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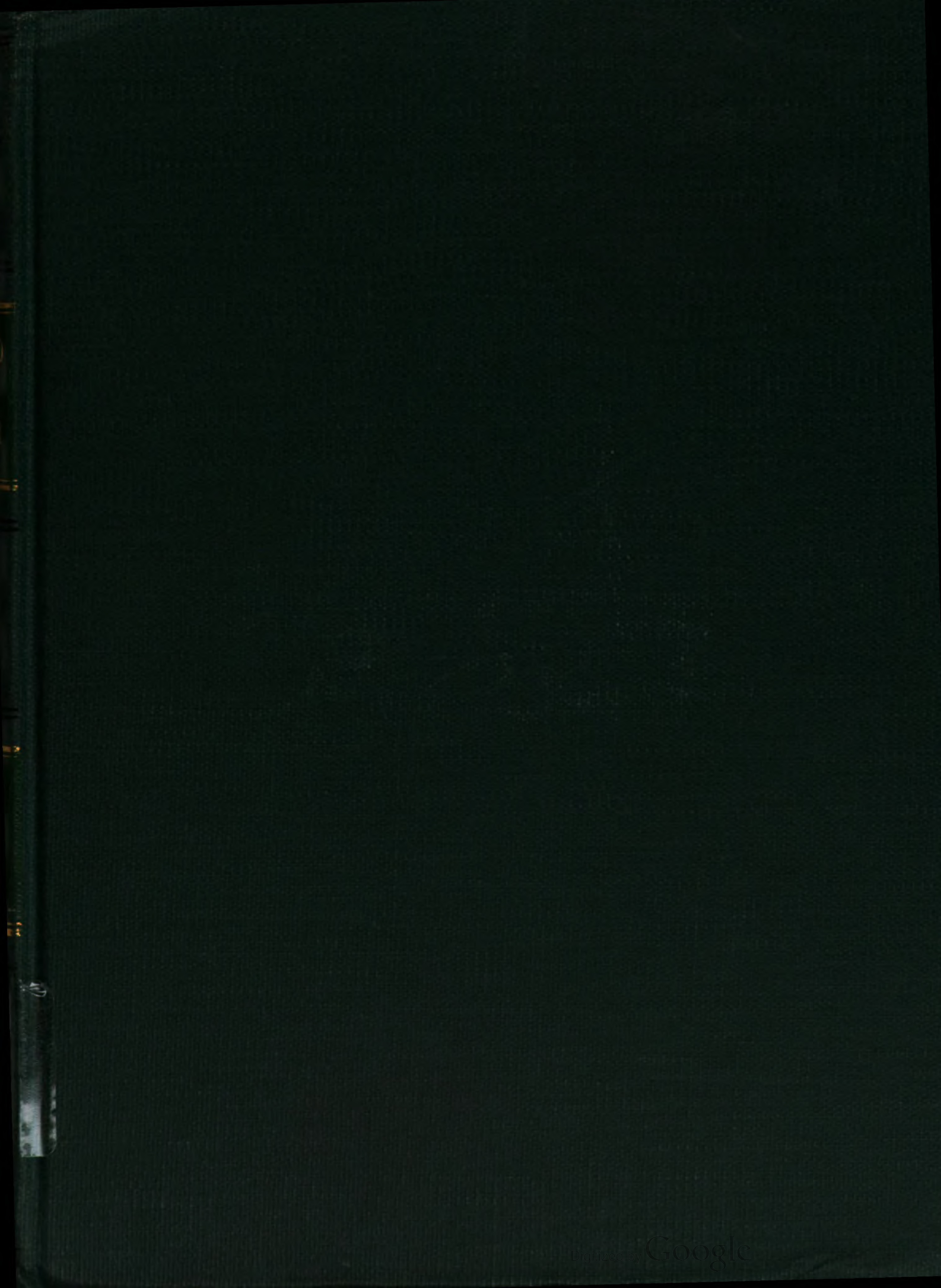

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The Cleveland Law Reporter.

PUBLISHED WEEKLY,

CONTAINING DECISIONS OF THE UNITED STATES SUPREME COURT,

CIRCUIT AND DISTRICT COURTS,

Syllabi of Ohio

SUPREME COURT DECISIONS.

—AND DECISIONS OF—

State District and Common Pleas Courts of Ohio,

AND IMPORTANT DECISIONS OF COURTS OF LAST RESORT IN OTHER STATES. RECORDS OF JUDGMENTS OF CUYAHOGA COMMON PLEAS.

J. G. POMERENE, Editor. — VOLUME II.

CLEVELAND, OHIO:

1879.

