor direct them in any way; that he told King where to put the coal; that King put it where he was told, and then came to the office and collected the money due him; that he did not know what King did with the money after it was given to him; that the company carried no insurance on King's employees; that after Bynum was injured some woman called him by telephone and told him that Bynum was in need of medical attention; that he notified the insurance company that he had received this request.

The only questions argued are whether Bynum was an employee of the Indiahoma Refining Company and whether the accident was one arising out of his employment. Inasmuch as there is no evidence in the record which establishes the relation of employer and employee between plaintiff in error and Bynum, it will not be necessary to consider the second question. A mere statement of the facts as they appear in this record demonstrates that the award must be set aside. King was an independent contractor, and Bynum was one of his employees. This conclusion is in harmony with our decision in Hale v. Johnson, 80 Ill. 185; Meredosia Levee District v. Industrial Com., 285 Ill. 68, 120 N. E. 516; Bristol & Gale Co. v. Industrial Com., 292 Ill. 16, 126 N. E. 599; and La May v. Industrial Com., 292 Ill. 76, 126 N. E. 604. The facts considered, there is nothing in Decatur Railway Co. v. Industrial Board, 276 Ill. 472, 114 N. E. 915, Cinofsky v. Industrial Com., 290 Ill. 521, 125 N. E. 286, or Franklin Coal Co. v. Industrial Com., 296 Ill. 329, 129 N. E. 811, which supports the award in this case.

The judgment is reversed, and the award is set aside.

Judgment reversed, and decision set aside.

(311 Ill. 50)

PEOPLE v. KEMMING. (No. 15733.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Criminal law ⟸485(1)—Opinion as to speed of car given in answer to hypothetical question assuming facts not in evidence held incompetent.

In prosecution against automobilist for homicide, court *held* to have erred in permitting taxicab driver to answer hypothetical question propounded, and in answer thereto give his opinion as an expert as to speed of defendant's Packard car at the time of the accident; the proof tending to show that defendant's car was dilapidated, and brakes were not in good condition, and the hypothetical question assuming the brakes to be in good condition, and it appearing that the witness had never driven a heavy car.

2. Criminal law ⟸572—Guilt of automobilist of manslaughter held not proved beyond reasonable doubt.

In prosecution of automobilist for manslaughter, identity of accused as the driver of the car that killed the deceased *held* not proved beyond a reasonable doubt, in view of alibi testimony.

3. Criminal law ⟸742(1)—Province of jury to determine credibility of witnesses and disbelieve testimony as to alibi.

It is the province of the jury to determine the credibility of the witnesses and the weight to be given their testimony; and, where there is any reasonable basis for disbelieving the testimony to prove an alibi, or where there are any circumstances which may tend to discredit such testimony, the jury may, notwithstanding the proof that the defendant was not at the place where the offense was committed at the time of its commission, find him guilty.

4. Criminal law ⟸1159(2)—Supreme Court should reverse conviction if it cannot say that guilt proven beyond reasonable doubt.

A reviewing court is reluctant to reverse a judgment of conviction on the ground that it is not warranted by the testimony; but when the evidence is of such a character that the reviewing court cannot say the guilt of accused was proved beyond a reasonable doubt it is its duty to reverse the judgment.

Error to Criminal Court, Cook County; John A. Swanson, Judge.

Raymond C. Kemming was convicted of manslaughter, and brings error. Reversed and remanded.

Charles E. Erbstein and John B. Fruechtl, both of Chicago, for plaintiff in error.

Edward J. Brundage, Atty. Gen., Robert E. Crowe, State's Atty., of Chicago, and James B. Searcy, of Springfield (Henry T. Chace, Jr., Edward E. Wilson, and Clyde C. Fisher, all of Chicago, of counsel), for the People.

FARMER, C. J. Plaintiff in error, who is about 22 years of age, and a resident of Chicago, was convicted in the criminal court of Cook county upon an indictment charging him with manslaughter. Motions for new trial and in arrest of judgment were overruled, and he was sentenced on the verdict to an indeterminate period in the penitentiary. He has sued out this writ of error to reverse the judgment. The assault mentioned in the indictment was made on December 13, 1922, with an automobile, upon the body of Anna McInerney, a child almost 11 years of age, who died very shortly after being struck by the car.

Some of the facts developed upon the trial were: That on Wednesday afternoon between 5 and 5:15 o'clock, Anna McInerney, while walking west across Crawford avenue, on the south side of Thomas street, at the intersection of Crawford avenue and Thomas street, was struck by a Packard touring car being driven north on Crawford avenue. Crawford avenue runs north and south and Thomas street east and west. On Crawford avenue there are two street car tracks, one used for north-bound and the other for south-bound traffic. That avenue is paved with asphalt except between the car tracks, which space is paved with brick. Thomas street is paved with asphalt. The paved portion of that street is about 30 feet wide. There is a 10-foot vacant space or grass plot on each side of the street between the curb and sidewalk, and the sidewalks are 6 feet wide, making the width of Thomas street between the building lines on either side of the street about 62 feet. On the northeast corner of the intersection of said streets is a drug store, and immediately joining that on the north is an Atlantic and Pacific store. These two stores occupy about 35 feet on Crawford avenue north of the northeast corner of the intersection. Over the Atlantic and Pacific store was a doctor's office. Near the northeast corner of the intersection are other stores, and residences are in the neighborhood. On the southeast corner of the streets, near where the accident occurred, is an electric light. After being struck by the touring car the body of the child was found on the north-bound car track a little distance north of the south crosswalk of the intersection.

The accident was observed by three or four witnesses, and from their testimony it appears the car that struck the child proceeded north across Thomas street and stopped at the east curb on Crawford avenue, about in front of the Atlantic and Pacific store, which was shown to be some 80 feet from the point of impact. One of the witnesses, Miller, who as on the northeast corner of the streets, heard a crash and saw the little girl lying on the car track. He ran and picked her up and carried her toward the doctor's office over the Atlantic and Pacific store. When halfway up the stairway he

was told the doctor was out. He came back down, got into the rear seat of the touring car standing at the curb, which the state contends was the car of plaintiff in error, and was driven to St. Anne's Hospital, where witness was helped into the hospital by the driver of the car. Witness carried the little girl up to the operating room of the hospital. The driver of the touring car then disappeared. It further appears that on the following Sunday evening, December 17, plaintiff in error, with Albert Fisher and a girl friend of Fisher's, drove into a Standard Oil filling station at Parkside and Chicago avenues. The car being driven by plaintiff in error was an old type Packard, and while there he was taken into custody by Officer Bazarek, and they drove to the Austin police station, where plaintiff in error was questioned by the police. Three of the witnesses to the accident were brought to the police station, and they identified plaintiff in error as the man who drove the car on the evening of the accident at Thomas street and Crawford avenue.

Counsel for plaintiff in error have assigned several errors. The most important of these are that the court erred in permitting, over objection, a witness named Parker to answer a hypothetical question propounded, and in answer thereto give his opinion as an expert as to the speed of the car at the time of the accident; that the court erred in permitting Officer Bazarek to testify as to what the mother of plaintiff in error said to the officer, not in the presence of plaintiff in error; that the verdict of the jury is contrary to the weight of the evidence.

The defendant denied he was the driver of the car which caused the death of the child, and proved by several employees at the place he worked, which was about 8 miles from the place of the accident, that he worked there until 5:30 p. m. the day of the accident, and also that his old model Packard car was not in running order that day and could not be driven. According to the testimony of Officer Bazarek, who arrested plaintiff in error, the latter's testimony on the trial was practically the same as the story told by him at the time of his arrest, at which time he denied having an automobile accident on December 13 at Thomas street and Crawford avenue, and stated he was at work for the Donnelly Corporation at the time. The state produced three witnesses who saw the accident. They had never seen plaintiff in error before that time, but they identified him as the man who after the accident drove the Packard car up to the curb in front of the Atlantic and Pacific store, and also drove the car when the little girl was taken to the hospital. The three eyewitnesses for the state, who identified plaintiff in error were Miller, Cronin, and Ryan. Miller testified: He was on the northeast corner of Thomas street and Crawford avenue. That he heard a crash, turned around, and saw a little girl lying on the street car track, and ran out and picked her up. He saw the automobile, after it hit the little girl, skidding along with the brakes on, and the brakes were squeaking. He said it was an old, large-size touring car, but he didn't know the model or make. He did not see the car before the accident, and did not see the car stop. When he heard the brakes squeaking the car had gone past Thomas street. It was this car he rode in to the hopsital. Cronin testified: That he was on the west side of Crawford avenue, about 85 feet south of Thomas street. He heard glass break, saw the car, and it kept going about 80 feet after it hit the girl, and stopped on the east side of Crawford avenue, right in front of the doctor's office. He heard the squeak of brakes after the car hit the girl, but did not see the car before he heard the glass break. Witness went over and stood by the car after it stopped. It was an old-time Packard car. Saw no broken glass on the car. Saw the driver. Witness opened the door of the car to let Miller in with the little girl. Ryan, a boy 14 years old, testified that he was on the northeast corner of the intersection, and heard the crash of glass and looked and saw the back of a machine passing over a little girl. The wheels did not run over her at all. After the car hit the girl it went about 50 feet on the car tracks and then turned in to the curb. Never saw the car till after the girl was struck. Heard the squeaking of brakes. The car was an old model Packard car, and had the lights on as it stood at the curb north of the drug store. Saw the driver get out of the car, and saw Miller get into the car with the little girl.

[1] The state produced witness Paul Parker who testified he had been driving a Checker cab for two years, and had driven an automobile for 9 or 10 years. A hypothetical question was propounded to the witness, which assumed the condition of the street as the proof showed it to have been; the absence of ice; that the car was a heavy Packard seven-passenger automobile of an old model; that a child crossing Crawford avenue on Thomas street about 8 or 10 feet from the southeast corner of Crawford and Thomas was struck by the automobile going north on Crawford avenue; that the driver put on the brakes immediately and stopped the car at a distance of about 97 feet from the point of contact with this child, and that the brakes were in good condition; and witness was asked if he had an opinion as to the rate of speed at which the automobile was traveling when it struck the child. Over objection the witness answered, "Forty miles an hour." It developed on cross-examination that the witness had very little knowledge of larger cars, and no experience with any type

of Packard cars but had driven smaller and lighter cars and based his answer solely upon the condition of the car witness drove. The witness further stated that squeaky brakes indicated that the brakes were not in good condition. The question assumed the brakes were in good condition, and that the car slid or skidded 97 feet thereafter. The proof in the record tends to show that plaintiff in error's old Packard car was dilapidated and the brakes were not in good condition. Under the state of the record the proof was improper. It should be borne in mind that none of the alleged eyewitnesses to the accident even intimated what speed the car was going at the time of the accident or thereafter, and no witness saw the car prior to its contact with the child.

[2] The three witnesses for the state who identified plaintiff in error as the man who was driving the car when the accident occurred were Miller, Cronin, and Ryan. None of them had ever seen him before. At the time they saw him at the car it was dark. Miller rode with him in taking the little girl to the hospital, but his attention was more particularly occupied with the injured child, and when he was called to the police station to identify plaintiff in error he could not be positive of the identification until plaintiff in error's overcoat was procured and he put it on. The identification of plaintiff in error by the three witnesses was reasonably positive; but, in view of the testimony hereafter to be referred to, and the known possibility of a mistake in identifying a man whom the witness had never seen but once and under such circumstances as here existed, we cannot regard plaintiff in error's guilt as having been proved beyond a reasonable doubt.

Plaintiff in error worked for the Reuben H. Donnelly Corporation, at 652 South State street, which is about 8 miles from the place of the accident, which, as we have said, occurred a few minutes after 5 o'clock the evening of December 13, 1922. He testified he was working there from 8:30 in the morning until 5:30 in the evening. His employer had a time clock system of checking up on its employees, who were required to punch the time they went to work in the morning and when they quit in the evening. Plaintiff in error's time card was lost at the time of the trial, but at the time of his arrest and the investigation made by the police officers at his employer's the card was in existence, was seen and examined by several witnesses and exhibited to Officer Bazarek. The supervisor for plaintiff in error's employer, who was immediately in charge of plaintiff in error, testified he saw the time card after December 13, examined it, and exhibited it to the police officer, and that the card showed plaintiff in error checked out on the 13th of December at 5:32. Woods, chief clerk for the Donnelly Corporation, testified he saw the time card, that the police officer examined it, and that it showed plaintiff in error checked out at 5:32 on December 13. The pay roll clerk of the Donnelly Corporation testified she saw plaintiff in error's time card for the week of December 13, and that she made the pay roll sheets from the cards and the daily work ticket; that December 13 plaintiff in error's time card showed he began work at 8:30 and quit at 5:30. The witness detailed the time plaintiff in error worked each day, beginning Monday, December 11, and that the time cards and work tickets, from which the pay roll was made up, showed that plaintiff in error came in at 8:30 Wednesday morning and went out at 5:32 in the evening. Melvin Roth, a clerk for the Donnelly Corporation, testified that he worked there on the 13th of December; that plaintiff in error worked there that day all day. Witness' card was punched for quitting time at 5:30 or 5:32. When witness punched his card plaintiff in error was standing alongside of him, and requested the witness to also punch his card, as there was a long line behind witness, and plaintiff in error was in a hurry to catch a train. Albert Fisher testified he was on the train with plaintiff in error when he went to his place of work on Wednesday, December 13. The two had lunch together at noon. He saw plaintiff in error in the evening as he came out of his place of employment with a young man named Roth. It was about 5:30 or a minute or two later. Witness and plaintiff in error hurried to a station to take a train on the Chicago, Milwaukee & St. Paul railroad, which left the station at 5:44. He testified both their fares were paid by him, he having his 25-ride ticket punched for the two. Plaintiff in error got off the train at Hermosa station, which was a 17 or 18 minute ride from where they boarded it, and it was then after six o'clock. Witness left the train at Cragin station, which was a 21-minute ride from where they boarded it.

Besides the above testimony there was the testimony of several witnesses who were in no way connected with plaintiff in error, and are apparently disinterested, that plaintiff in error's car was not in running condition from December 12 until the following Sunday, during which time it stood outside a building near plaintiff in error's residence. Some of the witnesses testified to having at different times, before and after December 13 assisted or tried to assist plaintiff in error in getting his car in running order, and that he never succeeded in doing so until Sunday evening after December 13, when he started it, and was arrested while driving the car. The officer who made the arrest did not know him, but made the arrest because he was driving a large, old model Packard car. When arrested plaintiff in error gave the offi-

[3, 4] It is true, the rule is that it is the province of a jury to determine the credibility of the witnesses and the weight to be given to their testimony, and, where there is any reasonable basis for disbelieving testimony to prove an alibi, or where there are any circumstances which may tend to discredit such testimony, the jury may, notwithstanding the proof that the defendant was not at the place where the offense was committed at the time of its commission, find him guilty. People v. Martin, 308 Ill. 233, 135 N. E. 404, and 304 Ill. 494, 136 N. E. 711; People v. Hildebrand, 307 Ill. 544, 139 N. E. 107. Disregarding the testimony of plaintiff in error's father and mother, with whom he lived, that the car could not be used the week of December 13, and that they assisted plaintiff in error on different occasions during that week in trying to put it in running order, we cannot see any reason, because of the character of the witnesses or on account of their relations with plaintiff in error, that there is any basis for disbelieving the employees of the Donnelly Corporation that plaintiff in error worked at that place, 8 miles distant from the place of the accident, from 8:30 in the morning of December 13 till 5:30 in the evening, and the testimony of other witnesses that the car was not in running order during that week, and the reasons why they knew it was not. A reviewing court is reluctant to reverse a judgment of conviction on the ground that it is not warranted by the testimony, but, when the evidence is of such a character that a reviewing court cannot say the guilt of the accused was proved beyond a reasonable doubt it is its duty to reverse the judgment. People v. Campagna, 240 Ill. 378, 88 N. E. 797, and cases there cited; People v. Ahrling, 279 Ill. 70, 116 N. E. 764. We cannot say the proof in this case was sufficient to exclude every reasonable doubt of the guilt of plaintiff in error.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

(311 Ill. 136)

VILLAGE OF ELMWOOD PARK v. L. H. MILLS & SONS et al. (No. 15587.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Municipal corporations ⇐501—Objection to special assessment held insufficient for indefiniteness.

Objection to special assessment proceedings for installation of waterworks, amounting to no more than that the proceedings were irregular and void, that the ordinance was incomplete, informal, and invalid, and that the village, and that the estimate of the cost was void and notice of publication had not been given as required by statute, *held* insufficient as not showing the point relied on and stating no fact as basis for introduction of evidence.

2. Municipal corporations ⇐508(4)—Objections to special assessment not specified held waived.

Where, in special assessment proceedings, objectors filed a printed list of numerous objections, many of which were inapplicable, and were ordered by the court to file in writing specific objections on which they expected to rely and they failed to do so, merely specifying certain numbered objections on which they would rely, *held*, that all objections not mentioned were waived, as was the right to urge any objections to which they had been required to specify the exact points in detail but had not attempted to do so.

3. Municipal corporations ⇐510—Court not deprived of jurisdiction to confirm special assessment because no estimate made nor public hearing held.

In special assessment proceedings that no estimate was made nor public hearing held, while available on application for confirmation, did not deprive the court of jurisdiction to confirm; for, if the objection was not made, the judgment of confirmation was valid and not subject to collateral attack.

4. Municipal corporations ⇐473—Special assessment for waterworks in uninhabited territory held unreasonable.

On objections to special proceedings for installation of a waterworks system in a village, where it appeared that the locality was unimproved and almost uninhabited property, from a mile to a mile and a half from transportation, and that there was no present or prospective use of the system until a system of transportation could be brought within reasonable reach of the property, *held*, that construction of a waterworks system under an assessment of more than $60,000 was unreasonable and oppressive.

5. Municipal corporations ⇐418—Fire hydrants may be paid for by assessment.

Fire hydrants are such part of a local improvement as may be paid for by local assessment.

Appeal from Cook County Court; E. M. Mangan, Judge.

Special assessment proceedings by the Village of Elmwood Park, wherein L. H. Mills & Sons and others file objections. From an order of confirmation of the benefits on a reduced assessment, objectors appeal. Reversed in part and remanded, with directions.

Daniel S. Wentworth and David B. Maloney, both of Chicago, for appellants.

William T. Hopeman, of Chicago, for appellee.

the village of Elmwood Park passed an ordinance providing for the laying of cast-iron water supply-pipes in certain streets of the village and caused a petition to be filed for the assessment of the cost upon the property benefited by the improvement. A number of owners of property appeared and filed objections. The objections consisted of a printed list containing more than 100 objections, many of which had no application whatever to the facts in regard to this particular assessment and many others were stated so vaguely and indefinitely as to present no issue of fact. On the motion of the village it was ordered that the objectors file in writing the specific objections upon which they expected to rely, fully and in detail, so that the court and counsel would be fully informed as to the exact points relied on and without referring to the general objections filed by numbers, by the 14th day of March, 1923. The objectors made no attempt to comply with this rule. They merely filed a statement in writing that the legal objections on which they intended to rely were those numbered 1, 2, 10, 17, 20, 22, 34, 58, 65, 66, 89, and 91, but there was no specification in detail of the exact points relied on or attempt to specify. No motion was made to strike this statement from the files and no further action was taken to require a compliance with the order. After the village offered in evidence the assessment roll, counsel for the objectors stated his objections to the ordinance and proposed to introduce evidence that the estimate of the cost of the improvement was never before the board of local improvements, that the president never signed the original estimate, that there is in the record of the board of local improvements no record of any estimate subsequent to the amendment by the board or anything to show that the board of local improvements ever made the recommendation attached to the petition or passed the ordinance attached to the petition, and that certain elements of the improvement were indefinite and insufficiently described, viz., "Eddy valves," "Class B pipe," "Clow's manhole covers and frames," and "Standard adopted by American Waterworks Association May 12, 1908." The court sustained objections to evidence offered by the objectors in support of any objection not specifying the exact point relied upon, in accordance with the previous order of the court. Evidence was heard as to the reasonableness of the improvement and the legal objections were overruled. Upon a trial by the court on the question of benefits the amount of the assessment was reduced and an order of confirmation was entered, from which the objectors have appealed.

The objections specified by number in the statement of the appellants were: (1) The ordinance for the proposed improvement was incomplete, informal, and otherwise invalid; the ordinance herein; (10) the petition, assessment roll, and the notice of confirmation proceedings do not comply with the provisions of the statute and are informal, insufficient, and void; (17) The property of these objectors is assessed more than its proportionate share of the cost of the proposed improvement fairly and equitably chargeable upon the same; (20) the estimate of the cost of the improvement is void; (22) the assessment upon the property of the objectors exceeds the benefits which will accrue to said property from the proposed improvement; (34) the notices of public hearing have not been given as required by statute; (58) no part of the cost of the proposed improvement has been apportioned against the petitioner as public benefits; (65) the ordinance is unreasonable and void because the proposed improvement is unnecessary; (66) the nature and character of the improvement proposed by the ordinance are not such as the character of the property warrants or demands, and the cost of the improvement and the assessment against the property of these objectors largely exceed the benefits to said property; (89) no public hearing was had by the board of local improvements, as required by law; (91) the estimate includes items not authorized by law and is therefore void.

[1] Objections Nos. 1, 2, 10, 20, and 34 did not specify any point relied upon and stated no fact as a basis for the introduction of evidence. They amounted to no more than the statement that the proceedings were irregular and void. They furnished no information to either court or counsel as to the objectors' claims and stated no fact or point upon which evidence was admissible or could be produced. The objections that the ordinance was incomplete, informal, and invalid, and the council had no authority to pass it, and that the petition, assessment roll, and notice of confirmation did not comply with the provisions of the statute, that the estimate of the cost was void, and the notice of public hearing had not been given as required by the statute, formed no basis for the introduction of testimony. If the objections could be considered at all, they raised no other question than such as might arise upon the face of the proceedings themselves. It is not argued that the ordinance is void on its face, that the lack of authority of the board of trustees is apparent on the record, or that any of the irregularities in the proceedings specified in the objections can be shown without introducing evidence. Evidence was required to establish the objections which the appellants sought to raise, and it was therefore necessary to state the facts showing the existence of the objections. This the appellants were ordered to do and failed to comply with the order. The question arose upon objection to evidence offered. For instance, in support of objections 1 and 2, that

pass it, the appellants offered evidence which they argued would show that there was no record of the board of local improvements showing that the board of local improvements made the recommendation of the improvement to the board of trustees or presented the ordinance which was passed by the board of trustees. An objection to this offer was sustained because the appellants' objection did not specify this ground of objection. Counsel for the appellants argued that the evidence offered went to the question of jurisdiction—the authority of the council to pass the ordinance, which was necessary to the jurisdiction of the court.

[2] Objections in a special assessment proceeding must be made in such a manner as to show the point on which a decision is asked, so that the opposite party may meet it if he can. Fisher v. Chicago, 213 Ill. 268, 72 N. E. 680. The object of filing objections to the petition is to notify the court and parties of the points, whether of fact or law, relied upon by the objector, and where many objections are filed it is the duty of the court, upon motion by the petitioner, to require the objector to point out specifically upon what objections he relies. Upon his failure to comply with such order, the objections which do not state specifically the points relied upon will be considered as waived and will not be considered by this court upon appeal. Clark v. Chicago, 214 Ill. 318, 73 N. E. 358. The objectors having been required to state their objections specifically, without reference to numbers, declined to do so but did specify certain numbered objections upon which they would rely. This could be regarded in no other way than as a waiver of all other objections not mentioned and of the right to urge any objections as to which they had been required to specify the exact points relied upon in detail but had not attempted to comply with the order. So far as the objections which had been filed did show the points relied on, the objectors were entitled to rely upon them and to introduce evidence to establish them.

[3] The county court had jurisdiction of the subject-matter, the general subject of special assessments, and their confirmation. The filing of the petition gave it jurisdiction of the particular case and of the petitioner. The giving of the statutory notices gave it jurisdiction of the property owners. The objections urged do not go to the question of the jurisdiction of the court to determine as to the validity of the ordinance or the authority of the city council, but only to the regularity of the exercise of that power. The mode provided by statute for making a special assessment must be followed, and a failure to observe the conditions imposed upon the exercise of the power will render the proceedings void. Clarke v. City of Chicago, want of a preliminary hearing upon the question of the estimate, the court had no jurisdiction to entertain the proceeding based upon the invalid ordinance. The use of the word "jurisdiction" was incorrect, and all that was intended was that the court could not, according to law, sustain the proceeding. The court clearly had the right to decide whether the ordinance was valid or not, and the right to decide is jurisdiction. The fact that no estimate was made or no public hearing was held, while available upon the application for confirmation, does not deprive the court of jurisdiction. If the objection is not then made, the judgment of confirmation is valid and not subject to collateral attack. Springer v. City of Chicago, 308 Ill. 356, 139 N. E. 414; Pipher v. People, 183 Ill. 436, 56 N. E. 84. The objection goes only to the power of the board of local improvements to initiate the improvement and of the council or board of trustees to pass the ordinance. These bodies have these respective powers, the objection goes only to the manner of the exercise of them, and it may be waived. The advantage of even a constitutional provision for the protection of property rights may be waived, and is waived unless an objection is made by the party entitled to the benefit of it, whenever it appears that the right has been invaded. Taylor Coal Co. v. Industrial Com., 301 Ill. 381, 134 N. E. 169; Pocahontas Mining Co. v. Industrial Com., 301 Ill. 462, 134 N. E. 160.

The appellants, having refused to comply with the order requiring them to specify the points relied upon, waived the points not specified. The court properly disregarded the objections which were not specifically set out fully and in detail so as to give full information as to the exact point relied on and properly excluded all evidence in regard to these objections.

In regard to objection No. 17 no evidence was offered. Objection No. 58 appeared on the face of the proceedings. No evidence was offered to sustain objection No. 89, that no public hearing was had, or No. 91, as to items improperly included in the estimate. The only objections which raised any issue of fact as to which evidence was offered and was admissible were No. 22, that the amount of the assessment exceeded the benefits, and Nos. 65 and 66, that the ordinance was unreasonable. Much evidence was heard on these objections.

The record shows that Elmwood Park is a village of about 2,750 population, containing two square miles of territory, being two miles long north and south and a mile wide east and west. Fullerton avenue is on a section line extending east and west and dividing the north half of the village from the south. The Chicago, Milwaukee & St. Paul Railroad, running from a few degrees south of east to

boundary line of the village of Fullerton avenue, so that somewhat more than half the territory of the village is south of the railroad. All of the village between the railroad and Fullerton avenue has been subdivided. The part of the village south of Fullerton avenue consists of one section of land, of which the east half and the east half of the northwest quarter have been subdivided. The system of water pipes provided for by the ordinance covers all the subdivided part of the village south of the railroad. The east line of the village is Harlem avenue, which constitutes the boundary between the village and the city of Chicago. The south line of the village is North avenue, which constitutes the boundary between the village of Elmwood Park and the village of River Forest. South of North avenue and east of Harlem avenue is the village of Oak Park. Armitage avenue extends west on the half-section line from Harlem avenue three-quarters of a mile to Seventy-Eighth avenue. The territory between Harlem avenue and Seventy-Eighth avenue north of Armitage avenue to Fullerton avenue is divided into 48 blocks by 11 north and south and 3 east and west intersecting streets. South of Armitage avenue to North avenue the territory west of Harlem avenue for half a mile to Seventy-Sixth avenue is divided into 32 blocks by 7 north and south and 3 east and west intersecting streets. The southeast corner of the village, at Harlem and North avenues, is 2 miles north and 9 miles west of the courthouse in Chicago. The appellants L. H. Mills & Sons purchased 140 acres in this section in 1910 for the purpose of building development. In 1915 they made an effort to sell the property in half-acre tracts. It was subdivided and platted, and they built a modern bungalow facing Harlem avenue as an example of a half-acre suburban improvement. They advertised extensively, spending nearly $30,000 in their effort to sell the property, and they made contracts for the sale of about 40 acres out of the 140. The property south of Armitage avenue has not been improved except by the bungalow mentioned and two or three other houses. There are no paved streets in the village and there is no system of sidewalks south of the railroad. There are no streets south of Armitage avenue which can be used for driving. The streets are merely platted, but there has been no grading or breaking of the sod. The ground is open prairie. Cinder paths were put in in 1915, but they have all disappeared and cannot be found now. The greater part of the development of the village is north of the railroad. There are perhaps 300 houses south of the railroad. The improvement in the part of the village south of the railroad is principally in the north end, toward Fullerton avenue. The two-story brick schoolhouse is in that part of the village, at which there is an attractive park. Some of the houses south of the railroad have been there for a number of years. Some were built in 1910 and others at different times since, the average age being four or five years. The property south of Armitage avenue is wholly unimproved except for the three or four houses mentioned. From 75 to 85 per cent. of the property between Armitage avenue and Fullerton avenue is unimproved.

The parties agree that the highest and best use of property in the territory affected by the improvement is for residence purposes, with bungalows of a reasonably good construction. The property will be occupied by people who will do business in the loop in Chicago or will work in the factories and industrial employments in that city. The distance to the nearest large manufactory is seven miles, though there are some small industrial plants about a mile and a half from the property. The use of the village for residences for people engaged in these employments depends upon the transportation. The nearest transportation to the property of the appellants is the railroad. From the station at Montclair, three-quarters of a mile from the nearest lot and a mile and a quarter from the farthest, there are 17 trains during the 24 hours—3 to the city in the morning rush hours and 2 from the city in the evening rush hours—the average running time being 28 minutes. The nearest street car lines are at Harlem and Fullerton avenues, a mile north, and Harlem and Chicago avenues, a mile south of North avenue. The former runs to the loop with a transfer. The fare is seven cents. The other line runs to Sixtieth avenue—the boundary between Oak Park and Chicago—for a ten-cent fare and an additional seven-cent fare to the loop. The running time of each is about an hour. On North avenue the street car line is a mile and a half east of Harlem avenue.

The demand for the property is and has been limited, and sales have been infrequent because of the remoteness from transportation and the absence of improvements. The development of the property depends, of course, on both transportation and other improvements. While some difference of opinion is expressed as to which must come first, it seems apparent that a water supply will not bring purchasers who desire to build homes to a property unless there is either a reasonably convenient means of transportation between their homes when acquired and the place where they must have employment, or a reasonably well assured prospect of such means of transportation within a reasonable time. The great bulk of this property is situated a mile and a half or more from any means of transportation. There is nothing in the record to indicate that any improvement is contemplated immediately or in the near future in the means of transportation, either by street cars or railroad. The ground

in which it is proposed to extend the water pipes south of Armitage avenue is entirely unimproved. There are no streets, no walks, no lights, no way to get to it. The two or three houses on the land would find the water a convenience, though the houses on the west side of Harlem avenue are now getting water from the Chicago system through pipes across Harlem avenue by arrangement with the city waterworks. It is desirable to have water for the residences north of Armitage avenue and the schoolhouse, and the improvement will be of benefit to this property.

It is stated by the appellants in their brief that they do not claim that the putting in of the water north of Armitage avenue is unreasonable, but they do claim it is unreasonable south of Armitage avenue. There is demand for the water north of Armitage avenue, and the putting of it in will add to the value of that property, and it would no doubt be advantageous to that property also if the property south of Armitage avenue should be included in the district and help to bear the expense; but this does not justify the inclusion of the latter property and its assessment unless it appears that the putting in of the water will add to the value of the property south of Armitage avenue. It is not only the convenience or necessity of the people who will get the use of the water which must be considered, but also the effect of the improvement upon the property which will be assessed to pay for it. The witnesses for the petitioner express the opinion that it will add $5 a foot to the property south of Armitage avenue and the assessment amounts to about $250 a lot, but the witnesses for the objectors testify that the improvement will not add anything to the value of the lots south of Armitage avenue. The addition to the value depends, of course, upon the making of a market for the property. Unless the property becomes salable and is sold for use as dwellings, the water pipes in the streets will be of no advantage to it and will not add anything to the value. Directly across North avenue the village of River Forest for a half mile south is in the same undeveloped condition. The condition is the same east of Harlem avenue in the city of Chicago for a mile east on the north side of North avenue, though property there has the benefit of the city water, and in the village of Oak Park for half a mile south on Harlem avenue.

[4] Eight of the 28 blocks objected for, being 40 acres, lie north of and adjoining Armitage avenue. The remaining 20 lots (100 acres) lie south of Armitage avenue. The total amount of the assessment roll was originally $315,137.60 and the assessment against the appellants' lots was $89,853.97. This was reduced by the court on the hearing of the legal objections and on the hearing as to benefits to $63,686.97, for which the assessment was confirmed. On the whole evidence it appears to be unreasonable to subject this unimproved and uninhabited property, from a mile to a mile and a half from transportation, to an assessment of more than $60,000 for laying water pipes for which there is no present or prospective use until some system of transportation is brought within reasonable reach of the property and while no system of transportation is in prospect in the immediate future. There is no indication that such a system will be in operation until some remote and uncertain date.

[5] One ground for objection was that no part of the cost of the improvement was assessed against the village as public benefits. The court found that the lots of the objectors should not be assessed the full cost of the fire hydrants, and ordered the assessments against such lots reduced in the aggregate amount of $3,500 for the cost of fire hydrants. The order did not assess the amount of such reduction, or any amount, against the village for public benefits, and the appellants complain because this was not done. The order eliminated the charge for fire hydrants from the assessment so far as the appellants' property was concerned, and it is not claimed that the amount was less than the proportionate share of the cost of the fire hydrants chargeable to the appellants' lots. Whether the amount of the reduction is assessed against the village or the other property owners is of no concern to the appellants, since they do not have to pay it. Fire hydrants are such part of a local improvement as may be paid for by local assessment. O'Neil v. People, 166 Ill. 561, 46 N. E. 1096; City of Springfield v. Springfield Consolidated Railway Co., 296 Ill. 17, 129 N. E. 580.

So far as the appellants' lots north of Armitage avenue are concerned, the improvement is conceded to be reasonable and the evidence as to the amount of benefits sustains the judgment of the county court, but it is unreasonable and oppressive to construct the improvement for the benefit of the lots north of Armitage avenue largely at the expense of vacant property for which there will be little demand until there is a prospect for better facilities of transportation. As to the lots north of Armitage avenue the judgment will therefore be affirmed, but as to the lots south of Armitage avenue it will be reversed, and the cause will be remanded, with directions to dismiss the petition as to them.

Reversed in part and remanded, with directions.

PEOPLE ex rel. MILLNER v. RUSSEL, Auditor of Public Accounts. (No. 15761.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Statutes ⇐33—Governor empowered to veto item of appropriation bill for payment of salary of assistant Attorney General fixed by statute.

Under Const. art. 5, § 16, requiring "every bill" passed by the General Assembly to be approved by the Governor or passed over his veto before it becomes a law, the Governor had power to veto item of an appropriation bill passed under article 4, § 16, for salary of assistant Attorney General fixed by Inheritance Tax Act, § 12.

2. States ⇐130—Statute fixing salaries of officers not an "appropriation" within constitutional provision providing that no money shall be drawn from treasury except pursuant to "appropriation."

Inheritance Tax, § 12, providing for the appointment, and fixing the salaries of, assistant Attorneys General in certain counties *held* not an appropriation of the amount so fixed as salary authorizing the payment thereof out of the state treasury, within Const. art. 4, § 17, providing that no money shall be drawn from the treasury except in pursuance of an "appropriation" made by law, in view of sections 16, 18, and Smith-Hurd Rev. St. 1923, c. 127, §§ 146, 148.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appropriate—Appropriation.]

Original proceeding in mandamus by the People, on the relation of Le Roy Millner, against Andrew Russel, Auditor of Public Accounts. Writ denied.

James J. Barbour, of Chicago, for petitioner.

Edward J. Brundage, Atty. Gen., Clarence N. Boord, of Springfield, and John J. Reeve, of Jacksonville, for respondent.

FARMER, C. J. This is an original petition filed in this court for a writ of mandamus against the auditor of public accounts. The petition alleges relator was appointed January 9, 1917, by the Attorney General of Illinois assistant Attorney General of Illinois at a salary fixed by law at $5,000 per year, payable in monthly installments, and that since that time he has continued to be, and now is, such officer; that his duties are to see to the enforcement of the Inheritance Tax Law in Cook county, by which act petitioner's salary was fixed. The petition alleges the auditor has refused to issue warrants for relator's salary for the months of July and August, and still fails and refuses to issue warrants although presented with vouchers in proper form. The petition further alleges the Fifty-Third General Assembly included, in the act making appropriations for the General Assembly and officers of the state government, money to pay assistant Attorneys General in Cook county. The Governor vetoed those items of the bill. The petition prays that the writ of mandamus issue commanding the auditor to issue warrants for relator's salary, payable out of any money in the state treasury not otherwise appropriated. The auditor demurred to the petition, and the case was submitted on briefs on the issue of law raised by the petition and the demurrer thereto.

The petitioner contends the Governor had no authority to veto the appropriation made to pay the salary; also, that the statute fixed the salary petitioner should receive and the time of its payment, and is in itself an appropriation within the meaning of section 17 of article 4 of the Constitution.

Since 1915, by section 12 of the inheritance tax statute (Smith-Hurd Rev. St. 1923, c. 120, § 386), the Attorney General has been authorized to designate in counties of the third class an assistant (or assistants) Attorney General, whose special duty shall be to attend to all matters pertaining to the enforcement of the act in respect to the appraisement, assessment, and collection of the inheritance tax in such counties. The statute fixes the salary of one assistant Attorney General at $5,000 per annum, the salary of each of two assistants at $4,000 per annum, and the salary of one assistant at $3,500 per annum, and directs that the salaries shall be paid in monthly installments.

[1] It is first contended by relator that the Legislature having passed an act creating the office, fixing the salary and the time of its payment, the Governor had no lawful power to veto the item for its payment in the appropriation bill for the payment of officers and members of the next General Assembly and officers of the state government. It is argued that it is the meaning and intent of section 16 of article 4 of the Constitution that salaries of officers of the state government shall be paid, and the Legislature having created the office, fixed the salary and provided that it should be paid monthly, was equivalent to a command that relator be paid his salary in monthly installments. From that premise it is argued that to hold the Governor had the constitutional power to veto the item of the appropriation bill for payment of the salary would require holding the Constitution invested the Governor with power to disobey statutes fixing the salaries of officers and members of the General Assembly and all state officers.

Section 16 of article 5 of the Constitution provides that "every bill passed by the General Assembly shall before it becomes a law" be presented to the Governor. If he approves and signs it, it becomes a law. If the

to return it, with his objections, to the house in which it originated, which house shall enter the objections on its journal and proceed to reconsider the bill. If both houses, by a two-thirds vote of the members elected, again pass the bill, it becomes a law notwithstanding the Governor's veto. The same section of article 5 further provides that bills making appropriations shall specify the objects and purposes for which they are made in distinct items and sections, and if the Governor will not approve any one or more of the items or sections but shall approve the residue, the items or sections approved shall become a law and the Governor shall return the bill to the house where it originated, with his objections, and unless both houses by the required vote overrule the veto the items or sections vetoed never become a law. The language of the Constitution, it will be seen, is broad and all-inclusive. It requires "every bill" passed by the General Assembly to be approved by the Governor, or, in case he disapproves it, to be passed over his veto before it becomes a law. The language is direct, plain, and affords no basis for the construction that bills or items of bills making appropriations for salaries of officers of the state government were intended to be excepted from bills the Governor has power to veto. It is true, if the Governor is clothed with such power to veto he might veto appropriations to pay salaries of any or all state officers, including judges of the courts, and thereby suspend the operation of any or all departments of the state government. It is not conceivable that any man elected to the office of Governor could ever become so reckless as to invite his own destruction by such an act. The bare possibility that one might do so does not authorize a court to take from the executive, by construction, powers which the Constitution plainly invests him with. The possibility that a power conferred on an official by the Constitution may be abused affords no basis for a court to hold the power never existed. It is as conceivable that the General Assembly might refuse to appropriate money to pay salaries of state officers and to carry on the different departments of the state government as it is that the Governor might paralyze the government by veto. It is possible for all public officers to abuse the powers conferred on them by the Constitution and laws, and they sometimes do so. No Constitution or law can make it impossible for an official to abuse the power invested in him, and because it may be possible for an official to abuse or wrongfully exercise the powers conferred on him does not support an argument that he never had the power. The Constitution and laws necessarily invest public officials with certain powers in the performance of the duties of the office. If the official neglects to exercise the powers necessary to a proper discharge of the duties died by holding he never had the power he abused. It would be a greater evil to so hold than is the infrequent evil of abuse or wrongful exercise of powers by public officers. Men may, and do, honestly differ about what powers the Constitution and laws confer on public officials and what acts are a proper exercise of the powers conferred. It would be a most unwise departure from our long-existing standards and principles of government to deny the existence of lawfully conferred powers because their abuse or wrongful exercise is possible. It must not be understood what we have said on the subject is intended as any indication of opinion that there is involved in this case an abuse or wrongful exercise of power by the Governor. What we have said is only an expression of our views as to the existence of the power. If it existed, its exercise was a function properly belonging to the executive in the exercise of what he considered his duty.

[2] Relator's further contention is that a statute definitely fixing the salary of a state officer is of itself an appropriation made by law and authorizes and requires the payment of the salary out of the state treasury. The earliest case cited to sustain that contention is Thomas v. Owens, 4 Md. 189. There the Constitution created the office of comptroller and fixed the salary he should receive. The Constitution also contained a provision that no money should be drawn from the treasury "except in accordance with an appropriation made by law." The Legislature had made no appropriation to pay the comptroller for a certain period of his term, and he applied for a writ of mandamus to compel the treasurer to pay him. The court said the purpose of the clause of the Constitution prohibiting money from being drawn except in accordance with an appropriation made by law was to prevent the expenditure of the people's money without their consent, either as expressed by themselves in the Constitution or by their representatives in constitutional acts of legislation; that the people had in the organic law not only given their consent but had commanded the salary to be paid the comptroller, and if it was in the power of the treasurer to withhold payment it would be to place him above the Constitution and invest him with authority to annul the sovereign will and stop the wheels of government. The opinion of the court concludes:

"We hold, for the reasons we have assigned, the people have given their consent to the payment of the salaries fixed in the Constitution, by declaring the amount 'shall be received' by the particular officers; and that this is an appropriation made by law—by the supreme law of the state."

That case has been followed and its reasoning adopted by a number of other states where a similar question was involved.

740, 8 L. R. A. 403, was mandamus to compel the state treasurer to pay the salary of the secretary of state. On request of Rotwitt, secretary of state, the auditor drew a warrant on the treasurer for its payment. The treasurer refused to honor the warrant on the ground that no provision had been made for its payment. The salary of the secretary of state was fixed by the Constitution, which contained a provision that it should not be increased or decreased during his term of office. The Constitution also provided that no money should be paid out of the treasury except upon appropriations made by law and on warrants drawn by the proper officer in pursuance thereof. The court adopted the reasoning of Thomas v. Owens, supra, and awarded the writ commanding the treasurer to pay the warrant "out of moneys in the treasury not otherwise appropriated."

State v. Weston, 4 Neb. 216, was mandamus to compel the auditor to draw his warrant for the payment of the salary of the Attorney General of the State. At the time Roberts, the relator, was elected to the office it existed by virtue of a statute, but after his election it was made a constitutional office and the tenure of the incumbent and his salary were fixed by the Constitution. The Constitution (Schedule, § 25) provided that the auditor should draw warrants quarterly for the payment of the salaries of all officers under the Constitution whose salaries were not otherwise provided for, "which shall be paid out of any funds not otherwise appropriated." Another article of the Constitution (article 3, § 22) provided that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." The court held there was no conflict between the two provisions of the Constitution referred to; that section 25 appropriated sufficient funds not otherwise appropriated, to pay the state officers' salaries whenever it happened that no legislative appropriation existed; and that an appropriation for that purpose might as effectually be accomplished by the Constitution as by legislative enactment. The court cited and relied on Thomas v. Owens, supra, as being directly in point.

Later the same court, in State v. Moore, 50 Neb. 88, 69 N. W. 373, 61 Am. St. Rep. 538, held the decision in the Weston Case had no application when a statute was involved. State v. Moore was mandamus to compel the auditor to draw a warrant on the treasury in favor of the relator. The Legislature had passed an act providing for payment out of the state treasury to any person or corporation of a bounty of five-eighths of one cent per pound for each pound of sugar manufactured in the state of Nebraska under the conditions and restrictions of the act. The act provided that claims under it, verified, filed, be certified to the auditor, who should draw a warrant on the treasurer payable to the person to whom it was due. The auditor refused to draw a warrant because there was no appropriation out of which it could be paid. It was contended the statute made the appropriation. The Constitution contained a provision that all appropriations should expire at the end of the first fiscal quarter after adjournment of the next regular session of the Legislature, which sessions were required to be held biennially. The court held an appropriation for the purpose was indispensable, no matter how great the legal or moral obligation of the state to make the payment; that a promise by the state to pay money was not an appropriation, neither is the duty on the part of the Legislature to make an appropriation an appropriation. The court cited State v. Weston, supra, and said that in a later case (State v. Weston, 6 Neb. 16) it was held the former decision was authority only where the office was created by the Constitution, and that it was an authority that the same rule had no application to officers whose salaries were fixed by the Legislature, in which case a specific appropriation was required.

Reed v. Huston, 24 Idaho, 26, 132 Pac. 109, Ann. Cas. 1915A, 1237, was mandamus to compel the auditor to draw his warrant for the payment of the salary of the commissioner of immigration, labor, and statistics. The Constitution authorized the creation of that office and the Legislature passed an act creating the officer, to be appointed by the Governor. The legislative act creating the office also fixed the salary at $2,500 per year, which was to be paid as the salaries of other state officers. At the session of the Legislature preceding the commencement of the suit it failed to make an appropriation for that officer. The Constitution (article 7, § 13) contained a provision that no money should be drawn from the treasury "but in pursuance of an appropriation made by law," and the statute provided that the salaries of all state officers whose salaries were paid from the state treasury should be paid quarterly, in January, April, July and October of each year, "out of any money in the treasury not otherwise appropriated." Another statute provided that in all cases of salaries ascertained and allowed by law the auditor must draw warrants on the treasury for the amount, provided the whole amount drawn and paid out for any purpose should never exceed the amount appropriated for that purpose. The court said the office was a constitutional one; that the salary had been fixed by the Legislature; that the statute directed the payment of salaries of state officers out of any money in the treasury not otherwise appropriated, and lastly required the auditor to draw warrants to pay such salaries

therefor, and held that was an appropriation for the salaries of the state officers. The court further held that it was a continuing appropriation for the payment of the salaries each year "out of any money in the treasury not otherwise appropriated." The court defined the expression "not otherwise appropriated" to mean money in the treasury that was not, at the time payment of the salary was due, appropriated by an act of the Legislature to some other special or particular purpose.

"In other words, any money that may be in the treasury at the time a salary becomes due, which is not at the time appropriated by the Constitution or act of the Legislature to some other use or purpose, is clearly 'not otherwise appropriated,' and is therefore available and 'appropriated' by this act to the payment of the salaries designated and enumerated in section 276, Rev. Codes."

Humbert v. Dunn, 84 Cal. 57, 24 Pac. 111, was mandamus to compel the comptroller to issue a warrant for the payment of the salary of a member of the commission on rivers and harbors. The comptroller refused to issue the warrant on the ground no appropriation had been made out of which it could be paid. The statute (St. 1889, p. 421) fixed the salary of the commissioner at $2,400 per annum, payable monthly "out of any money in the state treasury not otherwise appropriated." The court said the question was whether the statute referred to was an appropriation within the meaning of the Constitution (article 4, § 22), which provided that "no money shall be drawn from the treasury but in consequence of appropriations made by law." The court said no particular form was necessary to make an appropriation; that the intention of the Legislature that the salary should be paid monthly was manifested by the statute, which contained all the things necessary to a valid appropriation act.

State v. Burdick, 4 Wyo. 272, 33 Pac. 125, 24 L. R. A. 266, was mandamus to compel the auditor to issue his warrant for the payment of the salary of a state examiner. The office was created by the Constitution, which provided his compensation should be fixed by law. The Legislature fixed the salary at $2,000 per annum, payable from the state treasury in the same manner as other salaries of state officers are paid. The Legislature made no appropriation to pay the examiner's salary for the two years beginning March 31, 1893, and ending March 31, 1895. The Constitution (article 3, § 35) contained a provision that except for interest on the public debt, "money shall be paid out of the treasury only on appropriations made by the Legislature, and in no case otherwise than upon warrant drawn by the proper officer in pursuance of law." The court held salary was impliedly a continuing appropriation of money to pay the salary, and a special appropriation at each biennial session of the Legislature was not required to keep it alive and effective.

People v. Goodykoontz, 22 Colo. 507, 45 Pac. 414, was mandamus to compel the auditor to issue warrants for the payment of the salary of a steam boiler inspector. The Legislature had in previous years made appropriations to pay the salary but failed to do so in 1893. The Constitution provided that no money should be paid out of the treasury except on appropriation made by law and on warrant drawn by the proper officer in pursuance thereof; also, that no warrant should be drawn by the auditor or paid by the treasurer unless the money has been appropriated by law, and the whole amount paid under one head should never exceed the amount appropriated by law for that purpose. The statute provided that the salaries of officers of the state should be paid monthly. The court held the statute creating the office and fixing the salary and providing that it be paid the same as other officers of the state constituted a continuing appropriation and that no further legislative action was necessary, and cited in support of its conclusion Thomas v. Owens, supra, and other cases.

Reliance is placed on Fergus v. Russel, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120, wherein it was said the salaries of officers of the state government must be paid, and that the Constitution makes it incumbent on the Legislature to make appropriation for that purpose. There can be no doubt that it is the constitutional duty of the General Assembly to make appropriations to pay the salaries of officers of the state government. Section 16 of article 4 of the Constitution provides that bills making appropriations for pay of members and officers of the General Assembly and for salaries of officers of the government shall contain no provision on any other subject. Section 17 is in part as follows:

"No money shall be drawn from the treasury except in pursuance of an appropriation made by law, and on the presentation of a warrant issued by the auditor thereon; and no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution."

Section 18 requires each General Assembly to provide for all appropriations necessary for the ordinary and contingent expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, the aggregate not to exceed the amount of revenue authorized by law to be raised in such time, and all appropriations shall end with such fiscal quarter. The intention of section 16

was to make appropriations to pay the members of the General Assembly and salaries of officers of the government a distinct subject for legislative action, separate and apart from appropriations for other purposes. Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315. It is certain that the Constitution prohibits any money being drawn out of the treasury except pursuant to an appropriation made by law for its payment. If, as we hold, the Governor had the constitutional power to veto the item for relator's salary in the bill making appropriations "for the pay of officers and members of the next General Assembly and certain officers of the state government," the situation is the same as if relator's salary had been omitted from the appropriation bill when it was passed. Then, unless an appropriation was made by some law to pay the salary, there was no fund upon which the auditor could issue his warrant. It must be borne in mind that the statute fixing relator's salary and making it payable in monthly installments did not direct that it should be paid "out of any money in the treasury not otherwise appropriated," as was the case in some of the decisions above referred to, but simply provided that it should be paid in monthly installments. Smith-Hurd Rev. St. 1923, c. 127 (State Finance) § 137, provides the fiscal year shall begin July 1 and end June 30. All money of the state paid into the treasury not belonging to any special fund shall constitute the general revenue fund. All appropriations, unless otherwise in the act specified, are required to be paid from the general revenue fund. Section 10 (section 146) provides that "when an appropriation shall have been made by the General Assembly for the ordinary and contingent expenses" of operation of the state government, the auditor of public accounts shall draw his warrant on the treasurer for payment. Both the Constitution and statutes are carefully intended to prevent any money being paid out of the treasury unless its payment has been previously authorized by law. Section 13 (section 149) of the chapter on State Finance specifies and classifies the purposes for which appropriations are made; salaries being mentioned as the first class.

In Myers v. English, 9 Cal. 341, decided earlier than the California case cited by relator, which was mandamus to compel the payment of the salaries of state officers fixed by the Constitution, the court referred to Thomas v Owens, supra, but refused to follow it. The court said if the constitutional provision fixing the salary of an officer of the state government amounts to an appropriation for its payment, then a legislative appropriation to pay any salary fixed by the Constitution or statute would not be necessary, and the constitutional provision that no money shall be drawn from the treasury but in consequence of appropriations made by law would be comparatively useless. The court referred to the reasoning in Thomas v. Owens that a view contrary to that decision would countenance a co-ordinate branch of the government stopping the whole machinery by refusing to appropriate money to pay the salaries of the officers on whom devolved the duties of the departments of the government, and said:

"It is very true that the Legislature possesses the power to stop the whole machinery of government, whenever it is willing to take the responsibility of doing so. That body might repeal all the existing laws, and leave the people of the state practically without government for a time. So the Legislature, under the Constitution of this state, at one session, can fix the compensation of members at the succeeding session; and this compensation, though merely nominal, cannot be increased by the incoming Legislature. The Legislature has the power to repeal all existing revenue laws, and thus leave the state treasury without funds. The Legislature has also the power of taxation to the extent of the value of all the property in the state. But, with all due deference to the learned and distinguished jurists who decided the case of Thomas v. Owens, we are compelled to arrive at a different conclusion. We think the power to collect and appropriate the revenue of the state is one peculiarly within the discretion of the Legislature. It is a very delicate and responsible trust, and if not used properly by the Legislature at one session, the people will be certain to send to the next more discreet and faithful servants. It within the legitimate power of the judiciary, to declare the action of the Legislature unconstitutional, where that action exceeds the limits of the supreme law, but the courts have no means, and no power, to avoid the effects of nonaction. The Legislature being the creative element in the system, its action cannot be quickened by the other departments. Therefore, when the Legislature fails to make an appropriation, we cannot remedy that evil. It is a discretion specially confided by the Constitution to the body possessing the power of taxation. There may arise exigencies, in the progress of human affairs, when the first moneys in the treasury would be required for more pressing emergencies, and when it would be absolutely necessary to delay the ordinary appropriations for salaries. We must trust to the good faith and integrity of all the departments. Power must be placed somewhere, and confidence reposed in some one."

While that decision is in conflict with the later case decided by the same court, we think its reasoning sound and prefer to follow it rather than the later case. The same court in Stratton v. Green, 45 Cal. 149, held a statute fixing an officer's salary and the time of its payment was not an appropriation of money to pay it.

Shattuck v. Kincaid, 31 Or. 379, 49 Pac. 758, reviews most of the cases cited by relator but refused to follow them. There the salary was fixed by statute. The court said the object of the statute was accomplished

were fixed, that no other or further intendment could be predicated on it; that it was not an appropriation of money to pay the salary, but something more was required to indicate a legislative intendment to effectuate an appropriation. The court said it was one thing to fix the amount and time of payment of a salary and quite another to provide and make available funds for its payment.

In Menefee v. Askew, 25 Okl. 623, 107 Pac. 159, 27 L. R. A. (N. S.) 537, the court considered the question whether a statute fixing the salary of game warden amounted to an appropriation for its payment. The court cited and reviewed the cases on the subject, and said it could not agree that the mere fixing of the salary and the periods at which it was payable manifested any intent to appropriate money to pay it. In Oklahoma the Constitution contained a provision that no money should be paid out of the treasury pursuant to an appropriation made by law unless such payment be made within two and a half years after the passage of the appropriation act. The court said that provision clearly showed a continuing appropriation was not permissible under the Constitution.

Under our Constitution (section 18 of article 4) the period for which the General Assembly is required to make appropriations is "until the expiration of the first fiscal quarter after the adjournment of the next regular session." In none of the cases holding the fixing of the salary and time for its payment amount to a continuing appropriation of money to pay it is any constitutional provision referred to placing any limit on the time for which appropriations may be made. The Supreme Court of Oklahoma held, and we think correctly, that under their Constitution appropriations were only valid for 2½ years. Under our Constitution all appropriations necessary for the ordinary and contingent expenses of the government lapse at the expiration of the first fiscal quarter after the adjournment of the next regular session of the General Assembly. A continuing appropriation beyond that period cannot be made by the General Assembly. There is nothing in the language of section 12 of the Inheritance Tax Act to indicate that the Legislature intended by it to appropriate money to pay relator's salary. It merely creates the office, fixes the salary, and provides that it shall be paid in monthly installments. There is no provision in the act that the salary shall be paid in monthly installments "out of any money in the treasury not otherwise appropriated," which might afford a substantial basis for the claim that the act was an appropriation for payment of the salary when it became due for the period during which an appropriation any money in the treasury not appropriated by law to some other purpose. But if the act had contained such a provision, it could not, under our Constitution, have been a continuing appropriation beyond the period for which appropriations may be made. Furthermore, the Constitution (section 16 of article 4) provides that bills making appropriations for the pay of members and officers of the General Assembly and for the salaries of the officers of the government shall contain no provision on any other subject. One of the contentions in Fergus v. Russel, supra, was that the meaning of that provision is that such bills shall contain no provision on any other subject than appropriations. The court said:

"The language employed in this section is plain and unmistakable, and was clearly intended to prevent the making of appropriations for the pay of salaries of officers of the state government in any bill which should contain a provision on any other subject than that of appropriations for the pay of members and officers of the General Assembly and for salaries of officers of the state government. * * * Under this section of the Constitution it is incumbent upon the General Assembly to make the appropriations for the pay of its members and officers and for the salaries of the officers of the state government by a separate bill or bills which shall contain no provision on any other subject than that of appropriations for such members and officers."

In that case it was held that an appropriation in the Omnibus Bill for the pay of officers of the state government was invalid. Under the law announced in the Fergus Case, if for no other reason, section 12 of the Inheritance Tax Act could not be considered as making an appropriation to pay the salary of an officer of the state government, because it violated the constitutional provision above quoted in that it contained other subjects than an appropriation to pay the salary.

We have not referred to all the cases in which the subject here under consideration has been dealt with. They are by no means harmonious. Some of them involved salaries fixed by the Constitution and some of them salaries fixed by statute, but we have given this case the consideration we thought its importance required, and our conclusion is that the act creating the office of relator and fixing his annual salary, which is payable in monthly installments, was not intended to be, and could not be, considered an appropriation of money to pay the salary; that even if it had been intended to be an appropriation, and its language was such that it could be so treated, the appropriation could not be a continuing one but would lapse at the end of the first fiscal quarter succeeding the adjournment of the next regular session of the General Assembly; and that it could not be considered a valid appropria-

may be made because the bill or act embraced other subjects than an appropriation for pay of the salary.

The writ is denied.

Writ denied.

(311 Ill. 198)

PEOPLE v. ZAZOVE. (No. 15732.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Contempt ⇐52—Rule to show cause unnecessary in case of contempt in presence of court.

A rule to show cause why one should not be punished for contempt is not necessary in a case of contempt committed in the presence of the court.

2. Witnesses ⇐298—Provision against self-incrimination applies to production of writings or other evidence.

The constitutional provision that no person shall be compelled in any criminal case to give evidence against himself applies to the forced production of writings or other evidence as well as to oral statements.

3. Contempt ⇐21—Claim of constitutional privilege held germane, and no basis for charge of reflection upon integrity of court.

Where attorney in case was ordered to produce paper in court, and on his refusal based on the claim that the paper would tend to incriminate him, judgment punishing him for contempt was entered, his claim of constitutional privilege was germane to the matter before the court, and there was no basis for a charge by the court that there was a reflection on the integrity of the court, on striking the attorney's verified petition, to set aside the judgment, stating the facts on which he relied to justify his refusal to produce the paper, which were that opposing counsel and state's attorney were seeking indictments against the attorney, charging him with subornation of perjury and conspiracy to commit perjury as a result of testimony given in the trial as to notations made on the paper in question.

4. Contempt ⇐61(1)—One refusing, in presence of court, to obey its order though punishable in summary way, held entitled to hearing.

Where one in the presence of the court openly defies its authority and refuses to obey its order, he is punishable in a summary way by fine or imprisonment, or both, without any preliminary affidavit, process, or interrogatory; but the court erred in adjudging one guilty of contempt for disobedience of an order to produce a document, where refusal to obey was based on constitutional privilege to refuse to give evidence against one's self in a criminal case, without a fair hearing and an opportunity to state the facts, and, if necessary, to offer evidence to sustain his claim of constitutional privilege, whether evidence sought to be adduced will incriminate witness.

It is for the court to judge whether evidence sought to be adduced will furnish evidence against a witness refusing to give the evidence on the ground it would tend to incriminate him, and if from all the circumstances there appears reasonable ground to apprehend danger to the witness that the evidence sought may furnish a link in the chain of evidence by which he may be convicted of a crime, he is not bound to answer.

6. Witnesses ⇐298—Attorney held entitled to refuse to produce paper on order of court.

An attorney ordered to produce a paper in court *held* entitled to the benefit of his constitutional right to refuse to incriminate himself, it appearing that opposing counsel and the state's attorney were seeking to obtain and use the paper as evidence against the attorney in contemplated criminal charges of perjury and subornation of perjury, in view of the Fourth and Fifth Amendments to the federal Constitution, and Const. Ill. art. 2, § 10.

Error to Superior Court, Cook County; Harry A. Lewis, Judge.

Irving G. Zazove was adjudged guilty of contempt of court, and brings error. Reversed.

John J. Healy and Benjamin C. Bachrach, both of Chicago, for plaintiff in error.

Edward J. Brundage, Atty. Gen., Robert E. Crowe, State's Atty., of Chicago, and Edward C. Fitch, of Springfield (Henry T. Chace, Jr., Edward E. Wilson, and Clyde C. Fisher, all of Chicago, of counsel), for the People.

DUNN, J. The superior court of Cook county entered an order on May 31, 1923, adjudging Irving G. Zazove guilty of contempt of court, and committed him to the county jail for six months, and he has sued out a writ of error.

The record consists of the order and the bill of exceptions. The order recites that, it appearing to the court that Irving G. Zazove, attorney of record for the plaintiff in the case of Kryza v. Chicago Evening American Publishing Company, has in his possession a certain paper which was offered in evidence in that case, and was also introduced as an exhibit in the criminal court of Cook county in the case of People v. Zazove, and was, after a rule to show cause entered against certain witnesses in the case of Kryza v. Chicago Evening American, voluntarily shown to the court by Zazove, said paper purporting to be a portion torn from the cover of a magazine by Tee Brown, who alleged that she had written thereon certain names and addresses of witnesses who testified in the case of Kryza v. Chicago Evening American, and it appearing to the court

certain proceeding pending in this court, wherein a rule has been entered upon certain persons to show cause why they should not be attached for contempt of court, and that Zazove has been repeatedly requested to produce said paper in open court, a notice was duly served upon him that a rule would be entered upon him to produce said paper instanter on May 19, 1923, and he having appeared in open court with counsel, and the rule to produce the paper instanter having been entered against him, and he having been sworn as a witness, and the court having ordered him to produce said paper, and he having refused to produce it, or to allow the court to inspect it, giving as a reason therefor that said paper might tend to incriminate him, the court finds that Zazove is guilty of contempt of court in refusing to answer said questions, or to produce said paper in open court.

The bill of exceptions shows that on May 19, 1923, the plaintiff in error, in response to a notice served upon him that a rule was about to be entered requiring him to produce the paper, appeared in court with his counsel, and there was colloquy in which the court insisted upon the production of the paper. The plaintiff in error declined to produce it on the ground that it would tend to incriminate him, and his counsel stated that until the statute of limitations had run the plaintiff in error was in danger of prosecution for perjury for his testimony in the criminal trial. He further stated that the plaintiff in error ought to give his answer under oath, and requested the court to enter a rule on him to show cause why he should not be committed for contempt. The court asked the plaintiff in error, "Will you turn it over, Mr. Zazove?" Zazove answered that he stood on his constitutional right. The court remarked, "I don't care what your rights are; you refuse to turn it over?" Zazove answered again, "I refuse to turn it over on the ground it tends to incriminate me." The court said, "All right: I am going to hold you in contempt of court; well, you have already answered the rule now." The court, after some talk as to a stay of the mittimus, then said: "One year in the county jail for Mr. Zazove; now stay the execution of the sentence two weeks." No order was entered then or at any time until May 31. On the latter date the plaintiff in error appeared in court, and through his counsel asked leave to file his verified answer instanter to show that he was acting in good faith in refusing to produce the paper, believing that it would tend to incriminate him, and relying upon his constitutional right, and also to reduce the penalty. Leave to file the answer was refused and the judgment was entered; the term of imprisonment

Thereupon the plaintiff in error moved the court to vacate the judgment, and asked leave to file his verified petition in support of the motion. The court granted leave to file the petition, but immediately struck it from the files.

[1] The defendant in error contends that there is nothing before this court except the judgment itself, and if the findings are sufficient to sustain the judgment there can be no reversal. The substance of the findings is that the plaintiff in error had possession of the paper, and was ordered to produce it in a cause in which it was material evidence, but refused to do so on the ground that it might tend to incriminate him. On these findings he was adjudged guilty of contempt, for which he was sentenced to imprisonment in the county jail. The court made no finding that the production of the paper would not tend to incriminate the plaintiff in error, or that it would. The judgment affords no ground for any inference on this question. Before the judgment was entered the plaintiff in error sought to show cause why he should not be punished for contempt, and asked that a rule might be entered for that purpose. No rule was entered, for the reason that it was not necessary in a case of contempt committed in the presence of the court. The defendant asked leave to file his answer setting up the facts upon which he relied to justify his refusal to produce the paper. He was denied leave, and afterward moved to vacate the judgment, showing by his verified petition the same facts alleged in the answer which he had been refused leave to file. The court allowed the statement to be filed, but immediately struck it out, saying:

"Let the record show that it is stricken by reason of the fact that it contains matters that are not germane to the subject before the court and is a reflection upon the integrity of the court."

[2] The constitutional provision is that no person shall be compelled in any criminal case to give evidence against himself. This applies to the forced production of writings or other evidence as well as to oral statements. Lamson v. Boyden, 160 Ill. 613, 43 N. E. 781. The court apparently failed to appreciate the force of this constitutional provision, for in response to the statement of the plaintiff in error, "I stand on my constitutional right," the court said, "I don't care what your rights are; you refuse to turn it over?" and upon the plaintiff in error's statement, "I refuse to turn it over on the ground it tends to incriminate me," the court said, "All right; I am going to hold you in contempt of court." The answer which appears in the bill of exceptions contains the facts upon which the plaintiff in

would have a tendency to incriminate him. The court's refusal to permit the filing of the answer must be regarded as a holding that the facts stated were insufficient to show the existence of the privilege of the witness to refuse to produce the evidence. The facts stated were that the plaintiff in error was an attorney for Susie Kryza in an action brought by her against the Evening American Publishing Company, and on the trial of that cause in March, 1923, offered in evidence the slip of paper involved in this proceeding. It had on it two names and addresses of witnesses, and Tillie Brown testified that they were written on the paper on August 18, 1921, at the time of the accident which was the basis of the suit. An objection to the paper was sustained. After the trial the defendant made a motion for a new trial, on the hearing of which three of the witnesses who had testified in the case repudiated their testimony and said that it was false. A rule to show cause why they should not be punished for contempt was entered against these witnesses, two of whom attempted to involve the plaintiff in error as a party to the giving of their false testimony, and as a result the plaintiff in error, Tillie Brown, and three others were indicted by the grand jury for conspiracy to commit perjury and subornation of perjury. On motion of the state's attorney a severance was granted, and the plaintiff in error, Tillie Brown, and Israel Seigell were tried together and found not guilty.

On this trial Tillie Brown testified as she had in the civil suit, that the names and addresses were written on the paper on August 18, 1921, in the presence of a person who stated that his name was Michael Baron. Baron testified in the civil suit that he was present and witnessed the accident. On the motion for a new trial he repudiated his testimony, and testified, as he also did on the criminal trial, that the names and addresses were written on the paper in the office of the plaintiff in error, and in his presence, on March 1, 1923. The plaintiff in error testified that the paper was not prepared in his presence. After the trial in the criminal case, while the motion for a new trial in the civil case was being argued, the attorney for the defendant in that case requested that the paper be produced in open court, and stated that it was his purpose to submit it to experts, whom he afterward could call as witnesses to show that the paper did not exist on August 18, 1921, and came into existence only in March, 1923. The answer by the plaintiff in error stated that he believed that the attorney for the defendant in the civil case could, through the payment of sufficiently large fees, induce experts to falsely testify in favor of such contention, and that the plaintiff in error might not be able to

er the conclusion of the criminal trial he was informed that the state's attorney of Cook county, acting in conjunction with the attorney for the defendant in this suit, was seeking new and additional indictments against the plaintiff in error, charging him with subornation of perjury and conspiracy to commit perjury as a result of the testimony given in the criminal trial; that such threats had been published through the press of the city of Chicago by the attorney for the defendant in the civil suit, and the plaintiff in error was informed and believed that the state's attorney and the attorney for the defendant in the civil suit were planning to obtain and use the slip of paper as evidence against the plaintiff in error in such contemplated new criminal charges, and the attorney for the defendant in the civil suit hoped to obtain false and perjured testimony to sustain the false and perjured testimony of the witnesses against him. It was further stated that the motion for a new trial in the civil case had been disposed of by granting the defendant a new trial, and judgments had been entered in the contempt proceedings against the three witnesses who admitted they had testified falsely, adjudging them guilty of contempt, and there was nothing before the court with relation to which the slip of paper was material evidence. The bill of exceptions, however, shows that these matters were pending when demands were made in open court that the plaintiff in error produce the paper and he refused to do so.

[3] The statement in support of the motion to vacate contained the following:

"This respondent further represents and shows that he is fully convinced and firmly believes that the production of said document by him will tend to criminate him, and will tend to prove that this respondent has been guilty of one or more of the criminal charges now threatened against him, and that the attempt which is now being made to require this respondent to produce said document is an attempt to compel him in a criminal case to give evidence against himself, and is in violation of his constitutional rights and an invasion thereof, being in conflict with the Fourth and Fifth Amendments to the federal Constitution and section 10 of article 2 of the Bill of Rights of the Constitution of the state of Illinois, and is also in conflict with the Fourteenth Amendment of the federal Constitution and sections 2 and 6 of article 2 of the Bill of Rights of the Illinois Constitution."

This paragraph was construed as a reflection upon the court, and was the matter referred to when the court said:

"Let the record show that it is stricken by reason of the fact that it contains matters that are not germane to the subject before the court and is a reflection upon the integrity of the court."

germane to the matter before the court, and there is no basis for the charge that there was any reflection upon the integrity of the court.

[4-6] Where one in the presence of the court openly defies its authority and refuses to obey its order, he is punishable in a summary way by fine or imprisonment, or both, without any preliminary affidavit, process, or interrogatory. People v. Cochrane, 307 Ill. 126, 138 N. E. 291; Tolman v. Jones, 114 Ill. 147, 28 N. E. 464. In this case, however, the plaintiff in error based his refusal to obey the order of the court upon his constitutional privilege to refuse to give evidence against himself in a criminal case, and he had a right to a fair hearing and determination of his defense. The court did not give him a hearing of his defense, and its judgment did not determine this question. The court declined to permit the defendant to state the facts which constituted his claim of privilege, or to give him an opportunity to justify his claim. Upon his answer to the court's interrogatory that he refused to turn the paper over on the ground that it tended to incriminate him, the court announced that he was going to hold him in contempt of court, without any finding that the production of the paper would not tend to incriminate him, and without any showing that it would not do so, and without permitting him to show that it would do so. Though the proceeding was summary, plaintiff in error was entitled to a fair hearing, and an opportunity to state the facts constituting his justification, and, if necessary, to offer evidence to sustain his claim of constitutional privilege. Sherman v. People, 210 Ill. 552, 71 N. E. 618; People v. Spain, 307 Ill. 283, 138 N. E. 614. It is for the court to judge whether the evidence sought to be adduced will furnish evidence against the witness, and if from all the circumstances there appears reasonable ground to apprehend danger to the witness that the evidence sought may furnish a link in a chain of evidence by which he may be convicted of a crime he is not bound to answer. Minters v. People, 139 Ill. 363, 29 N. E. 45; Manning v. Mercantile Securities Co., 242 Ill. 584, 90 N. E. 238, 30 L. R. A. (N. S.) 725. It is apparent from the facts stated in the plaintiff in error's answer that he was justified in the belief that the production of the paper would furnish a link in the chain of evidence by which he might be convicted of perjury on the criminal trial, and he was entitled to the benefit of his constitutional right to refuse to furnish that link.

The judgment of the superior court of Cook county will be reversed.

Judgment reversed.

PERU PLOW & WHEEL CO. v. INDUSTRIAL COMMISSION et al. (No. 15754.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Master and servant ⟸371—"Accident" and "accidental injury" within Compensation Act defined.

The words "accident" and "accidental injury," as used in the Compensation Act, include every injury suffered in the course of employment for which there was an existing right of action at the time the act was passed, and extend the liability of employer to make compensation for injuries for which he was not previously liable, and fix the limit of such compensation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.]

2. Master and servant ⟸373—"Occupational disease" not compensable as "accident."

"Occupational diseases" are not covered by the Compensation Act, although not all diseases are to be excluded therefrom; an occupational disease being a diseased condition arising gradually from the character of the employee's work, but it is not an "accident."

3. Master and servant ⟸373—"Accident" within Compensation Act and "occupational diseases" distinguished.

An "accident," as contemplated by the Compensation Act, is distinguished from an occupational disease, in that it arises by some definite event, the date of which can be fixed with certainty, but which cannot be so fixed in the case of occupational diseases.

4. Master and servant ⟸371—Disability from accident must be traceable to definite time and place of origin.

In order that disability be by reason of accidental injury or the result of an accident within the Compensation Act, it must be traceable to a definite time and place of origin.

5. Master and servant ⟸373—Inflammation of lungs from breathing iron dust held an "occupational disease" not compensable; "accidental injury."

Where disability of an employee arose from continued breathing of iron dust in his particular occupation, and there was no one circumstance, incident, or time to which could be pointed the starting place of such disability, it cannot be held to arise out of an "accidental injury" within the Compensation Act, but was a disease of occupation and not compensable.

Error to Circuit Court, La Salle County; Edgar Eldredge, Judge.

Proceeding under the Workmen's Compensation Act by Arthur Rouso, claimant, opposed by the Peru Plow & Wheel Company, employer. An award of the Industrial Commission was affirmed by judgment of the circuit court, and the employer brings error. Reversed, and award set aside.

error.

Lee O'Neil Browne, of Ottawa, for defendant in error.

STONE, J. Defendant in error, Arthur Rouso, filed a claim with the Industrial Commission for compensation for injuries arising out of an accident alleged to have occurred in his employment with plaintiff in error. There is no controversy as to the relations of the parties; the questions in dispute being whether or not there was an accident, whether notice was given as required by law, and the nature and extent of the disability. No testimony was offered on behalf of plaintiff in error, either before the arbitrator or before the Commission on review; it being contended by it that the disability of Rouso was not an accident but a disease.

The record of evidence offered by the applicant shows that he is 34 years of age; that prior to the 17th day of February, 1921, when he first went to the hospital, he had worked for plaintiff in error for 5 years as a machinist, operating a lathe used in boring out or enlarging the inside of metal wheel hubs. Prior to that time he had been employed as a machinist in other shops and in the cement mills at Oglesby. The operation of the machine upon which he worked for plaintiff in error caused a fine metal dust to arise from the iron upon which he was working. This dust was sufficiently light to float in the air and was discernible in the sunlight. From this dust the clothes of workmen would turn yellow with rust. There being no appliances for the purpose of carrying this dust away, it was inhaled by the workmen. Rouso, at the time he quit working for plaintiff in error, on the 17th of February, 1921, was in what he characterized a "run down" condition, unable to sleep or eat, coughing continually, occasionally raising blood, and frequently a mucous sputum which the medical witnesses termed mucopurulent; i. e., made up of mucous and pus. Rouso remained in the hospital for about 9 days. Thereafter he returned to the plant of the plaintiff in error and told the foreman under whom he worked and the cashier of the company that he did not know when he could come back to work, as the doctor had told him to stay away from work and go West. His testimony shows however, that he did return and try from time to time to work for a period of about 6 weeks thereafter but was unable to work more than a few days at a time. After about 40 days of work put in in this manner he quit permanently and went to a sanitarium near Ottawa, operated for the treatment of tuberculosis, at that time telling the foreman why he was quitting. His last work for plaintiff in error was on June 27, 1921. He testified that he was unable to work; that he was too weak and short of breath; that in the mornings at times he would be so weak that he was unable to move. From that time until the 1st day of July, 1922, he made no attempt to engage in employment, and the evidence shows he was unable to do so. During July, 1922, he was given a position as ticket taker for the Tri-Cities Charities, who were operating the scenic park known as Deer Park, near Ottawa. He was employed there for a period of 2 months, taking admission fees of visiting tourists at the entrance to the park and issuing tickets to them. For this work he was paid the sum of $3.25 per day. His work employed him 7 days a week. He testified on hearing before the Commission that he felt better than he had at the time of the hearing before the arbitrator, and was receiving no medical attention, but that he could not do any physical labor.

Dr. Roswell Pettit, who conducts the tuberculosis sanitarium near Ottawa, made a thorough examination of Rouso, using X-ray, sputum, and blood tests, and other tests known to the medical profession. He testified that Rouso was unable to work, and that he believed his condition was permanent. He also testified the condition found in his lungs could be produced by a hard, cutting dust, which would irritate the mucous membrane, but that soft dust, such as coal, chalk, or cement, would have little or no damaging effect. Dr. A. J. Roberts, director of the La Salle County Sanitarium at Ottawa, had Rouso under his observation for four months. He testified as to his condition and that he was unable to do any manual labor; that at the time of the hearing before the Commission he had seen no difference in his condition. Both physicians testified that they found no evidence of tuberculosis, but that Rouso had an inflammation of the lungs, probably due to breathing this dust. The record also shows that prior to 6 months before he quit work in February, 1921, he was never known to lose time by reason of sickness; that he was what some of the witnesses characterized as a "husky" man; that during the 6 months prior to February 17, 1921, he had a hacking cough and lost flesh. The record does not disclose that anything unusual occurred in the work of Rouso at any time prior to February 17, 1921. The evidence also tends to show that it is not usual for men engaged in the occupation that Rouso was following to be affected by iron dust in the manner in which Rouso was affected, although it is shown by the medical testimony that the irritation set up in the lungs of Rouso by the iron dust was but a natural result of breathing hard, cutting dust.

[1] The first question to be determined is whether or not this is an industrial accident

or an occupational disease. An "accident" has been defined by the English courts as any unexpected personal injury, resulting to the workman in the course of his employment, from any unlooked for mishap or occurrence arising out of the employment. Fenton v. Thorley & Co., 5 B. W. C. C. 1. It is the view of this court, as expressed in numerous cases, that the word "accident" is not a technical legal term. No legal definition has been given or can be given which is both exact and comprehensive as applied to all circumstances. Those things which happen without design are commonly called an accident—at least in the popular acceptation of the word. Any event unforeseen, not expected by the person to whom it happened, is included in the term. In Matthiessen & Hegeler Zinc Co. v. Industrial Board, 284 Ill. 378, 120 N. E. 249, this court defined the term "accident" as follows:

"The words 'accident' and 'accidental injury' imply, and the provisions for notice to the employer within 30 days after an accident and his report to the Industrial Board of accidental injuries show, that an injury, to be accidental or the result of an accident, must be traceable to a definite time, place and cause, but if there is such a definite time, place and cause and the injury occurs in the course of the employment the injury is accidental within the meaning of the act and the obligation to provide and pay compensation arises. While it is not intended, and perhaps not possible, to give a definition of the words used in the act as applied to all possible circumstances, it may safely be said that an injury is accidental, within the meaning of the act, which occurs in the course of the employment unexpectedly and without the affirmative act or design of the employee."

[2, 3] The words "accident" and "accidental injury," as used in the Compensation Act (Smith-Hurd Rev. St. 1923, c. 48, §§ 138–172), were meant to include every injury suffered in the course of employment for which there was an existing right of action at the time the act was passed, and to extend the liability of the employer to make compensation for injuries for which he was not previously liable and to fix the limit of such compensation. Matthiessen & Hegeler Zinc Co. v. Industrial Board, supra; Baggot Co. v. Industrial Com., 290 Ill. 530, 125 N. E. 254, 7 A. L. R. 1611. Occupational diseases are not covered by the Compensation Act, although not all diseases are to be excluded from the purview of the compensation law. An occupational disease is a diseased condition arising gradually from the character of the work in which the employee is engaged. It does not occur suddenly, but is a matter of slow development. An occupational disease is not an accident. Matthiessen & Hegeler Zinc Co. v. Industrial Board, supra; Labanoski v. Hoyt Metal Co., 292 Ill. 218, 126 N. E. 548; Jerner v. Imperial Furniture Co., 200 Mich. 265, 166 N. W. 943. An accident, as distinguished from an occupational disease, as the former is contemplated under the compensation law, arises by some definite event, the date of which can be fixed with certainty, but which cannot be so fixed in the case of occupational diseases. City of Joliet v. Industrial Com., 291 Ill. 555, 126 N. E. 618; Matthiessen & Hegeler Zinc Co. v. Industrial Board, supra. It was said, in the case last cited:

"It is true that Adrian had been exposed to practically the same conditions for many years without injury, but it would not be unreasonable to conclude that his immunity was because of the state of his health and his ability to resist the deleterious effect of the gases and fumes over which he worked, but this time his physical condition was such as to make him susceptible to arsenical poisoning in such a degree as to bring on his fatal illness and death."

From what has been said it will be seen that not every disease is occupational simply because the conditions which were the immediate cause of the injury obtained for a long period of time. Certain diseases are well recognized as being attributable to accident, such as those caused by the entering of a disease germ through breaking of the skin, as anthrax. Chicago Rawhide Manf. Co. v. Industrial Com., 291 Ill. 616, 126 N. E. 616. Actinomycosis, a disease caused by handling wheat and barley, has been held to be an accidental injury. Hartford Accident & Indemnity Co. v. Industrial Com., 32 Cal. App. 481, 163 Pac. 225. Disability, caused from inhaling poisonous fumes in attempting to put out a fire. Munn v. Industrial Board, 274 Ill. 70, 113 N. E. 110. Paralysis, caused by exertion of a traveling salesman in running to catch a train while carrying heavy hand luggage. Crosby v. Thorp, Hawley & Co., 206 Mich. 250, 172 N. W. 535, 8 A. L. R. 1253. Nephritis, caused by exposure of the employee after working in heat and steam. United Paperboard Co. v. Lewis, 65 Ind. App. 356, 117 N. E. 276. Eczema, caused by exposure to fumes and splashes of carbon bisulphide. Evans v. Dodd, 5 B. W. C. C. 305. Rheumatism and gangrene, following an injury caused by dropping a heavy weight on the foot. Stinton v. Brandon Gas Co., 5 B. W. C. C. 426. It has been held that illness caused to a seaman by general exposure to rough weather could not be held to be an injury by accident (Barbeary v. Chugg, 8 B. W. C. C. 37), and that the death of a stoker following a gradual collapse from exhaustion induced by work for several days in the tropical heat of the Red Sea was not death by accident (Pyper v. Manchester Liner, 2 K. B. 691).

[4] The rule recognized in this state is that, in order that the disability be by reason of an accidental injury or the result of

nite time and place of origin. There must be some definite thing happen which can be pointed to as the immediate cause of the breakdown, although the employee may have been able to work in similar conditions for a considerable period of time prior to the happening of the event which was the immediate cause of his breakdown. That this must be considered the intention of the Legislature in passing the act is shown by the provisions of the act limiting the time in which notice may be given to the employer. If a definite time cannot be ascertained it is impossible to give the notice required by the act.

[5] Matthiessen & Hegeler Zinc Co. v. Industrial Board, supra, is cited and relied upon by both parties to this lawsuit. In that case the employee had followed his occupation of dragging out molten cinders for a number of years without detrimental results. Prior to October 6, 1914, he was in his usual health. He began work at 6 o'clock on that day, and when leaving home complained that he did not feel like going to work. He worked, however, until 2 o'clock in the afternoon, when he went home sick. About 8 o'clock that night he was seized with cramps, and from then on the progress of lead and arsenical poisoning was rapid. He was taken to the hospital on October 12 and died on October 14. The opinion in that case holds, as we have seen, that the arsenical poisoning which resulted in his death was contracted on October 6. There is nothing in this record to which we can point as showing the time when the disability of Rouso began. From all that appears in the record in this case his disability arose out of continued breathing of iron dust in his particular occupation. It appears from the medical testimony to be a characteristic and natural result of continued inhalation of iron dust. There is not one circumstance, incident, or time to which we can point as the starting place of his disability. While the record shows that up to 6 months prior to February, 1921, Rouso was in good health, there is no incident or time within said 6 months' period which is shown in the record to be the cause or starting point of his disability, and, applying the rule laid down in the cases here referred to, we are forced to the conclusion that this most unfortunate disability of the defendant in error did not arise out of an accidental injury, but is a disease of his occupation. This being true, the Commission was not justified in entering an award for an accidental injury, and the circuit court erred in confirming that award.

The judgment of the circuit court will therefore be reversed, and the award set aside.

Judgment reversed, and award set aside.

PEOPLE ex rel. ARMKNECHT et al. v. HAAS, Recorder of Deeds. (No. 15764.)

(Supreme Court of Illinois. Feb. 19, 1924.)

Records ⇐=3—Photographic records held compliance with statute; "record."

Act of recorder of deeds of Cook county in recording petitioners' deeds by the photographic process, pursuant to which the photographic copy, added to other similar copies of other instruments, was bound together with steel in book form, *held* a compliance with Recorder's Act, § 17; section 9 requiring every recorder, as soon as practicable after the filing of any instrument entitled to be recorded, to record same at length in order of time of its reception in well-bound books, where such method excelled any other known method adapted to that county for accuracy, permanency, speed, and inexpensiveness; "to record" meaning to transcribe, to write an authentic account of, to preserve the memory of, by written or other characters, to enter in a book for the purpose of preserving authentic and correct evidence of the thing recorded.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Record.]

Farmer, C. J., dissenting.

Original petition for mandamus by the People, on the relation of William F. Armknecht and another, against Joseph F. Haas, Recorder of Deeds of Cook County. Writ denied.

Everett Jennings, of Chicago, for petitioners.

J. Scott Matthews, of Chicago, for defendant.

THOMPSON, J. William F. and Mary E. Armknecht deposited with Joseph F. Haas, recorder of deeds of Cook county, a deed conveying to them certain real estate in joint tenancy and requested that he record the same. The recorder made a photographic copy of the deed, which he added to other similar copies and then bound the copies in book form. The grantees, contending that their deed was not properly recorded, have filed a petition in this court for a writ of mandamus, praying that the recorder be compelled to copy their deed in writing in a well-bound book. The respondent answered the petition, and petitioners have filed a general demurrer to this answer. The facts are substantially as follows:

Approximately 450,000 written instruments, containing about 6,000,000 folios of 100 words each, will be filed in the recorder's office of Cook county during the present year. The number of documents filed for record each year has been from 15 to 25 per cent. more than were filed the preceding year. The space in the courthouse allotted to the recorder has been overcrowded for

several years and no additional space is available. In order to meet the demand made on his office, the recorder for some time has maintained day and night shifts. Notwithstanding this, there are now nearly 500,000 folios of documents filed for record which have not been transcribed. Realizing that the present method of recording documents with the typewriter would soon prove inadequate, the recorder four years ago began an investigation of the practicability of the photographic method of recording instruments. This investigation has convinced the recorder that photographic copies of instruments, when properly made, are as permanent and durable as handwritten, typewritten or printed records.

The photographic copy of the instrument in question is bound in a book that is more substantial than the ordinary book used when instruments are recorded with the typewriter, because the pages are bound together with steel, instead of cloth, and a page cannot be removed without destroying it. Instruments can be recorded much more rapidly and with much less expense by the photographic method than by transcribing with the typewriter. Based upon the present volume of business in the recorder's office, it is estimated that $200,000 a year can be saved to the taxpayers of Cook county by the installation of the photographic method of recording. The books containing the photographic copies of recorded instruments are indexed and numbered as other books of record.

Section 9 of the Recorder's Act (Smith-Hurd Rev. St. 1923, c. 115) provides:

"Every recorder shall, as soon as practicable after the filing of any instrument in writing in his office, entitled to be recorded, record the same at length in the order of time of its reception, in well-bound books to be provided for that purpose."

To record means to transcribe; to write an authentic account of; to preserve the memory of, by written or other characters; to enter in a book for the purpose of preserving authentic and correct evidence of the thing recorded. Whatever the method used for recording, it is a record of the thing recorded as long as it is a true and correct copy. The object of recording a deed is to give it perpetuity and publicity, and the two main requirements of a public record is that it shall be accurate and durable. As civilization has progressed, so has the method of recording instruments changed. Charcoal drawings on the walls of caves gave way to carvings on the face of cliffs, and these in turn were supplanted by handwriting on parchment. Commercial necessity required the substitution of paper for parchment, and handwriting gave way to the speedier and more legible typewriting.

The earliest recording acts in this country did not even require the record to be in a book. The recorder was to provide either parchment or books, and his certificate was to give the number of the parchment roll or the book, as the case might be. Our statute requires that the instruments shall be recorded in "well-bound books to be provided for that purpose." Until this is done the record is not complete. The instrument is recorded, however, from the moment it is filed for record in the recorder's office. When an instrument is filed it is given a serial number and is entered in the entry book. As soon as it can be reached it is copied in the proper book. When the recorder has satisfied himself that it has been accurately copied in a well-bound book, he indorses upon the instrument a certificate showing the exact time when the instrument was filed for record, and the book and page where the instrument is recorded. If the instrument is recorded by handwriting or typewriting, the sheets of paper on which the instrument is transcribed are usually already bound in book form.

According to this record, where the photographic process is used, the sheet of paper which bears the photograph of the document is separate from other sheets. The record is not complete until these single photographic copies are assembled in proper order and substantially bound in book form. Because of this, it would probably be impracticable to use the process in any but very large counties, where at least one book a week of each class of instruments is made. Until the permanent record is complete, and the recorder has indorsed on the instrument his final certificate, the instrument itself is on file, and during the time between the filing of the instrument and the actual copying of it upon the record book the record consists of the entry book and the original instrument. In Cook county, at the present time, this period is nearly a month. There are so many instruments of each class filed in Cook county that, if the photographic process were used there, a book of such copies would be made in a much shorter period of time than a month. Therefore by the photographic process the instruments would be recorded in a well-bound book sooner than by the old method of transcribing them with the typewriter.

In 1874, when the Recorder's Act was written, the Legislature naturally had in mind the recording of instruments by handwriting. It knew nothing about the typewriter, nor the recording of instruments by the photographic process. While the language used in sections 9 and 17 indicates that the Legislature had in mind that the books would be bound before the instrument was copied, there is nothing in the statute which forbids the copying of the instruments on separate sheets and then binding these

used, it all comes to this: The record of the instrument from the time it is filed until it is recorded in a well-bound book is the entry book and the original instrument; after it it is recorded in a well-bound book and the book and page where the instrument is recorded are known and the certificate of the recorder has been indorsed on the original instrument, the record is the page or pages in the book bearing the copy of the instrument.

The recorder of deeds of Cook county is a county officer named in the Constitution. Every such officer, not only has the authority, but is required by law, to exercise an intelligent discretion in the performance of his official duties. The law requires him to record certain instruments in a well-bound book, but it does not require him to record them by any particular method. As long as the method adopted by him is accurate and durable, he has performed his duty. While the courts can compel him to record instruments entitled to be recorded in well-bound books, they have no right to compel him to record them in any particular way. No argument is needed to demonstrate that photography is a much more accurate process of making a copy of an instrument than any other known method. It will show the instrument exactly as it is. The requirement of accuracy is fully complied with by this method. The record shows that prints properly made are as permanent as the paper on which they are made, and so the requirement of permanency is met. We are satisfied that no other known method of recording instruments is as accurate as the photographic method, that no practicable method excels it in permanency, and that in counties where the volume of instruments recorded is large, as it is in Cook county, no other method is as speedy and inexpensive.

There being nothing in the law forbidding the recording of instruments by the photographic process, we hold that the recorder of deeds of Cook county has not abused the discretion with which he is clothed in recording the deed of petitioners as he has recorded it. This act complies with the requirements of the statute, and the instrument is legally recorded. The writ of mandamus is therefore denied.

Writ denied.

FARMER, C. J. (dissenting). Conceding that preserving the evidence of instruments required to be recorded may be more expeditiously and cheaply done by the photographic process, authority to so preserve them should come from the Legislature, and not from a court. By the act of 1874 deeds and other instruments entitled to be recorded book provided for that purpose. The only method then known of recording instruments was to transcribe them in a book. If the photographic method had then been known, it would have been competent for the Legislature to authorize that method. It did not know anything about that process, and so required the evidence of deeds and other instruments to be recorded—not photographed—in the only way then known. Application should have been made to the Legislature, and not to a court, to change the statute. I regard this decision as a plain usurpation of legislative power.

(311 Ill. 284)

PEOPLE v. POWLOSKI et al. (No. 15834.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Robbery ⇐24(1)—Evidence held sufficient to warrant finding accused committed robbery.

In a prosecution for robbery while armed with a deadly weapon, evidence *held* sufficient to warrant finding of accused's guilt beyond reasonable doubt.

2. Robbery ⇐23(1) — Evidence of telephone calls held material and relevant.

On a trial for robbing a doctor who had been summoned to a lonely spot by telephone, ostensibly to visit a sick boy, evidence of such telephone call, and evidence that defendants had previously telephoned another doctor, and, on learning that he was out, said he was not wanted unless he could come right away *held* relevant and material.

3. Criminal law ⇐386—Telephone conversation held competent if parties identified.

Telephone conversations which are relevant and material to the issue are competent if the parties are identified either by direct evidence or by facts and circumstances.

4. Robbery ⇐23(3)—Accused's possession of weapons and tools held competent evidence.

It is competent on a trial for robbery to prove that accused, when arrested, possessed a weapon or tools suitable for the commission of the crime charged, even if no claim is made that the tools or deadly weapon were actually used in committing the crime.

5. Robbery ⇐23(3)—Accused's possession of stolen articles must be exclusive to warrant inference of guilt.

To raise an inference of guilt on a trial for robbery from possession of stolen property, the possession must be exclusive in defendant in the sense that it is personal and inconsistent with an independent possession by others.

6. Robbery ⇐24(1)—Evidence held sufficient to show accused's possession of stolen property under recent possession rule.

In a prosecution for robbery, evidence that a stolen watch was found in defendant's vest

in the room occupied by him *held* sufficient to show his possession under rule of recent possession.

7. Robbery ⇐24(1)—That police officer was in accused's room held to raise no suspicion against evidence found.

The fact that a police officer was in accused's room more than once after his arrest for robbery *held* insufficient to raise a suspicion that a stolen watch found in accused's vest was placed therein by any other than accused.

8. Criminal law ⇐663—That exhibit refused admission seen by jury held not ground for complaint.

Defendants could not complain that a coat belonging to one of them, and covered with mud of the same kind as that covering a stolen automobile, though refused admission in evidence, was seen by jury when offered.

9. Robbery ⇐27(1)—Instruction as to recent possession as evidence of guilt held correct.

An instruction that the unexplained possession of stolen property soon after the theft was committed was sufficient of itself to authorize a conviction unless it was overcome by other evidence sufficient to create a reasonable doubt *held* correct.

10. Robbery ⇐28—Verdict of guilty as charged held finding of guilty of robbery while armed with deadly weapon.

Where an indictment charged robbery while armed with a deadly weapon, *held*, that a verdict of guilty of robbery in manner and form as charged in the indictment was a finding that accused were guilty as charged.

Error to Circuit Court, Madison County; J. F. Gillham, Judge.

John Powloski and others were convicted of robbery while armed with a deadly weapon, and they bring error. Affirmed.

Faulkner & Moore, of Granite City, for plaintiffs in error.

Edward J. Brundage, Atty. Gen., Joseph P. Streuber, State's Atty., of Edwardsville, Virgil L. Blanding, of Moline, and Wm. M. P. Smith, of Edwardsville, for the People.

CARTWRIGHT, J. A few minutes before midnight of January 26, 1923, Charles Kiser, a doctor living in Madison, was called by telephone to go to an appointed place near the corner of Tenth street and Alton avenue, and near the Polish Catholic church, to attend a sick boy. The designated place was in Madison, ten blocks from his residence, and he drove to the place in a Ford coupé. When he reached the place a masked man armed with a revolver pointed it at him, and told him to "Stick 'em up!" A second masked man armed with a gun came across the street, and gave the same command. The doctor handed the masked men his medicine case, and held his hands up. His watch and money were taken from him, and the robbers drove away in his Ford coupé. On his way home he telephoned to the police an account of the robbery, and the next morning the plaintiffs in error, John Powloski, Joe Prince, and Tosia Stydjal, were arrested at a rooming house in Madison for the crime. The Ford coupé was found the next day after the robbery near a pond not far from the place of the robbery, mired in the mud up to the axles. An indictment was returned into the circuit court of Madison county containing two counts, in each of which the plaintiffs in error were charged with robbery while armed with a deadly weapon. There was a plea of not guilty, and upon a trial the jury returned a verdict finding the plaintiffs in error guilty of robbery in manner and form as charged in the indictment, and finding their ages as follows: Prince, 20 years; Stydjal, 20 years; and Powloski, about 19 years. The plaintiffs in error were sentenced to the Illinois State Reformatory, at Pontiac, and the writ of error in this case was sued out for a review of the record.

[1] The defendants were together about 7 o'clock in the evening of January 26, 1923, at the White Eagle Pool Room, and remained together in that and other places in Madison practically all the time until after the robbery, visiting the soft drink parlor of Sarah Lagod, the soft drink parlor of George Sekora, and the coffee house of Tony Conchef, who is nicknamed "Car Shops." The people offered evidence, to which no objection was made, of the following facts: The defendants were in the soft drink parlor of Sarah Lagod twice on the night of January 26, the first time about 10:30 or 11 o'clock, when they went into the kitchen. At a later visit they asked for the telephone, and Sarah opened the door and let the three of them into the room where the telephone was. She said it was then pretty late—about 12 o'clock. Prince and Powloski visited Sekora's place at about 11:30 o'clock, and Sekora heard them talking about telephoning a doctor to visit a sick "kid." Prince asked permission to use the telephone, and he called the office of Dr. L. D. Darner, in Granite City. Sekora testified that in telephoning the defendants did not get their party, and said, "Well, if you cannot come here right away we don't want you." They then looked at the telephone book and went out.

[2, 3] After 11:15, and before 12 o'clock, Mrs. Darner, who was uncertain of the time, received a telephone call for the doctor, who was out answering calls. She told the party telephoning that the doctor was not there, and asked if they would leave any message. The reply was they wanted some one right

away, and they would try somewhere else if the doctor was not there. At the close of the evidence for the people the defendants moved the court to exclude the testimony of Mrs. Darner concerning the telephone message for her husband, and the motion was denied. Telephone conversations which are relevant and material to the issue are competent if the parties to the conversations are identified either by direct evidence or facts and circumstances. In this case the parties were identified, and the telephone conversation was material and relevant, as will hereafter be seen. The court did not err in denying the motion. Miles v. Andrews, 153 Ill. 262, 38 N. E. 644; Godair v. Ham Nat. Bank, 225 Ill. 572, 80 N. E. 407, 116 Am. St. Rep. 172, 8 Ann. Cas. 447.

[4] For some time before the robbery the defendant Stydjal occupied a small room in a rooming house at Fifteenth street and Madison avenue, in Madison. It contained a carpet, table, single bed, a mattress or pallet on the floor, and had hooks on the walls for hanging up clothing. The defendant Powloski, whose home was at Gary, Ind., had occupied the room with Stydjal for several nights before the robbery, and on that night all the defendants occupied the room. Two police officers came to the room at about 9:30 in the morning after the robbery and arrested the defendants, and asked them where their revolvers were. Stydjal denied they had any, but the officers found a large revolver and a smaller one under the mattress on the floor, upon which Powloski was sleeping. Stydjal admitted the ownership of the larger revolver, but denied any knowledge of the other. The large revolver alone was admitted in evidence, and it is contended that the court erred in the ruling, because it was not shown that the revolver was connected with the robbery. It is competent to prove that an accused, when arrested, possessed a weapon or tools suitable for the commission of the crime charged, even if no claim is made that the tools or deadly weapon was actually used in committing the crime. Williams v. People, 196 Ill. 173, 63 N. E. 681; People v. Allegretti, 201 Ill. 364, 126 N. E. 158; People v. Maciejewski, 294 Ill. 390, 128 N. E. 489; People v. Cunningham, 300 Ill. 376, 133 N. E. 270.

[5-7] When the defendants were arrested they were searched, but none of the stolen property was found. The testimony for the people was that no examination was made except of wearing apparel which the defendants had on their persons. The defendant Stydjal testified that the officers not only searched the clothing that the defendants had on, but that which was hanging up in the room. After the arrest one of the police officers went to the room occupied by the defendants. Two children, 12 and 14 years old, respectively, who were scrubbing the hallway in front of the stairway leading to the room, said that the officer was at the room three or four times. The evidence was that he had the key and he said he was there more than once. The last time he took with him the young man called "Car Shops" and Tony Fitzurka, and they found Dr. Kiser's watch in the vest of Powloski hanging on a hook in the room. In the vest there was also a business card of a lawyer in Gary, Ind., and a book. Powloski said that the vest was his, and the fact was not at any time denied. The card, and the book without the contents, were allowed in evidence as tending to identify the vest as the property of Powloski, and, the vest having been proved to belong to Powloski, the watch was offered and received in evidence. It is argued that this was error under the rule that possession of stolen property soon after a theft or robbery, in order to be prima facie evidence of guilt, must be exclusive. To raise an inference of guilt from the possession of stolen property, it is essential that the possession be exclusive in the defendant in the sense that it is personal and inconsistent with an independent possession by others. Conkwright v. People, 35 Ill. 204; People v. Sturdyvin, 306 Ill. 138, 137 N. E. 593. The evidence in this case met that requirement by showing the possession of the watch in the vest of Powloski in the room occupied by him. Powloski did not testify, and the possession was unexplained. The mere fact that the officer was in the room more than once was insufficient to raise a suspicion that the watch was placed in the vest by any other person than Powloski.

[8] It is also said by counsel that the defendants were prejudiced by the production of a gabardine coat owned by Powloski. Its ownership was proved, and it was covered with mud and clay of the same character as the mud and clay where the Ford was found. The court refused to admit the coat in evidence, but it was necessarily brought within the view of the jury. That is true of any exhibit offered in evidence, and, being excluded as evidence, there was no ground for complaint.

[9] The court gave the jury the following instruction:

"The court instructs the jury, as a matter of law, that the recent and unexplained possession of stolen property soon after the theft was committed tends to establish the guilt of the person in whose possession it was found. That fact, of itself, if you believe from the evidence beyond a reasonable doubt it is a fact, is sufficient to authorize a conviction unless the inference of guilt thereby raised is overcome by other facts and circumstances in evidence which create in the minds of the jury a reasonable doubt of such guilt."

The instruction was a correct statement of the law, and applicable to the evidence. Miller v. People, 229 Ill. 376, 82 N. E. 391; People v. Everett, 242 Ill. 628, 90 N. E. 226; People v. Knight, 308 Ill. 182, 139 N. E. 47; Williams v. People, supra.

[10] The court gave an instruction containing forms of verdicts, in one of which the jury were permitted to find the defendants guilty of robbery when armed with a deadly weapon, and in the other a form with a finding that the defendants were guilty but were not armed with a deadly weapon at the time the offense was committed. The verdict was guilty of robbery in manner and form as charged in the indictment, and both counts of the indictment charged the defendants with robbery while armed with a deadly weapon, and the verdict was a finding that they were guilty as charged. People v. Pleitt, 308 Ill. 323, 139 N. E. 597.

The evidence was sufficient to establish the guilt of the defendants beyond a reasonable doubt. The explanation offered for the call on Dr. Darner that he had been the attendant of Powloski after an automobile accident when Powloski lived in Madison, and before removing to Indiana, and that he might have been called to treat him, is inconsistent with the fact that Powloski did not need any treatment, but was going around from place to place in apparent good health, and the talk between Prince and Powloski was that the call was to be for treatment of a "kid." When it was found Dr. Darner was not at his office, Mrs. Darner was told that if he could not come right away he was not wanted. After the telephone call, when Dr. Darner was not at his office, the defendants looked at the telephone book and went out, and the call for Dr. Kiser summoning him from his office ostensibly to visit a sick boy in a dark and lonely spot followed. The evidence of these telephone calls was relevant and material to show that the defendants had planned to call a doctor to attend upon some fictitious child at a designated place for the purpose of a contemplated robbery, which took place. Laying aside that evidence, the facts that the defendants were together during the evening and after the robbery, that they occupied Stydjal's room during the night, and were found there in the morning, and the watch of Dr. Kiser, which had been taken during the robbery, was found there in the vest of Powloski, lead to the necessary conclusion that the defendants were at the designated place to commit the robbery in pursuance of their plan.

The evidence established the guilt of the defendants beyond a reasonable doubt, and the judgment is affirmed.

Judgment affirmed.

(311 Ill. 95)

PEOPLE ex rel. CHICAGO BAR ASS'N v. BAKER. (No. 14596.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Attorney and client ⇐45—Attorney should not advertise he will furnish questions to be used by board of law examiners.

An attorney engaged in instructing applicants for admission to the bar should not and must not advertise or represent that he can or will furnish his students with a question or questions which are to be used by the board of law examiners in the examination of the applicants.

2. Attorney and client ⇐38—Unprofessional conduct justifying disbarment.

Unprofessional conduct which would justify disbarment must have an element of immorality or dishonesty, or be of such character as to be in violation of private interests or the public good.

3. Attorney and client ⇐34—Right to practice law not absolute.

The right to practice law is not an absolute right, but is a privilege which may be revoked when the attorney's misconduct makes him an unfit person to be allowed to hold a license to practice.

4. Attorney and client ⇐53(2)—Misconduct must be shown by clear proof.

An attorney should not be disbarred except upon clear proof of willful and corrupt professional misconduct.

5. Attorney and client ⇐45—Attorney conducting quiz classes not guilty of unprofessional conduct warranting disbarment.

An attorney instructing and preparing applicants for admission to the bar for taking the examination before the board of law examiners, for which he conducted quiz classes for compensation, was not guilty of unprofessional misconduct warranting disbarment.

Dunn, Cartwright, and Carter, JJ., dissenting.

Information by the People, on the relation of the Chicago Bar Association, to disbar Lewis F. Baker, an attorney at law. Rule discharged.

John L. Fogle, of Chicago (William H. Sexton and Frank E. Harkness, both of Chicago, of counsel), for relator.

Joseph A. Weil, of Peoria, and A. D. Cloud and Thomas J. Symmes, both of Chicago (John A. Rose and McKinney, Lynde & Grear, all of Chicago, of counsel), for respondent.

FARMER, C. J. This is an information to disbar Lewis F. Baker, an attorney at law of the city of Chicago, who was admitted as an attorney at law in 1913, and has since that time been engaged in the practice of his profession in the city of Chicago. The information charges, generally, that respondent devotes most of his time to instructing and preparing applicants for admission to

the bar for taking the examination before the board of law examiners; that for that purpose he conducts quiz classes, for which the members pay him a substantial sum of money, the object being to prepare students, by intensive work under the respondent's supervision, to successfully pass the examination for admission to the bar, without regard to the student's previous training or knowledge of an acquaintance with the fundamental principles of law; that respondent is not connected with any college or institution giving instruction to students, but conducts his classes for the purpose of "cramming" applicants to pass the bar examination, and the instruction given by him is limited to the subjects mentioned in rule 39 of this court.

The first count specifically charges respondent has for many years made a practice of cultivating the acquaintance of members of the board of law examiners for the purpose of procuring their good will and to use the same in aid of his business; that he employed a member of the board to draft a cross-bill in a suit pending and paid him $200 for his services; that respondent told said member he was conducting a law school, and induced the member to deliver a lecture in respondent's office to students who were taking his quiz course, for the purpose of causing the students to believe respondent could aid them in passing the examination; that respondent had visited two members of the board distant from Chicago for the purpose of cultivating their acquaintance, in the hope that it would aid him in his business.

The second count charges that in the past there had been rumors that certain applicants for admission to the bar had been able to procure, in advance, questions to be put by the board of law examiners in an examination, and that respondent had been active in encouraging the circulation of the rumors; that at the July, 1921, examination, through an error, the printed questions to be used in the examination twenty-four hours later by the board were inadvertently passed among part of the applicants, but the mistake was immediately discovered and efforts made to have the lists returned; that one of the lists, or a typewritten copy of it, appeared the same day in respondent's office and was used by him in preparing his students for the examination; that respondent did not, as it was his duty to do, notify the board of the matter and endeavor to keep it from the knowledge of his students, but posted the list in a conspicuous place in his office, open to the view of the applicants for admission to the bar.

Count 3 charges that prior to the December, 1920, examination, which was held by the board in Chicago, the respondent procured or claimed to have procured advance information of the questions, or some of them, which would be put to the applicants for admission to the bar, and offered to sell the information to Robert J. Shaw for $300, and to C. Lysle Smith without cost to him, to be paid for by Smith's friends.

Count 4 charges that it was the practice of respondent, on behalf of applicants taking his course who were lacking in the time of study required to be shown by proofs to qualify them for taking the examination, to furnish them affidavits that the applicants had studied under his personal tuition the period of time covered by their attendance on respondent's classes, and this, it is alleged, was an evasion of the rule of this court.

After answer filed to the information the cause was referred to a commissioner, who heard the evidence and filed his report, and the case is submitted for decision on the commissioner's report, without exceptions having been filed by either party. People v. Gilbert, 263 Ill. 85, 104 N. E. 1082.

The report of the commissioner is of considerable length, but the importance of the questions presented is such that we think it should be set out in full. It is as follows:

"I, the undersigned, Roswell B. Mason, a master in chancery of the circuit court of Cook county and special commissioner of the Supreme Court of the state of Illinois, do now respectfully submit the following report pursuant to an order of this honorable court entered June 20, 1922:

"Commencing on July 6, 1922, and at various dates thereafter, down to and including December 4, 1922, I was attended at my office, room 1602 Marquette building, Chicago, Ill., by Mr. John L. Fogle on behalf of the relator and Mr. Thomas J. Symmes on behalf of the respondent. I have taken herein the depositions of Elmer H. Bielfeldt, Lysle Smith, Robert J. Shaw, William B. Hale, Albert Watson, A. M. Rose, James W. Watts, Lewis F. Baker, Albert J. Ginsberg, John K. Monihan, Samuel L. Golan, John J. Whiteside, Morris Fisher, and Albert Woods. Prior to the examination of said witnesses they were each and all duly sworn by me according to law, and their said depositions constitute, together with the instruments in writing described in and attached to said depositions, the entire transcript of evidence in this cause. Said transcript of evidence is in my possession, and I am ready to certify it up to this honorable court in case either of the parties hereto shall so desire. This case was argued before me by counsel for the parties in interest in the month of February, 1923. I have neither asked nor received any compensation whatsoever for taking such evidence and making this report. From all the evidence offered and received before me, being the evidence included in said transcript of evidence and no other evidence, I find:

"1. The respondent, Lewis F. Baker, was by the Supreme Court of Illinois, on or about October 8, 1913, admitted and licensed as an attorney and counselor at law of the state of Illinois under the then existing rules of this honorable court and his name entered on the roll of attorneys as an attorney and counselor

gaged in the practice of law in the city of Chicago, in said state of Illinois.

"2. Since the year 1913 said respondent has devoted his time almost exclusively to the business of instructing and preparing applicants for admission to the bar for their respective examinations by the state board of law examiners of the state of Illinois. The method followed by respondent in carrying on such business is to conduct what is known as a quiz class previous to the respective examinations, upon the payment of $25 from each applicant enrolled in the class. Said respondent admits to his quiz class only those who have complied with the rule of the Supreme Court in reference to preliminary education and previous law study. Said work of said respondent is conducted by him solely for the revenue accruing to the said respondent therefrom, and is of the same nature as that carried on by several other quiz masters in Chicago, some of whom are said to be attorneys at law.

"3. The sole object of such quiz class work and instruction is to insure, as far as may be, that the applicant taking such course, without regard to his actual knowledge and acquaintance with the fundamentals of the law, shall, by reason of such intensive work under the guidance of said respondent, be enabled successfully to meet the test of said board of law examiners at the subsequent regular examination for admission to the bar. Said respondent is connected with no college or institution giving training to such students, and is not engaged in conducting quiz classes covering specifically or generally any course in any college or institution of learning. Said respondent conducts said quiz course entirely independent of any such college or institution, and entirely independent of any course of studies theretofore pursued by such applicants, and solely for the purpose of preparing such applicants to meet the bar examinations as the same are given from time to time by said board of law examiners, limiting the instruction and quizzing to the topics set out in rule 39 of this honorable court, upon which it is prescribed applicants for admission to the bar 'must sustain a satisfactory examination.'

"4. Respondent is possessed of marked ability and shrewdness, and has acquired great proficiency in said work. He has for many years carefully studied each and every bar examination and each and every question propounded by the said board of law examiners at the examinations conducted by it, and has collected, codified, arranged, and systemized such questions. He has given careful attention and study to most, if not all, the published quiz books, and questionnaires on the topics mentioned in said rule, has studied the statutes and decisions of the Supreme Court of Illinois and the leading text-books on the subjects mentioned in the rule, and has prepared a list of over 5,000 questions and answers relating to the topics set out in said rule 39, which said list he uses in his said quiz course. He divides his students into classes, and nearly always has from 100 to 115 students taking his quiz course prior to each examination.

"5. Respondent claims that approximately 85 to 95 per cent. of the applicants taking his quiz course are successful in the succeeding examination. He also claims that by his method he is able to assure his students that they will have from 20 to 45 questions, verbatim or in principle, to be asked at the succeeding examination. There are 70 questions asked on each examination. This claim is made by respondent to induce applicants to take his quiz course. In effect, respondent guarantees to furnish verbatim questions and answers in from 28 to 64 per cent. of the succeeding examination. On the hearing before the committee on grievances of the Chicago Bar Association said respondent testified that he had, prior to each examination, from 25 to 45 verbatim questions—'that is, exactly verbatim'—of the questions that were given out at said examination. Lest there should be a possible misunderstanding, the commissioner thinks it only fair to the respondent to say here that both on the hearing before the said grievance committee and before the commissioner the respondent denied that he ever saw any of the actual questions put at the examination prior to the examination, except once in 1918 under circumstances hereinafter described. On the hearing before the commissioner the respondent modified his claim, and insisted that he always had 20 questions verbatim and 25 more in principle prior to each examination, and did not claim before the commissioner that he had prior to each examination from 25 to 45 questions verbatim.

"6. Respondent always tells his students at the beginning of his quiz classes that it is necessary for them to work hard and to keep order. Respondent secures students for his quiz classes from the established schools and colleges of law in Chicago and in other states on circulars and representations, either by letter or in person or by agents, of the thoroughness and value of his quiz course and of his great success in preparing students for the bar examinations. His advertising and solicitation of students are systematic and extensive.

"7. Respondent regularly conducts said quiz classes for 10 successive weeks prior to each examination, charging $25 to each student taking the same, and including therein for 5 days just previous to and during the examinations a special intensive or review quiz covering the whole course. For this he makes no additional charge to his regular students who have paid $25, but charges outsiders who have come in for the special intensive quiz only $10. His quiz course consists of questions that he has compiled covering the entire subject. He usually has 20 basic or fundamental questions on each subject, which, with the answers thereto, he urges each of his students to learn. He goes with his students to the place where the examination is held and answers questions that the students may put to him between the sessions of the board of examiners.

"8. In regard to the charges of specific acts of misconduct against respondent, I make the following

Findings:

"(1) While respondent has made a point of meeting and becoming acquainted with various members of the state board of law examiners, undoubtedly with the idea of advancing his business interests, he has not committed any impropriety, by word or act, in connection with

county other than Cook county to draft a crossbill in a proceeding pending in Cook county, this employment, as disclosed by the evidence, was in no way improper, and the fee of $200 paid by respondent for such service was a reasonable fee and was paid upon an oral bill rendered to respondent. Respondent did not represent to said member that he was conducting a law school and did not induce said member to attend in the office of respondent and deliver a lecture on a legal subject, and said member did not deliver a lecture on a legal subject to the persons who were taking the said quiz course from respondent.

"(2) In reference to many of the past examinations conducted by said board, rumors have been circulated, both in Chicago and Springfield, that certain applicants for admission have been able to procure in advance the questions to be put by said board. Respondent has not been active in permitting and encouraging the circulation of said rumors. At the July, 1921, examination, through an error, printed lists of questions to be submitted to the applicants at a session to be held 24 hours or more later were inadvertently passed among a part of the applicants by a monitor or some person working under the direction of the member of the board in charge thereof. The mistake was immediately discovered, and due effort was made to have the lists so given out by mistake returned. A copy of one of said lists appeared thereafter on the same day in the office of respondent. Respondent did not use it in any way in preparing the persons taking his quiz for the examination thereafter conducted. On the contrary, he advised his students to have nothing to do with it. He did not post the questions in his office. He did not call the attention of the board to said situation, and testified that he did not do so because he knew that the board would not use the questions thus inadvertently given out in advance. In the year 1918 a list of part of the questions used on an examination in that year was obtained by some person unknown, prior to the examination. Respondent was asked by some of his students about some of these questions. He saw a typewritten copy of 18 or 19 questions which he was told was taken from said list. They were in an adjoining office. When respondent learned the circumstances he refused to have anything to do with the questions. Respondent told a member of said board of the fact that this list of questions had gotten out prior to the examination.

"(3) In regard to the charge that prior to the December, 1920, examination conducted by said board in Chicago respondent had procured or claimed to have procured advance information of the questions, or some of them, to be put by said board to the applicants at said examination, I find that respondent did not procure or claim to have procured advance information of said questions or any of them. It is charged in the information that respondent offered to sell information in advance of the said examination, relating to the questions to be asked at such examination, to one Robert J. Shaw, upon the payment to the respondent by said Shaw of the sum of $300. This charge is refuted by a preponderance of the evidence, and I find that said respondent did not offer to sell advance information of the questions to said Robert J. Shaw, and that respondent did not have such advance information. It is further charged that respondent offered to sell to C. Lysle Smith, without direct cost to him, advance information of the questions, or some of them, to be put by said board to the applicants on the December, 1920, examination. There is no evidence whatever to sustain this charge. I find that respondent did not offer to sell such information to said C. Lysle Smith. Respondent has never procured or attempted to procure advance information of questions to be put on any examination by said board of law examiners, and has never sold or offered to sell to any applicant or possible applicant any advance information or any questions that were to be put or supposed to be put at a bar examination, in advance of such examination.

"(4) Where the applicants taking respondent's quiz courses have previously failed in taking the bar examinations, it has been the custom of respondent, on behalf of such of the applicants taking his course as were lacking in the time of study required to enable them to take another examination, to furnish the necessary proofs to make up such time by submitting to said board affidavits that said applicants had studied during the requisite time under his personal tuition for the period of time covered by their attendance on such quiz classes so conducted by respondent. In the opinion of the commissioner these affidavits constituted evasions of the rule of this honorable court. Taking respondent's quiz course is not, in the opinion of the commissioner, the study of law contemplated by the rule.

"9. There have been from time to time repeated rumors that the questions given out at bar examinations held by said board have been procured or given out in advance of the date of such examination. These rumors are not sustained by the evidence, except that in the case of the examination held in 1918, mentioned above, some one procured in advance of the examination, without the knowledge of the board, a list of part of the questions. Except for this there is no evidence that any questions or set of questions was obtained prior to any bar examination by any applicant or other person, and no evidence at all that the respondent was a party to or had anything to do with obtaining any such questions. There is no evidence that the state board of bar examiners are at fault in any way. On the contrary, the evidence shows that said state board conduct examinations faithfully and fairly, and take every precaution to prevent any leaks and to prevent any person whatsoever obtaining any advance information of the questions that are to be asked at the examination.

Conclusions.

"10. While quiz courses and quiz books are of value in preparing students for examinations and cannot be reasonably objected to when not abused, the quiz courses of respondent are calculated solely to 'cram' the students for imminent examination, with definitions and brief statements of legal principles, unsupported by training in reasoning or the analysis of facts or the application of law to facts. Success under respondent's system is purely a feat of

The claim of constitutional privilege was germane to the matter before the court, and there is no basis for the charge that there was any reflection upon the integrity of the court.

[4-6] Where one in the presence of the court openly defies its authority and refuses to obey its order, he is punishable in a summary way by fine or imprisonment, or both, without any preliminary affidavit, process, or interrogatory. People v. Cochrane, 307 Ill. 126, 138 N. E. 291; Tolman v. Jones, 114 Ill. 147, 28 N. E. 464. In this case, however, the plaintiff in error based his refusal to obey the order of the court upon his constitutional privilege to refuse to give evidence against himself in a criminal case, and he had a right to a fair hearing and determination of his defense. The court did not give him a hearing of his defense, and its judgment did not determine this question. The court declined to permit the defendant to state the facts which constituted his claim of privilege, or to give him an opportunity to justify his claim. Upon his answer to the court's interrogatory that he refused to turn the paper over on the ground that it tended to incriminate him, the court announced that he was going to hold him in contempt of court, without any finding that the production of the paper would not tend to incriminate him, and without any showing that it would not do so, and without permitting him to show that it would do so. Though the proceeding was summary, plaintiff in error was entitled to a fair hearing, and an opportunity to state the facts constituting his justification, and, if necessary, to offer evidence to sustain his claim of constitutional privilege. Sherman v. People, 210 Ill. 552, 71 N. E. 618; People v. Spain, 307 Ill. 283, 138 N. E. 614. It is for the court to judge whether the evidence sought to be adduced will furnish evidence against the witness, and if from all the circumstances there appears reasonable ground to apprehend danger to the witness that the evidence sought may furnish a link in a chain of evidence by which he may be convicted of a crime he is not bound to answer. Minters v. People, 139 Ill. 363, 29 N. E. 45; Manning v. Mercantile Securities Co., 242 Ill. 584, 90 N. E. 238, 30 L. R. A. (N. S.) 725. It is apparent from the facts stated in the plaintiff in error's answer that he was justified in the belief that the production of the paper would furnish a link in the chain of evidence by which he might be convicted of perjury on the criminal trial, and he was entitled to the benefit of his constitutional right to refuse to furnish that link.

The judgment of the superior court of Cook county will be reversed.

Judgment reversed.

(311 Ill. 216)

PERU PLOW & WHEEL CO. v. INDUSTRIAL COMMISSION et al. (No. 15754.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Master and servant ⟸371—"Accident" and "accidental injury" within Compensation Act defined.

The words "accident" and "accidental injury," as used in the Compensation Act, include every injury suffered in the course of employment for which there was an existing right of action at the time the act was passed, and extend the liability of employer to make compensation for injuries for which he was not previously liable, and fix the limit of such compensation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.]

2. Master and servant ⟸373—"Occupational disease" not compensable as "accident."

"Occupational diseases" are not covered by the Compensation Act, although not all diseases are to be excluded therefrom; an occupational disease being a diseased condition arising gradually from the character of the employee's work, but it is not an "accident."

3. Master and servant ⟸373—"Accident" within Compensation Act and "occupational diseases" distinguished.

An "accident," as contemplated by the Compensation Act, is distinguished from an occupational disease, in that it arises by some definite event, the date of which can be fixed with certainty, but which cannot be so fixed in the case of occupational diseases.

4. Master and servant ⟸371—Disability from accident must be traceable to definite time and place of origin.

In order that disability be by reason of accidental injury or the result of an accident within the Compensation Act, it must be traceable to a definite time and place of origin.

5. Master and servant ⟸373—Inflammation of lungs from breathing iron dust held an "occupational disease" not compensable; "accidental injury."

Where disability of an employee arose from continued breathing of iron dust in his particular occupation, and there was no one circumstance, incident, or time to which could be pointed the starting place of such disability, it cannot be held to arise out of an "accidental injury" within the Compensation Act, but was a disease of occupation and not compensable.

Error to Circuit Court, La Salle County; Edgar Eldredge, Judge.

Proceeding under the Workmen's Compensation Act by Arthur Rouso, claimant, opposed by the Peru Plow & Wheel Company, employer. An award of the Industrial Commission was affirmed by judgment of the circuit court, and the employer brings error. Reversed, and award set aside.

R. P. Garrett, of Chicago, for plaintiff in error.

Lee O'Neil Browne, of Ottawa, for defendant in error.

STONE, J. Defendant in error, Arthur Rouso, filed a claim with the Industrial Commission for compensation for injuries arising out of an accident alleged to have occurred in his employment with plaintiff in error. There is no controversy as to the relations of the parties; the questions in dispute being whether or not there was an accident, whether notice was given as required by law, and the nature and extent of the disability. No testimony was offered on behalf of plaintiff in error, either before the arbitrator or before the Commission on review; it being contended by it that the disability of Rouso was not an accident but a disease.

The record of evidence offered by the applicant shows that he is 34 years of age; that prior to the 17th day of February, 1921, when he first went to the hospital, he had worked for plaintiff in error for 5 years as a machinist, operating a lathe used in boring out or enlarging the inside of metal wheel hubs. Prior to that time he had been employed as a machinist in other shops and in the cement mills at Oglesby. The operation of the machine upon which he worked for plaintiff in error caused a fine metal dust to arise from the iron upon which he was working. This dust was sufficiently light to float in the air and was discernible in the sunlight. From this dust the clothes of workmen would turn yellow with rust. There being no appliances for the purpose of carrying this dust away, it was inhaled by the workmen. Rouso, at the time he quit working for plaintiff in error, on the 17th of February, 1921, was in what he characterized a "run down" condition, unable to sleep or eat, coughing continually, occasionally raising blood, and frequently a mucous sputum which the medical witnesses termed mucopurulent; i. e., made up of mucous and pus. Rouso remained in the hospital for about 9 days. Thereafter he returned to the plant of the plaintiff in error and told the foreman under whom he worked and the cashier of the company that he did not know when he could come back to work, as the doctor had told him to stay away from work and go West. His testimony shows however, that he did return and try from time to time to work for a period of about 6 weeks thereafter but was unable to work more than a few days at a time. After about 40 days of work put in in this manner he quit permanently and went to a sanitarium near Ottawa, operated for the treatment of tuberculosis, at that time telling the foreman why he was quitting. His last work for plaintiff in error was on June 27, 1921. He testified that he was unable to work; that he was too weak and short of breath; that in the mornings at times he would be so weak that he was unable to move. From that time until the 1st day of July, 1922, he made no attempt to engage in employment, and the evidence shows he was unable to do so. During July, 1922, he was given a position as ticket taker for the Tri-Cities Charities, who were operating the scenic park known as Deer Park, near Ottawa. He was employed there for a period of 2 months, taking admission fees of visiting tourists at the entrance to the park and issuing tickets to them. For this work he was paid the sum of $3.25 per day. His work employed him 7 days a week. He testified on hearing before the Commission that he felt better than he had at the time of the hearing before the arbitrator, and was receiving no medical attention, but that he could not do any physical labor.

Dr. Roswell Pettit, who conducts the tuberculosis sanitarium near Ottawa, made a thorough examination of Rouso, using X-ray, sputum, and blood tests, and other tests known to the medical profession. He testified that Rouso was unable to work, and that he believed his condition was permanent. He also testified the condition found in his lungs could be produced by a hard, cutting dust, which would irritate the mucous membrane, but that soft dust, such as coal, chalk, or cement, would have little or no damaging effect. Dr. A. J. Roberts, director of the La Salle County Sanitarium at Ottawa, had Rouso under his observation for four months. He testified as to his condition and that he was unable to do any manual labor; that at the time of the hearing before the Commission he had seen no difference in his condition. Both physicians testified that they found no evidence of tuberculosis, but that Rouso had an inflammation of the lungs, probably due to breathing this dust. The record also shows that prior to 6 months before he quit work in February, 1921, he was never known to lose time by reason of sickness; that he was what some of the witnesses characterized as a "husky" man; that during the 6 months prior to February 17, 1921, he had a hacking cough and lost flesh. The record does not disclose that anything unusual occurred in the work of Rouso at any time prior to February 17, 1921. The evidence also tends to show that it is not usual for men engaged in the occupation that Rouso was following to be affected by iron dust in the manner in which Rouso was affected, although it is shown by the medical testimony that the irritation set up in the lungs of Rouso by the iron dust was but a natural result of breathing hard, cutting dust.

[1] The first question to be determined is whether or not this is an industrial accident

the examinations without regard to the question whether they are or are not fitted by experience, training, and study to be admitted to the bar, and largely on the applicant's ability temporarily to memorize, verbatim, questions and answers given him by the respondent. This results in a lowering of the standard of admission to the bar.

"11. The object of the examinations conducted by the state board of law examiners is not to create an obstacle to admission to the bar, in surmounting which an intensive study or memorization of the character hereinbefore described should be the best preparation, but they are for the purpose of ascertaining whether applicants who have the required schooling and training have in the course of their legal education achieved that degree of efficiency which enables the board and the court to say by their due admission and enrollment that as attorneys they are to be trusted with the lives, liberty, honor, and property of the citizens of Illinois.

"12. The respondent professes to be sincerely convinced of the propriety of his conduct in holding the quiz courses described. All the commissioner can say is that the respondent is an exceptionally intelligent man and ought to know better.

"13. In the opinion of the commissioner the conduct of the respondent in holding the quiz courses described above is unethical and unprofessional.

"14. While in the opinion of the commissioner the evidence does not warrant a recommendation by the commissioner that respondent be disbarred, the commissioner recommends that respondent be required by this honorable court to desist forthwith from giving quiz courses to applicants for admission to the bar."

It will be seen the commissioner completely exonerates respondent from all the specific charges made in the information. The commissioner's conclusion is that respondent's conduct in holding quiz courses is unethical and unprofessional, but he reports that would not warrant his disbarment. The commissioner's recommendation is that this court require respondent to forthwith desist from giving quiz courses to applicants for admission to the bar. Although some specific charges of dishonest or fraudulent conduct were made in the information, there was no proof to sustain them. There was nothing unfair or fraudulent in respondent's conduct of his quiz course or in his relations with his students. He accepted none except those who were qualified by preliminary education and previous study of law to be permitted by the board of law examiners to take the examination. The only assistance he gave any of them in meeting the requirements of the rule entitling them to be admitted to take the examination was to those who had failed to satisfactorily pass the examination. Under rule 39, a rejected applicant cannot be again admitted to take the examination until one examination (two, if a third or fourth rejection) has intervened after such rejection, and study of law during the period subsequent to the prior examination. Respondent furnished the proof for such students that they had studied law for the time they were members of his class under his personal tuition. There is no intimation that respondent made any false affidavits. The only question raised on that branch of the case by the commissioner's report is his conclusion that a student taking respondent's quiz course was not studying law within the contemplation of the rule of this court, and such was an evasion of the rule. This would be true if the applicant pursued his studies for the ten weeks, only. For the time it covers, however, it conforms to the rule. The commissioner finds the respondent is a man of marked ability; that he has given careful attention to the study of the statutes, the decisions of this court, and to the leading text-books on the subjects the applicant is required by rule 39 to pass a satisfactory examination upon, and has prepared a list of over 5,000 questions and answers relating to the subjects required by the rule. Respondent has from 100 to 115 students at a time, and divides them into classes. It appears to us that his students are studying the law on the very subjects required by the rule of this court, and, according to the commissioner's report, under a competent instructor. His methods of instruction may and do differ from those of a standard law school, but the student was required to study law and be quizzed on the different subjects studied, by and under the personal tuition and direction of respondent.

While the testimony taken by the commissioner has not been filed in this court, his report shows four members of the board of law examiners testified as witnesses, and it is apparent from the commissioner's report the members of the board, or at least some of them, were personally acquainted with respondent and had knowledge that he was conducting a quiz course. As there is no proof or claim made that the board ever objected to or questioned the proofs made for applicants who were his students, the board, it would seem, did not consider what respondent was doing was an evasion of the rule. If the board thought it was an evasion it should not have accepted such proofs, but, having accepted them as a compliance with the rule, it cannot be said respondent should be disbarred for that reason, and the commissioner does not recommend that he be disbarred on that account. The requirement of the rule is that the student diligently pursue the study of law for the full period between examinations, and it is the duty of the board to demand proof of such study before admitting the applicant to a second or subsequent examination. But there is no proof that respondent has aided in the evasion of the rule.

fessional, and that this court should not disbar him but should require him forthwith to desist from conducting them. Just how this court can compel respondent to desist is not pointed out by the commissioner or by counsel. We have the power to disbar a lawyer permanently or for a definite period, but there is nothing in the nature of the business of conducting a quiz course in law, or any other legitimate subject, that would authorize this court to enter an order that an attorney conducting such course should forthwith stop it. Perhaps what the commissioner had in mind was that the court could make an order that respondent be suspended for a short time for the purpose of giving him an opportunity to retire from the business of conducting quiz courses, and, if he failed to do so, at the expiration of the time for which he was suspended he then be disbarred. Without stopping to consider the power of the court to do that, so far as we know it has never made such an order, and counsel for neither side suggest that any such order be made.

[1] Counsel for relator argue that the commissioner's report justifies the disbarment of respondent, and his counsel argue that it shows no justifiable grounds for disbarment. The ground upon which respondent's disbarment is asked is that his conduct in holding quiz courses is unethical and unprofessional. Exactly what acts or conduct measure up to the standard of being ethical is not always easy to define. Lexicographers define the term as meaning the philosophy of morals or pertaining to morals. Some conduct may be of a character to show such moral obtuseness that all would say it was immoral or unethical, but the division line that distinguishes the ethical and unethical is often so indistinct as to cause a contrariety of opinion as to whether acts were or were not ethical. It seems, however, as used by the commissioner, "unethical" is substantially synonymous with unprofessional, for there was nothing immoral in conducting the quiz courses by respondent. What, then, characterizes it as unprofessional? It should be borne in mind that the quiz courses were independent of and had no connection with respondent's relations with his clients. His classes were not clients who sought his services in the transaction of business, and he did not solicit clients to become members of his classes. He did not pretend to aid members of his classes in their preliminary qualification to enable them to take the examination. They were composed of men who had already qualified by preliminary education and by study of the law to be admitted by the board to take the examination for admission to the bar. For ten weeks he conducted a quiz course of instruction or review of the subjects which required them to be examined, to better prepare them for the examination. Respondent should not and must not advertise or represent that he can or will furnish his students with a question or questions which will be used by the board of law examiners in the examination of students for admission to the bar. Such advertising is wholly improper. The commissioner reports the work respondent was doing was of the same nature as that carried on by several other persons in Chicago, some of whom are attorneys at law. What we have said on the subject of what conduct is unethical is equally applicable to what is or what is not unprofessional. Where the conduct of an attorney is such that all right-minded people would conclude that it is not honorable, it must necessarily be unprofessional.

The grounds upon which counsel for relator base their argument that respondent's conduct was dishonorable or unprofessional is the claim that he did not aid in guarding against the admission to the profession of candidates "unfit or unqualified because deficient in either moral character or education" (canon 29, Canons of Ethics adopted by the American and Illinois State Bar Associations), and that respondent's conduct of quiz courses involved disloyalty to the law (canon 32). What respondent did had no connection with the moral fitness of the applicant. That is required to be determined by a committee on character and fitness appointed by this court, and respondent had no connection with that committee and never did anything to influence its actions. The charge that respondent violated canon 29 in not aiding to protect the bar against the admission of applicants deficient in education we do not think is sustained by the commissioner's report. As we have said, the respondent did not aid his students in meeting the requirements of rule 39 either as to preliminary education of law study, with the exception above noticed, as to students who had failed to pass the examination. His classes were composed only of students who had previously completed the requirement of the rule to be admitted to take the examination.

No doubt respondent represented to his students that such a course as he conducted would be of great aid in enabling them to successfully pass the examination, and there is no doubt that was the object of the students in taking the ten weeks' course under his tuition. Does that render respondent's conduct unprofessional to such an extent as to justify revoking his license to practice law? It does not appear before this time to have been so regarded by the bar or the courts. The commissioner reports that other attorneys at law in Chicago are doing the same kind of work, and, after a somewhat ex-

tensive investigation, we have been unable to find a decision of any court upon the question. No one would contend that a lawyer should be disbarred who, instead of opening an office and practicing his profession, devoted all his time to teaching law. Many very able and well-known lawyers have done that very thing, and many well-known lawyers devote a part of their time to teaching in law schools. There is this difference in that kind of teaching and respondent's teaching: That in law schools covering the period a student is required to study law the object is to make the student acquainted with the fundamental principles of law to prepare him to practice his profession, while respondent's course was given to supplementing the work already done by giving the student a ten weeks' review or quiz on the subjects he had studied in the law school, in order to refresh his memory and better prepare him to pass the examination for admission to the bar. A lawyer who has succeeded in establishing himself in a paying practice of the law might consider it would be beneath his dignity or that it would be unprofessional in him to conduct such courses as respondent conducted, but the views of such a lawyer cannot be the sole criterion for determining what is unprofessional conduct. It would not seem strange if in some respects the successful lawyer's ideas of professional conduct should differ from the ideas of those less fortunate. Of course, the ideals of the lawyer struggling to make enough to support his family can no more be accepted as the standard than those of his more fortunate brother. Common sense and a spirit of fairness must, in the absence of adjudication, be relied upon for guidance in determining the question.

[2] Unprofessional conduct which would justify disbarment must have an element of immorality or dishonesty, or be of such character as to be in violation of private interests or the public good. It is not claimed respondent's conduct has been in any sense dishonest or immoral or injurious to the public, except, as stated, that he has failed to live up to the standard of canon 29. We are unable to say that charge has been sustained by the commissioner's report, as we cannot say the profession or the public has been or will be injuriously affected by respondent's conduct.

[3-5] No attorney at law should be permitted to engage or continue in a course of conduct which brings the profession into disrepute. It is a vital necessity to the well-being of society and the administration of justice that attorneys, who are officials of the court and a part of our judicial system should exhibit the most scrupulous care in conducting themselves and their business in such manner as will secure and maintain the respect and confidence of the public in the attorney and the profession generally. The trust and confidence which must necessarily be reposed in an attorney by clients who confide to him most intimate secrets and their most sacred rights require in the attorney a high standard and appreciation of his duty to his clients, his profession, the courts, and the public. We feel very little charity for an attorney who is so morally obtuse as not to recognize the sacredness of his duties and the necessity for irreproachable conduct in his profession. His failure to live up to the requirements for a proper discharge of the duties of his office is only a little less injurious to the public than the failure of the judge on the bench in the proper conduct and discharge of his official duties. The right to practice law is not an absolute right. It is a privilege, which may be revoked when the attorney's misconduct makes him an unfit person to be allowed to hold a license to practice. An attorney can properly be disbarred only upon good cause shown, in a judicial proceeding. There is here no controversy about the fact as to what respondent's conduct was. This court has frequently considered the sufficiency of the proof required to authorize disbarment. In People v. Matthews, 217 Ill. 94, 75 N. E. 444, the court held disbarment was only justified upon clear and satisfactory proof. In People v. Harvey, 41 Ill. 277, the court said the proof must be clear and free from doubt, not only as to the act charged but also as to the motive. In People v. Barker, 56 Ill. 299, the court said slight evidence would not warrant disbarment. An attorney is entitled to practice his profession, and should not be denied the right to do so "except upon clear proof of willful and corrupt professional misconduct." Many more of our decisions are to be found citing and approving the cases above referred to. Practically all the disbarment cases we have examined charged conduct of the attorney which was fraudulent or dishonest. A few charged soliciting business as an attorney in a manner which was unprofessional and tended to bring the bar into contempt. We have already referred to the fact that there was no connection between respondent's quiz classes and his practice of the profession, further than the fact of being a lawyer enabled him to secure students for his courses. We are unable to see the ethical difference between what respondent did and substantially the same thing which it is generally understood is being practiced by some colleges and universities. This court said in People v. Palmer, 61 Ill. 255, that it was not its province to pass on the style of manners becoming to an honorable member of the profession. We are not to be understood as commending respondent's actions in conducting his quiz courses. After careful consideration and deliberation we only hold that in doing so he was not guilty of unprofessional conduct of so serious a character as to justify the destruction of his professional life by disbarment.

The rule is discharged.

Rule discharged.

(dissenting). The rules of the court prescribe the qualifications of general and legal education and of character and general fitness requisite for admission to the bar, and provide the method by which these shall be ascertained. The examination which must be sustained in the various subjects presented is intended to ascertain the fitness of the applicant, by reason of his mental training acquired by study and his legal knowledge, to undertake the practice of law. The respondent is not engaged in the preparation of students for the bar but for the bar examination, and this not by a study of the legal principles involved in the subjects on which the examination must be conducted, but by the memorizing of answers furnished by the respondent to questions which he has also furnished, with the statement that he is furnishing a large proportion of the questions to be asked at the examination, together with the answers. He advertises, systematically and extensively, his great success in thus enabling applicants to pass the bar examination, and a considerable proportion of the applicants at each examination are those who under his tutoring have prepared to pass an examination by the study of questions and answers, of which a large proportion—possibly a half—of the particular questions have been furnished to the applicants in advance. This is a clear evasion of the rule, which contemplates an examination which will not be merely a test of memory but will test the mental training, reasoning powers, knowledge of legal principles, mental capacity and general educational fitness of the applicant. The work of the respondent interferes with such an examination and makes the result depend largely upon the superficial acquaintance with a subject, which a good memory will enable the applicant thus examined temporarily to retain and display, and not upon any real knowledge. It not only lowers the educational standard for admission to the bar but also the moral standard. The entrance of a lawyer upon his profession ought not to be attended with an evasion of the rule providing for his admission.

The conduct of the respondent should be condemned instead of condoned, and he should be required to desist from it, and from giving courses of the character of those which he does give in preparation for the bar examinations.

(311 Ill. 118)

PEOPLE v. KRATZ. (No. 15526.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. False pretenses ⟸49(2) — Evidence held not to show fraudulent intent not to repay loans.

In a prosecution for swindling, by obtaining loans without intent to repay them, evidence that defendant, a married woman, loaned money to defendant, her husband's lodge acquaintance, for use in his business not relying on defendant's representations, but making a personal investigation, and that defendant gave her husband a position and issued stock and notes to her, though also showing that defendant represented his mortgaged stock and fixtures as assets without telling of the mortgages, *held* not to show beyond reasonable doubt a fraudulent intent not to repay the loans.

2. False pretenses ⟸5—Intent to swindle essential to confidence game.

Assuming that defendant induced prosecutrix to lend him money by making false representations concerning his business assets and liabilities, still if he did not intend to swindle her he is not guilty of the confidence game.

3. False pretenses ⟸4—Immaterial that confidence game assumed form of lawful business transaction.

In a prosecution for swindling, if the transaction complained of is in fact a swindling operation it is immaterial that the form assumed is that of a lawful business transaction, but there must be a swindling operation.

4. Criminal law ⟸1159(2)—On review of conviction, duty of Supreme Court to determine whether reasonable doubt exists.

It is the duty of the Supreme Court, in reviewing a conviction, to determine whether there is a reasonable doubt of defendant's guilt, and if so the verdict and judgment cannot stand.

Error to Criminal Court, Cook County; John A. Swanson, Judge.

Adolph E. Kratz was convicted of obtaining money by means of the confidence game, and he brings error. Reversed.

Edward B. Zahn, of Chicago, for plaintiff in error.

Edward J. Brundage, Atty. Gen., Robert E. Crowe, State's Atty., of Chicago, and Floyd E. Britton, of Springfield (Henry T. Chace, Jr., Edward E. Wilson, and Clyde C. Fisher, all of Chicago, of counsel), for the People.

DUNCAN, J. A judgment of conviction was entered in the criminal court of Cook county against Adolph E. Kratz, for obtaining money from Marie P. Witte by means and by use of the confidence game, and he has sued out this writ of error to review the judgment.

During the year 1921 plaintiff in error (hereinafter called defendant) conducted a store at 2574 Lincoln avenue, in Chicago, for the sale of phonographs, phonograph records, books, stationery, toys, magazines, postage stamps, and philatelic supplies. He also conducted a printing shop at 2566 Lincoln avenue, in the same city, where he published a magazine devoted to philately and filled the

orders he received for job printing. Early in the year 1921 he organized a corporation known as Adolph E. Kratz & Co. and conducted the business of the store and printing shop in its name. The complaining witness, Marie P. Witte, met the defendant in May, 1921, through her husband, who had become acquainted with him at their lodge. In May, 1921, defendant told the husband of the complaining witness that he needed money for his business and requested a loan of $500. The husband said he would have to ask his wife about it and went home and informed his wife of the request. She loaned the defendant $500. Another loan of $500 was made to defendant by her on May 28. She testified to the effect that when her husband first told her of defendant's request for a loan he told her of the nature of defendant's business and about the stock of goods in the store, and that she said to her husband, "I want to go there and see it myself before I ever invest money." She also testified in these words:

"I wanted to look it over before I invested my money, and I went over with my husband and I did look it over. I saw the German stock there. * * * A couple of toys I saw, and then I invested money."

Her husband testified that her first visit to the store was at the time she made the second loan of $500. Both complaining witness and her husband state, however, that defendant showed them the stock of merchandise and fixtures in the store, including a linotype in the printing shop; that defendant stated he had just gotten the linotype machine and paid over $5,000 for it, and that he had about $15,000 of his own money in the business, all of which had been paid for. Complaining witness further testified that defendant told her there were no mortgages on the property, and that she could have her money back in 30 days if she needed it. About the last of May, aforesaid, defendant gave her husband a position in the store, to work there until the last of August. In June following, the prosecuting witness loaned defendant another $500, $500 more in August, and at another time $100—in all $2,100. She received certificates of stock in Adolph Kratz & Co.—one in her own name and one in the name of her husband—for 1,600 shares of stock of the par value of $1,600 dated June 6, 1921, and two judgment notes of the company dated September 20, 1921, one for $500 and the other for $400. The latter note was to cover $100 interest on the money advanced and $300 due the husband as salary. Both the complaining witness and her husband further testified that at the time the money was loaned in August, defendant said he had around $600 coming from the Lincoln Park Chapter for printing. Before the $500 was loaned in August, one Straube, then manager of defendant's printing shop, and defendant, talked to the husband and explained the necessity of raising more money at once for the business, and it was agreed that Straube and defendant visit the complaining witness and solicit another loan. They did so. The complaining witness testifies that Straube said at the time of that visit that he would repay the money, in case the defendant did not do so, in two weeks.

The linotype machine in the printing shop was covered by a chattel mortgage, dated April 27, 1921, for $3,410. The printing press there, which was worth $1,950, was owned by Louis M. Schwartz, who was in charge of the shop until August, 1921. Schwartz was paying for the press by monthly installments, and had paid about $600 or $700 at the time he left the business in August. The contract between him and defendant was that Schwartz was to pay for the press, and that when he paid for it he would receive stock of the company for the amount he had paid. Schwartz took a judgment note of the company for $800 for his interest in the company when he left the business. A balance sheet prepared by one of the employees of the company and introduced in evidence by the prosecution shows that the company on June 1, 1921, had assets totaling $30,318.16 and had an indebtedness of $13,702.34.

Over the objections of defendant a number of witnesses were allowed to testify that they had loaned or invested money in defendant's business under circumstances similar to the transactions between the prosecuting witness and defendant. Defendant in his testimony positively denied that he told or represented to the complaining witness or her husband that all the property in the store and print shop was paid for, and that he had told her there were no mortgages on the property.

[1-4] The evidence in the record tends to show that the prosecuting witness did not rely upon the statements made to her by defendant to secure the loans, or any one of them, as to the character and the amount of property possessed or as to its value. Her own testimony shows that she was not willing to loan her money to him on the faith of his representations to her and her husband's statements to her concerning the business, but that she insisted on making a personal investigation before she loaned any money to him. She also had the promise of the manager of the printing shop that he would repay her the $500 advanced in August, in case the defendant did not repay it, within two weeks. She had experience in business, and the record tends to show that she advanced her money, not because she had confidence in defendant and his representations to her, but because her own investigation tended to assure her that the business was sound. There is a total lack of proof in the record of any intent on the part of defendant to defraud or swindle the prosecuting witness, even if we

assume there is sufficient proof to show that he obtained her confidence. Assuming that defendant induced the prosecuting witness to lend her money by making false representations concerning the assets and liabilities of the business, still, if he did not intend to swindle her, he is not guilty of the confidence game. It is true that if the transaction is, in fact, a swindling operation, it is immaterial that the form assumed is that of a lawful business transaction (People v. Keyes, 269 Ill. 173, 109 N. E. 684), but there must be an actual swindling operation. There is no evidence in this case, as there was in the Keyes Case, that the defendant did not intend to keep the promises made to his alleged victim, and that he falsely pretended that he would do so for the purpose of procuring the money or loans. We held in the Keyes Case that if the defendant entered into the contract in good faith, with the full intention of performing it, he would be guilty, simply, of the breach of an ordinary contract and not of the confidence game. In this case it must be held that there was a reasonable doubt, at least, on the proposition whether or not defendant intended to swindle the prosecuting witness when he procured the loan, because of the lack of evidence to prove that such was his intent. It is the duty of this court to determine the question whether or not there is a reasonable doubt of defendant's guilt, and, if so, the verdict and judgment of the trial court cannot stand. People v. Koelling, 284 Ill. 118, 119 N. E. 993.

The history of this entire transaction tends strongly to show that defendant and the prosecuting witness were dealing at arm's length and on equal footing. The evidence does not show that because of any fraudulent means, instrument, or device the prosecuting witness was induced to repose confidence in defendant, or that he intended to swindle her at the times he procured the loans.

The judgment of the criminal court is reversed.

Judgment reversed.

(311 Ill. 192)

VILLAGE OF BENLD v. DORSEY et al. (No. 15842.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Dedication ⇐19(2) — Ground marked as park on village plat held not dedicated to public by virtue thereof.

Where a certificate on a village plat stated that none of the lands described were for public use except the streets and alleys shown thereon, ground marked as a park thereon did not become a public park by virtue of the plat, though such designation would otherwise constitute a statutory dedication to the public for recreation, amusement, and kindred uses.

2. Dedication ⇐31, 44—Intention or estoppel to deny intention to dedicate must be clearly shown, and acceptance by public necessary.

A dedication of ground for public uses can be made only by the owner, whose intention to make a dedication or such acts or declarations as will equitably estop him from denying such intention must be very satisfactorily proved, and the intended dedication must be accepted by the public.

3. Dedication ⇐16(1)—No particular form or ceremony necessary.

To constitute a dedication of ground for public uses, the owner must do or suffer the doing of some act from which it can be fairly inferred that he intended a dedication, but no particular form or ceremony is necessary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dedication.]

4. Dedication ⇐20(1)—Intention may be manifested by express consent or acquiescence of owner and use for public purpose intended.

Intention to dedicate ground for public uses may be manifested by express consent or acquiescence by the owner and the fact of its use for the public purpose intended by him.

5. Dedication ⇐19(5) — Owner selling lots with reference to plat indicating devotion of part to public use dedicates such land for specified public purpose.

A landowner selling lots with reference to a village plat or map indicating devotion of part to a public use dedicates such land to the use of the public for the specified purpose.

6. Dedication ⇐44 — Nonlisting for taxation evidence of intent to dedicate.

That a block in a village plat was not listed for taxation is an evidentiary fact to be considered as tending to show that the owner intended and regarded it as public property, though not necessarily conclusive.

7. Dedication ⇐39—Secret intention contrary to that manifested by acts and declarations will not defeat dedication.

That an owner's agent in charge of land platted as a village did not intend to dedicate a certain block as a public park did not defeat such dedication, where such secret, undisclosed intent was clearly contrary to that manifested by his acts and declarations, on which the public had a right to rely.

8. Dedication ⇐39—Owner held estopped to deny intention to dedicate.

The owner of a village block accepted by the public for use as a park as indicated by acts and declarations of his agent in charge thereof *held* equitably estopped to deny the intention manifested by such acts and declarations to dedicate it to such use.

Appeal from Circuit Court, Macoupin County; Frank W. Burton, Judge.

Suit by the Village of Benld against George B. Dorsey, trustee, and others. Decree for complainant, and defendants appeal. Affirmed.

Alfred A. Isaacs, of Gillespie, and Jesse Peebles, of Carlinville, for appellants.

Murphy & Hemphill, of Carlinville, for appellee.

CARTWRIGHT, J. The appellee, the village of Benld, filed its bill in the circuit court of Macoupin county alleging that a tract of land described as block 30 in the original plat of the village had been dedicated to the village as a public park, and that George B. Dorsey, trustee, holding the legal title, had contracted to sell the block to Dean K. Rice and other persons, and praying for an injunction restraining said parties from selling or otherwise disposing of the tract. The bill was answered and a cross-bill was filed praying that the claim of the village should be removed as a cloud upon the title. The cross-bill was answered, setting forth the same facts alleged in the original bill, and the issues were referred to a special master in chancery, who took the evidence, found the issues for the complainants in the cross-bill, and reported his conclusions to the chancellor, who sustained exceptions to the report and entered a decree as prayed for in the original bill. From that decree this appeal was prosecuted.

[1] On November 11, 1903, George B. Dorsey, trustee, subdivided a part of a farm upon which coal mines were being opened, into lots and blocks, to be known as Benld, which was derived from the name of Ben L. Dorsey. He caused a plat to be made and filed for record, and the premises became the original plat of the village of Benld. All the blocks were divided into lots except a tract between Locust street and Willow street. The east end of this tract was marked 29, with the figures 300 indicating the length from east to west. West of this piece there was a strip marked 100 in width, with dotted lines between it and the two streets and a dotted line along block 29. West of that strip was a block marked 30, inclosed in regular lines covering the west part of the tract, and on that block was the word "Park." That block was about 300 feet square, except 17 feet off the northwest corner. The block was near the center of the village, and the name "Park" on a piece of ground in the village would indicate its intended use as a place for recreation, amusement and kindred uses as a public park and would constitute a statutory dedication to the public for such uses. In this case, however, while the piece of ground marked as a park was not mentioned, it was stated in the certificate on the plat that no part of the lands described was for the public use except the streets and alleys shown on the plat. This statement in the certificate negatived any intention to dedicate block 30 to the public, and it did not become a public park under the statute by virtue of the plat.

It was also alleged that there was a common law or implied dedication by the subsequent acts and statements of F. W. Edwards, who had full authority to control the uses of the property, and that question is to be determined by the evidence of such acts and statements. The farm homestead was on block 29, and it is apparent that that block was not subdivided because of that fact, and it was then and continued to be occupied as a home place and residence. There was no evidence as to the use to which the 100-foot strip was to be devoted, except so far as may be inferred from the dotted lines between it and the two streets and the homestead, and it is now a street. The village was soon settled as a mining town and finally grew to a population of about 4,000. George B. Dorsey, trustee, lived at Columbia, Mo., and F. W. Edwards, who lived in the old homestead, was his agent for selling lots and in general charge of the premises, and it is not denied that whatever Edwards did or said was binding on the owner. After the plat was made, Edwards took charge of the sale of the lots, and blueprints were made of the recorded plat showing block 30 marked as a park and were placed in his office to make sales. His authority was complete, and he testified that he had a number of deeds signed by the owner with the names of the grantees blank, and when a sale was made he took an acknowledgment of the deed as a notary. To purchasers of lots he stated that block 30 was a public park, and one purchaser testified that he offered Edwards $1,000 for 100 feet in block 30, but Edwards said it was a city park and he could not sell it. From the time the village began to be settled, and at least from 1904 to the beginning of the suit, the people of the village used block 30 as a public park. A band stand, dance platform, and refreshment stand were built on the block by general public subscription, in which Edwards joined. The block was used for picnics, band concerts, political meetings, celebrations, and later by the Red Cross, and the children of the village used it freely as a playground. There were toilets, which were repaired by the village, which also made repairs on the buildings when needed, the Red Cross subscribing $37 at one time for such repairs. Edwards represented to the village that it owned the park and ought to keep up the repairs, and at times he contributed to the repairs. He lived adjoining the block and gave considerable attention to it by driving off cows, and objected to liquor being sold or drank on the ground and to its use for objectionable purposes. He complained to the village trustees that after a celebration there were papers, bottles, and litter scattered over the premises and the village ought to clean it up. The village complied and paid for the cleaning. Edwards testified that he rented the park at times but received nothing, and what he called "renting" amounted to his personal

consent. The block was not listed for taxation, but was listed on the tax books as "City Park" and was not assessed, and no taxes were paid. The explanation of that fact given by Edwards was that the block was being used by the village and ought not to be assessed or taxed.

[2-5] A dedication of ground for public uses can be made only by the owner, and an intention of the owner to make a dedication must be proved. Before title can be divested by dedication the proof must be very satisfactory either of an actual intention to dedicate or such acts or declarations as will equitably estop the owner from denying such intention, and there must be an acceptance by the public of the intended dedication. The landowner must do some act or suffer some act to be done from which it can be fairly inferred that he intended a dedication to the public. Kelly v. City of Chicago, 48 Ill. 388; City of Chicago v. Stinson, 124 Ill. 510, 17 N. E. 43; City of Carlinville v. Castle, 177 Ill. 105, 52 N. E. 383, 69 Am. St. Rep. 212. There must be evidence of an intention to dedicate, but no particular form or ceremony is necessary. A dedication to a public use is not within the statute of frauds, and the mode of making the dedication is immaterial. The intention may be manifested by expressed consent or acquiescence of the owner of the land and the fact of its being used for the public purpose intended by the owner. Godfrey v. City of Alton, 12 Ill. 29, 52 Am. Dec. 476; Warren v. Town of Jacksonville, 15 Ill. 236, 58 Am. Dec. 610; Gentlemen v. Soule, 32 Ill. 271, 83 Am. Dec. 264; Davidson v. Reed, 111 Ill. 167, 53 Am. Rep. 613. If the owner of the land exhibits a plan of a town and sells lots to individuals, representing to them that it is a plan of a town, the purchasers acquire individual rights against the owner which may be enforced, and such fact is also evidence of an intention to make a dedication to the public, and, where the owner of the land sells lots with reference to a plat or map on which a portion indicates a public use, he thereby dedicates such lands to the use of the public for the specified purpose. Smith v. Town of Flora, 64 Ill. 93; Maywood Co. v. Village of Maywood, 118 Ill. 61, 6 N. E. 866; Marsh v. Village of Fairbury, 163 Ill. 401, 45 N. E. 236; Kimball v. City of Chicago, 253 Ill. 105, 97 N. E. 257.

[6, 7] The fact that block 30 was not listed for taxation was an evidentiary fact to be considered as tending to show the intention of the owner and that he regarded the block as public property, although the fact might not be conclusive. Poole v. City of Lake Forest, 238 Ill. 305, 87 N. E. 320, 23 L. R. A. (N. S.) 809. It appears from the testimony of F. W. Edwards that it was not his intention to dedicate block 30 as a public park, but only to permit or consent to its use by the public. It is probably true that he did not intend to make a dedication to the public, but merely to permit the public use and retain the full title and control for the owner; but the existence of such secret intention, existing only in his mind, would not defeat the dedication. Such secret and undisclosed intention, if it existed, is clearly contrary to the intention manifested by his acts and declarations, upon which the public had a right to rely, and the intention must be determined from his acts and declarations. Seidschlag v. Town of Antioch, 207 Ill. 280, 69 N. E. 949.

[8] The owner of block 30 was equitably estopped to deny the existence of the intention shown by the acts and declarations of Edwards, and, the property having been accepted by the public for the use indicated by such acts and declarations, the complainant was entitled to a decree enjoining interference with such use by the sale of the property and diverting it to private uses.

The decree is affirmed.

Decree affirmed.

THOMAS WALTERS CHAPTER OF THE DAUGHTERS OF THE AMERICAN REVOLUTION. (No. 15829.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Constitutional law ⇐33—Taxation ⇐196—Constitutional provisions relating to taxation exemptions not self-executing.

Const. art. 9, § 3, providing for the exemption of property which is used for charitable purposes, is not self-executing, but authorizes the General Assembly to exempt from taxation the classes of property therein specified.

2. Taxation ⇐197—Statute held not to enlarge classes of charitable organizations exempt from taxation; "beneficent"; "charitable."

Revenue Act, § 2, exempting from taxation such property as is actually used for charitable and beneficent purposes, does not designate a class of organizations or purposes not named in Const. art. 9, § 3, as the Legislature was not authorized to enlarge the meaning of the word "charitable" as used in the Constitution, and the word "beneficent" must be deemed to have been used synonymously with the word "charitable."

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Beneficent; Second Series, Charitable.]

3. Taxation ⇐204(2)—Statute granting tax exemption strictly construed.

Statutes granting tax exemptions are to be construed strictly, and the exemptions must come within not only the terms of the statute, but also the authority given by the Constitution.

4. Taxation ⇐251—Claimant of right to exemption has burden of establishing it.

It is incumbent on an organization claiming exemption from taxation under the Constitution to show that the use of its property comes within the provision of the Constitution granting exemption.

5. Taxation ⇐241(1)—Organization held one for "charitable purposes," its property therefore being exempt from taxation.

Where a chapter of the Daughters of the American Revolution was organized to maintain a chapter house, with a community rest room, and to preserve the memory of those who had promoted the interests of the community and had been prominent in the history of the country, and to impress on the people the value of their inheritance of freedom and reverence of those who achieved it, *held*, that it was organized for charitable purposes, and that its property, exclusively used for such purposes, was therefore exempt from taxation.

Appeal from Fulton County Court; J. D. Breckenridge, Judge.

Proceeding by the People, on the relation of Harry W. Greer, County Collector, against the Thomas Walters Chapter of the Daughters of the American Revolution. Judgment for defendant, and plaintiff appeals. Affirmed.

Floyd F. Putman, State's Atty., of Canton, for appellant.

Harvey H. Atherton and Glenn Ratcliff, both of Lewistown, for appellee.

CARTWRIGHT, J. The county treasurer of the county of Fulton applied to the county court at the June term, 1923, for judgment against the property of the appellee, Thomas Walters Chapter of the Daughters of the American Revolution, in the city of Lewistown, for delinquent taxes for the year 1922. The appellee filed an objection that it was a corporation organized exclusively for beneficent and charitable purposes; that the property owned by it was used for such purposes and no other, and was not leased or used with a view to profit; and that by statute it was exempted from taxation. Upon a hearing the objection was sustained, and judgment denied, and an appeal was allowed and perfected.

[1-4] Article 9, § 1, of the Constitution requires the General Assembly to provide such revenue as may be needful by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property; but section 3 of the article provides that the property of the state, counties, and other municipal corporations, both real and personal, and such property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempt from taxation by general law. That provision of the Constitution is not self-executing, but authorizes the General Assembly, by legislative enactment, to exempt from taxation the classes of property therein specified. People v. Anderson, 117 Ill. 50, 7 N. E. 625; In re Walker, 200 Ill. 566, 66 N. E. 144; People v. Salvation Army, 305 Ill. 545, 137 N. E. 430. Under the power conferred by the Constitution, the General Assembly, by the seventh paragraph of section 2 of the Revenue Act, has provided that all property of institutions of public charity, all property of beneficent and charitable organizations, whether incorporated in this or any other state of the United States, and all property of old people's homes, when such property is actually and exclusively used for such charitable and beneficent purposes, and not leased or otherwise used with a view to profit, shall be exempt from taxation. Smith-Hurd Rev. St. 1923, p. 1717. The General Assembly has added to the provision of the Constitution the word "beneficent," both as to the class of organizations and the purposes for which property is used. The General Assembly was not authorized to add to or enlarge the meaning of

icent" cannot be regarded as designating a class of organizations or purposes not named in the Constitution. Statutes granting tax exemptions are to be construed strictly, and must come within not only the terms of the statute, but also the authority given by the Constitution, and the legislative intention must have been to use the word as synonymous with the word "charitable." It was incumbent upon the appellee to show that its organization and the use of its property came within the provision of the Constitution as charitable.

[5] The appellee offered in evidence its charter, defining its nature and purpose as follows:

"The object for which it is formed is to maintain a chapter house at Lewistown, Illinois, and in connection therewith a community rest room; to perpetuate the memory of men and women who have actively promoted and protected the interests of the community in the past, of those who have been prominent in the history of our county, state, and country, and especially of those who achieved American independence, by the acquisition and protection of historical spots and the erection of memorials, and by the promotion of celebrations of patriotic anniversaries; to cherish, maintain, and extend the institutions of American freedom and to foster true patriotism and love of country."

The residence property, upon which there was a brick residence building erected in 1842, had some historical value. It was near the center of the city, and near the courthouse, and convenient for maintaining a rest room and community gatherings. A rest room was established, provided with a public toilet, chairs, and tables, where people might rest and eat their lunches. The building was in charge of a hostess, and the rest room was open to the public from 6:30 a. m. until 9 p. m., except on Sunday, when it was open from 9 a. m. to 9 p. m. In the year preceding April 1, 1922, more than 20,000 people made use of the community rest room, and whenever the number was such as to require it, the entire building, with the exception of a part of the second floor, was open to the public. No part of the premises was leased or otherwise used with a view to profit, but two rooms were rented to lodgers, producing an income of $132 a year, which was devoted to the purposes of the organization. The officers received no compensation, and the members paid annual dues, which were received by the state chapter, from which it furnished aid to schools, and this chapter aided in supporting a school. There was a mortgage on the property, and on occasions some of the rooms were rented to private organizations for entertainments, and tablets were sold to perpetuate the memory of men and women who had been concerned in the building of the community, and who were voted by the chapter or her memory. Eight tablets had been so erected, at $100 each. Other funds were secured by donations and by serving meals and banquets, and all revenues from any sales were devoted to paying for the property and the purposes of the chapter. At Christmas time the building was also devoted to aiding the poor and needy, by preparing baskets containing food furnished by the American Legion and goods and toys donated, and the baskets were distributed among the needy of the community. It was the plan and intention of the chapter to fit up a memorial room as soon as funds should be sufficient, wherein would be placed such historical books, manuscripts, and war relics as could be secured.

No fixed rule has been established by which it can be determined whether an organization is charitable and whether its property comes within the test established by the statute. St. 43 Elizabeth, c. 4, enumerated 21 charities, but in the growth and development of social conditions charities have not been confined to those enumerated, and various definitions have been given by the courts. In Crerar v. Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454, the following was regarded as a comprehensive legal definition of a charity:

"A charity, in a legal sense, may be more fully defined as a gift, to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burthens of government."

In Congregational Publishing Society v. Board of Review, 290 Ill. 108, 125 N. E. 7, it was said that charity, in a legal sense, is not confined to mere almsgiving, or to the relief of poverty and distress, but has a wider signification, and embraces the improvement and happiness of man. A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man. Ould v. Washington Hospital for Foundlings, 95 U. S. 303, 24 L. Ed. 450.

The question whether the property purchased by a chapter of the Daughters of the American Revolution, known as the Spaulding House, formerly owned and occupied by soldiers who served in the war of the Revolution, was exempted from taxation under a statute exempting "literary, benevolent, charitable and scientific institutions," occupied for the purposes of the chapter, was decided by the Supreme Judicial Court of Massachusetts in the case of Molly Varnum

Chapter D. A. R. v. City of Lowell, 204 Mass. 487, 90 N. E. 893, 26 L. R. A. (N. S.) 707. The chapter was chartered for the purpose of perpetuating the memory of the men and women who achieved American independence, of acquiring and protecting historic spots, encouraging historical research and the publication of its results, preserving documents and relics and individual records of Revolutionary soldiers and patriots, and promoting the celebration of patriotic anniversaries, or cherishing, maintaining, and extending the institutions of American freedom and fostering true patriotism and love of country; also for the purpose of holding real estate so far as may be necessary for its lawful ends. The court said that, if the sole object of the chapter had been a gratuitous collection and publication of the facts connected with our Revolutionary history, the work would have been educational and of great value to the community; that the statute plainly exempted institutions which a court of equity would hold to be within the provisions of the statute of Elizabeth and in aid of general welfare; that the purposes described in the charter were neither contrary to public policy nor opposed to morality, and the ends served were wholly beneficial to the community; that the fostering of love of country and respect for our civil institutions all tend to raise the standard and improve the quality of citizenship, and not only relieve the burden of government, but advance the public good, and that the chapter was entitled to the statutory exemption.

Thomas Walters Chapter was organized to maintain a chapter house, with a community rest room; to preserve the memory of those who had actively promoted the interests of the community, those who had been prominent in the history of the county, state and country, especially of those who achieved American independence, and by the promotion of celebrations of political anniversaries, and to cherish, maintain, and extend the institutions of American freedom, and to foster true patriotism and love of country. The organization of the chapter and the uses to which its property was devoted were not only for the establishment and maintenance of a community rest room and improvement of social conditions which were applied religion, but also to impress upon the people the value of our inheritance of freedom and reverence for those who achieved it, to maintain and perpetuate our established system of government, which has fulfilled the purposes and expectations of its founders, and to discourage and prevent opposition to the government and its institutions by discontented venders of political nostrums for the cure of supposed evils, existing only in perverted theories of government, or due to thwarted personal ambitions. The objects of the organization and the uses of its property were a distinct contribution to the public welfare, and the property has been devoted exclusively to such purposes, and not leased or otherwise used for profit.

The property being exempt from taxation, the judgment is affirmed.

Judgment affirmed.

(237 N. Y. 150)

NANKIVEL et al. v. OMSK ALL-RUSSIAN GOVERNMENT et al.

(Court of Appeals of New York. Dec. 4, 1923.)

1. Evidence ⇐⇒11—Creation of and loss of control by de facto Russian Government matter of common knowledge.

It is a matter of common knowledge that, if the Omsk All-Russian Government was at any time even a de facto government in the international sense, it was created as such with Admiral Kolchak at its head at Omsk in November, 1918, and recognized by General Seminoff and his forces at Vladivostok, and thereafter driven out of all regional control by the Bolshevik government not later than March, 1920.

2. International law ⇐⇒10—Cannot be entered against government without consent.

No valid judgment could be obtained against the Omsk All-Russian Government, whether alive or dead at the time it was obtained, since so long as it maintained an independent existence it was immune from suit for its governmental acts in our courts without its consent, and, since it was extinguished by conquest, it became, so far as its continued corporate existence was concerned, as if it had never existed.

3. International law ⇐⇒10—Lack of recognition does not permit individual suitor to bring de facto government before the bar.

Lack of recognition by the United States government does not permit an individual suitor to bring a de facto government before the bar.

4. International law ⇐⇒10—Sovereign state need not come into court and plead immunity.

To sue a sovereign state is to insult it in a manner which it may treat with silent contempt, and it is not bound to come into our courts and plead its immunity, being liable to suit only when its consent is duly given.

5. Execution ⇐⇒391—Third party entitled to have order for examination set aside.

A third party is entitled upon motion to have vacated and set aside an order for its examination in proceedings supplementary to execution upon a judgment rendered by default against a nonappearing defendant, if such third party shows such judgment to be void because defendant was a de facto government which could not be called upon to plead its immunity.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Claude M. Nankivel and another against Omsk All-Russian Government. From an order of the Appellate Division of the Supreme Court in the First judicial department (203 App. Div. 740, 197 N. Y. Supp. 467) which affirmed an order of the special term denying a motion to vacate an order for the examination of defendant in supplementary proceedings, members of the firm of Kidder, Peabody & Co. appeal by permission. Orders reversed, and motion granted, and third question certified answered in the affirmative.

Appeal, by permission, by third parties from an order of the Appellate Division of the Supreme Court in the First judicial department, entered December 22, 1922, which affirmed an order of Special Term denying a motion to vacate an order for the examination of defendant in supplementary proceedings.

The following questions were certified:

"(1) Is the judgment of the New York Supreme Court herein, which was rendered against defendant Omsk All-Russian Government upon default in appearance, void by reason of the facts alleged in the verified complaint respecting the status of the defendant and the nature of the cause of action therein set forth?

"(2) Does the fact that service of the summons and verified complaint was made only upon the alleged managing agent of defendant within the state, who at the time of the service thereof was the financial attaché to the Russian embassy in the United States duly recognized as such by the government of the United States, render void the judgment herein entered upon such service?

"(3) Does the record on appeal present facts, or have the courts judicial knowledge of facts, respecting the existence of the defendant Omsk All-Russian Government, which show that, prior to the commencement of the action in which the judgment herein was entered, said defendant had so totally ceased to exist as to render void the judgment entered against it in the action thereafter commenced?

"(4) Is a third party entitled, upon motion, to have vacated and set aside an order for its examination in proceedings supplementary to execution upon a judgment of the New York Supreme Court rendered by default against a nonappearing defendant, if such third party shows such judgment to be void by facts appearing upon the face of the record of the action in which such judgment was rendered?

"(5) Is a third party entitled, upon motion, to have vacated and set aside an order for its examination in proceedings supplementary to execution upon a judgment of the New York Supreme Court, rendered by default against a nonappearing defendant, if such third party shows such judgment to be void by facts outside the record of the action in which such judgment was rendered, but not in contradiction of such record?

"(6) Is a third party entitled upon motion to have vacated and set aside an order for its examination in proceedings supplementary to execution upon a judgment of the New York Supreme Court, rendered by default against a nonappearing defendant, if such third party shows such judgment to be void by facts outside the record of the action in which such judgment was rendered and in contradiction of such record?

"(7) Is the judgment upon which the proceedings supplementary to execution herein are based void, by reason of any of the facts presented by the record on appeal or within the judicial knowledge of our courts?

"(8) If so, is the third party in these supplementary proceedings entitled upon motion to have vacated and set aside the order for its examination herein by reason of such invalidity?

"(9) Is a direction in a subpœna duces tecum in supplementary proceedings valid, which requires a third party to produce upon examination in such proceedings all documents, accounts, papers, checks, vouchers, and letters dealing with or in any way connected with accounts standing in the name of "Serge Ughet, Russian Financial Attaché, Account Transfers," or of "Serge Ughet, Russian Financial Attaché, Account Loan," said Serge Ughet at the time being the financial attaché to the Russian embassy, duly recognized as such by the government of the United States?

"(10) Is a third party in proceedings supplementary to execution entitled upon motion to have set aside and declared null and void and of no effect the service of a subpœna duces tecum, which requires such third party to produce inter alia, upon the examination, all documents, accounts, papers, checks, vouchers, and letters dealing with or in any way connected with accounts standing in the name of "Serge Ughet, Russian Financial Attaché, Account Transfers," or of "Serge Ughet, Russian Financial Attaché, Account Loan," said Serge Ughet at the time being the financial attaché to the Russian embassy, duly recognized as such by the government of the United States?"

Frederic R. Coudert and Mahlon B. Doing, both of New York City, for appellants.

George Zabriskie and William E. Sims, both of New York City, for respondents.

POUND, J. The primary question is as to the validity of a judgment for $96,392.38 entered by default in Supreme Court, New York county, on May 9, 1922, against Omsk All-Russian Government in an action brought to recover the value of certain automobiles requisitioned and seized by it within its territory during the months of December, 1918, and January, February, and March, 1919. The summons and complaint were delivered on April 12, 1922, in New York, to Serge Ughet, said to be the managing agent of defendant.

Appellants resist an order for their examination in supplementary proceedings in aid of the execution issued on the judgment and a subpœna duces tecum accompanying it, on the ground that they rest on a void judgment, first, because the defendant, sued as a de facto government, was immune from suit, and, secondly, because at the time the judgment was entered it had ceased to exist as a government.

[1] The complaint alleges:

"Defendant, at all the times herein mentioned, was and it now is a foreign corporation, being a de facto government, which has never been recognized by the government of the United States as a lawfully constituted and existing government."

It is a matter of common knowledge, and the moving papers establish the fact that, if the Omsk All-Russian Government was at any time even a de facto government in the international sense, it was created as such with Admiral Kolchak at its head at Omsk in November, 1918, and recognized by General Seminoff and his forces at Vladivostok, and thereafter driven out of all regional control by the Bolshevik government not later than March, 1920.

[2] During its ephemeral and disastrous career, it asserted its authority over a portion of the inhabitants of the former Russian Empire, who had, after the debacle, separated themselves from the central government and established an independent sovereign government over a limited territory in Siberian Russia. It was not a subordinate state nor a civil division of the Soviet Republic. It was either what plaintiffs choose to call it, a de facto government, and therefore sovereign in character, or it was a mere aggregation of robbers and murderers, outside the protection of the laws of war. When its leaders failed in their endeavors to establish themselves permanently, when the armed formes of the Soviet government defeated its armies, overran its territory, executed Kolchak, and drove Seminoff into exile, its sovereignty ceased, and the Omsk All-Russian Government utterly perished. Whether alive or dead, no valid judgment could be obtained against it.

"At the time of the rendition of the judgment it had neither legal existence, capacity to be sued, nor any property against which a judgment could be enforced." People v. Knickerbocker Life Ins. Co., 106 N. Y. 619, 623, 13 N. E. 447, 448.

[3, 4] So long as it maintained an independent existence it was immune from suit for its governmental acts in our courts without its consent. Lack of recognition by the United States government, we have recently held, does not permit an individual suitor to bring a de facto government before the bar. Wulfshon v. Russian Socialist Federated Soviet Republic, 234 N. Y. 372, 138 N. E. 24. To sue a sovereign state is to insult it in a manner which it may treat with silent contempt. It is not bound to come into our

courts and plead its immunity. It is liable to suit only when its consent is duly given. People of Porto Rico v. Rosaly, 227 U. S. 270, 33 Sup. Ct. 352, 57 L. Ed. 507. When defendant was extinguished by conquest, it became, so far as its continued corporate existence is concerned, as if it had never existed. Williams v. Bruffy, 96 U. S. 176, 185, 24 L. Ed. 716.

Respondents now urge that it does not appear necessarily on the record that defendant was sued as a sovereign state or as anything more than a foreign corporation; that the words of the complaint, "de facto government, not recognized by the United States," were mere words of description and surplusage. They liken the Omsk Government to an ordinary business corporation which has suspended its operations, but has not been dissolved as private corporations are dissolved. But lack of recognition obviously was pleaded on the theory that immunity comes only with recognition, and the analogy is fallacious. A state is not a trading corporation which may be dissolved by judicial process. States may cease to exist when they are conquered by the enemy. A de facto government exists only as it governs. The fact that General Seminoff, while in the Tombs Prison in New York, under an order of arrest in 1922, was recognized by other exiles as commander in chief of the Russian eastern border region furnishes no evidence that a person or a foot of territory was then subject to the sovereign power of the Omsk Government.

So when this action was begun on April 12, 1922, no Omsk All-Russian Government in any corporate sense was in existence. If Ughet, the Russian attaché in the United States of the Kerensky government, to whom the summons and complaint were delivered, was ever its financial agent, his agency had ended when his principal became extinct.

[5] Respondents contend that these objections may not be raised by third parties. We think the necessities of the case compel an opposite conclusion. As an existing government, defendant was not called upon to plead its immunity. The dead government could not plead its own demise in abatement of the action. It could not by default admit its own existence. The fact of such existence could not be litigated in the action. Acquiescence will not be inferred from the silence of the dead. The judgment was void. Pendleton v. Russell, 144 U. S. 640, 644, 12 Sup. Ct. 743, 36 L. Ed. 574. Appellants are affected by it, and have a right to ask that its nullity be officially declared. O'Donoghue v. Boles, 159 N. Y. 87, 53 N. E. 537.

Ten questions are certified for our consideration. One only, the third, need be answered:

"Does the record on appeal present facts, or have the courts judicial knowledge of facts, respecting the existence of the defendant Omsk All-Russian Government, which show that, prior to the commencement of the action in which the judgment herein was entered, said defendant had so totally ceased to exist as to render void the judgment entered against it in the action thereafter commenced?"

The orders should be reversed, with costs in all courts. Motion granted, with $10 costs. Third question certified answered in the affirmative. Other questions not answered.

HISCOCK, C. J., and HOGAN, CARDOZO, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Orders reversed, etc.

(237 N. Y. 159)

In re ERLANGER et al.

(Court of Appeals of New York. Dec. 4, 1923.)

1. Corporations ⟸182—Court held to have power to correct error by modifying report of appraisers of stock of minority stockholders objecting to sale of real estate.

Where minority stockholders objecting to sale of assets applied for appointment of appraisers to determine the value of their stock under Stock Corporation Law, §§ 16, 17, and appraisers were appointed and made their report, the court had power to correct substantial error by modifying the report of the appraisers and confirming the report as modified, and was not required to send the proceeding back to the appraisers for a reconsideration of the fact; the action of the court consisting in discovering a separate item of damages erroneously included in the award with insufficient evidence to sustain it, and correcting the award by striking out that item.

2. Corporations ⟸182—Interest to which minority stockholders objecting to sale of assets entitled in proceeding to determine value of stock, stated.

In proceeding under Stock Corporation Law, §§ 16, 17, to determine the value of stock of minority stockholders objecting to sale of assets, the amount allowed by appraisers was not liquidated until the direction of the court was obtained as to the "manner in which payment for such stock shall be made to such stockholders," pursuant to section 17, and interest ran only from such time; the report of appraisers being advisory in its nature and having no finality until confirmed by the court.

Appeal from Supreme Court, Appellate Division, First Department.

In the matter of the application of Abraham L. Erlanger and others, stockholders of the New York Theater Company, for the appointment of appraisers to appraise the value of their stock. From a judgment of the First Department of the Appellate Division of the Supreme Court (206 App. Div. 148, 200 N. Y. Supp. 696) modifying and affirming a final order confirming the report of the commissioners, both petitioners and the company appeal. Modified and affirmed.

Joseph P. Bickerton, Jr., Philip Wittenberg, and Sidney R. Fleisher, all of New York City, for petitioners.

Clarence J. Shearn, of New York City, for respondent New York Theater Co.

POUND, J. The minority stockholders of New York Theater Company, objecting to a sale of the real estate of such corporation, applied to the Supreme Court for the appointment of appraisers to determine the value of their stock, under sections 16 and 17 of Stock Corporation Law (Consol. Laws, c. 59). Appraisers were appointed and made their report. The company moved at Special Term for an order to modify or set aside the report. This motion was denied. On appeal to the Appellate Division the appeal was dismissed (Matter of Bickerton, 196 App. Div. 231, 187 N. Y. Supp. 267) on the ground that the report of the appraisers was final and conclusive and that the court had no power to make an order in the premises. This court dismissed the appeal (232 N. Y. 1, 133 N. E. 41) on the ground that the order was not a final order, but in a careful and comprehensive opinion by Hiscock, C. J., construed the statute generally and held that the action of the appraisers was subject to review by the court.

Petitioners thereupon moved to confirm the report. The Special Term granted the motion but denied their motion that they be awarded interest from July 30, 1920, 15 days after the date of filing the report of the appraisers.

On appeal the Appellate Division modified the order: First, by reducing an additional allowance for plottage; and, secondly, by allowing interest on the amount of the award as demanded by the petitioners. Both parties thereupon appealed to this court.

The property is the block on the east side of Broadway between Forty-Fourth and Forty-Fifth streets. The valuation placed thereon by the appraisers was nearly $3,500,000. The building on the property was valued at $350,000. The valuation of the shares of the petitioners by the appraisers was $709,987.98. The difference between the total amount allowed by the appraisers and the amount allowed by the Appellate Division is $133,750. The interest involved on this appeal is 6 per cent. on the valuation of petitioners' shares from July 30, 1920, to February 21, 1922, when the Special Term made its order of confirmation.

[1] The first question which arises is as to the power of the court to correct substantial error by modifying the report of the appraisers and confirming the report as modified. The duty of the court was defined on the former appeal herein. It was to "examine the proceedings of the appraisers and determine whether they had been so in accordance with the principles governing such a proceeding that they ought to be approved and confirmed." 232 N. Y. 1, 10, 133 N. E. 41, 44.

The petitioners contend that as the court found that the award was excessive, it should not have modified the report, but should have sent the proceedings back to the appraisers for a reconsideration of the facts; that the petitioners were entitled, as the law required, to have the value of their shares determined, not by the court, but by the appraisers. Such is the general rule under Condemnation Law ([Consol. Laws, c. 73] § 15, formerly Code Civ. Pro. § 3371), whereby the power of the court on a motion to confirm the report in condemnation proceedings is strictly limited, with due regard for the right of one whose private property is taken for public use to have his damages ascertained as provided by the Constitution of the state of New York, article 1, § 7. In this proceeding, where the power of the court is not so delimited, it does not follow that the court may not, on discovering a separate item of damages erroneously included in the award, with insufficient evidence to sustain it, correct the award by striking out the item erroneously included.

We therefore pass to a consideration of the nature of the modification made by the Appellate Division. The appraisers plotted the land, valued the lots as plotted and the building thereon, and then added 15 per cent. to the value of the land for plottage. The learned Appellate Division disallowed the allowance of 15 per cent. and allowed 10 per cent. for plottage. It states the grounds for its action as follows:

"The next point raised by the respondent is as to the allowance by the majority appraisers of 'plottage' at 15 per cent. of the total land value found by them. 'Plottage' has been defined as 'a percentage added to the aggregate value of two or more contiguous lots when held in one ownership as representing an increased value pertaining to a group of lots by reason of the fact that they admit of a larger and more

advantageous disposition or improvement than a single lot.' (People ex rel. Pennsylvania, N. Y. & L. I. R. R. Co. v. O'Donnel, 130 App. Div. 734, 736.) It was testified by all of the witnesses that the usual allowance for plottage, because of the ownership of several lots contiguous to one another, was ten per cent. Two of the witnesses for the petitioners have testified that because of the peculiar location and frontage of this plot, 15 per cent. should be allowed for plottage. The other witness for the petitioners, and all of the witnesses for the respondent, testify that 10 per cent. is all that should be allowed for plottage on this tract, although they all testify that this would be a proper case for an extraordinary allowance for plottage if it were not for the fact that the building on the property has a value which was allowed at from $250,000 to $600,000 by the different witnesses and was fixed by the majority report at $350,000. The witnesses for both parties seem all to agree that 'extraordinary plottage can only be allowed beyond the usual 10 per cent. in case the property is immediately available for the best possible use,' and the preponderance of the evidence seems to be that the best possible use of such a property as the one in question would be to erect a tall office building on the front with two theaters in the rear. This 'best possible use' could only occur if the present building were torn down, in which case no value should be or could be allowed for the building. The 'best possible use' is inconsistent with any substantial allowance for the building. The difference between the 10 per cent. usual plottage and the 15 per cent. allowed by the majority appraisers amounts to $133,750, and the lowest value given to the building by any of the witnesses was $250,000, the value found by the majority appraisers being $350,000. The testimony of those of the petitioners' witnesses who allow both 15 per cent. for the plottage, and a large sum for the building, shows also that they only considered that property entitled to extraordinary plottage in case the property is available for the best possible use. The result of this comparison of testimony is that an allowance of $350,000 or any substantial sum for the building is inconsistent with the immediate best use of the land, and consequently inconsistent with an additional plottage allowance. The extra 5 per cent. for plottage should, therefore, be disallowed. * * *

"Upon the appeal of the company the order should be modified so as to disallow any sum allowed for plottage over and above ten per cent. upon the ground that in making such allowance the appraisers proceeded upon an improper basis because of the allowance for the value of the building made in the report."

Granting to the court a reasonable degree of latitude in determining whether the evidence was insufficient in law (Matter of Case, 214 N. Y. 199, 203, 108 N. E. 408) to sustain an allowance of 15 per cent. for plottage, we are disposed to say that it did not usurp the functions of the appraisers by placing a valuation on the shares on conflicting evidence It rejected the evidence on that point as insufficient in law and corrected the award accordingly. To send the proceeding back with directions to the appraisers to do what the court has done would be a useless superfluity.

[2] We now proceed to consider the allowance of interest on the award. The learned Appellate Division held that, because the order appointing the appraisers provided that payment for the stock should be made to the petitioning stockholders within 15 days after the filing of their report, the sum was sufficiently liquidated to bear interest from that date. This provision in the order was considered on the former appeal. The court said that the direction should be disregarded; that it should not have been contained in the order appointing the appraisers; that such direction should be made by the court "after the appraisers have completed their valuation, and when for the first time it can be done intelligently." 232 N. Y. 1, 9, 133 N. E. 41, 44. Omitting this direction from the original order, we reach the conclusion that the amount allowed by the original appraisers was not liquidated until the direction of the court was obtained as to the "manner in which payment for such stock shall be made to such stockholders" pursuant to Stock Corporation Law, § 17.

"We search in vain," says Hiscock, C. J. (232 N. Y. 1, 7, 133 N. E. 41, 43), "for any express and definite provision authorizing [in the first instance] an order compelling the corporation to pay the appraised value and take up the dissenting stock." The case does not involve a taking where interest from the time of taking is a part of the due compensation for the property taken. The stockholders' interest in the stock was taken and ceased only "when the corporation shall have paid the amount of such appraisal, as directed by the court." Stock Corporation Law (Consol. Laws, c. 59) § 17. The first valid direction of the court as to the manner of payment was when the Special Term made its order confirming the report of the appraisers. As the statute is silent on the subject of interest, interest runs only from the time of confirmation of the award. Matter of East River Land Co., 206 N. Y. 545, 100 N. E. 421.

By the law of the case, the report of the appraisers was not an adjudication as originally contended by petitioners. It was advisory in its nature, and had no finality until confirmed by the court.

A mistaken view of the law led the petitioners to rest their claims on the unconfirmed award until this court determined the proper procedure. By reason of the hiatuses

when promptness was necessary for the preservation of rights. But when this court collected the intention of the Legislature from the language used, it was as if it had been so written in the beginning, and the court is bound to follow the construction it has placed on it in this case, wherever that construction may lead.

The petitioners contend that they were stayed from moving to confirm the award. They had no intention to move to confirm until this court indicated that they could not otherwise bring the proceeding to an end. They were actually stayed from taking steps to enforce the award without an order of confirmation. The controversy between the parties was whether the petitioners were right in their contention that no order of confirmation was necessary. They contended that the proceedings to obtain court action were nugatory and should have been dismissed.

The report was finally confirmed on February 21, 1922, and no question is raised as to the allowance of interest from that date.

The order appealed from should be modified by striking out the allowance of interest from July 30, 1920, to February 21, 1922, and as so modified affirmed, with costs to New York Theater Company.

HISCOCK, C. J., and HOGAN, CARDOZO, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Ordered accordingly.

(237 N. Y. 167)

PEOPLE ex rel. NEW YORK FIRE INS. EXCH. v. PHILLIPS, Superintendent of Insurance of State of New York (CONRAN, Intervener).

(Court of Appeals of New York. Dec. 4, 1923.)

1. Insurance ⚷10—Jurisdiction of superintendent of insurance as to discrimination in rates for fire risks defined.

Under Insurance Law, § 141, providing suitable power in the superintendent of insurance to entertain complaints as to discrimination in fire rates as fixed by rate-making associations, the jurisdiction of the superintendent does not extend to the decision of the merits of rival automatic sprinklers, but only to the question whether all are treated fairly and alike.

for fire risks may prescribe its own tests for sprinkler systems.

Public policy requires that an association making rates for fire insurance risks must have power to adopt suitable rules, requiring those with devices for protection against fire to submit such devices for reasonable tests to be made by the association itself, or under its direction, and it is no discrimination for the association to refuse to give credit to the inventor of a sprinkler system by way of reduction of rates on the property wherein it is installed, where the inventor refuses to submit to the tests prescribed by the association, but offers other proof as to the efficiency of his apparatus.

Hogan and Crane, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Certiorari proceedings by the People, on the relation of the New York Fire Insurance Exchange, against Jesse S. Phillips, as Superintendent of Insurance of the State of New York, to review a determination by the Superintendent, wherein William F. Conran intervened. Determination of the Superintendent confirmed (203 App. Div. 13, 196 N. Y. Supp. 202), and relator appeals. Reversed.

Joseph S. Auerbach, Charles H. Tuttle, and Martin A. Schenck, all of New York City, for appellant.

Carl Sherman, Atty. Gen. (C. T. Dawes, of Albany, of counsel), for defendant, respondent.

Joseph F. Conran and Andrew F. Van Thun, Jr., both of Brooklyn, for intervener, respondent.

POUND, J. The New York Fire Insurance Exchange is a rate-making association maintaining an office in New York City, which has been authorized under the Insurance Law (Consol. Laws, c. 28) to make rates to be used by five insurance underwriters. To correct discrimination in the fixing of such rates by such associations, Insurance Law, § 141, provides suitable power in the superintendent of insurance to entertain complaints, and after a full hearing to order its removal.

The important part of section 141 of the Insurance Law so far as the question of discrimination is concerned, is that no such rate-making association shall fix any fire insurance rate—

"which discriminates unfairly between risks in the application of like charges or credits or which discriminates unfairly between risks of essentially the same hazards and having sub-

stantially the same degree of protection against fire. Whenever it is made to appear to the satisfaction of the superintendent of insurance *that such discrimination exists*, he may, after a full hearing * * * order such discrimination removed." Insurance Law, § 141, added by Laws 1911, c. 460, as amended by Laws 1912, c. 175, and Laws 1913, c. 26, since amended by Laws 1922, c. 660.

The relator has a testing agency known as its "Chicago Laboratories," where tests are made of fire protection devices for the purpose of assisting it in fixing rates without unfairly discriminating between various devices. Application was made to the relator for credit in the rating of certain risks, equipped with the so-called "Conran sprinkler head," an invention of the intervener. It was claimed that the Conran device was just as effective as the sprinkler systems for which the relator allowed a reduced rate. The relator refused to grant this reduced rating on the ground that the Conran sprinkler had not been submitted to or approved by the Chicago Laboratories. The intervener, having had his apparatus subjected to extensive tests and approved by the board of standards and appeals of the city of New York, the body which approves the installation of all fire apparatus in buildings within that city, and by others, complained to the superintendent of insurance that a discrimination against his device existed in the fixing of rates. The matter was finally brought to hearing and determination, the superintendent of insurance holding, in effect, that the determining issue was whether or not the Conran device was just as effective as the sprinkler systems for which the exchange had allowed a reduced rate. He found that it was, and ordered the removal of the discriminations.

The question is whether as matter of law the relator discriminated unfairly against the Conran sprinkler head. The effect of the decision of the Appellate Division is that the question before the superintendent of insurance was one of equal fire hazard, to be determined by him on such evidence as a complainant sees fit to produce. Under this interpretation of the statute the rate-making association, and the insurance companies who must recognize the device as a protection against fire, can be compelled to grant a rate equal to that given the most approved devices which have met all tests, although the exchange has not tested the device, and the owner of the device has refused to comply with the association's uniform rules for testing devices seeking a preferred rate.

Kiley, J., in a dissenting opinion, stated the rule as follows:

"Discrimination, as used here (in section 141 of the Insurance Law), and as applied to this relator, could only be practiced in one of two ways: First. After a test made relator might unfairly find that the intervener's device was not equal as a reducing element in fire hazard to some other device used for like purposes. Second. It might refuse to make the test. It did not default in either of these particulars; it was ordered to remove an 'unfair discrimination;' it never imposed—ordered in effect to certify to the efficiency of a device it had not been permitted to test."

The difference between these two interpretations of the statute makes the issue on this appeal.

[1] The question is not whether the Conran sprinkler is as good a sprinkler as any other in use. It may, for the purposes of the argument, be conceded that it is. The question is whether the exchange discriminates unfairly against it; makes a distinction in the way it treats the Conran device to its prejudice and in favor of others in the same class. The jurisdiction of the superintendent of insurance does not extend to the decision as an original proposition of the merits of rival automatic sprinklers. It extends only to the question whether all are treated alike and treated fairly. If equality and fairness to all is found, no discrimination can be said to exist.

[2] Public policy, it would seem, requires that the exchange should have the power to adopt suitable rules, requiring those whose devices are offered as a protection against fire to submit such devices to reasonable tests to be made by the exchange itself, or under its direction. The exchange and the fire insurance companies are assuming the financial risk and burden of granting lower rates where protective devices are installed. It has no power to turn away any applicant who presents his contrivance for approval, or to create a monopoly in behalf of the inventions it may seek to favor by refusing its approval of equally reliable automatic sprinklers which have met its test. But when the applicant for consideration who seeks to obtain the approval of the exchange refuses to submit to reasonable and competent tests to be made by it, and insists that the exchange shall act upon such tests as he offers, he seeks to substitute his own method of forming a judgment on the merits of his device for the method adopted by the exchange for the formation of its judgment thereon. His tests may be as good to the mind of the superintendent as the tests of

the exchange but the point is that the exchange may properly reserve to itself the function of making its own tests under its own rules, so long as it treats all comers with uniform and impartial consideration.

On slight reflection it would seem that the adoption of a uniform method of testing these devices by the exchange itself was well nigh essential for the satisfactory working of the scheme of rate reduction. The public has the right to rely upon the exchange to protect it from the installation of unsuitable devices. The exchange has the right to protect itself. If the applicant were allowed to select his own test, to convince the superintendent of insurance of its efficiency, and thus to avoid the test proposed by the exchange, the result would be inconvenience and uncertainty instead of definiteness and uniformity.

The substance of the relator's position is that it will not reduce rates, except where the protective device installed has obtained a license from it to be obtained on passing the tests which it imposes for its protection. Would an unlicensed chauffeur be heard to say that he was the best chauffeur in the world, and that, therefore, he should be excused from the tests officially imposed on others in the same class, and be licensed on some other basis of determining merit? Would an applicant for appointment in the civil service be heard to say, even if the Constitution did not forbid, that he should be permitted to demonstrate his merit and fitness by other methods than the examination required of others in the same class? Fairness and efficiency assumed, the better the device the more certain the required approval. The fairness and efficiency of the tests made by the Chicago Laboratories are not questioned. Conran is, in fact, seeking a discrimination in his favor, not the removal of a discrimination against him.

Discrimination may come after the device has been submitted to the exchange. Finality would not attach to its action. It may refuse to make the test, or the test may be unfair, or the decision may be arbitrary. The powers of the superintendent may then be properly invoked to remove such discrimination.

The order of the Appellate Division should be reversed, and determination of the superintendent of insurance annulled, with costs.

HISCOCK, C. J., and CARDOZO, McLAUGHLIN, and ANDREWS, JJ., concur.

HOGAN and CRANE, JJ., dissent.

Order reversed, etc.

(237 N. Y. 176)

LAWREY v. HINES, Director General of Railroads.

(Court of Appeals of New York. Dec. 27, 1923.)

1. Railroads ⇐5½, New, vol. 6A Key-No. Series—Failure to object to service on representative of federal Agent persuasive facts do not justify objection.

Failure to make objection that the officer of a railroad corporation to whom summons was delivered was not the duly authorized representative of the federal Agent is persuasive that the facts do not justify such objection.

2. Railroads ⇐5½, New, vol. 6A Key-No. Series—Summons served on representative of federal Agent may be amended.

Where service of summons, in an action brought against the Director General of Railroads after federal control ceased, is had on a corporation officer duly authorized by the federal Agent to accept delivery in his behalf, the summons may be amended by substituting the name of the federal Agent.

3. Railroads ⇐5½, New, vol. 6A Key-No. Series—Director General not suable after expiration of federal control.

An action for injury suffered during the régime of a certain individual as Director General of railroads cannot be brought against him after the period of federal control ended.

Hogan and McLaughlin, JJ., dissenting in part.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Charles Lawrey against Walker D. Hines, Director General of Railroads, operating the Southern Pacific Steamship Company. From an order of the Appellate Division (206 App. Div. 612, 198 N. Y. Supp. 927) affirming an order of the Special Term denying a motion to dismiss, defendant appeals by permission. Reversed, and motion to dismiss granted conditionally.

The following questions were certified:

"(1) Can this action, which was commenced on or about the 3d day of June, 1920, after the termination of federal control of the transportation systems of the United States, to recover damages for a cause of action arising out of and during federal control, wherein the defendant in the title of said action was described as 'Walker D. Hines, Director General of Railroads, Operating Southern Pacific Steamship Company,' and services of summons and complaint having been duly effected upon the person designated for service of summons in action against the United States arising out of federal control, be maintained against the United States?

"(2) The defendant having appeared and answered the complaint herein, and having failed

to demur to the defect in the description of the party defendant, and the defect appearing on the face of the pleadings, is the defendant estopped from now raising that question?"

J. Ard Haughwout, of New York City, for appellant.

Joseph Banner, of New York City, for respondent.

CARDOZO, J. [1] I think it is fairly to be inferred, both from what the defendant says and from what he omits to say, that the officer of the corporation to whom the summons was delivered was the duly authorized representative of the federal Agent empowered to accept delivery of the summons in the latter's behalf. No point is urged to the contrary. The failure to make the objection is persuasive that the facts do not justify the making.

[2, 3] In these circumstances our decision in U. T. Hungerford Brass & Copper Co. v. Hines, 236 N. Y. 528, 142 N. E. 270, would be authority for an order amending the summons if such an order had been requested. The difficulty is that the plaintiff has not asked for an amendment, but is content with the action as he has brought it. He stands upon his right to charge Walker D. Hines with liability for injuries, suffered during the period when Mr. Hines was Director General of Railroads, though action was not brought till federal control was ended. The right does not exist.

The order of the Appellate Division and that of the Special Term should be reversed, with costs in all courts, and the motion for judgment dismissing the complaint with costs granted, unless within 30 days and on payment of said costs the Special Term permits an amendment of the summons by substituting the name of the proper defendant.

HOGAN, J. (dissenting in part). This action was commenced June 3, 1920, and issue was joined by the service of an answer on June 23, 1920. The complaint alleges that at the times mentioned therein the defendant, Walker D. Hines, was the duly appointed Director General of Railroads, and as such operated and controlled the Southern Pacific Steamship Line, and in carrying on said business operated a steamer, Ledae; that on December 4, 1919, while plaintiff was in defendant's employ as a longshoreman, by reason of the negligence of the servants of defendant, an accident occurred whereby plaintiff sustained personal injuries resulting in damages which were sought to be recovered. An answer was served wherein each and every allegation of the complaint was denied. The complaint upon its face states facts sufficient to constitute a cause of action, but, in view of the denials contained in the answer, the burden of establishing the facts alleged by plaintiff would rest upon him.

The case being upon the calendar for the October term, 1922, and marked "Reserved generally," defendant, upon the summons, complaint, answer, and an affidavit setting forth the nature of the action, that Walker D. Hines at the time of the commencement of the same was not Director General of Railroads operating the Southern Pacific Steamship Company, or any other company, nor was the President of the United States in control of the railroads of the United States or any of them, followed by excerpts from the Transportation Act of 1920 (U. S. Comp. St. Ann. Supp. 1923, § 10071¼ et seq.), and the action taken thereunder disclosing that on and after the 18th day of May, 1920 (a date prior to the commencement of this action), Walker D. Hines was not Director General or Agent, but had been superseded by John Barton Payne, by designation of the President, that the summons and complaint was not served personally upon Walker D. Hines, but was served upon Hugh Neill, secretary of the Southern Pacific Company, who was not at that time authorized to accept service of process for defendant Walker D. Hines in any capacity whatever, obtained an order to show cause why an order should not be made dismissing the action.

A hearing upon the order to show cause was had at Special Term. Plaintiff did not furnish any affidavit in reply to the moving party affidavit, but rested his opposition on the papers upon which the order to show cause had been granted. The justice in a memorandum held that, notwithstanding the summons was not personally served on Walker D. Hines, but upon one who, for aught that appears, may well have been a proper person upon whom service of the summons could be made in accordance with subdivision (b) of section 206 of the Transportation Act, and the action being one against the United States, warranted a conclusion that the answer was intended as the answer of the real party in interest, namely, the United States, and held that the interests of justice required that the entire matter be reserved until the trial, at which time it can be disposed of, and thereupon made an order denying the motion.

The Federal Control Act approved March 21, 1918 (40 U. S. Stat. at Large, 451, § 10 [U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115¾ j]), provided that actions at law might be brought by and against carriers while under federal control, and judgment rendered as now provided by law; and

in any action at law against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. That act doubtless permitted an action against the carrier by name.

On October 28, 1918, General Order No. 50 was promulgated. The preamble of that order recited that actions were being brought and judgments rendered against carrier corporations based on causes of action arising during federal control for which such carrier corporations are not responsible, and such action should be brought against the Director General of Railroads.

"It is therefore ordered that actions at law * * * brought in any court based on * * * claims for death or injury to persons since December 31, 1917, arising out of federal control, which action * * * but for federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise."

February 28, 1920, the Transportation Act as amended (41 U. S. Stat. at Large, 456) was approved. That act provided (section 200[a]) that federal control should terminate at 12:01 a. m. March 1, 1920, at which time the President should relinquish possession and control of all railroads and systems of transportation then under federal control, and cease the use and operation thereof, or, supervision of the carriers operating them or the business or affairs of such carriers. Section 206a provided that actions at law based on causes of action arising out of the use or possession or operation by the president of the railroad or system of transportation of any carrier of such character as prior to federal control could have been brought against such carrier may, after the termination of federal control, be brought against an Agent designated by the president within 30 days after the passage of the act, but not later than two years from the date of the passage of the act (February 28, 1922). Section 206(b), relating to service of process, provided:

"Process may be served upon any agent or officer of the carrier operating such railroad * * * if such agent or officer is authorized by law to be served with process in proceedings brought against such carrier and if a contract has been made with such carrier by or through the President for the conduct of litigation arising out of operation during federal control. If no such contract has been made process may be served upon such agents or officers as may be designated by or through the President. The Agent designated by the President under subdivision (a) shall cause to be filed, upon the termination of federal control, in the office of the clerk of each District Court of the United States, a statement naming all carriers with whom he has contracted for the conduct of litigation arising out of operation during federal control, and a like statement designating the agents or officers upon whom process may be served in actions, suits, and proceedings arising in respect to railroads or systems of transportation with the owner of which no such contract has been made; and such statement shall be supplemented from time to time, if additional contracts are made or other agents or officers appointed."

Subdivision (d):

"Actions * * * of the character above described pending at the termination of federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a)."

The federal government, in thus assuming liability to respond in damages in an action at the suit of an individual sustaining personal injuries, attached, as it was authorized so to do, certain requirements and limitations deemed by it practical and essential for its protection. Compliance with such requirements was a condition precedent to the maintenance of an action in effect against the federal government. Did the plaintiff comply with the conditions imposed? The alleged injuries to plaintiff for which a recovery is sought were the result of an accident which occurred December 4, 1919. An action to recover for the same at that time and down to 12:01 a. m. March 1, 1920, could be brought against William B. McAdoo, Director General of Railroads, and not otherwise, as promulgated under General Order No. 50. Federal control having terminated March 1, 1920, the action was then required to be brought against an Agent to be designated by the President within 30 days after the passage of the Transportation Act of 1920, which was approved February 28, 1920, but not later than two years from that date.

The Congress, however, was cognizant of the scope and importance of legislation relating to federal control of systems of transportation, as well as numerous problems likely to grow out of the same not only during federal control but upon a termination of the same. The President assumed control of all systems of transportation at noon, December 28, 1917, pursuant to the power granted him by Congress approved August 29, 1916. Congress thereafter enacted the Federal Control Act of 1918 (chapter 25), heretofore referred to. That act provided an appropriation of $500,000,000, which together with any funds available from any operating income of each carrier line, was to be used as a revolving fund to pay expenses of federal control, provide equipment, etc.

The fund thus provided for was continued and embraced in the Transportation Act of 1920. Subdivision (e) of section 206 provided that the amount of any judgment recovered in an action against the Agent of the President pursuant to subdivision (a) shall be paid out of the revolving fund. Subdivision (g) inhibited the levy by execution under any judgment upon the property of the carrier, and by section 210 of the act the sum of $300,000,000 was appropriated to the revolving fund.

The extent of assumption by the federal government of the numerous systems of transportation in this country, the vast amount of money necessary to maintenance and operation of the same, and the appropriation of $800,000,000 made by the Congress in aid thereof necessarily required that the Congress in no uncertain language should provide the manner in which action of the nature of the one at bar should be maintained, the officers or agent of the government to be named as party defendant therein, and the manner of service of process upon such officer or agent. The federal government was in effect to be the defendant in such actions. Numerous accidents during federal control were likely to occur in every state giving rise to litigation, aside from numerous other claims. Uniformity of procedure was essential, and the Congress provided for the same. That no unreasonable requirement upon suitors or prospective suitors was imposed by the Transportation Act is illustrated in this case. The action was commenced June 23, 1920. The statutory time within which the same might have been commenced under the Transportation Law would not expire until February 28, 1922. Twenty months remained before the cause of action would be barred, which afforded ample opportunity for investigation.

If, as stated in the affidavit made a part of the motion papers on behalf of defendant, on March 11, 1920, the President duly appointed Walker D. Hines, Director General of Railroads, and his successor in office, as the Agent provided for in section 206 of the Transportation Act approved February 28, 1920, and Walker D. Hines resigned such position, and on May 18, 1920, John Barton Payne was designated Director General of Railroads, and his successor as the Agent provided for in section 206 of said act approved February 28, 1920, such facts, being a matter of public record, were available to plaintiff and his attorney.

The provision in General Order No. 50 that an action which "but for federal control might have been brought against a carrier company shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise," was modified by the amendment to the Transportation Act of 1920 in so far, at least, as service of process was concerned. Subdivision (b) of that act permitted service of process on an officer of the carrier operating a system of transportation if such officer is authorized by law to be served with process against such carrier, and if a contract has been made with such carrier by or through the President for the conduct of litigation arising out of federal control, and, in the absence of such contract, process was to be served upon such Agents as may be designated by the President. The act also required the Agent designated by the President as the officer against whom such action might be brought (section 206[a]) to file a statement naming all carriers with whom he had contracted for the conduct of litigations arising out of federal control, and a like statement designating the Agents or officers upon whom process may be served where no contracts had been made. The record in this case is barren of any action taken under that provision of the act. Statements relating to the same are contained in the briefs of respondent and answered in the brief of appellant. Such references must be disregarded.

In Weil v. New York Cent. R. R. Co., 235 N. Y. 570, 139 N. E. 738, we held that service of a summons upon a cause of action arising during federal control (as did the action at bar) upon a person designated by section 206 (b) of the Transportation Act of 1920 as a person to be served with process in such actions, in which summons the carrier and not the Agent designated by the President is named as defendant, did not constitute the bringing of an action against said Agent or his principal, i. e., the Agent appointed by the President under the Transportation Act of 1920.