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IN the case of Ohio vs. Lucius B. Eager, for malpractice as an attorney at law, Judge Cadwell decides that it is misconduct in office, such as warrants the suspension of an attorney from practice, to compound a misdemeanor.

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CUYAHOGA COUNTY COMMON PLEAS.

MAY TERM, 1878.

R. F. PAINE VS. F. W. COFFIN.

What are Fixtures—When Tenant has Right to Remove, etc.

HAMILTON, J.:

This is an action brought by the plaintiff to recover upon a certain lease for certain back rent claimed to be due. The lessor asks that a temporary injunction may be granted against the defendant upon the ground that he is about to remove certain fixtures from the premises. It seems that the premises were occupied by the defendant as a store-room under a lease which was to continue for the period of three years. The conditions of the lease were, in substance, that the defendant, the lessee, was to occupy the premises for six months, and at the end of six months was to pay three hundred dollars, the rental upon the lease being six hundred dollars per year, and thereafter fifty dollars per month as rent. The plaintiff states that the defendant has paid nothing, and is now threatening to remove the fixtures in the building, consisting of a furnace, also of a partition that has been erected in the building, certain counters, and a frame work for drawers set up along the side of the building, also certain platform tables, as they are termed, and he asks for a restraining order to prevent the defendant from taking them out; says that he has commenced an action of forcible detainer for the purpose of throwing them out; that the defendant is wholly insolvent, that proceedings in Bankruptcy have been commenced against him in the United States Court; the defendant has forfeited the term of his lease by the non-payment of rent on demand, the stipulation of the lease being that a demand may be made at any time after it becomes due to the same effect as if made at the time of falling due.

The answer is a general denial as to

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the taking away of anything. It is further said that there was a mistake made in the execution of the lease; that the copy set out in the petition is not accurate; that instead of paying three hundred dollars April 20th, as back rent, defendant's copy of lease stipstipulates that it is to be paid as advance rent, the idea being that the lessee was not to pay anything at all for the six months' rent; and the defendant asks for a reformation of the lease in that regard; says that he is ready and willing to pay the rent that is due and has offered to pay it and asks that the plaintiff be enjoined from pursuing his action of forcible detainer.

The reply denies these averments on the part of the defendant—that there was any tender ever made; avers that there was a pretended tender made, but that on plaintiff's offering to take it the defendant withdrew it and refused to pay it and said that he would pay it sometime during the day.

A restraining order was granted upon the application of the plaintiff in this case, and upon the coming i of the answer of the defendant a restraining order was also granted, temporarily, by the consent of the plaintiff in the case, until the case should be heard, upon the defendant's giving bail as requested. This bail was never given, and that is the status of the case at this time A motion is now made by the defendant to modify this restraining order, and the question arises whether the plaintiff, under the circumstances of the case, has any right whatever to these fixtures in the store.

It was undoubtedly the rule of the common law that anything attached to the freehold in any manner by the tenant became the property of the landlord. This rule has been very much modified by subsequent decisions in favor of the tenant. He is allowed to take away anything that was not designed to become part of the freehold. It is said, however, that whatever right the tenant may have had, before this lease was forfeited, to take away these fixtures, he has no such right now; that a tenant, if he wishes to remove any property that he has put into the premises, must do it during the term of his lease or not at all; that after the expiration of the lease by forfeiture or otherwise, he no longer has any right there, although he may be in possession of the property. The decisions are very diverse upon that proposition. Some of them maintain that it must be done during the term of the lease and that the continued possession would be a wrongful possession unless he had a right to remain, and therefore when the lease wes forfeited his term had expired and he would no longer have any right to take it way. The doctrine maintained by other authorities is that the tenant may remove the property at any time so long as he retains possession of the leasehold estate, which proceeds upon the theory that by an abandonment of the premises the property left becomes the property of the landlord.

Thus there are three holdings upon that proposition. I incline to think, however, that so long as the tenant remains in the actual possession of the property—has not vacated—remains there perhaps under question of right, as a suit in this particular case is now pending to determine whether or not that right has been forfeited—the tenant has the right to remove, if the fixtures are of the character which he may remove.

Now as to whether they are fixtures or not as between landlord and tenant is the only remaining question. In the 1st Ohio State, Teaff vs. Hewitt, the Court said: "A fixture is an article which was a chattel, but which, by being affixed to the realty, became accessory to it and parcel of it. The true criterion of a fixture, apart from established usages or special agreement, is the united application of the following requisites, to wit: 1. Actual annexation to the realty, or something appurtenant thereto. 2. Application to the use, or purpose, to which that part of the realty with which it is connected, is appropriated. 3. The intention of the party making the annexation, to make a permanent accession to the freehold, which intention is determinable from an inspection of the property itself, taking into consideration its nature, mode of attachment, purpose for which it is used, the relation of the party making the annexation and other attending circumstances." All these must combine in order to make a fixture and that is the criterion by which it is to be determined whether a certain thing is or is not a fixture.