In Fischer v. Wabash Railway Co., 235 N. Y. 568, 139 N. E. 738, decided with the Weil Case, where some additional questions were presented, the decision in the Weil Case, was followed, and we also held that a motion made by plaintiff for leave to substitute James C. Davis, Director General of Railroads, as defendant in place of the defendant carrier, and to amend the summons, complaint, and proceedings so as to set forth as defendant James C. Davis, Director General of Railroads, and to serve an amended summons and complaint, should not be granted.

Again, in Dubied & Co. v. Pennsylvania R. Co., 235 N. Y. 572, 139 N. E. 739, decided with the two cases mentioned, we held the same propositions stated in the cases re-

(311 Ill. 304)

PEOPLE ex rel. GREER, County Collector, v. THOMAS WALTERS CHAPTER OF THE DAUGHTERS OF THE AMERICAN REVOLUTION. (No. 15829.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Constitutional law ⇐33—Taxation ⇐196—Constitutional provisions relating to taxation exemptions not self-executing.

Const. art. 9, § 3, providing for the exemption of property which is used for charitable purposes, is not self-executing, but authorizes the General Assembly to exempt from taxation the classes of property therein specified.

2. Taxation ⇐197—Statute held not to enlarge classes of charitable organizations exempt from taxation; "beneficent"; "charitable."

Revenue Act, § 2, exempting from taxation such property as is actually used for charitable and beneficent purposes, does not designate a class of organizations or purposes not named in Const. art. 9, § 3, as the Legislature was not authorized to enlarge the meaning of the word "charitable" as used in the Constitution, and the word "beneficent" must be deemed to have been used synonymously with the word "charitable."

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Beneficent; Second Series, Charitable.]

3. Taxation ⇐204(2)—Statute granting tax exemption strictly construed.

Statutes granting tax exemptions are to be construed strictly, and the exemptions must come within not only the terms of the statute, but also the authority given by the Constitution.

4. Taxation ⇐251—Claimant of right to exemption has burden of establishing it.

It is incumbent on an organization claiming exemption from taxation under the Constitution to show that the use of its property comes within the provision of the Constitution granting exemption.

5. Taxation ⇐241(1)—Organization held one for "charitable purposes," its property therefore being exempt from taxation.

Where a chapter of the Daughters of the American Revolution was organized to maintain a chapter house, with a community rest room, and to preserve the memory of those who had promoted the interests of the community and had been prominent in the history of the country, and to impress on the people the value of their inheritance of freedom and reverence of those who achieved it, *held*, that it was organized for charitable purposes, and that its property, exclusively used for such purposes, was therefore exempt from taxation.

Appeal from Fulton County Court; J. D. Breckenridge, Judge.

Proceeding by the People, on the relation of Harry W. Greer, County Collector, against the Thomas Walters Chapter of the Daughters of the American Revolution. Judgment for defendant, and relator appeals. Affirmed.

Floyd F. Putman, State's Atty., of Canton, for appellant.

Harvey H. Atherton and Glenn Ratcliff, both of Lewistown, for appellee.

CARTWRIGHT, J. The county treasurer of the county of Fulton applied to the county court at the June term, 1923, for judgment against the property of the appellee, Thomas Walters Chapter of the Daughters of the American Revolution, in the city of Lewistown, for delinquent taxes for the year 1922. The appellee filed an objection that it was a corporation organized exclusively for beneficent and charitable purposes; that the property owned by it was used for such purposes and no other, and was not leased or used with a view to profit; and that by statute it was exempted from taxation. Upon a hearing the objection was sustained, and judgment denied, and an appeal was allowed and perfected.

[1-4] Article 9, § 1, of the Constitution requires the General Assembly to provide such revenue as may be needful by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property; but section 3 of the article provides that the property of the state, counties, and other municipal corporations, both real and personal, and such property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempt from taxation by general law. That provision of the Constitution is not self-executing, but authorizes the General Assembly, by legislative enactment, to exempt from taxation the classes of property therein specified. People v. Anderson, 117 Ill. 50, 7 N. E. 625; In re Walker, 200 Ill. 566, 66 N. E. 144; People v. Salvation Army, 305 Ill. 545, 137 N. E. 430. Under the power conferred by the Constitution, the General Assembly, by the seventh paragraph of section 2 of the Revenue Act, has provided that all property of institutions of public charity, all property of beneficent and charitable organizations, whether incorporated in this or any other state of the United States, and all property of old people's homes, when such property is actually and exclusively used for such charitable and beneficent purposes, and not leased or otherwise used with a view to profit, shall be exempt from taxation. Smith-Hurd Rev. St. 1923, p. 1717. The General Assembly has added to the provision of the Constitution the word "beneficent," both as to the class of organizations and the purposes for which property is used. The General Assembly was not authorized to add to or enlarge the meaning of

the word "charitable," and the word "beneficent" cannot be regarded as designating a class of organizations or purposes not named in the Constitution. Statutes granting tax exemptions are to be construed strictly, and must come within not only the terms of the statute, but also the authority given by the Constitution, and the legislative intention must have been to use the word as synonymous with the word "charitable." It was incumbent upon the appellee to show that its organization and the use of its property came within the provision of the Constitution as charitable.

[5] The appellee offered in evidence its charter, defining its nature and purpose as follows:

"The object for which it is formed is to maintain a chapter house at Lewistown, Illinois, and in connection therewith a community rest room; to perpetuate the memory of men and women who have actively promoted and protected the interests of the community in the past, of those who have been prominent in the history of our county, state, and country, and especially of those who achieved American independence, by the acquisition and protection of historical spots and the erection of memorials, and by the promotion of celebrations of patriotic anniversaries; to cherish, maintain, and extend the institutions of American freedom and to foster true patriotism and love of country."

The residence property, upon which there was a brick residence building erected in 1842, had some historical value. It was near the center of the city, and near the courthouse, and convenient for maintaining a rest room and community gatherings. A rest room was established, provided with a public toilet, chairs, and tables, where people might rest and eat their lunches. The building was in charge of a hostess, and the rest room was open to the public from 6:30 a. m. until 9 p. m., except on Sunday, when it was open from 9 a. m. to 9 p. m. In the year preceding April 1, 1922, more than 20,000 people made use of the community rest room, and whenever the number was such as to require it, the entire building, with the exception of a part of the second floor, was open to the public. No part of the premises was leased or otherwise used with a view to profit, but two rooms were rented to lodgers, producing an income of $132 a year, which was devoted to the purposes of the organization. The officers received no compensation, and the members paid annual dues, which were received by the state chapter, from which it furnished aid to schools, and this chapter aided in supporting a school. There was a mortgage on the property, and on occasions some of the rooms were rented to private organizations for entertainments, and tablets were sold to perpetuate the memory of men and women who had been concerned in the building of the community, and who were voted by the chapter worthy of having tablets erected to his or her memory. Eight tablets had been so erected, at $100 each. Other funds were secured by donations and by serving meals and banquets, and all revenues from any sales were devoted to paying for the property and the purposes of the chapter. At Christmas time the building was also devoted to aiding the poor and needy, by preparing baskets containing food furnished by the American Legion and goods and toys donated, and the baskets were distributed among the needy of the community. It was the plan and intention of the chapter to fit up a memorial room as soon as funds should be sufficient, wherein would be placed such historical books, manuscripts, and war relics as could be secured.

No fixed rule has been established by which it can be determined whether an organization is charitable and whether its property comes within the test established by the statute. St. 43 Elizabeth, c. 4, enumerated 21 charities, but in the growth and development of social conditions charities have not been confined to those enumerated, and various definitions have been given by the courts. In Crerar v. Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454, the following was regarded as a comprehensive legal definition of a charity:

"A charity, in a legal sense, may be more fully defined as a gift, to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burthens of government."

In Congregational Publishing Society v. Board of Review, 290 Ill. 108, 125 N. E. 7, it was said that charity, in a legal sense, is not confined to mere almsgiving, or to the relief of poverty and distress, but has a wider signification, and embraces the improvement and happiness of man. A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man. Ould v. Washington Hospital for Foundlings, 95 U. S. 303, 24 L. Ed. 450.

The question whether the property purchased by a chapter of the Daughters of the American Revolution, known as the Spaulding House, formerly owned and occupied by soldiers who served in the war of the Revolution, was exempted from taxation under a statute exempting "literary, benevolent, charitable and scientific institutions," occupied for the purposes of the chapter, was decided by the Supreme Judicial Court of Massachusetts in the case of Molly Varnum

ferred to, and also that the relation between the Director General and the carrier was not such that the carrier was merely the successor of the Director General, the appearance of whom was necessarily on behalf of the Director General as well as of itself.

In U. T. Hungerford Brass & Copper Co. v. Hines, 236 N. Y. 528, 142 N. E. 270, the summons and complaint were served on one Hall, the designated agent of a foreign railroad company, and authorized by James C. Davis, the Agent designated by the President under section 206(a), Transportation Act of 1920, to accept service of process. We held that, service having been made upon the agent authorized by James C. Davis, the Agent designated by the President to accept service, a motion made to amend the process to read U. T. Hungerford Brass & Copper Company against James C. Davis, Director General of Railroads, as Agent under Section 206 of the Transportation Act of 1920, should be granted.

That case is clearly distinguishable from the case at bar. In the Hungerford Case the process was actually served on the agent designated to accept service by the Agent appointed by the President, after Walker D. Hines had ceased to be Director General, Agent, and service so made was service upon the Agent appointed by the President, and thus a compliance with the Transportation Act. Describing the Director General, Agent, as "Walker D. Hines" was therefore a misnomer. Jurisdiction of the Agent designated by the President having been perfected, the name of such agent might properly be substituted. In the present case, as disclosed in the record, service was made upon an individual, who was not an agent designated by the Director General, Agent, to accept service of process, and who had no authority to accept service of any process in an action against the Agent appointed by the President as an agent upon whom service could be made. Appearance by attorney for such person could not operate as an appearance for the Director General, Agent, appointed by the President.

My conclusion is that this action was maintainable only against the Director General, Agent, designated by the President in office; that such officer should be named as such defendant describing him Director General as Agent under section 206 of the Transportation Act of 1920; that Walker D. Hines, not being Director General, could not as such be made defendant so as to confer jurisdiction upon the court to award judgment or any relief against the federal government, and service upon the secretary of the steamship company was not service upon the Agent designated by the President. The result reached may be unfortunate for the plaintiff, and relegate him to consideration by the Congress as the sole means of relief. With that question we have no concern.

The orders should be reversed, and the motion to dismiss granted, with costs in all courts.

Question No. 1 not answered, as it assumes service of summons, and complaint was duly effected upon the person designated for service.

Question No. 2 answered in the negative.

HISCOCK, C. J., and POUND, CRANE, and ANDREWS, JJ., concur with CARDOZO, J.

HOGAN, J., dissents from allowance of amendment in opinion, in which McLAUGHLIN, J., concurs.

Ordered accordingly.

(237 N. Y. 186)

FERGUSON CONTRACTING CO. v. STATE.

(Court of Appeals of New York. Dec. 27, 1923.)

Canals ⇐15—State's alteration of plan of construction held authorized by contract.

Under contract for construction of a canal at unit prices, wherein it was mutually agreed that the state reserved the right to make additions or changes in the plans, *held*, that alteration consisting in the substitution of concrete lining in place of puddled lining, concrete docking in place of wooden docking, and additional embankment construction, did not constitute a fundamental change in the contract, and contractor breached his contract by refusing to go on with the work.

Hiscock, C. J., and Cardozo and Andrews, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Claim by the Ferguson Contracting Company, against the State. From a judgment of the Appellate Division, Third Department (202 App. Div. 27, 195 N. Y. Supp. 901), unanimously affirming a judgment of the Court of Claims dismissing the claim, claimant appeals. Affirmed.

Brainard Tolles and Richard E. Dwight, both of New York City, for appellant.

Carl Sherman, Atty. Gen. (Wilbur W. Chambers, of Albany, of counsel), for the State.

McLAUGHLIN, J. On the 3d of April, 1905, the Ferguson Contracting Company

entered into a contract with the state of New York, known as contract No. 2, to construct a portion of the Barge canal provided for under the Barge Canal Act (Laws of 1903, c. 147). The portion of the canal to be constructed by it extended from the Mohawk river near Waterford westerly nine-tenths of a mile.

The contract provided generally for excavating, constructing supports for the sides of a canal, and the construction of two locks, Nos. 2 and 3, with side walls and floors of concrete. The amount of estimated work, with the prices stipulated in the contract, plans, and specifications made a part of it, including alteration orders 1 to 7, both inclusive, amounted to $946,105.76. The amount of work, excluding alteration order No. 7, was $906,896.26. Alteration order No. 7 added work amounting to $74,848.90, and decreased work amounting to $35,639.49, so that there was an actual increase in the work, by reason of this order, of $39,209.50. The contractor entered upon and continued performance of the work as called for until the 27th of April, 1909, when it refused to proceed further.

Section 7 of the contract provided as follows:

"It is mutually agreed that the state reserves the right, until the final completion and acceptance of the work, to make such additions to or changes in the plans and specifications covering the work as may be necessary, and the contract shall not be invalidated thereby, and no claim shall be made by the contractor for any loss of profits because of any such change or by reason of any variation between the quantities of the approximate estimate and the quantities of the work as done."

Thereafter, acting under the provision of the contract quoted, the state, from time to time, made certain alterations which are designated in the record as alteration orders Nos. 1 to 7, both inclusive. The contractor acquiesced in all of the alterations except No 7, and performed the work called for without objection, at the unit prices specified in the contract. When alteration order No. 7 was made, however, it refused to proceed further, or to recognize the right of the state to make the changes proposed. On the 27th of April, 1909, it accordingly wrote the state engineer as follows:

"Replying to yours of the 24th inst., directing us to progress with the work of construction of contract No. 2 under the so-called alteration No. 7, which has not been consented to or in any way approved by us, we write to say we must decline to recognize said alteration as valid. We have had the opinion of the best legal and engineering talent available on this subject and they advise us that this change is such a radical one as to be substantially the substitution of a new contract in place of our original contract. We were willing to but were not permitted to proceed with the original contract and we regard ourselves released from all obligations under said contract and we shall look to the state for damages for the breach."

Therefore the state, acting under the power given to it by section 7 of chapter 147 of the Laws of 1903, and by section 12 of the contract under consideration, in the form and manner provided therein, canceled the contract and directed the remaining part of the work under it to be readvertised and relet in accordance with the provisions of the statute. A new contract was then entered into for the completion of the work. After the new contract was let the claim in question, amounting to upwards of $400,000, was presented against the state, on the ground that it, by alteration order No. 7, had broken the contract.

The claimant, in the claim filed, alleged, in substance, that alteration order No. 7 constituted a radical change in the plans and specifications of the work remaining to be done under contract No. 2, thereby departing radically from the general character and type of the work as originally contemplated; that the claimant refused to recognize such radically proposed alterations as binding, and that the state, because of such refusal and for no other cause, canceled the contract and declined to permit claimant to proceed therewith. The claim as filed was subsequently amended so as to allege that the state, by requiring the additional work called for by alteration order No. 7, at unit prices, relieved the contractor from further performance.

In 1910 a trial was had as to the validity of the claim thus presented. The Court of Claims dismissed the claim. It found that alteration order No. 7 contained no item for which a unit price was not stipulated in the contract, and no work of a different kind from that called for by it. It also found, to which no exception was taken, as follows:

"(9) Alteration No. 7 did not change the nature of the work called for by the contract or substantially change the cost of the work.

"(10) The claimant refused to accept said alterations and refused to enter into an agreement therefor, on the ground that they constituted a fundamental change in the contract, and amounted to a breach of the contract by the state.

"(11) The claimant refused to continue the work under the contract after the submission of said alteration order No. 7, treating the order as a breach of the contract by the state, and thereby was guilty of a breach of its contract."

And as conclusion of law:

"1. Alteration order No. 7 did not change the nature or substantially affect the cost of the contract and was not a fundamental change of the contract."

These findings were unanimously affirmed by the Appellate Division.

The question presented by the appeal is whether the state had the right to make alteration order No. 7 and require the contractor to do the extra work called for thereby, at the unit prices specified in the contract. I think it had. All of the work called for was of the same general character for which the contractor had submitted a unit price. If the changes had called for new work for which no unit price had been specified in the contract, a different question would be presented. But they did not. The changes, considering the amount and character of the work, were but matters of detail which the state had the right to make under the clause of the contract to which reference has before been made. Daly v. Busk Tunnel Ry. Co., 129 Fed. 513, 64 C. C. A. 87; Kinser Construction Co. v. State of N. Y., 204 N. Y. 381, 97 N. E. 871. The principal changes were the substitution of concrete lining in place of puddled lining; concrete docking in place of wooden docking; and additional embankment construction. These, and other minor changes, did not work a substantial change in either character or cost of the work. The building of embankments and the construction of concrete work were among the chief items, both in quantity and price, specified in the contract, and were covered by unit prices. It could not, with entire accuracy, be determined, considering the amount and character of the work, just what would be necessary to be done when the contract was made. This was recognized by both parties. Hence the provision that changes or alterations might be made without invalidating the contract. In this connection it is quite significant that prior to the making of alteration order No. 7 six other alteration orders (which called for work and materials largely in excess of what was called for by order No. 7) had been made and in each instance acquiesced in by the contractor and not even a suggestion made by it that the unit prices specified in the contract did not apply.

The construction thus put upon the contract is supported by the practical construction the parties themselves placed upon it in the six prior alteration orders. The contract fixed unit prices for each class of work called for in these alteration orders, including order No. 7. The contractor had agreed that the state could make such additions to or changes in the plans and specifications covering the work as might be necessary and that if such changes were made they should not affect the contract, and that no claim should be made by the contractor "for any loss of profits because of any such change or by reason of any variation between the quantities of the approximate estimate and the quantities of the work as done." It is difficult to see how the intention of both parties to apply the unit prices to the work arising from alterations could be more clearly expressed. The chief increases under alteration order No. 7 were embankments and second-class concrete. The unit price provided in the contract for embankments was 12 cents per cubic yard. This price was recognized and acted upon in every alteration order, except the 7th, where embankment was involved, viz. orders Nos. 1, 3, 4, and 5. The unit price specified in the contract for second-class concrete was $5.50 per cubic yard, and this price was recognized and acted upon in alteration orders Nos. 1 to 6, both inclusive. Five of these alteration orders were agreed to in writing. The sixth, while not agreed to in writing, was, nevertheless, acquiesced in, and the work performed under the unit price specified in the contract.

Under the terms of the contract, as well as the construction placed upon it by the parties themselves, the work specified in alteration order No. 7 had to be performed by the claimant at the unit price specified, and when it refused to perform the work and furnish the materials called for, it broke the contract, and the state was justified in doing what it did.

The judgment of the Appellate Division should therefore be affirmed, with costs.

HOGAN, POUND, and CRANE, JJ., concur.

HISCOCK, C. J., and CARDOZO and ANDREWS, JJ., dissent.

Judgment affirmed.

(237 N. Y. 193)

PEOPLE v. CHIAGLES.

(Court of Appeals of New York. Dec. 27, 1923.)

1. Searches and seizures ⇐7—Immunity limited to searches and seizures unreasonable in light of common-law traditions.

Immunity from unreasonable searches and seizures under Civil Rights Law, § 8, is not from all searches and seizures, but from searches and seizures unreasonable in light of common-law traditions.

2. Arrest ⇐71—Government may search accused, when legally arrested, to discover evidence of crime.

The government may search the person of accused, when legally arrested, to discover and seize the fruits and evidences of crime.

3. Arrest ⇐71—Search of accused, when legally arrested, not restricted to things subject to be taken on search warrant without arrest.

Search of accused, when legally arrested, to discover and seize the fruits and evidences of crime and seizure of such evidence, is not restricted to things subject to be taken under a search warrant when there is no arrest of the possessor, which is confined under Code Cr. Proc. § 792, to property stolen or embezzled or used as means of committing felony or held with intent to use it as instrument of crime.

4. Arrest ⇐71—Search of person lawful when grounds for arrest discovered and law is subjecting his body to its physical dominion.

Search of the person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds as yet unknown for arrest or accusation, but it becomes lawful when grounds for arrest and accusation have been discovered, and the law is subjecting body of accused to its physical dominion.

5. Criminal law ⇐393(2)—Privilege against self-incrimination is not identical with immunity from unreasonable search.

Privilege against self-incrimination protected by Const. art. 1, § 6, is not identical with immunity from unreasonable search, and does not prevent admission in evidence of fruits of lawful search.

6. Criminal law ⇐393(2)—Order for return of letters seized when accused arrested refused, unless shown to be unrelated to controversy.

On accused's motion for return of letters taken from his person when he was arrested, such order may be refused, unless it is clear that the papers are unrelated to the controversy, and competency of the letters left to the trial court.

Appeal from Supreme Court, Appellate Division, Third Department.

Nick Chiagles was arrested on a criminal charge. From an order of the Appellate Division (204 App. Div. 706, 199 N. Y. Supp. 256) affirming an order of special term, which denied defendant's motion for return of certain letters taken from his person at time of his arrest, defendant appeals by permission, and the Appellate Division certified a question to the Court of Appeals (204 App. Div. 706, 199 N. Y. Supp. 940). Question answered, and order affirmed.

The Appellate Division certified the following question:

"Has the district attorney the legal right to retain the letters taken from the person of the defendant at the time of the arrest?"

H. D. Wright, of Gloversville, for appellant.

J. William Titcomb, Dist. Atty., of Gloversville, for the People.

CARDOZO, J. [1] A peace officer of the city of Gloversville arrested the defendant on October 13, 1922, charging him with a felony, arson in the third degree. The defendant when arrested was searched, and papers and other articles were found upon his person. Everything so found was returned, except two letters, which the district attorney retains on the ground that they supply incriminating evidence. The defendant, after examination before a magistrate, was held to answer to the charge. He moves for an order that the letters be returned.

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, ought not to be violated; and no warrants can issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Civil Rights Law, § 8 (Consol. Laws, c. 6).

[2] It is thus the statutes of New York express the principle that English law received as the outcome of the prosecutions of Wilkes and Entick. Entick v. Carrington, 19 State Trials, 1030; Wilkes' Case, 19 State Trials, 1405; Boyd v. United States, 116 U. S. 616, 626, 6 Sup. Ct. 524, 29 L. Ed. 746. The immunity is not from all search and seizure, but from search and seizure unreasonable in the light of common-law traditions. If immunity is to be conceived of as a rule, there is one exception that has been established as firmly as the rule itself. The government may "search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." Weeks v. United States, 232 U. S. 383, 392, 34 Sup. Ct. 341, 344 (58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177). There is no dearth of illustrative precedents both in our own country and abroad. Dillon v. O'Brien, 16

Cox C. C. 245; United States v. Snyder (D. C.) 278 Fed. 650; United States v. Wilson, (C. C.) 163 Fed. 340; United States v. Welsh (D. C.) 247 Fed. 239; affirmed (C. C. A.) 267 Fed. 819; United States v. Murphy (D. C.) 264 Fed. 842; Woolfolk v. State, 81 Ga. 551, 562, 8 S. E. 724; State ex rel. Murphy v. Brown, 83 Wash. 100, 145 Pac. 69; Getchell v. Page, 103 Me. 387, 69 Atl. 624, 125 Am. St. Rep. 307, 18 L. R. A. (N. S.) 253; State v. Hasson, 149 Iowa, 518, 524, 128 N. W. 960; Closson v. Morrison, 47 N. H. 482, 484, 93 Am. Dec. 459; Houghton v. Bachman, 47 Barb. 388; 1 Bishop Crim. Pr. § 211; 9 Halsbury Laws of England, p. 309; 13 Id. p. 610.

[3] The right goes back beyond doubt to the days of the hue and cry, when there was short shrift for the thief who was caught "with the mainour," still "in seisin of his crime." 2 Pollock & Maitland History of English Law, 577, 578. The defendant, conceding the right, would, none the less, restrict the seizure to things subject to be taken under a search warrant when there is no arrest of the possessor. Search is then confined under our statute to property stolen or embezzled, or used as the means of committing a felony, or held with the intent to use it as an instrument of crime. Code Crim. Pro. § 792. We find no support for a like restriction upon search incidental to arrest. The books speak broadly of searching the person of the prisoner for anything "that may be of use as evidence upon the trial" (Thatcher v. Weeks, 79 Me. 547, 549, 11 Atl. 599), or for anything "that will aid in securing the conviction" (Holker v. Hennessey, 141 Mo. 527, 539, 42 S. W. 1090, 39 L. R. A. 165, 64 Am. St. Rep. 524; cf. Weeks v. United States, supra). If things of evidential value are to be excluded unless of such a nature as to be themselves the instruments of felony, the line may not be drawn between books and papers on the one hand and other articles on the other.

"There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized." Gouled v. United States, 255 U. S. 298, 309, 41 Sup. Ct. 261, 265 (65 L. Ed. 647).

[4] Letters to or from accomplices found on the person of a conspirator, and evidencing the plan or the execution of the conspiracy (cf. Dillon v. O'Brien, supra, at p. 248), will have to be returned to the prisoner for concealment or destruction if only the fruits or the implements of crime may be retained; but so also will a murderer's garments, stained with his blood in the course of the affray. Garments thus bespattered are typical examples of the things that precedent and practice permit the government to keep. Woolfolk v. State, supra; State v. Baker, 33 W. Va. 319, 10 S. E. 639. The basic principle is this: Search of the person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds as yet unknown for arrest or accusation. Entick v. Carrington, supra. Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion.

The distinction may seem subtle, but in truth it is founded in shrewd appreciation of the necessities of government. We are not to strain an immunity to the point at which human nature rebels against honoring it in conduct. The peace officer empowered to arrest must be empowered to disarm. If he may disarm, he may search, lest a weapon be concealed. The search being lawful, he retains what he finds, if connected with the crime. We may be sure that the law would be flouted and derided if, defeating its own ends, it drew too fine a point, after sanctioning the search, between the things to be retained and the things to be returned. How fine the point might be has illustration in the case before us. The defendant does not attack the legality of the arrest. The attack, if made, would have no basis in the record, for the facts stated in the affidavit of the prosecuting officer make out a prima facie case of the commission of a felony, with reasonable cause for the belief that the person arrested had committed it. Code Crim. Pro. § 177. Conceding the legality of the arrest, he concedes by implication the legality of the search. What he complains of is not the search but the seizure that succeeded it. The search, we are told, may lawfully be made, but what is found must be returned, though it be proof positive of guilt, unless at the same time it is an implement of felony. This is to carry the immunity beyond the bounds of reason. The question has been much debated, and may still be open in this state, whether the evidences of guilt will be turned back to the prisoner if the search producing them was lawless. 4 Wigmore, Evidence, § 2184; Weeks v. United States, supra; Gouled v. United States, supra; Burdeau v. McDowell, 256 U. S. 465, 41 Sup. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159; cf. People v. Adams, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675. A ruling favorable to the defendant would bring us to a position even more extreme, and would mean that the evidences

must be returned, though the search producing them was lawful. We will not go so far.

[5] The defendant invokes the protection of article 1, § 6, of the Constitution of the state: No person shall "be compelled in any criminal case to be a witness against himself." Privilege against self-incrimination is not identical with immunity from unreasonable search (4 Wigmore, Evidence, § 2263; People v. Van Wormer, 175 N. Y. 188, 195, 67 N. E. 299; Holt v. United States, 218 U. S. 245, 252, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138), though they have their points of approach and at times their point of contact (Gouled v. United States, supra). We are not required at this time to trace the dividing line between them. This much at least is certain. When the things received in evidence are the fruits of lawful search, the claim of privilege is hollow (Boyd v. United States, supra, at page 633 [6 Sup. Ct. 524]; Burdeau v. McDowell, supra). Search would be mere futility if what is found could not be used.

[6] A question of practice remains to be considered. The defendant in his petition does not state the contents of the letters. He says that they were written to him by named persons at stated times. He adds that they are private correspondence, "in no way connected with the crime." This statement is belied to some extent by the statement which goes with it that the seizure was in violation of the constitutional privilege against self-incrimination. The district attorney, answering the petition, is content, like the petitioner, with a statement of conclusions. The letters found on the defendant's person are said to be "necessary, material, competent, and relevant evidence in the above-entitled action for and in behalf of the people and against the defendant." If they have and can have no such effect or tendency, they are not to be retained. Rex v. O'Donnell, 7 C. & P. 138; Dillon v. O'Brien, supra, at page 248; Hubbard v. Garner, 115 Mich. 406, 73 N. W. 390, 69 Am. St. Rep. 580. The point is made that upon this record there has been a failure to prove their incriminating quality.

We think the record permits the retention of the letters to abide the outcome of the trial. The defendant asks the court by summary order to direct the conduct of its officer. Such a summary order may be refused, unless it is clear that the papers are unrelated to the controversy. The defendant states one conclusion, though lamely and with apparent inconsistency. The district attorney states another, no doubt with a due sense of the responsibility of his office. The trial will fix the right.

The order should be affirmed, and the question certified answered in the affirmative.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Order affirmed.

(237 N. Y. 159)

WESTCHESTER ELECTRIC R. CO. v. CITY OF MT. VERNON et al.

(Court of Appeals of New York. Dec. 27, 1923.)

1. **Street railroads ⇐28(4)—Sidings and connections permitted by franchise.**

A franchise to operate a railroad in the streets of a city is a franchise to operate it with sidings and connections reasonably necessary to the enjoyment of the grant; but a barn may not be so located that tracks will have to be laid on contiguous streets, if it is reasonably practicable to acquire a site along the route.

2. **Street railroads ⇐26(1)—Consent of city held to embrace consent to spur in front of lots.**

Where franchise is given to operate railroad on certain streets, and it is reasonably necessary to construct a spur on an intersecting street in order to connect with a barn, the consent of the city, under Const. art. 8, § 18, and Railroad Law, § 171, as owner of the lots bounded on the portion of the highway to be occupied by the proposed connection, is embraced in the consent already given.

3. **Mandamus ⇐174—Pleadings held to make issue of fact.**

In mandamus by a street railroad to compel granting of permit for laying of tracks leading to its proposed car barn in a street not covered by its franchise, where it alleged, and the city denied, that no suitable site could be obtained along the franchise route, there was an issue of fact to be tried, and a peremptory order was erroneous.

Hogan and Andrews, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

In the matter of the application of the Westchester Electric Railroad Company for an order of mandamus against the City of Mt. Vernon and others. From an order of the Appellate Division of the Supreme Court in the Second Department (206 App. Div. 708, 200 N. Y. Supp. 956), affirming an order of the Special Term granting a peremptory mandamus, the defendants appeal. Order modified, by granting an alternative in lieu of a peremptory mandamus, and, as modified, affirmed.

counsel), for appellants.

Alfred T. Davison and Addison B. Scoville, both of New York City, for respondent.

CARDOZO, J. In 1909 consent was given to the Westchester Electric Railroad Company by the local authorities of the city of Mt. Vernon to construct and maintain a street railroad on designated streets and avenues within the limits of the city. The consent was upon conditions including, with others, the payment by the company of a percentage of its receipts. In 1922 the car barn, then in use for many years, was found to be inadequate, and a tract of land on the southerly side of East Sixth street was acquired as the site for a new barn. East Sixth street is one of the streets included by the terms of the consent in the description of the route. A difference of grade makes it impossible, however, to connect the barn with the tracks by sidings or spurs, so laid as to enter the front of the abutting land. The site, if it is to be utilized for a barn, must be connected by a spur or siding running through Garden avenue for a space of 50 feet. Garden avenue is laid out at right angles to East Sixth street, and is not one of the streets or avenues included in the franchise. The railroad company applied to the common council of the city for a permit to lay tracks for the necessary distance. A peremptory mandamus order followed the refusal.

[1, 2] A franchise to operate a railroad in the streets of a city is a franchise to operate it with sidings and connections reasonably necessary to the enjoyment of the grant. Brooklyn Heights R. R. Co. v. City of Brooklyn, 152 N. Y. 244, 46 N. E. 509; City of New York v. Brooklyn City R. R. Co., 232 N. Y. 463, 470, 134 N. E. 533. The municipal authorities consent by implication to the incident in consenting to the principal. Even so, sidings and connections must not extend outside of the streets and avenues designated as the route, unless a reasonable necessity exists for the departure. Only then will consent to the departure be an implication reasonably derived from approval of the franchise. A barn may not be so located that tracks will have to be laid upon contiguous streets, if it is reasonably practicable to acquire a site along the route.

We do not say that the use of contiguous streets will be permitted, even for necessary connections, if the operation of the railroad is without the consent of the lot holders affected. Constitution, art. 3, § 18; Railroad Law (Consol. Laws, c. 49) § 171. Such consent was obtained in Brooklyn Heights R. R. Co. v. City of Brooklyn, supra, 152 N. Y. 246, the city of Mt. Vernon, which is itself the owner of the land bounded on that portion of the highway to be occupied by the proposed connection. The city has already consented to the operation of the road, and this for a valuable consideration. The land affected by the change is part of a single parcel, the corner of a block, fronting partly on the route and partly on the intersecting avenue. We are not dealing with a situation in which consents applicable to one parcel are attached or extended to another remote or disconnected. Problems that might then be offered must be solved when they arise. If the use of this site is justified by reasonable necessity, the consent may fairly be interpreted as covering the construction of the spur.

[3] We think there is a question of fact whether this necessity is present. The railroad company asserts that no site adapted to its needs can be obtained along the route. The city denies this, and points to sites available. There is an issue to be tried.

The order of the Appellate Division and that of the Special Term should be modified, by granting an alternative in lieu of a peremptory mandamus, and, as modified, affirmed, without costs to either party.

HISCOCK, C. J., and POUND, McLAUGHLIN, and CRANE, JJ., concur.

HOGAN and ANDREWS, JJ., dissent, and vote for reversal.

Ordered accordingly.

(237 N. Y. 304)

In re HENRY'S ESTATE.

(Court of Appeals of New York. Dec. 27, 1923.)

1. Taxation ⇐867(4)—Advances by nonresident partner used in firm business subject to transfer tax on his death.

Where a nonresident was a member of a resident banking partnership, and made advances to the partnership, which were used in the business, *held*, that on his death the balance due thereon was subject to a transfer tax under Tax Law, § 220, subd. 2, imposing a tax on the transfer by will, or intestate law of capital invested in business in the state by a nonresident doing business in the state as principal or partner.

2. Taxation ⇐895(7)—Commissions payable to executrix on property outside state not deducted in determining transfer tax on estate of nonresident decedent.

In appraising property of a nonresident decedent for transfer tax, the court erred in de-

ducting the proportion of the commissions payable to the executrix on property outside the state, which the net state estate bore to the entire estate wherever situated, where there was but one set of commissions payable for the whole estate, and allocation between the home jurisdiction and the state had been adequately made, when there was allowance for the part of the commissions computed upon the assets in the state.

Appeal from Supreme Court, Appellate Division, First Department.

In the matter of the transfer tax on the estate of George Garr Henry, deceased. From an order of the Appellate Division of the Supreme Court in the First Department (203 App. Div. 456, 197 N. Y. Supp. 63), modifying, and, as modified, affirming, an order of the Surrogate, both parties appeal. Order affirmed in part, and reversed in part.

Chas A. Sawyer and Carl A. de Gersdorff, both of New York City, for executrix of Henry.

A. Welles Stump and Charles A. Curtin, both of New York City, for State Tax Commission.

PER CURIAM. [1] We concur with the Appellate Division in its conclusion that the so-called advances made by the decedent to the partnership of which he was a member are "capital invested in business in the state by a nonresident of the state doing business in the state either as principal or partner." Tax Law (Cons. Laws, c. 60), § 220, subd. 2. This leads to an affirmance of that part of the order which is the subject of the appeal by the executrix.

[2] We think, however, that the Appellate Division erred in modifying the order of the surrogate by deducting the proportion of the commissions payable to the executrix on property outside of New York which the net New York estate bore to the entire estate wherever situated. The fact seems to have been overlooked that the surrogate had already allowed a deduction of commissions computed on the New York assets. The result of the modification is to make the allowance twice. A different question would be here if there had been ancillary administration in New York. In such a situation duplication of administration expenses might be necessary. The fact is, however, that there was but one set of commissions payable for the whole estate. Allocation between the home jurisdiction and New York was adequately made when there was allowance for the part of the commissions computed upon assets here. We deal now with the law as it stood in 1920. Since the order under review was made, the rule has been clarified by an amendment of the statute. Tax Law (Laws 1922, c. 432), § 221c.

The order of the Appellate Division, in so far as it modified the order of the surrogate, should be reversed, and the order of the surrogate affirmed, without costs to either party.

All concur.

Ordered accordingly.

(237 N. Y. 207)

JOANNES BROS. CO. v. LAMBORN et al.

(Court of Appeals of New York. Dec. 27, 1923.)

1. Judgment ⇐572(2)—Judgment dismissing complaint without leave to plead over bars subsequent action unless defects corrected.

A judgment sustaining a demurrer to the complaint and dismissing the complaint without leave to plead over, whether right or wrong, is a bar to another action brought for the same cause, unless the defects or omissions adjudged to be present in the one action are cured or supplied by the pleadings in the other.

2. Sales ⇐442(4)—Buyer who resells not required to pay damages to his buyer in order to recover damages for breach of warranty from seller.

A buyer who resells the goods at the same price or at a profit need not pay damages to person to whom he sells in order to recover damages for breach of warranty from seller, since a right of action measured by the difference between the value of goods as they are and the value as they ought to be accrues to buyer at once when the warranty is broken.

3. Sales ⇐442(2)—Measure of damages for breach of warranty stated.

The measure of damages for breach of warranty is the difference between the value of the goods as they are and their value as warranted.

4. Action ⇐46—Buyer's action for breach of warranty not properly united with cause of action for rescission.

Under Civil Practice Act, § 258, a cause of action for breach of warranty cannot be united with one based upon rescission of sale contract, since the remedy for damages for breach of warranty is based upon the affirmance of the contract.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Joannes Brothers Company against Arthur H. Lamborn and others. From judgment of the Appellate Division of the Supreme Court (206 App. Div. 792, 200 N. Y. Supp. 569) reversing an order of the Special Term and granting the defendant's motion for judgment on the pleadings, the plaintiff appeals. Affirmed.

George T. Hogg, of New York City, and John F. Martin, of Buffalo, for appellant.

Edward S. Bentley, of Lawrence, and Louis O. Van Doren and Alfred C. B. McNevin, both of New York City, for respondents.

CARDOZO, J. [1] Plaintiff's assignor elected to rescind a contract for the purchase of a quantity of sugar on learning that some of the bags were defective in grade. This action is brought for equitable relief decreeing the rescission, or if that relief be denied, then for recovery of the price on the basis of a rescission already declared. An earlier action for the same relief was dismissed on demurrer, the judgment of the Appellate Division proceeding on the ground that there could be no rescission in respect of part without re-tender of the whole. We do not go into the question whether the decision then made is to be reconciled with our ruling in Portfolio v. Rubin, 233 N. Y. 439, 135 N. E. 843. Possible grounds of distinction would call for consideration if the merits were before us. We think they are not here. The demurrer was sustained without leave to plead over, and the complaint dismissed. A judgment so rendered, whether right or wrong, is a bar to another action brought for the same cause, unless the defects or omissions adjudged to be present in the one action are corrected or supplied by the pleadings in the other. Gould v. Evansville & C. R. R. Co., 91 U. S. 526, 534, 23 L. Ed. 416; Cohen & Sons, Inc., v. Lurie Woolen Co., Inc., 232 N. Y. 112, 115, 133 N. E. 370; Civil Practice Act, § 482. We think the complaint before us exhibits the same case as the complaint passed upon before. Some attempt is made to enlarge the plaintiff's rights by allegations of usage. They are so vague and uncertain that they miss the desired effect, even if we assume the potency of usage to work so great a change. Gravenhorst v. Zimmerman, 236 N. Y. 22, 34, 139 N. E. 766; 2 Williston, Contracts, §§ 651–655. Treatment of a contract as divisible for some purposes is not equivalent to an agreement that divisibility for every purpose shall be regarded as a right. We conclude that the complaint, if insufficient as it stood before, is not helped by the amendments. The judgment in the former action stands, therefore, as a bar.

[2-4] The point is made that the plaintiff has a cause of action for damages, though rescission be impossible. The difficulty is that the complaint is not framed upon that theory. We give no weight to the defendants' argument that a vendee who resells at the price at which he buys must pay damages to the subvendee before damages for breach of warranty will be due from the vendor. The law is settled to the contrary, and this though the resale has been effected at a profit. Muller v. Eno, 14 N. Y. 597, 605; Atlantic Dock Co. v. Mayor, etc., of N. Y., 53 N. Y. 64; King v. Barnes, 109 N. Y. 267, 289, 16 N. E. 332; Denton v. Fisher, 102 Md. 386, 62 Atl. 627, 3 L. R. A. (N. S.) 465; Buckbee v. Hohenadel, 224 Fed. 14, 23, 139 C. C. A. 478, L. R. A. 1916C, 1001, Ann. Cas. 1918B, 88; Randall v. Raper, 4 Jur. (N. S.) 662; 96 Eng. Com. L. 84, 90. A right of action, measured by the difference between the value of the goods as they are and their value as they ought to be, accrues to the vendee at once when the warranty is broken. Such a remedy is based, however, upon the affirmance of the contract, and is inconsistent, and not properly to be united (Civil Practice Act, § 258), with one based upon rescission. We hold that rescission, and not affirmance, is the gravamen of the action. The complaint, covering 16 pages of the record, and abounding in statements of the evidence, is not easily confined to any one consistent theory. It is framed in seeming forgetfulness of the requirement that—

"Every pleading shall contain a plain and concise statement of the material facts, without unnecessary repetition, on which the party pleading relies, but not the evidence by which they are to be proved." Civil Practice Act, § 241.

Buried in this verbiage are phrases which, taken from their setting, and read in isolation, suggest a claim for damages. They do not transform the pleading when we read it as a whole. If the plaintiff has, or claims to have, a cause of action for damages, it can state in a few words the facts essential to a recovery. With all its plethora of pages, it does not state them yet.

The judgment should be affirmed with costs.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Judgment affirmed.

(237 N. Y. 211)

In re HYAMS' ESTATE.

(Court of Appeals of New York. Dec. 27, 1923.)

1. Courts ⇐198—Surrogate's Court has only such power as is conferred upon it by statute.

The Surrogate's Court is a court of limited jurisdiction and has only such power as is conferred upon it by statute.

2. Executors and administrators ⇐85(3) — Right of discovery as to decedent's property held not to extend to property purchased with proceeds thereof.

Under Surrogate's Court Act, §§ 205, 206, providing for a proceeding to discover "property which belonged to the deceased in his lifetime" and which is being withheld from the executor or administrator, the Surrogate's Court has no jurisdiction to determine the title or the right to the possession of property not owned by deceased in his lifetime, but purchased with the proceeds of the sale of property so owned, notwithstanding section 40.

Appeals from Supreme Court, Appellate Division, Second Department.

In the matter of the discovery of the assets of Henry Hyams, deceased. Proceeding by the Kings County Trust Company, as executor, against Sophie Hyams, widow of the deceased, to discover property of the deceased withheld by widow. From an order of the Appellate Division (205 App. Div. 893, 198 N. Y. Supp. 922; 206 App. Div. 670, 199 N. Y. Supp. 928) modifying a decree of the Surrogate's Court, and as modified unanimously affirming it, both parties appeal. Order of Appellate Division affirmed in part and reversed in part. Decree of Surrogate's Court in so far as reversed by Appellate Division affirmed.

The following questions were certified: "1. In the circumstances disclosed by this record, did the surrogate have jurisdiction to hear, try and determine the question whether there was a valid gift of the bonds enumerated in the petition other than the Westinghouse bonds?

"2. In a discovery proceeding under sections 205 and 206 of the Surrogate's Court Act, where negotiable securities which are the subject of the proceeding and itemized in the petition are not in the possession of the respondent at or subsequent to the commencement of the proceeding, and when the answer sets up and the evidence establishes such fact, and when the answer also sets up title as to such negotiable securities in the respondent at and prior to the death of the petitioner's estate, and when respondent holds other and totally distinct negotiable securities purchased with the proceeds of the sale of the securities so disposed of, has the surrogate jurisdiction in such proceeding to hear, try and determine the question of title to such securities so disposed of between the respondent and the petitioner's testate?"

Theodore Kiendl, Lee McCanliss, and Otis T. Bradley, all of New York City, for Sophie Hyams.

George E. Brower, of Brooklyn, for Kings County Trust Co.

McLAUGHLIN, J. This proceeding was instituted under sections 205 and 206 of the Surrogate's Court Act (L. 1920, c. 928, as amended 1922) for the purpose of ascertaining whether certain specified securities alleged to have belonged to the testator at the time of his death were held by his widow, Sophie Hyams.

Section 205 is entitled "Proceeding to Discover Property Withheld." It provides that an executor, administrator, or guardian may present to the Surrogate's Court from which letters were issued to him, a petition setting forth on knowledge, or information and belief, any facts tending to show that money or other personal property which should be delivered to the petitioner is in the possession or under the control, or within the knowledge or information of a person who withholds the same from him, or who refuses to impart knowledge or information he may have concerning the same, or disclose any other fact which will aid such executor, administrator, or guardian in making discovery of such property, and praying an inquiry respecting it, and that the respondent may be ordered to attend the inquiry and be examined accordingly, and to deliver the property if in his control. If the surrogate is satisfied, on the papers presented, that there are reasonable grounds for the inquiry, he must make an order accordingly, which may be made returnable forthwith, or at a future time fixed by the surrogate.

Section 206 provides that if the person directed to appear submits an answer denying any knowledge concerning, or possession of, any property which belonged to the deceased in his lifetime, he shall be sworn to answer truly all questions put to him touching the inquiry prayed for in the petition. If it appears that the petitioner is entitled to the possession of the property, the decree shall direct delivery thereof to him. If such answer alleges title to or the right to possession of any property involved in the inquiry, the issue raised by such answer shall be heard and determined and a decree made accordingly.

The Kings County Trust Company, as executor under the last will and testament of Henry Hyams, deceased, presented a peti-

tion to the Surrogate's Court, in which it alleged that $2,000 Westinghouse Electric & Manufacturing Company bonds, and $30,000 United States securities owned by the deceased at the time of his death, were in the possession of Mrs. Hyams, who withholds them from it, and asked that an inquiry be held with respect thereto.

Mrs. Hyams interposed an answer, in which she alleged that the securities in question belonged to her; that they were given to her by her husband; that of such securities she has retained, and still has, the Westinghouse bonds; that the other securities she had sold prior to the institution of this proceeding and with the proceeds derived from the sale purchased other securities, which she now holds.

After a hearing before the surrogate, he held that the Westinghouse bonds were given to Mrs. Hyams by her husband prior to his death; and dismissed the proceeding as to the other securities, declining to make any direction in the matter, evidently upon the theory that the Surrogate's Court did not have jurisdiction to pass upon the question.

Upon appeal the Appellate Division unanimously affirmed the decree of the Surrogate's Court in so far as it related to the Westinghouse bonds, and reversed in so far as it dismissed the proceeding as to the other securities, and sent the matter back to the Surrogate's Court with directions to determine whether these securities were a valid gift inter vivos. The trust company appeals to this court as a matter of right from so much of the order of the Appellate Division as affirmed the determination of the Surrogate's Court relating to the Westinghouse bonds. Mrs. Hyams appeals, by permission, from the order of the Appellate Division in so far as it reversed the decree of the Surrogate's Court, and remitted the matter to it to determine whether she had title to the other securities.

[1,2] Under the sections of the Surrogate's Court Act to which reference has been made, it will be observed that the proceeding is limited to an inquiry concerning "money or other personal property" which should be delivered to the executor. At the conclusion of the hearing the decree terminating the proceeding can only direct the delivery of specific money or personal property which belonged to the deceased in his lifetime. If such property has been exchanged for other property, or sold, then the Surrogate's Court has no power to direct that the same be turned over to the executor. Matter of Heinze, 224 N. Y. 1, 120 N. E. 63. The Surrogate's Court is a court of limited jurisdiction. It has only such power as is conferred upon it by statute. It has not been given power to determine the title, or the right to possession, of any property other than that which belonged to the deceased in his lifetime.

It is suggested that when sections 205 and 206 are read in connection with section 40 of the Surrogate's Court Act, it has the power to determine all matters necessary to be determined in order to make a full, equitable, and complete disposition of the matter involved. Section 40 does not enlarge the powers of the Surrogate's Court in so far as the same relate to a discovery under sections 205 and 206. These sections point out specifically what must be done to obtain the discovery. An inquiry may be had concerning specific personal property. The inquiry is in terms limited to specific personal property which was owned by the decedent in his lifetime, and before a decree can be entered under section 206, it must appear that the petitioner is entitled to the possession of the specific property withheld. No decree can be entered directing the disposition of other property or proceeds derived from property in case a sale has been made. The right of an executor or administrator to compel discovery of a decedent's property is not of recent origin. It has existed for many years, as indicated by legislation and decisions upon the subject. It was not, however, until the amendment of 1914 (chapter 443) that title to property, the possession of which was sought, could be tried. If a verified answer were interposed denying the right to the possession of the property specified, then until the amendment of 1914 the proceeding had to be dismissed. Matter of Walker, 136 N. Y. 20, 32 N. E. 633.

The remedy now given does not apply to the case before us. Its primary purpose is still inquisitorial. It is confined exclusively to property owned by the deceased in his lifetime, and it does not relate or apply to any other property. The securities, other than the Westinghouse bonds, Mrs. Hyams sold or exchanged. The securities which she now has did not belong to the testator. They were not owned by him at the time of his death. To say that the executor can now follow the proceeds derived from the sale of the securities which the testator did not own at the time of his death, and then impress a trust upon such securities, is to give to the Surrogate's Court power which can nowhere be found in the statute. That is not an issue to be litigated in a proceeding of this character. The right to the securities must be determined in a proper proceeding instituted for that purpose.

The order of the Appellate Division, therefore, in so far as it affirmed the decree of the Surrogate's Court relating to the West-

inghouse bonds, is affirmed and in so far as it reversed the decree of the Surrogate's Court and remitted the matter to it to determine the title of other securities, is reversed and the decree of the Surrogate's Court on that subject affirmed, with costs payable out of the estate to Sophie Hyams in this court and the Appellate Division.

Questions certified. No. 1 answered in the negative, and No. 2 not answered.

HISCOCK, C. J., and HOGAN, POUND, CRANE, and ANDREWS, JJ., concur.

CARDOZO, J., not voting.

Ordered accordingly.

(237 N. Y. 218)

ALTMAN et al. v. OZDOBA et al.

(Court of Appeals of New York. Dec. 27, 1923.)

Evidence ⇐138—On issue of forgery, evidence showing indorsement on another note executed in same transaction was forged held competent.

In an action on a promissory note against an indorser whose defense was forged indorsement, evidence showing that the indorsement of another upon another note given as part of the same transaction, by the same maker, was also a forgery, *held* competent, as it was competent to show the whole plan of the maker in procuring and in giving the notes.

Hiscock, C. J., and Andrews, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Harry Altman and Benjamin Grodin, copartners doing business under the firm name and style of Altman & Grodin, against Isaac Ozdoba and Freda Ozdoba, copartners doing business under the firm name and style of Ozdoba Bros. From a unanimous judgment of the Appellate Division, First Department (206 App. Div. 610, 198 N. Y. Supp. 898), affirming two judgments of the Trial Term entered upon a verdict of a jury in favor of plaintiffs, defendants appeal by permission. Reversed, and new trial granted.

Zalkin & Cohen, of New York City (Samuel Greenbaum and Moses Cohen, both of New York City, of counsel), for appellants.

I. Gainsburg, of New York City (Chester B. McLaughlin, Jr., of Port Chester, of counsel), for respondents.

CRANE, J. The firm of Altman & Grodin had a lawsuit with the firm of Wilsker & Smoller, which came on for trial in the Supreme Court in October of 1920. After the case had been tried for two or three days it was settled for the sum of $5,000, to be paid according to the terms of a stipulation signed by the attorney for the plaintiffs and the attorney for the defendants. This stipulation recited that the action was to be settled for $5,000 "payable as follows: By two promissory notes made by the defendants herein for the sum of $2,500 each, dated October 23, 1920, and due, respectively, February 2, 1921, and February 25, 1921, and indorsed by Ozdoba Bros. which notes when paid shall be in full payment of all claims and demands which the plaintiffs have against the defendants; and it is agreed that upon the payment of said notes general releases shall be exchanged between the parties."

The notes were given, but were not paid. These two actions, which have been consolidated on appeal, were brought against the indorsers, Ozdoba Bros. After a trial and verdicts for the plaintiffs separate judgments were entered against the defendants for the full amount of the notes with interest, and separate appeals were taken to the Appellate Division and to this court. For the purposes of this opinion the two actions will be treated as one appeal, as there is but one record, and the same evidence applies to both notes.

The defense set up by the Ozdoba Bros. was forgery. They denied having signed the two notes as indorser, and claimed to have no interest whatever in the litigation between Altman & Grodin and Wilsker & Smoller. There was no direct evidence upon the trial that either member of the firm of Ozdoba Bros. indorsed the notes or ever authorized them to be indorsed. No one saw Ozdoba or his partner sign their name. There was no comparison of handwriting with any recognized or admitted standard of handwriting.

The plaintiffs came into the possession of the notes in this way: Louis B. Brodsky was the attorney for Wilsker & Smoller, and as such signed the stipulation settling their action. He testified that the day after the case had been marked settled and discontinued in court he found two notes on his desk put there in the regular course of business. He sent both of them over to Mr. Gainsburg's office. Gainsburg was the attorney for Altman & Grodin. Brodsky said:

"They purported to have two different signatures on the back of them, one by Ozdoba Bros., and the other, by Bernstein & Markus.

"Q. They were promptly returned? A. They were.

"Q. And what did you do thereafter with those two notes, one bearing Ozdoba's indorsement and the other, did you say Bernstein & Markus? A. I called upon Wilsker & Smoller, delivered the message delivered to me by Mr. Gainsburg.

"Q. What did you do with the two notes, the first two notes bearing one Ozdoba Bros.' indorsement and one Bernstein & Markus? A. I believe I returned one of them.

"Q. Which one? A. The one with the Bernstein & Markus' indorsement.

"Q. To whom? A. To Messrs. Wilsker & Smoller. * * * I received another note with a signature, with a signature purporting to be of Ozdoba Bros., indorsed on the back of the note: 'Notes made by Wilsker & Smoller.'

"Q. How soon after you returned the note containing the name of Bernstein & Markus on the reverse sides thereof did you receive this note in place of it with Ozdoba Bros.' name on the back of it? A. I should say two or three days.

"Q. You have used the expression with reference to both notes, one referring to Ozdoba Bros., purporting to contain or have the name of Ozdoba Bros. All that you know was that the name of Ozdoba Bros. appeared there? A. That is correct. * * * I delivered them to Mr. Gainsburg."

As before stated, the issue being tried was the genuineness of Ozdoba Bros.' indorsement. They denied their signature, and any interest in the litigation, or in the plaintiffs. They denied having indorsed the notes or having authorized anybody else to do so.

The defendants called Jacob Bernstein, of the firm of Bernstein & Markus, and asked him this question:

"Did you in the latter part of October, 1920, indorse a note made by Wilsker & Smoller for $2,500 payable to Altman & Grodin?"

The objection of the plaintiff's counsel to this question was sustained, and the answer excluded. The exception to this ruling presents the only serious question upon this appeal, and one that has given us much serious thought and attention.

Having given the facts in this case, we may put the question which is thus presented in this form: In an action upon a promissory note against an indorser, where the indorsement is alleged to be a forgery, is it permissible to show that other indorsements upon the same or other notes linked to and part of the original transaction coming from the same person were also forgeries? We think that both reason and authority justify the conclusion that such evidence is competent. The fact that this is a civil case instead of a criminal prosecution plays no part. In both classes of action the fact in this particular to be established is the same, to wit: Is the signature a forgery? To prove it a forgery the same kind of evidence may be received in the one case as in the other. It would be strange, indeed, if one branch of the court in a criminal case should permit certain evidence to establish the fact that a signature was a forgery and exclude the same evidence in a civil part when an action was brought upon the note. There is neither reason nor logic in such an arbitrary distinction. In fact, it is stated in section 392 of the Code of Criminal Procedure that the rules of evidence in civil cases are applicable also to criminal cases except as otherwise provided in the Code. It may be, and no doubt is, that the evidence which is sometimes received in criminal actions in order to show scienter or intent would be immaterial at times in civil cases where knowledge and intent are unnecessary to sustain the cause of action. But upon the issue of the fact of forgery, that is, whether or not the signature is genuine, the rules in civil and criminal cases are alike, and should be.

In the first instance two notes were given by Brodsky in settlement of the litigation with the plaintiffs. One was signed by Bernstein & Markus, presumably, and was returned to Wilsker. In its place a second note was given presumably indorsed by Ozdoba Bros. This note of Bernstein & Markus came from Wilsker, as did those indorsed by Ozdoba Bros. It was part of the same transaction, and used for the same purpose. It was part of the alleged scheme and plan of Wilsker to settle his litigation in the Supreme Court and procure delay in payment of the amount due. The fact that the name of Bernstein & Markus appeared upon a second note is no different in effect than if their name appeared under the signature of Ozdoba Bros., as indorsers on the same note. Under such circumstances, when the signature of Ozdoba Bros. is denied and claimed to be a forgery, it is competent to show the whole plan and scheme of the man procuring and giving the notes, and to give evidence establishing the forgery of all signatures and all indorsements. It has the probative effect of substantiating the claim of Ozdoba Bros., that their signature is likewise a forgery. This we believe to be a rule well established by the authorities.

In Boyd v. Boyd, 164 N. Y. 234, 241, 58 N. E. 118, 120, O'Brien, J., said:

"In all cases where it is alleged that a party has acquired the property of another through some fraudulent device, the charge may be supported by proof of contemporaneous acts of the same character."

And again:

"Proof of other and similar fraudulent acts is admissible when it appears that there is such a connection between the transactions as to authorize the inference that both frauds are part of one general scheme, and where transactions of a similar character by the same party are closely connected in point of time, and

otherwise, the inference is reasonable that their purpose and origin are the same."

This same rule was recognized and more fully explained in People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

In People v. Duffy, 212 N. Y. 57, 66, 105 N. E. 839, 841 (L. R. A. 1915B, 103, Ann. Cas. 1915D, 176) we find it stated that the law—

"permits proof of a plan or scheme to commit a series of crimes including the one for which the accused is being tried, and as tending to show the existence of such plan or scheme it allows testimony of the commission of crimes other than the one charged, but so related in character, time and place of commission as to tend to support the conclusion that there was a plan or system which embraced both them and the crime which is charged."

The rule is by no means confined to criminal cases. See Boyd v. Boyd, supra; Illch v. Mutual Benefit Life Ins. Co., 119 App. Div. 695, 104 N. Y. Supp. 297; Rankin v. Blackwell, 2 Johns. Cas. 198; Hall v. Naylor, 18 N. Y. 588, 75 Am. Dec. 269. Miller v. Barber, 66 N. Y. 558; Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 Pac. 1119, 1 L. R. A. (N. S.) 1075, 107 Am. St. Rep. 823.

In Faucett v. Nichols, 64 N. Y. 377, 383, we find an application of this principle of probative force to circumstances similar to those in this case. The action was brought against an innkeeper to recover for the loss of plaintiff's horses, carriage, harness, etc., which were burned in the barn, plaintiff being at the time a guest. The defense attempted to be established was that the fire was the work of an incendiary, and that it occurred without defendant's negligence. Such defense was within the provisions of the Innkeeper's Act. Chapter 658 of the Laws of 1866. The defendant offered to show that an attempt was made upon the same night to fire a building within 40 rods of defendant's barn where buildings were close and compact, and that kerosene, paper, and other combustibles were used in that attempt. The evidence was excluded. This court, speaking through ANDREWS, J., considered this error, and said:

"The defendant called one Trenchard as a witness, and offered to show by him that on the next street west, within forty rods of the barn which was burned, an attempt was made during the same night to fire a building, at a point where the buildings were close and compact, and that kerosene, paper and other combustibles were used in the attempt. This evidence was objected to as immaterial, and it was excluded by the judge. I am of opinion that the evidence offered was admissible. The offer was to show an actual attempt on the same night to burn another building in the same village, by the use of similar means, as the evidence on the part of the defendant tended to show, were used in firing the barn.

"The fact in issue, to which this evidence related, was whether the defendant's barn was fired by an incendiary. If there had been a series of incendiary fires in that village previous to and near the time of the fire in question, could not this fact have been shown in aid of the defense? It cannot be denied that in connection with the other circumstances proved, it would have produced upon the mind a strong conviction that the fire in the defendant's barn was also caused by an incendiary. * * *

"There is no fixed and definite rule by which it can be determined whether a collateral fact is so remote as to be inadmissible to support the principal fact sought to be established. The question must, to a considerable extent, be decided in each case, on its own circumstances, and we are of opinion that the proof offered, to which we have referred, ought to have been admitted."

We think that within this rule of evidence which has been applied in both civil and criminal cases the indorsement of Bernstein & Markus was so much a part of the original transaction and of a scheme and plan by Wilsker to cheat and defraud by forgery as to make admissible the testimony of Bernstein that his signature was forged. It would have some tendency to prove that the indorsement of Ozdoba Bros. was also forged.

The case of Costelo v. Crowell, 139 Mass. 588, 2 N. E. 698, has been called to our attention as bearing on this question. In an action on a promissory note the defendant contended that it had been forged by the plaintiff, and asked a witness whether he knew anything about the plaintiff making imitations of notes by a tracing, whether the plaintiff had told him anything about making such imitations, and whether the plaintiff had told him how he could make such imitations by means of a lamp and a table. This evidence the Supreme Judicial Court of Massachusetts determined had been rightly rejected. There was nothing in these visionary notes to show a common scheme or plan involving the note in suit. The other tracings or purported forgeries were in no way connected with the main transaction. The facts clearly did not bring the case within the rule which we have here enunciated.

We think, therefore, that very material evidence was improperly excluded by the trial court, and that the judgments recovered below must be reversed, and a new trial granted.

We have not overlooked the point made regarding the admission in evidence of the stipulation between the attorneys for Altman & Grodin and Wilsker & Smoller for the set-

in settlement were to be indorsed by Ozdoba Bros. Whether such a statement was competent evidence in an action on the notes against Ozdoba Bros., who had nothing to do with the making or giving of the stipulation, we do not consider, as there was no proper objection made or exception taken to this evidence.

Wherefore the judgments appealed from must be reversed, and a new trial granted, with costs to abide the event.

HOGAN, CARDOZO, and POUND, JJ., concur.

HISCOCK, C. J., and ANDREWS, J., dissent.

McLAUGHLIN, J., not sitting.

Judgments reversed, etc.

(237 N. Y. 227)

HUSSEY v. FLANAGAN.

(Court of Appeals of New York. Dec. 27, 1923.)

1. Trover and conversion ⇐16—Promoter receiving securities held liable in conversion for other promoter's share.

Where a written agreement between persons interested in the construction of a canal, and in any stocks, bonds, or profits received, provided that on the completion of pending negotiations between defendant and third parties defendant would deliver to plaintiff for his services a certain portion of the securities defendant expected to receive from the third party, plaintiff had such an interest in the securities received that on defendant's failure to deliver his pro rata share of bonds and stock received he could sue in conversion; no accounting being necessary to fix the amount of the securities, either on the theory of repudiation of agency and trusteeship or on that of equitable assignment.

2. Trover and conversion ⇐66—Whether promoter received securities in pending negotiations entitling plaintiff to share held question of fact.

In action between persons interested in the construction of a canal for conversion of stocks and bonds received from third parties on sale of interests and rights, plaintiff being entitled to share pro rata any securities obtained under negotiations pending at the time a certain contract was executed between the promoters, whether the securities in question were received by defendant under and in consummation of such negotiations *held* a question of fact.

3. Evidence ⇐84 — No presumption capital stock worth par.

There is no presumption that the par value of capital stock is its actual value.

Presumptions are supposed to rest on and express the results of actual experience.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Levi Hussey against De Witt C. Flanagan. From a judgment of the Appellate Division (206 App. Div. 187, 200 N. Y. Supp. 549), affirming a judgment of the Trial Term, entered on a directed verdict, defendant appeals. Judgment reversed, and a new trial granted.

Irwin Untermyer, Isadore Shapiro and Clarence V. Opper, all of New York City, for appellant.

Richard T. Green and John L. Feeny, both of New York City, for respondent.

HISCOCK, C. J. This is an action to recover for the alleged conversion by defendant of certain securities to which the plaintiff claims that he was entitled.

The controversy springs out of a project for the construction, financing, and completion of what was known as the Cape Cod Ship Canal. The plaintiff, defendant, and one Dodge, in a manner not very definitely disclosed, had become interested in this project, and apparently had had various agreements amongst themselves as to their respective shares in the fruits which might be realized from the scheme. For the purpose of reducing these agreements to a final and definite form they executed a written contract in March, 1906, which was to define their rights. This agreement is so important in determining the present controversy that it will be necessary to quote or summarize it with some detail.

It recited that the parties "had various agreements amongst themselves as to the respective shares of the stocks, bonds, and profits which they should receive from any sale" of the above-mentioned ship canal; that "negotiations are now pending and almost completed between" the defendant and responsible parties who were expected to finance the construction of the canal, and then it was "agreed that in the event (and only in that event) that the negotiations now pending between De Witt C. Flanagan and the parties hereinbefore indicated for the financing and construction of the Cape Cod Ship Canal shall become consummated, that, in lieu of the compensation and share which the said Hussey was entitled to receive under said prior contracts, he shall receive from the said De Witt C. Flanagan pro rata as and when the securities shall be paid to the latter by the purchasers or builders of

less and until the securities are so received by said Flanagan, $100,000 of the full paid capital stock of the Boston, Cape Cod & New York Canal Company, and $15,000 par value of a total issue of not exceeding $6,000,000 of the first mortgage bonds of said Canal Company from and out of the securities so received and not otherwise." Provision was further made for the organization of a holding company, which is not material; and that on payment to Hussey of the stock and bonds above provided for they should "be accepted by him and be in full payment and discharge of any and all claims, contracts, and agreements which he may have or may have had" with either of the other parties to said agreement. Flanagan on his part agreed "to make delivery of said stock and bonds to said Levi Hussey, his legal representatives, or assigns, at the times hereinafter specified out of the securities received by him and not otherwise."

Several years later the defendant received from August Belmont & Co., who had become the purchasers and owners of the rights originally possessed by the individuals hereinbefore referred to in this project, and in payment therefor, a large amount of bonds and stock, but he refused to deliver or pay over any thereof to the plaintiff, and there then resulted this action for conversion of what plaintiff claimed was his share. Aside from details of the written contracts between defendant and Belmont & Co., under which the latter secured their rights from defendant, and about which there is no dispute, it is important to be noted that the transaction was regarded and described as a sale by defendant to Belmont & Co. of various rights, options, franchises, etc.

Out of the action which has been brought and its method of trial there arise three important questions. These are the ones: First, whether plaintiff had any such interest or rights in the securities paid to defendant that he can maintain an action for conversion; second, whether as matter of law the securities received by defendant were so received in consummation of the negotiations described as pending for the financing and construction of the Cape Cod Ship Canal at the time the agreement between plaintiff, defendant, and Dodge was executed, because it was in that event only that the defendant became obligated to give any securities to plaintiff; and, third, whether the trial court erred in holding that there is a presumption that the par value of capital stock is its actual value.

[1] The first question which we have stated may not be entirely free from debate, but we have reached the conclusion that, under which we have quoted, the plaintiff did have such a right in the securities received by defendant, assuming that his claim was sustained in other respects, that an action for conversion will lie. As fully appears by the agreement from which quotations have already been made, plaintiff, defendant, and another were interested in the plan to construct the canal, and their respective interests in the stocks, bonds, and profits which should be received and accrue from said project had already been recognized by various agreements. Under these circumstances plaintiff in substance conferred upon defendant the right to negotiate for the construction of said canal and the sale of the rights involved therein, and then it was provided that, in case certain negotiations therefor were consummated, plaintiff was to receive from defendant "pro rata as and when the securities shall be paid to the latter by the purchasers or builders of said Canal or otherwise; but in no event unless and until the securities are so received by said Flanagan," certain securities, "from and out of the securities so received and not otherwise," and Flanagan agreed "to make delivery of said stock and bonds to said Levi Hussey * * * out of the securities received by him and not otherwise." And, as has already been pointed out, defendant had by virtue of the authority conferred upon him proceeded on the theory of selling to Belmont & Co. rights which had been acquired in the canal project, and received in return therefor certain securities.

It seems to us reasonably clear that the meaning of all these contracts was that as between the plaintiff and defendant the latter was authorized to sell and convey certain interests and rights which belonged to the former, and to receive therefor a certain specified portion of the purchase price as the agent and trustee of the plaintiff. Of course, if this is so, no accounting being necessary to fix the amount of said securities, plaintiff became entitled to his specified portion thereof when received by the defendant, and the defendant, when he repudiated his agency and trusteeship, and refused to deliver to plaintiff the securities which belonged to him, became guilty of conversion. Smith v. Frost, 70 N. Y. 65; Doyle v. Burns, 123 Iowa, 488, 497, 99 N. W. 195.

We think that the plaintiff's right to recover in conversion under the various contracts might be sustained upon another ground. We think that defendant's agreement to receive and pay over to plaintiff certain securities which might be received by him on the sale of plaintiff's rights might be regarded as an equitable assignment, and

that when the securities were actually received this assignment attached thereto and gave to plaintiff such a right and interest in the securities that he could maintain an action for conversion against defendant when the latter withheld the same. Fairbanks v. Sargent, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475; Hinkle Iron Co. v. Kohn, 229 N. Y. 179, 128 N. E. 113; Barnes v. Alexander, 232 U. S. 117, 34 Sup. Ct. 276, 58 L. Ed. 530.

[2] We then come to the question whether these securities were received by defendant under and in consummation of negotiations which were pending at the time the contract between plaintiff, defendant, and Dodge was executed, for as has been stated it was in said agreement expressly and plainly provided that plaintiff should be entitled to a share of securities only in the event that the negotiations then pending were consummated. The trial judge by his direction of a verdict held as matter of law that the securities were the product of the negotiations then pending, and in this respect we think he erred. We think it was a question of fact rather than one to be decided as a matter of law.

The only negotiations shown to have been pending at the time the agreement of these parties was executed for the financing or consummation of the canal project in which they had become interested were those pending with Belmont & Co. An agreement had been executed between the latter and defendant in February, 1906; that is, the month before the agreement between these parties was executed. But from a letter which appears in the record modifying this agreement, and from the fact that no negotiations could have been referred to "as pending" other than those with Belmont & Co., the parties apparently regarded the contract with the latter as still in the category of an inchoate arrangement. There certainly was a cessation of proceedings under this contract, and correspondence between Belmont or his representatives and defendant or his representatives on its face permitted the inference that the negotiations represented by and embodied in the agreement referred to had been terminated. Moreover, in 1907 a new agreement in form was made between Belmont & Co. and Flanagan for carrying out and consummating the project of the canal, but again operations under that agreement apparently were stopped by the panic of 1907, and in 1909 another agreement was made, which, however, referred to and was intended to make certain modifications in the agreement of 1907, and under which defendant received a different amount of securities than provided for in the original agreement of 1906.

In view of these circumstances we do not think that it can be said as matter of law that the agreement of 1909 under which defendant received the securities was a continuation and consummation of the agreement of 1906, but that it was for a jury to say whether the agreement of 1906 had been fully, completely, and in good faith terminated and ended, or whether operations under it had merely sunk temporarily into a condition of dormant suspension, and from which they were resurrected and put into new activity and final consummation by the agreement of 1907 as continued and modified by the agreement of 1909.

This brings us to the final question. The securities for alleged conversion of which plaintiff recovered consisted of bonds and stock issued to a construction company for its services in constructing the canal. There was no evidence that the stock was worth par, but the trial court held that there was a presumption to this effect. While there may be some doubt whether defendant's counsel properly raised a question as to the correctness of this view, we think that it is desirable to consider it, and thus prevent the possibility of error on another trial.

[3, 4] While there undoubtedly is a presumption that fixed obligations of an apparently solvent and going concern are worth par (Western R. R. Co. v. Bayne, 75 N. Y. 1, 5; Booth v. Powers, 56 N. Y. 22, 29; Met. Elev. R. Co. v. Kneeland, 120 N. Y. 134, 144, 24 N. E. 381, 8 L. R. A. 253, 17 Am. St. Rep. 619), we know of no such presumption in respect of the shares of ordinary capital stock. Such a presumption would run counter to the fact a large proportion of the time and presumptions are supposed to rest upon and express the results of actual experience. Accordingly, as would be expected, we find the rule settled directly to the contrary of what was held. Griggs v. Day, 158 N. Y. 1, 52 N. E. 692; Virginia v. W. Virginia, 238 U. S. 202, 35 Sup. Ct. 795, 59 L. Ed. 1272; Cooke on Corporations [6th Ed.] vol. 2, § 581; Sutherland on Damages [4th Ed.] vol. 4, § 1113.

The judgment appealed from should be reversed, and a new trial granted, with costs to abide event.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Judgment reversed, etc.

(227 N. Y. 326)

E. GREENFIELD'S SONS, Inc., v. FRAME et al.

(Court of Appeals of New York. Dec. 27, 1923.)

1. Sales ⇐87(3)—Evidence held to establish that chocolate sold was intended for export.

Evidence *held* to establish that chocolate sold under a contract was intended by both parties for export, so as not to be subject to 5 per cent. excise tax on sales for domestic use under Revenue Act U. S. tit. 9, § 900, subd. 9 (U. S. Comp. St. Ann. Supp. 1919, § 6309½a).

2. Sales ⇐58—Contract held to disclose goods were intended for export.

A written contract for the purchase of 50 long tons of chocolate "packed in cases strapped for export, delivery fas [free alongside steamer] New York, terms, cash against documents," and which provided for the giving of "shipping instructions," *held* to disclose on its face that the goods purchased were intended for export, so that the buyer's failure to export, subjecting the seller to a federal tax, was a breach of the contract.

Appeal from Supreme Court, Appellate Division, First Department.

Action by E. Greenfield's Sons, Inc., against Gregor M. Macgregor Frame and Ernest L. Prior, trading, etc., as Frame & Co. From a judgment entered on a nonunanimous order of the Appellate Division, First Department (206 App. Div. 752, 200 N. Y. Supp. 921), which affirmed a judgment of the Trial Term, entered on a verdict directed by the court in favor of defendants, dismissing the complaint on the merits, plaintiff appeals. Reversed, and judgment directed for plaintiff.

Samuel J. Rawak, of New York City, for appellant.

Stephen Van Wyck, of New York City, for respondents.

HOGAN, J. The plaintiff in this action sought to recover from defendants the sum of $1,904 and interest from June, 1920, which amount plaintiff was required to pay to the federal government as a revenue tax upon goods sold by it to defendants as asserted for exportation, but actually sold by defendants for the domestic trade. At Trial Term, at the close of the evidence presented by both parties, counsel for each party moved for a direction of a verdict. The trial justice directed a verdict for defendants, to which ruling an exception was duly noted. From a judgment entered upon the directed verdict, dismissing the complaint upon the merits as matter of law, an appeal was perfected to the Appellate Division, where the judgment below was affirmed by a nonunanimous decision. From such determination plaintiff appealed to this court.

On September 8, 1919, a broker's sold note in the form following was executed between the parties:

"U. S. Food Administration License No. G20689 R. B. & Co.

"Sept. 8th, 1919.

"Sold for account of Messrs. E. Greenfield's Sons, 95 Lorimer St., Bklyn, to Messrs. Frame & Co., 95 Wall St., N. Y.

"Quantity—50 long tons (packed in cases strapped for export—in ½ lb. cakes, wrapped in wax paper and labeled).

"Article—Chocolate.

"Quality—Sweetened.

"Price—34¢ per lb. fas steamer New York.

"Delivery during November, 1919.

"Terms: Net cash against documents.

"Shipping directions.

"Cartage.

"Rutger Bleecker & Co.,
"Wolf,
"Brokers."

A previous contract of sale and purchase of like nature was made between the same parties five days previous, viz. on September 3, 1920. The only material difference in the two contracts being the quantity which in the sale and purchase of September 3d, was 100 tons, the price, and the time of delivery, the latter to be during October, 1919.

The federal Revenue Act of 1918 (title 9, § 900, subd. 9, 40 Stat. 1122 [U. S. Comp. St. Ann. Supp. 1919, § 6309½a]) imposed a tax of 5 per cent. on the sale price of chocolate payable by the manufacturer. Section 1310 (c) of the same act (U. S. Comp. St. Ann. Supp. 1919, § 6371½k) provides that under rules and regulations to be adopted by the Commissioner of Internal Revenue, the tax imposed should not apply in respect to articles (chocolate) sold for export and in due course so exported. The rules and regulations adopted by the Commissioner of Internal Revenue (article 42) provide:

"The tax does not attach to the sale of an article which is sold by the manufacturer for export and in due course so exported by the purchaser. Where a manufacturer at the time an article is sold * * * has in his possession an order or contract of sale showing in writing * * * that the purchaser is buying the article in order to export it prior to its being used or subjected to further manufacture, there is a presumption that the sale of the article is exempt from tax, as an export sale, and the manufacturer may for a period of six months from the date of sale or shipment rely on such presumption."

The courts below in effect held that the contract of September 8th between the par-

ties was not a contract of sale and purchase of goods mentioned therein for the purposes of export, and such interpretation of the contract was urged by counsel for respondents upon the argument in this court. The correctness of such determination presents the fundamental question to be considered upon the present appeal. Proceeding to an interpretation of the contract of September 8th, two propositions are to be considered: (1) In the absence of an express stipulation in the contract on the part of defendants to export the goods, was it within the contemplation of the parties when the contract was executed that plaintiff was selling and defendants purchasing the goods for export? (2) Does the written contract between the parties disclose that defendants purchased the goods with the intention to export them prior to the same being used or subjected to further manufacture?

[1] The answer to the first proposition involves an examination of the evidence contained in the record, in relation to which there was no material dispute, bearing upon the nature of the business in which the parties were engaged, the facts and circumstances surrounding the dealings between them, prior dealings under a like contract, the facts in connection with the dealings and acts of the parties under the contract in question and the business to which the same related. Plaintiff is a manufacturer of chocolate. Defendants are exporters and as such had an agent for the sale of goods in Belgium and had sold and exported to that country a large quantity of chocolate. They had on September 3d, five days prior to the date of the contract in controversy, purchased of plaintiff under a contract practically identical in terms with the contract under review, save as already pointed out, a large quantity of chocolate, and exported some 60 tons to customers in Belgium. The parties, exporters and manufacturer, respectively, not only presumptively, but actually, had knowledge that chocolate sold and purchased for export and exported in due course was exempt from a revenue tax under the federal statute, while if sold and purchased for domestic consumption the tax would attach.

Under the contract of September 8th, plaintiff was obligated to make delivery of the chocolate and defendants obligated to accept delivery of the same by giving shipping instructions during November. Defendants alert to that fact had sold the chocolate in the latter part of October to a customer in Antwerp, Belgium, presumably for export not earlier than early in December after the delivery by plaintiff in November and were then in a position to order delivery of the 50 tons purchased from plaintiff for export to their customer in Antwerp. Thus far the defendants were performing the contract on their part. Their act in making sale of the property in Belgium is most cogent in support of the fact that they purchased the goods with the intention of exporting them. Having sold the goods in Belgium, the question naturally arises, why did they not export them? The answer was furnished by a witness produced by defendants upon the trial, who testified upon cross-examination, in substance, as follows: On November 21 defendants received a cablegram from their customer in Belgium to whom they had sold the goods directing defendants not to export the chocolate and to sell the same for his account in New York. Pursuant to such direction, defendants sold the goods in the New York market; thereupon, as defendants were aware, the revenue tax of 5 per cent. upon the sale price of the goods by plaintiff to defendants attached. Nonpayment of the tax by defendants rendered plaintiff liable for the same and the goods not having been exported in due course it paid to the government the amount of the tax. The transaction between defendants and their customer in Belgium was unknown to plaintiff, and defendants proceeded in their dealings with plaintiff along lines indicating their intention to export the goods. They realized that the goods had not yet been delivered by plaintiff, and probably would not be, were the facts made known to it, and it was confronted with a loss of $1,904, and they might then be confronted with litigation by the party to whom they had sold the goods in the New York market. Defendants having sold the goods for export and their customer abroad having directed them, not to export the goods, but to sell for his account in New York, fair dealing between plaintiff and defendants required the latter to charge to their customer aboard the amount of the revenue tax imposed upon the goods by reason of failure to export the same under his orders, then pay the tax, and save plaintiff harmless therefrom. Whether or not defendants did make such charge against their foreign customer did not appear.

Plaintiff having contracted to deliver the goods during November not having received shipping instructions from defendants on November 25th, the time for delivery nearing expiration, plaintiff wrote defendants as follows:

"Contract of September 8th fifty tons sweet chocolate for delivery steamer New York during the month of November. Kindly note that

shipment will be ready Friday, November 28th, and we will await your shipping instructions."

That letter, asking as it did for shipping instructions, that is, the marks to be placed upon the packages and the name of the steamer to which they were to be delivered, was susceptible of but one construction, namely, that plaintiff understood he had sold the goods to defendants for export and that the same were to be exported. When defendants read that letter, they were aware that they had in the first instance sold the goods in Belgium and intended to export them, but that prior to the receipt of that letter they had actually sold the goods in the market in New York, that the revenue tax had attached to such sale, that they were obligated to make delivery of the goods to the purchaser to whom they had sold the same in New York, and that the goods were not to be delivered alongside steamer or to be exported. They did not discuss the matter with plaintiff, but reserved such information to themselves, and on November 26th wrote plaintiff and requested the latter to deliver the 50 tons of chocolate purchased September 8th to the Fidelity Warehouse, to be stored for their account, and to present negotiable warehouse receipts for payment. If, as they now contend, the chocolate was not purchased for export, the inquiry is pertinent why they did not order the goods delivered directly to the party or parties to whom they had sold the same? Were they solicitous lest the plaintiff might thereby discover the transaction in which they had been engaged, and refuse to deliver the goods unless the tax was paid? The circumstances surrounding the conduct of defendants do not refute such inferences. The request made by defendants to deliver the goods to the warehouse would not tend to arouse curiosity, much less suspicion, on the part of plaintiff, that defendants did not intend to export the chocolate. Plaintiff had theretofore complied with a request made by defendants to deliver 50 tons of the 100 tons of chocolate purchased under a like contract of September 3d, which after delivery at the same warehouse defendants exported the goods and furnished to plaintiff evidence of such exportation. Was not plaintiff justified in a belief that defendants would adopt the same practice as to the 50 tons thus requested by them to be delivered?

On November 28th plaintiff delivered the goods as requested by defendants, procured a warehouse negotiable receipt for the same, and rendered to defendants an invoice for the goods. On December 1st, plaintiff addressed a letter to defendants wherein, after referring to the contract of September 8th and the invoice, the latter continued:

"Herewith please find negotiable warehouse receipt No. 2978 indorsed in blank, against which we await your check. The corresponding contract called for 'delivery fas steamer New York,' and unless you can supply bill of lading or customary affidavit before the end of December showing goods were exported, at which time we must make our monthly reports to the Treasury Department, it will be necessary for us to render you a separate invoice covering the 5 per cent. excise tax. This, of course, would be refunded to you, should shipment be delayed until the next month."

To that letter defendants never made reply, other than to forward a check for the amount of the invoice.

The only reasonable inference deducible from the foregoing narrated facts is that it was the intention of plaintiff to sell, and of defendants to purchase, the chocolate for export. The direction of a verdict for defendants was therefore error.

[2] 2. Does the written contract between the parties disclose that defendants purchased the goods for export, with the intention to export them prior to the same being used or subjected to further manufacture? This query must be answered in the affirmative. Defendants were exporters. The contract is for 50 long tons of chocolate "packed in cases strapped for export, delivery fas steamer New York. Terms cash against documents." Why the requirement that the cases should be strapped for export, unless the goods were to be exported? Goods sold for domestic use are not strapped for export. Not only were the goods to be "strapped for export," but they were to be delivered free alongside steamer, and the plaintiff could only procure payment for the same upon presentation of documents; that is, documents of the steamship company showing receipt of the goods. The contract likewise provided for "shipping directions"; that is, the cases were to be marked with the name of the consignee and destination, otherwise the steamship would not receipt for the same and issue documents therefor. The name and address of the consignee would be known only to defendants, and was to be furnished by them. The contract by its terms is one of sale and purchase of chocolate for export. A failure on the part of defendants to export the same and a sale of the same in the New York market for domestic trade was a violation of the contract by them, which resulted in damage to plaintiff to the extent of the sum it was required to pay to the federal government as and for the revenue tax.

The amount of such payment being undisputed, the judgment should be reversed, and judgment directed for plaintiff against defendants for $1,904, with interest thereon from June 10, 1920, with costs in all courts.

HISCOCK, C. J., and CARDOZO, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Judgment accordingly.

(237 N. Y. 245)

TALBOT v. NEW AMSTERDAM CASUALTY CO.

(Court of Appeals of New York. Dec. 27, 1923.)

1. Divorce ⇐272—Surety on husband's undertaking held liable.

Nonresident husband failing to pay alimony was arrested under Code Civ. Proc. § 551, and defendant executed, with the husband, an undertaking in accordance with section 575, subd. 1, providing that husband would obey directions of court. A motion to punish husband for contempt had been made prior to the undertaking while he was in jail, and an order had been entered adjudging him in contempt and fining him; but service of the latter order was delayed until after his release, at which time sheriff could not find him. *Held*, that defendant was liable for not subsequently producing the principal on notice, the duty of the bail being to produce his principal when his presence is essential to the enforcement of the judgment.

2. Bail ⇐1—Principal is in custody of bail.

In theory of law the principal is in the custody of his bail.

3. Divorce ⇐244—Requirement of undertaking held not satisfied.

Where husband was arrested for nonpayment of alimony under Code Civ. Proc. § 551, requirement of undertaking under section 575, subd. 1, was not satisfied because the husband was served with an order to show cause and subjected himself then to the jurisdiction of the court, it appearing that the husband later disappeared.

4. Divorce ⇐244—Undertaking not limited to directions to be subsequently made.

Where a husband is arrested for nonpayment of alimony under Code Civ. Proc. § 551, an undertaking, executed under section 575, subd. 1, in securing performance of the directions of an order or a judgment, *held* not limited to directions contained in an order or a judgment subsequently made.

5. Divorce ⇐272—Laches no defense in action against surety of husband.

Laches was not a defense in action against surety on undertaking executed in accordance with Code Civ. Proc. § 575, subd. 1, to obtain release of husband arrested under section 551 for failing to pay alimony, it appearing that, while the principal was in jail, an order adjudging him guilty of contempt was entered which was not served on the principal, but could have been served upon him if the wife had moved quickly, the statute not providing for a notice to plaintiff in advance of the sheriff's acceptance of the undertaking (Code Civ. Proc. §§ 573, 577, 587) and laches not constituting a defense even if it did exist.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Benedict Bristow Talbot against the New Amsterdam Casualty Company. From a judgment of the Appellate Division of the Supreme Court in the First Department (205 App. Div. 525, 199 N. Y. Supp. 726), reversing a judgment of the Trial Term for plaintiff and dismissing the complaint, plaintiff appeals. Judgment of Appellate Division reversed and that of trial term affirmed.

Richard B. Hand and Matthew B. Sentner, both of New York City, for appellant.

Jerome C. Jackson and Kevie Frankel, both of New York City, for respondent.

CARDOZO, J. Plaintiff obtained on March 12, 1913, a final judgment of divorce from her husband, Hayden Talbot, with alimony at the rate of $75 a month. More than eight years later, on June 8, 1921, she obtained an order of arrest under Code Civil Procedure, § 550, on the ground that her husband was a nonresident, and that there was danger that by reason of such nonresidence the judgment, which required "the performance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt," might be rendered ineffectual. Such an order may be granted either before or after final judgment. Code Civ. Proc. § 551. On June 9, 1921, Mr. Talbot was committed to the county jail under this order of arrest, and held in bail in the sum of $3,000. On August 22, 1921, he gave bail by delivering to the sheriff an undertaking executed by the defendant, New Amsterdam Casualty Company, in accordance with Code Civil Procedure, § 575, subd. 1. This undertaking provides that—

"The above-named defendant, arrested as aforesaid, will obey the direction of the court, or of an appellate court, contained in an order or judgment requiring him to perform the acts specified in the order, or in default of his so doing that he will at all times render himself amenable to proceedings to punish him for the omission."

At the date of this undertaking the husband was already in default by reason of the nonpayment of alimony in the sum of $12,-

470; a motion to punish him for contempt had been made on June 21, 1921, while he was in jail under the order of arrest; and on July 6, 1921, while he was still in jail, an order adjudging him in contempt and fining him $12,470 had been entered. Service of the latter order was delayed until after his release, but on January 7, 1922, the sheriff made return that he could not be found. Thereafter and on January 16, 1922, plaintiff served the bail with a notice that the principal be produced in accordance with the undertaking, and that in default of such production suit would be begun. The demand was not complied with, and this action followed. The Trial Term directed a verdict for the plaintiff. The Appellate Division reversed and dismissed the complaint.

[1, 2] We think the bail is liable. The defendant has undertaken that its principal will obey the direction of the court contained in an order or judgment requiring him to perform the acts there specified. He has not obeyed those directions. At the date of the undertaking there existed a final judgment which called for the payment of alimony at a stated rate. The duty thus imposed was a continuing one until discharged by payment. Payment has not been made. The defendant has also undertaken that, in default of obedience, the principal will at all times render himself amenable to proceedings to punish him for the omission. This also he has not done. An order has been made, and, by absenting himself when sought, he has frustrated its enforcement. In theory of law the principal is in the custody of his bail. Toles v. Adee, 84 N. Y. 222, 240. The duty of the bail is to produce him when his presence is essential to the enforcement of the judgment.

[3] The point is made for the defendant that the requirement of the undertaking is satisfied because the principal was served with the order to show cause, and subjected himself then to the jurisdiction of the court. This is said to be sufficient. So narrow an interpretation would make the undertaking worthless. A defendant does not render himself amenable to a proceeding to punish him for an omission by appearing at the beginning of the proceeding and absconding at the end.

[4] The point is also made that the undertaking, in securing performance of the directions of an order or a judgment, is limited to directions contained in an order or a judgment subsequently made. We read its meaning otherwise. Final judgment had been entered when the order of arrest was granted and the undertaking given. There could be no subsequent direction. The suggested restriction of the undertaking would destroy it altogether. Scofield v. Churchill, 72 N. Y. 565.

[5] There is some point of a defense of laches. The order adjudging the contempt could have been served, it is said, at the jail if the plaintiff had moved quickly. She had no warning, so far as the record shows, that bail was to be given. The statute does not provide for notice to a plaintiff in advance of the sheriff's acceptance of the undertaking. Code Civ. Proc. §§ 573, 577, 587. In such circumstances, no reason was apparent for extraordinary diligence. But laches, if it existed, would not establish a defense. Toles v. Adee, 84 N. Y. 222, and 91 N. Y. 562, cited to the contrary, is a case where a surety made request of the creditor that he proceed against the debtor, and was held discharged by the refusal. 84 N. Y. at page 239. Here there was no request, and, even if one were shown, the position of bail differs from that of ordinary sureties, since they may put an end to their liability by the surrender of the principal. 91 N. Y. 562. The defendant got its principal out of jail by the execution of an undertaking, and now urges the fact that he is out as a reason why the undertaking should be considered ineffective.

The judgment of the Appellate Division must be reversed, and that of the Trial Term affirmed, with costs in the Appellate Division and in this court.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Judgment reversed, etc.

(237 N. Y. 250)

MALEENY v. STANDARD SHIPBUILDING CORPORATION.

(Court of Appeals of New York. Dec. 27, 1923.)

1. Master and servant ⇐185(4)—Master liable for negligence of fellow servant constructing scaffold.

Under Labor Law, § 240, par. 1, a master failing to furnish a safe scaffold for an employee repairing a structure is liable for resulting injuries, though he furnished proper material and the scaffold was defectively constructed through the negligence of fellow servants.

2. Admiralty ⇐20—Employee injured while repairing ship because of master's failure to furnish safe scaffold may sue in admiralty or state courts.

Under federal Judiciary Act Sept. 24, 1789, § 9 (Judicial Code, §§ 24, 256 [Comp. St. §§ 991, 1233]), giving the federal District Courts exclusive original cognizance of admiralty and maritime causes "saving to suitors in all cases the right of a common law remedy," an employee injured while making repairs on a docked ship in consequence of the master's failure to furnish a safe scaffold, as required by Labor Law § 240, par. 1, may sue in admiralty or in the state courts.

3. Master and servant ⇐101, 102(1)—Common-law duty to furnish proper place and reasonably safe appliances.

It is the common-law duty of a master to furnish his servant with a proper place to work and reasonably safe appliances, and neglect of such duty renders him liable for resulting injury.

4. Admiralty ⇐20—Common-law duty of master to furnish proper place and appliances applicable in admiralty.

The common-law duty of a master to furnish his servant with a proper place to work and reasonably safe appliances applies in admiralty as to others than seamen.

5. Admiralty ⇐2—Common-law remedies saved to suitors by federal Judiciary Act may be modified by state law.

The common-law remedy saved to suitors by federal Judiciary Act Sept. 24, 1789, § 9 (Judicial Code, §§ 24, 256 [Comp. St. §§ 991, 1233]), is not limited to either the substantive or remedial law as it was in 1789, but, as applied to maritime torts, may be modified by state statutes within reasonable limitations.

6. Admiralty ⇐20—Law as to safe scaffold held applicable to work on ship in harbor.

Labor Law, § 240, par. 1, requiring masters to furnish safe scaffolding for employees repairing structures, is within the police power of the state to preserve the life and health of its citizens, and hence is applicable to work performed by a resident master and servant on a ship in a harbor.

7. Admiralty ⇐20—Construction of Labor Law by state court as applicable to marine tort not dependent on admiralty courts' views.

The power of the Court of Appeals to give force and effect to state statutes, as by declaring the Labor Law applicable to marine torts, is not entirely dependent on whether the admiralty courts would enforce such law.

8. Admiralty ⇐31—Contributory negligence merely reduces or apportions damage.

At common law, contributory negligence bars recovery, but in admiralty may merely reduce or apportion the damages.

9. Courts ⇐97(1)—Federal Supreme Court rule as to application of common-law rule of contributory negligence in actions for maritime torts in state courts followed.

The rule of the United States Supreme Court that the common-law rule that contributory negligence bars recovery, and not the admiralty rule of comparative negligence, applies in cases prosecuted in state courts for maritime torts, should be followed until modified or limited by such court.

10. Seamen ⇐2—Maritime rules applicable to seamen inapplicable to shore servants injured while working on docked ships.

The rules of maritime law that injured seamen and members of the crew are entitled to maintenance, cure, and wages only, unless the vessel was unseaworthy or the master failed to supply and keep in order the proper appliances appurtenant to a ship, do not apply to shore servants working on docked ships; they, like stevedores, being entitled to recover damages for injuries received through the master's negligence.

Pound and McLaughlin, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Peter Maleeny against the Standard Shipbuilding Corporation. From a judgment of the Appellate Division (206 App. Div. 780, 200 N. Y. Supp. 933) affirming a judgment of the Trial Term on a verdict for plaintiff, defendant appeals. Reversed, and new trial granted.

E. C. Sherwood, of New York City (Clarence S. Zipp, of New York City, of counsel), for appellant.

Elliott, Jones & Fanning, of Brooklyn (Ralph G. Barclay, Jay S. Jones, and Edward J. Fanning, all of Brooklyn, of counsel), for respondent.

CRANE, J. The Standard Shipbuilding Corporation, the defendant in this case, is a domestic corporation doing business in Richmond county, city and state of New York. The plaintiff was in the employ of the defendant working as a sheet iron helper. On the 6th day of October, 1921, he with other

laborers was engaged in making certain repairs upon the ship Buckeye State, lying at the shipyards of the defendant at Rosebank, Staten Island. The particular work that he was engaged in doing was the repair of a metal ventilating shaft which was erected over the engine room in the hold of the ship and extended to the deck. The ventilator had been removed and was being replaced at the time of the accident. A scaffold had been erected by a crew of riggers in defendant's employ upon which the plaintiff was obliged to work. A plank of this scaffold broke and the plaintiff fell about 20 feet to the engine room below, sustaining injuries for which he brought this action.

The court, in charging the jury, referred to the New York State Labor Law (Laws of 1921, c. 50 [Consol. Laws, c. 31]), which provides:

"Sec. 240. *Safe Scaffolding Required for Use of Employees.*

"1. A person employing or directing another to perform labor of any kind in the erection, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other mechanical contrivances which shall be so constructed, placed and operated as to give proper protection to a person so employed or directed."

Regarding this law the judge in his charge said:

"I said a moment ago something about the failure to observe a duty being negligence. There is a law in our state known as the Labor Law. Under section 18 of that law you will have to consider whether the defendant has observed the duty which that law casts upon it. Section 18 of the Labor Law prohibits an employer from furnishing to his employees a scaffold unsafe, unsuitable, or improper and which is not so constructed as to give proper protection to the life and limb of the person employed to work thereon. Under this section there is a positive prohibition laid upon the master without exception on account of his negligence or the carelessness of his servants.

"If you find that the statute has been violated, and that the violation caused the accident, you may consider the statute with all the other facts proved in determining whether the defendant was guilty of negligence."

[1] The charge was perhaps more favorable to the defendant than it was entitled to under the decisions of this court. We have held that there was an absolute duty under this Labor Law to furnish a safe scaffold, and that the master was liable as for negligence if the scaffold proved to be unsafe and the servant were injured. The principal modification of the common law is that the master is made liable even if the scaffold be defectively constructed through the negligence of fellow servants; he, the master, having furnished proper material. Stewart v. Ferguson, 164 N. Y. 553, 58 N. E. 662; Caddy v. Interborough Rapid Transit Co., 195 N. Y. 415, 88 N. E. 747, 30 L. R. A. (N. S.) 30.

[2] The defendant, of course, does not complain upon appeal that this charge was more favorable to it than it should have been. It claims, however, that the Labor Law can have no application to the case whatever, as the tort is a maritime tort, governed by the admiralty law. By section 9 of the Judiciary Act of 1789, which has been continued by the Judicial Code, sections 24 and 256 (Comp. St. §§ 991, 1233), the District Courts are given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."

For an accident such as happened to the plaintiff in this case he could bring his action in admiralty or in the courts of this state.

[3, 4] It is the common-law duty of a master to furnish his servant with a proper place to work and reasonably safe appliances; for his neglect of this duty he is liable for the resultant injury. Crispin v. Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Pantzar v. Tilly Foster I. M. Co., 99 N. Y. 368, 2 N. E. 24. This is also the law in admiralty, as applicable to those other than seamen. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157.

Whether there be an admiralty law of master and servant separate and distinct from the common law, as it is known and applied by the states, need not be discussed, as it is neither important nor pertinent.

The fact is that admiralty does apply the common law of master and servant as it has been expounded by the common-law courts.

In Leathers v. Blessing, 105 U. S. 626, 630 (26 L. Ed. 1192), it was said:

"Nor is the term 'tort,' when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed by direct force, but it includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case."

And Justice Holmes in Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 167, 40 Sup. Ct. 438, 442 (64 L. Ed. 834, 11 A. L. R. 1145), says:

"But somehow or other the ordinary common-law rules of liability as between master and servant have come to be applied to a con-

siderable extent in the admiralty. If my explanation, that the source is the common law of the several states, is not accepted, I can only say, I do not know how, unless by the fiat of the judges."

As I read the cases I find no disagreement with this statement of Justice Holmes, that the common law of the states has become the law of admiralty as it relates to master and servant. The only disagreement which I find is in determining what that common law is, or else in its application to situations strictly maritime. Workman v. New York, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; City of Detroit v. Osborne, 135 U. S. 492, 10 Sup Ct. 1012, 34 L. Ed. 260.

We start, therefore, in our discussion with the concession that for the failure of the master to provide the servant with a reasonably safe place to work and with proper appliances, an action may be brought either in the state courts or in the United States District Courts. The law to be applied in either tribunal will be the common law; in admiralty it may be called the maritime law.

The question arises whether or not this common-law rule of masters' liability can in any way be modified by state statutes. Can a state statute, for instance, create a presumption of negligence from the happening of an accident, which, I take it, would be simply modifying the rules of evidence, or shifting the burden of proof? Can it go a step further, as it evidently has done in our Labor Law, and say that employers do not fulfill their complete duty to their servants by simply furnishing them with sufficient material to build a scaffold, but that they must see to it that the scaffold when built is safe. Broadly speaking, this wipes out the fellow-servant rule as to such a construction. Are these modifications proper and enforceable in the state courts when the accident is a maritime tort? We must remember, in this discussion, that we are dealing with a domestic corporation, and with a servant working for that corporation in the state of New York.

[5] That the right of a common-law remedy which has been saved to suitors is not limited to either the substantive or remedial law, as it was in 1789, has heretofore been decided. Referring to the case of American S. B. Co. v. Chase, 16 Wall. 522, 21 L. Ed. 369, Mr. Justice Brown in Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 646, 20 Sup. Ct. 824, 828 (44 L. Ed. 921), said:

"Defendant took the position that the saving clause must be limited to such causes of action as were known to the common law at the time of the passage of the judiciary act, and as the common law gave no remedy for negligence resulting in death, an action subsequently given by the statute was not a common-law remedy. The contention was held to be unsound."

In The Hamilton, 207 U. S. 398, 404, 28 Sup. Ct. 133, 134 (52 L. Ed. 264), we find this stated as the opinion of the Supreme Court:

"The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, 'saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it,' Rev. Stats. § 563, cl. 8, leaves open the common-law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. * * * And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the Legislature."

That the common law applicable to maritime torts may be modified by state statutes to a certain extent, and within reasonable limitations, seems to be unquestioned. The extent of the modifications, however, has been much questioned of late, and has given rise to much uncertainty.

We have, upon the one hand, the Jensen Case (Southern Pacific Co. v. Jensen, 244 U. S. 205, 215, 37 Sup. Ct. 524, 529 [61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900]), which holds that a state statute wiping out the master's common-law liability for injuries to his servant resulting from negligence, and substituting therefor the Workmen's Compensation Law (Consol. Laws, c. 67), passed the limit of legality and was unconstitutional.

This case settled the state's power over maritime torts so far as the Workmen's Compensation Law was concerned, but made no attempt to fix the limits of that power. In fact, Mr. Justice McReynolds, writing the opinion, so intimates, for he frankly states:

"In view of these constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute, The Lottawanna, 21 Wall. 558, 579, 580; The J. E. Rumbell, 148 U. S. 1; pilotage fees fixed, Cooley v. Board of Wardens, 12 How. 299; Ex parte McNeil, 13 Wall. 236, 242; and the right given to recover in death cases, The Hamilton, 207 U. S. 398; La Bourgogne, 210 U. S. 95, 138. See The City of Norwalk, 55 Fed. Rep. 98, 106. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings in rem according to the course in admiralty, The Moses Taylor, 4 Wall. 411;

Steamboat Co. v. Chase, 16 Wall. 522, 534; The Glide, 167 U. S. 606; nor create liens for materials used in repairing a foreign ship, The Roanoke, 189 U. S. 185. See Workman v. New York City, 179 U. S. 552. And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself."

This was followed by Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145.

On the other hand, in the Garcia Case (Western Fuel Co. v. Garcia, 257 U. S. 233, 240, 42 Sup. Ct. 89, 66 L. Ed. 210) we find modifications of the common law by state statute adopted and applied in admiralty. While the previous cases of American S. B. Co. v. Chase, supra, and Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819, had sustained recoveries in a state court for negligence causing death in a maritime tort, the Garcia Case determined for the first time that the same modification of the common law would be followed in admiralty. In the opinion we find it stated:

"How far this rule of nonliability adopted and enforced by our admiralty courts in the absence of an applicable statute may be modified, changed or supplemented by state legislation has been the subject of consideration here but no complete solution of the question has been announced."

Referring to the Jensen and the Stewart Cases the court continues:

"We have recently discussed the theory under which the general maritime law became a part of our national law, and pointed out the inability of the states to change its general features so as to defeat uniformity—but the power of a state to make some modifications or supplements was affirmed."

At common law there was no recovery for death due to negligence. State statutes have modified this common-law rule by giving a cause of action to the representatives of the deceased. This, in my opinion, is more than a mere change in remedy or a method of procedure. It is giving of a substantial right. The reason it is recognized in admiralty is because it in no way interferes with the general scheme and scope of the admiralty law or the purposes which require that law to be uniform in all jurisdictions. It will not do to call these death statutes mere modifications of remedy as they are not such in fact. This is evidenced by the rule in the Garcia Case that the time limited within which to bring the death action is a part of the right, and not the remedy, and will be given force and effect in the admiralty courts. We find it there stated:

"Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right"—quoting from The Harrisburg, 119 U. S. 214, 7 Sup. Ct. 147, 30 L. Ed. 358.

Again as evidencing that the death statutes deal with something more than the remedy, we find the admiralty courts following the state courts as to contributory negligence in such cases, and holding contrary to their customary rule, that as contributory negligence bars recovery in a state court, in an action to recover for death from negligence, so likewise will contributory negligence bar recovery in the admiralty court. City of Norwalk (D. C.) 55 Fed. 98, 102.

Turning to this case, the City of Norwalk, cited with approval both in the Jensen Case and the Garcia Case, we find the limitation upon the state's legislative activity well expressed as follows:

"This view, however, does not exclude state legislation upon matters of merely local concern, which can be much better cared for under state authority, and which have always been thus cared for; nor does it exclude general legislation by the states, applicable alike on land and water, in their exercise of the police power for the preservation of life and health, though incidentally affecting maritime affairs; provided that such legislation does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations. The long-established doctrine in the Supreme Court has been that in this field of 'border legislation,' state laws are valid until Congress interposes, and thereby excludes further state legislation."

[6] Thus our Labor Law was not made especially applicable to ships or to the local waters, but applies to all employers furnishing scaffolds on buildings or structures within state territory. The defendant is a domestic corporation subject to the laws of the state of New York. The plaintiff was its servant and the accident happened here.

Can it not be claimed with much reason that this law passed in the interests of the laboring man for the erection of safe scaffolding was part of the police power of the state for the preservation of the life and health of its citizens, and was as applicable,

as upon any other structure? I think so, and for this reason believe that the Labor Law referred to has modified and supplemented the common law of master and servant within the limits permitted by the United States Constitution, and that it is applicable to such a marine tort as we have in this case.

[7] Whether the admiralty courts will enforce this Labor Law, we, of course, cannot determine. Our power, however, to give force and effect to our own statutes, is not entirely dependent upon what they may do. American S. B. Co. v. Chase, supra; Sherlock v. Alling, supra. See in point Schwede v. Zenith S. S. Co. (D. C.) 216 Fed. 566; Id., 244 U. S. 646, 37 Sup. Ct. 652, 61 L. Ed. 1369. Schwede was a seaman.

[8] Another question has arisen in this case which, because of the authorities in the United States Supreme Court, has proved quite troublesome to the state courts. It is the question of contributory negligence as a bar to recovery. According to the common law, contributory negligence of a plaintiff bars recovery; in admiralty it may merely reduce or apportion the damage. The court, in charging the jury in this case, said:

"Here is a provision of the maritime law which is peculiar, and I will ask you to pay strict attention while I am charging you on it. Contributory negligence of the injured party may not defeat a recovery entirely. It goes to the cause of the injury. It may be sufficient to defeat the recovery. It may require a reduction or an apportionment of the damages.

"It is for you to say whether the acts of the plaintiff were such as to relieve the defendant from liability or partial liability; and if partial liability, to what extent. You will apply that rule. That means that you can apportion the negligence, if you find there is negligence on both parties; that you can apportion the negligence between the parties, and arrive at your verdict on an apportionment basis, if you so determine."

This is the rule applicable in the admiralty courts as decided in The Max Morris, 137 U. S. 1, 15, 11 Sup. Ct. 29, 33 (34 L. Ed. 586).

"We think," said the court in that case, "this rule is applicable to all like cases of marine tort founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libelant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery."

[9] Note that the rule is applied to cases prosecuted in admiralty. When a collision case was prosecuted in the state court, a 1218. Two vessels collided in the Hudson river. An action was brought in the New York State Supreme Court to recover for the injuries sustained by one of the vessels. It was claimed that the plaintiff's ship was guilty of negligence, contributing to the accident. The common-law rule that contributory negligence bars recovery was held to be applicable. The court said:

"The doctrine in admiralty of an equal division of damages in the case of a collision between two vessels, when both are in fault contributing to the collision, has long prevailed in England and this country. The Max Morris, 137 U. S. 1. But at common law the general rule is that if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused. Atlee v. Packet Co., 21 Wall. 389.

"In order to maintain his action, the plaintiff was obliged to establish the negligence of the defendant, and that such negligence was the sole cause of the injury, or, in other words, he could not recover, though defendant were negligent, if it appeared that his own negligence directly contributed to the result complained of."

It has been therefore distinctly held that in admiralty the comparative negligence rule applies, while in the state courts the common-law rule of contributory negligence bars recovery. The cases of Wm. Johnson & Co. v. Johansen, 86 Fed. 886, 30 C. C. A. 675, The Lackawanna (D. C.) 151 Fed. 499, and Carter v. Brown, 212 Fed. 393, 129 C. C. A. 69, were actions in admiralty.

The Circuit Court of Appeals for the Second Circuit, in Port of New York Stevedoring Corporation v. Castagna, 280 Fed. 618, has applied the rule laid down in The Max Morris Case, supra, to an action at law. We feel that we should follow the rule of the Supreme Court of the United States in Belden v. Chase, until that court modifies or limits the authority. We do not find that it has ever been overruled. It was applied by this court in New York Harbor Tow-Boat Co. v. New York, L. E. & W. R. Co., 148 N. Y. 574, 42 N. E. 1086.

The Appellate Division also in Kennedy v. Cunard S. S. Co., 197 App. Div. 459, 189 N. Y. Supp. 402, held that the rules relating to contributory negligence must be determined by the maritime law and not by the common law. This followed, so its opinion states, the determination in Chelentis v. Luckenbach Steamship Company, Inc., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171. The distinction, however, the Appellate Division failed to notice, between seamen and the or-

dinary land servant temporarily working on a ship, such as a stevedore, painter or mechanic. The law of the Chelentis Case, The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, and Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 42 Sup. Ct. 475, 66 L. Ed. 927, was applied to the peculiar relationship existing between the members of the crew of a vessel and the owner.

[10] The nature of a seaman's contract is such that unless the vessel be unseaworthy or there be a failure to supply and keep in order the proper appliances appurtenant to a ship, a seaman for an injury received is only entitled to his maintenance and cure and to his wages, at least so long as the voyage is continued. For disobedience to orders he may be locked up or put in irons. These rules of maritime law, applicable to seamen and members of the crew, and so restricted by these decisions, have no application to shore servants working on docked ships. The instances where such servants, like stevedores have recovered damages for injuries received through negligence while working on ships, are so numerous both in admiralty and in the state courts that citations are unnecessary.

The common-law remedy, which, as above stated, was saved to suitors by the federal Judicial Act, included this rule that contributory negligence barred recovery in an action by a servant against his master. We are inclined to follow this common-law rule, not only because the United States Supreme Court has said that it is the law to be applied in state courts, but also because a contrary rule would work the following absurdity. It has been held that in actions to recover damages for death caused by negligence, arising out of maritime torts, contributory negligence will bar recovery. City of Norwalk, supra; Quinette v. Bisso, 136 Fed. 825, 838, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303; Groonstad v. Robins Dry Dock & Repair Co., 236 N. Y. 52, 139 N. E. 777. If, therefore, the comparative negligence rule of contributory negligence were to apply to actions in state courts for a maritime tort, we would have this situation: In an action brought against an employer by an employee for negligence arising out of a maritime tort, the comparative negligence rule would apply: if the employee were killed, his contributing negligence would absolutely bar recovery by his representatives.

No doubt the inconsistency may arise in the admiralty courts. This merely illustrates that if the law of contributing negligence as applied by the state courts and the admiralty courts differ, it is one of those differences which is apt to arise in all litigation where resort may be had to different tribunals. Law and its procedure is not an exact science. Given the same facts and circumstances, the same result cannot be guaranteed in law as it usually can be in natural science.

The inequalities which result to litigants at times in the application of different laws in different jurisdictions is not more serious than those differences in result which are due to human agencies, such as judges and jurors in attempting to apply a uniform law.

Believing, therefore, that the common-law rule of contributory negligence should have been charged in this case, we are obliged to reverse the judgments of the courts below and grant a new trial.

HISCOCK, C. J., and HOGAN, CARDOZO, and ANDREWS, JJ., concur.

POUND and McLAUGHLIN, JJ., dissent.

Judgments reversed, etc.

(237 N. Y. 265)

FOREIGN TRADE BANKING CORPORATION v. GERSETA CORPORATION.

(Court of Appeals of New York. Dec. 27, 1923.)

1. Principal and agent ⇐143(5)—Purchaser not charged with rights of undisclosed principal.

Where in sale by an importer of silk to which a bank held title under a trust agreement, the bank having delivered documents of title to enable the importer to obtain possession of the silk and deliver it, if the purchaser acted innocently and in good faith, with no notice or knowledge sufficient to put it on inquiry of the agreement between the bank and the importer, the rights of the purchaser were not to be affected by the subsequent disclosure of the agreement between the bank and the importer and the limitations on the authority of the importer.

2. Principal and agent ⇐143(5)—Purchaser held entitled to set off debt of seller against undisclosed principal.

Where, in the sale of silk, in which the seller was acting as agent for an undisclosed principal, to whom the silk belonged, and purchaser was an innocent party, and the contract required payment in cash or trade acceptances, purchaser could set off a debt which it held against seller at the time of the sale, and which was due when the suit by the principal for the value of the silk was commenced.

3. Principal and agent ⇐143(5)—Undisclosed principal of seller held estopped to assert its rights after equities between seller and purchaser had been fixed.

Where, in the sale of silk in which seller was acting for undisclosed principal and purchaser was not aware of the fact, after pur-

fixed, it was too late for the undisclosed principal to assert its adverse rights.

4. Principal and agent ⇐143(5)—Purchaser held entitled to show prior agreement with seller in action by undisclosed principal.

Where, in the sale of silk, the seller acted for undisclosed principal, and the principal sued for the price, purchaser was entitled to show, if it could, that it had a prior agreement with seller with regard to acceptance of the goods and the setting off of claims owed by seller to purchaser.

5. Sales ⇐52(6)—Letter received by purchaser held to be but slight evidence that principal was owner of property sold.

Where a seller acted for an undisclosed principal in sale of silk, and the principal sued for the price, a letter received by purchaser from principal on the day following the sale, which inclosed trade acceptances and invoices of the seller and requested that the acceptances be accepted, and the invoices recited that the silk was bought from seller, and contained the statement, "trade acceptances to be presented by principal and to be returned to them," *held* to be but slight proof that the principal was the owner of the property sold.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Foreign Trade Banking Corporation against the Gerseta Corporation. From a judgment of the Appellate Division, First Department (204 App. Div. 875, 197 N. Y. Supp. 912) unanimously affirming a judgment of the Trial Term for the plaintiff, defendant appeals by permission. Reversed, and new trial granted.

Herman Shulman and Mortimer Hays, both of New York City, for appellant.

Frank M. Patterson and Franklin H. Mills, both of New York City, for respondent.

POUND, J. The plaintiff is a banking corporation. The defendant is a manufacturer of silk. The complaint alleges that plaintiff sold and delivered raw silk to defendant of the value of $18,453.34 as follows: Plaintiff delivered the silk to the Raw Silk Trading Company under a trust receipt whereby that company agreed to deliver the silk to the purchasers thereof for the account of plaintiff and to deliver the proceeds to plaintiff; that the trading company, "as agent and on behalf of plaintiff" under said trust receipt, sold and delivered the silk to defendant "as the property of plaintiff;" that defendant agreed to pay therefor by cash or trade acceptances; that defendant knew when the silk was delivered that it was the property of plaintiff and delivered to defendant under delivered under the trust receipt, and demanded payment, which was refused.

Defendant alleges in substance, as its defense, that it bought the silk from the Raw Silk Trading Company as a principal without knowledge or notice that it belonged to plaintiff or that the Raw Silk Trading Company was acting as agent on behalf of plaintiff under the trust receipts, and that it is entitled to set off certain claims and demands against the Raw Silk Trading Company, although they were not due and payable at the time the silk was delivered.

For convenience the plaintiff will hereafter be referred to as the "bank," the defendant as the "purchaser," and the Raw Silk Trading Company as the "importer."

The facts developed on the trial are in substance as follows: On October 21, 1919, the purchaser entered into a contract with the importer for the purchase of 250 bales of raw silk at $8.65 per pound, to be delivered on the arrival of the shipment from Canton during March, April, May, June, and July, 1920. To finance the importation of the silk, the Raw Silk Trading Company applied to the bank for a letter of credit which was in due course issued, and the raw silk was shipped from China to this country under bills of lading made out in the name of the bank. At the time of the issuance of the letter of credit, the importer signed an agreement which provided that the title to and in the silk should remain in the bank until the amount of the letters advanced had been paid and that the raw silk should not be released to the importer until the advances of the bank had been paid or a sufficient security lodged with it to secure their payment. The silk arrived consigned to the bank. It was released to the importer by it under so-called trust receipts, reciting that the merchandise was delivered to the importer in trust for the bank, to enable the importer to deliver it to purchasers, and to collect the proceeds of the sale thereunder, and that the said proceeds of sale will be immediately delivered to the bank upon receipt of the same from customers. The title to the property was to remain in the bank, which should have the right at any time to cancel the trust and retake possession of the merchandise.

On July 29, 1920, the importer delivered 20 bales of raw silk to the purchaser and the purchaser receipted for the same as the property of the importer. On the same day the bank wrote a letter to the purchaser inclosing trade acceptances and with them sent invoices of the importer. These invoices recited that the merchandise was bought from

the importer and contained the statement, "Trade acceptances to be presented by Foreign Trade Banking Corporation and returned to them." The purchaser refused to sign these acceptances and finally returned them to the bank. Its reason was that the importer was indebted to it on other accounts for an amount in excess of the amount due on this raw silk transaction. The purchaser endeavored to prove an agreement between it and the importer with regard to the acceptance of merchandise and the setting off of claims owed by it to the purchaser, but this evidence was not received. It did show, however, indebtedness from the importer to it in excess of the amount due on the same. It also offered evidence to the effect that it had no notice of the bank's rights in and to the raw silk in question at the time the same was delivered to it. The merchandise was delivered to it by the trucks of the importer, delivery receipts were presented reciting that it was received from the importer, and the invoices showed that the merchandise was bought from it.

The court directed a verdict for the bank and refused to permit purchaser to go to the jury on the questions whether purchaser knew that title was in the bank, and whether or not it was entitled to set off its claims against the importer.

We are not dealing with a case where it is alleged that, because the agent had no authority from its principal to pass title, title did not pass, nor a case where the principal has disaffirmed the contract and sought to regain the goods. Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818.

The bank asserts that the silk was its property under the trust receipts, and that the importer "as agent and on behalf of plaintiff under said trust receipts sold and delivered" the same. Under the construction that the bank has placed on the trust receipts, by proceeding by this action to enforce the contract between the importer, as its agent and the purchaser, the bank takes the position that the importer sold and delivered the silk to the purchaser as its agent.

While it may be contended that, as between the importer and the bank, under the terms of the trust receipt, the importer had no authority to sell the silk in its own name, the bank now seeks to recover in affirmance of the sale made by its agent.

[1] The rule is elementary that an undisclosed principal cannot assert his rights against a third party without leaving to the third party the same rights that it would possess if the agent had in fact been the principal. If the agent sells goods in his own name, having possession of the goods, the right of set-off which might be asserted against the agent may be asserted against the undisclosed principal. The state of accounts between the agent and the third party at the time the principal seeks to assert his rights against the third party becomes a matter of defense. If the purchaser, acting innocently and in good faith, with no notice or knowledge, sufficient to put it on inquiry, of the agreement between the bank and the importer, dealt with the importer in reliance on its contract to purchase the silk from it and the possession of the goods, the rights of the purchaser are not to be affected by the subsequent disclosure of an unknown principal and the limitations on the authority of the agent. New York Security & Trust Co. v. Lipman, 157 N. Y. 551, 52 N. E. 595.

Although the bank now contends that it did not sell the silk, because the silk had been already sold by the importer to the purchaser and that, by the terms of the trust receipt, the bank delivered documents of title to the importer solely to enable the importer to obtain possession of the merchandise and deliver it to the purchaser, its complaint is plainly in conflict with this theory of the case. The bank did not vest title in the importer, but it invested it with the indicia of title and the possession of the goods. It might have protected itself if it had not put it into the power of the importer to deceive innocent persons. Plaintiff must rest on the theory that the purchaser was not an innocent party, but that it knew that delivery was made under the trust receipt.

We may assume that the nature of the bank's title under the trust receipt was as security for the payment of its advances and that such security title will be enforced to the extent necessary for the protection of the bank, but it does not seem necessary, under the facts pleaded and proved, to determine what the nature of such title was in order to determine the rights of the parties in this case. The purchaser's contract was with the importer; the possession of the goods was in the importer, and delivery was made by it. It had rightful possession of the goods and authority to deliver possession. As between it and the purchaser, it made the sale, not as alleged in the complaint, "as agent and on behalf of plaintiff under said trust receipt," but as a principal. Nor does it appear without dispute that purchaser at the time of delivery "well knew that said silk was the property of plaintiff and delivered to defendant under said trust receipt." The purchaser may therefore assume the position of an innocent party dealing with the agent of an undisclosed principal.

an innocent party? The contract of purchase and sale between the importer and the purchaser requires payment in cash or trade acceptances. The question arises whether the purchaser can set off a demand which it held at the time of the sale which was due at the time the suit was commenced. The rule is laid down in Hogan v. Shorb, 24 Wend. 458, 464, which is on all fours with this case. The action was brought by the principal on a contract for the purchase price of the goods. The goods were sold by an agent, but the name of the principal was not disclosed. It was held, that although the sale was a cash sale, and the purchaser, when he obtained the goods, did not intend to abide by his contract but proposed to set off a demand against the agent, he could set off a note of the agent given prior to the delivery of the goods in question but maturing thereafter; that notice after the sale would not defeat any equity already existing between the purchaser and the seller; that defendant had such equity; that the purchaser had a right to buy the goods for the purpose of obtaining payment of his debt, and the right to set off. The court said:

"The principal may no doubt come in at any time after the sale, and arrest all further dealing between his agent and the vendee; and if, after notice from the principal, the vendee pays the agent, or acquires a demand against him, he cannot set that up as a defense in an action by the owner of the goods. But notice after the sale will not defeat any equity already existing between the vendee and the agent. The defendants had such an equity. They bought the goods for the very purpose of obtaining payment of their debt against Morris; and the right to set off the note, though inchoate at the time of sale, became perfect before the suit was commenced."

See, also, McLachlin v. Brett, 105 N. Y. 391, 12 N. E. 17; Wright v. Cabot, 89 N. Y. 570.

[3] The defendant herein dealt with the importer, it may well be, in order to obtain a credit on the accounts between them. After it had accepted the goods, it was too late for the bank to give notice that it was the owner of the goods. Defendant had a right to know with whom it was dealing when it took in the goods. After the equities existwas too late for the undisclosed principal to assert its adverse rights. It is not a case where it makes no difference to the purchaser to whom he pays the price of the goods. If the bank's position is upheld, defendant will owe $18,000 more than it had a right to expect it owed when it took the goods.

[4] The purchaser was at least entitled to show, if it could, that it had a prior agreement with the importer with regard to the acceptance of the goods and the setting off of claims owed by the importer to the purchaser.

[5] It is also a question of fact herein whether the notice given by the bank to the purchaser and received by it on the day following the delivery of the goods was an adequate notice that the bank was the undisclosed principal with whom the purchaser had dealt. The letter inclosed trade acceptances and invoices of the importer, and requested that the acceptances be accepted. The invoices recited that the merchandise was bought from the importer and contained the statement "trade acceptances to be presented by Foreign Trade Banking Corporation [plaintiff] and returned to them." Did this transaction give purchaser as matter of law notice or knowledge of facts sufficient to put it on notice? Did it fairly create an inference as to the existence of the agency? Of course such a demand might arouse a suspicion, but in itself it amounts at best to slight proof that the bank was the owner of the property which the purchaser claims to have purchased from the importer in good faith. Wright v. Cabot, supra.

As a question of fact arises as to whether defendant had notice of the plaintiff's rights and the limitations of the agent's authority, it was error to direct a verdict for the plaintiff.

The judgments should be reversed and a new trial granted, with costs to abide the event.

HISCOCK, C. J., and HOGAN, CARDOZO, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Judgments reversed, etc.

STATE ex rel. SMITH v. BARNELL, Director of Public Service, et al. (No. 17986.)

(Supreme Court of Ohio. Jan. 29, 1924.)

(Syllabus by the Court.)

1. **Municipal corporations ⇐198(4)—Public safety director's inquiry into suspension of city employé held administrative and quasi judicial and not judicial.**

A city charter provides that, after suspension of an employé of the division of police or fire by the chief of the division, the chief of the division concerned shall forthwith in writing certify the fact, together with the cause for suspension, to the director of public safety, who within five days from the receipt thereof shall proceed to inquire into the cause of such suspension and to render judgment thereon. *Held*: That the acts of the director of public safety in inquiring into the cause of such suspension and rendering judgment thereon are administrative and *quasi* judicial, and not judicial.

2. **Municipal corporations ⇐198(4)—Public safety director held to have jurisdiction after period limited by charter to inquire into suspension of employé.**

The provision that the director of public safety within five days from the receipt of notice of suspension, shall proceed to inquire into the cause of such suspension, and render judgment thereon, is directory and not mandatory, and after the termination of the five-day period the director of public safety still has jurisdiction to proceed to inquire into the cause of such suspension and to render judgment thereon.

Error to Court of Appeals, Muskingum County.

Original action in mandamus in the Court of Appeals, by the state, on the relation of Jud T. Smith, against Charles G. Barnell, Director of Public Service, and another. Judgment for defendants, quashing the alternative writ and refusing a peremptory writ, and relator brings error. Affirmed.—[By Editorial Staff.]

In this case error proceedings were instituted to reverse the judgment of the Court of Appeals of Muskingum county, rendered in an original action in mandamus brought by the relator in that court, on April 3, 1923, against Charles G. Barnell, director of public safety of the city of Zanesville, Ohio, and William H. Tanner, chief of the division of fire of the city of Zanesville, Ohio.

The relator was suspended from the position of city fireman in the employ of the city of Zanesville upon March 21, 1923.

The petition avers that relator held this position subject to the regulations of the Zanesville civil service commission and to the provisions of the Zanesville charter, and claims that relator was wrongfully suspended service regulations.

The petition further alleges that the chief of the division of fire orally suspended the relator, not advising the relator of the reasons therefor, that the relator was not presented with any written charges or reasons for such suspension until more than five days thereafter, that certain papers purporting to constitute a notice and charges were then left at his residence in his absence, and that the safety director did not within five days from the receipt of the notice of suspension inquire into the cause of such suspension and render judgment thereon within the time required under the city charter, but fixed April 3, 1923, as the time for hearing the charges, and has not yet heard the same.

The petition further avers that the alleged charges do not, under the provisions of the Zanesville charter, nor under the rules of the civil service commission, set out facts which constitute sufficient cause for the suspension, and that, as the safety director failed to inquire into and render judgment within the period limited in the charter, he is without power and jurisdiction thereafter to render judgment.

The answer of Charles G. Barnell, safety director, alleges that on March 22, 1923, the defendant William Tanner, the fire chief, filed with the defendant Charles G. Barnell charges in writing against the relator, and that the defendant Charles G. Barnell, on the 27th day of March, 1923, left a written copy of the charges at the residence of the relator, together with a letter addressed to the relator.

The answer further alleges that the conduct of the relator upon which the charges of the fire chief were based occurred in the city of Columbus, Franklin county, Ohio, that the witnesses to such conduct were beyond the reach of the compulsory process provided by the charter of the city of Zanesville to secure the attendance of witnesses at the hearing, and that time was necessary, after the charges were filed, to secure the names of the witnesses and to arrange for them to be present at the hearing.

The answer further alleges that the witnesses were willing voluntarily to come to Zanesville on April 3, 1923, and that the defendant Charles G. Barnell, public safety director, set the hearing for that date, and, at the time this suit was commenced was about to hear and determine the issues of the case in accordance with the law and the facts, and is still ready to hear and determine the case if the court finds that he has jurisdiction so to do.

William H. Tanner, chief of the division of fire, filed an answer supplementing and corroborating the statements in the answer of Barnell.

ings, held:

"That the requirement of section 128 of the charter of the city of Zanesville, as alleged in said petition, providing that the director of public safety, upon certification to him of the suspension of any employé of the fire department, shall inquire into and render judgment upon the cause of such suspension within five days from the receipt of such certification, is, upon the authority of the case of Scharlo v. State, 105 Ohio St. 535, 138 N. E. 63, unreasonable, unconstitutional, and void, in that it is a legislative attempt unreasonably to limit and control the action of a *quasi* judicial officer, to wit, the director of public safety, in the exercise of his judicial power and discretion; that by reason thereof the question is raised as to the sufficiency of the allegations of said petition to entitle the relator to have and receive the relief prayed for, and that it is unnecessary for the court to receive, and the court does not receive, any evidence upon the issues raised by the pleadings, but finds, for the sole reason stated, that the allegations of the petition are insufficient and do not entitle the relator to the relief prayed for or to any relief whatever in this action."

The Court of Appeals therefore rendered judgment in favor of the defendants, quashing the alternative writ, and refusing the peremptory writ of mandamus prayed for by the relator.

Further facts are stated in the opinion.

E. E. Power and John C. Bassett, both of Zanesville, for plaintiff in error.

A. A. Porter, of Zanesville, for defendants in error.

ALLEN, J. Under the charter of the city of Zanesville, and subject to the civil service rules, can the safety director of that municipality inquire into and render judgment on charges against a suspended employé of the fire department, after a period of five days has elapsed from the time he received notice of such charges, or does the fact that he has not inquired into and rendered judgment on the charges within the five-day period deprive him of jurisdiction thereafter to act in the case? This is the principal question here before us.

The Court of Appeals, in refusing the peremptory writ of mandamus, and in rendering judgment in favor of the defendants, held that section 128 of the charter of the city of Zanesville, which provides that the director of public safety, upon certification of the suspension of any employé of the fire department, shall inquire into and render judgment upon the cause of such suspension within five days of the receipt of such certification, is, upon authority of the case of Scharlo v. State, 105 Ohio St. 535, 138 N. E. 63, unreasonable, unconstitutional, and void, in that it is a legislative attempt unreasonably to limit and control the action of a *quasi* judicial officer, to wit, the director of public safety, in the exercise of his judicial power and discretion.

This court, however, is of the opinion that the Scharlo Case does not apply to the present proceeding. The Scharlo Case was a case involving the following statute:

"Sec. 6212—20. A petition in error shall not be filed in any court to reverse a conviction for a violation of this act [Gen. Code, §§ 6212—13 to 6212—20], or to reverse a judgment affirming such conviction, except after leave granted by the reviewing court. Such leave shall not be granted except for good cause shown at a hearing of which counsel for the complainant in the original case shall have had actual and reasonable notice. *Such petition in error must be filed within thirty days after the judgment complained of, and the case shall be heard by such reviewing court within not more than thirty court days after filing such petition in error.*" Gen. Code.

The court held, in paragraphs 3 and 4 of the syllabus:

"3. So much of such act (section 6212—20, General Code) as reads 'A petition in error * * * filed in any court to reverse a conviction for a violation of this act, or to reverse a judgment affirming such conviction * * * shall be heard by such reviewing court within not more than thirty court days after filing such petition in error' is a clear invasion of the jurisdiction of the Court of Appeals and the Supreme Court, as fixed by the Constitution, and therefore, being in conflict with the Constitution, is null and void.

"4. An act of the General Assembly attempting to peremptorily prescribe the time within which any court in the exercise of its judicial function shall hear or determine a matter properly within its jurisdiction is a legislative invasion of judicial power, and, as such, is unreasonable and unconstitutional, and therefore null and void."

The Scharlo Case applies, in terms, to legislative restrictions upon judicial power, and not to such restrictions upon *quasi* judicial and administrative power. If the public safety director were a judicial officer, and if his hearing and judgment on the suspension in this case were a judicial hearing and judgment, the Scharlo Case would apply.

The defendant in error argues and the Court of Appeals evidently held that, because a hearing is to be had in this case, attended by witnesses, terminating in a so-called "judgment," the Scharlo Case controls, and that section 128 of the Zanesville charter is therefore unconstitutional and void.

Not every decision, however, made by a public officer after a hearing, is judicial in the legal sense. It may be judicial in the vernacular sense that an act involving an exercise of judgment is judicial. It is true that an act of judgment is always involved in a decision following upon a hearing. Moreover, if the public safety director holds this hearing, he will make a finding of fact,

the facts are and decide upon the facts what ought to be done. This circumstance, however, does not necessarily constitute the public safety director a judicial officer, exercising judicial power. This fact is demonstrated by a consideration of the function which he will perform officially, if permitted to act herein. The public safety director will hold this hearing, if permitted, as an incident to his main duty in the case, which is to decide whether the relator is to be suspended. If he upholds the chief of the fire department, the safety director's act will have suspended the relator. Now the act of removal or suspension is simply the converse of the act of employment or appointment. The act of employment, however, is plainly administrative and not judicial. And yet the employment of an employé involves a finding upon facts and a conclusion as to what ought to be done.

[1] The removal or suspension of an employé, which is the converse of the employment, is done, likewise, in the exercise of administrative functions. The power of appointment is not judicial, and the power of taking away the appointment, that is, the power of suspension, or removal, is not judicial. The fact that a hearing is held by the public safety director in a case of this kind, that is, that there is a longer and more formal consideration of the facts than usual, does not change the real nature of the act. It is still administrative, even though in the hearing itself the safety director exercises *quasi* judicial functions.

As the act of the public safety director in upholding or reversing the suspension would be administrative and not judicial, and as his functions in the hearing cannot be said to be more than *quasi* judicial, we hold that the Scharlo decision does not apply.

[2] However, upon another ground, the court is of the opinion that the judgment of the Court of Appeals must be affirmed in this case, which is, that the five-day limitation imposed by the charter is not mandatory, but directory only. In discussing this proposition, consideration of the following section of the Zanesville charter is necessary:

Sec. 128. "The chiefs of the divisions of police and fire shall have the exclusive right to suspend any of the officers or employés in their respective divisions, for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given by the proper authority, or for any other just and reasonable cause. If any officer or employé be suspended, as herein provided, the chief of the division concerned shall forthwith in writing certify the fact, together with the cause for the suspension, to the director of public safety, *who within five days from the receipt thereof, shall proceed to inquire into the cause of such suspension and render judgment thereon*, which such judgment in the matter shall be final, except as otherwise hereinafter provided. The director of public safety, in any such investigation, shall have the same power to administer oaths and secure the attendance of witnesses, and the production of books and papers, as is conferred upon the council."

Plaintiff in error claims that the provision that the director of public safety, within five days of the receipt of the notice of suspension, shall proceed to inquire into the cause of such suspension and render judgment thereon is mandatory and jurisdictional. Upon the admitted record, the director of public safety set the hearing several days after the five-day period had expired. Is he, because of this fact, without jurisdiction in the matter?

A mandatory provision in a statute is one the omission to follow which renders the proceeding to which it relates illegal and void; while a directory provision is one, the observance of which is not necessary to the validity of the proceeding.

Whether a statute is mandatory or directory is to be ascertained from a consideration of the entire act, its nature, its object, and the consequences which would result from construing it one way or the other. 36 Cyc. 1157.

Where the instructions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, the provisions may generally be regarded as directory. Hurford v. City of Omaha, 4 Neb. 336-350.

A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory merely, unless the nature of the act to be performed or the phraseology of the statute or of other statutes relating to the same subject-matter is such that the designation of time must be considered a limitation upon the power of the officer. 36 Cyc. 1160.

The charter section in question does not state in terms that if the judgment is not rendered within five days the public safety director shall have no jurisdiction.

Within the rules above given, then, what is there upon the face of this charter provision which makes the five-day period mandatory? The section does not read, "The public safety director *must* within five days from receipt of the said notice inquire into the suspension and render judgment thereon." The section does say that the public safety director "shall" perform the acts specified within five days, and upon this fact relator bases his claim.

It is established, however, that the one circumstance, that the word "shall" is employed, does not decide the matter. The word "may" may be construed as manda-

tory, and the word "shall" may be construed as merely permissive. 36 Cyc. 1160, states the rule as follows:

"*Construction of Particular Language.* As a general rule the word 'may,' when used in a statute, is permissive only and operates to confer discretion, while the words 'shall' and 'must' are imperative, operating to impose a duty which may be enforced. These words, however, are constantly used in statutes without regard to their literal meaning; and in each case are to be given that effect which is necessary to carry out the intention of the Legislature as determined by the ordinary rules of construction. Thus the word 'may' should be construed to be mandatory whenever the public or individuals have a claim *de jure* that the power conferred should be exercised, or whenever something is directed to be done for the sake of justice or the public good; but never for the purpose of creating a right. So the word 'shall' is to be construed as merely permissive where no public benefit or private right requires it to be given an imperative meaning. Even 'must' has been construed as merely directory, where, from a construction of the entire statute and the object to be accomplished by it, such appears to have been the intention of the Legislature."

Relator, however, quotes in this connection section 10378, General Code, which reads:

"Upon a verdict the justice must immediately render judgment accordingly. When the trial is by the justice, judgment must be entered immediately after the close of the trial, if the defendant has been arrested or his property attached. In other cases, it shall be entered either at the close of the trial, or if the justice then desires further time to consider, on or by the fourth day thereafter, both days inclusive."

Under this section of the General Code relator argues that the jurisdiction of the justice to render judgment lasts only for four days after the verdict, and that after that time has expired he is without power to render judgment. He urges that this section and the authorities under it favor his contention that the public safety director in this case has no jurisdiction after the five-day period has expired. Under the weight of authority this four-day provision is mandatory. Tussing v. Evans, 7 Ohio Cir. Ct. R. (N. S.) 237, affirmed without opinion (Evans v. Tussing, 76 Ohio St. 618, 81 N. E. 1185). However, the wording of section 10378, General Code, differs materially from that of the section in the Zanesville charter. It reads, "Upon a verdict the justice *must* immediately render judgment. * * *" The word "must" again is used in the next sentence, "When the trial is by the justice, judgment *must* be entered immediately after the close of the trial. * * *"

The fact that the Legislature used the word "must" twice in section 10378, General Code, necessarily gives the section a more mandatory character than that of section 128 of the Zanesville charter. The section therefore cannot be said to establish the rule contended for by the relator.

In this case the Court of Appeals, without demurrer being filed to any pleading, considered the case as though a motion had been filed for judgment upon the pleadings, and rendered judgment accordingly. Regarding the question here as if motion had been filed for judgment on the pleadings, and motion for judgment on the pleadings being in the nature of demurrer, for the purposes of this decision we shall take the allegations of the answers filed as true.

As shown by the answers filed, this is not a case where the public safety director is refusing to hold a hearing. If that were the fact, an action in mandamus would lie to force him to hear the case. He had set a hearing for a day shortly after the five-day period had expired, the very day upon which this action in mandamus was instituted.

It is the general rule that in cases of this kind provisions as to time limitation, imposed merely with a view to the prompt and orderly conduct of business, are directory and not mandatory. Spencer's Appeal, 78 Conn. 301, 61 Atl. 1010. The first paragraph of the syllabus of that case reads:

"The provision of General Statutes, § 3718, which requires that the decision of the railroad commissioners upon any matter relating to the removal of grade crossings shall be communicated to the parties within twenty days after the final hearing, is directory only, not mandatory; and therefore a failure by the railroad commissioners to give such notice does not render their decision void."

See, also, Dishon v. Smith, County Judge, 10 Iowa, 212; Pond v. Negus, 3 Mass. 230, 3 Am. Dec. 131; State ex rel. v. Siemens, 68 Or. 1, 133 Pac. 1173.

Does the five-day limitation of section 128 of the charter, then, constitute the essence of the provision and limit the jurisdiction of the public safety director, or is it a limitation merely with a view to the prompt and orderly conduct of business? To decide this question we must consider the "nature and object of the provision and the consequences which would result from construing it as directory or mandatory."

What, after all, is the object of the hearing which is to be held by the public safety director? It is that the employé dismissed or suspended shall have a fair opportunity to present his own view of his actions and to prevent unjust and hasty removal of employés in the public service.

This object might be nullified by holding the five-day limitation to be mandatory. A hearing of this kind might occupy considerably over five days. The employé himself might demand and need a continuance. The director of public safety, acting in entire good faith, might not be able to render a judgment within five days. In fact, the answer of Barnell shows that the director of

limit to secure attendance of the witnesses who were compelled to come from another county. Since the occurrence complained of took place in Franklin county, and the hearing was to be held in Muskingum county, it is possible that the relator himself would have been unable to obtain his own witnesses within the five-day period.

Moreover, the director of public safety might begin a hearing within the five-day period, and, when half way through, circumstances might prevent a determination before the expiration of the five days. To say that the public safety director would have no jurisdiction in such a case would render the provision for hearing useless.

The court holds, therefore, that this five-day limitation is directory and not mandatory, that the public safety director had jurisdiction to hear the question of suspension after the five-day period had elapsed, and that mandamus for reinstatement does not lie.

Relator also claims that the charter and civil service regulations were not complied with in the matter of notifying relator of the accusations against him, and that the charges were not served upon him within sufficient time prior to the date of hearing to afford reasonable opportunity to defend. The charges were left at relator's residence. We find nothing in the regulations nor charter, requiring personal service of such charges, and therefore hold this claim untenable. The record also shows that the relator was given more than a full period of five days to prepare for the hearing, and therefore this objection must be overruled.

Finally, relator claims that the charges are insufficient to justify suspension or discharge. The charter provides specific grounds for removal—

"for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given by the proper authority or for any other just and reasonable cause."

The charge filed in this case was as follows:

"I hereby prefer charges of drunkenness and of operating his automobile while under the influence of intoxicating liquor against Jud Smith, who was stationed in the Monroe street fire station in Zanesville, Ohio. The same Jud Smith was granted a leave of absence of two days by the chief, that he might do some work of importance, but instead of doing any work he drove his machine to Newark, Ohio, and from there to Columbus, and, while driving his machine on the streets of Columbus in an intoxicated condition, collided with another machine, and greatly endangered the lives of the innocent public in driving an automobile while in an intoxicated condition. He was arrested by a deputy sheriff of Columbus and lodged in the city prison; later he was released on bond trial and his bond was forfeited, which goes to show that he was guilty as charged. I furthermore charge the same Jud Smith with immoral conduct."

Relator's argument upon this point is that, where the charter provides specific grounds for removal, as for example, habitual drunkenness, such provision is an exclusion of other causes of like character, and that removal cannot be had for a single act of drunkenness.

However, a reading of the above charges shows that they are not confined to setting up a single act of drunkenness. They also include charges of an arrest, a failure to appear in court, and other specifications which can at least be characterized as describing conduct unbecoming an officer.

The charges, therefore, are properly laid under that phrase of the charter provision which provides for removal "for any other just and reasonable cause."

For the reasons above given, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

ROBINSON, JONES, MATTHIAS, and DAY, JJ., concur.

WANAMAKER, J., concurs in the judgment.

MARSHALL, C. J., took no part in the consideration or decision of the case.

STANKIEWOECZ v. STATE. (No. 24288.)

(Supreme Court of Indiana. Feb. 7, 1924.)

1. Intoxicating liquors ⟸236(13)—Finding that liquor kept was in fact intoxicating sustained.

In a prosecution for keeping intoxicating liquor with intent to sell, evidence *held* to show that the liquor kept was intoxicating in fact, as against a contention that it had not been analyzed or otherwise tested.

2. Criminal law ⟸304(20)—Court judicially knows that whisky is intoxicating.

The court has judicial knowledge that whisky is intoxicating.

3. Criminal law ⟸459—One knowing smell of whisky may testify that liquor is whisky from having smelled it.

One who knows the smell of whisky may testify a jar of liquor is whisky from having smelled it.

Appeal from Criminal Court, Lake County; Martin J. Smith, Judge.

Carl Stankiewoecz was convicted of keeping intoxicating liquor with intent to sell, and he appeals. Affirmed.

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and P. R. Chapin, all of Hammond, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward F. White, Deputy Atty. Gen., for the State.

EWBANK, C. J. [1, 2] Appellant was convicted of a violation of the prohibition law, in keeping intoxicating liquor with intent to sell the same. He filed a motion for a new trial for the alleged reasons that the verdict is not sustained by sufficient evidence and is contrary to law, which motion was overruled, and he excepted, and has assigned that ruling as error. The only point suggested by his brief is that no proof was offered that the alleged liquor which appellant had in his "soft drink parlor" was ever analyzed or otherwise tested, and found to contain more than one-half of one per centum of alcohol, nor that anybody tasted it. But three witnesses testified that it was "moonshine whisky," that they smelled it, and were familiar with the smell of moonshine whisky, and that appellant's wife was behind the bar when the policemen came, and when she saw them ran from behind it to the back porch with a glass jar containing the liquor, where she dropped the jar, which tipped over and spilled part of its contents, but without breaking, and that she then tried to kick the jar. This evidence supports and inference that the liquor in the jar was intoxicating. The court has judicial knowledge that "whisky" is intoxicating. Hogan v. State (1922, Ind. Sup.) 133 N. E. 1; Hiatt v. State (1920) 189 Ind. 524, 527, 127 N. E. 277.

[3] And one who knows the smell of whisky may testify that a jar of liquor is whisky from having smelled it. Shelton v. State (1921, Ind. Sup.) 132 N. E. 594; Zoller v. State (1920) 189 Ind. 114, 126 N. E. 1; Dillon v. State (1919) 188 Ind. 603, 125 N. E. 37.

The judgment is affirmed.

POTTENGER et al. v. BOND et al. (No. 11691.)

(Appellate Court of Indiana, Division No. 1. Feb. 6, 1924.)

1. Appeal and error ⚿187(3)—Defect of parties waived in absence of objection below.

A defect of parties defendant is deemed waived on appeal in the absence of objection below.

2. Towns ⚿64—Boards of trustees of incorporated towns are legal entities and suable as such.

Boards of trustees of incorporated towns are legal entities, and are suable as such; this being recognized by various sections of the statutes relating to towns and municipal corporations.

errors in suit to stay assessment proceedings did not bar right to appeal from decree.

In a suit against a town board of trustees to set aside its acceptance of a sanitary sewer and an assessment roll in favor of the contractor and to enjoin the collection of assessments therefor, etc., the fact that certain plaintiffs named as appellants paid their assessments or executed waivers of error under Burns' Ann. St. Supp. 1921, § 8718, pursuant to the decree appealed from, *held* not to bar their right to appeal, whatever effect such payment or execution of waivers of error had on their right to relief.

4. Appeal and error ⚿416—Notice of appeal to appellants omitted from one assignment not necessary.

Where all of the parties who were plaintiffs below joined in the first of two assignments of error or paragraphs, the failure to join certain of them in the second assignment or paragraph was unimportant and notice to the ones omitted therefrom was not required to confer appellate jurisdiction.

5. Trial ⚿395(7)—Conclusion of law held correct.

In a suit by property owners against a board of trustees of an incorporated town to set aside an acceptance by defendant board of a sanitary sewer constructed by contractor and an assessment in favor of the contractor and to enjoin collection of the assessments, a conclusion of law "that the acceptance of said sewer by said town board, under the facts found in said findings, constitutes a constructive fraud," *held* not erroneous.

6. Appeal and error ⚿747(2)—Appellant cannot complain of finding which he relies on for reversal.

Where appellees assign no cross-errors, findings and conclusions will be assumed to be correct where appellant relies in part on such findings and conclusions as a basis for his claimed right to a reversal.

7. Municipal corporations ⚿513(8)—Findings and conclusions in action to restrain acceptance of sewer and levy of assessment held insufficient.

Findings and conclusions in action to restrain acceptance of sanitary sewer and levy of special assessment, to the effect that plaintiff is entitled to an injunction, but that the injunction shall abate on performance by defendant of contract of certain conditions, not including performance of the contract according to its terms, *held* insufficient.

8. Appeal and error ⚿747(2)—Appellees must assign cross-errors.

Appellees cannot raise questions not assigned as cross-errors.

9. Appeal and error ⚿1071(2)—Erroneous conclusions not harmless unless correct judgment is rendered.

As to the conclusions supporting a judgment, those which are erroneous are harmless only when a correct judgment is rendered on the remaining conclusions.

Judgment must be construed as a whole in order to ascertain its true meaning.

11. Equity ⇐66—Notwithstanding maxim equity must enforce terms of contract.

Equity cannot, under the maxim as to doing equity, change contract, if by doing so its terms are ignored, but must enforce them, however onerous they may be, if such is the clear meaning of the language used and the intention of the parties.

Appeal from Circuit Court, Greene County; Thos. Van Buskirk, Judge.

Suit by Charles A. Pottenger and others against David H. Bond and others. From the decree rendered, plaintiffs appeal. Decree reversed as to all plaintiffs except as to those specifically excepted in the opinion, with directions.

C. E. Davis, of Bloomfield, for appellants. Kessinger & Hill, of Vincennes, and Hendren & Voslob, of Bloomfield, for appellees.

BATMAN, J. This is an action by appellants against appellees, David H. Bond, board of trustees of the town of Worthington, Ind., Hobart Hedden, as clerk, and Charles A. Pottenger, as treasurer, of said town, to set aside, on the ground of fraud, the acceptance, by said board of trustees, of a sanitary sewer, constructed by said Bond under a contract with it; to set aside, as fraudulent and void, the assessment roll in favor of said Bond; to enjoin the collection of the assessments therefor, the issuing of certificates thereon, and further payments to said contractor on account thereof; and from taking any further steps in the matter of said improvement. The complaint is in a single paragraph. Appellee Bond filed an answer thereto in four paragraphs. The appellees, other than Bond, filed a like answer. A reply in general denial having been filed to the affirmative paragraphs of each of said answers, the cause was submitted to the court for trial, and, on request, a special finding of facts was made, and conclusions of law stated thereon. In the former the court, after reciting the statutory proceedings taken by the board of trustees for the construction of the sewer, states that a contract therefor was made with said Bond, and sets out the provisions thereof. It is then found in substance, among other things, that said contractor subsequently presented a report to the board of trustees in which he claimed to have completed the construction of said sewer in all things according to his contract therefor, and asked that the same be accepted; that said board then made an examination of said sewer, and attempted to become acquainted with its condition, and ascertain whether it had been completed according to contract; that said board thereupon proceeded to make an assessment roll therefor, which included assessments against the real estate of appellants; that after notice and a hearing, as provided by law, said assessment roll was confirmed by said board; that the specifications for said sewer provide, among other things, as follows:

"Gaskets will be made of oakum or hemp twisted into strands of such size as will compress into joints, completely filling it all around so as to prevent the intrusion of mortar into the interior of the pipe. * * * Before cementing, the interior of the joints shall be carefully wiped smooth and the annular space must be completely cleaned of dirt, stones and water. A narrow gasket of oakum or hemp, dipped in cement grout shall be properly caulked into each joint, after which the cement mortar shall be introduced therein. Special care to properly fill the annular space at the bottom and sides as well as at the top of the joints with mortar must be taken. The interior of the joint shall then be wiped clean of cement by a rubber disk or other improved device. * * * The contractor may elect to be judge as to the best method of securing foundations for the sewer pipe in wet or unsuitable ground where extraordinary conditions exist. If he elects this method of procedure, the entire responsibility of securing satisfactory results must be assumed by the contractor."

It is further found that in different places in said sewer, the tile were laid in water bearing sand or soil, and that in such cases it was necessary to the efficiency and permanency of said sewer to use the gaskets of oakum, and to observe the methods of sealing and cementing the joints as specified; that in some of said water bearing sand or soil, said oakum was not used, and said specifications were not observed, with the result that said joints were left defective, leaving leaks therein, through which sand and water could enter into said sewer and obstruct the same, and through which sewage could leak; that in the construction of said sewer extraordinary conditions were found to exist, in this, that wet or water bearing sand was encountered in many places in the trenches in which the pipes were to be laid, for a total distance of 2,300 feet; that the nature of the sand was such that the sewer pipe to be laid therein, which were 18 inches in diameter, required, in order to keep them from sinking and hold them secure, and to render said sewer lasting and efficient, that artificial foundations either of timber or stone be used; that throughout said portions of said sewer trench, said contractor did not use or construct foundations of any kind whatever under the aforesaid 2,300 feet of said sewer pipe, but left the same without such foundation, because of which omission said sewer line was liable to subside, break, and part, and is yet liable to subside, break, and part, and destroy en-

of that part of said sewer above mentioned there have already been subsidences and a sinking and breaking, and a total stoppage of said sewer by reason of the lack of said foundation and the proper closing of said joints; that the omissions of said foundations and the closing of said joints, as before stated, has rendered said sewer liable to sink, and it will probably do so in the future, in other places along said lines, and thereby wholly obstruct and destroy its efficiency as a sanitary sewer; that, as shown by finding 9½, there was a failure to construct the manholes in said sewer of the size specified therefor, which resulted in a saving of 15 per cent. of the amount it would have cost if they had been so constructed; that said contractor effected a further substantial saving of money by said other omissions in the construction of said sewer; that said sewer, because of the omissions of said contractor to follow the plans and specifications therefor, is left inefficient and insecure, and liable to sink and collapse at any point in said water bearing sand formation, where foundations have not been laid, and will remain insecure and liable to collapse, until said foundations are constructed under said sewer; that there was at no time any intent to defraud or actual fraud perpetrated upon the part of the contractor or engineer in charge, or said board, or any member thereof, or of any other officer of said town in the construction of said sewer, or in the final acceptance of same, which was done in good faith; that the said breaks in the sewer and subsidence caused thereby have been repaired, and that said sewer system is now working satisfactorily, and doing the work for which it was intended. The court stated the following conclusions of law on the facts found:

"(1) That the law is with the plaintiffs, and that the acceptance of said sewer by said town board, under the facts found in said findings, constitutes a constructive fraud for which said acceptance should be set aside, until conditions in conclusion No. 3 are complied with.

"(2) That said assessment roll, in so far as it affects the plaintiffs herein, should be set aside until conditions in conclusion No. 3 are complied with.

"(3) That the defendants board of trustees of the town of Worthington, Hobart Hedden, as town clerk, and Charles A. Pottenger, as town treasurer of the town of Worthington, should be enjoined from taking any further steps to collect said assessments so set aside, and that said town board should be enjoined from making any new assessment roll or ordering any further acceptance of said sewer until, first, the contractor credits the original contract price with the difference in the cost of construction of manholes as specified in the plans and specifications and the manholes as actually constructed and referred to in finding No. 9½. Second, until the contractor or his in repairing said sewer up to this date. Third, until said contractor or his bondsmen place on file with said town board a good and sufficient bond that he will indemnify the town of Worthington against all damages resulting to said sewer system as a result of any defect in construction thereof, and said bond is to remain in full force and effect for a period of five years from the date of the bond. Until the contractor complies with the three conditions above set out, said injunction remains in force, and when said contractor or his bondsmen fully complies with the three items set out in this conclusion, said injunction will abate and be dissolved.

"(4) Judgment against defendants for costs."

The court rendered the following judgment thereon:

"It is therefore considered and adjudged by the court that the acceptance of the sanitary sewer system in the town of Worthington, Ind., constructed by the defendant David H. Bond, as contractor, together with the assessment roll setting forth the assessments of benefits for the construction of said sanitary sewer system, are each set aside, and it is further considered and adjudged by the court that the board of trustees of the town of Worthington, Ind., Hobart Hedden as town clerk of the town of Worthington, Ind., and Charles A. Pottenger as town treasurer of the town of Worthington, Ind., are each hereby enjoined from accepting said sanitary sewer system or from making a new assessment roll therefor, or paying any money to the defendant David H. Bond, contractor of said sanitary sewer system, on account of assessments heretofore paid to said town of Worthington, Ind., for the construction of said sanitary sewer system, until such time as the defendant David H. Bond, contractor for the said sanitary sewer system, or his bondsmen, shall (here follows in substance, but in more detail, the three requirements specified in conclusion No. 3). It is further considered and adjudged by the court that this injunction shall only be effective and operative against the acceptance of said sewer and the making of a new assessment roll until the said matters set forth in this judgment are complied with, and that when the said matters required to be done in this judgment shall have been done as specified herein, then and in such event this injunction shall abate and be dissolved, and that thereupon said board of trustees of the town of Worthington shall prepare a new assessment roll giving proper credit to the property assessed for said sum of $1,737.75 above set forth and take such other steps as by law provided for the full acceptance of said sewer system; and it is further adjudged that the plaintiffs and each of them shall have the privilege of installment payments on said new assessments as provided by statute, upon their filing waivers as provided by statute."

Appellants filed a motion to modify the judgment in certain particulars, which was overruled. This appeal followed, based on an assignment of errors alleging that the court erred in stating each of its conclusions

motion.

[1] Appellees, other than David H. Bond, have filed a motion to dismiss this appeal. Certain of the reasons given therefor have been rendered unavailing, because of amendments subsequently made by leave of court, and hence will not be considered. The remaining reasons will now receive attention. It is contended that the town of Worthington, Ind., was a necessary party, and that the record shows a failure to make it such. It suffices to say that, if appellees' contention were true, such omission would constitute merely a defect of parties. No question in that regard having been presented in the court below, it will be deemed waived on appeal. White v. Suggs (1914) 56 Ind. App. 572, 104 N. E. 55.

[2] It is also contended that the board of trustees of the town of Worthington, Ind., named as a defendant below, and an appellee in this court, is not a legal entity, and that since this is true, and the members of such board, in their official capacity as such trustees, were not made parties below, the appeal should be dismissed. Appellees are in error in making this contention. Boards of trustees of incorporated towns in this state are legal entities, as their existence is repeatedly recognized in the various sections of the several statutes relating to such towns, in which specific powers and duties are conferred and imposed upon such boards. The statute concerning municipal corporations provides that the board of public works in cities of the first, second, third, and fourth classes shall have charge of the establishment and construction of sewers therein, and of making and collecting assessments therefor. Section 265 thereof (Burns' Ann. St. 1914, § 8959) provides that—

"The provisions of this act relating to * * * sewer and other public improvements in cities of the first, second, third and fourth classes, shall apply to the cities of the fifth class and to incorporated towns, and the duties of the board of public works in relation to such matters shall be performed, * * * in towns by the board of town trustees."

It thus appears that this action relates to certain matters, which involve the duties of the board of trustees of the town of Worthington, imposed upon it as a collective body. Such board appeared by attorneys, whose authority is not questioned, and filed an answer in bar, in which it seeks to defend in part by reason of certain acts, performed by it as a collective body, pursuant to statute. Each individual member thereof knew his relation thereto, and that its acts, in the attempted discharge of certain duties, had been challenged in this action, under the same name substantially, in which such duties had been imposed. If the individual members of such board had any objections to answering which the statute gives, they should have presented the same in the court below; but, having failed to do so, neither they, nor any coparty who remained silent, can be heard to complain in that regard on appeal. It would seem strange indeed that an alleged defendant could be sued as a legal entity, answer as such, obtain a judgment with which it is satisfied, file a plea in bar on appeal, and then declare its own nonexistence, in order to retain the advantage thus gained.

[3, 4] The motion of appellees to dismiss the appeal is based on the further reason that, as they contend, two assignments of error, or a single assignment with two paragraphs, are attached to the transcript, one of which contains the names of all of the plaintiffs below, as appellants, and the other omits a number of them. It appears by the plea in bar, filed by appellees other than Bond, that certain persons whose names appear as appellants in one of the assignments or paragraphs, but are omitted from the other, have either paid an assessment, subsequently made on account of the construction of the sewer, in pursuance of the judgment involved in this appeal, or have executed waivers of error, and filed the same with the clerk of said town, in order to secure the privilege of paying their respective assessments in ten equal installments. Appellees contend that by reason of their acts in so doing they cannot be considered as having joined in the assignment or paragraph in which their names appear as appellants, and therefore should have been served with notice of this appeal, no matter which one of the assignments or paragraphs is relied upon. We cannot concur in this contention. The fact that certain persons, named as appellants, may have paid their assessments, or executed waivers of error, as stated, does not bar their right to appeal, whatever may be its effect on their right to relief thereby. It follows that such persons, having joined in the appeal through one assignment of errors, or one paragraph of an assignment, need not be given notice, although they may not be able to prevail on any error assigned. Koons v. Burkhart (1916 Ind. App.) 113 N. E. 751. It also follows that since all of the parties, who were plaintiffs below, have joined in the first assignment of errors or paragraph, the failure to join certain of them, in the second assignment or paragraph, is of no consequence, and notice to the ones omitted therefrom was not required in order to confer jurisdiction on appeal. Appellees having failed to show any just cause for dismissing the appeal, the motion therefor is overruled.

[5-7] Appellants contend that the court erred in stating each of its conclusions of law. It will be observed that the court stated as a part of its first conclusion:

town board, under the facts found in said findings, constitutes a constructive fraud."

This part of said conclusion, standing alone, appears to be correct, in the light of the following decisions: Leader, etc., Co. v. Grant, etc., Co. (1914) 182 Ind. 651, 108 N. E. 121; Cotterell v. Koon (1898) 151 Ind. 182, 51 N. E. 235; Gorham v. Gorham (1913) 54 Ind. App. 408, 103 N. E. 16; Crawfordsville, etc., Co. v. Ramsey (1913) 55 Ind. App. 40, 100 N. E. 1049, 102 N. E. 282; Alsmeier v. Adams (1916) 62 Ind. App. 219, 105 N. E. 1033, 109 N. E. 58; Windle v. City of Valparaiso (1916) 62 Ind. App. 342, 113 N. E. 429; Dunker v. Calahan (1917) 64 Ind. App. 624, 113 N. E. 15; Neil v. Turner (1919 Ind. App.) 125 N. E. 228. However, we are warranted in assuming that it is correct, since appellees have not assigned cross-errors, and appellants, in part, base their right to a reversal thereon. When we take this conclusion of law in connection with the facts found, it is clear that appellants were entitled to conclusions of law on which a judgment, setting aside the acceptance of said sewer, and the assessment roll therefor, could be based, and proper injunctive relief granted. Were such conclusions of law stated? As the third conclusion of law is, by reference, made a part of the first and second, we shall direct our attention to it first. It is there stated as a conclusion of law, in effect, that appellees, other than Bond, should be enjoined from taking any further steps to collect said assessments so set aside, and that the town board should be enjoined from making any new assessment roll, or ordering any further acceptance of said sewer, until appellee Bond shall have complied with three conditions, and that when appellee last named, or his bondsmen, shall have fully complied with the three conditions specified therein, then said injunction shall abate and be dissolved. It will be observed that the completion of said sewer, in substantial compliance, with the contract therefor, is not one of the three conditions. This of itself, under the facts found, which show a radical departure from the provisions of the contract in certain material particulars, renders said third conclusion erroneous, unless some fact is found which would relieve the contractor from so doing. A careful examination of the facts found fails to disclose any which would have the effect stated, except as to the omission of oakum in dry trenches. We therefore conclude that the court erred in stating said third conclusion of law, and likewise said first and second conclusions, as each of them fails to state that the acceptance of the sewer, and the assessment roll therefor, should be set aside permanently, or until the completion of the sewer according to contract, but limits appellants' rights in that regard to some other than the one just mentioned.

[8] We will now notice some of the objections urged by appellees in opposition to the conclusion we have announced. It is insisted that the complaint in this action is based on actual fraud, and, since the court found there was no such fraud intended or perpetrated, appellants cannot prevail in this action, as a party may not allege actual fraud and recover on constructive fraud. It is also insisted that the conclusion as to constructive fraud, as stated, was unwarranted, since it is not found that the board of trustees had knowledge that the sewer had not been constructed in substantial compliance with the plans and specifications, but the finding is made that the act of such board in accepting the same was done in good faith. It suffices to say, in answer to these contentions that appellees are not in a position to raise any such questions on appeal, as they have not assigned cross-errors, or laid the basis for such an assignment as would have permitted them to do so.

[9, 10] Appellees contend that the court ignored the concluding parts of the first and second conclusions of law, in the rendition of the judgment, as the acceptance of the sewer, and the assessment roll therefor, were set aside thereby unconditionally, and hence any error in either of such conclusions, by reason of reference to conclusion No. 3, was rendered harmless. The rule which appellees seek to invoke is available only when a correct judgment is rendered on the conclusions remaining, after the elimination of such erroneous portions. Was such a judgment rendered in the instant case? A judgment should be so construed as to give effect to all of its parts, and to every word of such parts, including such effects and consequences as follow by necessary legal implication from its terms, although not expressed. 23 Cyc. 1101. In the contemplation of this rule, a clause in a judgment may receive a construction different from that which would have been adopted, if it had stood alone, for the sake of giving effect to some other part thereof. Ex parte Beavers, 34 Ala. 71. In other words, the judgment must be construed as a whole, in order to ascertain its true meaning. Drach v. Isola, 48 Colo. 134, 109 Pac. 748. Applying this rule to the judgment before us, we cannot say that the erroneous parts of said first and second conclusions were ignored, nor can we say that a correct judgment was rendered, if they were ignored. While the language used in the first part of the judgment, if standing alone, would indicate that the acceptance of the sewer, and the assessment roll therefor, were set aside unconditionally, other parts of the judgment indicate that this setting aside was a matter of form, more than a matter of substance. We say

after certain things are done, which do not include the completion of the sewer according to contract, but the doing of those things contemplated, by the latter portions of said first and second conclusions, that a new assessment roll should be prepared, and such further steps taken by said board of trustees, as by law provided for the full acceptance of said sewer. Such a judgment, in our opinion, would result in producing the same practical effect as if the erroneous parts of said first and second conclusions had been stated in the judgment formally rather than substantially. We are led to believe from statements made in the oral argument of this cause, as well as by the facts contained in the plea in bar filed by appellees in this court, that the parties construed the judgment as we have indicated. We therefore conclude that the rule which appellees have sought to invoke is not available to them for the reasons stated.

Again it is contended that each of the three requirements contained in conclusion No. 3 is favorable to appellants, and hence they have no right to complain because of their presence in said conclusion. As we understand, appellants are not complaining so much of the presence of these requirements in said conclusion, as they are of the absence of a requirement that appellee Bond should complete the sewer in substantial compliance with the contract. It is the substitution of said three requirements for the material one last named that forms the basis of their complaint. Appellees therefore have not shown a sufficient reason for an application of the rule which they have sought to invoke.

[11] It is contended that since this is a proceeding in equity, the court was authorized to award appellees such affirmative relief as was necessary to effect an equitable result; that, under the circumstances of this case, it would be inequitable to require appellee Bond to reconstruct that portion of the sewer which the court found did not comply with the contract, but that equity required that appellants should accept the performance of the three conditions found in conclusion No. 3, in lieu of such reconstruction, under the maxim that he who seeks equity must do equity. We agree with appellees as to the character of these proceedings, but cannot agree that the court, in the exercise of its equitable powers, was authorized to require appellants, under the facts found, to accept anything as a substitute for the construction of the sewer in substantial compliance with the contract. While we recognize that courts of equity, in granting relief, are not circumscribed by any fast or technical rules, and hence have a broad discretion in framing their decrees, in order to adopt the relief to the circumlimits beyond which even a court of equity may not go. One of such limitations is stated in a recent legal treatise as follows:

"It is not the province of a court, however, to change the terms of a contract which has been entered into, even though it may be a harsh and unreasonable one. Nor will the dictates of equity be followed if by so doing the terms of the contract are ignored, for the folly or wisdom of a contract is not for the court to pass upon. Its terms, however onerous they may be, must be enforced if such is the clear meaning of the language used, and the intention of the parties using that language." 13 C. J. 541.

See, also, Pittsburgh, etc., Co. v. Lake, etc., Co., 118 Mich. 109, 76 N. W. 395; Cody, etc., Co. v. Coach, 76 Or. 106, 146 Pac. 973; Pine, etc., Co. v. Crystal, etc., Co., 65 Fla. 254, 61 South. 576. Should it be urged that this general rule is not without its exceptions, our answer would be that no facts are found which would warrant the application of an exception. The contract is not unconscionable or its methods of performance impracticable. Its terms are not even harsh, and certainly no facts are found which tend to excuse a substantial compliance. Under such circumstances, it appears absurd to contend that the parties who are compelled by law to bear the burden of payment may be required, through a decree of a court of equity, to accept anything substantially less than full compliance with the contract. In our opinion, we will take a step backward in the administration of justice, if courts of equity assume to possess the power to relieve contractors for public improvements from substantial compliance with the requirements of their contracts, conditioned that they give a bond, or perform some other act not provided therein, in lieu of such compliance, and thus take from those in whose behalf such contracts were made, not only a substantial right thereunder, but impose upon them the inconvenience, annoyance, and expense of enforcing such substituted rights, assuming that they are adequate and enforceable, which may not be true.

Having reached the conclusion announced, we find it unnecessary to consider the remaining error alleged. For the reasons stated, the judgment is reversed as to all appellants, except the following, who signed the waiver of error, pursuant to section 8718, Burns' Supplement of 1921, as disclosed by the plea in bar, filed by appellees, other than David H. Bond, viz., Minnie C. Crites, George Secrest, Clarence W. Heston, Jessie M. Heston, Earl Dyer, May Burris, Allen Gaskill, Mervin G. Heston, Haston Cornwall, Mary A. Criss, Sarah M. Bunger, Fred R. Griffith, Annie Catterson, Thomas L. Catterson, Wm. F. Hansford, Josiah T. Walker, executor of the last will of Grevilla Hansford, de-

ceased, Margaret J. Howe, W. J. Merrill, and Herman Ball, with instructions to the trial court to restate its conclusions of law, in accordance with this opinion, as to all of the appellants not herein specifically excepted, and enter judgment accordingly.

BARR et al. v. GEARY, County Auditor, et al. (No. 11519.)

(Appellate Court of Indiana, Division No. 2. Jan. 29, 1924.)

1. Appeal and error ⇐336(1)—Designating plaintiffs and cross-defendants as plaintiffs only held misprision of clerk.

Where trustees designating themselves as plaintiffs and cross-defendants moved for new trial, stating that for convenience they referred to themselves as plaintiffs, and court in overruling motion acted on theory that motion was in both capacities, use of word "plaintiffs" in order overruling motion *held* misprision of the clerk and appeal not considered as made by them as plaintiffs only and not as cross-defendants.

2. New trial ⇐112—Joint motion good or bad as to all.

A joint motion for new trial by three persons as plaintiffs and cross-defendants, being a single motion, must be either good or bad as to all.

3. Appeal and error ⇐171(1)—Trial theory as to parties' capacity prevails on appeal.

Where trial theory was that appellants as plaintiffs and cross-defendants prosecuted and defended below as trustees of a charitable trust, which was the only trust involved and it was understood that trustees were in court only in that capacity, such theory will prevail on appeal.

4. Appeal and error ⇐335—Entire record considered to determine whether appellants act in same capacity as in decree.

In determining whether appellants are named in assignment of errors in same capacity as they were parties to decree, the Appellate Court will look to the entire record and be liberal in sustaining sufficiency of assignments where parties are acting in representative capacity.

5. Appeal and error ⇐336(1)—Appeal not dismissed where appellants designate themselves same as in pleadings.

Where parties are designated in pleadings as trustees without designating the cestui que trust, appeal will not be dismissed because in their assignment of errors they are designated in the same manner.

6. Appeal and error ⇐937(1)—Trustees presumed to appeal on behalf of charitable trust which they represented below.

Where the only question before trial court was validity of a charitable trust, it will be presumed that trustees in appealing do so in behalf of the same trust they represented at the trial though not specifically designated as trustees of that trust.

7. Appeal and error ⇐385(2)—Not necessary that party appealing sign appeal bond in particular capacity.

It is not necessary that party appealing sign appeal bond in capacity in which he sues or is sued, or that he sign it at all.

8. Charities ⇐31—Charitable trusts liberally construed to sustain donations.

Charitable trusts are favorites of the law and will be most liberally construed to sustain attempts to donate property to charitable uses.

9. Charities ⇐31—All doubts resolved in favor of charitable trust.

The charitable character of a trust being made apparent, all doubts will be resolved in its favor.

10. Trusts ⇐112—Rule of liberal construction inapplicable to private trusts.

The rule of liberality of construction to sustain a charitable trust does not apply to private trusts.

11. Charities ⇐17, 23—Provisions of will held not so uncertain as to render charitable trust invalid.

Testatrix, after providing for payment of debts and certain legacies, provided for upkeep of a burial ground, for annuities for certain persons, and gave the residue to trustees with directions to manage it and from net proceeds make payment of the designated annuities and establish and maintain a memorial home for friendless mothers and their babies. *Held* that, since trustees had no discretion in carrying out testatrix's intention, neither the uncertainty as to the amount of income to be applied to the charitable purpose nor the provision that they should, "as soon as possible" after testatrix's death, establish and maintain the home, rendered the trust void for uncertainty.

12. Charities ⇐25—Trust, if invalid, held separable from another charitable trust.

Where testatrix created trust in 40 acres of land for upkeep of cemetery, and provided that any surplus income should be paid to the bulk of her estate, *held*, that such trust for burial ground was separate from a charitable trust created in the residuary estate and might be declared invalid without affecting the charitable trust.

13. Charities ⇐4—Provision not objectionable as mingling charitable and private trusts.

Where one of the conditions of a trust deed was that in a certain contingency the land should be conveyed to trustees named in the grantor's will and the will created a charitable trust, a provision in the will that in case of such conveyance the trustees under the will should convey to a person's widow and issue and that, if he left none, the land should remain a part of the estate, and the income be used for the purposes of such charitable trust, *held* not objectionable as mingling charitable and private trusts.

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14. Charities ⇐11—Direction to admit homeless and helpless girls to charitable home held not to invalidate charity.

Where testatrix left property to trustees to establish a home for sick and friendless women and their babies, a provision that, if the home was not filled with such women, homeless, helpless girls should be admitted *held* a valid charitable bequest.

15. Charities ⇐10—Gift not unlawful as charity because not intended to relieve poverty.

A gift to a public use is not unlawful as a charity because it is not for the purpose of relieving poverty.

16. Charities ⇐25—Charity not invalidated even though additional use might be invalid.

Where testatrix gave property for a home for sick and friendless women and their babies and provided that, if the home was not filled with such women homeless, helpless girls should be admitted, even though the latter provision should be invalid, it would not necessarily render the trust void.

17 Charities ⇐21(3)—Beneficiaries of trust not uncertain.

Provision in will that home for sick and friendless shall be open and free to all honest, virtuous, sick, and financially helpless mothers and their babies *held* not to render beneficiaries uncertain nor incapable of judicial enforcement.

18. Charities ⇐11—Trust for home for sick and friendless women held a "public trust."

A trust for the maintenance of a home for sick and helpless mothers and their babies was a public trust.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Trust.]

19. Charities ⇐34—Requirement of one year's residence before admission to home for friendless women construed.

Provision in will requiring residence for one year to entitle applicant to admission to home for sick and friendless mothers *held* not to mean one year's residence in state before testatrix's death.

20. Perpetuities ⇐8(1)—Rule inapplicable to gifts to charity where title vests immediately.

The rule against perpetuities (Burns' Ann. St. 1914, § 3998) does not apply to gifts for charitable uses where title vests immediately in charity.

21. Perpetuities ⇐8(8)—Direction for accumulation does not necessarily affect validity of gift to charity.

A direction for accumulation in a charitable bequest, forbidden by Burns' Ann. St. 1914, § 9724, does not necessarily affect validity of the gift.

22. Taxation ⇐251—Party claiming exemption has burden of proving property in exempt class.

Taxation being the rule, a party claiming exemption therefrom has burden of showing that his property is in class which is exempt.

23. Taxation ⇐204(2)—Statutes exempting property strictly construed.

Laws are to be liberally construed in favor of equal taxation, while statutes exempting property are to be strictly construed.

24. Taxation ⇐241(2)—Land not exempt where only part of income devoted to charity.

Where one-third of the income from agricultural land, after paying certain annuities, was to be paid to a certain legatee for life and the residue was to be used in establishing and maintaining a home for sick and friendless women, which occupied three acres in a tract of 2,800 acres, since only a part of the income was to be devoted to the charity, the land other than that used and set apart for the home was not exempt from taxation under Burns' Ann. St. 1914, § 10144, cl. 5, section 10151a, and Acts 1919, c. 59, § 5, cls. 5, 14, especially where the trustees were not diligently and in good faith carrying out the trust arrangement.

25. Taxation ⇐203—No implication that any property was intended to be excluded.

Exemption from taxation must positively appear, and no implication arises that any property was intended to be excluded if it comes within fair purview of the statute.

Appeal from Circuit Court, Benton County; Benj. F. Carr, Special Judge.

Action by James R. Barr and others, trustees, against Sherman N. Geary, County Auditor, and others. Decree for defendants, and plaintiffs appeal. Affirmed in part. Reversed in part, with directions to render judgment conforming to opinion.

Stuart, Simms & Stuart and Jones & Lairy, all of La Fayette, and Fraser & Isham, of Fowler, for appellants.

Gaylord & Sills, of La Fayette, Chas. M. Snyder and Burke Walker, both of Fowler, and Henry M. Dowling and Wm. L. Taylor, both of Indianapolis, for appellees.

McMAHAN, J. Jennie E. Caldwell died testate January 20, 1912, the owner of considerable personal property and of more than 6,000 acres of land in Benton county. Her will was probated in the Benton circuit court, and her estate was finally settled in 1917, when all the property of said testatrix remaining after the settlement of her estate was transferred, and turned over to appellants James R. Barr, Lee Dinwiddie, and William C. Compton, who took possession thereof and are now claiming to hold the same for charitable purposes under items 17 and 18 of said will, which items so far as they affect the questions involved in this appeal are as follows:

Item 17: "I hereby will, devise and bequeath to James R. Barr, Lee Dinwiddie and William C. Compton, and the survivor of them, in trust, nevertheless, and upon the conditions of trust herein following all the rest and residue of my property, real, personal and

mixed, of every kind and nature, and wheresoever situate; and I direct that said trustee shall manage said property to the best interests of my estate, keep all buildings and fences in good repair, pay all taxes and legal assessments thereon, and all proper expenses of administering the said trust. And from the net proceeds derived from said trust, I will and direct that said trustee shall pay"—here follows provisions for the payment (a) of over $400 a month during life to an aunt, (b) an annuity of $1,000 to a brother-in-law, (c) an annuity for life of $150 to a Mrs. Ford, (d) of $2,000 annually for life to two nieces, (e) of a $25,000 mortgage on the house of an uncle, and (f) one-third of the residue of the net income from the estate to Kathryn M. Sumner during her life and upon her death to be paid to William Fowler Sumner during his life.

Item 18: "I hereby will and direct that said trustees, and the survivor of them if either be then living, and if neither be living, then such trustees as the judge of the Benton circuit court may appoint, shall, as soon as possible after my death, establish and maintain, by the income from my estate, in the home where I now live near Earl Park, Indiana, a home for sick, helpless mothers and their babes, on conditions hereinafter named: That said home shall be known as the 'Jennie E. Fowler Caldwell Memorial Home.' That said home shall be open and free to all honest, virtuous, sick and financially helpless mothers and their babes, who are and have been for one year or more immediately prior thereto, residents of the state of Indiana. Provided, however, that said trustees shall select of such sick women and their babes who may apply for admission, those who, in the judgment of said trustees, are deserving of such admission and care, to the extent of the capacity of said home. And I further direct said trustees to admit none who are suffering from, or who shall have a contagious disease of any kind or nature. And I direct that said trustees shall manage my estate, keep in good repair the buildings thereon, and keep and manage said home in a manner best calculated for the comfort of such women and children, furnishing to them such medical care and aid and nursing as they may need; and that said trustees provide for every proper want of such women and babes, while at said home.

"And I further direct that said trustees shall, provided the income from my said estate be sufficient, and such home is not filled with such women and their babes, admit homeless, helpless girls, from the cities of Indiana and other parts of Indiana, and especially during the summer season, for an outing or fresh air vacation; which girls shall be selected by such trustees in the same manner as said women."

After said real estate was turned over to said trustees, it was listed and assessed for taxation, and the taxes not being paid it had been returned delinquent and the county auditor had advertised the same for sale for the nonpayment of such taxes. A few days before the land was to be sold, "James R. Barr, Lee Dinwiddie and William C. Compton, trustees of the trust created by the last will and testament of Jennie E. Caldwell for the Jennie E. Fowler Caldwell Memorial Home," filed their complaint against the auditor and treasurer of said county, hereafter referred to as appellee officers, to enjoin them from selling such real estate for the nonpayment of taxes. The complaint charged that the real estate had been devised to said trustees by the last will and testament of Mrs. Caldwell for charitable purposes, and that it was being used and applied by them for the benefit of a charitable purpose within this state and was exempt from taxation. Appellee officers filed a cross-complaint naming the plaintiffs and the state of Indiana as defendants, and alleging that the provisions of the will attempting to create a trust for the memorial home were void, and asking that the real estate in question be adjudged taxable. The Attorney General appeared for the state and filed a cross-complaint against the original plaintiffs, appellee officers, and Abigail H. Hart, Elizabeth H. Bond, and James Hawkins, hereafter referred to as appellee heirs, who were alleged to be heirs of the testatrix. The Attorney General by his cross-complaint sought to have the trust declared valid and to have the real estate exempted from taxation. Barr, Dinwiddie, and Compton, plaintiffs and cross-defendants, as "trustees of the trust created by the last will and testament of Jennie E. Caldwell," filed a motion to strike this cross-complaint from file. This being overruled, they filed a demurrer and then an answer in which they were designated as plaintiffs and cross-defendants, trustees created by said will.

Appellee heirs filed a cross-complaint against the Attorney General, and Barr, Dinwiddie, and Compton, "trustees of the trust created by the last will and testament of Jennie E. Caldwell Memorial Home," alleging that they were the owners in fee and as tenants in common of the real estate mentioned in the complaint and asking that their title be quieted and that they have judgment for possession. Plaintiffs and cross-defendants Barr, Dinwiddie, and Compton, "trustees of the trust created by the last will and testament of Jennie E. Fowler," filed an answer in five paragraphs to this cross-complaint. Appellee heirs later filed an additional cross-complaint against Barr, Dinwiddie, and Compton, "trustees under the last will and testament of Jennie E. Caldwell," in which it is alleged that the estate of Jennie E. Caldwell had been finally settled and that all the real estate described had been conveyed and delivered to "Barr, Compton, and Dinwiddie, as trustees under the last will and testament of said Jennie E. Caldwell"; that all legacies, devises, and annuities given in said will had been executed and discharged except an annuity of $1,000 per year to Nellie Fowler as provided for in item 5 of the will, and except also an annuity of $2,000 to Florence Follansbee and Anna Eckstadt as provided in item 17, each

created in item 18 of said will providing for the establishment and maintenance of the Jennie E. Fowler Caldwell Memorial Home was null and void, on account of certain designated reasons which will be referred to later in this opinion. A motion to make more specific a demurrer and answer were successively filed to this cross-complaint by "plaintiffs and defendants," as "trustees of the trust created by the last will and testament of Jennie E. Caldwell."

The court found the facts specially and concluded as a matter of law that the provisions of the will relating to the creation of the trust for the purpose of maintaining the memorial home were void; that the real estate was subject to taxation; and that the title of appellee heirs should be quieted as against the three trustees in so far as they claimed to hold the real estate as trustees for the maintenance of said home.

The plaintiffs and cross-defendants, Barr, Compton, and Dinwiddie, "trustees," filed a motion for a new trial, the opening paragraph of which motion reads as follows:

"Said plaintiffs and cross-defendants in the above-entitled cause, James R. Barr, William C. Compton, and Lee Dinwiddie, trustees of the trust created by the last will and testament of Jennie E. Caldwell for the Jennie E. Fowler Caldwell Memorial Home, hereinafter for convenience called the plaintiffs, respectfully move the court for a new trial thereof on the following grounds, to wit. * * *"

The order book entry showing the overruling of this motion states that "plaintiffs and cross-defendants," Barr, Dinwiddie, and Compton, "trustees," were present, and that "plaintiffs' " motion for a new trial was overruled, to which ruling plaintiffs excepted and were given time for filing bill of exceptions and appeal bond with certain named sureties. The record also shows that when the court filed the special finding and conclusions of law, Barr, Dinwiddie, and Compton, "trustees, plaintiffs and cross-defendants," each separately excepted to each conclusion of law. The appeal bond recites the rendition of the judgment against the same parties, as "trustees, plaintiffs and cross-defendants," and that they as such "trustees, plaintiffs, and cross-defendants" had appealed. The bill of exceptions containing the evidence purports to be the bill of said Barr, Dinwiddie, and Compton, as "trustees, plaintiffs and cross-defendants."

From a decree adjudging the provisions of said will void in so far as it attempted to create a trust for the establishment and maintenance of the memorial home and quieting the title of appellee heirs as to said trust, Barr, Dinwiddie, and Compton appeal. In the assignment of errors appellants are designated as "James R. Barr, William C. Compnie E. Caldwell," that being the way they were designated in the additional cross-complaint and decree.

Appellee heirs and appellee officers have filed separate motions to dismiss the appeal. These motions are so nearly alike that a ruling on the motion of appellee heirs will dispose of all the questions raised by the other motion.

The reasons stated in the motion of appellee heirs to dismiss, briefly stated, are:

(1) That no one excepted to the action of the court in overruling the motion for a new trial and was given time in which to file bond except the "plaintiffs," and that there was no issue or judgment on any issue between the parties appealing and these heirs in which the appellants were plaintiffs; that no notice of this appeal has been served on appellees.

(2) That Barr, Dinwiddie, and Compton, trustees of the trust created by the will of Mrs. Caldwell for the memorial home, were the only plaintiffs, and that they have not assigned error in this court in the capacity in which they brought suit, but have assigned error as "trustees of the trust created by the last will and testament of Jennie E. Caldwell"; that they never took any exceptions, prayed an appeal, or did anything in the capacity in which they as appellants assign error, and that no attempt has been made to give appellees notice of this appeal, although more than 90 days had elapsed since the transcript was filed.

(3) That this is an attempted appeal by Barr, Dinwiddie, and Compton in their individual capacity and not as trustees of the trust for the memorial home; that as such individuals they took no steps to perfect an appeal; and that they assign errors as trustees, but do not state the names of those for whose benefit they are appealing.

As hereinbefore stated, Barr, Dinwiddie, and Compton filed their complaint in which they alleged that the real estate in question had been devised to them by the will of Mrs. Caldwell in trust for charitable purposes and sought to enjoin the collection of taxes on such property on the theory that, being devoted to a public charitable purpose, it was not subject to taxation. The cross-complaints of appellee officers and appellee heirs each attacked the validity of the charitable trust mentioned in the complaint. Appellee officers asked that the provisions of the will creating such trust be adjudged to be void, and appellee heirs asked that the charitable trust be decreed void and that their title to the real estate be quieted free from such trust. The only issue presented to the trial court, whether arising on the complaint or on the cross-complaints, related to the validity of the provisions of items

17 and 18 of Mrs. Caldwell's will creating the trust for the memorial home.

[1-3] The three trustees, designating themselves as plaintiffs and cross-defendants, trustees of the charitable trust, as hereinbefore shown, filed their motion for a new trial, stating therein that for convenience they therein and thereafter referred to themselves as plaintiffs. The plaintiffs and cross-defendants filing this motion were the same persons. It was a joint motion of the three in their trust capacity. The court in overruling this motion acted upon that theory, and it is clear that the statement that the court overruled the "plaintiffs'" motion for a new trial, to which "plaintiffs" excepted and were given time, referred to the joint motion of the three trustees who were designated in the motion as "plaintiffs and cross-defendants" and also merely as plaintiffs. The use of the word "plaintiffs" in the order overruling this motion, instead of the words "plaintiffs and cross-defendants," will be held to be a misprision of the clerk. First National Bank v. Farmers,' etc., Bank, 171 Ind. 323, 333, 86 N. E. 417. Any other holding would put the trial court in the position of never having ruled on the motion of the cross-defendants and giving them the benefit of a term time appeal—an improbable situation, since a joint motion for a new trial, being a single motion as to all, must be either good as to all or bad as to all. After overruling this motion, the court entered a decree against all the parties filing the motion, which to our mind indicates that the court understood it had overruled the motion for a new trial as to all the moving parties. The trial court and all the parties understood that Barr, Dinwiddie, and Compton were prosecuting their complaint and defending the cross-complaints, as trustees of the charitable trust created for the benefit of the memorial home. No other trust was involved. There was in fact but one question presented to the trial court for determination, viz.: Were the provisions in items 17 and 18 relating to the trust for the memorial home valid? While the manner in which reference to this trust and the trustees thereof was not uniform, an examination of the record leaves no doubt that the reference in the pleadings, finding, judgment, and motion for a new trial, to the trustees, in every instance was understood by the parties and by the court to have reference to them in their capacity as trustees of the charitable trust for the establishment and maintenance of the memorial home. That was the theory on which the case was tried, and that theory will prevail on appeal. See Ditton v. Hart, 175 Ind. 181, 93 N. E. 961; Helms v. Cook, 62 Ind. App. 628, 632, 111 N. E. 632.

Having held as we do that the use of the word "plaintiffs" in the order overruling the motion for a new trial is to be treated as a misprision of the clerk, it follows that the necessary steps were taken by the trustees to perfect a term time appeal by them in their capacity both as plaintiffs and as defendants to the cross-complaints.

[4] In determining whether the appellants are named in the assignment of errors in the same capacity as they were parties to the decree, we will look to the entire record, and will be liberal in sustaining the sufficiency of the assignment of errors where the parties are acting in a representative or fiduciary capacity. Dykeman v. Jenkins, 179 Ind. 549, 555, 101 N. E. 1013, Ann. Cas. 1915D, 1011.

[5] The appellants are designated in the assignment of errors in the same manner as they were designated in the additional cross-complaint of appellee heirs, that being the cross-complaint upon which the judgment quieting the title of said heirs is founded. Where parties are designated in the pleadings as "trustees" without designating the cestui que trust, an appeal will not be dismissed because the appellants in their assignment of errors designate themselves the same as they were named in the pleadings below. Hiatt v. McColley, 171 Ind. 91, 85 N. E. 772; Nisius v. Chapman, 178 Ind. 494, 497, 99 N. E. 785.

[6, 7] Appellees say there were a number of private trusts created by Mrs. Caldwell in her will, and that it is not possible to tell from the assignment of errors whether the appellants are appealing as trustees of the private trusts, or as trustees of the charitable trust. It is a sufficient answer to this contention to say that no question was before the trial court affecting any of the so-called private trusts. The issues before the court related only to the validity of the charitable trust. It will therefore be presumed that the trustees in appealing do so in behalf of the same trust which they represented in the trial court. Appellants were only affected by the judgment below in their capacity as trustees of the charitable trust. The record clearly shows this appeal is being prosecuted by appellants in their fiduciary capacity for the purpose of reversing the judgment decreeing and adjudging that trust to be void. All the parties affected by that decree are before the court. The contention of appellees that the appeal must be dismissed because appellants are not designated as the trustees created by them for the memorial home in the same manner as they were designated in the title of the original complaint is not well taken. Appellees further contend that the appeal must be dismissed because the appeal bond was not signed by the plaintiffs in the capacity in which they sued. But it is not necessary that a party appealing sign the appeal bond in the capacity in which he sues or is sued, or that he sign the bond at all. Railsback v.

Ind. 405; Majenica Tel. Co. v. Rogers, 43 Ind. App. 306, 87 N. E. 165; Supreme Council v. Boyle, 15 Ind. App. 342, 345, 44 N. E. 56.

What we have said is sufficient to dispose of all the specifications in the motion to dismiss the appeal. The several motions to dismiss are overruled.

Appellees contend that the trust attempted to be created for the memorial home is invalid for the following reasons: (1) The subject-matter of the trust is uncertain. (2) The class of beneficiaries is uncertain. (3) That the charity is not of a public character. (4) That it is not enforceable by judicial decree, but rests in the uncontrolled discretion of the trustees. (5) That it violates the rule against perpetuities and the statute forbidding accumulations. (6) That it is against public policy.

In support of the first contention appellees say: (a) That the provisions of the will are vague and uncertain as to the corpus of the estate, on which the income applicable to the home is to be computed. (b) That the corpus of the trust is indefinite because it is diminishable at the discretion of the trustees. (c) That the provisions of items 17 and 19 of the will are antagonistic with respect to the disposition of the income from certain land. (d) That the trust is uncertain because of different instructions given the trustees in items 17 and 18. (e) That the requirement that the home be established as soon as possible after the death of the testatrix makes it uncertain. (f) That the will attempts to combine charitable with noncharitable trusts.

[8, 9] In considering these objections, we must keep in mind that a charitable trust is a favorite of the law, and that the most liberal rules of construction will be employed to sustain and uphold every attempt of a person to donate his property to a charitable use. The charitable character of the trust being made apparent, all doubts will be resolved in its favor. Dykeman v. Jenkins, supra; Board v. Dinwiddie, 139 Ind. 128, 37 N. E. 795; Erskine v. Whitehead, 84 Ind. 357; Reasoner v. Herman (Ind. Supp.) 134 N. E. 276; Richards v. Wilson, 185 Ind. 335, 384, 112 N. E. 780.

[10, 11] Appellees cite 26 R. C. L. 1183; 39 Cyc. 34; 28 Amer. & Eng. Ency. Law (2d Ed.) 865; Holsapple v. Shrontz, 65 Ind. App. 390, 117 N. E. 547; Nesbitt v. Stevens, 161 Ind. 519, 69 N. E. 256; and other authorities in support of the contention that the property must be clearly and definitely pointed out. The authorities cited all relate to private trusts—a class of trusts where the rule of liberal construction in order to sustain the trust does not apply. They also call attention to the provision in item 18 providing that the trustees shall establish of the estate and say that nothing was said about a "part of the income," "net income," or "income from a part of the estate," and that the language is broad enough to include all of the estate and all of the income from all of the estate.

Appellees seemingly overlook the fact that the testatrix by the first 16 items of her will made provision for the payment of her debts, disposed of a large portion of her personal property, including heirlooms, made provisions for certain relatives, rewarded employees and business associates, either with money or real estate, or the right to purchase certain real estate on favorable terms, and provided for the upkeep and maintenance of a burial ground.

By item 5 she bequeathed to her niece Nellie Fowler for life an annuity of $1,000, "to be paid out of my estate, annually, by the trustees hereinafter named."

By item 7 she gave Barr, Dinwiddie, and Compton a certain 40-acre tract of land in trust to be rented by them, and after paying the taxes, repairs, and expenses of management, to use the net income for the maintenance of a certain burial ground and if the income were more than required to maintain the cemetery, to pay the "residue of said net income from said forty acres of land to the bulk of my estate, to be disposed of as hereinafter set forth."

By item 8 she gave Barr, Compton, and Dinwiddie, as trustees, $10,000, with directions to invest as they deemed best and to pay the net proceeds thereof to Mrs. Mamie Huffman during her lifetime, and at her death to pay the $10,000 to the then living children of Mrs. Huffman as they reached the age of 21.

By item 17 she gave "all the rest and residue of my property, real, personal and mixed," to the three named trustees with directions to manage the same, to keep all buildings and fences in repair, to pay taxes and assessments and costs of administering the trust, and from the "net proceeds derived from said trust" make payment of designated annuities to certain persons during life and to pay off a mortgage indebtedness of $2,500 on the home of an uncle.

Item 16 provided that the trustees establish and maintain "by (from) the income" of her estate the memorial home. The $1,000 annuity payable to Nellie Fowler and the $10,000 devised to the trustees for Mrs. Huffman and her children were first carved out of the estate of the testatrix for the purposes therein designated. The trust created by item 7 for the upkeep of the cemetery is entirely separate and independent of the trusts created in items 17 and 18. The validity or invalidity of the trust for cemetery purposes does not affect the question as to the validity of the other trusts. The va-

lidity of the cemetery trusts and to whom the 40 acres of land would go if that trust be invalid are not before us for determination, and we express no opinion as to that question. We note, however, that there is nothing in the record to show whether the cemetery in question is public or private. Nor are we required to decide whether the $1,000 annuity provided for Miss Fowler in item 5 shall be paid out of the corpus of the estate or out of the income of the property in the hands of the trustee. It is clear, however, that the bequests provided for in item 17 are to be paid out of the net income derived from the property in the hands of the trustees, and that the whole of the net income remaining shall be used for the memorial home. While the exact amount in dollars and cents cannot be foretold to a certainty in advance, as the total net income from the trust property will vary from year to year, so the income to be devoted to the memorial home will vary from year to year, not because the trustees have any discretion in the matter, other than their discretion as to the management of the property.

Item 19, which appellees say is antagonistic to item 17 to the extent that it renders the trust void for uncertainty, after reciting that the testator prior to the execution of the will had by deed conveyed to Barr and Dinwiddie a certain tract of land in trust, one of the conditions of said trust being that in the event of the death of Kathryn M. Sumner and William Fowler Sumner, the two trustees therein named should convey said land to the trustees named in her will, devised and directed, in the event of the death of Kathryn N. Sumner and William Fowler Sumner and the reconveyance of said land to the trustees named in the will, that said last-named trustees should convey said land to the widow and lawful issue of William Fowler Sumner, if any, but if he left no widow or issue, the said real estate was to remain a part of the testator's estate and the income therefrom to be used to help maintain the memorial home in the same manner as the rest of her estate. William Fowler Sumner died prior to the death of the testatrix and left no widow or issue. The evident intent of the testatrix as expressed in item 19 was that when the trust which had been created by the deed had been fully executed, the real estate there involved should become a part of her estate or property in the hands of the three trustees named in her will, that the same should be held by them in the same manner and under the same conditions as they held the balance of the property under item 17, and that the income therefrom should be used to maintain the home in the same manner as the income from the other property. In any event, the trustees are to be guided by the intention of the testatrix and not by their inclination. What the intention of the testatrix was is a question of law. The trustees have no discretion in the matter. Their duty is to follow the expressed intent of the testator. If in doubt as to what that intent is, they have their legal remedy by petition for construction to the proper court. Appellees' contention that the income available for the memorial home may be diminished or changed by the discretionary acts of the trustees in using a part of the corpus of the estate in their hands, or in using the income, or a part of the income and a part of the principal for the purpose of paying annuities, cannot prevail. The legacies mentioned in item 17 are all to be paid out of the net income. Nor do we think the trustees have any discretion as to from what fund or property they are to pay the $1,000 annuity to Miss Fowler as provided in item 5; but, as before stated, we are not called upon at this time to decide that question. We are clear, however, that the provisions in that regard are not so uncertain as to render the trust created for the memorial home void.

Tilden v. Green, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487, cited by appellees, is readily distinguished from the instant case. There the testator created an active trust in the whole of his estate for private purposes and then gave his executors discretionary power to give such part of it as they deemed expedient to a certain charitable trust or to withhold all from it. No such discretionary power was given the trustees in the instant case.

In Mills v. Newberry, 112 Ill. 123, 1 N. E. 150, 54 Am. Rep. 213, the testator gave certain property to her mother absolutely, and then provided that so much of the property so devised to her mother, as "remained undisposed of and unspent" at the death of the mother, was to be given in trust for charity. The testatrix in that case having given the whole of the property to her mother, there was nothing left for charity. The mother had the absolute right to dispose of or spend the whole of the property and for that reason the attempt to create a trust failed. No specific property was there to set aside for charitable purposes. In the instant case the testatrix did set aside certain property for that purpose.

The directions in item 18 that the trustees should as soon as possible after the death of the testatrix establish and maintain the memorial home does not render the trust void for uncertainty. The testatrix had in mind that she had already made provision for the payment of certain legacies and annuities out of the income of the property, and, not knowing when sufficient money would be available for the establishment and maintenance of the home, she intentionally

left the time when the trustees should establish the home to their judgment subject, of course, to judicial control.

[12] Appellees next contend that the will fails to create a valid gift to charity because it attempts to combine the charitable bequest with others which are noncharitable. Appellees in their presentation of this as well as in the presentation of their other contentions overlook the rule of liberal construction in order to uphold the charitable trust and seek to apply the rule of strict construction in order to defeat a charitable trust. They say that the income named in items 18 and 19 is not indicated as a part of the income after certain other bequests are satisfied, nor as a residue and remainder of income, but is the entire income; that in items 7 and 17 she referred to the residue of net income; that the income mentioned in item 18 is to be used not only for the home but may be devoted to private trusts also; that there are at least four private trusts all of which are so mingled with the charitable trust as to render it impossible to say how the funds shall be apportioned.

The trusts referred to by appellees which they say render the trust created by items 17 and 18 for the memorial home invalid are: (1) The trust created by item 7, where 40 acres of land is given the same three individuals as trustees for the upkeep of the cemetery; (2) the trust for the payment of the annuities and legacies mentioned in item 17; (3) the trust referred to in item 19 requiring the two trustees, Barr and Dinwiddie, on the death of Kathryn and William Fowler Sumner, to convey said 40 acres to the three trustees named in the will, and providing that the income therefrom be used to help maintain the home; and (4) the provision in item 18 directing the trustees, if the income from the estate is sufficient and if there be room in the home, to admit homeless and helpless girls.

If it be conceded that the trust for the burial ground is a private trust and not valid, that trust, however, is separate and independent of the trust created for the home. Item 7 may be declared invalid as a whole without in any manner affecting the validity of the trust created for the memorial home. The aggregate of the funds available for the home would, in that event be reduced, by the amount of the income from the 40 acres left after the maintenance of the cemetery. This would not be because of anything in items 17 and 18 creating the trust for the home, but because of the invalidity of the trust attempted to be created for cemetery purposes.

[13] Item 19 relates to a trust created by deed prior to the execution of the will, wherein it was provided that the real estate there involved consisting of 640 acres should on the death of the beneficiaries be conveyed by the trustees therein named to the three trustees named in the will. The conditions under which the two trustees should hold that tract of land is not disclosed, although it may be inferred that they were to hold it subject to the right of Mrs. Caldwell to dispose of the remainder or reversionary interest by deed or by will, since she did in item 19 make provision for the conveyance of such real estate to the widow and children of one of the beneficiaries, William F. Sumner, if he died leaving a widow and children, with the further provision that if said William F. should not leave a widow or issue, such real estate was to remain a part of her estate in the hands of the trustees the income therefrom to be used to maintain the home in the same manner as the remainder of the estate in the hands of the trustees. This is by virtue of the will, and not by reason of any provision in the trust deed. No question is made as to the validity of the provisions made in this item in so far as it provides for a conveyance to the widow and children, and we see no objection to either that provision or to the provision giving the reversionary interest to the trustees for the use of the home.

[14] Does the direction as to the admission of homeless and helpless girls under the trust for the memorial home make it invalid? In Bowditch v. Attorney Gen'l., 241 Mass. 168, 134 N. E. 796, the testator gave the residue of his estate to a trustee, and after the payment of certain annuities, the balance of the income was to be divided by the trustee into three equal parts and expended or given away by him in such manner as in his judgment would best promote the following causes: (1) Women's rights, (2) temperance, and (3) "the best interests of sewing girls in Boston." The bequest to promote women's rights was held invalid, while the other two were upheld. In discussing the trust in the interest of sewing girls the court said:

"The trust to promote 'the best interests of sewing girls in Boston' is for a charitable purpose. It applies to an indefinite number of a particular class and the purpose of the testator is sufficiently certain and defined; manifestly it is a valid charity. Sewing girls are handicraftsmen, and the word 'girls' implies youth. The clause 'best interest' includes not only the relief of poverty and distress, but has a broader signification, and well may comprehend within its spirit and intendment whatever adds to their welfare and advancement and enables them to establish themselves in life."

[15] The gift to a public use is not unlawful as a charity because it is not for the purpose of relieving poverty. Such gifts may extend to the rich as well as to the poor. Charity is not confined to the relief of poverty or distress, but has a wider signification, which embraces the improvement and promotion of the happiness of mankind. New

335, 91 N. E. 385; Bowditch v. Atty. General, supra.

[15] We are well within the holding of the case last cited when we hold the provisions relative to the admission of homeless and helpless girls, to the memorial home is a charitable bequest. We are not ready to say that giving such girls a short period of rest in a home or institution where their comfort, and health may be looked after, and where they can be given "such medical care and aid and nursing as they may need," and where their "every proper want" is provided, would not add to their welfare and advancement and better enable them to establish themselves in life. Homeless and helpless girls ought to be and are objects of charity in no less degree than sick and helpless mothers. The testatrix appreciated that there were homeless and helpless girls whose health and physical condition were such that an "outing or fresh air vacation" in such an institution as she by her will was providing for, would promote and improve their happiness and better enable them to establish themselves in life. The provision for the benefit of "homeless and helpless" girls does not in our judgment make the trust for the home void, and we so hold. Courts are and should be keen sighted to discover on the part of the testator an intention to make a gift to charity. Re Galland's Estate, 103 Wash. 106, 173 Pac. 740. Even though the provision relative to homeless and helpless girls should be invalid that would not necessarily render the trust for the memorial home invalid. Reasoner v. Herman, supra; In re MacDowell's Will, 217 N. Y. 454, 112 N. E. 177, L. R. A. 1916E, 1246, Ann. Cas. 1917E, 853.

[17] Appellees make no claim that helpless mothers and their babes are not proper objects of charity, or that a trust for them would be void. They do claim, however, that the provision, "that said home shall be open and free to all honest, virtuous, sick and financially helpless mothers," renders the beneficiaries uncertain and not capable of judicial enforcement. We do not think the courts will have any trouble in ascertaining whether a mother who applies for admission measures up to and belongs to the class designated by the testatrix. Whether a mother is honest and virtuous is not so unascertainable as to render the trust void. That the provisions of the will are sufficiently certain as to the beneficiaries, see Board of Com'rs v. Rogers, 55 Ind. 297; De Bruler v. Ferguson, 54 Ind. 549; McCord v. Ochiltree, 8 Blackf. 15; Board of Commrs. v. Dinwiddie, supra; Chambers v. City of St. Louis, 29 Mo. 543; In re Macdowell's Will, supra.

[18] Nor do we agree with appellees in their contention that the trust for the memorial home is not a public trust. 193 S. W. 1059, L. R. A. 1917D, 1062, the object of the trust was to erect "a building provided with rooms for a library, dancing hall, lecture halls, and other rooms for good moral amusement," for the free use of the working men and women of a certain city and their families. The court in that case said:

"It cannot be doubted that a proper form of dancing is good physical exercise, and tends to promote health and vigor."

So here, the admission of homeless and helpless girls to the home for an outing or fresh air vacation, where they can have such medical care and nursing as they may need, will tend to promote their health, vigor, and morality. It might also be said that the admission of such girls to the home will have a tendency to keep them away from vicious places of amusement and thus serve a useful governmental purpose. If this provision has a tendency to relieve the bodies of an indefinite number of persons, from disease, suffering, or constraints by assisting them to establish themselves in life, it is sufficient to create a "charitable trust," as defined in the leading case of Jackson v. Phillips, 14 Allen (Mass.) 539, 556.

[19] We cannot agree with appellees in their contention that the provision requiring residence for one year in order to entitle an applicant to be admitted to the home requires residence for one year prior to the death of Mrs. Caldwell. The requirement is that they shall have been a resident of this state at least one year prior to their admission.

[20, 21] Appellees' next contention is that the provision of the will creating the trust for the home violates the statute against perpetuities, section 3998, Burns' 1914, and the statute forbidding accumulations, section 9724, Burns' 1914. In support of this contention appellees say that our statute against restraint of alienation is derived from those of New York, and that under the decisions of that state the gift to the three individual trustees for the memorial home is void. But we need not enter into a discussion of the New York cases cited by appellees. It is well settled in this state that the rule against perpetuities does not apply to gifts for charitable uses where the title vests immediately in charity as in the instant case. Dykeman v. Jenkins, supra. And the rule has been applied where the trustee was an individual and not a corporation. Reasoner v. Herman, supra. See, also, Ex parte Lindley, 32 Ind. 367; De Bruler v. Ferguson, supra; Erskine v. Whitehead, supra; Jansen v. Godair, 292 Ill. 364, 127 N. E. 97. Appellees have failed to point out any direction in the will for the accumulation of funds, and we find none. But a direction for accumulation does not necessarily affect the validity of the gift. Reasoner v. Herman, supra.

trust is definite, that the beneficiaries are sufficiently described, and that the trust created in their behalf is valid. Ackerman v. Fichter, 179 Ind. 392, 101 N. E. 493, 46 L. R. A. (N. S.) 221, Ann. Cas. 1915D, 1117; Dykeman v. Jenkins, supra; Barker v. Town of Petersburg, 41 Ind. App. 447, 82 N. E. 996; Hart v. Taylor, 301 Ill. 344, 133 N. E. 857.

Having held the trust valid, the question of estoppel raised by appellants becomes immaterial and need not be considered.

[22, 23] The next question for our consideration relates to the question of taxation. Section 1, art. 10, of the Constitution directs the Legislature to provide for a uniform and equal rate of assessment and taxation for all property excepting only such as is used for "municipal, * * * literary, scientific, religious, or charitable purposes, as may be especially exempted by law." Taxation being the rule, a party claiming exemption from taxation has the burden of showing that his property comes within some one of the classes of property which the statute says is exempt. Laws are to be liberally construed in favor of equal taxation, while statutes exempting property from taxation are strictly construed. La Fontaine Lodge, etc., v. Eviston, 71 Ind. App. 445, 123 N. E. 468; U. S. Pub. Establishment v. Shaffer, 74 Ind. App. 178, 123 N. E. 697; Oak Hill Cemetery v. Wells, 38 Ind. App. 479, 78 N. E. 350; Greenbush Cemetery Assn. v. Van Natta, 49 Ind. App. 192, 94 N. E. 899; Orr v. Baker, 4 Ind. 86; Indianapolis v. Grand Master, 25 Ind. 518; Trustees, etc., v. Ellis, 38 Ind. 3.