In the 22d Ohio State the Court uses the following language: "That the mode of annexation alone will not determine the character of the property annexed is apparent from the fact that property may be annexed by the same mode, and yet be personalty in the one case and realty in the other. Trees growing in a nursery are annexed to the soil in the same way as trees growing in an orchard; but, in the former case, they are cultivated for the purposes of trade and are regarded as personalty, while in the latter, being intended as a permanent accession to the lands, they are regarded as belonging to the realty. The general principle to be kept in view, which underlies all questions of this kind, is the distinction between the business which is carried on in or upon the premises, or *locus in quo*. The former is personal in its nature and articles that are merely accessory to the business, and have been put on the premises for this purpose, and not as accessions to the real estate, retain the personal character of the principal to which they appropriately belong and are subservient."

Now there have been some affidavits, perhaps two or three on each side of this case, showing the character of these fixtures—how permanently they are attached to the freehold. It appears that the furnace in this case is a portable furnace, and was set upon the floor in the basement with pipes leading from it to the floor where there are some two or three registers through which the heated air comes into the store room. The registers are attached. There is no question about those. They should remain. But this portable furnace, having no attachment whatever to the freehold, seems to me to stand in the same position as that of an ordinary stove. It was placed there by the tenant simply for the purpose of transacting his business.

In relation to the partition, that is permanent. It separates one part of the room from the other. This fixture attached to the side of the wall for holding drawers, there is no question but that is a permant fixture. Some of the counters are set upon the floor, not fastened in any way, and some of them are nailed to the floor. They were there and used simply by the tenant in carrying on his business. The safe is also there. The same may be said of that.

In reference to the platform tables, as they are termed, we think those are permanent. They are attached in a permanent manner—secured to the window, to the floor and to the side of the building, and constructed in such a manner that if taken down they would not be of a particle of use to anybody.

As to this shelving, drawers, etc., as I have said before, they were not designed to be permantly attached to the freehold, and as a matter of fact

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are the same as were formerly used by the tenant in the building at the Weddell house from where he removed into this building.

I find that the partitions, platform tables, registers in the floor, a.e fixtures and cannot be removed; that the counter, shelving, drawers and furnace are simply chattels and may be taken away by the tenant. The restraining order will therefore be modified in that particular.

SUPREME COURT OF OHIO.

DECEMBER TERM.

Hon. William White, Chief Justice; Hon. W. J. Gilmore, Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Judges.

Motion Docket.

TUESDAY, December 24, 1878.

No. 24. Stephen Shelden vs. Jas. McKnight, agent of the State of Missouri.

Motion for leave to file petition in error to reverse the order of the Hon. E. F. Bingham, a Judge of the Court of Common Pleas of Franklin county.

GILMORE, J.:

1. There is no authority for taking a bill of exceptions, setting out all the testimony in a proceeding before a Judge, under the act of March 23, 1875 [72 Ohio Laws, 79.]

2. An order made by such Judge is not reviewable on error.

Motion overruled.

No. 25. *Ex parte* Stephen Sheldon. Application for a writ of habeas corpus.

GILMORE, J,:

1. The certificate of authentication provided for in section 5,278 of the United States Revised Statutes [1,027] is not required to be in any particular form, and where the language employed by the demanding Governor in the requisition, shows the copy of an indictment annexed thereto to be authentic, it is sufficient.

2. It is no ground for discharging a fugitive from justice on *habeas corpus* that the indictment, after charging embezzlement, by way of conclusion in the same count, also avers that "so the defendant committed larceny."

3. Where from the authenticated copy of the indictment annexed to the requisition it appears that the fugitive stands charged in the demanding State with embezzlement, the printed statutes of such State, purporting to be published by its authority, may be received to show that embezzlement is made a crime by the laws of that State.

4. After an alleged fugitive from justice has been arrested on an extradition warrant, he will not be discharged on the ground that there was no evidence before the executive issuing the warrant, showing that the fugitive had fled from the demanding State to avoid prosecution.

Application denied.

No. 5. Albert Wolf vs. The State of Ohio. Motion for leave to file petition in error to the Court of Common Pleas of Franklin county. Motion overruled on authority of Griffin vs. The State decided December 17, 1878.

No. 20. George B. Kennedy vs. The State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Trumbull county. Motion granted.

No. 23. Carlin Wheeler vs. The State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Allen county. Motion granted.

General Docket.

No. 370. The State of Ohio on relation of Lyman S. Colburn vs. The Oberlin Building and Loan Association. Quo warranto.

OKEY, J.:

1. A building and loan association incorporated under the acts of May, 1868 [S. & S. 194, 194], has not the power to refuse to loan its funds to its members; nor to establish such rules and regulations, or to conduct its bosiness, as to prevent the loan of its funds to a member who bids the highest premium therefor; nor to borrow money for the purpose of lending it; nor to divide or distribute its funds among its members in advance of the distribution at the winding up of the corporation; nor to traffic in shares of its own stock.

2. Such corporation, acting in good faith, and reasonably, may compromise with a member, and release him from further obligation to the corporation, whether the indebtedness is for a loan or on subscription.

3. Where a corporation has abused or misused its corporate powers, but not in any particular as to which it is declared by statute the act shall operate as a forfeiture of its charter, the court is vested with a discretoin to determine whether the corporation shall be ousted of its franchise to be a corporation, or from the exercise of the powers illegally assumed.

Judgment that the corporation be ousted ~~from~~ from the exercise of the powers mentioned in the first, second, third, fourth and seventh specifications of the information.

The city of Akron vs. the Chamberlain Company. Error to the District Court of Summit county.

MCILVAINE, J. Held:

1. The owner of a lot abutting on an unimproved street of a city or village, in errecting buildings thereon assumes the risk of all damage which may result from the subsequent grading and improvement of the street by the municipal authorities if made within the reasonable exercise of their power.

2. The liability of a municipalty for injury to buildings on abutting lots exists only where such buildings were erected with reference to a grade actually established, either by ordinance or such improvement of the street as fairly indicated that the grade was permanently fixed, and the damage resulted from a change of such grade, or where the buildings, if erected before a grade was so established, were injured by the subsequent establishment of an unreasonable grade.

3. Whether a grade be unreasonable or not must be determined by the circumstances existing at the time the grade was established, and not by the circumstances existing at the time abutting lots may have been improved.

4. Within the principle of municipal liability, as above stated, is the case where a lot is improved in anticipation of, and with reference to, a reasonable future grade whis is afterwards established, and damage results from a subsequent change in the grade.

Judgment reversed and cause remanded for a new trial.

No. 506. Matthew Thomas et al. vs. Miles Greenwood et al. Error to the Superior Court of Cincinnati.

The Chief Justice announced the conclusion of the court in this case, affirming the judgment of the court below.

Okey and Gilmore, J. J. dissented on the ground that the issue of bonds under the act of May 15, 1878, known as the "Two Millions Act," ought to be enjoined.

The opinion in the case is not yet prepared.

Court adjourned to Monday, January 6, 1879.

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SUPREME COURT OF THE U. S.

No. 74—OCTOBER TERM. 1878.

GEOGRE B. PETERS VS. D. W. BOWMAN, ADMINISTRATOR.

Lien for Purchase Money—Estoppel to Deny Title of Vendor.

Upon a bill to enforce a lien for purchase money, where there has been no fraud and no eviction, actual or constructive, the vendee or those in possession under him, cannot controvert the title of the vendor, and no one claiming an adverse title can be permitted to bring it forward and have it settled in that suit.

SWAYNE, J.:

This is a bill to enforce a lien upon real estate situate in Tunica county, in the State of Mississippi. Bowman owned the premises in fee simple, and sold the undivided half to Bostick, and gave him a written contract, valid in equity, but not sufficient to pass the legal title.

Bostick died in 1868, possessed of property in Mississippi and Tennessee, and leaving a last will and testament.

By one of the clauses he appointed Gwinn his executor in Mississippi, and the appellee, Elliott, his executor, in Tennessee.

By another clause he authorized the Mississippi executor to lease or cultivate the premises in question with Bowman; and finally under the circumstances named, "to join the said Bowman in making sale and title to the purchasers."

By another clause, after the payment of all legacies, debts and expenses of administration, he gave to three persons, whom he named, and their successors, as trustees, the entire residue of his estate, "to be invested by them in a suitable site and buildings for a female academy" in Tennessee, and to be otherwise devoted to that institution.

Gwinn died in the lifetime of the testator.

On the 11th of January, 1869, the Probate Court of Tunica county granted "letters testamentary of the said last will and testament" to Elliot.

On the 25th of January, 1869, Elliott, describing himself as "executor of the last will and testament of J. Bostick, acting under the powers conferred by said will," and Bowman, united in conveyance with full covenants to the four brothers, Jaquess, for the consideration of $4,000 paid in cash, and the further sum of 24,000 dollars, for which four notes were given by the vendees, each for the m of six thousand dollars, and payle respectively on the first day of January in the years 1870, 1871, 1872, and 1873, with interest at the rate of six per cent. per annum.