[24] With these rules in mind, we proceed to a consideration of the statutes under which appellants claim the real estate in question to be exempt from taxation.

Section 10142, Burns' 1914, provides that "all property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation." Section 10144, clause 5, Burns' 1914, Acts 1893, p. 12, provides for the exemption from taxation of "every building used and set apart for educational, literary, scientific or charitable purposes by any institution, or by any individual or individuals, association or incorporation, or used for the same purpose by any town, township, city or county, and the tract of land on which such building is situate; also the lands purchased with the bona fide intention of erecting buildings for such use thereon, not exceeding forty acres; also the personal property, endowment funds and interest thereon, belonging to any institution, town, township, city or county, and connected with, used or set apart for any of the purposes aforesaid." Clause 5 in so far as it relates to the question now under consideration was carried forward and became a part of the law of 1919. Acts 1919, p. 199.

Section 10151a, Burns' 1914, provides:

> by will, or otherwise, to any executor or other trustee to be by him used and applied for the use and benefit of any municipal, educational, literary, scientific, religious or charitable purpose within the State of Indiana, and the money or property, if it had been given directly for any such purpose, would not be subject to taxation under existing laws, then and in all such cases, such money or property shall be exempt from all taxation while in the hands of such executor or other trustee; Provided, he shall be diligently and in good faith endeavoring to carry out the provisions of the will or other trust arrangement, and to use and apply such money or property to the purpose for which the same is donated."

This section in substance became clause 14 of section 5 of the tax law of 1919. Acts 1919, p. 201.

It will be observed that under the provisions of section 10144, cl. 5, supra, every building used and set apart for charitable purposes by any institution, individual, association, or incorporation and the tract of land on which such building is situated shall be exempt from taxation.

The real estate described in the complaint and which appellants claim as exempt amounts to about 2,800 acres located in sections 21, 22, 26, 27, 28, and 30 in township 26, range 9 west. The memorial home is located in the northeast corner of the northeast quarter of the southeast quarter of section 26. The whole of this land except about three acres where the house is situated is devoted to agricultural purposes, and the whole of the income is subject to be taken and applied to the payment of the annuities.

One-third of the net income after paying the annuities is to be paid to Kathryn M. Sumner annually during her lifetime, and the residue and remainder of the net income is to be used for establishing and maintaining the memorial home. How this land is divided by highways, and for farming purposes, we are not advised, although it appears that section 22 is traversed by a railroad and that the tract on which the memorial home is located lies north and east of this railroad. It also appears that there are eight tenant houses on the property. It may be, and we will assume that the memorial home and the three acres on which it is located are used and set apart for the home and devoted wholly to charitable purposes. But the balance of the 2,800 acres is not set apart and used exclusively for charitable purposes, and therefore is not exempt from taxation by reason of the provisions of clause 5, § 10144, supra. This clause does not provide for the exemption of property from taxation where only a part of the income derived therefrom is devoted to charitable purposes and the balance to purposes other than charity.

[25] Nor is the land under the facts found exempt from taxation by reason of the pro-

Under these sections the property must be given to the trustee to be by him used and applied for the use and benefit of some municipal, educational, literary, scientific, religious, or charitable purpose. It was clearly the intention of the Legislature that the property must be exclusive and wholly used and applied for some of the purposes named, in order to be exempt from taxation. It must be used purely for charitable purposes. Any other construction would permit a person to provide for the payment of annuities which would require practically the whole of the income of the property leaving for all practical purposes nothing to be used and applied to charity, and thus exempt the whole of the property from taxation. Exemption from taxation must positively appear, and no implication will arise that any species, property, or subject of taxation was intended to be excluded if it comes within the fair purview of the statute imposing the tax. English v. Crenshaw, 120 Tenn. 531, 110 S. W. 210, 17 L. R. A. (N. S.) 753, 127 Am. St. Rep. 1025.

These sections also require that the trustee diligently and in good faith endeavor to carry out the provisions of the trust arrangement in order that the property shall be exempt from taxation. The court found that appellants were not diligently and in good faith endeavoring to carry out the provisions of the will and were not using and applying the income or property to the purpose for which it was donated.

The court did not err in its third and fourth conclusions of law, which were to the effect that the property was not exempt from taxation and that appellants were not entitled to a judgment or decree against appellee officers enjoining the collection of the taxes. The court, however, did err in its first conclusion of law, which was to the effect that the provisions of the will creating the trust for the establishment and maintenance of the memorial home were void. It follows that the court also erred in conclusions Nos. 2, 6, 10, 11, 12, 13, and 14, all of which related to the right of appellee heirs to have their title quieted as to the charitable trust.

Appellants insist that the finding of the court to the effect that they were not diligently and in good faith endeavoring to carry out the provisions of the trust arrangement is not sustained by the evidence. As we construe the statutes under which appellants claim the property to be exempt from taxation, it would not have changed the result, if the court had found that appellants were diligently and in good faith endeavoring to carry out the trust arrangements. Appellants also contend that the special finding of facts is in many other respects not sustained were stricken out, or if the facts were found in accordance with appellants' contention, the result would not be changed. There was therefore no reversible error in overruling the motion for a new trial. Minerva H. Ditton having died intestate after the filing of her cross-complaint, her heirs William L., James H., and Jay Sumner Ditton were substituted and made parties to the action in her place.

The judgment in favor of appellee officers is affirmed, while the judgment in favor of appellee heirs is reversed, with directions to the trial court to restate its conclusions of law in accordance with this opinion and to render a judgment in favor of appellants on the cross-complaint of appellee heirs. One-half of the costs to be taxed against appellants and one-half against appellees Abigail H. Hart, Elizabeth H. Bond, Martha J. Jewell, William C. Ditton, James H. Ditton, and J. Sumner Ditton.

LEIKAUF et al. v. GROSJEAN. (No. 11675.)

(Appellate Court of Indiana, Division No. 2. Feb. 7, 1924.)

1. Judgment ⟸162(1), 163—What constitutes "excusable neglect" a matter of fact.

Burns' Ann. St. 1914, § 405, should be liberally applied, and when it appears that a judgment was taken through excusable neglect it should be set aside, but this does not mean that the trial court must accept the showing of the party seeking relief as conclusive evidence on the subject, and it may consider counter affidavits or controverting oral evidence, and the question whether or not excusable neglect is shown is a question of fact.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Excusable Neglect.]

2. Appeal and error ⟸1024(4)—Decision of court on application to set aside judgment for excusable neglect not disturbed if supported by evidence.

Where, on application to set aside a judgment for excusable neglect under Burns' Ann. St. 1914, § 405, affidavits and counter affidavits are heard, the decision of the trial court will not be interfered with if it is supported by any evidence.

3. Judgment ⟸139—Application to set aside default judgment addressed to judicial discretion.

An application to set aside a default judgment for excusable neglect under Burns' Ann. St. 1914, § 405, is addressed to the judicial discretion of the trial court.

4. Judgment ⟸162(4)—Refusal of application to set aside default judgment held not error.

Refusal of application to set aside default judgment for excusable neglect under Burns'

evidence.

Appeal from Circuit Court, Allen County; Sol A. Wood, Judge.

Action by Aristide Grosjean against John Leikauf and another. Judgment was entered for plaintiff, and defendants applied for relief on the ground of excusable neglect. The court denied the application, and defendants appeal. Affirmed.

H. H. Hilgemann and S. A. Callahan, both of Ft. Wayne, for appellants.

McMAHAN, J. Application by appellants for relief from a judgment which they claim was taken against them by excusable neglect. The matter was submitted to the court upon the application which was sworn to by Harry H. Hilgemann and Stephan A. Callahan, attorneys for appellants, and the affidavit of Owen H. Heaton, who was the attorney in the trial court for appellee.

The verified application states in substance that on July 31, 1920, appellee filed his complaint against appellants in the Allen circuit court for the foreclosure of a mechanic's lien. At that time appellants had employed attorneys Hilgemann and Callahan, they being associated together in the practice of law, to represent them in said foreclosure proceedings as well as in other actions pending in the Allen superior court, one of which was one commenced by appellee against appellants in 1919 to foreclose a mechanic's lien. Appellants and their said attorneys understood that said attorneys were to represent them in both of said actions. The personal attention of Mr. Hilgemann was called to filing of the complaint in the instant case. Mr. Callahan being out of his office at that time, his attention was not called to the filing of this complaint. September 5, 1920, Hilgemann entered an appearance for appellants. This appearance should have been of Hilgemann and Callahan as attorneys, but through the mistake of the former or the clerk the appearance of Mr. Hilgemann alone was entered. It was the belief of said attorneys that the appearance of both of them had been entered. In January, 1921, Hilgemann received an injury which confined him to his home until July 20, 1921. About three months later he retired from the practice of law, and engaged in other business, and assuming and believing that Mr. Callahan's appearance had been entered in the case gave it no further consideration. It is also charged that appellee through his counsel knew that Hilgemann had been so injured, confined to his home, and had retired, and that Callahan was to take charge of said action for appellants; that in April, 1922, the attorney for appellee wrote a letter to Hilgemann to the effect that a rule to answer had been entered in the letter had been sent to Callahan; that Callahan never received a copy of the letter; that later Hilgemann informed the attorneys for appellee that Callahan had charge of said cause; and that by reason of the mistake and inadvertences of appellant's attorneys no answer was filed; and on May 19, 1922, judgment was taken against appellants because of their failure to file answer. A meritorious defense is also alleged.

The affidavit of appellee's attorney filed in opposition to the application to vacate states that summons in the cause returnable September 9, 1920, was issued and served on appellants; that on the margin of the court's docket appeared the name of Harry H. Hilgemann as attorney for appellants; that on May 2, 1921, a rule to answer was entered, but no answer filed. On application of appellee's attorney the cause was set for trial June 3, 1921. May 4, 1921, appellee's attorney wrote a letter to Mr. Hilgemann, calling his attention to the case, and stating that the attorneys for appellee were required to secure progress and final disposition of the cause, and, after stating that appellants were delinquent for more than a year on the rule to answer, the letter stated that the cause was set for trial June 3; that the attention of Mr. Callahan had been called to that fact; and that appellants had been to see appellee's attorneys and made request that his cause be tried. On April 6, 1922, appellee's attorneys wrote a second letter to Mr. Hilgemann, to the effect that the issues must be closed immediately and the cause tried, and that a copy of this letter was being sent to Mr. Callahan. The affidavit states that a copy of this letter was mailed to Mr. Callahan; that on May 19, 1922, no appearance having been entered and no answer filed, proof of personal service on both appellants was shown and default entered, and that on June 21, 1922, the cause was submitted to the court for trial and judgment entered.

Section 405, Burns' 1914, provides that the court shall, on complaint or motion filed within two years, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect.

[1, 2] Appellants say that formerly the matter of granting relief was within the discretion of the court, but that, by the amendment of the statute upon this subject in 1867 (Laws 1867, p. 100), the Legislature adopted a more liberal practice in such cases, and excluded the discretionary power of the court, and conferred on the party the right to demand the relief. We agree with appellants that the courts should be liberal in the application of this statute, and that when it appears that the judgment was taken through excusable neglect the judgment should be set aside. But this does not mean that the trial court must accept the show-

tion of excusable neglect as conclusive evidence on the subject. Counter affidavits or oral evidence may be heard to controvert the alleged excuse for suffering the default to go. Wellinger v. Wellinger, 39 Ind. App. 60, 79 N. E. 214. But the question as to whether or not the affidavits submitted in support of the motion and those submitted in opposition show mistake, inadvertence, or excusable neglect is a question of fact. The expression "excusable neglect" has no fixed legal meaning. It therefore becomes necessary that all the facts are to be considered in determining whether the essential fact of excusable neglect is shown. Masten v. Indiana Car, etc., Co., 25 Ind. App. 175, 57 N. E. 148. As stated in Williams v. Grooms, 122 Ind. 391, 24 N. E. 158:

"Where, upon a complaint or motion to set aside a default, affidavits and counter affidavits are heard, the settled rule is that the decision of the court will not be interfered with in case it is supported by any evidence."

[3] In Mutual Reserve L. Ins. Co. v. Ross, 42 Ind. App. 621, 627, 86 N. E. 506, the court said:

"Such a motion is addressed to the judicial discretion of the trial court; and, unless we can say that upon the record before us there appears to have been an abuse of such discretion, whereby there has been undue interference with the course of justice, the judgment of the lower court will not be disturbed on appeal."

Appellants argue that the rule that the question is one of sound discretion of the court has its foundation in cases where the application to set aside has been granted. But there is an old saying to the effect that it is a bad rule that won't work both ways. If the court has the right to exercise a judicial discretion in granting the application, he should have the same discretion in refusing to grant the application. The rule has been adopted where the court refused to grant relief as well as where it has granted relief. Mutual Reserve L. Ins. Co. v. Ross, supra; Anderson v. Leonard, 51 Ind. App. 14, 98 N. E. 891.

[4] The complaint in the instant case was filed July 31, 1920. Process, returnable September 9, 1920, was served on both appellants. Default was not entered until June 21, 1922. It appears that appellants employed Hilgemann and Callahan on or before September 5, 1920, as it was on that day that Mr. Hilgemann had the clerk indicate on the docket that he appeared for appellants. Appellants knew this action was pending, and it inferentially appears that, about the time the first letter was written by appellee's attorneys to Mr. Hilgemann, appellants or one of them had called at the office of appellee's attorneys and made an urgent request it necessary to enter into an extended discussion of the facts as disclosed by the affidavits. It is sufficient that we say there was no error in the action of the court in refusing to set aside the judgment.

Judgment affirmed.

CHICAGO, T. H. & S. E. RY. CO. v. COLLINS. (No. 11657.)

(Appellate Court of Indiana, Division No. 2. Feb. 6, 1924.)

1. Trial ⟸359(2)—Conflict between answers to interrogatories and complaint not presented by motion for judgment.

In view of Burns' Ann. St. 1914, § 402, relative to failure of proof and section 585, cl. 6, authorizing a new trial where the verdict is not sustained by sufficient evidence or is contrary to law, the question whether the answers to interrogatories are in irreconcilable conflict with the complaint must be presented by motion for new trial and not by motion for judgment on the interrogatories.

2. Trial ⟸359(2)—Evidence not considered in determining motion for judgment on interrogatories.

In determining the real question presented by motion for judgment on interrogatories, evidence will not be considered.

3. Judgment ⟸584—Final judgment puts at rest the controversy involved.

It is a fundamental principle that a final judgment shall forever put at rest the controversy involved.

4. Judgment ⟸248—Must follow pleadings.

Judgment must follow the pleadings in order that the record may show what was adjudicated.

5. Pleading ⟸387—Evidence must support complaint in general scope and meaning.

Under Burns' Ann. St. 1914, §§ 400, 402, where evidence fails to support the complaint in general scope, there can be no recovery, no matter how perfectly some other cause of action may be proven.

6. Negligence ⟸111(1)—Theory of negligence to be stated in complaint.

In actions founded on negligence, the theory of the negligence to be charged must be stated clearly and accurately in the complaint, under Burns' Ann. St. 1914, § 343.

7. Pleading ⟸34(3)—Pleadings are to be liberally construed.

Slovenly pleading should not be encouraged, but Burns' Ann. St. 1914, § 385, requires that pleadings be liberally construed.

8. Pleading ⟸34(1)—Theory of pleading determined from its scope and tenor.

The theory of a pleading is to be determined from its general scope and tenor.

9. Railroads ⟸345(4)—Proof held not variance from theory of complaint; "wrongfully."

In action for personal injury from tripping over a rail of tracks which protruded above the

held, that allegations that defendant had wrongfully constructed the tracks did not necessarily relate to original construction nor "wrongfully" mean without governmental authority, and, where defendant was not thereby misled, the fact that defendant proved original construction was by another company, and under authority would not deprive plaintiff of judgment for negligently suffering the track to be in a dangerous condition, in view of Burns' Ann. St. 1914, § 400.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Wrongful—Wrongfully.]

10. Negligence ⇐119(4) — Objection to evidence not within pleading must be sustained.

Where plaintiff attempts to prove a negligent act other than that averred in complaint, a timely and proper objection must be sustained, and court may permit complaint to be amended.

11. Continuance ⇐30 — Amendment of complaint ground for.

If complaint be amended at trial, defendant may claim surprise, if facts warrant, and obtain continuance.

12. Pleading ⇐430(2)—Variance waived by failure to object.

Defendant, permitting evidence to be adduced without objection, may not escape consequences solely on ground of variance.

13. Damages ⇐132(8)—$2,000 for fracture of arm of woman of 56 years held not excessive.

Where a woman of 56 years sustained a fracture of both bones of the left lower arm, impairing its usefulness and causing pain, a verdict of $2,000 *held* not excessive.

Appeal from Circuit Court, Jackson County; James A. Cox, Judge.

Action by Mattie E. Collins against the Chicago, Terre Haute & Southeastern Railway Company and another. Judgment for plaintiff against defendant named only, and it appeals. Affirmed.

There was evidence that both bones of the lower arm were broken and that part of one bone leading into the wrist joint was broken off; that the fracture had affected the use of the arm 50 per cent.; that it would not get any better and might get worse. Plaintiff testified that it was in a splint for five weeks, and pasteboards two weeks longer; that it was painful all the time and still hurts; that she could not lift anything heavy; that it never gave her any trouble before the injury and she was able to do her own work at that time, but could not do all of it since the injury.

This action was instituted by Mattie E. Collins against the Chicago, Terre Haute & Southeastern Railway Company and also the Chicago, Milwaukee & St. Paul Railway Company to recover damages for personal injuries alleged to have resulted from the negligence of the defendants. The following is the body of the complaint:

Southeastern Railway Company was, and for a long time prior thereto had been, engaged in operating a line of railway in and through the city of Seymour, Jackson county, Indiana, where it maintained a passenger station for the receipt and discharge of passengers who had occasion to use its line of railway; that its said passenger station was located north and east of another passenger station owned and used for the same purpose by the Baltimore & Ohio Railroad Company; that said defendant's passenger station was located east of Ewing street in said city, which is a street leading northward from said Baltimore & Ohio passenger station; that prior to said date the defendant, Chicago, Terre Haute & Southeastern Railway Company, had wrongfully constructed one or more tracks across said Ewing street, consisting of crossties laid in the ground and T-rails fastened thereon; that, although said defendant well knew that such Ewing street was in general use by passengers going to and coming from such Baltimore & Ohio station, yet it negligently and carelessly so laid the rails in constructing its said tracks, contrary to law, across said street that they protruded one or more inches above the surrounding surface of said street, thereby making it very dangerous for persons to use said street in going to and from such Baltimore & Ohio passenger station, in that the protruding rails were likely to catch the feet of such passengers and trip them and cause them to fall down upon the hard surface of such street.

"That on said date, plaintiff had alighted from a train on said Baltimore & Ohio Railroad at its said station, and she then proceeded northward to her destination over and along Ewing street, all of the time using due care for her own safety and protection; that plaintiff is 56 years of age and has good eyesight for a woman of her age; that at said time it was dark, or nearly so, and plaintiff was unable to see such protruding rail; that in passing over the same, the toe of her shoe caught upon such protruding rail and tripping her caused her to fall with great force and violence upon the hard surface of said street, breaking her left arm at the wrist, jarring her entire body, and scratching and bruising her arms, shoulders, face, chest and legs.

"That as a result of her said injuries she was confined to her home and bed for —— weeks, and has suffered much pain and anguish; that her digestion has been impaired and her general health weakened and her nervous system has been broken down and injured; that she has not yet recovered the use of her arm and she will never be able to have good use thereof.

"That since said injuries were sustained as aforesaid, the defendant Chicago, Milwaukee and St. Paul Railway Company has succeeded to all the property and rights of its codefendant herein and has assumed all its obligations and liabilities; that said last-named defendant has become bound for the payment of any sums due plaintiff because of her said injuries.

"Wherefore plaintiff demands judgment against the defendants in the sum of ten thousand dollars."

A demurrer to the complaint for want of facts was overruled. Each defendant filed

waukee & St. Paul Railway Company. Trial resulted in a verdict for $2,000. With their verdict the jurors returned answers to five interrogatories as follows:

"No. 1. Did the Southern Indiana Railway Company construct and lay the track across Ewing street in the city of Seymour, of which plaintiff complains? Answer: Yes.

"No. 2. Did the Chicago, Terre Haute & Southeastern Railway Company construct or lay the track across Ewing street in the city of Seymour of which plaintiff complains? Answer: No.

"No. 3. Was the railway track across Ewing street in the city of Seymour of which plaintiff complains constructed and laid in pursuance of authority granted by an ordinance enacted by the common council of the city of Seymour on May 4, 1899? Answer: Yes.

"No. 4. Was the railway track across Ewing street in the city of Seymour of which plaintiff complains constructed and laid in conformity to the grade of said Ewing street as fixed and established by the common council of said city of Seymour? Answer: No.

"No. 5. Was the railway track across Ewing street in the city of Seymour, Indiana, of which plaintiff complains, laid in such manner as would afford security for life and property at such crossing? Answer: No."

A motion for judgment on the interrogatories, notwithstanding the verdict, was overruled. A motion for a new trial was overruled. The errors assigned challenge the action of the court in overruling (1) the demurrer; (2) the motion for judgment on the interrogatories; and (3) the motion for a new trial. Judgment on the verdict.

W. F. Peter, Jr., of Chicago, Ill., and Montgomery & Montgomery, of Seymour, for appellant.

Clarke & Clarke, of Indianapolis, for appellee.

DAUSMAN, P. J. (after stating the facts as above). The first error assigned has been expressly waived.

[1] Under the second assignment the appellant contends that a recovery is absolutely inhibited by the old rule that a litigant will not be permitted to recover on any "theory" other than the one stated in his pleading. To sustain the contention counsel proceed to put their own construction upon the complaint. They say that the plain "theory" of the complaint is that the track was originally constructed by the appellant, and that the original construction of the track was wrongful. They insist that the averment that the track was wrongfully constructed across Ewing street means that it was originally constructed without lawful authority, and that the complaint cannot be legitimately construed to charge negligence in the maintenance of the track, or in suffering the track to remain in the condition in which it was originally constructed.

The answers to the first and second interrogatories show that the Southern Indiana Railway Company, a company not named in the complaint. The answer to the third interrogatory shows that the Southern Indiana Railway Company was duly authorized by the common council of the city of Seymour to construct its track across Ewing street.

From the foregoing premises counsel conclude that, while the complaint is on the dual "theory" that the original construction was negligent and unauthorized, the answers to the interrogatories conclusively show that the verdict rests on an entirely different "theory," viz. negligence in the maintenance.

Is the question presented by this contention involved in the motion for judgment on the interrogatories? The act which authorizes the submission of interrogatories to a jury is not clear. Acts 1897, p. 128; section 572, Burns' Ann. St. 1914. It is indefinite and incomplete. It does not fit other provisions of the Code (as the Code was at the time this act became effective), and it is difficult, if not impossible, to determine what provisions of the Code, if any, it has repealed by implication. The use and purpose of the interrogatories, the force and effect to be given them, when answered, are not stated in the act. The practice which has been indulged under the act, as evidenced by the decisions, is confusing and baffling. It has often been held, however, that a motion for judgment on the answers to interrogatories notwithstanding the verdict, raises the question whether or not the answers to the interrogatories are in irreconcilable conflict with the verdict. Illinois Car, etc., Co. v. Brown, 67 Ind. App. 315, 326, 116 N. E. 4. But counsel are attempting here to use that motion to present a wholly different question, viz.: Are the answers to the interrogatories in irreconcilable conflict with the complaint? We are clearly of the opinion that interrogatories may not be used for that purpose.

There may be several reasons for adopting that view, but only one will be given. The Civil Code contains specific directions for the presentation of the precise question which counsel have sought to present by the motion for judgment on the interrogatories. The plan prescribed by the Code for presenting that question is ample, direct, simple, and effective. Under the Code the question is properly presentable by a motion for a new trial. Section 402, and section 585, cl. 6, Burns' Ann. St. 1914. The way of the Code must be followed. The devious and uncertain road proposed by the appellant must be shunned.

[2] The determination of the question which counsel have attempted to present by the motion for judgment on the interrogatories, as answered, necessarily involves a consideration of the evidence, and it is uniformly held that in determining the real question presented by that motion the evidence will

Under the third assignment of error we will consider the contention that the verdict rests on a "theory" wholly different from the one stated in the complaint.

A variance between the allegations and the proof is a common occurrence. In recognition of that fact the following section was made a part of the Civil Code:

"No variance between the allegations in a pleading and the proof is to be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must be shown in what respect he has been misled; and, thereupon, the court may order the pleading to be amended on such terms as may be just." Section 400, Burns' Ann. St. 1914.

The purpose of that section is to prevent sacrificing substance to show; to avoid subordinating substantive rights to mere procedure; to minimize the expense of litigation; and to facilitate and expedite the administration of justice. But, notwithstanding its beneficent purpose, that provision of the Code is not without its limitation, as evidenced by another section:

"When, however, the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof." Section 402, Burns' Ann. St. 1914.

[3-5] It thus appears that the old rule that the recovery must be in accordance with the allegations and the proof has not been entirely abrogated by our Code. Indeed it could not be entirely abrogated without serious consequences. It is a fundamental principle of jurisprudence that a final judgment shall forever put at rest the controversy involved in the litigation. The controversy involved can be determined only from the record, and the pleadings are an essential part of the record. Unless, therefore, the judgment follows the pleading on which it rests, the parties themselves may subsequently become involved in litigation concerning the same subject and then find that the record affords no means by which to determine exactly what matters were adjudicated in the former litigation. Rightly understood the provision of the Code last above quoted means that where the evidence fails to support the complaint, "not in some particular or particulars, but in its general scope and meaning," there can be no recovery, no matter how perfectly some other cause of action may have been proven.

In view of the Code it is obvious that every case of deviation is not to be regarded as a change of theory. How far, then, may one depart from the path designated in the complaint before the deviation will cease to be a variance and become a change of theory, cult to find. It is clear that a plaintiff may not have judgment where he proves a cause of action which belongs to a class of actions wholly different from the class to which the cause of action averred in his complaint belongs. And it has been held that proof of an implied contract will not sustain a judgment where the complaint declares on an express contract, and vice versa. Riley v. Walker, 6 Ind. App. 622, 34 N. E. 100; Louisville, etc., R. Co. v. Barnes, 16 Ind. App. 312, 44 N. E. 1113. In cases of such wide deviation it is clear that the variance does affect the substantial rights of the defendant. One of the ways in which a defendant would be prejudiced in his substantial rights, if such judgments were permitted to stand, is that in the event of future litigation his safety would be imperiled by reason of the fact that it would be difficult, if not impossible, to protect himself by invoking the principle of former adjudication. But there are many cases in which the line of demarkation is obscure.

Does the record now before us disclose a case of variance which might have been cured by amending the complaint, or a case of total failure of proof by reason of a complete change of theory? In attempting to reach a satisfactory answer to that question, manifestly the first step should be an examination of the complaint.

[6-8] Before instituting an action founded upon negligence, it is the duty of counsel in every instance, except where negligence is presumed, to work out a definite theory of the negligence to be charged and then to state that theory accurately and clearly in the complaint. Section 343, Burns' 1914; P., C., C. & St. L. R. Co. v. Nichols (Ind. App.) 130 N. E. 546; New York, etc., R. Co. v. Callahan, 40 Ind. App. 223, 81 N. E. 670. A disregard of that duty usually results in extended controversy and prolonged litigation which its observance would have avoided. In the case at bar that duty has been quite imperfectly discharged. While the courts should not encourage slovenly pleading, nevertheless the Code requires that pleadings "shall be liberally construed; with a view to substantial justice between the parties" (section 385, Burns' 1914); and it is a familiar rule that the theory of a pleading is to be determined from its general scope and tenor. Monnett v. Turpie, 133 Ind. 424, 32 N. E. 328.

[9] Does the averment that the defendant "had wrongfully constructed one or more tracks across Ewing street" necessarily relate exclusively to the original construction? Does the word "wrongfully" necessarily mean "without governmental authority"? We are of the opinion that each question must be answered in the negative. A motion to require the plaintiff to make the averment more definite and certain would have been appropriate. Section 385, Burns' 1914. But no such motion was made.

One of the fundamental reasons for re-

cause of action with sufficient definiteness to enable him to prepare his defense. In the case at bar, counsel for the defendant did not claim to have been misled in the preparation of the defense. Section 400, Burns' 1914. Indeed they could not have been misled in that respect. The complaint plainly directed their attention to the condition of the track at the Ewing street crossing on the day of the accident, and to the manner in which the accident occurred. At the trial the defendant was ready with witnesses and was prepared to dispute and did dispute in detail the plaintiff's evidence with respect to the condition of the track at the time and place of the accident.

The theory of the complaint, as determined from its general scope and tenor, is that the defendant negligently suffered the track to be in a condition dangerous to pedestrians on the day of the accident. That theory was vigorously contested by the defendant. The fact that the defendant went further and showed that the original construction was by another company and was not without governmental authority, will not deprive the plaintiff of her judgment. There has been no failure of proof within the meaning of the Code. Section 402, Burns' 1914.

[10-12] To avoid any misunderstanding, it should be stated that, where a plaintiff attempts to prove a negligent act or omission other than the one averred in the complaint, a timely and proper objection must be sustained. Thereupon it becomes the duty of the court, in the interest of justice, to take charge of the situation. The court may permit the complaint to be then amended. If the complaint be amended, then, if the facts warrant, the defendant may claim a surprise and obtain a continuance. That practice will usually prevent a variance and avoid future trouble. But where the plaintiff's evidence, whatever it may tend to prove, is permitted to be adduced without objection, the defendant may not escape the consequences solely on the ground that there is a mere variance between the proof and the averments of the complaint. The case has been fairly tried, and the record is a complete bar to another recovery for the same injuries.

[13] The amount of damages awarded is not excessive.

No other questions have been presented.

Judgment affirmed.

KILEY'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 27, 1924.)

1. Master and servant ⟸403—Burden of proof on compensation claimant to show cause and extent of incapacity.

Where questions for decision before the board member and the Industrial Accident Board on review, which adopted his findings, were, as stated in the record, whether his loss of sight resulted from the injury, and, if so, whether he has become incapacitated for work, and whether he is entitled to specific compensation for the reduction of vision in the injured eye to one-tenth of normal or less, under G. L. c. 152, § 36, the burden of proof was on the employee to offer evidence which would warrant findings in the affirmative on such questions.

2. Master and servant ⟸417(7)—Weight of testimony in compensation case for board.

In proceeding under Workmen's Compensation Act to obtain compensation for personal injuries, the credibility of the witnesses, as well as the weight to be given to their testimony, was for the board member who saw and heard them.

Appeal from Superior Court, Suffolk County; Waite, Judge.

Proceeding by John Kiley under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Town of Framingham, employer, and the United States Fidelity & Guaranty Company, insurer. There was an award of compensation and the insurer appeals. Affirmed.

H. V. Cunningham and W. S. Bangs, both of Boston, for appellant.

J. E. Luby, of Framingham, for appellee.

BRALEY, J. [1, 2] The insurer having admitted that the employee's injury to his right eye was received in and arose out of his employment, the questions for decision before the board member and the Industrial Accident Board on review, which adopted his findings, were, as stated in the record, whether his loss of sight resulted from the injury, and, if so, whether he has become incapacitated for work, and whether he is entitled to specific compensation for the reduction of vision in the injured eye to one tenth of normal or less. G. L. c. 152, § 36. The burden of proof was on the employee to offer evidence which would warrant findings in the affirmative on the questions posited. The employee was engaged in shoveling hot tar when some of it spattered "into his eye." It was undisputed that, although continuing at work while constantly complaining of his eye, he was finally obliged to go to a hospital where he remained under treatment for nine weeks, but no cure was effected, although he was somewhat relieved. It would serve no useful purpose to review the medical and other evidence in detail. The credibility of the witnesses, as well as the weight to be given to their testimony, was for the board member who saw and heard them. Pass' Case, 232 Mass. 515, 122 N. E. 642. The finding, that the reduction in vision in the right eye to less than "one twenty-fifth of normal" was not due to the injury, disposes of the claim for specific compensation. But on the question of total incapacity the evidence of the employee, if believed by the board member, warranted his findings that "the employee has demonstrated that he is unable

that he was able to work without any trouble before his injury, although he had poor vision, but that the additional handicap has totally incapacitated him for work." G. L. c. 152, § 34. The contention of the insurer that on all the evidence the injury to the right eye caused only a temporary incapacity, and compensation should be graduated as provided in G. L. c. 152, § 35, cannot be sustained for the reasons stated.

Decree affirmed.

MOQUIN v. KALICKA.

(Supreme Judicial Court of Massachusetts. Hampden. Feb. 26, 1924.)

1. Master and servant ⇐330(3)—Mere ownership of automobile not sufficient proof of engagement in owner's business.

Mere ownership of automobile is not sufficient to prove that it was engaged in the owner's business or was in the control of his agent at the time of an accident.

2. Master and servant ⇐330(3)—That driver delivered package from truck and had owner's license not proof of use in owner's business.

That the brother of owner of truck when driving the truck was seen delivering a package therefrom about the time of an accident and had the owner's license in his possession was not enough to show that he was engaged in the owner's business or that the truck was under the owner's control; both the owner and the brother testifying that it was taken without the owner's consent.

3. Master and servant ⇐332(1)—Evidence held not to warrant submission of truck owner's liability for injury.

In an action for injuries received as a result of being struck by automobile truck owned by defendant and driven by his brother, *held* that the court erred in submitting the case to the jury.

Report from Superior Court, Hampden County; Henry A. King, Judge.

Action of tort by Flora Moquin against Frank Kalicka for injuries received by her as a result of being struck by an automobile truck owned by defendant and operated by one Benjamin Kalicka, a brother of the defendant. On report after a directed verdict for defendant. Judgment for defendant upon the verdict.

Avery, Gaylord & Davenport, of Holyoke, for plaintiff.

Green & Bennett, of Holyoke, for defendant.

juries received by the plaintiff, as the result of being struck by an automobile truck, owned by the defendant and driven by his brother, Benjamin Kalicka. The question to be decided is, Was there any evidence for the jury that the defendant was responsible for the operation of the truck by his brother?

Benjamin Kalicka testified that he lived with the defendant; that without the latter's knowledge he took the truck from the garage; that "he was on his way to collect some money which was due to him personally" when the collision occurred; that he had no operator's license, and when asked to show his license he took "the * * * [defendant's] license, which was in the automobile, and exhibited that." The defendant testified that he did not give his brother permission to use the truck at the time of the accident or at "any other time." There was evidence that Benjamin Kalicka within "one-half hour or forty-five minutes of the accident" was seen "delivering a package from this truck, which was done up apparently in brown wrapping paper." One witness testified that Benjamin told him at the time of the accident that he (Benjamin) was wearing the defendant's overcoat and had his brother's registration and license.

[1] There was nothing in the evidence to show that the driver was in the employment of the defendant, nor that he was his servant or agent. If the evidence of the defendant and the driver were believed, the truck was operated without the knowledge of the defendant, by one who had no authority to operate it and who was not the agent of the defendant. If this evidence were not believed, there was no testimony showing that the driver was the servant of the defendant or his agent. Mere ownership of an automobile is not sufficient to prove that it was engaged in the owner's business or was in the control of his agent. Trombley v. Stevens-Duryea Co., 206 Mass. 516, 92 N. E. 764; Canavan v. Giblin, 232 Mass. 297, 122 N. E. 171; Haskell v. Albiani, 244 Mass. 5, 139 N. E. 516.

[2] The fact that the driver was seen delivering a package from the truck about the time of the accident, and had the owner's license in his possession, is not enough to show that he was engaged in the defendant's business, or that the truck was under the defendant's control.

[3] As there was no evidence warranting the submission of the case to the jury, judgment is to be entered for the defendant upon the verdict.

So ordered.

PILON v. EASTHAMPTON GAS CO. (two cases).

(Supreme Judicial Court of Massachusetts. Hampshire. Feb. 27, 1924.)

1. Negligence ⟸32(4)—Child gathering chips held a licensee.

Where a gas company permitted persons to go on its premises and remove ashes, cinders, and chips, a child, falling into a fire while gathering chips, *held* at most a licensee.

2. Negligence ⟸32(4)—No precautions owing to mere licensee.

Proprietor of premises owed to a seven year old child, who was a mere licensee, no duty to take precautions for his protection, being responsible only for injuries wantonly or willfully inflicted.

Exceptions from Superior Court, Hampshire County; H. T. Lummus, Judge.

Actions in tort by Emma Pilon, administratrix, and Raymond Pilon, p. p. a., respectively, against the Easthampton Gas Company to recover for injuries to a child. Decision for defendant, and plaintiffs bring exceptions. Exceptions overruled.

J. L. Lyman and D. A. Foley, both of Easthampton, and R. P. Stapleton, of Holyoke, for plaintiffs.

J. B. Ely, W. C. Giles, and W. A. McDonough, all of Springfield, for defendant.

BRALEY, J. The defendant had an open yard at its works, a part of which is referred to in the record as a place where logs were shaped into telephone poles, and the butts painted with a coat of heated carbolineum, or melted tar. It was uncontradicted that, on the day of the accident, some poles had been chipped and were to be painted. The tar had been on the fire for possibly 20 minutes when it was lifted off, and placed about a foot from the fire, and 7 feet behind the poles. The can having leaked through the parting of the seams and spread over the ground until the can was one-half or three-quarters full, an employee, one Shaw, who was in charge of the work, went away to procure another can, leaving no one to care for the fire or the tar. When returning he noticed the plaintiff in the second case, a child about 7 years of age, running towards him, who meanwhile had fallen into the fire and been severely burned. The jury could find that the plaintiff was one of a group of boys who were there while Shaw "was having the fire," and that "it was dangerous for them to be near the tar."

[1] It is contended that the plaintiff was on the premises by the express or implied invitation of the defendant, and his due care being for the jury, there was evidence of the defendant's negligence. But it appears, from the plaintiff's own testimony, that on the afternoon of the day in question, and by invitation of other boys who were going to the premises to get coke, he went with them and saw a man there, and a pan of tar in a fire near the poles.

"We picked a bag full of coke and then two were picking coke and two were picking chips. I was picking chips on the poles. I went back and fell into the fire. The tar was not in the same place it was when I first saw it. I did not know it had been changed. I took one step off the logs before I fell into the tar."

It is true there was evidence which tended to show, and the jury could find from the testimony of one Waltz, the defendant foreman of construction and maintenance, that the town took the ashes from the retorts for use in the repair and maintenance of highways, and that boys picked cinders from the ashes for about two years before the accident. The evidence of one Wilder, also a foreman of the defendant, "whose duties took him all over the premises," in substance was that he had seen boys gathering, not only cinders, but chips, and the "butt ends of joists lying around the yard," which came from the logs as they were finished into telephone poles. It also could be found on all the evidence that outsiders had previously been permitted to remove chips, ends of poles, cinders, and ashes which accumulated at the works. The entrance of the plaintiff upon the premises, as shown by his own evidence, had no direct connection with the business there carried on. It was permissive only, even if the removal of chips, as well as ashes and cinders, incidentally "kept the yard clean." Plummer v. Dill, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463.

[2] The plaintiff at most being a licensee, the defendant owed him no duty to take precautions for his protection, but is responsible only for injuries wantonly or willfully inflicted, of which there is no evidence. O'Brien v. Union Freight Railroad, 209 Mass. 449, 453, 95 N. E. 861, 36 L. R. A. (N. S.) 492. If the second action fails, the first action, brought originally by the father, and after his death prosecuted by his administratrix, for the expenses, and consequent damages resulting from the injury to his son, cannot be maintained. The entry in each case must be:

Exceptions overruled.

(Supreme Court of Indiana. Feb. 28, 1924.)

1. Criminal law ⇐295—Burden of proof on plea of former acquittal or conviction is on defendant.

On plea of former acquittal or conviction under Const. art. 1, § 14, the defendant has the burden of proving the necessary facts consisting of matter of record, including the former indictment and conviction, and the matter of the fact of the identity of the person convicted and of the offense with which he was charged.

2. Criminal law ⇐295—Former jeopardy plea must be supported by evidence as to identity of offense.

In order that a former conviction shall constitute a bar to a second prosecution, a mere plea thereof and the production of the record showing it are not sufficient, but the accused must show by evidence aliunde the record the identity of the offense.

3. Criminal law ⇐198—Plea of former jeopardy not available in prosecution for sale of liquor where former indictment charged sale on different date.

A plea of former jeopardy under Const. art. 1, § 14, *held* not available where the indictments charged the sale of liquor on different date.

4. Criminal law ⇐295—On plea of former jeopardy nolle prosequi presumed to be entered with defendant's consent.

Where the prosecuting attorney entered a nolle prosequi while the defendant and his attorneys were in court, it will be presumed in a subsequent prosecution in which the defendant claimed former jeopardy that the prosecuting attorney entered the nolle prosequi with the defendant's consent.

5. Criminal law ⇐290—Defendant may prove former jeopardy under plea of not guilty.

A defendant may prove former jeopardy under a plea of not guilty.

6. Criminal law ⇐294—Proof of former jeopardy under plea of not guilty must establish facts defendant would have been required to plead in written plea.

To prove former jeopardy under plea of not guilty, the defendant must prove the same facts which he would have been required to plead had he filed a written plea of former jeopardy.

Appeal from Circuit Court, Sullivan County; Walter F. Wood, Judge.

Walter Mood was convicted of unlawfully selling, bartering, exchanging, giving away, furnishing, and disposing of intoxicating liquor, and he appeals. Affirmed.

Lindley & Bedwell, of Sullivan, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward Franklin White, Deputy Atty. Gen., for the State.

Walter Mood. The indictment, omitting the caption, signature, and jurat, reads as follows:

"The grand jury of Sullivan county, state of Indiana, good and lawful men, duly and legally impaneled, charged and sworn to inquire into felonies and certain misdemeanors in and for the body of said county of Sullivan, in the name and by the authority of the state of Indiana, on their oath present that one Walter Mood, late of said county, on or about the 1st day of March, A. D. 1922, at said county and state aforesaid, did then and there unlawfully sell, barter, exchange, give away, furnish and dispose of one quart of intoxicating liquor to Ralph Robinson, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Indiana."

The appellant entered a plea of not guilty, and a trial by jury resulted in a verdict of guilty. After a motion for a new trial had been made and overruled, the court entered judgment upon the verdict, and from such judgment this appeal is taken.

Error is assigned upon the overruling of the motion for a new trial. Upon the trial of the cause the defendant introduced evidence upon the question of former jeopardy, and in his brief, under points and authorities, the only question discussed is former jeopardy, and in such brief he asserts:

"That the sole contention of the defendant is that the verdict of the jury is contrary to law for the reason that the record and evidence show, without conflict, that the defendant in the cause now appealed was convicted after he had been discharged after a trial for the same offense."

After the state had introduced its evidence and rested, the defendant offered in evidence a copy of an indictment against Walter Mood, in cause No. 6925 of the Sullivan circuit court, and same is read in evidence and is as follows:

"No. 6925, Sullivan Circuit Court, 24th Day of Feb. Term, 1922.

"Comes now the grand jury for the term aforesaid, and present in open court the following indictment, to wit:

"State of Indiana v. Walter Mood. Sullivan Circuit Court. Feb. Term, A. D. 1922. Indictment for Unlawful Sale of Intoxicating Liquor.

"The grand jury of Sullivan county, in the state of Indiana, good and lawful men, duly and legally impaneled, charged and sworn to inquire into felonies and certain misdemeanors in and for the body of the said county of Sullivan in the name and by the authority of the state of Indiana, on their oath present that one Walter Mood, late of said county, on or about the 1st day of January, A. D. 1922, at said county and state, aforesaid, did then and there unlawfully sell, barter, exchange, give away, furnish and dispose of one quart of intoxicat-

cases made and provided, and against the peace and dignity of the state of Indiana."

And the defendant then offered in evidence a record in a case wherein the state of Indiana is plaintiff and Walter Mood is defendant (cause No. 6925), and the same is now read in evidence as follows:

"State of Indiana v. Walter Mood. No. 6925. Unlawful Sale of Intoxicating Liquor.

"Comes now the state of Indiana by her attorney, Norval K. Harris, and comes also the defendant herein by attorneys, Lindley & Bedwell, and in his own proper person, into open court, and defendant waives arraignment and pleads not guilty to the charge set forth in the affidavit heretofore filed.

"And this cause being now at issue the same is submitted to the court for trial, finding and judgment, without the intervention of a jury. And at the close of plaintiff's evidence, Prosecuting Attorney Norval K. Harris filed written nolle prosequi, which written nolle prosequi is in words and figures as follows, to wit: [Here insert.] And this cause is dismissed for reasons therein given and defendant discharged.

"It is therefore ordered, adjudged and decreed by the court, that this cause be, and the same is hereby dismissed and that defendant Walter Mood go hence without day."

The Constitution of Indiana provides article 1, § 14 (section 59, Burns' 1914), that no person shall be put in jeopardy twice for the same offense.

[1] In a plea of former acquittal or conviction the burden of proof is on the defendant to show the identity of the offense. Cooper v. State, 47 Ind. 61; Jenkins v. State, 78 Ind. 133; Harlan v. State, 190 Ind. 322, 130 N. E. 413; Emerson v. State, 43 Ark. 372. And the proof must show that it was identically the same offense as the one for which he was then prosecuted. State v. Small, 31 Mo. 197; State v. Wister, 62 Mo. 592.

[2] In order that a former conviction shall constitute a bar to a second prosecution, a mere plea thereof, and the production of the record showing it, are not sufficient, but the accused must show, by evidence aliunde, the identity of the offense with the one charged in the indictment to which the plea is interposed. Rocco v. State, 37 Miss. 357; People v. Gault, 104 Mich. 575, 62 N. W. 724; Faulk v. State, 52 Ala. 415; Territory v. West, 14 N. M. 546, 99 Pac. 343; Daniels v. State, 78 Ga. 98, 6 Am. St. Rep. 238; State v. Bronkol, 5 N. D. 507, 67 N. W. 680; 3 Greenleaf on Evidence (14th Ed.) § 36; Underhill Crim. Evidence, § 197.

It has also been held that where a defendant has been put on trial before a competent jury or before the court, and a nolle prosequi is afterward entered without his consent, he cannot be again put upon trial for the same offense. Hensley v. State, 107 Ind. 587, 8 N. E. 692; Kingen v. State, 46 80 N. E. 829; State v. Reed, 168 Ind. 588, 81 N. E. 571.

In Hensley v. State, supra, it was held that in pleading former jeopardy it is not sufficient to show that a jeopardy once attached to the defendant, but it must also be shown that it was not waived by him by any act or discharged by operation of law.

In Kingen v. State, supra, it was held that where a defendant was put upon trial before a jury she was put in jeopardy and was entitled to have a verdict at their hands, and the discharge of one of such jurors by the court, on finding that he was not a freeholder or householder, without the consent of the defendant would have been equivalent to the acquittal of the defendant, and such defendant could not again have been put on trial for the same offense. But the defendant being in court in person and by counsel, at the time such juror was discharged, and neither excepting nor objecting, such discharge must be held to have been with the consent of the defendant, and subsequently putting the defendant on trial for the same offense was not error. In that case the court also said:

"Under the numerous decisions of this court, both in civil and criminal cases, based upon the statutes regulating the practice, we think it well established that whatever is done by the court without objection of the parties, they having an opportunity to object, must be deemed to have been done with their consent. The defendant clearly waived any objection to the discharge of the juror by failing to object or except thereto, and by her silence in this respect she must be deemed to have consented."

On the plea of former jeopardy the burden is upon the defendant to prove all the necessary facts upon which he relies, and the plea of former jeopardy consists of two matters: First, matter of record, to wit, former indictment and conviction; second, matter of fact, to wit, identity of person convicted and of the offense with which he was charged.

[3, 4] In this case the defendant was indicted and tried for the sale of intoxicating liquor to one Ralph Robinson on the 1st day of March, 1922. Another indictment introduced by the defendant in support of the defense of former jeopardy was for the sale of intoxicating liquor upon the first day of January, 1922. It thus appears from the indictments that the offenses charged were not the same. Two sales were specifically charged. Again it appears from the record introduced by the appellant that he was not acquitted of the charge of selling intoxicating liquor to Ralph Robinson on the first day of January, 1922, but that after the state had introduced some evidence, the defendant being in court in person and by his attorneys the prosecuting attorney entered a nolle

prosequi in such case. This must be presumed to have been done with the consent of the defendant. It is clear that it cannot be said that it was done over his objection.

[5, 6] No written plea of former jeopardy was filed by the defendant. He had a right under the statute to prove former jeopardy under a plea of not guilty but in order to successfully sustain that issue he must prove the same facts which he would have been required to plead had he filed a written plea of former jeopardy.

The evidence was not sufficient to sustain the defense of former jeopardy. Harlan v. State, supra.

Judgment affirmed.

DILLON v. STATE. (No. 24305.)

(Supreme Court of Indiana. Feb. 21, 1924.)

1. **Gaming ⇐94(1) — Unnecessary to prove participation by all those named in indictment.**

In a prosecution against a building owner for permitting its use for gaming where it was shown that three persons had gamed there, proof that all persons named in the indictment had participated was unnecessary, since it would serve no useful purpose.

2. **Criminal law ⇐1111(1) — Brief varying from record as to ground of objection precludes review of point raised.**

Where the brief varies with the record concerning ground of objection to evidence, the point raised will not be reviewed.

3. **Criminal law ⇐1030(1) — Objections not presented in trial court cannot be urged on appeal.**

Appellant cannot take advantage of objections not presented to trial court.

4. **Criminal law ⇐1169(1)—Admission of incompetent evidence not relating to proof of essential element of offense harmless error.**

Admission of incompetent evidence not relating to proof of any essential element in the offense or any fact subsidiary thereto was harmless error.

5. **Criminal law ⇐417(2)—Admission of statements of witnesses to others and to each other in appellant's absence erroneous.**

Admission of statements made by witnesses to others and to each other in appellant's absence was erroneous.

6. **Criminal law ⇐1169(1)—Conviction not reversed because of admission of harmless nonprejudicial evidence.**

A conviction will not be reversed because of admission of harmless and nonprejudicial evidence, although irrelevant and immaterial.

7. **Criminal law ⇐1169(2)—Harmless error to admit incompetent evidence of facts proved by competent evidence.**

Admission of incompetent evidence of facts proved by undisputed competent evidence is harmless error.

Appeal from Criminal Court, Marion County; W. V. Rucker, Special Judge.

Thomas B. Dillon was convicted of knowingly permitting a certain building and room therein, owned by him, to be used for gaming, and he appeals. Affirmed.

Holmes & McCallister, of Indianapolis, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward Frankin White, Deputy Atty. Gen., for the State.

TRAVIS, J. Appellant was charged with having knowingly permitted a certain building and a room therein, of which he was the owner, to be used for gaming by certain persons, naming them, and other persons to the grand jury unknown; and that he did knowingly and unlawfully permit persons, naming them, and other persons to the grand jury unknown, in and about the building and the room alleged, to play a certain game of chance called craps, which persons engaged in playing for money and other articles of value.

The court tried the cause without the intervention of a jury, upon defendant's plea of not guilty, and found the defendant guilty as charged in the indictment; which was followed by a judgment of guilty, from which appellant appeals.

The appeal is based upon the alleged erroneous overruling of appellant's motion for a new trial, for the causes that the finding of the court is not sustained by sufficient evidence and is contrary to law, and the admission in evidence of the answers to questions over the objection of appellant, and in overruling appellant's motion to strike out certain evidence.

It appears from the uncontroverted evidence that appellant and his wife were the owners of the two-story frame building located at the northwest corner of McCarty street and Capitol avenue in the city of Indianapolis, Marion county, Ind., where the scene of the offense as charged in the indictment is laid, and that they occupied the second story thereof as a dwelling. Two rooms of the lower floor of this building were brought into the evidence. The front room facing south and east was used for a dry beer saloon where soft drinks and tobacco were kept for sale. In it was located a bar. A door opened through the rear wall of this barroom to another room in which was a pool table, and upon which pool table the gaming in question was conducted. Two of the men named in the indictment and others had frequented both the barroom and poolroom during the months of May, June, and July, 1922, all of whom had entered into the game of craps on the pool table in the rear room and played the game for money. The net losses of one of the men named in

600 in one play. During the times that these different persons had been so gaming for money in this rear room, appellant had appeared from time to time, mingled among those present, and had looked upon the game when it was being played by those who testified of gaming there. At one of these visits of appellant to the gaming room there was a great pile of money on the pool table, which consisted of coins and currency. The evidence further discloses how the game was played and how the bets were made thereon, and how a "take-off" was paid to the man in charge who held the stakes for the house. Defendant did not testify in his own behalf, neither did he offer any evidence in denial of the essential elements of the crime.

[1] Under the cause for a new trial that the finding is not sustained by sufficient evidence, appellant makes the proposition that although two of the persons named in the indictment as having entered into the game testified that they had gambled in the second room by playing craps with dice, for money, there was no evidence that the third person named in the indictment had ever engaged in gaming therein, and asserts that the rule of law in such cases is that in a prosecution for permitting gambling in a building the names of the persons suffered to gamble must be stated and proved as alleged. The essential element of the offense, that the building was used for gaming, is established by undisputed competent evidence that three persons gamed therein, and it could serve no useful purpose to prove that a hundred persons had gamed there, or that all those named in an indictment as having so participated did game; the fact having been proven by competent and undisputed evidence that one person named in the indictment so gamed therein. A rule should neither be obnoxious nor unreasonable, which would be the case were it held to be necessary to prove that every one named in an indictment as having been permitted to participate in gaming for money had gamed as alleged. It is sufficient that the owner knowingly permitted his building to be used for gaming by two persons as well as to have the proof show that three, or a thousand, were permitted to use the same for gaming on the same day. The evidence in this case shows that three had been gaming for money at the place named in the indictment. Dormer v. State (1850) 2 Ind. 308.

[2, 3] Appellant complains of the action of the trial court in overruling his motion to strike out an answer by a witness upon the ground that it was hearsay evidence, but the record discloses that the objection made at the trial was upon another ground. Where the brief is at variance with the record on appeal. Appellant on appeal cannot take advantage of objections not presented to the trial court. Lucas v. State (1909) 173 Ind. 302, 306, 90 N. E. 305; Malott v. Central Trust Co. (1906) 168 Ind. 428, 437, 79 N. E. 369, 11 Ann. Cas. 879; Musser v. State (1901) 157 Ind. 423, 431, 61 N. E. 1; Chandler et al. v. Beal et al. (1892) 132 Ind. 596, 32 N. E. 597.

[4] Appellant challenges the ruling of the court in overruling his objections to questions and his motions to strike out evidence. It is unnecessary to quote the objections, questions, or motions. The questions and answers were objectionable, and appellant's objections and motions thereto respectively should have been sustained, and the rulings of the trial court thereon constituted error. But the errors were harmless, in that the questions either did not relate to any proof of any essential element in the offense, or of any fact subsidiary thereto, or the questions elicited incompetent evidence of a fact proven by uncontroverted competent evidence; neither did the answers give any proof of any essential element in the offense or of any fact subsidiary thereto, or the answers were in proof of a fact proven by other uncontroverted competent evidence.

[5] It is also claimed that evidence of statements, in the absence of appellant, made by witnesses to others, and to each other, was admitted erroneously, but all such evidence is harmless. Where such evidence does not prejudice the rights of the accused, and is harmless, the judgment will not be reversed because of its admission. Turbeville v. State (1873) 42 Ind. 490.

[6] Neither will a judgment of conviction be reversed because of the admission of evidence which was clearly harmless and not prejudicial to defendant, although it may have been irrelevant or immaterial. Jones v. State (1878) 64 Ind. 473; Siberry v. State (1892) 133 Ind. 677, 684, 33 N. E. 681; Shears v. State (1896) 147 Ind. 51, 55, 46 N. E. 331; Osburn v. State (1904) 164 Ind. 262, 275, 73 N. E. 601.

[7] Appellant, with much force, insists that prejudicial error was committed by the introduction of incompetent evidence in proof, as claimed in his brief, of what acts were done in the alleged gambling room. In answer to the contention, it is enough to say that incompetent evidence of facts, proven by undisputed competent evidence, is harmless. Coff v. State (Ind. Sup.) 133 N. E. 3; People v. Willy, 301 Ill. 307, 133 N. E. 859; Parker v. State ex rel. (1846) 8 Blackf. 292; Manchester v. Doddridge (1852) 3 Ind. 360.

Every material element of the offense was proven by undisputed competent evidence.

Judgment affirmed.

CYPRESS CREEK COAL CO. et al. v. BOONVILLE MINING CO. (No. 24073.)

(Supreme Court of Indiana. Feb. 5, 1924.)

1. Mines and minerals ⊂⊃48—Coal under ground real estate.

Ordinarily coal under the ground is a part of the real estate, and a conveyance thereof is a conveyance of real estate.

2. Life estates ⊂⊃12—Life tenant may resume operation of mine not finally abandoned.

Where a coal mine has not been in operation for a number of years when a life estate is created in the land, but there has been no final abandonment of it as mining property with an executed intention to devote the property to a different use, the life tenant may resume mining operations.

3. Life estates ⊂⊃12—Life tenant may lease land for operation of mine in operation at time of creation of life estate.

Life tenant had the right to lease land for purpose of operation of coal mine which was in existence when the life estate was created, and which had been operated many years both before and after the creation of such estate, the execution of such lease not constituting a conveyance of a part of the real estate.

4. Life estates ⊂⊃23—Life tenant cannot dispose of part of real estate.

A life tenant cannot dispose of a part of the real estate, since in so doing he is guilty of waste.

5. Guardian and ward ⊂⊃44—Order of court not essential to validity of lease.

Under Burns' Ann. St. 1914, § 3068, giving a guardian the right to manage his ward's estate for the best interests of the ward, he has a right to lease the ward's real estate without an order of court.

6. Guardian and ward ⊂⊃44—Lessor who joined with guardian of life tenant of adjoining tract in execution of lease could not attack validity on ground that guardian exceeded authority.

The owner of a tract of land who joined guardian of life tenant of adjoining tract in executing a mineral lease could not attack the validity of the lease on the ground that the guardian in leasing the land for a period of 25 years exceeded his authority if the life tenant did not live that long, since such fact concerned merely the lessee and the remaindermen, and the lease would at least be good during the continuance of the guardianship.

7. Contracts ⊂⊃153—Construed as mutual if possible.

A contract is to be construed as mutual if such a construction is possible.

8. Mines and minerals ⊂⊃58—Lease held not void for want of mutuality.

Mineral lease giving lessors a minimum royalty of $1,000 per year "from the time the said lessees begin operation under this lease," and providing for commencement of operation within six months with the option in lessors of declaring the lease forfeited for failure of lessees to begin within such period, *held* not void for want of mutuality, the lessees being bound thereby to operate the mine.

9. Mines and minerals ⊂⊃58—Provision making lessee judge as to right to abandon lease held not to invalidate lease.

Provision of mineral lease giving lessee the right to terminate the lease at any time the mine ceased to be profitable to operate, "of which the lessee shall be the judge," did not render deed void for lack of mutuality, since the provision, if it made lessee's decision final, was void to that extent; but such invalidity did not affect provision giving lessee right to abandon lease when it ceased to be profitable, and moreover the lease did not authorize abandonment unless it, in fact, ceased to be profitable.

10. Mines and minerals ⊂⊃63—Lease held not to create tenancy at will, notwithstanding forfeiture clause.

Where mineral lease contains an express agreement on part of lessee to pay royalties, the fact that it provided for a forfeiture on default in payment of royalties did not make the contract one creating merely a tenancy at will, the forfeiture clause being for the benefit of the lessor and enforceable at his option.

11. Alteration of instruments ⊂⊃3—Lease held not materially altered so as to invalidate same.

Insertion of names of remaindermen in life tenant's lease after delivery and recordation and subsequent signing by remaindermen *held* not a material alteration invalidating lease, the rights of the original parties not being affected thereby.

12. Alteration of instruments ⊂⊃2—Alteration to avoid contract must be material.

An alteration, to avoid a contract, must be material and must change the legal effect of the instrument, the question being whether the rights of the party who did not make nor consent to the change have been materially affected either beneficially or injuriously.

13. Mines and minerals ⊂⊃58—Execution of new lease by an adjoining owner to same lessee held not to avoid prior lease by two adjoining owners.

Where adjoining owners joined in the execution of a mineral lease, the subsequent execution by one of the lessors of another lease of part of his land to the same lessee, making no change in the rights under the prior lease of lessor, who did not join in the subsequent lease, and expressly reserving the lien of lessors under prior lease for rents and royalties thereunder, *held* not to avoid prior lease.

14. Mines and minerals ⊂⊃68(1)—Provision of lease requiring lessee to begin "operation" within specified period construed.

Where coal mine on land was not being operated at time of execution of lease and had been partially dismantled, making a large expenditure necessary to put the mine in condition for operation, provision requiring lessee to begin "operation" within six months from the date of the lease did not require lessee to begin the actual production of coal within the required time but merely required lessee to begin to put the mine in shape "operation"

being defined as "series of acts to effect a certain purpose."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Operation.]

15. Acknowledgment ⇐6(1)—Lease with defective acknowledgment not void as between parties or as to persons with actual notice.

A defective acknowledgment does not affect the validity of a mineral lease as between the parties thereto and as to any parties having actual notice thereof.

16. Mines and minerals ⇐51(5)—Measure of damages for removal of coal stated.

In an action for damages for wrongful removal of coal from land, the measure of damages, if the trespass or conversion is willful and intentional, is the value of the mineral at the time and place of conversion; but if the taking is not willful, but is the result of a mistake, the taker is entitled to deduction of the cost of production.

Appeal from Circuit Court, Gibson County; Chase Harding, Judge.

Action by the Boonville Mining Company against the Cypress Creek Coal Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. C. Mason, of Rockport, and Duncan & Duncan, of Princeton, for appellants.

Funkhouser, Funkhouser, Vandeveer & Markel, of Evansville, and Union W. Youngblood, of Boonville, for appellee.

GAUSE, J. This was an action by the appellee against appellants and others to recover damages for coal alleged to have been removed from land upon which the appellee claimed an exclusive right to mine coal, and also for an injunction to prevent appellants from removing any more coal therefrom. The court rendered judgment against appellants in favor of the appellee for damages in the sum of $20,958.38 and costs, and enjoined them from removing any coal from said land during the existence of the lease under which the appellee claims.

The land containing the coal in dispute is owned by Edmund H. Hart. The appellee claims its right by virtue of a lease dated November 4, 1916, executed to its assignor, Clem E. Doane, by said Hart and wife, which lease also purported to have been executed by Daniel De Forest, through his guardian, Sylvester T. De Forest, and which included land owned by said Hart and also other land in which said Daniel De Forest held a life estate. The appellants claim their rights by virtue of a deed to such coal, executed by said Hart and wife on June 6, 1917.

There are assignments of error based upon rulings of the court holding the complaint sufficient and certain paragraphs of answer bad and in overruling the appellants' motion for a new trial; but, as the questions raised by these several assignments are related, we shall discuss the propositions contended for without a separate discussion of each assignment.

A statement of the facts disclosed by the record is necessary before considering the questions raised:

On and prior to July 24, 1913, said Daniel A. De Forest owned 200 acres of land in Warrick county, which was at that time and for many years prior thereto had been leased by him to other persons for coal mining, and that during such time the same was used for mining purposes, and a coal mine was in operation thereon at such time, and from which said De Forest received a rental in the form of a royalty. That on said day he executed a deed to his children conveying the fee in such real estate, but reserving to himself a life estate, which deed was recorded July 24, 1916. That on March 16, 1914, Sylvester T. De Forest was appointed guardian for said Daniel A. De Forest. That in July, 1916, the person who had been operating the mine on said De Forest land surrendered his lease and ceased the operation thereof and removed a part of his property therefrom, and on November 4, 1916, when the lease in dispute was executed, the mine was not in operation. That said Edmund H. Hart owned 80 acres of land lying north of and adjacent to said De Forest land. That no mine had ever been opened on said Hart land. That on November 4, 1916, said Hart and wife and said Daniel A. De Forest, by his guardian, Sylvester T. De Forest, executed to one Clem E. Doane the lease in dispute, which covered the N. W. ¼ of section 32 and the N. W. ¼ of the N. E. ¼ of section 32, as belonging to said De Forest, and also 80 acres described as belonging to said Hart.

Said lease purported to give to said lessee the absolute and exclusive right to mine and remove the coal from under said land during the term of 25 years. Said lease also contained the following provisions, which are necessary to be considered in determining the questions raised:

"(3) The said lessee may terminate this lease at any time the mine ceases to be profitable to operate, of which the lessee shall be the judge, by giving the said lessors thirty (30) days' notice of his intention so to do and upon the expiration of said thirty (30) days shall have the right and privilege to remove all the buildings, machinery and improvements now situated or hereafter erected upon the real estate hereinabove described provided all royalties due and owing to the said lessor shall have been paid.

"(4) In consideration of the rights, privileges and franchises herein granted by the said lessors to the said lessee the said lessee agrees to pay to the said lessors as royalty for all coal mined under the land hereinabove decribed the sum of 2½ cents per ton of 2,000 pounds of mine run coal; and for all coal taken from other lands and hauled through the entries under

the lands of the said lessors hereinabove described, and the said lessee agrees to pay to the said lessors for each ton of two thousand pounds of mine run coal so hauled the sum of one-half of one cent per ton. Said royalties to be due and payable to the said lessors monthly on the 10th day of each and every month of each year for the preceding month. Each party of the first part to receive for his share of the royalty a sum proportionate, as to the number of acres of actual coal lands included in this lease; the lessors to select one of their number as treasurer to receive the whole sum of said royalty from the lessee, and receipt therefor, who shall make the distribution among the other lessors according to the term of this lease. It is expressly understood by and between the parties that in the event the said lessee shall make default in the payment of the royalties hereinabove provided and the same shall remain unpaid for a period of three months from the time they are due this lease becomes null and void and terminated and the said lessors shall have and hold a lien on any mining equipment and building located on the real estate of the lessors hereinabove described until such royalty or royalties are paid. * * *

"(6) It is understood and agreed that the lessees will begin operation under this lease within six (6) months from the date herein; otherwise this lease is null and void and the same may be forfeited at the option of the lessors. * * *

"(7) It is understood and agreed by the parties hereto that the minimum rental or royalty reserved under this lease for the period of each year from the time the said lessees begin operation under this lease shall be not less than the sum of one thousand ($1,000.00) dollars.

"And if, at any time, the royalty paid the lessors under this lease, should not amount to the sum of one thousand ($1,000.00) dollars, royalty shall be a credit on the future royalties of any year thereafter in which the royalties shall have amounted to more than one thousand ($1,000.00) dollars on the coal actually mined that year.

"It is understood and agreed by the parties hereto that the royalty for all coal mined on the south half of the northwest quarter of section thirty-two (32), township five (5) south, range eight (8) west, is to be kept separately and paid to the Daniel A. De Forest, but the royalty for all coal mined on any of the other above-described real estate is to be paid to the party above selected by the lessors and to be divided among the lessors on the proportion of 40 acres of coal lands for the said Daniel A. De Forest et al. and 80 acres of coal lands for the said Edward Hart."

That said guardian's action in executing said lease was not ordered or approved by the court until July 19, 1917. That said Sylvester T. De Forest was a notary public and as such notary took the acknowledgment of said Hart and wife to said lease. That Doane caused said lease to be recorded by the recorder of Warrick county on April 30, 1917. That thereafter Doane procured the children of Daniel A. De Forest, and who were the owners of the remainder interest in the De Forest real estate, to sign said lease, and their names were inserted in the body of the same. That thereafter, on July 19, 1917, this lease, bearing the signatures of the remaindermen as well as the original parties, was reported to and approved by the court, and then was again recorded. That on June 1, 1917, said Daniel A. De Forest, by his guardian, and the remaindermen, together with Henry A. Roetzel and Henry G. Roetzel, executed a lease to said Clem E. Doane, giving said Doane the right to mine coal for 25 years, on the south 80 acres of the De Forest land, being the south half of the northwest quarter of section 32, and also on approximately 80 acres owned by said Roetzels adjoining the De Forest land on the west. This south 80 acres of the De Forest land was included in the first lease given to Doane, but it was provided in that lease that all royalties for coal mined on that part was to be paid exclusively to De Forest and no part of the same to Hart.

This lease from the De Forests and Roetzels contained the following provisions, among others:

"(1) That the south half of the northwest quarter of section thirty-two (32), township five (5) south, range eight (8) be and the same is hereby released from a certain lease executed by the lessors Daniel A. De Forest et al. and Edward H. Hart and wife to the within lessee and said lease is hereby canceled as to the last above-described real estate, executed November 4, 1916, and recorded in Miscellaneous Record 11 at pages 63, 64, of the records of said county and state. * * *

"(12) It is further agreed by the parties hereto that the rents and royalties herein agreed to be paid shall be deemed and treated as rents received upon contract by the lessors and the same shall be a first lien against all said leasehold property, subject to the lien of the lessors Ed. H. Hart et al., in a lease dated November 4, 1916."

That the lessee Doane did not begin the actual production and hoisting of coal within six months after the execution of the Hart-De Forest lease, but within that time he bought some of the property at the mine belonging to the former lessee, and also bought a small amount of equipment which it was necessary for him to have to operate the mine, and did a small amount of work in and about the mine for the purpose of putting it in working order.

There was evidence which justified the court in finding: That within the six months' period he made a good faith beginning, under said lease, to put said mine in working condition, and that from such beginning he in good faith continued until he had said mine producing coal in October, 1917, and that he and his assignee, the appellee, had spent approximately $125,000 in equipping said mine, the principal part of which amount, however, having been spent after the expiration of said six months' period. That on September 5, 1917, said Doane assigned

lease expired on May 4, 1917. That on June 6, 1917, said Hart and wife executed a deed to all the coal under the Hart land to Erie Canal Coal Company and the Big Four Coal Company. This deed provided that the conveyance was made, "subject to all prior leases of any nature." The grantees in said deed later deeded said coal to the individual appellants, who in turn leased a part of it to the appellant Cypress Creek Coal Company. That the appellants had actual knowledge of the existence of the lease by Hart and De Forest to Doane prior to the time Hart and wife conveyed the coal to Erie Canal Coal Company and the Big Four Coal Company, and prior to the acquiring of any rights therein. That appellants opened a mine on the Hart land and took out a large amount of coal and the money judgment in this case is for the coal taken out.

It appears that the court allowed damages based upon the value of the coal after it was removed from the mine, less the cost of removing or producing it.

It is first contended that the complaint was insufficient because the lease, under which appellee claims, was ineffective and gave appellee's assignor, Doane, no rights, for the reason that the action of Sylvester T. De Forest, in executing said lease as guardian of his father, was not authorized nor approved by the proper court. The appellants' position is that the so-called lease was in fact a conveyance of a part of the real estate, which the guardian could not execute without an order of the court. To determine this question, it is necessary to determine what the character of the interest was that the guardian was seeking to transfer to the lessee Doane, by the execution of the instrument.

[1] It must be conceded that ordinarily coal under the ground is a part of the real estate, and, where the owner conveys it, he conveys a part of the real estate. But it is also generally held that where, before a life estate is created, the land has been impressed with the character of mining lands, and there is a mine already opened upon the land, the life tenant may work or lease such mines as were already in existence when his estate was created, and that he is not guilty of waste in so doing. Hendrix v. McBeth (1878) 61 Ind. 473, 28 Am. Rep. 680; Richmond Nat. Gas Co. v. Davenport (1905) 37 Ind. App. 25, 76 N. E. 525; Andrews v. Andrews (1903) 31 Ind. App. 189, 67 N. E. 461, and cases cited. See note to Deffenbaugh v. Hess (Pa.) 36 L. R. A. (N. S.) 1099.

[2] Even where the mine has not been in operation for a number of years when the life estate is created, if in fact there was no final abandonment of it as mining property, with an executed intention to devote the property to a different use, this fact would

[3] From the facts in this case, it is apparent that the life tenant, Daniel A. De Forest, had the right to lease his land for the purpose of continuing the operation of a coal mine which was in existence when the life estate was created, and which not only was in operation at such time, but had been operated many years both before and after the beginning of such estate.

[4] Yet he was only a life tenant and had no right to dispose of any part of the real estate, and, if he did so, he would be guilty of waste. The fact that he could lease this land for coal, if the effect of the lease was to continue mining of the character that was being carried on when the life estate was created, and not be guilty of waste, is because such act is not the conveyance of a part of the real estate, under such conditions, any more than the disposal of growing crops, planted by himself, would be a conveyance of real estate. The instrument in dispute not being a conveyance of real estate, authorities holding that a guardian cannot convey his ward's real estate without an order of court, are not in point.

[5] Under a statute giving a guardian the right to manage his ward's estate for the best interests of the ward, he has a right to lease the ward's real estate without an order of court. Section 3068, Burns' 1914; Elliott on Contracts, vol. 1, § 526; Jackson v. O'Rorke, 71 Neb. 418, 98 N. W. 1068; Palmer v. Oakley, 2 Doug. (Mich.) 433, 47 Am. Dec. 41.

[6] If the guardian in leasing the land for 25 years exceeded his authority, in the event his ward did not live that long, that is something the lessee and the remaindermen might be concerned about, but Hart could take no advantage of it. The lease would at least be good during the continuance of the guardianship.

Appellants cite cases where statutes expressly require an order of court to authorize a guardian to lease the ward's land, and also cases where no mine was in operation when life estates were created, but such cases are not in point in this case. Appellants say that the lease by Hart and De Forest to Doane was merely an offer to execute a lease to Doane whenever the guardian obtained the approval of the court. The approval of the court was not necessary, and there was nothing in the lease making it conditional upon the court approving it.

It is contended that there was nothing in the lease binding upon Doane; that he was not obligated to do anything and for that reason the lease was wanting in mutuality.

[7] A contract is to be construed as mutual if such a construction is possible. 13 C. J. 334, and cases cited.

[8] In the lease in question, the lessee

Doane, by the fifth item, agreed expressly to begin operations under such lease within six months. If he did not do so, the lessors had the option of declaring it forfeited as expressly provided therein, but this did not give Doane any option in the matter. He was obligated to begin operation within that time under the lease, which provided for a minimum royalty of $1,000 per year, "from the time the said lessees begin operation under this lease." This lease clearly bound the lessee to operate the mine. Consumers Gas Co. v. Littler (1904) 162 Ind. 320, 70 N. E. 363.

[9] It is also contended that said contract is lacking in mutuality because of the provision in the third item of said lease, heretofore set out, which gave to the lessee the right to terminate the lease at any time the mine ceased to be profitable to operate, "of which the lessee shall be the judge." The appellants insist that by virtue of this provision the lessee could terminate the lease at any time without any reason, and the lessors would be helpless to prevent it.

If the clause "of which the lessee shall be the judge," is to be construed as meaning that the decision of the lessee is final and no resort to courts can be had, then such clause would be invalid and of no effect. This, however, would not affect the balance of said provision giving the lessee the right to abandon when it ceased to be profitable. Kistler v. Indianapolis, etc., R. Co. (1882) 88 Ind. 460; Bauer v. Samson Lodge (1885) 102 Ind. 262, 1 N. E. 571; Supreme Order v. Forsinger (1890) 125 Ind. 52, 25 N. E. 129, 9 L. R. A. 501, 21 Am. St. Rep. 196; Maitland v. Reed (1906) 37 Ind. App. 469, 77 N. E. 290; American Steel, etc., Co. v. Tate (1904) 33 Ind. App. 504, 71 N. E. 189. The provision for the abandonment in case the operation ceased to be profitable contemplated the existence of such a fact, not merely the assertion of the fact.

In the case of Consumers' Gas. Tr. Co. v. Littler (1904) 162 Ind. 320, 70 N. E. 363, a gas and oil lease contained a provision for the ending of the contract whenever, "in the judgment of the second party, * * * oil or gas, * * * having been found, have ceased to exist in paying quantities."

The court, in construing such provision said:

"The stipulation does not contemplate an arbitrary judgment, but an honest one; a judgment that is justifiable by the results of a bona fide investigation."

See Thornton, Oil & Gas (3d Ed.) §§ 148, 156; Vandalia Coal Co. v. Underwood (1916) 60 Ind. App. 675, 111 N. E. 329.

Under the provision referred to in the lease in question, the lessee could not abandon the lease unless it in fact ceased to be profitable to operate.

This case is clearly distinguishable from cases where contracts give to one party the absolute right to terminate the contract at the pleasure of such party, as in the case of Knight v. Indiana Coal, etc., Co. (1874) 47 Ind. 105, 17 Am. Rep. 692, and similar cases.

Our construction of the lease also disposes of appellants' contention that the lease created an estate at will, because the lessee could not, by its terms, end the lease whenever he desired. Gilmore v. Hamilton (1882) 83 Ind. 196.

[10] The provision in the lease providing that it shall be void in case of default in the payment of royalties does not make it optional with the lessee whether he will make the payments, and does not create a tenancy at will. The lease contains an express agreement to pay the royalties, and the provision as to forfeiture in case of nonpayment is for the benefit of the lessor, not the lessee.

A promise to pay is not met by a failure to pay, and, if the lessee fails to pay as he has agreed, then it is optional with the lessor whether he will elect to treat the lease as forfeited. Hancock v. Diamond, etc., Co. (1904) 162 Ind. 146, 70 N. E. 149. There is no question in this case of any default in payments or a forfeiture on that account.

[11] The appellants contend that the inserting of the names of the remaindermen in the lease and their signing it, after it had been executed and delivered by Hart and De Forest and recorded by Doane, was such an alteration of the instrument as rendered it void.

[12] An alteration which will avoid a contract must be material. It must change the legal effect of the instrument, and the question is whether the rights of the party who did not make nor consent to the change have been materially affected, either beneficially or injuriously. Hayes v. Matthews (1878) 63 Ind. 412, 30 Am. Rep. 226; 1 R. C. L. pp. 967, 968.

The subsequent signing of the lease by the remaindermen, after its delivery, did not change the effect of the contract between the original parties to it. It had no more effect upon Hart's rights than if the remaindermen had executed a separate agreement with Doane, and it was the same as if a separate agreement between the remaindermen and Doane had been indorsed upon the instrument, which would not affect the original agreement. It did not purport to change any part of the original obligations existing between Hart and De Forest on the one side and Doane on the other. The obligations of Hart were neither increased nor diminished, nor were those of De Forest, nor of Doane, so far as his contract with Hart and De Forest was concerned. It was not a material alteration of the original lease.

[13] The execution of the lease by the Roetzels and De Forest on June 1, 1917, did not avoid the lease given by Hart and De Forest to Doane.

evidence of an intention to abandon a prior lease on the same premises, but this is where the second lease is inconsistent with the former lease. There was nothing in this second lease inconsistent with the lease by Hart and De Forest to Doane, so far as Hart's rights therein were concerned.

Instead of it being any evidence of an intention to abandon the same, so far as Hart's interests therein were concerned, the lease from Roetzel and De Forest to Doane expressly reserved, in section 12, the lien that Hart and De Forest had for rents and royalty under the first lease. The Hart-De Forest lease, it is true, gave Doane the right to mine coal under the south 80 acres of the De Forest land, but provided that all royalties for coal removed from that part should go to De Forest alone. The Roetzel-De Forest lease to Doane released this 80 acres from the former lease. This was not a matter in which Hart could be interested. Doane and De Forest could have modified or changed the contract as to this 80 acres at any time without Hart's consent. They could have changed the amount of royalty per ton that De Forest was to receive, and in fact, this is what was done. Hart was not concerned in it and cannot object to it.

It is true that Hart, by the first lease, was to receive an interest in one-half cent per ton for any coal taken from other lands and hauled through any of the De Forest land. He would still be entitled to his interest in this haulage compensation, if any coal was taken through this south 80 acres and not through the rest of the De Forest land. There was nothing in the Roetzel-De Forest lease to Doane that could deprive him of this. This latter lease, to which he was not a party, provided that the south 80 acres of De Forest's land was released from the first lease, but expressly reserved the lien of Hart and De Forest for rents and royalties under the first lease.

We think there is no question but that Hart would be entitled to his share of the haulage compensation if any coal is taken from other lands and hauled through this south 80 of the De Forest land. The only shaft on any of this land is located on the north 80 acres of the De Forest land, so that any coal upon which any haulage is apt to accrue will be taken through this shaft and not through the south 80 acres. But, if this situation does not always continue, Hart clearly has all the rights he ever had under the original Hart-De Forest lease.

[14] The appellants contend that the clause in the Hart-De Forest lease to Doane, "the lessee will begin operation under this lease within six months from the date herein," required the lessee to begin the actual production of coal; that is, to have the mine best proof that the parties did not mean, by the clause quoted, that the mine was to be operating within six months, is that they did not say so. The lessee was to begin operation under the lease within that time.

Keeping in view the circumstances and conditions existing, namely, that the mine was not being operated and had been partially dismantled and that a large expenditure was necessary to put it in condition to run, it was natural for the parties to make an agreement either as to when work was to start to put the mine in shape or when the production of coal was to start. By the language used, they evidently intended that the lessee was to begin the work of putting the mine in shape. This was work that it was necessary for him to do, and he would be doing it under and by virtue of the lease. He would be operating under the lease.

The minimum royalty was to start from the time the lessee began operation, so that the lessors would begin receiving their compensation within the six months.

By the Standard Dictionary, "operation" is defined as "a course or series of acts to effect a certain purpose." The construction we are giving to the word as used in the lease in question is consistent with this definition.

In the case of Fleming Oil & Gas Co. v. South Penn. Oil Co. (1893) 37 W. Va. 645, 17 S. E. 203, the court construed a lease which provided that the lessee should "commence operations for a test well within one year," etc., and it was contended by the lessor that the lessee was compelled to have the drill working, the well actually being sunk, but the court held it was not to be given such a construction. The court in the above case said:

"Webster defines the word 'operation' as 'an effect brought about in accordance with a definite plan;' and, in giving the interpretation ordinarily ascribed to the words 'to commence operations'—that is, applying to the words their common acceptation—I would understand the expression to mean the performance of some act which has a tendency to produce an intended result. For instance, if a man had determined to erect a brick house, and, in pursuance of that design, had quarried the rock on his own land to be used in the cellar walls and foundation, and had burned a kiln of brick on the same premises, for the purpose of constructing the walls and chimneys, it surely could not be said that he had not 'commenced operations' for the construction of his house. * * * And, again, where a building has been destroyed by fire, how frequently do we hear it remarked that the owner commenced operations at once for the construction of another by clearing away the débris, and contracting for material with which to rebuild the structure. The terms of the covenant contained in said lease must be considered as having been complied with, no matter how slight may have been the commencement of any portion of the work

which was a necessary and indispensable part of the work required in putting down the test well if commenced before [the date fixed]."

There was evidence which justified the court in finding that the lessee in good faith began operation under this lease, before the six months' period expired, by actually beginning a series of acts for the purpose of, and which were necessary to, starting the mine to producing coal, and that these operations were continued until said mine was actually producing. These acts were done by the lessee under the lease, and constituted a beginning of operation under the lease, which was all the contract required. Miller v. Chester Slate Co., 129 Pa. 81, 18 Atl. 565.

[15] Appellants contend that the lease in question is void, because Sylvester T. De Forest, who was guardian of a party to the lease, also took the acknowledgment, as a notary public, of Hart and wife, to the instrument. If Sylvester T. De Forest was such an interested party as disqualified him from taking such acknowledgment, then the only effect of such interest would be to make the acknowledgment void, but that would not affect the validity of the instrument as between the parties thereto and as to any parties having actual notice thereof.

The authorities cited by appellants sustain this proposition. Hubble v. Wright (1864) 23 Ind. 322; Kothe v. Krag-Reynolds Co. (1898) 20 Ind. App. 293, 50 N. E. 594.

The evidence showed that appellants had notice of this lease before they acquired any interest from Hart.

Appellants contend that the damages assessed are excessive.

[16] It is well settled that the measure of damages in cases of this kind, if the trespass or conversion is willful and intentional, is the value of the mineral at the time and place of conversion, with nothing deducted for labor expended in mining and marketing it.

If the taking is not willful, but is the result of a mistake, then the taker is entitled to have deducted from its value the cost of production. Everson v. Seller (1885) 105 Ind. 266, 4 N. E. 854; Sunnyside Coal, etc., Co. v. Reitz (1895) 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46; American Sand, etc., Co. v. Spencer (1913) 55 Ind. App. 523, 103 N. E. 426.

Even figured upon the basis of an inadvertent trespass, the evidence showed damages to the amount assessed by the court. This was as favorable a rule as appellants were entitled to, and the damages were not excessive.

Not finding any error in the record, the judgment should be affirmed.

Judgment affirmed.

PAYNE v. STATE. (No. 24291.)

(Supreme Court of Indiana. Feb. 29, 1924.)

1. Larceny ⟸57—Evidence held to sustain conviction.

In a prosecution for robbery under Burns' Ann. St. Supp. 1921, § 2246, evidence *held* to sustain conviction for grand larceny as against defendant's contention that he was too intoxicated at the time of the commission of the crime to entertain a felonious intent.

2. Indictment and information ⟸191(9)—Defendant charged with robbery may be convicted for larceny.

Under Burns' Ann. St. 1914, § 2148, a defendant may be convicted for larceny on a charge of robbery under Burns' Ann. St. Supp. 1921, § 2246.

3. Criminal law ⟸510—Defendant may be convicted of larceny on uncorroborated testimony of accomplice.

Under Burns' Ann. St. 1914, § 2111, a defendant may be convicted of larceny on the uncorroborated testimony of an accomplice.

Appeal from Circuit Court, Delaware County; Leonidus A. Guthrie, Special Judge.

Cecil Payne was convicted of grand larceny, and he appeals. Affirmed.

Thomas V. Miller and Raymond C. Cray, both of Muncie, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward F. White, Deputy Atty. Gen., for the State.

EWBANK, C. J. [1] Appellant was convicted of grand larceny, the indictment having charged him and three others, jointly, with the crime of robbery, as defined by Acts 1921, c. 59, p. 138 (section 2246, Burns' Supp. 1921). His motion for a new trial for the alleged reason that the verdict is not sustained by sufficient evidence and is contrary to law was overruled, and he excepted, and has assigned that ruling as error. There was evidence which, if believed, might be accepted as proof that appellant had a good reputation for morality, honesty, and integrity; that two or three hours before the money was taken appellant was "staggering drunk"; that afterward he drank more than a pint of intoxicating liquor; and that then, upon a suggestion by one of his companions that they "go get some whisky," he borrowed an automobile and went with them for that purpose; that he was so drunk he did not know what happened when his companions "held up" a merchant and took his money, and that the money found in defendant's possession was the proceeds of a check which he received for working on the road. But there was also evidence on which the state relies to the following effect: That appellant was 29 years old, and lived with his mother and brothers and sisters on a farm three miles

fore, and at about 6 o'clock on the evening of Monday, January 23, 1922, he was in a poolroom at Fairmount talking to his codefendant, McKinley, when McKinley said to another codefendant, "Let's go out and get a little bit of easy money this evening," and told appellant to get a car; that appellant went out and came back with a car, and with his three codefendants in the car drove it to Wheeling in Delaware county, Ind., some 12 miles southeast of Fairmount; that the weather was cold, and there was snow on the ground, and it had been sleeting all the evening, and the roads were "slick"; that appellant drove a quarter of a mile past the village of Wheeling, where all of his companions got out, and two of them cut the telephone wires, while appellant drove farther down the road and turned the car around, and then picked them up and drove with them to the store of a Mr. Hoover, in Wheeling; that McKinley there asked another codefendant to go inside, as he was afraid Mr. Hoover might know him, and while the other two went into the store appellant, accompanied by McKinley, drove the car about a square down the road and stopped it; that one of the two who went into the store put a gun against Mr. Hoover's side and said, "Hands up!" while the other took $80 that belonged to Mr. Hoover out of the till and took Mr. Hoover's pocketbook and watch; that this occurred at 7 o'clock in the evening; that while the store was being robbed two men walked past where the car was standing, and appellant drove it about half a mile farther west and stopped; that the two men who entered the store hurried down the road and got into the car after they came out, and appellant drove it to Fairmount; that they drove into Fairmount from the east before 8 o'clock, and went into a poolroom there, and the one who had taken the money while his companion held the gun gave each of them part of it; that appellant received and counted and put into his pocket part of such money, including a $10 bill, some dollar bills, and some silver money; that the four of them then rode in the car to Marion, 12 miles north of Fairmount, and appellant drove the car up there and back; that at Marion they obtained a quart of white mule whisky, and drank it on the way back to Marion; that appellant drove the car with one hand when he took a drink; that he kept the car in the road pretty well, and stopped and started the car all right, and was by himself when he turned it around; that they returned from Marion before 10 o'clock, and at about 10 that evening he "Let's go, they are watching us," and they went out; that after they returned from Marion appellant took one of his codefendants home in the car, and afterward was at a garage alone; that he reached his mother's home after she had retired, either late Monday night or early the next morning. The man who used the gun was recognized by the storekeeper and the town marshal of Fairmount, who knew all of the men, saw him and the other two in the car which appellant was driving as they came into Fairmount from the east before 8 o'clock, and the car they were riding in answered the description of the one that was stopped near the store while the robbery was being committed; and a number of witnesses testified that the general reputation of appellant for morality, honesty, and integrity was bad. This evidence, together with the inferences which might be drawn therefrom, was sufficient to sustain the verdict of guilty.

[2] There may be a conviction for larceny on a charge of robbery. Duffy v. State, 154 Ind. 250, 252, 56 N. E. 209; section 2148, Burns' 1914; Acts 1905, c. 169, p. 644, § 272.

[3] The evidence that before they started out one of the men had proposed that they go and get some easy money, that appellant turned the car around unaided while his companion cut the wires, that while all were in the car together one of them suggested that he did not want to go into the store because Mr. Hoover might know him, that while they were in the poolroom at Fairmount the stolen money was divided, and that appellant counted what he received and put it into his pocket, was given by the man who pointed the gun at Mr. Hoover at the time of the robbery, who had been indicted jointly with appellant, and who had been tried separately and convicted, before he so testified, and was then awaiting sentence. But a defendant might be convicted of larceny on the uncorroborated testimony of an accomplice, if the jury believed him and he testified to facts proving the defendant's guilt beyond a reasonable doubt. Section 2111, Burns' 1914 (Acts 1905, c. 169, p. 636, § 235); Ulmer v. State, 14 Ind. 52, 57; Nevill v. State, 60 Ind. 308, 309; Schuster v. State, 178 Ind. 320, 322, 99 N. E. 422; Ewbank, Ind. Crim. Law, § 405. And in this case the accomplice was corroborated on many material points, and appellant seems to have relied on proof by way of defense that he was intoxicated to the degree that he was unable to entertain a felonious intent. The weight of the evidence on that subject was for the jury.

The judgment is affirmed.

HOFFA v. STATE. (No. 24211.)

(Supreme Court of Indiana. Feb. 19, 1924.)

1. Criminal law ⇐1038(3)—Failure to request instructions precludes complaint of mere incompleteness in instructions given.

Where defendant requests no instructions, he cannot complain that instructions given were incomplete, if correct in so far as they went and applicable to the issues and evidence.

2. Criminal law ⇐766—Instruction as to power of jury to determine law held not invasive of their province.

An instruction that jury were the sole and exclusive judges of the facts and might also determine the law as enacted by the Legislature and considered and interpreted by the higher courts, but that they had not the right to make their own laws, *held* not erroneous or an invasion of the province of the jury.

3. Criminal law ⇐1172(1)—Instruction that valid enactment of Legislature was controlling held not harmful.

An instruction that it was the duty of the Legislature to determine the wisdom of the law and that if the jury found that a valid law had been passed which was applicable to the case it should govern, though apparently unnecessary, *held* not harmful or reversible error.

Appeal from Circuit Court, Clay County; Thos. W. Hutchinson, Judge.

Frank Hoffa was convicted of rape, and he appeals. Affirmed.

Rawley & Baumunk, of Brazil, Ind., and Edward H. Knight, of Indianapolis, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward F. White, Deputy Atty. Gen., for the State.

GAUSE, J. The appellant was prosecuted upon an affidavit charging him with the crime of rape on a female child under the age of 16 years. He was found guilty of rape by the jury, and was sentenced to imprisonment for not less than 5 nor more than 21 years. The only errors appellant discusses in his brief relate to the alleged error of the court in giving certain instructions.

[1] The appellant requested no instructions himself, and he cannot complain of any instruction because it is incomplete, if it is correct as far as it goes and is applicable to the issues and evidence. All, except two, instructions in this case are identical with the instructions given in the case of Chesterfield v. State,[1] decided by this court on December 11, 1923, being cause No. 24210, in which case it was decided that no reversible error was committed in the giving of such instructions.

[2] The two instructions questioned here, which were not given in the case above referred to, are Nos. 25 and 26.

Instruction No. 25 was as follows:

"You are the exclusive and sole judges of what facts have been proven and you may also determine the law for yourselves. That statement does not mean that you have the right to set aside the law and make your own law. You determine the law as it is enacted by the Legislature of this state and considered and interpreted by the higher courts of record, and in that way you have the right to determine the law for yourselves, but not to make your own laws."

This instruction was copied from one approved in the case of Lesueur v. State (1911) 176 Ind. 448, 95 N. E. 239, where this court, speaking of the instruction, said:

"The instruction just quoted is no more than advisory to the jury as to the manner of determining the law. It is charged with determining the law as applied to a particular case; that is, what the law is upon a specific point or question. The law exists, or it does not exist. Innocence or guilt depends upon what the law is, upon a given state of facts. How is a jury to determine what the law is? It must be from the statute and the judicial determinations—not from the statute alone, but the substantive law—and the jury is given no more than the rules to guide it in determining what the law is. It must be true that it cannot make the law, but by both the Constitution (article 1, § 19) and section 2136, supra, it has the right to determine it. The instruction was not erroneous, and the province of the jury was not invaded."

In the case at bar, the jury were plainly told in other instructions of their right to determine the law, and, that although the court's instructions and decisions of the higher courts were entitled to great respect, they were not binding on the jury, if they determined the law otherwise. The instruction under consideration was intended only to advise them how to determine the law, and they were informed in other instructions that this and other instructions were only advisory.

The instruction quoted gave the jury a correct guide for determining the law. Even if incomplete, it would not be sufficient to reverse the cause, as we cannot see how it could have been harmful to appellant in this case. Bowen v. State (1920) 189 Ind. 644, 128 N. E. 926.

[3] Instruction No. 26, after telling the jury that it was for the Legislature to determine as to the wisdom of a law, informed them that if they found that a law had been passed by the Legislature which was applicable to the facts in this case, and that the law was a valid one, then it should govern the jury.

Although the giving of this instruction would seem to be unnecessary, yet it is clearly the law and could not harm the appellant. Lynch v. State (1857) 9 Ind. 541; Hudelson v. State (1884) 94 Ind. 426, 48 Am. Rep. 171;

[1] 141 N. E. 631.

781.

The appellant not having pointed out any reversible error, the judgment is affirmed.

MILLER v. RAY, Sheriff. (No. 24349.)

(Supreme Court of Indiana. Feb. 19, 1924.)

Habeas corpus ⇐113(½)—Failure of appellee to file brief constitutes confession of error, and warrants reversal.

Failure of an appellee in habeas corpus to file a brief or argument in support of the judgment of the lower court within the time prescribed by Supreme Court rule 21 constitutes a confession of the errors assigned by appellant, and warrants the court in reversing and remanding the cause, without considering it on its merits and without prejudice to either party.

Appeal from Circuit Court, Greene County; W. H. Hill, Special Judge.

Application by Henry Miller for a writ of habeas corpus, to be directed to Ervin Ray, Sheriff of Greene County. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Chas. D. Hunt, of Sullivan, and Slinkard & Slinkard, of Spencer, for appellant.

WILLOUGHBY, J. This was an application for a writ of habeas corpus, made by complaint duly verified by the plaintiff against the sheriff of Greene county, Ind. The complaint set forth the plaintiff's cause of action, as required by section 1163, Burns' 1914. This complaint was filed, and a writ was issued to the coroner September 16, 1922. In such writ it was ordered that the body of Henry Miller, the plaintiff, be brought into court at 9 a. m. September 21, 1922. At that time the plaintiff filed an affidavit for change of venue from the judge. The change was granted and a special judge appointed. On September 30, 1922, the defendant filed a return to the writ, and on the same day the plaintiff filed exceptions to such return, which exceptions were overruled. The plaintiff then filed his answer to the return to the writ. On January 20, 1923, the case was tried and taken under advisement, and on January 27, 1923, the court made a finding for the defendant and, entered judgment on such finding, and from such judgment the plaintiff appealed.

The plaintiff has assigned as error that the court erred in overruling appellant's exceptions to the return to the writ, and that the court erred in overruling appellant's motion for a new trial. The record was filed in this court on May 25, 1923, and the cause submitted June 24, 1923. The appellant has filed been discussed and presented, so as to present to this court a prima facie cause for reversal. The appellant's brief was filed within the time allowed by the rules of this court for filing such brief. The appellee has not filed any brief, and seems to have ignored this appeal altogether.

Rule 21 of the Supreme Court Rules provides:

"That the appellant shall have 60 days after submission in which to file a brief, and that the appellee shall file his brief upon the assignment of errors within 90 days after submission, except that in criminal cases such brief shall be filed within 120 days after submission."

In Berkshire v. Caley, 157 Ind. 1, 60 N. E. 696, it is held that, where the appellee fails to file a brief within the time allowed in support of the judgment, such failure may be accepted and deemed to be a confession of the error assigned by the appellant, and the Supreme Court in the exercise of its discretion may reverse the judgment without considering the appeal on its merits. In that case the court said:

"The appellee has not favored us with a brief or any argument whatever to sustain the judgment below, and we are left wholly unaided, so far as he is concerned, to examine and consider the authorities and argument presented by counsel for appellant. This neglect is to be regretted, and meets our positive disapproval. Where a successful party in the lower court, when the case has been appealed by his adversary to this court, becomes so indifferent or derelict as to fail to prepare and file within the time allowed a brief or argument in support of the judgment assailed, such failure or default upon his part may be accepted and deemed to be a confession of the errors assigned by appellant, and this court, in the exercise of its discretion, may reverse the judgment without considering the appeal on its merits."

This rule was followed in the case of Nea v. Town of Bourbon, 157 Ind. 476, 62 N. E. 7, and in this last-named case the judgment was reversed at the cost of appellee, because of the appellee's failure to file a brief, without prejudice to either party, and the cause was ordered remanded to the lower court for further proceedings. The same rule was followed in People's Nat. Bank of Princeton v. State ex rel., 159 Ind. 353, 65 N. E. 6; Union Traction Co. v. Forst, 162 Ind. 567, 70 N. E. 979; Moore v. Zumbrun, 162 Ind. 696, 70 N. E. 800; Rose v. Arford, 172 Ind. 269, 88 N. E. 302; Burroughs v. Burroughs, 180 Ind. 380, 103 N. E. 1; Eigelsbach v. Kanne, 184 Ind. 62, 110 N. E. 549; Veit v. Windhorst, 184 Ind. 351, 110 N. E. 666. In Miller v. Julian, 163 Ind. 582, 72 N. E. 588, the same rule was followed, and in that case the court said:

"This rule was not declared in the interest of an appellant, but for the protection of the

controverting the arguments and contentions advanced for reversal, which duty properly rests upon counsel for the appellee."

In the instant case, in view of the failure of appellee to controvert any of the grounds upon which a reversal of the judgment is sought, we feel justified in regarding his silence and neglect as a confession of error.

The judgment is reversed, at the cost of appellee, without prejudice to either party, and the cause remanded to the Greene circuit court for further proceedings.

BAILEY et al. v. BOARD OF COM'RS OF CLINTON COUNTY et al. (No. 11737.)*

(Appellate Court of Indiana, Division No. 2. Feb. 6, 1924.)

1. **Statutes ⇐236—One claiming a statutory right must bring himself within statute.**

One who claims a statutory right must bring himself within the provisions of the statute.

2. **Statutes ⇐230—Change of phraseology by amendment raises presumption of change of meaning.**

A change of phraseology in a statute amending the original act raises the presumption that a change of meaning was also intended.

3. **Municipal corporations ⇐917(1)—State tax board's jurisdiction to determine question of issue of municipal bonds.**

Under Acts 1921, c. 222, § 4, providing that notice of the intention of a municipality to issue bonds shall be given by publication, and that taxpayers may object to such issuance within 15 days "after the issuance of such bonds * * * shall have been determined upon," amended by Acts 1923, c. 93, to read "after notice as aforesaid shall have been given that the issuance of such bonds * * * shall have been determined upon," the objectors must file their objections within 15 days from the time of the determination to issue the bonds in order to confer jurisdiction on the state tax board to determine the question as to whether such bonds should issue.

Appeal from Circuit Court, Carroll County; Benj. F. Carr, Judge.

Action by W. E. Bailey and others against the Board of Commissioners of Clinton County and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Combs & Laymon, of Frankfort, for appellants.

Thomas M. Ryan, of Frankfort, for appellees.

NICHOLS, J. This is an action by appellants against appellees to enjoin appellees from issuing and selling gravel roads bonds for the construction of a gravel road. The in overruling appellants' motion for a new trial, which presents that the finding of the court is not sustained by sufficient evidence, and that it is contrary to law.

The facts upon which the case was tried and determined under the issues were in substance as follows:

In January, 1920, Frank Gossard and others filed with the board of commissioners of Clinton county an amended petition for a free gravel road in Johnson township, Clinton county, Ind., under the township unit law. Upon said amended petition said road was ordered established, and on the 3d day of May, 1922, the board of commissioners of said county entered an order in which it was determined to issue bonds for its construction, together with other roads, said bonds aggregating $20,600. Notice of such determination was published in the Frankfort Morning Times, a daily newspaper published in said county, on May 6 and 13, and in the Crescent-News, a daily newspaper published in said county, on May 5 and May 12, 1922. It is agreed that said notices as to form were correct and sufficient. On May 29, 1922, appellants and more than 50 other resident taxpayers of said township filed objections to said bond issue with the auditor of Clinton county, and said objections were certified by said auditor to the Indiana state board of tax commissioners. On June 17, 1922, pursuant to proper notice by the Indiana state board of tax commissioners, a hearing was had by said board upon said objections to determine whether or not such bonds should be approved and issued. At said hearing appellees raised the question as to the time of filing said objections, and contended that appellants' objections were not filed within the time required by law, but the representatives present for said board ruled that said objections were filed within the time allowed, and heard the objections. After hearing all parties concerned, on June 26, 1922, the board entered an order that the bonds be not approved. Thereafter the board of commissioners of Clinton county, on August 12, 1922, entered another order in said cause in which it was determined to issue said bonds. On August 14 and 21, 1922, respectively, notice was again given by said commissioners by publication of such determination in the Crescent-News, a daily newspaper printed in said county, and by publication on the 15th and 22d days of August in the Frankfort Morning Times, a newspaper of general circulation in said county, and by due posting of said notices. It is agreed that the notices as to form were correct and proper. On September 2, 1922, appellants and more than 50 resident taxpayers of said township filed objections to said proposed bond issue with the auditor of Clinton coun-

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⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For superseding opinion, see 143 N. E. —.

the state tax board. Thereupon, after due notice, a day was set for hearing said objections, and said hearing was held on September 15, 1922. Appellants and other objectors appeared and objected to another hearing for the reason that the first hearing and order was final, but said tax board heard the parties, and thereupon entered another order that said bond issue be approved.

[1-3] Appellants contend that the decision of the state board of tax commissioners made June 26, 1922, against the issue of the bonds in question, was final, and that the board of county commissioners had no authority to enter the order of August 12, 1922, again determining to issue such bonds. Appellees contend that the objections or remonstrances by taxpayers were not filed within the time provided by law, and that they were therefore noneffective to confer any jurisdiction on the state board of tax commissioners to hear and determine the question as to whether such bonds should issue. The statute, the construction of which must determine the question, is section 4 of an act to amend an act concerning taxation (Acts 1921, p. 642), which so far as here involved, provides that—

"* * * In the event that the proper legal officers of any municipal corporation shall determine to issue any bonds * * * notice of such determination shall be given by publication for two weeks in two leading newspapers. * * * Ten or more taxpayers * * * who will be affected by the proposed issuance of such bonds * * * and who may be of the opinion that such bonds * * * should not be issued, * * * may file a petition in the office of the county auditor * * * within fifteen days after the issuance of such bonds * * * shall have been determined upon * * * setting forth their objection thereto and facts showing that the proposed issue is unnecessary, unwise or excessive, as the case may be."

The section further provides that the petition shall be certified to the state board of tax commissioners for hearing after notice, and that the decision of such board shall be final. It will be observed that notice of the determination to issue the bonds must be given by two weeks' publication, while, in the event that taxpayers wish to object or remonstrate, they must file their petition setting forth their objections within 15 days from the time of the determination to issue the bonds.

It is a well-established principle that one who claims a statutory right must bring himself within the provisions of the statute under which he claims. Windfall City v. State ex rel., 172 Ind. 302, 88 N. E. 505. The Legislature afterward amended section 4, supra, with reference to the time that the petition should be filed (see Acts 1923, p. ance of such bonds * * * shall have been determined upon," and inserting in lieu thereof "after notice as aforesaid shall have been given that the issuance of such bonds * * * shall have been determined upon. * * *" Such a change of the phraseology from that of the original act raises the presumption that a change of meaning was also intended. Barker v. Potter, 55 Neb. 25, 75 N. W. 57; Homnyack v. Prudential Ins. Co. of America, 194 N. Y. 456, 87 N. E. 769; United States v. Bashaw, 50 Fed. 749, 754, 1 C. C. A. 653; Hurlbatt v. Barnett, 1 Law Reports Q. B. 77, 62 L. J. Q. B. 1, 67 L. T. Rep. (N. S.) 818, 4 Reports, 103, 41 Wkly. Rep. 33. But as we read the section under consideration, it seems to us that there is but little ground for construction. The language of the statute is unambiguous; it plainly provides that objectors must file their objections within 15 days from *the time of the determination to issue the bonds*. That date, as appears by the record, was May 3, 1922. Under the plain language of the statute, the objections must have been filed on or before May 18, 1922, in order that the same might be certified to the tax board, and thereby be given jurisdiction. The petition or objections not having been filed within the 15 days, the pretended order of the tax board made on June 26, 1922, was without authority, and void. It will also be observed that the objections to the order of August 12, 1922, were not filed within 15 days thereafter.

Judgment affirmed.

SLINKARD v. SENTINEL PRINTING CO. (No. 11805.)

(Appellate Court of Indiana. Feb. 20, 1924.)

1. Appeal and error ⇐660(1)—Bill of exceptions not returned to clerk for correction of omissions.

On petition for a writ of certiorari, the record and bill of exceptions will not be returned to the clerk of the lower court, with directions to insert certain omitted exhibits; it being no part of the duty of the clerk to prepare or amend a bill of exceptions, the trial judge certifying to the correctness of all bills of exceptions, and he alone having the right to change.

2. Appeal and error ⇐648—Transcript of record cannot be changed after filing without leave.

When, on appeal, a transcript of the record from the trial court is filed in the office of the clerk of the Supreme Court, such transcript then becomes a part of the records of the Supreme Court, and may not be changed in any particular without leave being given therefor.

Appeal from Circuit Court, Sullivan County; W. F. Wood, Judge.

Action between William L. Slinkard and the Sentinel Printing Company. From a judgment for the latter, the former appeals. On application by appellant for a writ of certiorari. Writ denied.

Slinkard & Slinkard, of Spencer, and Chas. D. Hunt, of Sullivan, for appellant.

PER CURIAM. The appellant has filed in this cause his petition for a writ of certiorari. The said petition is duly verified, and in the same it is alleged that certain papers, Exhibits C and D which had been offered and read in evidence upon the trial of the case, had been, by mistake and inadvertence, omitted from the "bill of exceptions" on the evidence in this case, and appellant asks that "the record and bill of exceptions" in this case "be returned to the clerk of said court, with directions to the clerk of said court to insert said exhibits in said bill of exceptions."

[1, 2] It is no part of the duty of the clerk of the trial court to prepare, alter, or amend a bill of exceptions; that is the province of the judge who tried the cause, and not the clerk. The trial judge certifies to the correctness of all bills of exceptions, and he alone has the right to change. When, on appeal, a transcript of the record from the trial court is filed in the office of the clerk of this court, such transcript then becomes a part of the records of this court, and may not be changed in any particular, without leave being given therefor. Elliott, Appellate Procedure, § 194; Montgomery v. Gorrell, 49 Ind. 230. If there are mistakes or omissions in the bill of exceptions, on application and proper showing, leave will be granted for the trial judge to amend or correct the same, if such application and showing are seasonably made. The petition for the writ requested in this case must be denied.

Petition denied.

TOWNSEND & FREEMAN CO. v. TAGGART. (No. 11837.)

(Appellate Court of Indiana, Division No. 1. Feb. 8, 1924.)

1. Master and servant ⇐416—Findings of injury by accident arising out of employment essential to sustain award of compensation.

To sustain an award of compensation under the Workmen's Compensation Act, it is necessary for the board to find that the employee suffered an injury by accident and that such accident arose out of his employment.

2. Master and servant ⇐417(7)—Findings by Industrial Board on evidence final.

It is the province of the Industrial Board to find the facts, and when the facts so found are supported by any direct evidence, or by reasonable inference, the reviewing court is not at liberty to disturb them.

3. Master and servant ⇐373—Sunstroke an "accident" within Compensation Act.

Sunstroke or heat stroke is an "accident" within the meaning of the Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.]

4. Master and servant ⇐405(1)—Compensation award cannot rest on conjecture.

Under the Workmen's Compensation Act the burden rests upon applicant for compensation to establish each fact necessary to sustain an award of compensation, and the existence of such facts must be based on something more than mere guess, conjecture, surmise, or possibility.

5. Master and servant ⇐373—Sunstroke held not compensable as "arising out of employment."

In proceeding by log hauler to obtain compensation for personal injury, consisting of sunstroke and paralysis of part of the body, evidence that he suffered sunstroke during the course of his work of driving a team along a highway *held* not to show that accident arose out of his employment, all travelers being exposed to the same danger.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

Appeal from Industrial Board.

Proceeding by Hannibal P. Taggart under the Workmen's Compensation Act (Laws 1915, c. 106, as amended) to obtain compensation for personal injuries, opposed by Townsend & Freeman Company, the employer. The Industrial Board awarded compensation, and the employer appeals. Award set aside, and cause remanded.

Joseph W. Hutchinson, of Indianapolis, for appellant.

George W. Long, of Columbus, for appellee.

ENLOE, J. On, and for some time prior to September 7, 1922, the appellee was in the employment of appellant as a log hauler, hauling saw logs. In March, 1923, he filed with the Industrial Board his claim for an allowance of compensation, alleging in said claim that on the 7th day of September, 1922, he received an injury by accident arising out of and in the course of his employment as the servant of appellant. In his statement in said application as to the nature of the alleged accident and of the injury sustained thereby, the appellee claimed that on said day, as a result of his labor in the course of his employment, he suffered a "heat stroke" or "sunstroke," from exposure to the sun, which resulted in paralysis.

There was a hearing of the matter, first,

sulting in an award of compensation as for total disability, from which award this appeal is prosecuted.

The appellant contends on this appeal that the evidence is not sufficient to sustain the findings of the Board that (a) the appellee on the day in question suffered an injury by accident, and (b) that said accident arose out of his employment.

[1, 2] It was necessary, to sustain any award made to the appellee in this case, that each of the above facts be found by said Board. Muncie, etc., Co. v. Thompson, 70 Ind. App. 157, 123 N. E. 196. If the record in this case contains any direct evidence as to the existence of any fact necessary to sustain an award, or if the existence of such fact may be reasonably inferred from such direct evidence, this is sufficient. It is the province of the Industrial Board to find the facts, and when the facts so found are supported by any direct evidence or by such reasonable inference, we are not at liberty to disturb such finding. Pioneer Coal Co. v. Hardesty (Ind. App.) 133 N. E. 398.

[3] An examination of the record herein discloses that there is competent and direct evidence that the appellee on the day specified, suffered a "sunstroke," causing a rupture of one of the smaller blood vessels in the brain and thereby causing paralysis of the right arm, right leg, and partial paralysis of the vocal cords, whereby his power of speech was to some extent affected.

Sunstroke, or heat stroke, has been many times held to be an accident, not only under the provisions of insurance policies, but also under the provisions of Workmen's Compensation Acts. State ex rel. Rau v. District Court, 138 Minn. 250, 164 N. W. 916, L. R. A. 1918F, 918; Kanscheit v. Garrett Laundry Co., 101 Neb. 702, 164 N. W. 708; Hernon v. Holahan, 182 App. Div. 126, 169 N. Y. Supp. 705; Ismay I. & Co. v. Williamson, 1 B. W. C. C. 232; Maskery v. Lancashire, etc., Co., 7 B. W. C. C. 428. We therefore hold that the finding that appellee "sustained an injury by accident," is well founded upon the evidence.

[4] As to the finding that such accident to appellee "arose out of his employment," a more serious question is presented. In considering this question we must bear in mind that the burden rested upon the appellee to establish each fact necessary to sustain an award of compensation; also we must keep in mind that the existence of such facts so necessary to be found must be based upon something more than mere guess, conjecture, surmise, or possibility. Pioneer Coal Co. v. Hardesty, supra; Swing v. Kokomo, etc., Co., 75 Ind. App. 124, 125 N. E. 471.

[5] When we examine the testimony in this case with a view to determining whether there is any upon which said finding that said accident arose out of said employment, ed to a log wagon, and another employee of appellant driving a single team also hitched to a similar wagon, left the millyard of appellant, at Nashville, early on the morning of the day in question, and drove several miles into the country to get, each, a load of logs. They helped each other in the loading of the logs, and had them loaded and ready to start on the return to the mill at about 9 or 9:30 o'clock. They came back to Nashville over the road known as the "Columbus Pike," arriving at the mill about noon. In driving and managing his teams the appellee usually rode the "near wheel mule," but on this occasion, in returning to the mill, he as testified to by himself, "rode part of the way and walked part of the way." When they arrived at the millyard, the teams were unhitched, and the two men started to the barn with their teams, the barn being a short distance away, and the appellee riding one of his mules in going thereto. When they had arrived at the barn and appellee had dismounted, he then for the first time, according to his testimony, noticed that something was wrong, that his right hand felt numb, "like it was asleep," and his right leg was in the same condition. It was a clear, hot day, and the appellee was in the sun and exposed to its rays not only while traveling along said highway, but also in going from said millyard to said barn.

In McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, it was said:

"Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment *as a contributing proximate cause* and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." (Our italics.)

In the case of In re Harraden, 66 Ind. App. 298, 118 N. E. 142, this court said:

"The decisions of the courts of England and the courts of several of our states where the question has arisen announce the rule that the facts in any given case must show that the injury arose out of the employment and was a risk reasonably incident thereto, as distinguished from risks to which the general public is exposed. * * * Injuries resulting from exposure to conditions due to the weather or natural elements, such as heat, cold, ice, snow,

which the general public is exposed, and as not coming within the purview of Workmen's Compensation Acts, though the injured person, at the time he receives his injury, may have been discharging duties incident to and in the course of his employment."

The appellee, in support of his contention that the injury complained of "arose out of" his employment, cites the cases of In re Harraden, supra; United Paperboard Co. v. Lewis, 65 Ind. App. 356, 117 N. E. 276; and State ex rel. Rau v. District Court, 138 Minn. 250, 164 N. W. 916, L. R. A. 1918F, 918. Each of the above cases is clearly distinguishable from the instant case. In each of said cases the accident complained of was attributable to the condition of the place in which the servant was called upon, in the course of his employment, to perform service for his employer, while in this case the record does not show that the heat which produced the sunstroke of appellee was peculiar to his place of work, nor does it show that the work in which appellee was engaged at the time in any way contributed to the said accident. It simply shows that appellee suffered a sunstroke during the course of his labors on the day in question; this is not enough. The public generally, if they were traveling along and over the named highway on the day in question, were exposed to the same danger from sunstroke as appellee; the danger was common to all travelers upon said highway on said day, and was in no way related to or connected with the particular business of said travelers at such time.

We find no evidence in this record which will sustain a finding that said accident to appellee "arose out of his employment," and the award in this case must, therefore, be and the same is hereby set aside, and this cause remanded to the Industrial Board for further proceedings.

FORKER v. J. B. COLT CO. (No. 11795.)

(Appellate Court of Indiana, Division No. 2. Feb. 21, 1924.)

Sales ⇐90—Oral promise in negotiations merged in written contract.

An oral promise to install, made as an inducement to the signing of a written contract of purchase of the material for a lighting plant, was merged in such contract, and so is no defense to action for agreed price of material.

Appeal from Circuit Court, Noble County; Arthur F. Briggs, Judge.

Action by the J. B. Colt Company against John D. Forker. Judgment for plaintiff, and defendant appeals. Affirmed.

Luke H. Wrigley, of Albion, and Glenn E. Thrapp, of Kendallville, for appellee.

DAUSMAN, P. J. John D. Forker entered into a written contract with the J. B. Colt Company, by the terms of which he purchased from the latter a generator, pipes, burners, and other articles, for a carbide lighting plant. This action is on the contract to recover the agreed price of the merchandise. Forker answered that at the time of the execution of the contract the company orally promised to install the lighting plant in such manner as to properly light his residence; that the oral promise was made for the purpose of inducing him to sign the written contract, and constitutes a part of the consideration therefor; and that the company has refused to make the installation. A demurrer to the answer was sustained. The assignment of error challenges the ruling of the demurrer. The principle here involved falls within Brown v. Russell Co., 105 Ind. 46, 4 N. E. 428; and on authority of that case the judgment is affirmed.

DAVISSON v. MAGEE. (No. 11716.)

(Appellate Court of Indiana, Division No. 2. Feb. 29, 1924.)

Witnesses ⇐167—Claimant against estate not competent to testify to transaction with decedent, though of common knowledge.

Under Burns' Ann. St. 1914, § 521, a claimant against the estate of a decedent was not competent to testify as to things he did for the decedent and for which he claimed compensation, although the matters occurred in the lifetime of the decedent, and were matters of general knowledge open to the general observation of the friends and acquaintances of the decedent.

Appeal from Circuit Court, Starke County; W. C. Pentecost, Judge.

In the matter of the estate of Elizabeth A. Kittinger, deceased, Schuyler V. Davisson, executor. From a judgment for Rufus L. Magee on a claim against the estate, the executor appeals. Reversed, with instructions to grant new trial.

Oscar B. Smith, of Knox, Harry W. McDowell, of Winamac, and Long & Yarlott, of Logansport, for appellant.

Horner & Thompson and Judge George Burson, all of Winamac, and William J. Reed, of Knox, for appellee.

NICHOLS, J. Appellee filed a claim against the estate of appellant's decedent in the sum of $7,600, for services in the man-

larly in looking after two farms she owned and her residence property during the period of 12 years. The claim was disallowed by appellant. There was a trial by jury and verdict for appellee in the sum of $3,800, upon which judgment was rendered.

The error assigned is the court's action in overruling appellant's motion for a new trial.

Appellant presents but one question in this court, and that is as to whether appellee was a competent witness upon the trial of the cause to testify, in support of his claim, to material and relevant matters and things which occurred during the lifetime of the decedent. This question is presented by a bill of exceptions under the provisions of section 669, Burns' R. S. 1914, as a reserved question of law.

The evidence objected to is set out in the bill of exceptions, and embraces appellee's statement of the time that he worked for the husband of appellee's decedent, and the character of the services that he rendered; of the partnership formed between him and the decedent's husband, which continued until the death of the husband, and thereafter for more than 12 years. He was permitted to describe the home of the decedent at the time of the death of her husband and improvements that were thereafter made thereon. He was also permitted to give a description of two certain farms owned by the decedent, and of the improvements and repairs that were made thereon, in which testimony he repeatedly injected the fact that he participated in such improvements, though he was instructed both by his counsel and the court not to testify to the things that he had done.

Appellee has caused to be filed by writ of certiorari an amended or additional bill of exceptions, which presents in detail the evidence objected to together with the objections made and exceptions taken. It must be conceded that there was want of care in making objections and in taking exceptions, still we think that they were sufficient to present the question here involved. It is clear that the trial court understood the objections that appellant was making for it states in the original bill of exceptions that "said defendant at the same time objected to each question propounded to said witness, Rufus L. Magee, testifying in his own behalf, for the reason that said witness was not a competent witness, under the statute, to testify as to any matters or things relative to the issues which occurred during the lifetime of the decedent." It also appears in such original bill that each objection was overruled, and that thereupon appellant moved to strike out each of the answers made by the witness, and that such motion was overruled, to which ruling appellant excepted.

"In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate."

Appellee contends that, under the construction put upon this section of the statute by the courts, a claimant against an estate, in accordance with the spirit and intent of the statute, is competent to testify as to matters occurring in the lifetime of the decedent which were matters of common knowledge, open to the general observation of the friends and acquaintances of the decedent, and which were not direct transactions or conversations between the claimant and the decedent, and were not matters of such a nature as to be known only to the claimant and decedent. To sustain this contention appellee cites as his first authority Lamb v. Lamb, 105 Ind. 456, 5 N. E. 171. That case was one involving the contest of a will because of the unsoundness of mind of the testator, and the court held that the question of the soundness or unsoundness of mind was fully open to investigation by both parties, and permitted appellees to testify as witnesses to the mental soundness of the testator, basing their opinion upon matters about which they testified that occurred prior to the death of the testator. It was there held that there is nothing in the spirit of the statute, being section 522, Burns' R. S. 1914, and certainly nothing in the letter which excludes parties from testifying respecting matters open to the observation of all the friends and acquaintances of the deceased. But the court in the course of its opinion, said:

"We think that statute does not apply to such a case as this, but that it applies to cases where a claim is asserted against a decedent's estate, or where a claim asserted by the representative of the decedent is resisted."

While the court was speaking with reference to section 522, supra, the provision as to the incompetency of witnesses therein is substantially the same as section 521, here involved. Numerous authorities are cited by appellee that involve the question of the mental capacity of those executing wills. While in each of these cases witnesses were permitted to testify as to their observations and relations with the person whose mental capacity is in question, the jury was permitted to consider such testimony only for the purpose of throwing some light upon the mental condition, and not as evidence of substantive facts. But in the instant case the

"The matters and things testified to by claimant Rufus L. Magee were material to the issues presented by pleadings in said cause, and that defendant introduced evidence in opposition and answer to the allegations of claimant's claim and in opposition to the proof submitted by him in support thereof."

In Zimmerman v. Beatson, 39 Ind. App. 664, 79 N. E. 518, 80 N. E. 165, appellees were charged with converting certain moneys which belonged to appellant's decedent. There was evidence of the nonexistence of such money, and appellees were permitted to testify in detail regarding the habits, business methods, and possessions of appellant's decedent. This evidence was held to be incompetent, and the judgment was reversed by this court by reason thereof. The matters there testified to were as much open to common observation as were the matters and

appellant's contention, among which we cite Nelson v. Masterton, 2 Ind. App. 524, 28 N. E. 731; Hudson v. Houser, 123 Ind. 309, 24 N. E. 243; Taylor v. Dusterberg, 109 Ind. 165, 9 N. E. 907; Castor v. McDole (Ind. App.) 137 N. E. 889.

In the Nelson Case the general rule of this state, as established by the decisions of this court and the Supreme Court is thus stated:

"Where the contract or matter involved in the suit or proceedings is such that one of the parties to the * * * transaction is by death denied the privilege of testifying in relation to such matter, the policy of the statute is to close the lips of the other also in respect to such matter."

It was error to permit appellee to testify concerning the matters mentioned.

Judgment reversed, with instructions to grant a new trial.

(237 N. Y. 276)

In re CITY OF NEW YORK (Staten Island Proceeding).

Appeal of MEBANE et al.

(Court of Appeals of New York. Dec. 27, 1923.)

1. Appeal and error ⇐80(6)—Judgment on severed issue final and appealable.

Where, in proceedings by New York City for acquisition of land, two of the many claimants claimed title to all the property by grant from the British crown, and the court severed the proceeding and took up the determination of the grant alone, as making consideration of the other claims unnecessary if sustained, the judgment and decree excluding such grant, as not conveying the land and all evidence and exhibits of such two claimants, was final and appealable; the severance of issues in a cause or proceeding not being unknown to the law (Civil Practice Act, § 96; Greater New York Charter, § 822a, as added by Laws 1910, c. 245).

2. Appeal and error ⇐1114—Case remitted to Appellate Division for review on merits, when appeal dismissed.

The Appellate Division having erroneously dismissed an appeal, on the ground of the judgment not being final, the case will be remitted to it for review on the merits.

Appeal from Supreme Court, Appellate Division, Second Department.

Proceeding by the City of New York for acquisition of lands below the original high-water mark of Staten Island. From an order of the Appellate Division (205 App. Div. 845, 198 N. Y. Supp. 907) dismissing an appeal by Frank C. Mebane, receiver of the Symes Foundation, Inc., and the American Title & Trust Company, from a final order dismissing their claims, they appeal by permission of the Court of Appeals. Reversed and remitted.

See, also, 116 Misc. Rep. 179, 189 N. Y. Supp. 839.

Frank C. Mebane, of New York City (Benjamin Catchings and Merle I. St. John, both of New York City, of counsel), for appellants.

Gilbert & Gilbert, O'Brien, Boardman, Parker & Fox, Phillips, Mahoney & Leibell, Edward W. Murphy, Michael J. Mulqueen, Montague Lessler, Royal E. T. Riggs, E. J. Freedman, Valentine Taylor, and Francis P. O'Connor, all of New York City (A. S. Gilbert and A. B. Boardman, both of New York City, of counsel), for respondents.

Carl Sherman, Atty. Gen. (Anson Getman, Deputy Atty. Gen., of counsel), for the People.

CRANE, J. This proceeding was instituted by the city of New York in July of 1919, for the acquisition of certain premises between Arrietta street, in Tompkinsville, and Simonston avenue, Clifton, Staten Island, in the borough of Richmond, for the improvement of the water front of the city under and pursuant to the provisions of section 822 of the Greater New York Charter (Laws 1901, c. 466, as amended). The premises sought to be acquired consist of 22 parcels with subdivisions thereof. All of the property embraced in the condemnation area consists of filled in lands and lands under water, docks, wharves, piers, lumber yards, sawmills, bulkheads and other structures, and all of the property is below the line of original high-water mark surrounding Staten Island.

Claims were filed and served by numerous parties interested, either as owners or else in various parcels comprising the entire premises sought to be condemned.

Under the authority conferred by section 822 of the charter the sinking fund commission by resolution adopted on September 25th, 1919, directed that the title to the property should vest in the city of New York on the 11th day of October, 1919, and the title accordingly vested on that day in so far as the city was able to acquire the same as against the state.

The claims of the various owners and lessees were filed according to notice given by the corporation counsel, and came on for hearing and trial before a Special Term of the Supreme Court. The claimants sought compensation in damages according to their respective rights and ownership. It was necessary to prove before the court title in the claimants as well as the damages sustained by them. There were 21 appearances by different law firms.

The Symes Foundation, Inc., and American Title & Trust Company, claim title to all of the property in the condemnation area under a grant made by Queen Anne to Lancaster Symes in 1708. Three of the claimants are alleged to derive title under the Symes grant. If the Symes claim were sustained, it was conceded that the rest of the claimants, other than the three claiming under the Symes grant, either would not be or might not be entitled to any damages; that their titles were imperfect.

It was therefore suggested by counsel for the respective claimants that the validity or extent of the Symes grant and claim be first tried out before the court. About 40 pages of the printed record on appeal is taken up by a discussion between counsel and the court as to the propriety of this procedure under the charter. It would be useless to quote from this discussion. Among other things it was stated and conceded that—

"If the Symes claim prevails, the city's claim to these streets or the lands under water within the projected line of the streets fails."

The corporation counsel said:

"We did not make any map showing the Symes claim, for the reason that the Symes people claim everything in sight—"

To which the court replied:

"Well, that is the first one to pass upon, is it?

"Mr. Mayo (representing the city): I should think so, in orderly procedure; because, if that succeeds, everything else is unnecessary to be decided.

"The Court: Suppose the Symes grant is held to be a valid grant, is it necessary for you to go on and prove all these titles?

"Mr. Gilbert: It probably would not."

Mr. Catchings (representing the Symes title) said:

"The question of descent of title from Symes is a matter which I hope will be severable from the main question as to whether or not the patent covers the lands, because that is a very simple question, and, if that can be severed from the rest of the matter, we could get an appeal on it and get it settled and out of the way very quickly.

"Mr. Mayo: My idea is that the Symes claim should be taken up first."

This was the procedure pursued. The court severed the proceeding as to the Symes grant and took up the determination of that question upon which it thereafter took briefs of counsel.

Nothing else was to be taken up except the disposition of the Symes grant. After the court had determined this question, it directed counsel to submit an order dismissing the Symes claim and striking out all the exhibits and evidence introduced by the claimant. Thereupon on December 16, 1921, a judgment and decree was signed by the trial justice and entered, excluding the Symes patent as not purporting to convey any lands below high-water mark on Staten Island as of October 17, 1708, and excluding as irrelevant and immaterial all the evidence and exhibits offered by the claimant.

[1] The convenience and necessity of this procedure is apparent in view of what has been above stated. If the Symes claim were good, there was no necessity for much, if not all, of the evidence which would be offered by 18 of the other claimants whose titles were adverse to those under the Symes patent.

We think that there is nothing in the charter of the city of New York which prevents this reasonable procedure when necessity and convenience require it. The severance of issues in a cause or proceeding is not unknown to the law. Section 96, C. P. A. See section 822a of Charter of Greater New York, as added by Laws 1910, c. 245.

On appeal to the Appellate Division the court dismissed the appeal holding that the judgment entered was not a final judgment, and that the disposal of the Symes claim could only be passed upon in the final judgment and order entered at the end of the entire proceeding. The disastrous result of such a rule is at once apparent. It was stated by counsel that weeks would be taken up in the introduction of the evidence by the other parties to prove their claims. If, therefore, on appeal, it were determined that the Special Term was in error in excluding the Symes people, then all this evidence would have to be taken over again. Being out of the case at the very beginning by a judgment of the court, they would have been deprived of their right to cross-examine the claimants and other witnesses. The procedure adopted by the court in this case and by the claimant in appealing from its judgment as a final judgment is similar to that pursued in this court in partition actions. Brown v. Feek, 204 N. Y. 238, 97 N. E. 526.

[2] The Appellate Division, therefore, was in error in dismissing this appeal, and the matter must be sent back to it for review upon the merits. Matter of City of New York [Courthouse], 216 N. Y. 489, 111 N. E. 65, Ann. Cas. 1917D, 157.

The order of the Appellate Division should therefore be reversed, and the matter remitted to that court for review upon the merits, with costs to appellants.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Order reversed, etc.

(Court of Appeals of New York. Dec. 27, 1923.)

1. Sales ⇐182(1)—Whether purchaser required to secure shipping permits held for jury.

Whether the buyer or seller of goods was required to procure shipping permits from the general operating commission functioning under the United States Railroad Administration *held* for the jury.

2. Sales ⇐176(1) — Forwarding of shipping permits after delivery due date held waiver of precise date of delivery.

A purchaser, by forwarding shipping permits issued by the general operating commission functioning under the United States Railroad Administration, on October 31st, under a contract providing for delivery during October, thereby waived the precise date of delivery.

3. Contracts ⇐271, 305(1)—After unrestricted waiver of time for performance, that condition no longer essence of agreement; after waiver of delay, no rescission on that ground without notice.

Where there has been an unrestricted waiver of the time fixed for performance of the contract, that condition ceases to be of the essence of the agreement and constitutes no defense in an action to enforce, nor ground of rescission in absence of demand and notice, though it may be the basis of a counterclaim.

4. Sales ⇐182(3) — Question of extent of waiver of provision as to date of deliveries held for jury.

Where, due to inability to secure shipping permits, deliveries due under a contract "during October, 1919," were not made, the question whether the purchaser by forwarding on October 31st a permit good until November 11th, and in forwarding on Nov. 17th permits good until December 1st, in response to a letter that goods were ready, had granted a general extension of time for delivery, or only an extension for the period of the permits, and whether by a letter of December 1st, asking for "a definite statement of the question of deliveries," it had granted a still further extension, *held* for the jury.

Appeal from Supreme Court, Appellate Division, First Department.

Action by S. W. Bridges & Co., Incorporated, against Charles E. Barry and others. From a judgment of the Appellate Division (206 App. Div. 689, 199 N. Y. Supp. 952) affirming a judgment of the Trial Term, which dismissed the complaint upon the merits, plaintiff appeals. Reversed, and new trial granted.

Robert E. Samuels and Harry J. Leffert, both of New York City, for appellant.

Schuyler M. Meyer and Louis Dean Speir, both of New York City, for respondents.

the plaintiff agreed in writing to purchase and the defendants to sell 30,000 cases of condensed milk packed by Burdan Bros., who were manufacturers of the article at Potsdown, Pa., for export at $8.05 per case f. a. s. (free alongside ship), New York. Shipments were to be made from the factory "during October, 1919." Because of freight congestion at the time, no shipments might be made until the freight agent at the point of shipment received a permit from the general operating commission functioning under the United States Railroad Administration. These were known as G. O. C. permits. They are not mentioned in the written contract between the parties, but there is a dispute as to whether it was the duty of the plaintiff or of the defendants to procure them. The contract in the form of an order was inclosed in a letter from the plaintiff stating that it was applying for G. O. C. permits. These were sent on October 8th and by their terms expired on October 15th. Two thousand cases were shipped during that month. It may be that they came under these permits, although the number of them is different from the number of the permits mentioned in the shipping documents. On October 14th the defendants requested further permits. During the last half of the month, because of a longshoreman's strike, none seems to have been obtainable. At least no more were sent, although on the 15th the plaintiff replied that it had applied for permits and hoped to obtain them in a few days. On the 20th the manufacturer wrote to the defendants that he would be obliged to curtail his production of milk because he could not obtain sugar. This letter was forwarded to the plaintiff. It replied that the fact as to the sugar did not relieve the defendants of responsibility under the contract, neither did the plaintiff's inability to obtain permits. In answer on October 23d the defendants wrote that they had been unable to make shipments because not furnished with permits and because also of a lack of freight cars and of the inability of the manufacturer to secure sugar. "It is understood, therefore, that you will accept delivery of this contract after October, it being understood that this order will have a preference in Burdan Bros. factory and that shipment will be made as promptly as possible." On the 30th they again wrote that because of the lack of cars shipment might be considerably delayed, but as soon as permits arrived they would ship as promptly as possible. On the 31st the plaintiff sent a permit for shipments to be sent to Philadelphia good from October 30th to November 8th, but made no direct acknowledgment of the last two letters. Ap-

factory, for on November 3d 3,000 cases were shipped under the permit and received by the plaintiff.

[1, 2] On November 1st, therefore, the defendants had failed to comply with their contract. Twenty-eight thousand cases of milk were still undelivered. Their claim is that the plaintiff itself was in default because of its failure to furnish permits. The contract was made, they say, in view of an existing custom which required the purchaser of articles for export to obtain the permission of the general operating commission. The plaintiff denies that there was any such custom, and this question having been submitted to the jury that body found for the latter. In view of the record this was a matter of fact for their determination. We think, however, that the plaintiff by sending new permits on the 31st waived the precise date of delivery, but the extent of this waiver is not so clear as to become a question of law.

[3] Where there is a general unrestricted waiver as to the time fixed for the performance of a contract, that condition ceases to be of the essence of the agreement. If one thereafter seeks to enforce the contract, delay is no defense, although in some cases it may be the basis for a counterclaim. Nor may one rescind because of such delay in the absence of demand and notice. Whether there has been such a general waiver may be a question of law. The facts may be clear and bear but one interpretation. More often a question of fact is involved. So some extension may be admitted, but the claim may be that it was limited or that it depended upon some condition that has not been performed.

[4] Here defendants wrote stating that there would be considerable delay but that they would make delivery as soon as possible. There is no answer, but permits were sent expiring on November 8th. Was this intended as an assent to the defendants' proposition permitting the defendants to make delivery whenever they might be in a position to do so, or was it a statement that deliveries might be made up to the date when the permit expired? We think this was a question of fact to be solved by the jury. If the latter was the meaning of the transaction, the receipt of 3,000 cases early in November has no bearing on the question of waiver. Assuming that as a fact delivery was waived only until November 8th, we find that on the 11th the defendants wrote that the milk was ready for shipment but that the manufacturer had no permits and asking for them. This statement as to the milk was repeated on the 12th, and on the 17th two permits were shipments to Philadelphia, and one on December 1st, apparently allowing shipments to New York. Still no milk came, and on November 25th the plaintiff requested an explanation. On December 1st a reply was received, stating that Burdan Bros. had refused to complete their contract with the defendants and apparently attempting to cast the burden of dealing with the manufacturer upon the plaintiff. Again we think that compliance with the letter of October 11th asking for permits, especially in view of the statement that the milk was then ready for shipment, created a question of fact as to whether there was any intention to give a general extension of time or only an extension limited to December 1st.

In answer to defendants' letter of December 1st, the plaintiff wrote on the same day stating that it had nothing to do with Burdan Bros. and saying that deliveries were more than a month overdue and that its own customers were taking a firm attitude. "We would therefore ask you to give us a definite statement of the question of the delivery of the milk we have bought of you as we have already given you considerable leeway." To this letter no answer was made and some two weeks later this action was begun.

Assuming that the extensions heretofore given were limited to December 1st, this letter is far from compelling the conclusion that as a matter of law a further extension was granted. It might well be said to be merely an inquiry for definite information prior to some action on the part of the plaintiff. At least the defendants received all that they were entitled to if it were left to the jury to determine whether it was the intention to give a further extension or not.

The questions of fact in the case were submitted to the jury. They were told that they were to determine whether the defendants were excused for their failure to make deliveries because the plaintiff had failed to provide G. O. C. permits, and the contention of the parties in this regard as to the one on whom the duty rested to furnish them was stated. They were also told to determine if there was an extension of time for the delivery after November 1st, and if they found generally for the plaintiff they were to fix the damages and also to answer the specific question as to the day when the defendants might deliver under such extension. The jury did find for the plaintiff, and fixed this day as December 1st. Thereafter the court, having reserved consideration of the motion to dismiss the complaint, granted this motion, and judgment in favor of the defendants was entered accordingly. This judgment has been affirmed.

From the opinion of the trial judge we gather that it believed that the plaintiff's letter of December 1st constituted as a matter of law a further and general extension of the time of delivery. In this as we have already intimated he was in error. At most a question of fact was involved which should be, as it was, submitted to the jury.

It being so, the question as to whether testimony tending to show waiver was admissible under the answer need not be considered. Upon a new trial it may not arise.

The judgments appealed from should be reversed and a new trial granted, with costs in all courts to abide the result.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and CRANE, JJ., concur.

Judgments reversed, etc.

(237 N. Y. 287)

SOUTH & CENTRAL AMERICAN COMMERCIAL CO., Inc., v. PANAMA R. CO.

(Court of Appeals of New York. Dec. 27, 1923.)

1. Shipping ⇐142—Cummins Amendment, relating to interstate shipments, held inapplicable to common carrier by water, unconnected with carriage by land.

The Cummins Amendment of March 4, 1915, to the Interstate Commerce Act (U. S. Comp. St. §§ 8592, 8604a), providing as to carriers subject thereto, among other things, that no shorter period than two years shall be allowed for the institution of suit on claims, which period is to be computed from the disallowance of the claim under Transportation Act Feb. 28, 1920, § 438 (U. S. Comp. St. Ann. Supp. 1923, § 8604a), is inapplicable to a common carrier by water, whose carriage is unconnected with carriage by land; both the Interstate Commerce Act, § 1 (U. S. Comp. St. § 8563), and the Cummins Amendment being limited to carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or a continuous carriage or shipment.

2. Carriers ⇐160—Interstate Commerce Act relevant in considering whether public policy will permit enforcement of stipulation as to time to sue in bill of lading by carrier not subject to its provisions.

Though the Interstate Commerce Act and the Cummins Amendment (U. S. Comp. St. §§ 8592a, 8604a) may be inapplicable to a particular carrier, its standards are relevant to an inquiry whether public policy will permit the enforcement of a stipulation in a bill of lading issued by such carrier, exacting the institution of a suit within 60 days after notice of claim.

3. Carriers ⇐49—Shipping ⇐106—Bills of lading to be reasonable and if unreasonable may be resisted by shippers.

Bills of lading must be just and reasonable whether they are those of carriers by land or water, by United States Shipping Board Act, § 18, and if unjust or unreasonable they may be resisted by shipper or corrected by order of the supervising board under Interstate Commerce Act, § 15 (U. S. Comp. St. § 8583).

4. Statutes ⇐184—Statute may indicate a change in the policy of the law though expressing it only in specific cases most likely to occur to mind.

A statute may indicate a change in the policy of the law, though it expresses that change only in the specific cases most likely to occur to the mind.

5. Statutes ⇐184—Power of Legislature to decide what public policy shall be should be recognized, if it has intimated its will, however indirectly.

The Legislature has the power to decide what the policy of the law shall be, and, if it has intimated its will, however indirectly, that will should be recognized and obeyed.

6. Shipping ⇐142—Stipulation in bill of lading requiring institution of suit against common carrier within 60 days after notice of claim held invalid.

A stipulation in a bill of lading issued by a common carrier by water, requiring the institution of a suit within 60 days after notice of claim, *held* invalid, in view that carriers subject to the Cummins Amendment to the Interstate Commerce Act (U. S. Comp. St. §§ 8592, 8604a) may not fix a period of limitation less than two years after a written notice of rejection of claim.

7. Action ⇐63—Courts may refer to cognate statutes in determining measure of diligence required.

Courts of law, when determining the measure of diligence that may be fairly exacted in the prosecution of a claim, will resort to the standards and analogies of cognate statutes to inform and regulate their judgment.

Hiscock, C. J., and Hogan and McLaughlin, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the South & Central American Commercial Company, Inc., against the Panama Railroad Company. Defendant appeals by permission from a judgment in favor of plaintiff (205 App. Div. 123, 199 N. Y. Supp. 92) upon a submission of a controversy upon agreed facts. Judgment affirmed.

Richard Reid Rogers, of New York City, for appellant.

Edward S. Greenbaum, of New York City, for respondent.

CARDOZO, J. Bags of sugar, 477 in number, were shipped at La Libertad, San Salvador, consigned to the plaintiff in New York. They were loaded on a vessel belonging to the Pacific Mail Steamship Company, and after reaching Cristobal, Canal Zone, were delivered to the defendant for transshipment by its vessel to the port of destination. At Hoboken, N. J., where the defendant has its pier, the 477 bags consigned to the plaintiff were confused with 472 bags of a different grade consigned to some one else. Misdelivery followed as a result of the confusion. The plaintiff sues for the damage, the difference in value between the sugar consigned and the sugar received. A term of the bill of lading is to the effect that notice of claim must be given within 60 days after knowledge of the loss, and action brought within 60 days thereafter. The defense is the failure to comply with this provision. Under St. Louis, I. M. & So. Ry. Co. v. Starbird, 243 U. S. 592, 606, 37 Sup. Ct. 462, 61 L. Ed. 917, the letter of September 3, 1920, was a compliance with the requirement of preliminary notice. A fuller and more formal notice went forward in October. More than 60 days thereafter, however, on January 17, 1921, an action was begun. This was too late if the contract is to govern.

[1] Whether the limitation is valid, is the question to be answered. The plaintiff insists that it is void under the Cummins Amendment to the Interstate Commerce Act, which provides as to carriers subject thereto that in certain classes of cases there shall be no requirement of notice; that in other cases the period prescribed shall be not less than 90 days; and that no shorter period than two years shall be allowed for the institution of suit. Act of March 4, 1915, c. 176, 38 Stat. 1196 (U. S. Comp. St. §§ 8592, 8604a). The period is to be computed from the disallowance of the claim. Transportation Act 1920, 41 Stat. 456, 494, § 438 (U. S. Comp. St. Ann. Supp. 1923, § 8604a). But the defendant is not subject to the provisions of the Interstate Commerce Act. The act does not extend to a common carrier by water whose carriage is unconnected with carriage by land. Mutual Transit Co. v. U. S., 178 Fed. 604, 606, 102 C. C. A. 164; Burke v. Union Pac. R. Co., 226 N. Y. 534, 537, 124 N. E. 119; Union Pac. R. Co. v. Burke, 255 U. S. 317, 322, 41 Sup. Ct. 283, 65 L. Ed. 656. It is expressly limited by its terms, and so again is the Cummins Amendment, to carriers—

"engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment)." Interstate Commerce Act, U. S. Compiled Statutes, § 8563; Cummins Amendment, 38 Stat. 1196.

The defendant is none of these. Reaching that conclusion, we do not stop to consider whether other provisions, governing the route of carriage, would remove it in any event from the purview of the act. Enough for present purposes that it is a carrier by water.

[2-7] Though the act does not govern, its standards are relevant to the inquiry whether public policy permits the enforcement of the contract. Bills of lading must be just and reasonable, whether they are those of carriers by land or of carriers by water. United States Shipping Board Act, 39 Stat. p. 728, c. 451, § 18. If unjust or unreasonable, they may be resisted by the shipper, or corrected by order of the supervising board. Interstate Commerce Act, § 15 (U. S. Comp. St. 8583); U. S. Shipping Board Act, supra, § 18. We think a new public policy, a new conception of what is just and reasonable in these contractual limitations is established by this act, reinforced, as it is by the Transportation Act, which followed in 1920.

"A statute may indicate a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind." Gooch v. Oregon Short Line R. R. Co., 258 U. S. 22, 24, 42 Sup. Ct. 192, 193 (66 L. Ed. 443).

"The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." Johnson v. U. S., 163 Fed. 30, 32, 89 C. C. A. 508, 510, per Holmes, Circuit Justice.

We do not say that carriers not subject to these acts must adhere to the standards thus established with literal fidelity. That is obviously unnecessary, since the acts do not touch them ex proprio vigore. We say, however, that there is a duty of approximate or reasonable conformity, a conformity so great as to escape flagrant disavowal of the conception of reasonable opportunity reflected in the will of Congress. We cannot find that this measure of correspondence has been reached. The contract exacts the institution of a suit within 60 days after notice of claim, and this though negotiations for a settlement are proceeding in the interval. In the very case at hand the defendant had held out to the shipper the promise or at least the suggestion of an amicable adjustment. The likelihood of mistake is multiplied when vigilance is thus disarmed. The statute, on the other hand, says that carriers subject to its provisions shall not fix a

period of limitation less than two years after written notice of rejection. The disparity is too great, the contrast too glaring, between the limitation prescribed for one carrier and the limitation permitted to another not differently situated. A steamship company, carrying merchandise to Alaska under some arrangement with a railroad for continuous shipment, issues a bill of lading which Congress has in effect declared to be unreasonable if it fixes therein a limitation of less than two years for the institution of a suit. The same steamship company, it is said, makes a reasonable contract if it fixes a limitation of 60 days when it is acting independently. We are not to confuse a limitation for a preliminary notice with one for the institution of suit. Prompt notice may be necessary as a safeguard against fraud. When notice has been given, so that investigation can be made, there is little relation between the opportunity for fraud and a postponement of the suit. Courts of equity, even when not bound by a statute of limitations, were accustomed to apply the bar of the statute by analogy as a test of reasonable diligence. Bowman v. Wathen, 1 How. 189, 11 L. Ed. 97. Courts of law, in like manner, when determining the measure of diligence that may fairly be exacted, will resort to the standards and analogies of cognate statutes to inform and regulate their judgment. In the face of reiterated enactments, expressing too clearly for misapprehension the judgment and the will of Congress, this bill of lading could not stand if challenged before the shipping board as embodying an unjust and unreasonable provision. We think its fate can be no better when challenged in the courts.

Gooch v. Oregon Short Line R. R. Co. (supra) is cited by the defendant as supporting a contrary conclusion. The point at issue was the validity of a provision which affected, not the time to sue, but the preliminary notice. The decision went upon the ground that the policy declared by the statute in respect of the giving of such notices was not fairly to be extended to carriers of passengers. The analogy was not applied because the difference of conditions was so great that in truth it was no analogy. Even that conclusion was reached with vigorous dissent. In both opinions, the prevailing and the dissenting one, the implication is strong that a new standard has been established for carriers of property.

What we have said is, of course, applicable to those carriers, and those only, that are subject to federal regulation. We are not concerned at this time with carriers subject to regulation by the states.

The judgment should be affirmed with costs.

POUND, CRANE, and ANDREWS, JJ., concur.

HISCOCK, C. J., and HOGAN and McLAUGHLIN, JJ., dissent.

Judgment affirmed.

(237 N. Y. 233)

WATERMAN v. NEW YORK LIFE INS. & TRUST CO. et al.

(Court of Appeals of New York. Dec. 27, 1923.)

1. Wills ⇐694—Principal not divided among nephews equally on life tenant's failure to exercise power to appoint only one; "persons designated as beneficiaries."

Where life tenant, empowered by will to dispose of the principal "to such one of my nephews of my own blood" as she may by her will direct, failed to exercise the power of appointment, the principal will not be divided among all the nephews equally under Real Property Law, §§ 157, 158, 160, providing that "if the trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as beneficiaries," since the nephews as a class were not "the persons designated as the beneficiaries;" the life tenant's power being limited to the selection of only one.

2. Wills ⇐858(1)—Principal of trust fund, as life tenant's failure to exercise power of appointment, became part of residuary estate.

Where a will gave testator's homestead with contents to his wife for life with the power to dispose thereof, or proceeds thereof, in the event of a sale of the property during wife's life, to one of his nephews, and gave the entire residue to brothers and sisters, the proceeds, on the wife's failure to exercise power of appointment, did not pass to heir at law as upon intestacy, but became a part of the residuary estate.

3. Wills ⇐448—Construed, if possible, to avoid intestacy.

A will will be construed, if possible, to avoid intestacy.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Harrison F. Waterman against the New York Life Insurance & Trust Company, as trustee of John C. Carpenter, deceased, and others. Judgment of dismissal (119 Misc. Rep. 65, 195 N. Y. Supp. 881) was affirmed by the Appellate Division (204 App. Div. 12, 197 N. Y. Supp. 438), and plaintiff appeals. Affirmed.

Robert H. Koehler, of New York City, for appellant.

Joseph K. Savage, of New York City, for respondent trustee.

Eben H. P. Squire and Farrington M. Thompson, both of White Plains, for respondent Carpenter.

William A. Sawyer, of Port Chester, for respondents Burns and others.

CARDOZO, J. John C. Carpenter, who died in 1917, left his homestead with its contents to his wife, Dora, during her life, "giving to her full power of disposing of the same by will to such one of my surviving brothers or to such one of my nephews of my own blood as she may deem fit to receive the same." If the property was sold while the life estate continued, the proceeds of the sale were to be turned over to a trustee and thereafter were to form a portion of the residuary estate. The gift of the residuary estate is to the New York Life Insurance & Trust Company as trustee to pay the income to the wife during life, "and on her decease to divide and pay over said principal trust fund in equal shares to my surviving brothers and sisters; except that in case of the sale of my homestead hereinbefore given to my wife for her natural life, the proceeds of such sale are to be paid over on her death to such one of my nephews of my own blood as she may by her will direct."

The homestead was sold during the life of the wife, but she did not exercise the power to direct the payment of the proceeds to one of the surviving nephews. The plaintiff, a grandson, contends that by force of this omission the testator died intestate to that extent, and that the proceeds belong to him as surviving heir at law. The nephews, eight in number, contend that in default of an appointment to one of them, the law will direct a division equally among them all. The brothers and sisters contend that the proceeds belong to them as donees of the residuary estate.

[1] We think division among the nephews equally is forbidden by the will. Section 160 of the Real Property Law (Consol. Laws, chap. 50) provides:

"If a trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as beneficiaries of the trust." Cf. §§ 157, 158.

Division is to be made in accordance with this section in those cases, and those only, where some other division is not directed, either expressly or by implication, in default of the appointment. There are other directions here. The nephews as a class are not "the persons designated" by the testator "as the beneficiaries of the trust." He has made it plain that he had no such meaning. The wife is not authorized to select as many nephews as she chooses, one or more than one or all. On the contrary, she is repeatedly admonished that her choice must be confined to one. Division among all the nephews would frustate the testator's purpose if it were effected through any act of hers. It would equally frustate his purpose if it were effected by the law. Cases may indeed be found where, from slight and dubious tokens, the courts have drawn the inference of a "general intention in favor of a class." Burrough v. Philcox, 5 My. & Cr. 72, 92; Sugden on Powers (8th Ed.) §§ 6, 7, 8. In none of them had the intention been distinctly negatived as here. This case finds a parallel to some extent in Brown v. Higgs, 4 Ves. 708, where the gift, following an estate tail, was to "one of the heirs of the sons of my nephew Samuel Brown as he shall direct by a conveyance in his life time or by his will." The opinion was expressed, though the point was not decided, that in default of the exercise of the power there could be no division among the sons. Sugden, commenting on the case, puts the underlying principle before us in a sentence:

"A power to give to such as a donee may select of a class may be considered as including the whole class, for although any may be selected, yet the whole may be objects of the power; whereas a power to appoint to such one of a class as a person may name, authorizes a gift to one only of the class; no larger number, much less the whole class, can be made objects of the power." Sugden on Powers (8th Ed.) p. 593, § 17; cf. In Llewellyn's Settlement (1921) 2 Ch. D. 281, 290.

In the will before us now, the restriction of the choice to one is stated with industrious iteration. We cannot disregard it as casual or meaningless.

[2] The power of appointment failing, the question remains whether the proceeds of the sale are to be distributed as upon intestacy or as part of the residuary estate. The latter, we think, is the clear mandate of the will. The heir at law contends that the gift of a residue is not augmented by the failure or lapse of another portion of the residue. Wright v. Wright, 225 N. Y. 329, 340, 122 N. E. 213. The rule, though often deplored, has been thought to be settled by authority. Wright v. Wright, supra. It is without pertinency here. No gift of the residue or of any part of it has failed through the omission to execute the power of appointment. Subject only to the life estate and to the execution of the power, the whole residue was given to

the brothers and sisters, and title passed to them at once. Title would, indeed, have been divested if the appointment had been made. The effect of the failure to appoint is merely that title is maintained. The gift of the residue has not lapsed. It has been continued and confirmed.

[3] We cannot doubt that this construction gives effect to the testator's purpose. There is a struggle always to avoid intestacy. Matter of Ossman v. Von Roemer, 221 N. Y. 381, 387, 117 N. E. 576. This testator would surely wish that the struggle should succeed. The heir at law who claims the proceeds is his descendant through a divorced wife. The will reveals his purpose that neither she nor her issue should share in his estate.

The judgment should be affirmed with costs.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Judgment affirmed.

(237 N. Y. 300)

PEOPLE v. DEITSCH.

(Court of Appeals of New York. Dec. 27, 1923.)

1. Rape ⇐54(3)—Rule as to corroboration of prosecutrix stated.

Generally, testimony corroborative of prosecutrix in a rape prosecution, under Pen. Law, § 2013, should tend to show the material facts necessary to establish the commission of the crime, and the identity of the person committing it.

2. Rape ⇐54(2)—Evidence held to corroborate prosecutrix as to identity of defendant as person who committed crime.

In a prosecution for rape, in which the defendant claimed an alibi, testimony that defendant was standing in front of the house in which the crime was committed a few minutes before the time when it was alleged to have been committed *held* sufficient to corroborate the prosecutrix as to the identity of the defendant as the person who committed the crime.

3. Rape ⇐48(1) — Complaint by prosecutrix immediately after rape held admissible.

In rape prosecution, testimony that immediately after the crime the prosecutrix made complaint to a neighbor *held* admissible.

4. Rape ⇐48(2)—Statements by prosecutrix half an hour after rape, made in reply to questions, held inadmissible.

In rape prosecution, testimony as to detailed statements made by prosecutrix half an hour after the commission of the crime, not as a natural result of reaction to the crime, but in reply to questions by an officer, *held* inadmissible.

5. Criminal law ⇐1186(4)—Admission of statements by prosecutrix in reply to questions of policeman half an hour after crime held prejudicial.

In prosecution for rape, in which the defendant claimed an alibi, and the evidence as to the identity of the defendant as the person who committed the crime was not altogether satisfactory, testimony as to statements by prosecutrix half an hour after the commission of the crime in reply to questions asked her by a policeman, and not as the result of reaction to the crime, giving a description of the person who committed the crime that fitted the defendant, *held* prejudicial, under Code Cr. Proc. § 542.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Morris Deitsch was convicted of rape in the first degree, and from a judgment of the Appellate Division (205 App. Div. 446, 199 N. Y. Supp. 582) reversing the judgment of conviction, the People appeal. Affirmed.

See, also, 206 App. Div. 790, 200 N. Y. Supp. 939.

Guy B. Moore, Dist. Atty., of Buffalo (John J. Kane, of Buffalo, of counsel), for the People.

John J. Brown, of Buffalo, for respondent.

ANDREWS, J. The defendant was convicted of the crime of rape. His conviction was reversed in the Appellate Division, and he was granted a new trial on the ground that there was no sufficient evidence supporting the testimony of the complainant. Penal Law, § 2013. We agree that this result was right, but not, however, for the reason given in the court below.

[1, 2] The general rule is that the corroborating testimony should tend to show the material facts necessary to establish the commission of the crime and the identity of the person committing it. People v. Plath, 100 N. Y. 590, 3 N. E. 790, 53 Am. Rep. 236. Here the complainant was a child eight years of age. Her physical condition immediately after the alleged assault and the result of a medical examination was sufficient to support her story that a rape had been committed. In addition there was needed corroboration of her statement that the defendant was the guilty party. We have these facts bearing upon the question. The child's father, mother, and grandmother, who lived with her, left the house at 10 minutes to 8 o'clock in the morning. At 8 o'clock she says the defendant forced his way in and committed the crime. An independent witness states that she saw the defendant stand-

ing in the street at the gate in front of the house in which the complainant lived a few minutes before 8. This fact was accepted by the jury as true. The defendant, however, both by his own testimony and by the testimony of two other witnesses, falsely, it is found, attempted to establish an alibi. This testimony reflects upon the character of his presence in the street at the time stated, and justifies the inference that it was a guilty presence. Under these circumstances there is sufficient corroboration as to the identity of the criminal. People v. Terwilliger, 74 Hun, 310, 26 N. Y. Supp. 674; affirmed, 142 N. Y. 629, 37 N. E. 565; People v. Goffredo, 232 N. Y. 516, 134 N. E. 553; People v. Gorski, 236 N. Y. 673, 142 N. E. 330. The Gorski Case is in point. The deceased was murdered outside of a saloon. The stories of the accomplices charged the defendant with the commission of the crime.

That the crime was committed by some one was admitted. The only corroborating evidence tending to connect Gorski with it was the fact that very shortly after the murder he was seen walking in a direction away from the saloon, and at a distance from it of some 130 feet, with two other men, one of whom was not alleged to have participated in the murder. Gorski denied that he was present at the scene of the crime, and, as in this case, set up a false alibi. We held that the presence of Gorski in the neighborhood falsely denied by him was sufficient corroboration. His denial tended to show that his presence was not innocent. While the statute in regard to the corroboration of accomplices is not identical in language with that now before us, precedents applicable in the one case may well guide us in the other. People v. Terwilliger, supra; People v. O'Farrell, 175 N. Y. 323, 67 N. E. 588.

[3-5] We think, however, incompetent testimony damaging to the defendant was admitted over his objection and exception. Immediately after the assault it was shown that the child made complaint to a neighbor. Such testimony was competent. People v. O'Sullivan, 104 N. Y. 481, 10 N. E. 880, 58 Am. Rep. 530. Half an hour later, not as the natural result of reaction to the crime, but in reply to questions, she gave the details concerning it to a policeman. Those details given by him were inadmissible. Baccio v. People, 41 N. Y. 265. The error might have been overlooked, as the circumstances of the assault appear elsewhere in the case, except that she described the criminal as a stout man, wearing a straw hat, a description that fitted the defendant. The identification of the defendant was not altogether satisfactory. The testimony of the witness who testified she saw him by the gate on the morning in question was somewhat shaken on cross-examination. The child who recognized him as the criminal was young. Two apparently disinterested witnesses testified to facts which, if true, established an alibi. Any incompetent testimony tending to strengthen in the minds of the jury the identification of the complainant was harmful. We may not in this case affirm under section 542, Code of Criminal Procedure.

The judgment appealed from must be affirmed.

HISCOCK, C. J., and CARDOZO and POUND, JJ., concur.

HOGAN, McLAUGHLIN, and CRANE, JJ., concur in result, and on additional ground that there was not corroborating evidence.

Judgment affirmed.

(237 N. Y. 305)

CASEY v. KASTEL et al.

(Court of Appeals of New York. Jan. 15, 1924.)

1. Infants ⇐31(1) — May disaffirm sale of chattels before majority.

An infant may disaffirm a sale of chattels before majority.

2. Infants ⇐31(1) — Disaffirmance unnecessary before suit.

If a sale of chattels of an infant is void, no disaffirmance before suit is necessary.

3. Infants ⇐5 — Sale of infant's stock by agent voidable and not void.

Sale of corporate stock of an infant by an agent is voidable and not void.

4. Infants ⇐31(1)—On sale of infant's property no tort committed until after avoidance, and conversion does not relate back so as to make transaction void ab initio.

When the sale of an infant's property is voidable, no tort is committed until after avoidance, and the infant may then treat the refusal to deliver back the property or the proceeds as a conversion by those who have kept it intentionally or so intermeddled with it as to interfere with the infant's dominion over it.

5. Infants ⇐31(1) — Subsequent purchaser from infant's transferee of personalty may obtain good title.

Under Personal Property Law, § 105, where purchaser of infant's goods has a voidable title thereto, a subsequent buyer, before the infant has avoided his sale, acquires a good title to the goods, provided he buys in good faith for value and without notice.

6. Infants ⇐31(1)—Rescission of transfer of certificate of stock does not invalidate purchaser's subsequent transfer to one in good faith.

The rescission of a transfer of a certificate of stock by an infant does not invalidate even a subsequent transfer by the transferee in possession to a purchaser for value in good faith and without notice, under Personal Property Law, § 169, the transfer of the infant's certificate being valid when made under section 162.

7. Trover and conversion ⇐4—Assumption of ownership gist of "conversion."

The gist of "conversion" is the unauthorized assumption of the powers of the true owner.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conversion.]

8. Brokers ⇐35—Infants ⇐55, 57(1)—Brokers liable for selling stock of infants.

Brokers, selling stock of infant, indorsed in blank by her, are liable to her in conversion, her signature in blank being nothing more than a voidable consent to a sale, contractual in its nature rather than tortious, the infant not being estopped, in view of Personal Property Law, §§ 162, 163, and it is immaterial that once during minority she ratified the sale.

9. Infants ⇐55—Infant not estopped by indorsement in blank of stock certificate.

An infant is not estopped by indorsement in blank of certificate of stock to recover for its wrongful conversion, under Personal Property Law, §§ 162, 163.

10. Corporations ⇐110—Cancellation of infant's stock not conversion in absence of notice of her incapacity.

Where an infant delivered a certificate of stock indorsed in blank to a broker, who sold it, the cancellation of the certificate by the corporation without knowledge of the infant's incapacity was not an act of conversion, and it was not liable to her, it receiving nothing, and being but an intermediary in a sale by others, under Personal Property Law, §§ 162, 163, and the corporation did not become guilty of conversion after disaffirmance.

11. Corporations ⇐131—Corporation may be compelled by purchaser to transfer stock sold by infant.

Transfer of corporate stock by infant being voidable only, corporation had no right to refuse a transfer, and could have been compelled by the purchaser to make it.

12. Infants ⇐31(2)—Right to avoid contracts does not depend on ability to restore consideration.

The right of an infant to avoid or rescind contracts made during his minority does not depend on his ability to restore the consideration or otherwise make restitution to the other party, but, to the extent that the infant still has the consideration, the other party becomes entitled thereto.

13. Infants ⇐31(1)—Notice by infant of rescission before action at law generally necessary but immaterial, where nothing valuable to be surrendered.

Though an infant, suing in conversion brokers and others involved in sale of her corporate stock, should have given notice of rescission and tendered consideration, her action should not be dismissed, where she has spent the money consideration paid her, and has nothing of value left to tender back to defendants complaining, the law not requiring an idle ceremony.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Elizabeth Browne Casey against Philip F. Kastel, the United States Steel Corporation, and others. From a judgment of the Appellate Division of the Supreme Court for the First Department (206 App. Div. 793, 200 N. Y. Supp. 790) affirming a judgment of the Trial Term (jury waived) for plaintiff (119 Misc. Rep. 116, 195 N. Y. Supp. 848), certain defendants appeal. Judgment reversed, and complaint dismissed as to the United States Steel Corporation, and otherwise affirmed.

Wm. Averell Brown and Kenneth B. Halstead, both of New York City, for appellant United States Steel Corporation.

Ellery O. Anderson and F. K. Pendleton, both of New York City, for appellants Johnson and Wood.

Henry L. Sherman, Paul M. Herzog and Lionel S. Popkin, all of New York City, for respondent.

POUND, J. Plaintiff, an infant when the action was begun, sued to recover damages for conversion of her stock in defendant United States Steel Corporation. The learned trial court found, in substance, that plaintiff left the stock certificate with defendant Kastel, with an assignment executed in blank: that he sold it, acting as her agent or broker, for $11,000, without authority; that she afterwards ratified the sale, but now disaffirms it. The appellants are brokers doing business as the firm of Johnson & Wood, who, it is claimed, were parties to the conversion, because they, acting for Kastel, sold the stock and guaranteed the signature of the infant, and the steel corporation, which is made a party because it transferred the stock on its books, canceled plaintiff's certificate, and issued a new certificate to the purchaser. No claim is made against the ultimate purchaser.

[1, 2] An infant may disaffirm a sale of chattels before majority. Stafford v. Roof, 9 Cow. 626. If the sale is void, no disaffirmance before suit is necessary.

[3] The first question is whether the sale

of the stock by Kastel as plaintiff's agent was voidable or void. The court below proceeded on the theory that it is the law of this state that an infant's appointment of an agent is void, and that it follows that an infant cannot, during minority, ratify the act of one who assumes to act as her agent. The rule is stated, but by way of dictum only, in Ely v. Ehle, 3 N. Y. 506, 508, as follows:

"If an infant give or sell his goods and delivers them with his own hands, the act is voidable only; but if he give or sell goods, and the donee or vendee take them, by force of the gift or sale, the act is void, and the infant may bring trespass."

It is more definitely stated in Bool v. Mix, 17 Wend. 119, 131 (31 Am. Dec. 285), as follows:

"The rule seems to be universal, that all deeds or instruments under seal, executed by an infant, are voidable only, with the single exception of those which delegate a naked authority, which are void. And even in relation to a power of attorney, Parker, C. J., considered it a point of strict law, somewhat incongruous with the general rules affecting the contracts of infants, and that no satisfactory reason could be assigned for the exception."

Williston on Contracts (vol. 1, p. 444), states the rule as follows:

"It has been asserted often and decided sometimes that an infant's power of attorney or agreement to make another his agent is void; and especially a power or warrant of attorney by an infant for the confession of judgment against him has been held void, as has any authority given by the infant to an attorney to represent him in court. Probably courts would still hold an infant unable to authorize a confession of judgment or to appoint an attorney for judicial proceedings; but there seems no reason except the antiquity of the rulings to that effect which can support the broad proposition that an infant's power of attorney or appointment of an agent is void; and generally, in recent cases, courts have been disposed to treat the creation of an agency by an infant, like other agreements made by him, as merely voidable. A ratification by an infant of an act done on his behalf, but without his authority, stands logically on the same ground as an act originally authorized by an infant principal, and has been held binding."

Notwithstanding numerous general statements in the books, sound principles compel the conclusion that no satisfactory distinction can be drawn between a sale and delivery by the infant and a sale and delivery by an agent for him. The sale of the stock by Kastel was voidable only and not void. Dicta and general statements to the contrary are no longer respectable authority. Coursolle v. Weyerhauser, 69 Minn. 328, 332, 72 N. W. 697.

[4-6] When the sale of an infant's property is voidable, no tort is committed until after avoidance. The infant may then treat the refusal to deliver back the property or the proceeds as a conversion by those who have kept it intentionally or so intermeddled with it as to interfere with the infant's dominion over it, except: "Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title" (Personal Property Law [Cons. Laws, c. 41] § 105); and, in particular, the rescission of the transfer of a certificate of stock does not invalidate even a subsequent transfer by the transferee in possession to a purchaser for value, in good faith, and without notice (Personal Property Law, § 169).

[7] But the conversion does not relate back so as to make the entire transaction void ab initio. This the distinction between void and voidable as applied to infants' contracts forbids. The transfer of plaintiff's certificate by Kastel was valid when made (Personal Property Law, § 162), and is not made void ab initio by rescission. Until the disaffirmance by the infant the authorized acts of the parties were not wrongful. The fiction of relation whereby, to prevent injustice, an act done at one time is considered to have been done at some antecedent period should not be utilized to make those who deal with an infant's property tort-feasors as of a time when they did no wrong. The disaffirmance is retroactive only to the extent that thereafter the parties who have taken or intermeddled the infant's property are placed in the same position as if the transaction had not been authorized. They are guilty of conversion if they then refuse or fail to make restitution.

[8, 9] The infant transferred title when she authorized or ratified the delivery of the certificate indorsed in blank (Personal Property Law, § 162), but the right of an infant to disaffirm a transfer of stock is expressly reserved by Personal Property Law (section 163). Kastel, after disaffirmance, was bound to account to the plaintiff for the conversion of her stock to the extent, at least, of the unpaid portion of the purchase price which was the value of the stock which he retained. Johnson & Wood are also liable. They are held, not for a conversion growing out of a retention of the shares after notice of disaffirmance, but for an act of wrongdoing in meddling with and selling the property of another; for an interference with the dominion and right of property of the plaintiff, depriving her permanently of all her rights

therein. Plaintiff made no binding representations to them, and has not estopped herself from asserting a conversion against them. An infant arrived at years of discretion may be guilty of constructive fraud, but plaintiff did not cheat defendant. No fraud in her was found by the trial justice, but freedom from fraud was found. Nor was she guilty of negligence in indorsing the certificate to Kastel. Her signature to the assignment in blank of the certificate was nothing more than a voidable consent to the sale, contractual in its nature rather than tortious. Union Trust Co. of Rochester v. Oliver, 214 N. Y. 517, 523, 108 N. E. 809, although it holds that the owner is estopped in such cases, does not hold that an infant is thus estopped from asserting her title to a stock certificate. It deals merely with the attributes of stock certificates in general. They sold her shares and guaranteed her signature to the assignment in blank. They took her certificate, dealt with it as Kastel's representatives, and they stand in his shoes. Although she had once ratified the sale, when she disaffirmed it, she put them in the position of tort-feasors, acting for Kastel in consummating the sale of the stock by him. Hollins v. Fowler, L. R. 7 H. L. 757; Consolidated Co. v. Curtis & Son (1892) 1 Q. B. 495.

[10] The United States Steel Corporation is not in the same position as the defendants who sold the infant's stock on her behalf. When it transferred the stock on its books to the ultimate purchaser and canceled the infant's stock certificate, it did a valid act. No statute, as in Merriam v. Boston C. & F. R. R. Co., 117 Mass. 241, made the transfer illegal. It acted under her authority without notice of her incapacity, in good faith, and without negligence. It was not bound to inquire whether the transfer was voidable, for nothing put it upon inquiry. It received nothing and retained nothing for which it can be called upon to account. It appropriated no property to itself. It was an intermediary in a sale by others; a conduit for the transfer of title. It destroyed a muniment of title merely, and did not deprive the plaintiff of her rights in the stock itself, which exists apart from the certificate. Zander v. N. Y. Security & Trust Co., 178 N. Y. 208, 212, 70 N. E. 449, 102 Am. St. Rep. 492. It was guilty of no conversion after disaffirmance. Plaintiff might, with equal effect, have intrusted the certificate to a messenger to deliver to the purchaser. The messenger would have exercised no dominion over her property, done her no wrong, and made no gain, and, even if she afterwards disaffirmed the sale, could not be placed in the position of a tort-feasor. While there is no definite test of conversion of universal application (Bramwell, B., Burrows v. Bayne, 5 Hurl. & N. 296, 308), the courts have not gone so far as to say that the acts of a corporation in recording a transfer of stock amount to a conversion of the stock.

[11] The transfer being voidable only and legal and valid when made, the corporation had no right to refuse a transfer. Smith v. Railroad, 91 Tenn. 221, 239, 18 S. W. 546. It could have been compelled by the purchaser by recourse to the proper remedy to make it. Travis v. Knox Terpezone Co., 215 N. Y. 259, 264, 109 N. E. 250, L. R. A. 1916A, 542, Ann. Cas. 1917A, 387.

It follows that the judgment should be reversed as to the United States Steel Corporation and affirmed as to the individual defendants, unless as to them plaintiff proceeded erroneously in suing for a conversion based on a rescission without previously giving notice of disaffirmance. It is urged on their behalf that, as no tort was committed until disaffirmance, no action should lie without a prior disaffirmance (Gould v. Cayuga County Nat. Bank, 86 N. Y. 75, 82; Smith v. Ryan, 191 N. Y. 452, 456, 84 N. E. 402, 19 L. R. A. [N. S.] 461, 123 Am. St. Rep. 609, 14 Ann. Cas. 505), and that the action itself cannot be made an essential element of the cause of action without introducing an anomaly which is fundamental and more than procedural in its character.

[12] The right of an infant to avoid or rescind contracts made during his minority does not depend on his ability to restore the consideration or otherwise make restitution to the other party (Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233), but, to the extent that he still has the consideration, the other party becomes entitled thereto. The plaintiff had received from Kastel $4,500 in cash, which she has spent, and she holds his worthless note for $12,500, on which he is credited with $2,000. She demanded judgment in her complaint for the market value of the stock at the time of conversion, but on the trial, the parties having waived the right to a trial by jury, she tendered back the note, established her inability to return the cash received, and asked and obtained judgment for the difference between the net amount realized on the sale of the stock and the amount paid to her by Kastel.

[13] The form of the complaint is proper. It was not necessary to plead the evidence of a conversion. The voidable deed of an incompetent person may be avoided in an action of ejectment without resorting to equity, the complaint simply stating that the plaintiff was the owner in fee and entitled to the possession of the real estate therein described, and that the defendant unlawfully withheld

possession thereof. Smith v. Ryan, supra, 459 (84 N. E. 402). The beginning of replevin has also been held to be a sufficient act of rescission (Wise v. Grant, 140 N. Y. 593, 596, 35 N. E. 1078), but the general rule is that in law, in an action based on the prior rescission of a voidable contract, a tender before suit is necessary, although in equity, where the relief sought is rescission, it is sufficient to offer restoration in the complaint (Smith v. Ryan, supra, 456). The cause of action here is at law, the legal remedy is adequate, and an action to declare a rescission would not lie. Schank v. Schuchman, 212 N. Y. 352, 357, 106 N. E. 127.

But the plaintiff should not be dismissed. "The law does not require an idle ceremony." Gould v. Cayuga Co. Nat. Bank, supra, p. 81. Tender of benefits was excused. The money she had spent. Kastel's note was worthless. In any event he alone could insist on its return as a condition of disaffirmance (Stevens v. Austin, 1 Metc. [Mass.] 557, cited with approval in Gould v. Cayuga County Nat. Bank, supra), and he does not complain. Notice of rescission where there is nothing to tender back may well be dispensed with where tender of benefits received might otherwise be insisted upon. Plaintiff had received nothing from Johnson & Wood. No substantial right would have been conserved by a prior disaffirmance of the transfer as to them.

The judgment should be reversed as to defendant United States Steel Corporation, and complaint dismissed, with costs in all courts and otherwise affirmed, with costs.

HISCOCK, C. J., and CARDOZO, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Judgment accordingly.

McGEE v. SIGMUND. (No. 17931.)

(Supreme Court of Ohio. Feb. 19, 1924.)

(Syllabus by the Court.)

Husband and wife ⇐51—Spouses not empowered to contract with each other as to expectancy of inheritance neither vested nor contingent.

Section 7909, General Code, does not confer upon husband or wife any greater power to contract with each other than persons other than husband and wife possess. A husband or a wife is not thereby empowered to contract with the other with reference to a hope or expectancy of inheritance, which is neither vested nor contingent. Needles, Ex'r, v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85, approved and followed.

Marshall, C. J., and Wanamaker and Allen, JJ., dissenting.

Error to Court of Appeals, Highland County.

Action by Grace McGee against Anthony Sigmund. Judgment for defendant on demurrer was affirmed by the Court of Appeals, and plaintiff brings error. Affirmed.—[By Editorial Staff.]

The plaintiff in error filed her petition against the defendant in error in the common pleas court of Highland county, averring that on the 15th day of August, 1921, and prior thereto, Anthony Sigmund and Elizabeth Sigmund were husband and wife; that on that date Anthony and Elizabeth Sigmund entered into a written agreement, signed by the parties thereto in presence of witnesses, by the terms of which they agreed upon an immediate separation as husband and wife, which written agreement contained an assignment by Anthony Sigmund to Elizabeth Sigmund of stock in the Royal Savings & Loan Company of Portsmouth, Ohio, of the value of $2,500, and a release of his right, title, and claim to the household goods, furniture, etc. The petition further averred that this agreement contained the following provision:

"Now, therefore, in consideration of the premises, each party hereto does hereby release and discharge the other from all obligations of support, and from all other claims, rights and duties arising or growing out of said marital relations; and said parties mutually agree that each party hereto may freely sell or otherwise dispose of his or her own property by gift, deed, or last will and testament, and each party is by these presents hereby barred from any and all right or claim of dower, inheritance, descent, distribution, allowance for year's support, right to remain in the mansion house, and all other rights or claims whatsoever, in or to the estate of the other, whether real or personal, and whether now owned or hereafter to be acquired.

"And each party hereto, for the consideration aforesaid, does hereby release and relinquish to the other, and to the heirs, executors, administrators and assigns of the other, all claim or right of dower and inheritance in and to all the real property of the other, whether now owned or hereafter acquired, all rights or claims to a distributive share of the personal estate of the other, now owned or hereafter acquired, and all claims or rights to an allowance for year's support or to reside in the mansion house, and all other rights or claims whatsoever, and particularly such as grow out of the marriage relations. * * *

"Each party hereto further agrees, upon request of the other, to execute and acknowledge any and all deeds or other instruments of release or conveyance to enable such other to sell, convey or otherwise dispose of his or her own real property, free from any apparent right or inchoate dower therein; together with all proper and necessary voucher and papers, in the settlement of his or her estate; without any claim or demand for payment therefor.

"It is expressly and hereby specifically agreed by and between the parties, upon the considerations aforesaid that by these presents each is forever barred from all right, claim and title to any of the property of the other, now owned or hereafter acquired."

The petition further averred that at the time of the execution of the agreement the parties thereto had ceased to live together as husband and wife and did not thereafter resume the marital relation; that Elizabeth Sigmund died intestate on the 13th day of November, 1921, without issue surviving her, leaving Anthony Sigmund, the defendant in error here, her surviving husband; that the terms of the agreement were fully complied with up to the death of Elizabeth Sigmund, that the terms were fair, reasonable, and equitable, and that the defendant in error here is equitably estopped from denying the validity of the contract; that plaintiff in error is a niece of Elizabeth Sigmund, deceased, and the sole and nearest blood relative of deceased, and except for defendant in error plaintiff in error would inherit all of the estate of Elizabeth Sigmund, deceased; and that on the 7th day of December, 1921, she demanded in writing of the defendant in error that he release to her by quitclaim all his apparent rights and interest in the real estate of decedent, which is described as in lot No. 440, in the town of Hillsboro, Ohio, with which demand defendant in error has failed to comply. The prayer of the petition was for specific performance of the contract between Anthony Sigmund and Elizabeth Sigmund, and for equitable relief.

To this petition a demurrer was interposed, upon the ground that the plaintiff below, plaintiff in error here, had not legal capacity to sue, and upon the further ground that the petition did not state facts showing a cause of action, which demurrer was sustained and judgment entered dismissing the petition. Appeal was prosecuted to the

Court of Appeals, where the cause was again heard upon demurrer, and the demurrer was sustained and judgment entered dismissing the petition. Error is prosecuted here.

Hugh L. Nichols, of Cincinnati, and H. L. Wiggins and Wilson & Morrow, all of Hillsboro, for plaintiff in error.

Newby & Smith, of Hillsboro, for defendant in error.

ROBINSON, J. While the contract covers the subject of support, dower, inheritance, distribution, allowance for year's support, a right to remain in the mansion house, and all other rights or claims whatsoever, whether now owned or hereafter to be acquired, that portion of the contract which relates to the right of the husband to inherit the real estate of his deceased wife is the only portion of the contract involved in this cause, and it may be here conceded that the terms of the contract are sufficiently comprehensive to exclude the husband from inheriting the real estate in controversy in this cause if at the time of the execution of the contract he had any right thereto in being which could be the subject-matter of a release.

Counsel for plaintiff in error earnestly contend that section 7999, General Code, specially empowers husband and wife to enter into a contract of this character, and that section 8000, General Code, and the decision of this court in the case of Dubois v. Coen, Ex'r, 100 Ohio St. 17, 125 N. E. 121, in no way limit such right, with all of which this court does not find it necessary in the decision of this case to disagree, for the reason that section 7999, General Code, unrestricted and unqualified by any other statute or interpretation by this court, does not purport to give to husband or wife any greater power to contract with each other than persons other than husband and wife possess.

For the purposes of this case, then, the contract between the defendant in error and Elizabeth Sigmund may be given the force and effect which it would be given were it a contract with reference to inheritance between persons other than husband and wife.

It must be conceded that under section 8574, General Code, the husband of a deceased wife, in the absence of children of such deceased wife, or their legal representatives, is the heir to the nonancestral real estate of the deceased wife to the exclusion of the legal representatives of the brothers and sisters, and that unless the rule declared in the case of Needles, Ex'r, v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85, that "a *naked possibility*, or a *remote possibility*, cannot be released, for the reason that a release must be founded on a *right in being*, either vested or contingent. Consequently, the mere expectancy or chance of succession of an heir apparent to his ancestor's estate, at his decease, is not the subject-matter of release or assignment at common law," which was declared to be the settled law of the state at the date of that decision, and which has been consistently adhered to by this court and inferior courts ever since, is at this late day to be overruled, the judgment of the Court of Appeals must be affirmed, not because of any disability which existed between the contracting parties by reason of the marital relation, but because of the fact that defendant in error had no contingent or vested right, as an heir, to the property of the decedent at the time the contract attempting to release his hope or expectancy of inheritance was entered into, such expectancy or hope being subject to realization only in the event that the decedent in her lifetime would not alienate the property by deed, and require his assent thereto under the terms of the contract, or would not make disposition thereof by will. He, having been made the heir by statute, was in identically the same situation as were the children of Philemon Needles, who, in consideration of the receipt of various sums of money from him, gave a receipt in full of all claims they could have against his estate as heirs, and bound themselves not to set up any further claim thereto, with reference to which this court held:

"Such agreement can impose no binding obligation, inasmuch as the estate of a deceased person must pass, either by devise or descent, and the operation of the laws of the state, in this respect, cannot be defeated by any kind of executory contracts, made to control the distribution of a man's estate after his decease."

In the instant case the decedent died intestate. Her estate, therefore, could not pass by devise and had to pass by descent. The Legislature provided the course of descent. During her lifetime she had the absolute right to bestow the property by will upon the defendant in error, the plaintiff in error, or a stranger. She did not exercise that right. Courts are powerless to exercise it for her.

An extended discussion of the wisdom and logic of the case of Needles v. Needles, supra, is not necessary, nor would it be helpful, for the reason that when a principle has become a rule of property, and has become the settled law of the state, and no reason for its repudiation has, or can be, presented, which did not exist against the declaration of the principle at the time of its pronouncement, courts will not unsettle the law by overruling the case which announced the principle and the many cases which have followed it, especially where they relate to a rule which the legislative branch of the state is empowered by appropriate legislation to change.

A court in pronouncing a judgment overruling a principle so well settled as the principle announced in the case of Needles v.

Needles, supra, would be substituting its notion of what the law ought to be in the place and stead of what it knows the law is and theretofore has been. By such a course, the continuity, certainty, and stability of the law would be destroyed, and human rights would no longer be such by law, but would be such by the will of the particular individuals who by the favor of the public happen at the time to be occupying the positions of judges.

Touching the claim of the plaintiff in error that the defendant in error is estopped by reason of the contract from receiving the property in controversy, which the statute casts upon him as an inheritance, it is sufficient to say that no ground of estoppel is presented by this case which was not presented in the case of Needles v. Needles, supra, and it does not appear to any degree in this case that the contract was entered into by Elizabeth Sigmund for the benefit of the plaintiff in error, or that the plaintiff in error has in any degree altered her situation by reason thereof. On the contrary, the fact that Elizabeth Sigmund did not dispose of the property by last will and testament in favor of the plaintiff in error may, in view of the numerous decisions of this court as logically be argued to indicate a purpose on her part that the defendant in error should inherit as to indicate that she relied upon a provision in the contract of a character which had been void by law during all the years of her life, and which she, therefore, was presumed to know.

The judgment of the Court of Appeals will therefore be affirmed.

Judgment affirmed.

JONES, MATTHIAS, and DAY, JJ., concur.

MARSHALL, C. J., and WANAMAKER, and ALLEN, JJ., dissent.

GILDERSLEEVE v. NEWTON STEEL CO. (No. 17975.)

(Supreme Court of Ohio. Feb. 19, 1924.)

(Syllabus by the Court.)

1. Master and servant ⟸352—"Willful act" as used in compensation law defined.

The term "willful act" employed in section 1465—76, General Code, has been therein "construed to mean an act done knowingly and purposely with the direct object of injuring another." As thus employed, it imports an act of will and design and of conscious intention to inflict injury upon some person. Gross negligence or wantonness can no longer be a willful act under this section, unless conjoined with a purpose or intention to inflict such injury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful—Willfully.]

2. Master and servant ⟸352—Gross negligence without intent to injure no basis for action against employer, complying with Compensation Act, on theory of willful act.

In the absence of proof tending to show such purpose or intention to inflict injury, mere proof of construction of an electric device in such manner as to probably cause injury to another, or proof of gross negligence in construction, will not warrant recovery against an employer who has complied with the Workmen's Compensation Act. In such case the employé's remedy is compensation.

3. Master and servant ⟸356—Contributory negligence and fellow-servant doctrine available in action based on willful act against employer complying with Compensation Act.

Under section 35, art. 2, of the Constitution, and section 1465—76, General Code, in an action brought by an employé under authority of that section, an employer who has complied with the provisions of the act is "entitled to plead the defense of contributory negligence and the defense of the fellow-servant rule." These are common-law defenses, retained by the act in favor of employers complying therewith.

4. Master and servant ⟸356—Common-law defense of fellow-servant rule available to employer, complying with Workmen's Compensation Act, in action based on willful act.

The common-law defense of the fellow-servant rule is available to an employer in a suit brought by an employé under section 1465—76, General Code. Section 6242, General Code, is an abrogation of that rule, applying to separate departments, and is a departure therefrom, and to that extent denies to the employer the defense of the fellow-servant rule given without limitation by section 29 of the Workmen's Compensation Act (section 1465—76, General Code).

5. Master and servant ⟸352—Fellow servant of injured employé not "agent" within Compensation Act giving option to sue for willful act of employer's agent.

Section 1465—76, General Code, gives an injured employé an option to sue an employer therein named for an injury arising from the willful act of an employer's agent. A fellow servant of such injured employé is not an agent of the employer; the act expressly excludes such a relation from its operation. An "agent" of an employer is held to mean an employé, not a fellow servant, but one who is superior to and has authority or control over the injured employé, and his willful act must be committed while acting within his scope of employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Agent.]

Error to Court of Appeals, Trumbull County.

Action by Thomas Gildersleeve against the Newton Steel Company. Judgment for plaintiff was reversed by the Court of Appeals, plaintiff brings error, and defendant files a cross-petition in error. Affirmed.—[By Editorial Staff.]

This was an action for damages brought by Gilversleeve, as plaintiff, against the Newton Steel Company. In his amended petition Gildersleeve alleged that on the day he was injured, May 16, 1921, he was employed by the steel company in the capacity of foreman in one of its mills; that among his duties was that of supplying certain employés with tongs for the purpose of handling steel that was being run through the rolls of the mill; that the steel company kept a supply of such tools in a closet in its plant, the door of which was equipped with a lock, one of the keys whereof was in his possession; and that, while proceeding in the course of his employment to unlock the door, for the purpose of taking from the closet a pair of tongs, he received an electric shock from the electrically charged door, which injured him. He further alleged that the steel company "through its officers, agents, and employés, wrongfully, carelessly, negligently, wantonly, maliciously, and willfully caused the lock on said closet door to be wired so as to convey thereto an electric current in the amount of about 220 volts," that it also negligently, wantonly, maliciously, and willfully caused a steel plate to be placed in front of the door in such way as to cause any person standing thereon, while attempting to unlock the door, to receive a shock of electricity therefrom, all of which he alleges was unknown to him; and that the injuries complained of were entirely without any fault or negligence on his part. He further specifically alleged that the willful, wanton, and careless acts complained of were "done by the said company, its officers and agents, knowingly and purposely with the direct object of injuring the plaintiff."

The defendant answered by pleading four defenses, the first of which was a general denial. The second defense pleaded that the steel company had fully complied with section 1459—69 et seq., General Code, and had elected to pay compensation direct to its injured employés. This defense further alleged that the plaintiff did on May 27, 1921, file his application for compensation, etc., with the defendant company, which application the company filed with the Industrial Commission, and that the company from the 16th day of May 1921, until the 15th day of June, 1921, paid the plaintiff, for his compensation for injuries, his full and regular salary, and paid all bills presented to it for medical and hospital services. The third defense pleaded contributory negligence on the part of plaintiff. The fourth defense pleaded that the injuries were caused by the act of a fellow workman, to wit, "one A. C. Morrison, electrician, in no wise plaintiff's superior, who without the knowledge or consent of this defendant company, its officers or agents, charged the lock upon said door with electricity."

The reply admitted that the steel company had complied with the provisions of the Workmen's Compensation Act, aforesaid, but denied that plaintiff had filed his application for compensation as alleged in the answer, and averred that, if it should appear that he had executed an instrument purporting to be an application for compensation, the same was procured fraudulently, and by false and fraudulent representations of defendant's agent acting on its behalf, that he had no means of knowing the contents of the instrument, and that he was misled and tricked into signing the same. Plaintiff pleaded that at the time he was suffering great mental distress on account of his injuries, and was wholly unable to understand or appreciate the nature of the paper presented to him for signature, and that he relied on the representations made by the defendant's agent as to its nature. The reply denied that he was guilty of contributory negligence, and also denied that Morrison, the electrician, was a fellow servant of the plaintiff, but averred the fact to be that Morrison was his superior, and that he acted under the full authority and orders of the officers and agents of the company when he charged said lock with electricity.

Upon these issues the case went to the jury. On the trial the evidence offered was confined chiefly to the character and extent of the injuries and to the issue of fraud and misrepresentation in inducing the plaintiff to sign the application for compensation under the act. At the close of the plaintiff's evidence the defendant moved the court to arrest the case from the jury and direct a verdict in its behalf. The court overruled this motion. At the close of the entire evidence a similar motion was made, which likewise was overruled.

Before argument the defendant requested, and the court gave, a charge to the effect that, inasmuch as the defendant had complied with the Workmen's Compensation Act, plaintiff could not recover unless the jury should find from a preponderance of the evidence that the injuries "were directly and proximately caused by a willful act of this defendant, its officers or agents, and by willful act I mean an act done knowingly and purposely, with the direct object of injuring another." This rule was carried by the court into his general charge. The trial court charged upon all the issues made in the pleadings, with the exception of those relating to the issues made by the defenses of contributory negligence and fellow servant. In respect to those two the court said to the jury:

"Now with the other defenses set up in the answer [contributory negligence and fellow servant] you will have no concern, as I understand the third defense is withdrawn from your consideration and the court has disposed of the fourth defense."

No other allusion was made to these two defenses in the charge of the court. Under this phase of the case the jury returned a verdict for the plaintiff, and judgment was rendered for the amount thereof by the trial court.

The steel company prosecuted error to the Court of Appeals, which reversed the judgment of the trial court, for the following reason:

"That the court of common pleas erred in overruling the motion of the Newton Steel Company, defendant below, to direct a verdict in its favor on the ground that there was no evidence offered on the part of Thomas Gildersleeve, plaintiff below, to show a willful act on the part of the Newton Steel Company, its officers or agents."

Having reversed the judgment for the reasons stated, the Court of Appeals remanded the cause to the trial court for further proceedings according to law, whereupon plaintiff in error instituted his proceedings in this court to reverse the judgment of the Court of Appeals. Thereupon the steel company filed in this court its cross-petition in error, praying for final judgment in its favor.

Warren Thomas and C. H. Woodworth, both of Warren, for plaintiff in error.

Kennedy, Manchester, Conroy & Ford, of Youngstown, and Fillius & Fillius, of Warren, for defendant in error.

JONES, J. It is conceded by the pleadings that the steel company had fully complied with the provisions of the Workmen's Compensation Act. Such being true, the plaintiff below, under section 1465—76, General Code, cannot sue his employer unless it had failed to comply with a lawful requirement or the injury had arisen from the willful act of such employer or of its officers or agents. It would be a work of supererogation in this case to define the terms "willful act" or "willful negligence," as applied ordinarily in cases of negligence. Suffice it to say that this court has fully determined the quality of a willful act in such cases as this in Payne, Director General, v. Vance, 103 Ohio St. 59, 133 N. E. 85.

[1] The last clause of section 1465—76 provides as follows:

"The term 'willful act,' as employed in this section, shall be construed to mean an act done knowingly and purposely, with the direct object of injuring another."

This definition of a "willful act" was carried into the Code by the amended act of February, 1914 (104 O. L. 194), and, as stated in Patten v. Aluminum Castings Co., 105 Ohio St. 1, 11, 136 N. E. 426, no doubt this definition was embodied in the act because of the number of suits that were being brought in the courts, based upon allegations of willful conduct or upon gross negligence amounting to willful conduct. Under the definition of the term "willful act," as now employed in that section, plaintiff is required to plead and prove that the act was "done knowingly and purposely with the direct object of injuring another." The language employed is plain and unambiguous. Two requirements are necessary in order to sustain recovery: First, that the act be done knowingly and purposely; and, second, that it be done with the direct object of injuring another. In Holt v. State, 107 Ohio St. 307, 140 N. E. 349, this court decided that the words "purposely" and "willfully" carried the meaning of designedly and knowingly. Some lexicographers extend the definition to extent that the act must be done intentionally and with predetermination. As now employed in the quoted section the term "willful act" imports an act of will, of design, of conscious intention to inflict injury upon another, although that other may not be the person actually injured. Gross negligence merely, or wantonness amounting to gross negligence, can no longer be termed a willful act under this provision of the Code, unless such negligence or wantonness is conjoined with a purpose and intention to inflict injury upon another.

[2] The Court of Appeals reversed the judgment of the trial court because there was no evidence offered on the part of the plaintiff below to show such willful act. In this conclusion we agree. The only evidence offered by the plaintiff on the trial was that the master mechanic had ordered the chief electrician to wire the door of a certain closet in which the company's tools were kept. Evidence was also offered tending to show that this door was covered with sheet iron. Two or three feet to the right of the door there had been placed a switch by the electrician, from which about 200 volts of electric current were conveyed by wires connecting with the sheet iron nailed on the door. This closet and switch were in the blacksmith shop; the switch being ordinarily in charge of the blacksmith, who, upon this occasion, had thrown the switch so as to connect the electricity with the sheet iron door at the time plaintiff was injured. There was no testimony upon the part of either party showing why this closet, in which the tools were kept, was wired. No intimation appears from the record that the master mechanic, the chief electrician, or even the blacksmith, had any intention or purpose to injure the plaintiff or any one else. It is remarkable that not a single question was asked of a witness, either for the plaintiff or

the electrical connection had been made. Counsel for plaintiff below urge that, having proved the installation of the electrical device, that it was so constructed as to cause probable injury to another, and that one of the employés had turned the switch, they had established circumstances whereby a reasonable inference could be drawn that the act was a willful act, as defined by the Code, and that in such situation the duty was cast upon the defendant in the trial court to explain the purpose of such electrical device. This insistence overlooks the fact that, if such explanation were given, it would still be incumbent upon the plaintiff to prove that the act was consciously done for the purpose of injuring another. However, the duty of explanation was not cast upon the defendant. It must be conceded that if the plaintiff had not pleaded in his petition that the act was done knowingly and purposely with the direct object of injuring another, the petition would be demurrable. It is an elemental principle of law that whatever is necessary for plaintiff to plead in order to recover, he must also prove. The plaintiff in his petition did allege that what was done by the company, its officers and agents, was done knowingly and purposely, with the direct object of injuring plaintiff. This was a vital allegation which the plaintiff was required to plead and prove in order to constitute the act a willful one under the definition employed by the Legislature in section 1465—76, General Code. Upon that feature of the case there is an entire failure of proof, and the Court of Appeals did not err in reversing the judgment in that respect.

[3] In its general charge the court eliminated the defenses of contributory negligence and fellow servant and withdrew both from the consideration of the jury. He stated at the time that the third defense was withdrawn and that the court had already disposed of the fourth. However, a search of the record fails to disclose that the defense of contributory negligence was withdrawn, or how the court disposed of that relating to the fellow-servant feature. At any rate he made no allusion thereto in his general charge. It is fair to presume that the trial court was of the opinion that the defense of fellow servant was not available to an employer who had complied with the Workmen's Compensation Act because it considered that what is commonly known as the Norris Act (sections 6242 and 6245—1, General Code) deprived the company of these defenses in the instant case. These sections of the Code were in existence prior to the adoption of article 2, § 35, of the Constitution of 1912. Section 35 explicitly empowers the Legislature to pass laws "taking away any or all rights of action or defenses from employés and employers." It limits this right, however, be taken away when the injury arises from failure of the employer to comply with a lawful requirement. Having this constitutional authority, the Legislature, pursuant to its provisions, enacted section 1465—76, General Code, which, after giving the injured party his option to sue for damages if the injury arose from a willful act or from failure to observe a lawful requirement, provided in express terms that in the actions authorized by that section "the defendant shall be entitled to plead the defense of contributory negligence and the defense of the fellow-servant rule." The provisions of the Norris Act are still effective, but they do not apply to employers who have complied with the Workmen's Compensation Act. The legislative purpose is further shown by the enactment of section 1465—73, General Code, which deprives employers failing to comply with its provisions of the defense of contributory negligence, assumption of risk, and of the fellow-servant rule. These defenses were well-known common-law defenses, and it is obvious that under the provisions of the Constitution and of the legislative act the legislative purpose was to protect the employer who had complied with the Workmen's Compensation Act, by giving him the benefit of these two defenses in case of suit, and to penalize the employer who had not complied therewith by depriving him of these defenses. If the provisions of the Norris Act were held to apply to the instant case, then the quoted clause from section 1465—76, General Code, would be of doubtful value, for the full fruits of contributory negligence could not be obtained under the Workmen's Compensation Act. Contributory negligence would not be a complete defense.

We therefore hold that since it is conceded that the steel company had fully complied with the provisions of the Workmen's Compensation Act both of these common-law defenses were available to the employer.

It appears from the record that one Ray Fenton was master mechanic, and that he authorized Alec Morrison, the chief electrician, to wire the closet door. The evidence further tends to show that the injury was directly caused by the failure of the blacksmith to turn off the switch. William Gildersleeve, a witness for the plaintiff, testified that he and his brother Thomas were foremen in the rolling department. He testified further that the chief electrician's department and theirs were under two different supervisions, as follows:

"Q. This man Morrison, who was the chief electrician, had nothing to do with Tom, did he? A. No, sir.

"Q. He could not tell Tom what to do or what not to do? A. Not in his department; no.

"Q. And neither could Fenton, the master mechanic? A. Not in the operating.

"Q. Not in the operating department? A. No.

"Q. So that the master mechanic is one department in and of itself, and the electrician was another department in and of itself, and Tom was in a department in and of himself? A. The rolling department—yes, operating." * * *

"Q. Tom was not under the jurisdiction of either one of them? A. No, sir.

"Q. Was there anybody over in Tom's department? A. The manager.

"Q. The manager of the plant? A. Of the plant."

[4] It therefore appears from this testimony that the plaintiff foreman was not only in a different department from that in which Fenton and Morrison were employed, but that neither of the latter had any authority or control whatever over the plaintiff, and that all were engaged in the service of a common master. Sections 6242 and 6245—1, General Code, introduced in this state a rule of liability not theretofore existing. The latter section established the rule of comparative negligence; the former engrafted the principle making a superior employé in a separate branch or department the fellow servant of employés in any other branch or department. Section 6242, General Code, is a limitation of the fellow-servant rule, whereas the provisions of the Compensation Act give the complying employer the entire benefit of the rule in apt terms. Section 6242 emasculates the rule affecting employés in separate branches or departments, and, to that extent, denies to the employer the defense of the fellow-servant rule given him without limitation by section 1465—76, General Code. Since these sections cannot apply to employers who have complied with the Workmen's Compensation Act, the defendant below was entitled to plead and prove the common-law rule of fellow servant, as announced by this court in many cases, some of which are as follows: C., C. & C. Rd. Co. v. Keary, 3 Ohio St. 201, P., F. W. & C. Ry. Co. v. Lewis, 33 Ohio St. 196, and Kelly Island Lime & Transport Co. v. Pachuta, Adm'x, 69 Ohio St. 462, 69 N. E. 988, 100 Am. St. Rep. 706.

The defendant was also entitled to the fellow-servant defense, even if such superior employé was in a separate department, especially if such superior employé exercised no control or authority over the injured employé in another department. Whanlan v. Mad River & L. E. Rd. Co., 8 Ohio St. 249; P., F. W. & C. Ry. Co. v. Devinney, 17 Ohio St. 197; Railroad Co. v. Margrat, 51 Ohio St. 130, 37 N. E. 11. In the latter case this court held that an engineer on a locomotive on one train was in a separate branch or department from that of a brakeman on another train of the same company, and, in the course of the opinion, at page 141 of 51 Ohio St. (37 N. E. 11 [13]), Bradbury, J., said:

"Neither had been clothed with authority over the other, therefore the relation of superior and subordinate between them had no existence in fact. In the absence of such relation, their common employer would not be liable to either for injuries received through the negligence of the other, unless the rules of law upon the subject heretofore announced by this court have been abrogated."

The court held, however, that, although ordinarily no liability would attach because of the existence of the fellow-servant relation under the principles of the common law as announced by this court, the statute (section 3, 87 O. L. 150) had stepped in and abrogated the rule by expressly defining who should be considered fellow servants in the railroad service. Since then section 1465—76, General Code, has been adopted, restoring this defense to employers therein named.

[5] It is insisted, however, that either Fenton, or Morrison, or both, should be considered as "agents" of the company, and therefore liable under the provisions of section 1465—76, General Code, for the reason that that section authorizes suit in case such injury has arisen from the willful act of such employer or "any of such employer's officers or agents." No claim is made that the act was committed by any officer of the defendant, but it is argued that a right of action has been given the plaintiff because the injury in question arose from the willful act of an *agent* of the employer. Manifestly this argument falls of its own weight. If the employé who committed the injury is a fellow servant, for the reason that the statute expressly gives the employer that defense. Who then should be considered as the agent of the company, for whose willful act it should be held liable? As employed in this section of the act the term should not be given that restricted meaning usually adopted in defining the relations of principal and agent. Since the statute has excluded all fellow servants from its operation, the natural construction would be that the word "agent" applies, in cases of this character, only to those who are superior to the injured workman and who exercised power or control over him. To that extent the common-law rule of liability attaches under the Workmen's Compensation Act, as it did before. Even so, the act complained of must be within the scope of employment. If the willful act was committed by an employee who was at the time acting within the scope of his employment, and who was superior to and had authority or control over the injured plaintiff, and was done knowingly and purposely, with the direct object of injuring another, and the injury was suffered in the course of employment, liability would attach, and the fellow-servant defense would not apply.

The journal entry of the Court of Appeals

court erred in refusing to direct a verdict in favor of the defendant below at its request, for the reason that there was no evidence offered tending to show a willful act. A minority of this court are of opinion that it became its duty under that holding, and likewise the duty of this court, to render judgment in favor of the defendant in error instead of remanding the case to the court of common pleas for further proceedings. A motion for a directed verdict had been made at the close of the entire evidence offered. In view of the fact that the Court of Appeals did not render final judgment, but remanded the case for further proceedings, the majority are unwilling to render final judgment herein, but are content to affirm the judgment remanding the cause.

Judgment affirmed.

MARSHALL, C. J., and ROBINSON, MATTHIAS and DAY, JJ., concur.

DEAN v. McMULLEN. (No. 17902.)

(Supreme Court of Ohio. Feb. 19, 1924.)

(Syllabus by the Court.)

1. Exemptions ⇐92 — Agreement in lease waiving exemption to facilitate collection of rent held void as against public policy.

A lessee, living with wife and minor children, signed a lease which contained the following provision: "That all goods and chattels, or any property used or kept on said premises, shall be held for the rent or damages under this lease, whether exempt from execution or not, meaning and intending thereby to give the party of the first part a valid and first lien upon any and all goods and chattels, crops and other property belonging to said party of the second part." *Held*, that such agreement to waive exemptions created for the benefit of the family is void as against public policy.

2. Exemptions ⇐70—Claim for rent under lease waiving exemption against such claim held not within statute protecting certain claims against exemption.

Such agreement does not create such a claim as is included in section 11729, General Code.

3. Exemptions ⇐91 — Agreement in lease waiving exemption not signed by wife held not to deprive her of her right to claim exemption.

An agreement made in a lease for the payment of rent charged upon personal property of the lessee, containing a provision waiving the benefit of exemption laws signed by the husband lessee but not joined in nor ratified by his wife, does not deprive the wife of her statutory right to claim exemptions. The exemption claim of the wife is superior to the claim of the lessor for rent.

Error to Court of Appeals, Champaign County.

Petition by Anna McMullen against Wilbur H. Dean, wherein Flossie M. Dean and another filed an answer and cross-petition. Judgment for plaintiff was affirmed by the Court of Appeals, and defendant Wilbur H. Dean brings error. Reversed.—[By Editorial Staff.]

Anna McMullen filed a petition in the court of common pleas of Champaign county against Wilbur H. Dean, praying for personal judgment in the sum of $950, with interest, for rent due upon a lease, and also praying that all chattel property of Wilbur H. Dean, which was listed and appraised in a bankruptcy proceeding theretofore filed in the United States District Court, be sold and applied upon the payment of her claim.

Demurrer was filed to this petition and overruled. The defendant filed an answer containing two causes of defense. The first defense was in the nature of a general denial. The second defense alleged that in signing the lease defendant never intended, nor agreed, to waive his exemption rights, and set up that Anna McMullen had filed her claim in the bankruptcy case above mentioned and that therefore the court of common pleas had no jurisdiction to render a personal judgment against the defendant.

Flossie M. Dean, wife of Wilbur H. Dean, after having first obtained leave, also filed an answer and cross-petition, in which she alleged that she was not a party to the lease between Anna McMullen and Wilbur H. Dean and had never waived her right to claim exemption, nor authorized her husband to waive such right for her, and claimed as exempt certain property of the value of $432.75, in lieu of homestead, under section 11738, General Code.

D. M. Dean also filed an answer and cross-petition in the case, setting up a claim under chattel mortgage to certain property described in the petition. Judgment was rendered in favor of D. M. Dean upon this cross-petition, which has no bearing in this immediate case.

The facts of the case are as follows:

On December 30, 1919, Wilbur H. Dean entered into a written contract with Anna McMullen under which Anna McMullen leased her farm to Dean for a term of three years, beginning March 1, 1920, at the agreed annual rent of $950. The lease contained a provision that—

"All goods and chattels, or any other property used or kept on said premises, shall be held for the rent or damages under this lease, whether exempt from execution or not, meaning and intending hereby to give the party of the first part a valid and first lien upon any and all goods and chattels, crops and other property belonging to said party of the second part."

The case was heard in the court of common pleas, and in the Court of Appeals on appeal, upon an agreed statement of facts, which, among other facts, set forth the following: That the lease in question was prepared in the state of Colorado, where Anna McMullen resided at the time, and sent to Wilbur H. Dean by mail; that Dean signed the lease and returned it to Anna McMullen; that the rent, to wit, $950 for the year 1921, has not been paid to Anna McMullen by Dean, and that Dean still owes such rent; that Dean filed a petition in bankruptcy in the district court of the United States for the Southern District of Ohio on the 18th day of November, 1921, wherein he claimed all exemptions under the laws of the state of Ohio; that he was adjudicated a bankrupt; that Thomas B. Owen was appointed trustee for the benefit of the creditors of such bankrupt; that on the 10th day of December, 1921, the trustee set over to Dean, as exempt from execution, the property enumerated in the petition; that Anna McMullen on the 13th day of December, 1921, made proof of her claim and filed the same in the bankruptcy proceedings with the referee in bankruptcy of Cuyahoga county; that Dean is married, has two children, aged five and two years, respectively, and that he lives with his wife and children on said farm of Anna McMullen; and that Flossie M. Dean, wife of Wilbur H. Dean, had nothing to do with the negotiations for the lease and was not a party to the written contract of lease. The property sought to be subjected to the claim for rent consisted mainly of farm implements, stock, and crops. The court of common pleas rendered personal judgment against Wilbur H. Dean for $950, with interest, and ordered the property sold as prayed for, and the proceeds applied to the payment of the judgment. The Court of Appeals also rendered judgment for plaintiff and ordered the sale of the personal property in question.