In reference to these notes the deed contains the following provision: "And to secure the payment of each and all of which said notes and interest an express lien is hereby retained by the parties of the first part upon the real estate and premises" in question.

The note maturing on the 1st of January was paid by the Jaquess Brothers.

On the 26th of January, 1870, they sold and conveyed the premises to the appellant, Peters, for the consideration expressed in the deed of the sum of $11,920 cash in hand, "and the assumption by the said Peters of the payment of three promissory notes for $6,000, made by the first parties (Jaquess Brothers), and payable to Elliott and Bowman, for the same land herein conveyed."

This deed contains a covenant of the right to convey, of seizin, and of general warranty.

The covenant of good right to convey is synonymous with the covenant of seizin. The actual seizin of the grantor will support both, irrespective of his having an indefeasible title.

These covenants, if broken at all, are broken when they are made They are personal, and do not run with the land: Moiston vs. Hobbs, 2 Mass. 433; Greenby vs. Kellog, 2 J. R. 2; Hamilton vs. Wilson, 4 J. Rep. 49.

Peters put his co-defendants, General Chalmers and wife, in possession of the premises under an arrangement whereby when they should pay the balance of the purchase money he would convey to Mrs. Chalmers. Their possession has since continued, and has been undisturbed.

On the 8th day of November, 1869, the same Probate Court granted letters of anministration "upon the estate of J. Bostick, deceased, with the will of said Bostick annexed," to Elliott, upon his giving a sufficient bond and taking the oath prescribed by law, both of which were then done.

The original bill was filed on the 28th day of February, 1873, to enforce the lien reserved in the deed of Elliott and Bowman to Jaquess Brothers to secure the notes given for the purchase money, the three last of which are wholly unpaid.

On the 31st of July, 1874, Elliott, to obviate objections made to the prior deed, executed a second to the Jaquess Brothers for the same premises. In this deed he describes himself as "administrator with the will annexed of said Bostick," etc.

The deposition of Elliot shows that Bostick never had any title to the premises but what he derived from his contract with Bowman; that Bowman after Bostick's death, insisted upon selling, and hence the sale to the Jaquess Brothers.

The court below decreed in favor of the complainants. Peters brought the case here for review.

There is no controversy about the leading facts of this case. The questions presented are all questions of law. Bowman had the legal title to the entire premises, and that title he conveyed to Jaquess Brothers, and they conveyed it to Peters. The deed of Elliott and Bowman contained all the usual covenants of title. The covenant of warranty ran with the land and passed by assignment to Peters. The deed of the Jaquess Brothers produced that result. In the event of a failure of title, Peters can sue upon this covenant in either deed: King vs. Kerr's, adm'r, 5 Ohio, 156. When broken it becomes a chose in action, but a subsequent grantee may sue the warrantor in the name of the holder. There can be but one satisfaction: Id. A sheriff's or a quit-claim deed will carry the covenant before its breach to the grantee: White vs. Whitney, 4 Metc., 81; Hunt vs. Amidon, 4 Hill, 345.

Where at the time of the conveyance with warranty there is adverse possession under a paramount title, such possession is regarded as eviction and involves a breach of this covenant. Where the paramount title is in the warrantor and the adverse possession is tortious, there is no eviction, actual or constructive, and no action will lie: Noonan vs. Lee, 2 Black, 507; Duval vs. Craig, 2 Wheat, 62. Here there is no adverse possession, and no eviction, actual or constructive, nor does it appear that suit has been threatened, or that an adverse claim has been set up by any one. The possession and enjoyment of the property by General Chalmers and his wife have been the same as if their title were indisputable. It is insisted that the first deed of Elliott was fatally defective, because the letters from the Probate Court under which he acted in making it, were issued to him as executor and that both deeds were void, because under the will and the circumstances there was no authority to sell; and lastly, because the residuum of the estate of the testator, including proceeds of the premises in question, was disposed of in a way

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forbidden by a law of the State of Mississippi.

We prefer to rest our judgment upon a ground independent of all these points, and which renders it unnecessary to examine them.