Deaton, Bodey & Bodey, of Urbana, for plaintiff in error.

Owen, Ware & Owen, of Urbana, for defendant in error.

ALLEN, J. Three major questions arise in this case. They are as follows:

(1) Can exemptions be waived by executory contract in Ohio?

(2) Is a contract between the lessee and the lessor, charging rent upon the lessee's personal property on the farm, superior to the lessee's claim of exemption in lieu of homestead?

(3) Is a contract between lessee and lessor, charging rent upon the lessee's personal property on the farm, superior to an exemption claim asserted by the wife of the debtor, who did not join in the lease?

Subdivision 9 of the lease, under which this case arises, reads as follows:

"That all goods and chattels, or any other property used or kept on said premises, shall be held for the rent or damages under this lease, whether exempt from execution or not, meaning and intending hereby to give the party of the first part a valid and first lien upon any and all goods and chattels, crops and other property belonging to the said party of the second part."

Plaintiff in error urges that the claim of exemption made by Dean in the bankruptcy case is superior to the claim of Anna McMullen for rent, because subdivision 9 of the lease amounts to a waiver of the tenant's right to claim exemption and under the law this waiver is void.

[1] In support of his argument he points to various *nisi prius* cases which hold that an agreement to waive the benefit of exemption laws is contrary to public policy. These Ohio decisions do embody the general rule upon the subject. As is said in 11 Ruling Case Law, 543, § 60:

"The better reasoning and weight of authority support the proposition that a contract made at the time of incurring an indebtedness waiving the debtor's right to exemptions is contrary to public policy and invalid. The statutes which allow a debtor, being a householder and having a family for which he provides, to retain, as against the legal remedies of his creditors, certain articles of prime necessity, to a limited amount, are based upon views of policy and humanity which would be frustrated if an agreement waiving his right could be sustained. If effect should be given to such agreements, it is likely that they would be generally inserted in obligations for small demands, and in that way the policy of the law would be completely overthrown. Because of a disposition on the part of some to take undue advantage of another's extremity and because also of the readiness of men, under pressure, to make contracts which may deprive them and their families of articles indispensable to their comfort, the Legislature has most wisely interposed. Some courts, however, have taken a contrary view and sustained such agreements; but there is later authority regretting the adoption of that view. * * * Carter v. Carter, 20 Fla. 558, 51 Am. Rep. 618; Green v. Watson, 75 Ga. 471, 45 Am. Rep. 479; Recht v. Kelly, 82 Ill. 147, 25 Am. Rep. 301; Doherty v. Ramsey, 1 Ind. App. 530, 27 N. E. 879, 50 Am. St. Rep. 223; Curtis v. O'Brien, 20 Iowa, 376, 89 Am. Dec. 543 and note. See, also, Burke v. Finley, 50 Kan. 424, 31 Pac. 1095, 34 Am. St. Rep. 132 and note; Moxley v. Ragan, 10 Bush (Ky.) 156, 19 Am. Rep. 61; Kneettle v. Newcomb, 22 N. Y. 249, 78 Am. Dec. 186 and note; Mills v. Bennett, 94 Tenn. 651, 30 S. W. 748, 45 Am. St. Rep. 763. Notes: 13 L. R. A. 719; 72 Am. Dec. 742 et seq."

It is to be admitted at the outset that as between Dean himself and Anna McMullen all the equities are in favor of the lessor. Dean made a contract placing a charge upon his personal property, and in this contract he waived his right of exemption. If the exemption right were personal to the debtor, this court might hesitate to hold that the

claim of Dean for exemptions is superior to his own solemn contract deliberately made. However, it is the policy of the law to establish homestead exemptions and exemptions in lieu of homestead, not only for the benefit of the debtor, but for the benefit of his entire family—for the wife and the children. The record shows that Dean and his wife had two minor children. The exemption is made for their benefit, as well as for that of Dean, and because of this fact the equities between the immediate parties are not conclusive.

The case of Frost, Jr., v. Shaw, 3 Ohio St. 270, is sometimes quoted as opposing the doctrine that an executory contract of waiver of exemptions is void. That, however, was a case not of mere written contract, but of chattel mortgage, and therefore has no controlling influence here.

The court holds, therefore, upon the first question, that an executory contract of this nature, to waive the benefit of homestead exemption laws, is void as against public policy, which demands that the family of the debtor shall be protected whatever are the equities between the parties, and holds that the contract of waiver contained in this lease is void and of no effect.

Since Dean, then, in spite of having waived his exemptions, can still claim them, we come now to the question whether the agreement which specifically charges Dean's personal property on the farm with payment of the rent takes precedence of his exemption claim.

[2] In deciding this question we must consider section 11729, General Code, which reads:

"The following sections of this subdivision of this chapter shall not extend to a judgment rendered on a mortgage executed by a debtor and his wife, nor to a claim for manual work or labor, less than one hundred dollars, nor to impair the lien by mortgage or otherwise, of the vendor for the purchase money of the premises in question, nor the lien of a mechanic, or other person, under a statute of this state, for materials furnished or labor performed in the erection of the dwelling house thereon, nor for the payment of taxes due thereon."

This is a specific enactment of the Legislature protecting certain kinds of claims against exemptions. A mechanic's lien, the vendor's lien, the claim of manual labor under $100, the mortgage lien, and the lien of taxes, are made by this statute superior to the exemption claim.

It will hardly be contended that a claim arising under subdivision 9 of the lease, here considered, falls within any class of claims mentioned in section 11729 except that of mortgage.

But the agreement does not constitute a chattel mortgage. If it did, Frost, Jr., v. Shaw, 3 Ohio St. 270, would apply. It contains no conveyance to the mortgagee to secure the performance or nonperformance of an act defeasible upon the performance of the conditions of the lease; it is not executed, nor recorded, as required to constitute a valid chattel mortgage. At the very most, subdivision 9 of the lease constitutes an instrument in the nature of mortgage rather than mortgage itself.

The Legislature specifically enacted legislation excepting certain claims from the operation of the exemption laws, and made those claims superior to the exemption claim. Can we say that the Legislature intended this claim for rent, in addition to the others specified, to be superior to the right of exemption? If we so hold, an agreement not recognized by the Legislature in section 11729, General Code, has rights equal to claims specifically placed by the Legislature in the class of claims superior to the right of exemption, and also has rights superior to liens not so listed in section 11729, General Code, such as the warehouseman's lien or the innkeeper's lien.

The Legislature particularized various different exemptions, and it also particularized the claims which should be superior to all exemption claims. It did not include in section 11729 the kind of claim embraced in this lease. No court should enter the legislative field and legislate to add a new species of claim to those under section 11729 made superior to exemption, and this court will not take that step.

We hold, therefore, that the agreement here created, as it does not fall within section 11729, is not superior to Dean's exemption claim.

[3] Moreover, Flossie Dean, the wife of the debtor, files her own claim for exemption in this action and this concludes the matter. She makes this claim in her own right and not for Dean. Presumably also she makes it for the family, for the record admits that Dean and his wife have two minor children. If she may rightfully claim exemptions, and if her husband may not waive that right for her, since she in no wise joined in, ratified, nor acquiesced in the contract of lease, her claim is superior to that of the lessor for rent.

The history of the exemption statute throws some light upon the nature of the right possessed by Dean and his wife in holding this chattel property exempt from sale, and we shall consider that history briefly at this point.

The original statute providing for homestead exemption (48 O. L. 29), entitled "An act to exempt the homestead of families from forced sale on execution, to pay debts," was enacted by the Legislature of Ohio on March 23, 1850. Its first six sections related to the general provisions as to homestead exemption; the seventh was the original enactment of present section 11729, General Code, and read as follows:

"The provisions of this act shall not extend to any judgment or decree rendered on any contract made before the taking effect of this act, or judgment or decree rendered on any note or mortgage, executed by the debtor and his wife, nor any claim for work and labor less than one hundred dollars, nor to impair the lien, by mortgage or otherwise, of the vendor for the purchase money of the homestead in question, nor of any mechanic or other person, under any statute of this state, for materials furnished or labor performed in the erection of the dwelling house thereon, nor from the payment of taxes due thereon."

Section 8 was the section out of which section 11738, General Code, the section under which Dean is claiming in this case, has grown. It read:

"That it shall be lawful for *any resident of Ohio being the head of a family, and not the owner of a homestead*, to hold exempt from execution or sale, as aforesaid, mechanical tools, or a team and farming utensils, not exceeding three hundred dollars in value, in addition to the amount of chattel property now by law exempted."

The law was amended March 27, 1858, appearing in 55 Ohio Laws, at page 22, to permit any resident of Ohio who was the head of a family, and not the owner of a homestead, to hold exempt from execution not merely tools used by him in his trade, or a team and farming utensils, but any personal property not exceeding $300 in value. Other changes were later made, increasing the exemption to $500 and extending it to real property, but those amendments are not pertinent to this discussion and it is unnecessary to recite them in detail.

In 1884, as appears upon page 148 of volume 81 of the Laws of Ohio, an amendment was further enacted giving the right of exemption in lieu of homestead to "husband and wife living together." As contained in the law of April 12, 1884, the section reads as follows:

"Sec. 5441. 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 or personal property to be selected by such person, his agent or attorney, at any time before sale not exceeding five hundred dollars ($500) in value, in addition to the amount of chattel property otherwise by law exempted."

So far as pertinent to this discussion the law of Ohio to-day is the same as it was in 1884 with regard to allowance in lieu of homestead.

Why did the Legislature change the words "any resident of Ohio being the head of a family" to "husband and wife living together"? Why did it not, if it desired to give this right to the husband alone, use the following phrase: "Every husband who is living with his wife and who is not the owner of a homestead"? These words it did not use, nor any such equivalent. It said, "husband and wife living together" shall have the right to hold chattel property exempt from execution.

This wording gives the wife a clear right to claim exemptions, a right of which she is not deprived by the waiver of the husband. The husband is not an agent of the wife unless so constituted by express or by implied authority.

"The husband has no original or inherent power to act as his wife's agent; his authority arises only from her appointment. * * * In order to bind the wife by the acts of her husband it is essential that she shall have previously authorized him to act as her agent or subsequently, with knowledge of the act, ratified or adopted it." 30 Corpus Juris 620.

"Whether the husband was the agent of his wife is a question of fact to be found as any other fact. It is a fact to be proved by evidence, and not to be presumed. * * * There is no presumption of law that the husband has authority to act on behalf of the wife." 30 Corpus Juris 621.

As the record shows that Dean's wife joined neither in the lease nor in the waiver of exemption attempted to be created in the lease, and gives no proof of any acquiescence by her therein, Mrs. Dean's rights under the letter and spirit of the law remain unaltered by Dean's contract.

It is in fact the rule that the waiver of the husband does not affect exemptions in which his wife or his family have an interest. 25 Corpus Juris, 119, and cases cited.

A leading case upon this question is the case of King v. Moore, 10 Mich. 538. In this case Elizabeth King, the wife of Amos S. King, brought an action of trespass against Moore for the taking of certain corn and potatoes, and corn fodder, on an execution against King; the said articles being claimed as exempt from execution. The cause being removed by appeal to the circuit court, it was admitted by the parties on the trial that King was the owner of four acres of land in the county, upon which he resided with his family, and that all his personal property did not exceed $200 in value; that in May, 1858, he planted about two acres of his land to corn and potatoes; that on the 3d day of June, 1858, Moore, as constable, levied upon these crops, which had just vegetated and were visible above ground, and made an indorsement of the levy upon the execution reciting that they were turned out to him by said Amos; that after this levy the execution was allowed to rest until the corn and potatoes were fit for harvest, when Moore sold them upon the execution; and that when the sale was made King had no horse, cow, or other animal, except one pig. The cause being tried without a jury, the court

found that the corn and potatoes were planted by King for the use of his family; that there was not enough for the use of the family for six months, and to feed two cows and fatten two swine; and that the family alone would require all the potatoes and 26 bushels of corn for food in six months, the value of which was found to be $19.88. The circuit court held the whole to be exempt, and rendered judgment against Moore for $34.80 and costs. The court held that the action of the wife for exempt property taken on execution cannot be defeated by showing that the property was turned out by the husband for the levy.

The court at page 539 says:

"First. Can the action of the wife, under section 3294 of Compiled Laws, for property taken on execution against the husband, and which was exempt, be defeated by showing that the property was turned out by the husband to be levied upon?

"In answer to this question, we think it clear her action cannot thus be defeated. The exemption is intended quite as much for the benefit of the wife and family, as that of the husband."

See, also, Beecher v. Baldy, 7 Mich. 488.

The case of Kennedy v. Juhan, 102 Ga. 148, 29 S. E. 188, is likewise in point. This was a case in which a distress warrant in favor of Mrs. Juhan was sued out against Kennedy, and levied upon certain household furniture. Kennedy as trustee for his wife and minor child interposed a claim, alleging that the articles levied on were the property of the wife and child as beneficiaries "under and by virtue of a certain homestead exemption granted them" by the ordinary of Bibb county. When the case came on to be tried, the claimant, without the knowledge or consent of the beneficiaries, withdrew the claim, and judgment was rendered for costs against him. A levy was made upon personal property in the possession of Kennedy, and thereupon an equitable petition was brought by Mrs. Kennedy, for herself and as next friend of her minor child, praying that the judgment dismissing the claim case be set aside and the claim be reinstated and tried upon its merits.

The court, upon page 150 of 102 Ga. (29 S. E. 189) says:

"The withdrawal of the claim did not and could not constitute a waiver of the homestead right, the head of the family having no authority, either by express stipulation or by implication, to waive the homestead right after the property has been set apart as exempt. The withdrawal of the claim did not, therefore, render the property subject to the execution."

The court held, upon page 151 of 102 Ga. (29 S. E. 189):

"Mrs. Kennedy and her child, not being parties to the suit, are not bound in any way, either as beneficiaries of the exemption, or otherwise; and they are not precluded from appealing to the courts to protect their rights in the exempted property from invasion by the plaintiff. Their rights in the exempted property are not by such judgment in any way impaired or affected.

"3. There was no error in enjoining the execution from proceeding against the property claimed as exempt, and in denying the other prayers."

See, also, Augustine v. Gold, 188 Iowa, 551, 174 N. W. 581, which holds that as the incumbrance of exempt property by the head of a family is under the statute void, where his wife does not join therein, he does not waive the exemption by giving a mortgage thereon, in which the wife does not join.

The court, upon page 557 of 188 Iowa (174 N. W. 583), says:

"The exemption is made for the benefit of the family. It rests in sound public policy. It is made to protect the family against the improvident conduct of the husband."

It is contended that it would be inequitable not to hold this lien superior to the exemption claim, upon the ground that Mrs. McMullen rented her farm upon the faith of this very contract in the lease. From the standpoint of the parties alone it is often inequitable to allow an exemption claim. An exemption claim may often prevent creditors from collecting honest debts. But because of the needs of the family of the debtor, not because of his own needs, because of the interest of the state in the family, not in the debtor himself, the exemption laws have been enacted.

If we hold that this agreement is superior to the exemption claim of the family, we run counter to the expressed intention of the Legislature, and we defeat the very purpose of the exemption law, which is that irrespective of the just claims of creditors a family shall retain a certain minimum that cannot be sold for debt in a judicial proceeding. The judgment of the Court of Appeals is reversed.

Judgment reversed.

MARSHALL, C. J., and WANAMAKER, ROBINSON, JONES, MATTHIAS, and DAY, JJ., concur.

(Supreme Court of Ohio. Feb. 19, 1924.)

(Syllabus by the Court.)

1. Appeal and error ⟹901, 907(2)—Proceedings below deemed correct unless error affirmatively appears; evidence to authorize judgment presumed received.

The proceedings of a lower court are deemed correct unless error affirmatively appears on the face of the record. Evidence to authorize the judgment will be presumed to have been received unless the record necessarily negatives it.

2. Appeal and error ⟹339(5)—Proceedings to reverse order of vacation of judgment at prior term must be commenced within 70 days; "final order."

An order of vacation of a judgment rendered at a prior term, by virtue of section 11631, General Code, is a "final order," and a proceeding to reverse such final order must be commenced within 70 days after the entry of the final order complained of.

[Ed. Note.—For other definitions, see Words and Phrases, 1st and 2d Series, Final Order.]

3. Appeal and error ⟹1042(2)—Refusal to strike irrelevant matter from petition not ground for reversal in absence of prejudice.

The overruling of a motion to strike out of a petition alleged irrelevant matter will not be ground of reversal unless prejudicial error appears to have resulted therefrom.

4. Appeal and error ⟹1064(1)—When giving of special instructions before argument not prejudicial error stated.

Where a record discloses instructions before argument, given at plaintiff's request, which are a correct statement of the law from plaintiff's standpoint, but do not cover every branch and feature of the case, including effect of affirmative defenses, but such affirmative defenses are fully covered in the general charge, the giving of such special instructions before argument is not prejudicially erroneous.

Error to Court of Appeals, Cuyahoga County.

Action by M. H. Gelfand, administrator of the estate of Julia Stephen, deceased, against Theodore Makranczy and another. Judgment for plaintiff against defendant named was affirmed by the Court of Appeals, and defendant brings error. Affirmed.—[By Editorial Staff.]

The record in this case discloses that on December 5, 1918, Julia Stephen, a child between 5 and 7 years of age, was killed on West Twenty-Fifth street, near Franklin avenue, in the city of Cleveland, as a result of coming in contact with an automobile owned by Theodore and Charles Makranczy, and operated by one Bela Bloch.

At the time of the accident Bloch was driving a friend "over to town," as the street cars did not appear to be running at the provided Bloch would take Makranczy to see his brother, who was ill. While Makranczy was in his car on his way to his brother's house the accident to Julia Stephen occurred, and as a result of the same she died shortly thereafter.

The defendant in error was duly appointed administrator of the estate of Julia Stephen, deceased, and on May 6, 1919, filed the petition in this case. Summons was duly issued, and the defendants filed a motion to strike from the petition certain allegations as to the nature and extent of the injuries sustained by Julia Stephen. This motion was overruled, and exception noted. The defendants then filed an answer, in which they denied the agency of Bloch, denied negligence, and alleged negligence on the part of decedent.

To this answer a reply was filed, and the cause came on for hearing. Under date of December 4, 1919, the journal of the common pleas court of Cuyahoga county shows the following entry:

"To Court: This case is dismissed without prejudice at the plaintiff's costs, for which judgment is rendered against him."

On October 28, 1921, a motion to set aside and vacate the judgment of dismissal and to reinstate the case was filed on the ground:

"That there was irregularity in obtaining said judgment or order of dismissal in this, to wit, plaintiff represents and says that he was only the nominal party plaintiff, that the real parties plaintiff are Mrs. Theresa Stephen and Louis Stephen, * * * and says that at the time this action was dismissed without prejudice neither *he* nor the said Theresa Stephen and Louis Stephen had any knowledge of the fact that said case was set for trial, and said Theresa Stephen and Louis Stephen had no knowledge that the same was dismissed without prejudice to a new action."

Affidavits of Louis Stephen and Theresa Stephen in support thereof were filed, setting forth a want of knowledge of the dismissal of the case without prejudice, and of their having only learned of the same on or about the 25th of September, 1921. This motion was overruled by the court on November 15, 1921.

On December 6, 1921, a motion by plaintiff for rehearing, with notice, was filed, which motion, among other things recited:

"That since the action of the court in overruling the motion filed by plaintiff to reinstate this case he has learned *additional facts* to which he desires to call the court's attention, and he moves the court for a rehearing of the motion to reinstate this case, and upon such rehearing he moves the court for an order to reinstate this action and to set aside and vacate the judgment or order heretofore rendered and entered upon the docket of said court."

try appears upon the journal of the court of common pleas:

"To Court: The motion by the plaintiff for rehearing of plaintiff's motion to vacate dismissal and to reinstate the case is granted, and this case is reinstated on the docket. The defendant excepts."

In February, 1922, the case went to trial, and resulted in a verdict in favor of Charles Makranczy by direction of the court, and against Theodore Makranczy, by verdict of the jury, in the sum of $2,000. A motion for new trial was overruled, and judgment rendered on the verdict. Error was prosecuted to the Court of Appeals, which resulted in an affirmance of the judgment of the court below. Error is now prosecuted to this court to reverse the judgment of the Court of Appeals.

Quigley & Byrnes, of Cleveland, for plaintiff in error.

Vickery & Vickery, of Cleveland, for defendant in error.

DAY, J. The errors relied upon to reverse the judgment of the courts below in this case may be grouped under the following heads:

(1) That the common pleas court erred in vacating the judgment of dismissal and in reinstating the case on December 7, 1921, after the same had been dismissed without prejudice on December 4, 1919.

(2) That the court of common pleas erred in overruling the motion of the defendant to strike from the petition of the plaintiff, among other things, the allegation that the decedent "said Julia Stephen sustained a broken rib, a puncture of the right lung, two severe lacerations on the right side of her head."

(3) That the court of common pleas erred in admitting evidence tending to prove the allegations of the petition describing the injuries sustained by decedent.

(4) That the court of common pleas erred in giving in writing, at the request of the plaintiff, certain charges of law before argument.

Of these in their order:

Should the judgment of the court of common pleas have been reversed for vacating the judgment of dismissal and in reinstating the case, as appears by the entry of December 7, 1921?

[1] It is well established that, in order to justify a reversal by a reviewing court of a judgment rendered by a court of inferior jurisdiction, error must affirmatively appear to the prejudice of the party complaining. In order to ascertain whether prejudicial error exists, we are bound by the disclosures of the record.

We find that on December 4, 1919, the case was dismissed without prejudice at the plaintiff's cost; that on October 28, 1921, a motion to set aside and vacate the judgment of dismissal of December 4, 1919, and to reinstate for claimed irregularities in obtaining such judgment or order of dismissal, was filed by the plaintiff, based upon the lack of any knowledge by the administrator or the father or mother of the decedent that the case was set for trial; that the affidavit of the father and mother to that effect were filed in support thereof; that this motion was overruled on November 15, whereupon, on December 6, 1921, a motion for a rehearing was filed, wherein movant claimed he had learned *additional facts* to which he desired to call the court's attention and moved for a rehearing of the motion to reinstate the case, upon which rehearing he moved the court for an order to reinstate the case and set aside and vacate the judgment of dismissal theretofore rendered; and that on the day following the court made this entry on its journal:

"The motion by the plaintiff for rehearing of plaintiff's motion to vacate dismissal and to reinstate the case is granted, and this case is reinstated on the docket. The defendant excepts."

The record is entirely silent as to what evidence the court acted upon, or what showing was made to the court upon this rehearing. It was doubtless something entirely different from the matters disclosed in the affidavit of the father and mother theretofore filed when the court first heard the motion to reinstate, and denied the same. We are advised by the motion for the rehearing that it was for the purpose of giving the court "additional facts," and all we know is that after having heard this motion for a rehearing the court granted the prayer of the same and reinstated the case.

Now, the presumption of the law is that the action of the court is legal until the contrary affirmatively appears, and the burden is upon one who claims the existence of error to affirmatively so show.

We are quite in accord with the view that the affidavit of the father and mother would not have been sufficient; but without assuming that the court did not have before it good and sufficient legal grounds for its action we are powerless to disturb the judgment for error in this regard, the presumption of the law being that the court acted regularly and in accord with good and sufficient legal grounds. Without going outside the record we can find no grounds to reach a contrary conclusion, and, since the court had jurisdiction to set aside and vacate the judgment rendered at a former term, and to reinstate the case, and there is nothing in the record to show that the jurisdiction was improperly exercised, and error does not affirmatively appear in that regard, we are con-

It is urged in the brief of counsel for plaintiff in error that the action was voluntarily dismissed by the plaintiff. The Code provides that actions may be dismissed without prejudice at the request of the party, or by the court when the plaintiff fails to appear on the trial. Section 11586, General Code.

Now, it appears by the motion of the plaintiff below, filed October 28, 1921, "that at the time this action was dismissed without prejudice neither *he* nor the said Theresa Stephen and Louis Stephen had any knowledge of the fact that said case was set for trial." But, again, the record is silent as to whether the court dismissed the action without prejudice, upon its own motion, or whether it was done at the request of the plaintiff, and the same principle must apply, that until error affirmatively appears we must assume that the court acted in accordance with proper legal principles.

For the reason that error does not affirmatively appear in the record in the action of the court of common pleas in granting the motion for a rehearing and reinstating the case, and that to so hold we would have to go outside the record in the case, our conclusion is that this first ground of reversal must be denied.

In support of this conclusion reference may be made to many authorities, but the following will suffice: Little Miami R. Co. v. Collett, 6 Ohio St. 182, 183; Ohio Life Ins. & Trust Co. v. Goodin, 10 Ohio St. 557; McHugh v. State, 42 Ohio St. 154; Dallas v. Ferneau, 25 Ohio St. 635.

While we reach the conclusion above indicated, there is another reason why the error complained of by the trial court in reinstating the case under date of December 7, 1921, might not avail the plaintiff in error.

[2] It is well settled in this state that final disposition of a motion for vacation of a judgment, though made at a term subsequent to that wherein the judgment sought to be vacated was rendered, is a final order. Huntington & McIntyre v. Finch, 3 Ohio St. 445; Hettrick v. Wilson, 12 Ohio St. 136, 80 Am. Dec. 337; Braden v. Hoffman, 46 Ohio St. 639, 22 N. E. 930; Van Ingen v. Berger, 82 Ohio St. 255, 92 N. E. 433, 19 Ann. Cas. 799; Chandler & Taylor Co. v. Southern Pac. Co., 104 Ohio St. 188, 194, 135 N. E. 620.

The above cases, while recognizing the control by the court of its journals and docket during term, all concede that vacation of a judgment after term is a final order. This being so, it must follow that, by virtue of section 12270, General Code, no proceeding to reverse, vacate, or modify a judgment or final order shall be commenced unless within 70 days after the entry of the judgment or final order complained of.

As said by Judge Spear in Van Ingen v.

"The order does affect a substantial right in a summary application after judgment, and in that sense is a final order. * * * But for such order the plaintiff would have been entitled in law to the immediate fruits of his judgment. Of this right the order deprived him."

Therefore the plaintiff in error need not have waited for a trial upon the merits of the controversy, and awaited the conclusions of such a hearing, but was entitled to the fruits of his judgment theretofore rendered, if the law vouchsafed the same to him. Not having seen fit to take advantage of his opportunity to have the correctness of the court's ruling tested within the time prescribed by the law, he has slumbered upon his rights, and has lost the same. So that upon this ground, as well as for the reasons heretofore stated, this ground of error must be denied.

It may be suggested that the record fails to show compliance with section 11637, General Code, providing that a judgment shall not be vacated upon motion or petition until it is adjudged that there is a valid cause of action or defense. The record does show that notice of the application was given the defendant, and the exception preserved at the granting of the motion shows that he must have been present at the hearing or its determination.

The record also shows that the court had the affidavits of Louis Stephen, father of the decedent, to the effect:

"That at the time of bringing said action he believed that he had a good cause of action against the defendants for the death of his daughter and that he still believes that he has a good cause of action against said defendants, and he now desires to prosecute the same and has always intended to furnish the necessary evidence to the court and jury for the purpose of the trial of said action."

And the court had also the affidavit of the mother, Theresa Stephen, to the same effect.

What further evidence the court considered upon the point that plaintiff had a good cause of action the record does not disclose, save and except the inference that the conclusion reached was correct, because when trial was had upon the merits a verdict of $2,000 was returned for the plaintiff. We feel, however, that the following rule, announced in Dallas v. Ferneau, supra, 25 Ohio St. at page 637, justifies our determination:

"It does not affirmatively appear on the record that no evidence was produced tending to prove the performance of the labor, or the sale and delivery of the goods, or the value of the several items, neither does the statement of the record necessarily exclude the presumption, that testimony was heard and considered by the

necessary to sustain the judgment of a court having jurisdiction of the person and subject matter, that such evidence was heard and considered."

The second and third grounds relied upon relate to the allegation in the petition that "said Julia Stephen sustained a broken rib, a puncture of the right lung, two severe lacerations on the right side of her head."

[3] Now this was an action for damages for death by wrongful act, and the averment complained of was doubtless not necessary to state a cause of action; yet we are not prepared to say that prejudicial error intervened because this irrelevant matter appeared in the petition and was not stricken out upon motion. As was said in Long v. Newhouse, 57 Ohio St. 348, at page 367, 49 N. E. 79, 80:

"We fail to perceive that there was any error prejudicial to the defendant in the court refusing to sustain the motion to strike out portions of the plaintiff's petition. The petition may contain some irrelevant matters, but they could not have prejudiced the defendant in making a defense to the plaintiff's claim."

Evidence tending to show the nature and extent of the child's injuries might be a proper subject of inquiry before the jury upon the question of the position in which the decedent was when struck by the automobile, as bearing upon both the question of negligence of plaintiff and the negligence of the decedent herself, there being some conflict of testimony as to whether the machine struck her or she herself ran into the side of the machine. At any rate, we do not believe that the jury were influenced by this averment being in the petition, nor did excessive damages result by reason of the testimony in this regard. The testimony might have some probative value, and we do not think the court erred in receiving same. While, as above indicated, the averment in question was not necessary to the stating of a cause of action, the refusal to strike it out does not appear to have been prejudicial error.

[4] This brings us to the fourth and last ground, and that is the charges before argument, which were as follows:

"(1) If you find from the evidence that the driver of the automobile in question was driving the same at a rate of speed greater than that allowed by the laws of Ohio, he was guilty of negligence as a matter of law, and, if such rate of speed caused the injury to the decedent, the plaintiff is entitled to recover in this action.

"(2) The laws of Ohio in force at the time of the accident described in the petition make it unlawful to operate an automobile in a municipality at rate of speed greater than 15 miles an hour, and make it unlawful to operate an automobile in a closely built-up section of such municipality at a rate of speed greater than 8 miles an hour. If you find from the evidence that the rate of speed greater than 8 miles an hour, and you further find that this accident occurred in a closely built-up section of the city, and that such rate of speed caused the injury to the decedent, your verdict must be for the plaintiff."

Both of these instructions are based upon the principle of law announced in Schell v. Du Bois, Adm'r, 94 Ohio St. 93, 113 N. E. 664, L. R. A. 1917A, 710:

"The violation of a statute passed for the protection of the public is negligence *per se*, and where such act of negligence by a defendant is the direct and proximate cause of an injury not directly contributed to by the injured person, the defendant is liable."

Of course it is quite true that neither instruction contained the qualification as to the negligence of the decedent herself, but its omission would not necessarily be erroneous.

In the general charge, the court instructed the jury:

"If the evidence shows that the injury resulted proximately from the negligence and want of care of the deceased, or shows that she was guilty of negligence that caused or contributed to cause the injury complained of, that would bar plaintiff from a recovery and your verdict should be for the defendant."

It is to be noted that in both instructions given before argument the jury were told that if the preponderance of the evidence showed "that such rate of speed caused the injury to the decedent" the plaintiff would be entitled to recover, thus making the true and proximate cause of the injury to the decedent the unlawful speed at which the defendant was operating the car. This makes such unlawful speed not only the cause of the decedent's injury, but eliminates by inference the idea that her injury was caused in some other way; as, for instance, her own negligence, or contributory negligence.

Again, it may be observed that this court has held that paragraph 5, General Code, § 11447, pertaining to instructions before argument, "does not contemplate that such written instruction should cover every branch and feature of a case on trial, including the effect of an affirmative defense of payment, settlement or release." Swing, Trustee, v. Rose, 75 Ohio St. 355, 369, 79 N. E. 757, 760.

The defenses of the negligence or contributory negligence of the decedent are affirmative defenses, and, applying the doctrine of Swing v. Rose, supra, the instructions complained of would not be objectionable, even though they did not cover the issues raised by such affirmative defenses as claimed by defendant, present plaintiff in error.

Thus, when the entire instructions, both before and after argument, are taken in conjunction, we feel that the jury were properly instructed in the premises, and that no

special requests before argument.

As to the question of agency, that is to say, as to whether or not the driver of the machine, Bela Bloch, was the agent of the owner, Theodore Makranczy, plaintiff in error herein and defendant below the same observation as to the instructions given by the court in its general charge is applicable. So much of the instruction as to agency as will indicate what the jury were told in that regard is contained in the following excerpt from the general charge, in which the court did not fail to point out the necessity for plaintiff to show by a preponderance of all the evidence the agency of Bela Bloch, the driver, for the owner and defendant below:

"So the first question to be taken up and considered by the jury is whether or not Bela Bloch was on the business and in the employment of the defendant, Theodore Makranczy, at the time of the accident.

"The burden of establishing that allegation by a preponderance of the evidence is upon the plaintiff. I suggest that you take up that issue first, for the reason, if, after considering all of the evidence on that issue, you find from a preponderance of the evidence that Bela Bloch was on the business and in the employment of the defendant, then you will proceed with the other issues of the case. However, after considering all of the evidence on that issue, if the plaintiff fails to establish that by a preponderance of the evidence, that would end your consideration of the case. In other words, if the plaintiff establishes that by that degree of proof, whatever act Bela Bloch performed in connection with the operation of the automobile at the time and place, if on the business and in the employment of the defendant, would be the act of the defendant himself. However, if the plaintiff fails to establish that by a preponderance of the evidence, then the acts of Bela Bloch in the operation of that car at the time and place would not, as a matter of law, be the acts of the defendant, but the act of Bela Bloch. Theodore Makranczy being the defendant, and Bela Bloch not being a defendant, the defendant could not be held liable as a matter of law."

The record further fails to show any special instructions asked by the plaintiff in error in the respects complained of, and reveals that such requests as were asked by Makranczy were given by the court.

The record further shows, upon inquiry by the court:

"Is there anything further, Mr. Vickery, on the part of the plaintiff?

"Mr. Vickery: No.

"Mr. Byrnes (counsel for plaintiff in error): We have nothing further to suggest.

"The Court: Ladies and gentlemen, you will take the case.

"Mr. Byrnes: General exception to the charge."

We are therefore of opinion that the fourth ground of error complained of is not ment rendered herein.

Upon the entire record, we have reached the conclusion that the Court of Appeals was right in affirming the judgment of the court of common pleas, and its judgment in so doing should be, and is hereby, affirmed.

Judgment affirmed.

WANAMAKER, JONES, MATTHIAS, and ALLEN, JJ., concur.

DONOHUE v. WHITE.

(Supreme Judicial Court of Massachusetts. Worcester. Feb. 25, 1924.)

1. Injunction ⟸189—Plaintiff may have decree and execution for debt apart from main purpose of suit.

In an action to enjoin one from engaging in the laundry business for a year, and to recover indebtedness, plaintiff could have a decree and execution for his debt apart from the main purpose of the suit.

2. Injunction ⟸123—When written contract alleged, relief not granted on proof of parol contract.

In an action to enjoin defendant from engaging in the laundry business in violation of an alleged written contract of employment, plaintiff was not entitled, on evidence showing an oral contract to a decree restraining defendant, and such decree will be reversed, though defendant made no objection before the master to the introduction of evidence on which he found the parol contract, and did not take any exceptions to the report, or appeal from the interlocutory decree confirming it.

Appeal from Superior Court, Worcester County; C. T. Callahan, Judge.

Suit in equity by Daniel J. Donohue against John R. White to enforce a contract of employment, and to restrain defendant from engaging in the laundry business. Decree for plaintiff, and defendant appeals. Affirmed in part, and reversed in part.

Fusaro, Simpson & Foley, of Worcester, for appellant.

John P. Halnon, of Worcester, for appellee.

BRALEY, J. [1] The allegations of the bill are, that the plaintiff, who owned and operated a laundry in the city of Worcester, entered into a written contract of employment with the defendant, which among other stipulations provided, that during his employment and for one year thereafter the defendant would keep secret, and not divulge to any person, firm or corporation except by express order of his employer, the names, addresses, or any information concerning cus-

indirectly, either as principal, servant or agent, after the termination of his employment enter into any branch of the laundry business in Worcester without the plaintiff's approval, and consent in writing. A copy of the alleged contract is annexed to the bill. It is further alleged that the defendant's service began February 10, 1919, and terminated December 9, 1922, and that shortly before leaving, and in violation of the agreement, he notified some of the plaintiff's customers of his intended departure and solicited their patronage, either as the agent or servant of a rival laundry, and thereafter without obtaining the plaintiff's consent induced them to transfer their trade to him. The relief sought is that the defendant be restrained from engaging directly or indirectly "in any branch of the laundry business in the city of Worcester either as principal, agent or servant for the period of one year from December 9, 1922," and that he "be restrained from soliciting business on the same route covered by him while in the employment of the plaintiff." But the case having been referred to a master he finds that the contract just described never existed. It is found however that during the period beginning February 10, 1919, and ending December 19, 1922, the defendant was employed as a solicitor and collector to whom customers of the plaintiff on route four delivered their laundry work, and after giving the plaintiff notice that he would terminate his employment, the defendant during the last week of service notified the customers of his intended departure, and solicited their patronage. The report states, that seven customers were thus obtained for another laundry, and that the defendant is also indebted to the plaintiff for moneys collected and not accounted for amounting to $48.25. The amended bill asks for payment of this indebtedness. It is settled that the plaintiff may have a decree and execution for his debt quite apart from the main purpose of the suit. Stratton v. Hernon, 154 Mass. 310, 28 N. E. 269. See American Stay Co. v. Delaney, 211 Mass. 229, 233, 97 N. E. 911, Ann. Cas. 1913B, 509.

[2] It is contended by the defendant, that the written contract not having been established he cannot on the record be enjoined. "It is an elementary rule of equity pleading, that the bill must contain a clear and exact statement of all the material facts upon which the plaintiff's right to the relief sought depends, and that he can only introduce evidence of such facts as are thus stated." Drew v. Beard, 107 Miss. 64, 73. "And, where there is a variance, recovery can be had only on the case stated in the bill and not upon the case made out by the evidence." Malden & Melrose Gas Light Co. v. Chandler, 209 Mass. 354, 358, 95 N. E. 791, 792; Pick-

But even if the defendant made no objection before the master to the introduction of the evidence on which he found the parol contract, and did not take any exceptions to the report, or appeal from the interlocutory decree confirming it his contention must be sustained. Drew v. Beard, supra; Malden & Melrose Gas Light Co. v. Chandler, supra; Arnold v. Maxwell, 223 Mass. 47, 48, 111 N. E. 687. It therefore is unnecessary to determine whether on amendment of the bill, the plaintiff is entitled to injunctive relief on the facts found by the master.

It follows that so much of the decree as awards the plaintiff damages "in the sum of forty-eight dollars and twenty-five cents ($48.25) with interest from December 9, 1922, amounting to ninety-three cents, together with his costs taxed at eighteen dollars and ninety-six cents ($18.96)," when modified by addition of the words, "and that execution issue therefor," is affirmed. Stratton v. Hernon, supra. But in all other respects it is reversed, and the case is to stand for further proceedings in the trial court not inconsistent with this opinion.

Ordered accordingly.

DOYLE v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. March 3, 1924.)

1. Negligence ⟸136(8)—Where facts undisputed, verdict may be directed.

Where from the facts which are undisputed or indisputable, or shown by the evidence by which the plaintiff is bound, only one rational inference can be drawn, and that an inference of contributory negligence or want of due care, then the question of due care or contributory negligence is one of law for the court, and a verdict for the defendant should be directed.

2. Street railroads ⟸98(9)—Pedestrian held guilty of contributory negligence as matter of law.

One who steps from behind a standing street car onto another track without either looking or listening is guilty of contributory negligence as a matter of law.

Exceptions from Superior Court, Suffolk County; Henry F. Lummus, Judge.

Action of tort by Loretta F. Doyle against the Boston Elevated Railway Company for personal injuries. After verdict for plaintiff, a motion by defendant for verdict was allowed, and plaintiff brings exceptions. Exceptions overruled.

A. J. Connell, of Roxbury, for plaintiff.

L. Powers, of Boston, for defendant.

accompanied by Mr. Doyle, who has since become her husband, stood waiting in a doorway on the west side of Dorchester avenue in Boston, a few feet from the south side of Pearl street, which crosses Dorchester avenue at right angles. They were intending to take an inbound car of the defendant for Boston. The stopping point for inbound cars was on the opposite side of Dorchester avenue to the north of Pearl street, so that to take the car they would have to cross Pearl street and the westerly half of Dorchester avenue. The outbound track lay between them and the place for taking the inbound car. The stopping point for outbound cars was to the south of Pearl street and opposite the doorway in which they stood.

She looked toward Milton, saw an inbound car approaching, and when it was some 200 yards away at Savin Hill avenue, moving at an ordinary rate of speed, she and Mr. Doyle "left the doorway together and started to cross the street toward the stopping place on the opposite side." This was the last time they saw, or looked for, the inbound car before the accident.

An outbound car came up, stopped opposite the doorway they had left and discharged passengers. Without stopping, the plaintiff and Mr. Doyle walked a few feet out of their direct line to their left, around and to the rear of the standing car. Mr. Doyle stepped one step behind to avoid colliding with an alighting passenger, but the plaintiff, without lessening her speed, stepped from behind the standing car onto the inbound track and immediately was struck by the fender of the inbound car, thrown down and injured. She "thought she had ample time to get across before the car which she intended to take would be anywheres near the stopping place opposite."

There was testimony that the inbound car after it left Savin Hill avenue increased its speed, passed the standing car at the rate of 32 miles an hour without sounding the gong, and carried the plaintiff some 75 feet before it stopped.

The defendant offered no testimony and moved that a verdict for defendant be directed, at the close of the plaintiff's case. The trial judge denied this motion, but, after the return of a verdict for the plaintiff and before it was recorded, reserved leave to enter a verdict for the defendant, and later, on motion of defendant, entered a verdict for

[1] On the question of negligence by the plaintiff contributing to the injury, the evidence required a verdict for the defendant.

While it is true that "* * * when a party has the burden of establishing a proposition by oral testimony, a court can seldom rule as a matter of law that the proposition is proved" (Kelsall v. New York, New Haven & Hartford Railroad, 196 Mass. 554, 556, 82 N. E. 674), it is none the less true that "where from the facts which are undisputed or indisputable, or shown by evidence by which the plaintiff is bound, only one rational inference can be drawn and that an inference of contributory negligence or want of due care, then the question of due care or contributory negligence is one of law for the court and a verdict for the defendant should be directed" (Duggan v. Bay State Street Railway, 230 Mass. 370, 379, 119 N. E. 757, 760, L. R. A. 1918E, 680).

[2] The undisputed, indisputable evidence, coming from and binding the plaintiff, brings this case within the rule laid down where the person injured has stepped from behind one object in a street in front of another, either without looking or listening. The law is established that on such evidence as is here presented the contributory negligence of the plaintiff is proved as matter of law, and it is the duty of the court to direct a verdict for the defendant. Stackpole v. Boston Elevated Railway, 193 Mass. 562, 79 N. E. 740; Casey v. Boston Elevated Railway, 197 Mass. 440, 83 N. E. 867; Rundgren v. Boston & Northern Street Railway, 201 Mass. 156, 87 N. E. 189; Kennedy v. Worcester Consolidated Street Railway, 210 Mass. 132, 96 N. E. 78; O'Brien v. Boston Elevated Railway, 217 Mass. 130, 104 N. E. 442; Adams v. Boston Elevated Railway, 219 Mass. 515, 107 N. E. 360, distinguishing O'Toole v. Boston Elevated Railway, 211 Mass. 517, 98 N. E. 510; Gibb v. Hardwick, 241 Mass. 546, 135 N. E. 868.

We have examined the cases relied upon by the plaintiff, O'Toole v. Boston Elevated Railway, supra; Shea v. Boston Elevated Railway, 217 Mass. 163, 104 N. E. 355; Seabut v. Ward Baking Co., 231 Mass. 339, 121 N. E. 23; Healy v. Boston Elevated Railway, 235 Mass. 150, 126 N. E. 379; and Scherer v. Boston Elevated Railway, 238 Mass. 367, 130 N. E. 840; but all are clearly distinguishable.

Exceptions overruled.

HASKELL v. STARBIRD.*

(Supreme Judicial Court of Massachusetts. Middlesex. June 30, 1890.)

1. Trial ⇐253(8)—Instruction as to liability for agent's representations properly refused, as ignoring evidence.

In an action for false representations concerning land sold by defendant to plaintiff, an instruction that if the agent of defendant made the representations relied on, and if afterwards defendant informed plaintiff that he had never seen the land, and that his only knowledge of it was derived from others, and plaintiff then accepted the deed without further inquiry, he could not recover, *held* properly refused, as ignoring evidence that the agent had made such representations on the express authority of defendant, and had told defendant that he had made them before the sale was completed.

2. Fraud ⇐22(1)—Purchaser held not put on inquiry by vendor's statement as to truth of statements of vendor's agent.

That before a deed was delivered vendor told purchaser that he had never seen the land, and knew nothing about it, except what he had been told, did not put purchaser on inquiry as to the truth of representations which vendor's agent had made to him, that the land, not readily accessible, was adjacent to a flourishing village, and had a large amount of timber on it, and so did not relieve vendor from liability for such representations, though purchaser, without further inquiry, accepted the deed and paid the purchase price.

3. Principal and agent ⇐156—Principal liable for agent's fraudulent representations in making sale.

A vendor is liable for the fraudulent representations of his agent in a sale of land, which he was employed to make, though he was not authorized to make the representations, and vendor did not know of them till after the conveyance, and this though the agent was employed only to make the single sale.

4. Appeal and error ⇐183—Objection to form of action not available for first time in reviewing court.

Contention that fraudulent representations of an agent in making a sale are available against the principal, if at all, only in an action of contract, and not in an action of tort for deceit, not having been made at the trial, is not available in the reviewing court on exceptions.

5. Fraud ⇐65(1)—Instruction held not fairly open to construction of allowing recovery for representation not fraudulent.

As an instruction in action for deceit in sale of land that if representations made by an agent were false in fact, and the agent had no knowledge personally of "their truth," but cipal would be liable, related solely to agency, where the questions whether the instructions were such as to create liability had been otherwise covered, and the only information of the agent, so far as appeared, was derived from defendant, *held*, that it was not erroneous as allowing recovery, though the representations were not fraudulent.

Exceptions from Superior Court, Middlesex County; Lincoln F. Brigham, Judge.

Action by John Haskell against Charles D. Starbird, for deceit in the sale of land. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

C. Cowley, for plaintiff.

J. N. Marshall, M. L. Homblet, and J. C. Burke, for defendant.

DEVENS, J. There was evidence that the purchase of a certain tract of land in Canada, in which purchase the plaintiff alleged himself to have been deceived, was made through one Rockwell, who acted as the agent for the defendant, and that the plaintiff was deceived by the representations made by Rockwell that the land was of the value of $1,200, contained a large amount of timber, and was adjacent to a flourishing village, which representations were false. There was also evidence that Rockwell made these representations as the agent of the defendant. Rockwell also testified that the defendant made these representations to him; that he therefore made them to the plaintiff; and that, before the conveyance was made, he informed the defendant that he had so made them. While the statement as to the value of the land might be treated as an expression of opinion, only, those in reference to the locality of the land, and the amount of timber on it, were statements of fact, of importance to any one proposing to purchase it; nor does the land appear to have been readily accessible, so that their accuracy could have been tested by the plaintiff. The defendant denied that he ever made any representations concerning the condition or location of the land, and offered evidence that, at the time the conveyance was made by him, he informed the plaintiff that he had never seen the land and knew nothing about it except what he had been informed, etc. The defendant requested the court to instruct the jury as follows:

"(1) If the jury shall find that Rockwell was the agent of the defendant in selling the land in question, and that, as such agent, he made the misrepresentations relied on, and that after the same were made, and at the time, but before the deed of this land was delivered, the defendant, in answer to inquiry made of him by the plaintiff, replied that he had never seen the land, and knew nothing about it except what had been told him, and the plaintiff, without further inquiry, accepted the deed, and

*REPORTER NOTE.—This case as originally filed was published in 25 N. E. 14. Since this filing and publication, changes in the language of the opinion have been made by the judge, which, while not affecting the merits of the decision, make it necessary in the interest of our subscribers to reprint the case here.

paid the consideration agreed on, he cannot recover.

"(2) If the jury shall find that Rockwell was the agent of the agent of the defendant in selling the land in question, the plaintiff cannot recover, unless it is proved that the defendant was privy to or adopted the misrepresentations relied on."

The court declined to give these instructions, and instructed the jury:

"If the defendant employed and authorized Rockwell to sell the land, and in pursuance of that authority Rockwell sold the land and did induce the plaintiff to buy, and made false and fraudulent representations about the land, upon which the plaintiff relied and which induced him to purchase, I shall instruct you that the defendant would be responsible for that fraud, notwithstanding there were no instructions given to Rockwell by the defendant which authorized him to make fraudulent representations, and notwithstanding the defendant did not know that he practiced those fraudulent representations. Employing him as agent, or as his agent to do that thing, he became responsible for the methods which his agent adopted in doing that thing. * * * If the representations were false in fact, and Rockwell had no knowledge personally of the truth of these representations, but derived his information from others upon those facts, he, or the person for whom he was acting as the agent in the same, would be liable to an action for deceit."

[1, 2] The first instruction requested and refused should not have been given. It was an instruction on only a part of the evidence, and omitted entirely any consideration of the important testimony of Rockwell that he made the false representations acting as the defendant's agent and upon his express authority, and also that the fact that they had been made was communicated to the defendant before the transaction was closed by the payment of the purchase money, and the making of the conveyance. Even if the testimony of Rockwell was denied by the defendant, and controverted by other evidence, the instruction asked, if given, would have led the jury to infer that it was unimportant for them to consider this evidence, and that the mere fact that the defendant made the remarks testified to by him at the time of passing the deed would prevent the plaintiff from recovering, while it might be, also, that the plaintiff, in completing the transaction, depended upon the false and fraudulent representations of the defendant's agent, made at the defendant's own instance. The contention of the defendant is that, the plaintiff having been put upon his guard by this conversation, he was affected by all the knowledge which he might have obtained if he had inquired further, and elsewhere. But the defendant did not in the conversation, in any way, repudiate the representations of Rockwell, assuming them to have been made, or put the plaintiff on inquiry as to the correctness of them. On the contrary, the natural inference would be that the defendant adopted them, although he disclaimed personal knowledge. If it is true that these statements of Rockwell had been falsely and fraudulently made, and especially if made on the authority of the defendant himself, and if they had induced the plaintiff to make the purchase, the defendant cannot extricate himself from responsibility therefor by such a disclaimer.

[3] The instructions of the court upon the second request for a ruling, which was, in substance, that, even if Rockwell was the agent of the defendant to sell, the plaintiff could not recover unless it was proved that the defendant was privy to or adopted the misrepresentations relied on, made the defendant responsible for the false and fraudulent representations as to the land made by Rockwell, if Rockwell was employed by the defendant to sell the land as his agent, notwithstanding Rockwell was not authorized to make them, and notwithstanding the defendant did not know that he had made them until after the conveyance. They held that the defendant, by employing Rockwell as his agent to make the sale, became responsible for the methods which he adopted in so doing. The defendant contends that Rockwell was a special agent only, and that, as his authority extended only to the sale of this single tract of land, the defendant is not responsible for any representations Rockwell might have made which he did not authorize. The cases in which a distinction has been made in the responsibility of a principal for the acts of general and of special agents are those where the special agent did not have, and was not held out as having, full authority to do that which he undertook to do, and where one dealing with him was informed, or should have informed himself, of the limitations of his authority. There is no distinction in the matter of responsibility for the fraud of an agent authorized to do business generally, and of an agent employed to conduct a single transaction, if in either case he is acting in the business for which he was employed by the principal, and had full authority to complete the transaction. While the principal may not have authorized the particular act, he has put the agent in his place to make the sale, and must be responsible for the manner in which he has conducted himself in doing the business which the principal intrusted to him. Benj. Sales, § 465. The rule that a principal is liable civilly for the neglect, fraud, deceit, or other wrongful act of his agent, although the principal did not in fact authorize the practice of such acts, is quoted with approbation by Chief Justice Shaw in Locke v. Stearns, 1 Metc. 560, 35 Am. Dec. 382. That a principal is liable for the false representations of his agent, although personally innocent of the fraud, is said by Mr. Justice Hoar, in

White v. Sawyer, 16 Gray, 586-588, to be settled by the clear weight of authority. In the case at bar, if the false representations were made by Rockwell, they were made by him while acting within the scope of his authority in making a sale of land, which the defendant employed him to sell; and the instruction properly held the defendant answerable for the damage occasioned thereby. Lothrop v. Adams, 133 Mass. 471, 43 Am. Rep. 528.

[4] The defendant urges that even if, in an action of contract, the false representations of Rockwell as his agent might render the defendant responsible as the principal, he cannot thus be made responsible in an action of tort for deceit, and that in such action the misrepresentation must be proved to have been that of the principal. It is sufficient to say that no such point was presented at the trial, nor do we consider that any such distinction exists.

[5] If the instruction, "If the representations were false in fact," etc., is to be treated as an abstract proposition intended to cover the whole case, and fully to state under what circumstances the defendant would be responsible, it would be obviously erroneous. It does not require that the representations should be fraudulent as well as false, and it does not contain the additional and necessary element that the plaintiff should have been misled and deceived by them. It is not, however, to be thus treated, but must be considered in its connection with the part of the case, and the subject, upon which instructions had been asked. Both sides had tried the case upon the assumption that Rockwell had made statements that were false and that were also fraudulent, either as regarded himself or the defendant. Rockwell had testified on behalf of the plaintiff that he had made these representations upon the authority of the defendant, and upon information derived from him, which statement had been denied by the defendant. The instructions asked related solely to the question of agency, and do not themselves use the words "false" and "fraudulent," but only the word "misrepresentations." The instruction given in response to the request was that the defendant would be liable for false and fraudulent representations made by Rockwell, if he employed him to sell the land, and if the latter made them under the defendant's authority in selling it. The correctness of the instructions on this point we have already considered. When, therefore, the presiding judge dealt with the liability of the defendant for representations made by Rockwell on the information of others (the only information of Rockwell, so far as the case shows, being derived from the defendant), he was dealing with false and fraudulent representations, by which the plaintiff was deceived, although in such case the falsity and fraud would be of the defendant acting through Rockwell as his instrument. The part of the case to which this instruction as well as the former ones relate, assumes that the representations were of such a character that the defendant was liable therefor if he was liable for the misrepresentations of Rockwell. Whether those representations themselves, in the terms in which they were made, were sufficient to make the defendant liable, belonged to another part of the case, not then under discussion, and to facts as to which appropriate instructions were given.

It is not a fair interpretation of the last instruction to hold, as the defendant contends, that it would allow the plaintiff to recover if there had been a representation erroneous in fact, and yet not knowingly so made either by Rockwell, or by the defendant acting through Rockwell; nor do we think it could have been so understood. Exceptions overruled.

ALLIS-CHALMERS MFG. CO. v. FRANK RIDLON CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 29, 1924.)

1. Appeal and error ⟸687—Error in dealing with motion for judgment must be embodied in bill of exceptions.

Under G. L. c. 231, § 96, if any error of law was thought by the defendant to have been committed by the trial judge in dealing with plaintiff's motion for judgment in accordance with auditor's report, that alleged error ought to have been embodied in a bill of exceptions setting out in detail the facts and rulings of law and steps in the procedure, and it cannot be raised by way of appeal on record not showing such matters.

2. Appeal and error ⟸1078(1)—Points not argued waived.

Points not argued will be treated as waived on appeal.

Appeal from Superior Court, Suffolk County; John D. McLaughlin, Judge.

Action of contract on account annexed for goods sold by the Allis-Chalmers Manufacturing Company against the Frank Ridlon Company. From an order for judgment for plaintiff on the report of an auditor, defendant appeals. Affirmed.

Ham, Willard & Taylor, Ralph H. Willard, and M. J. Mulkern, all of Boston, for appellant.

R. S. Wilkins, of Boston, for appellee.

RUGG, C. J. This case comes before us on appeal from an order for judgment. It is

After the filing of a declaration upon an account annexed and an answer setting up several defenses, the case was referred to an auditor who filed an exhaustive report, and also a supplemental report covering a statement of the defendant's exceptions. The plaintiff filed a motion that judgment be entered according to the report of the auditor. That motion was allowed on July 18, 1923. On July 20 the judge of the superior court filed this "finding":

"The court finds for the plaintiff on the auditor's report and assesses damages in the sum of five thousand three hundred forty-nine dollars and twenty-eight cents ($5,349.28)."

On July 23, 1923, the defendant filed a claim of "appeal from the finding and order of the court entered July 20, 1923."

[1] It is stated in the defendant's brief that the rule to the auditor contained no direction that his finding of facts should be final and that there was no claim for jury. The only points argued by the defendant relate to the procedure and practice under rule 30 of Superior Court (1923) Rules, which authorizes, under stated conditions, the entry of judgment upon an auditor's report. Succinctly stated, the argument is that the court did not follow the procedure pointed out by that rule. Reliance is placed upon what has been decided in Farnham v. Lenox Motor Car Co., 229 Mass. 478, 118 N. E. 874, and Sherry v. Littlefield, 232 Mass. 220, 122 N. E. 300. Those questions are not open to the defendant. The case comes before us on appeal. It is assumed in favor of the defendant that the appeal is rightly here. It was decided in Samuel v. Page-Storms Drop Forge Co., 243 Mass. 133, 134, 137 N. E. 169, that under G. L. c. 231, § 96:

"Appeal now is available as a means for bringing to this court for review errors of law alleged to have been committed by the superior court in civil actions or proceedings at law in only three instances: First, where an order has been entered sustaining or overruling a demurrer on the ground that the facts pleaded do not in law support or answer the action; second, where an order for judgment has been entered on a case stated; and third, where an order has been entered 'decisive of the case founded upon matter of law apparent on the record.'"

Manifestly the case at bar cannot fall within either the first or second class of cases thus enumerated. It does not come within the third class of cases. The printed record does not show that the superior court failed to conform to the provisions of rule 30. For aught that appears, the judge may have held a hearing after reasonable notice upon the motion for the entry of judgment according to the auditor's report in which both parties participated, and decided upon sufficient evidence of law that no cause appeared or was shown why judgment should not be entered on the auditor's report. No matter of law is apparent on the record in this particular decisive of the case. If any error of law was thought by the defendant to have been committed by the trial judge in dealing with the motion for judgment in accordance with the auditor's report, that alleged error ought to have been embodied in a bill of exceptions setting out in detail the facts, rulings of law, and steps in the procedure. It cannot under the statute and decision just cited be raised by way of appeal on such a record as the present.

[2] Whatever other points, if any, were open to the defendant on this record must be treated as waived, because not argued. Commonwealth v. Dyer, 243 Mass. 472, 508, 138 N. E. 296.

Finding and order for judgment affirmed.

KING v. BOARD OF ALDERMEN OF CITY OF SPRINGFIELD.

(Supreme Judicial Court of Massachusetts. Hampden. Feb. 29, 1924.)

1. Municipal corporations ⇐454—Assessment for betterments must be made within six months.

An assessment for betterments under G. L. c. 80, § 1, must be made within six months, or it is invalid.

2. Municipal corporations ⇐454—Assessment for betterments held made within six months.

Where public improvement ordered was the laying out of a street, and part of the work was done by the county under St. 1915, c. 252, respecting bridge and approach, the whole improvement was a unit, and assessment need not be laid within six months after any one of the several public corporations had completed its share of the improvement, and an assessment by the city within six months after the county completed its part of the work was within proper time, under G. L. c. 80, § 1.

Report from Supreme Judicial Court, Hampden County.

Petition by Thomas E. King for a writ of certiorari to quash an assessment of betterments made by the Board of Alderman of the city of Springfield. On report. Petition dismissed.

R. T. King, of Springfield, for petitioner.

Jones, Ellis & Mitchell, of Springfield, for intervening petitioner.

Josiah Dearborn, City Sol., and Alfred C. Fairbanks, Asst. City Sol., both of Springfield, for respondent.

RUGG, C. J. This is a petition for a writ of certiorari to quash an assessment of bet-

of the laying out and construction of a public way. The relevant facts are that on March 28, 1921, the city council of the city of Springfield duly passed an order which was approved by the mayor, laying out and establishing as a public way an extension of Broadway, itself a public street, from Vernon street across Pyncheon street to Court street under the law authorizing an assessment of betterments. The order established the location of this extension in its entirety, but established its grade only in the section lying between Pyncheon street and Court street. All of the land required for this extension was provided by the city at its own expense and was of great value. The city also had at great expense removed a large building from the portion of the extension lying between Pyncheon street and Vernon street and constructed a temporary roadbed and temporary sidewalks. The city also constructed the street on the section of the extension lying between Pyncheon and Court streets. All the work done by the city on this improvement was completed by or before November 4, 1921, and no work was done by it thereafter. The permanent work on the remainder of this extension, being the section lying between Pyncheon and Vernon streets, was done and paid for by the county of Hampden pursuant to the provisions of St. 1915, c. 252, respecting a bridge over the Connecticut river and its approaches and the report of commissioners thereunder approved by the Supreme Judicial Court, and was completed on or about July 1, 1922. The betterment assessment to which the present petition is directed was levied on December 11, 1922, being more than six months after the city of Springfield ceased work on the extension and less than six months after the completion of work done thereon by the county.

It is provided by G. L. c. 80, § 1, that:

"Whenever a limited and determinable area receives benefit or advantage, other than the general advantage to the community, from a public improvement made by or in accordance with the formal * * * order of a board of officers of * * * a * * * city * * * and such order states that betterments are to be assessed for the improvement, such board shall within six months after the completion of the improvement determine the value of such benefit or advantage * * * and assess * * * a proportionate share of the cost of such improvement. * * *"

The single question argued is whether this assessment was levied within the time permitted by this statute

[1] The statute makes time of the essence of the validity of such an assessment. It must be laid within six months "after the er the expiration of the time limited, the assessment is invalid.

[2] The order here assailed was a single entity. The street extension laid out as a public way by the city council order of March 28, 1921, was a unit. It was not divided into parts. The "public improvement" accomplished by the order was the one arising from the laying out of a public way from the end of the then existing Broadway at Vernon street to and across Pyncheon street to Court street. There was nothing in the order which required the entire work to be done by the city of Springfield. The order laying out the street went no further than to establish the one and single public improvement. The work of constructing that public improvement was left to fall where required or permitted by law. The county of Hampden was by law authorized to do the work of construction of that part of the public improvement lying between Pyncheon and Vernon streets. When the county of Hampden did that work of construction, it was aiding in the completion of the public improvement accomplished by the layout of the new street between Vernon and Court streets. The completion of the public improvement was wrought by the work done both by the city of Springfield and the county of Hampden. The public improvement accomplished by the order of March 28, 1921, was not completed by the city of Springfield. The city constructed only a part and not the completion of that public improvement. The public improvement was completed through the agency of two public corporations, each authorized by law to do the work actually done by it. The statute does not provide that the assessment must be laid within six months after any one of several public corporations has completed its share of the public improvement. That is not the test. The rule established by the statute is "the completion of the public improvement." Measured by that rule, it is apparent that the assessment here assailed was laid within six months after the completion of the public improvement by the final work necessary to such completion, which was performed by the county of Hampden.

There is no complaint that the assessment laid was in excess of the actual expenditure made by the city of Springfield or of the actual benefit received by the several estates. Questions of that nature are not raised. This record also does not involve the inquiry whether a betterment may be assessed for a partial completion of the public improvement when the balance has been permitted to lapse by inaction.

Petition dismissed.

TWOHIG v. DALY.

(Supreme Judicial Court of Massachusetts. Plymouth. Feb. 27, 1924.)

1. **Evidence ⊂=400(2)—Vendor and purchaser ⊂=44—Contract cannot be varied by parol; burden to show fraud on party so claiming.**

The terms of a contract for sale of land cannot be varied by parol evidence, and the burden is on one executing it to offer affirmative evidence to show fraud.

2. **Brokers ⊂=102—No fraud for double representation, if broker succeeded in getting largest possible price.**

In action for breach of contract to sell land, where the identity of the purchaser was immaterial to seller if broker succeeded in getting the largest possible price, there was no fraud practiced by reason of the fact that seller contracted with a straw man.

3. **Brokers ⊂=102—Contract not set aside for fraud of seller's agent.**

A contract to sell land cannot be set aside for fraud of broker representing seller, in misrepresenting to the seller the price he could obtain, in the absence of a showing that the purchasers had knowledge or information that should have put them on inquiry as to the fraud.

Exceptions from Superior Court, Plymouth County; Hugo O. Dubuque, Judge.

Action on contract by Daniel Twohig against Julia M. Daly, to recover damages for breach of contract to sell land. Verdict for defendant, and plaintiff brings exceptions. Exceptions sustained.

O. V. Fortier, of Brockton, for plaintiff.

W. G. Rowe and W. J. Callahan, both of Brockton, for defendant.

BRALEY, J. The defendant being the owner of a lot of land on which were two summer dwellings entered into a contract with the plaintiff March 25, 1920, whereby she agreed to sell the property to him for $5,000, the premises to be conveyed "by a good and sufficient warranty deed on or before May 31, 1920." A partial payment of "one hundred dollars" was made, which has never been returned, and the defendant having refused performance as she admitted at the trial, the present action is brought to recover damages for the breach. The answer is a general denial, with averments that she was induced to execute the contract through the false and fraudulent representations of the plaintiff or his agent that the contract is against public policy, because it contains a clause whereby the plaintiff was allowed to secure a first mortgage on the premises "in amount and place he may desire and the defendant to take a second mortgage of $500 dated day of sale." It is further averred that she listed the property with Neafsey & Dwyer, purchaser, who promised to obtain the highest price possible, but instead—

"they made negotiations for the sale of said properties in the sum total of $7,200, besides reserving a lot of land for their own use, and then induced by false and fraudulent representations said defendant to sign said contract of sale with said plaintiff in the sum of $5,000;" "that the plaintiff is a straw, fraudulent and intermediate person, perpetrating and practicing fraud on your said defendant with the aid and assistance of said Neafsey & Dwyer." "And the defendant further answering says that the said plaintiff is not the real purchaser of the said properties, but that Neafsey & Dwyer or one of them having been the real estate brokers in said transaction had made or arranged a bona fide sale of the said properties to person or persons other than said Twohig, for the sum total of $7,200, besides retaining for their own use a small portion of said premises, and that the person of said plaintiff is being used as an intermediary party in order to carry out the fraud that is being perpetrated or practiced on said defendant, for this defendant says that she is being defrauded by said plaintiff in said contract."

The answer then charges that the plaintiff, when the contract was made, knew of the fraud to which the defendant is alleged to have been subjected, and of its harmful results in inducing her to agree to part with the property so that it could be sold at an enhanced price. The plaintiff at the close of the evidence requested the court to rule that—

"On all the evidence the jury are not warranted in finding there was any fraud in the case practiced on the defendant such as would invalidate the contract."

[1] The ruling was refused, and the jury having returned a verdict for the defendant the case is here on the plaintiff's exceptions. The sale was negotiated by one Neafsey, a real estate broker, a member of the firm of Neafsey & Dwyer, and the contentions of the defendant are that while acting for her he also was the agent of the plaintiff, and that his double employment and misstatements and concealment of material facts justified her repudiation of the agreement. The defendant, who does not appear to have been illiterate, voluntarily executed the contract, the terms of which cannot be varied by parole evidence and the burden was on her to offer affirmative evidence to sustain her contention that the plaintiff had acted dishonestly. Barron v. International Trust Co., 184 Mass. 440, 443, 68 N. E. 831; Seretto v. Schell, 244 Mass. —, 141 N. E. 871. If the jury believed the defendant's evidence, Neafsey before the agreement was executed, asked her whether she desired to sell the property. The defendant replied that she did not know "whether I want to or not." A second interview followed when the defendant expressed a desire

the third interview Neafsey informed her that $5.000 "was all he could get," and thereupon she signed the contract. But when asked to specifically state her reasons for not giving a deed, she testified that between the date of the agreement, and the—

"time of delivering a deed of the houses, * * * a number of people * * * told me of this fraudulent game that was being put up between Mr. Neafsey and Mr. Twohig and others; they were separating the property, and selling each house separate, and the land, dividing the money and keeping it. So when I found that out * * * I would not sign the deed. Mr. Neafsey claimed he sold the property to Mr. Twohig, which I am very sure Mr. Twohig was only a middleman for others. In separating the property he was selling one house to one person and another to another and keeping a lot of land for his own use."

[2, 3] And when asked, "Is that your only reason?" the answer was, "That is the only reason." The defendant admitted that Neafsey told her before the contract of sale was consummated that he had a customer, one Masterson, who had made an offer of $5,000 which was all he could get for the property, and that the defendant said she would not pay him any commission. If he wanted a commission the purchaser must pay it. The evidence tended to show and it could be found that Masterson had asked Neafsey if he could not buy the property for him, and that throughout the negotations Masterson was the principal, the plaintiff Twohig being his agent to take title. But even if the purchaser was to pay the commission, such payment was in accordance with the understanding between the defendant and Neafsey, and the case at bar on this question is governed by Alvord v. Cook, 174 Mass. 120, 54 N. E. 499, and not by Quinn v. Burton, 195 Mass. 277, 81 N. E. 257; the identity of the purchaser however on the defendant's own evidence as well as on all the evidence, being immaterial to her if Neafsey succeeded in getting the largest possible price, there was no fraud practiced by reason of the fact that Twohig was the party with whom she contracted. Veasey v. Carson, 177 Mass. 117, 58 N. E. 177, 53 L. R. A. 241; Ebert v. Haskell, 217 Mass. 209, 104 N. E. 556. The only remaining defense is that Neafsey, Masterson and Twohig acted in collusion to obtain the property for $5,000, which, as Twohig and Masterson testified was resold for an aggregate amount of $7,200, although the jury could believe the defendant that the sale covered only the houses, while Neafsey retained the land for himself. But a full examination of the record discloses no evidence, that either Masterson or Twohig had any knowledge or information that should have put them on inquiry, that Neafsey had represented to her true she had bound herself to sell for that price. The contract moreover which is a sealed instrument cannot be set aside for the fraud of Neafsey who was not the agent of the plaintiff, and who is not shown to have acted in collusion with him. Callahan v. Mercantile Trust Co., 188 Mass. 393, 74 N. E. 666; Ginn v. Almy, 212 Mass. 486, 497, 499, 99 N. E. 276; Seretto v. Schell, supra. The refusal of the request was erroneous for the reasons stated.

Exceptions sustained.

GOLDMAN v. REGAN.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1924.)

1. Explosives ⟸12—Testimony as to injury to house from explosion held not too remote.

Where an explosion occurred in 1914, and architect and construction engineer testified that he examined the house in 1921, court properly admitted, subject to defendant's objection and contention that the evidence was too remote, question as to what he observed, though there was no evidence to show that the house was in the same condition in 1921 as at the time of the explosion, witness further testifying that, if there was a violent explosion which caused the plaster and shelves to fall and part of the cellar wall to become broken, such condition would be noticeable for years, provided no permanent repairs were afterwards made, and there being other evidence tending to show that the conditions were not due to shrinkage or to the natural and usual settling of the house, and it being within the sound discretion of the trial judge to determine whether the evidence was too remote.

2. Evidence ⟸513(2)—Architect and engineer properly allowed to state what was required to be done to restore house to perfect condition.

In an action for injuries to house through explosion, there being evidence tending to show that before the explosion the house was in perfect condition, an architect and construction engineer was properly allowed to state what was required to be done to restore it to that condition.

3. Evidence ⟸529—Opinion of architect and engineer as to cause of condition of house competent.

In action for damages to house by explosion, opinion of architect and construction engineer as to cause of damage was competent.

4. Explosives ⟸12—Negligent blasting held for jury.

In an action for injuries to house from blasting while defendant was laying a sewer near the sidewalk, whether defendant was guilty of negligence *held* for the jury.

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negligence in blasting.

A city had a legal right to construct sewers in its streets, and could do so by its agents, or could contract with another to do the work, and the contractor doing the work is not liable to house owner for damages caused by blasting necessary to such construction, unless such damages were occasioned by the negligence of the contractor in doing the work.

6. Explosives ⟸12—Burden on house owner to show negligence of contractor blasting.

In an action for injuries to a house, caused by the negligence of a contractor blasting for sewer, the burden is on the house owner to show such negligence.

Exceptions from Superior Court, Suffolk County; George A. Sanderson, Judge.

Action of tort by Rebecca Goldman against George J. Regan, with trustee, growing out of an explosion that occurred while the defendant was laying a sewer. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

S. L. Ballen, of Boston, for plaintiff.
W. J. Patron, of Boston, for defendant.

CROSBY, J. The plaintiff brings this action to recover for damage to her house, caused by the alleged negligence of the defendant while engaged in constructing a sewer in the street.

There was evidence that, in November, 1914, the defendant had been blasting on and near the sidewalk in front of the plaintiff's house for several days; that on one of these occasions there was a violent explosion which shook the house and the plaster from the ceilings in some of the rooms fell; that the walls were cracked; that some of the stones in the cellar walls fell out and the walls became cracked; that the foundation in front of the house was cracked and that other damage resulted from the explosion. There was other evidence to show that in July, 1914, the house was in perfect condition.

[1-3] One Maney, a witness called by the plaintiff, testified that he was an architect and construction engineer and had had forty years' experience in building; that he examined the house in February, 1921. He was asked what he observed "around the house, first with reference to plastering." This question was admitted subject to the defendant's exception, his contention being that the evidence was too remote, and that there was no evidence to show that the house was in the same condition in 1921 as at the time of the explosion. We are of opinion that this evidence was not too remote, but was admissible to show the force and violence of the explosion, and also on the question of damages: besides, this witness further testified that the plaster and shelves to fall and part of the cellar wall to become broken, such conditions would be noticeable for years provided no permanent repairs were afterwards made. Although the admission of this evidence was not preceded by proof that the condition of the house in 1921 was the same as immediately after the explosion, it was rightly admitted, as there was other evidence tending to show that the conditions found were not due to shrinkage or to the natural and usual settling of the house, but were such as would result from a violent explosion near the house, and would be consistent with the explosion described to have occurred in 1914. Whether the evidence was too remote was within the sound discretion of the trial judge, which was not exercised wrongly. Ferron v. King, 210 Mass. 75, 77, 96 N. E. 52, and cases cited. There being evidence tending to show that in July, 1914, before the explosion, the house was in perfect condition, the witness Maney was properly allowed to state what was required to be done to restore it to that condition. The testimony of Maney and Culbert respecting the condition of the building in 1921 and their opinions as to the cause of damage to it were competent.

[4-6] The defendant's request that a verdict be directed in his favor on the ground that there was no evidence of negligence was rightly denied. The city of Boston had a legal right to construct sewers in its streets and could do so by its agents or could contract with the defendant to do the work; and the defendant is not liable to the plaintiff for damages caused by blasting necessary to such construction, unless such damages were occasioned by the negligence of the defendant in doing the work. Murphy v. Lowell, 128 Mass. 396, 35 Am. Rep. 381. The burden is on the plaintiff to show some acts of negligence and that such negligence contributed to the result. Hutchinson v. Boston Gas Light Co., 122 Mass. 219.

In the case at bar it could have been found that on November 14, 1914, when the defendant was blasting with dynamite in the street in front of the plaintiff's house while engaged in constructing the sewer, an explosion occurred of such force and violence that the whole house shook and some of the ceilings fell; that the walls were cracked; that the cellar walls were cracked and broken; and that much other damage occurred as the result of the explosion. There was also evidence that the blast was set off on or near the sidewalk in front of the house, and immediately thereafter a large hole was seen in the street into which a portion of the cellar wall fell. The jury viewed the premises and saw the condition of the house, the na-

rock in too close proximity to the plaintiff's house, or in using an unduly heavy charge and not protecting it in such manner as not to damage the plaintiff's premises. If, as the defendant contends, the blasting was done without damage to other houses in that vicinity, the jury could have found that the dynamite was not exploded so near the other houses, or that the charges were not so heavy as those exploded in front of the house of the plaintiff. If the jury believed the evidence offered by the defendant, that the house had been partially destroyed by fire and was also damaged by water used in its extinguishment, they could have found that it had been repaired and was in good condition in July, 1914. Upon the evidence offered by the plaintiff and the rational inferences which could be drawn therefrom a finding was not unwarranted that the damage to her property was the result of negligence of the defendant. Driscoll v. Gaffey, 207 Mass. 102, 92 N. E. 1010; Stewart v. Hanreddy, 212 Mass. 340, 98 N. E. 1030; Coffey v. West Roxbury Trap Rock Co., 229 Mass. 211, 118 N. E. 235.

As the evidence excepted to was properly admitted, and as the case was rightly submitted to the jury, the entry must be

Exceptions overruled.

AHERN'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 28, 1924.)

1. Courts ⟸97(1)—United States Supreme Court final arbiter in marking out boundary between federal and state jurisdiction.

The Supreme Court of the United States is the final arbiter in marking out the boundary between federal and state jurisdiction in maritime law.

2. Admiralty ⟸20—Employee engaged in making repairs on vessel held not entitled to compensation under Workmen's Compensation Act.

Where one employed to work both on land and on navigable waters was injured while engaged in making repairs on vessel in commission on navigable waters, he was not entitled to compensation under the Workmen's Compensation Act; courts of admiralty having exclusive jurisdiction over the parties and the injury.

Appeal from Superior Court, Suffolk County; Sanderson, Judge.

the insurer appeals. Reversed, and decree ordered for appellant.

E. Field and H. L. Brown, both of Boston, for insurer.

M. J. Mulkern, of Boston, for employee.

RUGG, C. J. This is a proceeding under the Workmen's Compensation Act. St. 1911, c. 751, as amended by Laws 1912, c. 571. The employee received injuries in the course of and arising out of his employment by the Bethlehem Shipbuilding Corporation. He was at that time engaged in making repairs on a vessel in commission on navigable waters. According to his testimony the employee worked one day on the shore and then was transferred to the vessel; that he was on a girder removing a bolt, and the wrench slipped and he lost his balance and was thrown off the girder to a platform below. Apparently under his contract of employment he worked both on land and on navigable waters.

The single question presented for decision is whether the employee is debarred by reason of the maritime law of the United States, or whether the state courts have jurisdiction under the Workmen's Compensation Act.

[1,2] In the decision of this question, we must be guided by the principles declared by the Supreme Court of the United States, which is the final arbiter in marking out the boundary between federal and state jurisdiction in maritime law. The Workmen's Compensation Act of this commonwealth extends to injuries of this class, except and so far as it is excluded by the grant of power to the United States of "all cases of admiralty and maritime jurisdicton." Gillard's Case, 244 Mass. 47, 138 N. E. 384.

The case at bar appears to us to be indistinguishable from Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U. S. 479, 43 Sup. Ct. 418, 67 L. Ed. 756. In that case it was said at page 480 (43 Sup. Ct. 418):

"Leo Kierejewski, a master boiler maker, was employed by it [Great Lakes Dredge & Dock Company] to perform services as called upon. Acting under this employment, he began to make repairs upon a scow moored in the navigable waters of Buffalo river. He stood upon a scaffold resting upon a float alongside. One of the company's tugs came near, negligently agitated the water, swamped the float and precipitated him into the stream where he drowned. While performing maritime service to a completed vessel afloat, he came to his death upon navigable waters as the result of a tort there committed. The rules of the mari-

of the parties. Western Fuel Co. v. Garcia, 257 U. S. 233. 'The general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled.' Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469, 476."

In the case at bar the employee was at work in the repair of a completed vessel afloat in navigable waters. His work had direct relation to commerce and navigation in that it was performed in the repair of a completed vessel in order to fit her for further navigation. New Bedford Dry Dock Co. v. Purdy, 258 U. S. 96, 42 Sup. Ct. 243, 66 L. Ed. 482. His injury was received and became operative on navigable waters. Since the courts of admiralty had exclusive jurisdiction over the parties and the injury, the courts of this commonwealth have no jurisdiction to pass judgment upon the rights of the parties.

The cases of Bockhop v. Phœnix Transit Co., 97 N. J. Law, ——, 117 Atl. 624, and West v. Kozer, 104 Or. 94, 206 Pac. 542, appear to us to be at variance with the Kierejewski Case, and hence we are constrained not to follow them. Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 42 Sup. Ct. 475, 66 L. Ed. 927; State Industrial Commission of New York v. Nordenholt Corporation, 259 U. S. 263, 42 Sup. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013; Duart v. Simmons, 231 Mass. 313, 121 N. E. 10; Id., 236 Mass. 225, 128 N. E. 32; Sterling's Case, 233 Mass. 485, 124 N. E. 286; Proctor v. Dillon, 235 Mass. 538, 129 N. E. 265; Dorman's Case, 236 Mass. 583, 129 N. E. 352.

Decree reversed. Decree to be entered in favor of insurer.

COOPER v. PANTAGES.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1924.)

1. Appeal and error ⇐1011(1)—General finding must stand if report contains only conflicting evidence.

Where the report contains only the conflicting testimony without any findings of fact, a general finding for the plaintiff must stand if there was any evidence to warrant it.

2. Brokers ⇐63(1)—Broker held entitled to commission on owner's refusal to sell.

Where defendant agreed to sell his business to plaintiff "or his appointy" for $1,500 and to pay the plaintiff $150 for his commission and balance of $1,500, but defendant refused to sell on being informed by plaintiff he had sold his store, plaintiff was entitled to the agreed commission.

3. Brokers ⇐82(4)—Offer to prove contract made to cheat owner's brother properly excluded.

In action for commission for procuring a purchaser of defendant's business, an offer to prove that the brokerage contract was made as subterfuge to cheat the defendant's brother was properly excluded, no such issue of fraud being raised by the pleadings, and the offer of proof merely going to the motive of the parties in making an admitted and legal contract.

Appeal from Municipal Court of Boston, Appellate Division.

Action of contract by Sid S. Cooper against Michael Pantages, to recover compensation for procuring purchaser of grocery and meat market. From a final decision of the Appellate Division dismissing report, defendant appeals. Affirmed.

J. H. Hopwood, of Boston, for plaintiff.
Samuel Susser, of Boston, for defendant.

DE COURCY, J. [1, 2] The plaintiff, a real estate broker and business chance agent, brought this action in the municipal court to recover a commission for procuring a purchaser of the defendant's grocery and meat market; and the finding was in his favor. We cannot say that there was error in the judge's refusal to give the defendant's requests for rulings. The report contains only the conflicting testimony, without any findings of fact; and the general finding for the plaintiff must stand if there was any evidence to warrant it. There was testimony that the defendant on March 8, 1922, agreed in writing to sell the business to the plaintiff "or his appointy," for $1,500, and to pay the plaintiff $150 for his commission and services; that on March 16 one Barbatti was secured as a purchaser by Cooper, made a deposit of $50, and had on hand the balance of $1,500; that Cooper immediately informed the defendant he had sold his store to Barbatti, but the defendant refused to sell. This testimony, if believed, entitled the plaintiff to recover. Green v. Levenson, 241 Mass. 223, 135 N. E. 114.

[3] The offer to prove that the brokerage contract was made as a subterfuge to cheat the defendant's brother was excluded rightly. No such issue of fraud was raised by the pleadings. Further, the offer of proof merely went to the motive of the parties in making an admitted and legal contract.

Order dismissing report affirmed.

(Supreme Court of Indiana. Feb. 29, 1924.)

1. Criminal law ⇐1130(2)—Ruling on motion for change of venue not considered because of omissions in brief.

Overruling of a motion for a change of venue from the county does not present error where appellant's brief sets out no motion or affidavit for such change.

2. Criminal law ⇐121—Change of venue discretionary.

Change of venue from the county is discretionary with the court.

3. Criminal law ⇐742(1)—Credibility of witnesses and weight of testimony for court or jury trying case.

Credibility of witnesses and weight to be given their testimony is for the court or jury trying the case.

4. Criminal law ⇐1130(2, 5)—Brief not including evidence or points or authorities held insufficient compliance with Supreme Court rule.

Where appellant assigning error in the overruling of his motion for a new trial on the ground of the insufficiency of the evidence failed to include in his brief a condensed recital of the evidence in narrative form, and set out no points or authorities, *held*, there was a total failure to comply with Supreme Court rule 22, subd. 5.

Appeal from Criminal Court, Marion County; Frank A. Symmes, Judge pro tem.

Stewart Donnelly was convicted of the unlawful sale of intoxicating liquor, and he appeals. Affirmed.

Thomas C. Whallon, of Indianapolis, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward F. White, Deputy Atty. Gen., for the State.

GAUSE, J. This is an appeal from a judgment convicting appellant of a violation of the law prohibiting the sale of intoxicating liquor. Appellant has wholly failed to present any question by his brief filed in this case.

We find, by going to the record, that he has assigned as error: (1) The ruling of the court on a motion for a change of venue from the county; (2) the ruling of the court on the motion for a new trial.

[1] Appellant has not set out in his brief any motion or affidavit for a change of venue, so no question is presented as to the first assignment of error.

[2] It need hardly be suggested that it was discretionary with the court whether a change from the county should be granted.

In his motion for a new trial appellant only questions the sufficiency of the evidence.

Appellant refers in his brief to the fact that there are 60 pages of evidence in the has devoted 22 lines to stating appellant's conclusion as to the substance of a part of the testimony of only a part of the witnesses. Appellant correctly states in his brief that he sets out "just a few lines here and there." The appellant has failed to set out in his brief a single point, under a heading of any error relied on. The part of a brief known and generally designated as "Points and Authorities" is entirely omitted.

[3] The brief contains a denunciation of so-called informers, and contends that such evidence is not entitled to credit. If this question were raised it would be a sufficient answer to call attention to the oft-repeated proposition that the question of the credibility of witnesses and the weight to be given their testimony is for the court or jury trying the case.

[4] There is an entire failure to comply with the fifth subdivision of rule 22 of this court, and the judgment must be affirmed.

Judgment affirmed.

BOBERG et al. v. HARLEM et al. (No. 24059.)

(Supreme Court of Indiana. Feb. 21, 1924.)

Statutes ⇐94(1)—Act relating to construction of memorials by counties and cities held not invalid, as local or special law regulating county business.

Acts 1919, c. 115, relating to construction of memorials by counties and cities, applying to every county in the state, not being local or special to the county to which it applies, is not within Const. art. 4, § 22, forbidding local or special laws regulating county business.

Appeal from Circuit Court, Posey County; Thos. Duncan, Special Judge.

Suit by Fred A. Boberg and others against Jacob M. Harlem and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Brill Hatfield & Brady, of Evansville, for appellants.

Wm. Espenschied, James H. Blackburn, and Geo. F. Zimmerman, all of Mt. Vernon, for appellees.

EWBANK, C. J. Appellants brought suit for an injunction and defendants answered by a denial. After hearing evidence the trial court found in favor of the defendants, and entered a judgment that appellants take nothing, and that appellees recover their costs. Appellants filed a motion for a new trial, specifying as reasons that the decision is not sustained by sufficient evidence and is contrary to law. Overruling that motion is the only error assigned.

The only question presented by the briefs or discussed by counsel is whether or not Acts 1919, c. 115, pp. 562 to 571, relating to the construction of "memorials" by counties or cities, violates that provision of the Constitution of Indiana (section 22, art. 4; section 118, Burns' 1914) which forbids the passage of local or special laws regulating county business. The complaint alleged that steps toward the construction in Posey county, Ind., at the expense of said county, of a memorial for the soldiers and sailors of the war fought by the United States with Germany and Austria-Hungary, had been taken under said statute, and that appellees had been made a board of trustees to act in the matter, and as such board had advertised for and received bids for the work of constructing such memorial, and were intending to, and unless enjoined would, let contracts for its construction at a cost exceeding $160,000, and if this were done the taxpayers of the county would have to pay such cost. The evidence fairly tended to prove the matters of fact so alleged.

Counsel for appellant cite and rely on two decisions of this court, each of which held an act of the Legislature void as being a local or special law regulating county business: "An act concerning the relocation of the county seat of Newton county," etc., which provided that "in case less than sixty-five (65) per cent. of the voters of said Newton county vote in favor of the relocation of the county seat of said county, it shall be the imperative duty of the board of commissioners of said county, upon the presentation of the petition of 500 legal voters, * * * to order the erection of a proper and suitable courthouse at the present county seat" (Acts 1899, c. 130, § 17), and fixed the maximum cost, and directed what should be done by the board of commissioners and by the county auditor, respectively, and how it should be done, was held to be local and special, as applying only to Newton county and the construction of a courthouse in the town of Kentland, and to be a regulation of county business, in that it prescribed what should be done in the matter of constructing and paying for a county building (Board, etc., v. State ex rel., 161 Ind. 616, 69 N. E. 442); and "An act concerning the construction of courthouses in counties having a population of more than 25,000" (Acts 1899, c. 53, p. 73), which forbade the board of commissioners of any county having more than that population to order the construction of any courthouse in such county, unless petitioned for by at least 500 reputable resident freeholders, with a proviso that nothing in the act should apply to the relocation and erection of courthouses pursuant to the provisions of an act of 1895 (page 217) relating to counties having an area of more than 500 square miles, was held to be unconstitutional because the limited number of counties to which it applied made it local and special, and the restrictions on the action to be taken by a board of county commissioners constituted a regulation of county business (Kraus v. Lehman, 170 Ind. 408, 83 N. E. 714, 84 N. E. 769, 15 Ann. Cas. 849).

If these decisions be accepted as establishing that the Memorial Act of 1919, under which appellees were assuming to proceed, is an act "regulating county business," by reason of authorizing the erection of county buildings and providing the manner in which their erection shall be ordered, together with rules to be followed in erecting and paying for them, and the method by which money of the county shall be raised from the sale of bonds and the levy of taxes for that purpose, still they do not afford any support for the contention that the act is local or special. It purports to apply equally to every county in the state, and refers throughout to "the several counties in the state," to "any county," to "any board of commissioners," to the "memorial committee of any county," and to "any committee." It is not local nor special with reference to the counties to which it applies; and the Constitution does not forbid the enactment of laws regulating county business, so long as they are neither local nor special. The objections to the constitutionality of the statute urged by appellants are not well founded.

The judgment is affirmed.

STATE ex rel. DEVRICKS v. SWAILS. (No. 24196.)

(Supreme Court of Indiana. Feb. 28, 1924.)

1. **Statutes ⟸188 — Construed according to natural and most obvious import of language.**

A statute should be construed according to the natural and most obvious import of the language, without resort to subtle and forced constructions, or strict and critical adherence to technical grammatical rules.

2. **Schools and school districts ⟸48(2) — County superintendent, qualified when elected, not disqualified for re-election after effective date of statute increasing qualifications.**

Under Acts 1921, c. 54, § 1 (Burns' Ann. St. Supp. 1921, § 6378), increasing the qualifications of county school superintendents, but providing that nothing therein shall disqualify any one qualified under amended Acts 1911, c. 94, § 1, for election to such office before September 1, 1921, nor any incumbent who has qualified thereunder, at any time, a nonincumbent elected before such date must have had the qualifications prescribed by the amended act, and an incumbent qualified thereunder is not disqualified for re-election after such date.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

that nothing therein shall disqualify an incumbent qualified under section 1 of the act amended thereby (Acts 1911, c. 94), *held* not invalid as referring to an act which had ceased to exist by reason of its amendment; the purpose being, not to keep the whole section in effect, but merely to declare qualification of an incumbent when elected a sufficient qualification for re-election.

Appeal from Superior Court, Marion County.

Quo warranto by the State of Indiana, on the relation of Robert K. Devricks, against Lee E. Swails. Judgment for defendant, and relator appeals. Affirmed.

Turner, Adams, Merrell & Locke, of Indianapolis, for appellant.

Emsley W. Johnson, Chas. Remster, H. H. Hornbrook, Albert P. Smith, Paul Y. Davis, and K. F. Pantzer, all of Indianapolis, for appellee.

GAUSE, J. This is a quo warranto proceeding brought by the state upon the relation of Robert K. Devricks against the appellee, Lee E. Swails, to contest the right of appellee to the office of county superintendent of schools of Marion county. The disputed election was held on June 6, 1921.

The complaint was originally in four paragraphs, the first two of which alleged and proceeded upon the theory that there were only eight townships in Marion county on that date, and that relator received the votes of one-half the trustees, and that the auditor of Marion county cast the deciding vote in favor of relator.

The first two paragraphs of complaint were withdrawn by appellant, and the question to be decided arises upon the sufficiency of the third and fourth paragraphs of complaint, in each of which it is alleged that there were nine townships in said county.

The court below sustained demurrers to the third and fourth paragraphs of complaint, and this ruling is assigned as error.

The third paragraph of complaint alleged, in substance: That the relator was on June 6, 1921, and at all times mentioned in the complaint, eligible to be elected and hold the office of county superintendent of schools of said county. That appellee was the duly elected, qualified, and acting county superintendent by virtue of an election held in November, 1917, and that his term expired on August 15, 1921. That on June 6, 1921, there were nine townships in said county, and on such time the appellee was not eligible to hold said office or to be elected thereto, for the reason that said appellee "did not then (June 6, 1921) and does not now, and was not then and is not now, entitled to hold a professional or life license granted upon examination held by the state board of eduaction; a life state license granted by the state board of education upon a four years' standard college course or a four years' standard normal course; a county superintendent's certificate granted without examination by the state board of education as a graduate of a four years' standard college or a four years' standard normal course; that he did not then and does not now hold, and that he was not then and is not now entitled to hold, a three years' state license or a sixty months' license to teach in the high schools of this state." That the five trustees who voted for appellee knew that he was ineligible to hold said office at the time they voted for him. That after said vote was cast the county auditor cast a vote for relator, and said auditor, who was acting as clerk of said meeting, recorded the election of relator. It is then alleged that relator gave bond, took the oath of office, and demanded possession of said office of appellee, which was refused, and that appellee is unlawfully keeping relator out of possession of said office.

The fourth paragraph contains substantially the same allegations as the third paragraph, except it is alleged that at said election five trustees voted for appellee and only one trustee voted for relator, while three trustees refrained from voting at all, and thereupon said auditor cast a vote for relator.

It is the theory of appellant that, under the facts averred, the appellee was not eligible to hold said office; that this fact was known to the five trustees who voted for him; that their votes being cast for one whom they knew to be disqualified rendered their votes a nullity and that it was the same as if they had not voted at all; that of the remaining votes cast, relator received a majority, and was therefore elected.

Appellee contends that the facts averred do not show him to be ineligible. He also contends that, even if it is shown that he is ineligible, the facts averred show that relator was not elected by a required vote, and therefore he cannot maintain this action.

Relator's whole case rests first upon the proposition that the facts averred show ap-

pellee to be ineligible. If he has not shown this, he has no case.

The determination of the question raised involves the construction of section 1 of the Acts of 1921, p. 131, Burns' Supp. 1921, § 6378, and more particularly the last proviso of said section. Said section reads as follows:

"No person shall be eligible to or shall hold the office of county superintendent of schools who has not had three years successful teaching experience in public schools and who does not hold at the time of election a professional or life license, granted upon examination held by the state board of education; or a life state license granted by the state board of education upon a four year standard college course or a four year standard normal course; or a county superintendent's certificate granted without examination by the state board of education to a graduate of a four year standard college or a four year standard normal: Provided, that nothing in this act shall apply to disqualify any one for election to the office of county superintendent of schools before September 1, 1921, who has qualified under section 1 of the act amended by this section, and provided further that nothing in this act shall apply to disqualify at any time any incumbent of the office of county superintendent who shall have qualified under section 1 of the act amended by this section."

Section 1 of the act amended by the above statute, and referred to therein, was chapter 94 of the Acts of 1911, and was as follows:

"That no person shall be eligible to or shall hold the office of county superintendent, who has not been actively engaged in school work for a period of not less than two years out of the ten years next preceding his election, and hold at the time of his election, either three years state license, a sixty months license, a life or professional license, granted upon examination as now provided by law." Section 6378, Burns' 1914.

Appellant claims that under the last proviso of the act of 1921 quoted, an incumbent must at the time he may be re-elected have the qualifications prescribed in the original act.

Appellee claims that under such proviso it is only required that an incumbent possessed the qualifications required by the act of 1911 at the time of his former election.

Neither paragraph of complaint alleges that appellee was not qualified to hold such office at the time of his former election, and if the appellee's construction of such statute is correct, then the complaint is insufficient.

The question in dispute turns largely upon the meaning of the clause, "shall have qualified under section 1 of the act amended by this section."

Appellant insists that the phrase, "shall have" qualified, denotes futurity and must be held to mean that an incumbent shall be qualified when the re-election is held.

[1] A statute should be construed according to the natural and most obvious import of the language, without resorting to subtle and forced constructions, and without strict and critical adherence to technical grammatical rules.

[2] The most obvious import of the language used in the proviso in question is that, if an incumbent possessed the qualifications required by the act of 1911 at the time of his former election, then the act in question does not disqualify him. The phrase, "Shall have qualified," is in the future perfect tense. This is a tense expressing action as past, with reference to a point in the future. Standard Dictionary. Evidently the Legislature had in mind, not to change the qualifications of those already in office, but to recognize the advantages of experience as equal to the increased qualifications for new officers. Under the last proviso, an incumbent is not disqualified, even if he is re-elected after September 1, 1921, the time fixed in said act, for the increased standard of qualifications to take effect, if he shall have qualified under the act of 1911, when elected. The meaning is not the same as if the act provided that it should not apply to an incumbent "who shall be qualified under section 1 of the act amended."

We think the correct interpretation of the act of 1921 is as follows:

(1) Any one, not an incumbent, who is elected after September 1, 1921, must hold a life license or a certificate as prescribed in said act, and possess the other qualifications therein set out.

(2) Any one, not an incumbent, who was elected prior to September 1, 1921, must have had at the time of such election the qualifications prescribed by the act of 1911. It will be noticed that the first proviso, which relates to elections of new officers before September 1, 1921, uses the present tense, "who has qualified," under the former law.

(3) An incumbent is not disqualified if, at the time he was elected under the law of 1911, he was qualified according to that law.

By this construction we give effect to every clause and provision of the statute in question, while the construction contended for by appellant would render the last proviso inoperative as to elections held before September 1, 1921, as was this election, because under the construction urged by appellant the same rule would apply to new officers as to incumbents, if elected prior to September 1, 1921, namely, that in either case the one elected must at that time have the qualifications of the old law.

We think the act in question required new officers to have those qualifications at the time of the election, and that incumbents must have had those qualifications at the time of their prior election.

appellant suggests that the last proviso of the act under consideration is invalid, because it refers to an act which has been amended and has therefore ceased to exist. He cites as authority to sustain this proposition cases which hold that, when a section of an act is amended, the act as amended is the law and the old section is superseded by the new. The part of the act we are considering does not conflict with this rule. The first proviso has the effect of fixing the time when the act shall become effective, which is, of course, permissible, and the last proviso does not attempt to keep the old section in effect, but only provides that if the one elected is an incumbent who was qualified when elected, this shall be a sufficient qualification.

The principle appellant refers to has no application to this case.

The only other points set out in appellant's brief relate to the question of relator's election if appellee was not eligible to the office.

We hold that the facts averred in the complaint do not show that appellee was ineligible to the office, and, it appearing that he received a majority of the votes of all the trustees, the appellant has not stated a cause of action in either paragraph of complaint.

The judgment is affirmed.

PITTSBURGH, C., C. & ST. L. RY. CO. v. FRIEND. (No. 23877.)

(Supreme Court of Indiana. Feb. 26, 1924.)

1. Appeal and error ⟸1097(2)—Principles of law established on former appeal law of case.

Principles of law established on a former appeal remain the law of the case, and must be followed on a subsequent appeal, even if its correctness is in doubt.

2. Carriers ⟸347(5)—Negligence in getting on moving train held not shown as matter of law.

In an action for injuries sustained by plaintiff while attempting to use a broken step in getting on defendant's train, evidence that plaintiff's wife and children were on the train without tickets, and that defendant started it without giving him time to get aboard, with knowledge that not all the passengers were on, and that he stepped on after the train had started, but before it had attained a greater speed than three miles an hour, *held* not to show plaintiff guilty of contributory negligence as a matter of law.

3. Carriers ⟸344—Burden on defendant carrier to show contributory negligence in getting on train.

In an action for injuries sustained by plaintiff while getting on a train in motion, defendant's burden to show contributory negligence.

4. Damages ⟸132(3)—Damages of $8,500 held not excessive for injuries sustained to face and head, pain, suffering, and subsequent paralysis.

Damages of $8,500 *held* not excessive where plaintiff's face was cut, and he received two deep gashes in his head, and did not recover consciousness for three days after the injuries, and sustained subsequent paralysis of his face, and was unable to talk plainly seven years after his injury.

5. New trial ⟸78(3)—Effect on new trial of verdict rendered on former trial stated.

In an action for injuries, where defendant procured the verdict returned at the first trial to be set aside as erroneous, such verdict could have no influence in determining whether a verdict on new trial, in which no error was committed, was rendered for a proper sum.

6. Appeal and error ⟸1195(3)—On retrial after remand decision of appellate court held law of case as to sufficiency of complaint.

Where a complaint was sufficient under the law of the case as declared on a former appeal, no error was committed on subsequent retrial in overruling a motion in arrest of judgment based on its alleged insufficiency.

Appeal from Circuit Court, Miami County; Chas. A. Cole, Judge.

Action by Ransford Friend against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

G. E. Ross, of Logansport, for appellant.

Frank D. Butler, of Peru, Ind., and Wolf & Barnes, C. W. Roll, and Geo. B. Shenk, all of Kokomo, for appellee.

EWBANK, C. J. In a former appeal of this case the complaint was held sufficient. Pittsburgh, C. C. & St. L. R. Co. v. Friend, 70 Ind. App. 366, 118 N. E. 598. It alleged, among other things, that on April 26, 1913, a menagerie and circus had exhibited at Marion, Ind., and in the evening large crowds of people returned on defendant's (appellant's) train from Marion to their homes at Amboy and other way stations along defendant's line of railroad west of Marion; that additional coaches, in excess of the number ordinarily attached to the train, had been added to it to accommodate the crowds; that the train reached Amboy 15 minutes late, and a large number of passengers attempted to get off there, and so crowded the platform of the car where plaintiff (appellee) and his wife and children were standing and where they attempted to get on that they had difficulty in reaching the car steps; that plaintiff, with his wife and three children, had gone to the station before the train arrived, and he had purchased tickets for all of them from Amboy to Bunker Hill, a station farther west on defendant's railroad, and had all the tickets

in his possession; that the train was scheduled to stop at Amboy to take on passengers, and when it stopped plaintiff and his family were waiting on the station platform at the north side of the railroad track, and tried to get upon the car steps; that train officials were hurrying the crowds off and on, and negligently failed to hold the train until plaintiff might get on, but negligently started it before he had time to get aboard, by reason of the congested condition of the traffic; that his wife and one child did get on, and he was immediately behind them trying to get on, but the train was started, although the trainmen knew that not all of the passengers were on; that plaintiff picked up his eight year old son with his left arm, and, as the car moved slowly past him, at the rate of not more than three miles an hour, caught hold with his right hand of the rail provided for that purpose and stepped upon the car step; that he believed all of his family were on the train except the child in his arms, and knew that he had all the tickets for them; that pieces had been broken out of the car steps, and defendant had negligently permitted them to become broken and defective so that it was dangerous for passengers to step thereon, and, by reason of the negligent starting of the train without time for plaintiff to get on, plaintiff's foot was caused to slip through the broken part of the step, and he was thrown to the ground between the train and platform, and was badly injured; and that all of said conditions were the direct result of defendant's said negligence.

[1] There was evidence fairly tending to prove the facts thus alleged, and under the law as declared on the former appeal such evidence is sufficient to sustain the verdict in favor of plaintiff. That decision is the law of this case, and must be followed on a second appeal, even if its correctness were in doubt. Cleveland, etc., R. Co. v. Blind, 186 Ind. 628, 630, 117 N. E. 641; Southern R. Co. v. Clift, 190 Ind. 536, 131 N. E. 4; George B. Limbert & Co. v. Waznitsky (Ind. Sup.) 133 N. E. 128.

[2, 3] But if the question were still an open one in the case under consideration upon the evidence that plaintiff's wife and children were on the train without tickets, that the company negligently started it without giving him time to get aboard, with knowledge that not all of the passengers were on, and that he stepped on after the train had started, but before it had attained a greater speed than three miles an hour, the court could not declare, as matter of law, that this was such contributory negligence as would bar a recovery for injuries sustained by falling from the broken step. The defendant had the burden of proof to establish contributory negligence, and the question whether or not it had done so was for the jury. Section 362, Burns' 1914; section 1, c. 41, Acts 1899, p. 58. Lake Erie, etc., R. Co. v. McFarren, 183 Ind. 113, 117, 122 N. E. 330.

[4] The verdict was for $8,500, for which sum judgment was rendered, and appellant insists that the damages are excessive. There was evidence that plaintiff, fell under the car beside the rail, and that, when the trucks passed over him, one after another, they would "catch him in the seat of the pants and turn him a somerset," and would "hit him again and turn him two or three somersets in there"; that he was left lying between the outside rail and the curb, unconscious, and bleeding from his nose and ears and from cuts in his face and two big gashes in his head, and that his left ear "was almost cut off," and these cuts had to be sewed up; that he moaned and cried out, but did not recover consciousness for three days; that when he recovered consciousness the left side of his face was paralyzed and "entirely useless"; that he could not use his left eyelid, and "the left eye looked up," and he could not control it, so that his eyes were crossed, and he could not see well; that it was four or five weeks before he got out doors, and then he had to use a crutch or cane; that he could not do any work for almost or quite a year; that the left corner of his mouth was drawn around, and "his tongue was thick," and he could not talk plain, even at the time of the last trial, seven years after he was injured; and that he had been normal in all these particulars before the injury. This evidence is sufficient to sustain a verdict for the amount of damages awarded.

[5] Appellant procured the verdict returned at the first trial to be set aside as erroneous, and that verdict can have no influence in determining whether or not a verdict returned when the cause afterward was tried without the commission of error is for the proper sum.

What has been said disposes of appellant's objections to the instructions given, and to the court's refusal to give those asked.

Answers to interrogatories returned by the jury with their verdict found that plaintiff was injured while attempting to get upon a moving passenger train that was actually in motion and running at the rate of three miles an hour when he took hold of the hand rail and put his foot upon the step of the car. As we have seen, the facts thus found were not necessarily inconsistent with plaintiff's right to recover. No error was committed in overruling appellant's motion for judgment in its favor on the answers to interrogatories.

[6] The complaint being sufficient under the law of this case as declared in deciding the former appeal, no error was committed in overruling a motion in arrest of judgment, based on its alleged insufficiency.

The judgment is affirmed.

UNION TRUST CO. OF INDIANAPOLIS v. FLETCHER SAVINGS & TRUST CO. et al. (No. 24157.)

(Supreme Court of Indiana. Feb. 26, 1924.)

Corporations ⇐565(2)—Creditor not entitled to prove full claim after part has been paid from proceeds of collateral security.

The creditor of an insolvent corporation, who has received a part of his debt by the sale of collateral security which he held, is not entitled to prove the full amount of the debt as a basis for determining his interest in the estate, but only that portion remaining unpaid after deducting the proceeds of his security.

Appeal from Circuit Court, Marion County; Harry O. Chamberlain, Judge.

Action by the Union Trust Company of Indianapolis against the Fletcher Savings & Trust Company and another, receivers of the German Investment & Securities Company. Judgment for defendants, and plaintiff appeals. Affirmed.

Chas. Remster, Henry H. Hornbrook, Albert P. Smith, and Paul Y. Davis, all of Indianapolis, for appellant.

Samuel D. Miller, Wm. H. Thompson, Frank C. Dailey, and Albert L. Rabb, all of Indianapolis, for appellees.

GAUSE, J. Appellees were appointed receivers of the insolvent German Investment & Securities Company on July 15, 1918. At the time of such appointment, said insolvent company was indebted to appellant in the sum of $18,000, which was evidenced by a promissory note. Appellant held as collateral security for such debt certain bonds. Appellant filed its claim for the $18,000 and thereafter, and before any distribution was made by the receiver, appellant sold said collateral security for the sum of $10,000.

The question for decision is whether appellant is entitled to have its claim allowed for the full amount of $18,000, and share in the general distribution on that basis, or whether its claim has been reduced to $8,000, the amount remaining after crediting the amount received from the sale of the collateral.

Appellant claims that its share of the dividends from the general assets should be figured on the basis of the amount of its claim at the time of the appointment of the receiver, subject, of course, to the qualification that it should in no event receive more than the face of its claim. The court below reduced said claim by the amount realized from the sale of collateral, and allowed it in the sum remaining.

There are two lines of decisions in this country on the question here involved, it being held by some courts that a creditor of an insolvent and who holds collateral security, is entitled to share in the distribution of the general estate on the basis of the original amount of his claim notwithstanding he may have received a part of his claim after the determination of insolvency, by a sale of his collateral, provided that he shall not receive more than the full amount of his claim; this rule being referred to frequently as the "chancery rule." Other courts adhere to the doctrine that the creditor's claim is reduced, pro tanto, by any amount he has received from his collateral, before distribution, and his proportionate share in the general estate is determined on the basis of the unpaid amount of his claim. This rule is often called the "bankruptcy rule." The latter rule gets its name from the fact that it is the one applied by bankruptcy courts in the distribution of the estates of insolvents.

The question under consideration is a new one, in this state, and we are free to adopt the view that seems to us the most equitable and just to all parties.

Some of the cases cited as sustaining the so-called chancery rule were where the insolvent had made a deed of assignment for the benefit of his creditors, and the conclusion is reached that the creditors, by such deed, became invested with an ownership in the property conveyed, and their share therein should be determined from their status at that time. Most of the cases cited by appellant to sustain the chancery rule assume that to require the creditor to deduct the amount he has received from his collateral would deprive him of some of his contract rights, which his diligence in requiring security had given him.

Two cases frequently cited to sustain the rule contended for by appellant, and in which most of the authorities to the same effect are referred to, are Merrill v. National Bank of Jacksonville (1899) 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640, and Chemical National Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231.

In the first case cited, Chief Justice White wrote a dissenting opinion concurred in by Justices Harlan and McKenna, in which the arguments urged in favor of the chancery rule are fully discussed, and the bankruptcy rule advocated. In that opinion it was pointed out that the so-called bankruptcy rule did not have its origin in any express statutory provision, but resulted from the requirement for a ratable distribution of the estate. The argument that to follow the bankruptcy rule would deprive the secured creditor of contract rights was also discussed.

Appellant insists that, because it was diligent in obtaining security for its debt, to require it to reduce the amount of its claim to the amount remaining unpaid would deprive it of a part of the benefit it acquired by such diligence; that it held security for the whole

debt, and before insolvency it could have proceeded against the debtor's general estate and also against the collateral. True, the security was pledged against the whole debt, but the actual fact is that it was only security to the extent of the value of the collateral, and the practical result was that as to the amount of the debt in excess of the value of the collateral, appellant had no security. As to the part of its debt for which it, in effect, had no security, it should stand upon an equal footing with other unsecured creditors. To adopt the rule urged by appellant would give it an advantage over other creditors as to the unsecured part of its claim.

In the case at bar, appellant's diligence had resulted in its having security for $10,000 of its claim. It had no security for $8,000 thereof; that is, appellant was trusting the debtor, and his general estate, for the amount of the debt in excess of the value of the security, the same as any other unsecured creditor.

Suppose the estate will pay its general creditors 45 per cent.; then, if we grant appellant's contention, it would receive approximately $8,000 as a general creditor, and $10,000 from its collateral, thus being paid in full, although $8,000 of its claim was without security. If there is another general creditor with a claim for $8,000, he will receive approximately $3,500. In such a case the appellant would not only be rewarded for its diligence to the extent of its security, but would also have an advantage over another creditor who, like appellant as to a part of its claim, was putting his trust in the debtor and his general estate.

Certainly appellant should be given the full benefit of its foresight in demanding security, but if it only was farsighted enough to require security worth $10,000 for a debt of $18,000, it should not have the same benefit it would have derived from security worth the whole debt.

By the action of the court below, appellant received the full benefit of its contract for the collateral, and for the balance of its debt it will be treated as the other creditors similarly situated.

When the collateral was sold and the proceeds applied upon the debt, it operated as a payment of the debt to that extent. The debt was reduced that much, and the debt now amounts to only $8,000.

The appellant is in the same position as if, before the receivership, it had brought suit against the debtor for the full amount, and then before judgment, part of the debt had been paid by a sale of the collateral. In such a case appellant could have recovered judgment for only the remaining portion.

As tending to sustain the rule that a secured creditor who has disposed of his collateral is entitled to prove his claim only for the amount remaining unpaid after deducting the amount he has received from the security, see the following cases: Re Kapu, 18 Hawaii, 369; Doolittle v. Smith, 104 Iowa, 403, 73 N. W. 867; Third Bank v. Lanahan, 66 Md. 461, 7 Atl. 615; Sullivan v. Erle, 8 Colo. App. 1, 44 Pac. 948; Erle v. Lane, 22 Colo. 273, 44 Pac. 591; State v. Bank, 40 Neb. 342, 58 N. W. 976; State Bank v. Esterly, 69 Ohio St. 24, 68 N. E. 582; Van Winkle v. Blackford, 54 W. Va. 621, 46 S. E. 589; Jamison v. Adler-Goldman Co., 59 Ark. 548, 28 S. W. 35; Philadelphia Co. v. Anniston, 106 Ala. 357, 18 South. 43; Wheat v. Dingle, 32 S. C. 473, 11 S. E. 394, 8 L. R. A. 375.

In the case of Re Kapu, supra, the court said:

"It is clear that, if after presenting his claim a secured creditor realizes sufficient from the security which he holds to pay it in full, the debt (and the claim for it) is extinguished. Why then is it not partially extinguished to the extent of the amount received? The creditor has by his own act wiped out the debt in the one case and in the other has reduced the debt just so much. If the debt can be wholly paid in such a way, why can it not be partially paid? The creditor seems to be asking for a dividend based on something which he has already received. In this case the creditor having exhausted his security, and having a balance due him of $464.05, which is unsecured, claims the right to take more than half of the assets in the hands of the administrator and have its unsecured balance paid to it in full and cut down all other unsecured claims of creditors accordingly. Such a proposition is not only unjust and inequitable, but it would give one unsecured creditor a preference over all the other unsecured creditors. That this unsecured creditor was at the time of filing its claim a secured one is immaterial, because by its own voluntary act it derived all the benefit of the security which it held and put itself, as to the balance due, in the class of unsecured creditors."

It was said by the court in the case of Sullivan v. Erle, supra:

"Where a part only of the creditor's claim is secured by collateral, he is and should be protected in his security. His vigilance and foresight are rewarded to the extent that he exercised it, but no further. Before realizing upon the security, the whole debt is due. Where he has sold the securities and received money, the debt for the payment of which he took the security is paid pro tanto—to that extent extinguished. What remains, and what remained in this case as the debt of the insolvent estate, at the time of the application for a dividend, was the balance remaining unpaid after applying the proceeds of the collateral, and as to that the creditor had only the rights of other creditors—to have it paid pro rata. * * * The rule contended for by appellant would work gross injustice by giving to one creditor full payment for the unsecured balance, while an unsecured creditor would get but a fraction."

The basis for the distribution of all insolvent estates should be to place all credi-

that none be given a greater preference than the nature of his claim entitles him to.

Evidently Congress believed that the rule we are adopting formed the most equitable basis for distribution, because under the Bankruptcy Act (U. S. Comp. St. §§ 9585–9656) a secured creditor is required to deduct any amount he had realized upon his security.

Our own Legislature has recognized the equity in such a plan by providing that it shall be the rule in distributing estates voluntarily assigned for the benefit of creditors. Section 3319, Burns' 1914.

If, in order to secure a just distribution, as contended for by appellant, it is necessary to permit the secured creditor to prove the full amount of his claim, notwithstanding he may have received a part thereof from his collateral security, and that to do otherwise would deprive him of his just rights, then a just distribution is denied him where either the insolvent is in bankruptcy, or has made a voluntary assignment.

We are persuaded that the practice followed in the case of bankrupts, and in our state in the case of voluntary assignments, and adhered to by the courts in the cases herein cited, that requires the secured creditor to deduct from his claim the amount he has realized from his security, and permits him to share in the general estate on the basis of the unpaid balance, is the more equitable rule.

An additional argument for the adoption of this rule is that it tends to promote uniformity of practice in the distribution of insolvent estates, since it is followed already in bankruptcy and voluntary assignment cases.

The question as to whether the holder of collateral security, who has not realized from such security at the time of proving his claim or at the time of distribution, can be compelled to dispose of such security, or account for its value, is not before us in this case, and we therefore do not attempt to decide that question.

The judgment is affirmed.

KLINE v. STATE. (No. 24276.)

(Supreme Court of Indiana. Feb. 27, 1924.)

1. Judges ⇐54—Defendant proceeding to trial before regular judge waives right to have case tried by special judge.

Where defendant withdrew his motion for a change of judge, and proceeded to trial before the regular judge without objection until after the verdict had been returned, he waived his right to have the cause tried by a special judge.

2. Criminal law ⇐1048—Withdrawal of motion for change of judge not available error.

Where the record recites that a motion for a change of judge was withdrawn several days before the trial commenced by the attorney who had appeared for defendant up to that time, before whom, as notary public, the motion had been sworn to, and no objection or exception is shown either to its withdrawal or to the regular judge acting thereafter, *held*, that there was no available error in the withdrawal of the motion.

3. Criminal law ⇐1048—Rulings must be excepted to when made.

Under Burns' Ann. St. 1914, § 656 (Rev. St. 1881, § 626), rulings must be excepted to at the time they are made, in order to be available as error on appeal.

4. Criminal law ⇐696(5)—Overruling motion to strike out evidence not reversible error where admitted without objection.

Where evidence was admitted without objection in answer to questions that fully disclosed exactly what would be the character of the answers, overruling a motion to strike it out ordinarily is not reversible error.

5. Criminal law ⇐696(3)—Motion to strike out evidence for reasons different from those stated in objection to its admission overruled.

Where an objection is made to the introduction of evidence, a motion to strike it out for reasons different from those stated in the objection to its admission may be overruled without error.

6. Disorderly house ⇐17—Evidence held to support conviction for keeping house of ill fame.

In a prosecution under Burns' Ann. St. 1914, § 2357 (Acts 1905, c. 169), for keeping a house of ill fame, resorted to for purposes of prostitution, evidence *held* to so clearly support a conviction that the Supreme Court would not be justified in setting the verdict aside because of irregular rulings.

Appeal from Criminal Court, Marion County; James Collins, Judge.

Mike Kline was convicted of keeping a house of ill fame, resorted to for purposes of prostitution, and he appeals. Affirmed.

Clyde E. Baker, of Indianapolis, for appellant.

U. S. Lesh, Atty. Gen., Mrs. Edward F. White, Deputy Atty. Gen., and O. S. Boling, of Indianapolis, for the State.

EWBANK, C. J. [1] Appellant was charged by affidavit in the language of section 2357, Burns' 1914 (section 460, c. 169, Acts 1905, p. 690), with the offense of keeping a house of ill fame, resorted to for purposes of prostitution and lewdness. Overruling his motion for a new trial is assigned as error. The record recites that a motion for a change of judge was filed, and another

tion; that some days later the case was called for trial before the regular judge, and that defendant thereupon came in person, and waived arraignment and entered a plea of not guilty, after which he filed a motion to suppress certain evidence, which motion is not shown to have been ruled on, and that the cause was then submitted to a jury for trial; that the trial continued throughout two days, during which 11 witnesses were examined (5 being recalled), the jury was instructed, and the verdict was returned, without the motion for a change of judge being refiled or any objection being offered to the regular judge presiding. By withdrawing his motion for a change of judge, and proceeding to trial before the regular judge without objection until after the verdict had been returned, appellant waived his right to have the cause tried by a special judge. Mattingly v. Paul, 88 Ind. 95; Spurlock v. State, 185 Ind. 638, 642, 114 N. E. 209.

[2] Appellant also complains because his motion for a change of judge was permitted to be withdrawn. But the record recites that it was withdrawn in open court several days before the trial commenced by the attorney who had appeared for him throughout, up to that time, before whom (as notary public) the motion had been sworn to, and no objection or exception is shown, either to its withdrawal or to the regular judge acting thereafter. In the absence of any objection or exception, there was no available error in what was done. Mattingly v. Paul, 88 Ind. 95; Spurlock v. State, 185 Ind. 638, 642, 114 N. E. 209.

[3-5] Rulings must be excepted to at the time they are made, in order to be available as error on appeal. Section 656, Burns' 1914 (section 626, R. S. 1881); Brown v. Ohio, etc., R. Co., 135 Ind. 587, 35 N. E. 503; Rose v. State, 171 Ind. 662, 671, 87 N. E. 103, 17 Ann. Cas. 228; Ewbank Manual (2d Ed.) § 24b. Appellant also complains of the refusal to strike out certain evidence after it had been admitted without being objected to for any of the reasons now urged by counsel. Where evidence has been admitted without objection in answer to questions that fully disclosed exactly what would be the character of the answers, overruling a motion to strike it out ordinarily is not reversible error. Eckman v. Funderburg, 183 Ind. 208, 213, Co. v. Wynant, 134 Ind. 681, 694, 34 N. E. 569; Indiana Trial Ev. § 140. And, even where an objection was made to the introduction of evidence, a motion to strike it out for reasons different from those stated in the objection to its admission may be overruled without error. Lane v. State, 151 Ind. 511, 516, 51 N. E. 1056.

[6] Many facts proved in this case are not such as may be recited with propriety. There was uncontradicted evidence, much of which was given by the appellant, himself, to the effect that the officers came to the door of the house in question, late at night, and that at the call of his wife appellant went to the door wearing only his undershirt and trousers; that he called a lawyer by phone, and had the lieutenant in charge of the squad of police talk to him; that he telephoned to the police station to know what bond would be required, and then told his wife to go to the safe and get him $1,500, and that she "kicked in the door," fastened with a spring lock, of the room where his hat, coat, and shoes were, and got $1,500 out of a safe in a little closet, which he deposited as cash bonds for his wife and the other three women and two of the men that the police had found in the house. There was also evidence of facts which appellant denied, among which were the following: That, when one of the men arrested there asked for his money back, appellant said, "Never mind, we will take care of that"; and that appellant lived and long had lived in that house, and it was kept by him. The bad character of the house and of the women found in it that night was proved by overwhelming evidence, the proof of the bad character of one of them being wholly undisputed, and there was much testimony not fit to be set out in an opinion of the court. We have carefully considered the objections urged by counsel to the admission of certain evidence and the giving of instructions, but are convinced that the evidence so clearly and overwhelmingly supports the verdict that we should not be justified in setting it aside because of the rulings complained of, even if they were shown to be irregular. Therefore we shall not further discuss the question whether or not they were correct in particulars.

The judgment is affirmed.

STATE ex rel. MASON v. JACOBS et al. (No. 24594.)

(Supreme Court of Indiana. Feb. 26, 1924.)

1. Drains ⇐1—Authority to establish within state's reserved power to provide for public welfare.

Authority to establish public drains rests in the state's reserved power to enact and enforce laws in the interest of the public welfare and for the general public benefit.

2. Constitutional law ⇐60—Drains ⇐1—Power to establish drains may be delegated to local authorities.

Establishment of public drains is an exercise of a sovereign power, which may be delegated to local authorities, or such other bodies, companies, or corporations as the Legislature chooses.

3. Statutes ⇐190—Statute subject to judicial interpretation when not plain and unambiguous.

When the meaning of a statute is not plain and unambiguous, judicial interpretation thereof may be properly demanded.

4. Statutes ⇐178—Operation of common-law rules of construction held not precluded by statute.

Burns' Ann. St. 1914, § 240, requiring that words and phrases in statutes be taken in their plain, ordinary, and usual sense, and that technical words and phrases be understood according to their technical import, is in part merely declaratory of the common law, but does not preclude the operation of other common-law rules of equal dignity and importance.

5. Drains ⇐49—"Damaged" and "injured" in statute authorizing recovery on contractor's bond by land owners refer to damage to property.

The words "damaged" and "injured" in Acts 1907, c. 252, § 5 (Burns' Ann. St. 1914, § 6144), providing that if persons whose lands are assessed for construction of a drainage ditch are "damaged" by the contractor's failure to complete the work within the time limited, the full amount of such damages may be recovered in an action on the contractor's bond by the state, on the relation of the person "damaged," for the use of the person "injured or damaged," etc., relate to the same subject-matter and look to the same general purpose, and hence must be considered in the sense first employed as meaning damage to property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Injure.]

6. Damages ⇐1—"Damaged" and "damages" defined.

"Damaged," in the ordinary and usual sense of the term, signifies an injury done, and "damages" the estimated money equivalent for such injury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Damage—Damages.]

Benefits not recoverable under contractor's bond for failure to complete work in time.

Acts 1907, c. 252, § 5 (Burns' Ann. St. 1914, § 6144), declaring drainage contractors liable on their bonds for damages to persons, whose lands are assessed for construction of drains, by failure to complete the work within the time limited, does not provide compensation for loss of delayed anticipated benefits from cultivation of land to be drained; such bonds being intended to indemnify such owners only for damages directly resulting from the work of construction.

Appeal from Circuit Court, Davies County; James W. Ogdon, Judge.

Action by the State of Indiana, on the relation of Taylor Mason, against Thomas Jacobs and another. Judgment for defendants, and relator appeals. Transferred from Appellate Court under Burns' Ann. St. 1914, § 1394, cl. 2. Affirmed.

Superseding opinion of Appellate Court, 138 N. E. 775, 140 N. E. 919.

W. A. Cullop, of Vincennes, and Alvin Padgett, of Washington, Ind., for appellant.

Chas. E. Henderson, of Indianapolis, for appellees.

MYERS, J. Appellant, the relator, brought this action against appellees to recover damages on account of an alleged breach of a certain bond given by appellee Jacobs as principal and his coappellee as surety for the faithful performance by Jacobs of a certain contract for the construction of a public drain established by the Knox circuit court under the provisions of chapter 252, Acts 1907, p. 508 (section 6140 et seq., Burns' 1914). The surety's demurrer to the complaint for want of facts was sustained, and this ruling of the court is assigned as error.

From the complaint it appears that the contract and bond were executed March 21, 1916. The contract was between Jacob S. Spiker, superintendent of construction, and appellee Thomas Jacobs, and it was therein stipulated that the latter shall complete the work of drainage in accordance with the plans and specifications therefor on or before December 1, 1916. The bond, after identifying the drainage proceeding and the fact of letting the contract to Jacobs, continued as follows:

"Now, therefore, if said contractor shall well and faithfully do and perform said work in all respects, * * * and according to the time, terms, provisions, and conditions specified in the said contractor for said work, * * * and shall pay all damages to any person, firm, or corporation, which shall suffer loss or damage by reason of any failure or neglect of said contractor to properly perform such work or carry out his contract in any particular, then this obligation shall be void; otherwise to be and remain in full force and effect."

time fixed by the contract, and, by reason of such breach only, that part of relator's land—about 40 acres—drained by the proposed ditch, and for which he paid an assessment of $267.60, could not be cultivated in corn for the years 1917 and 1918, as relator intended to do and would have done had the ditch been completed according to contract; that the rental value of the land without the drainage as provided in the contract was $100 per year, and with the drainage constructed as per contract its rental value would have been $5,000 for the year 1917 and $3,000 for the year 1918, whereby relator was damaged in the sum of $8,000.

Appellant points to section 5 of the act, supra (section 6144, Burns' 1914), as authority for the execution of the contract and bond and his right to maintain this action. The provision of this statute on which appellant relies, provides:

"And in case any person or party whose lands are assessed for the construction of such ditch shall be damaged by reason of such default and failure * * * to complete the work within the time limited, such contractor * * * shall be liable on his bond to the person or party so damaged to the full amount of such damages, which may be recovered in any court of competent jurisdiction in a suit or an action on such bond by the state of Indiana on the relation of the person or party damaged for the use of such person or party injured or damaged, and the amount recovered shall be paid to the party injured."

[1, 2] It must be conceded that the present controversy grew out of a public and not a private enterprise. The authority for the establishment of public drainage in this state rests upon the reserved power of the state to enact and enforce laws in the interest of public welfare and for the general public benefit. Such legislative action is the exercise of sovereign power which may be delegated to local authorities, or to such other bodies, companies, or corporations as the Legislature may choose to recognize and thus endow. Bemis v. Guirl Drainage Co., 182 Ind. 36, 105 N. E. 496.

The contract and bond at bar is in accordance with the legislative prescribed machinery for the successful execution of the particular drainage undertaking, but appellant was not a party to either the contract or bond. These instruments were public in character, and appellant's interests are purely private. However, he claims that the failure of the contractor to complete the ditch within the time stated in the contract was a breach of the bond which, by statute, was made to cover damage on account of delayed benefits from the drainage. He cannot and does not rely upon any principle of the common law to sustain his contention, but upon the statutory provision quoted from section 5, supra. Hence, the question presented is: Did the Legislature thereby intend to create a new right or liability unknown to the common law, or did it intend to provide a remedy additional to that already existing? In Grams v. Murphy, 103 Minn. 219, 222, 114 N. W. 753, 755, the question was stated thus:

"In this case the question is, not whether a landowner may be inconvenienced and deprived of certain profits if there is delay in draining his land, but whether it was the intention of the lawmakers to provide this statutory bond for the purpose of compensating him."

[3] We quite agree with appellant that, when the meaning of a statute is plain and unambiguous, there is no room for judicial construction, but, on the other hand, when the contrary certainly appears, judicial interpretation may be properly demanded. Felser, Auditor, v. Bosson, 189 Ind. 484, 492, 128 N. E. 145; Ward v. State, 188 Ind. 606, 125 N. E. 397.

[4] There are numerous well-defined and well-recognized rules for construing statutes, but none of them are more frequently applied by the courts than the following:

"Words and phrases shall be taken in their plain, or ordinary and usual sense. But technical words and phrases, having a peculiar and appropriate meaning in law, shall be understood according to their technical import." Section 240, Burns' 1914.

This statutory rule of construction is merely declaratory in part of the common law on that subject. But it does not preclude the operation of other common-law rules of equal dignity and importance in giving effect to the legislative intent. 2 Lewis' Sutherland Statutory Construction (2d Ed.) § 396.

[5] The provision of the statute to which we have referred uses the word "damaged" four times and the word "injured" twice; the last five of which, considering the word "injured" interchangeably with "damaged," all relate, no other intention appearing, to the same subject-matter and look to the same general purpose, and must be considered in the sense first employed, namely, damage to property. Ryan v. State, 174 Ind. 468, 474, 92 N. E. 340, Ann. Cas. 1912D, 1341, and cases there cited.

[6] This statutory provision also uses the word "damages" in the sense of compensating the party damaged. These words "damaged" and "damages," together have a well-established common-law meaning, and we may say, when they are measured by the "ordinary and usual sense" rule, their true import is just as apparent. The public generally, in speaking of a thing damaged, understands perfectly that such reference signifies an injury done, and by "damages" the estimated

Such are the definitions usually attributed to these words by lexicographers. Bouvier's Law Dictionary; Anderson's Law Dictionary; Century Dictionary; Webster and Standard Dictionaries.

[7] In this case there is no claim of any damage or injury whatever to appellant's land, nor is recovery sought on the theory of common-law negligence, nor for a damage not common to all persons whose lands were assessed. It is needless to say, except by way of reminder, that such drainage contractor would be liable to any landowner, whether his land was assessed or not, for any damage or injury done, proximately caused by negligent acts of omission or commission in the prosecution of the work. But in such case, there would be no liability on the bond. For aught appearing in the case at bar, the contractor never did anything in the way of work on the ditch under his contract. If that be true, the statute (section 6144, supra) gave the construction commissioner a remedy, which under certain contingencies, extended to the contractor's bond. But any action the commissioner might take would have no bearing upon the direct individual right of the appellant. However, in either case, the only authority to pursue the bond is statutory.

Considering the drainage statute as a whole, and especially the provision relied on by appellant, we are satisfied that the Legislature did not thereby intend to create a new cause of action, and that the words "damaged" and "damages" were used in their common-law sense; but, on the other hand, the language of the statute warrants the conclusion that a landowner whose land has been assessed is given recourse to the contractor's bond as an additional remedy for the collection of his damages only in case of an injury to the land itself or to growing crops or grasses, or by lessening its then productiveness, or for a reduction of its then rental value, brought about by the failure of the contractor to complete the work within the time limited. "The general purpose and scope of the act is to secure drainage for the public good, and not to compensate such owners because of delay in carrying out the project." The more reasonable and natural meaning of that part of the statute is that the bond is intended to indemnify only a particular class of landowners, who may be damaged as a direct result of the work of construction. Grams v. Murphy, supra, page 224 (114 N. W. 753).

For the reasons stated, we are led to conclude that the bond at bar does not provide compensation for loss of delayed anticipated benefits, by reason of the contractor's failure to complete the ditch on time.

Judgment affirmed.

BEAVER PRODUCTS CO., Inc., v. VOORHEES. (No. 11788.)

(Appellate Court of Indiana, Division No. 2. Feb. 29, 1924.)

1. Trover and conversion ⇐=1—Conversion defined.

Conversion consists, as a tort, either in the appropriation of the personal property of another to the party's own use and benefit, or in its destruction, or in exercising dominion over it, in exclusion and defiance of the rights of the owner or lawful possessor, or in withholding it from his possession, under a claim and title inconsistent with owner's.

2. Trover and conversion ⇐=9(12)—Buyer's failure to return rejected shingles resold under seller's authority held not a conversion.

Where seller shipped to buyer a lot of shingles that were not of the kind ordered by him, and thereafter authorized buyer to sell the shingles for it, but later ordered them reshipped to it, after buyer had made arrangements for resale, the latter advising seller that he could not comply with its order due to that fact, *held*, that buyer was the agent of seller to sell the shingles at the time he was ordered to reship them, that he was claiming no right of ownership against seller, and, if the order of seller was a demand, it required seller to do more than he was required to perform, and buyer's statement that the shingles had been resold did not amount to a refusal of possession to seller because of any claim by buyer to the property, and there being no showing that seller repudiated the acts of buyer in selling the shingles, his failure to return them to seller could not amount to a conversion.

Appeal from Circuit Court, Clinton County; Earl B. Stroup, Judge.

Action by the Beaver Products Company, Inc., against Richard D. Voorhees. Judgment for defendant, and plaintiff appeals. Affirmed.

Von Brunt & Harker, of Frankfort, for appellant.

Thos. M. Ryan, of Frankfort, for appellee.

NICHOLS, J. Action by appellant for damages for conversion. The only error assigned is the action of the court in sustaining appellee's demurrer to the complaint. It is averred therein that on and prior to February 24, 1921, the Vulcanite Roofing Company was the owner of 50 squares of shingles which it shipped on said date to appellee, such shipment being intended to fill an order from appellee, but by mistake of said roofing company the shingles so shipped were not the kind ordered. Thereupon appellee wrote to said roofing company, stating that the shingles were not the kind ordered, and that he would sell them for said company or it could move them elsewhere, with the suggestion that he preferred them

moved elsewhere in order to get them out of the way. Said roofing company consented to the proposition of appellee to sell said shingles for it, and permitted them to remain in his possession that he might attempt to sell them. On May 5, 1922, said roofing company wrote a letter to appellee, from which we quote as follows:

"We presume that you would like to get rid of these 50 squares of singles, and we would suggest that you kindly arrange to ship them to our company at Chicago, and when they are received we will arrange to pass credit to your account of $270.65, which is the amount charged against you on these 50 squares."

Upon receipt of this letter appellee in answer thereto wrote to said roofing company as follows:

"We sold these 50 squares on a large barn in the country here, although the party has not ordered them out yet, but he expects to start reroofing now within the next few days. When your salesman was here some few weeks ago he said that he had orders to sell these shingles at $4.00 per square in order to clean up this old account, and we sold them to this farmer on that basis, and besides have to deliver them ten miles in the country. It is impossible for us to ship them to Chicago since they are sold here. * * * We trust this will meet with your approval, and as soon as they are delivered we will mail you a check for the $200.00."

On May 28, 1922, said shingles were destroyed by fire while yet in the possession of appellee, by reason of which the foregoing the roofing company was damaged in the sum of $350. Thereafter said roofing company assigned its assets, including its claim against appellee as above set out, to appellant, and it is now the owner thereof, and demands judgment for $350.

It is appellant's contention that the failure of appellee to ship the shingles to it, as requested in its letter, amounted to a conversion thereof for which appellee is liable in damages. But we are not impressed with appellant's contention. Conversion is defined in 38 Cyc. p. 2005, as—

"An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights."

[1, 2] In Hunter v. Cronkhite, 9 Ind. App. 470, 36 N. E. 924, this court quotes with approval the following definition from 4 Encyc. of Law, p. 108:

"Conversion consists, as a tort, either in the appropriation of the personal property of another to the party's own use and benefit, or in its destruction, or in exercising dominion over it, in exclusion and defiance of the rights of the owner or lawful possessor, or in withholding it from his possession, under a claim and title inconsistent with the owner's."

There is no averment in appellant's complaint that would constitute a conversion of the property involved on the part of appellee, in the light of the foregoing definitions. The agreement between the roofing company and appellee constituted appellee as the agent of the company, and in that capacity he was serving at the time he made the sale. At no time did he claim a right to or ownership of the property as against the roofing company, but, after stating that the property had been sold, informed the company that as soon as payment was made the remittance thereof would be made to the company. These acts were wholly within the scope of appellee's authority as agent of the roofing company. Even if appellant's letter were construed as an unequivocal demand for the possession of the property, it also required that appellee should ship the same back to the company. There was no obligation on the part of appellee, even if he had not sold the property, to do more than deliver the possession upon demand. His letter to the roofing company stating the conditions as to the sale did not amount to a denial of the roofing company's right to possession. We hold that, under the averments of the complaint, appellee was the agent of the roofing company to sell the shingles involved at the time he received the letter with suggestion to ship them back, and that he was claiming no right of ownership or of possession against appellant's assignor, the roofing company; that, even if such letter was a demand, it required more of appellee than he was required to perform; and that appellee's letter stating conditions as to the sale did not amount to a refusal of the possession to appellant because of any claim by appellee of right or ownership of the property, and, in the absence of an allegation that the roofing company repudiated the act of appellee in selling the shingles as stated by him in his letter to the roofing company, his failure to ship them to the roofing company prior to the fire cannot be held to amount to a conversion. See Cumberland Telephone Co. v. Taylor, 44 Ind. App. 27, 33, 88 N. E. 631.

Judgment affirmed.

MILLER v. SEILER. (No. 11678.)

(Appellate Court of Indiana, Division No. 1. Feb. 26, 1924.)

1. Pleading ⇐308—Copy of written instrument must be filed with pleading or sufficient excuse alleged.

When a pleading is founded upon a written instrument, the original or a copy thereof must be filed with the pleading, or the pleading must contain averments showing sufficient excuse for failure so to do.

2. Pleading ⇐308—Excuse for not filing contract with pleading held properly alleged.

Averment in cross-complaint that contract forming the basis of the pleading was not made a part thereof for the reason that it was in the possession of plaintiff, who, upon demand made upon him before the filing of the cross complaint, refused to give it up, was sufficient to excuse the filing of a copy of the contract with the pleading.

3. Courts ⇐114—Record may be corrected nunc pro tunc after term of court.

Whenever the record of a cause shows that court proceedings were had of which no proper or sufficient entry was made by the clerk, it is within the power, and it is the duty, of the court upon proper application and notice to supply such omission by a requisite nunc pro tunc entry, and this power does not cease with the term of court at which the proceedings took place.

4. Courts ⇐114—Motion for nunc pro tunc entry not independent action requiring complaint and summons.

A motion for a nunc pro tunc entry to correct a record is not an independent action requiring complaint and summons, but is auxiliary to the preceding record in the case.

5. Courts ⇐114—Notice of motion for nunc pro tunc entry after judgment may be served upon attorney of record.

Notice of motion for a nunc pro tunc entry to correct the record, after entry of final judgment, served upon attorney of record, was sufficient notice to the party represented by the attorney; the authority of the attorney not ceasing with final judgment, where the correctness of record of trial is questioned.

6. Judges ⇐25(2)—Special judge authorized to determine motion for nunc pro tunc entry after final judgment in cause heard and determined by him.

Where, pursuant to Burns' Ann. St. 1914, § 427, a special judge is appointed to hear and determine a delegated cause, he acquires exclusive jurisdiction of the case throughout all of its stages with substantially the same powers as to that case as the regular judge would have had, and he may after final judgment determine a question presented by a motion for a nunc pro tunc entry correcting the record.

Appeal from Circuit Court, Warrick County; Marshall R. Tweedy, Special Judge.

er, Jr. Judgment for defendant, and plaintiff appeals. Affirmed.

James T. Cutler, of Evansville, and U. W. Youngblood, of Booneville, for appellant.

James W. Davis, of Booneville, for appellee.

REMY, C. J. Suit by appellant against appellee on a promissory note executed as a part of the purchase price of farm machinery, and to foreclose a chattel mortgage given to secure the payment of the note. Appellee answered: (1) Denial; and (2) failure of consideration. Appellee also filed a cross-complaint, setting forth that, contemporaneously with the sale of the machinery and the execution of the note and mortgage sued on, appellant by written instrument warranted the machinery, and agreed that, if it failed to do the work for which it was purchased, appellant would take it back, cancel the note and mortgage, and return to appellee a cash payment of $500; that the written instrument is not made a part of the cross-complaint as an exhibit or otherwise, for the reason that the same is now in the hands of appellant who refuses to give it up; that the machinery did not do the work as warranted, and is worthless; that appellee is entitled to the cancellation of the note and mortgage, and the return of the cash payment with interest.

A demurrer to the cross-complaint having been overruled, and issues joined by denial to the affirmative answer and cross-complaint, there was a trial by court resulting in a finding against appellant on the complaint, and in favor of appellee on his cross-complaint.

At the close of the term of court at which the cause was tried, and while a motion for a new trial was pending, the official term of the judge who had heard the cause expired, and he was succeeded by another. The newly elected judge being disqualified by reason of his previous connection with the case as attorney, the former judge whose term of office had just expired was, by agreement of the parties, appointed and qualified as special judge, and as such overruled appellant's motion for a new trial, and rendered judgment for appellee.

[1, 2] The action of the court in overruling the demurrer to the cross-complaint is first urged as a cause for reversal. The only objection presented by the memorandum which accompanies the demurrer is that the written contract of warranty is not set out as a part of the pleading as an exhibit. It is well settled that, when a pleading is founded upon a written instrument, the original or a copy thereof must be filed with the pleading, or the pleading must contain averments showing sufficient excuse for the failure so

(1883) 92 Ind. 556. Appellee in his cross-complaint avers that the contract which forms the basis of the pleading is not made a part thereof, for the reason that it is in the possession of appellant who, upon demand made upon him before the filing of the cross-complaint, refused to give it up. A sufficient excuse is thus shown. Keesling v. Watson (1883) 91 Ind. 578; Walter A. Wood, etc., Mach. Co. v. Irons (1894) 10 Ind. App. 454, 36 N. E. 862, 37 N. E. 1046. The court did not err in overruling the demurrer.

After the close of the term of court at which the motion for a new trial was overruled and final judgment was rendered, appellee filed a motion to correct the record of the judgment by nunc pro tunc entry, and served notice thereof upon one of appellant's attorneys of record who acknowledged the service as "plaintiff's attorney." Over appellant's objection made by the attorney on whom the notice had been served, and who had entered his special appearance, the motion was heard by the special judge, resulting in an order directing the correction to be made. Assignments of error challenge the right to correct the record after the close of the term at which the judgment was rendered, the sufficiency of the notice to confer jurisdiction over appellant, and the authority of the special judge to hear and determine the question presented by the motion.

[3-5] Whenever the record of a cause shows that court proceedings were had of which no proper or sufficient entry was made by the clerk, it is within the powers, and it is the duty, of the court upon proper application and notice, to supply such omission by a requisite nunc pro tunc entry; and this power does not cease with the term of court at which the proceedings took place. Smith v. State (1880) 71 Ind. 250. A motion for a nunc pro tunc entry to correct a record is not an independent action requiring complaint and summons, but is auxiliary to the preceding record in the case. Indianapolis, etc., Transit Co. v. Andis (1904) 33 Ind. App. 625, 72 N. E. 145. Appellant contends that, since the motion to correct the record was filed after final judgment, the notice served upon his attorney of record was insufficient as a notice to appellant. It is argued that the connection with the case of the attorney who had represented appellant at the trial was terminated by operation of law when final judgment was rendered. To the rule that the authority derived by an attorney at law from a general retainer to conduct a litigation on behalf of his client ceases when the final judgment is rendered, there are many exceptions. Brown v. Arnold (1904) 131 Fed. 723, 67 C. C. A. 125. One of the exceptions to the general rule is where the correctness of the record of the trial is questionable only to his client, but to the court as well, to see that the record is correctly made, and, after it is so made, that it be protected from change. It follows that, where a motion to correct a record by nunc pro tunc entry is filed by one of the parties after the close of the term of court at which the final judgment was rendered, the notice thereof is properly served upon the attorney of record of the other party. Doane v. Glenn (1872) 1 Colo. 454; Lusk v. Hastings (1841) 1 Hill (N. Y.) 656.

[6] Where, pursuant to section 427, Burns' 1914 (section 415, R. S. 1881), a special judge is appointed to hear and determine a designated cause, such special judge, having qualified, acquires exclusive jurisdiction of the case throughout all of its stages, with substantially the same powers as to that case as the regular judge would have had. Perkins v. Hayward (1890) 124 Ind. 445, 24 N. E. 1033. See, also, Staser v. Hogan (1889) 120 Ind. 207, 21 N. E. 911, 22 N. E. 990. We hold that the determination of the question presented by appellee's motion for a nunc pro tunc entry was within the jurisdiction of the special judge.

The decision of the court is sustained by the evidence.

Affirmed.

ANGELL v. ARNETT. (No. 11734.)

(Appellate Court of Indiana, Division No. 1. Feb. 27, 1924.)

1. Trial ⇐233(2)—Stating allegations of complaint in instruction held not error.

The court may state the allegations of a complaint in an instruction, where it does not purport to inform the jury as to whether or not plaintiff would be entitled to recover on the allegations thereof, it being immaterial that one of the paragraphs in the complaint does not state a cause of action, for defendant may waive the sufficiency of a complaint against him and rely on plaintiff's failing to establish a cause of action against him, if the evidence goes no further than the allegations of the complaint.

2. Pleading ⇐406(9)—Rule stated as to when recovery permitted on insufficient complaint.

A party may recover on an insufficient complaint to which no demurrer has been filed if the evidence tends to establish all the material averments thereof and such other facts as are necessary to its sufficiency.

3. Trial ⇐232(3)—Instruction held not objectionable for failure to limit recovery to paragraph of complaint which stated cause of action.

Where the second of two paragraphs of a complaint for injuries did not state a cause of action, an instruction giving forms of verdict, one of which should be returned, depend-

not objectionable as not limiting the return of a verdict in favor of plaintiff to the first paragraph; a recovery being permitted on an insufficient complaint to which no demurrer has been filed if the evidence tends to establish the material averments thereof, and other facts necessary to its sufficiency and, it being for the jury to determine whether the injury was inflicted on the theory alleged in the first paragraph, or the theory which plaintiff attempted to allege in the second paragraph.

4. Appeal and error ⟸739—Joint assignment of error as to refusal to give instructions fails if any one properly refused.

An assignment of error that the court erred in refusing to give certain numbered instructions requested by appellant is joint, and, if any one of the instructions was properly refused, the assignment fails.

5. Appeal and error ⟸761—Assignment of error held insufficient to present any question for review.

Where the proposition and point merely stated that the refusal of the court to give an instruction "was erroneous and prejudicial," with the citation of a single authority, the refusal of the instruction would not be considered.

Appeal from Superior Court, Marion County; James M. Leathers, Judge.

Action by Fred Arnett against Joseph M. Angell. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank S. Roby, Arthur R. Robinson, Frank A. Symmes, and Garth B. Melson, all of Indianapolis, for appellant.

Clarke & Clarke, of Indianapolis, for appellee.

BATMAN, J. This is an action by appellee against appellant to recover damages. The complaint is in two paragraphs. The first is based on the alleged negligence of appellant, in striking appellee's automobile with a truck, both of which at the time were being driven on a public highway. The second is the same as the first, except that, instead of alleging that said act was negligently and carelessly done, it alleges that it was willfully and maliciously done. The complaint was answered by a general denial. The cause was submitted to a jury for trial, resulting in a verdict in favor of appellee. The jury also returned its answers to certain interrogatories. Appellant filed a motion for judgment thereon, notwithstanding the general verdict, and also a motion for a new trial, each of which being overruled, judgment was rendered in favor of appellee. This appeal followed, based on the action of the court in overruling said last motion.

[1] Appellant contends that the court erred in giving instruction No. 1. This instruction is merely a statement of each paragraph of the complaint, and does not purport to instruct the jury that appellee would be entitled to recover on proof of the allegations thereof. It has been held to be proper to state the allegations of a complaint in an instruction. City of Indianapolis v. Moss (1920) 74 Ind. App. 129, 128 N. E. 857. The right of a court to do so does not depend upon whether or not it states a cause of action. If a defendant is confronted with an insufficient complaint he may elect, if he so chooses, not to demur thereto, but to file an answer and go to trial, and rely on the plaintiff failing to establish a cause of action against him, if the evidence goes no further than the allegations of such complaint. In that event, he has no right to complain, if the court merely states the allegations thereof in an instruction. It follows that appellant's contention that one of the paragraphs of the complaint in the instant case does not state a cause of action, if true, does not render such instruction erroneous.

[2, 3] Complaint is also made of the action of the court in giving instruction No. 29, which merely gives the forms of verdict, one of which should be returned, depending on whether they found for the plaintiff or defendant. The objection to this instruction is based upon the fact that it does not limit the return of a verdict in favor of the plaintiff on a finding in his favor on the paragraph of the complaint, which states a cause of action. There was no error in giving the instruction in this form, although one of the paragraphs of the complaint did not state a cause of action, as a party may recover on an insufficient complaint, to which no demurrer has been filed, if the evidence tends to establish all the material averments thereof, and in addition thereto such other facts as were necessary to its sufficiency, as is true in the instant case as to the paragraph challenged. Prudential Ins. Co. v. Ritchey (1918) 188 Ind. 157, 119 N. E. 369, 484. We make this statement in view of the fact that under the evidence it was for the jury to determine whether the injury was inflicted on the theory alleged in the first paragraph of the complaint, or the theory which appellee attempted to allege in the second paragraph thereof. If the evidence fully sustained such latter theory, a recovery should not be denied, merely because it was not properly alleged in a paragraph, to which no demurrer was filed. It follows that the court did not err in giving said instruction under the attending circumstances.

[4, 5] The only other contention made relates to the refusal of the court to give appellant's requested instruction No. 2, which would have directed a verdict, peremptorily, in favor of appellant on the second paragraph of the complaint. Appellant, in his motion for a new trial, states as one of the reasons therefor that the court erred in refusing to give instructions requested by him

numbered 1 to 12, both inclusive. This is a joint assignment, and if any one of the instructions was properly refused, the assignment fails. Cleveland, etc., R. Co. v. De Bolt (1894) 10 Ind. App. 174, 37 N. E. 737; Tucker v. Eastridge (1912) 51 Ind. App. 632, 100 N. E. 113. Said instruction No. 1 would have directed a verdict in favor of appellant, peremptorily, on the first paragraph of the complaint. It requires no argument to show that the giving of such an instruction would have been error, and therefore the assignment fails. But if the rule were otherwise, appellant could not prevail on this contention, as he merely states in his propositions or points that the refusal to give said instruction No. 2 "was erroneous and prejudicial," with the citation of a single authority. No reason is stated in support of such contention, or to which the authority could apply. This is not sufficient to present any question for our determination. Evansville, etc., R. Co. v. Hoffman (1917) 67 Ind. App. 571, 118 N. E. 151.

Failing to find any sufficient reason for holding that the court erred in overruling appellant's motion for a new trial, the judgment is affirmed.

PIERSON v. REPUBLIC CASUALTY CO.
(No. 11653.)

(Appellate Court of Indiana, Division No. 25. Feb. 21, 1924.)

Appeal and error ⟸1226—Supersedeas bond accepted by Supreme Court, when it had no jurisdiction, void, and sureties not liable thereon.

Where a bond is taken by a court acting under statutory authority, the instrument taken must be authorized by statute, or it will be void, so that, where the Supreme Court, on an appeal from an order appointing a receiver, granted a writ of supersedeas on the appeal bond being filed, when it had no jurisdiction to do so by reason of the appeal not having been taken in the time limited by Burns' Ann. St. 1914, § 1289, the bond was void, and the sureties thereon were not liable.

Appeal from Superior Court, Marion County; Solon Carter, Special Judge.

Action by Edward E. Pierson, Receiver of the Standard Electric Manufacturing Company, against the Republic Casualty Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Watson & Esarey and Joseph Collier, all of Indianapolis, for appellant.

Chas. E. Henderson, of Indianapolis, for appellee.

NICHOLS, J. Action by appellant to recover from appellee damages sustained by reason of the breach of an alleged appeal bond, upon which appellee was surety. The error relied upon for reversal is the action of the court in overruling appellant's motion for a new trial, which presents that the decision of the court is not sustained by sufficient evidence, and that it is contrary to law.

The facts in this case, so far as involved in this decision, were agreed upon, and, briefly stated, are as follows:

In a certain case pending in the Marion superior court, entitled Roy Tuttle v. Standard Electric Company, Ed. W. Pierson was appointed as receiver, the said receiver being appellant herein. On June 26, 1918, the court made an order in said cause directing the receiver to sell and dispose of certain property of the corporation, and thereupon the receiver fixed July 15, 1918, as the date of the sale of such property, and gave notice accordingly. The sale, however, was not had by reason of a supersedeas writ issued by the Supreme Court of Indiana in an appeal from the said order appointing the receiver in said cause, said appeal being by the Standard Electric Manufacturing Company. Supersedeas bond in said cause, being the bond here involved, was filed with the clerk of the Supreme Court. The transcript of the proceedings appealed from was filed in the Supreme Court July 12, 1918, by which transcript it appears that the question of the appointment of the receiver was submitted to the court for trial January 29, 1918, at which time the said receiver, who had theretofore been appointed without notice, was continued as such. On February 7, 1918, the defendant therein, being appellant in the case as appealed, filed a motion to set aside and vacate the judgment appointing a receiver, which motion was overruled on February 23, 1918, and thereupon said defendant, appellant in said appeal, filed a motion for a new trial, which was overruled May 31, 1918. After said transcript was filed with the clerk of the Supreme Court, said Standard Electric Manufacturing Company moved the Supreme Court to issuance of a supersedeas writ, and in pursuance thereof one of the judges of said court did order the issuance of said writ, which was done by the clerk accordingly. The said clerk of the Supreme Court fixed the amount of the bond required at $1,000, and thereupon the Standard Electric Manufacturing Company, as principal, and appellee herein, as surety, executed and delivered to the clerk of the Supreme Court the bond declared upon in this case. The contemplated sale of the property was not made on July 15, 1918, and there was no attempt to make the same until after the denial of the petition to transfer the case to the Supreme Court from the appellate court, to which the case had been theretofore transferred from the Supreme Court. By the decision of the appellate court as reported in 74 Ind. App. 559, 126 N. E. 438, the appeal was dismissed

within 10 days from the date of the appointment of the receiver. On February 2, 1921, the property involved was sold for $16,000. It appears by the evidence introduced that at the time of the proposed sale it was of the value of $40,000 or $45,000. This action upon the supersedeas bond was for damages because of the depreciation in the value of the property during the pendency of the said appeal. It is admitted by the parties hereto that the said appeal was controlled by section 1289, Burns' R. S. 1914. That section provides that, in all cases in which a receiver may be appointed or refused, the party aggrieved may, within 10 days thereafter, appeal from the decision of the court to the Supreme Court without awaiting for the final determination of such case, and, in cases where a receiver shall be or has been appointed, upon the appellant filing an appeal bond with sufficient surety, in such sum as may have been required of such receiver, conditioned for the due prosecution of such appeal, and the payment of all costs and damages that may accrue to any officer or person by reason thereof, the authority of such receiver may be suspended until the final determination of such appeal.

A number of questions are presented by appellant and by appellee, but as we view this case we need to consider but one. It will be observed that the statute which is controlling in this case, as above set out, gives the right of appeal from the appointment of a receiver only in the event that the same is taken within the 10 days after the appointment. But such appeal was not taken within 10 days after the appointment of the receiver, and this court in said case of Standard Electric Manufacturing Company v. Tuttle, supra, so held, and that appeal was dismissed for the reason that the appellate court was without jurisdiction as no appeal was perfected within 10 days after the appointment of the receiver. Of course, if for such reason this court had no jurisdiction of the cause, neither had the Supreme Court jurisdiction at the time it granted the writ of supersedeas.

It is conceded that the decision of the appellate court in the appealed case above mentioned is the law of this case. If, at the time that the Supreme Court by one of its judges granted a writ of supersedeas, that court had no jurisdiction of the appeal, it then had no authority to grant the supersedeas. No doubt had that court's attention been called to the situation and to the condition of the record, it would have denied the supersedeas writ and dismissed the appeal.

In Henderson v. Halliday, 10 Ind. 24, the court says:

"There is no assignment of errors. Hence we have no jurisdiction of the case. The as-

for the court, or any judge thereof, to act upon, even for the granting of a supersedeas. A supersedeas cannot be granted where there is no assignment of errors."

We may add in harmony with the quotation, "because there is no jurisdiction."

In State v. Winninger, 81 Ind. 51, one of the questions presented was the authority of an officer to take an appeal bond, and the court said: "It is well settled that a bond or recognizance taken by a court without jurisdiction, or an officer without authority, is utterly void," citing among other authorities Sherry v. Foresman, 6 Blackf. 56, where the court says: "There is no doubt that, if the court in which the bond was taken had no jurisdiction of the subject-matter, the bond would be void and the pleas on that ground good."

The bond in this case, being without authority of law, was void, and no action can be maintained on it. Caffrey v. Dudgeon, 38 Ind. 512, 10 Am. Rep. 126.

It is the settled law of this state that, where a bond is taken by a court acting under statutory authority, the instrument taken must be authorized by statute or it will be void. Byers v. State, ex rel., 20 Ind. 47. The authorities upon which appellant relies pertaining to this question are not in point. In each of the cases cited the court, accepting or approving the bond, had jurisdiction of the cause, while in the instant case the court granting the writ and in which the supersedeas bond was filed was without jurisdiction.

Having reached this conclusion, we do not need to consider other questions presented.

Judgment affirmed.

DAVIS, Agent, v. HOSTETTER.
(No. 11694.)

(Appellate Court of Indiana, Division No. 1. Feb. 20, 1924.)

1. Master and servant ⇐96(1)—Master required to anticipate what usually happens.

A master is required to anticipate and guard against what usually happens or is likely to happen.

2. Master and servant ⇐112(3)—Railroad held bound to anticipate injury to section hand moving track.

A railroad company maintaining a temporary track in a sand pit, constructed of old rails and partially decayed ties, which was moved about by section men using crowbars and standing both between and outside of the rails, *held* charged with the duty of anticipating that men so engaged might sustain injury by stepping upon ties which were suspended while being moved and which were insecurely fastened to the rails.

bility.

A railroad may escape liability for injuries from latent dangerous conditions by giving due warning thereof.

4. Master and servant ⟸219(1)—Risk of obvious danger assumed by servant.

If dangers to which a servant is subject are patent and of such an obvious character that he must, in the exercise of ordinary care, have known of them and appreciated the danger, he will be held to have assumed the risk, though no warning was given.

5. Master and servant ⟸219(12)—Section hand stepping on decayed tie while moving track held to have assumed risk.

A section hand engaged in moving a temporary track in a sand pit *held* to have assumed the danger of stepping upon a partially decayed tie, which was insecurely fastened to the rail above it, as it was suspended over a depression in the pit.

6. Master and servant ⟸297(2)—Answers to interrogatories as to proximate cause held not to overcome general verdict.

In an action for injuries to an employee, denial of a judgment on the jury's answers to interrogatories submitted, notwithstanding a general verdict on the ground that such answers showed that defendant was not chargeable with any negligence which was the proximate cause of plaintiff's injury, *held* not error where facts might have been shown, under the issues, disclosing such negligence.

7. Master and servant ⟸297(2)—Answers to interrogatories as to assumption of risk held not to overcome general verdict.

In an action for injuries to an employee, denial of a judgment for defendant on the answers to interrogatories submitted to the jury, notwithstanding a general verdict on the ground that such answers showed that plaintiff had assumed the risk, *held* not error where the answers to the interrogatories did not conclusively establish such assumption, in view of the evidence that may have been adduced on the trial.

8. Trial ⟸359(1)—Rule stated as to presumption on motion for judgment on answers to interrogatories notwithstanding general verdict.

On motion for judgment on answers to interrogatories notwithstanding the general verdict, the court will presume, in favor of the general verdict, that facts which might have been proven under the issues, and which would reconcile the verdicts, were shown.

Appeal from Circuit Court, Noble County; Arthur F. Biggs, Judge.

Action by Fred Hostetter against James C. Davis, Agent. From judgment for plaintiff, defendant appeals. Reversed, with instructions to grant new trial.

Sharpless & Springer, of Garrett, and Fred L. Bodenhafer, of Kendallville, for appellee.

BATMAN, J. Appellee filed a complaint against appellant in two paragraphs to recover damages under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665). Each alleges that the latter was operating the Baltimore & Ohio Railroad as Director General, and the former was in his employ as a section hand, and, that while so engaged, he sustained personal injuries by reason of the negligence of his employer in using a defective tie in a track, which he was assisting in moving, and in failing to fasten it securely to the rails thereof. The charges of negligence in each paragraph are substantially the same, except that the second alleges that said Railroad Company had elected not to operate under the Indiana Workmen's Compensation Act (Acts 1915, c. 106) and that appellee had no knowledge of the loose and defective condition of the tie which caused his injuries. The complaint was answered by a general denial. The cause was tried by a jury, which returned a verdict in favor of appellee, and also its answer to certain interrogatories. Appellant filed a motion for judgment on the answers to the interrogatories, notwithstanding the general verdict, and also a motion for a new trial, each of which was overruled. This appeal followed, based on the two adverse rulings stated.

Appellant bases his contention, that the court erred in overruling his motion for a new trial, in part on the statutory reason that the verdict is not sustained by sufficient evidence. In support of this reason he asserts: (1) That there is a total absence of any evidence to show that he owed appellee the duty of maintaining the track, when it was being moved, in such condition that the ties would not slip or break loose therefrom, under the circumstances shown. (2) That, if such duty had been shown, the evidence discloses that appellee assumed the risk arising from the danger which caused his injury. An examination of the record discloses uncontradicted evidence establishing the following facts: Appellee was injured on July 2, 1919, while in the employ of appellant as a section man. His duties as such, among other things, required him to assist in respiking the ties in appellant's railroad tracks, in replacing defective ties with new ones and spiking the same to the rails, in ballasting the tracks by raising the same, and tamping stones or gravel thereunder, and thereby placing the tracks in good condition. He had been so engaged for several months prior to the time of his injury, and had become familiar with the details of such work. On the day of his injury he, together with the other

worked, were sent to the Leland gravel pit, which was operated by appellant for the purpose of securing material to be used as ballast on the main lines of the Baltimore & Ohio Railroad in Indiana and Ohio, then under the control of appellant. The work in said gravel pit consisted in moving a railroad track some distance, in order to place it in a position for use in loading gravel. About 75 men were engaged in this work, including appellee. The moving was done by first jacking the track up out of the bed in which it rested while being previously used, so that it would clear the adjacent surface. The men would then begin at one end of the track, which was about 800 feet long, and, by the use of bars against the rails, would slip that portion of the track a short distance in the direction it was to be moved. In doing this some of the men would stand on the outside of the rails and apply their bars to the one nearest them, while others would stand between the rails, and apply their bars to the other rail. The men would then go forward and repeat this process on the various portions of the track, and would repeat the same on the entire track, when necessary, until the desired location was reached. The location of such track in any one place was only temporary, as it was necessary to move it from time to time for convenience in loading gravel, being the only purpose for which it was used. It was constructed of old rails and ties, discarded from use on the main tracks. The track would be moved as a whole, without detaching the ties from the rails. The surface of the gravel pit over which the track was being moved on the day appellee was injured was rough and uneven by reason of projecting stones and depressions in the bottom of the pit. The track itself was crooked and bent out of shape. Appellee began to assist in this work about 8 o'clock in the morning, and worked thereat until he was injured about 2 o'clock in the afternoon of said day, except perhaps during lunch hour. He assisted by using a bar as a pry against the rails. The work had been commenced at one end and about 400 feet in length of the track had been moved some distance, when appellee was directed to get over between the rails, and use his bar from that position. He was standing at the time in a depression, near a tie which hung suspended over the same, and about 30 inches from the bottom thereof, as estimated by appellee. In attempting to get over between the rails he placed one foot on the outer end of this tie, and placed his weight thereon, which caused the tie to slip and break loose from the rails to which it was attached, thereby causing him to fall against the end of another tie, and sustain an injury. The tie slipped and broke loose from the rail because of its decayed condition, which rendered it incapable the weight of appellee's body was applied. As appellee stated, it was an old rotten tie—one in which spikes would not hold—and the other ties appeared to be in the same condition. Other witnesses testified that the ties were in bad condition, old and rotten; that many of them were loose, and would drop from the rails at one or both ends when the track was lifted; that some had rotten ends and would not hold any weight at all; that many were in such condition that they would come loose when stepped upon; that the track was constructed of discarded rails and ties, and the latter would not hold spikes solidly; that in moving the tracks the ties frequently came loose from the rails from their own weight, and any additional weight would cause others to come loose. The undisputed evidence further shows that the track was in the condition described throughout its entire length, and that such condition was open and visible to all of the men engaged in moving the same.

[1, 2] We now proceed to determine whether it appears, from the facts stated, that appellant owed appellee the duty of maintaining the track, when being moved, in such condition that the ties would not slip or break therefrom, under the circumstances shown. It is well settled that a master is required to anticipate and guard against what usually happens, or is likely to happen. Therefore the inquiry in a given case should be: Were the injurious results probable—that is, likely to occur—according to usual experiences? Chicago, etc., R. Co. v. Dinius (1907) 170 Ind. 222, 84 N. E. 9. Applying this test to the facts stated, it is apparent that appellant should have anticipated, that in the process of moving the track, some of the decayed ties would at times hang suspended over the depressions in the bottom of the pit; that his servants, who stood between the rails in moving the tracks, might step upon such ties in going forward to resume their work on other portions thereof, and thus cause them to break loose from the rails, with possible injury to such servants. The evidence in that regard is at least sufficient to present a question, which was properly submitted to the jury, and which it determined in favor of appellee. However, it does not necessarily follow that appellee is entitled to recover, as other facts may exist which would preclude such a result.

[3-5] If the conditions described were latent, appellant could have escaped liability by showing that he had given appellee due warning thereof. Indianapolis, etc., Co. v. Sproul (1911) 49 Ind. App. 613, 93 N. E. 463; Southern, etc., R. Co. v. Howerton (1914) 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369. If, however, the evidence is such as to show that they were patent, and of such an obvious character that appellee must have known of them, and appreciated the danger therefrom,

had he exercised ordinary care, he cannot recover, as he will be held to have assumed the attending risk, without a warning from appellant. Indianapolis, etc., Co. v. Mathews (1911) 177 Ind. 88, 97 N. E. 320; Cleveland, etc., R. Co. v. Perkins (1908) 171 Ind. 307, 86 N. E. 405; Bennett v. Evansville, etc., R. Co. (1911) 177 Ind. 463, 96 N. E. 700, 40 L. R. A. (N. S.) 963; Walling v. Terre Haute, etc., Co. (1915) 60 Ind. App. 607, 111 N. E. 198. Were the dangerous conditions of which complaint is made of such a character? Appellee was an experienced man in the maintenance of railroad tracks, which included the renewal and respiking of ties therein. He began his work in the gravel pit at 8 o'clock in the morning and worked on the track in question about five hours before he was injured. In doing so, he passed by or over about 400 feet of the same, and assisted in moving it for that entire length, by prying on the rails with a bar. The track was bent and crooked when he began his work. It was constructed of old rails and ties, which had been discarded from use on the main tracks. Generally speaking, the ties were old and rotten. Many of them would come loose from the rails at one or both ends in moving the track, and others would come loose when weight was applied. These conditions, which existed throughout the entire length of the track, were plainly visible to the men engaged in moving the same. The particular tie, which broke loose from the rails and caused appellee's injury, was old and rotten, and of the same appearance as the other ties in the track. When appellee undertook to get upon the same, it was suspended over a depression about 30 inches deep. Therefore it must have been about waist-high, as he stood in the depression, and in such range of his eyes as to give a clear view of the same. Under these circumstances, it is inconceivable that appellee, an experienced man in track maintenance, did not know of the condition of the ties in the track, of the insecure manner in which they were fastened to the rails, and of the danger in placing his weight thereon, when suspended over a depression, without support. Appellee was a man of mature years, and, assuming that he was a man of ordinary intelligence, as we have a right to do in the absence of a showing to the contrary, it is likewise inconceivable that he should not have appreciated the danger in so doing. This applies not only to the ties generally, but also to the particular tie, the breaking loose of which caused him to fall, and sustain an injury. The undisputed facts, in our opinion, leave no room for diverse inferences with regard to appellee's knowledge and appreciation of the danger which caused his injury, but impel the single inference that appellee did know of its existence, and appreciated the same. This being true it is our duty to hold that appellee assumed the risk, and for that reason is not entitled to recover in this action, under the evidence before us. Avery v. Nordyke & Marmon (1904) 34 Ind. App. 541, 70 N. E. 888; Jennings v. Ingle (1904) 35 Ind. App. 159, 73 N. E. 945; Chicago, etc., R. Co. v. Bryan (1905) 37 Ind. App. 487, 75 N. E. 678. Other reasons for a new trial will not be considered, as the alleged errors on which they are based are not of such a nature as to render it probable that they will reoccur on another trial, and a mere possibility of their reoccurrence does not justify their consideration, in view of the conclusion we have reached.

[6-8] The only remaining error relates to the action of the court in overruling appellant's motion for judgment on the answers to the interrogatories submitted to the jury, notwithstanding the general verdict. His contention in this regard is based on two grounds, viz.: (1) That such answers show that appellant is not chargeable with any negligence which was the proximate cause of appellee's injury. (2) That appellee assumed the risk which resulted in his injury, because such risk was incident to his work, or arose from an open and obvious danger, or was created by a change in conditions, as the work progressed. An examination of such answers discloses that appellant's contention cannot be sustained on said first ground, as facts may have been shown, under the issues, as disclosed the existence of such duty in the instant case. This being true, we are required to assume that such facts were shown, in passing upon the motion under consideration. Standard Oil Co. v. Allen (1920) 189 Ind. 398, 126 N. E. 674; Terre Haute, etc., Co. v. Green (1911) 49 Ind. App. 309, 97 N. E. 343. The second ground is likewise unavailing, as the answers to the interrogatories do not conclusively sustain any one of the underlying reasons given therefor, in view of the evidence that may have been adduced on the trial.

The judgment is reversed with instructions to the trial court to sustain appellant's motion for a new trial, and for further proceedings consistent with this opinion.

NEW AMSTERDAM CASUALTY CO. v. MADISON COUNTY TRUST CO. (No. 11757.)

(Appellate Court of Indiana, Division No. 2. Feb. 21, 1924.)

1. **Frauds, statute of ⇐23(4)—Promise by surety to reimburse receiver for expenses incurred in completing contract secured held original one, not within statute.**

Where a bonding company became surety for an advancement to a manufacturer on a contract with the government, and thereafter induced a trust company, which was appointed receiver, to advance funds necessary to carry on the business and attempt to complete the contract secured, and promised to repay such advances, the bonding company's promise being mainly prompted by desire to safeguard its own pecuniary interests, was an original one, and not within the statute.

2. **Contracts ⇐124—Promise of compensation and to repay advances, made to induce acceptance of receivership, held not against public policy.**

Where a manufacturer, under contract to manufacture war supplies, for which an advancement was paid it, became financially involved, and its surety for the performance of the contract induced plaintiff, by a promise to pay for its services, to accept receivership, and, no money being available for operation, further induced plaintiff, by a promise to repay them, to advance funds to attempt to complete the contract, so as to avoid default, surety's promise was not void as against public policy; there being no suggestion of partiality shown by plaintiff to the surety, or that plaintiff did not in every particular obey the orders of the court.

3. **Contracts ⇐113(3)—Public policy offended by agreement tending to induce partiality by receiver.**

A receiver is bound to maintain an attitude of strict neutrality between all the parties in interest, and any agreement which might tempt him to jeopardize interests of one for benefit of another is contrary to public policy.

4. **Principal and surety ⇐55—Surety company bound by general agent's promise to reimburse receiver for advancements in completion of contract guaranteed.**

Where the general agent of a surety company, in making an effort to protect the interests of his company, induced plaintiff to accept receivership of a manufacturer, whose contract with the government the surety guaranteed, and advance funds in attempt to complete it, by a promise to compensate plaintiff for its services and to repay such advance, a finding that the agent acted within his authority and the company was bound thereby was justified.

Appeal from Circuit Court, Hamilton County; Fred E. Hines, Judge.

Action by the Madison County Trust Company against the New Amsterdam Casualty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. E. Henderson, of Indianapolis, and Shirts & Fertig, of Noblesville, for appellant.

Ralph Kane, of Indianapolis, Thomas Kane, of Noblesville, and J. A. Van Osdol, of Anderson, for appellee.

NICHOLS, J. Appellee's complaint in this cause is in two paragraphs, one for money had and received, and the other seeking reimbursement for money paid by appellee in conducting as receiver the Wagner Axle Company, upon an oral promise, made prior to the appointment of the receiver by a representative of appellant, to appellee to reimburse it for money advanced and for services rendered in administering the receivership and attorney's fees and other expenses incurred therefor. There was an answer in general denial, a trial by the court, and a finding and judgment for appellee in the sum of $2,294.64. The error assigned is the action of the court in overruling appellant's motion for a new trial, under which is presented that the decision of the court is not sustained by sufficient evidence, and that it is contrary to law.

The averments of the second paragraph of complaint, so far as here involved, and which are substantially proven are that on or about January 22, 1918, the Wagner Axle Company was then in possession of and operating a manufacturing plant at Anderson, Ind., and as such it then entered into a certain contract with the United States government for the manufacture of artillery hubs and wheel fastenings. To enable said company to proceed with production the United States government advanced to said company on account of said contract $30,000. To secure the United States from loss by reason of said advancement, appellant became surety for said company, and guaranteed the United States against loss by reason of the advancement aforesaid. Said Axle Company was then holding possession of and claiming to be the owner of said manufacturing plant, under a certain contract with one Sansberry, by the terms of which, upon the failure of said Axle Company to pay certain installments of purchase money then falling due on May 1, 1918, the said Sansberry would be entitled to have possession of said plant. Shortly before the maturity of said installment, it became evident to the appellant that said Axle Company would not be able to meet its said payment when due, was in danger of being ousted from said plant, would be thereby prevented from carrying out its contract with the government, and would make default thereon. It also became apparent to appellant that said Axle Company was so managing its affairs that it was in imminent danger of in-

said contract, and on its obligation to repay said advancement so made by the United States. Appellant believing its interest seriously imperilled by reason of the facts aforesaid, and that its interests would be better protected if said Axle Company was under receivership, and learning that one of its creditors was preparing to bring an action against it to enforce a demand in such creditor's favor approximating $8,000, appellant then requested said creditor to ask, as part of the relief which it would demand, the appointment of a receiver. Such action was commenced, and as part of the relief sought there was a demand for the appointment of a receiver, to which action said Axle Company appeared and consented to such appointment and on April 30, 1918, said court appointed appellee as such receiver.

At the earnest solicitation of appellant appellee was induced to and did accept said appointment, took charge of the business and affairs of the said Axle company, and, under order of said court, proceeded to carry on the business of said Axle Company, until the time when its property and assets were seized in bankruptcy. Said Axle Company had no funds with which to carry on its manufacturing operations, and as an inducement to appellee to accept said receivership and conduct the manufacturing business of said Axle Company, and especially to proceed promptly with the work of producing said hubs and wheel parts, appellant solicited appellee to advance from time to time such funds as might appear necessary to carry on said manufacturing business, and promised that appellant would pay appellee for such advances and for such services and claims for services as might be allowed by said court therefor. Relying upon the promises and representations of the appellant so made as aforesaid, appellee accepted said receivership, took charge of the business of said Axle Company, proceeded to conduct its operations as a manufacturing plant and with the production of said artillery hubs and wheel fastenings, and to carry on the business of said Axle Company. In so doing appellee employed such help and advanced such moneys as were necessary for that purpose. Appellee, prior to the bringing of this action, advanced and paid out in the due administering of said receivership $2,025.93, is legally bound for an additional sum of $670.86, and is entitled to $500 for services as receiver. The moneys so advanced and the services so rendered were necessary in administering said receivership and in carrying on the business of said Axle Company. Appellee continued to discharge the duties of such receiver and to carry on the business of said Axle Company continuously up to and including June 17, 1918, when proceedings in bankruptcy were instituted against said Court of Indiana, and such proceedings were there had that a receiver was appointed in said bankrupt court, who took from appellee on said June 17, 1918, the possession of said plant, and all of the property and assets of said Axle Company. After applying to said receivership and the expenses and costs thereof all the moneys which had come to the hands of this appellee as such receiver, there remained unpaid on the indebtedness sued on herein, including interest on money advanced, the sum of $3,254.29, which was allowed by the superior court and its payment by the bankrupt court recommended, but no funds remained after the settlement of said estate in bankruptcy which could be applied to the payment of all or any part of the claim sued on herein. Demand has been made upon appellant for payment thereof, all of which it has refused to do. There is now due and unpaid to appellee, by reason of the facts aforesaid, the sum of $3,254.29, for which it demands judgment against appellee, together with interest.

[1] The negotiations with appellee that preceded its appointment as such receiver, and which induced appellee's acceptance of such appointment, were conducted by James H. Weyer who was the general agent of appellant. Appellant's first contention, forcefully presented, is that the promise sued on is within the statute of frauds, not being a promise in writing, and being, as appellant contends, for the payment of a debt of another. It appears by the undisputed evidence that appellant was vitally interested in the welfare of the Wagner Axle Company, because of a bond for the repayment of $30,000 to the United States government upon which it was surety, that it was apparent to appellant that the company under its own management would lose its plant, fail to fulfill its contract with the government, make default in the repayment of the $30,000 advanced to it and thereby compel appellant as surety to make payment of said sum. It believed that its interest would be best served if that company was kept as a going concern, thereby making it the more salable. As it believed, this result could be best secured by the appointment of a receiver, and with this end in view it induced appellee, by its promise to advance funds necessary for future operation, to accept such receivership, and to continue the operation of said plant.

With these facts before us, it seems to us that appellant's first authority cited, Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826, is unfortunate for it. In that case Davis was interested in certain mining operations, and as an inducement to Patrick to continue to transport ore verbally promised that, if he would continue at the work, he (Davis) would be personally responsible for his pay. The issue in that case, as here, was whether the promise of Davis was orig-

frauds. But the court held that the statute does not apply to promises in respect to debts created at the instance and for the benefit of the promisor, the court saying:

"But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a personal, immediate, and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise. As said by this court in Emerson v. Slater, 63 U. S. (22 How.) 28, 43, 16 L. Ed. 360, 365: 'Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.'"

We have examined other authorities cited by appellant. They are not helpful to appellant's contention. Some of them have, with others, one clear distinguishing mark, in that the promise involved was to pay a debt then in existence and liquidated, while in the instant case there was at the time of the promise no debt in existence and to which appellant's promise to pay could constitute a collateral obligation. The principle involved has so been clearly determined by Indiana authorities that we deem it unnecessary to discuss or cite authorities from other states.

In Board of Commissioners v. Cincinnati, etc., Co., 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 502, appellant undertook to pay for work and materials to be subsequently furnished by appellee in order to secure the completion of a building where the principal contractor had failed to carry on the work, and it was held that the promise to pay was an original promise, not collateral, and not within the statute of frauds. The court quotes from Emerson v. Slater, supra, the same principle of law as quoted above, and then says that it is possible that the language quoted states the doctrine rather too broadly, but does not inquire whether it does or not, for the reason that it was not required to decide as to the rule where the promise relates to the past, inasmuch as it was in that case, as here, concerned only in what related to the future at the time the promise was made. This case is followed on this principle in Voris v. Star, etc., Association, 20 Ind. App. 630, 50 N. E. 779, where many authorities from other states are cited to sustain the principle. Other Indiana authorities are: Palmer v. Blain, 55 Ind. 11; Mitchell v. Griffin, 58 Ind. 560; Fisher v. Baker, 100 Ind. 374. We hold that the promise involved was not within the statute of frauds.

[2, 3] Appellant next contends that the promise which it made, and which induced appellee to accept the receivership, advance its money, and render its services was void as against public policy, and therefore it should be relieved therefrom. The unquestioned rule is stated that a receiver is bound to maintain an attitude of strict neutrality between all the parties in interest, and any agreement which might tempt him to sacrifice or jeopardize the interests of one for the benefit of another in interest is contrary to public policy. But it does not follow that one interested in the successful management of an industrial plant, that it may, if possible, protect itself against a loss of $30,000, may not use its influence in inducing some one competent to accept an appointment as receiver to operate the plant. Nor does it follow that where, as here, there was no money available with which to operate such an interested party may not promise such receiver to furnish money for the purpose of manufacturing material which had been purchased for use in carrying out the contract, the default of which it seeks to avoid. Nor does it follow that such money may not legitimately be furnished to keep the plant a going concern, thereby making it more salable. Such acts within themselves were not against public policy. They of necessity inured to the benefit of other creditors. There is not the slightest suggestion that the receiver was in any way partial to appellant, or that it did not in every particular obey the orders of the court. When its work was finished, it made a long detailed report of its operations, which report was approved by the court, and compensation for the receiver's advancements and services recommended. To permit appellant under the circumstances of this case to avoid its obligations on the ground that it was against public policy would be unconscionable. We regard the case of Polk v. Johnson, 160 Ind. 202, 66 N. E. 752, 98 Am. St. Rep. 274, as an authority against appellant's contention. In that case the receiver agreed with the insolvent that in case he was appointed as such he would serve without compensation, and the Supreme Court held that such contract was not opposed to public policy, and the receiver was compelled to serve without compensation though he found his duties more onerous than he expected. If such a prospective receiver can make a valid contract to serve without compensation, it would seem that he might with equal propriety make a contract for compensation, and for reimbursement for money which he would need to advance.

prevail.

[4] Finally, appellant says that, though the evidence shows that Weyer was the general agent of appellant, and made the contract sued upon, it is not shown that he was acting within the scope of his authority. But under the circumstances surrounding this case we are not impressed with appellant's contention. As general agent, Weyer was making an effort to protect the interests of his principal because of its prospective liability on the $30,000 bond. As general agent of an insurance company it must be presumed, in the absence of any evidence to the contrary, that he had authority to look after its policies, and to take such steps as were, in his judgment, necessary for the purpose of protecting it from loss thereon. Manning v. Gasharie, 27 Ind. 405, 411. The court might reasonably infer, in the absence of evidence to the contrary, and there was none, from the fact that Weyer went to Anderson to look after his principal's interest with reference to the bond, that he had full authority to act in its behalf. It is apparent that this business was intrusted to the agent's care. If not, then appellant is convicted of wholly neglecting business in which it was in imminent danger of losing $30,000, for it does not appear that any one else gave the matter any attention, except the vice president of appellant, who, after he had been notified by telegram from the receiver to Weyer, the general agent, that the court had ordered the plant surrendered to Sansberry, unless finances were furnished by a named date, sent an evasive letter, which was followed by a telegram from Weyer, the general agent, asking for further time to consummate a sale. From these facts and circumstances, the court found that the promise of the general agent was within his authority, and as such binding on appellant. The evidence sustains this finding.

We find no reversible error. Judgment affirmed.

EVANS et al. v. SHEPHARD. (No. 11706.)

(Appellate Court of Indiana, Division No. 2. Feb. 21, 1924.)

1. Party walls ⇐10—Theory of complaint not changed by averment that continued trespasses would ripen into an easement.

Where the theory of plaintiff's complaint was that the acts of defendant in constructing a wall with openings upon and over the lands of plaintiff constituted a nuisance and a continuing trespass, such theory was not changed by the additional averment that such continued trespass, if uninterrupted, would ripen into an easement.

2. Party walls ⇐10—Adjoining owner entitled to restrain continuing trespass.

An owner is entitled to injunctive relief if acts interfering with her rights constitute a continuing trespass.

3. Injunction ⇐48—Attempted appropriation of property by continuous trespass which may ripen into an easement may be restrained.

If there is an attempted appropriation of property by acts constituting a continuous trespass which in time might ripen into an easement, equity will compel restoration.

4. Principal and agent ⇐100(5)—Agent without authority to grant to adjoining owner right to commit trespass.

Where an agent's authority extended only to renting his principal's property, collecting rents, and making repairs thereon, he could not grant permission to an adjoining owner to tear down a fire wall existing between the two properties, and erect in its place a wall with openings constituting a continuing trespass on his principal's property.

5. Principal and agent ⇐166(2)—Acceptance of sale price not ratification of terms of contract not known to principal.

Where an owner agreed to sell a one-half interest in a fire wall to an adjoining owner, and the purchase price was paid to the vendor's agent, and the agent told vendor that it was to pay for one-half of the fire wall, but did not tell her that the old wall had been torn down and that a new one had been constructed in its place, and the vendor had no knowledge of that fact until she took steps to protect her rights, her acceptance of the purchase price, while a ratification of the sale, was not an acceptance of the new wall.

6. Party walls ⇐8(3)—Adjoining owner without right to change party wall.

Where a fire wall existing between adjoining property was a solid wall, it became a party wall when an adjoining owner purchased a one-half interest therein, and the latter had no right to change its character.

7. Party walls ⇐10—Adjoining owner entitled to have continuing trespass constituting a nuisance restrained.

Where the act of an adjoining owner, in tearing down a fire wall existing between the premises and constructing a new wall with openings which projected over owner's land and through which adjoining owner and his tenants were passing daily over owner's land without her consent, was such a continuing trespass as to constitute a nuisance, owner was entitled to have such acts restrained; Burns' Ann. St. 1914, §§ 6179–6181, not furnishing owner an adequate remedy at law.

Appeal from Circuit Court, Vermillion County; O. B. Ratcliff, Special Judge.

Action by Maggie Morgan Shephard against Clora Evans and Evan A. Evans. Judgment for plaintiff, and defendants appeal. Affirmed.

of Terre Haute, and H. B. Aikman, of Newport, for appellants.

Geo. D. Sunkel, of Newport, for appellee.

NICHOLS, J. This was an action by appellee for a mandatory injunction against appellants to require the removal of certain alleged obstructions extending beyond the wall of a certain building adjoining appellee's lands, the closing of certain windows, doors, and openings in such wall, and the removal of certain permanent structures and obstructions extending from said appellant's building onto the lands of appellee.

[1] The theory of the complaint is that the use of such windows, doors, and openings for ingress and egress to and from the appellants' building upon and over the lands of the appellee, and the maintaining of such obstructions upon and adjoining said wall of appellants' building, constitute a nuisance and a continuing trespass upon the appellee's lands and prevent her free use of the same. That it is averred that such continued trespass, if uninterrupted, would ripen into an easement, does not in our opinion change the theory of the complaint.

Appellants filed answer in five paragraphs: The first in general denial; the second alleging the construction of the wall involved, pursuant to the terms of a parol license, and that appellee had full notice and knowledge of the construction thereof as it was being built, stood by, and without objection saw that appellants were expending large sums of money, and made no objections until long after the wall and building were completed; the third, the same facts practically as the second paragraph, with the additional averments that the open space on the west end of appellee's lot was an open space used by the public generally for parking autos and other vehicles, and that the use of such open space by appellants was not different from that of the public generally; the fourth avers facts practically the same as the third paragraph, and in addition thereto that the parol license was granted by appellee's agent; the fifth, that the appellants constructed the wall in question, under the terms of a written contract authorizing the construction thereof.

The cause was tried by the court, and the court rendered its finding in favor of appellee and rendered judgment in her favor that appellants and each of them be required and compelled to close all of the doors, windows, and transoms constructed by them in the north wall of their said building, and to restore said wall to a solid wall, by filling up such openings with brick and mortar in a good and workmanlike manner so that the same will conform and correspond to the adjoining part of said wall, to remove that part of the stone windowsills which project north and beyond the line of said wall, to fill up two excavations dug by them on the premises of with the basement of their building, to remove the water drain and downspout attached to their building and projecting beyond the north line of said wall, all on or before July 1, 1923, and that they be thereafter perpetually enjoined from maintaining such trespasses.

The errors relied upon for reversal are the action of the court in overruling appellants' motion for a new trial, and in overruling appellants' motion to modify judgment.

The motion for a new trial presents that the decision of the court is not sustained by sufficient evidence, and that it is contrary to law.

The facts, as disclosed by the evidence, are that appellee's predecessor in title several years ago built a fire wall about 15 feet high and 13 inches thick, on the south side of his lot in Clinton, Ind., for protection against a frame livery barn on the adjoining lot on the south. Appellee inherited from her predecessor, who was her brother, the south 26 feet of this lot, together with the fire wall thereon, about the year 1918. The fire wall and livery barn remained intact until the spring of 1919, when the appellants became the owners of said livery barn and the west 58 feet of the lot upon which it was located. Soon thereafter the livery barn was condemned by the fire marshal and was torn down. Thereafter appellants decided to erect a new building on the west 58 feet of such lot adjoining the south side of said fire wall, and to use said fire wall in the new building. Pursuant thereto, appellant Evan A. Evans saw one Waggoner, the manager of Morgan's Emporium store, which was situated on a part of the lot on which said fire wall stood, and in which store the appellee had an interest, with a view to purchasing an interest in said fire wall. Waggoner informed such appellant that the appellants could purchase one-half interest in such fire wall by paying therefor $173.67, one-half of the cost of the same. This proposition was accepted by the appellants, and without payment of the money at such time they did, on May 30, 1919, proceed to tear down said wall and reconstruct it in the construction of their new building, without molestation or interference from the appellee. The new wall was built where the old one stood, on the lands of the appellee, and was made the back, or north, wall of the appellants' building. In reconstructing the wall as the back wall of the Evans' Building, certain openings were left in the wall, including three doors with transoms and several windows, as alleged in the complaint; that the windows had projecting stone sills and caps reaching out over appellee's premises. Certain excavations had been made in appellee's land, adjoining said wall, for openings into the basement of the appellants' building, extending several feet into appellee's land, and cement walls were constructed

but one had later been filled up. Drains and a downspout had been attached to this wall over appellee's premises. In using the doors of said building, appellants' tenants and others used the lands of appellee to get in and out of said Evans' building, and there was no way to enter or leave the said building and use said doors without using appellee's lands. Appellants used appellee's lands for the purpose of removing ashes from the basement of their building. The wall had not been reconstructed as a fire wall, but as a wall with openings, and used entirely by appellants. Said projections, downspout and gutter, excavations, and cement structures, were on appellee's premises, and had been placed there by appellants. Said doors, windows, and openings were placed in said wall by appellants, and all said openings and structures were being used by appellants, and continued to be used by them, and in so doing they were using appellee's premises.

As the work on the new building progressed, appellant Evans claims that he saw Waggoner and reached an agreement with him about inserting openings, with the necessary projections incidental thereto, about which appellee complains in her complaint. Waggoner denies that the appellants ever said anything to him about erecting a new wall before it was done, but admits that he saw such wall in course of construction and made no objection. Appellee says that she did not give the appellants any authority to make such openings or to tear down or rebuild such wall, either in person or by agent; that said Waggoner was not her agent for any such purpose, and never had been. She says that she did not know appellants, and had never talked to them. Appellants admit that appellee gave them no such authority in person. After the building was completed, appellants paid the money, amounting to $173.67, to said Waggoner for a half interest in the fire wall, and Waggoner paid the same to appellee. But Waggoner did not inform appellee of the openings in said wall, or the projections incidental thereto, or of the fact that her premises were being used by appellants for ingress and egress to and from their building, or of the other things complained of by appellee. Appellee testified that she knew nothing of these matters at such time, and did not know such facts until some time thereafter. She had been absent from the store since her brother's death between two and three years before, and upon her first visit to the store she discovered the men going back and forth across her lot in the rear of the store, and through the doors in the new wall, and later observed the condition of the new wall and the absence of the fire wall. She had never been down to her property while the new building was under construction, and had no knowledge of the conditions there, or what had been done to her said. There is nothing to contradict her testimony on this point, except that she lived in Clinton. She testified that as soon as she found out the condition of the wall, and saw appellants using her premises she went immediately to appellants and tried to get the matter adjusted, and, when she failed, she employed a lawyer and filed this suit.

[2, 3] If the acts of appellants as above set out constitute continuous trespass upon appellee's rights, it is well settled that she is entitled to injunctive relief. Wirrick v. Boyles, 45 Ind. App. 698, 91 N. E. 621; Knickerbocker Ice Co. v. Surprise, 53 Ind. App. 286, 97 N. E. 357, 99 N. E. 58; Brenner v. Heller, 46 Ind. App. 335, 91 N. E. 744; Owens v. Lewis, 46 Ind. 488, 15 Am. Rep. 295. And if there is an attempted appropriation of property which in time might ripen into an easement, equity will compel restoration. Szathmary v. Boston Ry. Co., 214 Mass. 42, 100 N. E. 1107.

[4, 5] But appellants contend that they constructed the wall involved with its openings, and did the other acts of which appellee complains, with the permission of appellee. They do not claim that there was any permission granted to them by appellee directly, but that such permission was by appellee's agent. But it clearly appears by the evidence that such agent's authority extended only to renting appellee's properties, collecting the rents, and making repairs thereon. It nowhere appears that he had authority to convey such property or to grant easements thereon. There is no evidence of any instrument in writing granting him such powers, nor is there any evidence of any other transaction in which he presumed to exercise such authority. He makes no claim of such right in this case, and appellee says that he had no such authority. It is true that the agent accepted $173.67 for one-half of the old fire wall, and appellant Evan A. Evans says that what he purchased was one-half of the old fire wall. When the agent turned this money over to appellee, he told her that it was to pay for one-half of the fire wall, and at that time he did not tell her that the old wall had been torn down, and the new one with windows and doors and other appurtenances had been constructed in its place; nor did she have such knowledge until some time afterward, when she immediately took steps to protect her rights. Her prompt action upon learning of conditions makes it unnecessary to discuss the question of laches presented by appellants. Her acceptance of the $173.67 with knowledge that it was to pay for one-half of the fire wall was a ratification of such sale, but certainly was not, in the absence of knowledge, an acceptance of the new wall with its objectionable appurtenances in lieu of the old fire wall. That an agent, with authority such as mentioned above, has no authority such as appellant contends belong-

ble scope of his authority. Thus an agent to manage a business or property cannot sell or dispose of it, make permanent improvements, additions, or alterations, or grant any easements or licenses or impose other burdens upon his principal's property."

With other cases, Lawrence v. Springer, 49 N. J. Eq. 289, 24 Atl. 933, 31 Am. St. Rep. 702, is cited which forcefully sustains the principle. Indiana authorities to the same effect are: Metzger v. Huntington, 139 Ind. 501, 37 N. E. 1084, 39 N. E. 235; Davis v. Talbot, 137 Ind. 235, 36 N. E. 1098; Robinson v. Anderson, 106 Ind. 152, 6 N. E. 12; Crumpacker v. Jeffrey, 63 Ind. App. 632, 115 N. E. 62; Pettis v. Johnson, 56 Ind. 139.

In the Metzger Case, the court on page 515, quoting from Mechem on Agency, § 706, says:

"Every person dealing with an assumed agent is bound, at his peril, to ascertain the nature and extent of the agent's authority. The very fact that the agent assumes to exercise a delegated power is sufficient to put the person dealing with him upon his guard, to satisfy himself that the agent really possesses the pretended power. If, having relied upon it, he seeks to hold the alleged principal responsible, he must be prepared to prove, if either be denied, not only that the agency existed, but that the agent had the authority which he exercised."

[6] We are clear that any acts of appellee's agent as claimed by appellants did not bind appellee, that any acquiescence by the agent in appellants' construction of the new wall in the manner described did not work an estoppel as against appellee, and that by the acceptance of the check for $173.67 she did not ratify any acts or acquiescence of her agent as to the manner of the construction of the new wall, and that such acceptance of the check, without knowledge of the new wall or the manner of its construction, did not constitute an acceptance of such new wall. The fire wall involved was a solid wall, and when appellants purchased one-half of it as it stood upon appellee's ground, it became a party wall, and as such, in the absence of evidence to the contrary, a solid wall, and appellee had a right to require that it or the new wall erected in its stead remain such. Fidelity Lodge, etc., v. Bond, 147 Ind. 437, 442, 45 N. E. 338, 46 N. E. 825; Kiefer v. Dickson, 41 Ind. App. 543, 84 N. E. 523; Finch v. Theiss, 267 Ill. 65, 107 N. E. 898; Springer v. Darlington, 207 Ill. 238, 69 N. E. 946, 30 Cyc. 785.

[7] Appellants say that under sections 6179–6181, appellee had a remedy at law, citing pellee's rights as to constitute a nuisance. Appellants could have no more right to place doors and windows in the new wall than they had to cut such openings in the old fire wall, and it will hardly be claimed that they could have lawfully committed such an invasion of appellee's rights. By the doors, three in number, left in the new wall, appellants, their tenants and many other persons were passing daily over appellee's lands without her consent. Excavations for the cellar windows walled with cement were made into appellee's land three feet from the wall. These trespasses, with others, were averred to constitute private nuisances to appellee, and the court by its general finding so found.

No question other than the ones above discussed is presented by appellants' motion to modify the judgment, and no authority other than Hart v. Hildebrandt, supra, is cited to sustain appellants' contentions with reference thereto. Appellants fail to comprehend the office of a motion to modify. The motion was properly overruled.

We find no reversible error.

Judgment affirmed.

LESE v. ST. JOSEPH VALLEY BANK. (No. 11810.)

(Appellate Court of Indiana, Division No. 2. Feb. 27, 1924.)

1. **Death ⇐11—Right of action statutory.**

A right of action for death does not exist in the absence of statute.

2. **Executors and administrators ⇐271—Administrator not empowered to pay funeral and monument expenses out of damages received for wrongful death of intestate.**

Under Burns' Ann. St. 1914, § 285, creating a right of action for death caused by wrongful act or omission, and providing that the damages "must inure to the exclusive benefit of the widow, or widower * * * and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased," an administrator could not pay expenses of funeral and erection of monument out of damages received by him for the wrongful death of intestate.

3. **Executors and administrators ⇐504(4)—Daughter held not estopped to deny right of father's administrator to pay for monument out of damages received by administrator for father's wrongful death.**

Where intestate's daughter was only 16 years of age when her father was killed, had

been in this country only a few months, could not speak English, did not know the value of her father's estate, nor the amount which father's administrator was to receive for wrongful death, the mere fact that she had accompanied administrator when he selected a monument for her father's grave and, expressed her satisfaction therewith and authorized administrator to pay for the monument, did not estop her from objecting to payment out of amount received for father's wrongful death.

Appeal from Superior Court, Elkhart County; W. B. Hile, Judge.

Proceedings by the St. Joseph Valley Bank, administrator of the estate of Paul Ianigro, for settlement of final report, to which Concetta (Ianigro) Lese, an heir, by Glen R. Sawyer, her guardian ad litem, filed exceptions. The exceptions were sustained in part and overruled in part, and the heir appeals. Judgment reversed with directions.

O. C. Raymer and C. T. Olds, both of Elkhart, for appellant.

Robt. E. Proctor, of Elkhart, and Elias D. Salsbury, of Indianapolis, for appellee.

McMAHAN, J. Appellee as the administrator of the estate of Paul Ianigro filed its final report, to which appellant filed exceptions. The exceptions were sustained in part and overruled in part.

The final report when amended to comply with the holding of the court was approved. The facts were found specially and so far as need be stated are in substance as follows: The decedent met his death through the wrongful act of the New York Central Railroad. The administrator charged itself with $1,250 received from the railroad in settlement of a claim arising out of the death of the decedent who was an Italian and who had been in this country about 14 years. He left surviving him a widow, who resided in Italy where she was at the time of his death living in open adultery. Appellant was the only child of decedent and was about 16 years of age when he died. She had been in this country about 5 months prior to his death and was not able to speak our language.

The estate or property owned by the decedent at the time of his death consisted of $9 cash, $70.70 on deposit in bank, and $50.92 for accrued but unpaid wages. The $9 was found on the body of the deceased by the coroner and by him turned over to a brother of the decedent. The bank also paid the $70.70 to said brother, who in turn gave all of said money $79.70 to his wife who expended the same in buying clothing for appellant. It had been the custom of the Italian people living in the city of Elkhart, when there was a death of one of their people, to make a contribution or donation of money to the head of the household when and where such death occurred. The decedent at the time of his death and his daughter were living with the brother referred to, and the money donated by the Italian people on the death of appellant's father was according to such custom given to his brother. The amount so given to the brother was $308.50.

It was a custom of the Italian people to bury one of their members with impressive ceremonies, and they would often in so doing expend money for a monument, out of proportion to the estate left by the decedent. Appellant took part in making the expenses incurred in the burial of her father and expressed a desire that he be given a good burial and that a monument should be erected at his grave, because, as she at the time said, there would be money coming on account of his death. The brother of the decedent and appellant consulted with a monument dealer and made arrangements for the erection of a monument at a cost of $177. This monument was erected, after which appellant expressed her satisfaction and directed appellee to pay said $177 for the monument, which it did. It also paid out on account of the burial of the decedent $8 for a pair of shoes; $451 to an undertaker; $10 for moving the body from a temporary to a permanet burial place; and $36 for religious services. The decedent at the time of his death owed debts aggregating $32.21. The decedent did not own a burial lot, so the brother purchased a lot, taking the certificate of title in his name. He paid $30 for this lot and $33 for having it filled in and leveled. The brother's wife expended a further sum of $35, which the members of the family had given her, for clothing purchased for appellant when her father died. Appellee as administrator paid each and all of the above items amounting to $1,286.62. It also paid to the clerk of the court $14.40 for court costs. The court found the services of the attorney for the administrator were worth $75, and that the services of appellee as administrator were worth $25.

The court concluded as a matter of law: (1) That the money turned over to the brother of the decedent by the coroner and the bank, amounting to $79.70, was wrongfully turned over to him, and that it belonged to the decedent's estate, and that the administrator should be charged with its recovery. (2) That the general estate of the decedent, amounting to $130.62, should be first applied to the payment of the expenses of administration including $14.40, court costs, $25, administrator fees, and $75, for attorney fees, and that the balance of $16.22 should be applied on funeral expenses. (4) That the balance of funeral expenses, $434.78, $8 for shoes for the decedent, $10 for removing body of decedent, $36 for religious services, and $177, for monument, a total of $665.78, should be paid out of the $1,250 received from the railroad company in settlement of

its liability growing out of the death of the decedent. (5) That all other payments made by the administrator out of the money in its hands were illegal. (6) That the wife of the decedent was not entitled to share in the distribution of the estate nor in the $1,250 derived from the railroad company and that the $584.22 thereof remaining after the payment of the items mentioned in No. 4 should be paid to appellant. (7 and 8) That the $308.50 paid by the Italian colony to the decedent's brother was not a part of the estate, and that the report should be amended in accordance with the conclusions of law and the estate settled accordingly.

Appellant excepted to each conclusion of law and on appeal contends: First. That it was error to allow the administrator to use any part of the $1,250 for a monument, for undertaker's bill, or for other expenses incurred because of the burial of the deceased. Second. That the $308.50 was given for burial purposes, and that the administrator should be charged with the same.

Section 285, Burns' 1914, reads as follows:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor. * * * the damages cannot exceed ten thousand dollars; and must inure to the exclusive benefit of the widow, or widower (as the case may be), and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

[1, 2] In the absence of statute no such right of action existed. The Legislature in enacting this statute not only created the right of action and directed who could prosecute it, but it went farther and stated to whom and the manner in which the money when received should be distributed. The Supreme Court in Jeffersonville, etc., R. Co. v. Hendricks, 41 Ind. 48, 74, said:

"Having thus conferred the right of action, and directed who should prosecute it, had they stopped here, it would have been inferable, at least, that the fund recovered would have been simple assets of the estate to be disposed of as other assets. But having created this fund, the Legislature had the right to determine what should become of it, and who should be benefited by it; and in the exercise of that right, the fund itself is charged with the express trust that it must inure exclusively to the benefit of the widow and children, if any. * * * Upon each and every farthing recovered in an action of this kind is ineffaceably impressed a trust of the most high and sacred character."

See Duzan v. Myers, 30 Ind. App. 227, 65 N. E. 1046, 96 Am. St. Rep. 341; Grancik v. Rajcany, 54 Ind. App. 274, 101 N. E. 745; Smith v. Cleveland, etc., R. Co., 67 Ind. App. 397, 117 N. E. 534; Pittsburgh, etc., R. Co. v. Hosea, 152 Ind. 412, 53 N. E. 419; Pittsburgh, etc., R. Co. v. Gipe, 160 Ind. 360, 65 N. E. 1034. In the case last cited the court said:

"When recovered, the amount of the recovery does not become assets in the hands of the administrator to be distributed, as the other assets of the estate, 'but the amount recovered shall be for the exclusive benefit of the widow and next of kin of such deceased person.' The creditors of the estate of the deceased have no interest whatever in the amount of such recovery."

Appellee contends that under the law the administrator of a decedent's estate is bound to pay the burial and funeral expenses and that the reasonable cost of a monument may be classed as a part of the funeral expenses and paid by the administrator out of the funds of the estate. In Hildebrand v. Kinney, 172 Ind. 447, cited by appellee, the funds in the hands of the administrator were all derived from the sale of real estate owned by the defendant in his lifetime. What the court there said was in reference to a solvent estate where there were sufficient funds to pay all the claims. The other cases cited by appellee are of like character, and are not of controlling influence in the instant case.

The $1,250 is chargeable only with the necessary expense incurred by the administrator in its collection. Yelton v. Evansville, etc., R. Co., 134 Ind. 414, 33 N. E. 629, 21 L. R. A. 158. Appellant concedes this to be the law, and makes no objection to the report in so far as the allowances for attorney fees and for the services of the administrator are concerned.

[3] Appellee contends that appellant, by her action in going with her uncle when he selected the monument, her expression of being satisfied and pleased with the monument, and in authorizing appellee to pay for such monument, estops her from objecting to the payment of such claims out of the $1,250. We cannot concur in this contention. The facts, both as shown by the evidence, and the special finding, disclose that appellant at the time her father was killed was but 16 years of age, had been in this country only a few months, and could not speak our language. The expenses for the burial and monument were all incurred before a settlement was made with the railroad company. There is nothing to show that appellant at any time knew the value of her father's estate, although it is reasonable to infer that she knew it was of little value. The $308.50 given to the family by the Italian people was not given until after the burial, but it was given before the monument was ordered. Appellee argues that since appellant was, as the court found, "a woman grown in physical appearance and size," the facts are sufficient to warrant the court in holding that appellee was justified in paying for the monument and for burial out of the $1,250.

We hold that appellant is not estopped from objecting to the amounts paid for burial and for the monument. In so far as the $308.50 is concerned, there is nothing in the evidence or in the finding that would warrant this court in saying it was a part of the estate of the decedent for which the administrator is chargeable. The court erred in the fourth conclusion of law, since none of the items therein mentioned should be paid out of the $1,250. The sixth conclusion is erroneous in so far as the amount ($584.22) which the court concludes should be paid appellant. The items mentioned in conclusion 4 amounting to $665.78 are not payable out of the $1,250.

Judgment reversed, with directions to the trial court to restate its conclusions of law, and for further proceedings in conformity with this opinion.

SCHWINDT et al. v. GRAEFF et al. (No. 17952.)

(Supreme Court of Ohio. Feb. 26, 1924.)

(Syllabus by the Court.)

New trial ⇐143(1)—Verdict may not be impeached by evidence of member of jury although he does not join therein.

The rule that the verdict of a jury may not be impeached by the evidence of a member of the jury is a common-law rule founded upon public policy, and not upon the doctrine of estoppel, and the fact that a juror offering such impeaching evidence did not join in the verdict does not exempt such evidence from the operation of the rule. The Legislature, and not the courts, is empowered to modify or abrogate the rule.

Marshall, C. J., and Wanamaker and Allen, JJ., dissenting.

Error to Court of Appeals, Tuscarawas County.

Action by Charles Schwindt and others against William Graeff and others to set aside a will. A judgment sustaining the will was affirmed by the Court of Appeals, and plaintiffs bring error. Affirmed.—[By Editorial Staff.]

This was an action to set aside a will. Verdict was returned sustaining the will, and motion for a new trial, supported by the affidavits of two members of the jury, was made, assigning among other grounds misconduct of the jury. The affidavits allege that one of the jurors, S., at a time when the jury was divided 8 to 4, the juror in question being one of the 4, stated "that he was going to toss a coin, and, if the figure and, if the coin fell with the other side up, he would change his vote and vote in favor of the defendants." He then tossed the coin, and it fell with the head up, and he said, "Well, I guess I have been voting right in this matter." And when the next ballot was taken the vote remained the same as before. Later, the said S. laid down three quarters, stating, in substance, that if two heads were up he would change his vote, and vote with the majority, and if two were otherwise he would continue to vote as before. Two heads were up, and on taking the next ballot the defendants received one more vote, which gave them nine votes—a sufficient number to authorize the return of a verdict in their favor. Such verdict was then returned, signed by nine of the jurors, including the name S.

No counter affidavits were filed. The motion for new trial was overruled, and judgment entered on the verdict. Error was prosecuted to the Court of Appeals, where the judgment of the court of common pleas was affirmed.

Seikel & Hill, of Dennison, and Mitchell & Mitchell, of New Philadelphia, for plaintiffs in error.

R. C. Bowers and Wilkin, Fernsell & Fisher, all of New Philadelphia, for defendants in error.

ROBINSON, J. Were it not for the fact that it is claimed that the affidavits of jurors who did not join in the verdict do not or ought not to come within the rule which forbids the impeachment of the verdict of a jury by members thereof, we would be content to decide this case upon precedent, without discussion.

An examination of the authorities, which are legion, discloses that prior to the adoption of our federal Constitution, and long prior to the organization of our state government, it was contrary to public policy at common law to impeach the verdict of a jury by the evidence of its members. The jury system at the time of the adoption of our federal Constitution was so well established that the framers of the Constitution did not deem it necessary to define it, but recognized it as an institution, and made reference to it by name only, declaring that the right of trial by jury shall be preserved, meaning, as has been since often declared by the federal courts and the courts of the various states, the right to trial by jury as it then existed at common law.

We, therefore, inherited the jury system with all the rules at common law which determined the character of actions in which the right to trial by jury existed, the character of persons eligible to act as jurors, the

jury, the function of a jury, the rules governing the conduct of a jury, what constituted misconduct of jury, and how such misconduct might be proven. While we have been unable to ascertain at what period courts first declared it to be the public policy that the deliberations and conduct of the jury while in the jury room should not be the subject of judicial investigation upon the evidence of the jurors alone, we do find that in 1785, in passing upon a motion to set aside a verdict upon an affidavit of two jurors who swore that the jury being divided in their opinion tossed up, and that the plaintiff's friends won, Lord Mansfield, Chief Justice, declared, in Vaise v. Delaval, 1 T. R. 11 (K. B.):

"The court cannot receive such an affidavit from any of the jurymen themselves * * * but in every such case the court must derive their knowledge from some other source: such as from some person having seen the transaction through the window, or by some such other means"—citing cases to which we have not access.

The principle that it is against public policy to permit jurors to impeach their own verdict has been generally with an occasional sporadic departure, followed in all the jurisdictions of which we have knowledge, except in those jurisdictions where the common-law rule has been modified by statute.

While common-law rights and common-law principles have to a very large extent been either modified, or enacted in the form of statutes, where unmodified or unabrogated by statute they have the same force and effect as a statute, and, while there perhaps is no restraining hand which may prevent a court of last resort from abrogating or modifying a common-law principle, yet no power has been vested in the courts so to do, such power being vested in the legislative branch alone. The rule being based upon public policy rather than upon the theory of estoppel, the fact that the jurors testifying by affidavit in the instant case did not join in the verdict does not take their testimony out of the operation of the rule. Indeed, to so hold would enable courts to inquire of the jurors themselves by what process they arrived at a verdict in civil cases, where the three-fourths rule applies, and deny the same inquiry in criminal cases where all must join in a verdict. Certainly if public policy denies to courts the right to inquire of the jurors whether they have violated their oaths in criminal cases, where liberty and life are at stake, that same policy would deny the right in civil cases, where monetary interests alone are involved.

While this cause presents a situation which strains the rule almost to the breaking point, and demonstrates that every hard and fast rule, whatever its origin, will not so long as we are to continue to be governed by law, rather than by men, a rule must be adhered to which is designed to accomplish justice in the greatest number of cases, and, if modified or abrogated, it must be done by that branch of the government specially empowered to legislate, rather than by that branch empowered only to propound law and administer justice according to existing law.

For these reasons we approve and follow the numerous decisions of this court holding that the verdict of a jury may not be impeached by the evidence of the jurors themselves.

The other assignments of error involve propositions which were also urged in the courts below, upon which the law is well settled, and upon which this court has heretofore spoken, and will not be further considered here. We find no reversible error.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

JONES, MATTHIAS, and DAY, JJ., concur.

MARSHALL, C. J., and WANAMAKER and ALLEN, JJ., dissent.

MARSHALL, C. J. (dissenting.) The majority opinion fully and correctly states the facts. I cannot agree with the conclusions of the majority.

There are two important considerations in every lawsuit—first, and most important, that justice be done between the parties; and, second, that in reaching a judgment the court should not do violence to sound rules of law.

First. It is conceded by the majority opinion that a gross injustice was done to the plaintiff, because, regardless of the merits of the case, it was deemed to have sufficient merit to justify its submission to a jury, and it was properly submitted to the jury for their deliberation and verdict. The jurors were arbiters of the facts, and instead of determining where the truth lies upon the facts submitted to them by a careful consideration of the evidence, and by finding the ultimate fact, it appears by the tendered affidavits of two jurors that one of the jurors, whose vote was necessary to the determination of the case, followed the reprehensible course of casting lots. Inasmuch as there were ten other jurors who could have denied the truth of these affidavits, and who have not seen fit to do so, and inasmuch as the particular juror who is charged with violating his solemn oath as a juror has not seen fit to controvert the truth of those affidavits, it will be presumed for the purposes of this discussion that there was misconduct to the prejudice of the plaintiff.

Second. If the rule excluding the testimony of jurors is a sound rule of law, it should

result in this particular case.

It is my purpose to challenge the soundness of the rule.

It is not questioned that in 1785, in a cause then pending in England in the King's Bench Division, Lord Chief Justice Mansfield, without any legislative authority therefor, and reversing a well-settled rule to the contrary, which had prevailed for a long time, declared the rule which is followed in the majority opinion. That was the case of Vaise v. Delaval, 1 T. R. 11 (K. B.), and that case differed from the instant case only in the fact that the entire jury in that case were guilty of tossing the coin, while in the instant case only one juror, his vote being necessary to a decision, was guilty of the misconduct. It is therefore interesting to learn upon what reason Lord Mansfield reached a conclusion contrary to the rule which had theretofore prevailed in England, and it is found by an examination of the record of that case that the new rule was supported by no reason whatever. The following is the entire opinion of the court:

"The court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor; but in every such case the court must derive their knowledge from some other source, such as from some person having seen the transaction through a window, or by some such other means."

Immediately after that decision other English courts began to follow the rule, and in time the rule received recognition in this country, and it must be admitted that it is now quite generally adhered to, except in quite a number of states where a statute has been passed affirmatively overthrowing this pernicious doctrine. There are, however, a few states of the Union whose courts refuse to follow the rule where it has not been overthrown by statute. I have examined a large number of English and American cases which have followed the rule of Lord Mansfield, and almost without exception the courts have deplored the injustice done to the parties and have followed the rule on the alleged ground that it would be against policy to receive the testimony of jurors under such circumstances. It is only in a very few cases that the courts have entered upon any discussion of the soundness of the rule, and I am bound to say in all sincerity that I do not find upon an examination of those attempts a single sound reason in support of the rule. The alleged reasons given are that a juror comes into court with a bad grace in attempting to prove his own dishonorable conduct and to stigmatize his companions, and that it might make it necessary for a court to prosecute jurors criminally. It should require no argument whatever to show the fallacy of such alleged reasons. the part of a juror to repent his misconduct and express a desire to have his action recalled in order that justice may be done between litigants, and if his confession does in fact stigmatize other jurors they may be heard in their own defense. In any event, it is much better that the testimony be received, thereby offering to the jurors who may be stigmatized an opportunity to make their defense, than to merely place the affidavits on file where the public may know what has happened, with the attendant discredit upon court proceedings and the consequent pollution of the stream of justice, only to be advised by the courts that even though injustice is done there should be no official exposure of such an unholy truth.

If the opinion of Lord Mansfield is worthy of being called an opinion at all it is certainly subject to severe criticism. It virtually says that the reprehensible conduct of a juror should only be exposed by evidence obtained through other reprehensible conduct, to wit, eavesdropping. The rule has been criticized severely, and the courts have refused to follow it in the following cases: Smith v. Cheetham, 3 Caines (N. Y.) 57, 59; Crawford v. State, 2 Yerg. (Tenn.) 60, 67, 24 Am. Dec. 467; Wright v. Illinois & Mississippi Telegraph Co., 20 Iowa, 195, 210, and Perry v. Bailey, 12 Kan. 539, 544.

The reasoning of the courts in all of these cases seems to me unanswerable. From the Tennessee case I quote the following, page 69:

"A verdict under such circumstances is to be approached with great caution and great circumspection, but it is not altogether intangible, and beyond the reach of the redressing power of the court; if it were, I for one would think it a defect * * * in the policy of the law."

In the Iowa case is the following, page 212:

"It is true, however, that public policy does require that, when a juror has discharged his duty and rendered a verdict, such verdict should remain undisturbed and unaffected by any subsequent change of opinion upon any fact or pretext whatever; and, therefore a juror should not be heard to contradict or impeach that which, in the legitimate discharge of his duty, he has solemnly asseverated. But when he has done an act entirely independent and outside of his duty and in violation of it and the law, there can be no sound public policy which should prevent a court from hearing the best evidence of which the matter is susceptible, in order to administer justice to the party whose rights have been prejudiced by such unlawful act. In other words, public policy protects a juror in the legitimate discharge of his duty, and sanctifies the result attained thereby; but if he steps aside from his duty, and does an unlawful act, he is a competent witness to prove such fact, and thereby prevent the sanction of the law from attaching to that which would otherwise be colorably lawful."

the sound public policy of forbidding disclosures of matters which should rest in the personal conscience of a juror, and then declared the following conclusion, page 545:

"But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard."

In the New York case, at page 59, the court propounded these pertinent inquiries:

"If a man will voluntarily charge himself with a misdemeanor, why should he not be indulged? Are not criminals in England every day convicted, and even executed on their own confession? And is not our state prison filled in the same way?"

I entertain the strongest convictions of the efficacy of the jury system, but I deny that it is entitled to protection against disclosures of criminal or other reprehensible conduct, and I assert that it only tends to discredit the jury system, and therefore to measurably bring the entire judicial system into disrepute, to deny to jurors the right to testify concerning misconduct in the jury room. Persons accused of crime are permitted to plead guilty, and their confessions obtained by proper means may be received in evidence. Other public officials are permitted to make voluntary confession of malfeasance in office, and it is impossible to conceive any reason why jurors should be placed in a class by themselves.

The decisions of the courts of Ohio have not been entirely consistent upon this question. In the case of Farrer v. State, 2 Ohio St. 54, it was stated in the opinion of Judge Corwin, on page 58, that in his opinion, after the foundation had been laid by the testimony of the sheriff of the misconduct of the jury, the testimony of the jurors themselves became competent. From page 56 I quote the following:

"I have no doubt, the general rule of policy, and a just regard to the sanctity of the province in which the jury is appointed to act, are against the reception of such evidence, in an ordinary case; but in one where life or even liberty is threatened by misconduct of the jury, it will readily be conceived, that circumstances may exist which would not only admit, but demand, the examination of members of the jury, as to their alleged bad behavior."

Can it be that one rule prevails in civil cases and that another and a different rule prevails where life and liberty are at stake?

In Goins v. State, 46 Ohio St. 457, 21 N. E. 476, the judgment of the lower courts was reversed on other grounds, and it was therefore not necessary to base the reversal upon the jury's misconduct. In that case affidavits of two jurors were tendered, showing that the verdict had been reached by lot, and without denial on the part of other jurors. The defendant in that case was indicted and tried for first degree murder. There was a conviction for manslaughter. After commenting upon the fact that the judgment of the lower courts was reversed upon other grounds, thereby making it unnecessary to determine the validity of the rule rejecting the testimony of jurors, Bradbury, J., at page 472 (21 N. E. 482), concluded with the the following observation:

"But a case like this at bar strains the principle to its utmost tension, and suggests a doubt whether there may not be found a carefully guarded exception to a rule, the universal application of which may present a spectacle so discreditable to our jury system."

I do not agree with the majority opinion in the instant case that no power is vested in this court to modify or abrogate this rule, and that such power is "vested in the legislative branch alone." The rule never had any force beyond that of a common-law principle, and surely the principles of the common law declared by the English courts are not binding upon the courts of the United States, except in so far as they are commended by their essential soundness.

Having thus far dealt with this question as a common-law principle, I desire to call attention to the state of the Ohio statutes upon the subject of competency of witnesses.

Section 11493, General Code, provides:

"All persons are competent witnesses except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."

Section 11494, General Code, declares what communications are privileged, and defines the limitations of such privilege. Needless to state, that section makes no reference whatever to the testimony of jurors. The Legislature of Ohio having invaded that field, the maxim "*expressio unius est exclusio alterius*" applies with full force, and it will be presumed that the Legislature did not intend that courts should extend the limitations of privilege beyond the plain provisions of that section.

I therefore insist that both upon principle and upon the authority of the statutes of Ohio the rule of Lord Mansfield should not be followed.

A judicial inquiry, whether civil or criminal, is not a game of chance but, on the contrary, is a simple inquiry as to where the truth lies upon the issues of fact involved, and the application of correct principles of law to the facts found. Unfortunately for the cause of jurisprudence, very many people have conceived the notion that legal principles have so many technical angles,

pressed or concealed by an unscrupulous party or a skilful practitioner, with the full knowledge on the part of the court that an injustice is being perpetrated. Such a conception is as unfortunate as it is unjust. To correct this false notion should be the task of the bench and bar. Like Cæsar's wife the administration of justice must be above suspicion. Any rule of long standing should generally be followed, but when it clearly appears that the rule is wrong there should be no hesitation in reversing it.

In addition to what has already been stated, I should perhaps make an explanation of a statement found in my dissenting opinion in Long v. Cassiero, 105 Ohio St. 123, beginning at page 129, 136 N. E. 888. At that time I not only conceded that it was a general rule that misconduct of a juror must be shown by testimony of persons other than jurors themselves, but I also conceded that it was a rule of good policy. There was no question of misconduct in that case, and I therefore had made no analytical study of the proposition so far as it is affected by moral obliquity of the juror, and I now feel, upon having made a careful, intensive study of the subject, that I conceded too much, and that the views hereinbefore expressed sound the better and the safer doctrine.

ALLEN J., concurs in the dissenting opinion.

(311 Ill. 311)

In re CUNNINGHAM'S ESTATE.

SMITH et al. v. BOND.

(No. 15216.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Accord and satisfaction ⇐=7(1), 10(1), 11 (1, 3), 12(1) — Compromise and settlement ⇐=5(2)—When payment of part a satisfaction.

The payment of a part of a fixed and certain demand which is due and not in dispute is no satisfaction of the whole debt, even where the creditor agrees to receive a part for the whole, and gives a receipt for the whole demand, but if there is a bona fide dispute as to how much is due, a part of the payment claimed by the debtor to be due in full settlement if accepted by the creditor is a satisfaction of the claim, though the creditor protests at the time, or does not accept it in full satisfaction of his claim.

2. Accord and satisfaction ⇐=11(1)—Erasure of "in full" from check or receipt immaterial.

That the words "in full" are erased from a check or receipt by the creditor does not affect the question whether the proffer and acceptknowledge or authority of the debtor.

3. Accord and satisfaction ⇐=10(1)—Compromise and settlement ⇐=6(2, 6)—Actual dispute necessary to furnish consideration.

There must be an actual dispute between debtor and creditor in order to furnish a consideration for an agreement to discharge the obligation of the debtor for an amount less than the creditor claims to be due; but the fact that the settlement was made on a wrong basis or that the creditor received an amount considerably less than he could have recovered, or that he was ignorant of the legal rules governing such settlement, is not a sufficient reason for disregarding the settlement made with full knowledge of the facts.

4. Payment ⇐=67(2)—Effect of acceptance of check.

In the absence of an agreement expressed or implied to accept a check as absolute payment, it is simply a means of obtaining payment; and ordinarily it will be presumed that the mere deposit of a check in the usual course of business is for collection only, and not as money.

5. Accord and satisfaction ⇐=18—Compromise and settlement ⇐=20(1)—Effect of stopping payment on checks.

When makers stopped payment of checks tendered in full settlement, and prevented creditors from receiving their money, he rendered ineffective their conditional acceptance of his offer to settle the indebtedness, as when creditors indorsed and deposited the checks tendered by him they accepted his offer only on condition that the checks would be paid in due course.

6. Accord and satisfaction ⇐=16—Accord must be fully executed.

In order to constitute a bar to an action on the original claim, an accord must be fully executed.

7. Payment ⇐=42—Application of partial payments on account.

Where an account due consists of principal and interest, partial payments made on account will be applied first to the payment of interest already due, and then to the payment of the principal, interest to be calculated to the time of the partial payment; but if payment is less than interest due the balance of the interest is not to be added to the principal, but is to be set apart to be paid together with other accumulated interest by the next payment.

8. Payment ⇐=38(4)—Application of partial payments as affected by consent of interested party.

When claim against debtor is a single debt consisting of principal and interest, a debtor cannot as a matter of right, appropriate a partial payment to the extinguishment of the principal in advance of the discharge of the interest; but, if he makes a partial payment upon the stipulation and agreement that it shall be applied in satisfaction of the principal, and it is so accepted and appropriated by the creditor, the creditor cannot, without the consent of

direct the application of such payment; but this right of appropriation applies only to voluntary payments, and does not exist in the case of payments in invitum or by process of law.

10. Executors and administrators ⇐275 — Right to make application personal to debtor himself, and does not pass to his administrator.

The right to make an application of a payment is personal, and is limited to the debtor himself, and it does not survive him and pass to his administrator, and partial payments by administrator should first be applied to the interest then accrued, and the balance should go to the reduction of the principal as of the date when the several payments were made; the administrator having no right to prefer one claim over another, and the court being required by law to apportion the fund.

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Vermilion County; Walter Brewer, Judge.

In the matter of the estate of James A. Cunningham, deceased. Claims by Daniel Smith, administrator, and others, against Nathan Bond, administrator. From a judgment of the Appellate Court for the Third District (227 Ill. App. 124) reversing a judgment allowing certain claims, claimants appeal. Reversed in part and affirmed in part.

O. M. Jones, of Danville, and C. E. Russell, of Hoopeston, for appellants.

J. H. Dyer, of Hoopeston, and Rearick & Meeks, of Danville, for appellee.

THOMPSON, J. A certificate of importance having been granted, this appeal is prosecuted to review a judgment of the Appellate Court for the Third District reversing a judgment of the circuit court of Vermilion county, allowing certain claims against the estate of James A. Cunningham, deceased.

Prior to his death Cunningham was a member of the firm of Hamilton & Cunningham, a partnership engaged in banking. Appellee, Nathan Bond, is administrator of the estate of Cunningham and receiver of the estate of Hamilton & Cunningham. Many depositors and others having claims against the bank filed their claims against the partnership estate in the circuit court and against the Cunningham estate in the probate court of Vermilion county. Among them was the claim of A. W. Smith for $9,651.87, of Rachel Austin for $936, of William Scott for $2,704.70, of Mrs. John Gerrard for $1,056.20, and of Emanuel Clouse for $625.24. In addition to his claim against the partnership estate Smith also had a claim for $5,278.81 July 29, 1911, and March 7, 1912. January 28, 1914, there was a payment of 25 per cent. of the original amount, and March 25 an additional payment of 20 per cent. of the original amount. July 25, 1921, Bond sent a letter to the personal representative of each of the five claimants (the claimants having died in the meantime), and inclosed two checks purporting to settle in full the several claims against the estate of Hamilton & Cunningham. In this letter he set forth a statement of the account applying all the partial payments to a discharge of the original principal. The funds in the estate of Hamilton & Cunningham were sufficient to discharge only 82 per cent. of the balance stated by him to be due, and this made it necessary to inclose a second check paying the remaining 18 per cent. from the estate of Cunningham. He inclosed two receipts—one to him as receiver, and the other to him as administrator—both of which stated that the respective checks were received by the respective claimants "as payment in full upon my claim allowed against said estate." Two or three days after these checks were mailed Bond had a conversation with the attorney for the claimants and with the persons to whom the checks had been sent covering the Smith, Austin, and Scott claims. They told Bond that they would not accept the checks in full satisfaction of their claims because he had not made an application of the several payments in accordance with the established rule concerning partial payments. Instead of returning the checks the claimants indorsed and deposited them in the several banks where they kept their accounts. A day or two after the claimants told Bond that they would not accept the checks in full payment of their claims he stopped payment of the checks. The owners of the Gerrard and Clouse claims struck out of the receipts the words "in full upon," and inserted in lieu thereof the word "on" and signed them as altered, so that the receipts returned by them to Bond read, "as payment on my claim." They indorsed the checks and collected the money on them. August 15, 1921, each of the five claimants filed in the probate court of Vermilion county a petition setting forth the facts above stated, and asking that the court direct the administrator to pay the balance due on said claims. The court held that the payments should have been first applied to the discharge of interest, and that the remainder of the payments should have been applied to the discharge of the principal, and directed the administrator to state the ac-

On appeal the circuit court made the same findings, but the Appellate Court reversed the judgment of the circuit court on the ground that there was an accord and satisfaction.

[1-3] The payment of a part of a fixed and certain demand which is due and not in dispute is no satisfaction of the whole debt, even where the creditor agrees to receive a part for the whole and gives a receipt for the whole demand (Ostrander v. Scott, 161 Ill. 339, 43 N. E. 1089); but, if there is a bona fide dispute as to how much is due, a payment of the amount claimed by the debtor to be due in full settlement, if accepted by the creditor, is a satisfaction of the claim. Snow v. Griesheimer, 220 Ill. 106, 77 N. E. 110. It makes no difference that the creditor protests, at the time, that the amount received is not all that is due or that he does not accept it in full satisfaction of his claim. The creditor must either accept what is offered with the condition upon which it is offered, or refuse it. Canton Coal Co. v. Parlin & Orendorff Co., 215 Ill. 244, 74 N. E. 143, 106 Am. St. Rep. 162. The fact that the words "in full" are erased from the check or receipt by the creditor does not affect the question whether the proffer and acceptance of the check constitute an accord and satisfaction where the erasure is without the knowledge or authority of the debtor. Worcester Color Co. v. Wood's Sons Co., 209 Mass. 105, 95 N. E. 392. There must, of course, be an actual dispute between the parties in order to furnish a consideration for the agreement to discharge the obligation of the debtor for an amount less than the creditor claims to be due (Scheffenacker v. Hoopes, 113 Md. 111, 77 Atl. 130, 29 L. R. A. [N. S.] 205); but the fact that the settlement was made on the wrong basis, or that the creditor received in settlement an amount considerably less than he could have recovered, or that he was ignorant of the legal rules governing such settlement, is not a sufficient reason for disregarding the settlement by him with full knowledge of the facts. Janci v. Cerny, 287 Ill. 359, 122 N. E. 507. Under these rules it is clear that the estate is discharged from further liability on the Gerrard and Clouse claims.

[4-6] Bond offered in settlement of the other three claims, checks signed by him as administrator and as receiver. The receipt of these checks by the claimants was not an absolute payment of the claims unless the claimants agreed to accept them as such. In the absence of an agreement, expresed or implied, to accept a check as absolute payment, it is simply a means of obtaining payment. Ordinarily it will be presumed that the mere deposit of a check in the usual course of business is for collection only, and not as money. Strong & Wiley Bros. v. King, 35 ed the claimants from receiving their money he rendered ineffective the conditional acceptance of his offer. When the claimants indorsed and deposited the checks tendered by him in full settlement of their claims, they accepted his offer on condition that the checks would be paid in due course. Heartt v. Rhodes, 66 Ill. 351. If we concede that this offer by Bond and this acceptance by the claimants is an accord, it is clear that Bond, by stopping payment of the checks, prevented the execution of the accord. In order to constitute a bar to an action on the original claim, the accord must be fully executed. State v. Funk, 105 Or. 134, 199 Pac. 592, 209 Pac. 113, 25 A. L. R. 625; Stanly v. Buser, 105 Kan. 510, 185 Pac. 39, 10 A. L. R. 218. There was no accord and satisfaction as respects the Smith, Austin, and Scott claims.

[7-10] Where the account due consists of principal and interest, partial payments made on account will be applied first to the payment of interest already due and then to the payment of the principal. If interest is due on the account it should be calculated to the time when the partial payment is made, and the partial payment applied to the discharge of the interest. If the payment exceeds the interest due, the balance should be applied to diminish the principal. If the payment is less than the amount due for interest, the balance of the interest is not to be added to the principal, but is to be set apart, to be paid, together with other accumulated interest, by the next payment. McFadden v. Fortier, 20 Ill. 509; Munger on Application of Payments, 126; 5 Page on Contracts, § 2840. When the claim of the debtor is a single debt, consisting of principal and interest, the debtor cannot, as a matter of right, appropriate a partial payment to the extinguishment of the principal in advance of the discharge of the interest. To permit him to do this without the consent of the creditor would be to change the legal effect of the contract, by which the unpaid balance, not including interest, bears interest until the entire debt is discharged. But if the debtor makes a partial payment upon the stipulation and agreement that it shall be applied in satisfaction of the principal, and not of the interest, and it is so accepted and appropriated by the creditor, the creditor will not be permitted, without the consent of the debtor, to shift the application of such payment from the principal to the interest, nor will the law do so for him. Tooke v. Bonds, 29 Tex. 419; Kann v. Kann, 259 Pa. 583, 103 Atl. 369. If a debtor makes a payment voluntarily, and out of his own funds, he has the right to direct the application of such payment; but this right of appropriation by the debtor applies only to voluntary payments, and does not exist in the

of law. 5 Page on Contracts, § 2847; Munger on Application of Payments, 31; Orleans County Nat. Bank v. Moore, 112 N. Y. 543, 20 N. E. 357, 3 L. R. A. 302, 8 Am. St. Rep. 775; Blackstone Bank v. Hill, 10 Pick. (Mass.) 129. In Wetmore & Morse Granite Co. v. Ryle, 93 Vt. 245, 107 Atl. 109, the Supreme Court of Vermont held that a payment by a receiver was an involuntary payment, and that neither the receiver nor the creditor had the right to make an application of the payment, the court saying:

"It is a case where the payments were by judicial proceedings and the applications were made by law at once, without regard to formal indorsements on the note or entry of credit on the account."

The right to make an application of payments is personal and is limited to the debtor himself. It does not survive him and pass to his administrator. After a claim is allowed it becomes a fixed charge against the assets of the estate, and, if the estate is solvent, all allowed claims must be paid in due course of administration. The administrator makes payments on these claims as he is directed by court orders, and the payments, when made, are applied at once by law. The administrator has no right to prefer one claim over another, but must pay all of them in full if there are available funds. If there are not sufficient funds to pay all the claims against the estate, the court is required by law to apportion the funds among the several creditors pro rata, according to their several rights as established by law, and the administrator is required to pay the claims according to the orders of the court. The circuit court properly held that the partial payments made from time to time shall first be applied to the interest then accrued, and the balance of said payments shall go to the reduction of the principal as of the date when the several payments were made.

The judgment of the Appellate Court, in so far as it applies to the Gerrard and Clouse claims, is affirmed. In so far as it applies to the Smith, Austin and Scott claims it is reversed, and the judgment of the circuit court affirmed.

Reversed in part and affirmed in part.

(311 Ill. 330)

PEOPLE v. WAGMAN. (No. 15530.)

(Supreme Court of Illinois. Feb. 19, 1924.)

1. Criminal law ⟸508(9), 510 — Conviction may be sustained on uncorroborated testimony of accomplice.

A conviction may be sustained on the uncorroborated testimony of an accomplice, but to be considered with great caution.

2. Criminal law ⟸742(2)—Credibility of testimony of accomplice for jury.

Whether the testimony of an accomplice in a criminal prosecution should be believed is a question for the jury.

3. Criminal law ⟸508(9)—That accomplices were desperate men and promised immunity held not to render their testimony incompetent.

In a prosecution for receiving stolen goods, that defendant's accomplices were desperate criminals, and were promised immunity if they would testify, did not necessarily require that their testimony in determining defendant's guilt should not be considered.

4. Receiving stolen goods ⟸8(3)—Evidence held to sustain conviction.

In a prosecution for receiving stolen goods, evidence *held* to sustain conviction.

5. Criminal law ⟸423(1)—Evidence of other crimes, the result of conspiracy, held admissible.

In a prosecution for receiving stolen goods, evidence that defendant had entered into a conspiracy with four self-confessed criminals by which they were to commit robberies and defendant was to buy the booty from them, and evidence of other crimes, the result of the conspiracy, was admissible.

6. Criminal law ⟸370—Evidence that defendant had on other occasions received stolen property from same thieves held admissible to show knowledge.

In a prosecution for receiving stolen goods in order to show guilty knowledge on part of defendant, it was proper to show that he had on other occasions received stolen property from the same thieves with whom he had entered into a conspiracy by which they were to commit robberies and he was to buy their plunder.

7. Indictment and information ⟸132(7) — State not required to elect on which count they would prosecute.

In a prosecution on two counts, one for robbery and the other for receiving stolen goods, the state was not required to elect on which count they would prosecute.

Error to Criminal Court, Cook County; Philip S. Sullivan, Judge.

Max Wagman was convicted of receiving stolen goods, and he brings error. Affirmed.

James J. Barbour, of Chicago, and Otis F. Glenn, of Murphysboro, for plaintiff in error.

Edward J. Brundage, Atty. Gen., Robert E. Crowe, State's Atty., of Chicago, and James B. Searcy, of Springfield (Edward E. Wilson, and Clyde C. Fisher, both of Chicago, of counsel), for the People.

FARMER, C. J. Plaintiff in error, Max Wagman (hereafter called defendant), was

jointly with Edward Kosnick, Jack Kral, Stanley Machowiec, and Edward Mazurka. The first count charged the accused with robbery of Edward Alberti of a large amount of money and jewelry, and that at the time they were armed with a pistol. The second count charges the same persons with receiving stolen property. Defendant was tried alone, and the jury returned a verdict of guilty of receiving stolen property, and finding the value of the property received to be $12,816.06 and defendant's age to be 44 years. Motions for a new trial and in arrest were overruled, and judgment and sentence pronounced on the verdict.

Defendant urges, as grounds for reversal of the judgment, that the court erred in admitting evidence of other robberies than the one charged in the indictment; that the court erred in not requiring the people to elect on which count they would prosecute; that the evidence was not sufficient to warrant the verdict; that the court gave improper instructions for the people; and the state's attorney was guilty of improper conduct.

April 15, 1922, defendant purchased the leasehold and furniture of the Monroe Apartments, at the corner of Monroe and Paulina streets, in Chicago. The building contains six flats, of seven rooms each. Defendant and his wife lived in part of the building and rented part of it to others. There was a common reception room, which was for the use of the occupants of the building, and a telephone line and signal board operated from the reception room. Different people or families occupied parts of the building at different times. Prior to his purchase of the Monroe Apartments defendant and his wife operated the Curtis Gardens, at 1100 West Madison street, which had previously been run as a saloon, restaurant, and cabaret. They lived over the Gardens and had a bartender named Long, with whom Edward Kosnick and Jack Kral were acquainted. They met defendant in September, 1921. Some time afterwards Kosnick worked for defendant and stayed generally at his place but testified he was not paid for his work, which appears to have been intermittent. Kral also went to live at defendant's in April, 1922. Edward Alberti was the proprietor of a jewelry store located at 1246 Milwaukee avenue, in Chicago, on May 10, 1922. At about 9:30 o'clock A. M. the people in the store were made by robbers to lie on the floor and the store was robbed of $1,000 in money and a large amount of jewelry. Kosnick, Kral, Machowiec, and Mazurka, besides being identified as the robbers, admitted that they committed the robbery. They testified on behalf of the people that Kral was serving an indeterminate term in the penitentiary at Joliet on another charge, and there were several indictments against him and Kosnick and robbery.

The assistant state's attorney who tried this case testified he told them if they would become witnesses for the people and tell the truth he would permit them to plead guilty to grand larceny and take a sentence from one to ten years, instead of from ten years to life if they were tried and convicted of robbery with a gun. They agreed to do so, and testified they committed the Alberti robbery and sold the property to defendant for $1,000. They also testified to robbing a man named Heard, in November, 1921, of $3,000 worth of property, a man named Gorecki, in February, 1922, of $4,500 worth of property, and a man named Nerad, in April, 1922, of $6,000 worth of property all or most of which they sold to defendant for a small fraction of its value. Kosnick testified defendant told them, when he was operating the Curtis Gardens, that he would buy any property they could procure by theft or robbery, and all four of them testified that defendant advised and encouraged them to rob and bring the plunder to him for sale, and sometimes he furnished them a gun or guns to aid in the robbery. He furnished them with one or two guns at the time they robbed the Alberti store, and they testified he knew they were going to commit the robbery. Shortly prior to the robbery of the Alberti store Kosnick or Kral (probably Kosnick) had taken a watch of defendant's to Alberti's store for repair. When they entered the store on the morning of the robbery Kosnick called for the watch, for which he had a ticket, and it was given him. As he took the money out of his pocket to pay for it he produced a gun and commanded, "Hands up!" Kral testified the purpose of taking the watch to the jewelry store for repair was to enable them to look the place over for the purpose of robbery. When they went to commit the robbery Kosnick was to get the watch before they robbed the place. They committed the robbery in a few minutes, the details of which they gave in full, as well as did Alberti and his employees, but it is not necessary here to state them. They went from the store, after the robbery, direct to defendant, and three of them went into his house. The chauffeur drove the car away to get rid of it. They asked defendant to give them $1,500 for the jewelry but finally sold it to him for $1,000. They testified, or some of them did, they told defendant before committing the robbery that they were going out to stick up a jewelry store. They divided the money received from him in four equal parts. They testified the defendant had knowledge of the robbery of the other places they testified to robbing, and promised them to buy, and did buy, the proceeds of the robbery. Guns were found in defendant's place when he was arrested, and the explanation he gave for their possession was that he

which had been taken to Alberti's jewelry store for repair was found on his person when he was arrested. He denied any knowledge of any of the robbers having taken it to the store or having taken it from his place. It had not been running before it was taken to the jewelry store for repair, but was running when taken from defendant's person. A card was found on defendant's person which was in the handwriting of Kosnick, and contained a notation of various amounts due from the four robbers to defendant. Defendant denied the card was found on his person, but the officers testified they took it from him, and Kosnick testified it was in his handwriting and was given defendant as a memorandum of the amount due from the robbers to Wagman.

We have not undertaken to set out the evidence of the four robbers further than that they testified defendant knew of and advised all the robberies and agreed to buy the proceeds of them, and that he did buy them for a fraction of their actual value. These four witnesses admitted that they were criminals, and the testimony shows they were of a very bad type of criminals. They testified they were armed with guns when they committed the robberies, and substantially that their intention was to kill and murder if they deemed it necessary to do so in order to make their escape. Defendant's counsel insist they were unworthy of belief, and that no man should be deprived of his liberty on the testimony of such criminal scamps, and especially so when their testimony, by an arrangement of the state's attorney, enabled them to escape a possible conviction and sentence of from ten years to life and get instead a sentence of from one to ten years. All these matters were fully before the jury. They saw the witnesses, heard them testify, and chose to believe their story rather than the story of defendant. Also there were a few circumstances, such as their acquaintance with defendant, some of them living at his house, the taking of defendant's watch to Alberti's store for repairs and it being found on his person when he was arrested, and the card in Kosnick's handwriting of amounts due from all four of the robbers to defendant, which tend to cast suspicion on the truth of the denials made by defendant and in some measure to strengthen the testimony of his confessed accomplices.

[1-3] A conviction may be sustained on the uncorroborated testimony of an accomplice, but such testimony is of doubtful integrity and is to be considered with great caution. Cohn v. People, 197 Ill. 482, 64 N. E. 306. Whether the testimony of an accomplice should be believed is a question for the jury. People v. Baskin, 254 Ill. 509, 98 N. E. 957. But it is insisted the four robbers were offered lighter sentences for their crimes if they would testify. One of them was at Joliet for another crime, and one of them was a reformatory convict. Nothing can be said in behalf of the character of the four robbers. They were desperate criminals, but they knew whether the matters testified to by them were true or not, and, although they were granted lighter punishment if they would testify, that fact alone does not necessarily require that their testimony should not be considered. People v. Becker, 215 N. Y. 126, 109 N. E. 127, Ann. Cas. 1917A, 600, is an instructive case on the subject. That was a capital case, and defendant received a death sentence. The court said:

"Of course these accomplices were very bad men; accomplices in murder always are; but it is almost a truism in criminal law that if the testimony of bad men were absolutely rejected many murderers would escape the punishment which they deserve."

[4] The court, by an instruction given for defendant, told the jury that the testimony of accomplices is subject to suspicion and should be acted upon with great caution, and that the jury should consider the influence under which their testimony was given. Notwithstanding these things, the jury believed they truthfully testified that defendant received the property stolen from the Alberti store. There is no doubt Kosnick, Kral, Mazurka and Machowiec robbed that store. Besides their own admissions, three of them were identified by Alberti and some of his employees. It is not disputed that they committed the other robberies they testified to. All of them testified they sold the proceeds of the robberies, including those of the Alberti robbery, to defendant. He denied it. The jury believed the four confessed criminals told the truth, and the trial court approved the verdict. The fact that none of the stolen property was found in defendant's possession when he was arrested two months after the robbery is not a circumstance of great importance. We do not feel that we would be warranted in reversing the judgment on the ground that the evidence did not support it. We have not overlooked the fact that some occupants of rooms in defendant's building testified that they had never seen anything wrong in the place, and that some witnesses gave testimony to the effect that defendant's reputation was good or that they had never heard it discussed.

[5, 6] It is very earnestly contended that the court erred seriously in admitting proof of other crimes than the Alberti robbery. The proof on behalf of the people was that the four self-confessed criminals and defendant had entered in a conspiracy and agreement by which the four men referred to were to commit robberies and defendant was to buy the booty from them. Under that situation we have held evidence of other crimes, the result of the conspiracy, is admissible. People v. Haipin, 276 Ill. 363, 114 N. E. 932;

People v. Bassili, supra, and cases there cited. In order to show guilty knowledge it was proper to show defendant had on other occasions received stolen property from the same thieves. People v. Niles, 300 Ill. 458, 133 N. E. 252; People v. Kohn, 290 Ill. 410, 125 N. E. 293.

[7] It is also contended the court committed reversible error in denying defendant's motion to require the state to elect on which count they would prosecute. This contention cannot be sustained. People v. Thompson, 274 Ill. 214, 113 N. E. 322, and cases there cited; People v. Munday, 280 Ill. 32, 117 N. E. 286.

We do not think there is any basis for the charge of defendant that he was a victim of persecution by the police officers. All the proof made of defendant's criminal record and trouble with the police was the testimony of defendant himself on direct examination, and does not, in our judgment, warrant the charge that he was a victim of persecution.

Complaint is made of some instructions given for the people, but the criticism is very technical and does not warrant extending this opinion by a discussion of them, further than to say the jury were fully and fairly instructed.

Finally, it is contended the state's attorney made improper remarks in arguments to the jury. The remarks complained of were, in our judgment, not of a character to prejudice the jury. To some of them the court sustained objections. The court gave the jury a number of cautionary instructions, such as that they should not allow prejudice to influence them, that their verdict should be based on the evidence heard on the trial, and that it would be a great injustice and would vitiate their verdict if they were influenced by anything the court instructed them not to act upon, no matter from what source it came.

We are impressed by the record that defendant had a fair trial and that we would not be warranted in reversing the judgment. It is accordingly affirmed.

Judgment affirmed.

BROGNA v. COMMISSIONER OF BANKS et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 29, 1924.)

1. Appeal and error ⟸694(1) — Questions considered where evidence not reported.

On appeal from a decree entered by a single justice, where no findings of fact were made and no evidence is reported, the only question of law presented is whether the decree properly, the entry of the decree importing a finding of all facts adverse to the losing party permissible under the pleadings.

2. Appeal and error ⟸694(1)—Decree in suit by receiver against commissioner of banks held not to be disturbed.

Decree for defendant in suit by receiver against commissioner of banks to recover amount shown in passbook of bank whose property and business is in possession of the defendant under St. 1907, c. 377 (G. L. c. 169), *held* not to be disturbed on appeal, where no evidence is reported; the bill not alleging that persons for whom plaintiff was receiver were conducting any one of the kinds of business enumerated in the statute, or that their assets were insufficient to pay their creditors, and the utmost extent of the allegations of the bill being that a passbook was issued, and the answer in substance being to the effect that no genuine deposit was made and that the passbook was used without authority of law.

3. Banks and banking ⟸301(1)—Passbook not negotiable instrument.

A passbook of a savings bank is not a negotiable instrument.

4. Banks and banking ⟸315(3)—Securities in savings department constitute trust fund for benefit of depositors in that department.

The securities, investments, and property of the savings department of a trust company constitute a trust fund which must be held strictly for the benefit of depositors in that department until paid in full, under St. 1907, c. 377 (G. L. c. 169).

Appeal from Supreme Judicial Court, Suffolk County.

Suit in equity by Vincent Brogna, receiver of the affairs of Nicola Sciaraffa and another, against Joseph C. Allen, Commissioner of Banks, and another. From a decree dismissing the bill, plaintiff appeals. Affirmed.

James J. Gaffney, of Boston, for appellant.

G. Alpert and J. E. Hannigan, both of Boston, for appellees.

RUGG, C. J. This is a suit in equity. The plaintiff alleges that he is the receiver of the affairs of Nicola Sciaraffa and Joseph A. Rossetti, and that as such he has obtained from the treasurer and receiver general a passbook showing a deposit of ten thousand dollars in the savings department of the Prudential Trust Company, which had been deposited with the Treasurer and Receiver General in lieu of surety pursuant to St. 1907, c. 377, now G. L. c. 169; that the defendant has taken possession of the property and business of the Trust Company under authority conferred by the statutes and is liquidating its affairs; that he has filed proof of claim with the agent of the defendant in liquidation and that the claim was disallowed. The answer of the defendant

passbook was issued contrary to the statutes by the officers of the Trust Company and that no valid title to the passbook was transferred to the treasurer and Receiver General, and that there is no legal warrant for the allowance of the claim.

[1, 2] The case was heard by a single justice, who entered a decree dismissing the bill. No findings of fact were made. No evidence is reported. The plaintiff's appeal brings the case here.

The only question of law presented on this state of the record is whether such a decree properly could have been entered under the pleadings. Dwyer v. Bratkoysky, 170 Mass. 502, 49 N. E. 915. The entry of such a decree imports a finding of all facts adverse to the plaintiff permissible under the pleadings.

The bill is meagre. There is no allegation that Sciaraffa and Rossetti were conducting any one of the kinds of business enumerated in St. 1907, c. 377, or that their assets are insufficient to pay their creditors, or that the receivership is not merely for the settlement of conflicting contentions between Sciaraffa and Rossetti. No intendment can be made in favor of the plaintiff in these particulars. Old Dominion Co. v. Commonwealth, 237 Mass. 269, and cases collected at 274, 129 N. E. 613.

The utmost extent of the allegations of the bill is that a passbook was issued and not that Sciaraffa and Rossetti were actual depositors in the savings department. The answer in substance and effect is that nongenuine deposit was made and that the passbook was issued without authority of law.

[3, 4] The passbook may have been found to have been issued fraudulently and not to represent any deposit whatsoever in the Trust Company. No veritable transaction may have taken place. It may all have been a trick. The passbook was not a negotiable instrument. See J. S. Lang Engineering Co. v. Commonwealth, 231 Mass. 367, 120 N. E. 843; Stebbins v. North Adams Trust Co., 243 Mass. 69, 136 N. E. 880. The securities, investments and property of the savings department of the Trust Company constitute a trust fund which must be held strictly for the benefit of depositors in that department until paid in full. It would be as much a perversion of that trust to permit those who are not real depositors to share in that fund as to divert it to uses not authorized by law. Commissioner of Banks v. Cosmopolitan Trust Co., 240 Mass. 254, 133 N. E. 630; Commissioner of Banks, In re Prudential Trust Co., 240 Mass. 478, 134 N. E. 253; Commissioner of Banks, In re Prudential Trust Co., 244 Mass. 64, 138 N. E. 702. There is nothing on this record which requires an investigation into conflicting equities between a trust company in liquidation and the innocent depositors. The bill is wholly contrary to law. No right in favor of the plaintiff is established. Cases like Gloucester Bank v. Salem Bank, 17 Mass. 33, and First National Bank of Danvers v. First National Bank of Salem, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450, have no relevancy. No error is disclosed.

Decree affirmed with costs.

BECKER v. HADLEY et al.

(Supreme Judicial Court of Massachusetts. Middlesex. Feb. 29, 1924.)

Principal and agent ⇐24—Whether relation between warehouse and transfer company that of principal and agent for jury.

In an action against a warehouse company for loss of a rug in transit to the warehouse, whether the relationship between the warehouse and the one doing the hauling was that of principal and agent *held* a question of fact, to be decided on all the evidence, notwithstanding that plaintiff paid the transfer man for hauling done on a former occasion.

Exceptions from Superior Court, Middlesex County; Elias B. Bishop, Judge.

Action of contract or tort by John L. Becker, p. p. a., against Thomas Hadley and others, trustees of the Brattle Storage Warehouse Company. Verdict for plaintiff, and defendants bring exceptions. Exceptions overruled.

E. C. Park, of Boston, for plaintiff.
J. L. Edwards, of Boston, for defendants.

CARROLL, J. The plaintiff's declaration alleges that the defendants operated a storage warehouse in Cambridge; that they received from the plaintiff for transportation and storage at their warehouse, certain furniture, including an oriental rug; that the defendants converted the rug, or by their negligence permitted it to be lost. The question in the case was the liability of the defendants as principals for the loss of the rug through the negligence of their alleged agent, Harry N. Duvey. At the close of the evidence the defendant filed a motion for a directed verdict, which was denied.

There was evidence that the rug was delivered to Duvey in June, 1921, to be carried with other furniture belonging to the plaintiff to the defendants' warehouse; that it was never delivered to the warehouse, but was lost or converted while in transit. It could have been found that Duvey's mother was the manager of the defendants' storage business; that Duvey had an office on the premises and the use of the telephone, in return for which he acted as the defendants'

der the name of the Brattle Storage Warehouse, and also of Frank Duvey Company the name under which he carried on the business of trucking and furniture moving; that Mrs. Duvey kept the books of the defendants as well as those of her son, received orders for the storage of goods and their transportation, and in all instances when furniture was to be moved to the warehouse, she sent her son for it.

The plaintiff testified that in June, when he interviewed Mrs. Duvey about storing the furniture, she told him, "The furniture would be sent for and stored;" that in February, 1921, he saw Mrs. Duvey at the office of the defendants and informed her that his furniture had been sent from Chicago, and he desired to have it stored; that she told him she would care for it; and that upon its arrival it was stored by the defendants. The jury could find that the goods were carried by Duvey to the defendants' warehouse in February, and the plaintiff was notified of their arrival by the defendants.

It also appeared that while the furniture was in the custody of the defendants, the plaintiff called at the storehouse, desiring to have certain articles moved to his residence. On this occasion he saw Duvey, who opened the room in which the furniture was stored, and after certain articles were collected they were carried to the plaintiff's residence by Duvey. Referring to the interview between the plaintiff and Mrs. Duvey in February, he was asked on cross-examination, "Did you decide that Mrs. Duvey, that her concern was to attend to getting the furniture off the train?" and he replied, "Yes." He also testified in cross-examination that he thought there was a business connection between the two firms, and that they were one. No exception was taken to this evidence.

Whether the relationship between the defendants and Duvey was that of principal and agent was a question of fact to be decided on all the evidence. There was evidence for the jury tending to show that Duvey in transferring the rug from the plaintiff's residence was acting as the defendants' agent. It was admitted that he was employed as their janitor and occupied their office. There was also evidence that the transferring of goods to and from the defendants' warehouse was done by him; that he had access to the storage rooms of the warehouse, carried the plaintiff's goods therefrom, and delivered them to him on his request, without consulting the defendants or their manager. The defendants' manager assured the plaintiff, according to his testimony, that the furniture would be sent for and stored; and on a former occasion, told him it would be cared for on its arrival, and was accordingly delivered at the warehouse. The jury would be warranted in finding on this evidence, that the defendants undertook to carry and store the plaintiff's furniture; that Duvey, in transferring it, was held out by them as their agent; and that the plaintiff was led to believe he was dealing with the defendants in the entire transaction, as principals, and that Duvey was acting as their agent and not for himself as an independent contractor. Rintamaki v. Cunard Steamship Co., 205 Mass. 115, 91 N. E. 220; Jordan Marsh Co. v. Hedtler, 238 Mass. 43, 130 N. E. 78.

The fact that Duvey was paid by the plaintiff on a former occasion for transferring the furniture is a circumstance to be considered on the question whether the relation of principal and agent existed between him and the defendants. But this fact is not conclusive. See Chisholm's Case, 238 Mass. 412, 131 N. E. 161.

Exceptions overruled.

SAMUEL EISEMAN & CO., Inc., v. RICE et al.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1924.)

1. Sales ⇐181(11)—Finding that buyer renounced contract supported by evidence.

In action for price of goods prematurely shipped by and returned to plaintiff, which did not return them on the date they should have been delivered, a finding that defendant gave plaintiff to understand he would not accept or pay for the goods if shipped on the proper date, and that there was a plain renunciation on defendant's part of all intention to perform the contract, *held* sustained by evidence.

2. Account, action on ⇐6(1)—Declaration on account annexed includes count for goods sold.

A declaration on an account annexed by legal intendment includes a count for goods bargained and sold, or goods sold and delivered, under G. L. c. 231, § 7.

Exceptions from Superior Court, Suffolk County; John D. McLaughlin, Judge.

Action of contract by Samuel Eiseman & Co., Inc., against Abraham L. Rice and others, to recover for goods and merchandise alleged to have been sold and delivered to the defendants. The court found for the plaintiff, and defendants bring exceptions. Exceptions overruled.

P. M. Lewis, of Boston, for plaintiff.

J. L. Sheehan and S. S. Shore, both of Boston, for defendants.

DE COURCY, J. This is an action to recover on an account annexed, and was tried by a judge of the superior court without a jury. There was a finding for the plaintiff.

dence, and to the refusal of the judge to give certain requested rulings. On the evidence favorable to the plaintiff the trial judge could find the following facts: The defendants are manufacturers of neckties. Under their firm name of Lion Neckware Company they ordered from the plaintiff, a wholesale dealer in silks, a number of patterns of printed poplin. The material was not then finished, but the designs were selected, and subsequently the patterns were printed according to the order sketches. The samples (items 1 and 2) were to be shipped June 1, 1920, and were in fact all sent by June 7th. They were received by the defendants, who used at least some of them, and later (March 3, 1921) acknowledged their indebtedness therefor, amounting to $602.55. By an agreement modifying the original contract the third item of 72 pieces was to be delivered and billed September 1, 1920. These goods were sent in June, but the defendants refused to accept them; writing that they were obliged to do so because of the "sudden standstill of business," adding that they had "enough goods on hand of the old numbers which have not as yet been disposed of," and asking the plaintiff to keep the goods until September 1st. They were then recalled by the plaintiff, and held waiting the defendants' orders; and the latter were notified that the invoice was being dated as of September 1st. On July 1, 1920, the defendants wrote the plaintiff that they were "unable to take in the goods at present, and not until you hear from us." They further wrote, under date of July 8, 1920:

"* * * We regret very much that we cannot give you a definite date for delivery of the goods and with no prospects to pay for same. Cancellations and returns, with lack of business are the causes for the above reply."

These goods have since remained in the plaintiff's possession, awaiting shipping instructions. They never were examined by the defendants; and there was ample evidence that all the goods were in accordance with the contract.

[1, 2] The only item as to which there can be any serious question is that relating to the 72 pieces, prematurely shipped June 23, 1920. The defendants claim that they are not liable therefor because the plaintiff did not forward them again on September 1st. As this was a New York contract, it is doubtful if this defense is open in view of the evidence introduced, that under the law of that state when a refusal to accept goods is based upon certain specified objections all others are deemed waived. Littlejohn v. Shaw, 159 N. Y. 188, 53 N. E. 810; Hess v. Kaufherr, 128 App. Div. 526, 112 N. Y. Supp. 832. But further, it is apparent from the modifications with which the trial judge accepted from his general finding for the plaintiff, that he found "the defendant gave plaintiff to understand he would not accept or pay for the goods if shipped September 1st," and that "there was a plain renunciation on defendant's part of all intention to perform the contract." We cannot say that these findings, express and inferential, were without warrant in the evidence. Bearse v. McLean, 199 Mass. 242, 85 N. E. 462. Apparently no question of pleading was raised at the trial. The declaration was on an account annexed, which by legal intendment includes a count for goods bargained and sold, or goods sold and delivered. G. L. c. 231, § 7; Massachusetts Mutual Life Ins. Co. v. Green, 185 Mass. 306, 309, 310, 70 N. E. 202.

The exceptions taken to the admission of evidence relate mainly to letters and telegrams sent after September 1, 1920. While some of these seem to relate to other transactions, we find nothing in them likely to have any prejudicial effect.

It may be added that no issue of anticipatory breach was raised or determined. And as the judge refused to find and rule that the plaintiff had committed any breach of its contract, no discussion is necessary as to the New York law applicable to entire contracts. An examination of the entire record discloses no reversible error.

Exceptions overruled.

COMMONWEALTH v. DE FRANCESCO.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 28, 1924.)

Criminal law ⟸778(4)—Presumption of innocence is not evidence, and court properly refused to so instruct.

The presumption of innocence is not evidence, and the court properly refused to so instruct, though instructions concerning the burden of proof and concerning the amount of evidence necessary to convict must be given.

Exceptions from Superior Court, Suffolk County; H. T. Lummus, Judge.

Joseph De Francesco was found guilty of having in his possession and under his control a firearm, as defined in section 121 of chapter 140 of the General Laws, without a permit, under section 131, and brings exceptions. Exceptions overruled.

M. Caro, Asst. Dist. Atty., of Boston, for the Commonwealth.

Charles D. Driscoll and R. S. Driscoll, both of Boston, for defendant.

RUGG, C. J. The sole questions on these exceptions are whether a defendant in a

evidence in his favor, and that that presumption remains with the defendant throughout the trial until it is overcome by evidence or until the verdict is reached. Requests to this effect were preferred in various forms of words.

The presumption of innocence never has been held to be evidence in this commonwealth. It expressly was held that the "presumption of innocence is not a matter of evidence" in Commonwealth v. Sinclair, 195 Mass. 100, 80 N. E. 799, 11 Ann. Cas. 217, where Mr. Justice Sheldon spoke for the court. The opinion upon this point is brief, but positive. The supporting citations there collected at page 110 (80 N. E. 802) from courts of sister states demonstrate that the words used and already quoted were intended to express the precise meaning conveyed by their natural signification. That such a presumption is not evidence is plainly implied from the statement of Chief Justice Shaw in Commonwealth v. Webster, 5 Cush. 295, at page 320 (52 Am. Dec. 711):

"All the presumptions of law independent of evidence are in favor of innocence."

That statement could not have been made if the presumption of innocence were evidence. That sentence marks a distinction between the presumption and evidence. In Duggan v. Bay State Street Railway, 230 Mass. 370, 378, 119 N. E. 757, L. R. A. 1918E, 680, it was decided that a presumption was not evidence, but a rule about evidence. Nothing was decided contrary to this current of our decisions in Commonwealth v. Anderson, 245 Mass. 177, 139 N. E. 436. That case merely held that a defendant was ordinarily entitled to an instruction to the effect that he was presumed to be innocent at the opening of the trial. That was a necessary conclusion from our decisions, as is pointed out in the opinion. Nothing is required beyond a plain statement that the presumption of innocence means that the finding of an indictment by the grand jury or an appeal on a complaint from a district court are not to be regarded as circumstances tending to criminate the defendant or creating against him unfavorable impressions, and that he is not to be found guilty upon suspicion or conjecture but only upon evidence produced in court. A simple statement of that nature full of proof and the amount of evidence necessary to convict of course must be given, but they relate to subjects wholly different from the presumption of innocence. Commonwealth v. Webster, 5 Cush. 295, 320.

That the presumption of innocence which exists in criminal cases is evidence was plainly held in Coffin v. United States, 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109, decided on May 4, 1896. The denial of a request for categorical instruction to that effect was held not to be error in Agnew v. United States, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624, decided January 11, 1897, and at page 51 it was said respecting that request that:

"The court might well have declined to give it on the ground of the tendency * * * to mislead."

Coffin v. United States was discussed and apparently narrowed in its scope on this point. Again, in Holt v. United States, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138, substantially the same words were used in deciding that there was no error in denying a request that the "presumption of innocence is evidence in the defendant's favor." Agnew v. United States is cited as authority and reference is made to section 2511 of Wigmore, but no reference is made to Coffin v. United States. It would seem that on the point, whether the presumption of innocence is evidence, the law as now declared by the Supreme Court of the United States does not differ from our own as hitherto declared and here reaffirmed.

Sound reasoning and a considerable body of authority appear to us to support our rule that the presumption is not evidence. See, in addition to cases cited in Commonwealth v. Sinclair, 195 Mass. 110, 80 N. E. 799, 11 Ann. Cas. 217, and in 5 Wigmore on Evidence (2d Ed.) § 2511 and notes; "The Presumption of Innocence in Criminal Cases" by J. B. Thayer, in Preliminary Treatise on Evidence, 551–576; 3 Chamberlayne on Ev. s. 1175, c.; Lisbon v. Lyman, 49 N. H. 553, 563; State v. Linhoff, 121 Iowa, 632, 636, 97 N. W. 77; Price v. United States, 218 Fed. 149, 132 C. C. A. 1, L. R. A. 1915D, 1070; State v. Brauneis, 84 Conn. 222, 229, 79 Atl. 70. The requests for rulings were rightly refused in so far as not covered in the charge, and the instructions given were not erroneous.

Exceptions overruled.

WARD v. NEW YORK CENT. R. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 27, 1924.)

1. Carriers ⟹238 — Railroads ⟹275(2) — Mail clerk loading cars held not a passenger, but an invitee on car.

A railway mail clerk whose duty it was to load cars and not to ride on them was not a passenger, but while in the course of his employment of loading and unloading a car stood toward the carrier as an invitee, and did not become a mere licensee where he was locked in the car, which was to be taken away, and endeavored to attract the attention of a brakeman by waving his hand and hollering.

2. Railroads ⟹282(9) — Whether mail employee exercised due care question of fact.

In an action for injuries to employee in railway mail service, whose duty it was only to load cars and not to ride in them, whether plaintiff, who was locked in a car when it was about to be moved, and was injured while attempting to attract attention, exercised due care, *held* a question of fact.

3. Railroads ⟹282(9)—Negligence as to mail employee held question of fact.

In an action for injuries to railway mail service employee, accidentally locked in a car, whether the carrier was negligent in moving the car while plaintiff had his arm between the leaves of a double door, attempting to attract attention, *held* a question of fact.

Report from Superior Court, Suffolk County; Frederick Lawton, Judge.

Action in tort by William J. Ward against the New York Central Railroad Company, for personal injuries received while in one of defendant's cars. On report after a directed verdict for defendant on the opening statement of plaintiff's counsel. Case remanded for trial.

Thos. Bilodeau, of Boston, for plaintiff.

L. A. Mayberry and Walter F. Levis, both of Boston, for defendant.

CARROLL, J. The plaintiff offered to prove that, on February 17, 1921, he was employed in the railway mail service of the United States, and on that day was working within the scope of his employment at the Overland Building, Boston.

The defendant, under its contract with the United States government for the transportation of mail, had placed certain cars on a siding at the Overland Building, to be loaded with mail. The employees in the mail service were, by reason of this contract, permitted to come upon the cars furnished by the defendant for the purpose of loading and unloading mail. It was not a part of the plaintiff's duty to ride in a car after it was loaded. The cars were known as baggage storage cars, in which mail for different destinations was piled. Each car had two single doors near the ends and double doors on each side. These double doors were operated on rollers by which each leaf of the door could slide along the side of the car. After the plaintiff had finished his work of loading the car, he undertook to leave by the double door and found it locked. He then tried the other doors, and found they were locked. The double doors of the car had been locked by the foreman in charge of the mail clerks, by means of a hasp and padlock on the outside, the key being in his possession. None of the defendant's employees had keys to the lock in question. The plaintiff attempted to get out of the car, and was able to force the two leaves of the locked door about six or eight inches. He looked through this opening and saw a brakeman, one of the defendant's train crew, standing ten or fifteen feet away, and attempted to attract his attention, "by hollering. He called, 'Hello, there, I am locked in this car, let me out,' * * * and put his left arm through the opening and waved it at the brakeman, who turned and looked at him when he hollered. After the brakeman looked at him, he saw the brakeman give a signal and the engine attached to two other baggage cars coupled on and backed up to the car in which the plaintiff was locked. The signal given was a signal to the engineer to back up, but it was not known to the plaintiff to be such a signal." When the cars came together the plaintiff was in the act of withdrawing his arm from the opening, and it was caught between the two leaves of the side door.

[1] The plaintiff was not to be carried by the defendant as a passenger; but while in the course of his employment of loading and unloading the car had the right to use it for the purpose of his employment, and stood toward the defendant as an invitee. See Crimmins v. Booth, 202 Mass. 17, 24, 88 N. E. 449, 132 Am. St. Rep. 468; Griswold v. Boston & Maine Railroad, 213 Mass. 12, 99 N. E. 474; Carpenter v. Sinclair Refining Co., 237 Mass. 230, 234, 129 N. E. 383.

When the plaintiff found he was locked in the car, and attempted to leave it, and endeavored to attract the attention of the brakeman by waving his hand and hollering, he did not become a mere licensee. He was, in our opinion, an invitee, and was entitled to protection as such. He could use a reasonable time in leaving the car without losing his right to be treated as an invitee. When he found the doors were locked without his fault or the fault of the defendant, he could make a reasonable effort to escape and call the attention of others to the position he was in. We cannot say that, as matter of law, in doing what he did under the circumstances shown in this case he was a mere licensee to whom the defendant owed only the duty of refraining from reckless and

Griswold v. Boston & Maine Railroad, supra. See Wilcox v. New York, New Haven & Hartford Railroad, 226 Mass. 171, 115 N. E. 254; French v. Boston & Maine Railroad, 230 Mass. 163, 119 N. E. 691; Belyea v. New York, New Haven & Hartford Railroad, 235 Mass. 225, 126 N. E. 282.

In Heinlein v. Boston & Providence Railroad, 147 Mass. 136, 139, 140, 16 N. E. 698, 9 Am. St. Rep. 676, the plaintiff remained in the station for his own accommodation. The court said, in the course of decision, the plaintiff could, "up to the time that he was informed that there was no train such as he desired, be held to have the rights of an intending passenger; * * * after that time he had no such rights, if he continued to remain in the station after he had full opportunity to leave it." In Severy v. Nickerson, 120 Mass. 306, 21 Am. Rep. 514, the plaintiff was on the vessel to gratify his own curiosity. In our opinion, these decisions, relied on by the defendant, do not apply to the case at bar.

[2] The plaintiff's due care was a question of fact. The jury could take into account his actual situation and the fact, if they so found, that he did not know the brakeman was giving a signal to the engineer to back the cars; it could not be said, as matter of law, that he was careless. McKeon v. New York, New Haven & Hartford Railroad, 183 Mass. 271, 273, 67 N. E. 329, 97 Am. St. Rep. 437.

[3] As the plaintiff could have been found to be an invitee, the defendant was required to use reasonable care for his safety. This was a question of fact. If the brakeman heard the plaintiff and saw the peril he was in at the time, the jury would be warranted in finding that he gave the signal to back the cars and engine against the car on which the plaintiff was standing in a place of danger, and that this was a negligent act. The case should stand for trial in the superior court; and according to the terms of the report it is to be remanded to that court.

So ordered.

BAKER v. BARSTOW et al.

(Supreme Judicial Court of Massachusetts. Plymouth. March 1, 1924.)

Courts ⇐202(3)—Judge of probate not bound to reopen hearing after final decree.

Judge of probate, after findings of fact had been filed and a final decree entered on petition of executor for instructions as to construction of will, was not bound to reopen the hearing for reception of evidence on application of legatee who did not appear at the hearing; the entry of the final decree ending the

Appeal from Probate Court, Plymouth County; Mayhew R. Hitch, Judge.

In the matter of the estate of Rogers L. Barstow, deceased. Petition by Ezra H. Baker, executor, as against Alice R. Barstow and others, praying for instructions as to the amount of a bequest made to Ezra B. Barstow. From a decree, Ezra B. Barstow appeals and files a request for findings of fact. Decree affirmed.

F. W. Bacon, of Boston, for appellant.

CROSBY, J. This is a petition brought in the Probate Court by Ezra H. Baker, executor of the will of Rogers L. Barstow, praying for instructions as to the amount of a bequest made to Ezra B. Barstow by the fourth paragraph of the will, which so far as material to the question raised is as follows:

"I give and bequeath to my son, Ezra B. Barstow, or, if he be not living at the time of my decease, to his children in equal shares, the issue of any deceased child to take by right of representation, the sum of five thousand dollars ($5,000.00) and also such sum as is the difference between the amount charged on my books to Rogers L. Barstow, Jr., and the amount charged on my books to Ezra B. Barstow. * * *"

The judge of probate found that the testator died June 19, 1921; that he kept a journal and ledger which were written up to January 1, 1919; that on the ledger the balance charged to Rogers L. Barstow, Jr. was $41,081.36 and to Ezra B. Barstow $27,796.90, making a difference of $13,284.46, representing the amount which Rogers had received more than Ezra up to that time. The judge further found that the testator "became sick and made no further entries on his ledger or journal of amounts paid either to Ezra or Rogers"; that his check books were kept to April 15, 1921, and the stubs showed payments to each of these sons; that between January 1, 1919, and April 15, 1921, the testator paid to Rogers $6,077.24 and to Ezra $2,200.82; that these amounts appear on the stubs of the check books except three items of income from an estate amounting to $333.28, which are included in the credits deducted; that—

"There is nothing to indicate on the check stubs the purpose for which the payments were made. Besides the date, amount and number of the check, only the name of the payee appears on the stub."

The court also found that the testator kept certain memoranda which were in accord with the items on the check books; that there were entries on the books of Chase & Barstow (a partnership of which the testator was a member in March 1921) of two

of payment in the check books above referred to, or those on the books of the partnership, "were amounts charged on the books of the testator to them within the meaning of the provisions in the will, and therefore found that the only charges to the sons on the books of the testator were those on the ledger and journal aforesaid."

Some time after the foregoing findings of fact were made and filed counsel for Ezra B. Barstow contended that there were certain notations on some of the check book stubs indicating that certain checks had been made to Rogers L. Barstow, Jr. Thereafter the judge filed an "Amendment to the Foregoing Findings of Fact" in which he stated that these notations were not called to his attention at the hearing, or seen by him, or considered in coming to a decision of the case, and that he has not since seen them; that the hearing was held on June 5, 1922; that while the executor and the guardian ad litem appeared there was no appearance for Rogers or Ezra, and that the bill was taken as confessed as to them; that the documentary evidence was voluminous; that the ledger, journal and check books were put in evidence together with other evidence; that no testimony was offered respecting the alleged notations, if there were any, on some of the stubs; and that the attention of the court was not called to them. A decree was entered on June 19, 1922 instructing the petitioner to pay to Ezra B. Barstow $13,284.46 as the difference between the amount charged on the books to Rogers and that charged to Ezra, this sum to be in addition to the $5,000 given to Ezra in paragraph four of the will.

After the entry of the decree the respondent Ezra B. Barstow appeared, appealed from the decree and filed a request for findings of fact. The attention of the judge was not then called to the notations above referred to, and at no time was there any evidence offered respecting them. After the appeal the judge was asked by the respondent to re-examine the check books and revise his findings, which he declined to do. While the respondent did not appear at the hearing in the Probate Court, and no appearance was entered for him, and the bill was taken as confessed as to him, there is nothing in the record to show, and it is not contended that he might not have appeared at the hearing and presented the evidence which he contends should have been considered by the court. In these circumstances, the judge was not bound to reopen the hearing after findings of fact had been filed, and a final decree entered. No further or other findings could properly be made by him. The entry of the final decree ended the jurisdiction of

stances, of which this is not one. White v. Gove, 183 Mass. 333, 67 N. E. 359; Martell v. Dorey, 235 Mass. 35, 126 N. E. 354; Morgan v. Steele, 242 Mass. 217, 136 N. E. 77.

Decree affirmed.

PRISCILLA PUB. CO. v. CREAM OF WHEAT CO.

(Supreme Judicial Court of Massachusetts. Middlesex. Feb. 27, 1924.)

1. Contracts ⟸204—Advertisement contract construed as to subscriptions to be included in circulation; "receives;" "accepts."

Under an advertisement contract guaranteeing circulation to average 600,000, no subscription to be considered, for which publisher received in cash less than 50 per cent of his published subscription price, the publisher must actually receive in cash 50 per cent. of its regular price for subscriptions, exclusive of rebates and discounts and gratuities to agents under agreements to increase the circulation; "receives" being synonymous with "accepts."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accept.]

2. Work and labor ⟸12—Defendant having accepted benefit of advertising contract should make compensation.

In action for consideration for publication of advertisements in magazine where plaintiff guaranteed certain circulation, but failed of full performance under such guarantee, defendant, having received and accepted the benefit of the advertisements as published, should make just compensation, though the contracts were entire.

3. Set-off and counterclaim ⟸59—To be rendered in favor of party to whom balance found due.

By G. L. c. 232, § 11, judgment in an action in which a declaration in set-off has been filed shall be rendered in favor of the party to whom a balance is found due for the amount of such balance, and judgment should not be rendered for both the plaintiff and the defendant in varying amounts found due.

Report from Superior Court, Middlesex County; Joseph Walsh, Judge.

Action of contract by the Priscilla Publishing Company against the Cream of Wheat Company to recover for advertising and on an account annexed, in which defendant filed claim in recoupment and declaration in set-off. On report after directed verdict for plaintiff for less than was claimed and directed verdict for defendant on its set-off. Judgment for plaintiff.

John S. Stone and A. A. Gillette, both of Boston, for defendant.

BRALEY, J. The plaintiff, publisher of the Modern Priscilla, a monthly magazine, and the defendant entered into annual contracts under which the plaintiff agreed to insert, and publish the defendant's advertisement of its cereal, "the cream of wheat," in each issue during the years 1919, 1920, and 1921. The declaration has two counts to recover respectively the amounts alleged to be due for 1920 and 1921, and a third count on an account annexed covering the same period. Gerrish Dredging Co. v. Bethlehem Shipbuilding Corporation, 244 Mass. ——, 141 N. E. 867. The answer was a general denial, with a plea of payment. A claim in recoupment, and a declaration in set-off, also were filed to recover alleged overpayments or damages arising from the alleged failure of the plaintiff to furnish the circulation guaranteed not only in 1920 and 1921, but in 1919. The parties concede that at the close of the evidence there were no issues of fact for the jury, and the exceptions to the admission of evidence having been waived, the questions for decision on the report of the trial court, are, whether as matter of law the verdicts ordered should be set aside or modified. The price for the insertion of the advertisement in each month of 1919 was $1,339.80 with a cash discount of three per cent., and an average circulation of 500,000 copies for every month was guaranteed. In 1920 the rate was $2.040 for each month, but in 1921 it had become $2,380, while the average circulation for 1920 and 1921 was fixed at 600,000 copies. The principal, if not the only, controversy is over the construction of the clause common to all the contracts, which relates to the volume of circulation, and its general character. It reads as follows:

"The party of the first part does hereby guarantee that the average circulation of the above mentioned publication for the term during which the above advertisement shall run, shall be six hundred thousand (600,000) copies per issue, and it is understood that the term circulation for the purpose above mentioned, shall be construed as follows: The total number of copies of each issue of the publication above mentioned, which shall be published and sold and delivered by the publishers thereof, both to said subscribers and to the news agencies, exclusive of all returns from news agencies and copies given away in any manner whatever. And it is further understood and agreed that no subscriptions shall be considered a paid subscription that is more than six months (6) in arrears or for which the publisher receives, in cash, less than fifty per cent. (50 per cent.) of his published subscription price.

"And it is hereby understood and agreed that the said publishers of the Modern Priscilla will access to such books and papers as are considered necessary by the Cream of Wheat Company or its agent for the purpose of examining and ascertaining the circulation of the said the Modern Priscilla and its methods of obtaining said circulation, it being understood that said examination may be made by the said Cream of Wheat Company, or its authorized agent, at any reasonable times, without notice, but that said examination shall not be made oftener than twice in each year; and it is further understood and agreed that in case said examination does not bear out the circulation claimed and embodied in this contract and shall be found to be materially less than six hundred thousand copies (600,000) the expense of this examination, not to exceed one hundred dollars ($100.00) shall be borne by the said the Modern Priscilla, otherwise by the said Cream of Wheat Company.

"It is further understood and agreed that in case said examination shows the circulation to be materially less than above stated the Modern Priscilla will, immediately after said examination, make a pro rata rebate to the Cream of Wheat Company for said shortage in circulation, paying said rebate in cash."

[1] The language is free from all ambiguity. The parties themselves have defined the term "circulation." It is "the total number of copies of each issue of the publication * * * which shall be published, sold, and delivered by the publishers thereof both to paid subscribers, and to the news agencies exclusive of all returns from news agencies, and copies given away in any manner whatever." The word "subscriptions" is also defined.

"No subscriptions shall be considered a paid subscription that is more than six months * * * in arrears, or for which the publisher receives in cash less than fifty per cent. * * * of his published subscription price."

The manifest intention is that the circulation shall consist solely of subscriptions paid in cash, and all other subscriptions are not to be counted. It was correctly ruled as matter of law that the subscription agreements of the plaintiff with the Crowell Publishing Company, to accept subscriptions as shown by the record, as well as similar contracts with other companies, which contained no reference to sales of single copies, but merely covered arrangements for subscriptions to be obtained for the plaintiff by the several agencies, were not within the terms of the contracts in which the action is brought. The plaintiff moreover, by reason of the rebate in the subscription agreements, did not receive in cash fifty per centum of its regular price for subscriptions. The word "receives" as used in the contracts is synonymous with the word "accepts." The paid subscriptions received and accepted are to be in cash, and cannot be diminished below 50 per centum of the pub-

lished subscription price by rebates or gratuities in any form to agents under agreements with the plaintiff to increase the circulation of its magazine. Standard Oil Co. of Indiana v. United States, 164 Fed. 376, 390, 90 C. C. A. 364, 378. The circulation books of the plaintiff during the years in question, which under the provisions of the contracts had been examined by expert accountants employed by the defendant, and whose audit was admitted to be accurate, showed that if the agency agreements were excluded the circulation fell materially below the average circulation as guaranteed. The examination of the accountants with the results thereby shown having been put in evidence, the parties for the purposes of the trial agreed that if the ruling to which we have referred was made, "the circulation * * * for the years 1919, 1920 and 1921, fell materially short of the average monthly circulation guaranteed by the contracts for those years, in the amount of a monthly average of 113,377 for 1919, 148,607 for 1920, and 191,198 for 1921, * * *" and that—

"The payments made by the plaintiff to the Crowell Publishing Company, which payments were all that could be claimed by the Crowell Publishing Company from the Priscilla Publishing Company under their contract should be deducted from the cash received by the Priscilla Publishing Company for such copies, or subscriptions, in determining whether the plaintiff has received in cash for these copies, or subscriptions, fifty per cent. of the published subscription price of the Modern Priscilla.

"It is agreed that the defendant's specifications in connection with its claim in set-off, and its claim of recoupment as to total circulation, and copies returned, or given away, are true.

"It is agreed * * * that the contracts between the plaintiff and other companies having relations with the plaintiff similar to the plaintiff's relations with Crowell, are substantially the same in wording as the Crowell contracts."

[2, 3] It follows that the defendant was entitled to recover the amount overpaid, and the verdict in set-off for $3,745.64, the computation of which if the defendant prevails is not attacked, was rightly ordered. Massachusetts Life Insurance Co. v. Green, 185 Mass. 306, 309, 70 N. E. 202. The contracts severally were entire. But there is no contention that the plaintiff's failure of full performance was intentional, and the defendant having received and accepted the benefit of the advertisements as published should make compensation. Cullen v. Sears, 112 Mass. 299, 308; Burke v. Coyne, 188 Mass. 401, 404, 74 N. E. 942. The deficiency in circulation having been established, the plaintiff, as the court correctly held, could recover only the proportion of the contract price which covered the actual circulation, to be ascertained on the basis of the guaranteed circulation of 600,000 copies for each issue, and the verdict for $6,245.64 should stand. The report states that if the rulings were right, "judgment is to be entered on the verdicts." But by G. L. c. 232, § 11—

"Judgment in an action in which a declaration in set-off has been filed shall be rendered in favor of the party to whom a balance is found due for the amount of such balance, not exceeding the jurisdiction of the court, with costs. If the amounts found due to the respective parties are equal, judgment shall be rendered in favor of each for such amounts and an entry shall be made that the judgments are satisfied by the set-off, with costs to either party, or without costs, as the court orders."

The entry accordingly must be judgment for the plaintiff, with costs, in the sum of $2,500. Sargent v. Fitzpatrick, 4 Gray, 511; Caverly v. Bushee, 1 Allen, 299; Woodworth v. Fuller, 230 Mass. 160, 119 N. E. 685; Id., 235 Mass. 443, 126 N. E. 781.

So ordered.

WISE v. KENNEDY.

(Supreme Judicial Court of Massachusetts. Franklin. Feb. 27, 1924.)

1. Evidence ⟸5(2)—Common knowledge that automobiles constantly in market are distinguishable only by number.

It is common knowledge that automobiles of various mechanical designs made by numerous manufacturers under multiform tradenames are constantly in the market for purchase and sale, and that cars of any one of the makers can be distinguished with reasonable certainty from other automobiles of the same class only by the number by which each car is designated.

2. Chattel mortgages ⟸51—Mortgage of certain make of automobile with wrong number ineffective against innocent purchaser.

Record of a mortgage on "one new Jordan touring car No. 6552" was not constructive notice to an innocent purchaser from the mortgagor, where the number stated in the mortgage was incorrect, and the mortgagor an agent for the sale of Jordan cars.

Exceptions from Superior Court, Franklin County; H. T. Lummus, Judge.

Action in replevin by Jennie M. Wise against James B. Kennedy to recover possession of an automobile. Judgment for defendant, and plaintiff brings exceptions. Exceptions sustained.

T. M. Hayes, of Greenfield, for plaintiff.

W. A. Davenport and Charles Fairhurst, both of Greenfield, for defendant.

BRALEY, J. The plaintiff sues in replevin to recover possession of a red Jordan

touring car No. 6557; which she purchased in June, 1920, from one Charles D. Herlihy. The material facts do not seem to have been in dispute. The defendant claimed title under a mortgage given by Herlihy to him and two other mortgages September 11, 1919, which were duly recorded. It is contended by the plaintiff, that having bought and received the car without actual notice, or knowledge of any facts which should have put her upon inquiry, she is an innocent purchaser for value, unless chargeable with constructive notice of the defendant's mortgage. G. L. c. 255, § 1; Eastman v. Foster, 8 Metc. 19, 25; Travis v. Bishop, 13 Metc. 304; Shapleigh v. Wentworth, 13 Metc. 358; Denny v. Lincoln, 13 Metc. 200, 202; Bigelow v. Smith, 2 Allen, 264, 265; Veazie v. Somerby, 5 Allen, 280, 289; Ring v. Neale, 114 Mass. 111, 19 Am. Rep. 316; Whitney v. Browne, 180 Mass. 598, 599, 62 N. E. 979; Berry v. Levitan, 181 Mass. 73, 63 N. E. 11. The mortgagor, after the mortgage had been given and recorded, retained possession of the car, which is described in the mortgage as "one new Jordan touring car No. 6552." Cousins v. O'Brien, 188 Mass. 146, 148, 74 N. E. 289. The identity of the car having been unquestioned, the trial court, following Pettis v. Kellogg, 7 Cush. 456, ruled, in substance, that the number stated in the mortgage could be disregarded, leaving the words "one new Jordan touring car" as a sufficient description under which title would pass. But in Pettis v. Kellogg, the defendant mortgaged to the plaintiff "all the staves I have in Monterey, the same I had of Moses Fargo." It appeared that the mortgagor had no staves in Monterey but had a quantity of staves in the adjoining town of Sandisfield. The court held, that the words "in Monterey" could be rejected as a false recital, and that the remainder of the description was sufficient to give full effect to the sale.

[1, 2] We are, however, of opinion that the case at bar should be distinguished. It is common knowledge, and the uncontradicted evidence shows, and the jury would have been warranted in finding, that automobiles of various mechanical designs, made by numerous manufacturers under multiform trade-names, are constantly in the market for purchase and sale, and that cars of any one of the makers can be distinguished with reasonable certainty from other automobiles of the same class, only by the number by which each car is designated. Warner v. Fuller, 245 Mass. 520, 139 N. E. 811. The seller with whom the plaintiff dealt was an agent for the sale of Jordan cars, and an examination of the record showing a mortgage of a Jordan touring car numbered 6552 would be insufficient to charge the plaintiff with notice that the car mortgaged, was the car with the "serial" No. 6557, which she bought. If the number in the mortgage is eliminated, the remainder of the description is applicable to all Jordan cars of that class by whomsoever owned. The first request of the plaintiff, that "if the jury find, that the number used in the defendant's mortgage was not the correct number, the plaintiff can recover," should have been given. Iowa Auto Supply Co. v. Tapley, 186 Iowa, 1341, 171 N. W. 710; First Mortgage Loan Co. v. Durfee, 193 Iowa, 1142, 188 N. W. 777.

Exceptions sustained.

TONSMAN v. GREENGLASS et al.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1924.)

1. Food ⇐25—Manufacturer liable for injuries to consumer.

The manufacturer of a defective article is not generally liable to an ultimate consumer, who has purchased from a middleman, for injuries resulting from negligence in its manufacture, where there is neither fraud nor privity of contract, and the defective article is not inherently dangerous; but a manufacturer is liable for negligence in the preparation of food for human consumption, whether unfitness of the food be due to deleterious ingredients, or to the presence of a foreign substance.

2. Food ⇐25—Bread manufacturer's responsibility held for jury.

Whether a sharp piece of iron, causing the breaking of teeth, got into a loaf of bread in process of manufacture, *held* for the jury.

3. Food ⇐25—Instruction held not erroneous as applying res ipsa loquitur doctrine to injury to consumer.

In action against manufacturer of bread for injuries caused by biting on a piece of iron in bread, an instruction: "You may use your own experience and such inferences as are reasonable, whether the facts in this case afford you just ground, from ordinary experience, that this piece of metal would not have gotten in, except through the negligence, or some negligence, on the part of the defendant. It is all a question of fact for you to determine"—*held* not subject to the objection that it applied the doctrine of res ipsa loquitur.

4. Trial ⇐244(2)—Requests emphasizing isolated facts properly refused.

In an action for injuries occasioned by biting on a nail in a loaf of bread manufactured by defendant, requests of the defendant concerning manufacture of bread and finding of foreign substances therein *held* properly refused, as selecting isolated facts for emphasis and comment.

5. Trial ⇐260(1)—Request to instruct as to matters adequately covered properly refused.

Court did not err in refusing requests to instruct as to matter adequately and correctly covered by the charge.

County; Louis S. Cox, Judge.

Action of tort by Sadie Tonsman against Barnet Greenglass and others for personal injuries. Verdict for plaintiff, and defendants bring exceptions. Exceptions overruled.

The defendants presented the following requests for rulings and instructions:

"(2) There is no evidence that the device used by the defendants in the preparation of the bread bought by the plaintiff was not reasonably adapted to the safe, careful, and proper preparation of the same.

"(3) There is no evidence that the method of manufacture used by the defendants in the preparation of the bread used by the plaintiff was not reasonably adapted to the safe, careful, and proper preparation of the same."

"(6) The fact, if it be a fact, that some foreign substance was found in the bread manufactured by the defendants, without any affirmative evidence of negligence on the part of the defendants, is of itself not enough to warrant a finding of negligence on the part of the defendant."

"(8) The fact, if it be a fact, that the bread manufactured by the defendants contained a deleterious foreign substance, is not of itself evidence of negligence sufficient to warrant a finding for the plaintiff."

The court instructed the jury as follows:

"You may use your own experience, and such inferences as are reasonable, whether the facts in this case afford you just ground, from ordinary experience, that this piece of metal would not have got in except through the negligence, or some negligence, on the part of the defendant. It is all a question of fact for you to determine."

J. T. Connolly, of Boston, for plaintiff.
C. Gerstein, of Boston, for defendants.

DE COURCY, J. [1] It is a long-established general rule that the manufacturer of a defective article is not liable to an ultimate consumer, who has purchased from a middleman, for injuries resulting from negligence in its manufacture; where there is neither fraud nor privity of contract, and the defective article is not inherently dangerous. Tompkins v. Quaker Oats Co., 239 Mass. 147, 131 N. E. 456, and cases cited; Windram Manufacturing Co. v. Boston Blacking Co., 239 Mass. 123, 131 N. E. 454, 17 A. L. R. 674, note, and cases collected.

The courts generally, although on various grounds, recognized as an exception to this rule the liability of the manufacturer to third persons for negligence in the preparation of food for human consumption; whether the unfitness of the food be due to deleterious ingredients, or to the presence of a foreign substance. Wilson v. Ferguson Co., 214 Mass. 265, 101 N. E. 381; Newhall v. Ward Baking Co., 240 Mass. 434, 436, 134 N. E. 625; Tomlinson v. Armour & Co., 75 N. J. Law, 748, 70 Atl. 314, 19 L. R. A. (N. S.) Tenn. 23, 177 S. W. 80; Ketterer v. Armour & Co. (D. C.) 200 Fed. 322; Freeman v. Schultz Bread Co., 100 Misc. Rep. 528, 163 N. Y. Supp. 396; Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 South. 64, 17 A. L. R. 667; Drury v. Armour & Co., 140 Ark. 371, 216 S. W. 40; Watson v. Augusta Brewing Co., 124 Ga. 121, 52 S. E. 152, 1 L. R. A. (N. S.) 1178, 110 Am. St. Rep. 157; Salmon v. Libby, McNeill & Libby, 219 Ill. 421, 76 N. E. 573; Davis v. Van Camp Packing Co., 189 Iowa, 775, 176 N. W. 382, 17 A. L. R. 649; Parks v. C. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202, L. R. A. 1915C, 179; Goldman & Freiman Bottling Co. v. Sindell, 140 Md. 488, 117 Atl. 866; Craft v. Parker, Webb & Co., 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 South. 791; Ward v. Morehead City Sea Food Co., 171 N. C. 33, 87 S. E. 958; Crigger v. Coca-Cola Bottling Co., 132 Tenn. 545, 179 S. W. 155; Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213, Ann. Cas. 1915C, 140. See, also, Bishop v. Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; 17 A. L. R. 689, note.

[2-5] There was testimony on which the jury could find these facts: The plaintiff, through her agent, bought from a neighboring grocer a loaf of bread which was manufactured by the defendants and had on it their trade-mark label, "Greenglass Bread, the Best Bread Baked." When she attempted to eat a slice cut from the loaf her teeth came in contact with a thin piece of iron, about half an inch long and wide, and two of her teeth were broken; the piece of metal was in the center of the loaf, and was "covered with green stuff," and the bread "smelled something terrible." The process of mixing the ingredients, and the machinery used, were described by one of the defendants, but no explanation was offered as to the presence of this foreign substance in the loaf. The jury reasonably could infer that it got into the bread during the process of manufacture; because it was imbedded in the center or soft part, and the discoloration of the iron and the bad odor indicated that the metal was there while the dough was soft and during a period of fermentation or other chemical change. The trial judge did not apply the doctrine of res ipsa loquitur, but properly submitted the issue of negligence to the jury. We find no error in the portion of his charge that was excepted to, especially when it is considered in connection with the context. The first and seventh requests were rightly denied. Wilson v. Ferguson Co., supra. The defendants were not entitled to those numbered 2, 3, 6 and 8, which selected isolated facts for emphasis and comment; and the subject-matter was adequately and correctly covered by the

Exceptions overruled.

WICKWIRE-SPENCER STEEL CORPORATION v. UNITED SPRING MFG. CO., Inc., et al.

(Supreme Judicial Court of Massachusetts. Worcester. Feb. 29, 1924.)

1. Equity ⟸117—Motion to dismiss not proper way to take objection to parties.

Motion after answer to dismiss the cause is not the proper way to take the objection to nonjoinder of necessary parties.

2. Appeal and error ⟸694(1) — Findings of fact accepted as final, where evidence not reported.

Where the evidence is not reported, the findings of fact must be accepted as final on appeal in equity case.

3. Appeal and error ⟸694(1)—Question to be determined where evidence not reported.

Where the evidence is not reported on appeal in equity case, the only question is whether the decree conforms to the allegations of the bill and rightly could have been entered on the facts found.

4. Trusts ⟸366(1) — Who should be made parties in suit concerning trust fund largely discretionary.

The court ordinarily takes pains to see that all parties interested in a trust fund are given an opportunity to be heard in a suit concerning it, but how far such parties should be made parties rests largely in sound judicial discretion.

5. Equity ⟸42(1), 53(4)—Right to complain for want of equity or complete remedy at law waived by proceeding to trial.

By answering and proceeding to trial on the merits, all right to complain for want of equity or because there is a plain and complete remedy at law has been waived.

6. Trusts ⟸363—Superior court held to have jurisdiction of cause.

Superior court had jurisdiction of a suit in equity against a corporation and an individual, as trustee of its assets, to have plaintiff's claim against the corporation defendant established, and the individual defendant decreed to hold a sum adequate to pay its claim as trustee for the plaintiff.

7. Trusts ⟸282—Trustee misapplying property liable to person entitled thereto.

Where corporation sold all its personal property and caused proceeds to be paid to an individual in trust to pay a portion thereof in specified amounts to its creditors, balance to be paid to stockholders, the individual was bound to distribute it according to the terms of the agreement, and, where he paid more to the stockholders than he should, the court properly decreed him liable to a creditor as trustee left to pay himself the compensation to which he was entitled under the agreement with the corporation.

8. Trusts ⟸39, 345—May be created for benefit of third person who may avail himself by proceedings to enforce.

A trust may be created for the benefit of a third person without his knowledge or consent, and the latter may avail himself of its advantages by instituting proceedings to enforce its terms.

Appeal from Superior Court, Worcester County; P. M. Keating, Judge.

Suit in equity by the Wickwire Spencer Steel Corporation against the United Spring Manufacturing Company, Incorporated, and Ralph G. Albert. From a decree for plaintiff, the last-named defendant appeals. Affirmed.

R. F. Albert, of Boston, and W. B. Feiga, of Worcester, for appellant.

P. D. Wesson, of New York City, for appellee.

RUGG, C. J. This is a suit in equity. Stated summarily, the allegations of the bill are that the plaintiff is a creditor of the corporate defendant, which sold all its personal property and caused the proceeds to be paid to the individual defendant on the trust to pay a portion thereof in specified amounts to its creditors, that the individual defendant has paid all such creditors except the plaintiff and one other, and that he holds a sum sufficient to pay the claim of the plaintiff in trust for it. The prayers of the bill are that the plaintiff's claim against the corporate defendant be established and that the individual defendant be decreed to hold a sum adequate to pay its claim as trustee for the plaintiff, and for general relief.

[1] The defendants filed several answers. More than six months thereafter the individual defendant filed a motion to dismiss the cause on the ground of want of proper parties. This was denied rightly. Such motion is not the proper way to take the objection that necessary parties have not been joined. Noyes v. Bragg, 220 Mass. 106, 110, 107 N. E. 669.

The case was heard by a judge of the superior court, who filed a statement of his findings. The facts thus found were that the directors, constituting practically all the stockholders, of the corporate defendant sold all its property and stock for $6,830, which sum was placed in the hands of the individual defendant in trust for the purpose of having him pay all the creditors of the corporate defendant and distribute the balance, after deducting $100 for his own services, among its stockholders. The total amount of bills due to such creditors was $1,592.87. All the creditors have been paid except the plaintiff

manifestly considerable payments were made to the stockholders, but after all payments were made the individual defendant had a balance in his hands of $622.25. Under the terms of the trust deposit he had no right to distribute anything among stockholders until he had paid creditors, including the plaintiff, in full.

A decree was entered to the effect that the plaintiff is entitled to receive from the individual defendant the amount of its claim with interest and costs. His appeal brings the case here.

[2, 3] The evidence not being reported, the findings of fact must be accepted as final. The only question is whether the decree conforms to the allegations of the bill and rightly could have been entered on the facts found. First Baptist Society in Brookfield v. Dexter, 193 Mass. 187, 79 N. E. 342; Gordon v. Borans, 222 Mass. 166, 109 N. E. 950; Jacobs v. Anderson, 244 Mass. 125, 138 N. E. 314.

[4-6] No objection can be urged successfully at this stage of the case, upon the facts shown, for want of parties. There were ample funds placed in the hands of the individual defendant to pay all the creditors of the corporate defendant. The bill might be treated as brought in behalf of all parties in interest. The court ordinarily takes pains to see that all parties interested in a trust fund are given an opportunity to be heard. But how far such persons should be made parties rests largely in sound judicial discretion. Smith v. Williams, 116 Mass. 510; Crowell v. Cape Cod Ship Canal Co., 164 Mass. 235, 41 N. E. 290. The case at bar is distinguishable from Gregory v. Merchants' National Bank, 171 Mass. 67, 50 N. E. 520, and similar decisions. By answering and proceeding to trial on the merits, all right to complain for want of equity or because there is a plain and complete remedy at law has been waived. Creely v. Bay State Brick Co., 103 Mass. 514; Driscoll v. Smith, 184 Mass. 221, 68 N. E. 210; Bauer v. International Waste Co., 201 Mass. 197, 201, 87 N. E. 637. Manifestly the superior court had jurisdiction of the cause of action. Maker v. Bouthier, 242 Mass. 20, 24, 136 N. E. 255.

[7, 8] The individual defendant, having received this money in trust, was bound to distribute it according to the terms of his fiduciary agreement. The plaintiff does not appear to have been a direct party to that trust or to have assented to its terms except by bringing the present suit. A trust may be created for the benefit of third persons without their knowledge or consent. One for whose benefit a trust is established may avail himself of its advantages by instituting proceedings to enforce its terms. Boston v. Turner, 201 Mass. 190, 194, 195, 87 N. E. 634, and cases there collected; Forbes v. Thorpe, 209 Mass. 570, 581, 582, 95 N. E. 955. It is plain that the remedy at law might have been available to the plaintiff. Mellen v. Whipple, 1 Gray, 317, 322; Johnson v. Johnson, 120 Mass. 465; Chase v. Perley, 148 Mass. 289, 294, 19 N. E. 398. It cannot now be urged that such remedy was exclusive upon the facts here disclosed.

The facts found plainly show that the individual defendant has money in his hands which he ought to apply in payment of the plaintiff's claim.

Decree affirmed with costs.

In re SMART'S ESTATE.

FRYE v. SAUNDERS et al.

(Supreme Judicial Court of Massachusetts. Essex. March 1, 1924.)

1. Wills ⇐602 — Will excluding "relations" of mother of testatrix and of father's first wife held not to exclude descendants of father and mother.

Under will, "I give and devise nothing whatever to my father's first wife's relations and nothing to my mother's relations," *held*, that the word "relations" was used in a colloquial sense, as referring to those who were related to her only through her father's first wife or through her mother, and not as referring to the other descendants of her father.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Relation—Relative.]

2. Wills ⇐478—Implied gift held not contained in will.

A will providing, "I give and devise nothing whatever to my father's first wife's relations and nothing to my mother's relations," *held* not to contain an implied gift to remote and collateral relations, who would be the next of kin if there were no descendants of testatrix's father, dealing only with collateral connections, and not with direct kindred of the blood.

3. Wills ⇐478—Gift by implication must be founded on expression in will.

A gift by implication must be founded on some expressions in the will, from which such intention can be inferred from absolute silence on the subject.

4. Wills ⇐493—Property must go undevised where designation of devisees uncertain.

Unless there is to be found in a will not only a manifestation of the testatrix's intention that a fund should be disposed of by the will, but also a clear and certain designation of the persons to whom it is to be paid, it must go as undevised property to his heirs at law, under G. L. c. 190, § 2.

Appeal from Probate Court, Essex County; Harry R. Dow, Judge.

In the matter of the estate of Abbie M. Smart, deceased. Petition by the executor, Newton P. Frye, for construction of the will, against Hannah Holt Saunders and others. From a decree, certain respondents, descendants of Darius Holt, appeal. Decree ordered.

J. F. Neal, of Boston, for appellants.

R. B. Stone, of Boston, for respondents, Smart's next of kin.

T. Eaton, of Boston, for respondent Edmands.

DE COURCY, J. The will of Abbie M. Smart contains a number of specific bequests and money legacies, but no residuary clause. There is remaining in the hands of the executor approximately $70,000, and he brings this petition for instructions as to what persons are entitled to it. The occasion for the application is the presence in the will of the following paragraph:

"I give and devise nothing whatever to my father's first wife's relations and nothing to my mother's relations; and hope that my wish as herein expressed will be clearly understood."

Amos Holt, the father of the testatrix, was twice married; his first wife being Pattie Wardwell, and his second wife Eunice Evans, who was the mother of the testatrix. Mrs. Smart died leaving no issue, and as her next of kin the descendants of her deceased half-sisters, who were children of Amos Holt and his first wife. These descendants are 14 in number, and all are grandnephews or grandnieces of the testatrix, except one, who is the only child of a previously deceased grandniece. They claim the residue as intestate property. The respondents who appealed are descendants of Darius Holt, a brother of Amos Holt. The other respondents, who have taken no appeal, are related to the testatrix through her mother. The decree of the probate court was that the clause of the will in question—

"is not sufficiently clear to support a gift by implication to the relatives of the testatrix exclusive of her next of kin, and the personal property in the hands of the petitioner must be treated as intestate estate and distributed in accordance with the statutes governing the distribution of intestate estate."

[1] As to the interpretation of the clause in controversy: It is to be noted that the testatrix does not speak of her "father's relations" or of her own. If it were her purpose to exclude her own half brothers and sisters and their issue, as the appellants contend, presumably she would have said so. It could scarcely be claimed that her own issue, if she left any, would be excluded merely because such issue would be her "mother's relations." Or if she spoke of "my husband's relations," it could not successfully be contended that she meant to exclude her own children, although literally they would be her husband's relations. In our opinion she used the word "relations" in a somewhat colloquial sense, as referring to those who were related to her ony through her father's first wife or through her mother, and not as referring to the other descendants of her father. She was dealing with collateral connections, not with direct kindred of the Holt blood.

[2-4] But whatever meaning be given to the clause in question, it does not contain an implied gift to the remote and collateral relations who would be the next of kin if there were no descendants of Amos Holt. As was said by Shaw, C. J., in Nickerson v. Bowly, 8 Metc. 424, 431:

"A gift by implication must be founded upon some expressions in the will, from which such intention can be inferred. It cannot be inferred from an absolute silence on the subject."

We find no language in the controverted clause, or elsewhere in the will, to support an implied gift to the appellants. Child v. Child, 185 Mass. 376, 70 N. E. 464; Boston Safe Deposit & Trust Co. v. Buffum, 196 Mass. 242, 71 N. E. 549; Shea v. Maitland, 237 Mass. 221, 225, 129 N. E. 399. And, to adopt the language of Sheldon, J., in Sanger v. Bourke, 209 Mass. 481, 486, 95 N. E. 894, 895:

"Unless there is to be found in the will not only a manifestation of the testator's intention that this fund should be disposed of by the will, but also a clear and certain designation of the persons to whom it is to be paid, it must go as undevised property to his heirs at law."

See, also, Cavan v. Woodbury, 240 Mass. 125, 133 N. E. 95.

The funds in the hands of the executor are "personal property of a deceased person not lawfully disposed of by will" within the express terms of our statute of distributions (G. L. c. 190, § 2); and must be distributed to the next of kin as intestate property, in accordance with the decree of the probate court.

Costs of the appeal as between solicitor and client may be allowed out of the estate in the discretion of that court.

Decree accordingly.

SHAHEEN v. HERSHFIELD.

(Supreme Judicial Court of Massachusetts. Essex. Feb. 28, 1924.)

1. Interest ⇐22(2)—Rule for computing interest in action on judgment stated.

One who recovered a judgment, which under G. L. c. 235, § 8, bore interest from the date of its rendition, was entitled to recover interest on the amount of his judgment from that date to the date of suing out his writ, in an action on the judgment and also interest from the latter date on a new principal, being the amount of his judgment plus that first interest, to the date of a new judgment.

2. Costs ⇐18—District court could eliminate costs of one who could have gone into court under small claims procedure.

Under G. L. c. 218, §§ 21-25, the district court was within its jurisdiction in eliminating costs of plaintiff, where he might have gone into the court under small claims procedure.

3. Appeal and error ⇐2—Small claims procedure statute held to still leave open right of appeal from certain judgments.

The small claims procedure statute still leaves open the right of appeal from an adverse judgment in district court, rendered on a writ brought on or before September 30, 1922, under G. L. c. 231, § 97, as amended by St. 1922, c. 532, § 12, and St. 1922, c. 532, § 8, subsec. 110B.

4. Appeal and error ⇐151(5)—Plaintiff had right to appeal from judgment for less amount than claimed.

The plaintiff had a right of appeal from a judgment of the district court to the superior court, where the judgment, although in his favor, was for a less amount than was claimed and than was due.

5. Costs ⇐221—Elimination of costs in district court did not follow case into superior court.

An appeal from a judgment in district court to the superior court vacated the judgment rendered in the district court, and an elimination of costs ordered in the district court did not follow the case and the parties into the superior court, under G. L. c. 218, § 25, and St. 1922, c. 532, § 12.

6. Costs ⇐231(2)—Rule stated as to recovery of costs by one successfully appealing from judgment in his favor to superior court.

Plaintiff was entitled to costs on judgment rendered in the superior court, after appeal from judgment in his favor in district court, where plaintiff recovered, by the finding in the superior court, a sum for debt greater than judgment in the district court, and greater also than that judgment plus interest from the date of its rendition under G. L. c. 261, §§ 1, 3, action having been brought in the district court prior to September 30, 1922, in view of St. 1922, c. 532, § 8, subsec. 110B.

Exceptions from Superior Court, Essex County; G. A. Flynn, Judge.

Action by Joseph Shaheen against Kalman Hershfield on a judgment for costs rendered in favor of the plaintiff against the defendant. From adverse rulings, plaintiff brings exceptions. Exceptions sustained.

M. A. Flanagan and J. J. Fox, Jr., both of Lawrence, for plaintiff.

RUGG, C. J. This is an action on a judgment for costs amounting to $6.51 rendered in favor of the plaintiff against the defendant by the district court of Lawrence on the 28th of January, 1922. The writ in the case at bar was dated on the 7th of February, 1922. Judgment in the present action was rendered in favor of the plaintiff for $6.51, and costs taxed at $8.50 on May 19, 1922. That judgment appears to have been vacated. Costs subsequently were eliminated by order of the district court under G. L. c. 218, § 25. The case went to judgment finally in the district court on the second of February, 1923, for $6.51 without costs. From that judgment the plaintiff appealed to the superior court. At the trial in the superior court the judge ruled: (1) That G. L. c. 218, § 25, related to district courts solely and conferred no power on the superior court; and (2) that the elimination of costs by the district court was a matter of discretion and not subject to revision or appeal. He allowed the motion of the defendant to eliminate costs and found for the plaintiff in the sum of $6.91. It was agreed at the trial that the plaintiff recovered the judgment upon which this action is brought and that it has never been satisfied in whole or in part. The plaintiff's exceptions to the second ruling above stated and to the allowance of the motion to eliminate costs bring the case here.

There was error in the allowance in the superior court of the defendant's motion to eliminate costs and in the ruling which we interpret to mean that the elimination of costs by the district court was binding upon the parties to the cause in the superior court.

[1-3] It is plain that the plaintiff was aggrieved by the amount of the judgment rendered in the district court in his favor against the defendant. He had recovered a judgment which under G. L. c. 235, § 8, bore interest from the day of its rendition, namely, from the 28th day of January, 1922. He was entitled to recover interest on the amount of his judgment from that date to the date of suing out his writ in the case at bar, and also interest from the latter date on a new principal, being the amount of his judgment plus that first interest, to the date of the judgment from which he took appeal. But that latter judgment included no interest whatever. It was for the same amount as the judgment on which this action is founded. The plaintiff in this action did not

go into the district court under the small claims procedure, as he might have done. G. L. c. 218, §§ 21 to 25. Instead he sued out a writ. He had a right to do that. Under section 25 the district court was within its jurisdiction in eliminating the costs of the plaintiff, because the plaintiff might have begun under the small claims procedure. The power of eliminating costs in such case is expressly conferred by section 25. The plaintiff, however, had done nothing to estop himself from taking advantage of whatever remedy the law afforded for the correction of errors committed by the district court respecting his case. The only remedy thus afforded him at that time was by taking an appeal to the superior court as provided in G. L. c. 231, § 97, as amended by St. 1922, c. 532, § 12. The small claims procedure statutes still leave open the right of appeal from an adverse judgment rendered on a writ brought on or before September 30, 1922. St. 1922, c. 532, § 8, subsec. 110B.

[4, 5] The plaintiff had a right of appeal from the judgment of the district court because that judgment, although in his favor, was for a less amount than was claimed and than was his due. Kingsley v. Delano, 172 Mass. 37, 51 N. E. 186. The appeal vacated the judgment rendered in the district court. The object and purpose of such an appeal under our statutes is to enable the parties to have their rights determined without regard to any decision of the court of first instance, because it shall be tried and determined in the superior court "as if originally commenced there." St. 1922, c. 532, § 12. The whole case in all its aspects was pending in the superior court under the appeal. Cronin v. Barry, 200 Mass. 563, 86 N. E. 958; Hall v. Hall, 200 Mass. 194, 196, 86 N. E. 363; Jaha v. Belleg, 13 Allen, 78, 80. This statutory power is quite inconsistent with the view that the elimination of costs ordered in the district court shall follow the case and the parties into the superior court. Apart from this, the words of G. L. c. 218, § 25, hardly would be susceptible of that construction.

[6] The plaintiff is entitled to his costs on the judgment rendered in the superior court. The general rule is that the prevailing party in civil actions "shall recover his costs, except as otherwise provided." G. L. c. 261, § 1. It is provided by G. L. c. 261, § 3, that if—

"in a civil action before a district court the plaintiff appeals from a judgment in his favor * * * and does not recover in the superior court a greater amount for debt or damages than he recovered by the first judgment he shall recover no costs arising after the appeal."

It is manifest that the plaintiff recovered by the finding in the superior court a sum for debt greater than the judgment in the district court and greater also than that judgment plus interest from the date of its rendition. See Crandall v. Colley, 178 Mass. 339, 59 N. E. 844. Whether it was for an amount as large as the plaintiff was entitled to recover is not raised on this record. The procedure here followed is inapplicable to actions brought in district courts subsequent to September 30, 1922. St. 1922, c. 532, § 8, subsec. 110B.

Exceptions sustained.

ALPHA PORTLAND CEMENT CO. v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts. Suffolk. March 4, 1924.)

1. Taxation ⇐453—Cannot by petition under statute inquire whether there has been overvaluation of matter subject to tax.

A corporation cannot, by petition under G. L. c. 63, § 77, authorizing inquiry as to wrongful assessment of tax or excise, cause inquiry to be made whether there has been an overvaluation of that which is rightly subject to tax or excise, relief for wrong of that nature being afforded by sections 51 and 71.

2. Taxation ⇐165—Intangible assets having situs within state considered in determining excise tax.

The excise tax due from a corporation doing business within the state under G. L. c. 63, §§ 30–43, 52, and St. 1921, c. 361, may be measured in part by intangible assets arising exclusively from the conduct of interstate business but having a situs within the commonwealth, such as credits due from residents of the commonwealth.

Petition from Supreme Judicial Court, Suffolk County.

Petition in equity by the Alpha Portland Cement Company against the Commonwealth to recover an excise alleged to have been exacted illegally. From a final decree dismissing the petition, the petitioner appeals. Petition dismissed.

L. H. Porter, of New York City, Howland Twombly, of Boston, and F. Carroll Taylor, of New York City (J. G. Palfrey, of Boston, of counsel), for petitioner.

Jay R. Benton, Atty. Gen., and Alexander Lincoln, Asst. Atty. Gen., for the Commonwealth.

RUGG, C. J. [1] This is a petition under G. L. c. 63, § 77, to recover an excise alleged to have been exacted from it illegally for the year 1922. This section of the statute enables a corporation to bring before this court the inquiry whether there has been a wrongful assessment of a tax or excise upon that which was not the proper subject of taxation. A corporation cannot by petition un-

whether there has been an overvaluation of that which is rightly subject to the tax or excise, relief for wrong of that nature being afforded by G. L. c. 63, §§ 51, 71. Boston Manuf. Co. v. Commonwealth, 144 Mass. 598, 12 N. E. 362; Attorney General v. East Boston Co., 222 Mass. 450, 111 N. E. 167.

[2] The petitioner is a corporation organized under the laws of New Jersey, engaged in business in this commonwealth. Its only tangible property within this commonwealth is office furniture of a value of $573. It conducts within this commonwealth, in the sale and delivery of cement and the maintenance of a sales force, an extensive business exclusively interstate in character. Its nature and extent are described in Alpha Portland Cement Co. v. Commonwealth, 244 Mass. 530, 139 N. E. 158, in substantially the same general terms as shown on this record and need not now be repeated.

The excise here assailed was levied under the provisions of G. L. c. 63, §§ 30 to 43, both inclusive, section 52, and St. 1921, c. 361. All these sections are printed in 244 Mass. 532 to 543, 139 N. E. 158, 164, and need not here be recited. It is provided by G. L. c. 63, § 47, that the commissioner of corporations and taxation "shall make from time to time such reasonable rules and regulations, consistent with sections thirty to fifty-one, inclusive, as he may deem necessary for carrying out their provisions." Pursuant to that mandate the commissioner made a general ruling of the following tenor:

"2505. Ordinarily, such proportion of an intangible asset employed in business will be deemed to be employed in business within Massachusetts as that portion of the remainder of income allocable in Massachusetts under the provisions of section 19 of the act bears to the total of said remainder. If, however, because of the peculiar circumstances of any particular case such method of apportionment does not fairly reflect the proportion of an asset employed in business in Massachusetts, the corporation may submit its reasons for requesting determination by another method. The department also reserves the right in such cases to make the apportionment by another rule, even though the corporation does not request determination by another method; but in such event the corporation will be notified."

The petitioner filed its return and made no request for determination by any other method. So far as this method affects valuation, it is not open to inquiry in this proceeding. The remedy for a wrong of that nature would be under sections 51, 71.

This statute in its application to the present petitioner was considered at length in Alpha Portland Cement Co. v. Commonwealth, 244 Mass. 530, 139 N. E. 158. The purpose of bringing the present petition respecting the excise levied for the year succeeding that under investigation in the earview of this court as to points thought by the petitioner not to have been fully developed there, in order that the Supreme Court of the United States on writ of review may have before it all aspects of the statute.

The method of calculation of the excise is set out with greater detail in the present than in the earlier record. The basis of the excise is the value of the corporate excess employed within the commonwealth and the net income derived from business within the commonwealth. Thus the express terms of the statute confine its operation and effect to property located and net income earned within the commonwealth. Without pursuing the details of the method of computation to ascertain these two elements, it is enough to say that it is in conformity to the statute. This conclusion finds confirmation in the fact that the petitioner failed to exercise the option, extended to it by the ruling of the commissioner already quoted, of requesting an apportionment by some other method.

The petitioner founds its objections to the statute on no narrow ground. The only contention now urged by it stated broadly is that the tax is illegal and in violation of its rights under the federal Constitution. That contention is understood to mean that, as matter of constitutional right, the only factor capable of being used to ascertain the excise due from it is the tangible personal property owned by it and located in this commonwealth, that is to say, its office furniture worth $573. It is said in the brief of the learned counsel for the petitioner:

"In the former case it was stipulated that the amount of the tax assessed was not questioned, and while in the court's opinion reference was made to the petitioner's intangible assets, the extent to which the valuation of corporate excess consisted of a valuation of these intangible assets arising solely from the conduct of interstate commerce did not appear. If in the former case the court intended to construe the statute as including as assets employed in business within the Commonwealth these intangibles constituting a part of and arising exclusively from the conduct of interstate commerce, why that is of course the end of this case."

The former decision rested in its ultimate analysis upon the theory that under the statute the excise might be measured in part upon intangible assets of the petitioner having a situs in this commonwealth and arising exclusively from the conduct of its interstate business. We understand that credits due from residents within this commonwealth to nonresidents may be made the subject of direct property taxation here. Metropolitan Life Ins. Co. of New York v. New Orleans, 205 U. S. 395, 27 Sup. Ct. 499, 51 L. Ed. 853; Liverpool & London & Globe Ins. Co. v. Orleans Assessors, 221 U. S. 346, 31 Sup. Ct. 550,

252 U. S. 333, 42 Sup. Ct. 109, 40 L. Ed. 252; Shaffer v. Carter, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445, and cases there reviewed. The source from which such credits arise is not material. They are not immune from taxation because coming into existence through the transaction of interstate commerce. That being so, it would seem that such credits may be used as a measure of an excise levied indifferently upon all corporations under a general law.

The case at bar appears to us to be governed in every essential particular by the authority of Alpha Portland Cement Co. v. Commonwealth, 244 Mass. 530, 139 N. E. 158, and the decisions there collected and reviewed. Its reasoning is adopted without discussion as decisive of the case at bar.

Petition dismissed with costs.

RUGGIERO et al. v. SALOMONE.

(Supreme Judicial Court of Massachusetts. Suffolk. March 3, 1924.)

Good will ⟹6(4)—Decree enjoining employment with competitor held proper.

Where defendant went to work in another barber shop 300 feet distant from complainants' shop, after having sold his shop to complainants and agreed not to become an owner or part owner of a barber shop within a radius of one mile from the place sold for five years, and it appeared that the personality of the defendant would and did attract old customers, a decree restraining him from doing anything to impair the good will of the business sold *held* to have properly applied the agreed measure of space and time to his work as journeyman or voluntary assistant.

Appeal from Superior Court, Suffolk County; Sisk, Judge.

Bill in equity by Frank Ruggiero and another against James L. Salomone, to restrain the defendant from carrying on or conducting in any capacity, either directly or indirectly, whether as sole proprietor, member of a firm or partnership, or as a shareholder, or employee, a hairdressing parlor or barber shop. Decree for plaintiffs, and defendant appeals. Affirmed.

D. H. Fulton, of Boston, for appellant.

James J. Bacigalupo, of Boston, for appellees.

PIERCE, J. This is a bill in equity to restrain the defendant from carrying on or conducting in any capacity, either directly or indirectly, whether as sole proprietor, a member of a partnership, or as a shareholder, or employee, a hairdressing parlor or barber No. 48 Summer street in said Boston, for a term of five years from October 25, 1922.

Upon the filing of the answer the case was referred to a master. His report, to which both parties waived the right to file objections, in substance shows that for some years before October 25, 1922, the defendant had a barber shop at No. 48 Summer street, Boston; that on that day he sold it to the plaintiffs for $7,000 by a bill of sale of all the right, title and interest of the defendant in the barber shop, "including good will" and the enumerated tangible stock in trade; that the bill of sale under seal also contained a covenant that the defendant would "not engage in the barber business either as an owner or part owner within a radius of one mile of No. 48 Summer street, Boston, for a term of five years from date of this instrument." The report further discloses that the defendant, without complaint of the plaintiffs, worked as a floor director and journeyman barber at Filene's barber shop from April, 1923, until July 1, 1923; that since July 2, 1923, he has been at work at No. 104 Summer street at a shop which is distant three hundred feet east of the plaintiffs' shop; that the shop at No. 104 Summer street and that of the plaintiffs are to some extent competitors; that the shop at No. 104 Summer street was owned by Polcari and Genneally; that they quarreled, and Polcari wished to sell and the defendant desired to buy his interest; that Polcari and the defendant unsuccessfully negotiated with the plaintiffs to see on what terms the plaintiffs would allow the defendant to enter the business; that when the defendant left Filene's and went to No. 104 Summer street, Polcari left No. 104 Summer street and took the defendant's place at Filene's at $28 a week; that Polcari pays the defendant $20 a week and receives one half of the profits of the business; that the defendant has not bought the interest of Polcari but would quickly come to terms if this litigation was out of the way; that if the defendant shall become part owner at No. 104 Summer street and be known to be owner it will divert a substantial part of the plaintiffs' customers; that the defendant is a man likely to impress himself favorably upon customers, be noticed and remembered by them, and would attract customers generally to any shop in which he was owner or manager; that some of the defendant's personal customers at the old shop have already followed him to the new one; and that this has taken away trade that belonged to the plaintiffs and has impaired their good will.

The defendant, in support of his appeal, contends that the decree is inequitable in the extent of territory within which he is prohibited from working at his trade. He makes no claim that the decree improperly

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radius of one mile of No. 48 Summer street, Boston, for a term of five years from October 25, 1922; and he does not dispute the propriety of the decree enjoining him from doing any act or thing to injure, impair or interfere with the plaintiffs' good will in the barber shop now conducted at No. 48 Summer street, Boston.

In view of the finding of the master that the personality of the defendant would attract customers generally to any shop in which he was owner or manager, and upon consideration of the fact that personal customers have followed him from the old to the new shop to the impairment of the good will of the old shop, we think it cannot fairly be said that the decree was wrong in applying the same measure of space and time to the defendant in his work as a journeyman or volunteer assistant, which the defendant and plaintiffs agreed upon as adequate when applied to the protection of the business against the influence which they supposed would accompany and flow from the whole or part ownership of such a shop by the defendant. Rosenberg v. Adelson, 234 Mass. 488, 125 N. E. 632; Old Corner Book Store v. Upham, 194 Mass. 101, 80 N. E. 228, 120 Am. St. Rep. 532.

Decree affirmed.

CALDWELL v. EASTMAN.

(Supreme Judicial Court of Massachusetts. Plymouth. March 6, 1924.)

1. Bankruptcy ⇐31—Debt not duly scheduled when office address given instead of residence.

A debt is not duly scheduled by a bankrupt when the office address instead of the residence of the creditor is given in the schedule under the designation of residence.

2. Bankruptcy ⇐31—Schedule of debts must state street and number.

A schedule of debts must state street and number of street of residence of creditor, or state that it is unknown.

3. Bankruptcy ⇐436(1)—Burden of proof as to notice of discharge in bankruptcy.

If plaintiff was scheduled as a creditor in bankruptcy proceedings in such a way that the defendant has to rely upon notice to the creditor in order to take advantage of the discharge, then the question of notice is an affirmative defense and one upon which the defendant and not the plaintiff has the burden of proof.

4. Bankruptcy ⇐436(1)—Burden of proof on bankrupt to show diligence in ascertaining residence of creditor in subsequent action by creditor.

When misstatement of residence in schedule of creditors was proved by creditor subsequently, bankrupt, who had been discharged, had the burden of showing that he had used due diligence and made proper effort to ascertain the actual abode and residence of the creditor, and the court, in the absence of any explanation, was warranted in inferring a lack of diligence in this regard.

Report from Superior Court, Plymouth County.

Action of contract by Warren H. Caldwell against George A. Eastman to recover balance due on a promissory note. On report after a directed verdict for plaintiff. Judgment for plaintiff.

W. G. Rowe, of Brockton, for plaintiff.
Ray Henry, of Boston, for defendant.

PIERCE, J. This is an action of contract to recover the balance due on a promissory note. The defendant pleaded a discharge in bankruptcy in March, 1913. There was a trial before a judge of the superior court with a jury. At the close of the evidence counsel agreed that no facts were in dispute; and the defendant's counsel stated, in reply to an inquiry from the court, that he was not prepared to show that the plaintiff had had notice of the bankruptcy proceedings.

The defendant introduced in evidence a certificate of the District Court of the United States for the District of Massachusetts, showing his discharge in bankruptcy in March, 1913, together with a certified copy of Schedule A of his original bankruptcy petition, wherein the plaintiff's claim was scheduled. This schedule gave as the name of the creditor, W. H. Caldwell, and "Main street, Brockton, Mass. (number unknown)," as the residence of such creditor. The plaintiff then introduced proof that he resided at No. 14 L street, Brockton, for the two years preceding the bringing of this action; that prior to that he lived at No. 56 Green street, Brockton, for a period of eighteen years; that he never lived on Main street, Brockton, but did have a place of business there in 1912 and 1913; that he did not know where the defendant was in 1912 and 1913; that he received no notice of the defendant's going into bankruptcy, and heard nothing about the defendant's discharge in bankruptcy, until the year 1920.

[1-3] At the plaintiff's request the court ruled:

"(1) A debt is not duly scheduled when the office address instead of the residence is given in the schedule under the designation of residence.

"(2) A schedule must state the street and number of street of residence of creditor or state that it is unknown to be a valid schedule in that respect.

"(3) If the plaintiff was scheduled as a creditor in such a way that the defendant has to rely upon notice to the creditor in order to

take advantage of the discharge, then the question of notice is an affirmative defense and one upon which the defendant and not the plaintiff has the burden of proof."

The judge directed the jury to return a verdict for the plaintiff in the sum of $603. The defendant duly excepted to the rulings and to the order. The case is reported to this court, such entry to be made "as law and justice may require."

In Parker v. Murphy, 215 Mass. 72, 102 N. E. 85, the court said:

"Section 17 of the bankruptcy act provides that a discharge in bankruptcy shall release the debtor from all provable debts 'except such as * * * have not been duly scheduled * * * unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.' Claims are not duly scheduled unless the names of the debtor's 'creditors showing their residences, if known,' are on the list of creditors filed. Section 7, cl. 8. The burden of proving that he did all things required of him under the bankruptcy law to give notice to the respondent creditor of the bankruptcy proceedings or that the latter had actual knowledge of them rests upon the plaintiff [the bankrupt] in this case. Wylie v. Marinofsky, 201 Mass. 583; Wineman v. Fisher, 135 Mich. 604, 608. The requirement for duly scheduling the names and residences of creditors is a most important one. It is in compliance with the generally recognized principle that one shall not be barred of his claim without the opportunity of having his day in court. It is for the benefit of the creditors and in the interest of fair dealing with them and is to be construed in harmony with this purpose. It is essential in order that notices in the bankruptcy proceeding may be sent him. It has been construed with some strictness. Birkett v. Columbia Bank, 195 U. S. 345; Custard v. Wigderson, 130 Wis. 412."

The schedule filed in these proceedings listed the plaintiff's creditor with a residence at Main street, Brockton, number unknown. It was proved by the plaintiff, and subsequently admitted by the defendant, that the residence of the plaintiff—the customary abode of the plaintiff as distinguished from the place where he transacted his usual business on February 29, 1912—was on Green street, Brockton, and was not and never has been on Main street, Brockton. It was also proved that the place of business of the plaintiff in February, 1912, was on Main street, Brockton. The schedule described the street without the number of the place of business. It is an indisputable fact that the street residence of the plaintiff was not scheduled. As we understand it, the defendant contends that the statement "Main street * * * (number unknown)" may be treated as surplusage, leaving the words "Brockton, Mass."; and that so read the schedule is sufficient within the bankruptcy rule as interpreted and applied in Kreitlein v. Ferger, 238 U. S. 21, 35 Sup. Ct. 685, 59 L. Ed. 1184. On the other hand the plaintiff contends that the entire declaration of the schedule is "an affirmative misstatement" of the place of residence of the creditor, and is of no greater value as a compliance with the terms of the statute than is a schedule with the name of the creditor improperly spelled, Custard v. Wigderson, 130 Wis. 412, 414, 110 N. W. 263, 10 Ann. Cas. 740, or the name of the city of residence omitted, Troy v. Rudnick, 198 Mass. 563, 85 N. E. 177.

[4] When the misstatement of the residence was proved by the plaintiff, the burden of proof still rested on the defendant to satify the court and jury that the defendant used due diligence and made proper effect to ascertain the actual abode and residence of the creditor, and the judge in the absence of any explanation was warranted in inferring a lack of diligence in this regard. The third ruling is covered by the decision of Smith v. Hill, 232 Mass. 188, 122 N. E. 310, 2 A. L. R. 1667, affirmed in Hill v. Smith, 260 U. S. 592, 43 Sup. Ct. 219, 67 L. Ed. 419. On all the facts of the report we are of opinion that judgment should be entered for the plaintiff in the amount of $603, as found by the court, with interest thereon.

So ordered.

TOWER v. OLANSKY.

(Supreme Judicial Court of Massachusetts. Suffolk. March 3, 1924.)

1. Trover and conversion ⇐11—Purchase of goods from owner's employee held a conversion.

Defendant's act of receiving and paying for goods taken to him by plaintiff's employee with knowledge that they had been taken from plaintiff in violation of law was a conversion, without the further fact that defendant used, sold, and gave them away.

2. Trover and conversion ⇐40(4)—Finding of knowledge of one receiving goods from dishonest employee sustained.

In action for conversion against one receiving goods from plaintiff's employee, evidence *held* to warrant a finding of knowledge that the goods had been taken wrongfully and illegally.

3. Trover and conversion ⇐11—Purchaser of goods from dishonest employee of owner held guilty of conversion.

Defendant was guilty of conversion where he went to plaintiff's place of business and purchased goods from plaintiff's employee with the knowledge that the employee intended to retain the proceeds to his own use.

Appeal from Municipal Court of Boston, Appellate Division.

Action of tort by Russell B. Tower against Samuel Olansky for the conversion of goods and merchandise. From an order of the

Appellate Division of the Municipal Court of Boston dismissing a report, defendant appeals. Affirmed.

David Flower, of Boston, for appellant.
Walter Shuebruk and Charles C. Gammons, both of Boston, for appellee.

PIERCE, J. This is an action of tort for the conversion of certain goods and merchandise of the plaintiff, to the value of $600. The case comes before this court on the appeal of the defendant from an order of the Appellate Division of the Municipal Court of the City of Boston. The defendant in his brief does not contend that the declaration is insufficient; or that at the hearing there was any failure to prove, if necessary, a demand on the defendant for the goods alleged to have been converted, and a refusal to deliver to the plaintiff such goods. We assume the proof or waiver of all preliminary matters of evidence or fact which otherwise might be required as a basis of the right to set this form of action in motion.

At the trial on the merits the defendant, before the final argument, made certain requests for rulings, which were denied. No one of them in terms is referred to in the defendant's brief but all of them have been considered as included in the first request that "On all the evidence the plaintiff cannot recover."

The evidence of the plaintiff warranted a finding that between July 19 and August 2, 1921 there was an unexplained loss of goods worth from $1,000 to $2,000 from the plaintiff's wholesale and jobbing stock "of human hair goods, hair nets, toilet goods, and sundries for the hair"; that the plaintiff had about twenty persons in his employ; that among them was Alfred A. Edwards, a salesman, and Leonard J. Chaplik, a shipper who occasionally made sales.

[1, 2] The connection of the defendant with and his responsibility for the loss to the plaintiff of the goods alleged to have been taken, to the knowledge of the defendant, without right from the possession of the plaintiff, could be found from the signed statement of the defendant to the Pinkerton Detective Agency, from his testimony at the trial, and from the testimony of Leonard J. Chaplik. From these sources, succinctly stated, it could be found that the defendant, within the three years preceding August 8, 1921, received from one Chaplik while Chaplik was employed at the E. E. Tower & Co. store about $100 worth of merchandise described as toilet water, hair tonic, face powder, cold creams, lip sticks, nail polish and hair nets; that these goods were delivered to the defendant outside the store of the plaintiff in small lots by Chaplik, whose practice, without any order of the defendant for goods, was to make up bundles of small articles from the plaintiff's store and take them to the defendant, from where he immediately received from $1 to $2 without examination or knowledge of just what was in the bundle or bundles. And upon the testimony of the defendant it could be further found that the defendant used, sold and gave away the goods delivered to him by Chaplik. Upon the foregoing facts it could be further found that the defendant knew that Chaplik was taking the goods of the plaintiff in violation of law and was wrongfully selling them to him. In such case his act of receiving and paying for the goods in aid of the unlawful conduct of Chaplik was a conversion, without the further admitted fact that the defendant used, sold and gave the delivered goods away. Stanley v. Gaylord, 1 Cush. 536, 48 Am. Dec. 643; Riley v. Boston Water Power Co., 11 Cush. 11; Heckle v. Lurvey, 101 Mass. 344, 3 Am. Rep. 366; O'Brien v. McSherry, 222 Mass. 147, 149, 109 N. E. 904.

[3] As regards the transactions with Edwards, whereby the defendant received at the store of the plaintiff after business hours about $500 worth of goods of the kind alleged to have been unlawfully sold, it could be found upon consideration of all the evidence and the circumstances recited that the defendant knew when the goods were delivered to him that Edwards, with his connivance, had sold such goods with the intention to retain the proceeds of the several sales to his own use. Such assent, cooperation and aid to the unlawful sale or disposition of the plaintiff's property by Edwards is a conversion of such property by the defendant, as well as a conversion of it by Edwards. Banfield v. Whipple, 10 Allen, 27, 87 Am. Dec. 618.

It follows that the entry "Report dismissed" of the Appellate Division is affirmed.

So ordered.

FOSTER v. COMMERCIAL NAT. BANK.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1924.)

1. Evidence ⇐441(15)—Parol evidence held admissible to explain receipt, and to show that certain bonds were held as collateral under written agreement.

In action by trustee in bankruptcy against bank to recover possession of bonds claimed by bank to be held as collateral, conversations between the bankrupt and bank officers *held* admissible to explain receipt given by bank to bankrupt for the bonds, and to show that it was understood that the bank was holding the bonds in question as collateral under a former written agreement that all securities coming into the hands of the bank should be held as collateral for any subsequent loans or indebtedness, as against the objection that they could not be received to vary the terms of written contracts.

all securities held collateral immaterial.

The circumstance that bonds left with a bank for safe-keeping were not in existence at the time of an agreement that the bank could hold any securities coming into its possession as collateral to any loan or indebtedness to the bank did not affect the right of the bank to hold them in accordance with its provisions.

3. Contracts ⟸108(2)—Agreement that securities subsequently coming into bank's hands should be held as collateral not against public policy.

An agreement between a bank and one borrowing money from it and discounting sight drafts that all securities coming into the hands of the bank should be held by it as collateral to any loan or indebtedness, whether then existing, or thereafter contracted, was not void as against public policy.

4. Banks and banking ⟸179—Bank's right to retain securities in possession may be limited by special agreement.

While a bank has a general lien on all securities in its possession belonging to its customer for a balance due on general account, yet the right to retain such securities for a balance due may be controlled by any special agreement which shows that such was not intended by the parties.

5. Banks and banking ⟸179—Bank has no lien on bonds left for safe-keeping.

A bank has no lien on bonds left with it merely for safe-keeping for a balance due from a customer.

Appeal from Superior Court, Suffolk County; McLaughlin, Judge.

Bill by Walter H. Foster, trustee in bankruptcy of the estate of Leonard C. Daniels, against the Commercial National Bank. Decrees for defendant, and plaintiff appeals. Affirmed.

G. W. Pike, of Lisbon, N. H., for appellant.
H. F. Knight, of Boston, for appellee.

CROSBY, J. The plaintiff, as trustee of the bankrupt estate of Leonard C. Daniels, brings this bill for an accounting in respect to certain discount transactions between the defendant bank and Daniels, and to compel the bank to turn over to the plaintiff certain Liberty Bonds which the defendant claims to hold as security for certain indebtedness due to it from Daniels. The case was referred to a master, whose report shows that the evidence before him consisted of an agreed statement of facts and of oral evidence, neither of which is reported. The case is before us upon an appeal from an interlocutory decree overruling the exceptions to the master's report, and confirming the report, and an appeal from a final decree dismissing the bill.

There is but little controversy between the parties respecting the material facts. In the

as a wholesale dealer in hay and grain, and in April of that year became a customer of the defendant bank, and applied to it to discount sight drafts which he was drawing upon parties to whom he had sold merchandise; these drafts were discounted by the bank from time to time, and he used the proceeds to pay for goods he had purchased. Before any of the transactions were had, Daniels, at the request of the bank, executed and delivered to it an agreement (a copy of which is made a part of the master's report) which contained, among other provisions, the following:

"(1) All securities deposited by the undersigned with said bank, as collateral to any such loan or indebtedness of the undersigned to said bank, shall also be held by said bank as security for any other liability of the undersigned to said bank, whether then existing or thereafter contracted; and said bank shall also have a lien upon any balance of the deposit account of the undersigned with the said bank existing from time to time, and upon all property of the undersigned of every description left with said bank for safe-keeping or otherwise, or coming into the hands of said bank in any way, as security for any liability of the undersigned to said bank now existing or hereafter contracted."

It was also recited that:

"It is further agreed that these presents constitute a continuing agreement, applying to any and all future as well as to existing transactions between the undersigned and said bank."

The master found that Daniels thereafter was continually contingently liable to the bank by reason of discounting drafts which in October, 1918, amounted to $129,000.

In addition to the liability on account of drafts discounted, Daniels borrowed from the bank on August 16, 1918, $3,750, for which he gave a promissory note and deposited with the bank as collateral security therefor United States Third Liberty Loan Bonds of the face value of $5,000. Upon the renewal of this note the bonds, as collateral, were repledged, and have from the time of the original loan remained in possession of the defendant. The new note (a copy of which is printed in the master's report) was dated February 13, 1919, and is in the form of collateral notes commonly taken by banks and trust companies. On February 28, 1919, the bank also loaned to Daniels $350, for which he gave his promissory note payable March 3, 1919, but without collateral given at that time.

During the period when the federal government was soliciting subscriptions for Liberty Loans, Daniels subscribed, through the defendant, for $300 of the first issue and $5,000 of the second issue. They were paid for by him in installments by checks drawn on his account in the bank, and the bonds or

certificates therefor were kept in the possession of the bank. On March 18, 1918, he had completed the payments for bonds, and the bank requested him to give it a receipt for the $5,300 of bonds so purchased; he gave two receipts, one for $300 for the bonds of the first issue, and one for $5,000 for the bonds of the second issue. At the same time the defendant gave him a receipt for the bonds "for safe-keeping," and they remained in the possession of the bank. As soon as payments for each had been completed the bonds were put in envelopes, which were placed with others containing collateral securities held by the bank.

On March 11, 1919, an involuntary petition in bankruptcy was filed against Daniels, and on April 1, 1919, he was adjudged bankrupt. The plaintiff has not argued that he is entitled to recover the $5,000 of bonds held as collateral security for payment of the note for $3,750, or for any other indebtedness due to the bank. It is plain that such a contention could not be successfully maintained. He does not contend, however, that the $300 of bonds of the first issue and the $5,000 of bonds of the second issue were left with the defendant for safe-keeping, and that it is not entitled to apply them to any indebtedness of Daniels; and that as his trustee in bankruptcy the plaintiff is entitled to receive them as assets of the estate.

[1] The plaintiff excepted to the admission by the master of conversations between Daniels and officers of the bank at the time the receipts were given, and at later times when there were conversations relative to collateral, for the reason "that such conversations could not be received to vary the terms of the written contract dated April 24, 1916, * * * and the receipt given by the bank dated March 18, 1918." The master states that the cashier of the defendant testified that on the day the receipts were given he had a conversation with Daniels in which "it was stated that the bank was to hold them [the bonds] as 'collateral' or 'security' or as 'safeguard.' Daniels said that, as the bank was to keep them in its possession, he wanted something to show that it had them and the cashier replied that he would give a receipt." The master also found that in the fall of 1918 officers of the bank made frequent requests of Daniels for additional security and that he replied in substance, "'You have my Liberty Bonds,' or 'my bonds, up there. There is nothing for you to worry about,' and 'with the stuff you have there now, what you have ought to prove sufficient' "; and that on or about February 28, 1919, Daniels told the president of the bank that he was going to Chicago to arrange a meeting of his creditors and wanted to borrow some money and upon being asked by the president if he could give additional collateral he replied, "I haven't any. You have all the property, all the collateral I have, now." This evidence was admissible to explain the receipts and to show, as the master found, that Daniels and the officers of the defendant understood that the bank was holding the bonds in question as collateral under the agreement. It is well settled that a receipt is open to explanation and may be varied, contradicted or controlled by parol testimony. Brooks v. White, 2 Metc. 283, 37 Am. Dec. 95; Briggs v. Call, 5 Metc. 504. We are unable to find that these conversations tended to vary the terms of the agreement made in April, 1916, which agreement entitled the defendant to a lien on property left for safe-keeping. The exception to the admission of this evidence must be overruled.

[2] If the contention that the evidence was inadmissible were sound it would be immaterial, in view of the finding of the master that the agreement was never discharged or waived, for the reason that the defendant was entitled under the agreement to hold the bonds when left "for safe-keeping or otherwise." The total liabilities of Daniels to the bank, exclusive of interest, amounted to a sum in excess of the value of all the bonds delivered to it by him; and it is found that at the time of the adjudication in bankruptcy there had been no change in the conditions under which the bonds were held by the bank. The circumstances that the bonds were not in existence at the time the agreement of April 24, 1916, was executed and delivered by Daniels does not affect the right of the defendant to hold them in accordance with its provisions.

Although by the terms of the receipt the bonds were held for safe-keeping, no overt act was required on the part of the defendant to change its position from that of bailee to pledgee, as the bonds became subject to the agreement as soon as they came into the possession of the defendant. The conversations between Daniels and the officers of the bank above referred to plainly show that it was understood by them that these bonds were being held as collateral under the agreement.

[3-5] There is no intimation that Daniels was induced to execute the contract by reason of any deception practiced upon him by the defendant or its officers, or that any fraud was committed by them. It was not void as against public policy but was one which the defendant as a banking institution could lawfully require a customer of the bank to execute for its protection against loss. The plaintiff has cited no case to the contrary and we have found none. Nesmith v. Washington Bank, 6 Pick. 324, cited by him is not pertinent to the contract in the case at bar. While a bank has a general lien upon all securities in its possession belonging to its customer for the balance due on general account, yet the right to retain such securities for a balance due may be controlled by any special agreement which shows that such was not intended by the parties. If in the absence of any agreement

these bonds had been left with the defendant merely for safe-keeping it would not have had a lien thereon for the balance due from Daniels. Neponset Bank v. Leland, 5 Metc. 259; Furber v. Dane, 203 Mass. 108, 117, 89 N. E. 227; Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; Hanover National Bank of New York v. Suddath, 215 U. S. 110, 30 Sup. Ct. 58, 54 L. Ed. 115; Duncan v. Brennan, 83 N. Y. 487, 491. But in the case at bar the agreement specifically provides that the bank shall "have a lien * * * upon all property of the undersigned of every description left with said bank for safe-keeping or otherwise," and not being unlawful the defendant is entitled to the bonds to be applied in satisfaction of the indebtedness of Daniels to it.

It follows that the interlocutory decree overruling the exceptions to the master's report and confirming the report, and the final decree dismissing the bill with costs, should be affirmed.

So ordered.

BATCHELDER v. BROWN.

(Supreme Judicial Court of Massachusetts. Middlesex. March 3, 1924.)

Master and servant ⇐8(1)—Employment of actress held not for season.

Where telegram in answer to offer of employment as an actress asked, "Can you guarantee full season?" and replying telegram evaded answer by stating "have good booking for the season sometime a lay off is forced on an act or two make railroad jump * * * wire," and employee dropped matter as to period and entered service, there was no agreement to employ for the entire season.

Exceptions from Superior Court, Middlesex County; J. Walsh, Judge.

Action of contract by Alice Batchelder against Tom Brown to recover damages for breach of written contract by which the plaintiff was engaged to render services as a musician and actress. Verdict for plaintiff, and defendant brings exceptions. Exceptions sustained.

Stoneman & Hill and Thos. J. Barry, all of Boston, for plaintiff.

J. Albert Brackett, of Boston, for defendant.

PIERCE, J. This is an action to recover damages for the alleged breach of a written contract, by which the plaintiff was engaged to render services as a musician and actress in a company of the defendant. At the close of the evidence the defendant requested "that on all the evidence which is the evidence set forth in the bill of exceptions, the plaintiff could not recover." This request was denied, the defendant duly excepted, and the jury found for the plaintiff.

The defendant contends that on all the evidence the plaintiff is not entitled to recover, because (1) the facts do not establish a legal agreement; (2) the evidence does not establish such an interpretation of the word "season" as is required by the rules of universal custom; and (3) evidence explaining the word season was inadmissible.

The alleged contract between the parties is confined to the following telegrams:

"Chicago, Ill., August 12, 1920.

"Miss Alice Batchelder, Cornetist, 92 Lake Street, Melrose, Mass. Can you come to Chicago at once to join my act will pay you forty dollars per week and transportations want you here to rehearse couple of days we leave Tuesday and open in Minneapolis Thursday August Nineteen wire answer at once Union Hotel Chicago, Ills. Gus King."

"Boston, Mass., August 13, 1920.

"Gus King, Union Hotel, Chicago. Can you guarantee full season, transportation to Chicago, and fifty dollars a week position here equals that. Alice Batchelder."

"Chicago, Ills., August 13, 1920.

"Miss Alice Batchelder, 92 Lake Street, Melrose, Mass. Have good booking for the season sometime a lay off is forced on an act or two make railroad jump will pay salary you mentioned understand you furnish evening gown and double on also saxophone wire answer at once also time you will arrive in Chicago will refund your fare. Gus King."

After receiving the telegram the plaintiff left for Chicago and was met on her arrival by King, who arranged for and superintended a rehearsal of the act. It is agreed the plaintiff commenced to work for the defendant on August 19, 1920, and so continued until February 6, 1921; and that she was paid for her services during that period. On February 6, 1921 the revue closed in New York, the reason given by King being "because it could get no more booking from the Loew people for whom we worked and that week (February 6, 1921,) we knew we could get no more booking. We tried to get other booking but could not and closed it for good and it never played since." On the same point the defendant in a letter to the plaintiff dated February 17, 1921 wrote:

"I am very sorry that the act had to close, but it is just one of those things that we are up against in New York, as it is a mighty hard thing to please everybody."

Should we assume, as the plaintiff contends, that the word "season" as used in the telegrams meant a period of time commencing on or about August 15 in one year and terminating on or about the 15th day of May of the following year, and that that was the sense in which the word was used in the telegrams, we nevertheless think the plaintiff was not entitled to recover any damages

ten contract" to employ her for the period of time determined by the definition of the word season, for the reason that the plaintiff and defendant never came to an agreement upon the length or period of time the plaintiff was to serve the defendant and the defendant was to employ the plaintiff. The first telegram makes no mention of the time to be covered by the employment. The second telegram recognizes this omission and asks "Can you guarantee full season?" The third and last telegram evades an answer to the question, "Can you guarantee full season?" by the adroit reply, "Have good booking for the season sometime a lay off is forced on an act or two make railroad jump * * * wire." Instead of wiring or otherwise ascertaining whether the defendant would guarantee a full season, the plaintiff so far as the record discloses dropped the matter of an understanding as to the period to be covered by her contract and entered the service of the defendant for a time measured only by the will of the plaintiff or by that of the defendant. Harlow v. Curtis, 121 Mass. 320. Lawrence v. Rosenberg, 238 Mass. 138, 142, 130 N. E. 189.

Exceptions sustained.

COMMONWEALTH v. NOVICK.

(Supreme Judicial Court of Massachusetts. Hampden. March 1, 1924.)

1. Embezzlement ⟸8—Larceny ⟸7—Common-law rule stated as to liability of partner for appropriating firm money.

At common law a general partner could not be convicted of larceny or embezzlement for appropriating to his own use money which came into his possession by virtue of his being such partner and joint owner, because it was not "the property of another."

2. Larceny ⟸7—Officer of voluntary association appropriating its money guilty, though entitled to interest in property.

Under G. L. c. 266, §§ 58, 59, an officer of a voluntary association or society who converts money which has come into his possession by virtue of his office is guilty of larceny, although he is a member of the organization and, as such, entitled to an interest in the property thereof, and it is immaterial whether or not members are civilly liable as copartners; this applying to a society organized for the purpose of enabling its members to obtain loans from money raised by selling its capital shares, in view of G. L. c. 182, § 1.

Exceptions from Superior Court, Hampden County; W. Thayer, Judge.

Max Novick was convicted of stealing money from a voluntary association, and brings exceptions. Exceptions overruled.

and Chas. R. Clason, Asst. Dist. Atty., of Springfield, for the Commonwealth.

Harry M. Ehrlich, Isadore H. Hurowitz, and Joseph Swirsky, all of Springfield, for defendant.

DE COURCY, J. The defendant was convicted under an indictment charging him with stealing $2,900 from "the Woronoco Mutual Benefit Association, a voluntary association." This society was organized mainly for the purpose of enabling its members to obtain loans from money raised by selling its capital shares. Many of the provisions of the agreement of association were not in fact carried out, such as the issuing of certificates of shares; but loans aggregating several thousand dollars were made, each secured by the promissory note of the borrower endorsed by another member. The agreement refers to the subscribers both as partners and as stockholders. The defendant was a member and treasurer from 1918 until November 29, 1921. There was evidence tending to show that he "appropriated and converted to his own use, without right and without any authority or consent of the directors, or any other officers beside himself, funds belonging to the organization * * * and used them in his own business." The only defense raised by his exceptions is that the agreement created a copartnership, and that as matter of law he could not be held guilty of larceny for converting the partnership assets to his own use.

[1, 2] At common law it was ordinarily held that a general partner could not be convicted of larceny or embezzlement for appropriating to his own use money which came into his possession by virtue of his being such partner and joint owner, because it was not "the property of another." 31 L. R. A. (N. S.) 822, note, and cases cited; Gary v. Northwestern Mutual Aid Association, 87 Iowa, 25, 53 N. W. 1086; State v. Butman, 61 N. H. 511, 60 Am. Rep. 332. See Commonwealth v. Bennett, 118 Mass. 443. As to the unauthorized conversion of the funds of benevolent and fraternal organizations by their fiscal or managing agents, see 14 Ann. Cas. 725, note. State v. Kusnick, 45 Ohio St. 535, 15 N. E. 481, 4 Am. St. Rep. 564; People v. Mahlman, 82 Cal. 585, 23 Pac. 145. It was doubtless to exclude such a defense that our Legislature enacted the Statutes 1884, c. 174, and 1886, c. 328 (now G. L. c. 266, §§ 58, 59). By the express terms of said sections 58 and 59 an officer of a voluntary association or society who fraudulently converts its money, goods or property, which has come to his possession by virtue of his office, is made guilty of larceny, "although he is a member of such organization or voluntary association and, as such, entitled to an interest in

the property thereof." It is immaterial whether or not the members of the Woronoco Mutual Benefit Association are civilly liable as copartners. It is a "voluntary association or society" within the meaning of the statute; and the defendant can be held liable criminally for stealing its funds. See G. L. c. 182, § 1.

Exceptions overruled.

WINNISIMMET TRUST, Inc., v. LIBBY et al.

(Supreme Judicial Court of Massachusetts. Suffolk. March 3, 1924.)

1. Mortgages ⇐199(1)—Mortgagor entitled to rents and profits while in possession.

A mortgagor of real estate has a right to the rents and profits while he is allowed to remain in possession.

2. Mortgages ⇐199(1)—Lease by mortgagor not binding on mortgagee; mortgagee entitled to rents after entry.

Where a lease is made by a mortgagor, after the mortgage, it does not bind the mortgagee nor in any manner affect his rights, and he has no right to demand the rent reserved by the lease in the absence of entry by him and notice to tenants to pay rent to him; but, having made entry and demanded rent from the tenant, the tenant is not liable to the mortgagor.

3. Mortgages ⇐199(1)—Exemption from liability to lessor mortgagor does not depend upon recognition of paramount title of mortgagee.

Exemption of tenant from liability for rent to lessor mortgagor after entry by mortgagee does not depend upon recognition by the tenant of the paramount title of the mortgagee in possession.

4. Mortgages ⇐199(1)—Assignee of rents held not entitled thereto after entry by mortgagee.

Assignee of rents under a lease executed by mortgagor, after the mortgage, was not entitled to recover rents from tenants after foreclosure of the mortgage and notice by mortgagee in possession to pay rent to her, though the mortgagee did not actually evict the lessees, but threatened to evict them if they would not pay the rent to her, such threats being equivalent to an eviction.

5. Mortgages ⇐199(1)—Effect of assent of mortgagee to lease by mortgagor as respects right to rents after foreclosure.

Assent of mortgagee written upon lease at the time it was executed and delivered did not have the effect of postponing for the term of the lease the mortgagee's right to collect the amount of the debt secured by the mortgage by foreclosure and sale of the property, including the right to rents which might thereafter accrue from its occupancy, such assent being no more than an agreement not to take possession of the premises in the event of foreclosure so long as the tenants perform the covenants of the lease.

Appeal from Municipal Court of Boston, Appellate Division.

Action of contract by Winnisimmet Trust, Incorporated, against Fred M. Libby, Jr., and others, to recover rent. From an order of the appellate division of the municipal court of the city of Boston dismissing report, plaintiff appeals. Order affirmed.

Clarence A. Warren and Lester W. Edwards, both of Boston, for appellant.

G. C. Scott, of Boston, for appellees.

CROSBY, J. This action was brought, in the municipal court of the city of Boston, to recover rent from April 2, 1918, to and including November 2, 1918, reserved under a lease to the defendants from the plaintiff's assignor, one Duval. The trial judge found for the defendants and the case was reported to the appellate division, which dismissed the report.

At the trial the material facts were not in dispute. The record shows that Duval, who was the owner of an estate known as the "Dream Theatre," on March 2, 1916, mortgaged it to Rufina M. Jordan by a power of sale mortgage in the usual form; that on the same day, but after the execution and delivery of the mortgage, he leased the estate to the defendants for the term of three years, at an annual rental of $600, payable $50 monthly in advance, and the mortgagee signed the following clause, written on the lease: "I hereby assent to the foregoing lease."

It further appears that upon the execution and delivery of the lease the defendants entered into possession of the premises; that on or about April 27, 1916, Duval assigned all rents (except the last three installments falling due to him under the lease) to the plaintiff, as security for certain indebtedness then and thereafter to be contracted; that the defendants were duly notified of the assignment, on or about November 28, 1916, and payment of the rent was demanded of the plaintiff; that on May 31, 1917, the mortgagee, for breach of the conditions of the mortgage, made an entry on the premises for the purpose of foreclosure; that on July 10, 1917, the mortgage was foreclosed and the premises were sold under the power of sale therein; that on the same day the purchaser reconveyed the property to Rufina M. Jordan, who has ever since been the owner; that all rent falling due from December 2, 1916, to March 2, 1918, inclusive, has after litigation been paid to the plaintiff by the defendants; "that the defendants continued to occupy and enjoy the demised premises under said lease without interruption until May 2,

1918, except that on frequent occasions after foreclosure and prior to April 2, 1918, Mrs. Jordan and her attorney demanded payment of the rent and threatened to evict the defendants unless payment was made, and that in consequence of these demands and threats the defendants on May 2, 1918, entered into an agreement with Mrs. Jordan" by the terms of which the tenancy of the defendants was to terminate on that day and they were to attorn to her for rent previously due; and that on the same day the defendants vacated the premises.

It also appears that the defendants have not paid rent, under the lease or otherwise, to any one since the payment of the balance of the rent due March 2, 1918. It is their contention that thereafter they were under no liability to the plaintiff, and were liable to Mrs. Jordan only for the rent due April 2, 1918.

Certain questions, previously arising under this lease between the same parties, were considered by this court in 232 Mass. 491, 122 N. E. 575, and in 234 Mass. 407, 125 N. E. 599, 14 A. L. R. 638.

[1, 2] "No rule of law is plainer than that a mortgagor of real estate has a right to the rents and profits, while he is allowed to remain in possession. Wilder v. Houghton, 1 Pick. 87. And when a lease is made by a mortgagor, after the mortgage, it does not bind the mortgagee, nor in any manner affect his right. There is no privity between him and the lessee, and no right in him to demand the rent reserved by the lease. * * * In order to give him such right, there must at least be an entry by him, and notice to the tenants to pay rent to him, or some act equivalent thereto." Tilden v. Greenwood, 149 Mass. 567, 569, 22 N. E. 45, 46; Knowles v. Maynard, 13 Metc. 352.

[3,4] After a mortgagee has entered for the purpose of foreclosure and has demanded rent from the tenant of the mortgagor, the tenant is not liable to the latter for rent. Cook v. Johnson, 121 Mass. 326; Adams v. Bigelow, 128 Mass. 365; Winnisimmet Trust, Inc., v. Libby, 234 Mass. 407, 410, 125 N. E. 599, 14 A. L. R. 638. Such exemption from liability does not depend upon recognition by the tenant of the paramount title of the mortgagee in possession. In the last mentioned case, which was for the recovery of rent under the lease, the plaintiff was held entitled to recover after the foreclosure of the mortgage, on the ground that the mortgagee in possession had not notified the lessees to pay him rent and had not threatened eviction; and for the further reason that the lessee had not agreed to attorn to the mortgagee in possession. But it was said in that case, at page 410 of 234 Mass. (125 N. E. 600):

"The tenants cannot avoid paying rent to the assignee of their original landlord unless and until the mortgagee in possession notifies them to pay rent to her, or threatens to evict them, or they have agreed to attorn to her in recognition of her paramount title."

It appears in the case at bar "that on frequent occasions after foreclosure and prior to April 2, 1918, Mrs. Jordan [the mortgagee] and her attorney demanded payment of the rent and threatened to evict the defendants unless payment was made. * * * " It follows that after such demands and threats the defendants were no longer liable to pay rent to the plaintiff, as assignee of the original landlord, but they were obligated to make such payment to Mrs. Jordan. Although the mortgagee in possession did not actually evict the lessees, threats to do so were equivalent to an eviction. Smith v. Shepard, 15 Pick. 147, 149, 25 Am. Dec. 432.

[5] It remains to consider the effect of the assent of the mortgagee written upon the lease at the time it was executed and delivered. The assent did not have the same effect upon the rights of the tenants as if the lease had antedated the mortgage. Such assent is to be construed as an agreement not to take possession of the premises in the event of foreclosure so long as the tenants perform the covenants of the lease. The assent cannot properly be held as postponing for the term of the lease the mortgagee's right to collect the amount of the debt, secured by the mortgage by foreclosure and sale of the property, including the right to rents which might thereafter accrue from its occupancy. The assent was not for the benefit of the mortgagor or his assignee, but was for the protection of the lessees in the event of foreclosure; and while they could not be evicted so long as they performed the covenants of the lease, yet such assent did not operate to prevent the mortgagee from taking possession after foreclosure, and requiring the tenants to pay rent to her in accordance with the terms of the lease.

It follows that the plaintiff's request for rulings were rightly denied.

Order dismissing report affirmed.

DOREY v. DOREY et al.

(Supreme Judicial Court of Massachusetts. Middlesex. March 7, 1924.)

1. **Appeal and error ⟸1078(5)—Exceptions not argued treated as waived.**

Exceptions to the master's report will be treated as waived where not argued.

2. **Appeal and error ⟸704(2)—Exceptions to findings ineffective, in absence of evidence.**

Exceptions to findings and failure to find are ineffective, in the absence of the evidence.

3. **Equity ⟸44—Remedy for enforcement of judgment for separate maintenance held not confined to probate court.**

Where a decree of probate court, in a suit for separate support, established liability of the defendant to his wife for a definite amount, she could bring a bill in equity to reach and apply in payment of the debt property fraudulently conveyed by the defendant, in any court having jurisdiction of the parties; her sole remedy not being in the probate court, in view of G. L. c. 214, § 3, cl. 9.

4. **Divorce ⟸326—Foreign decree of divorce held not to terminate wife's claim under judgment for separate support.**

Where wife obtained judgment against the husband within the state for separate maintenance, and her domicile remained in the state, and she never submitted to jurisdiction of the court of another state which granted the husband an absolute divorce, the decree of that court could not terminate her claim against the husband, under the judgment for separate support.

Appeal from Superior Court, Middlesex County; Marcus Morton, Judge.

Bill in equity by Elizabeth T. Dorey against John J. Dorey and others, to reach and apply in payment of a debt property fraudulently conveyed by the named defendant. Decree for plaintiff, and defendants appeal. Modified and affirmed.

C. G. Morse, of Boston, for appellants.
I. Harris, of Boston, for appellee.

DE COURCY, J. This is a bill in equity brought to reach and apply in payment of a debt, property fraudulently conveyed by the defendant John J. Dorey. The facts found by the master which are material to the issues now before us are as follows: The plaintiff and the defendant Dorey were married November 9, 1914. On April 21, 1916, she filed in the Suffolk probate court a petition for separate support against him; and that court issued a decree on June 15, 1916, ordering him to pay her $10 a week pendente lite. This decree has not been modified or vacated by the court; and nothing has been paid the plaintiff in accordance therewith. She obtained a decree of divorce nisi for desertion, in the superior court for Suffolk county, on December 13, 1920; and six months thereafter said decree became absolute.

The master finds that the defendant Dorey, while engaged in litigation with a former wife or with certain attorneys who were suing him for fees, transferred certain mortgages and stocks to his nephew, the defendant Willard B. Bryne, upon a secret trust and for the purpose of hindering, delaying and defrauding his (Dorey's) present and future creditors. Among the property thus fraudulently transferred or held there were seventy-five shares of the preferred stock of the American Sugar Refining Company, the certificates being numbered J-24271 and J-28666. In the case of Charles J. Martell v. John J. Dorey et al., a final decree was entered to the effect that said seventy-five shares were so held by Bryne; a sale thereof was made in accordance with the decree, and after the claim of Martell was satisfied, the defendant Bryne received the balance of the proceeds, namely, $3,102.52, on or about April 23, 1921. See Martell v. Dorey, 235 Mass. 35, 126 N. E. 354. The master also found that under the decree of the probate court there was due and unpaid to this plaintiff to the time of the filing of this bill (June 20, 1919) the sum of $1,560, and to the date of her decree absolute (June 13, 1921) the sum of $2,610. A final decree was entered accordingly, establishing the total amount due with interest as $2,990; and ordering the defendant Bryne to apply the balance of the proceeds of the sale of said seventy-five shares to the payment of the amount found due this plaintiff, with interest and costs.

[1-3] The exceptions taken by the defendant Bryne to the master's report have not been argued, and we treat them as waived. It may be said, however, that as they are based on contentions that the master was wrong in making certain findings, and in failing to make certain others, they are ineffective in the absence of the evidence. Thompson v. Davis, 225 Mass. 385, 114 N. E. 680. There was no error in the denial of the motion to recommit the master's report. The claim of the appellants, that the sole remedy of the plaintiff is in the probate court, cannot prevail. The decree of that court established the liability of the defendant Dorey for a definite amount; and no reason is shown why she should not have the rights given to a creditor under G. L. c. 214, § 3, cl. 9, to enforce payment of the same in a court having jurisdiction of the parties. Green v. Gaskill, 175 Mass. 265, 269, 56 N. E. 560; McIlroy v. McIlroy, 208 Mass. 458, 94 N. E. 696, Ann. Cas. 1912A, 934; Williamson v. Williamson, 246 Mass. 270, 140 N. E. 799.

[4] The master referred to the court the question of law whether the alleged decree of divorce in Oregon, granted to John J. Dorey, "assuming that the same is sufficiently proved by the evidence" bars all further

its date, to wit, February 14, 1917. It does not appear that the "certificate" of the clerk of the Oregon court was duly authenticated so as to make it admissible under G. L. c. 233, § 69. But it is doubtful if the master intended to refer that question to the court; and the plaintiff has not raised it properly, as she filed no exceptions to the report. On the record, however, the domicile of the plaintiff remained in this commonwealth; she never submitted to the jurisdiction of the Oregon court; and the decree of that court could not terminate her claim against the defendant Dorey. Commonwealth v. Blood, 97 Mass. 538; Shaw v. Shaw, 98 Mass. 158; Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841, L. R. A. 1917B, 1028; Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366. The decree is to be modified by adding interest to date, and as so modified is affirmed, with costs.

Decree accordingly.

GOODWIN v. COSMOPOLITAN TRUST CO. et al.

(Supreme Judicial Court of Massachusetts. Suffolk. March 8, 1924.)

1. Bankruptcy ⟸303(3)—Trust company holding bonds and mortgage held entitled to foreclosure.

In an action by trustee in bankruptcy of lumber company against trust company and commissioner of banks to enjoin the foreclosure of a mortgage held by the trust company in terms securing bonds of the lumber company, evidence *held* to show that the mortgage was delivered to the trust company along with the bonds with the intent that the bonds be sold by the trust company and the proceeds be applied on notes of the lumber company held by the trust company, and that pending a sale of the bonds they should be regarded as held by the trust company as a form of security for the payment of the notes.

2. Appeal and error ⟸220—Exceptions to master's report not considered unless founded on objections.

Unless application is made and relief is granted from the observance of equity rules 31, 32, exceptions to a master's report cannot be considered unless they are founded on objections in writing to the report after the draft of it has been settled, and such objections are appended to the report, and no complaint can be made on appeal that master admitted evidence altering and varying the terms of the written instrument.

3. Bankruptcy ⟸303(3)—No evidence to support claim that mortgage and bonds were intended to hinder and delay creditors.

In an action by trustee in bankruptcy of a lumber company against a trust company and commissioner of banks to enjoin the foreclosure of a mortgage held by the trust company intended to secure bonds to be sold for payment of notes held by the trust company, *held*, that there was no evidence to support claim of plaintiff that the scheme was devised solely for the purpose of hindering and delaying creditors.

Appeal from Supreme Judicial Court, Suffolk County.

Suit in equity by Angier L. Goodwin, as trustee in bankruptcy of the estate of the New England Lumber Company, against the Cosmopolitan Trust Company and another, to enjoin the foreclosing of a mortgage and to cancel the same of record. From an interlocutory decree overruling his exceptions to master's report and confirming the report and a final decree dismissing the bill, plaintiff appeals. Affirmed.

C. S. Hill, of Boston, for appellant.

S. M. Child, of Boston, for appellees.

PIERCE, J. This is a suit in equity brought in the superior court and removed, on motion of the defendants, to the Supreme Judicial Court under the provisions of G. L. c. 214, § 32.

The bill was brought by the trustee in bankruptcy of the estate of the New England Lumber Company against the defendants; it alleges that the defendant commissioner has in his possession a mortgage of real and personal property, dated May 5, 1919, given by the New England Lumber Company to the Cosmopolitan Trust Company as trustee for the payment of an issue of bonds to the amount of $300,000; that no delivery was ever made of said mortgage to the Cosmopolitan Trust Company; that none of the bonds were ever sold by any one; that no money or other consideration was ever received by the New England Lumber Company for said mortgage or for said bonds; that nothing was further done with respect to said mortgage by the New England Lumber Company or the Cosmopolitan Trust Company; that the Cosmopolitan Trust Company became insolvent and possession of it was taken by the defendant commissioner on September 25, 1920; that on November 21, 1921, the defendant Commissioner of Banks gave written notice to the plaintiff that it was the intention of the Cosmopolitan Trust Company to begin foreclosure proceedings of said mortgage; and it prays that an injunction issue restraining the defendants, their agents and servants, from foreclosing or taking steps to foreclose the above described mortgage; that a decree may be entered to the effect that said mortgage is invalid and void as against this plaintiff; and that the defendants be ordered to cancel and discharge the same of record.

The answer admits the plaintiff is trustee in bankruptcy of the New England Lumber

Company; admits for the purposes of this suit the insolvency of the Cosmopolitan Trust Company; admits that on November 21, 1921, written notice was given to the plaintiff that it was the intention of the Cosmopolitan Trust Company to begin foreclosure proceedings of said mortgage; and admits the New England Lumber Company on May 3, 1919, was indebted to the Cosmopolitan Trust Company in large sums of money which it could not liquidate. The defendants deny all other of the plaintiff's charges and further answering say:

"That said mortgage of $300,000, and the bonds accompanying the same, were duly delivered to the defendant, the Cosmopolitan Trust Company, for value; that an attempt was made to sell said bonds, but owing to market conditions, the same could not be sold, but if sold, that the proceeds were to be the property of the defendant Cosmopolitan Trust Company, to be applied to the indebtedness of the New England Lumber Company to the Cosmopolitan Trust Company; that on September 25, 1920, the New England Lumber Company was indebted to the Cosmopolitan Trust Company in excess of $740,000, on promissory notes, unsecured except by said mortgage, of which the said New England Lumber Company received the cash represented by the discount of said notes by the defendant the Cosmopolitan Trust Company."

The case was referred to a master under the usual rule. The report discloses that the New England Lumber Company was organized at the instance of the Cosmopolitan Trust Company, to hold the assets and to assume the obligations of four or five corporations, which corporations were indebted to the Cosmopolitan Trust Company in an amount something less than $300,000. The method adopted in the execution of the plan involved the issue of stock of the par value of $299,700 in exchange for the assets of these corporations; and the issuance of bonds in the amount of $300,000, to refund the indebtedness and obligations which the New England Lumber Company had assumed and taken over from other companies, secured by a mortgage of all its property to the Cosmopolitan Trust Company as trustee. The mortgage is in the ordinary form of a mortgage to secure a bond issue, and provides in the twelfth clause that after a foreclosure sale "any balance shall be paid to the mortgagor and its successors and assigns." There is annexed to the mortgage an affidavit of the president and treasurer of the New England Lumber Company and of the Cosmopolitan Trust Company "that the above mortgage is made in good faith to secure the amount named therein and without any design to hinder or delay the creditors of the New England Lumber Company, the mortgagor."

At the hearing before the master, against the objection of the plaintiff, one Lester, secretary and director of the New England Lumber Company, testified that the purpose of the issue of the bonds was to take up notes of the New England Lumber Company at the Cosmopolitan Trust Company. And one Bills, president and director of the New England Lumber Company, testified in substance that one Mitchell, president of the Cosmopolitan Trust Company, wanted security for the unsecured notes of the companies which were to be consolidated with the New England Lumber Company; that it was agreed that bonds secured by a general mortgage be placed, and that the proceeds received from the sale of these bonds were to be paid to the Cosmopolitan Trust Company and applied on the notes, the bonds to be held by the Cosmopolitan Trust Company until the notes were paid, as security for these notes.

[1] With this evidence the master was fully justified on all the facts reported in finding, as he did:

"That the mortgage was given and the bonds were issued in pursuance of a plan to secure the Cosmopolitan Trust Company as the largest creditor by far of the lumber company. While the arrangement was somewhat informal it was in general understood and intended that the trust company should receive these bonds, disposing of them to the general public, if that was possible, and applying the proceeds, so far as may be, in satisfaction of its claim, and that pending a sale of the bonds they should be regarded as held by the Cosmopolitan Trust Company as a form of security for the payment of the indebtedness upon the notes of the lumber company to the trust company."

The case is before this court on appeal from an interlocutory decree overruling the plaintiff's exceptions and confirming the report of the master; and also from the final decree dismissing the plaintiff's bill.

[2] The exception of the plaintiff, taken to the admission of the evidence of Lester and Bills on the ground that such evidence enlarged, altered and varied the terms of the mortgage, was overruled rightly. The master states he prepared a draft report, had a hearing upon it, made certain changes in it in consequence of suggestions of counsel at the hearing, sent to counsel copies of draft report and final report, with a notification that he "was prepared to receive within the time fixed by law, such objections to this report as they might desire to file with me," and "received, however, no objection to this report." Unless application is made and relief is granted from the observance of equity rules 31 and 32, exceptions to a master's report cannot be considered unless they are founded on objections in writing to the report after the draft of it has been settled and such objections are appended to the report. Smedley v. Johnson, 196 Mass. 316, 82 N. E. 21; Capen v. Capen, 234 Mass. 355, 362, 125 N. E. 692; Barbrick v. Huddell, 245 Mass. 428, 438, 139 N. E. 629.

[3] There is nothing in the evidence that

scheme disclosed was "devised solely for the purpose of hindering and delaying creditors and lulling into a sense of security those creditors who would have been warned and aroused into immediate action by the recording of a mortgage of all the property of a debtor, if framed in a form which openly disclosed the purpose now claimed by the defendant."

It results that the defendants as against the plaintiff are entitled to hold and enforce the mortgage, and that the interlocutory and final decrees must be affirmed.

Ordered accordingly.

WEBSTER et al. v. CONDON et al.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1924.)

1. Customs and usages ⟸8—Custom of waiving statute of frauds inadmissible.

In an action to recover loss upon goods purchased by defendants, where the statute of frauds was pleaded, court properly excluded evidence tending to show a custom and usage among grain dealers, known to and acquiesced in by the defendants, to disregard and waive the legal rights possessed by them under the statute of frauds.

2. Frauds, statute of ⟸113(2)—Memorandum must state all essential terms of agreement.

Under G. L. c. 106, § 6, memorandum of sale of goods must state upon its face, or by means of other documents to which reference may be had, all the essential terms of the agreement.

3. Frauds, statute of ⟸118(4)—Memorandum of sale of grain held insufficient.

Sales slip and two letters relating to purchase of grain and not referring to one another, *held* not to constitute sufficient memorandum of sale under G. L. c. 106, § 6.

Exceptions from Superior Court, Suffolk County; H. T. Lummus, Judge.

Action of contract by Horace F. Webster and others against Joseph C. Condon and others, to recover loss on oats alleged to have been purchased by defendant. Verdict for defendants, and plaintiffs bring exceptions. Exceptions overruled.

H. H. Pratt, of Boston, for plaintiffs.
W. G. Todd, of Boston, for defendants.

DE COURCY, J. This is an action of contract brought to recover the loss upon five cars of oats, alleged to have been purchased by the defendants from the plaintiffs on July 22, 1920. The answer set up the statute of frauds, with other defenses. At the trial the plaintiffs offered evidence tending to ers which was known to and acquiesced in by the defendants, to disregard and waive the legal rights possessed by them under the statute of frauds. The offer was excluded by the court, and the plaintiffs excepted. The only other exception is to the granting of the defendants' motion that a verdict be directed for them respectively.

[1] 1. The evidence was excluded rightly. The defendants may recognize their obligations under oral contracts, and refrain from setting up the statute of frauds in actions brought against them if they so wish. But if they do rely upon the statute, a custom or usage cannot be allowed to annul the general liabilities of the parties under the established rules of law. Conahan v. Fisher, 233 Mass. 234, 124 N. E. 13, and cases cited; Webster-Tapper Co. v. Eastern Hay Co., 39 R. I. 482, 98 Atl. 50.

[2] 2. The alleged contract was for the sale of goods in excess of $500. It is not contended that the defendants accepted any part, or gave anything to bind the bargain or in part payment; so that the plaintiffs cannot prevail "unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." G. L. c. 106, § 6 (1). And it is settled that the memorandum must state upon its face or by means of other documents to which reference may be had all the essential terms of the agreement. Nickerson v. Weld, 204 Mass. 346, 354, 90 N. E. 589.

[3] The only writings introduced to satisfy the statute of frauds were a sales slip and two letters. The sales slip was dated July 22, 1920, and made out by one of the plaintiffs, "to Pawtucket Products Co.," without disclosing the name of the seller. It was not signed by or on behalf of the defendants; in fact, it does not appear that they ever saw it, nor does the record disclose any of the circumstances attendant upon the making of it. Plainly it is not in itself a sufficient compliance with the statute. The letter of the defendants dated July 30, 1920, contains no reference to the alleged contract of July 22, unless it be in the words: "I would like to buy 5 cars of oats to even up on the 96c Dec. oats." In the defendants' letter of August 5, is the following:

"Wrote you several days ago in regards buying some September or December oats to even up on the two purchases I made on the very top of the market after being strongly advised to do so by your office."

In neither of them is any reference made to the sales slip. The later letter mentions not one but two purchases; and from its mention of the earlier letter in this connection, it is reasonable to infer that the "96c Dec. oats" embraced the same two purchas-

es. There was no parol evidence connecting the defendant Mary T. Condon with the alleged contract; and the defendant Joseph C. Condon, when asked for shipping directions, denied that he ever made any such purchase. On this record there was no error in directing verdicts for the defendants. See Lerned v. Wannemacher, 9 Allen, 412, 416; Schmoll Fils & Co., Inc., v. Wheeler, 242 Mass. 464, 136 N. E. 164.

Exceptions overruled.

COMMONWEALTH v. BEDROSIAN.

(Supreme Judicial Court of Massachusetts. Middlesex. March 1, 1924.)

1. Witnesses ⇐318—Accused held not entitled as matter of right to fortify testimony of impeaching witness.

Accused was not entitled as a matter of right to fortify the testimony of his witness, who testified in impeachment that police officer had made a statement contradictory of his testimony, by showing that the witness had written an account of the crime for the newspaper after having made an investigation of the case, to make it more probable that his version of his conversation with the officer was true.

2. Homicide ⇐11—"Malice" any unlawful motive.

"Malice" in homicide means every unlawful motive that may be inferred from unlawful killing, and does not necessarily imply ill will toward the person killed, but includes any intent to inflict injury upon another without legal excuse or palliation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malice.]

3. Homicide ⇐146—Presumption of malice from killing.

Where there are no circumstances disclosed tending to show justification or excuse for a killing, there is nothing to rebut the natural presumption of malice.

4. Homicide ⇐146—Instruction as to presumption of malice held proper.

In homicide case, jury was properly instructed that, if the defendant intentionally and unlawfully killed deceased, malice was presumed unless by the circumstances of the homicide it was disproved.

Exceptions from Superior Court, Middlesex County; Nelson P. Brown, Judge.

John Bedrosian was found guilty of murder in the second degree, and brings exceptions. Exceptions overruled.

E. J. Tierney and M. G. Rogers, both of Lowell, for defendant.

A. K. Reading, Dist. Atty., and R. T. Bushnell, Asst. Dist. Atty., both of Boston, for the Commonwealth.

CROSBY, J. This is an indictment charging the defendant with murder. He was convicted of murder in the second degree. The case is before us on his exceptions to the exclusion of two questions put by his counsel to a witness called by him, and to the charge "in so far as it stated that the intentional unlawful killing of one human being by another carries with it malice, and in so far as it stated that if the killing was proved to be intentional that, in and of itself imported malice."

There was evidence that the defendant had stated that, while he was in the company of the deceased in the woods, they had been set upon by four young men accompanied by two young girls, and that he and the deceased had been attacked; that he had made his escape, and had called certain persons to the scene, informing them that his companion was in the woods and was being killed by the four young men and the two girls. The body of the deceased, for whose murder the defendant was indicted and tried, was found in the woods. One Lynch, a police officer, called as a witness for the commonwealth, testified on cross-examination that he had not stated to any person that he had been informed that an automobile containing certain young persons had been seen near the place of the crime on the day it was alleged to have been committed by the defendant. One Woodies, a newspaper reporter, was called as a witness by the defendant for the purpose of contradicting the testimony of Lynch and to affect his credibility, and testified in substance that Lynch had told him that he (Lynch) had been informed that some one had seen an automobile near the scene of the crime on the date it was committed. On his redirect examination Woodies was asked the following questions, which, upon objection by the district attorney, were excluded:

"Does your report, the nature of your report, of the case in the Lowell Sun have any effect on your being sure, or otherwise, as to whether this conversation actually occurred or not?"

"Did you write an account of this conversation which—rather did you write an account of the statement which you have testified to that Officer Lynch made, in the Lowell Sun on the day that you were—you made this investigation?"

[1] The exceptions to the exclusion of the questions must be overruled.

"The witness could not carry his testimony higher than to state what, as he said, he remembered specifically concerning the particular occasion. That was final, if believed. It was a matter of discretion whether and how far the court should allow the witness to give further testimony also depending, of course, upon his truthfulness in order to render credible a statement which, if he was truthful, was enough in itself." McCooe v. Dighton, Somerset & Swansea Street Railway, 173 Mass. 117, 118, 53 N

E. 133; Sanderson v. Carroll, 238 Mass. 142, 145, 130 N. E. 81.

The defendant was not entitled as matter of right to fortify the testimony of the witness Woodies by showing that the witness had written an account of the crime for the newspaper after having made an investigation of the case, and to make it more probable that his version of the conversation with the officer was true.

"When a witness has testified directly to a fact from the experience of his own senses, the extent to which he shall be allowed to testify to circumstances corroborative of the truth of what he thus has sworn must rest in the discretion of the judge who tries the case." Commonwealth v. Bishop, 165 Mass. 148, 152, 42 N. E. 560, 561.

[2-4] The portions of the charge excepted to were correct statements of the law. Murder in the first degree is murder committed with deliberately premeditated malice aforethought. Murder in the second degree is unlawful killing with malice aforethought. It has repeatedly been held by this court that malice in this connection means every unlawful motive that may be inferred from unlawful killing, and when there are no circumstances disclosed tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. Malice as here used does not necessarily imply ill will toward the person killed, but has a more comprehensive meaning, including any intent to inflict injury upon another without legal excuse or palliation. The jury was correctly instructed in substance that, if the defendant intentionally and unlawfully killed the deceased, malice was presumed, unless by the circumstances of the homicide it was disproved. In other words, if there was an intention to inflict injury upon the deceased which was not justified on any lawful ground or palliated by the existence of any mitigating circumstances, that intention was malicious within the meaning of the law. Commonwealth v. York, 9 Metc. 93, 43 Am. Dec. 373; Commonwealth v. Webster, 5 Cush. 295, 304, 52 Am. Dec. 711; Commonwealth v. Hawkins, 3 Gray, 463, 465; Commonwealth v. Pemberton, 118 Mass. 36, 39, 43; Commonwealth v. Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306.

Exceptions overruled.

KEMP v. KEMP et al.

(Supreme Judicial Court of Massachusetts. Middlesex. March 7, 1924.)

1. Trusts ⟸94½—Constructive trust held not created by absolute transfer in absence of fraud.

Where land was absolutely conveyed on condition that it be reconveyed on demand, and the grantees were not guilty of any fraudulent conduct during the preliminary transactions, no constructive trust arose under G. L. c. 203, § 1.

2. Frauds, statute of ⟸138(3)—Value recoverable as for failure of consideration on breach of grantee's oral agreement.

Where land was conveyed under mutual understanding that grantees were to reconvey at grantor's request, the statute of frauds does not prevent the grantor from recovering the value of the property from the grantees where they refused to reconvey on request, on the theory of a failure of consideration.

3. Appeal and error ⟸1178(8)—Disposition of equitable action on reversal where plaintiff could recover at law.

Where final decree in equitable action must be reversed, but it appears that plaintiff has a right to recover in an action at law, the reviewing court may give plaintiff leave to amend from a suit in equity into an action at law, upon such terms as the trial court may impose, and provide that, if such amendment is not made, a decree be entered dismissing the bill, under G. L. c. 231, §§ 55, 125.

Appeal from Superior Court, Middlesex County; P. M. Kealing, Judge.

Bill in equity by James Kemp against Clarence S. Kemp and another. From final decree for plaintiff, defendants appeal. Decree reversed, with leave to amend.

A. S. Allen, of Boston, for appellants.
D. H. Fulton, of Boston, for appellee.

BRALEY, J. It is found on evidence not reported that the plaintiff, seventy-five years old, is the father of the defendants, a son and daughter by his first marriage. In 1911 he bought a parcel of land with the buildings, which was subject to a mortgage of four thousand dollars. But his first wife having died, he married again in May, 1912, and shortly thereafter differences arose between him and his wife, which becoming acute she left his home "within a few months after" September, 1915. During the latter part of 1912, or early in 1913, he gave to the defendant Clarence S. Kemp certain mortgage notes of the aggregate value of about twenty-six hundred dollars, and to the defendant LaBelle Marie, moneys deposited in savings banks amounting to eleven hundred dollars. In making these gifts the plaintiff's purpose was, to put the property beyond the reach of his wife, and another daughter with whom he was not on friendly terms. The defendants in May, 1915, at the plaintiff's suggestion, and with his approval, used the proceeds of the gifts to pay the mortgages, taking an assignment to themselves. The plaintiff's wife however was seeking through counsel to obtain money for her separate support, and the negotiations for a settlement which followed, and were known to the de-

fendants, contemplated the release of her inchoate rights of dower, and homestead, on payment of five hundred dollars. The defendants agreed orally with the plaintiff, that if he paid the amount and his wife signed a release, he then should convey the premises to them, to be held in trust for his benefit, and at his request they were to reconvey subject to the mortgage. It was also agreed, that he was not to be required to pay any part of the principal, or interest on the mortgage "so long as he should remain the owner of the equity in said real estate." The plaintiff settled with his wife, and received the release, whereupon he executed and delivered the deed in question to the defendants, to hold thereunder as "joint tenants and not as tenants in common." The conveyance is admitted in the original answer. But in their amended answer, the defendants further say, "that it was agreed and understood * * * that the plaintiff was, if he wished, to have the right to live in the premises conveyed, or a portion thereof so long as he lived; that he was also if he wished, to have the right to collect the rents for so long as he lived; that he was to pay the taxes, * * *" but deny that they were to hold the property in trust. The buildings contained three apartments, one of which was occupied by the plaintiff, while he rented the other two, and the court finds that he continued in occupation after as well as before the delivery of the deed, made repairs, collected the rents, paid the taxes and insurance. The plaintiff requested the defendants to reconvey, but they refused, claiming that the property was a gift. It is plain on the findings, that there was no gift. The contract as mutually understood by the parties, enabled the plaintiff to obtain a valid release of his wife's inchoate right of dower, while he was to remain in possession, receive the rent, pay the taxes, and at his request the property was to be reconveyed to him. Flynn v. Flynn, 171 Mass. 312, 314, 50 N. E. 650, 42 L. R. A. 98, 68 Am. St. Rep. 427. It has been fully performed as to the first two stipulations, and under the judge's findings, the only defense now relied on is, that the plaintiff is precluded from showing by parol evidence, that the defendants hold the property in trust.

[1, 2] It is true, that even if the relation between the parties is fiduciary in character, Story Eq. Jur. (13th Ed.) §§ 218, 309; Stahl v. Stahl, 214 Ill. 131, 73 N. E. 319, 68 L. R. A. 617, 105 Am. St. Rep. 101, 2 Ann. Cas. 774, and cases collected in note 777–779, the present record is insufficient to impose a constructive trust on the conscience of the defendants. They are not shown to have procured the transfer, or to be guilty of any fraudulent conduct during the preliminary transactions. The conveyance was purely voluntary on the part of the plaintiff. It is absolute in form, and no constructive trust arose at the time the deed was delivered. G. L. c. 203, § 1; Tourtillotte v. Tourtillotte, 205 Mass. 547, 91 N. E. 909; Kennerson v. Nash, 208 Mass. 393, 94 N. E. 475. Cushman v. Noe, 242 Mass. 496, 136 N. E. 567, relied on by the plaintiff is not in point. The apparent sale of personal property there set aside was held on the master's report to have been a mere pretense and not an actual transfer. But the plaintiff is not remediless. The defendants are not purchasers for value, and having obtained their father's estate under the mutual understanding, that they were to reconvey at his request, and having refused to make the conveyance, the consideration has wholly failed. Dix v. Marcy, 116 Mass. 416; O'Grady v. O'Grady, 162 Mass. 290, 293, 38 N. E. 196; Dixon v. Lamson, 242 Mass. 129, 137, 136 N. E. 346. As was said by Mr. Justice Morton in Cromwell v. Norton, 196 Mass. 291, 292, 293, 79 N. E. 433, 118 Am. St. Rep. 499:

"So far as the statute of frauds is concerned the case comes within the well settled principle that if one conveys to another land or other property pursuant to an oral agreement which such other party refuses to perform and cannot be compelled to perform because within the statute, the value of the property so conveyed can be recovered by the party conveying it. Kelley v. Thompson, 181 Mass. 122; Peabody v. Fellows, 177 Mass. 290, 293; Miller v. Roberts, 169 Mass. 134, 145; Holbrook v. Clapp, 165 Mass. 563; O'Grady v. O'Grady, 162 Mass. 290. Recovery is allowed in such a case, not as an indirect way of enforcing the contract, which would be contrary to sound principles, but on the ground that the refusal of the defendant to perform constitutes a failure of consideration, and he is therefore bound to make the plaintiff whole for what he has got from him. If the defendant is ready to perform, the fact, that the contract is within the statute and he could set up the statute if he chose to, is immaterial. Twomey v. Crowley, 137 Mass. 184. So is the exact nature of the undertaking on the part of the party refusing to perform, whether, for instance, it was to hold in trust or to reconvey."

[3] While the final decree granting specific relief as prayed must be reversed, the plaintiff is given leave to amend from a suit in equity into an action at law to recover the value of the property, within thirty days after rescript, upon such terms as the trial court may impose. If such amendment is not made, a decree is to be entered dismissing the bill. G. L. c. 231, §§ 55, 125; Donovan v. Walsh, 238 Mass. 356, 362, 130 N. E. 841.

Ordered accordingly.

(Supreme Judicial Court of Massachusetts. Suffolk. March 8, 1924.)

1. **Bankruptcy ⟸306 — Finding that transfer presumptively in fraud of creditors held not so plainly wrong as to require reversal.**

In an action by trustee in bankruptcy to recover proceeds of corporate stock as assets of the bankrupt estate, a finding that bankrupt's transfer of the stock in trust for his son was presumptively in fraud of creditors *held* not so plainly wrong that it should be reversed on appeal.

2. **Fraudulent conveyances ⟸58 — When gift is in fraud of creditors.**

Unless property retained is sufficient and readily available to pay all creditors, a voluntary conveyance is voidable by creditors when the donor at the time of the conveyance is insolvent, is in embarrassed circumstances, or is involved to an extent to endanger the rights of creditors.

3. **Fraudulent conveyances ⟸64(1)—Intent to defraud creditors need not rest upon moral turpitude.**

An actual intent to defraud creditors need not rest upon the existence of moral turpitude but exists where there is an unjustifiable purpose to deprive creditors of their legal rights.

Appeal from Superior Court, Suffolk County; Marcus Morton, Judge.

Suit in equity by Dudley H. Dorr, as trustee in bankruptcy of the estate of Neil J. Tracy, bankrupt, against Grace P. Tracy and others, to recover as assets of bankrupt estate proceeds of sale of stock. Decree for plaintiff, and defendants appeal. Affirmed.

H. V. Cunningham and W. S. Bangs, both of Boston, for appellants.

Grafton L. Wilson, of Boston, for appellee.

PIERCE, J. [1] This is a suit in equity, brought by the trustee in bankruptcy of Neil J. Tracy to recover of the defendants Tracy, as assets of the bankrupt estate, the definite proceeds of the sale of three hundred and twenty-five shares of stock, which Tracy transferred September 15, 1920 (more than four months before his bankruptcy), to his wife, the defendant Grace P. Tracy, without consideration other than love and affection; and which she in turn transferred in March, 1921, to their son, upon his becoming of age, for a like consideration, but with the purpose to carry out and execute the intent and plan of her husband that the stock should be given to the son. The case was heard by a judge of the superior court and all the evidence appears in a commissioner's report. The question for decision is, whether the finding of the judge "that said transfer was presumptively in fraud of creditors; and also that the said transfer made by the said ... ly wrong that it should be reversed by this court. Lindsey v. Bird, 193 Mass. 200, 79 N. E. 263; Glazier v. Everett, 224 Mass. 184, 186, 112 N. E. 1009.

Tracy, in 1918, with others organized the corporation known as the Harney, Tracy, Crehan Company, putting in $25,000, for which he received one-third of the capital stock, represented by two hundred and fifty shares, later, by a stock dividend, increased to three hundred and thirty-four shares. The business of this corporation was successful, as appears from the fact that shortly before this suit was brought the defendant Edward W. Tracy sold the three hundred and twenty-five shares of it which he had received from his father through his mother for $25,000; the proceeds invested by Tracy (the son) in bonds are the property sought to be reached and applied by the creditors of Neil J. Tracy to the payment of his debts.

When these shares of stock were transferred to Tracy's wife for the benefit of his son, Edward, on September 15, 1920, Neil Tracy's liabilities amounted to $187,606.54, of which $163,509.38 was due the Merchants National Bank, where Tracy had obtained the cash to buy the large amount of leather that formed his principal assets and which to Tracy's knowledge looked to his assets (including the stock in question and also a house owned by Tracy's wife) for its security. His assets exclusive of leather were worth about $17,000, perhaps no more than $7,500.

The leather was bought in the fall of 1919 and spring of 1920, at a time when there was a great inflation of prices, at a cost of $336,021, and consisted of about four hundred and seventy-eight thousand feet of glazed kid, known as "table run." This is a stock which contains various grades, not sorted and separated. When shipped to foreign ports it passes through the hands of a merchant who resells it after sorting it out near the customers to suit their different needs; and it requires regrading to make advantageous sales. The leather market had been fairly active up to June, 1920, but prices had dropped in June. In June and July there was a distinct break and up to September there was a decline so unusual as to cause great anxiety among leather dealers. A majority of dealers believed in September that the decline had spent its force and that later in October and November there would be a reaction, as was the usual course of the leather market in former years; but there was a substantial minority who did not so believe. There was no change from the first until the last of September, "the market was dead." In October and November the market collapsed, culminating in what was described by a witness for the defendant as an "ava-

The judge finds upon undisputed evidence that the value of the leather had fallen on September 15, 1920, by at least thirty-three and a third per cent. of the cost; that the uncertainty of the market made the demand for leather slight, except at sacrifice prices; and that it was a great question whether Tracy was solvent on September 15, 1920. The evidence shows and the judge finds that Tracy had tried to sell leather from time to time and had succeeded in selling only a relatively small amount of his best grade at a serious loss. Supported by the evidence the judge further finds that if the bank had insisted upon payment in full of his indebtedness Tracy would have been obliged to sell his entire stock; that to obtain the best prices Tracy would have had to regrade the leather at considerable expense and time; that had he regraded it himself the time taken would have brought him into October, when the market had collapsed; that if he had sold it as a whole, without regrading, the fact that the purchaser would have to take the risk of the market would have affected the price obtainable; that the sale as a whole of such a large amount of leather on an unstable declining market must be taken into consideration; that the probable result of the sale under such conditions is that the loss would have been much larger than thirty-three and a third per cent. of the cost, and in all probability would not have enabled him to pay his indebtedness without the three hundred and twenty-five shares of stock; and that the transfer left too small a margin of safety to have warranted the present to his son.

[2, 3] The further finding of the judge that the gift was presumptively in fraud of creditors rests upon the rule that, unless the property is retained sufficient and readily available to pay all creditors, a voluntary conveyance is voidable by creditors when the donor at the time of the conveyance is insolvent, is in embarrassed circumstances, and is involved to an extent to endanger the rights of creditors. Parkman v. Welch, 19 Pick. 231; Briggs v. Sanford, 219 Mass. 572, 574, 107 N. E. 436; Smith v. Clark, 242 Mass. 1, 7, 136 N. E. 66, 23 A. L. R. 582. Peter Bent Brigham Hospital v. McClure, 245 Mass. 370, 139 N. E. 484. In the present case the evidence warranted a finding that Tracy was embarrassed and was involved to an extent to endanger the rights of his creditors when the transfer of the stock was made on September 15, 1920. Beyond the question of the insolvency of Tracy and of his inability to pay his debts as they became due, the judge finds that Tracy had the actual intention to defraud his creditors when the transfer was made. This finding cannot be said to be clearly wrong. It rests not upon the existence of their legal rights. Matthews v. Thompson, 186 Mass. 14, 23, 71 N. E. 93, 66 L. R. A. 421, 104 Am. St. Rep. 550.

It results that the decree should be affirmed.

Decree affirmed.

MURPHY v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 29, 1924.)

1. Negligence ⟸32(2)—Contractor's employee going on other premises mere licensee.

Employee of contractor constructing building for owner of yards was not an invitee, but merely a licensee, while crossing railroad tracks in another part of the yard to get a drink, though doing so with the owner's knowledge and passive acquiescence, and a railroad operating its cars in such yard under a contract with the owner owed such employee no greater duty as to care than did the owner.

2. Negligence ⟸32(1)—Duty to licensee limited to refraining from willful injury.

The duty of owner of premises and one working there under contract toward a licensee was only to refrain from willful, wanton, or reckless conduct, and neither is liable for mere negligence to the licensee.

Exceptions from Superior Court, Suffolk County; Henry A. King, Judge.

Action of tort by Agnes C. Murphy, administratrix of the estate of Pius S. Murphy, deceased, against the Boston & Maine Railroad to recover for the conscious suffering and death of the deceased. Verdict for plaintiff, and defendant brings exceptions. Exceptions sustained, and judgment rendered for defendant.

T. H. Bilodeau, of Boston, for plaintiff.
A. W. Rockwood, of Boston, for defendant.

CARROLL, J. This action is to recover damages for the death and conscious suffering of the plaintiff's intestate, who was run over by a car of the defendant in the coal yard of the Darrow-Mann Company. The action is brought by the Ætna Life Insurance Company, Agnes C. Murphy having been paid compensation under the Workmen's Compensation Act (Laws 1911, c. 751 as amended by Laws 1912, c. 571) as a dependent of the intestate.

The deceased was employed by the Leahy-Rattigan Construction Company as a carpenter. This company was building a transformer station and office building in the yard of the Darrow-Mann Company, and was doing the planking and cap logging on a wharf

Darrow-Mann Company. On April 6, 1916, the defendant was operating its cars in the yard of the Darrow-Mann Company, under a contract with this company. A fire hydrant, a part of the Darrow-Mann equipment, was located on the easterly side of the railroad track; a hose was frequently attached to this hydrant for construction work and sometime it was "equipped with a faucet" and "when the men there wanted a drink of water they went over to hydrant to get it." "The Leahy-Rattigan company's men used the hydrant to get water and * * * sometimes the men going over there for a drink would take off the hose used for construction work and drink at the faucet" and the employees of the Darrow-Mann Company used the hydrant for drinking purposes, and "all the different men from all over the plant resorted to this hydrant for drinking water, the hydrant being the only place in the plant where you could get a drink of water." There was a path across the tracks leading to the hydrant.

On April 6, the day of the accident, the intestate was working with other employees of the Leahy-Rattigan Construction Company on the wharf on the westerly side of the tracks; he walked up the yard to a point opposite the hydrant and crossed the tracks, which were two or three feet higher than the coal field, to get a drink of water; while returning, in crossing the track he was struck by a car operated by the defendant. The office building which the Leahy-Rattigan company was constructing for the Darrow-Mann Company was on the easterly side of the railroad tracks, at least six hundred feet from the hydrant. Mr. Murphy had done some work on this building but had been employed at the wharf for a week or more before the accident, and on that day "only finishing up work such as putting in the chair rail and adjusting doors was being done upon the office building." The transformer station and locker building for wearing apparel and tools adjoined the transformer station on the westerly side of the tracks. There was no way from the locker and transformer building to the hydrant except crossing the tracks.

[1] The plaintiff's intestate was working on the premises of the Darrow-Mann Company; his employer, the Leahy-Rattigan Construction Company, under its contract was to do certain work on the Darrow-Mann Company's premises; but the work in which the intestate was engaged was in a different part of the yard than the tracks and hydrant, and did not call upon him to cross the tracks to the hydrant. No invitation was given him to cross the tracks or go to the hydrant, either by the defendant or the Darrow-Mann Company. The fact that a pathway existed over the tracks at this point, that the employees of the Darrow-Mann Company in going and returning from the hydrant and used the hydrant for drinking purposes, did not amount to an invitation by the owner of the land to cross the tracks. Knowledge of such use does not amount to an invitation; the mere passive acquiescence in the use to which this portion of the premises was put was not equivalent to an inducement or invitation to use them in this way. Sweeny v. Old Colony & Newport Railroad, 10 Allen, 368, 87 Am. Rep. 644; Wheelwright v. Boston & Albany Railroad, 135 Mass. 225; Youngerman v. New York, New Haven & Hartford Railroad, 223 Mass. 29, 111 N. E. 607; Laporta v. New York Central Railroad, 224 Mass. 100, 112 N. E. 643; Doherty v. New York, New Haven & Hartford Railroad, 229 Mass. 135, 118 N. E. 281.

The deceased was not required to cross the tracks. In going to the hydrant for his own purposes he was not an invitee but was a licensee of the Darrow-Mann Company. Severy v. Nickerson, 120 Mass. 306, 21 Am. Rep. 514; Laporta v. New York Central Railroad, supra; Carey v. Gray (N. J. Err. & App.) 119 Atl. 176.

In Carpenter v. Sinclair Refining Co., 237 Mass. 230, 129 N. E. 383, it could have been found that the plaintiff was invited to use the rheostat in the performance of his work and that he was "not a volunteer or intermeddler." In Crimmins v. Booth, 202 Mass. 17, 88 N. E. 449, 132 Am. St. Rep. 468, the plaintiff when injured was at work on one of the hatches of a vessel in the course of his employment. Boyle v. Columbian Fire Proofing Co., 182 Mass. 93, 64 N. E. 726, is not in conflict. In that case the plaintiffs were employees of the defendant and going from the eighth floor of the building, which they were engaged in erecting, to eat dinner, when the accident occurred; this was held to be an incident of the workmen's employment. In Olsen v. Andrews, 168 Mass. 261, 47 N. E. 90 the plaintiff was injured by the negligence of his employer's servant, while crossing a bridge on his way from dinner, on a certain track which was given up to the defendant by the railroad company, and the only way from the plaintiff's work to his boarding place was over this bridge.

[2] The defendant in the discharge of its contract with the Darrow-Mann Company had the right to use the tracks on the premises of the Darrow-Mann Company. The defendant's duty to the plaintiff's intestate was no greater than the duty owed to him by the Darrow-Mann Company. He was not invited by the defendant to use the premises, and he stood toward the defendant as a licensee. The case is governed by Cole v. Willcutt & Sons Co., 214 Mass. 453, 101 N. E. 995. The plaintiff in that case was not in the employ of the defendant, but was employed by an-

other contractor on the building. The defendant was engaged in constructing a stairway, which the employees of the other contractor sometimes used during its erection and at times used the elevator. It was held that the defendant's passive acquiescence in the use of the stairway gave the plaintiff as against the defendant only the rights of a licensee. Blackstone v. Chelmsford Foundry Co., 170 Mass. 321, 49 N. E. 635. The duty of the defendant toward the plaintiff's intestate as a licensee was to refrain from willful, wanton, or reckless conduct and there was no evidence of such conduct. Robbins v. Athol Gas & Electric Co., 236 Mass. 387, 128 N. E. 417; Hafey v. Turner's Falls Power & Electric Co., 240 Mass. 155, 133 N. E. 107. This duty applies not only to the care and maintenance of permanent structures but to the work done on the premises by the owner or the contractor. Neither the owner nor the contractor is liable for mere negligence to a licensee in the performance of work upon the premises; and unless there is evidence of willful or wanton conduct the injured licensee cannot recover. Jones v. New York, New Haven & Hartford Railroad, 211 Mass. 521, 98 N. E. 607; Robbins v. Athol Gas & Electric Co. supra; Murphy v. Avery Chemical Co., 240 Mass. 150, 133 N. E. 92; Hafey v. Turner's Falls Power & Electric Co. supra.

O'Neil v. National Oil Co., 231 Mass. 20, 120 N. E. 107 and Boutlier v. Malden, 226 Mass. 479, 116 N. E. 251, Ann. Cas. 1918C, 910 are to be distinguished. In O'Neil v. National Oil Company the plaintiff was upon the premises where she was employed as a maid. The jury could have found that she was upon the driveway when injured and that the excavation extended into the driveway; even if she was not upon the driveway, in walking upon the premises of her employer she was in the rightful use of them, under the particular circumstance of the case, and stood toward the wrongdoer in the right of her employer. In Boutlier v. Malden evidence was excluded tending to show that the intestate was upon the land with the implied invitation of the owner; and it did not appear that the defendant had the right to use the place for its poles and wires. Sughrue v. Booth, 231 Mass. 538, 121 N. E. 432 is not applicable to the facts shown in the case at bar; in that case the vessel on which the plaintiff was killed was in the custody of the United States marshal, and the intestate had been appointed its custodian; he was lawfully upon the vessel. Berube v. New York, New Haven & Hartford Railroad, 234 Mass. 415, 420, 125 N. E. 629. The defendant's motion for a directed verdict should have been allowed.

Judgment to be entered for the defendant. Exceptions sustained.

INHABITANTS OF TOWN OF BROOKFIELD v. INHABITANTS OF TOWN OF HOLDEN.

(Supreme Judicial Court of Massachusetts. Worcester. March 3, 1924.)

1. Paupers ⟸20(3)—Settlement of married woman.

A married woman whose husband has no settlement in the commonwealth can acquire a settlement of her own under G. L. c. 116, § 1, cl. 2, which she may possibly lose by her voluntary absence from the place of her settlement for a period of five consecutive years under section 5, or by the husband acquiring a settlement, but a married woman whose husband has a settlement in the commonwealth takes the settlement of her husband and cannot acquire one of her own.

2. Paupers ⟸21(3)—Absence from husband's settlement during his life does not affect widow.

A married woman who with her husband has been absent from the place of his settlement in the commonwealth less than five consecutive years at the time of his death does not lose her settlement derived from him at the expiration of the remainder of the five years if she is herself absent from the place of settlement under G. L. c. 116, § 1, cl. 2, and section 5, since her absence is not her voluntary act until his death.

Report from Superior Court, Worcester County; Nelson P. Brown, Judge.

Action by the Inhabitants of Town of Brookfield against the Inhabitants of Town of Holden. On report after finding for plaintiff. Judgment in accordance with finding.

A. F. Butterworth, of Brookfield, for plaintiff.

Chas. M. Thayer, Frank C. Smith, Jr., Geo. A. Gaskill, and J. Otis Sibley, all of Worcester, for defendant.

WAIT, J. The report in this case presents the question whether a married woman, who with her husband has been absent from the place of his settlement in this commonwealth less than five consecutive years, after becoming a widow, loses her settlement derived from him at the expiration of the remainder of the five years, if she is still herself absent from the place of settlement. In the superior court it was held that she did not. The decision was right.

[1, 2] A married woman whose husband has no settlement in this commonwealth can acquire a settlement of her own, G. L. c. 116, § 1, cl. 2, which she may, possibly, lose by her voluntary absence from the place of her settlement for a period of five consecutive years, G. L. c. 116, § 5, or by the husband acquiring a settlement; but a married woman whose husband has a settlement in the commonwealth takes the settlement of her husband, and cannot acquire one of her own. G. L. c. 116, § 1, cl. 2; Somerville v. Boston, 120

Mass. 574; Spencer v. Leicester, 140 Mass. 224, 5 N. E. 820. Until St. 1870, c. 892, § 2, a settlement once obtained continued until another was acquired. St. 1793, c. 34, § 2; Rev. St. c. 45, § 3; Gen. St. c. 69, § 3. There was no way a settled person could lose or defeat his settlement in one place except by his voluntary action in changing his place of settlement. It was not until the enactment of St. 1898, c. 425, § 2, that any term of absence was made to defeat a settlement. Lawrence v. Methuen, 187 Mass. 592, 595, 73 N. E. 860; Treasurer and Receiver General v. Boston, 229 Mass. 83, 118 N. E. 284; Pub. St. c. 83, § 6; R. L. c. 80, § 6; G. L. c. 116, § 5, re-enacting St. 1911, c. 669, § 4.

When the policy of the commonwealth was changed, and a settlement was lost by absence, first for ten years from the commonwealth, St. 1898, c. 425, § 2; then, for five years from the place of settlement, St. 1911, c. 669, § 4; and now (and since the rights in this case arose) for failure to reside in the place of settlement for five consecutive years, St. 1922, c. 479, it is not readily to be supposed that the Legislature intended to give to death any direct effect it did not have before, or to take away from any one the voluntary quality in the acts losing or defeating the settlement. No words expressing such intention are used in the statutes.

The absence of a married woman living with her husband from the place of his settlement cannot justly be called her voluntary act, and counted against her to defeat a settlement derived from the husband. That a voluntary act on her part is essential to the loss of even a derivative settlement was decided by Treasurer and Receiver General v. Boston, 229 Mass. 83, 118 N. E. 284. Not until the coverture is ended can her action be taken as effective to terminate the settlement; for not until then is her action voluntary where husband and wife have been living together.

In the case at bar, upon the proper interpretation of the statute, the widow aided by the plaintiff had not been absent from the place of her settlement derived from the husband for the period required to defeat and lose the settlement in the town of Holden.

Judgment in accordance with the finding.

ALLEN v. BERRY.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 29, 1924.)

Husband and wife ⇐281—Matters held not to constitute equitable defense to enforcement of separation agreement.

In an action by trustee under trust agreement under seal to recover money from defendant husband for the benefit of the beneficiary, defendant's wife, who was not a party to the contract, that at the time of the agreement moneys of defendant were in the hands of the wife, and that defendant understood that she was not to use them pending settlement of their difficulties, she nevertheless using them for her own benefit, constituted no defense either at law or in equity under G. L. c. 231, § 31; such facts not showing fraud with respect to the contract, and there being nothing to show that plaintiff had knowledge of the facts or was in collusion with the wife.

Exceptions from Superior Court, Suffolk County; Marcus Morton, Judge.

Action of contract by Thomas Allen, Jr., trustee, against Charles F. Berry to recover money alleged to be due from the defendant to the plaintiff as trustee for the wife of the defendant. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

D. P. Ranney, of Boston, for plaintiff.

J. P. Walsh and H. A. J. Oppenheim, both of Boston, for defendant.

RUGG, C. J. This is an action to recover amounts due under a contract signed and sealed by the plaintiff and defendant of the tenor following:

"In consideration of these mutual covenants and our seals hereto affixed we, Dr. Charles F. Berry and Thomas Allen, Jr., Trustee for Lorette C. Berry, agree by and with each other, as follows: The said Dr. Charles F. Berry agrees to pay on or before the tenth day of each and every month starting September 1st, 1920, an amount equal to $30.00 per week, or $120 per month, to said Thomas Allen, Jr., trustee as aforesaid, for the support and maintenance of said Lorette C. Berry, wife of said Dr. Charles F. Berry. The said Thomas Allen, Jr., trustee as aforesaid, agrees to receive said amount as aforesaid and transmit the same to the said Lorette C. Berry. Witness our hands and seals the day and year first above written."

The defendant pleaded, amongst other matters, that his execution of the agreement was due to fraudulent conduct of the plaintiff's cestui. The defendant made the following offer of proof:

"That under the agreement the witness Allen, under direct and cross-examination of the cestui—that at the time that that written agreement was entered into the cestui had in her possession sums of money approximating several thousand dollars which belonged to the defendant, and that at that time the defendant agreed to pay the sum of $30.00 per week he made the agreement with the understanding and belief that these sums should remain intact and not be used by the cestui or the trustee until the termination of the marital difficulties between them. The defendant further offers to prove that the cestui has appropriated these various sums to her own use and benefit, despite the contract entered into be-

tween the defendant and the plaintiff trustee. The defendant offers as an equitable defense the fraudulent acts and omissions and concealment by the cestui as a defense."

The single exception is to the exclusion of this offer of proof. In this there was no error. Under G. L. c. 231, § 31:

"The defendant may allege in defense any facts which would entitle him in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action or against a judgment recovered by the plaintiff in such action."

This offer of proof constitutes no defense at law or in equity to the plaintiff's claim. The only parties to the contract are the plaintiff and the defendant. It is under seal. Only the parties to a sealed instrument can sue on it. The wife is not a party to this contract. The facts set forth in the offer of proof do not constitute fraud such as to avoid this contract. There is nothing to indicate that the plaintiff had knowledge of the facts or was in any particular in collusion with the defendant's wife. The final sentence of the offer is simply a characterization of the facts stated earlier and adds nothing to them. It sets out no new fact. Whatever may be the respective rights of the defendant and his wife to the property to which reference is made, no fraud is shown with respect to the contract on which the present action is founded. The most that could be inferred from the offer was a misunderstanding on the part of the defendant as to what he expected his wife to do with his money in her hands. If his legal rights have been impaired by her with respect to that property, that controversy does not constitute the defense of fraud or any equitable defense to the present action.

Exceptions overruled.

DERBY et al. v. DERBY et al.

(Supreme Judicial Court of Massachusetts. Middlesex. March 3, 1924.)

1. Courts ⟸200¼—Probate courts have only equity jurisdiction expressly conferred.

Probate courts have equity jurisdiction only in those cases where it is expressly conferred upon them.

2. Courts ⟸472(4)—Superior court, and not probate court, held to have jurisdiction of action to enforce oral promise of testator to convey.

After death of a testator and after the will was admitted to probate, the superior court, and not the probate court, had jurisdiction of an action brought by one, appointed trustee under the will, individually, for specific performance of an oral agreement by the testator to convey him a certain parcel of land, under G. L. c. 214, § 1; chapter 215, § 6; R. S. c. 74, §§ 8–13 (G. L. c. 204, § 1), notwithstanding litigation on the plaintiff's account as trustee pending in the probate court.

3. Specific performance ⟸41—Oral contract to convey land may be enforced.

An oral agreement to convey land may be specifically enforced in equity, notwithstanding the statute of frauds, where the agreement has been partly performed by the party seeking to enforce it by taking possession and making improvements so that he cannot be restored to his original situation.

4. Specific performance ⟸105(3)—One in possession under no obligation to assert equitable title until repudiation.

One obtaining land under oral contract to convey was under no obligation to assert his equitable title until after repudiation of his right, and he is not guilty of laches in not seeking specific performance of the contract until such time.

Appeal from Superior Court, Middlesex County; W. C. Wait, Judge.

Bill in equity by Benjamin Derby and others against Sarah W. Derby and others, to obtain specific performance of oral promise to convey land. From an order sustaining demurrer to the bill, and from final decree dismissing the bill, plaintiffs appeal. Decree reversed, and decree entered overruling demurrer.

G. K. Gardner, of Boston, for appellants.
C. S. Wing, of Boston, for appellees.

DE COURCY, J. The amended bill in equity, brought in the Superior Court by Benjamin Derby (herein referred to as the plaintiff) and his assigns Tyler and Duncan, seeks among other things to obtain specific performance of an oral promise to convey land, made by Benjamin Derby, Sr., now deceased. The defendants Sarah W. and Annie H. Derby (who demurred to the bill) and the plaintiff are the only children of said Benjamin Derby, Sr., and the defendant Anna E. Derby is his widow. The trial judge entered an order sustaining the demurrer, and a final decree dismissing the bill; and the plaintiffs appealed to this court.