It is the settled law of this court that upon a bill of foreclosure, or, as in this case, a bill to enforce a lien for the purchase money, and where there has been no fraud and no eviction, actual or constructive, the vendee, or a party in possession under him, cannot controvert the title of the vendor; and that no one claiming an adverse title can be permitted to bring it forward and have it settled in that suit. Such a bill would be multifarious, and there would be a misjoiner of parties: Noonan vs. Lee, supra; Dial vs. Reynolds, 96 U. S., 340. In such cases, the vendee and those claiming under him, must rely upon the covenants of title in the deed of the vendor. They measure the rights and the remedy of the vendee, and if there are no such covenants, in the absence of fraud, he can have no redress. This doctrine was distinctly laid down in Patton vs. Taylor, 7 How., 159, and was re-examined and affirmed in Noonan vs. Lee; see also Abbott vs. Allen, 2 J. C. R., 519; Corning vs. Smith, 2 Seld., 84; Beebe vs. Swartwout, 3 Gilman, 162. That the vendor is insolvent or absent from the State, or that an adverse suit is pending which involves the title, does not withdraw the case from the operation of this principle: Butler vs. Hill, 6 Ohio S., 218; Platt vs. Gillchrist, 3 Sand. S. C., 118; Latham vs. Morgan, 1 Smedes & Marshall's Ch. Rep. 611.

The rule is founded in reason and justice. A different result would subvert the contract of the parties and substitute for it one which they did not make. In such cases the vendor by his covenants, if there are such, agrees upon them and not otherwise, to be responsible for defects of title. If there are no covenants he assumes no responsibility, and the other party takes the risk. The vendee agrees to pay according to his contract, and secures payment by giving a lien upon the property. Here it is neither expressed nor implied that he may refuse to pay and remain in possession of the premises—nor that the vendor shall be liable otherwise than according to his contract.

Where an adverse title is claimed it cannot be litigated with binding effect unless the claimant is before the court. We have shown that he cannot be made a party. One suit cannot thus be injected into another. Without his presence the judgment or decree as to him would be a nullity. The law never does or permits a vain thing.

A title which cannot be made good otherwise may be made so by the lapse of time or the statute of limitations. Is the vendor to wait wait until this shall occur, and in the meantime can the vandee, or those claiming under him, remain in possession and enjoy all the fruits of the contract and pay neither principal nor interest to the vendor?

Chancellor Kent well says: "It would lead to the greatest inconvenience, and, perhaps, abuse, if a purchaser in the actual possession of land, and when no third person asserts or takes any measures to asserts a hostile claim, can be permitted, on a suggestion of a defect or failure of title, and on the principle of *quia timet*, to stop the payment of the purchase money, and of all proceedings at law to recover it:" Abbott vs. Allen, *supra*.

The decree of the Circuit Court affirmed.

[Reported by R P. FLOOD.]

COURT OF COMMON PLEAS.

Actions Commenced.

Dec. 27.

14390. S. Dettlebach vs. Caroline Newman et al. Appeal by deft Judgment Nov. 30th. W. P. Rogers; J. Grannis.

Dec. 28.

14391. John Ruhland vs. Clemens Stolz. Money only. Foster, Hinsdale & Carpenter.

14392. Alice Rurrett vs. Thomas Jones. Money and relief. Nesbit & Lewis.

14393. Michael Wooldridge vs. Willard B. Thomas et al. Money and to subject lands. Wm. K. Kidd.

14394. Clemens Stolz vs. Louise C. Boltz. Money only. G. Nichols.

14395. Unice Hurlbut vs. Laura Botsfort et al. Dower. Perry Prentiss.

14396. Same vs. Regina Reinthal et al. Same. Same.

14397. Same vs. Fanny Straus et al. Same. Same.

14398. Same vs. James Wade, Jr. et al. Money and relief. Same.

14399. James Ruple vs. Geo. Engel et al. Money and foreclosure. W. S. Kerruish.

14400. Edwin Cowles vs. Geo. Cowing et al. Injunction and relief. Prentiss & Vorce.

14401. Faneuil Hall Ins. Co. vs. H. M. Crosby et al. Money only. Frank A. Spencer.

14402. Richard Cunningham et al. vs. Henry Harris. Money only. E. J. Blandin.

Dec. 30.

14403. Jessie C. Downs vs. S. M. Charlton. Money only. R. A. Davidson.

14404. M. E. Rawson vs. John Patterson et al. To foreclose mortgage and equitable relief. Marvin, Taylor and Laird.

14405. William Heisley as ex. etc., of Elizabeth, alias Betsy Gillegan vs. Mary Ann Williams et al. To quiet title and equitable relief. Arnold Green.

14406. Michael Shannon et al. vs. The State of Ohio. Kessler & Robison.

14407. Henry Baker vs. Denmore Bratton. Money only. G. H. Hubbard.

Dec. 31.