The facts alleged are in substance as follows: In 1901 Benjamin Derby, Sr., owned and occupied with his family the "Derby Homestead Place," comprising about twenty-five acres at Concord Junction in the town of Concord, Massachusetts. A portion of this property, bounding southerly on Main Street, was known to the family as the Orchard Lot. In that year the plaintiff, being then about to be married, informed his father of his intention to build a house upon a lot which he owned in another part of Concord and to establish his home there. Thereupon Benjamin Derby, Sr., urged the

plaintiff to continue living with him on the Homestead Place, and in consideration of the plaintiff's agreeing to do so gave him said Orchard Lot, put him in possession thereof, and promised him that if he would build his proposed house thereon and make his home there, he (Benjamin Derby, Sr.,) would convey the lot to the plaintiff in fee simple. In reliance on, and in consideration of, this promise the plaintiff at his own expense built on said lot a house which cost considerably more than the value of the land. Ever since his marriage he has occupied this house and lot as his own, and brought up his family there; and until recent months his sole right thereto was always acknowledged by his father or by the defendants.

In 1908 Benjamin Derby, Sr., died, and his will was admitted to probate February 26, 1908. By its terms all his property, during the lives of the testator's widow, Anna E., and his brother Edward Derby, was given to the plaintiff upon certain trusts for their benefit. Upon the death of said widow and brother the real estate goes in fee simple to his three children, Benjamin, Sarah W., and Annie H. Derby, in equal shares.

The plaintiff was appointed and qualified as executor and trustee under the will, but did not take possession of the "Orchard Lot" as executor or trustee; his executor's inventory, of which the defendants had notice, was filed April 1, 1908, and the Orchard Lot and house did not appear therein. Until the present dispute arose he filed no inventory as trustee. The defendants now claim that said lot and house are a part of the property devised under the terms of said will; and are seeking, in proceedings pending in the Probate Court upon the plaintiff's account as trustee, to charge him with the rent of this house and lot since the testator's death.

The testator's brother Edward Derby died in 1922. In July, 1923, the plaintiff Benjamin Derby assigned to the other plaintiffs, Tyler and Duncan, all his interest in the Orchard Lot arising out of his father's agreement to convey, and all his interest in the Derby homestead property under the will.

The principal prayer of the bill is for the specific performance of the testator's oral promise to convey the "Orchard Lot,"—by appropriate conveyances and releases running from the defendants to the plaintiff or to his assigns Tyler and Duncan. The defendants demurred on five grounds, hereinafter discussed. The demurrer was expressly sustained on a sixth ground, taken ore tenus, that the Probate Court had exclusive jurisdiction of the case.

[1, 2] If the subject-matter of the present suit were the same as that involved in the proceedings upon the trustee's account pending in the Probate Court, and these courts had concurrent jurisdiction thereof, undoubtedly the Probate Court, to which application was first made, would have acquired exclusive jurisdiction. Phillips v. McCandlish, 239 Mass. 301, 131 N. E. 861; Dorsey v. Corkery, 227 Mass. 498, 116 N. E. 870. But in our opinion the Probate Court has no jurisdiction to compel specific performance of the oral promise, made by Benjamin Derby, Sr., to convey land to the plaintiff. Obviously such relief is within the general chancery jurisdiction of the Superior Court. G. L. c. 214, § 1. But Probate Courts have equity jurisdiction only in those cases where it is expressly conferred upon them. Bailey v. Dillon, 186 Mass. 244, 247, 71 N. E. 538, 66 L. R. A. 427. Specific performance is not included in the matters over which the Probate Court is given concurrent jurisdiction by G. L. c. 215, § 6. What the plaintiff is seeking is not, within said section 6, a matter "relative to the administration of the estate" of Benjamin Derby, Sr., nor to his will, except as the adverse claim may affect the corpus of the estate to which the will applies; nor does it relate to "trusts created by will or other written instrument," as it is not based on the will, and might have been enforced against the testator during his life. If there were any doubt as to this construction of said section 6, it would be removed when it is recalled that the Legislature long since conferred power on the Probate Court to enforce specific performance, but expressly limited that jurisdiction to certain cases where there is a written agreement for the conveyance of real estate. R. S. c. 74, §§ 8–13; G. L. c. 204, § 1. Accordingly the plaintiffs are entitled to prosecute their suit for specific performance in the Superior Court, notwithstanding the litigation on the trustee's account pending in the Probate Court.

[3, 4] Although the defendants have not argued the other grounds of demurrer, it is necessary to consider them briefly in view of the conclusion reached on the question of jurisdiction. It is too well settled for discussion that an oral agreement to convey land may be specifically enforced in equity, notwithstanding the statute of frauds, where the agreement has been partly performed by the party seeking to enforce it, by taking possession and making improvements upon the estate, as alleged in this bill, so that he cannot be restored to his original situation. Williams v. Carty, 205 Mass. 396, 91 N. E. 392; Curran v. Magee, 244 Mass. 1, 5, 138 N. E. 1. As to laches, "The plaintiff was under no obligation to assert his equitable title until after a repudiation of his right"; and in the circumstances alleged in the bill it cannot be said as matter of law that he is barred by laches. Low v. Low, 173 Mass. 580, 582, 583, 54 N. E. 257. Finally, no argument has been advanced as to the necessity of making "Benjamin Derby as he is trus-

tee under the will of Benjamin Derby, Sr., deceased," a party to the bill. Benjamin Derby is already a party plaintiff, and the court can adjudicate his rights with respect to the matter in suit. And it must be borne in mind that according to the allegations in the bill he never took possession of the "Orchard Lot" as trustee; nor until recently did the respondents claim that this lot and house were a part of the testator's estate, or that the plaintiff occupied the same as trustee.

The decree must be reversed, and a decree entered overruling the demurrer.

Ordered accordingly.

COMMONWEALTH v. ASHEY et al.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1924.)

Incest ⟸5—Marriage and cohabitation held offense.

Where one married the daughter of his sister of the half blood and they had sexual intercourse, they committed an offense under G. L. c. 272, § 17, in view of G. L. c. 207, §§ 1, 2.

Report from Superior Criminal Court, Suffolk County; Patrick M. Keating, Judge.

Esa G. Ashey and another were found guilty of having sexual intercourse, not being lawfully married. On report. Verdict ordered to stand.

M. Caro, Asst. Dist. Atty., of Boston, for the Commonwealth.

A. F. Flint, of Boston, for defendants.

DE COURCY, J. The defendants were indicted under G. L. c. 272, § 17, which provides:

"Persons within the degrees of consanguinity within which marriages are prohibited or declared by law to be incestuous and void, who intermarry or have sexual intercourse with each other, shall be punished. * * *"

It was admitted that they went through a ceremony of marriage on December 18, 1922, that they lived together as husband and wife and that they had sexual intercourse. The jury returned a verdict of guilty against both, and answered specially that the relationship of the male defendant to the mother of the female defendant was that of brother and sister of the half blood. In other words Teresa Benedetti is Ashey's niece of the half blood. The question of law raised by the report depends primarily on the proper construction of G. L. c. 207, §§ 1, and 2, providing that "no man shall marry his * * * sister's daughter" and "no woman shall marry her * * * mother's brother."

This statute prohibiting certain marriages has come down from chapter 2 of the Province Laws of 1695–96. Section 1 of said chapter 2 contains an elaborate enumeration of the prohibited degrees. It was apparently modeled on the table of degrees established by Archbishop Parker in 1563, which in turn was based upon the Levitical decrees, the source of the law of incest. See Gibson's Codex Juris Ecclesiastici Anglicani, vol. 1, p. 414. This table prohibits marriage between a man and his sister's daughter, among others. The fundamental case expounding the ecclesiastical law as it was deemed to be at the time (1722) is that of Butler v. Gastrill, Gilbert's Reports, p. 156. See also as to the early law, L. R. A. 1916C, 690; 2 Kent's Com. (13th Ed.) 82–85. Bacon's Abridgement (1852) vol. 6, pp. 455–460.

It was said in Butler v. Gastrill, supra, at page 158:

"And when we consider who are prohibited to marry by the Levitical law, we must not only consider the mere words of the law itself, but what, from a just and fair interpretation, may be deduced from it."

And the English courts have held that the prohibition applies where the relation is that of the half blood. Queen v. Inhabitants of Brighton, 1 B. & S. 447; Mette v. Mette, 28 L. J. (N. S.) 1859, part III, p. 117. On the basis of these cases it is said in 16 Halsbury's Laws of England, 284:

"In reference to the prohibited decrees, relationship by the half blood is a bar to marriage equally with relationship by the whole blood. * * *"

And Bishop, in his Marriage, Divorce & Separation, vol. 1, § 748, states:

"The relationship by half blood is the same in these cases as by whole blood; so that, for example, it is incestuous for a man to marry the daughter of his brother of the half blood, or the daughter of his half-sister."

When our original law was enacted in 1695–96, it seems reasonable to assume that the interpretation of the ecclesiastical law as it then existed in England was adopted, treating the half blood relation like the whole blood. See Schouler Marriage, Divorce, Separation & Domestic Relations (6th Ed.) vol. 1, § 16; Bishop, supra, vol. 1, § 756. And no substantial change in the fundamental doctrine involved appears in our subsequent statutory law.

No Massachusetts case has been called to our attention which decides whether the half blood is to be treated on a par with the whole blood in a prosecution for incest under our statutes. The decisions in other states, however, support the contention of the commonwealth. In State v. Wyman, 59 Vt. 527, 8

Atl. 900, 59 Am. Rep. 758, it was held that the word "brother," in the statute against incest, includes a brother of the half blood; and a conviction of the defendant, who committed the offense with a daughter of his half-brother, was sustained. In Shelly v. State, 95 Tenn. 152, 31 S. W. 492, 49 Am. St. Rep. 926, the defendant was convicted on a charge of incestuous intercourse with the daughter of his half-sister; the statute forbidding such intercourse with "the daughter of his brother or sister," etc. State v. Reedy, 44 Kan. 190, 24 Pac. 66, involved a charge of incestuous cohabitation with the daughter of the defendant's half-brother. The conviction was upheld; the court stating:

"The language employed by the Legislature is to be interpreted according to its common meaning; and, when the terms 'uncle' and 'niece' are viewed in that light, they will include the half-brother of the father, and the daughter of a brother of the half blood. They are more closely allied in blood than some of those who are specifically mentioned in the statute as being within the forbidden degrees, and this to some extent indicates the meaning and purpose of the Legislature."

The defendant in The People v. Jenness, 5 Mich. 305, was convicted of incest with the daughter of his sister. It was said by Christiancy, J. (page 318):

"The charge is sexual intercourse between persons within the degrees of consanguinity within which marriages are prohibited. By reference to the statute prescribing these degrees * * * it will be seen that no man is permitted to marry his sister's daughter, and no woman her mother's brother. And we think it quite clear that such marriages are equally prohibited whether the parties or their parents are legitimate or illegitimate, or of the whole or the half blood."

See also State v. Guiton, 51 La. Ann. 155, 24 South. 784; Williams v. McKeene, 193 Ill. App. 615.

In Burdue v. Commonwealth, 144 Ky. 428, 138 S. W. 296, the defendant was found guilty of the crime of incest, with his half-sister. The judgment was affirmed. The court said (144 Ky. 432, 138 S. W. 297):

"We are clearly of opinion that the word 'sister,' as used in the statute under consideration, applies to and includes a half-sister. So that one who carnally knows his half-sister is as much guilty of incest as though she were a sister of the full blood."

Campbell v. Crampton, 8 Abb. N. C. (N. Y.) 363, involved primarily the conflict of laws. The action was for breach of contract of marriage. The plaintiff was a half-sister of the defendant's mother. The court said (page 373):

"The case is to be considered as though the parties were nephew and aunt; as relatives of the half blood are, equally with those of the whole blood, included in those degrees of consanguinity within which marriages are deemed incestuous."

In view of this uniform line of authorities, we are of opinion that the defendants come within the prohibition of said G. L. c. 272, § 17. The fact that the Legislature has expressly provided in our statute of descent and distribution (G. L. c. 190, § 4) that children of the whole and half blood shall inherit equally is not in conflict with this conclusion. That statute was enacted for a limited purpose. As was said of a similar statute in State v. Wyman, supra, 528 (8 Atl. 900):

"It did not undertake to affect the relations of brethren of the half blood any further than to prescribe, for certain reasons having their origin in the ancient system of feudal tenures, that in the descent of the inheritance a brother of the half blood should be left out."

The jury were warranted in finding the defendants guilty; and, in accordance with the terms of the report, the verdict is to stand.

So ordered.

BEAL v. ATTLEBORO SAV. BANK.

(Supreme Judicial Court of Massachusetts. Suffolk. March 5, 1924.)

1. Mortgages ⟸374—Auction sale under power held in effect mere contract of sale.

An auction sale of land under power in mortgage deed was in effect a mere contract of sale, and the sale was not executed until the deed was delivered, when the title passed to the purchaser.

2. Mortgages ⟸599(1) — Right to redeem continues until sale executed; "sold."

Under R. L. c. 187, § 18, mortgagor's right to redemption continued until the land was "sold" pursuant to power of sale contained in the mortgage deed, and the words "sold pursuant to a power of sale" mean an executed sale as distinguished from a mere contract of sale, and continued until actual delivery of a deed, where writing delivered to purchaser at time of auction sale showed that a future conveyance was contemplated.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sold.]

3. Vendor and purchaser ⟸54—Vendor holds legal title as trustee for purchaser under contract for sale.

Where a contract for the sale of land has been made, but the sale is not then executed, the vendor holds the legal title as trustee for the purchaser.

4. Mortgages ⟸372(4)—Mortgagor entitled to rents and profits between sale and delivery of deed.

Where mortgagee in possession foreclosed and sold the property at auction, the mortgagor was entitled to redeem until deed was delivered,

and the mortgagee was entitled to remain in possession and collect rents and profits between the date of the sale and the date of delivery of the deed as trustee for the mortgagor, and it was immaterial that the purchaser gave a note secured by mortgage dated as of the date of the sale and bearing interest.

Appeal from Superior Court, Suffolk County; Sanderson, Judge.

Suit in equity by Abraham B. Beal against the Attleboro Savings Bank for an accounting. Decree for plaintiff, and defendant appeals. Affirmed.

W. S. Pinkham, of Boston, for appellant.
F. L. Norton, of Boston, for appellee.

CARROLL, J. The plaintiff is the mortgagor of certain real estate. The defendant, the mortgagee, entered to foreclose; and while in possession sold the premises under the power in the mortgage deed, at public auction, on August 23, 1919. The sum bid at the auction sale was the amount due on the mortgage. The receipt given the purchaser by the mortgagee acknowledged that $1,000 had been paid on account of the purchase, and provided for the conveyance of the property on or before September 18, 1919. It contained no provision indicating to whom the rents belonged. The consideration was paid September 18, when the deed was delivered to the purchaser. The mortgage given the defendant by the purchaser was dated August 23, 1919, bearing interest from that date. The defendant accounted to the purchaser for the rents and profits received from August 23 to September 18. This suit in equity is brought by the original mortgagor for an accounting of the rents and profits collected by the defendant between August 23, 1919, the time of the foreclosure sale, and September 18, 1919, when the deed was delivered.

[1] The auction sale was in effect a mere contract of sale. The sale was not executed until the deed was delivered, when the title passed to the purchaser. See Fall River Savings Bank v. Sullivan, 131 Mass. 537; Dennett v. Perkins, 214 Mass. 449, 101 N. E. 994.

[2] Under the statute the plaintiff's right to redemption continued until "the land has been sold pursuant to a power of sale contained in the mortgage deed." R. L. c. 187, § 18. The words "sold pursuant to a power of sale" have been construed to mean an executed sale as distinguished from a mere contract of sale. Referring to these words it was said in Way v. Mullett, 143 Mass. 49, 53, 8 N. E. 881, 883, this clause was "evidently enacted for the purpose of fixing the time when a foreclosure is complete, under the execution of a power of sale in a mortgage. * * * By its terms, until a sale of the premises is completed, the mortgagor, or any person claiming under him, may redeem the same." See Matthews v. Dinner, 237 Mass. 153, 154, 129 N. E. 394.

"A power to sell *executed* to one who relies upon such power, * * * will without doubt pass an unconditional estate to the purchaser. * * * But while the power remains unexecuted, the relation of mortgagor and mortgagee subsists." Eaton v. Whiting, 3 Pick. 484, 491.

The writing delivered to the purchaser at the time of the auction sale shows that a future conveyance was contemplated; and it was in fact executed on September 18.

[3, 4] It has been held in numerous cases, where a contract for the sale of land has been made, but the sale is not then executed, that until the sale is executed the vendor holds the legal title as trustee for the purchaser. Patterson v. J. D. Loiseaux Lumber Co., 92 N. J. Eq. 569, 114 Atl. 336; Bailey v. Coffin, 115 Me. 495, 99 Atl. 447; Curry v. Curry, 213 Mich. 309, 182 N. W. 98. Under this rule, as the purchaser is in equity the owner from the date of the contract of sale, the profits and rents belong to him and the losses fall on him. Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 582. In this commonwealth, however, the principle that the losses fall on the prospective purchaser is not fully accepted. Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65; Libman v. Levenson, 236 Mass. 221, 128 N. E. 13, 22 A. L. R. 560. In Cheney v. Woodruff, 45 N. Y. 98, the question considered was the right of a purchaser at a foreclosure sale to recover the rents accruing between the time of the purchase and the time of the delivery of the deed; it was decided that the rents did not belong to the purchaser. In the course of the opinion Peckham, J., said at page 101:

"But what right had the plaintiff to this rent? He had not possession of the premises until after this term had expired, nor had he any right to such possession. * * * He had not paid all the purchase-money. He had no deed; until he received that, he had no title under a mortgage foreclosure, so as to claim any rent."

Garrett v. Dewart, 43 Pa. 342, 82 Am. Dec. 570, is to the same effect. The sheriff's sale took place on the 21st of May, 1860. The purchaser at that time paid the full price. The deed, however, was not delivered until September 27, 1860, and he was denied the right of the rents accruing from May 21 to September 27. It was said at page 349:

"Profits of land belong to the person who is in rightful possession by himself or his tenants."

It was decided in Astor v. Turner, 11 Paige (N. Y.) 436, 43 Am. Dec. 766, that the purchaser was not entitled to rents which became due before his right of possession commenced. At page 437 this language was used:

"If the purchaser had been entitled to the immediate possession of the premises, by the

terms of the decree and the conditions of the sale, the rents which fell due the next day would have belonged to him. The legal presumption, in that case, would have been that he had purchased in reference to such right."

See Clason v. Corley, 7 N. Y. Super. Ct. 447, 452; Lysaght v. Edwards, 2 Ch. Div. 499.

There was nothing in the agreement of sale made at the time of the auction, showing to whom the rents subsequently accruing, before the sale was completed, belonged, and we are not called upon to decide whether, if such an agreement were made, it would be binding on the mortgagor. Neither are his rights affected by the fact that the purchaser's note, secured by the mortgage, was dated August 23 and carried interest from that date. The defendant was rightfully in possession of the property from the time of the auction until September 18. Up to that time the plaintiff had an equity of redemption; being in possession, the defendant had the right to the rents and profits, and he collected them as trustee for the original mortgagor. Cheney v. Woodruff, supra.

Decree for the plaintiff affirmed, with costs.

COMMONWEALTH v. ROSS.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1924.)

1. Criminal law ⇐150—Prosecution for polygamy held not barred by limitation.

Defendant in prosecution for polygamy was not entitled to have a verdict of not guilty returned, on the ground that the second marriage charged was entered into more than six years before the finding and return of the indictment; it appearing that defendant continued thereafter to cohabit with the second wife and within six years before the finding of the indictment under G. L. c. 272, § 15.

2. Bigamy ⇐1—Statute making polygamy offense held not repealed or modified.

The purpose of G. L. c. 207, § 6, is to provide against the illegitimacy of children and to protect the public interest, and it did not repeal or modify chapter 272, § 15, making polygamy a criminal offense.

3. Criminal law ⇐753(3)—Direction of verdict of guilty held proper.

Where case was submitted on agreed facts and no question of law was involved, action of the court in directing a verdict of guilty was without error.

Exceptions from Superior Court, Suffolk County; Elias B. Bishop, Judge.

John Robert Ross was found guilty of polygamy, and brings exceptions. Exceptions overruled.

Maurice Caro, Asst. Dist. Atty., of Boston, for the Commonwealth.

Killion, Dimento & Mitchell, of Boston, for defendant.

CROSBY, J. This is an indictment for polygamy. At the trial the case was submitted to the jury on the following agreed facts: The defendant, under the name of John Rosbrough, was married on February 5, 1905, at Boston, to Bessie Robinson, who obtained a divorce from him in Chicago in the year 1911; they were remarried at Louisville, Kentucky, in 1912 and lived together for a short time. The defendant was married to Gertrude Traynor on January 11, 1916; they lived together as husband and wife in Boston until some time in August, 1922, when she learned of his previous marriage to Bessie Robinson and left him, and has not since lived with him. Bessie Robinson obtained a divorce from him in Texas on March 14, 1918. Under the laws of that state either party is free to remarry after the final decree is entered. The foregoing is all the evidence submitted. The defendant filed a written motion that a verdict of not guilty be directed in his favor; this motion was denied and the defendant excepted. He also excepted to the refusal of the court to give certain requests for instructions; to the ruling that the divorce granted to Bessie Robinson was not a defense; and to the direction to the jury that a verdict of guilty should be returned.

[1] The indictment charges the crime set forth in G. L. c. 272, § 15, that—

The defendant "having a lawful wife living, to wit, Bessie Robinson Rosbrough, did at Boston, unlawfully marry and have for his wife one Gertrude Traynor, after which the said John Robert Ross * * * did while said Bessie Robinson Rosbrough was still living, during the six years next before the finding of this indictment, unlawfully cohabit and continued to cohabit in said Boston with the said Gertrude Traynor."

The indictment was found in November, 1922, and is drawn in conformity with the second form contained in the schedule of forms of pleading under the heading "polygamy" in G. L. c. 277, § 79. The contention of the defendant that he was entitled to have a verdict of not guilty returned on the ground that the second marriage charged was entered into more than six years before the finding and return of the indictment, cannot be sustained. General Laws, c. 272, § 15, provides that—

"Whoever, having a former husband or wife living, marries another person or continues to cohabit with a second husband or wife in the commonwealth shall be guilty of polygamy. * * *"

The circumstance that the second marriage was entered into more than six years before

the indictment was found is immaterial, as it appears that the defendant continued thereafter to cohabit with the second wife in this Commonwealth, and within six years before the finding of the indictment.

[2] The contention that the defendant is not guilty by reason of St. 1895, c. 427, as amended by St. 1896, c. 499, now G. L. c. 207, § 6, is without merit. That statute was not intended by the Legislature to repeal or modify the statute making polygamy a criminal offense. The purpose of G. L. c. 207, § 6, is to provide against the illegitimacy of children and to protect the public interests. Turner v. Turner, 189 Mass. 373, 375, 75 N. E. 612, 109 Am. St. Rep. 643; Green v. Kelley, 228 Mass. 602, 118 N. E. 235; Gardner v. Gardner, 232 Mass. 253, 258, 122 N. E. 308. The motion for a directed verdict and the requests for instructions were rightly denied.

[3] As the case was submitted on agreed facts, and as no question of law was involved, the action of the court in directing a verdict of guilty was without error. Commonwealth v. Gardner, 241 Mass. 86, 91, 134 N. E. 638.

Exceptions overruled.

MOORE v. MANSFIELD.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1924.)

1. Trusts ⟸44(2)—Evidence held to show money given by plaintiff's deceased wife to defendant was held in trust.

In suit to recover money delivered by plaintiff's deceased wife to the defendant and claimed by the plaintiff as his property, evidence *held* to sustain a finding that the money was given by the plaintiff to his wife for their mutual benefit so that they might some time have a home of their own, and that it was not a gift to her, but a trust created for their joint benefit.

2. Trusts ⟸142 — Joint trust fund went to husband on death of wife.

Where husband from time to time turned money over to his wife for their mutual benefit so that they might some time have a home of their own and a trust was created for their joint benefit, on her death the fund belonged to the husband.

3. Trusts ⟸358(2)—Following trust fund deposited in bank.

Where husband gave money to wife in trust for their mutual benefit, on the wife's death the husband could enforce his claim for the trust money, though the money was deposited in a bank to the credit of the wife's account and became a part of her separate fund, since it will be presumed that withdrawals from the account made by her were from her individual part of the fund and not from that part which consisted of the trust money, so long as there remains in the fund any part of the trustee's own money.

4. Judgment ⟸670, 715(3)—Judgment in action by administrator not res judicata in action by administrator as individual and involving different issues.

An action by an administrator upon a note in one count and in the other for money lent was not res judicata in a suit by the administrator as an individual to recover money delivered by his deceased wife to the defendant and claimed by the plaintiff as his property, it appearing that defendant had given the wife a note for the money and that it had been destroyed on wife's orders, parties and issues being different.

5. Trusts ⟸365(2)—Plaintiff held not guilty of laches.

Plaintiff, in suit to recover money delivered by the plaintiff's deceased wife to the defendant and claimed by the plaintiff as his property in that the wife had held the money as trustee, *held* not guilty of laches, where the suit was brought about four years after the wife's death; it appearing that he had previously brought action to recover the money as administrator of his wife's estate, which was tried shortly before the suit.

6. Appeal and error ⟸263(3) — Failure to give request for ruling not considered in absence of exceptions.

No exceptions having been taken to the failure of the judge to give the defendant's request for rulings, they are not to be considered on appeal.

Appeal from Superior Court, Suffolk County; Frederick J. Lawton, Judge.

Bill in equity by William S. Moore against Mary E. Mansfield to recover money delivered by the plaintiff's deceased wife to the defendant and claimed by the plaintiff as his property. Decree for plaintiff, and defendant appeals. Affirmed.

L. M. Harlow, of Boston, for appellant.
D. M. Lyons, of Boston, for appellee.

CROSBY, J. This bill in equity is brought to recover the sum of $1,244.14, delivered by the plaintiff's deceased wife to the defendant and claimed by the plaintiff as his property. The case was heard by a judge of the Superior Court who found for the plaintiff, and a final decree has been entered ordering the defendant to repay to the plaintiff the amount with interest and costs. The evidence was taken by a commissioner and is annexed to the record. The case is before us on an appeal by the defendant from the final decree.

The bill alleges that the plaintiff married Rose A. Moore on January 14, 1896; that he lived with her until the date of her death on March 27, 1912; that during the period of their married life he turned over to her from time to time sums of money varying in amounts; that the money so given was to be used for the joint support of both, and for the maintenance of their home, and that

sums not needed for these purposes were to be kept by her for him; that the money was deposited in the Westfield Savings Bank in her name, and was charged with a trust in favor of the plaintiff.

There is but little dispute as to the facts. At the date of the marriage the plaintiff's wife had a deposit in the Westfield Savings Bank in her maiden name of Rossey McManus. The account, as appears by the passbook, began with a deposit of $84 on July 28, 1884. At the date of her marriage it amounted to $614. Before and after her marriage various sums on different dates were deposited and withdrawn, and at the date of her death the balance was $1,244.14.

The plaintiff testified that a few days after their marriage his wife withdrew from the bank $300 to pay for household furniture which they had purchased just before the marriage; that he had no money at that time. It appears from the passbook that on January 18, 1899, $300 was withdrawn. He further testified that when he started in business for himself in the fall of 1897, she drew from the account $200 to assist him, and the judge so found. The passbook, however, shows but one withdrawal that fall, which was the sum of $190 on September 14, 1897. The plaintiff also testified that on another occasion his wife drew $25 and gave it to him to help pay his father's funeral expenses; that at other times she withdrew small sums and gave them to him. The book shows that $175 was drawn on October 5, 1898; this is not accounted for. At the time of the marriage and for about three years thereafter they lived in Westfield, and in April, 1899, they moved to Boston and lived there until her death. He was a carpenter, working by the day, during their married life, except for a short time when he was in business for himself. He testified that while residing in Westfield the household bills were paid by him, that he retained a small sum each pay day out of his wages and gave the balance to his wife; that after moving to Boston his wife paid cash for household supplies and that he gave her his wages, first deducting a small sum which he reserved for himself that he "gave it to her so that * * * [they] might sometime have a home of * * * [their] own."

The defendant was a sister of the plaintiff's wife, who was in poor health for some time previous to her death, and on different occasions made long visits at the defendant's house, where she died. The relations between them evidently were very intimate and friendly. On May 20, 1911, while Mrs. Moore was in a hospital in Roxbury, the defendant went to see her and she gave the defendant a written order for the amount of the deposit, to be used by the latter to help in purchasing a house in Springfield. On July 10, 1911 the amount due ($1,244.14) was paid over on Mrs. Mansfield's order as part payment for the house so purchased, and it was agreed between these sisters that when Mrs. Mansfield became settled in the house Mrs. Moore would go there, which she did in June, 1911, and remained until the following October paying no board. In August or September, 1911, the defendant gave to Mrs. Moore a note for $1,244.14, saying "something might happen to me, I might die first." In February, 1912, the defendant, at her sister's request, came to Boston and took her to the defendant's house in Springfield where she died March 27, 1912. The trial judge found that a few days before her death she gave the defendant the note; at that time she said, in substance, "the lawyer says the will I made is not good against my husband, but I want you to have this money and so I am giving you this note as I want you to have the money. Take the note and destroy it." At that time the defendant received and destroyed the note.

[1, 2] In 1899 the deceased made a will in which she left all her estate to Rose A. Mansfield, the defendant's daughter, and named the defendant executrix. The assignment of the deposit, the giving of the note, and the making of the will were unknown to the plaintiff until after the death of his wife. There were no children by the marriage and the estate was less than $5,000. Soon after the death of his wife, the plaintiff was appointed by the Probate Court of Suffolk County administrator of her estate, and having learned of the assignment of the deposit and the giving of the note, on August 1, 1912, he brought an action against Mrs. Mansfield in Hampden county declaring upon the note in one count, and in the other for money lent. The answer was a general denial and payment. The case was tried and judgment entered for the defendant. In February, 1915, on petition of Rose A. Mansfield, the will of Mrs. Moore was allowed, and later the plaintiff was appointed administrator with the will annexed. The trial judge after making specific findings of fact found that "the essential allegations in the plaintiff's bill are true," and ordered that a decree be entered charging the defendant with the full amount of the deposit with interest. This finding cannot be said to be unsupported by evidence and must stand. The effect of the finding being that the money given by the plaintiff to his wife was turned over to her for their mutual benefit, so that they might some time have a home of their own. It is plain that it was not a gift to her, but that a trust was created for their joint benefit, and she having deceased the fund belongs to him. McCluskey v. Provident Institution for Savings, 103 Mass. 300, 302; Jacobs v. Hesler, 113 Mass. 157, 161.

[3] While the money so given her in trust was deposited in the bank to the credit of her account and became a part of her separate fund, and the plaintiff is unable to iden-

tify his money so deposited, still he may enforce his claim, as it will be presumed that withdrawals from the account made by her were from her individual part of the fund, and not from that part which consisted of the trust money, so long as there remains in the fund any part of the trustee's own money. Hewitt v. Hayes, 205 Mass. 356, 361, 91 N. E. 332, 137 Am. St. Rep. 448. We need not consider whether the plaintiff could make a valid gift to his wife to take effect during his lifetime, as there is no evidence to show that any money turned over to her by him was intended as a gift. So far as his testimony is concerned it shows that no gift was intended, and no inference from the entire evidence would warrant a contrary conclusion.

Whether the whole amount of the deposit is charged with a trust in favor of the plaintiff depends upon whether any part of it was the separate property of Mrs. Moore. Upon this question it appears as previously stated that at the date of her marriage the deposit amounted to $614; that afterwards she drew out $300 to pay for household furniture; and the plaintiff testified that she drew $200 to help him in going into business, and $25 to assist in paying the funeral expenses of his father. Other small sums which she drew at various times and gave to him need not be considered, as he was unable to state the amounts or times when they were so paid. In addition to the above sums drawn from the bank, amounting to $525, it also appears that she drew $175, which is not accounted for and which must be presumed to have been drawn from her own fund. Hewitt v. Hayes, supra. It is therefore plain that her total withdrawals were considerably in excess of the balance of her deposit at the time of their marriage. It follows that the entire deposit at the time of her death is charged with a trust and is the property of the plaintiff.

[4] The contentions that the judgment for the defendant in the action brought against her by the plaintiff as administrator is res adjudicata, and that the doctrine of election applies, cannot be sustained. The plaintiff in this suit, brought in his individual capacity, is not the same plaintiff as in the action at law. Moreover, the issues tried and determined in that action are not the same as those in the present case. Accordingly the former judgment is not a bar to the maintenance of this proceeding. Corbett v. Boston & Maine Railroad, 219 Mass. 351, 357, 107 N. E. 60, 12 A. L. R. 683; Frost v. Thompson, 219 Mass. 360, 367, 369, 106 N. E. 1009; Rollins v. Bay View Auto Parts Co., 239 Mass. 414, 422, 132 N. E. 177.

[5] It cannot be ruled as matter of law that the plaintiff is precluded from maintaining the bill on the ground of laches. The record shows that the action was brought by him as administrator in 1912, the year in which his wife died; that it was not tried until March 13, 1916; and that the present bill was filed on April 11, 1916. Upon these facts it cannot be said that the plaintiff delayed an unreasonable time in bringing the bill.

[6] No exceptions having been taken to the failure of the judge to give the defendant's requests for rulings, they are not before us. As the final decree was not unwarranted it must be affirmed.

So ordered.

H. P. HOOD & SONS et al. v. PERRY.

(Supreme Judicial Court of Massachusetts. Suffolk. March 5, 1924.)

1. Landlord and tenant ⇐104—Grant of lessee's entire estate an assignment of lease.

A transfer by a lessee corporation of its entire assets and business to another corporation constituted an assignment of lease owned, warranting termination of the lease as provided therein for assignment, though there was no substantial change in the management of the business.

2. Evidence ⇐448—Transfer of corporate assets in unambiguous language not controlled by parol evidence.

Where the language of a grant by one corporation of all of its assets and business to another corporation was free from ambiguity, parol evidence was inadmissible to show that it was not intended to include a leasehold interest, which the lessor was attempting to terminate because of an assignment in violation of the terms of the lease.

Report from Supreme Judicial Court, Suffolk County.

Bill in equity by H. P. Hood & Sons and another against Alonzo W. Perry for injunctive relief and specific performance of a lease. On report. Interlocutory decree to be entered sustaining defendant's exceptions to parol evidence, and final decree to be entered dismissing the bill.

H. W. Ogden, of Boston, (C. M. Gordon, of Boston, on the brief), for plaintiffs.

J. E. Hannigan, of Boston, for defendant.

CARROLL, J. The defendant leased in January, 1915, to the H. P. Hood & Sons, a corporation organized under the laws of Maine, real estate in Boston, for the term of 11 years and 11 months from February 1, 1915. The lease contained a covenant that the lessee was not to assign or underlet, in whole or in part, without the written consent of the lessor, and was made on condition "that if the lessee fail or neglect to observe and perform any of the covenants herein con-

tained, * * * the lessor may * * * terminate this lease, enter upon the said premises," and expel the lessee. H. P. Hood & Sons took possession of the premises February 1, 1915.

H. P. Hood & Sons, Inc., a Massachusetts corporation, was organized in February, 1920. On February 2 of that year, the Maine corporation executed a document by which it sold, assigned and tranferred to the Massachusetts corporation the entire property and assets, real, personal and mixed, and "all its business and good will"; the Massachusetts corporation being formed to take over the assets and carry on the business of the Maine corporation. Since February, 1920, the Massachusetts corporation has been in possession of the leased premises and has conducted the business therein without interruption or substantial change in the management, claiming rights under the lease to the Maine corporation, and it has paid the rent of the premises since that time.

The defendant was not told, and had no notice of any change, and "was not notified of the execution and delivery of the document" transferring the assets of the Maine corporation to the Massachusetts corporation, and no request was made of the defendant by the Maine corporation to assign or underlet. In May, 1920, the president of the Maine corporation notified the Attorney General of Maine that the corporation had ceased to transact business and asked to be excused from filing its annual return. This suit is brought to restrain the defendant from interfering with the possession of the leasehold premises, by attempting to enforce the forfeiture of the lease because of its assignment to the Massachusetts corporation.

[1] The deed of February 2, 1920, from the Maine corporation to the Massachusetts corporation conveyed to the grantee the entire property and assets of the grantor, "of every kind and description and wherever situate," and "all its business." It was a grant of the lessee's entire estate and was an assignment of the lease. Sanders v. Partridge, 108 Mass. 556; Ryder v. Loomis, 161 Mass. 161, 36 N. E. 836. The two corporations were separate and different legal entities. Marsch v. Southern New England Railroad Corp., 230 Mass. 483, 498, 120 N. E. 120; Osgood v. Tax Commissioner, 235 Mass. 88, 91, 126 N. E. 371. As was said in Brighton Packing Co. v. Butchers' Slaughtering & Melting Association, 211 Mass. 398, at page 403, 97 N. E. 780, at page 782:

"These are two distinct corporations, created by the laws of two different states. The powers of each corporation are limited and controlled by the statutes of the state which created it."

The Maine corporation acquired under the lease an estate for years—a leasehold interest, which was a part of its entire property and assets, which passed by the deed of conveyance. Sanders v. Partridge, supra. McNeil v. Kendall, 128 Mass. 245, 35 Am. Rep. 373. The Maine corporation, as found by the master, ceased to pay the rent and vacated the premises; its grantee entered and took possession and paid the rent. The covenant against assignment, therefore, having been broken, the lessor had the right to enter and terminate the lease. See Trask v. Wheeler, 7 Allen, 109, 111; Saxeney v. Panis, 239 Mass. 207, 210, 131 N. E. 331.

[2] The language of the grant was free from ambiguity and could not be controlled by parol evidence. There is nothing in the situation of the parties which rendered evidence of this kind admissible. See Taylor v. Kennedy, 228 Mass. 390, 395, 117 N. E. 901; Gold v. Boston Elevated Railway, 244 Mass. 144, 138 N. E. 251.

Relief cannot be granted against the forfeiture by permitting the assignment of the lease from the Massachusetts corporation to the Maine corporation. This corporation has transferred all its assets to its successor; the Massachusetts corporation is in possession of its property and carries on the business in the leased premises. In such circumstances no ground is shown for relief from the forfeiture provided in the lease.

An interlocutory decree is to be entered, sustaining the defendant's exceptions to the parol evidence tending to show that it was not intended to include the leasehold interest in the deed of February 2, 1920, and overruling the plaintiff's exception, and a final decree is to be entered dismissing the plaintiff's bill with costs.

So ordered.

LYTTLE v. MONTO.

(Supreme Judicial Court of Massachusetts. Middlesex. March 6, 1924.)

1. Negligence ⇐22½—Automobile owner not liable to guest except for gross negligence.

Owner of automobile is not liable for injuries to a guest in the absence of gross negligence.

2. Negligence ⇐136(18)—Whether boy on automobile truck was mere licensee held for jury.

Where defendant operating an automobile truck asked a boy where certain place was and not being able to understand told the boy to jump on the truck and they drove to such place and thereafter the defendant told the boy to climb on the truck and he would take him home, whether the boy on the way home was a mere licensee or entitled to the exercise of reasonable care *held* for the jury.

3. Negligence ⟸134(4)—Finding of negligence as to boy on truck sustained.

In an action by boy for injuries received when thrown from defendant's automobile truck, evidence *held* to sustain a finding that defendant was negligent in the operation of the truck.

Exceptions from Superior Court, Middlesex County; J. Walsh, Judge.

Action of tort in behalf of William Lyttle, a minor, against Louis F. Monto, to recover damages for injuries sustained while riding upon the defendant's auto truck. Verdict for plaintiff, and both parties bring exceptions. Exceptions overruled.

Patrick J. Duane, of Waltham, for plaintiff.

Dallinger & Stearns and James L. Edwards, all of Boston, for defendant.

DE COURCY, J. The case went to the jury on the amended declaration, designated as the "third count," and there was a verdict for the plaintiff. The only exception is to the refusal of the judge to direct a verdict for the defendant. On the evidence most favorable to the plaintiff the jury could find the material facts to be as follows: On the afternoon of May 16, 1921, the defendant Monto was operating an automobile truck owned by him. At the corner of Lowell and Chestnut streets in the city of Waltham he saw the plaintiff, a boy nine years of age, and asked him where "Dolan's Paint Shop" was, on Alder Street. The boy told him, but Monto "didn't quite understand," and said "Jump on and show me." Thereupon the boy climbed upon the running board, and went with Monto to Dolan's place, which was about a quarter of a mile distant. The truck was backed up the driveway and some barrels were there delivered. The defendant then said "Jump on, kid, and I'll drive you home." The boy thereupon jumped upon the running board, grasping a post or upright, and Monto started down the driveway, driving slowly. Just before reaching the sidewalk he suddenly put on speed, turned quickly to the right, the car went over the curbstone, and the plaintiff was thrown to the ground and injured.

[1-3] The controlling question is whether at the time of the injury the plaintiff was a mere guest, in which event the defendant would not be liable to him in the absence of gross negligence, or whether he was riding in the truck at the request and for the benefit of the defendant. West v. Poor, 196 Mass. 183, 81 N. E. 960, 11 L. R. A. (N. S.) 936, 124 Am. St. Rep. 541; Flynn v. Lewis, 231 Mass. 550, 121 N. E. 493, 2 A. L. R. 896. The instructions to the jury were clear and comprehensive, and the verdict necessarily involves a finding that the plaintiff was not a mere licensee, but one legally entitled to the exercise of reasonable care on the part of the defendant. There can be no dispute that such was the relation between them while the automobile was on the way to the paint shop. We are of opinion that the jury were warranted also in finding that the same relation and standard of duty continued while the defendant was returning the boy to the place where he sought his assistance, near his home, and a quarter of a mile away. Loftus v. Pelletier, 223 Mass. 63, 111 N. E. 712. There was ample evidence that the defendant was negligent, and that the plaintiff was in the exercise of due care.

Admittedly it is now unnecessary to consider the exceptions taken by the plaintiff.

Exceptions overruled.

MABEE v. HERSUM.

(Supreme Judicial Court of Massachusetts. Middlesex. March 8, 1924.)

Master and servant ⟸39(2)—Allegation of consideration for contract held not supported by evidence.

Allegation that defendant promised and agreed that, if plaintiff would buy stock, he would pay her a salary and dividends upon the stock, with the proceeds of which she could pay for the stock on installments, was not supported as to the consideration for the promise by evidence that, after plaintiff had arranged to buy the stock from a third person, defendant said he would employ her until her shares were paid for, and that he would be able to pay dividends, and she would be able to pay for her shares, and the variance was fatal.

Exceptions from Superior Court, Middlesex County; Frederick M. MacLeod, Judge.

Action of contract by Dorothy M. Mabee against Ernest L. Hersum. Verdict for plaintiff, and defendant brings exceptions. Exceptions sustained.

J. L. Edwards, of Boston, for plaintiff.

J. H. Morson, of Boston, for defendant.

PIERCE, J. This is an action of contract. The first count of the declaration alleged that—

"The defendant on or about August 1, 1920, promised and agreed with the plaintiff that if she would buy seventy-one (71) shares of stock in Hersum & Company, a Massachusetts corporation, by whom she was at that time employed as bookkeeper and of which he was at that time majority stockholder, he would pay her a salary, and dividends upon said shares, with the proceeds of which she could pay for said shares upon installments. And the plaintiff says that in consideration of the said promise of the defendant she paid two thousand (2,000) dollars on account of the purchase price of said shares and signed notes for five

tervals in installments over a period of three years. And the plaintiff says that the defendant, wholly regardless of his said promises and agreements, discharged the plaintiff from her position aforesaid without any cause, whereby she was unable to pay for said seventy-one (71) shares as she agreed, thereby losing the two thousand (2,000) dollars she had paid on account, and the said shares of stock, for which she claims damages of the defendant."

At the close of the testimony the defendant made a motion in writing that the court instruct the jury to return a verdict for the defendant on count 1 of the plaintiff's declaration. The motion should have been allowed.

No evidence whatsoever was offered by the plaintiff in support of the allegation of the declaration "that the defendant on or about August 1, 1920, promised and agreed with the plaintiff that if she would buy seventy-one (71) shares of stock in Hersum & Company * * * he would pay her a salary, and dividends upon said shares, with the proceeds of which she could pay for said shares upon installments." The testimony of the plaintiff, as also that of her husband, was to the effect "that after she had made her arrangements with [one] Farnham to buy his seventy-one shares of stock in the corporation she discussed definitely for the first time with the defendant the terms on which she was to buy the stock"; and that the defendant said "he would employ * * * [her] until * * * [her] shares were paid for"; that "it would take three years"; that "he would be able to pay dividends and * * * [she] would be able to pay for * * * [her] shares."

The promise of the defendant to employ the plaintiff until she could pay for her shares of stock purchased from Farnham with the proceeds of her salary and possible corporate dividents, if based upon any legal consideration, is supported by a consideration which in no respect is the equivalent to the alleged promise to pay salary and dividends to the plaintiff if she would buy seventy-one shares of stock in Hersum & Company. Failure to prove the consideration upon which the promise set out in the declaration rests, leaves the promise without any legal consideration to support it. Such a promise is clearly nonenforceable. Moreover, the variance between the allegations of the declaration and the proof reaches to the life of the action itself. The difference is radical, and required the presiding judge to sustain the motion for a directed verdict, for the reason that the variance went to the merits of the case, and the evidence was entirely inadequate to sustain the allegation of the declaration. Shaw v. Boston & Worcester Railroad Corp., 8 Gray, 45, 72; Stone v. White, 8 Gray, 589, 594; Humphrey v. Totman, 204 Wheelwright, 240 Mass. 221, 133 N. E. 106.

The second count having been withdrawn, and there being no case for the plaintiff on the first count, the first request, that upon all the evidence the plaintiff was not entitled to recover, also should have been given.

Exceptions sustained.

WRIGHT v. GRAUSTEIN.

(Supreme Judicial Court of Massachusetts. Suffolk. March 3, 1924.)

Set-off and counterclaim ⇐59—Defendant not entitled to have excess of damages caused by plaintiff's breach of contract recouped as against assigned claims.

In an action upon an account annexed for milk sold and delivered by plaintiff and other persons, who assigned their claims to him before action commenced, defendant was not entitled to have any excess of damages caused by plaintiff's breach of contract, not necessary to offset and extinguish plaintiff's individual claim, recouped as against the assigned claims, in view of G. L. c. 231, § 5.

Appeal from Municipal Court of Boston, Appellate Division.

Action of contract by William H. Wright against Ida S. Graustein, to recover upon an account annexed for milk sold and delivered by plaintiff, and other persons who assigned their claims to him. From orders of the appellate division of the municipal court of the city of Boston granting a new trial, and dismissing a report, the defendant appeals. Affirmed.

W. A. Graustein, of Boston, for appellant.

F. W. Campbell, of Boston, for appellee.

PIERCE, J. This action, brought in the municipal court of the city of Boston, is one in which the plaintiff seeks to recover in a declaration upon an account annexed, for milk sold and delivered by the plaintiff and seven other persons who assigned in writing their claims to him before the action was commenced. The plaintiff waived at the hearing in the municipal court items eight and ten in the account annexed.

The defendant's answer is a general denial, payment and recoupment. The answer in recoupment is that the defendant on or about April 1, 1916, entered into several oral contracts with the plaintiff and with each of his assignors, to wit: Edward T. Stevens, Dana H. Jennison, E. E. Putnam, Lynn W. Fullam, Ray D. Metcalf, W. W. Davis and Frank H. Farr, to purchase from each of said persons all the milk which they should produce on their farms respectively, between the first day of April and the first

day of October, 1916; that the plaintiff and his assignors on or about May 3, 1916, severally refused to sell or deliver milk to the defendant; that the defendant has always been ready and willing to perform her part of said contracts and each and all of them with the plaintiff and his said assignors; and that by reason of said breaches of said contracts by the plaintiff and his assignors, the defendant has been greatly damaged in her business, and has suffered great loss, and claims to offset the amount of said damages, and by way of recoupment or counterclaim against the cause and causes of action alleged against her by the plaintiff.

The action comes before this court upon two appeals of the defendant from two orders of the appellate division of the said municipal court. The report of the first trial states that it contains all the evidence material to the issues and to the findings of the judge. It also states, and the defendant does not otherwise contend, that the defendant admitted at the trial the sale and delivery to her of the quantity of milk declared for in items one to seven and nine of the account annexed, and further states that the defendant at the trial did not question the quality of the milk or the validity of the several written assignments. After the trial and arguments, the judge found that the plaintiff and his assignors of the several claims sued on had made contracts with the defendant, in substance, to sell and deliver milk to the defendant from April 1 until October 1, 1916; that the plaintiff and his assignors refused and failed to deliver milk as agreed between May 3 and October 1, 1916; and found as a result of such failures that the defendant suffered damage which is specified in each contract, other than upon the contracts of Davis and Putnam, in excess of the respective claims and largely in excess of the plaintiff's combined claims. The judge found for the defendant and reported the case as requested by the plaintiff to the appellate division. That division ordered a new trial and the defendant duly appealed to this court.

The action of the appellate division was right. The reported evidence, which was all the evidence material to the findings of the judge, afforded no justification for the finding that "the plaintiff Wright and his assignors of the claim sued on * * * made contracts with the defendant to sell all the milk they produced." in the terms which are narrated in the first and second paragraphs of the findings of the judge.

At a second trial a judge found that the plaintiff was entitled to recover on account of the claims of Stevens, Putnam, Fullam, Metcalf, Davis and Farr the sum of $211.08; that Wright (the plaintiff) was entitled to recover for milk sold and delivered and for personal services in shipping milk to the defendant, $66.94; and that the assignor Jennison had a claim under a contract with the defendant of $52.25. At the trial the judge found that the plaintiff and one of his assignors, Dana H. Dennison, were still under contract to deliver milk to the defendant at the time the relations between them ceased. Nevertheless the judge found for the plaintiff, and upon request of the defendant reported the case for review to the appellate division. That court sent the case back for a new trial to be confined to the question of damages, to which the defendant is entitled by way of recoupment in answer to the claims of Wright and Jennison. The appellate division in its opinion states:

"The only issue to be retried in recoupment under the rule above laid down, viz. that the difference between the contract price at the time and place of delivery and the market price at that time and place, or, if there was no market then in that place, the price at that time, in the nearest available market, is to be taken as the measure of damages with an allowance for the increased or diminished cost of transportation."

Thereafter there was a new trial confined to the issue as above set forth.

The judge finds that the defendant suffered a total loss of $353.10 by reason of Wright's failure to carry out his contract; and that she suffered a loss of $241.13 by reason of Jennison's breach of contract. He ruled that the plaintiff was entitled to recover $211.08 "under claims assigned to him for collection by * * * Stevens, Putnam, Fuliam, Metcalf, Davis and Farr"; that he was not entitled to recover anything from the defendant under his personal contract to sell milk to her and transport the milk of other dealers; that the plaintiff was not entitled to recover anything against the defendant as assignee of Jennison; and that the defendant had not the right to recoup her damages, sustained from Wright's breach of his contract with her, against the amount due Wright as assignee of the claims of Stevens, Putnam, Fullam, Metcalf, Davis and Farr.

The defendant requested the court to rule:

"1. The defendant is entitled to judgment on her claim in recoupment."

"4. The defendant is entitled to recoup against Wright as the owner by assignment of the claims of Stevens, Putnam, Davis, Metcalf, Farr and Fullam any excess of the damage caused to the defendant by Wright's breach of contract with the defendant and not necessary to offset and extinguish Wright's individual claim as in No. 3."

"5. As the plaintiff is a nonresident, the defendant may offset against his claims, both individual and assigned, the amount of any damage found to have been caused by the plaintiff to the defendant by the breach of his contract."

With respect to these requests the judge ruled:

"That the defendant is entitled to judgment under her plea in recoupment to the extent

tiff would otherwise be entitled to recover under his personal contract with the defendant and also under the contract between the defendant and plaintiff's assignor, Jennison."

He found for the plaintiff in the sum of $211.08, and at the request of the defendant reported the case to the appellate division; which division, after hearing, ordered the report dismissed. The defendant thereupon duly appealed to this court.

The sole question presented on this appeal is whether the defendant was entitled to have any excess of damages, caused by Wright's breach of contract with the defendant, not necessary to off set and extinguish Wright's individual claim recouped as against Wright as the holder of claims above enumerated of $211.08. The six claims against the defendant assigned to the plaintiff in origin were distinct and independent the one from the other. The assignment to the plaintiff did not transfer to him the legal title to them discharged of the defenses and rights of counterclaim, recoupment, or set-off, to which the defendant would have been entitled had these several rights of action been brought in the names of the individual assignors. G. L. c. 231, § 5. In each claim the measure of the defendant's relief in recoupment against the assignor of the claim was limited, by way of reduction of damages, to the amount of that claim; and no judgment could have been entered against such an assignor for any excess of damage sustained by the defendant over the amount necessary to discharge that particular claim. Cox v. Wiley, 183 Mass. 410, 413, 67 N. E. 367; Bennett v. Kupfer Bros. Co., 213 Mass. 218, 220, 100 N. E. 332; Mark v. Stuart-Howland Co., 226 Mass. 35, 43, 115 N. E. 42, 2 A. L. R. 678; Barnett v. Loud, 226 Mass. 447, 450, 115 N. E. 767. The fact that Wright became the owner of all the claims cannot serve in recoupment to make such combined claims bear the burden of a set-off, which would not have attached to them separately had each of them been assigned to different assignees.

It results that the entry must be order dismissing report affirmed.

So ordered.

SANJEAN v. MILLER et al.

(Supreme Judicial Court of Massachusetts. Middlesex. March 3, 1924.)

1. Frauds, statute of ⇐106(2)—Memorandum showing receipt of deposit held insufficient.

Memorandum, "Deposit by check. Received from Mr. S. $50 as deposit on houses No. 107—109—111—113—115—117 Windsor Road, Medford. Deposit subject to purchaser's approval"—*held* not to satisfy G. L. c. 259, § 1, cl. 4, because it failed to show whether the transaction was for sale, for lease, or for what purpose, and did not show any of the terms of the transaction, and left the receipt of $50 from S. being left open to oral testimony.

2. Frauds, statute of ⇐113(1)—Memorandum must contain terms of agreement.

A memorandum to satisfy the statute must contain the terms of the agreement of which it is the memorandum.

Appeal from Superior Court, Middlesex County; F. T. Hammond, Judge.

Suit in equity by John Sanjean against Eugene W. Miller and another, for specific performance of an alleged agreement for the sale of land. From an interlocutory decree sustaining a demurrer, and a final decree dismissing the bill, plaintiff appeals. Affirmed.

V. C. Lawrence, of Boston (D. W. Donahue, of Boston, and J. Sanjean, on the brief), for appellant.

J. F. Gadsby, of Boston, for appellees.

WAIT, J. [1] The only question which arises on this appeal is, whether the following memorandum satisfies the statute of frauds (G. L. c. 259, § 1, cl. 4):

"Deposit by check. Sept. 14/23.

"Received from Mr. Sanjean $50.00 as deposit on houses No. 107—109—111—113—115—117 Windsor Road, Medford. Deposit subject to purchaser's approval.

"Charles E. Howe Co.
"W. E. Young."

On demurrer, we assume that the Charles E. Howe Company was agent for the defendant authorized to sell the land and buildings of the defendant on Windsor Road, Medford, and that an oral agreement for a sale was made as alleged with the plaintiff. Whether or not the plaintiff was the purchaser is not definitely alleged. Perhaps the fair inference from the memorandum is that he was not; since the deposit was made subject to the purchaser's (sic) approval.

The memorandum does not show whether the transaction was for sale, for lease, or for what purpose. It does not show any of the terms of the transaction. It does not even show a completed transaction: for, if some other than Sanjean was the purchaser, then it is a fair inference that the entire proceeding was subject to a future assent by him.

Such a memorandum is inadequate. It fails to give any help in avoiding perjury. Everything except the locus dealt with and the receipt of $50 from Mr. Sanjean is left open to oral testimony.

[2] A memorandum to satisfy the statute of frauds must contain the terms of the agreement of which it is the memorandum. Bogigian v. Booklovers' Library, 193 Mass. 444, 79 N. E. 769.

The demurrer was sustained properly.

Decree affirmed.

MONKS et al. v. BRADFORD et al.

(Supreme Judicial Court of Massachusetts. Suffolk. March 8, 1924.)

Wills ⇐497(2)—"Surviving children" named as substitute beneficiaries of trust held not to include grandchildren.

Under a will leaving property in trust for testator's children and providing that in case of the decease of any child the share of such child should go to his children (if any) otherwise to "my surviving children," *held*, that upon the death of a child without issue his interest went to his brothers and sisters, excluding the issue of brothers or sisters who predeceased him.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Survive—Surviving—Survivor.]

Case Reserved from Supreme Judicial Court, Suffolk County.

Bill by Frank H. Monks and another, as trustees under the last will and testament of John P. Monks, against Harold S. Bradford and others, as persons interested in distribution of income under the will, for instructions. Reserved by a single justice for determination by the full court. Decree ordered.

A. K. Cohen and Max E. Bernkopf, both of Boston, for plaintiffs.

Harold Williams, Jr., of Boston, for defendants.

DE COURCY, J. The will of John P. Monks provides for annuities to his mother and sister from the net income of the trust fund and for the payment to his wife yearly during her life of one third of the net income remaining. It then directs the trustees to pay "the other two thirds to all my children equally to be divided * * * to their sole and separate use during their lives, and if my wife shall die before my children then her third of said income shall go equally to said children in manner afore expressed and after the decease of my mother and sister then their shares shall be divided as afore mentioned amongst my children and in case of the decease of any child or children of mine the share of such child shall go to his or her child or children (if any) otherwise shall be divided between my surviving children as aforesaid until the decease of all my children."

The testator's wife is deceased. He was survived by seven children. Henry died in 1893, unmarried; and thereafter his share in the income was distributed among the six surviving children. The share of Richard, who died in 1911, has since been divided between his two children, Allan B. Monks and Grace B. Monks. Katherine E. (Bradford) died in 1918, and her share in the income has since been paid to her son, Harold S. Bradford. Robert H. died in 1923, without issue. Surviving him are three other children of the testator, Louisa D. Hempel, Frank H. Monks and George H. Monks. The trustees brought this bill for instructions as to whether Robert's share of the income should be divided among his surviving sister and brothers, or whether the children of his deceased brother and sister, Richard and Katherine, should participate in the distribution.

As above stated the language of the will on this point is:

"And in case of the decease of any child or children of mine the share of such child shall go to his or her child or children (if any) otherwise shall be divided between my surviving children as aforesaid until the decease of all my children."

It is generally recognized that a gift over to "my surviving children" in such a testamentary provision means a gift to the children of the testator surviving the life tenant who dies without issue, and that the word "children" does not include grandchildren. Lawrence v. Phillips, 186 Mass. 320, 71 N. E. 541; Dary v. Grau, 190 Mass. 482, 486, 77 N. E. 507; Mullaney v. Monahan, 232 Mass. 279, 283, 122 N. E. 387. We find nothing in the additional words "as aforesaid" to overcome this ordinary meaning of "my surviving children." These words apparently refer back to the provision for the payment of income, "to all my children equally to be divided." The testator uses the similar phrases "in manner afore expressed" and "as afore mentioned" in providing for the contingency of the death of his wife before that of his children; and also when disposing of the shares of his mother and sister after their decease. And reference to the will as a whole confirms our opinion that the testator used the words "my surviving children" in their plain and primary meaning. His main intention was that the division of the income should be made among his children equally, as expressly stated in the codicil. The grandchildren are to have the whole estate after the decease of all the children. The case is within the authority of Lawrence v. Phillips, supra; Meserve v. Haak, 191 Mass. 220, 77 N. E. 377; Wheaton v. Batcheller, 211 Mass. 223, 97 N. E. 924; Anderson v. Bean, 220 Mass. 360, 107 N. E. 964; and Boston Safe Deposit & Trust Co. v. Goldthwait, 247 Mass. —, 142 N. E. 38. It is distinguishable from cases like Boston Safe Deposit & Trust Co. v. Nevin, 212 Mass. 232, 98 N. E. 1051, and Boston Safe Deposit & Trust Co. v. Reed, 229 Mass. 267, 118 N. E. 333, where the language of the will precluded the treatment of the legatees as a class.

The trustees should be instructed to divide Robert H. Monk's share of the income among

his surviving brothers and sister during their lives. The allowance of costs out of the fund, as between solicitor and client, is to be determined by a single justice.

Decree accordingly.

THOMPSON et al. v. LAWRENCE et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 29, 1924.)

Trusts ⇐284—Testamentary trustees held not impowered to create new trust.

Under will creating trust for nephew, providing "whenever, and not before, they (trustees) shall in their discretion be satisfied that it is safe and proper to do so, they may pay to the said A. (the nephew) any part or the whole of the accumulation of said trust, etc.," *held*, that the trustees had no power to arrange a new or different trust or to substitute another kind of oversight of the fund, their power being limited to paying to the nephew a part or the whole of the trust fund absolutely.

Case Reserved from Supreme Judicial Court, Suffolk County.

Petition by William G. Thompson and another, as trustees under the will of George O. Crocker, deceased, touching their duty under a trust created for the benefit of Amos E. Lawrence. Case reserved upon petition, answers, appointment of guardian ad litem, and appearance of Maud Ballington Booth, together with a special power of attorney by her to Mrs. Oliver C. Stevens, for the determination of the full court. Questions answered.

W. G. Thompson, of Boston, for plaintiffs.

W. H. Dunbar, and H. T. Davis, both of Boston, for Amos E. Lawrence.

R. C. Evarts, of Boston, for G. O. C. Lawrence.

G. D. Burrage, of Boston, guardian at litem, pro se.

C. M. Rogerson, of Boston, for Boston Safe Deposit & Trust Co.

F. S. Moulton, of Boston, for Old Colony Trust Co.

E. V. Grabill, of Boston, for Elizabeth C. Clarke.

RUGG, C. J. This is a petition for instructions by the trustees under the will of George O. Crocker touching their duty under a trust created for the benefit of his nephew, Amos E. Lawrence. The testator died in 1887, leaving a will by which disposition was made of a large estate. No wife, issue or parents survived him. His heirs at law and next of kin were six in number: A sister (who had one living son, a nephew of the testator), two nephews (one of whom was Amos E. Lawrence) and a niece, children of a deceased brother, and two nephews, sons of a deceased sister. The testator divided the residue, being the great part, of his estate, into seven equal parts, giving one part in trust for the benefit of his sister, one part in trust for the benefit of Amos E. Lawrence, one part outright to his niece, and one part outright to each of his remaining four nephews. The trust for the benefit of his sister was to terminate at the death of her husband in the event that he should predecease her, and might be terminated at any time on her request in writing. In case the trust was not terminated during her life, she was given power of appointment over the fund, and if this power should not be exercised, the fund was to go to her son, the nephew of the testator, in absolute right. That trust has terminated by her death intestate.

The trust for the benefit of Amos E. Lawrence contained usual provisions for investment both of principal and income. There was no absolute requirements on the trustee to pay any part of either principal or income to Amos E. Lawrence, but the provision was in these words:

"Whenever, and not before, they shall in their discretion be satisfied that it is safe and proper to do so, they may pay to the said Amos E. Lawrence, Junior, any part or the whole of the accumulation of said trust. If any balance of such trust fund shall be remaining in the hands of my executors as such trustees upon the death of the said Amos E. Lawrence, Junior, then, in that event, the same shall be paid by them as follows: If he leave issue, or issue and a widow, in equal shares to said widow and issue, that is to say one half to the widow, and one half divided among his issue. And if he leave no widow, the whole to be divided among his issue. If he leave a widow and no issue, the widow is to receive twenty five thousand dollars of said trust fund, and the remainder is to be divided among my heirs at law. If he (my said nephew) leave neither widow nor issue, then the said trust fund is to be divided among my heirs at law, or so much of the same as shall remain in the hands of said trustees, at the death of my said nephew."

The pertinent facts, so far as shown by the record, as to Amos E. Lawrence are that at the time of the execution of the will he was 19 years old, and then and at the time of the death of the testator, when he was 23 years old, his characteristics were such that it was impossible for the testator to determine definitely whether and when it would be safe and proper to vest in him the absolute title and control of the property left in trust for his benefit or the right to receive either the accumulations or the income of that property free from discretionary power on the part of the trustees to withhold any part thereof.

Amos E. Lawrence is now 59 years of age

and was married in 1919, but has no issue. The trustees have paid to him from time to time sums of money equivalent in the aggregate to the income of the trust fund, but no more. The amount of the trust fund is now about $195,000. It is alleged in the petition that:

"Amos E. Lawrence has requested the trustees to pay over to him the entire fund in order that he may make adequate provision for his wife in the event of his death before her, and may provide for a disposition of the property at his death; and to that end he has proposed simultaneously with such a transfer of the property to himself to settle it in the hands of trustees satisfactory to the petitioners upon an irrevocable trust to carry out the foregoing purposes in such manner as the petitioners may approve."

A further allegation is that a dispute has arisen as to the power of the trustees to comply with this request. It also is alleged:

"If the power given the trustees by the tenth item above quoted means * * * that the trustees cannot at this time pay over the whole of said trust fund to said Amos E. Lawrence unless they are satisfied that said Amos E. Lawrence is personally qualified safely to manage the fund, the trustees cannot pay over the fund because they are not so satisfied. If the power so given the trustee means * * * that the trustees can pay over the whole of said fund if in the exercise of their discretion they are satisfied that said Amos E. Lawrence will in fact take such steps as to insure the safe management of the property in the sense above expressed and both a present and final disposition of it rational and compatible with the best interests of said Amos E. Lawrence, then the trustees in their discretion are satisfied that it is safe and proper to make such payment and desire to comply with the request of said Amos E. Lawrence, and will if authorized make such payment, with such safeguards as may be satisfactory to them and agreed to by him."

The reasons which actuated the testator in establishing the trust respecting Amos E. Lawrence seem fairly inferable. The characteristics of his nephew rendered impracticable a present control by him of any property. If these characteristics continued, it might be necessary in the exercise of sound judgment to protect him against the results of his own abuse of money and to deny to him control of any substantial part of the trust. If these characteristics should disappear, then apparently the desire of the testator was that this nephew should receive the same share as others standing in the same degree of relationship to him. The terms of the trust plainly were such as to guard the fund so long as it remained in trust from creditors of the beneficiary. He had no absolute right to any part of it himself and his creditors could acquire none. The testator covered the whole field of the ultimate disposition of the fund, in case the trustees did not exercise the discretion vested in them by the will to pay it over to his nephew. No power of appointment was given to the nephew. Provision was made for the several events of that nephew leaving (1) a widow and issue, (2) issue without widow, (3) widow without issue, and (4) neither widow nor issue.

The intent of the testator with respect to this trust for his nephew, as manifested by the words of the will, is in marked contrast to his intent with respect to the trust for his sister. She had an absolute right to the income; he has no absolute right to any part of the income. She had an absolute right to demand and receive the whole of the principal of the fund; he has no absolute right to any part of the principal of the fund. She had full power of appointment over the fund; he has no power of appointment. The trustees have no power to confer upon the nephew any one of these property rights conferred by the testator upon his sister but denied by the testator to his nephew. The only power conferred upon the trustees by the will in these respects is, "whenever, and not before, they shall in their discretion be satisfied that it is safe and proper to do so, they may pay" to the nephew "any part or the whole of the accumulation of said trust." This is not a power to arrange a new or different trust or to substitute another kind of oversight of the fund. The line of demarcation made by the testator was between the trust as established in his will, on the one side, and an absolute payment to the nephew of the whole or any part of the fund in the wise, enlightened but untrammeled discretion of the trustees, on the other side. There is no middle ground for the trustees. They are given no power to supervise and approve a new trust having a different aim from that of the testator as a condition precedent to the exercise of their discretion to make a payment. The grant to them of discretionary power is to make to the nephew an absolute payment of the whole or a part of the fund when in the exercise of sound judgment they think that it is safe and proper so to do, having regard to all the factors which determine whether he will make a wise use of the money and be able to manage it with prudence.

The plan proposed in the request now made of the trustees in substance, so far as shown in the record, involves a radical change from the design of the testator. It provides for the creation of a new trust simultaneously with the payment of the fund to the nephew. This new trust might in conceivable circumstances make the fund or its income subject to claims of creditors. If an absolute right to the income is to be conferred on the nephew, that would be a material modification of the purpose of the testator. The avowed design of the proposed trust is to make greater provision for the wife of the nephew than the testator made, and to direct

a way different from that specified by the testator. The proposed powers of the new trustees, whether greater, or less than, or the same as, those of the petitioners, will be exercised by others than those designated by the testator and they will not be responsible to the probate court for the execution of his wishes as declared in his will. The terms of the new trust, subject to its dominant purposes already stated, are to be approved by the petitioners. That is no part of their trust function and is not within the scope of their duties under the will. That is something quite beyond the power "to pay to the said Amos E. Lawrence" any part or the whole of the accumulations of the trust in their discretion when "satisfied that it is safe and proper to do so."

To the first request for instructions the answer is, yes; to the second, no; and to the third, nothing further need be said.

Ordered accordingly.

WHITE v. WHITE et al.

(Supreme Judicial Court of Massachusetts. Middlesex. March 3, 1924.)

Frauds, statute of ⟹144—Wife held not estopped from relying on statute of frauds in preventing husband from living on her property.

Where husband purchased property in the name of his wife with the mutual understanding that one tenement should be used as a home for them both, the wife, who refused to permit the husband to enter the premises and make his home there, is not estopped from relying on the statute of frauds by reason of such mutual understanding, in view of R. L. c. 153, § 2 (G. L. c. 209, § 2); R. L. c. 147, § 1 (G. L. c. 203, § 1); the wife as holder of the legal estate having the right to the possession of the entire estate and the legal and equitable right to exclude the husband therefrom.

Appeal from Superior Court, Middlesex County; Geo. A. Sanderson, Judge.

Bill by Roy S. White against Edith S. White and another to enjoin interference with complainant's use of premises. From a final decree dismissing the bill, plaintiff appeals. Affirmed.

D. H. Fulton, of Boston, for appellant.

J. F. Gadsby, of Boston, for appellees.

PIERCE, J. This case, which is before this court on appeal from a final decree dismissing the bill of the plaintiff, was heard by a judge of the superior court upon the "pleadings, findings of fact and decrees in White v. White, Mdx. No. 4350, and upon the cross bill filed in said case, upon the agreed statement of facts that since the bill and cross bill were filed and the decree entered, the defendant Edith S. White has caused the plaintiff to be excluded from the house, as stated in paragraph seven of this bill of complaint, and upon the bill and answer."

The facts which are material to a decision of the present controversy are that the plaintiff and defendant, husband and wife, in 1916 purchased a house and land in Medford. Title thereto was taken in the name of the wife by the husband "to make sure that it was hers if there should be 'any accident in his business, or if anything happened to him'"; and both husband and wife intended that this property should belong to the wife and that one tenement in it should be used as a home for them both. In 1919 the husband purchased a barn on a neighboring lot, and had it moved onto the rear of his wife's land and set on four concrete posts, with the intention that it should be a permanent improvement of the land which he expected to occupy with his wife. No question is now raised that the barn is not a part of the real estate, as the trial judge found. The husband is a carpenter and has his shop on the second floor of the barn. Since February, 1921, the plaintiff and defendant have not lived together; and the defendant admits in her answer the charge of the plaintiff "that she had no intention of returning to live with her husband, and that she definitely refused to live with him in the premises." After the unappealed decree dismissing the bill and cross bill in White v. White, Mdx. No. 4350, filed October 26, 1922, the defendant in the absence of the plaintiff, on November 25, 1922, assisted by others forcibly entered the house, is now living there, and refuses to permit her husband to enter the premises and make his home there; as also to maintain it as a common home and sustain the relations of husband and wife with the defendant. The defendant further admits the charge of the plaintiff that she has executed a lease of the barn to one Perkins, a straw man for the defendant, without consideration, and that Perkins has also caused a notice to be served upon the plaintiff to quit the barn forthwith.

The plaintiff alleges he has no plain, complete and adequate remedy at law and "brings the present bill to restrain the respondents from interfering with the right which he claims to have to occupy one tenement in the real estate as a home and to use the barn so far as it is a permanent improvement and adjunct of the home he is entitled to have there." He states his claim and alleged right as follows:

"At the outset it must be noted that the complainant does not attempt to avoid the legal title of the wife or to prevent her use and occupation of the premises; he seeks merely to restrain her from interfering with his rights to occupy a tenement in the house as his home

with his use of the barn. This is not a bill to destroy the family and its home, but the complaint of a man who refuses to believe that a wife can live apart from him without justifiable cause and successfully prevent him from living in a tenement which both parties, at the time of purchase of the property, intended should be their home, which common intention was clearly the moving cause for the action which was taken at the time of purchase."

The plaintiff does not now contend that the defendant holds the estate which he caused to be conveyed to her upon a resulting or constructive trust; but contends that the defendant is estopped to deny and defend against his right to have a home in the premises, because when she received the conveyance there was a mutual understanding that one tenement should be used as a home for them both.

In the absence of a fraudulent intent of the defendant when the conveyance was made to her not to abide by the "mutual understanding" an express oral agreement "that one tenement should be used as a home for them both" as an agreement between husband and wife would be void, R. L. c. 153, § 2; G. L. c. 209, § 2; and as a declaration of an express trust would be voidable if, as here, the defendant relied as a defense on the statute of frauds, in so far as such statute relates to the creation of trusts, R. L. c. 147, § 1; G. L. c. 203, § 1, and set it up in plea or answer to the bill. The plaintiff rests his claim to an estoppel upon the single fact that the defendant after years of harmonious married life on the estate refused to live with him or to allow him to live in the tenement which she desired to occupy exclusively herself. Manifestly such refusal and determination cannot estop the defendant from relying on the statute of frauds. As the holder of the legal estate not subject to a trust for the benefit of the plaintiff, the defendant had the right to the possession of the entire estate and the legal and equitable right to exclude the plaintiff therefrom.

Decree affirmed.

BULLUKIAN v. INHABITANTS OF TOWN OF FRANKLIN.

(Supreme Judicial Court of Massachusetts. Norfolk. March 3, 1924.

1. Highways ⇐1—Establishment of public way by prescription.

To establish a public way by prescription, it is necessary for a town to prove an adverse use of the land which has continued for more than 20 years under a claim of right and without the acquiescence of the owner or his predecessors in title.

Mere fact of user by the public for the period required to establish a public way by prescription raises no presumption that such use is adverse, but to establish such use the further fact must be proved or admitted that the general public used the way as a public right, and that it did must be proved by facts which distinguish the use relied on from a rightful use by those who have a permissive right to travel over the private way.

3. Highways ⇐17—Finding of prescriptive right in town not sustained by evidence.

On hearing of petition to register a parcel of land, facts *held* not to warrant a finding that use by public for more than 20 years established a prescriptive right in a town.

Exceptions from Land Court, Norfolk County.

Petition by Harry Bullukian against the Inhabitants of the Town of Franklin to register and confirm his title to certain lands situated in such town. Decree for petitioner, subject to public rights acquired by prescription, and petitioner brings exceptions. Exceptions sustained.

C. E. Haywood, of Boston (C. A. Cook, of Milford, on the brief), for plaintiff.

O. T. Doe, of Boston (A. W. Dana, of Franklin, on the brief), for defendant.

PIERCE, J. This is a petition to register a parcel of land situated in the area of an acute angle formed by the junction of Main and Central streets in the town of Franklin. These streets come together at a railroad bridge under which are the tracks of the New York, New Haven & Hartford Railroad Company. Fronting easterly or southeasterly toward this bridge, and about twenty-five feet therefrom, is the petitioner's main building, for many years the principal general, and only dry goods, store in the village. The respondents claim public rights of way over the space between the building and the bridge and over the sidewalk as now constructed. The respondent town claims no other interest in said premises, and the only issue is the acquirement by the town and the public in this easement.

The petitioner offered no evidence other than the report of the examiner and a plan of the premises, a copy of which is annexed to the bill of exceptions. The bill of exceptions states that—

"The findings of fact and conclusions of fact contained in the decision of the land court are all the facts and summarize all the material evidence in this case upon which the court made its findings of fact and conclusions of fact and made its rulings of law."

The facts found by the judge are as follows: Until 1896 there was a covered piazza across the front of the building, with the

piazza. The streets were country roads. On Main street was a sidewalk close to the building as far as the piazza. On Central street there was the usual footpath along the side of the road also as far as the piazza. From the sidewalk on either side was a step leading up to the piazza. Against the front of the piazza were three hitching posts. The space between the hitching posts and the railroad bridge was used for street purposes as the junction of the two roads. Teams were at times hitched to the posts in front of the store, but until 1896 the public in general passed and re-passed continually over this space. The ground was low and apt to be muddy, and from time to time dirt was filled in over it, although there is no evidence as to who did the filling, until between 1887 and 1889, when it was graded by the town from the bridge back to the piazza. From at least 1862 to the time of the decision of the land court the space from the bridge back to the piazza has been used as a public road. The piazza was used by the public as though it constituted the junction of the sidewalks. People passing on foot did not go around in front of it over the roadway but passed across it. Since 1896, when the piazza was taken away and the entrance to the store moved to the corner of the building at Main street, the space formerly occupied by the piazza has been utilized as a sidewalk, the town laying and maintaining a concrete walk with a curbstone between it and the roadway.

Upon the foregoing facts, which summarize all the material evidence, as a conclusion of fact, the judge found (1) that the portion of the petitioner's land between the sidewalk in front of his building and the bridge is subject to public rights of way; and (2) that the strip of the petitioner's land within the sidewalk on Central street and around the curve from the southeast corner of the petitioner's small building (which was the nearest corner of the former piazza) is subject to the public rights acquired by prescription to use the same as a part of the sidewalk on Central street and the junction of Central and Main streets. To the finding or ruling that from 1862 to the present time the space from the bridge back to the line of the piazza has been used as a public road, and to the findings and rulings embraced in paragraphs numbered 1 and 2, the petitioner duly excepted.

The question presented is whether the drawn warrant a ruling that the public or town has acquired by prescription an easement of way over any portion of the petitioner's land above described.

[1, 2] To establish a public way by prescription, it was necessary for the respondent town to prove an adverse use of the land sought to be registered, which had continued for more than twenty years under a claim of right and without the acquiescence of the petitioner or his predecessors in title to such use. Sprow v. Boston & Albany Railroad, 163 Mass. 330, 339, 39 N. E. 1024. The mere fact of user by the public for the period required to establish a public way raises no presumption that such use is adverse. To establish such a use the further fact must be proved, or admitted, that the general public used the way as a public right; and that it did must be proved by facts which distinguish the use relied on from a rightful use by those who have permissive right to travel over the private way. Hannefin v. Blake, 102 Mass. 297. The requirement that proof of adverse use under claim of right, as distinguished from a use which is permitted, shall be established by proven facts is particularly apposite to a claim of a public right of way, which proved destroys a private way kept open and unobstructed, by the owner of the fee, so that all persons might travel over it in connection with the business of such owner, with the least inconvenience to travellers, prospective customers and the owner.

[3] Upon the facts there is nothing to show that the private way could have been closed to the public, as distinguished from invitees and licensees of the owner, without inconvenience to the owner and injury to his business. There is no fact to prove that use of the way by the public would do any appreciable damage, and it is plain that it would be difficult to ascertain whether the person travelling on the way was doing so as a mere traveller under a claim of right, or was one who used it at the invitation or with the permission of the owner. Durgin v. Lowell, 3 Allen, 398. In the circumstances disclosed the use of the private way described in the petition, including the sidewalk area, by the public at large, did not warrant the finding or ruling that such use established a prescriptive right in the town. It follows that the exceptions must be sustained.

Exceptions sustained.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 29, 1924.)

1. Bills and notes ⇐491—Limitation of actions ⇐195(3)—Burden of proof on plaintiff to show cause of action.

In an action on a negotiable promissory note, the burden of proof was on the plaintiff to show both a cause of action and a suing out of process within the period of limitations.

2. Limitation of actions ⇐160—Indorsements on back of draft not sufficient proof, standing alone, to take note out of statute of limitations.

Indorsements on back of a note were not sufficient proof, standing alone, to take the note out of the statute of limitations; none of them having been made by or in the presence of the maker under G. L. c. 260, § 14.

3. Evidence ⇐589—Testimony of party may be disbelieved, except as constituting admissions.

The testimony of a party might have been disbelieved, except in so far as it constituted admissions against himself.

4. Evidence ⇐21—Common knowledge interest not usually paid in advance.

In an action on mortgage notes, it might have been regarded as common knowledge that interest on such notes is not usually paid in advance or before it is due.

5. Limitation of actions ⇐197(4)—Finding of payment of interest within period sustained by evidence.

In an action on a mortgage note, wherein defendant pleaded the statute of limitations, a finding that payment of interest had been made within six years before the action *held* sustained by evidence.

6. Mortgages ⇐218—Answer pleading accord and satisfaction held to set up affirmative defense casting burden of proof on defendant.

In action on mortgage note, averments in answer that plaintiff agreed with defendant to await his recovery from illness and financial difficulties, and without notice to him repudiated the agreement, and advertised the mortgaged premises for sale, and sold the property, intending to acquire title at less than its market value, and thereby extinguish defendant's liability on the note, and that such conduct constituted an accord and satisfaction, *held* to plead an affirmative defense, the burden of proving which rested on the defendant.

7. Evidence ⇐113(8)—Mortgages ⇐218—Price on resale held not admissible to show defendant damaged by breach of plaintiff's agreement to wait before foreclosing mortgage.

In an action on mortgage note where defense was that plaintiff agreed to wait until defendant recovered from an illness and financial troubles, and would not press him for payment and foreclosure, and subsequently plaintiff repudiated her agreement, and advertised the premises for sale, and sold them to herself, and that offered by defendant as to what plaintiff subsequently sold the property for, as bearing on the value of the property, and to show that defendant had been damaged by the alleged breach by plaintiff of her agreement, and that plaintiff received more than the credit allowed in the net price bid at the foreclosure sale.

8. Mortgages ⇐218—Evidence held insufficient to show bad faith in foreclosing mortgage.

In an action on mortgage note after foreclosure, evidence *held* insufficient to show bad faith, on the part of the plaintiff in her foreclosure of the mortgage and purchase of the property.

9. Mortgages ⇐408—Promise to delay foreclosure without consideration.

Promise of mortgagee to delay foreclosure of mortgage until mortgagor should get over his illness and financial troubles was without consideration, and not binding on the mortgagee.

10. Mortgages ⇐360—Mortgagee bound to exercise good faith in exercise of power of sale.

The mortgagee is bound to exercise good faith in the exercise of the power of sale.

11. Mortgages ⇐360—Mere inadequacy of price insufficient to show bad faith.

Mere inadequacy of price obtained at foreclosure sale falls short of showing bad faith on the part of the mortgagee.

Exceptions from Superior Court, Suffolk County; M. Morton, Judge.

Action on a negotiable mortgage by Pauline F. McCarthy against Isaac Simon. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

W. Hirsh, of Boston, for plaintiff.
E. Greenhood, of Boston, for defendant.

RUGG, C. J. This is an action of contract to recover the balance due on a negotiable promissory note dated August 17, 1912, for $15,000, payable in two years from date to a third person, and indorsed to the plaintiff. One defense is the statute of limitations. So far as here material, indorsements on the notes were:

"$375—interest on within note paid to July 8, 1914. $1,744.50—paid on principal on within note. $331.40—interest on within note to January 5, 1915."

None of these were in the handwriting of the defendant. Conceded facts at the trial were that on July 8 or 9, 1914, a payment by the defendant was made on the principal of the note, the amount of which was in dispute. The sum of $375 due as interest for the six months then last past was paid by the defendant at or about the same time, this being shown by the indorsement. Confessedly the note was outlawed in the hands of the plaintiff, an indorsee, unless a pay-

father insisted upon payment of 25 cents per foot on the land to be released and of six months' interest in advance to January 5, 1915, as a condition of giving the release. His further testimony was:

"Thereupon, I agreed to pay 25 cents and the interest in advance and went out saying I would be back shortly with the money for both release and interest. In an hour I returned wtih a little over $2,900, sufficient to pay for the release, but I told them I could not raise the money for the advance interest. I gave them my word I would pay it within a week, and they took my word. I paid them in two $1,000 bills, one $500 bill, four $100 bills and the rest in small stuff. Within a week I paid plaintiff's father the six months' interest in advance, a little over $300. That was the last money and time I ever paid on that note."

The plaintiff's father testified that no such transactions as were testified to by the defendant occurred except that he, being at that time the record holder, signed a partial release of the mortgage securing the note. The plaintiff testified that she received on July 8 or 9, 1914, $375 as interest, and $1,744 for the release, and that the indorsements of those payments on the note were in her handwriting. The husband of the plaintiff testified:

"I received the last payment on this note. The last indorsement is in my handwriting. I don't remember where I received it, but I received it somewhere from the defendant."

There was conflict upon other incidental matters between the testimony of the defendant and that of the plaintiff and of her father.

[1, 2] The burden of proof was on the plaintiff to show both a cause of action and the suing out of process within the period of limitations, that is, within six years prior to December 24, 1920. Pond v. Gibson, 5 Allen, 19, 81 Am. Dec. 724; Slocum v. Riley, 145 Mass. 370, 14 N. E. 174; Currier v. Studley, 159 Mass. 17, 20, 33 N. E. 709. The indorsements on the back of the note were not sufficient proof standing alone to take the note out of the statute of limitations. None of them were made by or in the presence of the defendant. G. L. c. 260, § 14.

[3-5] The testimony of the defendant might have been disbelieved except so far as it constituted admissions against himself. Lindenbaum v. New York, New Haven & Hartford Railroad, 197 Mass. 314, 84 N. E. 129; Commonwealth v. Russ, 232 Mass. 58, 70, 122 N. E. 176. Disregarding the testimony of the defendant, so far as favorable to himself, the remaining facts, which might ger amount than was due according to the testimony of the defendant. While there is no categorical evidence to the effect that the last installment of interest actually was paid on the note within six years before the date of the plaintiff's writ, yet it might have been regarded as common knowledge that interest on mortgage notes is not usually paid in advance or before it is due, and that hence this payment of interest confessedly made by the defendant in some amount within six months after July 8, 1914, was not made until or about its due date, that is to say, January, 1915, which would be within six years prior to the suing out of the writ. The instructions to the jury on this point were not open to objection. The verdict of the jury shows that the inference was drawn that the payment of interest was not made very long, if at all, before it was due. It cannot be pronounced unwarranted by the evidence and the inference reasonably to be drawn therefrom.

[6] The defendant in his answer "set up payment and also specially averred that 'plaintiff agreed with defendant to await his recovery' from his illness and financial difficulties 'and not to press him in regard to interest or principal on said mortgage, and not to exercise the power of sale contained therein'; that, 'without giving notice to the defendant that she repudiated said agreement or was going to ignore the same, plaintiff subsequently advertised the mortgaged premises for sale under such power of sale and sold the mortgaged property at mortgagee's sale to herself at the price of $12,700, without having given the plaintiff any adequate opportunity to turn himself around and protect himself,' 'intending to acquire the title to the mortgaged property at less than its fair market value'; that, by the aforesaid conduct, the plaintiff did not act in good faith as defendant's mortgagee, and that her conduct in the premises had 'extinguished the defendant's liability on said promissory note,' and constituted in law an 'accord and satisfaction' thereof."

The averments of the answer constituted the pleading of an affirmative defense, the burden of proving which rested on the defendant. Wylie v. Marinofsky, 201 Mass. 583, 584, 88 N. E. 448; Taylor v. Weingartner, 223 Mass. 243, 248, 111 N. E. 909; Hughes v. Williams, 229 Mass. 467, 470, 118 N. E. 914.

The plaintiff, in August, 1915, foreclosed the mortgage by which the note was secured, purchasing the property covered by it herself and crediting on the note $12,563 after de-

defendant testified in substance that in the spring of 1915, he was sick and in financial troubles, and, being pressed for payment of the mortgage by the plaintiff, he talked with her on the telephone and told her his conditions; that she told him not to worry about them, that she would wait until he got over his illness and financial troubles, and would not press him for payment or foreclosure, and he believed her; that, subsequently, in August, when he was sick abed, he accidentally learned from one Gould, an attorney, that the mortgage was advertised for foreclosure on the next day, and he sent the attorney to the sale to protest against it. Gould testified that he went to the sale, protested against it, and that it was continued by the plaintiff's auctioneer for one week. There was other evidence to the effect that the sale was continued for a week. There was evidence, also, that the plaintiff's father had sold the property to the defendant for $20,000 in 1912.

[7-9] "As bearing on the value of said property and to show that the defendant had been damaged by the alleged breach of said agreement to wait, and that the plaintiff, by such foreclosure, got more than the credit allowed in the net price bid at the foreclosure sale, defendant attempted to prove what plaintiff subsequently sold the property for, contending that he expected to show that it was sold for much in excess of the price so bid at the sale." This offer of evidence was excluded rightly. Vahey v. Bigelow, 208 Mass. 89, 93, 94 N. E. 249. It and all the other evidence in the case was insufficient to show bad faith on the part of the plaintiff in the foreclosure of the mortgage. The note was long overdue. The right to foreclose was complete and indisputable. There is nothing to indicate that there was not full compliance with every requirement of the mortgage as to foreclosure, or that there were not numerous bidders at the sale. The promise of the plaintiff to delay foreclosure of the mortgage was without consideration and hence was not binding upon her. Williams v. Sneirson, 225 Mass. 199, 114 N. E. 297; Downing v. Brennan, 232 Mass. 535, 122 N. E. 729; Barnett v. Rosen, 235 Mass. 244, 126 N. E. 386; Rowland v. Hackel, 243 Mass. 160, 137 N. E. 265.

[10, 11] The plaintiff was bound to exercise good faith in the exercise of the power of sale. Bon v. Graves, 216 Mass. 440, 103 N. E. 1023; Stevenson v. Dana, 166 Mass. 163, 170, 44 N. E. 128. Mere inadequacy of price obtained at the foreclosure sale falls short of showing bad faith. Learned v. Geer, 139 Mass. 31, 29 N. E. 215; O'Brien v. Logan, 236 Mass. 507, 511, 128 N. E. 878; Vahey v. Bigelow, 208 Mass. 89, 93, 94 N. E. 249. All the evidence in its aspect most favorable to the plaintiff fails to sustain any answer. Radley v. Shackford, 226 Mass. 435, 115 N. E. 924; Manning v. Liberty Trust Co., 234 Mass. 544, 125 N. E. 691, 8 A. L. R. 999; Stone v. Haskell, 212 Mass. 283, 98 N. E. 1032.

There was no error of law in the instructions given to the jury or in the denial of the requests for rulings.

The exception touching the expenses of foreclosure was waived.

Exceptions overruled.

OLSON'S CASE.

(Supreme Judicial Court of Massachusetts. Worcester. March 3, 1924.)

1. Master and servant ⟸388—Illegitimate child of employee not entitled to compensation as a "dependent" or "child" when not living with him.

An illegitimate child does not come within the meaning of the words "child" or "children," as used in G. L. c. 152, § 32, and is not next of kin, and although an illegitimate child may in fact be a "dependent" if a member of an employee's family and dependent in whole or in part on his earnings, such child is not entitled to compensation where living with its mother entirely apart from the employee, although supported by him.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Child—Children; Dependent.]

2. Master and servant ⟸417(4¼), 418(4)—Copies of decision of reviewing board should be certified, but proceedings assumed regular.

Superior court has no jurisdiction to enter a decree in a workmen's compensation proceeding unless copies of the decision of the reviewing board submitted to it are certified as required by G. L. c. 152, § 11; but, where attention was not called to the defect below, it may be assumed, in case of doubt, that the proceedings were regular.

Appeal from Superior Court, Worcester County; Webster Thayer, Judge.

Proceeding by Helen Olson, p. p. a., under the Workmen's Compensation Act, to obtain compensation for the death of her father, opposed by the Royal Indemnity Company, insurer. Claimant was denied compensation, and appeals from decree of superior court. Affirmed.

Carl H. L. Bock, of Worcester, for appellant.

T. H. Calhoun and Edw. J. Sullivan, both of Boston, for appellee.

WAIT, J. This is an appeal by a claimant under the Workmen's Compensation Act (G. L. c. 152).

The board member found that the em-

jury received in the course of and arising out of his employment; that, as was admitted, the claimant was the employee's illegitimate child; that the claimant was dependent on the employee and actually was being supported by him; and that at the time of the injury, she was not living with the employee, but was living with her mother apart from him. The board member dismissed the claim for compensation on the ground that the claimant was not a member of the employee's family.

After a claim of review, the Industrial Accident Board affirmed and adopted the findings and rulings of the board member.

The insurer requested the following rulings:

"1. That the claimant has not sustained the burden of proving that the death of the employee arose out of and in the course of his employment.

"2. That upon all the evidence the causal connection between the death of the employee and his employment is a matter of speculation and conjecture.

"3. That the claimant not being a member of the employee's family, nor his next of kin, is not a dependent within the meaning of the Act."

Numbers 1 and 2 were refused. Number 3 was given.

[1] The first two rulings are not open on this appeal. The third ruling was correct. It is settled by Gritta's Case, 236 Mass. 204, 127 N. E. 889, that an illegitimate child does not come within the meaning of the words "child" or "children" as used in G. L. c. 152, § 32, although an illegitimate child may, in fact, be a "dependent" within the statute, if a member of the family of the employee and dependent in whole or in part on his earnings. An illegitimate child is not next of kin to the father.

The claimant lived with her mother entirely apart from the employee, although supported by him. She was not a member of the employee's family. Cowden's Case, 225 Mass. 66, 113 N. E. 1036; Mahoney's Case, 228 Mass. 555, 117 N. E. 794. See Broadbent's Case, 240 Mass. 449, 452, 134 N. E. 632.

[2] It was suggested, for the first time, in this court, that the copies of the decision of the reviewing board submitted to the Superior Court were not certified as required by the statute, G. L. c. 152, § 11. If true, the Superior Court had no jurisdiction to enter the decree appealed from. Sciola's Case, 236 Mass. 407, 412, 128 N. E. 666. We are not certain with regard to the fact. Had attention been called to this defect, if indeed the defect existed, it could readily have been remedied. We feel justified in assuming that the proceedings were regular and in dealing with the appeal. The decree of the Superior Court does not in terms dismiss the "and her claim is dismissed." As so amended, the entry must be

Decree affirmed.

CONROY v. MAXWELL.

(Supreme Judicial Court of Massachusetts. Middlesex. March 1, 1924.)

1. Death ⇐58(1) — Deceased presumed to have exercised due care.

In action for death, where the conduct of the deceased at the time of the accident is not fully disclosed by the evidence, she is presumed to have been in the exercise of due care, under St. 1914, c. 553, G. L. c. 231, § 85.

2. Landlord and tenant ⇐169(11)—Due care by deceased tenant for jury.

In an action for death of tenant who fell from a piazza when railing broke, whether deceased exercised due care *held* for the jury.

3. Landlord and tenant ⇐169(4) — Tenant takes premises in condition in which he finds them and there is no presumption as to their good repair.

A tenant, in the absence of an express warranty or deceit, takes the premises in the condition in which he finds them, and there is no presumption that they are in good repair, or that they are fit for occupancy.

4. Landlord and tenant ⇐164(1)—No recovery for personal injuries, unless landlord agrees to repair or is negligent.

A tenant cannot recover against his landlord for personal injuries due to a defective condition of the premises let, unless the landlord agrees to repair or is negligent in making repairs.

5. Landlord and tenant ⇐162—Liability for injuries where landlord retains control over part of premises.

Where landlord retains control over halls, entrances, stairways, and passageways used by tenants in connection with demised premises, he owes to the tenants the duty of using reasonable care to keep them in the same condition as they were in or appeared to be in at the time of letting.

6. Landlord and tenant ⇐169(11)—Whether rear piazza and gutter were part of premises demised held for jury.

In action for death of tenant who fell from rear piazza of building containing two tenants, whether the piazza and gutter were a part of the premises let to the intestate, or remained in the control of the landlord, *held* for the jury.

7. Landlord and tenant ⇐169(6)—Evidence held to sustain finding death caused by negligence of landlord.

In action for death of tenant who fell from piazza when railing gave way, evidence *held* sufficient to sustain a finding that death was caused by negligent failure of defendant landlord to keep the railing in repair.

Report from Superior Court, Middlesex County; James H. Sisk, Judge.

Action of tort by William F. Conroy, administrator of the estate of Mary Conroy, deceased, against Beatrice J. Maxwell, for personal injuries sustained, which resulted in her death without conscious suffering. On report after a verdict for plaintiff. Judgment for plaintiff.

Kerwin & Reilly, of Lowell, for plaintiff.

D. J. Donahue and J. P. Donahue, both of Lowell, for defendant.

CROSBY, J. This is an action of tort brought to recover for the death of the plaintiff's intestate. The case is before us on a report of the trial judge after a verdict for the plaintiff.

On September 12, 1921, the date of the accident, which resulted in the death of the intestate, the defendant was, and for at least eighteen years before that time had been, the owner of a building situated on the northerly side of Bartlett street in Lowell. The building had two tenements; the upstairs one being occupied by the plaintiff's intestate for the seventeen years before her death, and that downstairs by one Fee, both as tenants at will. Each tenement had a separate front entrance; and there were separate rear entrances which were reached by entering the yard on the easterly side of the building, which yard sloped gradually downward from the level of the street. An uncovered piazza, ten feet long and three feet wide, extended from the northeast corner of the house along a portion of the easterly end and was reached from the yard by four or five steps at its south end which was about five feet above the ground; and the northerly end about seven feet above the ground. Along the north and east sides of the piazza and about three feet above the floor was a railing supported by three posts. Two doors led from the westerly side of the piazza to the tenements, the southerly door to the one downstairs and the northerly door to that occupied by the deceased. The southerly door was just north of the southerly end of the piazza, and the northerly door was just south of its northerly end. The piazza was used for no purpose except as a means of entrance and exit. A piazza was built into the second story as part of the upstairs tenement, the easterly line of which was parallel with and directly above the westerly line of the piazza downstairs. A gutter about ten feet long was attached to the eaves at the easterly edge of the roof just above the upper piazza and ran parallel with it to its northerly end.

When the tenancy of the deceased began the downstairs piazza and the gutter were in good condition; later the piazza showed signs of deterioration; in 1917 it was noticeably dilapitated, and thereafter its condition became worse. There was evidence that within a year before the accident the deceased on several occasions had called the defendant's attention to the condition of the piazza and asked her to repair it, and that the defendant replied that she could not do so "until labor came down"; that on August 15, 1921, the occupant of the lower tenement called the defendant's attention to the poor condition of the piazza; that from some time in the year 1917 until the day of the accident the gutter was loose and hung below its proper position from six to eight inches, leaving an open space between it and the edge of the roof; that on the night of the accident it rained; that about three o'clock in the morning Fee was awakened by a loud crash, and went out to the piazza with a search light and observed that the railing on the north side of the piazza was gone, but that the one on the east side was standing; that he saw a portion of the gutter lying on the ground north of the piazza. He further testified that the night before, the north railing was in place. The "loud crash" referred to by Fee was also heard by one Haggerty who lived in an adjoining house.

Margaret Conroy, a daughter of the deceased who lived with her mother, testified that in the morning of the day of the accident she was awakened by her mother about 5:50 o'clock and that shortly afterwards she heard her mother going down the back stairs which led to the lower piazza; that it was her mother's practice to go down at this time every morning "to get the milk"; that she heard her mother open the northerly door leading on to the piazza, and after a space of about four or five seconds she heard "a crash as of splintering wood"; that she arose from her bed and looking down saw her mother lying face down on the ground to the east of the piazza; that she hurried down the back stairs and then noticed that there were no rails or posts standing on the piazza; that she went down the steps to her mother and found her lying with the easterly rail of the piazza beneath her body; that she was lying directly opposite the northerly door leading from the piazza. A certified copy of the death certificate was admitted in evidence in which it was stated that the deceased died "as a result of a fracture at the base of her skull caused by a fall from a piazza." There was evidence that a few hours after the accident the wood at the base of the posts of the piazza was found to be in a decayed condition and that the removal of the northerly rail would greatly weaken the easterly rail.

[1, 2] The conduct of the deceased is not fully disclosed by the evidence. She is presumed to have been in the exercise of due care. St. 1914, c. 553, now G. L. c. 231, § 85. That question, therefore, was for the jury. Mercier v. Union Street Railway, 230 Mass.

Light Co., 231 Mass. 186, 120 N. E. 654.

[3-5] Whether the injuries which the deceased received, and which resulted in her death, could be found to have been due to the defendant's negligence depends upon whether the piazza from which the deceased fell remained in the control of the defendant, and was allowed by her to be in a defective and dangerous condition at the time of the accident. If this piazza was a part of the premises rented to her there is no liability on the part of the defendant. A tenant in the absence of an express warranty or deceit takes the premises in the condition in which he finds them, there is no presumption that they are in good repair, or that they are fit for occupancy. Conahan v. Fisher, 238 Mass. 234, 124 N. E. 13. A tenant cannot recover against his landlord for personal injuries due to a defective condition of the premises let, unless the landlord agrees to repair, or is negligent in making repairs. Galvin v. Beals, 187 Mass. 250, 72 N. E. 969; Conahan v. Fisher, supra, and cases there collected. Stumpf v. Leland, 242 Mass. 168, 136 N. E. 399. It is also settled that where a landlord retains control over halls, entrances, stairways and passageways used by tenants in connection with demised premises, he owes to the tenants the duty of using reasonable care to keep such stairways, hallways and passageways in the same condition as they were in or appeared to be in at the time of letting. Andrews v. Williamson, 193 Mass. 92, 78 N. E. 737, 118 Am. St. Rep. 452; Pizzano v. Shuman, 229 Mass. 240, 243, 118 N. E. 229; Conahan v. Fisher, supra.

[6] It could not have been ruled as matter of law that the rear piazza gutter were a part of the premises let to the intestate; whether such was the fact, or that they remained in the control of the defendant, was a question for the jury. Poor v. Sears, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 272; Hilden v. Naylor, 223 Mass. 290, 292, 293, 111 N. E. 848. Standard Tire & Rubber Co. v. Richardson & Brothers, Inc., 231 Mass. 374, 376, 121 N. E. 29. Both tenants were obliged to pass over the lower piazza in going to and from the rear entrance to their respective homes. There was no railing or other barrier which divided the piazza and nothing to indicate that the whole of it was not intended for the use of both tenants in common. Although the deceased and the members of her family were required to travel over a greater portion of it in passing between their entrance and the piazza steps than the tenant of the lower floor, that circumstance is not conclusive against the plaintiff's contention that the piazza as a whole was intended by the defendant to found that the right of both tenants and the members of their respective families to the use of the piazza was not limited merely to passing back and forth over it, but that each was entitled to use the whole space for any proper purpose. It could have been found as a rational inference that in view of the limited area of this piazza, it was not intended by the defendant that the use by each tenant was restricted to specific parts of it, and only for the purpose of exit and entrance.

[7] The tenant of the lower floor and his wife testified that "In coming and going to and from their tenement by way of the rear piazza, they would use a portion of the railing which had fallen," although the plaintiff on cross-examination testified to the contrary. The fact that the tenant of the lower floor might not have to use it so much or in the same way as the deceased and her family, is not material. Nash v. Webber, 204 Mass. 419, 425, 90 N. E. 872. The jury were warranted in finding that the defendant retained control over it; that the railing was in good condition when the tenancy of the deceased began; that at the time of the accident, seventeen years later, it had become decayed and out of repair; and that the defendant knew of its condition before the accident. It also could have been found as a reasonable inference from the evidence that on the night of the accident the gutter and railing on the northerly end, because of their defective condition, fell, thereby causing the easterly railing to be greatly weakened, and that not long afterwards the deceased went out upon the piazza and came in contact with the easterly railing opposite the rear doorway; that because of its defective condition it gave way and she was precipitated to the ground below. Boutilier v. Malden, 226 Mass. 479, 485, 116 N. E. 251, Ann. Cas. 1918C, 910; Jordan v. Adams Gas Light Co., supra. It could have been found as a fair inference from all the evidence that the defendant retained control of the piazza and that the death of the intestate was caused by the negligent failure of the defendant to keep it in repair. Shipley v. Fifty Associates, 101 Mass. 251, 3 Am. Rep. 346; Wilcox v. Zane, 167 Mass. 302, 45 N. E. 923; Andrews v. Williamson, supra; Fitzsimmons v. Hale, 220 Mass. 461, 107 N. E. 929; Sullivan v. Northbridge, 246 Mass. 382, 141 N. E. 114.

The present case upon its facts is distinguishable from Conahan v. Fisher, supra, and other cases relied on by the defendant. As the case was rightly submitted to the jury the entry, in accordance with the report, must be

Judgment for the plaintiff on the verdict.

FORE RIVER SHIPBUILDING CORPORATION v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 29, 1924.)

1. Taxation ⟸117—Mere possession of franchise not subject to tax.

St. 1919, c. 355, pt. 1, § 2, as amended by St. 1920, c. 549, § 1 (now G. L. c. 63, § 32), imposes an excise only on corporations which are carrying on or doing business, and the mere possession of a franchise to be a corporation is not made subject to the tax.

2. Taxation ⟸117—Performance of government contracts through agents held "carrying on or doing business," and subject to excise tax.

A domestic corporation, which transferred all its assets to a foreign corporation, except its contracts with the government of the United States, which were not assignable, under Rev. St. U. S. § 3797, as to which contracts it made the foreign corporation its agent to perform, was nevertheless "carrying on or doing business," within the meaning of St. 1919, c. 355, pt. 1, § 2, as amended by St. 1920, c. 549, § 1 (now G. L. c. 63, § 32), and was subject to excise tax, as whatever one does by another he does by himself, so far as concerns legal responsibility.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Carry on Business.]

3. Taxation ⟸117—Completing unfinished contracts is "carrying on or doing business," requiring payment of excise tax.

To complete contracts in hand, but unfinished, with the purpose of doing no more business, is "carrying on or doing of business," within the meaning of St. 1919, c. 355, pt. 1, § 2, as amended by St. 1920, c. 549, § 1 (now G. L. c. 63, § 32), providing that domestic corporations carrying on or doing business must pay an excise tax.

Report from Supreme Judicial Court, Suffolk County.

Petition by the Fore River Shipbuilding Corporation against the Commonwealth of Massachusetts, to recover a corporation excise tax alleged to have been exacted illegally. On report by a single justice, who ruled that petitioner was entitled to recover. Petition dismissed.

F. B. Greenhalge, of Boston, for petitioner.

Alexander Lincoln, Asst. Atty. Gen., for the Commonwealth.

RUGG, C. J. This is a petition under G. L. c. 63, §§ 77, 78, to recover a corporation excise tax assessed under St. 1919, c. 355, pt. 1, § 2, as amended by St. 1920, c. 549, § 1 (now G. L. c. 63, § 32), and alleged to have been exacted illegally. The question is whether the petitioner was at the time carrying on or doing business within the meaning of the words of the statute, which provided, with exceptions not here material, that "every domestic business corporation shall be subject to pay annually with respect to the carrying on or doing of business" an excise tax to be computed as set forth in the act. The relevant facts are that the petitioner was organized as a corporation under the laws of this commonwealth in 1913 for the purpose of building ships and for other kindred and incidental purposes. In 1917 substantially all its stock was owned by a Pennsylvania corporation. To the end that numerous corporations owned directly or indirectly by that Pennsylvania corporation might be consolidated into one, a new corporation known as the Bethlehem Shipbuilding Corporation, Limited, was organized under the laws of Delaware. In November, 1917, the petitioner leased its real estate and plant at Quincy to the Bethlehem Corporation for a term of three years from November, 1917, and sold and conveyed to that corporation all its remaining assets, excepting only (as alleged in the bill of complaint) "certain contracts with the United States government which were not assignable" and a railroad not material to the present case. Under an agreement bearing the same date the petitioner entered into a contract with the Bethlehem Corporation, which recited that the former had sold to the latter all its current assets except (1) its corporate franchise, and (2) its contracts with a New Jersey corporation for the construction of submarines, (3) its contracts with the United States, (4) its contracts with others, which, or the ships, vessels or boats being constructed pursuant to the terms of which, have been requisitioned by the United States of America, and (5) its claims against the United States of America. The contract then provided that the petitioner employs, constitutes and appoints the Bethlehem Corporation as its agent "but not in any way as the assignee thereof or of any interest therein to perform and complete" its submarine contracts and all its ship contracts. In a schedule forming a part of that contract 35 different craft are specified, and other work in connection with submarines and destroyers. The Bethlehem Corporation agreed to complete the contracts as required by their terms, and the petitioner agreed to pay to the Bethlehem Corporation all moneys as and when received by it on such contracts. Other provisions of the agency agreement need not be recited. All the remaining property of the petitioner, including the real estate and property previously leased to the Bethlehem Corporation, but excepting said contracts, was conveyed to the Bethlehem Corporation by deed executed late in 1920, but dated December 31, 1918. It has been found that from and after November, 1917, it was the purpose and endeavor of the petitioner to cease from doing any business whatsoever, and within the

meaning of the governing statute it did no business during the period for which the excise is assessed unless the carrying out of its nonassignable contracts with the government of the United States by the Bethlehem Corporation pursuant to the agency contract is the doing of business.

[1, 2] The governing statute imposes an excise only upon corporations which are carrying on or doing business. Mere possession of the franchise to be a corporation is not made subject to this tax. In this respect the present law differs from some earlier statutes. Compare Attorney General v. Massachusetts Pipe Line Gas Co., 179 Mass. 15, 19, 60 N. E. 389. It is the carrying on and doing of business alone upon which is levied the present excise. It may be assumed that, when a corporation has leased all its property and assets and does nothing more than to receive and distribute the rental among its stockholders, it is not carrying on or doing business. Attorney General v. Boston & Albany Railroad, 233 Mass. 460, 124 N. E. 257; McCoach v. Minehill & Schuylkill Haven Railroad, 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842; United States v. Emery, Bird, Thayer Realty Co., 237 U. S. 28, 35 Sup. Ct. 499, 59 L. Ed. 825; Von Baumbach v. Sargent Land Co., 242 U. S. 503, 37 Sup. Ct. 201, 61 L. Ed. 460. The petitioner was doing much more. It was the principal in its contracts with the government of the United States. The United States of America recognized it and it alone as under obligation to complete government contracts to which it was a party. In order to secure continuity of liability of the petitioner from the beginning to the completion of all such contracts, the government provided that the petitioner could in no way assign such contracts. See Rev. St. U. S. § 3797. Doubtless performance of these contracts by an agent was permissible. Hardaway v. National Surety Co., 211 U. S. 552, 29 Sup. Ct. 202, 53 L. Ed. 321. All payments under the contracts were due and were made to the petitioner alone. This is acknowledged and provided for in the agency contract by the petitioner with the Bethlehem Corporation. Performance of the contracts as between the petitioner and the government was the business of the petitioner. A contract of agency with respect to business imports from its essential nature the business of the principal. Any other conception involves a contradiction of terms. Whatever one does by another, he does by himself so far as concerns legal responsibility. That thought is expressed in the Latin, qui facit per alium, facit per se. It is an underlying maxim of the law of agency and is of almost universal application. It extends even into the criminal law. Commonwealth v. White, 123 Mass. 430, 434, 25 Am. Rep. 116. The circumstance that the mechanical and physical execution of the contracts was done by the Bethlehem Corporation under the agency agreement is in this connection of slight consequence. The contracts still were the contracts of the petitioner. The act of the agent was the act of the principal. A foreign corporation may be treated as doing business within this commonwealth when all its activities are conducted solely by an agent holding no corporate office. Reynolds v. Missouri, Kansas & Texas Railway, 224 Mass. 379, 113 N. E. 413, affirmed in 255 U. S. 565, 41 Sup. Ct. 446, 65 L. Ed. 788.

[3] There would be a palpable inconsistency in treating the petitioner with respect to the United States of America as the single person responsible for the execution of these contracts without power of assignment and in holding at the same time that the actual performance of those contracts was not its business because done by the hand of its agent. The factor that it was the intent and design of the petitioner to do no new business is not decisive. It is none the less carrying on or doing of business to complete contracts in hand but unfinished with the purpose of doing no more business. Intent and design are in many connections of great significance. But they cannot prevail in the face of decisive conduct of an opposite character. Performance of live contracts, the obligation of which is to build ships by the instrumentality of an agent, is conduct of unmistakable meaning. It is the doing of business. It overcomes the most solemn asseverations of an intent and design to do no business. It follows as an irresistible result of the facts of this case that the petitioner in causing the performance of these contracts for shipbuilding made by it with the United States through the Bethlehem Corporation as its agent was "carrying on or doing business."

Petition dismissed with costs.

M. E. HALL CO. v. GALE et al.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1924.)

1. Appeal and error ⇐1011(1)—Findings of trial judge conclusive.

On appeal, findings of the trial judge are conclusive, and must stand, where they are not unwarranted, and the evidence is largely oral, and the testimony of witnesses conflicting.

2. Release ⇐13(1)—Release of one partner held supported by consideration.

Partnership creditor's agreement to release from liability one of the partners, if he transferred the property to the other partner, so that the latter might convey it to a corporation, was founded on a valuable and sufficient consideration.

If the consideration is valuable, it need not be adequate.

4. Evidence ⟸249(3)—Declaration of partner after dissolution held not binding on copartner.

Where partnership creditor agreed to release from liability a partner, if he transferred the property to the other partner, so that the latter might convey it to a corporation, a statement made by the partner to whom the property was transferred to the creditor's treasurer, that the first partner had promised to procure a loan for the corporation for the purpose of paying the creditor's claim, could not bind the released partner, where made in his absence, and after the partnership had been dissolved; such statement relating to an undertaking wholly outside the business of the firm.

Appeal from Superior Court, Suffolk County; W. C. Wait, Judge.

Suit by the M. E. Hall Company against Bernard L. Gale and others. Decree for defendants, and plaintiff appeals. Affirmed.

F. M. Carroll, of Boston, for appellant.
H. Kahn and M. H. Slobodkin, both of Boston, for appellee Burman.

CROSBY, J. The defendant Bernard L. Gale and James P. McKeever were formerly engaged in the leather business, as copartners, under the name of Gale Manufacturing Company, and on April 23, 1923, the firm owed the plaintiff a balance of account of $3,037.69. The partnership was dissolved in March 1923, and McKeever retired from the firm.

Thereafter he entered into negotiations with Gale for the purchase of the firm assets, which were to be transferred to a corporation to be organized by McKeever and called the Blue Ribbon Cut Sole Company. At a later date the plaintiff, in consideration of the transfer by Gale of the assets of the Gale Manufacturing Company to McKeever, agreed to release Gale from all liability on account of his indebtedness to the plaintiff for merchandise sold by it to the Gale Manufacturing Company, and to look to McKeever for the payment of such indebtedness. The agreement so entered into is contained in a letter from the plaintiff to Gale as follows:

"You are hereby notified that in order to facilitate the transfer of the assets of the Gale's Manufacturing Company to James P. McKeever and in consideration of such transfer by you to Mr. McKeever, I release you from all personal liability on account of any merchandise sold by me to the Gale's Manufacturing Company, and will look for payment of all bills due me from the Gale's Manufacturing Company to James P. McKeever which he assumes. I acknowledge the receipt of $200.00

The defendant Gale sold and transferred the assets to McKeever in accordance with the terms of the foregoing letter, and took in payment therefor McKeever's unsecured notes for $4,000. On or about May 4, 1923, McKeever caused to be organized the corporation above referred to and turned over to it the assets received from Gale.

[1] It is the contention of the plaintiff that the transfer of the firm assets to McKeever, and by him to the corporation, is fraudulent as to the creditors of the Gale Manufacturing Company; that there was no valid consideration for the release, and that Gale was bound by statements made by McKeever to the plaintiff before the release was delivered, to the effect that Gale had promised to procure loans for the corporation so that the plaintiff's claim would be paid. The trial judge found that Gale made the conveyance to McKeever in good faith, relying on the promise of the plaintiff contained in the release, and that there was no fraud for which Gale was responsible. The findings of the trial judge are conclusive and must stand, as the evidence (which is made a part of the record) shows that they were not unwarranted.

[2-4] The plaintiff properly concedes that if this court is without power to revise the findings the plaintiff is bound by them. It contends, however, that this court stands in the same position as the trial judge, and relies on the rule stated in Old Corner Book Store v. Upham, 194 Mass. 101, 106, 80 N. E. 228, 120 Am. St. Rep. 532, and in Mansfield v. Wiles, 221 Mass. 75, 108 N. E. 901, that when the evidence is documentary, or does not depend upon the credibility of witnesses, this court is in the position of the trial judge with reference to inferences of fact to be drawn from the evidence. That rule is not applicable to the case at bar, as the evidence was largely oral and the testimony of witnesses conflicting, and the judge had a better opportunity to decide upon their credibility. The plaintiff's agreement to release Gale from liability to it, if Gale transferred the property of the manufacturing company to McKeever so that the latter might convey it to the Blue Ribbon Cut Sole Company, was founded upon a valuable and sufficient consideration. If the consideration is valuable it need not be adequate. Train v. Gold, 5 Pick. 380, Barnett v. Rosen, 235 Mass. 244, 249, 126 N. E. 386. The statement made by McKeever to the plaintiff's treasurer that Gale had promised to procure a loan for the corporation for the purpose of paying the plaintiff's claim against the Gale Manufacturing Company, could not bind Gale; it was made in his absence, and after the partnership had been dissolved. The alleged prom-

lated to an undertaking wholly outside the business of the firm.

Decree affirmed with costs.

BAUER et al. v. MITCHELL et al.

(Supreme Judicial Court of Massachusetts. Essex. March 1, 1924.)

1. Injunction ⇐114(1)—County necessary party to suit by agricultural school trustees against county commissioners to restrain certain use of school land.

The county of Essex was a necessary party to a suit in equity, brought in their individual names by four of the seven trustees of the Independent Agricultural School of the county of Essex against the three county commissioners, who are the three remaining trustees of the school, and who also constitute the board of trustees of the tuberculosis hospital of the county on adjoining land, to prevent the defendants from constructing cesspools and filter beds on the school land to afford treatment and disposal of sewage of the hospital; the legal title to all land and property used in connection with the hospital being in the county.

2. Parties ⇐21—One alone financially interested in result of suit necessary party.

Where the sole financial aspects of a suit relate to a party, that party is essential to an adjudication of the issues of the suit.

3. Parties ⇐95(6)—Amendment bringing in county permitted, where action prosecuted against commissioners.

Where a suit has been prosecuted against county commissioners, instead of against the county, bringing in the county as a party would be a formal matter, and an amendment may be allowed making the county a party, in view of G. L. c. 34, § 14, authorizing county commissioners to represent the county, though service of process in proceedings to which a county is defendant commonly must be made on the county treasurer, under G. L. c. 223, § 37.

4. Appeal and error ⇐694(1)—Rule as to effect of findings of master in absence of evidence stated.

On appeal the findings of a master, in the absence of a report of the evidence, must be accepted as true, unless mutually repugnant or contradictory and plainly wrong.

5. Schools and school districts ⇐65—County commissioners held without authority to use agricultural school land for hospital purposes.

The three county commissioners of the county of Essex, who are also trustees of the Independent Agricultural School of the county, and also constitute the board of trustees of the tuberculosis hospital of the county on adjoining four trustees of the school, use part of its lands for cesspools and filter beds with connecting drains to afford treatment and disposal of the sewage of the hospital, the land being bought solely for the school under definite provisions of St. 1912, c. 587, and the general care and control of the school property being vested in the trustees of the school, and the general supervision and control of county property vested by G. L. c. 34, § 14, in the county commissioners not giving them these powers over the school property.

6. Officers ⇐119—Trustees of agricultural school of county could not maintain suit against county and county commissioners concerning school land.

Four trustees of the Independent Agricultural School of the county of Essex cannot maintain a suit in equity against the county and the three county commissioners, who are the three remaining trustees of the school, and who also constitute the board of trustees of the tuberculosis hospital of the county on adjoining land, being both such trustees by virtue of their office as county commissioner, to prevent the construction and maintenance on school lands of cesspools and filter beds with connecting drains to afford treatment and disposal of the sewage of the hospital to the damage of the school; such trustees not being clothed with authority to litigate with the county commissioners.

7. Officers ⇐119—Plain statutory words necessary to authorize one public board to institute suit in equity against another public board.

Plain and unequivocal words or imperative public necessity would be required to authorize one public board to institute suit in equity against another public board of the same public corporation to adjust conflicting contentions as to the boundaries of their respective powers.

Appeal from Superior Court, Essex County; H. A. Dubuque, Judge.

Suit in equity by Ralph S. Bauer and others against John M. Grosvenor, James C. Poor, and Robert Mitchell. The bill was dismissed as to the first two named defendants, and from a decree overruling his demurrer, the remaining defendant appeals, and from the final decree plaintiffs appeal. Decree reversed, and demurrer sustained. Decree to be entered dismissing bill on amendment.

A. X. Dooley, of Lawrence for appellants.
James J. Ronan, of Salem, for appellees.

RUGG, C. J. This suit in equity is brought in their individual names by four of the seven trustees of the Independent Agricultural School of the county of Essex (hereafter called the school) against the three county commissioners of the county of Essex who are the three remaining trustees of the school

Essex (hereafter called the hospital), being both such trustees by virtue of their office as county commissioners of the county of Essex.

The salient facts alleged in the bill are that the school was established under the provisions of St. 1912, c. 587, for the purpose of affording instruction in agriculture, and that to enable the execution of that object a large tract of land was in 1913 bought in fee free from all conditions in the name and with moneys of the county of Essex, which was appropriated to the uses of the school, all under the direction, management and control of the trustees of the school. Another parcel of land adjacent to the school land was taken by eminent domain by the county of Essex and a tuberculosis hospital was built and is being maintained thereon under the provisions of St. 1916, c. 286. The defendants, without the consent or knowledge of the plaintiffs and without right, have entered upon a portion of the land bought and used for the school, for the purpose of constructing and maintaining thereon cesspools and filter beds with connecting drains to afford treatment and disposal of the sewage of the hospital, to the irreparable damage of the school, and the defendants refuse to remove or to cease the use of the same.

[1, 2] The defendants demurred to the bill on divers grounds. The only ground now argued is that the county of Essex is a necessary party to these proceedings. The demurrer must be sustained on that ground. The legal title to all land and property used in connection with the school is in the county of Essex. The same is true of all land and property used in connection with the hospital. All expenses and costs both direct and remote which might arise in the course of righting the wrongs of which the plaintiffs complain must be paid by the county of Essex. The remedy to be afforded for such alleged wrongs also affects solely the county of Essex. The filter beds and drains are constructed upon land of the county of Essex. Those constructions are designed only for the use and benefit of other property of the county of Essex. Manifestly, the county of Essex in the capacity of owner of all property directly and indirectly concerned in the subject matter of the bill is a necessary party to this proceeding. Its property interests alone are concerned. Obviously, where the sole financial aspects of a suit relate to a party, that party is essential to an adjudication of the issues of such suit. Allen v. Turner, 11 Gray, 436; Taunton v. Taylor, 116 Mass. 254; Welch v. Boston, 211 Mass. 178, 186, 97 N. E. 893.

[3] Although service of process in proceedings to which a county is defendant commonly must be made on the county treasurer sent the county (G. L. c. 34, § 14). The individuals composing the county commissioners of the county of Essex are named as defendants in this suit. The case has been heard at length before a master and by a judge upon confirmation of his report and for entry of final decree. The facts seem to have been fully developed. While it would have been appropriate for the county to be represented by counsel, different from those representing the trustees of the hospital, we cannot see that substantial rights have been affected. Bringing in the county of Essex as a party would seem to be a formal matter. Therefore amendment may be allowed making the county of Essex a party. Worcester Board of Health v. Tupper, 210 Mass. 378, 383, 96 N. E. 1096.

[4-6] The case is considered on the footing that such amendment is made. The findings of the master in the absence of a report of the evidence must be accepted as true unless mutually repugnant or contradictory and plainly wrong. Glover v. Waltham Laundry, 235 Mass. 330, 334, 127 N. E. 420. Those findings so far as material, in addition to the undisputed facts set forth in the bill, are that the land bought in fee by the county of Essex for the school comprises about 114 acres. This property has been improved and enlarged by the alteration of existing and the construction of new buildings, so that at the times here in question it was the site of a large and growing school for the youth of both sexes. The acquirement, construction and maintenance of this property has involved large expenditures of money made exclusively for the purposes of the school. The conveyance of the land was obtained by the trustees of the school solely for purposes of the school, and its location and extent determined by them to that end with the approval of the state board of education.

The cost of the hospital has been approximately $1,500,000, and a considerable number of patients are there treated constantly. Apparently some system of sewage disposal is essential to the valuable use of the hospital. The filter bed system of the hospital occupies about 3 acres of the land purchased for the school. It had been to some extent under cultivation for school purposes. It is located about 2,000 feet from the school buildings on a remote, rough and gravelly portion of the school farm. At times an odor comes from the filter beds offensive to those at work near by, but few people are likely to be affected. Interference with ice production for the school is so slight as to be negligible. The plaintiffs had no actual knowledge of the construction of the sewerage system, although reasonably active oversight by them would have disclosed it. On the other hand, the defendants in doing this work resorted

to the use and occupation of land acquired by the county under the statute for the school without the consent or knowledge of the school trustees, and a very large part of that use and occupation, being that for filter purposes, with full knowledge of the objections of the plaintiffs. Before the construction of the filter beds, which were to take the place for sewage purification of previously constructed cesspools, a formal resolution of protest to the whole work was passed by the trustees of the school, the plaintiffs and the county commissioners being present.

The general care and control of the school property is vested in the trustees of the school. Although there is no express provision to that effect in St. 1912, c. 587, such is the necessary implication of the powers conferred upon the trustees. They are not constituted a corporation but their function as public officers of the county gives them that control. The general supervision and control of county property vested by G. L. c. 34, § 14, in the county commissioners does not give them these powers over the school property. It would be incompatible with the broad duties imposed by the statute on the trustees of the school to permit the county commissioners to have dominating control of the property devoted to the school. Such construction of the two statutes would or might involve constant conflict of authority between two boards of county officers. Moreover, the county commissioners as trustees of the school possess the influence in the control and management of the school property thought by the Legislature requisite for harmonious administration and due regard to the point of view naturally represented by the county commissioners. The land in question was bought solely for the school under the definite provisions of a statute enacted with single reference to this particular school. The land thus was appropriated to this one public use. While all private rights in the land were extinguished by the acquisition of an unconditional title in fee, the public rights as thus defined were single, not general. The appropriation by the county commissioners as trustees of the hospital of land bought for and dedicated to the uses of the school against the protest of the trustees of the school was without legal right. Explicit legislation to that end would have been necessary before such authority could have been exercised. Higginson v. Treasurer of Boston, 212 Mass. 583, 591, 99 N. E. 523, 42 L. R. A. (N. S.) 215.

[7] The plaintiffs, however, are members of a public board acting for the county of Essex within a restricted sphere. They are not clothed with authority to litigate with the county commissioners conflicting contentions respecting the land in question. Doubtless with reference to third persons on school land they may have possessory powers of an important nature. Trustees of State Lunatic Hospital v. County of Worcester, 1 Metc. 437; Hawkins v. County Commissioners, 2 Allen, 254; Fitzgerald v. Lewis, 164 Mass. 495, 41 N. E. 687. No express power to institute litigation of this nature is conferred by the statute. Implied powers essential to the exercise of their duties over the school do not carry them to this extent. Plain and unequivocal statutory words or imperative public necessity would be required to authorize one public board to institute a suit in equity against another public board of the same public corporation to adjust conflicting contentions as to the boundaries of their respective powers. Sinclair v. Mayor of Fall River, 198 Mass. 248, 84 N. E. 453; Fowler v. Brooks, 188 Mass. 64, 74 N. E. 291, 3 Ann. Cas. 173; Chelsea v. Treasurer & Receiver General, 237 Mass. 422, 432, 130 N. E. 397; Steele v. Municipal Signal Co., 160 Mass. 36, 35 N. E. 105. Prince v. Crocker, 166 Mass. 347, 358, 44 N. E. 446, 32 L. R. A. 610. We are of opinion in the case at bar that the plaintiffs are not authorized to institute proceedings in equity against the defendants or the county of Essex with respect to the cause of action set forth in the bill and shown by the master's report. Day v. Greenfield, 234 Mass. 31, 124 N. E. 481. Other questions raised need not be considered.

Decree reversed. Demurrer sustained. Leave granted to amend by adding the county of Essex as a party defendant. If and when such amendment is made, decree to be entered dismissing bill on the ground that the plaintiffs have no right to maintain the bill.

OLD COLONY TRUST CO. v. PEPPER.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1924.)

1. Appeal and error ⟸1078(1)—Matters not argued waived.

Matters not argued on appeal must be treated as waived.

2. Wills ⟸318(1)—Order respecting framing of issues for jury in will contest not reversed, if supported by statements of expected proof.

An order of judge of probate court denying issues for a jury trial in a will contest ordinarily will not be reversed, if it is supported by the statements of expected proof.

3. Wills ⟸318(1) — Proposed issue in will contest too general and indefinite.

In will contest, proposed jury issue as to undue influence exercised by D. E. "or any other person" could properly have been denied as too general and indefinite.

4. Wills ⇐316(3)—Issue for jury trial in will contest properly denied.

On appeal in will contest, *held* that it could not be said that the issue of undue influence of housekeeper of deceased ought to have been submitted to a jury.

5. Wills ⇐318(1)—General allegations of incompetency cannot prevail against actual facts indicating mental capacity.

General allegations, such as that the contestant "expect [ed] to be able to establish the fact * * * that this man wasn't, at the time he made this will, in a mental condition to understand what he was doing," cannot prevail against actual facts indicating that he had the contestant in mind when he executed the will.

Appeal from Probate Court, Suffolk County.

In the matter of the estate of Rufus E. Lawrence, deceased. Petition by the Old Colony Trust Company for allowance of the will, as against Emma K. Pepper, contestant. From an order denying issues for a jury trial, contestant appeals. Affirmed.

Marion Weston Cottle, of Boston, for appellant.

S. E. Gifford, of Boston, for appellee.

DE COURCY, J. [1] This is an appeal from an order for the probate court denying issues for a jury trial, on the petition for allowance of the will of Rufus E. Lawrence, late of Chelsea. The contestant Emma K. Pepper is sister, sole heir at law and next of kin of the deceased; and moved for the framing of four issues. The first, relating to the execution of the instrument, is expressly waived. The meaning and propriety of the fourth have not been argued, and it must be treated as waived. The second and third relate to the issues of soundness of mind and undue influence.

[2-4] Although the question is before us on appeal substantially as it was before the probate court, where the motion was heard on statements of counsel without oral testimony, yet, in view of the element of discretion involved in the action of the judge of probate, his order respecting the framing of issues ordinarily will not be reversed if it is supported by the statements of expected proof. Cook v. Mosher, 243 Mass. 149, 153, 137 N. E. 299; Appeal of Connell (Mass.) 142 N. E. 55. The proposed issue as to undue influence exercised by Daisy Edith Stillings "or any other person" might well have been denied as too general and indefinite. See Fuller v. Sylvia, 240 Mass. 49, 55, 133 N. E. 384. But aside from that, on the alleged facts we cannot say that the issue ought to be submitted to a jury. Mrs. Stillings was the housekeeper of the deceased; she collected the rents on his real estate, and kept his books. She is not a beneficiary under the will. Even if she became unfriendly to the contestant when deprived by Mrs. Pepper of the collection of certain rents, it does not appear that she did anything designed to prejudice the testator against his sister. The reason given by him for making no gift to Mrs. Pepper, that she was "amply provided with this world's goods," was substantially correct. There is a significant absence of any specific facts tending to show that the testator was likely to be influenced by Mrs. Stillings in the disposition of his property, or that she attempted to exert such influence, such as ordinarily appears in will contests.

[5] On the issue of the testator's testamentary capacity, the main facts alleged are that he was suffering from tuberculosis, and had a violent hemorrhage of the lungs and a pulse of 120 on the day the will was executed. No offer was made to show that this indicated unsoundness of mind. It appeared that counsel for the contestant had him sign legal documents about a month before the date of the will. The acute stage of his disease did not occur until some months after the will was executed; and he lived until December 11 of that year. General allegations, such as that the contestant "expect [ed] to be able to establish the fact * * * that this man wasn't at the time he made this will, in a mental condition to understand what he was doing," cannot prevail against the actual facts indicating that he had the contestant in mind. He distributed the bulk of his estate among charitable organizations; a disposition not unreasonable or unjust to the contestant, in the circumstances disclosed by this record. Clark v. McNeil, 246 Mass. 250, 140 N. E. 922. The decision of the probate court ought not to be reversed.

Order affirmed.

GALLOUPE v. BLAKE et al.

(Supreme Judicial Court of Massachusetts. Norfolk. March 5, 1924.)

1. Wills ⇐439—Construed in accordance with intentions of testator.

A will is to be construed in accordance with the intention of the testator.

2. Wills ⇐547—Surviving legatee held entitled to entire amount.

Under a will "to my cousins J. and M. in equal shares * * * or the survivor of them, I give the sum of five thousand (5,000) dollars," both legatees, if living at testatrix' decease, should divide the $5,000, but when only one survived the testator he took the whole amount.

3. Wills ⇐481 — Language construed as of time of death.

The language of a will ordinarily is to be construed as of the time of the death of the testator.

take parents share.

Under a will "to my cousins E. and C., in equal shares, * * * or the survivor of them, I give the sum of five thousand (5,000) dollars," where both E. and C. died before testatrix, the children of each should take one-half the entire amount; but if one died without issue, and the other died subsequently leaving issue, the survivorship provision would be given effect by distributing the entire amount of the legacy among the issue of the survivor.

5. Wills ⟸777—Clauses held not to lapse by reason of death of legatees; "relatives."

Under G. L. c. 191, § 22, legacies to cousins are legacies to relatives, and legacy does not lapse on death of the legatee leaving issue, and this is true though legacies are made to two persons jointly and not to them separately, the statute operating to change the rule of the common law that a class is to be determined as of the time of distribution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Relation—Relative.]

In the matter of the estate of Ann Maria Fosdick, deceased. Petition by Frederic R. Galloupe, executor, against Maria F. Blake and others, for instructions as to payment of legacies. From a probate decree, an appeal is taken. Decree reversed, and decree entered.

J. Abbott, of Boston, for petitioner.

G. R. Nutter and W. E. Fuller, both of Boston, for Maria F. Blake and others.

C. M. Rogerson and C. M. Davenport, both of Boston, for Mass. Gen. Hospital and another.

H. T. Davis, of Boston, for Wm. I. Frothingham and others.

CROSBY, J. This is a petition brought by the executor of the will of Ann Maria Fosdick for instructions as to whom certain legacies under article 2 of the will are to be paid and in what amounts. This article, so far as material to the questions to be decided, is as follows:

"2. To my cousins, Elizabeth A. Mason and Channing Frothingham, in equal shares, of Brooklyn, New York, son and daughter of Issac H. Frothingham, or the survivor of them, I give the sum of five thousand (5,000) dollars.

"To my cousins, Mrs. Sadie Holland and Wellington Frothingham, of said Brooklyn, children of Abraham R. Frothingham, in equal shares, or the survivor of them, I give the sum of five thousand (5,000) dollars.

"To my cousins, John S. Frothingham and Mrs. Mary T. F. Low, of said Brooklyn, children of John W. Frothingham, in equal shares, or the survivor of them, I give the sum of thousand (5,000) dollars.

"To my cousin, Miss Mary F. Robinson, the daughter of Martha C. Robinson, if she survives me, I give the sum of twenty-five hundred (2,500) dollars."

ance with the intention of the testatrix. It is dated June 28, 1910. The testatrix died May 2, 1922. All the persons named in the first three clauses of article 2 predeceased the testatrix, except Mary T. F. Low, named in the third clause. Channing Frothingham died before Elizabeth A. Mason. The appellants, Maria F. Blake, Albert L. Mason, Elizabeth Frothingham and Francis Mason are children of Elizabeth A. Mason. William I. Frothingham, Lawrence P. Frothingham, Channing Frothingham, Jr., are children of Channing Frothingham. Wellington Frothingham died before Sadie Holland and without leaving children. The appellants Alexander Holland and Mary F. Holland are children of Sadie Holland. John S. Frothingham died without issue. The residue of the estate under the will is given in equal shares to ten charities. It is the contention of these residuary legatees that the gifts to the persons named in the first three clauses of article 2 lapsed, with the exception of the gift to Mrs. Low, and that she is entitled to $2,500 thereunder. It is the contention of the appellants, with the exception of Mrs. Low, that, by reason of G. L. c. 191, § 22, the legacies did not lapse and that the children of the survivor in each such instance take the gift. Mary T. F. Low contends that as the survivor of John S. Frothingham, who died without issue, she is entitled to $5,000 and not merely to one half of it.

[2] It is plain that it was the intention of the testator that as to each group, both legatees, if living at her decease, should divide the $5,000; but as one might predecease her, she provided in that contingency that the survivor should take the whole amount. If she had intended that each should receive $2,500, it is a rational inference that she would have so provided by express language. The words "or the survivor of them" are meaningless unless she intended that the survivor should take the whole amount. The fact that the legatees expressly named constitute a class does not conclusively show that the gifts were to them only as undividuals, and does not defeat the intention of the testatrix that there shall be survivorship between them. Jackson v. Roberts, 14 Gray, 546, 551; Springfield Safe Deposit & Trust Co. v. Dunn, 243 Mass. 7, 10, 136 N. E. 622. The circumstance that in the fourth clause of article 2 the testatrix made a gift of $2,500 to her cousin Mary F. Robinson "if she survives me" does not indicate that it was her intention that each cousin should survive her to be entitled to a legacy given in the first, second or third clause of that article. The words "or the survivor of them" cannot be construed as showing that the legacies in the first three clauses must fall

The reason why the legacy given under the fourth clause was limited to $2,500 does not appear, nor is it material. It is a rational inference that it was the intention of the testatrix that if one of the persons named predeceased her the other would be substituted and become the sole legatee as to the whole amount given them together. As the survivor of the legatees named in the third clause of article 2, it is plain that Mrs. Low, by the express language of that clause is entitled to receive $5,000.

[3, 4] Under the first clause of article 2, Elizabeth A. Mason and Channing Frothingham, or the survivor of them, were given $5,000 in equal shares. Both predeceased the testatrix, and both left children. The question is whether the children of Mrs. Mason, who survived Channing Frothingham, are to take the entire amount of the bequest, or whether it is to be distributed among the children of each of the legatees named. While the will provides that the surviving legatee shall take the entire amount, yet there is nothing to indicate that, in the event of the death of both of these named legatees before the death of the testatrix, she intended to distinguish in the survivorship provision between the children of these legatees, or to give a preference to the children of either. She must have known that both legatees named might predecease her, and that each might leave children. The general rule that the language of a will ordinarily is to be construed as of the time of the death of the testator, Bosworth v. Stockbridge, 189 Mass. 266, 75 N. E. 712, is applicable to the legacy given under the first clause. We are of opinion that it was her intention that, in the event of the death of both of these cousins before her decease, the children of each should take one half the entire amount.

By the second clause of article 2, Sadie Holland and Wellington Frothingham, "or the survivor of them," are given $5,000 in equal shares. As both predeceased the testatrix, and as Wellington Frothingham died without issue, it is manifest that the survivorship provision is to be given effect by distributing the entire amount of the legacy among the issue of Mrs. Holland who survived Wellington Frothingham.

[5] The contention that the legacies under the first, second, and third clauses of article 2 lapsed cannot be sustained, in view of G. L. c. 191, § 22, which provides that:

"If a devise or legacy is made to a child or other relation of the testator, who dies before the testator, but leaves issue surviving the testator, such issue shall, unless a different disposition is made or required by the will, take the same estate which the person whose issue they are would have taken if he had survived the testator."

land v. Slade, 155 Mass. 415, 29 N. E. 631, and it is applicable to the legacies in question although each is to two persons jointly and not to them separately. When a gift is made to a class of relatives of a testator, the statute operates to change the rule of the common law that a class is to be determined as of the time of distribution. When a gift is made to a class of relatives and one of them dies before the testator, the issue of such deceased person who would otherwise be a member of the class takes that person's share. Moore v. Weaver, 16 Gray, 305, 307; Stockbridge, Petitioner, 145 Mass. 517, 14 N. E. 928; Howland v. Slade, supra. There is no inconsistent provision in the will making the statute inapplicable to the legacies under the first three clauses of article 2.

The decree entered in the probate court is reversed. A decree is to be entered directing that under the first clause of article 2 the sum of $2,500 be divided equally among the children of Elizabeth A. Mason; that the sum of $2,500 be divided equally among the children of Channing Frothingham; that the sum of $5,000 given in the second clause of article 2 be divided equally between the children of Mrs. Sadie Holland; and that the sum of $5,000 given in the third clause of article 2 be paid to Mrs. Mary T. F. Low. Counsel fees as between solicitor and client may be allowed out of the estate in the discretion of the probate court.

Ordered accordingly.

LINCOLN et al. v. CROLL.

(Supreme Judicial Court of Massachusetts. Suffolk. March 8, 1924.)

1. Sales ⟸445(5)—Question of reasonable notice of breach of warranty properly considered as one of law.

In an action to recover for breach of warranty in sale of yarn, where the facts were undisputed, concise, clear, and certain in respect to their signification, and the decision of the ultimate fact of reasonable notice or otherwise to the defendant of the alleged breach of warranty did not require or involve the finding of any inferential fact, the question of reasonable notice was properly considered by the court as one of law.

2. Sales ⟸285(1)—Buyer of goods packed for export not required to give notice of breach of warranty on delivery.

Where a seller of yarn knew it was purchased for resale, and was intended to be packed and delivered ready for export, the buyer *held* not required to examine the yarn on delivery to it and give notice at that time of a breach of warranty.

tice to the seller of a breach of warranty eight months after such resale was not within a reasonable time, under G. L. c. 106, § 38, especially as cable communication was maintained between the point of shipment and destination.

Exceptions from Superior Court, Suffolk County; A. R. Weed, Judge.

Action of contract by Frederic W. Lincoln and others (Henry W. Peabody & Co.) against Albert I. Croll, to recover for an alleged breach of warranty in a sale of yarn. Finding for defendant, and plaintiffs bring exceptions. Exceptions overruled.

J. G. Palfrey, of Boston, for plaintiffs.

E. R. Anderson and R. B. Owen, both of Boston, for defendant.

PIERCE, J. This is an action of contract, in which the plaintiffs seek to recover for an alleged breach of warranty in the sale of 4,500 pounds of 12/1 first grade carded peeler fast sulphur black knitting yarn, in that the yarn sold and delivered by the defendant to the plaintiffs did not correspond with the description thereof set forth in the instrument of purchase and sale annexed to the plaintiffs' declaration. The case was tried before a judge of the superior court, without a jury. He ruled on the facts set down in the bill of exceptions, which are all the facts material to the exceptions, that the plaintiffs failed to give notice to the defendant of said breach of warranty within a reasonable time after the plaintiffs knew or ought to have known of said breach, and found for the defendant. The plaintiffs excepted to this ruling, and to the refusal to make certain requested rulings which are now expressly waived.

[1] The facts found are agreed to be all the material facts. They are undisputed, concise, clear and certain in respect to their signification. The decision of the ultimate fact of reasonable notice, or otherwise, to the defendant of the alleged breach of warranty did not require or involve the finding of any inferential fact. It follows that the question of reasonable notice was properly considered by the court as one of law. Williams v. Powell, 101 Mass. 467, 3 Am. Rep. 396; W. H. Pride & Co. v. W. R. Marshall & Co., Inc., 239 Mass. 53, 58, 131 N. E. 183; American Steam Gauge & Valve Manuf. Co. v. Mechanics' Iron Foundry Co., 214 Mass. 299, 101 N. E. 376; Skillings v. Collins, 224 Mass. 275, 112 N. E. 988, Ann. Cas. 1918D, 424.

The provision of the Sales Act (G. L. c. 106, § 49) that "where the contract to sell or the sale is made by sample, if the buyer has a reasonable opportunity to examine the bulk to see that it corresponds with the sample, and if he does not do so, he shall not be entitled to rely on the sample," and the provision that "where the buyer, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."

Succinctly stated, the bill of exceptions shows that the plaintiffs bought and the defendant sold the quantity and quality of yarn described in the declaration. The defendant delivered the quantity but not the quality of yarn to the plaintiffs in New York on September 4, 16, and 17, 1918, packed in seventeen cases strapped with iron bands for export, and the plaintiffs paid the agreed price therefor. The defendant knew that the yarn was purchased for resale; that it was intended to be packed and delivered to the plaintiffs in New York, ready for export; but did not know the place to which it was to be exported. He was not informed by the plaintiffs of the destination, and save as it might be inferred from the knowledge that the yarn was to be packed and delivered ready for export did not know that it would not be examined prior to export or to arrival at its foreign destination. On December 12, 1918, the 17 cases, without being opened and the contents examined by the plaintiffs, were shipped to Buenos Aires consigned to a hosiery manufacturer in that city. The cases reached Buenos Aires some time during March, 1919. One case was taken from the custom house in April, 1919, and examined by the consignee, and the remaining 16 cases were so taken, examined and rejected by the consignee on July 7, 1919. Thereupon, one of the partners of the plaintiffs' firm, resident at Buenos Aires and in charge of the business of the firm there, without notice to the defendant, after unsuccessful attempts to sell the yarn settled with the consignee by allowing him to keep the yarn with a 50 per cent. discount from the agreed price at which the plaintiff had sold the yarn to the consignee, to wit, an allowance of $2,452.27½.

When the consignee rejected the yarn on July 7, 1919, the plaintiffs received seventeen fair samples of the cones contained in the 17 cases, one sample cone from each case. These sample cones were packed for shipment to the New York office, as appears by a letter of the resident partner to the New York office, dated August 14, 1919, which recites the "whole affair," including the action of the consignee and that of the resident partner representative. This letter was received in New York on October 29, 1919. The record

made to the representative, or what action, if any, was taken by the plaintiffs because of such information. The case containing the 17 sample cones was shipped from Buenos Aires in September, 1919. On December 3, 1919, the vessel carrying the cones cleared through the New York custom house. On December 17, 1919, entry of the case of cones was completed. On January 7, 1920, the case of cones was received at the New York storehouse of the plaintiffs. On February 13, 1920, the plaintiffs, for the first time, wrote the defendant that the "'yarn did not fulfill the specifications of our contract, and it was necessary for us to dispose of the goods at a net loss of $2,500,' and asked the defendant 'to reimburse us for our loss.'" This letter also stated, in substance, that they had a case of samples, and affidavits, correspondence and all papers in connection with the claim that the goods were not of proper quality, and invited a thorough discussion of the matter. The letter, as also one dated February 28, 1920, made statements in alleged justification of the plaintiffs' delay in not taking the matter up earlier.

[2] Because the seller must have known from the manner of packing the yarn that it would not be examined by the purchaser, or that it was highly improbable that the purchaser would do so, we think that all parties must be held to have understood that the examination of the yarn both as to quantity and quality was to be deferred until the cases could reasonably be opened at the place of their destination. We therefore think it could not have been ruled that the yarn should have been examined on delivery to the plaintiffs, and a notification given the defendant before December 12, 1918, that the plaintiffs claimed the yarn was defective, that there was in consequence a breach of the warranty, and that the plaintiffs relied on such breach as a defense or as giving a right of rescission or a right to damages.

[3] However, when the yarn was rejected by the consignee on July 7, 1919, and resold to the consignee at a 50 per cent. discount, the plaintiffs must be held to have accepted and taken final title to the yarn, with the right of recoupment or cross action for damages, upon giving notice within a reasonable time after July 7, 1919, to the defendant that they claimed there was a breach of warranty. We think the ruling of the court, in substance, that the plaintiffs had failed to give notice of the alleged breach of warranty within a reasonable time, as that phrase is used in G. L. c. 106, § 38, after they had knowledge of such breach in April, 1919, and again, more fully, if not absolutely, on July 7, 1919, was manifestly right.

During the summer and fall of 1919 cable communication was maintained between the New York and Buenos Aires offices of the Close of the business day in New York of Buenos Aires and were received and delivered at the other end on the following morning. The plaintiffs made use of such mode of communication frequently, sometimes daily. The Sales Act in the identical language of G. L. c. 106, § 38, was in force in New York and Pennsylvania when the contract of sale was closed by the exchange of the letters, in copy annexed to the declaration.

In a matter involving the gain or loss of $2,500 it must be inferred that the partner at Buenos Aires informed his partner in New York of the imperfection of the yarn and of his action in relation thereto, at the first opportunity after he had made resale of the yarn at a discount because of the alleged imperfection of it. If he did not communicate all the facts by cable soon after July 7, 1919, he did give the New York office a full account of the matter in a letter dated August 14, 1919, which was received on October 29, 1919. For some undisclosed reason the resident partner did not ship the 17 sample cones until September, 1919. The delivery of these cones at the New York warehouse of the plaintiffs, through the congestion of traffic, was delayed until January 7, 1920. The plaintiffs on February 13, 1920, in a letter gave notice to the defendant for the first time that the "yarn did not fulfill the specifications of our contract" and asked to be reimbursed for the loss. It is too plain for serious discussion, having regard to the situation of the plaintiffs, and in the light of all the circumstances, that the delay of the plaintiffs in giving notice to the defendant was entirely without business or legal excuse and was made as matter of law a bar to the action. Trimount Lumber Co. v. Murdough, 229 Mass. 254, 257, 118 N. E. 280.

Exceptions overruled.

HANNAFORD v. CHARLES RIVER TRUST CO.

(Supreme Judicial Court of Massachusetts. Middlesex. March 3, 1924.)

1. Appeal and error ⟸1097(1)—Former decision law of case.

A decision on review on bill of exceptions is the law of the case on subsequent review on exceptions.

2. Fraudulent conveyances ⟸27, 209—Effect of mortgage to defraud creditors and rights of future creditors.

Though a mortgage and note given in fraud of creditors may be good as against the mortgagor and so not absolutely void, in legal parlance such a mortgage is void as against creditors who assert their right to avoid it, and it is also voidable by future creditors when void

3. Mortgages ⟸312(2)—Statute as to discharge inapplicable to mortgages of real estate.

G. L. c. 140, §§ 91, 94, requiring mortgagee or pledgee to release mortgage or restore pledge upon payment or tender of the amount due, and imposing liability for failure to do so, are applicable only to mortgages and pledges of personal property, and do not apply to discharge of mortgages of real estate.

Exceptions from Superior Court, Middlesex County; James Sisk, Judge.

Action by Louisa M. Hannaford against the Charles River Trust Company. Verdict was directed for plaintiff for $1, and she brings exceptions. Exceptions overruled.

A. L. Richards, of Boston, for plaintiff.

G. K. Richardson, of Boston, for defendant.

PIERCE, J. After the decision and rescript "Exceptions sustained" in this case, reported as Hannaford v. Charles River Trust Co., 241 Mass. 196, 134 N. E. 795, the case was tried again in the superior court and by direction of the judge a verdict for the plaintiff in the sum of $1 was returned by the jury. To the order directing a verdict and to the refusal to give certain requests for rulings the plaintiff excepted. The bill of exceptions contains all the evidence material to the questions presented thereby.

[1] The issues raised at the former trial were whether "the record and judgment in the suit of Hayden v. Hannaford et al. were admissible in evidence to show that the mortgage in question was fraudulent and void, and that, therefore, there was no liability, or no damage, or only nominal damage in the case at bar; and whether, in view of this evidence, the court should have directed a verdict for the defendant." The plain and unmistakable import of the former decision, which is the law of the case, is that the mortgage held by the plaintiff was fraudulent and voidable as to existing creditors, was worthless as an instrument as against creditors, and that the discharge of the mortgage on the facts then before the court in no way injured the plaintiff. It is equally plain on the facts as they then appeared that the plaintiff was entitled to recover no more than nominal damage. It was assumed at the former trial, and found as a fact by the jury at the second trial, that the mortgage was not discharged by the defendant at the request of the plaintiff.

At the new trial, in addition to the facts reported in the opinion above referred to (which need not be quoted), it appeared that the Hayden Case was a suit in relation to a chattel mortgage; that it combined a replevin aspect of the case was abandoned; that there was no decree for the delivery or cancellation of either mortgage; that the plaintiff took out a special precept of attachment and took a money decree for $4,700 with interest and costs against the estate; that Hayden, after the decree, at a conference agreed in substance that he would not "execute," would not take judgment against the estate, but would buy the property at a foreclosure sale and in that way get enough to pay his claim of $4,700 and the plaintiff's mortgage. It is to be observed that the court found in the Hayden Case, supra, that the mortgage in question was without consideration, was given for the purpose of hindering, delaying and defrauding the mortgagors' creditors; that Louisa M. Hannaford, the plaintiff, knew and joined in said fraudulent purpose; and that the mortgages were not given " 'particularly' to defraud the plaintiff."

[2] The plaintiff's requests numbered 1, 2, 3 and 4 were denied rightly, each of them resting upon the assumed fact, which the Hayden Case negatived, that there was a consideration for the mortgage and the mortgage note. It is true that a mortgage and mortgage note, given in fraud of creditors, may be good as against the mortgagor, and so not absolutely void; but in legal parlance such a mortgage is void as against creditors who assert their rights to avoid it. Sherman v. Davis, 137 Mass. 132. It is also true that such a mortgage and mortgage note are voidable by future creditors, when void as against creditors existing when the conveyance was made. Livermore v. Boutelle, 11 Gray, 217, 71 Am. Dec. 708; Wadsworth v. Williams, 100 Mass. 126; Day v. Cooley, 118 Mass. 524, 527; Dodd v. Adams, 125 Mass. 398; Woodbury v. Sparrell Print, 187 Mass. 426, 73 N. E. 547. The request numbered 5 was properly denied.

[3] The plaintiff's request numbered 6 was inapplicable to discharge of mortgages of real estate, and the statute, G. L. c. 140, §§ 91, 94, cited is applicable only to mortgages and pledges of personal property. The requests numbered 7 and 8 are not applicable where, as here, the note which the mortgage was given to secure was without consideration; they were rightly denied. The request numbered 9 was rightly denied; the facts present no question of preference upon which the jury could be called upon to pass. The refusal to give request numbered 10 was

amount of damages a plaintiff is entitled to recover in such circumstances. The request numbered 11 was refused rightly; the evidence raises no question of the validity of this mortgage because the conveyance of it was upon a consideration of blood or affection. There was no error in the refusal to give the requests numbered 12, 13, 15 and 16.

Upon all the evidence contained in the bill of exceptions, we think the case presented at the second trial in every substantial particular was the case heard at the first trial; and that the opinion and rescript in the case as reported in 241 Mass. 196, 134 N. E. 795, required, in such event, the ruling that the plaintiff was entitled to receive nominal damages only for the failure of the defendant to reassign the mortgage.

Exceptions overruled.

COOK v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. March 3, 1924.)

1. Trial ⇐178—Mover for directed verdict admits truth of testimony.

A defendant moving for a directed verdict admits the truth of all facts which the jury might find in favor of the plaintiff, and admits that the testimony and any inference of fact in favor of the plaintiff is true, if it conflicts with evidence introduced by the defendant.

2. Carriers ⇐347(1)—A passenger using escalator not in motion not negligent as matter of law.

In an action by passenger for injuries received on escalator at station, *held*, that trial judge erred in holding as matter of law that plaintiff was not in the exercise of due care in using an escalator not in motion; it being in evidence that she started up the escalator before she knew that it was not in motion.

3. Carriers ⇐320(7)—Whether carrier negligent in not guarding against use of nonmoving escalator held for jury.

In an action by a passenger for injuries while using a nonmoving escalator, whether the defendant was guilty of negligence in not placing a barrier to prevent use of the escalator *held* for the jury.

4. Carriers ⇐286(4)—Duty to warn passengers against use of nonmoving escalator.

If carrier knew, or ought to have known, that the use of a nonmoving escalator at station was likely to result in harm to passengers invited by the carrier to use the escalator, it owed the duty to the passengers to warn them in some efficient manner that use of the nonmoving escalator was forbidden as dangerous.

Exceptions from Superior Court, Suffolk County: Marcus Morton, Judge.

er for personal injuries received in consequence of being injured by an escalator operated and controlled by the defendant. Verdict was directed for defendant, and plaintiff brings exceptions. Exceptions sustained.

W. A. Bule, of Boston, for plaintiff.

A. F. Bickford, of Boston, for defendant.

PIERCE, J. This is an action of tort to recover damages for personal injuries sustained by the plaintiff, through the alleged negligence of the defendant, while she was using a stairway called an escalator, arranged so that the treads ascended continuously and one stepping upon it was carried up from the platform under the South Terminal of the subway of the defendant street railway to the street above. At the close of all the evidence the court ordered the jury to find a verdict for the defendant, on the written motion of the defendant, and the case is before this court on the exceptions of the plaintiff to this order.

[1] Applying the rule that a mover for a directed verdict admits the truth of all facts which the jury might find in favor of the plaintiff, and admits that the testimony and any inference of fact in favor of the plaintiff is true if it conflicts with evidence introduced by the defendant (Lindenbaum v. New York, New Haven & Hartford Railroad, 197 Mass. 314, 323, 84 N. E. 129; Shea v. American Hide & Leather Co., 221 Mass. 282, 283, 109 N. E. 158), the jury upon the reported facts properly could have found that on August 7, 1920, the plaintiff, who was fifty-five years of age, early in the morning became a passenger on a train of the defendant, and as such was carried from Central Square, Cambridge, through the tunnel to the station of the defendant under the South Terminal in Boston; that she arrived at the terminal at about 6:30 a. m.; that there are two moving stairways situated side by side on the east platform at the terminal, which lead from the platform to the street; that one of these was in motion and in use at the time the plaintiff came in front of the escalators; that the other was not in motion; that there were a lot of people ahead of her using the escalator that was not in motion to ascend to the street level; that the plaintiff did not know when she stepped upon the stairway that it was not in motion; that she first learned that fact "after she had passed the third step"; that she went ahead and was followed by a lot of people; that when "a sufficient number of persons got on the escalator" it revolved rapidly backwards and the plaintiff and others were thrown back on the tunnel platform and the plaintiff was injured.

There was evidence that the escalator had

1920, * * * and was not in working order on August 7, 1920." On cross-examination a transfer man employed by the defendant, who was on duty at the east platform, testified that "he had never known the escalator to be used by people if there was a sign on it, but if there was no sign on it they would run up it." The plaintiff testified she saw no signs indicating that this escalator was out of order or that it should not be used by her as a means of ascending to the street level, or that it was dangerous for her to use; and that nothing was said to her by any one to dissuade her from using it; that she had noticed on previous occasions that there were chains or barriers on escalators at the South Station when they were not in motion; and that she knew no reason why this escalator moved backward.

On behalf of the defendant there was evidence that a barrier marked "closed," consisting of two upright iron posts about three feet in length set in sockets, but not permanently fastened, was placed across the entrance to the escalator when it was shut down; that it was in place at 6 a. m., but had been thrown to one side on the platform when the accident took place.

On the evidence the jury could find, disbelieving the witness for the defendant, that there was no sign across the entrance to the escalator at 6 o'clock on the morning of August 7, 1920; and that it was not there at that time or at the time of the accident through the neglect of some servant of the company whose duty it was to see that it was put and retained in the described position. And it could be found on the testimony that the escalator was used as a stairway by passengers, with the knowledge of the defendant, when there were no signs indicating that it was closed to travel. It could not be ruled on the evidence that the plaintiff had reason to anticipate harm to herself should she use the nonmoving stairway, or infer that use of it was forbidden, in the absence of the signs of warning she had observed at other times.

[2] The trial judge could not properly rule, as contended by the defendant, that the plaintiff was not in the exercise of due care, because after she knew the escalator was not in motion she continued with others to walk up it until she, with such others, was thrown backward. Such a ruling could not have been made if consideration was given to the evidence that no physical barrier or warning sign prohibited its use; that on previous occasions such barrier had been before it to the plaintiff's knowledge when it was not intended that the escalator should be used; that a "lot of people" were ascending it when she came to it and a "lot of people" came upon it behind her, and presumably would interfere with if not block her leaving it. In a word, a mistaken choice between going forward and returning was not in law such a negligent act as in law must preclude her recovery. Albee v. Boston Elevated Railway, 209 Mass. 6, 95 N. E. 110; Scherer v. Boston Elevated Railway, 238 Mass. 367, 138 N. E. 840; Coleman v. Lowell, Lawrence & Haverhill Street Railway, 181 Mass. 591, 64 N. E. 402.

[3, 4] Negligence of the defendant properly could be found by the jury on the evidence for the defendant that the dead escalator was used by people who would run up it if there was no sign on it; that there was no sign on it when the plaintiff and others entered upon it; and, disbelieving the defendant's evidence, that there had been no sign or barrier on or before it on the day of the accident. If the defendant knew or ought to have known the use of a nonmoving escalator was likely to result in harm to passengers invited by the defendant to use the escalator, it clearly owed a duty to such passengers to warn them in some efficient manner that use of the nonmoving escalator was forbidden as dangerous. As said above the jury on the evidence could have found that the defendant on the day of the accident neither guarded the entrance to the stairway nor warned its passengers against the use of the escalator. It follows that the exceptions of the plaintiff must be sustained.

Exceptions sustained.

McDONALD v. DR. McKNIGHT, Inc.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 27, 1924.)

1. Physicians and surgeons ⇐16—Dental company could not avoid liability where unregistered person extracted tooth.

Where plaintiff went to place of business of dental company and told cashier he desired dental assistance, and thereupon dentist in charge called an employee wearing a dental uniform and told him to take care of plaintiff, and such person extracted a tooth, the dental company could not avoid liability for injury to plaintiff, where the person extracting the tooth was not authorized by law to do so, by evidence that such person's authority was limited and that he was employed only in laboratory work; plaintiff having the right to assume that defendant would not permit unauthorized persons to pull his tooth, in view of G. L. c. 112, §§ 49, 50, 52.

2. Physicians and surgeons ⇐18(9)—Whether certain doctor was in charge of dental office and acting within scope of duties held for jury.

In an action against dental company for negligence in extracting tooth, whether a dentist in the office of defendant, who directed an

unregistered person to extract the tooth, was in charge of the office, and whether his directions to the unregistered person were within the scope of his duties, *held* for the jury.

3. Physicians and surgeons ⟸16—Dental company by reason of contractual relations held liable for improper treatment.

A dental company by reason of contractual relations was liable for injuries to a patient from extraction of tooth by an employee in the office who was not a registered dentist, apart from any question of negligence.

Exceptions from Superior Court, Suffolk County; Henry A. King, Judge.

Action of tort by Hugh McDonald against Dr. McKnight, Incorporated, to recover damages for personal injuries received by reason of negligence in removing and treating a tooth. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

Dr. McKnight testified that it was Dr. Campbell's duty to see that no one who was an improper person should work on a patient who came into the office, and that he was the only registered dentist in the office at the time in question and had charge of the operating work.

At the close of the testimony and before the arguments plaintiff's counsel duly presented certain requests for rulings and the defendant duly saved its exception to the granting of each of the plaintiff's requests for rulings as follows:

No. 6. The mere fact that Hyman Friedman's general duties consisted of laboratory work does not relieve the defendant corporation from liability if at the direction of a person authorized to give directions he did a specific act outside of laboratory work in the course of the defendant's business, in a negligent manner.

Plaintiff's Request for Ruling No. 7. The law imposed a duty upon the defendant to see to it that no person in its employ not properly registered and admitted to practice dentistry operated upon or even examined, with the intention of operating upon the teeth or jaws of the plaintiff, and if doing or permitting this to be done, has a causal connection with the injuries sustained by the plaintiff, the jury is warranted in finding negligence on the part of the defendant corporation.

Plaintiff's Request for Ruling No. 8. If the jury finds that the defendant violated the statute regulating the practice of dentistry, this fact although not conclusive of negligence, may be considered by the jury in passing upon the question as to whether or not the defendant was negligent.

Plaintiff's Request for Ruling No. 9. If the jury find from the evidence that Dr. Campbell, in the absence of Dr. McKnight, was in charge of the business of the office in so far as it concerned the operative work upon patients and that Dr. Campbell directed Hyman Friedman to extract the plaintiff's tooth, and Friedman did extract the tooth, then the defendant corporation may be held liable for any negligence on the part of Friedman committed in the process of such extraction.

Plaintiff's Request for Ruling No. 11. There is evidence upon which the jury may find that on January 13, 1920, Dr. Campbell, during the absence of Dr. McKnight, had full authority in the premises in so far as it concerned work upon patients' teeth, and if Campbell ordered or directed Hyman Friedman to extract or treat the plaintiff's teeth and such work was done by Friedman in a careless manner, then the defendant may be held liable for damages in this action provided the plaintiff was in the exercise of due care.

E. A. Whitman and C. D. Driscoll, both of Boston, for plaintiff.

R. L. Mapplebeck, of Boston, for defendant.

BRALEY, J. It appears from answers to interrogatories propounded by the plaintiff and other evidence introduced at the trial, that the defendant prior to, and during the period covered by the record, operated a dental office in the city of Boston, with signs on the window which read, "Dr. McKnight, Inc. Nap a minute, painless extraction. Low priced dentistry." The plaintiff suffering from toothache entered the office January 13, 1920, for relief, and had a tooth extracted. But the operation as the jury could find, was so negligently, unskillfully and improperly performed as to cause the plaintiff much subsequent pain, with symptoms of possible if not actual necrosis of the jaw, which were relieved and a cure effected after prolonged surgical treatment. The defendant's president Dr. A. J. McKnight, a registered dentist, for whom the corporation was named, had the general charge and supervision of the business. The dental staff on the day in question consisted of two registered operating dentists Dr. Campbell and Dr. Good, with whom in the office of the defendant was a cashier, while the remaining employee Hyman Friedman worked in the laboratory on rubber plates. The twenty-third interrogatory, "State whether or not the plaintiff's mouth or teeth were treated by a dentist duly registered, and admitted to practice," was answered:

"Our records show that a man by the name of Hugh McDonald had a tooth extracted on that day by Dr. Campbell, a registered dentist."

But notwithstanding this unequivocal and positive statement, the evidence showed and the jury were warranted in specially finding, that the tooth was extracted by Friedman acting under an order from Dr. Campbell, who they further could find was in charge of the office. It also was undisputed, that the plaintiff paid the cashier the price charged, and was given a receipt. While numerous exceptions were taken by the defendant to the admission of evidence, and to the rulings of

the presiding judge, we shall consider only the exceptions which ave been argued, treating the other exceptions as waived. It is contended, that Friedman's act was not within the scope of his contract of employment, and if it was not, then the direction of Dr. Campbell, even if he was a registered dentist, to Friedman, did not bring the act of Friedman within the limitation of his employment. By St. 1915, c. 301, § 9, in force January 13, 1920, now G. L. c. 112, § 49, "No person shall conduct a dental office under any name other than that of the dentist actually owning the practice, or a corporate name containing the name of such dentist." And by sections 10–14, now G. L. c. 112, § 50, any person who carries on a dental practice or business, or who by himself, his servants or agents, or by contract with others performs any operation on the human teeth or jaws, or who advertises by sign, or otherwise indicates that he by contract with others or by himself, his servants or agents will perform any operation, or make examination with the intention of performining or causing to be performed any operation on the human teeth, shall be deemed to be practicing dentistry within the meaning of the statute. If any person without being registered, directly or indirectly practices, or attempts to practice dentistry without being duly registered, or any registered dentist, or incorporated dental company employs or permits a person to practice dentistry unless such person is registered, he is liable to a fine, or imprisonment, or both. If the offender is a corporation it is punishable by fine, and its officers, owners or managers concerned in the violation, are subject to the penalty of fine, or imprisonment, or both. See G. L. c. 112, § 52. The defendant represented by signs that it was conducting a dental office, and there was evidence for the jury that the plaintiff desiring dental advice and assistance entered the office, where, after stating his condition to the cashier, he sat down and waited until a young man came out of a side room and talked with him. Dr. Campbell then came in, called, and told Friedman "to take care of him." At the direction of Friedman the plaintiff went into a side room where after examination Friedman extracted the tooth.

[1-3] The plaintiff had the right to assume that Dr. Campbell and Friedman, who each wore dental uniforms, and the cashier, were employees of the defendant engaged in conducting its business as advertised. The defendant however offered evidence that Friedman was actually employed only in laboratory work. But the jury were to determine, whether as between the parties, Friedman was acting within the scope of his ostensible employment. The plaintiff could not be expected, nor was he required to ask for proof of the authority of the cashier, or of Dr. Campbell or of Friedman, all of whom he found at the office engaged in the manner previously described. He had the right to "trust to appearances, and to the not unreasonable assumption, that the defendant would not permit unauthorized persons to be so engaged." The defendant under such circumstances could not avoid liability by evidence that Friedman's authority was limited. Newman v. British & North American Steamship Co., 113 Mass. 362, 365; Rintamaki v. Cunard Steamship Co., 205 Mass. 115, 118, 119, 91 N. E. 220, 28 L. R. A. (N. S.) 743; Danforth v. Chandler, 237 Mass. 518, 130 N. E. 105; Hosher-Platt Co. v. Miller, 238 Mass. 518, 524, 131 N. E. 310. And the instructions on this question were sufficiently favorable to the defendant. The jury also were to determine on the evidence, whether Dr. Campbell was in charge of the office during the absence of Dr. McKnight, and whether his directions to Friedman were within the scope of his duties. It follows, that the plaintiff's ninth and eleventh requests which were given, as well as the last request which was a modified form of the ninth request, disclose no error of law. Holldge v. Duncan, 199 Mass. 121, 123, 85 N. E. 186, 17 L. R. A. (N. S.) 982; Sandon v. Kendall, 233 Mass. 292, 297, 123 N. E. 847; Gerrish Dredging Co. v. Bethlehem Shipbuilding Corporation (Mass.) 141 N. E. 867. The defendant moreover by reason of the contractual relations between the parties, was bound in the discharge of its duty to furnish the plaintiff with proper care and treatment. If the jury found that this duty had not been performed, it was responsible for the harmful consequences, quite apart from any question of negligence. Vannah v. Hart Private Hospital, 228 Mass. 132, 137, 117 N. E. 328, L. R. A. 1918A, 1157, and cases cited; Hannon v. Siegel-Cooper Co., 167 N. Y. 244, 60 N. E. 597, 52 L. R. A. 429.

The exceptions must be overruled, and it is

So ordered.

TWOMBLY v. FRAMINGHAM GAS, FUEL & POWER CO.

(Supreme Judicial Court of Massachusetts. Middlesex. Feb. 27, 1924.)

1. Gas ⟸20(4)—Cause of death of trees held for jury.

Whether gas escaping from pipes caused the death of trees, and whether the escape resulted through negligence of defendant gas company, *held* for the jury.

2. Corporations ⟸428(8)—Statement to person in gas company's office held admissible to show notice to it.

In an action against a gas company for destruction of trees by escaping gas, evidence of tree warden that he called at defendant's office and spoke to a girl, who was the only person in charge of the office, telling her that he wanted to see the superintendent and that trees on a certain street "were dying," was admissible to show notice to defendant.

3. Gas ⟸20(4)—Question of notice of condition causing injury held for jury.

In an action for destruction of trees by gas, whether notice to a girl ostensibly in charge of defendant's office was notice to defendant *held* for the jury.

4. Witnesses ⟸268(1)—Allowance of question on cross-examination held discretionary with judge.

In action against gas company for destruction of trees by escaping gas where a witness for defendant, a former employee, testified that during the time in question he was in sole charge of the repairs of leaks of which he made a record showing the name, address, date, and nature of the work, it was discretionary with the judge to permit plaintiff on cross-examination to ask, "What effort have you made to find the record?"

5. Evidence ⟸498½—Competency of witness to testify to damage held matter to be decided by presiding judge in his discretion.

In an action against gas company for destruction of trees, it was for the presiding judge in his discretion to decide whether plaintiff's husband was qualified to testify as to sales on such street as preliminary to giving evidence of the damages, where the evidence showed that he had dealt with real estate as a member of an investment committee of a local co-operative bank and knew of every sale on the street in question.

Exceptions from Superior Court, Middlesex County; A. R. Weed, Judge.

Action of tort by Edith E. Twombly against the Framingham Gas, Fuel & Power Company to recover damages for injury to real estate by reason of the killing of trees thereon by gas alleged to have escaped from defendant's pipes. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

Edw. L. McManus, of Boston, for plaintiff.
Fred L. Norton, of Boston, for defendant.

that the trees on the plaintiff's estate were killed by gas, and the only issues were, whether their death was caused by the defendant's negligence, to which the plaintiff's negligence had also contributed. The plaintiff introduced evidence, that her attention having been called to the trees, and to the odor of gas in the highway in front of them, she spoke to the tree warden and shortly after telephoned to the defendant and told the person who answered, about the odor. The jury could find, that shortly after, the defendant's employees were seen digging in the street opposite to the trees. The plaintiff again telephoned, calling the attention of the defendant's superintendent to the odor, and told him that the leaves were turning yellow. The superintendent answered, that probably this condition was caused by lice. But the defendant's employees reappeared and were again seen digging in the street with crowbars, and the evidence of the defendant showed, that a small leak was discovered in the main in the immediate vicinity of the trees, caused by the thread of the pipe being drawn away from the connecting coupling owing to the severe frost of the previous winter. The jury were to determine upon this evidence whether the conditions described were caused by gas from the defendant's main, and whether its escape could have been prevented by the exercise of ordinary care. Hunt v. Lowell Gas Light Co., 1 Allen, 343; Emerson v. Lowell Gas Light Co., 3 Allen, 410; McGenness v. Adriatic Mills, 116 Mass. 177, 180, 181; Salem v. Salem Gas Light Co., 241 Mass. 438, 442, 135 N. E. 573, and cases cited.

[2, 3] The evidence of the warden to which the defendant excepted, that he called at the defendant's office, and spoke to a girl who was the only person in charge of the office, telling her, that he wanted to see the superintendent, and that trees on Pleasant street, the highway in question, "were dying," was admissible. The office which apparently was the defendant's place of business was in charge of a person ostensibly employed there to look after its affairs, and notice to her of the condition of the trees, the jury under the circumstances could say, was notice to the company. McDonald v. Dr. McKnight, Inc., 142 N. E. 825. The case at bar is plainly distinguishable from Simmons v. Poole, 227 Mass. 29, 116 N. E. 227, on which counsel for the defendant places much reliance. It was there held, that demand for payment of an overdue promissory note in order to charge an indorser must be made, where the note did not state the place of payment nor the address of the maker, at the usual place of business or residence of the maker, and that presentment in an open field to a stranger was insufficient.

mer employee, testified, that during the time in question he was in sole charge of the repairs of leaks of which he made a record, showing the name, address, date, and nature of the work. The defendant excepted to the following question asked in cross-examination, "What effort have you made to find the record?" It was discretionary with the judge whether the question should be allowed, and this exception is without merit. Jennings v. Rooney, 183 Mass. 577, 67 N. E. 665. The last exception, is, that the evidence of the plaintiff's husband as to damages was erroneously admitted, because he was not shown to be qualified to give an opinion. But on the recitals in the record of his experience in dealing with real property as a member of the investment committee of a local co-operative bank, and of his general knowledge, and his statement that he knew of every sale on Pleasant street, which consisted of two lots sold on the same side of the street as the plaintiff's premises, and three lots on the other side, the questions to which the defendant excepted, "How many other sales on that [Pleasant] street do you know of in the last 52 years?" and "How many individual sales of lots have been made on Pleasant street during the last 52 years?" cannot be said as matter of law to have been inadmissible. It was for the presiding judge in his discretion to decide whether the witness was qualified to answer the questions, which were preliminary to the final inquiry, calling for his opinion as to the amount of damages suffered by the plaintiff. Carroll v. Boston Elevated Railway, 200 Mass. 527, 533, 86 N. E. 793, and cases cited. See Davis v. Crane, 243 Mass. 275, 282, 283, 137 N. E. 378.

Exceptions overruled.

LANNING v. TREFRY, Tax Com'r.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 29, 1924.)

1. Taxation ⇐104—Stock dividend held "income" taxable under statute.

A stock dividend declared by a corporation out of an accumulated surplus of earnings was taxable in 1917 as "income" of the stockholder receiving the same in 1916, under St. 1916, c. 269, § 2, though declared and payable before the act was passed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

2. Constitutional law ⇐229(1)—Taxation ⇐54—Taxation of stock dividends held not to deny equal protection of laws.

The Forty-Fourth Amendment to the Constitution, and St. 1916, c. 269, § 2, construed as rendering stock dividends taxable as income, do not violate a stockholder's right to equal protection of the laws secured to him by the Fourteenth Amendment to the Federal Constitution.

Report from Superior Court, Suffolk County; J. D. McLaughlin, Judge.

Complaint by Edward Lanning against William D. T. Trefry, Tax Commissioner for the Commonwealth of Massachusetts, for abatement of income tax. On report on agreed statement of facts without decision. Complaint dismissed.

W. D. Turner, of Boston, for complainant.
C. R. Cabot, of Boston, for respondent.

RUGG, C. J. This is a complaint under St. 1916, c. 269, § 20, for the abatement of an income tax assessed in 1917 on the value of capital stock issued to the complainant as stockholder by a foreign corporation as a stock dividend on January 10, 1916. The salient facts are that the complainant, a resident of this commonwealth, was a stockholder in the Continental Insurance Company, a corporation of the State of New York. Prior to 1916 the corporation had accumulated a large surplus of earnings. In the latter part of the year 1915 the corporation voted to issue to its stockholders on January 10, 1916, a stock dividend in amount equal to the surplus from earnings accrued prior to March 1, 1913, and to transfer that amount from the "surplus" to the "capital stock" account. The tax in question was laid upon the stock dividend thus issued to the complainant. Facts as to the market value of the shares of stock before and after the declaration of this stock dividend and other facts set forth in the record need not be narrated. Shortly stated, the issue raised is whether a stock dividend declared by a corporation out of an accumulated surplus of earnings is taxable as income to the stockholder receiving the same.

[1] The relevant words of St. 1916, c. 269, are in section 2 as follows:

"Income of the following classes received by any inhabitant of this commonwealth during the calendar year prior to the assessment of the tax shall be taxed at the rate of six per cent. per annum: * * * (b) Dividends on shares in all corporations * * * organized under the laws of any state * * * other than this commonwealth. * * * No distribution of capital, whether in liquidation or otherwise, shall be taxable as income under this section; but accumulated profits shall not be regarded as capital under this provision."

The case at bar is not affected by St. 1920, c. 352, whereby stock dividends are exempted from the income tax.

Confessedly this case is indistinguishable in its main features from Tax Commissioner v. Putnam, 227 Mass. 522, 534, 535, 536, 116 N. E. 904, L. R. A. 1917F, 806. It there was held that a stock dividend was taxable as

in the case at bar the stock dividend was voted by the corporation before the year 1916 payable to and received by the complainant in January of the year 1916. That is to say, this dividend was declared and was payable before the enactment of the income tax law on May 26, 1916. That fact in some cases may be of significance. See Nutter v. Andrews, 246 Mass. 224, 140 N. E. 744, 142 N. E. 67. The statute under which the tax was levied in the case at bar by the express terms of sections 1 and 2 was first to be levied in the year 1917 on all income received by the taxpayer during the preceding calendar year, and was accompanied by suitable exemptions of the property from which the income was derived. See section 11. This distinction does not bring the tax in the case at bar within the inhibition of the principle suggested in 227 Mass. at page 529, 116 N. E. 904, L. R. A. 1917F, 806.

An earnest and able argument has been made to the effect that Tax Commissioner v. Putnam, 227 Mass. 522, 116 N. E. 904, L. R. A. 1917F, 806, ought to be overruled out of deference to the decision in Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570, holding that stock dividends are not income under the Sixteenth Amendment to the United States Constitution and the Acts of Congress imposing an income tax, and declining to adopt the reasoning or result of Tax Commissioner v. Putnam, 227 Mass. 522, 116 N. E. 904, L. R. A. 1917F, 806. It is cause for regret that there is diversity of view between this court and the Supreme Court of the United States. Uniformity of thought is not always possible. Even in the Eisner Case four out of nine justices of that court believed that a stock dividend could be taxed as income and elaborate dissenting opinions were filed in support of that conclusion. The decision in the Putnam Case was rendered first. It was delivered after full and careful consideration in which all the justices participated. It has been followed on this precise point in later cases. Wilder v. Tax Commissioner, 234 Mass. 470, 125 N. E. 689; Tilton v. Tax Commissioner, 238 Mass. 596, 131 N. E. 219. See Lapham v. Tax Commissioner, 244 Mass. 40, 138 N. E. 708. Doubtless much money has been paid into the Treasury of the Commonwealth on the strength of that decision. It relates to the interpretation of the Forty-Fourth Amendment to the Constitution of this commonwealth and of a statute enacted pursuant thereto. It is supported by the reasoning and conclusion of Swan Brewery Co. v. The King, 1914 A. C. 231, by dissenting opinions of four justices in Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570, and by well reasoned opinions of two of the five law lords participating in the decision of Inland Revenue Commissioners v. Blott [1921] 2 A. C. 171, 90 L. J. K. B. 1113, 125 L. T. 833, 37 T. L. R. 833, 65 Sol. Jo. 703. We are of opinion that the decision in the Putnam Case was right in the light of what has been said on the subject since the Putnam Case was decided. No sufficient reason is perceived for overruling that decision. Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 176, 196, 89 N. E. 193, 40 L. R. A. (N. S.) 314. It would be superfluous to go over the ground again and to attempt further to elucidate the conclusion there reached. It is adopted without more discussion as the basis of this decision.

[2] The Forty-Fourth Amendment and the Income Tax Law as thus interpreted do not violate complainant's right to the equal protection of the laws secured to him both by the Constitution of the commonwealth and by the Fourteenth Amendment to the Constitution of the United States. So far as concerns this commonwealth, that question is set at rest by the conclusion that a stock dividend is "income" within the meaning of that word in the Forty-Fourth Amendment. There is nothing in other parts of our Constitution at variance with that interpretation. All this is settled by Tax Commissioner v. Putnam, 227 Mass. 522, 116 N. E. 904, L. R. A. 1917F, 806; Lapham v. Tax Commissioner, 244 Mass. 40, 47, 138 N. E. 708.

The argument of invalidity under the Fourteenth Amendment to the United States Constitution has not been strongly pressed. The only cases cited in its support are Detroit, G. H. & M. Ry. v. Fuller (D. C.) 205 Fed. 86, and Louisville & N. R. Co. v. Bosworth (D. C.) 209 Fed. 380, each decided by a district court judge. They do not seem to us pertinent to the issues here raised. We are of opinion that the tax law here in question is not open to successful assault. Tax Commissioner v. Putnam, 227 Mass. 522, 116 N. E. 904, L. R. A. 1917F, 806. In Dane v. Jackson, 256 U. S. 589, it was said at page 598, 599, 41 Sup. Ct. 566, 567 (65 L. Ed. 1107):

"The relation of the power of the federal courts to the taxing systems of the states has been the subject of much discussion in the opinions of this court, notably in the following cases."

After the citation of numerous decisions the opinion proceeds:

"While the nature of the subject does not permit of much finality of general statement, it may plainly be derived from the cases cited that since the system of taxation has not yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers, in proportion to payment made, as will be returned to every other individual or class paying a given tax, it is not within either the disposition or power of this court to revise the necessarily complicated taxing systems of the states for the purpose of attempting to produce what might be thought to be a more just distribution of the burdens of taxation than that arrived at by the state legislatures (4 Pet. 517; 15 Wall. 319; 109

where, as here, conflict with federal power is not involved, a state tax law will be held to conflict with the Fourteenth Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—'to spoliation under the guise of exerting the power of taxing' (134 U. S. 237; 173 U. S. 615; 239 U. S. 220, supra). For other inequalities of burden or other abuses of the state power of taxation, the only security of the citizen must be found in the structure of our government itself."

Complaint dismissed with costs.

McDONOUGH v. VOZZELA.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 29, 1924.)

1. Appeal and error ⇐995—Reviewing court concerned only with questions of law.

A reviewing court has nothing to do with the weight of the evidence, and is concerned only with questions of law.

2. Negligence ⇐136(30)—Whether custodians of child run down by automobile exercised due care held for jury.

In an action for injuries to child run down by automobile, whether child's mother and her niece, 15 years old, to whose custody the mother intrusted the child, exercised due care in caring for the child, *held* for the jury.

3. Negligence ⇐85(3)—Child 4 years of age held not as matter of law incapable of exercising care in crossing highway.

A boy 4 years and 5 months of age, while too young to have much prudence, cannot be pronounced as matter of law incapable of exercising care in crossing a highway.

4. Highways ⇐184(3)—Whether automobilist, running down child, negligent held for jury.

Whether automobilist, running down child on country road, was guilty of negligence, *held* for the jury.

5. Master and servant ⇐302(2)—Master not liable for act of servant taking automobile without authority.

If employee used master's automobile in the master's business, but without authority or consent, master was not liable for negligent driving.

6. Master and servant ⇐332(2)—Jury not bound to credit uncontradicted testimony as to automobile driver's authority.

In action for injuries to pedestrian by automobile, jury *held* not bound to give credit to testimony of the master and servant that the servant was driving the automobile without authority, even though uncontradicted.

7. Master and servant ⇐332(2)—Automobile driver's authority held for jury.

In an action for injuries to a pedestrian, run down by defendant's automobile, whether the employee driving the car was doing so with the authority of the master *held* for the jury, where he was driving it during regular hours business.

8. Evidence ⇐588—Mere disbelief of testimony not proof of contrary.

Mere disbelief of testimony is not proof of facts of an opposite nature or tendency.

9. Trial ⇐244(2)—Judge may not be required to deal specifically with fragmentary portions of evidence.

Court did not err in denying requests for instructions which related to fragmentary portions of the evidence with which the judge could not be required to deal specifically.

10. Highways ⇐184(4)—Instruction as to due care of infant properly refused.

In action for injuries to child four years of age, court properly refused a prayer for an instruction omitting all reference to the supervision of the girl in charge of the infant and her relation to his conduct, which was an important factor in determining his due care.

11. Trial ⇐191(1) — Instruction containing statements of fact about which evidence conflicted properly refused.

Request for instruction, containing statements of fact about which the evidence was in conflict, was properly denied.

12. Trial ⇐267(1) — Court not required to adopt phrase of requested instruction.

The court was not required to adopt the phrase of the instruction requested, provided the subject was dealt with adequately.

13. Highways ⇐184(4)—Instruction concerning failure of driver to be licensed held proper.

In action for injuries to infant on highway, the court did not err in charging that "it was also a violation of the law for the defendant to allow his automobile to be driven without a license, if he knew it, and knew the driver had no license; those are violations of the law, and can be used in considering the evidence of negligence," in view of G. L. c. 90, §§ 12, 20.

14. Trial ⇐252(1)—Judge cannot assume existence of facts not proved, raise false issues, or give instructions not adapted.

The judge in his charge cannot rightly assume the existence of facts not proved, raise false issues, or give instructions not adapted to the evidence.

Exceptions from Superior Court, Suffolk County; John F. Brown, Judge.

Action of tort by John McDonough, a minor, by his father and next friend, John J. McDonough, against Dominick Vozzela, with trustee, to recover for injuries received by being struck by an automobile belonging to the defendant. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

The court instructed:

"Something has been said here about Todesca driving without a license. That is a violation of the law, and it was also a violation of the law for the defendant to allow his automobile to be driven without a license, if he knew it and knew the driver had no license. Those

were violations of law, and can be used in considering the evidence of negligence, if you find the defendant negligent and that negligence had anything to do with the accident; you are to take them into account and give them such weight as you think you ought to. The fact that Frank Todesca was convicted has nothing to do with it. It is introduced simply to show you that he has been convicted, was found guilty of a criminal offense, and that he ought not to be believed on the witness stand; simply whether it affects his credibility or not; it is for you to say."

Wm. Flaherty and Jos. P. Walsh, both of Boston, for plaintiff.

C. H. Cronin, of Boston (W. A. Lackey, of Boston, on the brief), for defendant.

RUGG, C. J. [1] This is an action of tort to recover compensation for personal injuries received by the plaintiff by being struck by an automobile owned by the defendant. The evidence touching the manner and circumstances of the injury was conflicting and it would seem that the defendant reasonably might have expected a verdict in his favor. But we have nothing to do with the weight of the evidence and are concerned only with the questions of law.

1. There was evidence tending to show that the mother of the plaintiff, having occasion to go out of her home on the afternoon of the injury, left her youngest child, 2 years and 8 months of age, and the plaintiff, 4 years and 5 months of age, in charge of her niece, then about 15 years old, who lived with her. The plaintiff then was in the house, but was being dressed so that he could go on the street. The niece took these two small children out for a walk, with no definite destination, holding the younger by the hand and permitting the plaintiff to run ahead, playing on the sidewalk, and calling him back from time to time. Finally the plaintiff ran quite a distance ahead of her and crossed to the other side of the street, and she called to him when he was from 100 to 200 feet away (or further according to some evidence) to come back. As she called, an automobile passed and just then the plaintiff started to cross the street and he was almost over to her side when the automobile knocked him down. The automobile was going "very fast and kept going fast until the plaintiff was knocked down." The street was a country road and automobiles passed back and forth to some extent, but not very much. One could see up and down the street for a long distance. It was level. She did not see the automobile until it passed her. There was much evidence tending to show that the accident did not happen in this way, but in the aspect of the evidence most favorable to the plaintiff the narrative just stated might have been found to be true.

[2, 3] The rights of the plaintiff must chiefly be determined by the conduct of his proper custodian. Plainly the jury could find that the mother was not negligent in intrusting the plaintiff to the care of her niece. Although the case is close upon this point, it cannot quite be said as matter of law that the niece in the performance of her duty as temporary custodian of the plaintiff failed to exercise due care. Moreover, the plaintiff while too young to have much prudence cannot be pronounced as matter of law incapable of exercising any care in the circumstances confronting him. All these factors required the submission to the jury of the issue of the due care of the plaintiff, his custodian and his mother. Sullivan v. Boston Elevated Railway, 192 Mass. 37, 78 N. E. 382; Beale v. Old Colony Street Railway, 196 Mass. 119, 81 N. E. 867; Dowd v. Tighe, 209 Mass. 464, 95 N. E. 853; Ayers v. Ratshesky, 213 Mass. 589, 101 N. E. 78; Travers v. Boston Elevated Railway, 217 Mass. 188, 104 N. E. 383; Sughrue v. Bay State Street Railway, 230 Mass. 363, 119 N. E. 660. The case at bar is distinguishable from cases like Holian v. Boston Elevated Railway, 194 Mass. 74, 80 N. E. 1, 11 L. R. A. (N. S.) 166, Walukewich v. Boston & Northern Street Railway, 215 Mass. 262, 102 N. E. 311, Kelley v. Boston & Northern Street Railway, 223 Mass. 449, 111 N. E. 1045, Garabedian v. Worcester Consolidated Street Railway, 225 Mass. 65, 113 N. E. 780, and Sullivan v. Chadwick, 236 Mass. 130, 127 N. E. 632.

[4] 2. There was sufficient evidence of the negligence of the driver of the automobile to require the submission of that issue to the jury. Pertinent evidence in that connection was to the effect that the street was comparatively free from traffic, that it was straight for a considerable distance with unobstructed view, that it was daylight, that the speed of the automobile was variously estimated at from seven to forty miles an hour, that the driver did not see the girl with the two children as he came along the street, that he saw the plaintiff standing in the gutter and did not see him again until after the accident, and that the plaintiff was almost across the street before he was struck, and that the driver of the automobile, who was in it alone, was not licensed to drive a motor vehicle. Quinn v. Boston Elevated Railway, 214 Mass. 306, 310, 101 N. E. 151; Sughrue v. Bay State Street Railway, 230 Mass. 363, 366, 119 N. E. 660; Fuller v. Andrew, 230 Mass. 139, 147, 119 N. E. 694; Walters v. Davis, 237 Mass. 206, 129 N. E. 413; McMahon v. Pearlman, 242 Mass. 367, 370, 136 N. E. 154, 23 A. L. R. 1467.

3. The defendant was building a sewer for the city of Boston in a nearby street. Admittedly he was the owner of the automobile but was not in it at the time of the injury. On the point whether at that time it was being used in his business by his authority there was evidence that the driver of the

employ caring for gasoline pumps and compressors, but was not employed to drive and never had driven his automobile. About half past 3 o'clock on a November afternoon the defendant instructed Todesca to go to Roslindale to get some lanterns, the store to which he was sent being about 15 minutes walk from the job. No directions were given to take the automobile, which was about 700 feet from the place where the defendant gave his orders to Todesca. Never having driven the defendant's automobile, Todesca took it on this occasion and while he was returning from the store with the lanterns the accident happened. There was also evidence that the defendant said to the father of the plaintiff shortly after the injury that "he sent Frank Todesca up for some lanterns; that it was getting dark and he had to get the lanterns in a hurry for a job he was doing for the city of Boston."

[5-8] With the exception of the testimony just quoted, all the evidence on that point came from the defendant and a witness called by him. Of course the plaintiff was not bound by it. See Sullivan v. Boston Elevated Railway, 224 Mass. 405, 112 N. E. 1025. If all this evidence were believed, plainly the automobile was not being used at the time by the defendant's authority and hence the defendant would not be liable. Manifestly not every act performed by a servant in his master's business binds the latter. Hartnett v. Gryzmish, 218 Mass. 258, 105 N. E. 988; Marsal v. Hickey, 225 Mass. 170, 114 N. E. 301; Seaboyer v. Director General of Railroads, 244 Mass. 122, 138 N. E. 538; Porcino v. De Stefano, 243 Mass. 398, 137 N. E. 664; Phillips v. Gookin, 231 Mass. 250, 120 N. E. 691. But it is familiar law that the jury are not bound to give credit to testimony even though uncontradicted. Lindenbaum v. New York, New Haven & Hartford Railroad, 197 Mass. 314, 323, 84 N. E. 129; Commonwealth v. Russ, 232 Mass. 58, 70, 122 N. E. 176. Mere disbelief of testimony is not proof of facts of an opposite nature or tendency. Wakefield v. American Surety Co., 209 Mass. 173, 177, 95 N. E. 350; Martell v. Dorey, 235 Mass. 35, 41, 126 N. E. 354. The jury might have found that the only credible evidence was that which proved that the defendant owned the automobile, that Todesca, who was in the general employ of the defendant, was using it during time when his master was entitled to his services on his master's business of getting lanterns, and that that business was urgent and must be quickly done by reason of approaching darkness. If these were found to be the facts, then the case stands in this way: There is use of the defendant's automobile by his servant during regular hours of work, in the prosecution of his business. We are of opinion that from these facts the inferences here disclosed, that such use was impliedly authorized or assented to by the defendant, notwithstanding the denials of the defendant and his servant. Whether such inference ought to be drawn was matter for the jury to determine. The fact that the use of the automobile was in the owner's business distinguishes the case at bar from cases like O'Rourke v. A-G Co., Inc., 232 Mass. 129, 122 N. E. 193; Melchionda v. American Locomotive Co., 229 Mass. 202, 118 N. E. 265; Teague v. Martin, 228 Mass. 458, 117 N. E. 844; Gardner v. Farnum, 230 Mass. 193, 119 N. E. 666, L. R. A. 1918E, 997; Canavan v. Giblin, 232 Mass. 297, 122 N. E. 171; Wilson v. Pennsylvania Railroad, 63 N. J. Law, 385, 43 Atl. 894; and Moquin v. Kalicka, 244 Mass. ——, 142 N. E. 693.

The case at bar falls within the class of cases illustrated by Reynolds v. Denholm, 213 Mass. 576, 100 N. E. 1006; D'Addio v. Hinckley Rendering Co., 213 Mass. 465, 100 N. E. 647, Ann. Cas. 1914A, 907; Hopwood v. Pokrass, 219 Mass. 263, 106 N. E. 997; Heywood v. Ogasapian, 224 Mass. 203, 112 N. E. 619; Campbell v. Arnold, 219 Mass. 160, 106 N. E. 599; Ouimette v. Harris, 219 Mass. 466, 107 N. E. 435; Barney v. Magenis, 241 Mass. 268, 135 N. E. 142; Conant v. Constantin, 246 Mass. ——, 141 N. E. 587.

[9] 4. There was no error in the denial of the several requests of the defendant for instructions. Most of them related to fragmentary portions of the evidence with which the judge could not be required to deal specifically. Ayers v. Ratshesky, 213 Mass. 589, 593, 101 N. E. 78.

[10-12] The charge was adequate in its treatment of the question of the due care of the plaintiff. The third prayer omitted all reference to the supervision of the girl in charge of the plaintiff and her relation to his conduct, which was an important factor in determining his due care. The sixteenth request contained statements of fact about which the evidence was conflicting. The court was not obliged to adopt the phrase of the instruction provided the subject was dealt with adequately.

[13] There was no error in the way in which the failure of the driver to be licensed and the bearing of that violation of a criminal statute upon the question of negligence of the defendant or the driver was left in the charge. Berdos v. Tremont & Suffolk Mills, 209 Mass. 489, 496, 95 N. E. 876, Ann. Cas. 1912B, 797; Davis v. John L. Whiting & Sons Co., 201 Mass. 91, 96, 87 N. E. 199, 18 A. L. R. 782; Nager v. Reid, 240 Mass. 211, 133 N. E. 98.

[14] 5. The exception to the ruling that it was a violation of law for the defendant to allow his automobile to be driven without a license, if he knew it and knew that the driver had no license, must be overruled.

The charge was in accordance with the statute. G. L. c. 90, §§ 12, 20. The judge in his charge cannot rightly assume the existence of facts not proved, or raise false issues, or give instructions not adapted to the evidence. Clough v. Whitcomb, 105 Mass. 482; Plummer v. Boston Elevated Railway, 198 Mass. 499, 516, 84 N. E. 849; Corsick v. Boston Elevated Railway, 218 Mass. 144, 105 N. E. 600. What has been said already under division 3 of this opinion shows that the inference as to these facts against the defendant might have been drawn. In this connection it is to be noted that there was evidence to the effect that shortly after the accident the defendant said to the father of the plaintiff that Todesca had no license to operate the automobile. A careful examination of the entire record discloses no reversible error.

Exceptions overruled.

ROCKPORT GRANITE CO. v. PLUM ISLAND BEACH CO.

(Supreme Judicial Court of Massachusetts. Essex. March 3, 1924.)

1. Principal and agent ⇐103(2)—Contractor held not authorized to purchase materials on credit of employer.

Under a contract to construct a road providing that contractor should furnish all necessary labor and materials and take all responsibility therefor, but that the owner should pay directly, bills of parties furnishing materials and equipment, *held*, that the contractor was not authorized to purchase materials on the credit of the owner, and a materialman could not enforce his agreement to pay bills directly.

2. Contracts ⇐28(3)—Evidence held not to show owner agreed to be liable to furnisher of materials.

In an action by the furnisher of materials against the owner of land, for materials furnished independent contractor constructing a road, evidence *held* not to show that defendant orally agreed to become liable for materials furnished.

3. Estoppel ⇐56—Owner held not estopped to deny liability for materials furnished independent contractor.

Owner having road constructed *held* not estopped to deny liability for materials furnished contractor, never having requested the materialman to furnish the materials in question, and materialman not having been induced by the conduct of the owner to do something which otherwise it would not have done.

4. Evidence ⇐237—Statements of independent contractor to others held not admissible against owner.

In an action by a materialman against owner for materials furnished independent contractor constructing road, there was no error in excluding testimony as to conversations between the contractor and plaintiff's assistant treasurer, as defendant could not be affected by conversations between third persons which were unauthorized and not brought home to it.

5. Appeal and error ⇐1058(3)—Exclusion of evidence harmless when otherwise admitted.

Exclusion of evidence was harmless, where the same evidence got before the jury from other witnesses during the trial.

6. Evidence ⇐376(1)—Exclusion of card record held proper.

Exclusion from evidence of a card record, kept by plaintiff as a part of its bookkeeping system, *held* justified, where the offer of proof did not comply with the requirements of G. L. c. 233, § 78, as to proving books of account.

7. Sales ⇐358(1)—Evidence as to whether materialman knew terms of contract properly excluded.

In an action for the price of materials sold a contractor constructing a road for defendant, evidence as to whether plaintiff's officer knew the terms of the contract between defendant and the contractor was properly excluded, where he knew there was a contract, and never asked defendant about its terms.

Exceptions from Superior Court, Essex County; F. T. Hammond, Judge.

Action by the Rockport Granite Company against the Plum Island Beach Company. Decision for defendant, and plaintiff brings exceptions. Exceptions overruled.

F. H. Tarr, of Gloucester, for plaintiff.
C. W. Dealtry, of Boston, for defendant.

DE COURCY, J. By a contract under seal, dated May 27, 1920, Thomas Fitzgibbon and his son, Thomas Fitzgibbon, Jr., copartners doing business as the Fitzgibbon Company, referred to therein as the "contractor," agreed to construct a road on Plum Island for the defendant corporation. Among other things, the contractor was to furnish all the necessary labor and materials, to keep the work under his personal control, and take all responsibility therefor; was to be paid fifteen per cent. of the cost of all labor employed; and, if the total cost should be less than $40,000, as agreed by the contractor, would be paid one-half of the difference between the actual cost and that sum. One of its provisions was that "the owner shall pay directly to all parties furnishing materials and equipment necessary in the performance of this contract all proper bills for the same." Before signing the contract Thomas Fitzgibbon, Jr., the active partner on this work, asked Mr. Rogers, the plaintiff's treasurer, for his price on stone; on June 10, in writing he accepted the plaintiff's price of $3.75 per ton, the quantity to be approximately twenty-five hundred tons; and directed the plaintiff to "send all bills on this

contract and mail to Fitzgibbon Co." According to the testimony of Fitzgibbon, Jr., he told Rogers on June 10 that he had "signed a contract to build a road at Plum Island," and discussed it with Rogers, "outlining the whole intention of the contract."

[1] Thereafter the plaintiff made shipments of stone, billed to "Fitzgibbon Company"; and these were paid for by said contractor, after sending a corresponding bill to the defendant and receiving payment therefor. It is unnecessary to go into details, as the plaintiff concedes and its treasurer testified that for stone shipped prior to September 20 the defendant was under no obligation to it. In view, however, of the suggestion in the plaintiff's brief, that the written agreement between the defendant and the Fitzgibbons may be interpreted as making the latter the agent of the beach company, it may be said that nothing therein authorized this independent contractor to purchase materials on the credit of the defendant. New England Structural Co. v. James Russell Boiler Works, 231 Mass. 274, 120 N. E. 852. See Harding v. Boston, 163 Mass. 14, 18, 39 N. E. 411.

[2] The real claim of the plaintiff is, in substance, that for all shipments made subsequent to September 20, 1920, the defendant became directly liable to the plaintiff by virtue of a new verbal contract, authorizing the plaintiff to charge such shipments to the defendant. The basis for this claim is an alleged conversation at Plum Island between Fitzgibbon, Jr., and Mr. Draper, treasurer of the beach company, on some day between September 8 and September 20. It appears that the defendant had sent its check direct to the plaintiff, in payment of the bill of August 17 to the Fitzgibbon Company. Thomas Fitzgibbon, Jr., testified, with reference to this conversation, that he told Mr. Draper they "must have thought that the Fitzgibbon Company were getting a rake-off * * * when they sent a check directly to the Rockport Granite Company, so he told them to send everything directly from this on to the Rockport Granite Company"; and that he (Fitzgibbon) "would instruct the granite company to bill the stone directly to Draper and Dowling, directly to the Plum Island Beach Corporation, and Mr. Draper said it was all right, that it was satisfactory." His testimony was not concluded, because of his illness. When recalled on a subsequent day his version of the same conversation was that—

"He said to Draper that as he (Draper) had sent a check directly to the Rockport Granite Company, and since the work was practically all extra work just now, and that the Fitzgibbon Company was not getting anything out of the contract, if satisfactory to him, he could continue sending the check there. Mr. Draper said that he would; that it was satisfactory to him."

This was substantially repeated on his cross-examination. In a letter which he testified was sent to the defendant on September 20, 1920—but which the defendant apparently did not receive and never answered—appears:

"They [Rockport Granite Company] * * * wrote me that you had sent check direct to them for previous shipment. I have instructed them to make out all bills in the future to the Plum Island Beach Company, assuming that this is the way you wished it done. I will approve the same and forward them to you. Trusting this is satisfactory," etc.

Without further recital of the differing versions of this alleged conversation, it seems to us that the reasonable interpretation of it is that the defendant should thenceforth exercise the right which was expressly given to it in its contract with the Fitzgibbons, namely, to "pay directly to all parties furnishing materials"; a right which it had not exercised until it paid the plaintiff for the shipment of August 17. That this is what they meant, whatever the language they used, seems clear in the light of their subsequent conduct. For instance, Fitzgibbon never told the defendant that he had undertaken to make it directly liable to the plaintiff for the stone. He did not even inform the defendant what amount or kind of stone he had contracted to take from the plaintiff. He testified that he had "the right to buy material for this roadway wherever he pleased, and he did so," that "any payments would be charged to the account of Fitzgibbon Company, and that he therefore had the right, and insisted upon the right, to O. K. bills for material." So far as the record shows, Fitzgibbon acted on the understanding, after as well as before September 20, that his contract remained in force. The conduct of the Plum Island Beach Company indicates that it also acted throughout under its contract with Fitzgibbon. It did not claim, much less attempt to exercise, a right to buy stone for the roadway. It never was informed by Fitzgibbon that he undertook to subject it to a liability to the plaintiff; nor did the plaintiff, in writing or by telephone, notify the defendant that Fitzgibbon had purported to make a new contract for it direct with the granite company. Finally, the plaintiff itself continued to send the barges of stone with the shipping receipts marked "Loaded for Fitzgibbon Co."; it sent its bills, not to the defendant but to Fitzgibbon; and whenever prior to October 28 the defendant's name appeared thereon it was "for account Fitzgibbon Co." When payments were slow, it was to the Fitzgibbons that the plaintiff telephoned or wrote. And after it sent a bill made out to the defendant, October 29, 1920, the defendant repudiated liability by sending no more checks. As late at June 6, 1921, some six months after

the plaintiff in its letter to the defendant wrote:

"This material was furnished to you by us for the Fitzgibbon Company, and we were instructed under date of Sept. 20, 1920, in accordance with your contract with them, that you were to pay for all material."

No suggestion was made that a new contract, based on the conversation and letters on or about September 20, established a direct liability of the defendant to the plaintiff. Considering the whole voluminous record, we are of opinion that the evidence would not warrant a jury in finding a direct contractual obligation to the plaintiff on the part of the defendant, superseding its written contract with the Fitzgibbons. And, as already stated, the provision therein that the defendant should pay directly to parties furnishing materials, cannot be enforced by the plaintiff, who was not a party to the contract. New England Dredging Co. v. Rockport Granite Co., 149 Mass. 381, 21 N. E. 947; New England Structural Co. v. James Russell Boiler Works, supra.

[3] This conclusion renders it unnecessary to consider the authority of the treasurer, Draper, to make or ratify such a new oral agreement, in lieu of the sealed instrument executed by the president. See Sears v. Corr Mfg. Co., 242 Mass. 395, 136 N. E. 266. It may be added that there is no basis for a claim of estoppel. The plaintiff was not induced by the conduct of the defendant to do something which otherwise it would not have done, and to its detriment. The defendant never requested the plaintiff to furnish the stone. Nelson v. Wentworth, 243 Mass. 377, 379, 137 N. E. 646. The plaintiff has not argued that there was any novation.

[4-7] Certain exceptions relating to evidence were argued; and we treat the others as waived. There was no error in excluding the testimony of Thomas Fitzgibbon, Jr., that he told Louis A. Rogers, assistant treasurer of the plaintiff, that he would see Mr. Draper; nor in excluding the testimony of said Rogers that Fitzgibbon, Jr., told him that he had informed the Plum Island Beach Corporation that if payment was not made the shipments of stone would be stopped. The defendant's rights could not be affected by these conversations between third persons which were unauthorized and not brought home to it. Even if the exclusion had been erroneous the plaintiff could not have been harmed thereby, as the same evidence got before the jury from other witnesses during the trial. The same is true of the excluded testimony of said Louis A. Rogers, that Fitzgibbon, Jr., instructed him to send a statement of the account to the Plum Island Company and it would pay the account direct; and the proffered testimony of C. him in September about a conversation he (Fitzgibbon) had with the defendant. Indeed there was no offer of proof as to what this alleged conversation was. The exclusion of the card record kept by the plaintiff as part of its bookkeeping system was justified because the offer of proof made did not comply with the requirements of G. L. c. 233, § 78, as to proving books of account. Moreover, the change in the plaintiff's books had already been testified to by Rogers. The witness Louis A. Rogers was asked whether he had ever been told the terms of the contract between the defendant and the Fitzgibbons. We find no error in the exclusion of this testimony. The witness had been told by Fitzgibbon, Jr., that he had signed a contract to build the road. If he was ignorant of its contents (although Fitzgibbon testified to the contrary), it was because he failed to inquire. He never asked the defendant about its terms.

As an examination of the entire record discloses no reversible error, the exceptions of the plaintiff must be overruled.

So ordered.

FRASER v. FLANDERS.

SAME v. DUNN.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 27, 1924.)

1. Municipal corporations ⇐705(10)—Pedestrian could assume one of two approaching cars would grant right of way to other.

A pedestrian at an intersection could rightly assume that one of two approaching cars would observe the provisions of G. L. c. 89, § 8, and chapter 90, § 1, and grant the right of way to the other car.

2. Municipal corporations ⇐705(1)—Travelers bound to exercise reasonable care to avoid injury to each other.

Travelers on public ways are bound to exercise reasonable care to avoid injury to each other in their respective use of the street.