14408. Morgan, Root & Co. vs. Wells & Wedge. Cognovit. Geo. S. Kain; Frank A. Spencer.

14409. S. Henry Benedict et al. vs. A. C. Brown. Cognovit. Prentiss & Vorce; R. J. Winters.

14410. Same vs. Same. Same. Same.

14411. Samuel B. Prentiss vs. Ira Butterfield et al. To subject land. Baldwin & Ford.

14412. Benjamin Pearsall vs. William Lockyear et al. To subject land and equitable relief. John T. Sullivan. Bishop, Adams & Bishop.

14413. Wm. H. Babcock vs. Fanny Launder. Cognovit. Babcock & Nowak; Wm. Abbey.

14414. James A. Hayes et al. vs. H. J. Holbrook et al. Money and equitable relief. Hord, Dawley & Hord.

14415. James M. Wight vs. Patrick Sullivan. Money only. Jackson & Pudney.

14416. Edward Haslam vs. C. O. Stetson. Appeal by deft. Judgment Dec. 13. Gilbert, Johnson & Schwan.

14417. Ferdinand Schsermann vs. A. Montpelier. Appeal by deft. Judgment Dec. 2d.

14418. Griffeth Morgan vs. Same. Same Same.

14419. Benjamin Gates vs. C. H. Richmond. Motion to amerce deft. as att. Ingersoll & Williamson.

Motions and Demurrers Filed.

Dec. 27.

2119. Edwards et al. vs. The Highland Coal Co. et al. Motion by plaintiff to confirm report and supplementary report of C. E. Pennewell, Referee and for a decree.

2120. McLaughlan et al. exrs., vs. King et al. Demurrer by plaintiff to answer of I. J. Kretch.

2121. Webb et al. vs. Fitch et al., trustees, etc., et al. Demurrer by defts. to the petition.

2122. Bingham vs. Stone et al. Demurrer by deft. Arnold Green, to the reply of plaintiff, to his answer and cross petition.

Dec. 28.

2123. Picket vs. Mathews. Demurrer to the petition.

2124. Gibbons vs. Byrider et al. Motion by defendants to dismiss action.

2125. Ohio & Penn. Coal Co. vs. Bowler, receiver, et al. Motion by defendants to strike petition from the files,

2126. Halle vs. Schaefer et al. Motion by deft. Magdalena Schaefer, to require plff. to make petition more definite and certain.

2127. Holmes vs. Holmes et al. Motion by deft. to strike from the answer of defts.

2128. Cleveland Paper Co. vs. Fairbanks et al. Motion by deft. A. W. Fairbanks, to discharge attachment and garnishee with affidavit.

2129. Zoeter vs. Lamson. Motion to require plff. to amend his amended petition by striking out, etc.

2130. Houghtaling et al. vs. Brennan et

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al. Motion by defts. for order directing John M. Wilcox, Receiver, to deliver to defts. goods to the amount of $400 from property in his possession.

2131. Bachus et al. vs. The Aurora Fire and Marine Ins. Co. Motion to make the petition more definite and certain.

2132. Davidson vs. Whitman. Motion by deft. for a new trial.

Dec. 30.

2133. Same vs. Same. Motion by plff. for new trial.

2134. Rogers vs. Hughes. Motion by plff. to set aside report of referee and for new trial.

Dec. 31.

2135. Henke vs. Carran. Motion to strike out from answer, make same more definite and certain and to seperately state and number defenses.

1236. James Gibbons vs. Wm. C. Byrider et al. Mottion by defts. to discharge attachment with notice and acknowledgement of service.

3137. Farrington et al. vs. Fournier et al. Motion by deft. A. Fournier to dismiss action for non-compliance with order to separately state and number.

2138. Heil et al. vs. Wolf et al. Demurrer to second defense of answer of Elizabeth Wolf.

Motions and Demurrers Decided.

Dec. 23.

1847. The Hibernia Ins. Co. vs. John McKenny et al. Overruled.

2101. Henry P. Hubbull et al. vs. I. Reinthal. Overruled.

Dec. 31.

2132. Davidson vs. Whitman. Overruled. Deft. excepts.

2133. Same vs. Same. Same. Plff. excepts.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending January 4, 1879.

MORTGAGES.

Dec. 28

Eliza Lepper et al. to N. E. Smith. $175.

B. L. Pennington and wife to C. E. Shattuck. $1050.

Dec. 30.

Levi and Electa A. Nichols to Geo. O. Baslington. $1,000.

Patrick Lynch and wife to M. S. Hogan. $200.

Elisha A. Hoffman to M. Lauer. $200.

James Roach to E. Christian. $124.92.

Geo. H. Tower and wife to Wm. Dobson. $200.

Dec. 31.

Frank Zak and wife to Joseph Zak. $600.