3. Municipal corporations ⇐706(5)—Injured pedestrian not bound to point out exact way in which accident occurred.

A pedestrian, injured in connection with a collision of automobiles at street intersection, was not bound to point out the exact way in which the accident occurred, nor to exclude the possibility that it might have happened in some other manner than that which he claimed.

4. Municipal corporations ⇐705(11)—Primary cause of train of events may be proximate cause.

While train of events which brought about injury to pedestrian in connection with collision of automobiles at street intersection was the active, efficient cause of the injury, the primary

cause may be the proximate cause, although it may have operated through successive instruments.

5. Municipal corporations ⟸706(6) — Negligence of automobilist held for jury.

In an action by a pedestrian for injuries resulting in connection with automobile collision at street intersection, the question of defendant's negligence *held* a question of fact for the jury.

6. Negligence ⟸15 — Wrongdoers severally and jointly responsible.

Where two or more wrongdoers negligently and concurrently contribute to the injuries of another, they may be found severally and jointly responsible.

7. Trial ⟸260(1)—No error in refusing requests covered by instructions.

No cause for reversal exists for refusal of requests for rulings amply covered by the instructions.

8. Witnesses ⟸380(5)—Party cannot impeach own witness.

A party calling a witness, who testifies to facts observed by her, cannot be asked by such party if she did not make inconsistent statements.

9. Witnesses ⟸389—Party bound by denial of his witness to inconsistent statements.

Plaintiff calling witness could not complain that court sustained objection to question by plaintiff as to whether she had not made a certain inconsistent statement, where the witness testified that she had no conversation with any one.

Report from Superior Court, Suffolk County; W. H. Whiting, Judge.

Actions in tort by Samuel C. Fraser against Mary L. Flanders and against Catherine M. Dunn, respectively, for personal injuries sustained when struck by an automobile. Verdict for plaintiff in the first case, and for defendant in the second case. The case comes up on report in the first case, and on plaintiff's exceptions in the second case. Judgment for plaintiff in the first case and exceptions overruled in second case.

In the Dunn case Frances Flanders, called by plaintiff, after testifying to matters observed by her, was asked by plaintiff if she did not make inconsistent statements, and said she had no conversation with any one.

E. Field, of Boston, and G. C. Thorpe, of Washington, D. C., for plaintiff.

F. M. Ryder, of Boston, for defendant Flanders.

E. I. Taylor, of Boston, for defendant Dunn.

BRALEY, J. These actions are in tort for personal injuries alleged to have been caused by the negligence of the respective defendants, and, having been tried together, the verdict in the first case was for the plaintiff, and in the second case for the defendant. At the close of the evidence in the first case the defendant asked for the following rulings:

"(1) On all the evidence the plaintiff is not entitled to recover from the defendant Flanders.

"(2) On all the evidence the defendant Flanders had the right of way over the defendant Dunn and exercised it, and the law providing for precedence over the other at the intersection of a way has no application in this case.

"(3) On all the evidence the plaintiff Fraser is not entitled to recover from the defendant Flanders if the jury find that the Flanders car has passed out of the path of the Dunn car before the Dunn car reached the intersection of the ways of the two cars.

"(4) On all the evidence the jury must find for the defendant Flanders, there being no evidence from which the jury could find that she operated the car in a negligent manner.

"(5) On all the evidence the jury must find for the defendant Flanders, there being no evidence that the collision between the Flanders and Dunn cars, which was subsequent to the contact between the Dunn car and the plaintiff Fraser had anything to do with, or contributed to the accident to the plaintiff Fraser.

"(6) On all the evidence the jury must find for the defendant Flanders, if the jury find that the defendant Dunn was operating her car approaching the intersection of the two streets at an excessive rate of speed."

[1, 2] The defendant excepted to the refusal of the judge to give the requests, and to such portions of the instructions as were inconsistent with them. The plaintiff, a pedestrian, whose due care was for the jury under G. L. c. 231, § 85, was crossing Newbury street along the easterly side of Exeter street going in a southerly direction, which were intersecting highways in the city of Boston, when, as the jury could find, he was struck by an automobile, and severely injured. The jury also would have been warranted in finding, that shortly before the accident, the automobile driven by the defendant Flanders, moving northerly along Exeter street, and the Dunn automobile, moving westerly along Newbury street, were approaching at right angles. It appeared in the evidence of Mrs. Flanders, that she observed the Dunn car at a distance of about 65 feet from the place where the plaintiff was injured, and about 60 feet distant from the corner of Exeter and Newbury streets, while Mrs. Dunn testified that she saw the Flanders car, just at the time they were equally distant from the corner. It could be found that the cars were moving at about equal speed, and in view of these conditions the jury could say that in the exercise of ordinary prudence the respective drivers ought to have foreseen that, if the speed of either car was not slackened or its direction changed, the cars must ultimately come into collision. If the jury came

judge properly instructed them, could rightly assume that Mrs. Flanders in operating her car would observe the provisions of G. L. c. 89, § 8, and chapter 90, § 1, and grant the right of way at the point of intersection to the Dunn car which was approaching on her right. See McCarthy v. Beckwith, 245 Mass. —, 141 N. E. 126. The parties, travelers on a public way, were bound to exercise reasonable care to avoid injury to each other in their respective use of the street. Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345, 4 Ann. Cas. 396.

[3] The plaintiff was not bound to point out the exact way in which the accident occurred, nor to exclude the possibility that it might have happened in some other manner than that which he claimed. McNicholas v. New England Telephone & Telegraph Co., 196 Mass. 138, 141, 81 N. E. 889. It could be found, that he had safely passed in front of the Dunn car, and that just before the collision, Mrs. Dunn had applied the brakes. But as she did so, the rear end of the car began to slip from side to side, the back of the car turned at right angles to Newbury street, and swerved around sufficiently to strike the plaintiff, who was found after the accident about 6 feet from the rear of the car. The question also was for the jury whether the Flanders car had come in contact with the Dunn car, causing the Dunn car to move backwards, before the plaintiff had reached the southerly side of Newbury street.

[4] It is true the circumstances were unusual. But it was said by Rugg, J., in Dulligan v. Barber Asphalt Paving Co., 201 Mass. 227, 231, 87 N. E. 567, 569, citing a number of our cases:

"The particular manifestation of the result of careless conditions is not infrequently quite out of the usual experience, but if the conditions possess elements of negligence, the person responsible for them may also be held responsible for the result."

While the train of events which brought about the result was the active efficient cause of the plaintiff's injuries, the primary cause may be the proximate cause, although it may have operated through successive instruments. Lynn Gas & Electric Co. v. Meriden Fire Insurance Co., 158 Mass. 570, 575, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. Rep. 540.

[5] The question of the defendant's negligence therefore was a question of fact. It cannot be held as matter of law that the jury on all the evidence would not be justified in finding that the accident would not have happened if Mrs Flanders had exercised ordinary care, and had obeyed the statute. Finnigan v. Winslow Skate Mfg. Co., 189 Mass. 580, 76 N. E. 192; Hanley v. Boston Elevated Railway, 201 Mass. 55, 87 given were denied rightly, and the instructions were full, clear and accurate.

[6] In the second case it is contended that the defendant is liable as a joint tort-feasor. Doubtless, where two or more wrongdoers negligently and concurrently contribute to the personal injury of another, they may be found jointly and severally responsible. Feneff v. Boston & Maine Railroad, 196 Mass. 575, 581, 82 N. E. 705.

[7-9] The plaintiff's seventh and thirteenth requests, however, which asked for rulings in accordance with this general principle, while refused in terms, were amply covered by the instructions, and no ground for reversal is shown. The plaintiff called Frances Flanders, a daughter of Mrs. Flanders, who was riding with her at the time of the collision, who after narrating what she had observed was asked if she had not made statements inconsistent with her evidence, coupled with an offer of proof showing such statements. The exclusion of the question presents no error of law. Cobb, Bates & Yerxa Co. v. Hills, 208 Mass. 270, 272, 94 N. E. 265; Old Colony Trust Co. v. Wallace, 212 Mass. 335, 98 N. E. 1035; Aldrich v. Aldrich, 215 Mass. 164, 168, 169, 102 N. E. 487, Ann. Cas. 1914C, 906. The exceptions to the denial of the motion for a new trial are without merit. Lopes v. Connolly, 210 Mass. 487, 495, 496, 97 N. E. 80, 38 L. R. A. (N. S.) 986.

The result is that the entry in the first case must be judgment for the plaintiff on the verdict, and in the second case the exceptions are overruled.

So ordered.

POTTER v. CROCKER.

(Supreme Judicial Court of Massachusetts. Worcester. March 3, 1924.)

1. Contracts ⊂=228—Party held not entitled to money promised under agreement whereby mortgagee acquired mortgaged mines.

Where defendant agreed with plaintiff, in consideration that plaintiff and others allowed her peaceably to acquire mines then mortgaged to the defendant, that she would form a new corporation and take over the mines, and promised to "see to it that, when sufficient funds are raised by the said corporation to be formed for the unwatering, equipping, and developing," certain sums would be paid to plaintiff, and it was agreed $150,000 should be deemed the maximum amount sufficient for unwatering, etc., *held*, that plaintiff was not entitled to the sum promised, where $150,000 was not raised, though $53,000 was received from bullion, the cost of mining the same being the $143,157, and the expenses during the period being $161,755, and the contract came to an end where plaintiff

agreed that the mines be turned over to another person under a new and different contract.

2. Evidence ⟸158(27)—Oral evidence as to agreement inadmissible, where contract in writing.

Oral evidence as to an agreement was inadmissible, where the contract was in writing.

Report from Superior Court, Worcester County; F. T. Hammond, Judge.

Action by Isabella A. Potter against Minerva C. Crocker. On report. Judgment for defendant.

R. B. Owen, of Boston, for plaintiff.
E. W. Baker, of Fitchburg, for defendant.

CARROLL, J. The defendant agreed in writing with the plaintiff and others, in consideration of their allowing her "peaceably [to] acquire the Iowa Groups Mines," then mortgaged to the defendant, that she would form a new corporation and take over the mines, and promised to "see to it that when sufficient funds are raised by the said corporation to be formed for the unwatering, equipping and developing the said Gold Hill & Iowa Groups Mines," certain sums would be paid the plaintiff and others. It was also agreed that the sum of $150,000 "shall be deemed the maximum amount sufficient for unwatering, equipping and developing" the mines; that the sums payable to the plaintiff and others should be due and payable when enough money was "raised for the unwatering, equipping and developing" of the mines, or as soon as $150,000 was raised for this purpose. The agreement further provided that the defendant "hereby guarantees that the new corporation to be organized * * * shall pay to the said parties of the second part the * * * sums to which they are respectively entitled, * * * as soon as the said new corporation shall have been organized and the aforesaid sufficient funds for the unwatering, equipping and developing of said mines," or the sum of $150,000 had been "raised and obtained," and if the new corporation failed to pay the sums mentioned in the agreement, the defendant agreed to make these payments "within six months after the said new corporation shall have been organized," and money enough for the purpose already mentioned, or the sum of $150,000 for this purpose "shall have been raised and obtained."

Pursuant to the agreement a new corporation was formed January 3, 1907. Between that time and October 1, 1912, various sums amounting to $148,921.58 were secured. Of this amount $53,196.20 was received from bullion, the cost of mining the same being $143,157. The expenses during this period were $161,755.66, and on October 1, 1912, the company's debts amounted to $56,728.24. On October 5, 1912, the stockholders were notified by the directors that the company was badly in debt, and that one Estabrook was ready to take over the mines under certain conditions. The plaintiff received this notice and sent her proxy, which was voted at the stockholders' meeting ratifying the action of the board of directors who had accepted the Estabrook contract. From October 1, 1912, to August 4, 1914, under Estabrook's management there was produced in bullion $75,578, the expenses being $111,357.08. It was agreed that the mine was entirely unwatered in February, 1910.

The sum of $2,100 to be paid the plaintiff under the contract has not been paid to her, either by the defendant or by the corporation.

[1] Assuming, but not deciding, that the promise of the defendant was an original promise and not a mere guaranty, the defendant's agreement was to pay the sum stipulated when sufficient funds were "raised" by the new corporation for the "unwatering, equipping and developing of said mines." The sum of $150,000 was never raised or obtained for this purpose according to the terms of the contract, and it was not shown that a sum sufficient for the purpose was ever obtained in the manner contemplated by the contract. The contract provided that the plaintiff was to be paid when the money was raised or obtained. This meant that money adequate in amount, but not exceeding $150,000 was to be collected or acquired, by the sale of the stock of the corporation, or by loans or other obligations of the company, or by operating the mines at a profit, so that it would be available for the purpose from the net profits of the undertaking.

As we construe the contract, it did not mean that the plaintiff could demand the sum named, when, by operating the mine at a loss, this amount was realized. The money expended in connection with the operation was more than $160,000, and the receipts from the sale of stock and from the mortgage were $83,367.50. The money received from bullion was $53,196.20, but the cost of mining this was $143,057. There was no evidence that money sufficient in amount to accomplish the purpose was ever raised in the manner or from the source intended. The total amount received by the corporation from all sources, including the sale of bullion, was less than $150,000. It amounted to $148,921.58, and the expenses during that period greatly exceeded the receipts, so that on October 1, 1912, the corporation had an indebtedness of $56,728.24.

The plaintiff contends that the bullion obtained from the mine must be considered as money so raised, irrespective of the cost of mining. The agreement specified that funds were to be "raised and obtained," and until this was done the plaintiff could not recover against the defendant. The bullion

not be considered as a part of the fund raised. Deducting the expenses, there was no money available from the sale of bullion.

[2] The plaintiff further contends that, in ascertaining the funds secured, to the sum of $148,921.58 being the total amount received by the corporation to October 1, 1912, without deducting the expenses, should be added the sum of $50,000, which Estabrook advanced to the corporation while it was under his management. After the corporation passed to the control of Estabrook, under the agreement of the stockholders, including the plaintiff, the original contract was at an end. The plaintiff could not thereafter rely on the funds advanced under this new and different contract with a third person, to show a breach of the plaintiff's contract with the defendant. The evidence offered by the plaintiff, that the money expended in obtaining ore from the mine had been procured for its development, was inadmissible. The contract was in writing. Waldstein v. Dooskin, 220 Mass. 232, 107 N. E. 927.

As the plaintiff cannot recover, for the reason that the funds necessary for the unwatering, equipping and developing of the mine have not been "raised or obtained," as provided in the contract, we have not thought it necessary to consider the question of the plaintiff's waiver of the original contract by entering into the contract with Estabrook. Judgment is to be entered for the defendant.

So ordered.

COMMONWEALTH v. PERRY.

(Supreme Judicial Court of Massachusetts. Middlesex. Feb. 26, 1924.)

1. Criminal law ⇐427(3)—Evidence held admissible on charge of conspiracy.

In a prosecution for conspiracy and receiving stolen automobiles, the court did not err in permitting the commonwealth to introduce evidence as to defendant's connection with forged bill of sale and tools and changes of numbers on automobiles, though the government had not at the time introduced any evidence of the alleged conspiracy; the order of proof being a matter of judicial discretion, which was not exercised in a manner prejudicial to the defendant.

2. Criminal law ⇐424(1)—Testimony as to admissions and statements of co-conspirator held not admissible.

In a prosecution for receiving stolen automobiles and for conspiracy, admissions and statements of a co-conspirator with police sergeant in regard to past events, and not in furtherance of any scheme of the codefendants and defendant to receive automobiles or selling them, were inadmissible; such admissions sistent and in agreement with his testimony at the trial.

3. Criminal law ⇐673(4)—Court erred in not charging that certain evidence should not be considered against one defendant.

In prosecution of defendant and others for conspiracy and receiving stolen automobiles, where evidence of a conversation with a codefendant after the termination of the alleged conspiracy was admitted, and defendant moved to strike it out so far as he was concerned, the court erred in not instructing the jury that they should consider the evidence only as to the codefendant.

4. Criminal law ⇐338(4, 5), 1169(1)—Admission of court record showing plea of guilty by another held prejudicial error.

In prosecution for conspiracy and receiving stolen automobiles, error of the court in admitting in evidence a record of a municipal court showing that a certain person had pleaded guilty to stealing a certain automobile, which person was not a codefendant in the indictment under which the defendant was then on trial, but having been a codefendant in an indictment previously found, which was nol. prossed, was error, material and prejudicial; the car in question being one of the automobiles which defendant was alleged to have received knowing it to have been stolen.

5. Conspiracy ⇐45—Receiving stolen goods ⇐8(2)—Testimony concerning receipt held inadmissible.

In prosecution for receiving stolen automobiles and for conspiracy, the court erred in permitting witness to testify that he delivered a car from his house to a certain person, and received payment and signed a receipt, that he did not write the body of the receipt, but that it was written by defendant; it being admitted by the commonwealth that the particular car was never recovered, and there being no evidence that it was stolen.

6. Judgment ⇐751—Court erred in refusing to admit certified copy of court record showing acquittal.

In prosecution for conspiracy, the court erred in refusing to admit in evidence a certified copy of a record of a police court of the acquittal of defendant on the charge of receiving a certain car knowing it to be stolen, where such car was one of those which had been specified by the commonwealth as having been received in pursuance of the conspiracy; the fact that defendant was found not guilty of receiving such car being conclusive as to his lawful possession of the car in case the jury believed it was stolen.

7. Criminal law ⇐434—Entry in books, made from order of which bookkeeper had no knowledge, held inadmissible.

Entry in book was erroneously admitted in evidence, where bookkeeper testified that she made such entry in the book from an order blank used in the store, and all that she knew about the entry was that it was transmitted to her on an order blank, under G. L. c. 233, § 78.

evidence a book entry showing sale to defendant of a set of steel block figures was prejudicial.

9. Criminal law ⟸451(1)—Testimony held to describe act, and not mental process.

Testimony of officer that he saw a certain person identify an automobile *held* to describe the act, and not the mental processes, of the person making the identification.

10. Criminal law ⟸695(6)—Defendant held not entitled to except to admission of letters as whole, where he refused to point out part not pertinent.

Where letters were introduced in evidence by the district attorney, after the refusal of the defendant to examine them and point out what ones, if any, were not pertinent to the issue, defendant cannot complain that a part of the whole would have been sufficient for the purpose for which the letters were offered.

Exceptions from Superior Court, Middlesex County; John F. Brown, Judge.

George T. Perry was convicted of receiving stolen automobiles and conspiracy, and brings exceptions. Exceptions sustained.

R. T. Bushnell, Asst. Dist. Atty., of Boston, for the Commonwealth.

W. H. Garland, of Boston, for defendant.

PIERCE, J. The defendant, with one Barry, Collamore, Rice, Surette, and Bouve, was jointly indicted for conspiracy, between the 1st day of January, 1917, and August, 1918, in two counts; the first count charging in substance that the said defendants conspired to steal automobiles, and the second count in substance alleging that the same defendants conspired to receive by sale or aid in the concealment of automobiles, knowing the same to be stolen. The defendant was indicted separately for stealing on November 30, 1918, an automobile, the property of Helliwell Garages, Inc. The defendant was also indicted separately, in two counts, upon the accusations of stealing and receiving on July 18, 1917, an automobile, the property of one Thomas M. Howard. The defendant was also indicted separately on the charge of receiving, on October 2, 1917, a stolen automobile, the property of one David B. MacPherson. These indictments, with four other separate indictments charging Collamore with receiving stolen cars, the property respectively described as of one Lowe, Eyges, Bridges, and Buffam, were tried together.

After the jury was impaneled the defendants Rice, Surette, and Bouve each retracted his plea of not guilty, and pleaded guilty to the conspiracy charge and to the counts alleging receiving stolen automobiles. In the and Barry on the indictments against them. In the course of the trial Collamore fell ill and the cases against him were continued. By the direction of the court the jury found the defendant Perry not guilty of stealing the Howard car and the car of the Helliwell Garages, Inc. On the three remaining indictments the jury found the defendant Perry guilty on both counts of the indictment charging conspiracy, and on the indictments charging him with receiving the Howard car and the MacPherson car, knowing them to have been stolen. The jury disagreed as to the charges against Barry. Verdicts of guilty were returned on March 24, 1922, and the defendant on that day was sentenced to state prison, on both indictments for receiving stolen automobiles, with successive sentences. On November 16, 1922, the district attorney moved for sentence on the indictment for conspiracy and the defendant was therefore sentenced to the house of correction, said sentence to be served after the previous sentences.

In the course of the trial the indicted coconspirators Rice, Surette, and Bouve were called as witnesses and testified for the government. We shall consider the voluminous exceptions in the order of their presentation in the defendant's brief.

[1] Before the government had introduced any evidence of the alleged conspiracy, Rice was called and testified that two police officers, Sheehan and Day, came to his place at Wilmington "at one time in 1918"; that at that time he had in his barn a Buick touring car; that they asked him "where he got said car"; that "he then showed Sergeant Sheehan a bill of sale to show that he had the possession rightfully of said car." He then identified as the document in question two pieces of paper which were offered in evidence. The defendant objected to their admission "on the ground that there was no proof that he was connected in any way with this particular transaction as to which the witness was about to testify." The papers were then marked Exhibits 1A and 1B, and the witness stated that they bore the name of William H. Halley, 12 Oak Grove avenue, Springfield, Massachusetts; that he saw George T. Perry, the defendant, "sign that name in his office in the Journal Building, Boston, Massachusetts; that Mr. Perry made out the body of the bill." The defendant excepted to the admission of said paper as an exhibit, and stated his objection to be "that there was no evidence of conspiracy with Mr. Perry in any of these acts and they were not connected with him."

The witness was then shown certain dies

testified, in substance, that he had seen them before "up in my place out at Wilmington"; that "he gave those articles to Sergeant Sheehan that night he came out"; that "Mr. Perry paid for those dies, and they were turned back to Mr. Perry." The dies first above mentioned and the plane were then offered and received in evidence, marked Exhibits 2 and 3, and the defendant duly excepted. The witness then testified that he got the plane at Haymarket Hardware Company, and that Mr. Perry purchased it; that the car found in his possession the night Sheehan went out there he got from the defendant Daniel K. Collamore, Melrose Highlands; that he paid $50 for it; that he changed the motor number on that car to 292492, which number he took off the bill of sale that he had in his possession, referring to Exhibit 1, upon which a similar number appears. He then testified that Perry took the number from a book; that he described to the witness the way to change numbers on a motor, which the witness stated to be as he thereafter testified. He further testified that he painted the engines of cars with paint which he got and Perry paid for. It appeared from the testimony of the witness that he met the other alleged conspirators Surette, Collamore, and Barry, at Perry's office in Boston; and it could have been found from Rice's testimony that the scheme was to have the cars delivered at his shop in Wilmington, where he would change the numbers and deliver the cars, under Perry's instructions, to other parties to the conspiracy for disposition. There was no error in receiving in evidence the testimony connecting the defendant with the drafting of the bill of sale and the purchase of the plane and dies. Such testimony and the exhibits were relevant to establish against the defendant the charge of conspiracy; and the order of proof was a matter of judicial discretion, which does not appear to have been exercised in a manner prejudicial to the legal rights of the defendant. It follows that the exceptions taken to the testimony of Rice and the admission in evidence of the exhibits must be overruled. Commonwealth v. Johnson, 188 Mass. 382, 385, 74 N. E. 939; Commonwealth v. Dorr, 216 Mass. 314, 319, 103 N. E. 902.

The defendant duly excepted to the testimony of Sergeant Sheehan wherein, in substance, he said that on July 23, 1918, he had a conversation with Rice in reference to the Buick touring car found in the barn of Rice; that Rice stated that he was to have the next car that came to the defendant Collamore's place of business; that Rice showed him the bill of sale that was put in evidence during the testimony of Rice; that Rice said that "he went to Lawyer George T. Perry's office and requested a bill of sale, saying to Mr. Perry that he had stolen a car in Lowell and that he would like to get a bill of sale was the week previous to this car afterwards coming to Collamore's; the following week or thereabouts a car came to Collamore's, and Collamore called him up about it, and he brought the car to Wilmington, where he changed the numbers to the numbers that were on this bill of sale." He further testified that Rice said "he [Rice] would go to Collamore's place and bring cars over and change the numbers at his place, and that he would go to Perry's office, where Perry would supply him with certain numbers to change on these cars, from a book; that he would take these certain numbers to Wilmington and put those numbers on the cars." He further testified that, on the night Rice had testified he (Sheehan) came to the home of Rice at Wilmington, Rice went into the barn, ripped up a boarding and produced a set of dies and a wooden block plane (which were the dies and plane introduced in evidence during the testimony of Rice), which Rice told the witness were used to change the numbers on the Ford cars, and the body number and number on the door of Buicks. He also testified that three or four days after the night referred to, that is, July 23, 1918, he had another conversation with Rice wherein Rice stated "he accompanied Mr. Perry to Allen Bros. on Cornhill, where there was some transaction regarding dies; that the dies that were received from Allen Bros. were given to him; that he used these dies to change numbers on Buicks; that Rice did not show him those dies in question and did not tell him where they were until later on, he should say in November, 1918"; and that Rice told him he had returned the dies to Perry.

[2] The admission and statements of Rice with the police sergeant were in the nature of confessions of guilt, and manifestly were not verbal acts in furtherance of any scheme of the codefendants and Perry to steal automobiles, or to sell and receive automobiles that he or they knew were stolen. It is plain that the declarations to the police officer were not made with a view to divert and lead him from further investigation, while the defendants concealed and made safe disposal of the property which they had in combination obtained; nor was it an attempt to conceal any evidence which would be material to connect them or any of them with their unlawful scheme, as charged in the several indictments. The testimony of Sheehan that Rice made statements and declarations of fact consistent or in agreement with his testimony at or about the time to which the statements of fact relate, was not admissible to prove that such statements were true or were not of recent invention, and were not made under the pressure of some undue influence, and nothing had developed at the trial to justify the supposition that the defendant would contend that the

conversation with Collamore (then on trial), Sheehan testified, in substance, that "somewhere in the vicinity of the 7th of August, 1918," he had a conversation with Collamore at which one Surette, a codefendant was present; that Collamore in reply to questions said, in substance, that Surette and John Marshall were the same person; that he (Collamore) did not know him by any other name than John Marshall and had seen him in the office of the defendant, where he always knew him as Marshall. At the close of the narrative of the conversation with Collamore and after cross-examination the defendant renewed a motion, made at the close of the direct testimony, "to strike out this testimony so far as the defendant Perry was concerned, so far as it appeared that the conversation took place after the termination of the alleged conspiracy." The court denied the motion and the defendant excepted. The exception must be sustained. The evidence, while admissible against Collamore, was inadmissible against the defendant, and the defendant under his motion to strike out the testimony to which he had excepted was entitled to have the jury instructed that they should consider the evidence only as to Collamore. Commonwealth v. Shepard, 1 Allen, 575, 581, 582; Commonwealth v. Fecl, 235 Mass. 562, 568, 571, 127 N. E. 602.

[4] The court received in evidence, subject to the exception of the defendant, the record of the municipal court of Brookline, showing that one Stephen Crowley on November 18, 1919, pleaded guilty to stealing on October 2, 1917, an automobile, the property of one David B. MacPherson. Crowley was not a codefendant in the indictment under which the defendant was then on trial, but had been a codefendant in an indictment found in 1918 which was then nol. prossed. At the close of the evidence the judge of his own motion stated in the absence of the jury: "I also strike out the record of the police court of Brookline." For some reason not disclosed in the record he did not do so and the defendant did not call his attention to the omission. The MacPherson car was one of the automobiles the defendant was alleged to have received on October 2, 1917, "well knowing the said property to have been stolen." It is plain the reception of the record was material in proof of the allegation that the car which was received by the defendant on October 2, 1917, was a stolen car and the property of MacPherson. The error was material and not trivial and unimportant, as is argued by the commonwealth. Commonwealth v. Slavski, 245 Mass. 405, 140 ant must be sustained on other grounds, we think it is unnecessary at this time to determine whether in a criminal case a defendant is estopped to prosecute the exceptions which he has saved by the failure of his attorney to remind the court that it had omitted to instruct the jury to disregard the evidence to which the exception had been taken as it had undertaken to do on its own motion. In this connection see Commonwealth v. Johnson, 199 Mass. 55, 59, 85 N. E. 188; Clarke v. Fall River, 219 Mass. 580, 586, 107 N. E. 419; N. J. Magnan Co. v. Fuller, 222 Mass. 530, 111 N. E. 399; Commonwealth v. Wakelin, 230 Mass. 567, 576, 120 N. E. 209; Diaz v. United States, 223 U. S. 442, 450, 32 Sup. Ct. 250, 56 L. Ed. 500, Ann. Cas. 1913C, 1138. The court also stated to the defendant "I also strike out Cumming's testimony," but did not for some reason direct the jury to disregard it. The evidence which was received subject to the exception of the defendant, related to matters not the subject of the several indictments, and was not admissible to affect the credibility of the defendant, who had testified in his own behalf. As stated in reference to the Crowley exception, supra, the exigencies of the case as now presented do not require a decision as to whether the defendant did or did not estop himself to rely on his exception by failing to remind the court that it was forgetful of its undertaken duty.

[5] Against the exception of the defendant Rice was permitted to testify that he delivered a car from his house to one Pembroke, which lacked a splash pan on the engine; that he received therefor either money or a check and signed a receipt when he delivered the car; that he recognized a paper then shown to him as the receipt which he signed and gave to Pembroke; that he did not write the body of the receipt, it was written by Mr. Perry; that he did not know what became of the car lacking the splash pan which he delivered to Pembroke. It was admitted by the commonwealth that "the particular car was never recovered"; there was no evidence that it was stolen and it was not when the evidence was received or afterwards identified as one in respect of which any crime had been committed by any of the defendants. This evidence was important in establishing by means of the receipt the alleged conspiracy between Rice and Perry. It is plain the testimony was inadmissible, should have been stricken out on the motion of the defendant, and that the exception must be sustained.

[6] The defendant's exception to the refusal of the court to admit in evidence a certified copy of the record of the police court of Somerville of the acquittal of Perry, July 25, 1919, on the charge of receiving the Helliwell car, knowing it to be stolen, must be sustained. The Helliwell car was one of the cars which had been specified by the commonwealth as having been received in pursuance of the conspiracy charged in the second count of the indictment. The fact that in 1919 he had been found not guilty of receiving the Helliwell car, if shown, was conclusive as to his lawful possession of the car in case the jury believed the car was stolen and was the one which, as the commonwealth claimed, he kept and used from November, 1917, until it was taken from him in replevin. In passing it is to be observed that the jury did, by direction of the court, find Perry not guilty of stealing the Helliwell car.

[7, 8] Miss Florence J. Grover, a bookkeeper in the employ of Allen Bros., of 17 Cornhill, Boston, testified that a certain book was one kept in the regular business of the firm; that certain entries therein were in her handwriting; that a certain entry was made by her on April 9, 1918; that that order was written down by her from an order blank used in the store which she copied into the book. She further testified "that all she knows about the entry is that it was transmitted to her upon an order blank which she copied into the book; that she could not say whether she saw the person that gave the order or not and did not know whether or not it was a Mr. Perry or what Mr. Perry it was." The defendant after the introduction of the evidence moved that the testimony be stricken out; the motion was denied and the defendant excepted. The entry which was admitted in evidence and shown to the jury subject to the defendant's exception reads: "To one set of 5/32 steel block figures, $2.50, with a credit of 1/8 set returned, $1.50." It was marked, "For Mr. Perry. Call Wednesday," and stamped, "Paid." This entry was inadmissible and its admission was manifestly prejudicial error. Upon the evidence the entry was not admissible in civil or criminal cases at common law; and such an entry is not made admissible in criminal proceedings against the objections of the defendant, under G. L. c. 233, § 78. The exception to the admission of the entry in evidence is sustained. Kent v. Garvin, 1 Gray, 148; Kaplan v. Gross, 223 Mass. 152, 154, 111 N. E. 853; Commonwealth v. Stuart, 207 Mass. 563, 568, 93 N. E. 825; Commonwealth v. Wakelin, 230 Mass. 567, 575, 120 N. E. 209.

[9] In the sequence of question and answer, we think the answer of Sheehan that he "saw Mrs. Lillian K. Eyges identify the car" describes the act and not the mental processes of Mrs. Eyges. With such interpretation the testimony was properly received. Commonwealth v. Stortivant, 117 Mass. 122, 19 Am. Rep. 401; Jenkins v. Weston, 200 Mass. 488, 493, 86 N. E. 955; Mielke v. Dobrydnio, 244 Mass. 89, 91, 92, 138 N. E. 561.

[10] The letters introduced in evidence to show why Crowley was not called by the district attorney were properly admitted as a whole, after the refusal of the defendant to examine them, and point out what ones, if any, were not pertinent to the issue. Refusing to make such an examination he cannot thereafter complain that a part of the whole would have been sufficient for the purpose for which the letters were offered, and have an exception to the admission of the excess. This exception must be overruled.

The remaining exceptions are not now considered, because they either are without error, or present questions of evidence and of procedure which are not likely to arise at any new trial.

Exceptions sustained.

O'HARA'S CASE.

BRANDIES' CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 29, 1924.)

1. Master and servant ⟸417(7)—Finding of jurisdiction in compensation case sustained if supported by evidence.

A general finding of Industrial Accident Board that employee's claim under the Workmen's Compensation Act was within its jurisdiction, and not within the exclusive jurisdiction of admiralty, will be sustained if there is any evidence to support it; such a finding importing a finding of such subsidiary facts necessary to uphold it so far as justified by the evidence.

2. Admiralty ⟸20—Workmen's Compensation Act inapplicable to cases of admiralty jurisdiction.

The Workmen's Compensation Act is operative only upon classes of employment and injury within the jurisdiction of the commonwealth, and does not extend to cases of admiralty and maritime jurisdiction, which are exclusively under the control of the United States, under Const. U. S. art. 1, § 8, and article 3, § 2.

3. Admiralty ⟸20—Workmen's Compensation Act held not applicable to injuries on dry dock.

Injuries received in either a floating dry dock or in a dry dock affixed to the land, both designed to receive vessels floating in navigable waters, are not covered by the Workmen's Compensation Act, the employees at the time

tion Act to obtain compensation for injuries received while repairing and repainting ships in dry dock are not within the words of the Judicial Code "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," under Judicial Code, § 24, cl. 3, and section 256, cl. 3 (U. S. Comp. St. §§ 991, 1233); the Workmen's Compensation Act not being a "common-law remedy."

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Common-Law Remedy.]

5. Admiralty ⟸20—Statute is inapplicable to workman's injuries occurring before passage, and is also unconstitutional.

Judicial Code, § 24, cl. 3, and section 256, cl. 3, as amended by Act Cong. June 10, 1922 (U. S. Comp. St. Ann. Supp. 1923, §§ 991, 1233), is not operative in proceedings to obtain compensation for a workman's injuries on dry dock occurring prior to its passage, and is also contrary to the federal Constitution.

Appeal from Superior Court, Suffolk County; McLaughlin, Judge.

Proceeding by Adolph Brandies under Workmen's Compensation Act, to obtain compensation for personal injuries, opposed by the Bethlehem Shipbuilding Corporation, the employer, and the United States Mutual Liability Insurance Company, the insurer. There was an award of compensation and a decree, and the insurer appeals. The O'Hara case, being controlled by the same principles of law, is decided. Decree in each case reversed, and decree rendered in favor of insurer.

E. Field, of Boston (H. L. Brown, of Boston, on the brief), for appellant.

E. B. Cook, of Boston, for appellee Brandies.

F. W. Mansfield, of Boston, for appellee O'Hara.

RUGG, C. J. These are two cases under the Workmen's Compensation Act. The facts show that the cases are subject to the same controlling principles of law and although argued separately they are decided by a single opinion.

[1] Brandeis received injuries in the course of and arising out of his employment by the Bethlehem Shipbuilding Corporation. The general finding of the board was that the employee's claim was within its jurisdiction and not within the exclusive jurisdiction of admiralty. This general finding will be sustained unless it appears that the only reasonable inference from the facts is that the employee was at work at the time of his injury on a dry dock, building a staging, that was the work he always did; that he was handing a big plank to a fellow employee and it slipped causing his injury. Other testimony showed that the dry dock was moored to piers and was floating in navigable waters, so that "the ship sails right into it." The vessel in the floating dry dock was a steamship in commission which came into the dock for repairs. In order to make the required repairs, it was necessary to erect a staging on the outside of the vessel within the dry dock. The staging consisted of horses twenty-six feet high, which moved on wheels and which were arranged along the inside of the dock against the side of the ship. Planks were placed on these horses to make the staging continuous around the ship. The claimant when injured was engaged in setting up this staging. These appear to be the facts in their light most favorable to the claimant which on the evidence the board might have found. The employer of Brandies was insured under the Workmen's Compensation Act.

O'Hara's case was submitted on an agreed statement of facts in substance as follows: A contract for certain repairs on an ocean-going steamship was made by her owners with the corporate proprietor of a dry dock. The dry dock rested upon and was attached to land. For the performance of the contract it was necessary that the steamship be floated into the dry dock. That had been done and the water had been partly pumped out of the dock at the time of the injury. O'Hara was in the employ of subcontractors, to whom had been let the chipping of the hull, that is, the removal of old paint in preparation for a new coat of paint. While in the performance of his duties, walking on a plank extending from the side of the dry dock to the side of the steamship, he fell, receiving injuries for which compensation is here sought. The proprietor of the dry dock was insured under the Workmen's Compensation Act, but the subcontractors by whom the complainant was employed were not so insured. See G. L. c. 152, § 18, White v. George A. Fuller Co., 226 Mass. 1, 114 N. E. 829, and Bindbeutel v. L. D. Willcutt & Sons Co., 244 Mass. 195, 138 N. E. 239.

[2] Both these cases are within the scope of the Workmen's Compensation Act so far as concerns mere matter of verbal construction. That act must be and has been interpreted as operative only upon classes of em-

"cases of admiralty and maritime jurisdiction," which are exclusively under the control of the United States. Article 3, § 2, article 1, § 8, of the United States Constitution; Gillard's Case, 244 Mass. 47, 51, 52, 138 N. E. 384.

[3] The single question to be decided is whether these injuries are "cases of admiralty and maritime jurisdiction." This is a subject on which decisions by the Supreme Court of the United States constitute the law of the land. Therefore, our only concern is to endeavor to ascertain and apply the governing principles declared by that court.

In the leading case of Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, it was held respecting a stevedore injured on a gangway connecting an ocean-going vessel with the pier while helping to unload her cargo, that his work was "maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction." As a necessary consequence it further was held that the New York Workmen's Compensation Law was not operative because the jurisdiction of the United States over admiralty and maritime affairs was exclusive. This decision according to our understanding has not been modified in its essential features by more recent pronouncements. It has been cited with approval and as a controlling authority on all matters within its scope in all subsequent decisions dealing with the subject. Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171; Union Fish Co. v. Erickson, 248 U. S. 308, 39 Sup. Ct. 112, 63 L. Ed. 261; Peters v. Veasey, 251 U. S. 121, 40 Sup. Ct. 65, 64 L. Ed. 180; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145. See, also, other decisions herein cited. It was held in Western Fuel Co. v. Garcia, 257 U. S. 233, 242, 42 Sup. Ct. 89, 90 (66 L. Ed. 210), as the logical result of prior decisions, that where death upon navigable waters within a state resulted—

"from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given. The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."

66 L. Ed. 321, 25 A. L. R. 1008, following earlier decisions, was that the construction of a new and uncompleted vessel lying in navigable waters had no direct relation to navigation or commerce and was non-maritime in nature, and hence that rights and liabilities with respect to injury to a workman injured while engaged in such construction were governed by a Workmen's Compensation Act. This case was followed in Gallard's Case, 244 Mass. 47, 138 N. E. 384, Danielson v. Morse Dry Dock & Repair Co., 235 N. Y. 439, 139 N. E. 567, and Zahler v. Department of Labor and Industries, 125 Wash. 410, 217 Pac. 55. The converse of this principle was illustrated in New Bedford Dry Dock Co. v. Purdy, 258 U. S. 96, 42 Sup. Ct. 243, 66 L. Ed. 482, where it was held that a contract for converting a vessel into a different kind of water craft was for repair rather than for original construction and hence was maritime in nature. In Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 42 Sup. Ct. 475, 66 L. Ed. 927, the principle was reiterated that when one of a crew sustains injuries while on a vessel in navigable waters, "the general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common law court." The decision rested on the ground that the vessel was unseaworthy and that in such instances the maritime law affords compensatory damages. Proctor v. Dillon, 235 Mass. 538, 129 N. E. 265. The decision in Industrial Commission v. Nordenholt Corp., 259 U. S. 263, 42 Sup. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013, was that a longshoreman, injured while engaged in unloading a vessel lying in navigable waters but actually at work on the dock (an extension of the land [Cleveland Terminal & Valley Railroad Co. v. Cleveland Steamship Co., 208 U. S. 316, 28 Sup. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215]), was subject to the Workmen's Compensation Act of the state and not to maritime law. While the contract under which he was working was maritime in its nature, it was held in effect that, the place of injury being on land, the local law governed. It was said at page 273, of 259 U. S. (42 Sup. Ct. 474), quoting from the Rohde Case:

"The general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled."

In Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U. S. 479, 43 Sup. Ct. 418, 67 L. Ed. 756, a boiler maker employed to perform services as called upon was injured while repairing a vessel lying in navigable waters. It was held that admiralty law governed, the court saying:

tive on navigable waters, but the rights and liabilities of the parties are matters which have direct relation to navigation and commerce."

In Washington v. W. C. Dawson & Co., 44 Sup. Ct. ——, 68 L. Ed. ——, decided two days ago by the Supreme Court of the United States, it was adjudged that the Workmen's Compensation Act of the state of Washington was inoperative over stevedores at work on board ship in navigable waters and that that of the state of California was inoperative over workmen actually engaged in maritime work under a maritime contract on a ship moored at her dock and discharging her cargo, and that the Act of Congress of June 10, 1922, c. 216, 42 U. S. Stats. at Large, 634, amending section 24, cl. 3, and section 256, cl. 3, of the Judicial Code (U. S. Comp. St. Ann. Supp. 1923, §§ 091, 1233), was in direct conflict with the Constitution of the United States, and hence unenforceable. It further was expressly held that—

"None of the later causes depart from the doctrine of Southern Pacific Co. v. Jensen [244 U. S. 205], and Knickerbocker Ice Co. v. Stewart [253 U. S. 149]. * * *"

See Danielson v. Morse Dry Dock & Repair Co., 235 N. Y. 439, 139 N. E. 567, certiorari denied in 262 U. S. 756, 43 Sup. Ct. 703, 67 L. Ed. 302; and see, also, Zurich General Accident & Liability Inc. Co., Ltd. v. Industrial Accident Com. (Cal. Sup.) 218 Pac. 563, and Alaska Packers' Ass'n v. Industrial Accident Com. (Cal. Sup.) 218 Pac. 561, in each of which certiorari was denied by the Supreme Court of the United States on January 28, 1924.

The principle deducible, as we think, from all these decisions, is that the rights and liabilities of parties with respect to injuries received by a workman engaged in repair of a completed vessel in navigable waters are governed by maritime law, because the work has direct relation to navigation and the injury occurs on navigable waters. The place of occurrence is decisive as to jurisdiction. The nature of the contract seems to us to be of no significance. But, however that may be, we are of opinion that, so far as parties by their contracts contemplate the performance of labor in repair of vessels lying in navigable waters, the contracts are to that extent maritime in their nature.

The injuries were received in the cases at bar, the one in a floating dry dock and the other in a dry dock affixed to the land. A dry dock designed to receive vessels floating in navigable waters is itself part of navigable waters and subject to admiralty jurisdiction. A vessel employed in navigation is still a maritime object—

"within the admiralty jurisdiction when, for the purpose of making necessary repairs to fit her for continuance in navigation, she is placed about her. * * * Nor is there any difference in principle between a vessel floated into a wet dock, which is so extensively utilized in England for commercial purposes in the loading and unloading of vessels at abutting quays, and the dry dock into which a vessel must be floated for the purpose of being repaired, and from which, after being repaired, she is again floated into an adjacent stream. The status of a vessel is not altered merely because in the one case the water is confined within the dock by means of gates closed when the tide begins to ebb, while in the other the water is removed and the gates are closed to prevent the inflow of the water during the work of repair." The S. S. Jefferson, 215 U. S. 130, 142, 30 Sup. Ct. 54, 58 (54 L. Ed. 125, 17 Ann. Cas. 907).

It was said in The Robert W. Parsons, 191 U. S. 17, 33, 24 Sup. Ct. 8, 13 (48 L. Ed. 73):

"A dry dock differs from an ordinary dock only in the fact that it is smaller, and provided with machinery for pumping out the water in order that the vessel may be repaired. * * * But as all serious repairs upon the hulls of vessels are made in dry dock, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs. * * *"

There is in reason no distinction between the continued control of admiralty over a vessel when she is in a dry dock for the purpose of being repaired and the subjugation of the vessel when in dry dock for repairs to the jurisdiction of a court of admiralty for the purpose of passing upon claims for salvage services.

There seems also to be no distinction in reason between the admiralty jurisdiction over repairs to a vessel in dry dock and over salvage services in saving a vessel in dry dock from destruction by fire established in the two decisions last cited, and admiralty jurisdiction over injuries received by a workman in making repairs on a vessel in dry dock. It was expressly so held in the Anglo-Patagonian, 235 Fed. 92, 148 C. C. A. 586, petition for writ of certiorari to which was dismissed in 242 U. S. 636, 37 Sup. Ct. 19, 61 L. Ed. 539, under the name Lord v. Ledwitch; Danielsen v. Morse Dry Dock & Repair Co., 235 N. Y. 439, 139 N. E. 567.

Whether the dry dock is floating or resting upon and attached to land is also an immaterial factor in view of these decisions. The essential factor is that the vessel floats into it.

These principles and decisions seem to us decisive of the cases at bar. Brandies was injured in a floating dry dock while making ready the appliances for the repair of a seagoing vessel. We are of opinion that it is as much a part of the repair of a vessel to adjust to her hull the staging within the dry dock upon which men are to stand while performing the repairs as to be actually engaged

in the craftsmenship of repair. Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U. S. 479, 43 Sup. Ct. 418, 67 L. Ed. 756, and The Anglo-Patagonian, 235 Fed. 92, 148 C. C. A. 586, appear to be precisely in point. O'Hara was injured while walking on a plank extending from the dry dock to the side of the vessel in the performance of his work on her hull. This case cannot be distinguished in its salient facts from those upon which rests the decision in Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900.

The decisions to which reference already has been made constrain us to hold that the admiralty jurisdiction of the United States excludes the operation of our Workmen's Compensation Act with reference to the injuries here in issue. This result is not affected by the fact that our act is optional with the parties, and is not compulsory. The voluntary and optional feature of statutory laws as distinguished from absolute compulsion sometimes is of decisive significance. Holcombe v. Creamer, 231 Mass. 99, 120 N. E. 354. Cf. Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785, 24 A. L. R. 1238. But the Supreme Court of the United States has held that admiralty jurisdiction as to personal injuries is fixed inexorably by the place of occurrence.

"Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." The Plymouth, 3 Wall. 20, 36 (18 L. Ed. 125).

When that court has held that admiralty jurisdiction is exclusive where the injury takes place on navigable waters in the repair of a completed vessel, to enable her to continue navigation, there seems to us no room for the operation of the Workmen's Compensation Act. We felt obliged so to hold in Duart v. Simmons, 231 Mass. 313, 320, 121 N. E. 10, Id., 236 Mass. 226, 128 N. E. 32, Sterling's Case, 233 Mass. 485, 124 N. E. 286, and Dorman's Case, 236 Mass. 583, 129 N. E. 352. We are bound by these decisions, and we feel that they are sound. See, also, to the same effect with reference to elective statutes, Neff v. Industrial Commission, 166 Wis. 126, 164 N. W. 845; Wis. Laws 1911, c. 50 (Wis. St. 1911, §§ 2394—5, 2394—6); Foppen v. Fase, 219 Mich. 136, 188 N. W. 541; 2 Compiled Laws of Mich. 1915, §§ 5423–5495. Cf. West v. Kozer, 104 Or. 94, 206 Pac. 542.

The considerations already stated serve without further discussion to distinguish the cases at bar from Gallard's Case, 244 Mass. 47, 138 N. E. 384.

[4] We feel compelled to hold that the injuries here in question gave rise to "cases of admiralty and maritime jurisdiction," and that they are not within the operation of the Workmen's Compensation Act. It plainly follows that the cases are not within the words of the Judicial Code "saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it." Act of Congress of March 3, 1911, c. 231, § 24, cl. 3, and section 256, cl. 3, 36 U. S. Stats. at Large, 1091, 1161. The Workmen's Compensation Act is not a common-law remedy. It is purely statutory and in substitution for the common-law remedy. It has a form of procedure, rules for the establishment of liability and a scale of compensation wholly foreign to common-law remedies. Gould's Case, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372; McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; Devine's Case, 236 Mass. 588, 592, 593, 129 N. E. 414; Southern Pacific Co. v. Jensen, 244 U. S. 205, 218, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900.

[5] We do not regard Act of Congress of June 10, 1922, c. 216, 42 U. S. Stats. at Large, 634, amending section 24, cl. 3, and section 256, cl. 3, of the Judicial Code, as operative upon the cases at bar, in both of which the injuries occurred prior to its passage. That act must be regarded as prospective only in its operation. Hanscom v. Malden & Melrose Gas Light Co., 220 Mass. 1, 3, 4, 5, 107 N. E. 426, Ann. Cas. 1917A, 145; Shwab v. Doyle, 258 U. S. 529, 534, 42 Sup. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454. But as already stated that act by the decision in Washington v. W. C. Dawson & Co., ubi supra, has just been declared contrary to the Constitution of the United States and to stand on the same footing as the act held contrary to the Constitution in Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 164, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145.

In each case the decree must be reversed and a decree entered in favor of the insurer.

So ordered.

FARLOW v. STATE. (No. 24325.)

(Supreme Court of Indiana. March 13, 1924.)

1. Criminal law ⇐1106(2)—Transcript must be filed within 90 days after service of notice of appeal, notwithstanding bail bond and order.

The provision of Burns' Ann. St. 1914, § 2215, that the transcript must be filed within 90 days after appeal is taken, applies to the concluding requirement of section 2218c that bail bond be conditioned on the perfecting of an appeal within a time fixed, not to exceed 180 days, hence, as an appeal is taken by serving notice thereof, defendant who was granted 180 days to perfect his appeal and gave properly conditioned bail bond, might have served notice of appeal at any time within the time granted, but having at once served his notice he was bound to file transcript within 90 days after such notice, though 180 days had not expired.

2. Criminal law ⇐1081—Service of notice of appeal determines time appeal is taken.

Service of notice of appeal on the prosecuting attorney determines the time at which the appeal is taken.

3. Criminal law ⇐1026, 1068½—Statute held not to grant right of appeal to any one convicted of criminal offense.

Acts 1911, c. 154, § 3, as amended Acts 1913, c. 225, relating to stay of execution and bail on appeal, does not grant a right of appeal to accused, nor provide manner of taking appeals.

4. Criminal law ⇐1106(2)—Statute held not to lengthen time within which transcript in criminal appeal may be filed.

Burns' Ann. St. 1914, § 2218c, does not lengthen the time within which a transcript in a criminal appeal may be filed after the appeal has been taken, but shortens the time in which the appeal may be perfected to the time fixed by the order of the court trying the cause, which time shall not exceed 180 days from the date of the judgment.

5. Criminal law ⇐1106(3)—Filing the transcript on appeal within statutory time a jurisdictional act.

The filing of the transcript on appeal within the time provided by the law is a jurisdictional act, and, unless so filed, there is no cause of action in the appellate court, and the appeal will be dismissed.

Appeal from Circuit Court, Rush County; John W. Craig, Special Judge.

John D. Farlow was convicted of arson. He appeals. Appeal dismissed.

Donald L. Smith, of Rushville, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward F. White, Deputy Atty. Gen., for the State.

TRAVIS, J. [1-4] This is an appeal from a judgment on a verdict of guilty of the is, Has this court jurisdiction of this appeal? The question turns upon the construction of sections 2215 and 2218c, Burns' 1914, as to whether or not the 90-day limit for the filing of the transcript after the appeal is taken under section 2215 applies to the last sentence of section 2218c. Appellant's motion for a new trial was overruled on the 6th day of November, 1922, and upon the same day at the request of appellant he was granted 90 days in which to file his bills of exceptions, and 180 days in which to perfect his appeal, and thereupon filed the notice of his intention to appeal, duly served upon and acknowledged by the prosecuting attorney, which was followed thereafter on the same day by a petition for bail, with which petition a bail bond was tendered and approved, which bond was conditioned according to section 2218c, Burns' 1914. The transcript of the record was filed in this court April 24, 1923, 169 days after the date of the service upon the prosecuting attorney of the notice of intention to appeal.

The Attorney General did not petition this court to dismiss the appeal, but raises the question in his brief by the proposition that appellant has failed to perfect his appeal according to law and the rulings of this court, in that the transcript of the appeal was not filed within 90 days after the appeal was taken. The only justification for the appeal by appellant appears in his reply brief, wherein he says that his appeal was perfected under section 2218c, Burns' 1914, and that he was given 180 days by order of the court trying the cause within which to perfect his appeal. The appeal was taken November 6, 1922. In contradistinction to all other acts in the steps necessary to take a criminal appeal, the service of notice of the appeal upon the prosecuting attorney determines the time at which the appeal is taken. The appeal is deemed to have been taken by virtue of the service of such notice as of the date of such service. Winsett v. State, 54 Ind. 437; State v. Quick, 73 Ind. 147; Price v. State, 74 Ind. 553; Farrell v. State, 85 Ind. 221.

Under the statute (section 2215, supra), which governs the time in which criminal appeals may be taken, the transcript must have been filed within 90 days from the date of the service upon the prosecuting attorney of the notice of the intention to take an appeal. Appellant does not discuss his assertion in his reply brief to the effect that he perfected this appeal under section 2218c, supra, by and through which he was given 180 days to perfect his appeal, or cite authorities to sustain his statement; and the nearest we can interpret his idea in support of the assertion is that the act (chapter 154, Acts 1911) as amended (chapter 225, Acts 1913), pertains to and governs the taking of criminal appeals under certain conditions

and circumstances, notwithstanding and contrary to the provisions in section 2215, supra.

Chapter 154, Acts 1911, as amended (chapter 225, Acts 1913), provides for the stay of execution and bail on appeal in certain criminal cases, and does not in any manner grant a right of appeal to any person convicted of a criminal offense, nor the manner in which appeals may be taken. Section 2218c, supra, and particularly the last sentence thereof, instead of lengthening the time within which a transcript in a criminal appeal may be filed, after the appeal has been taken, as seems to be claimed by appellant, if appellant avails himself of such right to a stay of execution and bail, shortens the time in which the appeal may be perfected to the time fixed by the order of the court trying the cause, which time in which said appeal shall be perfected shall not exceed 180 days from the date of the judgment. The time when his appeal was to be perfected is governed by his act in serving notice upon the prosecuting attorney November 6, 1922, of his intention to take an appeal. By this act he thereby established a time within which the transcript in the appeal must be filed. The date when such notice to the prosecutor of his intention to take an appeal was served was within his power to select, provided it be within the time granted by the court within which to perfect the appeal, or, bail not having been procured by virtue of section 2218c, supra, and time not having been limited by the court trying the cause thereunder within which to perfect the appeal, then the time within which this appeal must have been taken is governed and limited by section 2215, supra, which limits the time for the filing of the transcript within 90 days after the appeal is taken. Winsett v. State, supra; Buell v. State, 69 Ind. 125; Flory v. Wilson, 83 Ind. 391; Farrell v. State, supra; State v. Quick, supra; Price v. State, supra; Johnson v. Stephenson, 104 Ind. 368, 4 N. E. 46; Wright v. Manns, 111 Ind. 422, 12 N. E. 160; Smythe v. Boswell, 117 Ind. 365, 20 N. E. 263; Galentine v. Wood, 137 Ind. 532, 35 N. E. 901; Bollenbacher v. Whisnand, 148 Ind. 377, 47 N. E. 706; Michigan Mutual Life Insurance Co. v. Frankel, 151 Ind. 534, 539, 50 N. E. 304; Vail v. Page, 175 Ind. 126, 93 N. E. 705; 1 Am. & Eng. Enc. of Law (1st Ed.) 621; 3 Corpus Juris, 1040.

[5] The filing of the transcript on appeal within the time provided by the law is a jurisdictional act. The limitation within which appeals may be taken and perfected is a rule of procedure established by valid legislation, which not only operates upon the parties but also binds the court, and, unless the transcript is filed within the time fixed by statute, there is no cause of action in this court. Smythe v. Boswell, supra; Michigan Mutual Life Ins. Co. v. Frankel, 539, supra; Vail v. Page, 131, supra.

The transcript not having been filed within the time limited by law, the appeal is dismissed.

MYERS, J., not participating.

SHOCKLEY et al. v. STATE. (No. 24364.)

(Supreme Court of Indiana. Feb. 26, 1924.)

1. Judges ⇐16(1)—Special judge held qualified.

Where a change of venue was taken from a judge and no agreement made between the state and defendant as to who should preside, and where one selected to preside in the manner prescribed by Burns' Ann. St. Supp. 1921, § 2075, was unable to serve, *held*, that another duly appointed in the same manner as the first was qualified to act.

2. Criminal law ⇐622(2)—Denial of separate trial in prosecution for misdemeanor held not error.

In a prosecution of two defendants under Burns' Ann. St. 1914, § 2466, for keeping a room occupied for gaming, denial of motions for separate trial under section 2135 *held* not error; separate trials being a matter of right under that statute only in prosecutions for felony.

3. Criminal law ⇐1166(1)—Granting change of venue from judge upon motion of codefendant held not prejudicial.

In a prosecution of two defendants of keeping a room for gaming, changing the venue of the cause from the regular judge upon the application of one defendant *held* not prejudicial to the other, who made no objection thereto, and whose motion for a separate trial was properly overruled.

4. Criminal law ⇐1169(2)—Admission of evidence as to reputation of place held not prejudicial.

In a prosecution for keeping a room for gaming, the admission of testimony that a witness knew the general reputation of the room and that it was bad and was resorted to for the purpose of gambling, if erroneous, *held* not prejudicial; being uncontradicted and abundantly supported by other evidence.

5. Criminal law ⇐1186(4)—Supreme Court must disregard technical errors.

Under Burns' Ann. St. 1914, § 2221, the Supreme Court must disregard all technical errors that do not prejudice substantial rights of defendant.

6. Criminal law ⇐1169(2)—Improper evidence of fact proven by legitimate evidence harmless.

The admission of improper evidence tending only to disclose a fact conclusively proven by other legitimate evidence is harmless error.

Appeal from Criminal Court, Marion County; Emsley Johnson, Special Judge.

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they appeal. Affirmed.

Eph Inman, Henry Spoon, and Edwin Steers, all of Indianapolis, for appellants.

U. S. Lesh, Atty. Gen., Mrs. Edward F. White, Deputy Atty. Gen., and O. S. Boling, of Indianapolis, for the State.

WILLOUGHBY, J. This is a prosecution by indictment against the appellants George Shockley and Roy Travis and another, for a violation of section 2466, Burns' 1914. The charging part of the indictment is that—

"The grand jurors of Marion county, state of Indiana, upon their oaths present that George Shockley and Roy Travis and * * * on or about the 8th day of January, A. D. 1922, and continuously since that time up to and including the 1st day of September, A. D. 1922, did then and there in the county of Marion and state aforesaid, unlawfully and knowingly keep a room on the second floor of a certain building, commonly known as 2129½ East Washington street, in the city of Indianapolis, in said county and state aforesaid, to be used and occupied for gaming."

Each defendant waived arraignment and entered a plea of not guilty. A trial by jury resulted in the following verdict:

"We, the jury, find the defendants guilty, as charged in the indictment, and that each be fined in the sum of $500 and imprisoned in the county jail—Indiana State Farm—for a period of 30 days."

After a motion for new trial had been made and overruled, judgment was entered upon this verdict, and from such judgment the appellants appeal. Each appellant made a separate assignment of errors, and each appellant has filed a separate brief herein.

The questions presented for the consideration of this court are: (1) Did the lower court err in overruling the separate and several motion of the appellants objecting to the appointment of and qualification of Emsley W. Johnson as special judge? (2) Did the lower court err in overruling appellants' separate and several motion for a separate trial? (3) Did the lower court err in changing the venue of this cause as to the appellant Travis from the regular judge upon the separate motion of his codefendant, George Shockley? (4) Did the lower court err in permitting the introduction of evidence tending to show the reputation of the place alleged to have been kept as a gaming house?

[1] Section 2075, Burns' Supp. 1921, provides for the selection and appointment of a special judge in a criminal case where a change of venue is taken from the judge. After providing that if the prosecuting attorney on behalf of the state and the defendant shall agree in open court upon some judge or member of the bar of any court in this state to try such cause, it shall be the duty of the court to appoint such judge, and that in this case the prosecuting attorney and the defendant did not agree on a special judge, and the statute provides that—

"In the absence of such agreement, it shall be the duty of the court within five (5) days to nominate five (5) competent and disinterested persons, each of whom shall be an available judge or member of the bar of this state, to be submitted to the parties in the action from which the state of Indiana, by the prosecuting attorney, for the plaintiff's side and the defendant or defendants, within two (2) days thereafter may strike off two (2) of such names, each. The court shall thereupon appoint such person who shall remain unchallenged to preside in said cause. * * * And, if the person so appointed, if not a regular judge, if he consent to serve, such attorney shall be qualified as other judges and his appointment and oath shall be filed with the clerk and entered on the order book and he shall have power to hear and determine such cause until the same is finally disposed of."

The record shows that on the 9th day of March, 1923, appellant George Shockley filed an affidavit for change of venue from the Honorable James A. Collins, judge of the criminal court of Marion county, which was on the same day sustained and five names submitted to the parties from which to strike in the selection of such judge. As a result of such striking off of names, the name of James E. Deery was left. The trial of the cause was set for the 15th day of March, 1923, and, the said James E. Deery having notified the judge that he could not sit as special judge in that case at the time set because he would be absent from the city, the judge of the criminal court, without objection of the defendants or either of them, then submitted five other names of persons possessing the qualifications required of a special judge, and two names having been struck off by the prosecutor and two by the defendants, left the name of Emsley W. Johnson, to be selected as special judge and the said Emsley W. Johnson, on March 13, 1923, was by the judge of the criminal court of Marion county legally appointed as special judge to try said cause. Said Emsley W. Johnson accepted such appointment and was duly qualified and assumed jurisdiction over said cause. We have examined each of the briefs and have examined the part of them in which the record is set out, and we find no legal objection pointed out to the appointment of said Emsley W. Johnson as such special judge, and we know of no such objection. The lower court did not err in the appointment of said special judge.

[2] Each of the appellants allege that the trial court erred in overruling their separate and several motion for a separate trial. Section 2135, Burns' 1914, provides:

"When the indictment or affidavit is for a felony charged against two or more defendants

jointly, any defendant requiring it, before the jury is sworn, must be tried separately."

See Acts 1905, p. 640, § 259. This is a reenactment of section 1822, Revised Statutes 1881, except that in the act of 1905, the word "affidavit" is substituted for the word "information." Prior to the act of 1881, this provision of the statute read as follows:

"When two or more defendants are indicted jointly, any defendant requiring it, must be tried separately."

See volume 2, Davis' Revised Statutes 1876, p. 401, § 105.

Under this statute, it was held that in prosecutions for misdemeanors by indictment defendants must have a separate trial if demanded (see Trisler v. State, 39 Ind. 473), though not when prosecuted by information (Lawrence v. State, 10 Ind. 453).

The statute as it now stands is plain and requires a separate trial only when the offense charged is a felony. In cases of misdemeanor the granting of a separate trial is discretionary with the court. See section 2135, Burns' 1914; Acts 1905, p. 640, § 259; Douglass v. State, 72 Ind. 385; 16 C. J. 788, § 2011.

Appellants reply on Shular v. State, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211. The indictment in that case was for murder, and under the statute which we have just cited he was entitled to a separate trial. Jones v. State, 152 Ind. 318, 53 N. E. 222, also cited by appellants to sustain their contention, was also a prosecution for a felony and under the statute just cited, each defendant was entitled to a separate trial. This was an application for a change of venue from the judge, and did not have the effect of severing the trial of two defendants in the instant case; it being a misdemeanor.

[3] The appellant Roy Travis claims that the court erred as to him in changing the venue of the cause from the regular judge on application of his codefendant George Shockley. An examination of the record as set out in appellant's brief does not show that he ever made this objection to the trial court. It appears from the record that when his codefendant moved the court for a change of venue from the judge, he immediately moved the court for a separate trial. For reasons above stated, such motion was properly overruled.

[4] Appellants each alleged that the court erred in permitting a witness at the trial of the cause over appellants' objection to state that he was acquainted with the general reputation of the room and place alleged to have been kept by appellants during the time covered by the indictment, that the reputation was bad, and it was a place resorted to for the purpose of gambling. If it be conceded in this case that such evidence should not have been admitted, was it harmful to the appellants or either of them? The only evidence in the trial of the cause was the testimony of witnesses on behalf of the state. This testimony was not in any manner contradicted, and shows that from some time in February, 1922, to about the 1st of September, 1922, this room described in the indictment was used and occupied by each of the defendants for the purpose of gambling. The evidence shows without contradiction that both of said defendants were there, sometimes both at once and sometimes one at a time; they had charge of games played there at that place; that they watched the games and collected the take-off and when any one owed a debt for gambling they collected it; that this continued during the entire time covered in the said indictment in this case.

[5] Section 2221, Burns' 1914, requires that the Supreme Court shall disregard all technical errors that do not prejudice the substantial rights of the defendant. Leach v. State, 177 Ind. 234, 97 N. E. 792; Robinson v. State, 177 Ind. 263, 97 N. E. 929; Woodsmall v. State, 179 Ind. 697, 102 N. E. 130; Hay v. State, 178 Ind. 478, 98 N. E. 712, Ann. Cas. 1915C, 135; Medly v. State, 183 Ind. 660, 110 N. E. 58; Walker v. State, 185 Ind. 240, 113 N. E. 753, 1 A. L. R. 1255; Smith v. State, 186 Ind. 252, 115 N. E. 943.

[6] It has been held in this state that when improper evidence is admitted which tends only to disclose a fact which is conclusively proven by other legitimate evidence, the error is harmless. Lee v. State (Ind. Sup.) 132 N. E. 582; Mass. Bonding Co. v. State (Ind. Sup.) 131 N. E. 398; Carpenter v. State, 190 Ind. 611, 131 N. E. 375; Board v. Hammond, 83 Ind. 453.

No reversible error being shown, the judgment is affirmed.

NEELY v. STATE.

LEE v. SAME.

(No. 24359.)

(Supreme Court of Indiana. Feb. 28, 1924.)

1. Judges ⇐25(2) — Granting of separate trials by special judge would not reinvest regular judge with jurisdiction.

Where a change of venue from a regular to a special judge has been granted at the instance of one of several defendants, the granting of separate trials on motion of other codefendants would not operate to reinvest the regular judge with jurisdiction over their persons or the subject-matter.

2. Criminal law ⇐622(2)—Denial of motion for separate trials held not error.

In a misdemeanor prosecution of several defendants jointly, where a change of venue from the regular judge has been granted at the request of one defendant, without objection by

his codefendants, denial of such codefendants' motion for separate trials *held* within the discretion of the court and not error, in the absence of any showing of bias or prejudice.

3. Criminal law ⟸105—Right to question jurisdiction over person held waived.

Where two of three codefendants, after their codefendant had obtained a change of venue from the regular judge, voluntarily appeared and submitted themselves to the jurisdiction of the special judge, waived arraignment, and answered in bar to the action, they thereby waived any question of jurisdiction over their persons.

4. Criminal law ⟸1033(1)—Jurisdiction over person or subject-matter may be first raised on appeal.

Question of jurisdiction over the person or subject-matter may be raised for the first time in the Supreme Court.

Appeal from Criminal Court, Marion County; Harry O. Chamberlain, Special Judge.

John Neely, Harry Lee, and another, were jointly convicted of keeping a room for gaming, and the named defendants separately appeal. Judgments affirmed.

Holmes & McCallister, of Indianapolis, for appellants.

U. S. Lesh, Atty. Gen., and Mrs. Edward F. White, Deputy Atty. Gen., for the State.

MYERS, J. We have examined and compared the records and briefs of counsel filed in connection with the above-entitled appeals, and have reached the conclusion that no good purpose will be subserved by writing an opinion in each case. Hence, for the purposes of an opinion, these cases are consolidated.

Appellants and one other person were jointly charged by indictment, tried at the same time, and convicted of unlawfully keeping a room used and occupied for gaming, in violation of section 2466, Burns' 1914. Their separate motions for a new trial were overruled, and judgment followed in accordance with the verdict of the jury. They prosecuted separate appeals, but rely upon like assignments of error and causes for the reversal of the judgment against them.

The several reasons presented and urged in support of their several assignments are: (1) The court's action in refusing to grant each of them a separate trial; (2) want of jurisdiction of the special judge over the person of appellants; (3) error of the court in admitting certain evidence on behalf of the state; and (4) the verdict of the jury was contrary to law.

[1] Referring to the first insistence, it appears that appellants' codefendant, in the court below, sought and obtained a change of venue from the regular judge. A special judge was appointed before whom appellants appeared and, without objection, entered a general plea of not guilty, and at the same time moved the court in writing for separate trials. This motion was overruled. Appellants insist that this ruling was erroneous and harmful to them, because they were compelled to go upon trial before a special judge whose appointment was not occasioned by any act of either of them, and before whom they were not willing to be tried. Their argument in support of this contention proceeds upon the theory of a constitutional right to a trial before an impartial tribunal, and that a change of judge on account of his bias and prejudice is a personal privilege. It is true appellants did not ask for a change of judge, neither did they object to such change, nor did they bring to the attention of the trial court any reason why they could not have a fair and impartial trial before him, nor do they here suggest anything tending to show a hostile attitude toward them by the presiding judge. Moreover, if appellants had been granted separate trials, such ruling would not have reinvested the regular judge with jurisdiction over their persons or the subject-matter of the action, as seems to be the thought of appellants.

[2] The offense charged was a misdemeanor, and the right to a separate trial by parties so jointly charged is a matter for the exercise of judicial discretion. In the instant case appellants fall far short of showing an abuse of that discertion. Hence, we hold that appellants' insistence is not well taken. Shockley and Travis v. State, No. 24,364, this term, 142 N. E. 850, and cases there cited.

[3, 4] The contention of appellants attacking the jurisdiction of the special judge over their person cannot be sustained, for the reason it appears that appellants voluntarily appeared and submitted themselves to the jurisdiction of the court. They in no manner, prior to filing their motions for a new trial, questioned the jurisdiction of the trial court over their person and obtained a ruling of the court in that respect. While the question of jurisdiction of the court over the person or subject-matter may be raised for the first time in this court, yet when it is made to appear, as here, that the defendants, without objection, waived an arraignment and answered in bar to the action, they thereby waived any question of jurisdiction over their persons. Burrell v. State, 129 Ind. 290, 28 N. E. 699; State v. Nugent, 108 Minn. 267, 121 N. W. 898; People v. Perrin, 170 App. Div. 375, 377, 155 N. Y. Supp. 698; Greene v. American Malting Co., 153 Wis. 216, 140 N. W. 1130; Brown v. State, 9 Okl. Cr. 382, 395, 132 Pac. 359; Kemper v. State, 63 Tex. Cr. R. 1, 23, 138 S. W. 1025.

On the subject of the admission of incom-

petent evidence, we may say that this exact question was presented, considered, and decided in the case of Young v. State (Ind. Sup.) 141 N. E. 629, and upon the authority of that case we hold that no reversible error was committed by the court in admitting the questioned testimony.

Appellants, in support of their contention that the verdict of the jury was contrary to law, rely solely upon the premise that the court had no jurisdiction over the person of appellants. What we have already said pertaining to the question of the court's jurisdiction furnishes sufficient grounds for holding that the verdict is not impeachable for want of the court's jurisdiction over the person of appellants.

No other questions are presented.

The judgment in each of the above-entitled causes is affirmed.

HOBBS v. CITY OF SOUTH BEND et al. (No. 24045.)

(Supreme Court of Indiana. March 11, 1924.)

Municipal corporations ⇐284(5)—Ordinance authorizing assessment by board of public works for making private connections with water mains in streets to be improved held valid.

An ordinance authorizing the board of public works, when improvement of a street is desired, to require abutting owners to make private connections with water, sewer, and gas mains in the street, and after notice and default of owners to make connections to cause them to be made, and assess the cost thereof, is not void as an unauthorized delegation of power by the common council, but invokes an exercise of power which the board already possessed as expressly given to it by Burns' Ann. St. 1914, §§ 8696, cl. 11, 8697, 8711 (as amended by Acts 1919, c. 142), 8714, 8939, 10052g4, and Burns' Ann. St. Supp. 1918, § 8710, and the power given to the common council by Burns' Ann. St. 1914, §§ 8655 (cl. 31), 8960, to enact such ordinances.

Appeal from Superior Court, St. Joseph County; Chester R. Montgomery, Judge.

Action by William R. Hobbs against the City of South Bend and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Seebirt & Schurtz, of South Bend, for appellant.

Thos. W. Slick, of South Bend, for appellees.

EWBANK, C. J. Appellant sued the appellee city, alleging that an assessment against his real estate for the cost of making certain connections with a water main and bringing them inside the curb in preparation for paving the street was void, and asking that it be canceled. Appellee Luther intervened by leave of court, and filed a cross-complaint seeking to foreclose an alleged lien for the amount of such assessment. Each appellee answered the complaint by a general denial, and appellant filed two paragraphs of affirmative answer to the cross-complaint to which appellee Luther replied by a denial. The court found against appellant on his complaint, and in favor of appellee Luther on his cross-complaint, and entered a judgment awarding the city of South Bend its costs, and foreclosing Luther's alleged lien for the amount of the assessment.

Overruling the motion for a new trial, for the alleged reasons that the decision is not sustained by sufficient evidence and is contrary to law, is the only error assigned. And the only question presented for decision is whether or not the assessment was void because of the alleged invalidity of a duly enacted ordinance reading (in part) as follows:

"That whenever the board of public works shall desire to improve any street, alley or other public place by paving the same, and shall have adopted a resolution to that effect said board is hereby authorized to require the owners of the abutting property to make private connections with the sewer, gas and water mains in such street, alley or public place by bringing such connections inside the curbs * * * and said board shall adopt a resolution to that effect showing the number and location of such service pipes or private connections which they may deem necessary to accommodate the abutting property; also, such resolution shall designate the material to be used and the manner of laying the same from the mains to the points inside of the curb line. Upon the adoption of such resolution, the board shall give notice by publication in a daily newspaper of the city for two successive days to the owners of such abutting properties to make such connections within 20 days from the last publication of such notice. On default of any of such owners to make any such connections, the said board of public works is hereby authorized to cause such connections to be made. * * * The cost of making such connections shall be a lien on the real estate of any such owners, and said board shall cause such cost to be assessed against said real estate," after notice, and a hearing, etc.

The common council of the city had statutory authority to enact ordinances for the following purposes:

"To regulate the making of private connections with sewers, gas, water and other like pipes and public conveniences, and to compel owners of property to bring such connections inside the curbs of streets before the permanent improvement thereof; and, on default of the owner's making such connections, to authorize the proper city officials to do so at the owner's expense, and to make such expense a lien on the property, collectible in the

same manner as expenses for other street and sewer improvements." Section 8655, cl. 31, Burns' 1914 (Acts 1905, c. 129, p. 251, § 53, cl. 31).

"To pass all ordinances necessary to more effectually carry into execution the powers in this act granted them in relation to the * * * improvement of any street, alley, water-course or public grounds, or any other public improvement of such city or town, and which are not inconsistent with the laws of the state. * * *" Section 8960, Burns' 1914 (Acts 1905, c. 129, p. 407, § 266).

The board of public works is given by statute general supervision over the streets, alleys, sewers, public grounds, and other property of the city, and is charged with the duty to keep them in repair and in good condition. Section 8697, Burns' 1914 (Acts 1905, c. 129, p. 281, § 94).

Except so far as controlled by the action of the Public Service Commission, whenever a city does anything in the matter of granting a franchise to lay water mains and pipes in the streets the board of public works is authorized by statute to agree thereto, and to prepare an ordinance approving and confirming the agreement, and all the common council has to do in the matter is to adopt or reject such contract by passing or defeating the ordinance of approval. Section 8939, Burns' 1914 (Acts 1905, c. 129, p. 396, § 254).

Express power is conferred on the board of public works by statute "to authorize * * * water * * * companies to use any street, alley or public place in such city and erect necessary structures therein, to prescribe the terms and conditions of such use," etc. Section 8696, cl. 11, Burns' 1914, (Acts 1913, c. 85, p. 255); section 10052g4, Burns' 1914 (Acts 1913, c. 76, p. 205, sec. 110).

The board of public works is also given power by statute to determine when a street, alley, or other public place in the city shall be improved, and whether by paving or in some other manner, and to make plans and specifications for such proposed work, and to initiate proceedings for making such an improvement at the expense of the abutting owners, subject to a hearing before such board on the question of benefits, and subject to certain limitations, such as keeping the cost below a designated proportion of the value of abutting property, and submitting to control by the majority of the property owners as to the kind or pavement to be laid. Section 8710, Burns' Supp. 1918 (Acts 1917, c. 132, p. 417).

And the power of accepting or rejecting an improvement as completed and of assessing benefits and thereby creating liens against abutting property is expressly conferred on the board of public works by statute. Acts 1919, c. 142, p. 631, amending section 8711, Burns' 1914; section 8714, Burns' 1914 (section 109, c. 172, Acts 1909, p. 412).

But appellant insists that the common council, by enacting the ordinance above set out, has exceeded its statutory powers; that it has attempted to delegate to the board of public works a legislative discretion in the matter of regulating the making of private connections with water, sewer, and gas mains, and requiring the owners of abutting property to bring such connections inside the curbs of streets before the permanent improvement thereof (he says), instead of exercising its own discretion in determining what connections shall be so made, and its own powers in ordering that they be made. Appellant complains of this as an attempt to confer powers on the board of public works by ordinance without statutory power to do so.

And authorities are cited to the effect that unless power to enact such an ordinance is expressly conferred by statute, an ordinance providing that public improvements shall be made at the expense of abutting owners in case certain ministerial officers shall determine that the public good demands it, or providing that a public improvement shall be made in the manner that such a ministerial officer shall deem most expedient, is void, as being an unauthorized attempt to confer on others a discretion vested by law in the common council alone.

The authorities referred to have no application to the facts of the case at bar under the statutes recited above. Those statutes having conferred on the board of public works full power and authority over the question when a street improvement shall be undertaken, its character and the details of its construction, and the creation of liens for its cost by making assessments against the abutting property, with control over the location and laying of water pipes in the streets, and having given said board the power and charged it with the duty of repairing the streets and keeping them in good condition, the ordinance in question did no more than to invoke an exercise of powers which the board already possessed, as expressly given to it by those statutes.

And the statutes giving the common council power to enact ordinances to regulate the making of private water connections, and to compel them to be brought inside the curbs before the permanent improvement of the streets, and to authorize "the proper city officials" to make such connections and to charge the expense to the property as an improvement lien, and to pass all ordinances necessary to carry such powers into effect, afforded ample authority for calling on such board of public works to exercise its statutory powers in the manner specified in the ordinance in question.

The ordinance was not open to the objections urged by appellant.

The judgment is affirmed.

EMPLOYERS' LIABILITY ASSUR. CORPORATION, Limited, v. INDIANAPOLIS & CINCINNATI TRACTION CO. et al. (No. 24584.)

(Supreme Court of Indiana. Feb. 19, 1924.)

Master and servant ⇐398—Compensation insurer's action against their person causing injuries, held barred by limitation; "employer."

Under Workmen's Compensation Act, §§ 13, 24, 57, 62, 68, 75, and 76, declaring an employer's liability and authorizing an agreement with an injured employee for the payment thereof, and permitting employer to collect from a third person whose negligence caused the injury "the indemnity paid or payable" after "having paid the compensation or become liable therefor," and declaring that the term "employer" embraced the insurer, an insurer who has agreed to pay compensation for injuries due to the negligence of a third person cannot, under Burns' Ann. St. 1914, § 295 (Rev. St. 1881, § 293), maintain an action against such third person to recover compensation paid, more than two years after the injury and agreement, for compensation, though within two years after final payment thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employer.]

Appeal from Superior Court, Marion County; Arthur R. Robinson, Judge.

Action by the Employers' Liability Assurance Corporation, Limited, against the Indianapolis & Cincinnati Traction Company and others. Judgment for defendant, and plaintiff appeals. Transferred from Appellate Court under section 1394, Burns' Ann. St. 1914 (section 10, c. 247, Acts 1901). Affirmed.

Superseding former opinion 139 N. E. 200.

Fesler, Elam & Young, of Indianapolis, for appellant.

Donald L. Smith, of Rushville, for appellee.

EWBANK, C. J. The question presented for decision is whether or not an insurance carrier for an employer, being required by an award of the Industrial Board to pay compensation to an injured workman whose injuries were caused by the negligence of some one other than the employer, may maintain an action against such third person under sections 13 and 76 (a) of the Workmen's Compensation Act (Acts 1915, c. 106, pp. 395, 415; sections 8020w and 8020h3 (a), Burns' Supp. 1918), commenced within two years after paying the last installment of compensation, although such action was not commenced within two years after the injury was inflicted.

Appellant was the plaintiff below. The complaint was filed February 16, 1921. It alleged that appellant was authorized to do business as an insurance company; that in April, 1916, it issued to a designated company a policy covering the liability of said company to its employés under the Workmen's Compensation Law, a copy of which policy was set out, and that it became and was the insurance carrier for said company; that thereafter, on May 31, 1916, a workman in the employ of said company, while engaged in doing certain acts shown by proper averments to be within the scope of his employment, was struck by a car on the track of appellee traction company by reason of certain alleged negligence of said appellee, and was thereby so injured that his arm was crushed off below the elbow; that the Industrial Board demanded of plaintiff that it pay compensation for such injury, and plaintiff, as such insurance carrier for said employer, entered into an agreement with the injured workman to pay him compensation at a designated rate (as fixed by section 31 (f), c. 106, of Acts 1915, p. 400) for 150 weeks, and said agreement as to compensation was in all things approved by the Industrial Board, and remained wholly unchallenged; that the injured workman's average weekly wage was of an amount stated, and his bills for medical attention within the first 30 days were of an amount stated, so that the agreement provided that plaintiff, as such insurance carrier, should pay only what the statutes of Indiana required it to pay; that pursuant thereto plaintiff paid said medical bills, and said weekly installments of compensation for 150 weeks, in the total sum of $1,496.50, for all of which it became and was made liable as such insurance carrier by reason of the said negligent acts of the traction company and its negligent infliction of said injuries on said workman, and under plaintiff's contract of insurance it was compelled to pay the same to save the employer company harmless from liability for such payments; that plaintiff is the owner of the alleged cause of action, and the entire beneficial interest therein has vested in it by reason of said facts; that the last installment of said compensation was paid in April, 1919; that by reason of the said facts the traction company was indebted to plaintiff in the sum of $1,496.50, together with interest. The policy of insurance made a part of the complaint bound plaintiff "to pay the compensation and to furnish or cause to be furnished the medical * * * services and medicines * * * on behalf of the insured, to any person or persons to whom compensation or services shall become due for or on account of personal injuries * * * suffered by an employé of the assured," as provided by the Workmen's Compensation Act of Indiana, which was expressly referred to therein, and to indemnify the insured against loss because of liability for damages on ac-

of such payment," etc.

The defendant filed an answer in three paragraphs, the first of which was a general denial, the second a plea that the alleged cause of action sued on did not accrue within two years, and the third that when the said workman was injured defendant was then and continuously thereafter a domestic corporation, with its principal offices at Indianapolis, Ind., and that the injured workman was of full age and sound mind at the time of the injury; that defendant's alleged negligence and the workman's injury occurred on May 31, 1916, and by reason of said facts the alleged cause of action did not accrue within two years next before the commencement of the action. There was evidence fairly tending to prove the averments of the complaint, and proving, without dispute, that the negligence of defendant occurred and the injury was inflicted on May 31, 1916, and that the injured workman could have maintained an action for damages because of his injuries on or after that date, as alleged in the answer. On motion the court instructed the jury to return a verdict for the defendant. A motion for a new trial specifying as error the giving of this instruction was overruled, and appellant excepted, and has assigned the ruling as error.

At the time the injury was inflicted and for more than two years thereafter the sections of the Workmen's Compensation Act by which the rights of the parties must be determined read (in part) as follows:

"Sec. 13. Whenever an injury for which compensation is payable under this act shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employé may at his option either claim compensation or proceed at law against such other person to recover damages or proceed against both the employer and such other person, but he shall not collect from both; and if compensation is awarded under this act the employer, having paid the compensation or having become liable therefor, may collect in his own name or that of the injured employé from the other person in whom legal liability for damages exist, the indemnity paid or payable to the injured employé. * * *

"Sec. 24. The right to compensation under this act shall be forever barred unless within two years after the injury * * * a claim for compensation thereunder shall be filed with the Industrial Board. * * *

"Sec. 57. If after 14 days from the date of the injury * * * the employer and the injured employé * * * reach an agreement in regard to compensation under this act, a memorandum of the agreement in the form prescribed by the Industrial Board, signed by the employer and the injured employé * * * shall be filed with the Industrial Board. * * *

"Sec. 62. Upon the approval of such agreement by the Industrial Board, a copy thereof certified by the Industrial Board shall be filed in the office of the clerk of the circuit court of the county in which the injury occurred, and thereupon such agreement shall be enforceable by decree of court with the same effect as a judgment, and shall be so entered of record by the clerk of such court. * * *

"Sec. 74. No policy of insurance against liability arising under this act shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to same all benefits conferred by this act, and all installments of the compensation that may be awarded or agreed upon. * * * Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name. * * *

"Sec. 76. In this act unless the context otherwise requires: (a) 'Employer' shall include the state and any municipal corporation within the state or any political division thereof, and any individual, firm, association or corporation or the receiver or trustee of the same or the legal representatives of a deceased employer, using the services of another for pay. If the employer is insured it shall include his insurer so far as applicable. * * *

Sections 8020w, 8020h1, 8020o2, 8020z2, 8020f3, 2020h3, Burns' Supp. 1918; sections 13, 24, 57, 68, 74, and 76, c. 106, Acts 1915, p. 392 et seq.

And section 62 provided for the entry of an award or duly approved agreement as a judgment of the circuit or superior court, when to the same effect "as though said judgment had been rendered in a suit duly heard and determined by said court." Section 8020t2, Burns' Supp. 1918; section 62, c. 106, Acts 1915, p. 411.

The changes made in these sections by subsequent amendment did not alter their meaning as applied to the facts of the case at bar. Acts 1917, c. 81, p. 226; Acts 1919, c. 57, pp. 159, 171, 175.

It appears from the foregoing that the law required plaintiff, as an insurance carrier, to become primarily bound to pay all the compensation due a workman employed by one whom it insured, and that plaintiff became thus bound; that the law authorized it, with the approval of the Industrial Board, after a workman was injured, to enter into an agreement with him fixing the amount and terms of payment of the compensation that he should receive, which should be enforceable by decree of court with the same effect as a judgment, and that plaintiff had done this, and so had become legally bound to pay installments of compensation weekly in a total amount as so fixed after the expiration of 14 days from the date of the injury; that "the employer" was authorized to collect in

negligence his workman was injured the indemnity paid or payable to the injured employé" after "having paid the compensation or having become liable therefor"; and that the term "employer," as used in the statute, embraced plaintiff, as the insurer of the company by whom the injured workman was employed.

It follows that at any time after the workman was injured plaintiff had the right to become bound to him for the payment of his compensation and medical bills, either by an award of the Industrial Board or by an agreement with him, approved by the Board, and by doing so could acquire the right to bring suit in its own name against appellee for damages, joining the injured workman and the company by whom he was employed, as parties, to answer to their interest, or in the name of the injured workman, at its option; and that it exercised this right and became entitled to bring such an action.

"The following actions shall be commenced within the periods herein prescribed, after the cause of action has accrued, and not afterward:

"First. For injuries to person or character, * * * within two years. * * *"

Section 295, Burns' 1914; section 293, R. S. 1881.

The only reason suggested by counsel for appellant for holding that the statute last cited does not bar this action, commenced more than two years after the injury was inflicted, is the alleged reason that the insurance carrier could not have maintained a suit brought within that time. But, as we have seen, it could have sued as soon as it became legally bound to pay a definite sum.

The case of Maryland Casualty Co. v. Cleveland, C., C. & St. L. Ry. Co., 74 Ind. App. 272, 124 N. E. 774, is cited by appellant, but is clearly distinguishable from the one at bar. In that case the complaint to which a demurrer was sustained alleged that the workman was injured while in the employ of the Dunn-McCarthy Company, and that thereafter the Industrial Board "awarded him compensation, and ordered said company to pay him" certain sums "as compensation for the injuries sustained by him"; and that under a clause in an insurance policy by which plaintiff (appellant) had insured said company against liability on account of injuries to its workmen and by reason of payments it had made plaintiff was subrogated to the rights of the Dunn-McCarthy Company and of the injured workmen in their right of action to recover damages for the negligent injury. It was not alleged that the plaintiff in that case had become primarily bound to pay compensation, nor that an award in favor of the injured workman had been made against said plaintiff, and it does not appear that the effect of section 76 (a), gested to or considered by the court. That case correctly declared the equitable doctrine of subrogation. But it is not controlling in a case where the plaintiff is within the statute giving an "employer" a right of action after it shall have become liable under an award of compensation, and defining the term "employer" as including the insurer by whom the one employing an injured workman was insured.

The courts of Illinois and Minnesota have given a like construction to similar language in the statutes of those states. Joseph Schlitz B. Co. v. Chicago R. Co., 307 Ill. 322, 138 N. E. 658; Fidelity & Casualty Co. v. St. Paul G. L. Co., 152 Minn. 197, 188 N. W. 265; but see Star Brewing Co. v. Cleveland, etc., R. Co. (C. C. A.) 275 Fed. 330.

We conclude that under the facts alleged and proved appellant could have maintained an action for the cause stated in its complaint at any time after it had become directly liable to the injured workman, and that its right of action was barred at the expiration of two years after the injury was inflicted.

The judgment is affirmed.

O'CONNOR et al. v. BOARD OF COM'RS OF ALLEN COUNTY et al. (No. 24195.)

(Supreme Court of Indiana. March 11, 1924.)

1. Highways ⇐113(3)—Contract not consummated until approval of bonds.

The County Unit Road Act (Acts 1919, c. 112) and the act concerning taxation (Acts 1919, c. 59, § 202, and section 201, as amended by Acts Sp. Sess. 1920, c. 49, § 4, and Acts 1921, c. 222, § 4), with reference to the issue of bonds for the construction of a highway under the County Unit Road Act, should be construed together, so that any contract for construction of a highway cannot be consummated unless and until the bonds for the construction are approved by the board of tax commissioners; such bonds being bonds of a municipal corporation within the meaning of the Tax Act.

2. Counties ⇐174—Municipal board to make new determination to issue bonds after execution of new contract.

Where the municipal board determines to issue bonds for improvement of highway under Acts 1919, c. 112, and the bond issue is disapproved by the state tax commissioners, Acts 1919, c. 59, § 201, as amended by Acts Sp. Sess. 1920, c. 49, § 4, and Acts 1921, c. 222, § 4, do not contemplate a new determination by the municipal board to issue bonds for the improvement without the execution of a new tentative contract.

3. Counties ⇐177—Tax commissioners held to have jurisdiction to disapprove bonds.

Where municipal board determines to issue bonds for a highway improvement under Acts

jecting to the issue of bonds the tax commissioners obtained jurisdiction, and their decision in disapproving of the bonds was not unlawful, under Acts 1919, c. 59, § 201, as amended by Acts Sp. Sess. 1920, c. 49, § 4, and Acts 1921, c. 222, § 4.

4. Highways ⇐113(2)—County commissioners held entitled to relet contract on disapproval of bonds.

Where county commissioners let contract under County Unit Road Act (Acts 1919, c. 112), and determined to issue bonds under Acts 1919, c. 59, § 201, as amended by Acts Sp. Sess. 1920, c. 49, § 4, and Acts 1921, c. 222, § 4, and the tax commissioners, on petition, disapproved the issuance of the bonds, the county commissioners had authority to receive bids for reletting the work; the acceptance of the first bid having failed through the act of the tax commissioners in disapproving the proposed issue of bonds.

Appeal from Superior Court, Allen County; Wm. W. Ballou, Judge.

Action by John C. O'Connor and others against the Board of Commissioners of Allen County and others. From an order overruling their motion for temporary injunction and refusing to grant a temporary injunction, plaintiffs appeal, and defendants move to dismiss the appeal. Motion to dismiss overruled, and judgment affirmed.

Hoffman & Hoffman, of Ft. Wayne, and Smith, Remster, Hornbrook & Smith, of Indianapolis, for appellants.

Harry G. Hogan, of Ft. Wayne, for appellees.

TRAVIS, J. This is an action by appellants to enjoin the board of commissioners of Allen county from canceling an alleged contract to construct a highway, and from reletting the same.

Appellants by their verified complaint filed May 1, 1922, alleged: That in 1919 a lawful petition by freeholders and voters of Allen county was filed with the board of commissioners of the county petitioning for the improvement of the highway commonly known as the Lima road. On April 29, 1919, the board of commissioners referred the petition to the county surveyor. September 3, 1919, the county council of Allen county examined the proposed road, and by unanimous vote held the proposed improvement to be a public utility, and that bonds should issue therefor. The board of commissioners and county surveyor filed their report, together with the plans and specifications, in the office of the auditor of Allen county on February 16, 1921, to appellants upon their bid, and thereupon a written agreement was entered into between appellant contractors and appellee commissioners at the contract price of $563,100.94. Thereafter the board of commissioners, on January 28, 1922, adopted an ordinance to issue bonds to provide funds with which to pay for the construction of the highway, in the sum of $570,000, at five per cent. interest. Thereafter a remonstrance was filed with the auditor of Allen county by taxpayers of the county, remonstrating against the issue of bonds as determined upon by the commissioners, which remonstrance was referred to the state board of tax commissioners, which board, after hearing, entered an order that said issue of bonds in the sum of $570,000 at five per cent. interest be not approved. That on the ——— day of April, 1922 (which was prior to the date of filing the complaint), without any notice to appellants, the appellee board of commissioners unlawfully and without right passed a resolution attempting to set aside the written agreement theretofore entered into by and between the appellant contractors and appellee commissioners for the construction of such work, and thereafter the board of commissioners ordered the auditor of Allen county to readvertise for bids for the construction of the Lima road, to be received on May 3, 1922, which action was taken without notice to appellants, and without their consent, all of which action on the part of the board of commissioners was illegal. It is alleged that the contract entered into March 29, 1921, between the parties for the construction of such road was a legal and binding agreement, and that appellees had no lawful or equitable right to set it aside; that there had never been a legal proceeding or determination to issue bonds of the county to provide funds with which to construct the work, and that there had been no lawful hearing by the state board of tax commissioners with reference to the issue of the bonds provided for by the action of the board of commissioners, for the reason that the determination to issue such bonds by the board of commissioners provided that the bonds bear interest at the rate of 5 per cent., but that the notice as published for the issue of the bonds provided that they should bear interest at the rate of 6 per cent.; that unless restrained by the court the board of commissioners will cancel and void the aforesaid contract for the construction of the road, and will receive bids on May 3, 1922,

cessful bidder to construct the work, notwithstanding the written agreement with appellants executed March 29, 1921.'

Appellees filed their motion to dismiss the appeal, for the reason that any action ever taken by them in relation to voiding or setting aside or canceling the alleged written agreement with appellants was taken before the filing of the complaint or the commencement of this action, which is a complete answer to the prayer of the complainants that the board of commissioners be enjoined from setting aside, voiding, canceling, or taking any other action pertaining to setting aside, voiding, or canceling the written agreement entered into by and between the appellants and the appellees under the date of March 29, 1921, and that the only other relief sought by the prayer to the complaint is to enjoin the board of commissioners from entering into any agreement with any other bidders for the construction of such road.

[1] An injunction enjoining appellees from setting aside, voiding, canceling, or taking any action tending to set aside the contract with appellants would reach the second proposition in the prayer of the complaint, which is to deny the appellees the right to enter into a contract with any other bidder for bids received on the 3d day of May, 1923, so that, if the question of enjoining the appellees from setting aside the alleged contract with appellants is moot, the injunction asked to estop appellees from receiving bids and letting another contract thereon would not change the situation. The question whether or not appellees' petition to dismiss ought to prevail because the action by the board of commissioners in setting aside the contract occurred prior to the time of bringing this action depends in part upon whether or not there was a valid agreement entered into between appellants and appellees on the 29th day of March, 1921. Appellants' main proposition to sustain its alleged error is that they had a lawful and valid contract with the appellees board of commissioners to build and construct the Lima road. The soundness of this proposition depends upon whether or not the County Unit Road Act (Acts 1919, p. 531) and the act concerning taxation (Acts 1919, p. 198) with reference to the issue of bonds for the construction of a highway under the County Unit Road Act shall be construed together, the result of which would be that any contract so sought to be entered into would not be consummated unless and until the bonds for the construction of such road shall have been approved by the state board of tax commissioners. In any case where the action of such state board of tax commissioners is invoked by remonstrance, as provided in amended section 201 of the act (Acts 1921, p. 642), in construing the two acts mentioned concerning the question at issue, this court holds that, in so far acts shall be construed together as parts of the general law, and that bonds issued to provide funds for the payment of the improvement of a highway under the County Unit Road Law are bonds of a municipal corporation within the meaning of the State Tax Act, providing that a municipal corporation may not issue bonds without the approval of the state board of tax commissioners when objection is made by petition as provided by law. Van Hess v. Board, etc., 190 Ind. 347, 129 N. E. 305. Since the above case was decided the section of the act in question, section 201, has been amended (Special Session Acts 1920, p. 171; Acts 1921, p. 642), giving power to any municipal corporation coming within the definition in section 202 of the Tax Law to issue bonds as it may deem necessary, except that the state board of tax commissioners shall pass upon objection to the issuing of said bonds as presented by petition by taxpayers, and decide the question of the propriety of issuing such bonds, which decision by such board of tax commissioners shall be final.

Section 201 of the Tax Law as amended in no way eliminates or operates to separate it from the County Unit Road Law, so that the two acts shall be construed together where there is no conflict between them. Construing section 201 of the Tax Law as amended with the County Unit Road Act, in relation to the issuing of bonds, the question arises: Has the board of commissioners acting under the county road act power to make a valid, binding, consummated contract for the construction of a highway until the time has elapsed within which taxpayers may petition and object to the issuing of bonds, or, if such petition has been filed, that the state board of tax commissioners has denied the petition and approved the bonds? Under section 201 as originally enacted, the board of commissioners did not have power to enter into a consummated contract for the construction of a highway until the issue of bonds to raise money for the payment of such work had been approved by the state board of tax commissioners. Under the section of the act as amended the board of commissioners take many steps in a proceeding to construct a highway, even to determine whether or not bonds should be issued for the payment of such work, before any action of the state board of tax commissioners may be invoked, if at all. To hold that the board of commissioners could enter into a consummated contract before the time when the action of the state board of tax commissioners may be invoked would be to hold that the section as amended was useless and without relief; and, to go still further, that the act as amended was incompatible with the County Unit Road Act when construed therewith, and therefore that it bore no relation to the County Unit Road

gether. If the board of commissioners may enter into a contingent agreement with a successful bidder and determine by its action thereafter to issue bonds, as provided by the act, which agreement shall ripen into a consummated contract after the 15 days have elapsed and no petition filed objecting to the issuing of such bonds, or such a petition having been filed, and under the hearing thereof the bond issue having been approved, section 201 of the Tax Act may then be construed with the County Unit Road Act without violence to either.

The court holds that the alleged agreement entered into between appellants and appellees March 29, 1921, was tentative only, and contingent upon the action of the board of tax commissioners upon the petition objecting to the issue of bonds, and, such board having granted the petition and disapproved the issue of the bonds, that such agreement did not ripen into a consummated contract. It follows that the provisions of section 201 of the Tax Act as amended became a part of the tentative agreement entered into by the appellants and appellees on the 29th day of March, 1921, as though written therein at full length. Therefore the alleged contract in question was not a binding, valid contract which appellants could enforce, notwithstanding provisions of section 201 of the Tax Act as amended, and that the action of the board of commissioners in April, 1921, pretending to cancel said agreement, was of no force or effect, for the reason that the action of the state board of tax commissioners in disapproving the bond issue was as complete a rescission of the unconsummated contract as though the contract itself had had written therein a provision that it was subject to the action of the state board of tax commissioners, if invoked according to law, and void, and of no force and effect, provided such tax commissioners disapproved the proposed issue of bonds determined upon by the board of commissioners. The parties to the agreement were not legally competent to enter into a binding contract except in compliance with amended section 201 of the act concerning taxation. Hampden Railroad Co. v. B. & M. R. R., 233 Mass. 411, 124 N. E. 254; Belmar Contracting Co. v. State of N. Y., 110 Misc. Rep. 429, 180 N. Y. Supp. 494.

[2, 3] Appellants admit that the decision of the board of tax commissioners upon the determination of the municipal board to issue bonds is final, but that section 201 as amended of the Tax Law (Acts 1921, p. 642) contemplates that a new determination by the municipal board to issue bonds for the improvement may be made after an adverse decision by the board of tax commissioners upon the former determination by the municipal board to issue bonds, provided the municipal board makes a change in the determination. The basis for the action of the board of commissioners to determine to issue bonds for the purpose of raising money to pay for the construction of such highway is the contract price, and all expenses and damages allowed, not to exceed 3 per cent. of the contract price. The contract price is the amount of the accepted bid, potential until enlivened by the favorable action of the board of tax commissioners, or the lapse of 15 days after determination to issue bonds without a petition having been filed objecting thereto. The municipal board having accepted the bid of appellants as the lowest bid, and the board of tax commissioners having acted upon the petition objecting to the issue of bonds in relation thereto, and decided adversely to such determination to issue bonds in the amount stated, there was no potential contract price, or bid upon which a potential contract price could be based, upon which to ground a determination to issue bonds. The proposition of appellants is incorrect. Appellants claim there was no lawful determination to issue the bonds in question, from which it must follow the decision of the board of tax commissioners was unlawful, for the reason that the notice of such determination by the municipal board to issue bonds gave the interest rate as 6 per cent., whereas the official action in determining to issue such bonds provides for interest at 5 per cent. as provided by the statute. The petition objecting to the issue of bonds gave the board of tax commissioners jurisdiction; it was the notice. The notice had no control over the action of the municipal board determining to issue bonds. The notice served its purpose in notifying the petitioning taxpayers of the determination to issue bonds, who knew the rate of interest provided by the statute, and its function was not jurisdictional. Had notice not been given, the petition, together with such other data as may be necessary in order to present the questions involved, would have invested the board of tax commissioners with jurisdiction to act on the petition and to decide the question. The misstatement of the rate of interest as provided by statute and as determined by the municipal board in the notice, did not make unlawful either the act in determining to issue the bonds or the decision of the board of tax commissioners in disapproval of such determination.

[4] The board of commissioners had authority to receive bids to relet the work. If there was a binding contract to construct a highway, as claimed by appellants, they failed to enter upon the performance of such contract. The single purpose of the law is to construct highways. The acceptance of a bid to perform the work having failed through the act of the board of commissioners disapproving the proposed issue

sioners, charged by the law to carry into effect the proceeding to construct the highway, would be thwarted, unless the law implies such reletting, for the statute is silent upon receiving new bids and awarding a contract to the successful bidder. The purpose of the statute would fail in the event of disapproval of bonds, and, in case the contractors failed to complete the work under the contract after it is consummated by the issue of bonds, unless the board of commissioners had authority to advertise for bids and relet the work. It is held that the authority to receive bids for a reletting of the work is necessarily implied. Donaldson v. State ex rel., 46 Ind. App. 273, 90 N. E. 132, 91 N. E. 748.

The action of the trial court overruling appellants' motion for a temporary injunction and refusing to grant a temporary injunction as prayed, was not error. Appellees' motion to dismiss is overruled.

Judgment affirmed.

STATE ex rel. KENSINGER v. COX, Judge. (No. 24495.)

(Supreme Court of Indiana. March 11, 1924.)

1. New trial ⇐153—Motion for new trial held sufficiently filed.

Where, within the time allowed by Acts 1913, p. 848, § 1 (Burns' Ann. St. 1914, § 587), a litigant has caused to be delivered to the judge in open court, for the purpose of being filed, a written motion and statement of reasons for new trial, which was received by the judge for that purpose and by his authority indorsed with a file mark, noted on the books of the court as having been filed, and placed among papers in the cause by the clerk, there has been a sufficient filing, though the person actually delivering the paper to the judge was not attorney for the litigant or in fact an attorney at all.

2. New trial ⇐157—When motion properly filed, court has no discretion as to ruling thereon.

Where a motion for a new trial has been properly filed within the time allowed by law, the litigant's right to have it entertained and ruled upon is not subject to the arbitrary discretion of the judge.

3. Mandamus ⇐165—On demurrer to return to alternative writ, final judgment for relator held proper.

In an action for a writ of mandamus to compel a judge to restore the expunged record of the filing of a motion for a new trial and to rule upon the same where the verified return by respondent to an alternative writ showed facts from which it clearly appeared that the relief sought was warranted, it was proper for the Supreme Court, on demurrer to such return, to enter final judgment for relator.

Forest M. Kensinger, for a writ of mandamus to be directed to John E. Cox as Judge of the Superior Court of Vigo County. On demurrer to return to alternative writ. Final judgment for relator.

See, also, 141 N. E. 225.

PER CURIAM. The relator filed his complaint in which, besides certain facts not deemed material to a determination of the rights of the parties, he alleged substantially the following: That he was the plaintiff, as contestor, and George A. Schaal was the defendant, as contestee, in a certain action pending in the superior court of Vigo county, Ind., for the contest of an election, which was and is numbered 19732; that the respondent is, and for more than five years has been, the duly elected qualified and acting judge of that court; that said cause was tried before defendant, sitting as such judge, and on the 10th day of January, 1922, a decision and judgment against relator as the plaintiff in that cause was duly rendered and recorded; that thereafter, on the 7th day of February, 1923, the relator, as plaintiff in that suit, filed in said court and caused to be brought to the knowledge and attention of respondent, as judge of the court, in open court, while he was performing his duties as such judge, the plaintiff's motion for a new trial and reasons therefor, in writing, specifying that the decision was not sustained by sufficient evidence, that it was contrary to law, that the court erred in excluding each of fifteen different items of evidence, and that it erred in each of a dozen other rulings; that respondent, as judge, under said circumstances, in person and in his own handwriting, made an entry in his docket stating that the motion was filed, and directed the clerk to file the same, as so specifying the written reasons on which it was based, and the clerk thereupon, by his direction, put upon it his file mark, stating the date of such filing, with the signature of the clerk, and filed the motion among the papers in the cause, and wrote in the proper order book of the court, among the entries of acts done by the court on that day, a recital under the title and number of said cause, that "comes now the contestor in the above entitled cause by counsel and files motion and reasons for a new trial, which motion reads as follows, to wit (here insert)"; but that thereafter, on the 14th day of February, 1923, the defendant (contestee) in that action filed a verified motion to expunge said record entry, and to strike out and reject said motion for a new trial for certain alleged reasons hereinafter noticed, and on the 22d day of February, 1923, the respondent, as judge, assuming to act as the superior court of Vigo county, Ind., caused to be erased from the order book of the court the said entry and struck

judgment against him and desires to appeal for it, and alleges that it is erroneous in the particulars specified in the motion, but cannot appeal until his motion for a new trial shall have been ruled on. Upon the facts stated, the petitioner asked for a writ of mandamus directing the respondent to restore the expunged record of the filing of said motion, and to rule upon the same, either sustaining or overruling it.

An alternative writ having been issued, the respondent filed a verified return, which expressly admitted all of the foregoing facts, except that relator, as plaintiff, had filed the motion, as to which he averred that the facts were as follows: That on the 7th day of February, 1923, the superior court of Vigo county, Ind., was in session, with a special judge engaged in trying a cause, and respondent, the regular judge, was absent from the courtroom, when an attorney representing relator came into the courtroom and told Albert Duddleston that he had a motion for a new trial in the said election contest, entitled Forest Kensinger v. George A. Schaal, and offered two typewritten copies of it to him; that Duddleston was the deputy clerk of that court, and told the attorney that he would not put the file mark upon papers left with him until the court had first noted the filing of such papers on the judge's docket, but told him that he could leave the papers with him (Duddleston) though he would assume no responsibility in the matter; that relator's said attorney thereupon delivered to Duddleston the duplicate copies of the motion and reasons for a new trial, properly entitled as of said cause, and left the courtroom before respondent re-entered it; that later in the same afternoon, after said attorney had gone from the courtroom, respondent resumed his place as judge of the court, and Duddleston then handed him the said papers, and told him what had taken place between him and relator's attorney; that respondent took the two papers and made an entry in the judge's docket to the effect that the contestor in said election suit had that day filed a motion for a new trial, but that respondent so received the papers and made the entry when neither the relator nor any attorney for him was in the courtroom, and that later the same day Duddleston, as deputy clerk of the court, made the order book entry, as alleged; that the judge did not sign the order book, and seven days later, at the same term, being after the time allowed by law for filing the motion for a new trial had expired, upon a motion by the adverse party, supported by the affidavit of Duddleston stating said facts, respondent as judge ordered and caused said entries to be erased

inates a demurrer to this return, which amounts to an exception to its sufficiency and will be so treated.

[1] The facts so admitted under oath show relator entitled to the relief asked. They show that within the time allowed by statute (section 587, Burns' 1914 [section 1, c. 320, Acts 1913, p. 848]) relator caused to be delivered to the judge in open court, for the purpose of being filed, a written motion and statement of reasons for a new trial, which was received by the judge for that purpose and by his authority was indorsed with a file mark, noted on the books of the court as having been filed, and placed among the papers in the cause by the clerk, whose duty it was to perform those services with respect to papers filed. This was a sufficient filing of the motion. Gfroerer v. Gfroerer, 173 Ind. 424, 428, 90 N. E. 757; Meek v. State ex rel., 172 Ind. 654, 661, 88 N. E. 299, 89 N. E. 307; Hammond, etc., R. Co. v. Antonia, 41 Ind. App. 335, 342, 83 N. E. 766.

And the mere facts that the person who actually put the paper in the hands of the judge for the purpose of being so filed was not the attorney for the contestor, or even that he was not an attorney at all, and that neither the contestor nor his attorney was present in the courtroom at the time are immaterial, where they were so delivered by authority of the contestor for the express purpose of being filed, and were received and filed.

[2] The motion for a new trial having been filed within the time allowed by law, relator's right to have it entertained and ruled on is not subject to the arbitrary discretion of the judge, but it became and is the imperative duty of the respondent to rule on such motion, and to cause a record to be made of the facts that it was filed and ruled on, to the end that if the motion be overruled an appeal may be taken, and if it be sustained that the cause may be retried and proceed to final judgment; and his act in erasing from his order book the record of its filing after the clerk had made it was wholly unauthorized.

[3] Respondent having made a verified return of facts from which it clearly appears, without dispute, that it is his imperative duty, as judge of the superior court of Vigo county, state of Indiana, to restore the entry which he wrongfully and without authority erased from the order book of said court, which recorded as part of the proceedings had therein on the 7th day of February, 1923, being the fifty-seventh judicial day of the December, 1922, term of court, the fact that on that day the relator, as contestor in the action pending therein known as cause No. 19732, and entitled Forest Kensinger v.

same, which was so presented to the judge and was marked as filed on said day, and that it is his duty thereafter within a reasonable time to make, and to cause to be entered and recorded in said order book as of the day when it is so made, an order disposing of said motion either by sustaining or overruling the same, together with a notation therein of the fact that the party against whom such ruling is made excepts to the same, it is proper for this court to enter final judgment upon said facts.

It is therefore adjudged that the respondent, as judge of said court, be and he is hereby commanded to make such rulings and to cause entries recording said facts to be made in the order book of his court, all as above set out, and that the relator recover of and from the respondent his costs therein, taxed at $———.

SINGER v. STATE. (No. 24338.)

(Supreme Court of Indiana. March 12, 1924.)

1. Assault and battery ⇐91—Speed in excess of 25 miles per hour only prima facie evidence of unreasonable speed.

In a prosecution for assault and battery with an automobile, speed in excess of 25 miles an hour is only prima facie evidence that such speed is greater than is reasonable or prudent, having regard to the traffic and use of the highway.

2. Assault and battery ⇐82—Driving at 50 miles per hour held to create inference of disregard for safety of others.

Where an auto driver drove his car at a speed of 50 miles an hour on a much used public highway, just at dusk, such conduct created a reasonable inference, in prosecution for assault and battery, that driver was acting with a reckless disregard for the safety of others, and with a willingness to inflict injury.

3. Assault and battery ⇐91—Evidence held to show unlawful intent to commit offense.

In a trial for assault and battery for driving a car in collision with a wagon, evidence *held* to show unlawful intent to commit the offense.

4. Criminal law ⇐1159(2)—Supreme Court cannot weigh evidence.

The Supreme Court cannot weigh evidence in a criminal prosecution.

Appeal from Circuit Court, Gibson County; Robert C. Baltzell, Judge.

William Singer was convicted of assault and battery, and he appeals. Affirmed.

Ely & Corn, of Petersburg, and Hovey Kirk, of Princeton, for appellant.

Franklin White, Deputy Atty. Gen., for the State.

GAUSE, J. Appellant was charged with the crime of assault and battery, and upon a trial by the court he was convicted.

On this appeal he has assigned that the court erred in overruling his motion for a new trial. The only point he seeks to make under this assignment is that the finding of the court is not sustained by sufficient evidence, and is therefore contrary to law.

The appellant has set out only a part of the evidence in his brief. The testimony of some witnesses is entirely omitted, and that of others omitted on very material matters.

The part of the evidence that appellant has set out in his brief tended to show, and the court could have found from such evidence, that appellant was driving his automobile along a much used public highway, just at dusk, when there was also dust hanging over the road, making it impossible to see but a short distance ahead, at a speed of at least 50 miles per hour; that when going at such a speed, under such conditions, he ran into a wagon to which was hitched a team of mules; that the driver of said team had pulled over to the right side of the road, and the appellant turned his automobile suddenly to the left and caused the collision; that the prosecuting witness was riding on said wagon and was severely injured.

[1] Of course it is true that the mere fact that appellant was driving in excess of 25 miles an hour would not render him guilty. Speed in excess of 25 miles an hour is only prima facie evidence of the fact that he was driving at a speed which was greater than was reasonable or prudent, having regard to the traffic and use of said highway.

[2] But, if appellant was driving at the speed the state's witnesses testified he was going, and which the court trying the cause had a right to believe, and considering the conditions existing at such time, then the court could reasonably have found that the appellant acted with a reckless disregard for the safety of others, and with a willingness to inflict the injury. In other words, the court could have found from the evidence that the appellant had the intent to commit the battery.

[3] The undisputed evidence shows the collision, and that the prosecuting witness was injured as a result thereof, which constituted a rude touching of another, and from the evidence set out the court was justified in finding that it was done with an unlawful intent, and was not merely a negligent act. Luther v. State (1912) 177 Ind. 619, 98 N. E. 640; Schneider v. State (1914) 181 Ind. 218, 104 N. E. 69; Bleiweiss v. State (1918) 188 Ind. 184, 119 N. E. 375, 122 N. E. 577.

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court or jury charged with the duty of weighing the evidence and determining the facts, although it does not seem to have persuaded the trial court in this case; but, as we cannot weigh the evidence, and as there was evidence which, if believed by the court trying the case, was sufficient to convict, we have no alternative but to affirm the judgment.

Judgment affirmed.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY v. Guernsey O. BURTCH. (No. 23536.)

(Supreme Court of Indiana. Feb. 29, 1924.)

Appeal from Circuit Court, Jackson County.

On remand from the Supreme Court of the United States. Former judgment (134 N. E. 858) set aside, in obedience to mandate of United States Supreme Court (44 Sup. Ct. 165, 68 L. Ed. 187).

PER CURIAM. This court, on March 14, 1922, by its decision in the above-entitled appeal, affirmed the judgment of the Jackson circuit court. Thereafter, by virtue of a writ of certiorari, the transcript of the record in the above-entitled cause was filed in the Supreme Court of the United States, wherein the decision and judgment of this court was reviewed, with the result that on February 15, 1924, a memorandum of the decision of the Supreme Court of the United States in said cause was filed in this court, and reads as follows:

"And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and twenty-three, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

"On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed, with costs, and that the said appellant, the Baltimore & Ohio Southwestern Railroad Company, recover against the said appellee three hundred and sixty-six dollars and eighty cents for its costs herein expended and have execution therefor.

"And it is further ordered that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this court. January 7, 1924."

Now, therefore, in obedience to the above and foregoing mandate of the Supreme Court of the United States, the order and judgment of this court, affirming the judgment of the Jackson circuit court, is hereby set aside and annulled; that the judgment of the Jackson circuit court rendered in said cause be and the

of the Supreme Court of the United States, pronounced January 7, 1924, reported in Baltimore & O. S. W. R. Co. v. Burtch, 44 Sup. Ct. 165, 68 L. Ed. 187.

KELL v. STATE. (No. 24365.)

(Supreme Court of Indiana. March 11, 1924.)

1. **Criminal law ⇐829(1)—Requested instructions properly refused where principle of law involved is covered by court's instructions.**

Requested instructions may be properly refused, where the principle of law involved therein is embraced in instructions given by the court, though the requested instructions are proper to be given.

2. **Criminal law ⇐814(1)—Instructions which incorrectly stated the law as applied to the evidence held properly refused.**

Where the instructions tendered by defendant in a prosecution for rape were not correct statements of the law as applied to the evidence to which they were directed, they were properly refused.

3. **Criminal law ⇐829(1)—Court not required to repeat instructions where principle of law has been fairly stated once.**

Where propositions of law have been fully and fairly stated once, the court is not required to give additional instructions covering the same points.

4. **Witnesses ⇐337(4)—Defendant properly cross-examined in rape prosecution as to relations with women other than the prosecutrix.**

In a prosecution for rape, the court did not err in permitting defendant as a witness in his own behalf to be cross-examined as to his relations with women other than the prosecutrix; defendant in becoming a witness subjecting himself to the same treatment as any other witness.

5. **Witnesses ⇐327, 338; 363(1)—Interest, bias, ignorance, motives, or that witness is depraved, may be shown on cross-examination to impeach witness.**

Any fact which tends to impair the credibility of a witness by showing his interest, bias, ignorance, motives, or that he is depraved in character, may be shown in cross-examination.

6. **Witnesses ⇐267—Extent of cross-examination is within discretion of the court.**

The extent to which cross-examination may be carried is within the sound discretion of the court.

7. **Criminal law ⇐783(1)—Admission of evidence of defendant's relations with women other than prosecutrix properly limited by instruction.**

In a prosecution for rape, where evidence of defendant's relation with women other than

acts were admissible in evidence for the purpose only of bearing upon the weight and credit to be given to testimony of defendant.

8. Criminal law ⟸785(3) — Instruction not open to objection that it required jury to consider all the evidence on the credibility of witnesses.

In a rape prosecution, an instruction on the question of the credibility of witnesses *held* not open to the objection that it directed the jury to consider all the evidence on that subject.

9. Criminal law ⟸782(1)—Instruction authorizing consideration of all facts and circumstances held not erroneous.

An instruction that the jury might take into consideration all the facts and circumstances shown by the evidence, *held* not erroneous as authorizing consideration of evidence of defendant's moral character, and collateral and extraneous matters brought out on cross-examination in determining the question of guilt.

10. Criminal law ⟸788(2) — Instruction to consider defendant's testimony, even if believed in connection with testimony of other witnesses, held erroneous.

An instruction which required the jury to give the testimony of defendant, if believed, such force as it was entitled to when considered in connection with the other testimony relating to the same matters, *held* erroneous, it being the jury's duty, if satisfied that defendant's testimony was true, to act on it without reference to other testimony.

11. Criminal law ⟸554 — Defendant's testimony should be considered same as testimony of other witnesses.

The testimony of defendant in a criminal prosecution should be considered the same as the testimony of any other witness, though the jury may consider his interest.

Appeal from Circuit Court, Gibson County; Robert C. Baltzell, Judge.

Robert Kell was convicted of rape, and he appeals. Reversed, with instructions.

Duncan & Duncan, of Princeton, for appellant.

U. S. Lesh, Atty. Gen., and Mrs. Edward F. White, Deputy Atty. Gen., for the State.

WILLOUGHBY, J. The appellant, Robert M. Kell, was convicted by a jury of the crime of rape upon a female child under the age of 16 years. The appellant seeks a reversal of the judgment, and assigns as error the overruling of his motion for a new trial. Under such assignment of error he alleges that the verdict was not sustained by sufficient evidence; that the court erred in admitting certain evidence on cross-examination of the appellant; that the court erred in giving and refusing certain instructions.

bered 1 and 2 and tendered by the defendant. These are general instructions relative to reasonable doubt and the burden of proof, and were proper to be given under any state of the evidence in the trial of a criminal case, but in this case other instructions were given by the court in its series of instructions which embraced each principle of law set forth in these instructions or either of them, therefore it was not error to refuse to give them.

[2] Instruction No. 2a and instruction No. 7, tendered by the defendant, are not correct statements of the law as applied to the evidence to which they were directed. The court properly refused to give each of them.

[3] Instruction No. 4, tendered by appellant, was fully covered by instruction No. 13, given by the court of its own motion. Where propositions of law have been fully and fairly stated once, the court is not required to give additional instructions tendered, covering the same points and propositions. Bohan v. State (Ind. Sup.) 141 N. E. 323; Barnett v. State, 100 Ind. 171.

[4-6] On the trial certain questions were asked the appellant on cross-examination by counsel for the state touching his relations with women other than Evelyn Armstrong. These questions were proper. The defendant in becoming a witness subjected himself to the same treatment as any other witness. It has been held that any fact tending to impair the credibility of a witness by showing his interest, bias, ignorance, motives, or that he is depraved in character, may be shown in cross-examination, but the extent to which the cross-examination may be carried is within the sound discretion of the court. Pierson v. State, 188 Ind. 239, 123 N. E. 118, and cases there cited.

[7] This evidence was limited by the court by instruction No. 13, given by the court of its own motion, as follows:

"Certain questions were propounded on cross-examination by counsel for the state to the defendant, Robert Kell, touching his relations with women other than Evelyn Armstrong. These inquiries were permitted by the court concerning alleged specific acts and conduct extraneous to the issues involved in this case. They were calculated to degrade the defendant and impair his credibility, and were admissible in evidence for the purpose only of bearing upon the weight and credit to be given to the testimony of said defendant."

This instruction properly limited such evidence to the purpose for which it was admitted.

[8] Appellant says that instruction No. 10, given by the court of its own motion, is erroneous, "in that it directs the jury to consider all the evidence on the subject of the

witnesses on the theory that the defendant is innocent, if you can. If you cannot reconcile the statements of witnesses on account of contradictions, then you have a right to believe the witness or witnesses you deem most worthy of credit, and disbelieve the witness or witnesses whom you believe least worthy of credit. In determining whom you will believe you may consider the nature of the evidence given by them, their interest, bias, or prejudice, if any, disclosed; their opportunity for knowing the facts about which they testify; their manner and deportment while on the witness stand; how far they are corroborated or contradicted by other testimony, and in weighing the testimony and determining the credibility of the witnesses it is proper for you to take into consideration all the surrounding circumstances of the witnesses as brought out in the evidence, their interest, if any, in the result of the action, and such other facts appearing in the evidence as will, in your opinion, aid you in determining whom you will believe; and you may also, in considering whom you will or will not believe, take into account your experience and relations among men."

In Morgan v. State, 190 Ind. 411, 130 N. E. 528, it was claimed that an instruction substantially in the language of this one invaded the province of the jury on the question of the credibility of witnesses, but the court held otherwise. It was not error to give this instruction. Morgan v. State, supra; Keesler v. State, 154 Ind. 242, 56 N. E. 232; Adams v. State (Ind. Sup.) 141 N. E. 460.

[9] Appellant also says that instruction No. 12 was erroneous, because it "directs the attention of the jury to the fact that the evidence given to prove the general moral character of appellant and all the evidence on cross-examination touching collateral and extraneous matters may be taken into consideration in determining the guilt of the appellant." The interpretation given to this instruction by appellant is far fetched and unreasonable. The instruction is as follows:

"Circumstantial evidence in any criminal case is the proof of such facts or circumstances connected with or surrounding the commission of the crime charged as tend to show guilt or innocence of the accused; so in this case you may take into consideration all the facts and circumstances as shown by the evidence upon the trial of this cause in determining the guilt or innocence of the defendant."

While it might be said there is no circumstantial evidence in this case requiring an brief to indicate that it was in any way harmful to the appellant. The instruction clearly refers to circumstantial evidence concerning the material facts constituting the crime for which appellant was being tried. While this instruction cannot be commended as a model, it was not error to give it in this case.

[10, 11] Instruction No. 16, given by the court of its own motion, is assailed by the appellant for the reason that, as he says, it casts suspicion on his testimony. This instruction is upon the subject of the weight and credibility of the testimony of the defendant. It is long and somewhat obscure, but the sentence in it which appellant claims to be erroneous is as follows:

"If you believe the things to which the defendant has testified as a witness, it will become your duty to give to it such force and effect as you deem it to be entitled to when considered in connection with the other testimony given upon the trial relating to the same matters."

The general rule of law upon the subject of testimony of the defendant is "that the testimony of the defendant shall be considered the same as the testimony of any other witness." Of course it is proper for the jury to take into consideration the interest which the defendant has in the result of the trial in arriving at the weight and credit that they will give to his testimony, but after the jury has determined that the things to which the defendant has testified are true then it would not be proper in giving force and effect to such testimony to consider it in connection with the other testimony given upon the trial relating to the same matters. In other words, if upon the trial of the cause the jury has arrived at the conclusion that the testimony of the defendant is true, it cannot be cast aside or disregarded on account of other testimony given upon the trial relating to the same matters. If the jury were satisfied that his testimony was true, it was their duty to believe and act upon it without reference to other testimony. Hartford v. State, 96 Ind. 461, 467, 49 Am. Rep. 185. The giving of this instruction was harmful error.

Judgment reversed, with instructions to the trial court to sustain appellant's motion for a new trial.

The clerk will issue the necessary warrant for the return of the prisoner to the sheriff of Gibson county.

CO. (No. 11763.)

(Appellate Court of Indiana, Division No. 2. March 14, 1924.)

1. Negligence ⇐119(1)—Plaintiff not required to prove all allegations of negligence.

Where there were several different acts of negligence charged, any one of which, had it proximately caused the fatal injury, would have been sufficient as a matter of law to entitle plaintiff to recover in the absence of contributory negligence of decedent, an instruction requiring plaintiff to prove all of the material allegations of her complaint was erroneous.

2. Trial ⇐252(8)—Instruction as to facts not disputed held improper as tending to confuse jury.

In an action for death of plaintiff's decedent, injured by being struck by defendant's automobile driven by its employee, where the undisputed evidence showed that the employee was engaged in defendant's business at the time of the accident, an instruction as to that matter should not have been given as tending to confuse the jury.

3. Municipal corporations ⇐706(8)—Instruction on presumption of negligence in operation of automobile held not erroneous.

In an action for death of one struck by defendant's automobile, an instruction that negligence charged was not to be presumed from the mere happening of the accident and consequent injury to deceased as a result thereof, but that in order to recover the evidence must sufficiently establish by a fair preponderance that the accident was one which in the exercise of reasonable care and foresight defendant ought to have anticipated and prevented, *held* not erroneous.

4. Trial ⇐256(10)—Instructions omitting last clear chance doctrine held not erroneous in absence of request for further instructions.

Instructions which were otherwise correct were not erroneous merely because they did not embrace the last clear chance doctrine in the absence of any request by plaintiff for instructions concerning that doctrine.

5. Appeal and error ⇐761—Statement in brief held insufficient to present question with reference to instructions refused.

Appellant's statement in her points and authorities with reference to instructions requested and refused, which she asserts should have been given, with no other statement, *held* insufficient to present any question to appellate court.

Appeal from Superior Court, Marion County.

Action by Maisie Lathrop, administratrix, against the Frank Bird Transfer Company. From a judgment for defendant, plaintiff appeals. Reversed, with instructions to grant new trial.

Turner, Adams, Merrell & Locke, and Jones, Hammond & Jones, all of Indianapolis, for appellee.

NICHOLS, J. Action by appellant against appellee for damages for the death of her husband. It is averred in the complaint that appellant's decedent was injured by being struck by appellee's automobile as a result of the negligence of appellee's employee in the operation of the same, which injury resulted in his death. The accident occurred near the intersection of Monument Circle with Meridian street, and in front of the English Hotel, Indianapolis.

There are three separate acts of negligence charged against appellee, to wit: (1) Operating an automobile at an unlawful rate of speed, to wit, 30 miles per hour at the time and place of the accident; (2) failing to slow down after he saw the decedent, and saw that the accident would occur unless he did so; (3) operating his automobile without having it equipped with sufficient brakes in good working order. The complaint averred that each of the acts of negligence on the part of appellee separately and severally was the sole and proximate cause of the injury and death of decedent. There was a demand for $10,000 damages. To this complaint there was an answer in denial, trial by jury, and verdict for appellee, upon which judgment was rendered.

The error assigned in this court is the action of the court in overruling appellant's motion for a new trial, under which she presents error in giving certain instructions and in refusing to give certain instructions tendered by her.

Appellee contends that the instructions are not properly in the record. But we hold that there was a substantial compliance with the statute in this regard as to the instructions given. Nothing can be gained by a discussion of this question.

[1] Instruction No. 3 informed the jury that—

"In order to entitle plaintiff (appellant) to recover, she must prove by a fair preponderance of the evidence all of the material allegations of the complaint."

This was error. There were several different acts of negligence charged in the complaint, any one of which, had it proximately caused the injury and death of the decedent, would have been sufficient as a matter of law to entitle appellant to recover in the absence of contributory negligence of her decedent, and she was not required to prove all of them. National, etc., Vehicle Co. v. Kellum, 184 Ind. 457, 109 N. E. 196; Chicago, etc., R. Co. v. Barnes, 164 Ind. 143, 149, 73 N. E. 91; Cleveland, etc., R. Co. v. Klee, 154 Ind

102 N. E. 887; Lake Shore, etc., R. Co. v. Myers, 52 Ind. App. 59, 98 N. E. 654, 100 N. E. 313; Diamond Block Coal Co. v. Edmonson, 14 Ind. App. 594, 43 N. E. 242; Burton v. Figg, 18 Ind. App. 284, 47 N. E. 1081.

[2] Instruction No. 8 informed the jury that, if the appellee's employee, who was operating the automobile, was not at the time of the alleged injury engaged in the business of his employer, but was carrying into effect some purpose of his own or doing something not connected with his employment, then appellee was not liable for such injury, however negligent or careless the employee might have been. Instruction No. 19 was to the same effect. Answers to interrogatories submitted before trial to appellee and the undisputed evidence showed that appellee's employee was returning from the delivery of a passenger, and was returning to his stand at the Union Station. It is undisputed that the employee was engaged in the business of his employer at the time of the accident. These instructions could only tend to confuse the jury, and should not have been given.

[3] Instruction No. 10 informed the jury that the negligence charged was not to be presumed from the mere happening of the accident and consequent injury to deceased as a result thereof, but that in order to recover the evidence must sufficiently establish by a fair preponderance that the accident was one which in the exercise of reasonable care and foresight appellee ought to have anticipated and prevented. There was no error in giving this instruction. Indianapolis, etc., Traction Co. v. Roach (Ind. Sup.) 135 N. E. 334; Wabash, etc., R. Co. v. Locke, Adm'r, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193.

[4] Appellant complains of instruction No. 11 which informed the jury that, if it should find that both the decedent and appellee by their negligence materially and approximately contributed to the injury from which death resulted, it could not find for appellant. This is a correct statement of the law so far as the court intended the instruction to express it. Appellant's complaint of the instruction is that it ignores the doctrine of last clear chance which she says was involved. We do not determine as to whether such question was presented by the evidence, but, if appellant so believed, it was her right to tender an instruction covering that issue. We note, however, that instruction 15, after informing the jury that a person crossing the street has a right to assume that a person driving a vehicle therein will use ordinary and reasonable care to avoid injuring him, and that a driver of a vehicle also has a right to assume that the pedestrian will use reasonable and ordinary care to avoid collision until it becomes apparent that the other is not aware of the danger that exists, and whenever such fact becomes apparent, if it does so appear, then such party is required to exercise ordinary care commensurate with such fact. If appellant desired a more definite statement of the law as to the doctrine of last clear chance, she should have tendered an instruction more fully covering the question. Appellant's objections to instructions Nos. 12, 13, and 14 cannot prevail. These instructions are correct statements of the law, and the fact that they do not embrace the doctrine of last clear chance does not make them erroneous.

[5] We find no error in giving instruction No. 18. We do not need to determine whether the instructions tendered by appellant and refused by the court are in the record, for, even if they are in the record, appellant's statement in her points and authorities, with reference to those which she undertakes to present, that they state the law and should have been given, with no other statement, is insufficient to present any question for our consideration. City of Linton v. Jones, 75 Ind. App. 320, 130 N. E. 541.

For the errors above mentioned, the judgment is reversed, with instructions to grant a new trial.

PITTSBURGH, C., C. & ST. L. R. CO. v. BOUGHTON. (No. 11594.)

(Appellate Court of Indiana, Division No. 2. Feb. 19, 1924.)

1. Railroads ⇐396(2)—Res ipsa loquitur doctrine held applicable to injuries to pedestrian by derailed car.

In a pedestrian's action for injuries sustained when struck by derailed car, doctrine of res ipsa loquitur *held* applicable, since in the ordinary course of things a derailment would not have happened if the railroad had used proper care.

2. Railroads ⇐401(2) — Instruction on res ipsa loquitur doctrine, in action for injuries caused by derailed car, held warranted by pleadings.

In an action for injuries to a pedestrian struck by a derailed car, in which one paragraph of the complaint alleged in general terms that the railroad negligently operated its railroad and that by reason thereof one of its cars was thrown or pushed off the track and struck the plaintiff, an instruction on the res ipsa loquitur doctrine *held* proper, though a second paragraph of the complaint charged specific acts of negligence.

3. Railroads ⇐401(2) — Instruction as to, whether injured pedestrian was using public street held inapplicable to evidence.

In an action for injuries to a pedestrian struck by a derailed car, tried upon the theory

was using the public street, instruction that the strip of roadway on which the pedestrian was walking at the time of the injury was not a public street, notwithstanding the public's continuous use thereof, under Burns' Ann. St. 1914, § 5244, unless it served to connect a street or highway on each side thereof, *held* not warranted by evidence.

4. Trial ⇐296(1) — Erroneous instructions held not cured by other instructions in conflict therewith.

The giving of erroneous instructions was not cured by other instructions in conflict therewith, the effect of which was merely to confuse the jury and leave them in doubt as to which instructions should be followed.

5. Negligence ⇐138(2) — Res ipsa loquitur doctrine not properly applied to proximate cause of injury.

An instruction that where "the casualty is of such a nature as in the ordinary course of things does not happen if those who have the management thereof use due care, it affords prima facie evidence, in the absence of any explanation or rebuttal by defendant, that the injury resulted from the want of proper care on the part of the defendant," *held* erroneous, in that it applied the res ipsa loquitur doctrine to the proximate cause of the injury.

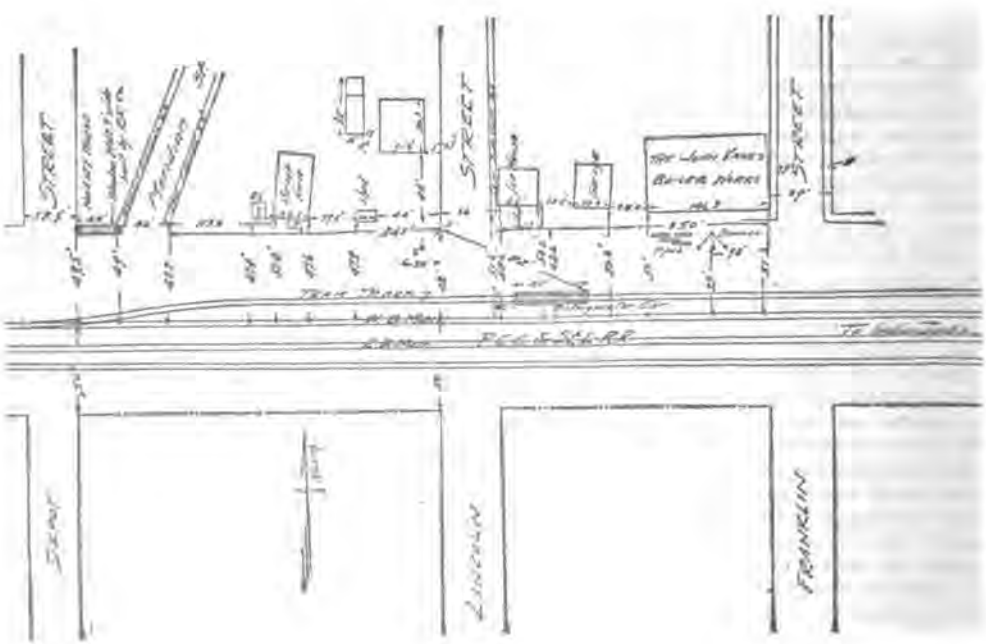
Appeal from Circuit Court, Clay County; Thos. W. Hutchinson, Judge.

Action by Charles E. Boughton against the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed with directions.

Terre Haute, for appellant.

Hottel & Patrick, of Indianapolis, and Rawley & Baumunk, of Brazil, Ind., for appellee.

McMAHAN, J. Complaint by appellee in two paragraphs to recover damages for personal injuries alleged to have been received by him by reason of the negligence of appellant. The first paragraph alleges in general terms that appellant negligently operated its railroad, and that by reason thereof one of its cars, which had been left standing on a switch east of Lincoln street in the city of Brazil, was thrown or pushed off the track and struck appellee as he was traveling on Lincoln street, thereby injuring him. The second paragraph alleges that he was walking east on what was called Railroad street at the time of the accident, and that when he reached a point near the intersection of Railroad and Lincoln streets he was negligently run into, struck and injured by one of appellant's cars; that appellant negligently suffered one of its cars to become out of repair and negligently ran such car so that it struck and threw the car on the switch off the track into Railroad street against appellee thereby injuring him. Both paragraphs alleged that appellant's railroad crossed Lincoln street and running westwardly therefrom appellant maintained several tracks, one of them running along the side of Railroad street. The general location of the streets and surroundings are shown by the following plat:



north of the team track as located on the above plat, and extends west from Lincoln to Depot street. There was a trial by jury which resulted in a verdict and judgment for appellee. Appellant contends the court erred in overruling its motion for a new trial, on account of the giving of instructions 1, 4, 5, 7, and 10, requested by appellee, and 21 and 24, given by the court on its own motion.

There is evidence tending to establish the following facts: On and prior to May 11, 1920, appellant owned and operated a line of railroad through the city of Brazil. Its right of way in said city was crossed by Depot and Lincoln streets. At the intersection of the right of way and Lincoln street, and for some distance both east and west thereof, appellant maintained four tracks on its right of way; the most northerly one being known as the team track, the next to the south being the north main, the next south main, and the most southerly a switch or passing track. For many years there had been a strip of ground about 30 feet wide extending east from Depot street to Lincoln street, and lying between the team track and the property north of the right of way. Appellant's right of way including the so-called Railroad street is substantially 100 feet wide. The strip of land north of the team track which appellee alleges is Railroad street had for many years been used by the public for the purpose of reaching the team track in order to load and unload freight. There is some evidence that people traveled over this strip at times other than when loading or unloading freight and not in connection with any business with the railroad. Appellee on said day was chief of the fire department of the city of Brazil, and about 6 p. m. was on his way from his home to the fire station, and in doing so walked easterly from Depot street to Lincoln over said strip immediately north of the team track. At this time there were two freight cars on the team track east of Lincoln street. When appellee reached a point about 20 feet from Lincoln street he heard a crash, and looking to the east saw the first car on the team track moving toward him. He saw the east end of this car leave the tracks and swing around to the northwest. When he heard the crash and saw the car swing to the north and west across Lincoln street, he started to run northeast so as to get into Lincoln street. When he got to the north side of this strip of land and the west side of Lincoln street, he saw the derailed car was going to strike him. He threw his hand up against the car and swung himself around the north end of it and was struck and injured. The car moved about 20 feet further west and turned over.

[1] Instruction No. 1, given at the request of appellee, is as follows:

reasonable evidence of the negligence of the defendant, but where the thing responsible for the injury is shown to be under the management of the defendant or its servants, and the accident itself is such as, in the ordinary course of things, does not happen if those who have the management used proper care, it affords reasonable evidence, in the absence of explanation by the defendant that the accident arose from want of care on its part."

Appellant contends that the giving of this instruction was error, because it applies the rule of res ipsa loquitur to a state of facts not warranted by the evidence. Its contention is that his act in running and throwing his hand against the car raised the question of contributory negligence, and that, where the evidence shows that the injury might as well have happened by reason of the negligence of the injured party, the rule does not apply. In this contention it must be remembered that appellee was traveling east about 20 feet west of Lincoln street when he heard a noise and saw the east end of the derailed car swing around to the north and west across Lincoln street and rapidly moving toward him in such a position as to prevent him reaching Lincoln street without danger of being injured. True, he might have run north and gotten on the lot north of this strip off of Railroad street out of the way of the moving car, but he was required to act instantly as he was in imminent danger. The jury was fully instructed on the question of contributory negligence. It was correctly told that appellee could not recover in any event if the jury found he was guilty of any negligence which proximately contributed to his injury.

It is also contended that the instruction assumes that the derailing of the car was responsible for the injury. When we consider the instruction as a whole, in connection with all the other instructions, it is perfectly clear that the expression relating to "the thing responsible for the injury" being under the management of the defendant had reference to the accident which caused the car to leave the track and not to the injury of appellee. It would have been better if the court had omitted the word "injury" and used in its place the word "accident," thus specifically indicating that he meant to refer to the thing which caused the car to be derailed. But when this instruction is considered with the other instructions on negligence, contributory negligence, and proximate cause, its giving was not reversible error.

[2] The fact that the second paragraph of complaint charged specific acts of negligence did not make the giving of this instruction reversible error. The instruction was applicable to the evidence and to the issues presented by the first paragraph. In Feldman v. Chicago Railway Co., 289 Ill. 25, 124 N. E.

complaint contained usual charges of negligence, and two contained specific charges of negligence. It was there conceded that the rule was not applicable to the paragraphs charging specific acts of negligence. The court, however, held the doctrine applied where there was another paragraph charging negligence generally. To the same effect see Union Traction v. Giese, 229 Ill. 260, 82 N. E. 232.

In the instant case the car was under the management and control of appellant. Its derailment was such as in the ordinary course of things would not have happened if appellant had used proper care. The derailment, itself, therefore, affords reasonable evidence in the absence of an explanation by appellant that it arose from want of proper care.

Appellant made no attempt to explain the cause of the derailment of the car. Its defense was (1) that the so-called Railroad street was not a street but was a part of its right of way and was used by the public only in loading and unloading freight on or from appellant's cars, and that appellee, if injured, was injured while traveling along and on the right of way under such conditions as to relieve it from liability on account of mere negligence, and (2) that appellee had reached Lincoln street out of the path of the derailed car before the accident, and that he was not struck or injured. The court fully and at great length correctly instructed the jury as to the contentions of appellant, and there is no ground for the contention that the jury was confused or misled by said instruction.

The court at the request of appellant charged the jury that if the place where appellee was traveling was not a public street, but was a part of appellant's right of way and that if appellee was injured while upon its right of way and before he reached Lincoln street, he could not recover. The jury was clearly and specifically instructed that if appellee was injured while upon the right of way at a point west of Lincoln street he could not recover unless it found that the place where he was traveling was a public street. Under these instructions, before the jury could return a verdict for appellee, it was required to find that he was injured on a public street.

The evidence fails to show when the railroad was located or constructed at its present location. We may assume that it was about April 22, 1852, as on that day the owner of the land immediately north of the railroad and lying between Franklin and Meridian streets, as shown on the above plat, recorded a plat in the recorder's office, showing the subdivision of the land into the lots. The north and south streets and alleys as located on this plat extend from the north to the railroad right of way. One hundred feet north of the railroad it shows a street 60 south line of the lots were indicated as being the north line of the railroad right of way. The first lot west of Franklin street extending west 120 feet was marked "Depot Lot" and was immediately north of what on this plat indicated the location of the railroad. Later the owner of this subdivision sold and by deed conveyed the lot immediately north of the railroad and east of Lincoln street and also all the lots immediately north of the railroad and between Lincoln and Meridian streets, and in the deeds stated that these lots lay "on the railroad fronting the switch," and were "bounded on the south by the railroad." This plat does not indicate the width of the right of way or whether any part of the land indicated as being railroad property ever belonged to the party making this plat. But in April, 1854, he sold the land south of the railroad. The land immediately east of the above subdivision and extending south of the railroad was platted in September 1856, and the part occupied by the railroad was marked "Railroad 100 feet wide."

The public authorities never made any improvements or did any work on that part of the right of way which appellee calls Railroad street. The railroad, however, when necessary, unloaded stone and cinders on this strip so that it could be used by those desiring to reach the team track. In 1906 the city council, on petition of certain property owners, ordered Depot street improved with a brick pavement from the north line of the railroad right of way to a certain street south of the railroad, and an assessment was levied against the right of way on each side of Depot street to a distance of 150 feet. This assessment, without any objection being made, was paid by the railroad. Sidewalks were constructed on both sides of Franklin street in 1906, and the railroad was assessed for the costs of such sidewalks across its right of way at that point. The railroad leased narrow strips of land on the north side of its right of way and on both sides of Franklin street to owners of the land north of the right of way for storing lumber and other material. It also constructed a sidewalk from Depot street east to Meridian street. The buildings between Meridian and Lincoln Streets and immediately north of the railroad fronted on a street north of the railroad. When the owner of the storage house wanted to load or unload a car on the team track he would erect a runway of plank from the storage house to the car for that purpose. The same thing was done by those using the building east of Lincoln street marked "Ice House" on the plat.

As before stated, each paragraph of complaint alleged that appellee was injured while using a public street. The case was tried upon that theory, and the jury instructed that he could not recover unless he was injured while traveling on a public street.

tions 4 and 5, given at the request of appellee.

[3] The court, in instruction 4, quoted section 5244, Burns' 1914, which provides:

"That the use by the public (of the) right of way or depot grounds of any railroad in this state by riding, driving or walking thereon, shall not ripen into a right to continue to do so even though it has been so used for a period of twenty years or more; nor shall such use be evidence of a grant to do so except where such use is made across such ground to connect a street or highway on each side thereof, and except where a court of competent jurisdiction has adjudged the existence of a street or highway."

and then instructed the jury that under this statute if it found the strip designated in the complaint as Railroad street, was at the time of the accident a part of appellant's right of way, the mere fact that the public had continuously used it as a public road for more than 20 years, would not constitute such strip a public street, unless it should be found that such strip was so used by the public generally for 20 years to connect a street or highway on either side thereof as in such statute provided.

Instruction 5 was to the effect that, if the jury found the strip so designated as Railroad street was a part of the right of way of appellant, and that it had been generally used by the public as a public highway to connect a street on either side thereof, and had been so used by the public under a claim of right for 20 years or more, it would be authorized in finding that such strip was a public highway.

Appellees concedes that section 5244, supra, is not applicable to the strip of land lying north of the team track extending from Depot street to Lincoln street, and that the statute is only applicable where the strip of ground was a part of the right of way of the railroad, and had been used to connect a street extending across the right of way. Appellee, however, insists that the instruction is applicable to that part of Lincoln street which crosses the right of way and connects that part of Lincoln street north of the railroad with that part south of the railroad. This contention cannot prevail. There was no claim made by any one at the trial that Lincoln street was not a public street at the point where it crossed the right of way.

The court in each of these instructions specifically referred to the strip designated in appellee's complaint as Railroad street, and undertook to apply the statute to that particular strip lying between Depot and Lincoln streets and not to the part of the right of way connecting Lincoln street north of the railroad with that part of the street south of the railroad. Section 5244, supra, was not applicable to the evidence. The giv-

[4] Appellee calls attention to instructions 17, 18, and 39, given at the request of appellant, and insists that the giving of these rendered the giving of 4 and 5 harmless. No. 17 is in conflict with 4 and 5, and its effect would be to confuse the jury and leave them in doubt as to which instructions should be followed. We are not advised as to the order in which the instructions were given, and even if 17 was given after 4 and 5 it would not have the effect of rendering the last two harmless. Nor does the giving of 19 and 39 cure the error.

Instruction 7 related also to the use of a highway under a claim of right, and could only have been intended to refer to the use of the strip north of the team track. The giving of this instruction was also erroneous. There was no error in giving instruction 10 tendered by appellee.

In instruction 21, given by the court on its own motion, the court again quotes section 5244, supra, and gave the jury to understand that it applied to highways by prescription but not to the acquisition of highways by dedication. As before stated, the statute referred to was not applicable to the evidence, and this instruction should not have been given. Whether it would have been proper under the evidence to have given an instruction on the subject of dedication is very doubtful to say the least, but we need not pass upon this question at this time. The strip designated in the complaint as Railroad street was under the evidence without doubt a part of appellant's right of way.

This is not a case like Pittsburg, etc., R. Co. v. Town of Crown Point, 150 Ind. 536, 50 N. E. 741, where the public officials had taken possession of the way, graded, and improved it each year for more than 30 years and where buildings had been erected upon the assumption and belief that it was a street. There the town had paved the strip of land in controversy upon the theory that it was a public street. In the instant case the city had paved and improved streets crossing the railroad and had assessed the strip in question for such improvement, upon the theory that it was a part of appellant's right of way and not a street.

[5] Instruction 24, given by the court on its own motion, applies the rule ipsa loquitur to the proximate cause of the injury. The expression, where "the casualty is of such a nature as in the ordinary course of things does not happen, if those who have the management thereof use due care, it affords prima facie evidence, in the absence of any explanation and rebuttal by the defendant, that the *injury* (our italics) resulted from the want of proper care on the part of the defendant," renders the instruction erroneous for the same reason as the court held

burg, etc., R. Co. v. Arnott, 189 Ind. 350, 126 N. E. 13. For the reasons indicated, the court erred in overruling the motion for a new trial.

Judgment reversed, with directions to sustain appellant's motion for a new trial, and for further proceedings consistent with this opinion.

MONTGOMERY v. PIERSON. (No. 11738.)

(Appellate Court of Indiana, Division No. 2. March 13, 1924.)

Deeds ⇐203 — Mental condition of grantor held admissible on rebuttal on issue of undue influence.

In a suit to set aside a deed because of undue influence, where plaintiff in his complaint averred that grantor was greatly impaired in mind and body, and witness for plaintiff testified that grantor was in a helpless condition and at times unconscious and not rational all of the time in her conversation, defendant's evidence as to the condition of the grantor's mind in rebuttal was justified.

Appeal from Circuit Court, Bartholomew County; J. W. Donaher, Judge.

On petition for rehearing. Petition denied. For former opinion, see 142 N. E. 136.

NICHOLS, J. Appellant challenges the court's statement that he gave evidence of Mrs. Montgomery's weakened condition, both physically and mentally, and says that he gave no evidence of her mental condition. He says that the only evidence touching such subject in any way was that the decedent was 83 years old, greatly worried about the disposition of her property after the murder of her favorite son; that she suffered spells of intense pain, when the doctor would administer morphine and put her to sleep. Appellant's witness Carrie Wood, on examination in chief, after testifying to the decedent's helpless condition, says that she was unconscious, and at times seemed to be in a doze. Speaking of the time that appellee was talking to her grandmother, the decedent, about her property, she said that the grantor's condition was very weak, that she was not able to sit up in bed, that she was not conscious, and that a great deal of the time when conversations were going on she was not conscious; that she was not rational all of the time in her conversation; and that they were giving her morphine and other sedatives two or three times a day. This evidence, together with some other evidence similar in character, coupled with the averments in the complaint that the decedent was greatly impaired in mind and body, justified appellee's evidence as to the condition of her mind, in rebuttal.

The petition for rehearing is denied.

JACQUA v. HESTON et al. (No. 11729.)

(Appellate Court of Indiana, Division No. 2. Feb. 21, 1924.)

1. Appeal and error ⇐1012(1)—Findings of lower court reversed as against evidence.

In an action to determine boundaries between the lots of plaintiff and defendant, the action of the lower court in readjusting boundaries so as to give defendant an additional 32 feet, no possible view of the evidence entitling defendant to more than an additional 20 feet, required reversal.

2. Appeal and error ⇐773(5)—Failure to file brief held confession of error.

Where, in boundary dispute, the contention of appellant that the findings of the lower court were erroneous for failure to take into consideration the effect of the partial vacation of an adjacent street was prima facie valid in view of Burns' Ann. St. 1914, § 8912, appellee's failure to file brief *held* to be taken as confession of error.

3. Deeds ⇐114(3)—General statement conveying part of lots yields to particular and specific description.

Statement in deed that grantor conveys part of lots *held* general, which must yield to particular and specific description given in measurements and directions.

Appeal from Circuit Court, Jay County; Roscoe D. Wheat, Judge.

Action to quiet title by Judson A. Jacqua against Bettie Farris Heston and another. Judgment for defendants, and plaintiff appeals. Reversed, and new trial granted.

This action was instituted by Judson A. Jacqua against Bettie Farris Heston and James E. Heston, to quiet the plaintiff's title to lot 113 in the original plat of the town of South Portland (now in the city of Portland), Ind.; except the triangular portion forming the east extremity of said lot, which triangular portion is about 56 feet east and west. The complaint is in the usual short form authorized by the Code. The defendants filed answer in general denial. Bettie Farris Heston then filed a cross-complaint against the plaintiff Judson A. Jacqua and his wife, Addie C. Jacqua, to quiet her title to a part of said lot 113, particularly described as follows: Beginning at the southeast corner of lot 114 in South Portland (now in the city of Portland); then east 20 feet; thence north 44 feet; thence west 20 feet; thence south 44 feet to the place of beginning. Judson A. Jacqua and his wife, Addie C. Jacqua, filed answers in denial to the cross-complaint.

The special finding discloses the following material facts:

(1) That prior to November 7, 1917, the addition known as South Portland Addition to the city of Portland, Jay county, Ind.,

was laid out and platted as an addition to the town (now city) of Portland, which plat was duly recorded in Plat Record A, at page 78, of the records in the office of the recorder of Jay county, and that among other lots shown on said plat are lots 113 and 114 in said addition.

(2) That on November 7, 1917, Catherine Heddon became the owner in fee simple of said lots 113 and 114.

(3) That there was a highway, known as Bridge street, laid out and platted, lying and abutting on the west side of said lot 114; that said Catherine Heddon, being the owner of said lot 114, filed her petition in the Jay circuit court, at the May term, 1911, asking that a strip 32 feet in width, abutting said lot 114, in said Bridge street, be vacated; and that upon a hearing of her cause the court rendered a judgment vacating that part of said street, 32 feet in width, abutting on said lot 114.

(4) That on December 14, 1917, Catherine Heddon conveyed to Albert Newman by warranty deed the following described real estate in Jay county, to wit: Parts of lots 113 and 114 in South Portland addition to the town (now city) of Portland, Ind., described as follows, to wit: Beginning at the southwest corner of said lot 114 and running thence north 44 feet; thence east 132 feet; thence south 44 feet to the south line of said lot 113; thence west along the south lines of lots 113 and 114 to the place of beginning.

(5) That on April 2, 1920, Albert Newman conveyed to Bettie Farris Heston by warranty deed the same real estate described in No. 4 above.

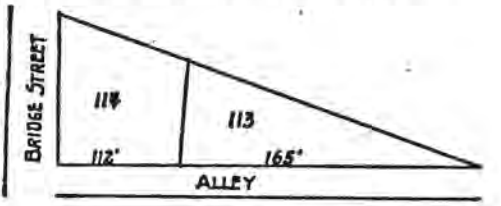
(6) That on June 29, 1920, Catherine Heddon conveyed to Minnie Thornburg by warranty deed said lot 113; that on December 15, 1921, Minnie Thornburg conveyed to William Brandis by warranty deed said lot 113; and that on October 31, 1922, William Brandis conveyed to Judson A. Jacqua by warranty deed said lot 113.

(7) That Bettie Farris Heston is now the owner in fee simple of the following described real estate in Jay county, Ind., to wit: Part of lot 113 in South Portland addition to the town (now city) of Portland, Ind., commencing at the southwest corner of lot 113 in said addition; running thence north 44 feet; thence east 32 feet; thence south 44 feet to the south line of lot 113; thence west 32 feet to the place of beginning.

On the foregoing facts the court stated the following conclusions of law: (1) That the law is with the defendants; (2) that Bettie Farris Heston is entitled, on her cross-complaint, to have her title quieted as against Judson A. Jacqua to the real estate described in finding No. 7; and (3) that the defendants are entitled to recover their costs.

Judgment was rendered in accordance with the findings and the conclusions of law. The errors assigned are that the court erred in each conclusion of law and in overruling the motion for a new trial.

The following map will aid materially in understanding the questions involved:



The parties respectively claim title through the deeds executed by Catherine Heddon. No parol evidence was adduced.

Walter F. MacGinnitie, of Portland, for appellant.

DAUSMAN, P. J. (after stating the facts as above). [1] The undisputed evidence shows that lot 114, as originally designated on the recorded plat, is 112 feet deep, measured east from Bridge street. How far, if at all, does the tract conveyed to Bettie Farris Heston extend into lot 113? If the southwest corner of lot 114, as originally designated on the plat, be taken as the point of beginning, then it follows as a matter of computation that her tract extends 20 feet into lot 113. By the seventh paragraph of the special finding the court fixes the east line of her tract 32 feet east of the west line of lot 113—an excess of 12 feet. This error alone requires a reversal. The controversy, however, involves another feature.

[2] The appellant Judson A. Jacqua presents the following contention: That when a portion of Bridge street was vacated, as shown by the third paragraph of the special finding, the boundary lines of lot 114, as originally designated on the recorded plat, were readjusted by sheer force of law, so as to include the vacated portion of the street. In other words, that, when that portion of the street was adjudged vacated, then by operation of law the southwest corner of lot 114 was fixed at a point 32 feet west of the corner as shown by the original lines on the recorded plat. On that basis the tract conveyed to Bettie Farris Heston does not extend into lot 113, but the east line of her tract is 12 feet west of the west line of lot 113.

The foregoing contention is prima facia valid. Bergan v. Co-operative, etc., Co., 41 Ind. App. 647, 84 N. E. 833; City of Mt. Carmel v. Shaw, 155 Ill. 37, 39 N. E. 584, 27 L. R. A. 580, 46 Am. St. Rep. 311; Brackney v. Boyd, 71 Ind. App. 592, 123 N. E. 696, 125 N. E. 238; section 8912, Burns' 1914. The appellee has filed no brief, and in the cir-

the failure to file a brief shall be taken as a confession of error.

[3] The statement in the deed executed by Catherine Heddon to Albert Newman to the effect that the grantor thereby conveys "part of lots 113 and 114" is a general statement in the nature of a conclusion, and must yield to the particular and specific description given in measurement and directions. The same principle is applicable to the deed from Newman to Heston. The application of that principle harmonizes all the conveyances involved.

The judgment is reversed, and the trial court is directed to grant a new trial.

MEREDITH et al., Board of County Com'rs, v. CROWDER et al. (No. 11661.)

(Appellate Court of Indiana, Division No. 2. March 12, 1924.)

1. Highways ⟸113(4)—Board of commissioners, hearing protests to report of road inspector and annulling former order acts in judicial capacity.

A board of county commissioners, in hearing remonstrances to a second report secured by taxpayers from the engineer and inspector, appointed by the board to inspect road work of contractors, and in ordering annulment of a former order approving the work, acts in a judicial capacity.

2. Injunction ⟸76—Remedy for commissioners' adverse ruling in judicial capacity by appeal not injunction.

The remedy for adverse ruling of the board of county commissioners, acting in a judicial capacity is by appeal, and injunction will not lie.

3. Injunction ⟸32—Court will not enjoin another court having jurisdiction of an appealable matter.

The court will not, as a rule, enjoin another tribunal from acting in a matter over which it has jurisdiction, or where there is a right of appeal.

4. Appeal and error ⟸1176(6)—Reversal of judgment proper where demurrable complaint not amendable to state action.

Where a complaint, seeking to enjoin county commissioners from annulling an order approving road construction work, is demurrable, and cannot be amended to state a cause of action, the judgment will be reversed, with directions to vacate all proceedings subsequent to filing of the demurrer to the complaint.

Appeal from Circuit Court, Fulton County; Reuben R. Carr, Judge.

Suit by John F. Crowder and another against Henry L. Meredith and others, Board of County Commissioners. A demurrer to refusing to plead further, judgment was rendered against them, from which defendants appeal. Reversed, with directions.

Superseding former opinion in 141 N. E. 528.

Albert B. Chipman, of Akron, and Hiram G. Miller and Arthur Metzler, both of Rochester, for appellants.

C. C. Campbell, of Rochester, for appellees.

McMAHAN, J. Complaint by appellees, alleging that the board of commissioners of Fulton county, on petition of the requisite number of freeholder and voters, ordered the improvement of a certain highway under the County Unit Road Law; the contract for such work being awarded to appellees, they entered into a contract for the completion of such work; that the commissioners appointed an engineer and an inspector for said work, and, after having obtained permission from the State Board of Tax Commissioners, issued and sold bonds in an amount sufficient to pay for such improvement, all as required by law; that appellees completed the said work in July, 1921 and called upon the inspector and engineer to make and file their report; that on July 22, 1921, the engineer made an examination of the work and filed his report, together with the report of the chemist with the auditor of said county, stating that appellees had completed said work according to the plans, specifications, and contract; that the inspector had failed and refused to make and file a report; that the board of commissioners on August 3, 1921, received said engineer's report from the auditor, and made an examination of said road and improvement, and, after being duly advised, no objections or remonstrances being filed, the commissioners accepted said work as completed and entered of record a judgment of such completion and acceptance, and discharging appellees upon their contract; that as part of said judgment and order said board ordered and caused the said auditor to issue a warrant to appellees in full payment for the balance then due them; that appellees received said warrant and thereafter presented the same to the county treasurer, who paid appellees the amount due them on said warrant, and that thereupon the board of commissioners took full control of said road, and cared for the same as an accepted piece of work.

It is then alleged that on October 8, 1921, certain taxpayers of said county secured a second report from the said engineer and inspector, to be filed with said auditor, which said second report stated that the work had been completed according to the plans, specifications, and contract; that thereafter said taxpayers filed with said auditor a remonstrance against the acceptance of said second report; that the board of commissioners fix-

ed upon a hearing of said remonstrance, and set December 12, 1921, as the day when a final order and judgment would be entered thereon; that appellants, as members of said board, had announced that they would at said meeting to be held December 12 enter an order canceling and annulling said order and judgment so made by them August 3, 1921. Upon the facts so alleged appellees asked that appellants be enjoined from taking any action to annul or cancel said order of August 3, 1921. Appellants' answer was an argumentative denial.

A demurrer having been sustained to this answer, appellants excepted, and, refusing to plead further, the court, after hearing the evidence, found for appellees and entered a decree enjoining appellants as prayed in the complaint. Appellant's motion for a new trial being overruled, they appealed, and assign as error, the action of the court in overruling the demurrer to the complaint, in sustaining the demurrer to the answer, and in overruling their motion for a new trial.

[1] Appellants contend that the action of the board which appellees were asking to be enjoined was judicial in character, and that appellees' remedy was by appeal and not by injunction. We think it clear that the board was acting in a judicial capacity. Southern Indiana R. Co. v. Railroad Com., etc., 172 Ind. 113, 87 N. E. 966; Board, etc., v. Conner, 155 Ind. 484, 58 N. E. 828.

[2, 3] Appellees had a right to appeal from an adverse decision of the board of commissioners. Where the proceeding is judicial it is manifest that the remedy is not by injunction, for a court will not, as a rule, enjoin another tribunal from acting in a matter over which it has jurisdiction, or where there is a right of appeal. Galey v. Board, etc., 174 Ind. 181, 91 N. E. 593, Ann. Cas. 1912C, 1099; Board, etc., v. Dickinson, 153 Ind. 682, 688, 53 N. E. 929; Kirsch v. Braun, 153 Ind. 247, 258, 53 N. E. 1082; Board, etc., v. Conner, supra. Buck v. Indiana Const. Co. (Ind. App.) 138 N. E. 356, cited by appellees, is not in point. The acts there involved were administrative in character. Here they are judicial.

[4] The proceedings sought to be enjoined being judicial, and appellees having a remedy by appeal, this action cannot be maintained. The cause must therefore be reversed because of the action of the court in overruling the demurrer to the complaint. Other questions have been discussed by the parties, but, in view of the conclusion we have reached, such questions are not and need not be considered, as they are not involved in this action. It not being possible for appellees to so amend their complaint as to state a cause of action, the judgment is reversed, with directions to vacate all proceedings subsequent to the ruling on the demurrer to the complaint and enter judgment accordingly.

JOHNSON et al. v. SNYDER et al. (No. 11778.)

(Appellate Court of Indiana, Division No. 2. March 14, 1924.)

1. **Descent and distribution ⇐33—When brothers and sisters of decedent, or their descendants, inherit, stated.**

Before brothers and sisters of a decedent, or their descendants, can inherit decedent's property, under Burns' Ann. St. 1914, §§ 2993, 3028, which sections must be read together in determining the question, there must be no widow, no child, nor descendants of any child, no father, and no mother.

2. **Descent and distribution ⇐52(2)—Powers ⇐39—Remainder of decedent's estate not disposed of under testamentary power by widow held to go to her as intestate property.**

Where a widow failed to exercise the power given her in the will of her deceased husband to dispose of the remainder of the estate after her life estate, either by deed or by will, same was wholly undisposed of and became an intestate estate, and where there was no child and no father or mother surviving deceased, the widow took the whole of the property of which her husband died intestate, as his heir, in view of Burns' Ann. St. 1914, § 3028; section 3045, which is similar to section 3043, requiring the widow to make an election, being applicable only to property of decedent devised or bequeathed.

Appeal from Superior Court, St. Joseph County; L. J. Oare, Judge.

Action by Lillie I. Johnson and others against Designey A. Snyder and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Seebirt & Schurtz, of South Bend, and Harvey J. Curtis, of Gary, for appellants.

Parker, Crabill, Crumpacker & May and Miller Guy, all of South Bend, for appellees.

NICHOLS, J. Action by appellants against appellees to determine the ownership of property of which one Winfield Leroy Johnson died seized. Said deceased left no father or mother, living, but left his widow, Amanda H. Johnson, and also brothers and sisters, and descendants of brothers and sisters, some of whom are appellants, and others of whom were defendants below and appellees in their court. Item II of the will of said deceased gave his widow all his property both real and personal for and during her natural life, and the use thereof and the entire income therefrom as long as she lived, and pro-

each, and that the residue of the remainder should after his widow's death be distributed as she should direct by will. Item III provided that his widow should have full power to sell or exchange any of the real estate left by him, and to convert the same into cash or securities during her natural life, and, if such disposal should be made, the remainder interest should be distributed as designated in item II.

Appellee Designey A. Snyder is the residuary legatee of the widow, Amanda H. Johnson. The complaint alleges and the demurrer admits that the widow took under the will of her said husband, qualified and acted as executrix thereof, made no attempt whatever to renounce its provisions, and failed to make any attempt to retain her rights in her husband's estate under the laws of the state of Indiana. The exact nature of the action therefore is to determine whether appellants, who are the brothers and sisters of Winfield Leroy Johnson, or their descendants, shall take the remainder of his property after the life estate to the widow and the specific bequests, or appellee Designey A. Snyder, who is the residuary legatee of Amanda H. Johnson, the widow, shall take the same. This question is presented in this court by error assigned on the court's action in sustaining the demurrer of appellee Snyder to the complaint.

[1] Section 15 of the Laws of Descent, in force since May 6, 1853, being section 3012, Burns' R. S. 1914, provides that—

"Every rule of descent or distribution prescribed by this act shall be subject to the provisions made in behalf of the surviving husband or wife of the decedent."

Section 26 of the same act, still in force, being section 3028, Burns' R. S. 1914, provides that—

"If a husband or wife die intestate, leaving no child and no father or mother, the whole of his or her property, real and personal, shall go to the survivor."

Section 4 of said act, being section 2993, Burns' R. S. 1914, provides that—

"If there be neither father nor mother, the brothers and sisters of the intestate living, and the descendants of such as are dead, shall take the inheritance as tenants in common."

It is apparent from the last two sections quoted above, read together as they must be on the question under consideration, and only under which and section 2992, R. S. 1914, which has no application here, can the brothers and sisters of a decedent, or their descendants, inherit, there must be no widow, no child nor descendants of any child, no father, and no mother, in order that appellants may recover.

[2] Conceding, then, that Winfield Leroy

tion, we do not see how appellants can recover, for they are not within the provisions of the only sections of the statute of descent that will give them a right of action. If there was a widow, and there was, appellants cannot recover, regardless of the question as to who would inherit the real estate involved. But, as we view this case, we are not in doubt as to who inherited the estate in controversy. The widow having failed to exercise the power given her to dispose of the remainder of the estate after her life estate, either by deed or by will, the same was wholly undisposed of; it was an intestate estate. There being no child and no father or mother surviving, the widow took the whole of the property of which her husband died intestate as his heir. This has been the law since the decision of the Supreme Court in Armstrong v. Berreman, 13 Ind. 422.

Appellants rely upon section 3045, Burns' R. S. 1914, which is as follows:

"That whenever any personal or real property be bequeathed to any wife, or a pecuniary or other provision be made for her, in the will of her late husband, such wife shall take under such will of her late husband, and she shall receive nothing from her husband's estate by reason of any law of descent of the state of Indiana, unless otherwise expressly provided in said will, unless she shall make her election to retain the rights in her husband's estate given to her under the laws of the state of Indiana. * * *"

But this section is similar in its principle controlling here to section 41 of the Act of 1853, being section 3043, Burns' R. S. 1914, in force at the time of the decision in the Armstrong Case, which so far as here involved is as follows:

"If lands be devised to a woman, or a pecuniary or other provision be made for her by the will of her late husband, in lieu of her right to lands of her husband, she shall take under the will of her late husband, unless she shall make her election whether she will take the lands so devised, or the provision so made, or whether she will retain the right to one-third of the land of her late husband; but she shall not be entitled to both unless it plainly appear by the will to have been the intention of the testator that she should have such lands, or pecuniary or other provisions thus devised or bequeathed in addition to her rights in the lands of her husband."

It was held in the Armstrong Case that—

"It is clear that this section has no application to a case where a surviving wife claims the whole estate as an heir, as in the case provided by section 26, where there are no others capable of inheriting before her."

In harmony with this holding, we hold that section 3045, supra, has no application to property wholly undevised or unbequeathed,

wife die, leaving any estate undevised, and leaving no child, and no father or mother, the whole of such estate shall descend to the survivor; the word 'intestate' refers to property, and not to the decedent."

In Waugh v. Riley, 68 Ind. 482, the facts were substantially the same as in this case, and it was there held that the fee simple of all of the decedent's undevised real estate, and the absolute ownership of his personal property, went to his surviving wife.

We hold that section 3045, supra, has no application to property of which the decedent died intestate, that such property went to the widow, Amanda H. Johnson, upon the death of her husband, and by the residuary clause of her will to appellee Designey A. Snyder.

Judgment affirmed.

McMAHAN, J., not participating.

RYAN v. SUMMERS. (No. 11780.)

(Appellate Court of Indiana, Division No. 2. March 13, 1924.)

1. **Pleading ⟸225(1)—Second complaint after demurrer to first is sustained is amended complaint, however entitled.**

Where a demurrer to a complaint is sustained, a second complaint is in effect an amended complaint, though entitled a second paragraph of complaint.

2. **Specific performance ⟸8—Rests in court's discretion, though terms of contract are clear and unambiguous.**

Specific performance is not a matter of right, even where the terms of the contract are clear, certain, and unambiguous, but rests in the sound discretion of the court.

3. **Specific performance ⟸73—Contract to pay for services in caring for promisor's aged wife not specifically enforced.**

Specific performance will not be required of a contract by defendant, an aged man, to pay a weekly salary and convey realty in consideration for services in caring for his aged and mentally unsound wife, during her lifetime; the proper execution of such a contract requiring that the parties should continue to occupy towards each other relations of confidence and esteem.

4. **Specific performance ⟸25—Contract must be complete, certain, and fair.**

A contract to be specifically enforced must be complete, certain, and fair, and the parties keeping his mentally unsound wife from wandering away from home, and to act as chauffeur for her when asked, *held* not specifically enforceable against the husband; there being no definite provisions as to what was to be done in the way of assisting, who should direct the manner of assisting, and when or how it should be done, and the character of the services to be rendered being wholly within the discretion of the party rendering them.

6. **Action ⟸25(2)—Complaint construed as one for specific performance only.**

A complaint alleging repudiation of a contract to pay for personal services to defendant's wife before full performance thereof, plaintiff's offer and tender of performance, her demand for a conveyance of property as agreed on the wife's death, defendant's refusal, and plaintiff's inability to secure other work for several weeks after her discharge, *held* a complaint for specific performance only and not for damages for breach of contract or compensation for services rendered.

Appeal from Circuit Court, Boone County; Earl F. Gruber, Special Judge.

Action by Mary Lissa Ryan against Martin Summers. Judgment for defendant, and plaintiff appeals. Affirmed.

Ira M. Sharp, of Lebanon, for appellant.

Paul Laymon, of Frankfort, and Dodson & Seifres, of Lebanon, for appellee.

McMAHAN, J. Appellant filed a complaint in one paragraph for the specific performance of a contract. A demurrer was sustained, and the appellant excepted and afterwards by leave of court filed a "second paragraph of complaint," to which a demurrer was also sustained, an exception reserved, and upon appellant's refusal to plead further a judgment was rendered, and this appeal follows.

[1] The so-called second paragraph of complaint states the same cause of action upon which the first was based, and, when filed, constituted the only complaint then before the court for action. The first complaint having gone out on demurrer the second complaint was in effect an amended complaint, without regard to the manner in which it was entitled. Scheiber v. United Telephone Co., 153 Ind. 600, 55 N. E. 742.

Said second paragraph of complaint alleged that on June 21, 1922, appellant and appellee entered into a written contract, which, after reciting that appellee was guardian of his wife, Celia Summers, who was a person

away from her home, which was with the appellee, stated that appellee had entered into a contract with appellant, wherein she was "to assist in keeping his wife, the said Celia Summers, from leaving her home and wandering away and always to act as chauffeur in driving the auto when asked to do so." By the terms of this contract, appellee agreed to pay appellant for such services $12 a week, and as further consideration for the services of appellant, appellee agreed that appellant was to have title by a good and sufficient deed in fee simple, made to her for certain real estate. The complaint also alleged that at the time when the contract was entered into, Mrs. Summers was about 85 years of age and was of unsound mind; that appellee was 88 years of age and employed appellant to assist him in keeping and watching his wife from wandering away from home and to act as chauffeur; that she was to continue such employment during the lifetime of Mrs. Summers, and at her death appellee was to convey the real estate, which is alleged to be of the value of $2,500, to appellant; that appellant had fully performed all the conditions in the contract required of her, but that on November 27, 1922, appellee repudiated the contract and refused to be bound thereby; that appellant offered to perform such services and tendered her services to appellee; that Mrs. Summers died in December, 1922. It also alleged a demand for the conveyance of the real estate, the refusal of the appellee to convey, and the inability of the appellant to secure other work for the period four weeks after her discharge.

[2] Whether the specific performance of a contract will be granted depends in a large measure upon the facts in the case. Even where the terms of the contract are clear, certain, and unambiguous, specific performance is not a matter of right, but rests in the sound discretion of the court, to be determined from all the facts and circumstances. Edwards v. Brown, 308 Ill. 350, 139 N. E. 618.

[3] In Humphrey v. Johnson, 73 Ind. App. 551, 127 N. E. 819, the court aptly said:

"Where one enters into a contract to live with aged persons, to provide for their wants, to nurse them in sickness, and to care for them in their helplessness, a relation of trust and confidence is created, in which the personal element is of unusual significance. It is essential to the proper performance of such a contract that mutual respect, confidence, sympathy, and kindness shall prevail. If these things are lacking, if aversion, hatred, distrust and discontent should arise, the situation would become intolerable—especially for the aged. It is apparent that where the psychological conditions essential to the proper performance of the contract, as above indicated, do not exist, there is an element of impropriety, not to say danservices until the death of the aged. These considerations constitute an impelling and indisputable reason for holding that either party may abandon the contract arbitrarily, and in that event the only rational standard by which to adjust the rights of the parties is found in the quantum meruit."

In Hoppes v. Hoppes, 190 Ind. 166, 129 N. E. 629, the court refused to grant specific performance of a contract calling for the rendition of personal services of a son and his wife in making a home for the father; the court in the course of the opinion saying:

"It is obvious that the court would have no means of compelling the appellant and his wife during the remainder of appellee's life to perform all those intimate services due from a son and daughter-in-law which are implied by the undertaking to make a home for the father and to care for him; and a court will not compel one party to perform when performance by the other cannot also be enforced."

The contract in the instant case called for continuing care and personal services, and for proper execution required that the parties concerned should occupy towards each other relations of confidence and esteem. Such contract belongs to a class the specific performance of which courts of chancery do not undertake. Lindsay v. Glass, 119 Ind. 301, 21 N. E. 897.

Ikerd v. Beavers 106 Ind. 483, 7 N. E. 326, was an action for the specific performance of a contract to convey land in consideration of care and support to be furnished the owner during his life. Specific performance was denied, the court at page 485, of 106 Ind. (7 N. E. 327) saying:

"It is essential to the jurisdiction of a court of equity, to enforce the performance of a contract, that certain qualities should be found inherent in the contract itself. Besides being complete and definite, it must belong to a class capable of being specifically enforced, and be of a nature that the court can decree its complete performance against both parties without adding to its terms. The contract must be fair, just and equal in its provisions, and the circumstances must be such at the time the court is called upon to act, that to enforce it would not operate to the oppression of the person against whom its enforcement is asked. Moreover, it must appear that the plaintiff has no adequate remedy at law, and that to refuse to perform the contract would be a fraud upon him."

[4] A contract, in order to be capable of being specifically enforced by a court of chancery, must be complete, certain, and fair. In cases of this kind courts can only proceed when the parties have themselves agreed upon all the material and necessary details of their bargain. If any of these are omitted, or left obscure and undefined,

the contract, the case is not one for specific performance. Ikerd v. Beavers, supra.

[5] The agreement of the appellant in regard to the most essential part of the contract was "to assist" in keeping appellee's wife from leaving her home and wandering away, and to act as chauffeur when asked. What appellant should do in the way of assisting in looking after appellee's wife, who should direct the manner in which appellant was to assist, what she should do, and when or how she should do it, are all left to conjecture. Without supplying essential features, no court could have so framed a decree during the lifetime of Mrs. Summers so as to have afforded appellee sufficient protection. The character of the services which appellant was to perform was wholly in her discretion. Such a contract cannot be said to be so fair, just, equal, and definite in its terms, as to be the subject of favor in a court of conscience. See Lisk v. Sherman, 25 Barb. (N. Y.) 435. This is not a case where the services have been fully performed by one party and accepted by the other, and nothing is left undone except to execute a conveyance. Where a contract like the one now under consideration has been repudiated and the services not fully performed, the remedy is at law and not in equity.

[6] Appellant's complaint must be construed simply as a complaint for specific performance, and not as a complaint for damages for breach of the contract or to recover compensation for services rendered.

There was no error in sustaining the demurrer to the complaint.

Judgment affirmed.

HARRIS v. CLARK et al. (No. 11676.)

(Appellate Court of Indiana, Division No. 1. March 12, 1924.)

1. Attorney and client ⇐136 — Persons not admitted to practice may not recover compensation.

Persons rendering legal services who have not been duly admitted to practice law in compliance with Acts 1913, p. 940 (Burns' Ann. St. 1914, § 997a), may not recover compensation for services so rendered in an action therefor.

2. Attorney and client ⇐166(1) — Attorney suing for compensation must establish status as such.

In an action to recover compensation for legal services rendered, the burden is upon plaintiffs to establish that they have been duly admitted to the practice of law in compliance with Acts 1913, p. 940 (Burns' Ann. St. 1914, § 997a); nor does the fact that they are official notice of their status as such.

Appeal from Superior Court, Marion County; S. S. Nullen, Judge.

Action by Charles B. Clark and another against Elijah Harris. Judgment for plaintiffs, and defendant appeals. Reversed, and new trial granted.

See, also, 132 N. E. 6.

Joseph R. Williams and Chalmer Schlosser, both of Indianapolis, for appellant.

Martin M. Hugg and Bernard Korbly, both of Indianapolis, for appellees.

ENLOE, J. The appellees brought this action to recover attorneys fees, for services alleged to have been rendered by them for the appellant. The complaint was in two paragraphs; the first being founded upon an alleged special contract as to the amount to be paid by appellant for said services, and the second upon an implied promise to pay the reasonable value of said services.

The appellant filed an answer in general denial to each paragraph of said complaint, and also an affirmative paragraph, alleging a mutual rescission of said contract; he also filed a counterclaim.

The issues being closed, the cause was submitted to the court for trial, and resulted in a finding and judgment in favor of the appellees, from which judgment this appeal is prosecuted; the error assigned being the overruling of appellant's motion for a new trial.

It is first urged by the appellant that the decision of the court is not sustained by sufficient evidence, in this, that there is no evidence that the appellees, or either of them, had ever been admitted to the bar, as an attorney at law, in any court of general jurisdiction, or of appellate jurisdiction, in the state of Indiana, as required by section 997a, Burns' 1914 (Acts 1913, p. 940).

An examination of the evidence, as the same appears in the record in this case, does not reveal any direct testimony upon this subject. Neither of the appellees testified that they, or either of them, had ever been admitted to practice law in this state, nor were any records of any court of general jurisdiction, or of appellate jurisdiction in this state, offered or read in evidence showing such admission of the appellees as attorneys at law in this state. It is true that the trial court made a specific finding that "the plaintiffs had been duly admitted as attorneys at law, and each of them had been duly admitted as an attorney at law * * * at and during the times mentioned in said complaint"; but unless there is some evidence to support such finding, either directly or by legitimate inference, it must fall.

presented by this record, is: May a person who has not been duly admitted to practice law in this state in conformity with the provisions of said act of 1913, supra, recover for legal services by him so rendered?

Section 2 of said act (997b, Burns' 1914) makes it a crime, punishable by fine, or by fine and imprisonment in the county jail, to conduct a trial in any court or "to engage in the business of a practicing lawyer" in this state without having first been duly admitted to practice law as provided in section 1 of said act. It is fundamental that the law will not assist a person to reap the fruits or benefit of an unlawful act—an act done in violation of law. As said in the case of Winchester, etc., Co. v. Veal, 145 Ind. 506, 41 N. E. 334, 44 N. E. 353:

"In the case now under consideration, the appellee having violated an express statute in loaning the money in his hands as county treasurer, and the question being before us for decision, the holding must be that he can maintain no action based upon his own illegal act. This has been the invariable decision of all courts."

See, also, Griswold v. Waddington, 16 Johns. (N. Y.) 438, in which case Kent, Chancellor, said:

"There is, to my mind, something monstrous in the proposition, that a court of law ought to carry into effect a contract founded upon a breach of law. It is encouraging disobedience, and giving to disloyalty its unhallowed fruits. There is no such mischievous doctrine to be deduced from the books."

In Beecher v. Peru Trust Co., 49 Ind. App. 184, 97 N. E. 23, it was said:

"The prevailing weight of authority establishes the proposition that where a statute forbids carrying on a business without first procuring a license, paying a tax, and complying with prescribed tests, inspection, registration or the like, contracts made by persons in carrying on such business are void, though the statute contains no express provision to that effect."

See, also, Bank v. Hartman, 61 Ind. App. 440, 109 N. E. 846; Skelton v. Bliss, 7 Ind. 77; Sandage v. Studabaker Co., 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165.

Under the foregoing authorities, we hold that if the appellees had not been duly admitted to practice law in compliance with the provisions of section 997a, supra, they cannot recover for any such services so rendered.

the burden of proof. In the case of Beecher v. Peru Trust Co., supra, the court said:

"Ordinarily it is true that the presumption is in favor of compliance with the law. But where the business, profession or acts have been made the subject of legislation, and penalties have been fixed for failure to comply with the statute, the one who asserts a right based on such business, profession or acts, is by such law informed that his right depends on compliance with the statute, and that he cannot rely upon inference."

Upon the trial of this case the burden was upon the appellees to establish every fact material to their right to a recovery in this case, among which facts was the one with reference to their having been duly admitted to practice law in this state. This burden they did not discharge.

Counsel for appellee seek to avoid the consequences of their failure to discharge this burden of proof by asserting that "attorneys are officers of the court and that courts take judicial notice of their officers." Within certain limitations the proposition contended for is true, but it has its limitations. The authorities sustain said proposition as to such notice, as to officers of the court while acting as such officers; but when they appear before the court in the capacity of litigants, they then appear as any other private citizen, and proof must be made. In the case of Belden v. Blackman, 118 Mich. 448, 76 N. W. 979, it was contended that the court would take judicial notice that the plaintiff was an attorney at the bar of that court, but the court said:

"There is nothing to show that the William P. Belden who is the complainant is the same William P. Belden who is an officer of this court."

See, also, Cothren v. Connaughton, 24 Wis. 134, and Perkins v. McDuffee, 63 Me. 181.

Considering the entire record in this case, we are constrained to say, as said by Worden, C. J., in Rock v. Stinger, 36 Ind. 346:

"The defense" in this case "has nothing in it to commend itself to favorable consideration; but, notwithstanding this, it should prevail if the rigid law is with the defendants."

The decision in this case not being supported by sufficient evidence, this cause is reversed, with directions to sustain appellant's motion for a new trial, and for further proceedings.

County; Lenn J. Oare, Judge.

Thad M. Talcott, Jr., and W. R. Arnold, both of South Bend, for appellants.

Arthur L. Gillion, of South Bend, for appellee.

REMY, C. J. Judgment affirmed, on authority of Stoner et al. v. American Trust Co. (No. 11801) 142 N. E. 126, decided this term.

DAUSMAN, P. J., dissents.

Kenneth HAMILTON, by Next Friend, v. UNION TRACTION CO. OF INDIANA et al. (No. 10475.)

(Appellate Court of Indiana. Feb. 5, 1924.)

Appeal from Superior Court, Marion County; Linn D. Hays, Judge.

Geo. W. Galvin, of Indianapolis, for appellant.

Matson, Kane & Ross, of Indianapolis, for appellees.

PER CURIAM. Dismissed, on authority of Cole et al. v. Franks et al., 147 Ind. 281, 46 N. E. 532.

MAHONING PARK CO. v. WARREN HOME DEVELOPMENT CO. (No. 17900.)

(Supreme Court of Ohio. Feb. 19, 1924.)

(Syllabus by the Court.)

1. Liens ⇐8—Character, operation, and extent of statutory lien must be ascertained from statute; statute creating lien cannot be extended to meet situation not provided for.

The character, operation, and extent of a statutory lien must be ascertained from the statute creating and defining it. Such statute cannot be amended or extended by judicial construction to meet a situation not provided for nor contemplated thereby. The remedy is legislative.

2. Mechanics' liens ⇐187—Extent of lien for work or material for erection or repair of structure under contract stated.

The provisions of section 8310, General Code, authorize a lien in favor of one who does work or furnishes material for the erection or repair of a structure by virtue of a contract, express or implied, with the owner, part owner, or lessee thereof, or the authorized agent of either; but such lien is only upon the right, title, and interest of such owner, part owner, or lessee at the time the work was commenced or the furnishing of material was begun by the repairs and improvements are to be made upon a building at the lessee's expense, which are to remain at the termination of the lease, the lessee is not thereby constituted the agent of the lessor, and the latter is not rendered liable by a contract entered into by the former in his own name for labor and materials to make such improvements; nor can the reversion in fee of the lessor be subjected to a lien for labor and materials furnished to the lessee pursuant to such contract.

4. Mechanics' liens ⇐118—Statements to be furnished by original contractor to owner held condition precedent to perfection of lien.

The provisions of section 8312, General Code, wherein certain statements are required to be furnished by an original contractor to an owner, part owner, or lessee, are mandatory; compliance therewith is a condition precedent to the perfection of the lien, and unless complied with the contractor has no right of action or lien against the owner, part owner, or lessee.

5. Mechanics' liens ⇐120—Attorney of owner held not an "agent" on whom service of notice under mechanics' lien law may be made.

An attorney at law, employed by such owner, part owner, or lessee only in an action pending in court, is engaged in a special employment and is not, by reason thereof, an agent upon whom service of notice required by section 8315, General Code, may be made.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Agent.]

Error to Court of Appeals, Trumbull County.

Action by the Warren Home Development Company against the Mahoning Park Company. Judgment for defendant was reversed by the Court of Appeals, and defendant brings error. Reversed and rendered.—[By Editorial Staff.]

This action was instituted in the court of common pleas of Trumbull county by the Warren Home Development Company, to foreclose a mechanic's lien which plaintiff claimed to have upon certain premises owned by the defendant, the Mahoning Park Company. The averments of the petition are, in substance, that one Leon Lackey entered into a contract in writing with plaintiff, which is attached to the petition, under the terms of which plaintiff was to furnish material and labor for and build an addition to a dancing pavilion on the lands of the defendant, therein described at Leavittsburgh, Ohio, and known as Mahoning Park, for a consideration of $2,190, payable on the completion

ment additional materials were furnished and labor performed in the amount of $496.-44, making a total of $2,686.44, the date of the last item being May 14, 1921; that on July 2, 1921, the plaintiff perfected a lien upon said premises to secure payment for said labor and materials, and on said date, and previous to the filing of said affidavit of lien, the plaintiff filed affidavits of general contractors and subcontractors, materialmen and laborers with the defendant and served a copy of the affidavit of lien on the defendant; and that said lien was duly recorded within 60 days of the completion of said work or furnishing the last of said material. It is further averred that, at the time Leon Lackey entered into the written agreement for the improvement of the dancing pavilion, the defendant, through its president, John L. Herbold, accompanied him and counseled with him and the representative of the plaintiff as to the working plan of said improvement and the details of said agreement; that the defendant, through its said president, solicited, suggested, and supervised the erection of said pavilion, and said materials were furnished to said Leon Lackey with the consent, knowledge, and approval of the defendant, through its president, John L. Herbold, and that the defendant was present when the materials were delivered and the work performed; and that subsequently said Lackey abandoned said pavilion, claiming to have only a leasehold on said premises, and that the defendant immediately entered into the control and operation of the pavilion. And it is further averred that there was no lease for said premises, oral or written, entered into by the defendant and said Lackey.

The defendant by answer denied participation in, or knowledge of, the execution of the contract between Lackey and the plaintiff, and denied that it had given permission or approval to the furnishing of labor or materials under said contract, through its president or otherwise. The defendant averred that the Mahoning Park Amusement Company entered into a written contract with said Lackey on April 12, 1921, whereby it leased to Lackey a dance hall for the purpose of conducting dances between May 15 and October 15 of each year, for a period of five years; that as part of the consideration therefor Lackey agreed to make all repairs and improvements at his own expense, pay all bills, taxes, damage claims for accidents, and personal damage to persons or property resulting from the running of such dance hall; that pursuant thereto Lackey made repairs to said dance hall, with the express understanding and agreement that the Mahoning Park Amusement Company should be in no way liable or responsible for the labor or materials furnished; and, that, because of failure to comply with the terms of said lease actual abandonment of said property and the lease thereof by Lackey, the Mahoning Park Amusement Company entered into possession of the property.

A reply of the plaintiff admitted the occupancy of the premises by Lackey from May 15 to August 1, 1921, as averred, and that the defendant then took possession thereof.

On trial in the court of common pleas, that court found for the defendant and dismissed plaintiff's petition. Upon appeal, the Court of Appeals found upon the issues joined for the plaintiff, and decreed foreclosure of its lien, and sale of said described premises as upon execution. Thereupon, upon leave of this court, a petition in error was filed herein, and plaintiff in error seeks a reversal of the judgment of the Court of Appeals.

Fillius & Fillius and H. H. Hoppe, all of Warren, for plaintiff in error.

Buchwalter & Clark, of Warren, for defendant in error.

MATTHIAS, J. The question of prime importance presented in this case is whether the plaintiff, who furnished material and performed labor for the repair and improvement of a dancing pavilion, pursuant to a contract entered into with the lessee thereof, may have a mechanic's lien upon the reversion in fee of the lessor by reason of the fact that such lease by its terms requires the lessee to make such improvements at the lessee's expense, and the same were made in accordance with such provisions.

For the purpose of this consideration we shall adopt the finding of the Court of Appeals that the lease executed by John L. Herbold, manager, was in fact the lease of the Mahoning Park Company, the majority of the stock of which Herbold owned, and who was also the president of the company, although such finding is challenged by counsel for plaintiff as being unsupported by evidence in the record. There is evidence that the ownership of the fee of this amusement park, consisting of about 17 acres, and the ownership of the amusement structures and concessions thereon, including this dancing pavilion, had theretofore been separate. The plaintiff in error owned the fee, and Herbold claimed that he individually owned these several structures referred to, including the dancing pavilion, in which ownership for some reason he used the name of the Mahoning Park Amusement Company. However there is evidence in the record supporting the conclusion of the Court of Appeals in this respect.

The lease to which we have referred leased to Leon Lackey—

"the message or tenement situate in the said Mahoning Park, Warren township, county of Trumbull, and state of Ohio, known and described as follows: Dance hall to run dances

"The party of the second part [Lackey] agrees to make all repairs at his own expense, also pay all bills and taxes and damage claims for accidents and personal damages to person or property resulting from running the above hall for dancing."

This lease contained the further provision, "no additions to be removed at the expiration of this lease." Thereafter Lackey entered into a written contract with the defendant in error, the Warren Home Development Company, to make the improvements contemplated by the lease. These were completed May 14, 1921, and Lackey continued in possession and use of said building until about August 1, 1921, when he abandoned the same and later absconded without paying any of the rentals required by the terms of the lease, and without paying the defendant in error for making the improvements in accordance with the terms of his contract.

The Court of Appeals held that the plaintiff below was entitled to a mechanic's lien, not only upon the leasehold interest of Lackey in the dancing pavilion, but also upon the fee, and decreed foreclosure thereof and ordered sale of the premises.

[1, 2] The right of one who furnishes labor or material for the construction or repair of a structure to a lien therefor is created entirely by statute, and hence it becomes necessary to examine those provisions to ascertain the rights of the parties, as well as the procedure necessary to perfect the claim which is here asserted. This calls for an examination, particularly, of section 8310, General Code, which, so far as pertinent to this case, provides in substance that every person who does work or labor, or furnishes material, etc., for erecting, altering, or repairing any structure by virtue of a contract, express or implied, with the owner, part owner, or lessee of any interest in real estate, or the authorized agent of the owner, part owner, or lessee of any interest in real estate, shall have a lien to secure payment thereof upon such structure and—

"upon the interest, leasehold, or otherwise, of the owner, part owner, or lessee, in the lot or land upon which they may stand, or to which they may be removed, to the extent of the right, title, and interest of the owner, part owner, or lessee, at the time the work was commenced or materials were begun to be furnished."

Under the provisions of this section, before one who furnishes labor or material may have a mechanic's lien to secure the payment therefor, it must appear as a condition precedent thereto that the same was furnished pursuant to a contract, express or implied, such labor or materials were furnished. Such are the clear terms and provisions of section 8310, General Code, and such are the express limitations stated therein. Here there was such a contract, but that contract was entered into by Lackey, the lessee—a written contract signed by the lessee and the contractor, and therefore leaving nothing for implication. Only between the lessee and the contractor was the relation of debtor and creditor created. Before a mechanic's lien can attach there must exist the relation of creditor and debtor; a debt must be created before there can be a lien. Boone v. Chatfield, 118 N. C. 916, 24 S. E. 745. No other contract was made so far as the record discloses, and it was therefore pursuant to the contract with Lackey, who was acting for himself and not as agent for the plaintiff in error, that said labor and material were furnished by the contractor, for which he thereafter sought to assert a lien. The statute authorizes such lien only to the extent of the right, title, or interest of the lessee, and under a construction most favorable to the defendant in error it included only the dance hall and the premises appurtenant thereto providing a means of ingress and egress.

It is contended, and such seems to have been the theory of the Court of Appeals, that by virtue of the requirements stated in the lease with reference to additions and repairs, and by virtue of the fact that Herbold was present at times during the making of the repairs and manifested an interest therein, Lackey was thereby made and constituted the agent of the Mahoning Park Company, by reason of which facts such lien would cover, not only the leasehold interest of Lackey, but also the fee of the Mahoning Park Company, notwithstanding the provision in the lease that the improvement should be made at the expense of the lessee and that he should pay for the same. In our opinion that conclusion not only leaves out of consideration the express provisions of the lease, but also disregards the express provisions and limitations of section 8310, General Code, to which we have just referred. If it may be held under such circumstances that the lessee is the agent of the lessor in the execution of such a contract, and the making and completion of the improvements therein provided for, then not only could a lien be imposed upon the fee of the lessor by reason thereof, but the lessor would also be liable personally. Indeed, that theory seems to have been adopted in this case, for a personal judgment was sought, and was in fact, rendered against the

In the statutes of other states where the term "lessee" is not used, and in our own statute before it included the term "lessee," the term "owner" was construed to include not only the owner of a fee but also the owner of a leasehold, as the case might be. Dutro v. Wilson, Jr., 4 Ohio St. 101. In that case it was held that—

"If the ownership is in fee, the lien is upon the fee; if it is of a less estate, the lien is upon such smaller estate."

This same proposition is concisely stated in Tiffany on Real Property (2d Ed.) p. 2770, and then the author further states:

"One having such limited estate can, however, as a rule, not create a lien more extensive than his own interest, that is, on others' interests in the land."

Support is found for the text in many cases, including Wilkerson v. Rust, 57 Ind. 172; Johnson v. Dewey, 36 Cal. 623; Boteler v. Espen, 99 Pa. 313; Cornell v. Barney, 94 N. Y. 394; Hoffman v. McColgan, 81 Md. 390, 32 Atl. 179; Merrill v. Brant, 175 Mich. 182, 141 N. W. 550. The author further goes on to say that the furnishing of labor and materials under a contract with one having only a leasehold estate may support a lien upon the reversion where the owner of the latter expressly or impliedly authorizes or adopts such contract, "*and, where the statute creates a lien for labor or materials furnished with the consent or permission of the owner*, the reversion may become subject to a lien for work or labor furnished under a contract with the lessee, by reason of consent, express or implied, on the part of the reversioner to the making of the improvements." Many cases are cited which support this proposition, and these have been carefully examined, but we deem it unnecessary to analyze or even to comment upon them in this opinion, for in this state, admittedly, we have no statute such as that indicated in the text quoted, and apparently the author's statement is based upon those decisions construing and applying various statutory provisions materially different from our own. For instance, the New York decisions referred to were based upon a statute which authorized a lien for labor or materials furnished pursuant to a contract with "any person permitted by the owner of such lands to build, repair, alter or improve," etc. (Laws 1862, c. 478, § 1), and the statute involved in other decisions cited authorized a lien upon real property of any person on whose premises the improvements are made "with the knowledge and consent of the owner."

In Jones on Liens (3d Ed.) § 1276, the distinction is clearly stated between the rule applicable under statutes such as our own, on the one hand, and those under considera-

thor there stated that—

"In general, the interest of the lessor cannot be subjected by the lessee to a mechanic's lien for work done or materials furnished on the contract of the lessee, or of any one claiming under him. * * * Where a building is erected or repaired under a contract with the lessee alone, his interest only is subject to the lien, inasmuch as a lessee for a term of years is an owner. The fact that the owner of the fee knew that the lessee was making improvements does not subject his interest to the lien, as he does not thereby become a party to the contract. The rule is otherwise under a statute which provides that, when the construction of a building upon land is known to the owner of any interest therein, such interest shall be subject to the contractor's lien. In such case, where the construction is at the instance of a leaseholder with the knowledge of the owner, not only the leasehold interest, but also the fee, is subject to such lien."

Many cases cited by the text involving the construction and application of various statutory provisions are considered and distinguished in the case of Belnap v. Condon, 34 Utah, 213, 97 Pac. 111, 23 L. R. A. (N. S.) 601. The general rule as stated in Rockel, Wykes, and other texts on mechanic's liens, and supported by cases cited, is that, unless the statute so authorizes the lien cannot extend beyond the interest of the contracting tenant.

Notwithstanding the beneficent and commendable purpose and object of the mechanic's lien statutes, and the declaration that they shall be liberally construed in so far as they are remedial, yet being in derogation of the common law—

"the character, operation, and extent of the lien must be ascertained by the terms of the statute creating and defining it; and the courts cannot extend the statute to meet cases for which the statute itself does not provide, though these may be of equal merit with those provided for." Jones on Liens (3d Ed.) § 105.

The remedy is by legislative amendment. Williams v. Vanderbilt, 145 Ill. 238, 34 N. E. 476, 21 L. R. A. 489, 36 Am. St. Rep. 486.

[3] The application of our statute to the facts in this case (its terms need no construction) requires the conclusion that the plaintiff below could not obtain a lien upon the freehold, but only upon the interest of the person with whom it entered into the contract, the owner of the leasehold. This is no hardship upon the contractor, for in every instance he knows, or at least it is incumbent upon him to ascertain, the ownership of the premises and the extent of the interest therein of the person who proposes to enter into a contract with him for the improvement thereof.

In the consideration thus far we have assumed the validity of the procedure taken

nary affidavits did not contain the requirements of section 8312, General Code; (2) that there was no service of the preliminary affidavits and of the affidavits to obtain a mechanic's lien, as required by statute.

[4] The plaintiff below, as an original contractor, is required by the provisions of section 8312, General Code, to furnish "the owner, part owner, lessee or mortgagee, or his agent, a statement under oath, showing" (1) the name of every laborer in his employ who has not been paid in full; (2) the name of every subcontractor in his employ, and of every person furnishing machinery, material, or fuel, giving the amount, if any, which is due, or to become due, for material, etc., furnished to him, and that must be accompanied by a certificate signed by every such person who furnished material, etc., to the effect that the amounts set forth in such affidavits are the correct amounts due and owing. A similar sworn statement from each subcontractor is required. It is provided in the section referred to that—

"Until the statements provided for in this section are made and furnished in the manner and form as herein provided, the contractor shall have no right of action or lien against the owner, part owner, or lessee."

It is disclosed by the record that, although the McClure Lumber Company furnished material and delivered the same upon the job in question at the request of the plaintiff below, the contractor's affidavit failed to so state; nor was there any certificate by the latter company that it had been paid; nor was there a release of any lien to which it might be entitled. It is claimed further that while in the body of the preliminary affidavit it appears that certain persons therein named were carpenter subcontractors, and that others named were laborer subcontractors, with one exception they did not furnish affidavits as required by the statute, and that the affidavit of the subcontractor who did furnish the same does not show whether there were any materialmen or subcontractors in his employment.

Although it appears in the affidavit of the president of the Warren Home Development Company that J. Munson was a carpenter contractor, and C. W. Munson is referred to as a contractor, and Ed. Peters is referred to as a "laborer contractor," and A. H. Butler likewise referred to as a "laborer contractor," the affidavit of J. Munson is to the effect that C. W. Munson, Ed. Peters and A. H. Butler were the only laborers employed on said job by him as carpenter subcontractor, and that they each have been paid in full. It further appears from the record that each of the four men named re-

or section 8312, General Code. It does appear from the record, however, that the plaintiff below did not comply with the mandatory requirements of section 8312, General Code, that a verified statement be made and furnished showing the name of those furnishing material for such improvement, and the amount, if any, due them. The furnishing of such statement is, without exception, held to be a condition precedent to the perfection of a lien, from which requirement neither the provision as to liberal construction nor the fact of payment for such material affords relief.

The language of section 8312, General Code, is imperative and mandatory, where it requires that the contractor shall have no right of action or lien against the owner, part owner, or lessee until the statements provided for in this section are made and furnished in the manner and form as therein required, and, though the statute is declared to be remedial, the court is not thereby authorized to disregard such explicit and mandatory provisions, nor to hold them to mean something other or different from that which they so clearly and explicitly state. The furnishing of such statement is required for the protection of laborers, subcontractors, and materialmen, as well as for the protection of the owner, and such requirement is expressly made imperative and compliance therewith a condition precedent to the perfection of the lien. Upon this proposition we cite the well-reasoned opinion of United States District Judge Sater in the case In the Matter of The Kinnane Co., Bankrupt, 14 Ohio Law Reporter, 531, and the numerous cases there cited and reviewed.

[5] The affidavits prepared by the plaintiff below pursuant to the provisions of sections 8312 and 8314, General Code, were not served upon either the Mahoning Park Company or Leon Lackey, but service upon the owner referred to was attempted to be made by serving the same upon an attorney at law, who at that time was the attorney of record for the Mahoning Park Company in an action pending, wherein that company sued Leon Lackey to recover rentals accrued under the lease involved in this litigation, and wherein a receivership was sought. It does not appear, nor is it contended, that this attorney was the agent for, nor in any wise represented, the owner or lessee in and about the making of such improvements, or that he had anything to do with either of the parties except in the capacity of attorney at law in the case referred to.

The term "agent" as used in the mechanic's lien law refers to one who is the representative of the owner of the building, gen-

ture upon which a mechanic's lien is attempted to be asserted for labor or material furnished, or who represents him in the control and supervision of the premises. An attorney at law employed only in an action pending in court is engaged in a special employment, his agency is limited, and he does not by reason merely of such employment and service represent the owner with reference to a building contract, or the erection or repair of a structure pursuant to such contract, or in the control or supervision of the premises of such owner, and service upon him of such affidavits cannot be held to be a compliance with the requirements of section 8315, General Code.

It is our conclusion, therefore, based upon the foregoing reasons, that the plaintiff below had no right of action either for personal judgment against, or foreclosure of a mechanic's lien upon, the property of the Mahoning Park Company, sole defendant in this action, but only upon the lensehold interest therein of the lessee, Lackey, who is not a party defendant in this action.

The judgment of the Court of Appeals is reversed, and judgment rendered for plaintiff in error.

Judgment reversed.

MARSHALL, C. J., and ROBINSON, JONES, and DAY, JJ., concur.

(109 Ohio St.)

STATE ex rel. LINDLEY v. THE MACCABEES. (No. 18233.)

(Supreme Court of Ohio. March 4, 1924.)

(Syllabus by the Court.)

1. Quo warranto ⇐34—Individual may not institute except in particular case.

The only authority given an individual to institute an action in quo warranto is found in section 12307 General Code. Under its provisions one claiming title to a public office may bring such action in his private capacity.

2. Courts ⇐207(6)—Constitutional power of Supreme Court applies only when law authorizes remedy.

Section 2, article IV, of our Constitution, as amended in 1912, merely confers original jurisdiction in quo warranto upon this court; it grants no power of invocation, but safeguards the remedy only where the law empowers its exercise.

Original action in quo warranto by the State, on the relation of James K. Lindley, against the Maccabees, a Michigan corporation. On demurrer to the petition. Demurrer sustained, petition dismissed, and writ denied.—[By Editorial Staff.]

mitted upon demurrer to the petition of the relator. The action was instituted by Lindley in his individual capacity. The petitioner alleges that he is a citizen of this state, and a member of the Maccabees, a corporation organized under the laws of Michigan and carrying on a fraternal insurance business in Ohio under a license granted by the superintendent of insurance of the state. He alleges that he became a member of the society in 1886, at which time the defendant issued to him a policy of insurance for the sum of $3,000; that on about May 15, 1893, the defendant, by false statements and misrepresentations, induced him to sign an application for an additional policy in the sum of $2,000; and that he has paid a large amount of money by way of premiums into the treasury of the defendant.

The petition alleges that the defendant is not exercising in good faith the franchises and powers conferred upon it by the state; but, on the contrary, since about the year 1890, it has misused its corporate authority and franchise contrary to the laws of Ohio, and is continuing to abuse such franchises in various respects enumerated in his petition, viz.: By making false statements relating to its operations, securing his membership under fraud and misrepresentation; misrepresenting the values of his policies, causing him to believe that a reserve fund was being maintained for retiring policies; arbitrarily reducing their face value; charging new and higher rates, which will shortly become effective; and arbitrarily changing the form of insurance, compelling the relator to surrender his original policies for new policies less desirable.

Relator further alleges in his petition that by reason of the wrongful conduct of the defendant it has forfeited its corporate rights and franchises and has a large fund now in its control which ought to be conserved and administered for the benefit of the relator and other members.

The relator prays that the defendant be adjudged to have forfeited its corporate license, authority, franchises, and privileges, and that it be ousted therefrom; that a trustee be appointed for the benefit of the creditors and members of the organization; and that incidental injunctive relief be granted pending a final hearing.

The defendant demurred to the petition. The demurrer challenged the petition for various reasons, among others that it failed to state facts showing a cause of action and that the plaintiff had no legal capacity to sue.

Maurice V. Kessler and Frank S. Monnett, both of Columbus, for relator.

J. B. McIlwain, of Port Huron, Mich., and

because franchises emanated from and public offices were under the control of the crown, the writ of quo warranto was never employed by a private individual to test the usurpation or misuser of a franchise, or to challenge the title to the office. The writ could only be employed by the crown at the instance of its own officers, usually the Attorney General. The function of the writ was to protect the rights of the crown against the usurpation of governmental prerogatives, and thus safeguard the public interests. The right to use the information on the relation of a private individual was not fully granted and exercised until the intervention of Parliament by adoption of the statute 9 Anne, c. 20 (12 English Stats. at L. 189). Though still retaining the right of the crown to question unlawful intrusion into office, recognizing the interests of individual claimants thereto, authority to institute a proceeding in quo warranto was conferred upon the individual claimant, whereby he could determine the title to an office held by an adverse claimant. But the act gave such private individual no authority to use the writ for the purpose of questioning the usurpation or misuse of franchises granted by the crown. This distinction accorded by the English law has been generally recognized by various states, including our own, which have adopted statutes prescribing when the writ may be employed by the state and when by the individual. Sections 12303, 12304, and 12305, General Code, distinctly provide that the proceedings against a person or corporation, covered by the first two sections, shall be instituted by the Attorney General or prosecuting attorney in the name of the state. The only authority granted to an individual wherein he may employ the writ of quo warranto is that contained in section 12307, General Code, which is as follows:

"A person claiming to be entitled to a public office unlawfully held and exercised by another, by himself or an attorney at law, upon giving security for costs, may bring an action therefor."

This statute, as did the statute of Anne, empowers the individual to use the writ only in favor of one "*claiming to be entitled to a public office.*" In this case the individual attempts on his private relation to employ the writ because of the use and misuse of franchises granted by the state. He prays that the defendant be adjudged to have forfeited its corporate license and franchise, and that it be ousted therefrom. The petition admits that a license has been granted to the defendant by the superintendent of insurance, and it has been held by this court that such

425, 135 N. E. 606; and State v. Ackerman, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298.

That the relator cannot bring this action in his private capacity is sustained by the case of State ex rel. Silvey v. Miami Conservancy District Co., 100 Ohio St. 483, 128 N. E. 87. That case was one in *quo warranto*, originating in the Court of Appeals, and was brought by individuals in their private capacity. The Court of Appeals dismissed the petition for the reason that relators had no right to bring the suit. In a per curiam decision this court held:

"The right to file an information in the nature of a quo warranto, or to institute a civil action or proceeding to arrest a usurpation of franchises, does not belong to the individual citizen. The right to institute such proceedings is in the state. * * * It is well settled that in this state a private person cannot maintain quo warranto except under the authority conferred by what is now section 12307, General Code."

However, counsel urge the invalidity of any statute that now deprives relator of power to institute any suit in quo warranto in this court. They rest their argument upon the final clause of section 2, article 4, of the Constitution, as amended in 1912. That section, after a grant to this court of original jurisdiction in quo warranto, provides:

"No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court."

[2] The quoted clause was in force when the Miami Conservancy Co. Case, supra, was decided by this court in December, 1919, wherein it was held that an action of this character could not be brought by a private individual. However, it must be conceded that the controversial point now urged was not made in that case. Section 2, art. 4, of our Constitution, as amended in 1912, merely confers original jurisdiction in quo warranto upon this court; it confers no grant of power for the invocation of that remedy, but safeguards the remedy only where the law empowers its exercise. It must be observed that the clause in question was adopted when the procedural statutes, relating to the employment of remedy, were still in force. Our quo warranto statutes do not prevent a private litigant from invoking the original jurisdiction of this court, nor does the above-quoted constitutional clause grant the individual the right to employ such remedy in all cases; his only right in that respect is that given him by law, and a more comprehensive one has not been granted him by such constitutional provision. Where the

12307, General Code, as he did in State ex rel. Turner v. Fender, 106 Ohio St. 191, 140 N. E. 182, his constitutional right to invoke our jurisdiction is maintained. In the adoption of this provision it was undoubtedly the purpose of the constitutional clause to make ineffective the rule of this court theretofore adhered to, *which required its leave* before its original jurisdiction could be invoked. That this purpose was attained and its former requirement for leave to file a petition in a case of original jurisdiction rendered ineffective is conclusively shown by the syllabus, and by Chief Justice Shauck's opinion, in State ex rel. City of Toledo v. Lynch, 87 Ohio St. 444, 101 N. E. 352.

In support of their demurrer counsel for the respondent further urge that, inasmuch as the state has conferred upon the superintendent of insurance the power to issue and revoke licenses, the statutory remedy given by section 9490, General Code, is exclusive, and quo warranto may not be employed. It is intimated in their brief that this argument would be urged whether the writ was sought by an individual in his private capacity, or by the state on the relation of its public officers. Since we have decided that a private individual may not utilize the writ of quo warranto in a case of this character, we deem it inopportune to pass upon the question whether the statutory remedy only would be available if the suit were instituted at the instance of the state. Certainly the state would not be bound by any decision this court should make upon that feature until a case is properly presented in which it is a party.

The demurrer to the petition will be sustained. the petition dismissed, and the writ denied.

Writ denied.

MARSHALL, C. J., and MATTHIAS and DAY, JJ., concur.

WANAMAKER, ROBINSON, and ALLEN, JJ., took no part in the consideration or decision of the case.

(109 Ohio St.)

GEARHART et al. v. RICHARDSON. (No. 17968.)

(Supreme Court of Ohio. March 4, 1924.)

(Syllabus by the Court.)

1. Courts ⇐240—Decree terminating a charitable trust created by will appealable to Court of Appeals; "chancery case."

An action construing a will creating a charitable trust is equitable in nature, and is, therefore, a chancery case within the meaning of section 6, art. IV, of the Constitution of Ohio, as amended September 3, 1912, and appropriating such trust.

2. Charities ⇐4—Gifts for charitable purposes favored in equity.

Gifts for charitable purposes have always been favored in equity, and trusts created for such purposes are carried into effect upon broad liberal principles of equity jurisprudence under circumstances where a purely private trust might fail.

3. Charities ⇐23, 29—Charitable trust will not be terminated because of small changes in administration.

A charitable trust, capable of being enforced, will not be terminated because of a small change incident to the method of administration, which does not alter the purpose or object of the trust, nor vary the class of beneficiaries, nor divert the fund from the charitable purposes named by the donor; nor will said trust fail because the trustees have not acted, nor fully carried said trust into operation; but if the founder describes the general nature of a valid charitable trust, and names the class of beneficiaries, he may leave the details of its administration to be settled by the trustees under the guidance of a court of equity.

Error to Court of Appeals, Summit County.

Action by Martha E. Richardson against J. B. Gearhart and others. Judgment for plaintiff was affirmed by the Court of Appeals, and defendants bring error. Reversed.

This was an action begun in the common pleas court of Summit county, Ohio, by the defendant in error, Martha E. Richardson, as sole heir at law and next of kin (a niece) of Joseph B. Richardson, deceased, to set aside a charitable trust created by will of said Richardson, to declare the trust null and void and dissolve the same, and to require the trustees to account to the defendant in error for the funds coming into their hands as such trustees. The record discloses that Joseph B. Richardson, a long-time resident of Tallmadge township, Summit county, died in 1906, seized of two farms in Tallmadge township and certain personal property. The terms of the will creating the charitable trust under consideration are as follows:

"Item 1. To-wit: I request that if my sister, Mary, is living at the time of my death, after using what little she may have, I request that she be well provided for and live where she may desire, and I request that all such expense of living and after her death her funeral expenses be paid out of my estate.

"Item 2. To my niece, Miss Marthy Elizabeth Richardson [defendant in error], if living at the time of my death, I give $1000. Dollars. * * *

"Item 10. I request that my Real Estate if in my possession at the time of my death, be disposed of as follows: My farm situated in Tallmadge Township, Summit Co., Ohio, consists of two parcels of land divided by high-

of 76 acres, I give and devise to the Township of Tallmadge, to be managed by the Trustees of said Township of Tallmadge and their successors in office in Trust for the purpose of providing a home for the aged and destitute people of said Township of Tallmadge or any of the Residents thereof who by reason of sickness or unavoidable misfortune are unable to provide for themselves. Said Farm is not to be sold, but maintained by said Trustees permanently as a home as above specified under such rules and regulations as may be prescribed by said Trustees. To fully carry into effect the charitable purposes herein expressed, said Trustees shall have the power in case not all the premises are neaded at any time for the use of the home to rent any portion thereof temporarily and aply said rentals to the maintenance of said Home.

"Item 11. To Miss Sally Dreisbaugh, if living at the time of my death, I give a life use of my land on east side of said road oposite the 76 acres before mentioned containing 15 acres. After the death of Miss Sally Dreisbaugh, I request that the above mentioned 15 acres be given to the Township of Tallmadge to be managed by the said Trustees of Tallmadge, in trust. Said place is not to be sold but maintained by said Trustees permanently and added to the 76 acres above mentioned for the same charitable purpose under the same rules and regulations to fully carry into effect the charitable purpose above expressed.

"Item 12. I request that should I hereafter mete with loss and my assets not be sufficient to pay the legacys heretofore named, then I request that these Legacys be paid pro rata.

"Item 13. I give and devise to the Trustees of Tallmadge Township, Summit Co., Ohio, any and all my property not hereinbefore disposed of in trust, for the purpose of further providing for the maintenance of said Home, in Trust."

After the payment of the debts and specific legacies, the balance, constituting the trust fund, was turned over to the township trustees of Tallmadge township, as directed by the will. The trustees, by resolution entered upon their journal, accepted the trust in 1907, entered upon the discharge of their duties, and have held the same until the present time. The decedent's sister, Mary, named in item 1 of the will, survived the testator, and died in 1912. As long as she lived she was supported by the trustees out of the income from the trust estate, and her funeral expenses were paid from the estate. The expenditures thus made, together with certain repairs upon the buildings, practically consumed the income of the trust fund up to that time.

Miss Sally Dreisbaugh, mentioned in item 11 of the will, is still living and in possession of the life use of the land referred to in said item, and the same has not yet come into the possession of the trustees.

The farm mentioned in item 10, consisting of about 76 acres, with a farmhouse thereon and two or three barns, has been leased from time to time by the trustees, always township might be sent to the farm, but during the period from 1907 to 1914 no such persons were sent to the farm by the trustees. No additional buildings have been erected, but the present farm buildings have been maintained by the trustees out of the trust fund.

After the death of testator's sister, Mary (Mrs. Cooley), in the year 1914, an action was commenced in the common pleas court of Summit county by one Henry Bierce, a resident of Tallmadge township, the prosecuting attorney filing the action, in which it was averred that the trustees were not using the trust property in the manner contemplated by the testator, in that, instead of bringing to the farm persons of the class referred to in the will, they were using the income from the trust for the purpose of furnishing what is commonly known as outdoor (outside) relief to the persons entitled to the 76 acres for a home. The petition asked that an injunction be issued restraining such use.

To this petition the trustees filed an answer, wherein they averred that the objects of the trust will be better carried out by permitting the trustees to afford relief out of the income of the farm and out of the trust fund in all cases as the trustees may think best rather than to require such persons entitled to relief to give up their homes and to resort to the farm for a home, and the trustees prayed for an order authorizing and instructing them as to the use of said trust fund "and its income in providing necessary relief to the persons entitled thereto, as specified in items 10 and 13 of the last will of said testator, without being required to maintain said home or to commit any of said persons thereto."

Upon the issues thus made up the parties went to trial, and the common pleas court held that the injunction prayed for by the plaintiff, Bierce, should be denied, and instructed the defendant trustees to rent the farm in question, and to use the proceeds thereof, and the income from the personal estate, as follows:

"In caring for the aged and destitute people of said township of Tallmadge or of the residents thereof, 'who by reason of sickness or unavoidable misfortune are unable to provide for themselves,' without committing said persons or any of them to said home or maintaining the same for them, but granting such assistance to said persons from said net income of said farm and the income from said principal fund, at such places, at such times and under such conditions as the said trustees or their successors in office may think will be the best and cheapest method of caring for such persons, having in mind the charitable purpose expressed in the will of said decedent."

The defendant in error in this case, Martha E. Richardson, was not made a party to

the Bierce Case, but she lived at the time on a farm near the farm of testator, about a quarter to a half mile away, which was being conducted by the trustees as a part of their trust. The personal property now constituting a part of said trust fund amounted at the time of the commencement of this action to about $16,000, which, together with the 76-acre farm referred to in item 10 of the will and the 15-acre piece referred to in item 11, made up the trust fund in question. Since the time of the decree in the Bierce Case, in 1914, the trustees have followed the instructions of the court in that case and have used the income from the fund in helping the poor of Tallmadge township, by furnishing them in their homes, and elsewhere, coal, groceries, medical care, and the like. Tallmadge township was a farming community adjacent to the city of Akron, but owing to the rapid growth of that city a part of the township has been taken into the city, and large tracts of land outside the portion annexed to the city have been laid out in lots as suburban residences, all of which has caused a considerable increase in population, with a corresponding increase, as the trustees claim, of destitute persons coming within the purview of beneficiaries named in the will; and at all times since the death of the testator there have been residents of Tallmadge township coming within the classification of the beneficiaries named in item 10 of the will. On January 13, 1912, and on February 9, 1921, the trustees filed an itemized account of their receipts and disbursements as trustees of the fund in question, which accounts have been duly approved by the probate court.

The answer tendered by the trustees in the common pleas court in this case admitted their official position as trustees of the township, the execution of the will of Joseph B. Richardson, and the existence of the trust in question. They further set up the case brought by Henry Bierce in the common pleas court of Summit county, above referred to, and they claimed to have fully complied with and obeyed all the orders of the common pleas court made in that case. They then deny each and every allegation of plaintiff's petition except that which the answer admitted.

For reply the defendant in error, who was plaintiff below, denied the power or jurisdiction of the common pleas court to divert or change the trust created by the will, and she further averred that she was not a party to the suit named and was not bound by its judgment, and she reiterated her prayer for the relief asked for in her petition.

Upon the issues thus made up, the parties went to trial, and the common pleas court sustained the contentions of the plaintiff below, Martha E. Richardson, and terminated the trust, ordered an accounting to be made by the trustees to her, and quieted the title in her of the real estate named in the will.

Defendants below prosecuted an appeal from this decree to the Court of Appeals, which court reached practically the same conclusions as the court of common pleas, and while allowing a credit for the amount expended by the trustees, which had been approved by the probate court, the Court of Appeals ordered that the trust be terminated and that the fund and property in the hands of the township trustees, as trustees of the charitable trust, be turned over to Martha E. Richardson, defendant in error here. To reverse this decree of the Court of Appeals, this action is prosecuted in this court.

A. W. Doyle, Pros. Atty., W. A. Spencer, Asst. Pros. Atty., and Rockwell & Grant, all of Akron, for plaintiffs in error.

C. R. Grant, of Akron, and C. H. Howland, of Cuyahoga Falls, for defendant in error.

DAY, J. [1] The first question requiring consideration is whether or not the Court of Appeals had jurisdiction to entertain this case upon appeal.

The answer to this question depends upon whether or not the action is "a chancery case." We have no hesitancy in saying that an action wherein the termination of a charitable trust is sought, and an accounting for the proceeds thereof by the trustees prayed for, is equitable in character and is a chancery case.

It has long been recognized that the jurisdiction of courts of chancery over charitable trusts has been exercised without question, and that early in English judicial history the law of charities was engrafted upon the common law, even prior to the statute of 43 Elizabeth, and that there was an inherent jurisdiction in the court of chancery over the subject of charities even before the enactment of that statute. This doctrine is acknowledged so generally that a citation to the following authorities will suffice: 5 Ruling Case Law, 357, § 95; 11 Corpus Juris, 307; 14 L. R. A. (N. S.) 55. The principle has long been recognized by this court, from Landis v. Wooden, 1 Ohio St. 160, 163, 59 Am. Dec. 615, decided in 1853, down to the case of Palmer v. Oller, Ex'x, 102 Ohio St. 271, 275, 277, 131 N. E. 362, decided in 1921, where the cases are collected and discussed.

The next inquiry is: Did the trustees have the right to prosecute appeal from the decision of the court of common pleas terminating the trust?

We are of opinion that the trustees did have such power, and we think in the event of a decree of a court terminating a charitable trust it is not only the privilege, but under most circumstances the duty, of the trustee to protect his trust, either by appeal

court in Edgerton, Adm'r, v. Hunt, Trustee, 75 Ohio St. 594, 80 N. E. 1126, where the judgment of the Circuit Court refusing to dismiss an appeal by a trustee from a decree terminating a charitable trust was affirmed. In that case the trustee had invoked the jurisdiction of the court under the statute, asking for a construction of the will and direction as to his trust. The heirs at law of the testator filed cross-petitions asking for a termination of the trust, on the grounds of uncertainty of purpose and uncertainty of beneficiaries. From the decree of the common pleas court terminating the trust the trustee appealed to the Circuit Court, and a motion was made in that court to dismiss the appeal. In the opinion of Judges Donahue, McCarty, and Taggart, found in Hunt, Trustee, v. Edgerton, 9 Ohio Cir. Ct. R. (N. S.) 353, 354, it was said:

"It is sufficient to say that we think that he as trustee is affected by this judgment, that it is adverse to him in his trust capacity, and as such trustee he has as much right and power to appeal as if it had been adverse to him personally."

We are, therefore, of opinion that the Court of Appeals had jurisdiction to hear and determine the matter as a chancery case upon appeal from the common pleas court, and that to the decree of the Court of Appeals terminating the trust proceedings in error may be prosecuted to this court.

Passing to a consideration of the chief points of attack that are made upon this charitable trust, we may say that charitable trusts fail usually from (1) failure of trustee; (2) uncertainty of purpose; (3) uncertainty as to beneficiaries; (4) uncertainty as to manner of execution.

As to the question of trustees, the plain language of the will, and the nature of the trust, as well as the trustees appointed, to wit, the trustees of Tallmadge township, obviate any difficulty in regard to the trust ever failing for want of trustees. It is a general principle of equitable jurisdiction in dealing with charitable trusts that a court of chancery will never permit a charitable trust to fail for want of trustees.

As to the power of the township trustees to accept this trust, the General Code of Ohio makes ample provision. By section 18 it is provided:

"The * * * township * * * may receive by gift, devise or bequest, moneys, lands or other properties, for their benefit or the benefit of any of those under their charge, and hold and apply the same according to the terms and conditions of the gift, devise or bequest."

And by section 3244, General Code, it is provided:

"It [civil township] shall be capable of suing and being sued, * * * and of receiving and for any useful purpose. The trustees of the township shall hold such property in trust for the township for the purpose specified in the devise, bequest, or deed of gift."

Authorities recognizing the power of township trustees to receive and hold for charitable purposes trust funds of the character named in the will of the testator in the case at bar are collated in 5 Ruling Case Law, p. 321, § 42; 14 L. R. A. (N. S.) 112, 113; and 8 Ann. Cas. 1181.

As to the certainty of the purpose and object of this trust, the terms of the will are quite explicit. It is:

To provide "a home for the aged and destitute people of said Township of Tallmadge or any of the Residents thereof who by reason of sickness or unavoidable misfortune are unable to provide for themselves."

The relief of the poor and unfortunate is a most worthy object of charity. Trusts for the benefit of the poor, aged, disabled, or otherwise unfortunate of a defined locality are almost universally sustained as valid charitable trusts, and the fact that a bequest for the relief of the poor of the township works a benefit to the taxpayers of the township does not change the charitable nature of the gift, nor make it any less valid. Strong's Appeal, 68 Conn. 527, 37 Atl. 395.

It is, however, contended that the testator intended his charity to stop with the limits of this farm as a home, and that none of the benefits of the trust that he created should go to those who are not actually resident or maintained upon the farm, or within the home thus established. This objection goes not so much to the purpose and object of the trust as to the manner of administering the same, because the relief of the aged and destitute people who by reason of sickness or unavoidable misfortune are unable to provide for themselves was the true purpose of Joseph B. Richardson. As to the objection indicated, the same will be considered under the administration of the trust.

It is, however, upon the third and fourth grounds that the chief attack upon this charitable trust is made, to wit: Does the trust fail for uncertainty of beneficiaries, or for want of beneficiaries, or for incapability of enforcement or administration? It is the paramount claim of those attacking this trust that it is for these reasons chiefly that this trust should be set aside, and apparently the Court of Appeals based its conclusions largely upon these grounds, for it is found in the eighth and eighteenth findings of fact, as follows:

(8) "That at the time of Richardson's death there was no beneficiary in existence to receive the bounty provided by Richardson in the home which he directed should be established; * * * that there has never been a beneficiary

such as Richardson specified in his will, to claim the said bounty," etc.

(18) "That the trust has failed for the reason that there never was money sufficient to carry it through, and for the further reason that from the date of Richardson's death, to the time of filing this suit, there has never been a beneficiary in existence to receive the benefits proposed by Richardson's will."

We reach a different conclusion than the Court of Appeals from the testimony appearing at several places in the record, especially in the testimony of the witness Willis P. Fenn:

"Q. From the year 1906 down to the year 1920, what do you say as to whether there were in Tallmadge township a—whether there were in Tallmadge township many or few people who were aged and destitute, and who, by reason of sickness or unavoidable misfortune, were unable to provide for themselves? A. What period of time would that cover?

"Q. From 1906 down to say 1920, two years ago? A. The latter part of that period *there was a good many.*

"Q. Take it from 1906 first to 1915, what do you say? A. Why, not so many.

"Q. Well, would you—do you mean by that there were very few or were there considerable? A. I would say very few.

"Q. And how long did that condition exist—up to what time? A. Along about '15 or '16 they begun to get in on us."

Other excerpts from the record could be cited to the same effect, but sufficient is it to say that in this township, consisting of lands now a part of the populous city of Akron, and other lands lying adjacent and contiguous thereto, we think the record shows that from the time of the death of the testator down to the date of the filing of the petition in the instant case there were, and are now, in existence "aged and destitute people of said township of Tallmadge" and "residents thereof who by reason of sickness or unavoidable misfortune are unable to provide for themselves." It would indeed be almost an anomaly that a territory as large as this township, in a community so populous as the one under consideration, should not contain some who come within the class of beneficiaries named by the testator.

It is a significant fact that the Ohio Supreme Court reports show that many charitable trusts have been construed, and that in but a few isolated instances has a trust for charitable purposes been allowed to fail. Lessee of Bryant v. McCandless, 7 Ohio, pt. 2, 135; Trustees of McIntire Poor School v. Zanesville Canal & Mfg. Co., 9 Ohio, 203, 287, 34 Am. Dec. 436; Zanesville Canal & Mfg. Co. v. Zanesville, 20 Ohio, 483; Williams v. First Presbyterian Society in Cincinnati, 1 Ohio St. 478; Landis v. Wooden, 1 Ohio St. 160, 163, 59 Am. Dec. 615; Hullman v. Honcomp, 5 Ohio St. 237; McIntire's Adm'rs v. Zanesville, 17 Ohio St. 352; Miller v. Teachout, 24 Ohio St. 525; Bd. of Ed. of Fairfield Twp. v. Ladd, 26 Ohio St. 211; American Tract Society v. Atwater, 30 Ohio St. 77, 27 Am. Rep. 422; Scott v. Trustees of Marion Township, 39 Ohio St., 153; Sowers v. Cyrenius, 39 Ohio St. 29, 48 Am. Rep. 418; Christy v. Commissioners, 41 Ohio St. 711; Mannix, Assignee, v. Purcell, 46 Ohio St. 102, 19 N. E. 572, 2 L. R. A. 753, 15 Am. St. Rep. 562; Palmer v. Oiler, Ex'x, 102 Ohio St. 271, 131 N. E. 362. In all the above cases charitable trusts have been sustained.

[2] The general doctrine is that charitable trusts have been favored, and trusts created for such purposes are carried into effect by courts of equity upon general principles of equity jurisprudence under circumstances where private trusts would fail; and this indefiniteness of beneficiaries is one of the characteristics of charitable trusts, and the uncertainty of the persons to be relieved by a charitable fund should never be called into effect for the purpose of destroying the charitable trust. We think that the conclusion reached by the courts below in declaring this trust void for want of beneficiaries, or uncertainty of beneficiaries, is far too narrow a construction, and not justified by the record, and not in accord with the great weight of authority in this state.

Another point urged by the defendant in error is that she was in no way bound by the conclusions reached in the court of common pleas in the Bierce Case in 1914. While it is true she was not a party to that action, she appears to have been a resident of the community and living upon a farm about a half mile or quarter mile from the one concerned in the trust, and she was named in the will of the testator. But whether she is bound by the conclusions of the court in that instance is not necessary for us to determine, in view of the construction that we give the will of the testator in the present instance, and in the light of the authorities applicable to charitable trusts of this character.

[3] We realize that the claim is made that the intention of the testator was the creation of a *home* where the destitute and needy of the township could be cared for, but we do not agree that the home on the farm was as much the paramount purpose as was the desire to provide charitable aid "to the aged and destitute of Tallmadge Township or residents thereof who by reason of sickness or unavoidable misfortune are unable to provide for themselves." The "home" he was providing was not only to help the needy, but would also help "the aged and destitute" of the township if its earnings and increase should be directed to the charitable purposes expressed by the testator. He himself empowered the trustees to prescribe rules and regulations for the maintenance of the "home" and if "not all the premises are needed at any time for the use of the home" the rest of the farm was to be rented and the

proceeds applied "to the maintenance of said home."

All must concede the clearness of the charitable purpose of the testator, but the difference arises over the trust's administration. One side says the fund can only be used for beneficiaries actually upon the premises devised; the other side says as long as the fund and its earnings are exclusively used for the charitable purpose designated it is not absolutely necessary that the beneficiary be always physically upon the farm, so long as he is of the class named, to wit, a resident of Tallmadge township, aged and destitute, or unable to provide for himself by reason of sickness or unavoidable misfortune.

Charitable trusts are entitled to a liberal and favorable consideration and will receive a more liberal construction than is allowable to private trusts or in cases of gifts to private individuals. "They are construed so as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form and manner pointed out by him cannot be followed. If two modes of construction are fairly open, one of which would turn a gift into an illegal trust, while by following the other it would be valid and operative, the latter mode must be preferred." 5 R. C. L. 353; Woodruff v. Marsh, 63 Conn. 125, 126, 26 Atl. 846, 38 Am. St. Rep. 346; In re Robinson's Will, 203 N. Y. 380, 96 N. E. 925, 37 L. R. A. (N. S.) 1023, and Attorney General ex rel. Nesmith v. City of Lowell, 141 N. E. 45. This principle was recognized in Ohio as early as the case of Francis Le Clercq v. Trustees of the Town of Gallipolis, 7 Ohio, 218, 221, pt. 1, 28 Am. Dec. 641.

We think the rule to be well established in this country, in construing charitable trusts, that if the founder thereof describes in the instrument by which he creates the charitable trust the general nature thereof and names the class of beneficiaries, he may leave the details of its administration to be settled by the trustees, under the guidance of a court of equity (In re Upham Estate, 127 Cal. 90, 59 Pac. 315), and that where exact conformity to the plan of the person who has provided by his will for the charitable trust cannot be carried out in exact detail such object will be attained and duty performed with as close approximation to the original plan as is reasonably practicable, provided the same is in conformity and consistent with the charitable purposes named by the founder; that, at least, a court of equity will not permit such charitable trust to fail because of some slight deviation or change from the original plan, if the general purpose named by the creator of the trust is still attained.

Entertaining the opinion that we do as to the construction to be given the will of Joseph B. Richardson, creating the charitable trust in question, we are disposed to the view that the common pleas court in its directions given to the township trustees in the Bierce Case was right in its conclusions, and that the trustees in following such directions have been proceeding according to law, although some of the beneficiaries could perhaps be cared for on the farm while others receive relief as directed by the common pleas court; that if some can be cared for upon the farm that plan should also be pursued.

Our attention is called to the case of Union Savings Bank & Trust Co. v. Alter, 103 Ohio St. 188, 132 N. E. 834, but it is to be understood that the court in that case was construing a strictly private trust, and the rules of construction with regard to charitable and private trusts are very different and the distinction quite marked. A greater exactness and strictness of construction is the rule in private trusts, while liberality and broad generous application of the principles of equity are called in vogue in construing a will creating a charitable trust. 11 Corpus Juris, 302; 5 Ruling Case Law, 352; Hagen v. Sacrison, 19 N. D. 160, 123 N. W. 518, 26 L. R. A. (N. S.) 724; Sherman, Adm'r, v. Baker, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717. "Trusts for public charitable purposes, being for objects of permanent interests and benefit to the public, and perhaps being perpetual in their duration, are upheld under circumstances under which private trusts would fail." 14 L. R. A. (N. S.) 53.

It is quite true that the will provides for a home, and doubtless the testator intended that some of the beneficiaries should be accommodated thereon, for he says that if the premises be not "all needed for the use of the Home that balance might be rented and the proceeds applied to the maintenance of the Home," but as a man of affairs, public spirited and of noble and generous nature, he must also have realized that many cases would arise in the township in which the needy parties might come within the purview of the class of beneficiaries named by him who would be better cared for in their own houses, where the kindly administration of kindred would assist the charitable benefactions of the Richardson Home. This gift is to the township of Tallmadge to be managed by the trustees for the purpose set forth, and we cannot say that it should fail because some of its philanthropic results reach those who, though named as beneficiaries, do not physically reside upon the 76, nor yet upon the 15, acres named in the will.

Admittedly, it might require much money to equip and maintain a farmhouse as a place to provide and care for with modern methods the aged and destitute, yet the purpose to give relief should not be abandoned by reason thereof. The "home" referred to by the testator was only the means to the end which he sought, to wit, to grant charitable aid to the aged and destitute and the unfortu-

vide for themselves. A court of equity in construing a charitable trust should lend its aid in attaining that end rather than let it fail because of doubt as to the *means* described by the testator.

As was said by this court in the case of McIntire v. Zanesville Canal Co., in 9 Ohio, at page 287, 34 Am. Dec. 436:

"Whether the bequest can be carried into exact execution or not * * * a court of equity will sustain the legacy, and give effect to it in some form upon principles of its own. * * * One of the earliest elements of every social community upon its lawgivers, at the dawn of its civilization, is adequate protection to its property and institutions which subserve public uses, or are devoted to its elevation."

Also in the case of McIntire v. Zanesville, 17 Ohio St., at page 363, it was said:

"We must look deeper than the mere words of this donation, and, through them, see its spirit. We must inquire what the donor himself would now direct, had he lived to witness the present *altered circumstances* of the case."

The smallness of the size of the class of beneficiaries is no reason why this trust should fail so long as the object is a public charity. 5 Ruling Case Law, 310; Sears, Trustee, v. Attorney General et al., 193 Mass. 551, 79 N. E. 772, 9 Ann. Cas. 1200.

Another point urged is that the size of this trust fund is not sufficient to carry out the charitable purposes indicated by the testator. If a charitable trust is valid in all other respects, and can be enforced upon general equitable principles, we think it would be a reproach to equity if the smallness of a gift for charitable purposes should be used alone as a means for defeating it.

We are referred to certain decisions by courts outside of this state, which counsel for defendant in error claim support their position. We think that in most of these cases the instruments creating the trusts under discussion are in such different language from that here under consideration, or that the construction of charitable trusts in those states is so little in harmony with the broad liberal construction accorded such trusts in the state of Ohio, that we cannot regard such cases as outweighing the decisions of this state. And not all of the decisions cited have the effect claimed by counsel for defendant in error, but recognize many of the principles urged by plaintiffs in error.

Being of opinion that the record in this case shows that there were in existence at the time of the death of the testator, and at the time this trust took effect, beneficiaries of the class named by him, that the will by implication vests the trustees with power of

ble trust does not fail for uncertainty of purpose or object, nor for want of trustees, nor for uncertainty in beneficiary, nor for incapability of execution and administration, and that there exists no ground in equity why this charitable trust should not be upheld, it therefore follows that the decrees of the Court of Appeals and the common pleas court finding that the trust should be declared null and void, and terminated, were erroneous. The judgments of said courts should be, and are hereby, reversed.

Judgments reversed.

MARSHALL, C. J., and WANAMAKER, JONES, MATTHIAS, and ALLEN, JJ., concur.

ROBINSON, J., took no part in the consideration or decision of the case.

(109 Ohio St.)

CLYDE L. OYLER, Administrator of the Estate of Lindley C. Oyler, Deceased, v. CHICAGO & ERIE R. CO. (No. 18152.)

(Supreme Court of Ohio. March 11, 1924.)

Case Certified from Court of Appeals, Hardin County.

Henderson & Roof, for plaintiff in error.

Mahon & Mahon, of Kenton, and Cook, McGowan, Foote, Bushnell & Lamb, of Cleveland, for defendant in error.

PER CURIAM. A careful examination of the record in this case discloses that it presents a controversy in all essential respects identical with the case of Payne, Director Gen. of Railroads, v. Vance, 103 Ohio St. 59, 133 N. E. 85. The judgment of the Court of Appeals in the instant case must therefore be affirmed upon the authority of that case.

We feel, however, that, inasmuch as this case must be remanded to the trial court for a new trial, some notice should be taken of defendant's requests to charge, five in number, presented at the hearing of the case in the trial court. Without taking the time to discuss them in detail, it is sufficient to say that we approve as sound propositions of law Nos. 1, 3, and 4. We disapprove charge No. 2, and feel that if charges 1, 3, and 4 are given by the trial court at the new trial of this cause No. 5 should be omitted, if for no other reason than that it is a repetition of matters contained in the other approved charges.

The judgment of the Court of Appeals is therefore affirmed.

Judgment affirmed.

MARSHALL, C. J., ROBINSON, JONES, MATTHIAS, DAY, and ALLEN, JJ., concur.

WANAMAKER, J., not participating.

False pretenses ⇐51—In prosecution for issuing check against insufficient funds, that check was given for past consideration no justification for directing acquittal.

Under section 710—176, General Code, the making, drawing, uttering, or delivering of a check, draft, or order, payment of which is refused by the drawee, is prima facie evidence of the intent to defraud, and the mere fact that the check was given for a past consideration does not justify the court in taking the case from the jury upon the admission of that fact in the opening statement by counsel for the state.

Exceptions from Court of Common Pleas, Hamilton County.

Ben Lowenstein was charged with issuing a check against insufficient funds, a verdict of not guilty was directed, and the State excepts. Exceptions sustained.—[By Editorial Staff.]

This case arises upon exceptions taken by the state to the action of the trial court in directing a verdict for the defendant.

The defendant, Ben Lowenstein, was indicted by the grand jury of Hamilton county, in the court of common pleas, charged with issuing a check against insufficient funds. To this indictment defendant entered a plea of not guilty, and the case was tried at a subsequent term of the court. A jury was impaneled and sworn to try the case, and counsel for the state then made the opening statement as to what he expected the evidence would prove.

Immediately after the opening statement of the prosecutor, the court directed a verdict of not guilty.

Further facts are stated in the opinion.

Charles S. Bell, Pros. Atty., and Edward Strasser, Asst. Pros. Atty., both of Cincinnati, for the State.

John W. Cowell, of Cincinnati, for defendant.

ALLEN, J. The sole question in this case is this: Does the giving of a check drawn on a bank wherein there are insufficient funds to pay the same, when the check is given for a past consideration, constitute a prima facie violation of section 710—176 of the General Code? This section reads as follows:

"Any person who, with intent to defraud, shall make or draw or utter or deliver any check, draft or order for the payment of money upon any bank or other depositary, who, at the time thereof, has insufficient funds or check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud, and knowledge of insufficient funds in, or credit with, such bank or other depositary. The word 'credit' as used herein shall be construed to mean any contract or agreement with the bank or depositary for the payment of such check, draft or order, when presented."

The court of common pleas granted the motion of counsel for the defendant for a directed verdict of not guilty. The motion was made presumably upon the ground that the statement of the prosecutor showed that the check was given for a past consideration, and that hence there was not and could not be an intent to defraud on the part of the defendant Lowenstein. The statement of the prosecuting attorney in full, upon which the motion to take the case from the jury was granted, is as follows:

"The state expects the evidence in this case to show that on or about the 23d day of June, 1922, and some time prior thereto and some time thereafter, Mrs. McCarthy, along with a number of other women, was employed as a solicitor for the Lowenstein Snappy Garment Company, operated by the defendant Lowenstein; that on the 23d day of June, there was due her as salary and commission for work she had performed some $15; that in payment of that salary and commission she received a check from the Lowenstein Snappy Garment Company, countersigned by the defendant Lowenstein, and when she presented it for payment at the bank the bank refused payment on the ground that there were insufficient funds to the credit of the Lowenstein Snappy Garment Company to meet the check.

"We expect the evidence further to show that at the time other checks were issued to other women in the same manner.

"We expect the evidence to show that there were other women paid in the same way, and their checks met the same fate at the time.

"We also expect the evidence to show beyond any doubt that this fact was known at the time to the defendant, at the time he issued these checks he knew he had insufficient funds to meet the payment. * * *

"We expect that the evidence will further show that the fraud perpetrated upon Mrs. McCarthy was this: That she was deprived of a right to seek employment elsewhere when she was under the belief and impression that at that time she would be paid for the services then being rendered to the Lowenstein Snappy Garment Company, of which the defendant Lowenstein was the president."

The court then questioned the prosecutor as follows:

the time this check was given, that Mrs. McCarthy refused to continue to work unless the check was given, and it was given to induce her to continue work?

"No; she did not refuse to work, but she relied on the fact that she would be paid on the regular pay day for services to be rendered thereafter.

"The Court: But nothing was said, at the time of giving of the check, on that subject?

"Nothing was said until after she took it to the bank and found it was not honored by the bank. Then she came back to see Mr. Lowenstein.

"The Court: Do you expect to prove he told her it would be made good, and then she continued to work?

"Mr. Strasser: That is exactly the situation.

"The Court: Well, I am still of the opinion that the statute has not been violated."

It is evident, therefore, that the learned judge was of the opinion that in no case where a check is given for a past consideration can intent to defraud exist, and that the prima facie evidence of intent to defraud, which, under the statute, exists when payment of the check is refused by the drawee, is rebutted when it is shown that the check is given for a past consideration.

Defendant in error relies mainly for his contention upon a judgment in the Court of Appeals of Kentucky (Commonwealth v. Hammock, 198 Ky. 785, 250 S. W. 85), which state has recently enacted a "cold-check" law similar to the law of Ohio. In that case an indictment was framed accusing one Henry Hammock of "unlawfully and fraudulently delivering a check for the payment of money upon a bank, knowing at the time of such delivery that the maker had not sufficient funds in such bank for the payment of such check in full upon its presentation." Demurrer was filed to this indictment.

The indictment charged that the defendant received for the check currency in the amount of $76.07, which had been advanced to Hammock some 20 or 30 days prior to the giving of the check. The court held that as Hammock obtained the money 20 or 30 days before the check was given, he did not obtain the money or any part thereof by reason of the check, or its issue, or delivery, and that he issued and delivered the check, not with the intent to obtain such money, but only in payment of a past-due obligation. The court held, therefore, that the defendant could not have issued the check with intent to defraud, and that the trial court properly sustained the demurrer to the indictment.

The Kentucky Statute (section 1213A) differs somewhat from that of Ohio, in containing the following provision:

"Provided, however, that if the person who makes, issues, utters or delivers any such check, draft or order, shall pay the same with- of such check, draft or order, he shall not be prosecuted under this section, and any prosecution that may have been instituted within the time above mentioned, shall, if payment of said check be made as aforesaid, be dismissed at the cost of defendant."

The court relies upon this provision in its opinion, saying in substance that this provision shows that the purpose of the statute is to provide that fraud exists only when a check or draft is issued to obtain money or property obtained at the same time.

There is no such provision in the Ohio statute, and therefore the reason of the Kentucky holding, if logical, does not strictly apply. Under the above section of the Kentucky statute, proof of nonpayment of the check by the maker within 20 days of notice of its dishonor appears to be necessary to complete even a prima facie case against the maker. Such is not the case in Ohio. Apart from this distinction, however, we cannot agree that the above provision has the effect stated by the court, and are forced to examine the question from the standpoint of sound logic, and not from the authority of this Kentucky case.

If rebutted, the presumption must be rebutted by something in the nature of the act of giving a "cold check" for a past consideration, which establishes enough of good faith to counteract the presumption of fraudulent intent specifically raised by the statute.

What is this element? It cannot be the fact that no money was obtained from giving the check, for it is well established that in an offense of this kind the element of money damage is not essential.

Under the statute, as drawn, money damage is not necessary to complete the crime. All that is necessary is the issuing of the check upon a bank or depositary by one who at the time has insufficient funds or credit: the issue being made with intent to defraud. It is admitted that all of the other essential elements described in the statute were present in this case, including the nonpayment of the check by the bank, which the statute makes prima facie evidence of intent to defraud, and the sole question is whether sufficient evidence of intent to defraud was shown to take the case to the jury.

What is "intent to defraud"? It is intent to commit a fraud. What is fraud? As defined by Webster, "fraud" is a "deception deliberately practiced with a view to gaining an unlawful or unfair advantage." Financial damage is not necessary to the existence of fraud. In the case of United States v. Plyler, 222 U. S. 15, 32 Sup. Ct. 6, 56 L. Ed. 70, a forgery case which involved a discussion of the elements of fraud, the Supreme Court of the United States says:

forgery, and involved the intent to defraud, the court in syllabus 1 holds:

"The crime of forgery is complete with the making of a false instrument with the intent to defraud, and it is immaterial whether any one is, in fact, defrauded if the intent to defraud is shown."

In spite of the fact that financial damage need not be shown to make out a prima facie case under the statute, the learned trial judge seemed to think that the giving of a "cold check" for a past consideration is per se so innocent as to rebut the presumption of fraudulent intent established under the statute by the refusal of the check. Is this the case? If given without knowledge that there were not funds in the bank to meet the check, or that the funds were insufficient to meet the check, the issue is innocent. If given with knowledge that payment would be refused, the presumption of intent to defraud established under the statute by the mere refusal of payment would seem to be strengthened instead of being rebutted. That is, in the issue of a check for a past as well as for a present consideration, the question whether or not the intent to defraud exists is a question of fact, and hence for the jury.

When in payment of a past consideration a man gives a check, if he gives the check knowing that he has not funds on deposit to cover it, why does he so act? He so acts because he expects to gain an advantage. He expects perhaps to deceive persons who are pressing for payment; he expects them to think that he has paid the old debt when he has not paid.

Defendant contends, however, that the giving of a check for a past consideration, so far from defrauding the person who receives it, may give the payee an advantage, because, if the check is given for a debt arising out of a simple contract, the creditor can then rely upon a written rather than upon an oral contract in enforcing his claim. To push this contention to its ultimate conclusion, we should have to hold that where a man issues a false check in payment of a debt past due, knowing that he has no money in the bank, or insufficient credit, and immediately absconds from the jurisdiction in order to avoid service, he has committed no fraud because the check was under false pretenses.

It was the evident purpose of this statute to prevent the negotiation of false checks drawn on accounts which did not exist, or were insufficient to pay the checks drawn. It was meant, for example, to protect hotelkeepers from receiving "cold checks" in payment of obligations incurred for lodging, many of which are past due. It was enacted to protect business men all over the state, to protect commercial life; about 90 per cent. of the commercial work of the world being done on credit. In order to protect the credit intercourse of the community this statute was enacted creating a new crime and providing new and distinct rules of evidence.

The statute is silent as to the issue of checks for a past-due obligation. It does not state that the issue of a check under such circumstances establishes or negatives intent to defraud. It provides, however, that the return of the check is prima facie proof of "intent to defraud, and knowledge of insufficient funds in, or credit with, such bank or other depositary." That is, the statute places the knowledge of the insufficiency of funds on the same plane as intent to defraud, and thus makes proof of such knowledge evidence of intent to defraud.

The fact of knowledge cannot be determined until evidence is taken upon that point. Certainly it cannot be determined on a statement such as was given by the prosecutor in this case. Intent to defraud and knowledge of the insufficiency of the fund are questions of fact to be determined on all the evidence by the jury. Hence it was error for the court to decide that question.

It is not the holding of this court that the issue of such a check for a past-due obligation is conclusive evidence of intent to defraud. It is prima facie evidence only, and may be rebutted in the course of the trial. The court, however, does hold that a prima facie case of intent to defraud was established upon the facts here set forth and that the learned judge erred in sustaining the motion to take the case from the jury.

Exceptions sustained.

MARSHALL, C. J., and WANAMAKER, ROBINSON, MATTHIAS, JONES, and DAY, JJ., concur.

(109 Ohio St.)

TRAVELERS' INS. CO. OF HARTFORD, CONN., v. VILLAGE OF WADSWORTH. (No. 18013.)

(Supreme Court of Ohio. March 4, 1924.)

(Syllabus by the Court.)

1. **Municipal corporations ⊂=226—Village operating lighting plant authorized to contract for indemnity insurance.**

The board of trustees of public affairs of a village, which under authority granted by the Constitution and general law operates an electric light and power plant and lines, has power within sections 4361 and 3961, General Code, to contract for an insurance policy of indemnity against liability for the operation of the said property.

2. **Municipal corporations ⊂=272—Power to operate municipal light plant proprietary power.**

The power to establish, maintain, and operate a municipal light and power plant, under the Constitution and statutes aforesaid, is a proprietary power, and in the absence of specific prohibition, the city acting in a proprietary capacity may exercise its powers as would an individual or private corporation.

Error to Court of Appeals, Medina County.

Action by the Travelers' Insurance Company of Hartford, Conn., against the Village of Wadsworth. Judgment for defendant on demurrer was affirmed by the Court of Appeals, and plaintiff brings error. Reversed.

The Travelers' Insurance Company, plaintiff, filed a petition in the court of common pleas of Medina county to recover from the village of Wadsworth the sum of $643.01, with interest, representing the premiums due on two liability insurance policies previously issued to the village. The plaintiff claimed that upon the first of these policies a balance of $349.96 was due, with interest from October 1, 1920, and that upon the second policy a balance of $293.05 was due, with interest from October 1, 1921.

The defendant demurred to the petition. The demurrer was sustained, and final judgment entered in favor of the defendant. Error proceedings were prosecuted to the Court of Appeals, which affirmed the judgment of the court of common pleas.

Further facts appear in the opinion.

Griswold, Green, Palmer & Hadden, Dustin, McKeehan, Merrick, Arter & Stewart, and C. M. Horn, all of Cleveland, for plaintiff in error.

H. J. Sadler, of Wadsworth, and F. W. Woods, of Medina, for defendant in error.

ALLEN, J. [1] The controlling question in this case is whether a village in the state of Ohio has the power, through its board of trustees of public affairs, to contract with an insurance company to insure itself against liability to members of the public on account of injuries or deaths caused by the maintenance and operation of a municipal electric light and power plant and lines. The particular policies of insurance issued constituted an agreement on behalf of the Travelers' Insurance Company to indemnify the village of Wadsworth against loss by reason of liability imposed upon it for damages on account of injuries or deaths resulting to persons other than those employed by the village. The policies further provided that in case of action against the village the defense should be conducted by the insurance company, and that the village should defend such suits only upon being given written authority by the insurance company. The insurance covered "electric light and power operation, maintenance, extension of lines, and making of service connections, said business being located on the south side of Broad street in said village," and applied to "injuries other than at the plant if caused by drivers or other helpers engaged at the time in the service of the village in connection with operating the said business and covering liability for one or more persons injured up to $10,000." The premium was based upon the pay roll.

The petition included the following averment:

"Plaintiff further says that said contract of insurance was deemed by said board of trustees of public affairs and was necessary for the safe, economical and efficient management and protection of said works, plants, and public utilities, which were during all of said times owned by said village, that said board made said contract in anticipation of revenues to be derived from the operation thereof, and that in said transaction defendant acted in its corporate, proprietary, and ministerial capacities, namely, the operation and management of an enterprise and industry formerly carried on by private citizens and not by the government or its subdivisions. Plaintiff further says that said light and power plant was then and has ever since been owned, maintained, and operated by said village, both for lighting the streets of said village and for distribution of light and power to private consumers, and included the maintenance and operation of wires carrying electric current of high voltage, poles, engine, dynamo, boiler, and vehicles, and that bodily injuries to and death of members of the public are possible therefrom."

The provisions of the Constitution and the statutes under which the case arises are the following:

Constitution, art. 18, § 4:

"Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product

or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

G. C. § 3616:

"All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

G. C. § 3618:

"To establish, maintain and operate municipal lighting, power and heating plants, and to furnish the municipality and the inhabitants thereof with light, power and heat, *to procure everything necessary therefor*, and to acquire by purchase, lease or otherwise, the necessary lands for such purposes, within and without the municipality."

When a village owns and operates an electric light plant, or similar public utility, under General Code, § 4357, the council establishes a board of trustees of public affairs to manage the same. The powers of the board are as follows:

G. C. § 4361:

"The board of trustees of public affairs shall *manage, conduct and control* the waterworks, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish supplies of water, electricity or gas, collect all water, electrical and gas rents, and appoint necessary officers, employees and agents. The board of trustees of public affairs may make such by-laws and regulations *as it may deem necessary for the safe, economical and efficient management and protection of such works, plants and public utilities.* Such by-laws and regulations when not repugnant to the ordinances, to the Constitution or to the laws of the state, shall have the same validity as ordinances. * * * *The board of trustees of public affairs shall have the same powers and perform the same duties as are possessed by, and are incumbent upon, the director of public service* as provided in sections 3955, 3959, 3960, 3961, 3964, 3965, 3974, 3981, 4328, 4329, 4330, 4331, 4332, 4333, and 4334 of the General Code, and all powers and duties relating to waterworks in any of these sections shall extend to and include electric light, power and gas plants and such other similar public utilities, and such boards shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith."

Among the powers possessed by the director of public service of a city, and thus given by reference to the board of trustees of public affairs of a village, in the management of electric works, are the following:

G. C. § 3961:

"Subject to the provisions of this title, the director of public service *may make contracts* for the building of machinery, waterworks buildings, reservoirs and the enlargement and repair thereof, the manufacture and laying down of pipe, the furnishing and supplying with connections all necessary fire hydrants for fire department purposes, keeping them in repair, and *for all other purposes necessary to the full and efficient management and construction of waterworks.*"

Under section 4361, above quoted, the board of trustees of a village is given the same powers in managing an electric light plant as the director of public service of a city has in managing a waterworks, and under section 3961 the director of public service of a city in managing a waterworks is authorized to make contracts for building, enlargement, and repair of the machinery and buildings under his supervision and "for all other purposes necessary to the full and efficient management and construction of waterworks."

The case arises on demurrer to the petition. Any question of fact, therefore, is eliminated. No bad faith, no abuse of discretion, is alleged on the part of the board of trustees of public affairs of the village. The single important question before us is whether the board of trustees of public affairs of Wadsworth was authorized to enter into a contract of liability insurance of the nature described.

Upon the pleadings, defendant in error has admitted that the securing of this insurance was necessary to the full and efficient management of the works. Therefore, under section 4361 and section 3961, the trustees had power to make these contracts, for they are authorized to make contracts "for all other purposes necessary to the full and efficient management" of the electric light and power plant.

We are not, however, disposed to place our holding upon such narrow ground. The defendant in error claims, and the Court of Appeals held, that liability insurance is not necessary to the full and efficient management of the plant. Their view is apparently that the financial calamity which a small municipal business might incur if it were subject to a large judgment, due to the carelessness of one of its employés, would not destroy the physical side of the business, and that protection from such possible danger is not necessary to the full and efficient management of the business. We are unable to reconcile this view with the state of the pleadings, but, rather than decide this case upon a technicality, we shall proceed to discuss the power of the village from a larger viewpoint.

The court is of the opinion that the board of trustees had such power for the following reasons:

First: Because under the Constitution and general law the city was acting in a proprietary capacity in running the electric power and light plant, and hence the board of trustees was empowered to act with regard to

the plant as a private business man would act in the conduct of his business.

Second: Because section 4361 expressly authorizes the protection, not merely of the plant and the works, but of the public utility.

That the municipality in operating an electric light plant is functioning through its proprietary powers, and that in the management of such a plant municipal officers are vested with broad discretion and authority, is established in this state. Butler v. Karb, 96 Ohio St. 472, 117 N. E. 953, the first paragraph of the syllabus of which case reads:

"Municipalities of the state are authorized to establish, maintain, and operate lighting, power and heating plants and furnish the municipality and the inhabitants thereof light, power, and heat. The powers thus conferred are proprietary in their character and in the management and operation of such plant municipal officials are permitted wide discretion."

[2] Since the village is acting in a proprietary capacity in running the plant, the question next arises how it may exercise these proprietary powers. Under the Ohio statutes a municipality is nowhere prohibited from taking out liability insurance, so that any prohibition against making such a contract through its properly authorized officers must be inferred from the statutes above given, or from the nature of the power exercised. With regard to the exercise of proprietary powers the rule is that when exercising those powers the municipality may act as would an individual or private corporation. This is the general rule upon the subject.

When a municipality is engaged in operating a municipal plant, under an authority granted by the general law, it acts in a business capacity, and stands upon the same footing as a private individual or business corporation similarly situated. Pond, Public Utilities, § 11; 4 McQuillin on Municipal Corporations, § 1801; 3 Dillon on Municipal Corporations (5th Ed.) § 1303; Helena Consol. Water Co. v. Steele, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412; Henderson v. Young, 119 Ky. 224, 83 S. W. 583; Omaha Water Co. v. Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614; Davoust v. City of Alameda, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847, 20 Am. Neg. Rep. 7; Western Sav. Fund Soc. v. City of Philadelphia, 31 Pa. 175, 72 Am. Dec. 730; Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 396.

This position is supported by the weight of authority. In Brumm v. Pottsville Water Co., 9 Sad. (Pa.) 483, 12 Atl. 855, the Supreme Court of Pennsylvania says:

"In separating the two powers, public and private, regard must be had to the object of the Legislature in conferring them. If granted for public purposes, exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantages and emolument, although the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands upon the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred."

To the same general effect are Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; Southern Bell Telephone & Telegraph Co. v. Mobile (C. C.) 162 Fed. 523; City of Winona v. Botzet, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204; and Muncie Natural Gas Co. v. Muncie, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822.

In Andrews v. City of South Haven, 187 Mich. 294, 153 N. W. 827, L. R. A. 1916A. 908, Ann. Cas. 1918B, 100, the court held that it would not interfere "with any reasonable exercise of the implied powers to operate such plants in a business way and as any private corporation could or would."

See, also, Fretz v. City of Edmond, 66 Okl. 262, 168 Pac. 800, L. R. A. 1918C, 405, the second paragraph of the syllabus of which reads:

"Municipal corporations in operating a water plant exercise business and administrative functions, rather than those strictly governmental in their nature, and in the exercise of such functions are governed largely by the same rules applicable to individuals or private corporations engaged in the same business."

Would a private business man take out liability insurance upon such a business as this Wadsworth utility? Such insurance is often written upon businesses operated by individuals and by private corporations, and making contracts therefor is generally considered to be the act of a prudent business man.

Under the ruling of the Karb Case, supra, and the reasoning of the above cases, the village was authorized to contract for the policies. Moreover, we hold that authority to make such contracts is expressly given the village in the general law.

Section 4361, Gen. Code, authorizes the municipal officials to protect works, plants, and public utilities.

What is the meaning of the words "public utilities" in this part of the section? The "works and plants" evidently refer to the physical equipment. Do the words "public utilities" also mean the physical equipment? What authority is given in the power to protect "public utilities" as well as "works and plants"? Is authority given only to protect the physical equipment of the public utility? It would seem futile for the Legislature to duplicate its terms to such a degree, if "public utility" in this connection means nothing more than the plant itself and "protection to

In the statute there is no definition of a public utility owned by a municipality. Section 614—2, General Code.

Looking at the Constitution, we find that any municipality—

"may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants. * * *" Article 18, § 4.

This section shows plainly that the term "public utility" has a broader meaning than that of mere physical equipment. It authorizes a municipality not merely to acquire or construct, or lease, own, or operate a plant, but it also authorizes it to acquire, construct, own, lease, and operate the plant and business of a kind defined in section 614—2; that is to say, under the Constitution the term "public utility," as operated by a municipality, refers to the entire business, including both the plant and its operation.

Under this construction of the words "public utility," and under section 4361, General Code, even if the contract of liability was not authorized for the efficient management of the plant, it was authorized for the protection of the public utility itself. If a judgment for $10,000 were obtained against a village like Wadsworth, the operation of the electric light and power plant might be seriously curtailed because of the diversion to the payment of the judgment of funds otherwise applicable to the work of the plant. What reasonable distinction can be drawn, so far as economy is concerned, between the loss sustained by a municipality through the payment of damages to a person injured in the operation of an electric light plant and a loss sustained by the municipality if the same plant is burned? What reasonable distinction, from the standpoint of economy, can be drawn between fire and liability insurance? Damage from both forms of misfortune very often occurs. In one form of insurance protection to the works is given; in the other, protection to the utility itself, including the business. In each case, procuring insurance appears a wise means of protection against such loss. Such protection would be exercised by an ordinary business man.

It has been expressly held that the power to maintain a public building includes the power to contract for fire insurance. French v. City of Millville, 66 N. J. Law, 392, 49 Atl. 465, referred to in French v. City of Millville, 67 N. J. Law, 349, 51 Atl. 1109. In this case a judgment was rendered against the city on notes given for fire insurance premiums. The court said:

houses, and such other public buildings as may be necessary in the city. As incidental to the power thus granted, the city acquired the right to contract for indemnity against loss by the burning of such building."

There being no practical distinction in protecting a business from loss by fire and from loss by liability, we consider this case an authority in favor of the power of the village to make the contract.

The defendant in error claims, however, that the petition is fatally defective because it does not aver that section 3806, General Code, was complied with, and that the clerk's certificate that the money required to meet the premiums was in the treasury had been filed before the contracts of insurance were made. However, section 3806 applies only where payment is to be made from money raised by taxation. Kerr v. City of Bellefontaine, 59 Ohio St. 446, 52 N. E. 1024. As the petition alleges and the demurrer admits that the board made the said contracts in anticipation of revenues to be derived from the operation of the electric light plant, this objection is untenable.

Defendant in error also urges that, even if the village had the power to carry this insurance, the contracts should have been entered into by the council. The board of trustees of public affairs is authorized to make contracts to the same extent as the director of public service of a city, and within the provisions of section 4328, General Code, a contract for less than $500 may be made by the director of public service without the action of council. The record shows that each of the two premiums sued upon is for less than $500; hence this objection also is overruled.

Finally, defendant in error claims that the village of Wadsworth had no power to enter into this insurance contract because the policies provided that the insurance company should furnish the defense in case suit was brought to recover for personal injuries. Both of the policies sued upon do provide that the village cannot defend suits brought against itself without written permission from the insurance company. Under our Constitution and statutes the validity of such a provision is indeed questionable. However, the contention as to this provision of the policy is moot, because of the fact that no loss nor injury was sustained by the village of Wadsworth during the period that the policies were in force. No accident occurred, and the Travelers' Insurance Company did not defend any proceedings brought against the village. The question as to this provision of the policy, therefore, is not before us, and we do not decide that question.

Coverage was given to the village of Wads-

the policies sued upon. The village received the protection, and had the power to make the contracts under which the coverage was given.

For this reason the judgment of the Court of Appeals is reversed.

Judgment reversed.

MARSHALL, C. J., and JONES, MATTHIAS, and DAY, JJ., concur.

ROBINSON, J., took no part in the consideration or decision of the case.

O'NEILL v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. March 14, 1924.)

1. Carriers ⇐318(1)—Black apple core in aisle no evidence of negligence, in absence of proof as to how long it was there.

Evidence that apple core in aisle of trolley car was black did not constitute evidence of negligence on the part of the carrier, there being no evidence as to the length of time it had been there.

2. Carriers ⇐298(1)—Sudden acceleration of stopping not evidence of negligence.

Sudden acceleration of moving trolley car, or sudden stopping, without more, is not evidence of negligence.

Exceptions from Superior Court, Suffolk County; R. W. Irwin, Judge.

Action of tort by Mary E. O'Neill against the Boston Elevated Railway Company, to recover for personal injuries received while riding on a car of the defendant. Verdict was directed for defendant, and plaintiff brings exceptions. Exceptions overruled.

R. T. Healey, of Boston, for plaintiff.

J. E. Hannigan, of Boston, for defendant.

RUGG, C. J. [1] This is an action of tort by a passenger to recover compensation for personal injuries received while riding upon a car of the defendant. There are two counts in the plaintiff's declaration. It is alleged in the first count that the plaintiff slipped by reason of the negligence of the defendant in allowing a greatly discolored portion of an apple to remain in the aisle of the car. The only evidence tending to support this allegation was the testimony of the plaintiff to this effect:

"I got on the car at the corner of Washington street and Columbia Road. * * * I took a seat and I got up to be near the door and I slipped on a dirty piece of apple core—black. * * * A woman assisted me to my feet and pointed at the time to it, the black apple core. * * * It looked black."

There was no evidence as to the length of time it had been in the aisle. Its color was no evidence on this point. Upon the authority of numerous cases, there was no evidence of negligence on the part of the defendant on this count. Goddard v. Boston & Maine Railroad, 179 Mass. 52, 60 N. E. 486; Lyons v. Boston Elevated Railway, 204 Mass. 227, 90 N. E. 419; Hotenbrink v. Boston Elevated Railway, 211 Mass. 77, 97 N. E. 624, 39 L. R. A. (N. S.) 419; Norton v. Hudner, 213 Mass. 257, 100 N. E. 546; Douglas v. Shepard Norwell Co., 217 Mass. 127, 104 N. E. 491; Zugbie v. J. R. Whipple Co., 230 Mass. 19, 119 N. E. 191; Sheehan v. Holland, 231 Mass. 246, 120 N. E. 591; Labrie v. Donham, 243 Mass. 584, 138 N. E. 3. The case at bar is distinguishable from Anjou v. Boston Elevated Railway, 208 Mass. 273, 94 N. E. 386, 21 Ann. Cas. 1143.

[2] It is alleged in the second count of the declaration that there was negligence in the sudden starting of the car. The evidence upon this point from the plaintiff was that after being assisted to her feet—

"I had hold of the handle bar of the seat; the car had been going slowly, merely going, and the car made a sudden jerk over the crossing, and I fell forward with great strength against the iron bar. * * * The car started to go over across the track, with a jerk; it jerked; it stopped short sudden, and sent me back and forward up against the iron bar."

Thereafter the car came to a standstill. Another witness testified that the car was "lurching" and stopped, "slowing on a dead brake." The acceleration of the speed of the car while it was in motion was not negligence. Anderson v. Boston Elevated Railway, 220 Mass. 28, 107 N. E. 376, and cases there collected; Sullivan v. Boston Elevated Railway, 224 Mass. 405, 112 N. E. 1025; Work v. Boston Elevated Railway, 207 Mass. 447, 93 N. E. 693; Martin v. Boston Elevated Railway, 216 Mass. 361, 103 N. E. 828; Jameson v. Boston Elevated Railway, 196 Mass. 560, 79 N. E. 750. Sudden stopping, without more, was not evidence of negligence. Stangy v. Boston Elevated Railway, 220 Mass. 414, 107 N. E. 933; Sandler v. Boston Elevated Railway, 238 Mass. 148, 130 N. E. 104; McNiff v. Boston Elevated Railway, 234 Mass. 252, 125 N. E. 391.

Exceptions overruled.

Where evidence showed plaintiff bought stock from defendants, and paid therefor, and that he left the stock with the defendants so they could make some adjustments, bookkeeping entries, and later learned that defendants held the stock as collateral, and demanded that the securities be returned, and defendants refused to make such return, a recovery for money had and received would not be warranted in the absence a further showing that defendants sold the securities, and received the money.

2. Money received ⟸6(3)—No recovery allowed because of stocks of plaintiff retained by defendant as collateral for debt.

Plaintiff cannot recover on a count for money had and received because of stocks purchased by defendants for plaintiff, if defendants purchased and sold the stock for him in substantial performance of his direction, and expended money in his behalf in excess of the value of the stock, which he had deposited with them as collateral, while his indebtedness remained unpaid.

3. Money received ⟸6(1)—Mutual mistake collateral to essential thing contracted about, held not ground for recovery.

In action for money had and received, claim of plaintiff that consideration for agreement, for the performance of which stocks, purchased by defendants for plaintiff, were left as collateral with the defendants, failed, in that the defendants or plaintiff misjudged the time when the stock to be purchased for the plaintiff could be delivered, is true in so far only as mutual mistake unavoidably inhered in the nature of the transaction, and, it appearing that the mutual mistake was collateral to essential thing contracted about, it would be inequitable to permit a recovery of the value of securities left with defendants without a reimbursement of money which defendants expended for the plaintiff in the purchase of the stock.

Exceptions from Superior Court, Suffolk County; C. T. Callahan, Judge.

Action of contract or tort by Frank Stadmiller against Charles G. Schirmer and others. Verdict for defendants, and plaintiff brings exceptions. Exceptions overruled.

Wm. Reed Bigelow, of Boston, and H. G. Sleeper, of Natick, for plaintiff.

Berry, Bucknam & Lovejoy and Chas. F. Lovejoy, all of Boston, for defendants.

PIERCE, J. The declaration in the writ, which is an action of contract or tort, is in two counts: A first count for the conversion of one hundred shares of Ventura Consolidated Oil Fields stock and fifty shares of Libby, McNeil & Libby stock; and a second count for money had and received to recover contained in the bill of exceptions, the plaintiff "elected to stand on the second count of his declaration, to wit, the count in contract." He then moved "that upon all the evidence as a matter of law a verdict be ordered for the plaintiff for the amount claimed in the second count of his declaration with interest from the date of the writ." The court denied the motion and the plaintiff duly saved an exception thereto. "The defendants thereupon made a motion that the court rule on the pleadings and the evidence that the plaintiff is not entitled to recover"; the court granted that motion and directed that a verdict be returned for the defendants. The plaintiff duly excepted to this order, and the jury thereupon returned a verdict for the defendants in accordance with the direction of the court.

This ruling was right if the testimony of the plaintiff stood in every respect unimpeached and uncontradicted. That evidence, in substance, was that some time in October, 1919, the plaintiff bought of the defendants one hundred shares of Ventura Consolidated Oil Fields Company and fifty shares of Libby, McNeil & Libby stock for $3,533.75; that on October 31, 1919, he gave the defendants a check for the amount of his purchase, $3,533.75; that he left the securities at the request of the defendants "for the purpose, as they said of making some adjustments, bookkeeping entries"; that on November 12, 1919, the securities were returned to him without any conversation or communication at that time; that on the same day, on the statement of the defendants that there was a mistake in sending the securities to him, "We need them to make some book adjustments," he said, "All right, if you want them back I will be very glad to bring them back," and he brought them back; that later he learned that the defendants held the securities as collateral on a Texas oil transaction with the defendants; that on March 3, 1920, he made a demand that the securities be returned; and that the defendants refused to make such return in response to his demand. The plaintiff in cross-examination testified:

"I most positively did not deliver this Ventura and Libby stock to Schirmer & Co. [the defendants] as collateral; I left it at the suggestion of one of the parties for the purpose, so they said, of making some adjustments, bookkeeping entries."

The plaintiff offered no evidence, and none appears in the bill of exceptions, that the defendants had sold the securities and receiv-

brought on March 19, 1920.

[1-3] The foregoing statements of facts, if believed by the jury, established a conversion of the securities by the defendants; but did not permit the owner to waive the tort and bring an action for money had and received, in the absence of evidence that the defendants had sold the securities and received the money. Jones v. Hoar, 5 Pick. 285, 290; Gilmore v. Wilbur, 12 Pick. 120, 22 Am. Dec. 410; Berkshire Glass Co. v. Wolcott, 2 Allen, 227, 79 Am. Dec. 781; Hagar v. Norton, 188 Mass. 47, 50, 73 N. E. 1073; Arizona Mining Co. v. Iron Cap Copper Co., 236 Mass. 185, 190, 128 N. E. 4. It is plain the plaintiff cannot recover on a count for money had and received if the defendants purchased and sold stock for him, in substantial performance of his direction, and expended money in his behalf in excess of the value of the securities which he had deposited with them as collateral, while his indebtedness remained unpaid. That the securities were deposited as collateral for the obligations which the defendants assumed at the request of the plaintiff, and that payments exceeded the value of the securities, are found by the auditor. The claim of the plaintiff that the consideration for the agreement for the performance of which the collateral was left with the defendants failed, in that the defendants and plaintiff misjudged or miscalculated the time when the stock to be purchased from the plaintiff could be delivered, is true in so far only as such mutual mistake unavoidably inhered in the nature of the transaction. The mutual mistake on the evidence was collateral to the essential thing contracted about, Cavanagh v. Tyson, Weare & Marshall Co., 227 Mass. 437, 116 N. E. 818, and it would be inequitable to permit a recovery of the value of the securities, without a reimbursement of the money which the defendants had expended for the plaintiff in the purchase of the stock which the plaintiff had requested the defendants to purchase. Marston v. Singapore Rattan Co., 163 Mass. 296, 39 N. E. 1113; Williston on Contracts, § 1595.

Exceptions overruled.

McLAUGHLIN v. LEVENBAUM.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1924.)

1. Courts ⇐487(5), 488(4)—Affidavit necessary to obtain transfer to superior court for trial by jury in small claims suits.

Under G. L. c. 218, § 23, a defendant in a small claims suit to obtain a trial by jury and a transfer of the case to the superior court must file an affidavit, and judge of superior court properly ordered papers returned to the sworn statement of defendant.

2. Injunction ⇐26(4)—Injunction against prosecution of small claims suits held not warranted on specific grounds alleged.

No relief may be properly given in suit in equity to enjoin further prosecution of 14 small claims suits pending in municipal court and to have the cases disposed of by consolidation or otherwise, and for damages caused by the bringing of a multiplicity of actions; it appearing that an adjudication of one of the claims in favor of either party would not settle the issues of the other claims, and the matter of consolidation being one for determination by the municipal court, and there being no need for equitable relief for multiplicity of actions as abuse of process, plaintiff having an adequate remedy in the court where the cases are pending, and damages being recoverable in an action at law.

3. Action ⇐53(3)—Separate breaches of continuing contracts subject of separate action.

As a general rule, separate breaches of a continuing contract can be made the subject of separate successive actions.

4. Courts ⇐189(11½)—Municipal court may require trial together of suits between same parties pending at one time.

Municipal court in its discretion could require trial together or could consolidate as many small suits between the same parties as might be pending together at any one time under G. L. c. 218, §§ 21–25.

5. Injunction ⇐26(4)—Plaintiff held not entitled under prayer for general relief to injunction against prosecution of suits.

Where a bill in equity sought specifically to enjoin the further prosecution of 14 small claims suits by defendant in the municipal court until the liability of plaintiff in one of them could be determined and the particular grounds alleged by plaintiff for the injunction were held not sufficient to warrant it, *held*, that plaintiff's prayer for general relief did not entitle him to such injunction in view of the power of the municipal court to try together or to consolidate as many claims as should be pending at one time, of its power under G. L. c. 218, § 24, to transfer cases to the regular civil docket in case consolidation should increase the amount of the claim beyond $35 and in view of a provision of such statute by which plaintiff could obtain the benefit of G. L. c. 261, §§ 7, 8, relating to costs where causes of action are unnecessarily made the subject of separate suits.

Appeal from Superior Court, Suffolk County; M. Morton, Judge.

Suit in equity by James M. McLaughlin against Barnet Levenbaum to enjoin further prosecution of 14 small claims suits. Decree for defendant, and plaintiff appeals. Affirmed.

Edward A. McLaughlin, Jr., for appellant.
Merritt & Merritt, of Boston, for appellee.

CROSBY, J. This suit in equity is brought specifically to enjoin the further prosecution

inally by the defendant in this suit against this plaintiff, in the municipal court of the Dorchester district of the city of Boston; and to have the cases disposed of by consolidation or otherwise; and for damages caused by the bringing of a multiplicity of actions. The bill contains a prayer for general relief. The case was referred to a master; it is before this court upon appeal by the plaintiff from an interlocutory decree confirming the master's report and sustaining the defendant's exceptions, and from a final decree dismissing the bill with costs. The final decree ordered remanded to the municipal court of the Dorchester district the nine cases which had been transferred from that court to the superior court.

The record shows that, by a written instrument dated March 10, 1921, the defendant leased to the plaintiff certain premises which adjoined those occupied by the defendant. A heater for both apartments was located in the cellar of the leased premises. The lease provided that the "lessee herein agrees to heat the premises leased and the adjoining premises numbered 1536 Dorchester avenue, and the lessor herein agrees to pay to the lessee two-fifths of the cost of fuel for such heating." The lease was for a term of two years from March 15, 1921, at a rental of $70 a month, payable in advance.

The master found that disputes about the heating began in November, 1921; that on December 17, 1921, the defendant filed a claim against the plaintiff in the municipal court of the Dorchester district for $35, under the small claims procedure, G. L. c. 218, § 21, relying upon a breach of the covenant to heat; that on December 24, 1921, a similar claim was filed by the defendant against the plaintiff and the guarantors of the lease; that these cases were tried and the lessor had judgment upon the first claim and was defeated upon the second; that the judgment was satisfied March 27, 1922. He further found that on January 25, 1922, the defendant filed six similar claims against the plaintiff in the same court, relying respectively upon the failure to supply heat during the week of December 8 to 14, 1921, inclusive, and in the five succeeding weeks to January 18, 1922, inclusive; that on February 10, 1922, he filed three more similar claims relating to the three weeks next succeeding January 18, 1922; that on February 25, 1922, claims were filed by the defendant in the same manner, covering the preceding two weeks. The first nine cases were transferred to the superior court. These transfers followed in each case a claim by the present plaintiff for trial by jury accompanied by payment of the proper fee, and by an unsworn "statement of defence," as it is called in the master's report.

January 20, 1922, the defendant brought ipal court of the city of Boston to recover rent due and unpaid on the previous January 15. An attachment of personal property thereunder was dissolved by the plaintiff paying $70 and $9.60 costs "under protest." The writ was not entered; the officer's return shows "satisfaction of the suit by the defendant." February 24, 1922, the defendant brought another action against the plaintiff in the same court returnable March 4, 1922. These two actions are not referred to in the present bill; the facts as to the first, brought on January 20, show error in the plaintiff's bill in alleging that the attachment and subsequent settlement were proceedings brought in the municipal court of the Dorchester district under G. L. c. 218, § 21. After the various actions were brought the plaintiff brought this bill in the superior court.

In addition to the foregoing facts found by the master, he states:

"I do not find that the suits or claims were brought in a spirit of malice or ill will towards this plaintiff except as the same may be inferred from the method of filing the claims, the number of them and from the facts found herein. * * * I find that the bringing of several claims for similar alleged breaches of contract under the small claims procedure, instead of one suit, where all said causes of action have accrued at the time of filing, is unnecessarily annoying to the defendant named therein, is contrary to the intention of the framers of such small claims procedure, as stated in the report of the judicature commission, is more expensive to both parties than one suit, and serves no useful purpose. * * * If the court rules that the plaintiff is entitled to equitable relief and to damages, I find said damages amount to two hundred dollars ($200.00)."

[1] G. L. c. 218, § 23, provides that a plaintiff who begins a case under the statute is deemed to waive all rights of appeal, report, or trial by jury, except that a trial by jury may be claimed, if some other party removes the suit to the superior court. It then provides:

"No other party to a cause under the procedure shall be entitled to an appeal or report. In lieu thereof, any such party may, prior to the day upon which he is notified to appear, file in the court where the cause is pending a claim of trial by jury, and his affidavit that there are questions of fact in the cause requiring trial, with specifications thereof, and that such trial is intended in good faith, together with the sum of three dollars for the entry of the cause in the superior court; and thereupon the clerk shall forthwith transmit such original papers or attested copies thereof as the rules for the procedure may provide, and the superior court may try the cause as transmitted or may require pleadings as in a cause begun by writ, but the cause may be marked for trial on the list of causes advanced for speedy trial by jury."

The unsworn statements of the plaintiff in the present case, which may not have been

defence" by the master, were not affidavits within the obvious meaning of that term, which requires an oath, Hadley v. Watson, 143 Mass. 27, 28, 9 N. E. 806; and upon reading section 23 as a whole, it is manifest that the making and filing of such affidavits were conditions precedent to the exercise by the clerk of the power to "thereupon" transmit the papers to the superior court. The word "may" is apt to indicate the election which the defendant has to allow such a claim to go to trial under the procedure, or to set properly in motion the machinery for transferring the cause to the superior court. As no affidavits were filed as required by statute, the district court had no authority to permit the removal of the nine cases to the superior court, and they, therefore, never were removed, but are still pending in the lower court; the judge of the superior court rightly ordered the papers returned to the court in which the cases are still pending. Dion v. Powers, 128 Mass. 192; Universal Optical Corp. v. Globe Optical Co., 228 Mass. 84, 116 N. E. 491.

[2] The plaintiff prayed for a decree staying the prosecution of the several cases until the liability of the defendant upon one of them should be determined. See Lumiansky v. Tessier, 213 Mass. 182, 188, 99 N. E. 1051, Ann. Cas. 1913E, 1049. If the court could make such a decree it could decline to do so, in its discretion, if each of the several claims involved the determination of a separate question of fact, namely, whether there was a breach of the contract to heat in a particular week in question. It does not appear that an adjudication of one of the claims in favor of either party would settle the issues of the other claims. As to the plaintiff's prayer that the actions be consolidated for trial, it appears that no one of them was pending in the superior court, but all were before the municipal court of the Dorchester district for determination, where the plaintiff could apply for such consolidation and trial.

[3] It is also contended by the plaintiff that the bringing of so many suits constitutes an abuse of process for which he is entitled to damages, and an injunction against the continuance of such abuse. If such contention is correct there is no need for equitable relief, as the plaintiff has an adequate remedy in the court where the cases are pending. If he is entitled to damages they are recoverable in an action at law. As a general rule separate breaches of a continuing contract can be made the subject of separate successive actions. Badger v. Titcomb, 15 Pick. 409, 26 Am. Dec. 611; Fay v. Guynon, 131 Mass. 31, 36. What the effect may be upon the defendant's rights—he having several times split up past breaches of the contract ton, Contracts, § 1292; Inhabitants of Cummington v. Inhabitants of Wareham, 9 Cush. 585, 590; Warner v. Bacon, 8 Gray, 397, 404, 69 Am. Dec. 253.

[4, 5] The contention of the plaintiff that under his prayer for general relief he is entitled to a decree enjoining the defendant from bringing any further suits and from prosecuting those pending, at least until one of them has been tried and the question of his liability determined, cannot be sustained. The small claims procedure statute, G. L. c. 218, §§ 21 to 25, inclusive, was intended by the Legislature to provide a simple, prompt, and informal means, at small expense, for adjudication of claims where the debt or damage claimed does not exceed $35. The statute and the rules of practice afford sufficient means of protection against abuse in ordinary cases. The municipal court of the Dorchester district in its discretion can require trial together of as many of these claims as might be pending together at any one time. Witherlee v. Ocean Ins. Co., 24 Pick. 67; Lumiansky v. Tessier, supra. Bradford v. Boston & Maine Railroad, 225 Mass. 129, 132, 113 N. E. 1042. If several claims pending at one time can be the subject of a single suit, the court has power to order them consolidated. Lumiansky v. Tessier, supra. To the objection that such a consolidation would increase the amount of the claim beyond $35 and that thereby the court would be deprived of jurisdiction, the answer is that the court has discretionary power to "transfer a cause begun under the procedure to the regular civil docket for formal hearing and determination as though it had been begun by writ, and may impose terms upon such transfer." G. L. c. 218, § 24. Under this provision the plaintiff in the present case may obtain the benefit of the provision relating to costs, where causes of action are unnecessarily made the subject of separate suits. G. L. c. 261, §§ 7, 8. For these reasons it does not appear that ground for relief in equity is shown.

None of the cases cited by the plaintiff go to the extent of granting the relief which he seeks. If the defendant has without right brought separate suits, the existing remedies at law are adequate for the plaintiff's protection. If the conduct of the defendant has been tortious, there is a remedy at law for damages. If he has exercised and continues to enforce strictly legal rights in an unconscionable manner, the remedies of the plaintiff by joint trial, consolidation, and limitation of costs are sufficient protection to the plaintiff. The small claims statute was intended to afford the court full power to prevent its being used contrary to the purposes of its enactment, and so far as appears in the present case it cannot be said to have

will be fully preserved.

Decree affirmed.

JACKSON, Treasurer and Receiver General, v. REVERE SUGAR REFINERY.

SAME v. DARROW-MANN CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 29, 1924.)

1. Appeal and error ⟸133—Order for judgment appealable.

No question of practice being argued, it is not necessary on appeal to consider whether, if there were no exceptions, the "agreed facts" upon which the case was tried might be interpreted as a "case stated," and plaintiff having filed a bill of exceptions, and also appealed from an order for judgment, the appeal will be held rightly before the reviewing court, under G. L. c. 231, § 96.

2. Appeal and error ⟸15—There cannot be both exceptions and appeal from same alleged errors.

There cannot be, touching the same alleged errors in an action at law, both exceptions and appeal, and, the bill of exceptions presenting all the questions of law as to which error is alleged, the case will be considered on that footing.

3. Navigable waters ⟸38—Statutory authority to fill flats held grant and not license.

St. 1855, c. 481, giving the Mystic River Corporation power to fill flats and construct wharves, operated as a legislative grant subject to the terms and conditions therein set forth, and not as a mere revocable license, present rights being immediately vested in the corporation, subject to be revoked if the contemplated work was not done within the time limited; but the breach of that condition would not of itself render the grant void and revest the title in the grantor, but there must be some definite act for the purpose of working a forfeiture.

4. States ⟸89—Legislative or judicial proceedings necessary to forfeit grants.

Where the commonwealth is the grantor, it can take advantage of breach of condition subsequent only by judicial proceedings or by a legislative declaration of forfeiture.

5. Statutes ⟸238—Grants construed most strongly against grantee.

A grant by the commonwealth is to be construed most strongly against the grantee.

6. Navigable waters ⟸38—Grant of right to fill flats held not forfeited by requirement of license.

Requirement of a license under R. L. c. 96, § 17, did not have the effect of forfeiting rights granted to the Mystic River Corporation under St. 1855, c. 481, to fill flats and construct wharves after expiration of the time set for

7. Navigable waters ⟸38—Persons holding under grant of right to fill flats held not liable to assessment for tidewater displacement.

Successors of the Mystic River Corporation granted the right to fill in flats by St. 1855, c. 481, were not liable for assessments for tidewater displacement under G. L. c. 91, § 21, and insertion in license under R. L. c. 96, § 17, of clause requiring payment for displacement of tidewater was in derogation of the grant by the commonwealth to the corporation, and beyond the power of public officers to demand as a condition of granting license.

8. Licenses ⟸48—Unauthorized terms in licenses void.

Conditions and terms inserted in a license by a public board not authorized or warranted by law are void.

Exceptions and Appeal from Superior Court, Suffolk County; John D. McLaughlin, Judge.

Actions at law by James Jackson, Treasurer and Receiver General, in behalf of the Commonwealth, against the Revere Sugar Refinery and the Darrow-Mann Company, respectively, to recover assessments for tidewater displacements. Judgments for defendants, and plaintiff brings exceptions and appeals. Exceptions overruled, and appeals dismissed.

J. H. Devlin, Jr., Asst. Atty. Gen., for plaintiff.

R. G. Dodge and J. M. Raymond, both of Boston, for defendants.

RUGG, C. J. These are actions at law in behalf of the Commonwealth to recover from the defendants assessments for tidewater displacement under R. L. c. 96, § 23, now G. L. c. 91, § 21. The cases were submitted to the Superior Court on "agreed facts." Requests for rulings by the plaintiff were denied and others by the defendants were granted. Finding was made and judgment ordered for the defendants in each case.

[1, 2] 1. The plaintiff filed one bill of exceptions for both cases and also appealed from each order for judgment. No question of practice has been argued. It is not necessary to consider whether, if there were no exceptions, the "agreed facts" might be interpreted as a "case stated," Frati v. Jannini, 226 Mass. 430, 115 N. E. 746, and thus the cases come before us rightly by appeal from the orders for judgment. Samuel v. Page-Storms Drop Forge Co., 243 Mass. 133, 137 N. E. 109; G. L. c. 231, § 96. Plainly there cannot be, touching the same alleged errors in an action at law, both exceptions and appeal. The single bill of exceptions presents for review in appropriate form all the questions of law as to which error is alleged. G. L. c. 231, § 113; Lumiansky v.

Ann. Cas. 1913E, 1049. The cases will be considered on that footing.

2. In the action against Revere Suger Refinery recovery is sought for the displacement of tidewater caused by the filling of a portion of the flats lying in front of its upland situated between Medford Street in that portion of Boston called Charlestown and the shore of Mystic River and by erecting on those flats pile platforms and a wharf. In the action against Darrow-Mann Company recovery is sought for displacement of tidewater caused by erecting a coal wharf and storage pocket in the same general neighborhood. In both cases the tidewater was displaced within the area described in St. 1855, c. 481. The defendants have succeeded to the rights of the Mystic River Corporation under that and succeeding statutes.

The general question presented is whether under chapter 481 of St. 1855 the defendants may displace tidewater by such filling and structures without liability therefor under R. L. c. 90, § 23, now G. L. c. 91, § 21.

It is stated in the exceptions that the structures and fills made by the defendants were almost entirely within the areas governed by 25 U. S. Sts. at Large 1888, c. 860, § 12 (as amended by 26 U. S. Sts. at Large 1890, c. 907, § 12), and by 30 U. S. Sts. at Large of March 3, 1899, c. 425, § 10 (U. S. Comp. St. § 9910). It has not been argued that these statutes of the United States exclude the operation of statutes of this Commonwealth affecting these defendants, and for the purposes of this decision it is assumed that they do not have that effect. Brackett v. Commonwealth, 223 Mass. 119, 111 N. E. 1036, Ann. Cas. 1918B, 863; Commonwealth v. Nickerson, 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568.

The Mystic River Corporation was authorized by St. 1855, c. 481, § 1, "to enclose, by a good and sufficient sea-wall, and to fill up the portion of flats," including those which these defendants have filled and built upon, and to extend "such docks as may be desired" as therein specified, and "to build warehouses on the above described premises, and to lay vessels at the sides and ends of the wharves and quays, and to receive wharfage and dockage therefor." That corporation was required by section 2 to excavate other flats and by section 3 to fill the flats described in section 1 to a designated height with material excavated from defined places. The whole work was to be done to the satisfaction of a commissioner appointed by the Governor, a power and duty devolved upon the Directors of the Port of Boston under St. 1911, c. 748, and vested in the Commission on Waterways and Public Lands under St. 1916, c. 288. By section 4 it was provided that—

"The structure and excavation by this act authorized shall be commenced within three years after the passage of this act."

The Mystic River Corporation began the construction of its improvements within the time limited and has continued them from time to time. There has been extension of the time thus limited by several statutes, the last by St. 1893, c. 334, being until May 7, 1903.

[3] 3. The terms of St. 1855, c. 481, operated as a legislative grant subject to the terms and conditions therein set forth, and not as a mere revocable license. Fitchburg Railroad v. Boston & Maine Railroad, 3 Cush. 58, 87; Bradford v. McQuesten, 182 Mass. 80, 64 N. E. 688. Question arose in Bradford v. Metcalf, 185 Mass. 205, 70 N. E. 40, touching the nature of rights in some of the flats within this same area before May 7, 1903. It there was said, 185 Mass. 209, 210, 70 N. E. 42:

"These rights had been granted by the Commonwealth to the Mystic River Corporation, had been attached to the lands, and had been held by the defendants and their predecessors as their own property. * * * St. 1893, c. 334, was an extension of the right to fill the defendants' lands without paying for the displacement of tide water. * * * At least this last act of the Legislature should be treated as a release and a grant to them by implication of all rights which the Commonwealth might assert as to their filling these flats under authority of the earlier statutes, and subject to the requirements of those statutes."

4. The grant effected by St. 1855, c. 481, was upon the condition subsequent that it might be avoided if the filling was not made and the structures completed in the time limited as extended. It is manifest that a condition subsequent was created because there was a present grant in order to enable the Mystic River Corporation and its successors to enter upon the flats and erect structures and make the fill. Present rights were immediately vested in the Mystic River Corporation subject to be revoked if the contemplated work was not done within the time limited. The breach of that condition would not of itself render the grant void and revest the title in the grantor. There must be some definite act for the purpose of working a forfeiture for breach of such a condition. Private rights under conditions subsequent commonly are asserted by entry for breach, or by its equivalent, or by legal proceedings designed to secure possession. Langley v. Chapin, 134 Mass. 82; Hayden v. Stoughton, 5 Pick. 528; Thompson v. Bright, 1 Cush. 420. Attorney General v. Merrimack Manuf. Co., 14 Gray, 586, 612; Guild v. Richards, 16 Gray, 309, 317; Fay v. Lock, 201 Mass. 387, 389, 87 N. E. 753, 131 Am. St. Rep. 402.

[4, 5] 5. Where the Commonwealth is the grantor, it can take advantage of breach of a condition subsequent only by judicial pro-

ceedings or by a legislative declaration of forfeiture. That precise question does not appear hitherto to have arisen in this Commonwealth. The governing principle is settled by decisions of the Supreme Court of the United States. With reference to the manner of assertion of rights arising from breach of conditions subsequent, it was said in the leading case of Schulenberg v. Harriman, 21 Wall. 44, 63, 64, 22 L. Ed. 551:

"If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale."

This principle was applied in St. Louis, Iron Mountain & Southern Railway v. McGee, 115 U. S. 469, 6 Sup. Ct. 123, 29 L. Ed. 446, and in Bybee v. Oregon & California Railroad, 139 U. S. 663, 11 Sup. Ct. 641, 35 L. Ed. 305, to the attempted forfeiture of lands granted in aid of the construction of railroads to be completed on or before a specified date. United States v. North Pacific Railway, 177 U. S. 435, 20 Sup. Ct. 706, 44 L. Ed. 836; Spokane & British Columbia Railway v. Washington & Great Northern Railway, 219 U. S. 166, 31 Sup. Ct. 182, 55 L. Ed. 159; Grand Trunk Western Railway v. United States, 252 U. S. 112, 123, 40 Sup. Ct. 309, 64 L. Ed. 484. It follows that while a grant by the sovereign power is construed most strongly against the grantee. Cleaveland v. Norton, 6 Cush. 380, 383, 384; Lynnfield v. Peabody, 219 Mass. 322, 330, 106 N. E. 977, the grant in the case at bar did not expire by its own limitation.

[6] 6. The record fails to show any action by the Commonwealth sufficient to revest in itself title to that which was granted by chapter 481. Requirement of a license under R. L. c. 96, § 17, was far short of such action. It was a stipulation of St. 1855, c. 481, § 3, that the work authorized by the act should be done to the satisfaction of a public officer to whose functions the Directors of the Port of Boston and the Commission on Waterways and Public Lands in turn succeeded. Compliance with that requirement was simple conformity to the terms of the original grant. A bald declaration by a public board that compensation must be paid for displacement of tidewater did not constitute a termination of the rights under the grant to which the defendants succeeded. If it be assumed, as argued by the Attorney General, that under the colony ordinance the fee of the flats had vested in the defendants or their predecessors in title as owners of the upland and that the only right remaining in the Commonwealth was that of public navigation, Boston & Hingham Steamboat Co. v. Munson, 117 Mass. 34; Jubilee Yacht Club v. Gulf Refining Co., 245 Mass. 60, 140 N. E. 280, the same result follows. The right nevertheless was one of which the Commonwealth must repossess itself by appropriate means.

7. The applications by the defendants for licenses under R. L. c. 96, and the acceptance of licenses do not make out a case for the plaintiff. They do not affect the defendants' rights under the grant. As already pointed out, these steps were in substance required by chapter 481. Approval by the public board of structures to be erected in tidewater was a valid regulation. In each license there was a provision that nothing therein contained should be construed to impair the legal rights of any person.

[7] The insertion in each license of the clause requiring payment for displacement of tidewater was in derogation of the grant by the Commonwealth and hence beyond the power of the public officers to demand as a condition of granting the license.

[8] The general doctrine is that conditions and terms inserted in a license by a public board not authorized or warranted by law are void. Even express acceptance of them by the licensee had been held to be ineffectual. Keefe v. Lexington & Boston Street Railway, 185 Mass. 183, 70 N. E. 37; Selectmen of Wellesley v. Boston & Worcester Street Railway, 188 Mass. 250, 253, 74 N. E. 355; Selectmen of Clinton v. Worcester Consolidated Street Railway, 199 Mass. 279, 285, 85 N. E. 507; the Queen v. Mann, L. R. 8 Q. B. 235.

Exceptions overruled.

Appeals dismissed.

KING v. BELMORE.

(Supreme Judicial Court of Massachusetts. Plymouth. March 1, 1924.)

1. Physicians and surgeons ⇐18(9)—Malpractice in dressing wound held for jury.

In action for malpractice in dressing wound in the leg, resulting in poisoning and amputation, *held*, that the court did not err in refusing to direct a verdict for the defendant.

2. Appeal and error ⇐1064(1)—Physicians and surgeons ⇐18(10)—Instruction on malpractice held erroneous under evidence and prejudicial.

In action for malpractice in caring for injured leg, resulting in a septic condition and amputation of the leg, an instruction permitting the jury to consider defendant's failure to discover fracture of small bone was erroneous and prejudicial, where the undisputed evidence was that the fracture did not result in any septic condition, and plaintiff did not so claim; the alleged negligence having to do with the care of an open wound on the leg.

should have instructed loss of leg did not raise presumption of negligence.

In action for damages for malpractice in dressing injured leg, court should have granted defendant's request that the fact that plaintiff suffered sepsis and amputation of leg did not raise a presumption of want of proper care or skill or negligence.

4. Appeal and error ⇐971(1)—Evidence ⇐547—Questions calling for expert medical opinions left to discretion of trial court.

In dealing with questions calling for expert medical opinion, much must be left to the discretion of the trial court, and its rulings will not be revised unless they are plainly prejudicial to the rights of the excepting parties.

Exceptions from Superior Court, Plymouth County; Joseph Walsh, Judge.

Action of tort by Edward King against Adelore O. Belmore. Verdict for plaintiff, and defendant brings exceptions. Exceptions sustained.

W. G. Rowe, of Brockton, for plaintiff.

F. G. Katzman, of Hyde Park, and J. P. Vahey and R. Clapp, both of Boston, for defendant.

CROSBY, J. This is an action of tort against the defendant, a physician and surgeon, for malpractice in treating the plaintiff for an injury resulting from being run down by a motorcycle.

Immediately after the accident, which occurred on November 6, 1918, the plaintiff was taken to the defendant's office. The defendant examined him and found an open wound on the calf of the right leg; he dressed the wound and thereafter attended him on different days until November 16, 1918; and two days later he was dismissed from the case by the plaintiff. Dr. Hunt, another physician, was then called, who treated the plaintiff until March 5, 1919, when he was removed to a hospital and there, on April 19 following, his right leg was amputated at a point six inches below the hip.

There was evidence tending to show that the cut or wound had become infected or septic; and that pus had formed above the wound and discharged through it. Dr. Hunt testified that the proper treatment for such an injury would be for the attending physician to wash off all possible cause of infection by the use of a corrosive or bichloride solution; to open and clean the edges of a wound such as the plaintiff had received, and clean the open parts with gauze dipped in such solution, following which to suture the wound with stitches; that after it had been cleaned to apply an iodoform gauze bandage, and assuming that the plaintiff had lost considerable blood to apply absorbent cotton next outside the iodoform gauze and place outside the absorbent cotton a bandage of aseptic surgical not always possible to detect until several days after an open wound has been received, that the most common period for its appearance is from three to eight days following the receipt of a street injury, and that—

"Generally after an accident a physician would know whether pus had come or not within about three days."

This witness also testified that—

"When pus forms an avenue of escape should be open; if there is a wound you separate the edges of the wound. * * * Drainage should be established. If there is no evacuation, septic absorption follows, which may cause septicemia and ultimate death. Usually the development of pus causes an increase in temperature."

Dr. Bassett testified that he was chief of the surgical service of the Brockton Hospital; that he "would expect infection introduced in a wound to manifest itself inside of a very short period, three or four days." There was evidence that the defendant did not place a drain in the wound; that he put a white powder on it; that he never took the plaintiff's temperature; that in the afternoon of November 16, after the defendant saw the plaintiff for the last time, about a cup of pus came from the wound under the bandage.

Dr. Hunt testified that he first visited the plaintiff on November 18, 1918; that he was emaciated; that he took his temperature and found that he had a fever; that he removed what seemed to be a strip of sheeting from his leg; that there was no iodoform bandage there; that there was a scab underneath the sheeting, and evidence of the application of a white powder; that he removed the scab and found the edges of a small wound somewhat glued together; that he pulled the edges apart and there was a very profuse discharge of pus. He further testified as follows:

"I found on the outer side of the lower third of the thigh a bulged condition which fluctuated on pressure, and which appeared to be a well of pus, which discharged through the wound below, when the wound was open. * * * I established drainage of the pus, tilted the leg down and propped the patient up in bed. The pus soaked all the clothes we had in the bed, through the sheets and onto the mattress. From the emaciated condition of the patient and the amount of pus I should say the pus condition was eight or ten days old. There was no drain in the wound, I inserted a drain and put on a wet dressing with a weak lysol solution. The scab covered the wound. The evacuation of the pus eased the plaintiff's pain; pus under pressure causes pain, and there was pressure there."

There was further medical evidence to the effect that sepsis might have been caused by contamination of the wound after the accident, by faulty method and care in the way

skillfulness of any kind. Dr. Packard, another witness called by the plaintiff, testified that "pus takes three or four days before you would get much of any evidence of it."

Upon the testimony of the defendant it could have been found that the care and treatment which he administered to the plaintiff were skillful and proper; but the jury were not obliged to believe his testimony, and could have found that the wound was infected, and that pus had formed after the accident. It was for them to determine whether in the exercise of reasonable skill the defendant should have discovered the condition of the plaintiff, and whether the treatment under the circumstances was skillful or otherwise. It is uncontroverted that the defendant did not learn at any time during his attendance upon the plaintiff that pus had formed or that there was a fracture of the fibula, as appears from the undisputed testimony.

While the defendant testified that when he first saw the plaintiff at his office the first thing he did after looking at the wound was to cut his trousers and underdrawers from the bottom to the hip with scissors, and that otherwise he would not have been able thoroughly to clean and treat the injury, there was testimony from other witnesses that the trousers were not cut or slit as described by the defendant. If the jury found that the wound was treated without either removing or cutting the trousers, they could have found that it was not cleaned at that time so as to avoid infection.

[1] It is manifest that upon all the evidence the defendant's motion for a directed verdict could not have been allowed; and that the jury could not properly have been instructed that the plaintiff was not entitled to recover. That was a question of fact to be determined upon the evidence with reasonable inferences which might be drawn therefrom. It was for the jury to say whether the defendant exercised such skill and care as members of his profession ordinarily would have exercised under corresponding conditions. Chesley v. Durant, 243 Mass. 180, 137 N. E. 301, and cases cited.

[2] The defendant however was entitled to have his sixth and tenth requests given, in substance. Instead of giving these requests the trial judge charged the jury as follows:

"The fact that the leg was fractured, as shown by the X-ray plate, need not trouble you to any great extent, in view of the fact that it is not claimed, as stated by counsel,—it is not now claimed, if it ever was claimed that the fracture of the fibula caused the loss of the leg. There was a fracture, apparently, of the fibula; the X-ray plate shows it. It was not discovered, as I recall the testimony, until some time around the 15th or 19th of December. Dr. Goddard, I think, was called by Dr. Hunt, who came after Dr. Belmore, the defendant, was told not to come again, and it was then had a fracture; and you have heard the physicians testify what crepitus is—the grating of the two ends of the bone; but it is not claimed that that fracture caused the loss of the leg. So that, unless you are satisfied from the evidence, gentlemen, here in this case, in spite of the fact that it is not so claimed,—unless you are satisfied from all the evidence in the case that this fracture did cause the loss of this leg, it is not important with reference to that particular aspect of the case; but if you do so find, why, then it will be necessary, if you so find from all the evidence in the case, notwithstanding the fact that it is not so claimed, notwithstanding what the experts have testified, if you do then find that this fracture of the leg caused the plaintiff's condition, it will be necessary for you then to consider what treatment, if any, at any time may have been given for this fracture, because if there was no treatment given by Dr. Belmore and none by Dr. Hunt and none by Dr. Goddard it will be necessary for you to find that Dr. Belmore was negligent in not discovering this fracture and that it existed at the time and could have been discovered; but, as I have said, unless you find, in spite of the fact that it is not claimed, that it had anything to do with the loss of the leg, and notwithstanding the opinion of the experts, that aspect of the case need not give you further concern."

Four medical experts, called by the plaintiff, testified in substance that the fracture of the fibula had nothing whatever to do with sepsis in the leg. The plaintiff's counsel in his argument to the jury stated that it was not claimed that the failure of the defendant to discover the fracture was the cause of the infection which resulted in the loss of the leg, and that it was probable that the plaintiff received an initial infection at the time of the injury from some germ from the street. Apart from this statement to the jury the undisputed testimony shows that the failure of the defendant to discover and treat the fracture did not result in any septic condition, nor was there any evidence that it was a cause or a contributing cause of the condition of the plaintiff which resulted in the amputation of his leg. As these instructions were erroneous and prejudicial to the defendant the exception to this part of the charge must be sustained.

[3] The seventh request, that the fact that the plaintiff suffered sepsis and amputation of his leg did not raise a presumption of want of proper care, skill or negligence on the part of the defendant in his treatment of the plaintiff, in substance should also have been given.

[4] There was evidence that the defendant used certain "dust cloths" and strips from sheets furnished him by the plaintiff's mother in bandaging the wound. But there was no evidence to show, and the plaintiff's counsel did not contend at the trial, that such cloths and sheets were unsanitary or improper for such use. The plaintiff and his moth-

and were clean. Accordingly the defendant's eighth request in substance should have been given. The exceptions to the admission of evidence cannot be sustained. They all arose from the admission of questions calling for expert medical opinion. In dealing with such questions much must be left to the discretion of the trial court; and his rulings will not be revised unless they are plainly prejudicial to the rights of the excepting party, which does not appear in the case at bar.

Exceptions sustained.

COSMOPOLITAN TRUST CO. v. CIRACE et al.

(Supreme Judicial Court of Massachusetts. Suffolk. March 3, 1924.)

1. Appeal and error ⇐694(1)—Findings not revised in absence of evidence.

On an appeal from a decree, master's findings of fact cannot be revised in the absence of the evidence.

2. Estoppel ⇐83(5)—Evidence ⇐370(4)—Note and mortgage executed by defendant admissible in evidence regardless of genuineness of signature of one not party; party presenting mortgage as security estopped to deny genuineness.

When it was justifiably found that note and mortgage were executed by defendant, they were rightly admitted in evidence regardless of the genuineness of the signature of another person who was not a party to the action, and where defendant or some one in his behalf presented the mortgage as security he was thereby estopped to deny its genuineness.

3. Bills and notes ⇐92(5)—Mortgages ⇐25(2)—Mortgage note held not given without consideration.

Where the person, mainly interested financially in a commercial undertaking conducted in the name of a corporation, gave a note and mortgage as additional security to a trust company which had financed the purchase of olives and held a lien thereon, the mortgage note was not without consideration, especially as there was a presumption of consideration in favor of a holder for value under G. L. c. 107, §§ 47, 48.

4. Mortgages ⇐199(1)—Plaintiff held entitled to recover rentals collected by mortgagor's tenant.

In an action to establish amount due plaintiff from defendant on a note, and to reach and apply thereon debt alleged to be due such defendant from another defendant, and for general relief, single justice *held* warranted in holding the second defendant responsible to the plaintiff for rentals collected by her from property which she claimed to have leased from the first defendant, and which had been purchased by plaintiff on foreclosure of mortgage, either as money due the defendant liable on the note, or as property of the defendant, in view of the prayer for general relief.

Appeal from Supreme Judicial Court, Suffolk County.

Bill in equity by the Cosmopolitan Trust Company, through the commissioner of banks as liquidating agent, against Henry Cirace and another, to establish the amount due it from the named defendant on account of a promissory note, and to reach and apply toward the satisfaction thereof a certain debt alleged to be due from the other defendant, and for general relief. Decree for plaintiff, and defendants appeal. Affirmed.

J. T. Zottoli, of Boston, for appellants.
D. L. Smith, of Boston, for appellee.

DE COURCY, J. This bill in equity was brought by the Cosmopolitan Trust Company, through the commissioner of banks as liquidating agent, to establish the amount due it from the defendant Cirace on account of a certain promissory note; to reach and apply toward the satisfaction thereof a certain debt alleged to be due to Cirace from the defendant Florio, and for general relief. The following facts found by the master are here material:

In November, 1918, Cirace, who was engaged in the wholesale grocery business under the name "Italian Importing Company," became interested in a proposition to purchase large quantities of olives in California and ship them to Boston for sale. He made arrangements with the Fidelity Trust Company to finance the purchase, and to hold the shipments as security for its advances; and he went to California, leaving one Cataldo in full charge of his Boston business. During his absence the business was incorporated, under the same name "Italian Importing Company," for the sole purpose of providing a suitable medium for receiving from the Fidelity Trust Company the advances made from time to time and giving security therefor. On the return of Cirace to Boston the Fidelity Trust Company insisted upon further collateral to secure the advances it had made; and he executed a note for $10,000 payable to said trust company, secured by a mortgage of certain real estate on North street owned by him. Thereafter the fidelity company insisted that Cirace reduce the indebtedness of the Italian Importing Company, and refused to release the olives held in storage except upon the payment of approximately $40,000. A loan of $46,345 from the Cosmopolitan Trust Company was negotiated by a straw man for Cirace's benefit; a check for that amount was later made, payable to Cirace's then attorney, one Dewey; and it was indorsed by said Dewey to the Fidelity Trust Company. In connection with this transaction, and as part security

pany received from the Fidelity Trust Company through said Dewey an assignment of the mortgage.

No payment of principal or interest was made on the note. On or about July 27, 1921, the commissioner of banks, who had taken possession of the Cosmopolitan Trust Company, proceeded to foreclose the mortgage. A sale was duly held under the power in the mortgage; the property was bid in for $7,000 in the plaintiff's name; and the foreclosure deed and affidavit were duly executed and recorded. The plaintiff has never obtained possession of the premises The defendant Florio has been in possession, through tenants holding under her, at a rental of $65 per month, claiming to have a six years' lease from Cirace, antedating the mortgage. As to whether or not any such lease was in fact executed, the master was unable on the evidence to find. A final decree was entered by the single justice, in accordance with the master's findings, establishing the plaintiff's title to the premises under the foreclosure deed as against the defendants; determining the indebtedness of Cirace on the mortgage note to be $4,963.16, and of Florio, for money received as rentals, to be $1,215; and directing executions to issue.

[1, 2] The defendant Cirace filed twenty-six exceptions to the master's report. More than half of them were based on objections to the master's findings of fact or to his failure to find certain other alleged facts. Manifestly we cannot revise the findings in the absence of the evidence. Cook v. Scheffreen, 215 Mass. 444, 102 N. E. 715. The remaining exceptions are to the admission and exclusion of certain evidence. The testimony of the witness Rich, qualifying him to give an opinion upon Cirace's signature, was admissible in the discretion of the master. Commonwealth v. Meehan, 170 Mass. 362, 49 N. E. 648. When it was justifiably found that the note and mortgage were executed by Cirace, these and the other papers were rightly admitted in evidence, regardless of the genuineness of the signature of Donata Cirace, who is not a party. Cirace, or some one in his behalf, presented this mortgage in its present state to the Fidelity Trust Company as security, and he is estopped to deny its genuineness. The questions with reference to the Pacific Products Corporation were properly excluded as not material to the issue that was being tried. In brief, the exceptions to the master's report were overruled rightly.

[3] The contention of the defendant Cirace, on his appeal from the final decree, is that there was no consideration for the mortgage note. But it is apparent from the facts found by the master that Cirace was the person mainly interested financially in the ownership them to Boston for sale; and that when the project proved unprofitable and it became necessary to give additional security to the Fidelity Trust Company, which had a lien on the olives in storage, this mortgage was given by him because he was the real party in interest. Further, the plaintiff was a holder for value, and under the negotiable instruments act there was a presumption of valuable consideration for the note. G. L. c. 107, §§ 47, 48.

[4] The defendant Florio filed no exceptions to the report. In her answer and at the trial she claimed to hold the premises under a lease from Cirace antedating the mortgage. As already stated, the master was unable to find on the evidence whether or not such lease was in fact executed. He did find however that "during the entire period between the acquisition by the plaintiff of title to the North street property under the foreclosure sale, and the time of the hearings before me as master, the defendant Florio has continued to rent one room on the second floor of the building located on said property, together with the store on the ground floor thereof to said Angello at a rental of sixty-five dollars a month." So far as the record discloses, Guidita Florio has never paid over this money to any one. We cannot say that the single justice was not warranted in holding her responsible to the plaintiff, in view of all the facts disclosed; whether the decree was based on the application to the debt established against Cirace of money due to him from said Florio under a lease; or upon her duty to pay over to the plaintiff, under the prayer for general relief, the rental collected by her from tenants of its property, which she holds only as a constructive trustee.

Decree affirmed, with costs.

COMMONWEALTH v. REILLY.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 28, 1924.)

1. Indictment and information ⇐110(15) — Indictment in words of statute held sufficient.

An indictment following the terms of G. L. c. 266, § 91, making it an offense to state untrue facts in advertising, was not open to objections.

2. Criminal law ⇐13—Statute making misrepresentation of facts in advertisement an offense held to sufficiently prescribe standard of guilt.

G. L. c. 266, § 91, making it an offense to make representations or statements of fact which might "on reasonable investigation have been ascertained to be untrue" in advertisement, is not unconstitutional as failing to conform to the requirements of Constitution, Dec-

ascertainable standard of guilt.

3. Criminal law ⇐13—Crimes must be created with reasonable degree of definiteness.

In view of Constitution, Declaration of Rights, pt. 1, art. 12, crime can be created only by specification to a reasonable degree of definiteness of conduct forbidden or enjoined, and a guide or rule in the description of conduct must be established capable of being understood by the ordinary member of society.

4. Fraud ⇐68—Statute making misrepresentation in advertisements crime, within police power.

G. L. c. 266, § 91, making it a crime to misrepresent facts in advertisements, is a valid exercise of the police power and does not offend against any guaranty of the Constitution of the United States.

5. Criminal law ⇐696(7)—No error in refusing to strike entire answer, part of which was pertinent.

There was no reversible error in refusing to strike out the entire answer of a chemical expert because he was unable to state the precise elements of a small amount of matter of an orange color forming a part of an advertised article, the result of his analysis of the other constituent elements of that article being pertinent upon the issue presented.

6. Criminal law ⇐478(1), 481—Competency of chemical expert largely within discretion of trial court; chemical expert held competent.

The competency of witness called as a chemical expert rested largely within the discretion of the trial court, and there was no error in law in permitting him to express his opinion as to the value of a certain article in increasing the power to be derived from gasoline and the effect in that respect of some of its component parts, though the witness did not possess the highest degree of knowledge.

7. Criminal law ⇐483—Inquiry of chemical expert held proper.

In a prosecution under G. L. c. 266, § 91, for misrepresentation of facts in advertisements where one proper subject of inquiry was the chemical composition of the article advertised by the defendant as giving greater power to gasoline, *held* not a violation of the defendant's rights to inquire of the chemical expert as to the effect of certain of its elements standing alone, when mixed with gasoline.

8. Criminal law ⇐488—Experiments admissible within discretion of court.

Testimony of experiments by a chemical expert *held* admissible within the discretion of a trial judge.

Exceptions and Appeal from Superior Court, Suffolk County; P. J. O'Connell, Judge.

Lincoln L. Reilly was found guilty of violations of G. L. c. 266, § 91, and his motion in arrest of judgment was overruled, and he brings exceptions and appeals. Exceptions judgment affirmed.

L. Marks, of Boston, for appellant.

M. Carol, Asst. Dist. Atty., of Boston, for the Commonwealth.

RUGG, C. J. This indictment charges that the defendant, at divers times set forth in several counts, published in certain newspapers, respecting an article called Fam-O, advertisements containing assertions, representations and statements of fact which were untrue, deceptive and misleading, and which the defendant knew and might on reasonable investigation have ascertained to be untrue, deceptive and misleading. The indictment is based on G. L. c. 266, § 91. That section is in these words:

"Any person who, with intent to sell or in any way dispose of merchandise, securities, service, or anything offered by such person, directly or indirectly, to the public for sale or distribution, or who, with intent to increase the consumption of or demand for such merchandise, securities, service or other thing, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, makes, publishes, disseminates, circulates or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated or placed before the public within the commonwealth, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, and which such person knew, or might on reasonable investigation have ascertained to be untrue, deceptive or misleading, shall be punished by a fine of not less than ten nor more than five hundred dollars; * * *" with a proviso not here material.

[1] The indictment follows the terms of G. L. c. 266, § 91. Therefore, as matter of criminal pleading it is not open to objection.

[2, 3] The defendant contends that the statute itself is unconstitutional because it fails to conform to the requirements of Article 12 of the Declaration of Rights of the Constitution of this Commonwealth. That article provides that—

"No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him. * * * And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

It is urged that the statute involved in the case at bar does not fix an ascertainable

accused of its violation no defined measure of conduct, that it does not forbid any specific act, and that it is so broad as to be vague and uncertain. Article 12 of the Declaration of Rights is an important safeguard of individual liberty. All statutes must conform to its requirements. Crimes can be created only by specification to a reasonable degree of definiteness of conduct forbidden or enjoined. Acts to be done or avoided must be stated with clarity. A guide or rule in the description of conduct must be established capable of being understood by the ordinary member of society. The duty of the individual must be set out with such explicit definition that the law abiding may avoid prosecution and find protection. Commonwealth v. Badger, 243 Mass. 137, 137 N. E. 261; Commonwealth v. Pentz (Mass.) 143 N. E. 322; Commonwealth v. Atlas, 244 Mass. 78, 82, 138 N. E. 243.

The chief attack on the statute is directed against that part which authorizes a verdict of guilty for publishing as an advertisement in a newspaper an untrue, deceptive or misleading assertion, representation or statement, whose untrue, deceptive or misleading nature "might on reasonable investigation" have been ascertained. It is argued that "reasonable investigation" is not a definite standard of conduct, but varies so much with the idiosyncrasies of each individual that it is vague and uncertain.

The common law has established many tests for separating criminal from noncriminal conduct based on what a jury may think is reasonable. Self-defense as a justification in cases of homicide is made out by proof that the defendant had reasonable cause to believe, and in truth did believe, that it was necessary to strike in order to protect his own person, and that the mortal blow was given solely for that purpose. Commonwealth v. Woodward, 102 Mass. 155, 161; Commonwealth v. Crowley, 165 Mass. 569, 570, 43 N. E. 509. In Commonwealth v. Presby, 14 Gray, 65, a police officer was indicted for assault and battery. The defense was that the alleged crime was committed in arresting one for being intoxicated on a public street in the nighttime under the mandate of a statute. It was held that the defense was made out by proof that the defendant acting in good faith had "reasonable cause" to believe that the person arrested was intoxicated even though not intoxicated in fact. The dividing line between guilt and innocence in the criminal law is whether a jury are satisfied beyond a "reasonable doubt" that the defendant committed the crime charged. Commonwealth v. Webster, 5 Cush. 295, 319, 320, 52 Am. Dec. 711. A large number of statutory crimes are made to depend for one essential element upon conduct described as reasonable or unreasonable. See, for example, "without reasonable "reasonable cause," G. L. c. 269, § 13; chapter 272, §§ 5, 88, unreasonable neglect or without making reasonable provision, G. L. c. 273, §§ 1, 20; Commonwealth v. Burlington, 136 Mass. 435; Commonwealth v. Ham, 156 Mass. 485, 31 N. E. 639; Commonwealth v. Graham, 157 Mass. 73, 31 N. E. 706, 16 L. R. A. 578, 34 Am. St. Rep. 255; Commonwealth v. Simmons, 165 Mass. 356, 43 N. E. 110; Commonwealth v. Shaman, 223 Mass. 62, 111 N. E. 720, refusal to contribute reasonably, G. L. c. 273, § 15; Commonwealth v. Callaghan, 223 Mass. 150, 111 N. E. 773, certiorari denied 241 U. S. 667, 36 Sup. Ct. 551, 60 L. Ed. 1229; Commonwealth v. Rosenblatt, 219 Mass. 197, 106 N. E. 852. See Commonwealth v. Cassidy, 209 Mass. 24, 95 N. E. 214. In all the decisions just cited it was assumed without discussion that the statute was valid and convictions were upheld. These statutes are illustrative and are not intended to be an exhaustive collection. "Reasonable cause to know" has been an essential element for conviction in some aspects of our laws against the sale of intoxicating liquor, and has been explained in our decisions. Commonwealth v. Joslin, 158 Mass. 482, 494, 33 N. E. 653, 21 L. R. A. 449; Commonwealth v. Gould, 158 Mass. 499, 508, 33 N. E. 656. An indictment charging a conspiracy to establish a monopoly and to enhance unreasonably the price of a necessity of life in time of war, has been upheld as not vague or indefinite. Commonwealth v. Dyer, 243 Mass. 472, 490, 491, 138 N. E. 296. Definitions of negligence not infrequently refer to the conduct of a "reasonable man" as one of its elements. See Pollock on Torts (3d Ed.) 385, 386. The person of ordinary caution and prudence often embodied in definitions of negligence is but another way of describing the reasonable person. See Altman v. Aronson, 231 Mass. 588, 591, 121 N. E. 505, 4 A. L. R. 1185. There are statutory crimes resting upon negligent conduct. G. L. c. 268, § 29; c. 269, §§ 3, 4. Negligence of varying degrees has been made the basis of crime under numerous statutes, some of which are reviewed in Brooks v. Fitchburg & Leominster St. Railway, 200 Mass. 8, 86 N. E. 289. Yet courts of other jurisdictions often have said that the distinction between ordinary negligence and gross negligence is incapable of definition. See Massaletti v. Fitzroy, 228 Mass. 487, 494 to 498, 118 N. E. 168, L. R. A. 1918C, 264, Ann. Cas. 1918B, 1088, and cases there reviewed. Reference has been made to these statutes and decisions, not as definitely concluding the point here raised, but because it is unlikely that so many statutes would have been enacted and so many decisions rendered upholding convictions thereunder if the point here raised were sound. Their cumulative effect is entitled to consideration.

With respect to an argument as to vague-

the court in Nash v. United States, 229 U. S. 373, 377, 33 Sup. Ct. 780, 781 (57 L. Ed. 1232):

"The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' Commonwealth v. Pierce, 138 Mass. 165, 178. Commonwealth v. Chance, 174 Mass. 245, 252."

The case at bar is distinguishable from United States v. L. Cohen Grocery Co., 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045. The statute under consideration in that decision merely declared it to be unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." It was held that no ascertainable standard of guilt was established and that the statutory words were not "adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them."

The statute here assailed prohibits as an inducement to business transactions the publication of untrue, deceptive or misleading statements or representations of fact. If the statute had stopped here, it would have been invulnerable under many decisions upholding statutes which forbid the doing of some act wholly apart from any intent. Commonwealth v. Mixer, 207 Mass. 141, 93 N. E. 249, 31 L. R. A. (N. S.) 467, 20 Ann. Cas. 1152, and cases there collected. The present statute goes further and requires as an element to be found, before guilt can be established, either actual knowledge of the untrue, deceptive or misleading nature of the statement or representations by the defendant, or that such knowledge might have been acquired by him on reasonable investigation. It is manifest that here there is a fixed and ascertainable standard of guilt and that adequate information is given as to the nature and cause of the acts set forth in the accusation. Whether the falsity of the advertisement might have been ascertained on reasonable investigation is as definite a guage of conduct as is involved in the many instances of criminal prosecution to which reference has been made.

That the crime defined by this statute is not open to sound objection in a constitutional sense, because it contains an element of degree about which there is no mathematical measure, is settled in principle by

viewed.

It is not necessary to examine in detail decisions from other states relied upon by the defendant. They relate to statutes of differing terms.

[4] The statute here attacked is a valid exercise of the police power under the numerous decisions collected and reviewed in Holcombe v. Creamer, 231 Mass. 99, 120 N. E. 354.

We are of opinion that this statute does not offend against any guaranty of the Constitution of the United States. The reasons already stated appear to us decisive of that point. They also are set forth at length in Commonwealth v. Pentz, supra, and need not be repeated. The case at bar seems to us to be controlled by Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417; Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232; Fox v. Washington, 236 U. S. 273, 35 Sup. Ct. 383, 59 L. Ed. 573; Omaechevarria v. Idaho, 246 U. S. 343, 38 Sup. Ct. 323, 62 L. Ed. 763; Miller v. Strahl, 239 U. S. 426, 36 Sup. Ct. 147, 60 L. Ed. 364; and to be distinguishable from International Harvester Co. v. Kentucky, 234 U. S. 216, 34 Sup. Ct. 853, 58 L. Ed. 1284; Collins v. Kentucky, 234 U. S. 634, 34 Sup. Ct. 924, 58 L. Ed. 1510; American Seeding Machine Co. v. Kentucky, 236 U. S. 660, 35 Sup. Ct. 456, 59 L. Ed. 773; and United States v. Cohen Grocery Co., 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045.

[5] There was no reversible error in refusing to strike out the entire answer of the chemical expert, because he was unable to state the precise elements of "a small amount of material of an orange color" forming a part of the article called Fam-O. The result of his analysis of the other constituent elements of that article was pertinent upon the issues presented, and well may have been helpful.

[6] The competency of the witness called as a chemical expert rested largely within the discretion of the trial court. There was no error in law in permitting him to express is opinions as to the value of the article in increasing the power to be derived from gasoline and the effect in that respect of some of its component parts. While the witness did not possess the highest degree of knowledge, it cannot be said as matter of law that his testimony was of no value. Commonwealth v. Spencer, 212 Mass. 438, 448, 99 N. E. 266, Ann. Cas. 1913D, 552; Jordan v. Adams Gas Light Co., 231 Mass. 186, 189, 120 N. E. 654; Cook v. Fall River, 239 Mass. 90, 94, 131 N. E. 346, 18 A. L. R. 119; Parker v. Shaghalian & Co., Inc., 244 Mass. 19, 22, 138 N. E. 236.

[7] The form of the questions to the witness does not disclose reversible error. He

fair import of some of the questions to which exception was saved is that they were grounded on the facts revealed by his analysis. In a case like this where one proper subject of inquiry was the chemical composition of a specified article, it cannot be pronounced a violation of the defendant's rights to inquire of the expert as to the effect of certain of its elements standing alone when mixed with gasoline. The questions were admissible under the principles stated in Commonwealth v. Russ, 232 Mass. 58, 72–75, 122 N. E. 176. They do not fall within the inhibitions illustrated by Connor v. O'Donnell, 230 Mass. 39, 42, 119 N. E. 446; Commonwealth v. Williams, 244 Mass. 515, 521, 139 N. E. 347; Stoddard v. Winchester, 157 Mass. 567, 575, 32 N. E. 948; and Biancucci v. Nigro (Mass.) 141 N..E. 568. They did not call for answers beyond the range of the expert knowledge of the witness.

[8] The testimony of the expert was not open to the objection that he attempted to pass upon the truth of other evidence or to base his conclusions on unstated inferences from other evidence. His experiments were admissible within the discretion of the trial judge. We find no reversible error in the evidence of this witness. Commonwealth v. Tucker, 189 Mass. 457, 477–479, 76 N. E. 127, 7 L. R. A. (N. S.) 1056.

Denial of motion in arrest of judgment affirmed. Exceptions overruled.

O'SHEA v. HURLEY et al.

(Supreme Judicial Court of Massachusettts. Essex. March 3, 1924.)

1. Appeal and error ⟸1078(1)—Exceptions not argued treated as waived.

Exceptions which are not argued or mentioned in the brief are treated as waived.

2. Executors and administrators ⟸469(1)—Probate court without jurisdiction to inquire whether executor as trustee in bankruptcy was guilty of breach of duty.

The probate court in the settlement of an executor's account was without jurisdiction to inquire whether the executor, who was also trustee in bankruptcy of a debtor of the estate, was guilty of a breach of his duty as executor by reason of the fact that he was guilty of maladministration in the office of trustee in bankruptcy to the probable diminution of assets that should have come to the estate in process of probate; the remedy of a creditor being to have the trustee removed and a new trustee appointed who would make distribution under the order of the probate court.

3. Bankruptcy ⟸274½—Creditor cannot sue trustee for unaccounted for assets.

A creditor cannot sue a trustee in bankruptcy direct, even for admittedly unaccounted for assets, because he would be entitled to re-share of an unascertained share of the balance found due after an accounting and order for distribution in the bankruptcy court.

4. Executors and administrators ⟸89—Executor held not to be charged with money paid to debtor of estate.

Master did not err in refusing to rule that executor should be charged with the difference between what he received from a debtor of the estate and what he would have received from such debtor in the exercise of due diligence, where such executor as attorney for the debtor after suit collected a sum of money out of which he paid the estate a considerable sum with the permission of the debtor, but paid the balance to the debtor, and there was no merit in a contention that he should have advised his coexecutors to consult counsel with a view to securing the debtor's money for the benefit of the estate.

5. Executors and administrators ⟸507(4)—Hearing on question of executor's claim for services rendered deceased in lifetime, proper.

On accounting by executor, exception to master's report because he heard the parties on the question of executor's claim for services rendered deceased in his lifetime in the belief that both parties desired the claim to be passed upon, and that both parties had waived the provision of R. L. c. 141, § 6, was properly overruled.

Appeal from Probate Court, Essex County.

In the matter of the estate of Michael Hurley, deceased. William O'Shea, as executor, filed an account which was opposed by John S. Hurley and others, as legatees. From an interlocutory decree overruling exceptions and confirming the master's report and a final decree, appeals are taken. Affirmed.

J. H. Casey, of Boston, J. M. Barry, of Lynn, and F. J. Muldoon, of Boston, for appellants John S. Hurley and others.

W. E. & R. L. Sisk, of Lynn, for appellee.

PIERCE, J. This is an appeal from an interlocutory decree overruling exceptions and confirming the master's report, as also an appeal from a final decree ordered by a justice of this court.

William O'Shea, now deceased, was appointed July 24, 1899, one of three executors under the will of Michael Hurley. As one of the executors O'Shea filed an account in the probate court on July 22, 1902, which was opposed by the legatees under the will (children of said Michael Hurley), two of whom were also coexecutors with the accountant. The probate court after extended hearings settled the account; and both parties being aggrieved appealed to the Supreme Judicial Court with statements of their objections to the decree of that court, which were entered on March 27 and on April 5, 1911, in the Supreme Judicial Court.

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dence, find the facts and report the same to the Court forthwith." The master heard the parties upon their objections, and made his report May 10, 1913. The heirs of Michael Hurley are described in the report of the master as appellees, and will be spoken of under that designation. They brought in forty-six objections in writing, which were appended by the master to the report; and by leave of court duly filed their exceptions founded on the objections. The evidence is not reported and no motion was made or denied to recommit to the master to receive, reject or report evidence. The exceptions numbered 1 to 25 inclusive voice merely the dissatisfaction of the appellees with specific findings of fact. No one of them is argued or mentioned in the brief and they are consequently treated as waived. Exceptions 26, 27, 28, 29, 42, 43 and 44 are based upon corresponding objections to the refusal of the master to receive certain evidence and to his refusal to make certain rulings of law.

The evidence was offered and rulings were requested on the theory of the appellees that the executor O'Shea was bound to account to the estate of Michael Hurley for money which he had received, or should have received, as trustee of the bankrupt estate of the Hurley Shoe Company and of the estate of Farrell & Hurley, in both of which the Michael Hurley estate was the heaviest creditor, among over one hundred creditors who proved their claims in bankruptcy against those two estates. The argument for the admission of the evidence rests upon the fact that these bankrupt estates would have declared and the estate of Michael Hurley would have received a larger dividend in settlement of each estate than in fact it did receive, if the trustee had with due diligence collected and accounted in the bankruptcy court for large sums of money which do not appear to have been accounted for in the trustee's accounts of said estates in the bankruptcy court.

[2, 3] The offered evidence adds no material facts to those found by the master which aid in the determination of the question whether the master was right in ruling that the probate court, in the settlement of the executor's account, was without jurisdiction to inquire whether the trustee in bankruptcy (who was also the executor), whose account was under examination, was guilty of a breach of his duty as executor, by reason of the fact that he was guilty of maladministration in the office of trustee in bankruptcy to the probable diminution of assets that should have come to the estate in process of probate. The ruling was right. of a creditor was to have the trustee removed and a new trustee appointed, who would make distribution under the order of the probate court. The court had no jurisdiction affecting the bankruptcy cases, except to charge the executor for what actually came into his hands, under the decree of the bankruptcy court, as executor of the Michael Hurley estate and as creditor of the bankruptcy estates. And it is settled that a creditor cannot sue the trustee direct, even for admittedly unaccounted for assets, because he would be entitled to receive from the trustee only his proportionate share of an unascertained share of the balance found due after an accounting and order for distribution in the bankruptcy court. There is nothing in the fact that the funds of executor, trustee, and individual, were commingled in a single bank account which calls for discussion in this connection. It results that these exceptions were properly overruled.

[4] Exceptions 32 and 41, to the refusal of the master to rule that O'Shea should be charged with the difference between what the executor received from Sheehan as a debtor of the Hurley estate and what he would have received from Sheehan in the exercise of due diligence as executor, were overruled rightly, upon the facts stated by the master, which, succinctly stated, are that O'Shea, as attorney for Sheehan, after suit collected a sum of money, out of which O'Shea paid the estate a considerable sum with the permission of Sheehan, but paid the balance to Sheehan. We find nothing inconsistent with the duty of the executor in making such payment to Sheehan or in his not advising his coexecutors to consult counsel with a view to securing the Sheehan money for the benefit of the estate of Michael Hurley, as is argued by the appellees.

[5] Exception 37 was overruled rightly. The master heard the parties on the question of the executor's claim to be allowed for service rendered Michael Hurley in his lifetime, in the belief that both parties desired the claim to be passed upon and that both parties had waived the provision of R. L. c. 141, § 6, and the rule laid down in Buckley v. Buckley, 157 Mass. 536, 32 N. E. 863. In the circumstances his finding should not be disturbed. The report shows that the question raised by the remaining exceptions were carefully examined by the master. We agree with that analysis without further discussion.

It results that the decrees should be affirmed with costs.

Ordered accordingly.

COMMONWEALTH v. ANDLER.

(Supreme Judicial Court of Massachusetts. Middlesex. Feb. 29, 1924.)

1. Trade-marks and trade-names and unfair competition ⇐51—Complaint charging having registered bottles in possession held not to state any crime.

A complaint, charging that defendant "did have in his possession registered vessels * * * without the written consent of the owner," was in proper form under G. L. c. 110, § 20, on which a search warrant might issue, but stated no crime known to the law; the only crime created with explicit reference to registered bottles being in section 18, relating to the filling of bottles with intent to sell the same, nor was the complaint based on sections 1, 22, 23, 24.

2. Indictment and information ⇐196(5)—Objection complaint stated no crime known to law may be made at any time.

An objection to a complaint on the ground that it set up no crime known to the law might have been taken by motion to quash; but, since it affected the jurisdiction of the court, it could be raised at a later time, under G. L. c. 278, §§ 17, 34.

3. Criminal law ⇐1032(5)—Indictment and information ⇐196(5)—Sentence under complaint stating no crime improper and should be reversed.

No court has jurisdiction to sentence a defendant under a complaint stating no crime known to the law, and it is the duty of the court to consider such a point of its own motion, and a reviewing court should not permit a sentence to stand though such point has not been raised or argued.

Exceptions from Superior Court, Middlesex County; James H. Sisk, Judge.

Israel Andler was found guilty of having registered bottles in his possession without the consent of the owner, and brings exceptions. Exceptions sustained.

Arthur K. Reading, Dist. Atty., of Boston, and Gardner W. Pearson, Asst. Dist. Atty., of Lowell, for the Commonwealth.

Benj. Rabalsky and Sam'l A. Margolis, both of Boston, for defendant.

RUGG, C. J. This complaint, made by one Comiskey, "agent for H. P. Hood & Sons, Inc., a corporation," charges that the defendant at a specified time and place "did have in his possession registered vessels, to wit, fifty-nine registered bottles marked H. P. Hood & Sons, Registered, without the written consent of the owner, the said H. P. Hood & Sons, Inc., against the peace of the said Commonwealth, and contrary to the form of the Statute in such case made and provided." There was a verdict of guilty. Sentence of fine was imposed but its execution stayed.

[1] This complaint sets out no crime known to the law of this Commonwealth. It is a § 20, on which a search warrant may issue and on which a person in possession of such vessels as are there described may be summoned into court and examined as to the circumstances of such possession, and on which possession of such property taken on the search warrant may be awarded to the owner. That section does not authorize the imposition of any sentence on the person in whose possession the vessels are found. The only crime created with explicit reference to registered bottles is in G. L. c. 110, § 18. It there is provided that—

"No person, without the written consent of the owner thereof, shall fill with a beverage with intent to sell the same any vessel registered under the preceding section, or change in any way, or conceal any name or the word 'registered' thereon, or buy, sell, traffic in or dispose of any such vessel."

The complaint in the case at bar manifestly is not framed on section 18 and does not charge the essential facts made a crime thereby. Plainly it is not based on G. L. c. 110, §§ 1, 22, 23, 24.

[2] Objection to the complaint on the ground that it set out no crime known to the law might have been taken by motion to quash. But this defect affected the jurisdiction of the court and properly might be raised at a later time. G. L. c. 278, §§ 17 and 34; Commonwealth v. Connor, 155 Mass. 134, 29 N. E. 204.

[3] The point that the complaint sets forth no crime known to the law has not been raised or argued at the bar. Nevertheless it ought to be noticed. No court has jurisdiction to sentence a defendant for that which is not a crime. It is the duty of the court to consider such a point of its own motion. Commonwealth v. New York Central & Hudson River Railroad, 206 Mass. 417, 427, 92 N. E. 766, 19 Ann. Cas. 529; Eaton v. Eaton, 233 Mass. 351, 364, 124 N. E. 37, 5 A. L. R. 1426, and cases there cited; Paige v. Sinclair, 237 Mass. 482, 130 N. E. 177; Jordan v. Ulmer, 237 Mass. 577, 130 N. E. 71; Attorney General v. Pelletier, 240 Mass. 264, 299, 134 N. E. 407; Maker v. Bouthier, 242 Mass. 20, 22, 23, 136 N. E. 255. To permit a sentence to stand for that which is not a crime would shock judicial conscience and result in a palpable miscarriage of justice.

The questions argued cannot be considered because they all rest on the assumption that the complaint is valid. Since the court has no jurisdiction of the case tried on this complaint, it cannot deal with other matters which might be involved if a crime were charged.

No order is made other than exceptions sustained, because although the defendant cannot be held for sentence upon the complaint it is possible that there ought to be further proceedings with reference to award-

§ 20.
Exceptions sustained.

SIMPSON BROS. CORPORATION v. MERRIMAC CHEMICAL CO.

(Supreme Judicial Court of Massachusetts. Suffolk. March 5, 1924.)

1. Contracts ⟸302—Owner, by approving plan, did not excuse contractor from exercise of skill.

By approving contractor's plan for a tank, to be constructed under a contract requiring the work to be done in accordance with drawings made by contractor and approved by owner, the owner did not excuse the contractor from the exercise of ordinary and reasonable skill in designing the structure, and approval of plan did not deprive owner of remedy, if the plan was inadequate, or because of a lack of reasonable skill on the contractor's part the structure failed to hold oil, for which it was designed.

2. Contracts ⟸302—Ruling as to effect of approval of plans by third person properly refused.

Where, on suggestion of one who had contracted to construct a tank in accordance with drawings as made by the contractor and approved by the owner, engineers were consulted, who made certain suggestions, which the contractor did not carry out, a requested ruling that, as the design and plan was submitted to such engineers employed by the owner, and were approved by them, the owner could not deny that it was bound by its approval of the plans, *held* properly refused.

Exceptions from Superior Court, Suffolk County; Frederick Lawton, Judge.

Motion by the Merrimac Chemical Company for acceptance and confirmation of an award rendered by the majority of three arbitrators to whom, by agreement, under G. L. c. 251, the parties had submitted certain matters in dispute between them, and for judgment thereon in its favor against the Simpson Bros. Corporation. From adverse decisions, the Simpson Bros. Corporation brings exceptions. Exceptions overruled.

The defendant requested the following ruling:

"(3) That inasmuch as it appears from the facts found by the arbitrators that the design and plan prepared by Simpson Bros. Corporation was submitted to J. R. Worcester & Co., consulting engineers, employed by the Merrimac Chemical Company, and were approved by them as safe against flotation, and inasmuch as it also appears from the facts that the damage to the tank was caused through flotation, the Merrimac Chemical Company cannot be heard to say that it is not bound by its approval of the plans."

E. A. Whitman, of Boston, for plaintiff.
F. D. Putnam, of Boston, for defendant.

CARROLL, J. The plaintiff (hereinafter called the contractor), whose business was the designing and building of reinforced concrete structures, including reinforced concrete oil tanks, made a contract with the defendant (hereinafter called the owner), a corporation engaged in the business of manufacturing heavy chemicals, to build for it an underground concrete tank for the storage of fuel oil. The plan was prepared by the contractor and submitted to the owner. The drawings and specifications were part of the contract, the specifications providing:

"The work shall be done in accordance with drawings accompanying specifications as made by the contractor and approved by the owner."

The matters in dispute between the parties were by a written agreement submitted to arbitrators, the contractor contending that it had performed its contract and was entitled to the balance of the contract price. The owner contended that the tank was badly designed, that the contractor failed to use reasonable and ordinary engineering skill in designing it, and that it was entitled to recover damages. The contention of the owner was sustained by a majority of the arbitrators. The agreement of arbitration directed the arbitrators to "report any findings of fact necessary to the decision of any question of law raised, and shall report their rulings on such questions." A majority of the arbitrators found that no representative of the owner approved of the plans showing the design of the tank "in any particular relating to its strength or ability to hold oil unless such approval is to be implied as a matter of law by reason of the recital in paragraph 2 of the specifications"; that no representative of the owner attempted to supersede the judgment of the contractor's engineer in any matter relating to the design or construction of the tank; that the design of the tank was inadequate for the conditions as they already existed; that in designing the tank the contractor did not use reasonable and ordinary engineering skill and care; and that the failure of the tank was due solely to this fact. The case is before us on the contractor's exceptions. Giles v. Royal Ins. Co., 179 Mass. 261, 268, 60 N. E. 786.

[1] The approval of the plan by the owner, under the clause in the specifications already referred to, did not, as matter of law, mean an unqualified acceptance and sanction of the whole scheme in all its details, as planned by the contractor. By approving the plan the owner did not excuse the contractor from the exercise of ordinary and reasonable skill in designing the structure. The owner

the right to assume that it would be exercised. It could approve the plan submitted, without depriving itself of a remedy, if the plan was inadequate, or, because of a lack of reasonable skill on the contractor's part, the tank failed to hold the oil for which it was designed. The word "approved" has been used to mean determination, examination and positive sanction. See G. L. c. 74, § 1; Galligan v. Leonard, 204 Mass. 202, 205, 90 N. E. 583; Amory v. Lowell, 104 Mass. 265; Brown v. Newburyport, 209 Mass. 259, 95 N. E. 504, Ann. Cas. 1912B, 495; McLean v. Mayor of Holyoke, 216 Mass. 62, 64, 65, 102 N. E. 929; Simpson v. Marlborough, 236 Mass. 211, 214, 127 N. E. 887. The word, however, was not used in this sense in the contract of the parties. The owner approved the general plan submitted. This did not mean that all the particular details of the plan—the engineering skill and the sufficiency of the structure—were approved in all the respects called for by the contract. See Shipman v. State, 43 Wis. 381, 390, 391. The owner was not estopped from showing the defects in the plan and the contractor's lack of skill. The second request of the contractor was denied properly.

[2] J. R. Worcester & Co. were consulted at the suggestion of the contractor's engineer, to ascertain if the tank as designed would be safe against flotation, provided it was placed two feet below the existing surface. Certain suggestions were made by J. R. Worcester & Co. to the contractor, but were not carried out by it. The request relating to the employment of J. R. Worcester & Co. by the owner and the effect of its approval were properly denied.

Exceptions overruled.

ROGERS v. ABBOTT.

(Supreme Judicial Court of Massachusetts. Middlesex. March 3, 1924.)

1. Licenses ⇐39—That plumber obtained permit through name of another not fraud.

One employing one not a master plumber to do work could not defend on ground of fraud, in that the plumber obtained a permit to do the work from the city through the use of the name of a master plumber who was not interested in the contract.

2. Licenses ⇐39—Obtaining permit to do plumbing work in name of another not illegal.

Act of licensed journeyman plumber, not a master plumber, in obtaining permit to do work through the name of a master plumber, with his consent, *held* not illegal as in violation of R. L. c. 103, §§ 1, 8, where he and his partner did the work themselves without employing others.

3. Licenses ⇐13—Judicial notice of ordinances.

Judicial notice cannot be taken of an ordinance of a city requiring that a permit should be obtained by master plumbers or others doing plumbing work.

4. Licenses ⇐13—Copartners could do plumbing work though not master plumbers.

Under R. L. c. 103, §§ 1, 8, providing for supervision of plumbers and for the licensing of master and journeymen plumbers, licensed journeymen plumbers could lawfully do plumbing work which they contracted to do, though they were not master plumbers, where they did the work as partners, without employing others.

5. Trial ⇐388(3), 388(1)—Judge not required to make findings of fact or rulings of law inapplicable to the facts found.

The trial judge was not required to make findings of fact at the request of a party, or to make rulings of law which were inapplicable to the facts found.

Exceptions from Superior Court, Middlesex County; Jos. Walsh, Judge.

Action of contract under a common count on an account annexed by George I. Rogers against William C. Abbott, for plumbers' labor and material. Finding for plaintiff, and defendant brings exceptions. Exceptions overruled.

As found by the auditor, defendant contracted with one MacFadyen to do plumbing work. MacFadyen had no license as master plumber, and told defendant, it would be necessary to have some one associated with him, and that he would take in Rogers, the plaintiff, and divide the profit with Rogers. He did take in Rogers with the knowledge and tacit consent of defendant, and the work proceeded under the general direction and superintendence of Rogers to defendant's knowledge. Rogers did not hold a master plumber's license, and secured the permit to do the work in the name of one Luny, who had no connection with the job except to allow the use of his name in securing the building permit. Defendant requested the following rulings:

"I. That on the whole evidence, as a matter of law, the plaintiff cannot recover.

"II. That the act of plaintiff in procuring a permit, through the use of Luny's name to do the work, was fraudulent.

"III. If fraud is shown as part of his undertakings, plaintiff cannot recover as he cannot take advantage of his own fraud.

"IV. The permit to Luny (Luny having no interest or connection with the job) could not have been legally used by plaintiff so as to afford his doing the work or carrying out his alleged undertaking and afford him the right to recover.

"V. Revised Laws, c. 103, and particularly section 1, is a prohibition statute. Plaintiff, before he can be permitted to recover must

name of any other disinterested party, or that he did no illegal act in laboring on the job without a permit running to him authorizing him personally to do the work.

"VI. The permit being issued in the name of Luny, presumably a licensed master plumber, could not, on the evidence, have been used by the plaintiff, and thus afford him any right or rights under that permit.

"VII. That a permit is merely a license to the party receiving the permit to do a certain thing. The permit in question did not run to the plaintiff or authorize the plaintiff in any way to do the work or furnish the materials.

"VIII. That the statute in force in 1918 is mandatory; the violation of it is prohibited. The plaintiff in carrying out his alleged contract with the defendant, without having a permit authorizing him personally to do the work, violated that statute and therefore cannot recover."

Forest F. Collier, of Boston, for plaintiff.
R. W. Light, of Boston, for defendant.

PIERCE, J. [1] The evidence in this case, offered by the auditor's report and by the testimony of the defendant, on the merits warranted the finding of the judge that there was no fraud of which the plaintiff could complain and that the plaintiff was entitled to judgment in the amount found by the auditor with interest from the date of the writ. G. L. c. 221, § 56; Crocker v. Lowell, 231 Mass. 249, 120 N. E. 688.

[2, 3] We are also of opinion on the facts shown by the record that acts of the plaintiff were not illegal as being in violation of R. L. c. 103, §§ 1, 8. The record does not set out or refer specifically to any ordinance of the city of Boston which, in the regulation of plumbing, requires that a permit should be obtained by master plumbers or others to do plumbing work; and we cannot take judicial notice of such an ordinance or of its provisions. Mahar v. Steuer, 170 Mass. 454, 49 N. E. 741; Attorney General v. McCabe, 172 Mass. 417, 52 N. E. 717; O'Brien v. Woburn, 184 Mass. 598, 69 N. E. 350.

[4] There is nothing in the record to show that the plaintiff Rogers and his associate, MacFadyen, were not both licensed as journeymen plumbers; there is no evidence that either of them employed the other or employed other journeymen plumbers to assist in doing the work which one or both of them did for the defendant; and no evidence that they did not do the work themselves as copartners, as they lawfully might under R. L. c. 103, §§ 1, 8. Barriere v. Depatie, 219 Mass. 33, 106 N. E. 572; Burke v. Holyoke Board of Health, 219 Mass. 219, 106 N. E. 976; Commonwealth v. McCarthy, 225 Mass. 192, 195, 114 N. E. 287; Chubbuck v. Hayward, 217 Mass. 134, 105 N. E. 144.

Elgar, Inc., v. Newhall, 235 Mass. 373, 126 N. E. 661), or to make the rulings of law, which were inapplicable to the facts found by the auditor and by the court. It results that the exceptions must be overruled.

Exceptions overruled.

KATZEFF v. GOLDMAN et al.

(Supreme Judicial Court of Massachusetts. Suffolk. March 14, 1924.)

1. Election of remedies ⇐7(1)—Joinder of counts held not election to rely upon breach of contract.

In an action to recover a deposit made by plaintiff under an agreement by him to purchase real estate, joinder of two counts, the first alleging plaintiff's payment on account, and ability, readiness, and willingness to carry out his part, and refusal of defendants to perform or to return money paid, and the second for money had and received was not an election by plaintiff to rely solely upon the breach of the contract.

2. Vendor and purchaser ⇐338—Appropriate remedy to recover money deposited on contract of purchase.

A count for money had and received was an appropriate form of pleading on which to recover money deposited by one contracting to purchase real estate provided the proof showed that the contract was rescinded and the parties agreed that the money be returned.

3. Pleading ⇐252(1)—Time of adding count does not narrow rights.

That a second count was added to the declaration at the beginning of the trial did not narrow plaintiff's rights under it.

4. Vendor and purchaser ⇐341(3)—Evidence held sufficient to support recovery of deposit by buyer.

In an action to recover a deposit made by the plaintiff under an agreement by him to purchase real estate, evidence tending to show that, after an examiner of titles had pointed out some possible defects in the title, the parties agreed that the agreement be rescinded, and that the deposit be returned to the plaintiff, was sufficient to support a finding for the plaintiff upon a count for money had and received.

5. Trial ⇐386(4) — Requests ignoring one count properly refused.

Requests for rulings of law were properly refused where they ignored the second count in the declaration, and the credibility and weight of the evidence tending to support it.

6. Trial ⇐388(1)—Refusal of requests for findings of fact involves no question of law.

So far as requests involve findings of facts, their denial involves no question of law.

Appeal from Municipal Court of Boston, Appellate Division; Thomas H. Dowd, Judge.

cover back a deposit made under an agreement by the plaintiff to purchase real estate. From an order of the appellate division of the municipal court of the city of Boston dismissing report, defendants appeal. Affirmed.

W. J. Patron and S. H. Goldinger, both of Boston, for appellants.

B. N. Vernon and M. Katzeff, both of Boston, for appellee.

RUGG, C. J. This is an action to recover a deposit of $500, made by the plaintiff under an agreement by him to purchase and by the defendants to sell certain real estate. There were two counts in the plaintiff's declaration. The first alleged an agreement as to purchase and sale of the real estate, the plaintiff's payment to the defendants of the sum of $500 on account, the plaintiff's ability, readiness and willingness to carry out his part of the contract and the refusal by the defendants to carry out their part of the contract, and their refusal to return to him on demand the money paid them on account. The second count was for $500, money had and received by the defendants to the use of the plaintiff.

[1] The plaintiff was entitled on these pleadings to recover upon proof either of the breach of the contract by the defendants or of facts showing that the defendants had in their possession money of his which in equity and good conscience they ought to return to him. The joinder of these counts was no election by the plaintiff to rely solely upon the breach of the contract. It was, on the contrary, an assertion of a right to recover if the evidence supported the allegations of either count.

[2] The count for money had and received was an appropriate form of pleading on which to recover the $500 deposited by the plaintiff with the defendants on account of the sale, provided the proof showed that the contract was rescinded and the parties agreed that the money be returned to the plaintiff. Holbrook v. Dow, 1 Allen, 397; Fish v. Gates, 133 Mass. 441.

[3] No question of election between these two counts is presented on this record. The plaintiff was not asked or required to make such an election. The case was tried throughout on both counts. The circumstance that the second count was added at the beginning of the trial did not narrow the plaintiff's rights under it. There is nothing in the record which confined the plaintiff to his first count or to recovery on the theory of continued affirmation of the original contract.

[4] There was evidence tending to show that, after an examiner of titles had pointed out some possible defects in the title to the real estate, the parties agreed that the agreement was rescinded and the money should be returned. This evidence was sufficient to support a finding for the plaintiff upon the second count of the declaration. Burk v. Schreiber, 183 Mass. 35, 66 N. E. 411. The case of Marcus v. Clark, 185 Mass. 409, 70 N. E. 433, has no relevancy to the questions presented on this record.

[5] In view of this evidence the several requests by the defendants for rulings of law were denied rightly. They all appear to be based on the theory that recovery must be confined in substance to recovery upon the first count of the declaration. The second count in the declaration, as well as the credibility and weight of the evidence tending to support its allegations, was wholly ignored in the requests.

[6] So far as any of the requests involved findings of facts, their denial involves no question of law. Davis v. Boston Elevated Ry., 235 Mass. 482, 494, 495, 126 N. E. 841.

The trial judge found as a fact that the parties "mutually agreed to call off the agreement." There was evidence to support this finding. It must stand. No error is disclosed on the record.

Order dismissing report affirmed.

QUIMBY v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. March 14, 1924.)

1. Trial ⇐98—Ruling held to import finding of preliminary facts required for admission of statement of deceased.

Where defendant offered in evidence, as bearing on damages, a statement signed by a physician since deceased, and the judge remarked when objection was made that the requirement of the statute was that the deceased must have made a statement of facts of his own knowledge before the beginning of the action and in good faith, a ruling that whatever the plaintiff stated to the decedent might be read imported a finding of the preliminary facts required by G. L. c. 233, § 65.

2. Evidence ⇐318(1)—Statement signed by deceased 10 years before trial admissible.

Under G. L. c. 233, § 65, the fact that a statement was made by a party plaintiff and reduced to writing and signed by decedent 10 or 12 years before the trial did not render it incompetent.

3. Appeal and error ⇐1052(5)—Admission of evidence held harmless if error.

Any erroneous admission of evidence bearing only on the question of damages in personal injury case could not have been harmful to plaintiff where the jury returned a general verdict for the defendant.

Exceptions from Superior Court, Suffolk County; R. F. Raymond, Judge.

the Boston Elevated Railway Company, to recover for personal injuries received while a passenger upon defendant's car. Verdict for defendant, and plaintiff brings exceptions. Exceptions overruled.

J. M. Browne and H. A. Baker, both of Boston, for plaintiff.

R. L. Mapplebeck and A. E. Pinanski, both of Boston, for defendant.

RUGG, C. J. [1] This is an action of tort to recover compensation for personal injuries alleged to have been received by the plaintiff, in 1919, while a passenger of the defendant, through the negligence of its servants. The defendant offered in evidence, as bearing on damages, a statement signed by a physician, deceased at the time of the trial, concerning an injury received by the plaintiff in a station of the defendant in 1910. The judge remarked, when objection to this evidence was made by the plaintiff, that the requirement of the statute was that the deceased must have made the statement of facts of his own knowledge before the beginning of the action and in good faith. In these circumstances the ruling that whatever the plaintiff stated to the decedent might be read imported a finding of the preliminary facts required by G. L. c. 233, § 65; McSweeney v. Edison Electric Illuminating Co., 228 Mass. 563, 564, 117 N. E. 847; Eldridge v. Barton, 232 Mass. 183, 122 N. E. 272.

[2] The fact that the statement was made by the plaintiff and reduced to writing and signed by the decedent ten or twelve years before the trial did not render it incompetent.

[3] The statement was introduced in evidence only on the question of damages. The jury returned a general verdict for the defendant. Even if there had been error in the admission of evidence on the question of damages, it could not have harmed the plaintiff and the verdict would not be disturbed. Davis v. Elliott, 15 Gray, 90; Jordan v. Adams Gas Light Co., 231 Mass. 186, 120 N. E. 654; Franklin Park Lumber Co. v. Hule-Hodge Lumber Co., 246 Mass. 157, 140 N. E. 810.

Exceptions overruled.

GELDERT v. USHER et al.

(Supreme Judicial Court of Massachusetts. Suffolk. March 3, 1924.)

1. Limitation of actions ⇐36(1, 2)—Statute applies to suits in equity; constructive trusts subject to limitations.

The general statute of limitations applies to suits in equity, and cases of constructive trusts are subject to the statute.

Action against legal representatives of mortgagee for accounting held barred by statute.

Where deed to land was given as security for a loan, and the grantee died and executors qualified and collected rents and sold the land, an action by the grantee more than one year after the sale against the executors for an accounting and for damages for breach of trust by the defendants was barred by G. L. c. 260, § 11, and grantor could not be aided by chapter 197, § 10, excusing delay by one not guilty of culpable negligence, as this applies only to a creditor of deceased.

Appeal from Supreme Judicial Court, Suffolk County.

Suit in equity by Esther S. Geldert against Samuel Usher and others for an accounting. From an interlocutory decree sustaining a demurrer, and a final decree dismissing the bill, complainant appeals. Affirmed.

A. W. Blakemore, of Boston, for appellant.

A. W. Rockwood, of Boston, for appellees.

CARROLL, J. The plaintiff alleges in her bill that on December 18, 1914, she conveyed certain real estate to one Hartshorn, by an instrument in writing which contained this provision:

"This deed is given to the grantee subject to a mortgage assigned to said William N. Hartshorn, which mortgage is still to remain in force as if this deed had not been given, except that any sum received from rents or income, or from any other source from this estate, above expenses and charges, together with any amounts expended in repairs shall be deducted from the amount due on the mortgage note given to Thomas Arnold and assigned to said William N. Hartshorn with said mortgage. Notice is hereby given of incumbrances of record."

She also alleges that Hartshorn died in the year 1920 and the defendants duly qualified as his executors on January 7, 1921; that the deed to Hartshorn was security for a loan of $1,000; that he was to hold the property and the rents collected as security, and after payment of the loan and the charges of operating the property, to convey the property to the plaintiff; that the net profits have been sufficient to pay the loan, "the mortgage on said property, and a substantial sum in addition"; that Hartshorn rendered no account to the plaintiff, and the defendants on June 8, 1921, obtained a license to sell and "did shortly thereafter sell said real estate * * * for $3,250, subject to a mortgage then alleged to be $6,250, all without notice to the plaintiff; that said price was inadquate"; and that the net profits since 1914 have been sufficient to pay the mortgage and other indebtedness.

The plaintiff prayed for an accounting, that damages be awarded her for breach of

erty; that they be ordered to pay the net profits due her; that the value of the equity above the mortgage be assessed and charged to the defendants; that they be ordered to pay this sum to her; and that a trust be declared "in the funds now in the hands of the defendants." The bill was filed December 13, 1922. The defendants' demurrer was sustained and the plaintiff appealed.

Hartshorn died in the year 1920. On June 8, 1921, the defendants obtained a license to sell and did sell the property. The plaintiff's bill was filed December 13, 1922, more than one year after the sale. The bill is brought to recover the surplus rents received by the defendants and the value of the land sold by them, it being alleged that the deed to Hartshorn was given merely as security. The plaintiff does not seek to recover because of Hartshorn's acts, and it does not appear that when he died sufficient funds had been collected to pay the plaintiff's indebtedness. The claims of the plaintiff, both as to the profits and the value of the land, are demands against the defendants, and not against Hartshorn.

Under G. L. c. 260, § 11, the claims against the defendants are barred, that statute providing that an action founded on any contract "or act done" by any person acting as an executor, administrator, or other legal representative of an estate of a deceased person, shall be brought within one year. The title of Hartshorn as an alleged mortgagee vested in the defendants as his executors. Miller & Sons, Limited, v. Blinn, 219 Mass. 266, 271, 106 N. E. 985. They had the right to collect rents, Holman v. Bailey, 3 Metc. 55, 57, and the property was sold by them. These acts of the defendants occurred more than one year before the bill was filed.

[1, 2] The statute speaks of an action, and an action ordinarily refers to a proceeding at law. Farnam v. Brooks, 9 Pick. 212, 242. The general statute of limitations in this commonwealth applies to suits in equity. Cases of constructive trusts are subject to the same statute. See Farnam v. Brooks, supra; Ela v. Ela, 158 Mass. 54, 32 N. E. 957; Bremer v. Williams, 210 Mass. 256, 96 N. E. 687.

It is also alleged in the bill that the plaintiff in September, 1921, knew that the defendant sold the real estate; that she then wrote the defendant Anden asking for an account; that she told him she was going to bring suit and immediately consulted a member of the bar, who "after some delay told her that he was too busy to take her case," and that later she consulted another lawyer, "who, after some delay, on December 20, 1921, wrote her a letter declining to act." These allegations, apparently, are made to bring the case within G. L. c. 197, § 10. By that statute in a bill in equity, filed by a creditor whose claim had not been prosecuted within the time limited by G. L. c. 197, § 9, if the creditor is not chargeable with culpable negligence, he may be given judgment for the amount of his claim. This statute, however, applies only to creditors of a deceased debtor. It has no application to a creditor whose cause of action arises from the acts of an executor.

The frame of the plaintiff's bill is not to redeem from the deed, alleged to be in effect a mortgage, which was given to Hartshorn; the title thereunder is stated to be outstanding in the name of third persons who are not parties to the suit. The plaintiff's suit is based on the acts of the executor, and G. L. c. 197, § 10, does not help her. Nashua Savings Bank v. Abbott, 181 Mass. 531, 63 N. E. 1058, 92 Am. St. Rep. 430, relied on by the plaintiff, had reference to what is now G. L. c. 197, § 9, and was decided before the year 1911, when St. 1911, c. 147, was passed. See St. 1914, c. 699, § 3, now G. L. c. 260, § 11.

The interlocutory decree sustaining the demurrer and the final decree dismissing the bill are affirmed.

Ordered accordingly.

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⇐53 (Mass.) "Bill of lading" receipt of quantity and description of goods shipped, and contract to transport and deliver.—L. L. Cohen & Co. v. Davis, 75.

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⇐133 (Mass.) No recovery for refusal to transfer stock when injunction in force restraining transfer.—Bartnett v. Handy, 84.

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⇐182 (N.Y.) Court *held* to have power to correct error by modifying report of appraisers of stock of minority stockholders objecting to sale of real estate.—In re Erlanger, 571.

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⇐588 (Ill.) Corporation created by consolidation of other corporations, if public utility, must obtain commerce commission's authorization of bond issue.—Southern Illinois Gas Co. v. Commerce Commission, 500.

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⇐92 (Ind.App.) Discussion of point not involved in opinion *held* "obiter dictum."—Smith v. Smith, 128.

⇐97(1) (Mass.) United States Supreme Court final arbiter in marking out boundary between federal and state jurisdiction.—Ahern's Case, 703.

⇐97(1) (N.Y.) Federal Supreme Court rule as to application of common-law rule of contributory negligence in actions for maritime torts in state courts followed.—Maleeny v. Standard Shipbuilding Corporation, 602.

⇐114 (Ind.App.) Record may be corrected nunc pro tunc after term of court.—Miller v. Seiler, 719.

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⇐240 (Ohio) Decree terminating a charitable trust created by will appealable to Court of Appeals; "chancery case."—Gearhart v. Richardson, 890.

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⇐488(1) (Ind.) No reference to Appellate Court's opinion required in Supreme Court's opinion after transfer for erroneous declaration of law.—Riverside Coal Co. v. North Indianapolis Cradle Works, 377.

⇐488(4) (Mass.) Cause properly remanded where transfer made on defendant's unsworn statement.—McLaughlin v. Levenbaum, 906.

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Hope for milder punishment by entry of plea

alent to plea of former acquittal, and may be pleaded specially.—Earle v. State, 405.

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⇐294 (Ind.) Pleadings *held* sufficient to admit evidence of former jeopardy.—Earle v. State, 405.

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⇐294 (Ind.) Proof of former jeopardy under plea of not guilty must establish facts defendant would have been required to plead in written plea.—Mood v. State, 641.

⇐295 (Ind.) Burden of proof on plea of former acquittal or conviction is on defendant.—Mood v. State, 641.

Former jeopardy plea must be supported by evidence as to identity of offense.—Id.

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⇐296 (Ind.) Defendant entitled to be tried separately on special plea of former jeopardy.—Earle v. State, 405.

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⇐338(4, 5) (Mass.) Admission of court record showing plea of guilty by another *held* error.—Commonwealth v. Perry, 840.

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⇐369(2) (Ill.) Evidence as to other sales *held* admissible in prosecution for violation of Illinois Securities Law.—People v. Love, 204.

⇐369(2) (Ill.) Commission of other crimes not ground for conviction.—People v. Meisner, 482.

⇐369(3) (Ill.) Evidence as to offenses committed on nights preceding and following murder *held* incompetent.—People v. Meisner, 482.

⇐369(9) (Ill.) Proof of larceny, disconnected with offense, *held* inadmissible.—People v. Ensor, 175.

⇐370 (Ill.) Testimony of other victims competent to show guilty knowledge.—People v. Harrington, 246.

⇐370 (Ill.) Evidence that defendant had on other occasions received stolen property from same thieves *held* admissible to show knowledge.—People v. Wagman, 743.

⇐374 (Ill.) Evidence of false representations in similar transactions by agents of defendant's corporation *held* inadmissible.—People v. Massie, 503.

⇐381 (Ill.) Bad character not ground for conviction.—People v. Meisner, 482.

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⇐394 (Ind.) Evidence obtained in invited search admissible notwithstanding invalidity of warrant.—Meno v. State, 382.

⇐395 (Ind.) Allegations of illegal seizure *held* insufficient against demurrer.—Earle v. State, 405.

⇐396(1) (Ill.) Introduction of evidence of another crime by defendant *held* not authorized by latter's evidence.—People v. Meisner, 482.

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⇐402(1) (Ill.) Exclusion of testimony as to assignment of oil lease to defendant's corporation *held* error.—People v. Massie, 503.

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⇐423(1) (Ill.) Evidence of other crimes, the result of conspiracy, *held* admissible.—People v. Wagman, 743.

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⇐427(2) (Ind.) Testimony as to conversation with defendant's coconspirator out of defendant's presence admissible notwithstanding failure to charge conspiracy.—Gillespie v. State, 220.

⇐427(3) (Mass.) Evidence *held* admissible on charge of conspiracy.—Commonwealth v. Perry, 840.

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⇐451(1) (Mass.) Testimony *held* to describe act, and not mental process.—Commonwealth v. Perry, 840.

⇐459 (Ind.) One knowing smell of whisky may testify that liquor is whisky from having smelled it.—Stankiewoecz v. State, 615.

⇐470 (Ill.) Testimony that infection causing death was caused by abortion admissible.—People v. Carrico, 164.

⇐478(1) (Mass.) Chemical expert *held* competent.—Commonwealth v. Reilly, 915.

⇐481 (Mass.) Competency of chemical expert largely within discretion of trial court.—Commonwealth v. Reilly, 915.

⇐483 (Mass.) Inquiry of chemical expert *held* proper.—Commonwealth v. Reilly, 915.

⇐485(1) (Ill.) Opinion as to speed of car given in answer to hypothetical question assuming facts not in evidence *held* incompetent.—People v. Kemming, 529.

⇐488 (Mass.) Experiments admissible within discretion of court.—Commonwealth v. Reilly, 915.

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⇐510 (Ill.) Conviction may be sustained on uncorroborated testimony of accomplice.—People v. Wagman, 743.

⇐510 (Ind.) Defendant may be convicted of larceny on uncorroborated testimony of accomplice.—Payne v. State, 651.

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⇐622(2) (Ind.) Denial of separate trial in prosecution for misdemeanor *held* not error.—Shockley v. State, 850.

⇐622(2) (Ind.) Denial of motion for separate trials *held* not error.—Neely v. State, 852.

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⇐656(9) (Ill.) Court should express no opinion on weight of testimony.—People v. Carrico, 164.

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⇐663 (Ill.) That exhibit refused admission seen by jury *held* not ground for complaint.—People v. Powloski, 551.

⇐673(4) (Mass.) Court erred in not charging that certain evidence should not be considered against one defendant.—Commonwealth v. Perry, 840.

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⇐691 (Ind.) Defendant cannot complain of questions as to information obtained by unlawful search of codefendant's premises.—Walker v. State, 10.

⇐695(6) (Mass.) Defendant *held* not entitled to except to admission of letters as whole, where he refused to point out part not pertinent.—Commonwealth v. Perry, 840.

⇐696(3) (Ind.) Motion to strike out evidence for reasons different from those stated in objection to its admission overruled.—Kline v. State, 713.

⇐696(5) (Ind.) Overruling motion to strike out evidence not reversible error where admitted without objection.—Kline v. State, 713.

⇐696(7) (Mass.) No error in refusing to strike entire answer, part of which was pertinent.—Commonwealth v. Reilly, 915.

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⇐742(1) (Ill.) Province of jury to determine credibility of witnesses and disbelieve testimony as to alibi.—People v. Kemming, 529.

⇐742(1) (Ind.) Credibility of witnesses and weight of testimony for court or jury trying case.—Donnelly v. State, 705.

⇐742(2) (Ill.) Credibility of testimony of accomplice for jury.—People v. Wagman, 743.

⇐753(3) (Mass.) Direction of verdict of guilty *held* proper.—Commonwealth v. Ross, 791.

⇐766 (Ind.) Instruction as to power of jury to determine law *held* not invasive of their province.—Hoffa v. State, 653.

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⇐782(1) (Ind.) Instruction authorizing consideration of all facts and circumstances *held* not erroneous.—Kell v. State, 865.

⇐783(1) (Ind.) Admission of evidence of defendant's relations with women other than prosecutrix properly limited by instruction.—Kell v. State, 865.

⇐785(3) (Ind.) Instruction not open to objection that it required jury to consider all the evidence on the credibility of witnesses.—Kell v. State, 865.

⇐786(2) (Ind.) Instruction to consider defendant's testimony, even if believed in connection with testimony of other witnesses, *held* erroneous.—Kell v. State, 865.

⇐813 (Ill.) Abstract instructions on subject covered by instruction applying law to facts *held* improper.—People v. Meisner, 482.

⇐814(1) (Ind.) Instructions which incorrectly stated the law as applied to the evidence *held* properly refused.—Kell v. State, 865.

⇐814(11) (Ill.) Instructions on alibi *held* properly refused as inapplicable to facts.—People v. Meisner, 482.

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⇐878(1) (Ill.) Verdict not too uncertain to sustain conviction.—People v. Quesse, 187.

⇐878(2) (Ind.) General verdict of guilty construed as being on offense proved where only one was proved.—Meno v. State, 382.

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⇐878(3) (Ill.) Counts *held* not identical; hence acquittal as to one not acquittal as to other.—People v. Quesse, 187.

⇐893 (Ill.) Whether jury's intention can be ascertained, test as to sufficiency of verdict.—People v. Quesse, 187.

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⇐913(1) (Ind.) Defendant's assignments *held* not grounds for new trial.—Utley v. State, 377.

⇐915 (Ind.) Defendant's assignments *held* not grounds for new trial.—Utley v. State, 377.

⇐935(1) (Ind.) Proof of possession *held* sufficient proof of ownership as against motion for new trial in larceny prosecution.—Donnelly v. State, 219.

⇐938(2) (Ill.) Denial of new trial *held* not error.—People v. Harrington, 246.

⇐951(1) (Ind.) Motion in arrest of judgment *held* to cut off right to file motion for new trial.—Earle v. State, 405.

⇐956(4) (Ill.) Affidavit for new trial on ground constitutional rights were denied in entering plea of guilty *held* insufficient.—People v. Kawoleski, 169.

⇐957(1) (Ind.) Juror not permitted to impeach verdict in support of motion for new trial.—Meno v. State, 382.

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⇐998 (Ill.) Refusal to vacate sentence entered on plea of guilty *held* not abuse of discretion.—People v. Kleist, 486.

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⇐1026 (Ind.) Statute *held* not to grant right of appeal to any one convicted of criminal offense.—Farlow v. State, 849.

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⇐1030(1) (Ind.) Objections not presented in trial court cannot be urged on appeal.—Dillon v. State, 643.

⇐1031(4) (Ind.) Answer not tested by demurrer, motion, or otherwise not questioned for sufficiency of facts upon appeal.—Earle v. State, 405.

⇐1032(5) (Mass.) Sentence under complaint stating no crime improper and should be reversed.—Commonwealth v. Andler, 921.

⇐1032(7) (Ind.) Objection because of variance in description must be taken when evidence is offered.—Donnelly v. State, 219.

⇐1032(7) (Ind.) Variance *held* not available on appeal in absence of objection and assignment of ruling as ground for new trial.—Gillespie v. State, 220.

⇐1033(1) (Ind.) Jurisdiction over person or subject-matter may be first raised on appeal.—Neely v. State, 852.

⇐1038(3) (Ind.) An appellant who did not tender more complete instruction on subject cannot complain that instruction given was incomplete.—Meno v. State, 382.

⇐1038(3) (Ind.) Failure to request instructions precludes complaint of mere incompleteness in instructions given.—Hoffa v. State, 653.

⇐1048 (Ind.) Rulings must be excepted to when made.—Kline v. State, 713.

⇐1063(2) (Ind.) Variance *held* not available on appeal in absence of objection and assignment of ruling as ground for new trial.—Gillespie v. State, 220.

⇐1064(1) (Ind.) Only errors presented on motion for new trial are available on appeal.—Poehler v. State, 410.

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⇐1068½ (Ind.) Statute *held* not to provide manner of taking appeal.—Farlow v. State, 849.

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⇐1088(11) (Ind.) Instructions must be made part of record by bill of exceptions.—Gillespie v. State, 220.

Instructions not made part of record not considered on appeal.—Id.

⇐1088(11) (Ind.) Instructions not considered on appeal unless made part of record by bill of exceptions.—McNaught v. State, 418.

⇐1088(14) (Ind.) Bill of exceptions not presented and filed within required time not part of record on appeal.—McNaught v. State, 418.

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⇐1090(8) (Ind.) Sufficiency of evidence not considered in absence of bill of exceptions.—McNaught v. State, 418.

⇐1106(2) (Ind.) Transcript must be filed within 90 days after service of notice of appeal, notwithstanding bail bond and order.—Farlow v. State, 849.

Statute *held* not to lengthen time within which transcript in criminal appeal may be filed.—Id.

⇐1106(3) (Ind.) Filing the transcript on appeal within statutory time a jurisdictional act.—Farlow v. State, 849.

⇐1111(1) (Ind.) Brief varying from record as to ground of objection precludes review of point raised.—Dillon v. State, 643.

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⇐1130(2) (Ind.) Brief not containing evidence will not support assignment that findings were contrary to evidence.—Poehler v. State, 410.

⇐1130(2) (Ind.) Ruling on motion for change of venue not considered because of omissions in brief.—Donnelly v. State, 705.

Brief not including evidence *held* insufficient compliance with Supreme Court rule.—Id.

⇐1130(5) (Ind.) Brief not including points or authorities *held* insufficient compliance with Supreme Court rule.—Donnelly v. State, 705.

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⇐1134(3) (Ind.) Unnecessary to discuss questions on appeal, where their consideration would not lead to reversal.—Carr v. State, 378.

⇐1144(17) (Ind.) Judgment assumed to rest on good counts of indictment.—Walker v. State, 16.

⇐1151 (Ill.) Discretion not disturbed, except for abuse.—People v. Kleist, 486.

⇐1159(2) (Ill.) Supreme Court should reverse conviction if it cannot say that guilt proven beyond reasonable doubt.—People v. Kemming, 529.

⇐1159(2) (Ill.) On review of conviction, duty of Supreme Court to determine whether reasonable doubt exists.—People v. Kratz, 561.

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⇐1166(1) (Ind.) Granting change of venue from judge upon motion of codefendant *held* not prejudicial.—Shockley v. State, 850.

⇐1166½(12) (Ill.) Remarks of court as to partisanship of witness not reversible error.—People v. Carrico, 164.

⇐1169(1) (Ind.) Admission of incompetent evidence not relating to proof of essential element of offense harmless error.—Dillon v. State, 643.

Conviction not reversed because of admission of harmless nonprejudicial evidence.—Id.

⇐1169(1) (Mass.) Admission of court record showing plea of guilty by another *held* prejudicial error.—Commonwealth v. Perry, 840.

Admission of evidence *held* prejudicial.—Id.

⇐1169(2) (Ind.) Harmless error to admit incompetent evidence of facts proved by competent evidence.—Dillon v. State, 643.

⇐1169(2) (Ind.) Admission of evidence as to reputation of place *held* not prejudicial.—Shockley v. State, 850.

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⇐1169(6) (Ind.) Improper cross-examination of defendant as to husband's guilt of prior offense *held* not prejudicial error.—Walker v. State, 16.

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On sale of infant's property no tort committed until after avoidance, and conversion does not relate back so as to make transaction void ab initio.—Id.

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Rescission of transfer of certificate of stock does not invalidate purchaser's subsequent transfer to one in good faith.—Id.

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⇐31(2) (N.Y.) Right to avoid contracts does not depend on ability to restore consideration.—Casey v. Kastel, 671.

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⇐146(3) (N.Y.) Policy susceptible of two interpretations construed most strongly against insurer.—Ira S. Bushey & Sons v. American Ins. Co., 340.

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⇐155 (Ind.) Construction of life insurance policy by state insurance department *held* in-

⇐162 (N.Y.) Builders' risk policy covers loss of materials delivered on ground, and manifestly intended to be incorporated in building.—Ira S. Bushey & Sons v. American Ins. Co., 340.

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⇐42(4) (Ill.) Evidence *held* to prove sale of securities to persons other than stockholders in violation of Securities Law.—People v. Love, 204.

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⇐329 (Ind.) Complaint *held* sufficiently to allege assault and battery through servant.—Princeton Coal Co. v. Dowdle, 419.
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⇐332(1) (Mass.) Evidence *held* not to warrant submission of truck owner's liability for injury.—Moquin v. Kalicka, 639.
⇐332(2) (Mass.) Jury not bound to credit uncontradicted testimony as to automobile driver's authority.—McDonough v. Vozzela, 831.
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⇐356 **(Ohio)** Contributory negligence and fellow-servant doctrine available in action based on willful act against employer complying with Compensation Act.—Gildersleeve v. Newton Steel Co., 678.

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⇐361 **(Ill.)** Moving picture theater employee *held* engaged in "extrahazardous" business within Compensation Act.—Ascher Bros. Amusement Enterprises v. Industrial Commission, 488.

⇐367 **(Ill.)** Compensation claimant *held* employee of independent contractor.—Indiahoma Refining Co. v. Industrial Commission, 527.

⇐367 **(Ind.App.)** Contractor *held* an "independent contractor."—Zainey v. Rieman, 397.

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⇐371 **(Ill.)** "Accident" and "accidental injury" within Compensation Act defined.—Peru Plow & Wheel Co. v. Industrial Commission, 546.

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⇐373 **(Ill.)** "Occupational disease" not compensable as "accident."—Peru Plow & Wheel Co. v. Industrial Commission, 546.

"Accident" within Compensation Act and "occupational diseases" distinguished.—Id.

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⇐373 **(Ind.App.)** Occupational disease *held* not compensable as "accident."—Moore v. Service Motor Truck Co., 19.

⇐373 **(Ind.App.)** Sunstroke an "accident" within Compensation Act.—Townsend & Freeman Co. v. Taggart, 657.

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⇐374 **(Ill.)** Pneumonia *held* not compensable as result of injury.—Perry County Coal Corporation v. Industrial Commission, 455.

⇐375(1) **(Ill.)** Injuries *held* compensable as arising out of employment.—Brooks Tomato Products Co. v. Industrial Commission, 451.

⇐375(1) **(Mass.)** Injury to motorman crossing street for a drink *held* not compensable as "arising out of employment."—Gardner's Case, 32.

⇐376(2) **(Ill.)** Death from disease, aggravated by "accident," *held* compensable.—Chicago & Alton R. Co. v. Industrial Commission, 182.

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⇐385(15) **(Ill.)** "Temporary disability" within compensation act defined; "permanent disability."—Consolidated Coal Co. of St. Louis v. Industrial Commission, 498.

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⇐388 (Mass.) Illegitimate child of employee not entitled to compensation as a "dependent" or "child" when not living with him.—Olson's Case, 808.

⇐398 **(Ind.)** Compensation insurer's action against their person causing injuries, *held* barred by limitation; "employer."—Employers' Liability Assur. Corporation v. Indianapolis & Cincinnati Traction Co., 856.

⇐403 **(Ind.App.)** Extent of compensable disability must be proved.—Western Const. Co. v. Early, 396.

⇐403 **(Mass.)** Burden of proof on compensation claimant to show cause and extent of incapacity.—Kiley's Case, 638.

⇐405(1) **(Ill.)** Compensation award must be supported by preponderance of evidence.—Consolidated Coal Co. of St. Louis v. Industrial Commission, 498.

⇐405(1) **(Ind.App.)** Compensation award cannot rest on conjecture.—Townsend & Freeman Co. v. Taggart, 657.

⇐405(4) **(Ill.)** Evidence in compensation case *held* to prove lifting contributed to employee's death.—Chicago & Alton R. Co. v. Industrial Commission, 182.

⇐405(4) **(Ill.)** Evidence *held* to show compensable injury to employee dying from tumor.—Ascher Bros. Amusement Enterprises v. Industrial Commission, 488.

⇐405(6) **(Ill.)** Evidence in compensation case *held* to justify finding as to period of temporary total disability.—Consolidated Coal Co. of St. Louis v. Industrial Commission, 498.

⇐405(6) **(Ill.)** Evidence in compensation case *held* to show permanent total disability.—Old Ben Coal Corporation v. Industrial Commission, 507.

⇐405(6) **(Ind.App.)** Finding of Industrial Board as to extent of compensable disability sustained.—Western Const. Co. v. Early, 396.

⇐415 **(Ill.)** Incompetent evidence, received without objection in compensation case, may be considered.—Ascher Bros. Amusement Enterprises v. Industrial Commission, 488.

⇐416 **(Ill.)** Stenographic report in compensation case must be filed within time.—Baker v. Industrial Commission, 184.

Method of review under Compensation Act exclusive.—Id.

Delay in filing transcript in compensation case may be waived.—Id.

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⇐416 **(Ind.App.)** Findings of injury by accident arising out of employment essential to sustain award of compensation.—Townsend & Freeman Co. v. Taggart, 657.

⇐417(2) **(Ind.)** Court's answer to Industrial Board's question under Compensation Act advisory and not an adjudication.—State v. McMahan, 213.

⇐417(4¼) **(Mass.)** Copies of decision of reviewing board should be certified.—Olson's Case, 808.

⇐417(5) **(Ind.App.)** Award within limitation of compensation act final.—Western Const. Co. v. Early, 396.

⇐417(7) **(Ill.)** Court will give due weight to finding of fact in compensation case.—Consolidated Coal Co. of St. Louis v. Industrial Commission, 498.

⇐417(7) **(Ind.App.)** Finding of Industrial Accident Board on evidence in compensation case final.—Moore v. Service Motor Truck Co., 19.

⇐417(7) **(Ind.App.)** Findings by Industrial Board on evidence final.—Townsend & Freeman Co. v. Taggart, 657.

⇐417(7) **(Mass.)** Weight of testimony in compensation case for board.—Kiley's Case, 638.

⇐417(7) **(Mass.)** Finding of jurisdiction in compensation case sustained if supported by evidence.—O'Hara's Case, 844.

⇐417(8) **(Ill.)** Lack of finding as to earning capacity *held* not to invalidate award of compensation for permanent partial incapacity.—Consolidated Coal Co. of St. Louis v. Industrial Commission, 498.

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⇐120 (Ohio) Attorney of owner *held* not an "agent" on whom service of notice under mechanics' lien law may be made.—Mahoning Park Co. v. Warren Home Development Co., 883.

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⇐48 (Ind.) Coal under ground real estate.—Cypress Creek Coal Co. v. Boonville Mining Co., 645.

⇐51(5) (Ind.) Measure of damages for removal of coal stated.—Cypress Creek Coal Co. v. Boonville Mining Co., 645.

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⇐58 (Ind.) Lease *held* not void for want of mutuality.—Cypress Creek Coal Co. v. Boonville Mining Co., 645.

Provision making lessee judge as to right to abandon lease *held* not to invalidate lease.—Id.

Execution of new lease by an adjoining owner to same lessee *held* not to avoid prior lease by two adjoining owners.—Id.

⇐63 (Ind.) Lease *held* not to create tenancy at will, notwithstanding forfeiture clause.—Cypress Creek Coal Co. v. Boonville Mining Co., 645.

⇐68(1) (Ind.) Provision of lease requiring lessee to begin "operation" within specified period construed.—Cypress Creek Coal Co. v. Boonville Mining Co., 645.

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⇐25(2) (Mass.) Mortgage note *held* not given without consideration.—Cosmopolitan Trust Co. v. Cirace, 914.

⇐30 (N.Y.) Delivery of deeds for preparation of mortgage *held* insufficient to establish equitable mortgage.—Sleeth v. Sampson, 355.

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⇐199(1) (Mass.) Mortgagor entitled to rents and profits while in possession.—Winnisimmet Trust v. Libby, 772.

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Exemption from liability to lessor mortgagor does not depend upon recognition of paramount title of mortgagee.—Id.

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⇐199(1) (Mass.) Plaintiff *held* entitled to recover rentals collected by mortgagor's tenant.—Cosmopolitan Trust Co. v. Cirace, 914.

⇐218 (Mass.) Answer pleading accord and satisfaction *held* to set up affirmative defense casting burden of proof on defendant.—McCarthy v. Simon, 806.

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⇐372(4) (Mass.) Mortgagor entitled to rents and profits between sale and delivery of deed.—Beal v. Attleboro Sav. Bank, 789.

⇐374 (Mass.) Auction sale under power *held* in effect mere contract of sale.—Beal v. Attleboro Sav. Bank, 789.

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⇐407(2) (Ind.) Act providing for assessment for improvements *held* not violative of constitutional provision for uniform and equal rate of assessment.—Hutchins v. Incorporated Town of Fremont, 3.

⇐418 (Ill.) Fire hydrants may be paid for by assessment.—Village of Elmwood Park v. L. H. Mills & Sons, 532.

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⇐705(11) (Mass.) Primary cause of train of events may be proximate cause.—Fraser v. Flanders, 836.

⇐706(1) (Ind.) Complaint *held* to seek damages for personal injuries and allegation negativing contributory negligence was unnecessary.—Fame Laundry Co. of Indiana v. Henry, 379.

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⇐706(5) (Ind.App.) Verdict for injuries to bicycle rider struck by truck *held* not sustained by evidence.—Winski v. Clegg, 130.

⇐706(5) (Mass.) Testimony that truck was going fast too indefinite to show negligence.—Whalen v. Mutrie, 45.

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⇐706(5) (Mass.) Injured pedestrian not bound to point out exact way in which accident occurred.—Fraser v. Flanders, 836.

⇐706(6) (Ind.App.) Negligence of truck driver *held* for jury.—Winski v. Clegg, 130.

⇐706(6) (Mass.) Negligence of automobile driver *held* for jury.—Braun v. Bell, 93.

⇐706(6) (Mass.) Negligence of automobilist *held* for jury.—Fraser v. Flanders, 836.

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⇐817(3) (Ind.App.) Plaintiff not required to prove freedom from contributory negligence.—Town of Hobart v. Casbon, 138.

⇐819(1) (Ind.App.) Finding of negligence in permitting unlighted traffic post in street sustained.—Town of Hobart v. Casbon, 138.

⇐819(7) (Ind.App.) Finding driver not negligent in colliding with unlighted traffic post sustained.—Town of Hobart v. Casbon, 138.

⇐822(1) (Ind.App.) Instruction *held* not to require automobile driver to pass other automobile overtaken by him.—Town of Hobart v. Casbon, 138.

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⇐865(2) (Ind.) Levy for improvements *held* not to increase town indebtedness beyond constitutional limit.—Hutchins v. Incorporated Town of Fremont, 3.

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⇐917(1) (Ind.App.) State tax board's jurisdiction to determine question of issue of municipal bonds.—Bailey v. Board of Com'rs of Clinton County, 655.

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⇐956(1) (Ill.) Judges of municipal court of Chicago are "corporate authorities."—People v. City of Chicago, 161.

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⇐37(4) (N.Y.) Grant from state conveys merely to shore of navigable lake.—Stewart v. Turney, 437.

Grantee from state of lot on Cayuga Lake *held* to take to low-water mark.—Id.

⇐38 (Mass.) Statutory authority to fill flats *held* grant and not license.—Jackson v. Revere Sugar Refinery, 909.

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Persons holding under grant of right to fill flats *held* not liable to assessment for tidewater displacement.—Id.

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⇐15 (Mass.) Wrongdoer severally and jointly responsible.—Fraser v. Flanders, 836.

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⇐22½ (Mass.) Automobile owner not liable to guest except for gross negligence.—Lyttle v. Monto, 795.

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⇐32(1) (Mass.) Duty to licensee limited to refraining from willful injury.—Murphy v. Boston & M. R. R., 782.

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⇐85(3) (Mass.) Child 4 years of age *held* not as matter of law incapable of exercising care in crossing highway.—McDonough v. Vozzela, 831.

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⇐111(1) (Ind.App.) Theory of negligence to be stated in complaint.—Chicago, T. H. & S. E. Ry. Co. v. Collins, 634.

⇐119(1) (Ind.App.) Plaintiff not required to prove all allegations of negligence.—Lathrop v. Frank Bird Transfer Co., 868.

⇐119(4) (Ind.App.) Objection to evidence not within pleading must be sustained.—Chicago, T. H. & S. E. Ry. Co. v. Collins, 634.

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⇐122(1) (N.Y.) Burden of proving contributory negligence on defendant.—Horton v. New York Cent. R. Co., 345.

⇐134(4) (Mass.) Finding of negligence as to boy on truck sustained.—Lyttle v. Monto, 795.

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⇐136(8) (Mass.) Where facts undisputed, verdict may be directed.—Doyle v. Boston Elevated Ry. Co., 693.

⇐136(18) (Mass.) Whether boy on automobile truck was mere licensee *held* for jury.—Lyttle v. Monto, 795.

⇐136(30) (Mass.) Whether custodians of child run down by automobile exercised due care for jury.—McDonough v. Vozzela, 831.

⇐138(2) (Ind.App.) Res ipsa loquitur doctrine not properly applied to proximate cause of injury.—Pittsburgh, C. C. & St. L. R. Co. v. Boughton, 869.

⇐142 (Ind.App.) Denial of motion for judgment non obstante on ground answers to interrogatories showed contributory negligence *held* not error.—Winski v. Clegg, 130.

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⇐18 (Ind.App.) Overruling motion to strike from complaint not cause for new trial.—Hopkins v. Dreyer, 17.

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⇐73 (N.Y.) Special verdict could be set aside as against weight of evidence.—Greenpoint Nat. Bank of Brooklyn v. Gilbert, 338.

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⇐143(1) (Ohio) Verdict may not be impeached by evidence of member of jury though he does not join therein.—Schwindt v. Graeff, 736.

⇐153 (Ind.) Motion for new trial *held* sufficiently filed.—State v. Cox, 862.

⇐153 (Ind.App.) Court empowered to extend time for filing of affidavits in opposition to motion.—Louisville & Southern Indiana Traction Co. v. Miller, 410.

court has no discretion as to ruling thereon.—State v. Cox, 862.

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⇐3 (Ohio) Imposition of additional duties *held* not "creation of new office."—State v. Powell, 401.

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⇐39 (Ill.) Officer or public body cannot have de facto existence if de jure officer or body is functioning.—People v. Brautigan, 208.

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⇐79 (Ill.) "De jure officer" defined.—People v. Brautigan, 208.

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⇐119 (Mass.) Trustees of agricultural school of county could not maintain suit against county and county commissioners concerning school land.—Bauer v. Mitchell, 815.

Plain statutory words necessary to authorize one public board to institute suit in equity against another public board.—Id.

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⇐11 (Ind.App.) Unemancipated minor could not recover damages for torts of father during minority.—Smith v. Smith, 128.

Reasons for rule against recovery for parent's torts to child during minority *held* not to have disappeared.—Id.

⇐17(7) (Ohio) Verdict of guilty of "abandoning" child *held* sufficient under statute against "neglect."—Norman v. State, 234.

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⇐21 (Mass.) One alone financially interested in result of suit necessary party.—Bauer v. Mitchell, 815.

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⇐63 (Mass.) Substitution of party not commencement of new action.—L. L. Cohen & Co. v. Davis, 75.

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⇐95(6) (Mass.) Amendment bringing in county permitted, where action prosecuted against commissioners.—Bauer v. Mitchell, 815.

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⇐88 (Ill.) In suit by heirs, decree ordering payment of undisputed claims against estate, out of interest of each heir, *held* proper.—Miller v. Moseley, 509.

⇐89 (Ill.) Decree ordering foreclosure of mortgage liens and payment of claims against estate land *held* proper without cross-bill.—Miller v. Moseley, 509.

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⇐49 (Ind.App.) Refusal to admit trade acceptance signed by one of alleged partners *held* not error.—Eastern Rock Island Plow Co. v. Hinton, 230.

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(A) Firm Property and Business.

⇐70 (Mass.) Partners owe highest degree of good faith to one another.—Flint v. Codman, 256.

⇐76 (Mass.) Title to property in firm and not individual.—Kilduff v. Boston Elevated Ry. Co., 98.

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(D) Actions by or Against Firms or Partners.

⇐218(3) (Ind.App.) On conflicting evidence existence of partnership is question of fact.—Eastern Rock Island Plow Co. v. Hinton, 230.

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⇐10 (Ind.App.) Theory of complaint not changed by averment that continued trespasses would ripen into an easement.—Evans v. Shephard, 730.

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⊂=4(14) (Ind.) Devise limited on death without issue *held* too remote.—Quilliam v. Union Trust Co. of Indianapolis, 214.
⊂=6(5) (Ind.) Provision in will suspending power to alienate real estate *held* void.—Quilliam v. Union Trust Co. of Indianapolis, 214.
⊂=8(1) (Ind.App.) Rule inapplicable to gifts to charity where title vests immediately.—Barr v. Geary, 622.
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⊂=16 (Mass.) Dental company could not avoid liability where unregistered person extracted tooth.—McDonald v. Dr. McKnight, Inc., 825.
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⊂=18(6) (Mass.) Court should have instructed loss of leg did not raise presumption of negligence.—King v. Belmore, 911.
⊂=18(9) (Mass.) Whether certain doctor was in charge of dental office and acting within scope of duties *held* for jury.—McDonald v. Dr. McKnight, Inc., 825.
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⊂=18(10) (Mass.) Instruction on malpractice *held* erroneous under evidence.—King v. Belmore, 911.

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⊂=8(7) (N.Y.) Allegation that insurer's contract impliedly included duty to inform insured of offer to settle *held* conclusion of law.—Streat Coal Co. v. Frankfort General Ins. Co., 352.
⊂=34(1) (Ind.App.) Theory of pleading determined from its scope and tenor.—Chicago, T. H. & S. E. Ry. Co. v. Collins, 634.
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⊂=34(3) (N.Y.) Liberally interpreted in favor of pleader.—Brown v. Tregoe, 159.

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⊂=49 (Ind.App.) Complaint for fraudulently inducing contract of sale of merchandise *held* in tort.—Butler Bros. v. Snyder, 398.

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⊂=129(1) (Ill.) Defendant defaulted for want of plea admits facts well pleaded in declaration.—Povlich v. Glodich, 466.

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⊂=225(1) (Ind.App.) Second complaint after demurrer to first sustained is amended complaint, however entitled.—Ryan v. Summers, 879.

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⊂=258(4) (Ill.) Court did not err in overruling motions to file amendment to answer.—Robar v. Isham, 460.

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⊂=308 (Ind.App.) Copy of written instrument must be filed with pleading or sufficient excuse alleged.—Miller v. Seiler, 719.
Excuse for not filing contract with pleading *held* properly alleged.—Id.

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⊂=367(3) (Ind.App.) Allegation that buyer "notified" seller of defects *held* to plead compliance with contract requiring "witten notice."—Maxwell Implement Co. v. Fitzgerald, 392.
Buyer's counterclaim *held* to state cause of action for damages caused by seller's refusal to accept defective machine and refund price paid.—Id.

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⊂=387 (Ind.App.) Evidence must support complaint in general scope and meaning.—Chicago, T. H. & S. E. Ry. Co. v. Collins, 634.

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⊂=402 (Ind.) Reply of some defendants to answer to cross-complaint *held* not on behalf of all.—Jackson v. State, 1.
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⊂=100(5) (Ind.App.) Agent without authority to grant to adjoining owner right to commit trespass.—Evans v. Shephard, 730.
⊂=103(2) (Mass.) Contractor *held* not authorized to purchase materials on credit of em-

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(B) Undisclosed Agency.

⊂=143(5) (N.Y.) Purchaser not charged with rights of undisclosed principal.—Foreign Trade Banking Corporation v. Gerseta Corporation, 607.

Purchaser *held* entitled to set off debt of seller against undisclosed principal.—Id.

Undisclosed principal of seller *held* estopped to assert its rights after equities between seller and purchaser had been fixed.—Id.

Purchaser *held* entitled to show prior agreement with seller in action by undisclosed principal.—Id.

(C) Unauthorized and Wrongful Acts.

⊂=156 (Mass.) Principal liable for agent's fraudulent representations in making sale.—Haskell v. Starbird, 695.

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⊂=166(2) (Ind.App.) Acceptance of sale price not ratification of terms of contract not known to principal.—Evans v. Shephard, 730.

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⊂=5(3) (Ind.) Supreme Court will not prohibit Appellate Court from giving opinion on constitutionality of statute in response to inquiry of Industrial Board.—State v. McMahan, 213.

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QUO WARRANTO.

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⊂=8 (Ill.) Organization of district may be attacked by quo warranto.—People v. Hartquist, 475.

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⊂=29 (Ill.) Delay of three years in action for quo warranto to question organization of school district *held* not to estop people.—People v. Hartquist, 475.

⊂=34 (Ohio) Individual may not institute except in particular case.—State v. The Maccabees, 888.

⊂=43 (Ill.) Leave to file information, or vacation of order granting leave, discretionary.—People v. Dodds, 241.

⊂=43 (Ill.) Leave to file information in nature of quo warranto not absolute right.—People v. Chandlerville community high school Dist. No. 62, Cass County, 453.

Information unauthorized; court may enter rule nisi.—Id.

Entry of rule nisi requiring respondent to show cause within court's discretion.—Id.

On petition for leave to file information, any fact properly influencing judicial discretion considered.—Id.

Denial of petition for leave to file information *held* error.—Id.

⊂=43 (Ill.) Judge may enter rule to show cause or consider application on petition alone.—People v. Hartquist, 475.

Petition granted if judge satisfied there is "probable ground" to justify it.—Id.

Leave to file information granted under misapprehension may be vacated.—Id.

Allegation of noncompliance with election notice requirement and ballot law *held* probable cause for granting leave.—Id.

⊂=48 (Ill.) Information need only charge usurpation.—People v. Dodds, 241.

Information attacking legality of high school district *held* to require plea as to contiguity of territory.—Id.

Averments that territory in one school district constituted parts of other districts *held* averments of evidentiary facts.—Id.

Information charging in general terms usurpation requires respondents to justify or disclaim.—Id.

Information attacking legality of high school district *held* sufficient.—Id.

⊂=48 (Ill.) Office of information to require respondents to show warrant for right claimed.—People v. Hartquist, 475.

Requirements of information attacking organization of school district stated.—Id.

⊂=52 (Ill.) Objection that information improvidently filed, how made.—People v. Dodds, 241.

Information demurrable, if grounds stated do not constitute cause of action.—Id.

Truth of averments assumed on demurrer.—Id.

⊂=56 (Ill.) Failure to pass on pleas in abatement to information dismissed *held* not error.—People v. Dodds, 241.

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⊂=5½ [New, vol. 6A Key-No. Series] (Mass.) Company not suable for damages caused during federal control.—L. L. Cohen & Co. v. Davis, 75.

Government agent properly substituted for railroad as party.—Id.

⊂=5½ [New, vol. 6A Key-No. Series] (N.Y.) Failure to object to service on representative of federal Agent persuasive that facts do not justify objection.—Lawrey v. Hines, 576.

Summons served on representative of federal Agent may be amended.—Id.

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⊂=33(2) (Ill.) Employee of foreign company *held* "agent" on whom process could be served.—American Hide & Leather Co. v. Southern Ry. Co., 200.

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⊂=188 (Mass.) Illegality of mortgage bond must be pleaded.—Stevens v. Berkshire St. Ry. Co., 59.

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⊂=274(2) (Ind.App.) Duty to keep depot and platforms safe not extended to premises not

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Injuries received by invitee, seeking to purchase ticket, *held* not actionable.—Id.

⇐275(2) **(Mass.)** Mail clerk loading cars *held* an invitee on car.—Ward v. New York Cent. R. Co., 751.

⇐282(9) **(Mass.)** Whether mail employee exercised due care question of fact.—Ward v. New York Cent. R. Co., 751.

Negligence as to mail employee *held* question of fact.—Id.

(F) Accidents at Crossings.

⇐324(3) **(Mass.)** Husband, operating automobile registered in wife's name, trespasser, not entitled to recover for negligence.—Washburn v. Union Freight R. Co., 79.

⇐339(2) **(Mass.)** Railway *held* not guilty of wanton conduct as to automobile driver.—Washburn v. Union Freight R. Co., 79.

⇐345(4) **(Ind.App.)** Proof *held* not variance from theory of complaint; "wrongfully."—Chicago, T. H. & S. E. Ry. Co. v. Collins, 634.

⇐350(13) **(N.Y.)** Automobile driver *held* not negligent as matter of law under statute requiring him to reduce speed to "safe limit." and proceed "cautiously and carefully" with vehicle under "complete control."—Horton v. New York Cent. R. Co., 345.

(G) Injuries to Persons on or near Tracks.

⇐396(2) **(Ind.App.)** Res ipsa loquitur doctrine *held* applicable to injuries to pedestrian by derailed car.—Pittsburgh, C., C. & St. L. R. Co. v. Boughton, 869.

⇐401(2) **(Ind.App.)** Instruction on res ipsa loquitur doctrine, in action for injuries caused by derailed car, *held* warranted by pleadings.—Pittsburgh, C., C. & St. L. R. Co. v. Boughton, 869.

Instruction as to whether injured pedestrian was using public street *held* inapplicable to evidence.—Id.

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(B) Evidence.

⇐48(1) **(N.Y.)** Complaint by prosecutrix immediately after rape *held* admissible.—People v. Deitsch, 670.

⇐48(2) **(N.Y.)** Statements by prosecutrix half an hour after rape, made in reply to questions, *held* inadmissible.—People v. Deitsch, 670.

⇐54(2) **(N.Y.)** Evidence *held* to corroborate prosecutrix as to identity of defendant as person who committed crime.—People v. Deitsch, 670.

⇐54(3) **(N.Y.)** Rule as to corroboration of prosecutrix stated.—People v. Deitsch, 670.

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⇐35(1) **(Ind.)** Jointly owned property not taken without notice where restraining order sufficient.—Tucker v. Tucker, 11.

When cause sufficient for appointment without notice.—Id.

Rule as to appointing receiver in vacation without notice stated.—Id.

Facts averred *held* sufficient only for restraining threatened sale.—Id.

Defendant's insolvency not shown by complaint.—Id.

Conclusion in complaint *held* not to have weight as evidence.—Id.

Affidavit must state facts, and not opinions, "sufficient cause shown by affidavit."—Id.

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⇐142 **(Ind.App.)** Lien on insolvent's goods for unpaid taxes *held* not affected by receiver's sale.—State v. Skinner, 387.

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⇐154(1) **(Ind.App.)** Receivership costs *held* to have priority out of funds in receiver's hands over insolvent's delinquent taxes.—State v. Skinner, 387.

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⇐1 **(Ill.)** Elements of crime stated.—People v. Ensor, 175.

⇐7(6) **(Ill.)** Proof of larceny of goods *held* not to sustain conviction for receiving them.—People v. Ensor, 175.

⇐8(1) **(Ill.)** Proof of automobile theft and possession by defendant later *held* not to raise presumption of.—People v. Ensor, 175.

⇐8(2) **(Mass.)** Testimony concerning receipt *held* inadmissible.—Commonwealth v. Perry, 840.

⇐8(3) **(Ill.)** Evidence *held* to sustain conviction.—People v. Wagman, 743.

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⇐3 **(Ill.)** Photographic records *held* compliance with statute; "record."—People v. Haas, 549.

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I. REQUISITES AND VALIDITY.

⇐13(1) **(Mass.)** Release of one partner *held* supported by consideration.—M. E. Hall Co. v. Gale, 813.

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⇐55 **(N.Y.)** Defendant pleading release as new matter *held* to have the burden of establishing it as plaintiff's act.—Boxberger v. New York, N. H. & H. R. Co., 357.

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⇐69(4) **(Mass.)** General denial *held* to put in issue plaintiff's right of possession.—Dunbar-Laporte Motor Co. v. Desrocher, 57.

⇐70 (Mass.) Burden on plaintiff to show right to immediate possession.—Dunbar-Laporte Motor Co. v. Desrocher, 57.

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⇐23(1) **(Ill.)** Evidence of telephone calls *held* material and relevant.—People v. Powloski, 551.

ons and tools *held* competent evidence.—People v. Powloski, 551.

Accused's possession of stolen articles must be exclusive to warrant inference of guilt.—Id.

⇐24(1) (Ill.) Evidence *held* sufficient to warrant finding accused committed robbery.—People v. Powloski, 551.

Evidence *held* sufficient to show accused's possession of stolen property under recent possession rule.—Id.

That police officer was in accused's room *held* to raise no suspicion against evidence found.—Id.

⇐27(1) (Ill.) Instruction as to recent possession as evidence of guilt *held* correct.—People v. Powloski, 551.

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⇐252(1) (Mass.) Instruction as to matter without evidence in support properly refused.—Viaux v. John T. Scully Foundation Co., 81.

⇐252(1) (Mass.) Judge cannot assume existence of facts not proved, raise false issues, or give instructions not adapted.—McDonough v. Vozzela, 831.

⇐252(8) (Ind.App.) Instruction as to facts not disputed *held* improper as tending to confuse jury.—Lathrop v. Frank Bird Transfer Co., 868.

⇐252(18) (Mass.) Request properly refused as assuming fact not shown by evidence.—Cereghino v. Giannone, 153.

Instruction assuming facts not shown to exist properly refused.—Id.

⇐253(5) (Ind.) Instruction omitting element of waiver of surrender of policy properly denied.—Federal Life Ins. Co. v. Sayre, 223.

⇐253(8) (Ind.) Instruction that certain facts would not constitute probable cause *held* erroneous as ignoring return of indictment.—Duckwall v. Davis, 113.

⇐253(8) (Mass.) Instruction as to liability for agent's representations properly refused, as ignoring evidence.—Haskell v. Starbird, 695.

⇐253(9) (Ind.) Binding instruction assuming to declare liability under enumerated facts must recite all essential facts.—Princeton Coal Co. v. Dowdle, 419.

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⇐256(10) (Ind.App.) Instructions omitting last clear chance doctrine *held* not erroneous in absence of request for further instructions.—Lathrop v. Frank Bird Transfer Co., 868.

⇐257 (Ind.) Exceptions to refusal of instructions not tendered until conclusion of argument not available.—Duckwall v. Davis, 113.

⇐259(1) (Mass.) Request to comment on testimony of witnesses must be in writing.—Viaux v. John T. Scully Foundation Co., 81.

⇐259(2) (Ind.) Signing request for instructions *held* sufficient signature of latter.—Duckwall v. Davis, 113.

⇐260(1) (Mass.) Request to rule, covered by instruction given, properly refused.—Cereghino v. Giannone, 153.

⇐260(1) (Mass.) Request to instruct as to matters adequately covered properly refused.—Tonsman v. Greenglass, 756.

⇐260(1) (Mass.) No error in refusing requests covered by instructions.—Fraser v. Flanders, 836.

⇐260(8) (Ind.App.) Refusal of instruction covered by ones given not error.—Union Traction Co. of Indiana v. Grobs, 389.

⇐267(1) (Mass.) Court not required to adopt phrase of requested instruction.—McDonough v. Vozzela, 831.

⇐267(3) (Ill.) Modification of instruction on issue of accord and satisfaction *held* proper.—Dailey v. Grand Lodge, Brotherhood of Railroad Trainmen, 478.

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⇐278 (Mass.) Exception to entire charge does not lie.—Cereghino v. Giannone, 153.

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⇐295(1) (Ind.) Instructions as a whole fairly stating the law, inaccuracy or omission not cause for reversal.—Federal Life Ins. Co. v. Sayre, 223.
⇐295(1) (Ind.App.) Where evidence supports verdict, judgment not reversed for error in instruction.—Craig v. Lee, 390.
⇐295(5) (Mass.) Instruction, considered as whole, *held* proper.—Cereghino v. Giannone, 153.
⇐296(1) (Ind.App.) Erroneous instructions *held* not cured by other instructions in conflict therewith.—Pittsburgh, C., C. & St. L. R. Co. v. Boughton, 869.
⇐296(2) (Ind.) Instruction on waiver of surrender of policy not objectionable and cured by others if defective.—Federal Life Ins. Co. v. Sayre, 223.
⇐296(3) (Mass.) Erroneous instruction *held* not cured by another.—Froio v. Eastern Massachusetts St. Ry. Co., 255.
⇐296(8) (Mass.) Error in instruction cured by subsequent instruction.—Cereghino v. Giannone, 153.
⇐296(11) (Ind.App.) Instruction mentioning amount of plaintiff's demand for damages *held* not reversible error.—Louisville & Southern Indiana Traction Co. v. Miller, 410.

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⇐340(5) (Ind.App.) Verdict *held* properly corrected to show amount intended.—Town of Hobart v. Casbon, 138.
⇐341 (Ind.App.) Denial of motion for venire de novo *held* proper in view of appellant's contention that verdict was good as to certain amount.—Town of Hobart v. Casbon, 138.
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⇐344 (Ind.App.) Affidavits of jurors admissible to correct clerical defect in verdict.—Town of Hobart v. Casbon, 138.

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⇐349(2) (Mass.) Framing special question for jury within discretion of court.—Viaux v. John T. Scully Foundation Co., 81.
⇐359(1) (Ind.App.) Rule stated as to presumption on motion for judgment on answers to interrogatories notwithstanding general verdict.—Davis v. Hostetter, 723.
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⇐388(1) (Mass.) Judge not required to make findings of fact or rulings of law at request of a party.—Rogers v. Abbott, 923.
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⇐316(3) (Mass.) Issue of testamentary capacity *held* to be framed for jury trial.—Smith v. Brewster, 56.

⇐316(3) (Mass.) Issue for jury trial in will contest properly denied.—Old Colony Trust Co. v. Pepper, 817.

⇐318(1) (Mass.) Order of probate judge respecting framing of issues ordinarily not disturbed.—Appeal of Connell, 55.

⇐318(1) (Mass.) Order respecting framing of issues for jury in will contest not reversed, if supported by statements of expected proof.—Old Colony Trust Co. v. Pepper, 817.

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⇐439 (Ind.) Construction must give effect to testator's intention.—Quilliam v. Union Trust Co. of Indianapolis, 214.

⇐439 (Mass.) Ascertaining intention cardinal rule of construction.—Potter v. McLane, 49.

⇐439 (Mass.) Construed in accordance with intentions of testator.—Galloupe v. Blake, 818.

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⇐481 (Mass.) Language construed as of time of death.—Galloupe v. Blake, 818.

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⇐502 (Mass.) Will excluding "relations" of mother of testatrix and of father's first wife *held* not to exclude descendants of father and mother.—In re Smart's Estate, 759.

⇐506(2) (N.Y.) Gift to "heirs" has same effect as one to "legal heirs."—New York Life Insurance & Trust Co. v. Winthrop, 431.

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⇐185 **(Ohio)** Privileged communications between attorney and client subject to statutory regulation.—Spitzer v. Stillings, 365.
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⇐345(1) **(Mass.)** Charge of commission of crime and acquittal inadmissible for impeachment.—Braun v. Bell, 93.

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⇐388(2) **(Ohio)** Proper foundation must be laid to impeach testimony of party by attorney as witness.—Spitzer v. Stillings, 365.

⇐389 **(Ill.)** Letter, writing of which was denied by beneficiary, *held* properly excluded.—Dailey v. Grand Lodge Brotherhood of Railroad Trainmen, 478.

⇐389 **(Ind.App.)** Testimony that witness to accident who had denied contradictory statement in fact made such statement *held* admissible.—Louisville & Southern Indiana Traction Co. v. Miller, 410.

⇐389 **(Mass.)** Party bound by denial of his witness to inconsistent statements.—Fraser v. Flanders, 836.

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