Wm. Bowman, exr., to S. Jenny Slutz. $267.54.

Isabella O'Neal and husband to Charlotte Scheuer. $500.

Emily A. Harvey to the U. S. Mortgage Co. $18000.

Catharine O'Toole and husband to Patrick Ryan. $800.

Wm. and Louisa Herchert to Christian F. Behltie. $600.

Jan. 2.

Mary A. and C. W. Coates to Henry Hally. $1,000.

Arthur S. Norway and wife to Otis Farrer. $125.

Mary and John Gack to Noah N. Spafford. $500.

Jacob Stephan and wife to Conrad Wastarwaller. $325.

John Kist and wife to Liberty Lodge No. 3, A. O. Good Fellows. $400.

Henry J. Johnson and wife to H. J. Winslow. $4,000.

Henry Paul to James and Anna N. Junker. $1,000.

Jan. 3.

Joseph Havlicek and wife to Jacob Finger. Twelve hundred dollars.

Louisa Schrieb to Sarah Walworth. One hundred and fifty dollars.

H. P. Weddell and wife to Society for Savings. Twenty-five thousand dollars.

Dorothy and F. W. Cooper to The Citizens Savings and Loan Association. One thousand dollars.

Lazarus Fuldheim and wife to Simon Newmark. One thousand dollars.

CHATTEL MORTGAGES.

Dec. 28.

J. C. Scholey to B. H. Barney. $1,000.

Theodore Bender to Wm. Walter. $79.14.

F. E. Munger to Baily & Watkins. $60.

Dec. 30.

Geo. Shoellhammer to Chas. Fogler $250.

Sulter & Beck to Robert and Matilda Beck. $624.

Geo. H. and Welhelmina Koble to Geo. Rettberg. $1,000.

Jas. H. Clark to Holland Brown. $187.20.

Dec. 31.

Merian Bros. to S. J. Miller. $120.

Maggie McDonald to same. $60.

Con. Sullivan to M. O'Donnell. $100.

Henry W. Acker to Geo. Muth, Sr. $1,500.

Peter Ruthenbuecher to Felix Nicola. $500.

Frank S. Mason to Mrs. J. Ross. $428.61.

Bernard McCarty to Bernard McCarty, Jr. $1,500.

F. S. Mason to J. O. Mason. $413.15.

Dan'l Austin to T. R. Bolton, assignee. $62.80.

Joseph Czaloum and wife to Frank B. Czaloum. $200.

John W. Dodge to F. L. Raymond. $116.

Orlando Van Hire to C. K. Saunders. $26.

Jan. 2.

John Anderson to Charles C. Bolton. $75.

H. H. Kerr to Samuel Crobaugh. $150.

Jan. 3.

Geo. Von Metzch to John S. Donnelly. Thirty-three dollars.

Howard Marguard to Karl Kleindienst. Four hundred dollars.

DEEDS.

Dec. 28.

Geo. W. Canfield and wife to John Malleeek. $200.

Jas. M. Hoyt and wife to Patrick Gleason and wife. $300.

Levi Haldeman and wife to John Hartness. $17,000.

Hugh Harrison and wife to Russel. $1.

Robert Russell to Rebecca Harrison. $1.

Alvah A. Jewett to John Gainon. $650.

S. D. Smith and wife to Daniel Gilfether. $1,000.

John Brown et al. by Mas. Com. to J. A. Wiener. $710.

John B. Bruggeman et al. by Mas. Com. to James Corregan. $1,800.

Joseph Frengle et al. by Mas. Com. to William Meyer. $800.

L. S. Holden et al. by Mas. Com. to H. Haines. $1,284.

John Kortan et al. by Mas. Com. to Geo. Duty. $534.

Dec, 30.

James Decker and Jan. Zoeter and wife to Wm. Fry. $576.

Margaret Kerver, adm'x of N. Kerr to Wm. J. Gordon. $1,241.77.

John J. Neville and wife to M. K. Brown. $150.

Wm. T. Upham and wife to Alfred Adams. $10.

Wm. H. Van Wie and wife to John Flanagan. $500.

Ruben Yeakel and wife to Elisha A. Hoffman. $100.

David Z. Herr and wife to Elisha A. Hoffman. $4,150.

Rachael Watkins et al. by Mas. Com. to David James. $396.

David James to Wm. Swinbank. $400.

Dec. 31.

Patrick Baylin to Bridget Baylin. $1,200.

Joseph and Mary Czaloun to Vaclav and Mary Zaul. $700.

Lorenzo and Henry Carter, exs. of

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Alonzo Carter to American Steel and Boiler Plate Co. $2,181.17.

J. M. Curtis and wife to Wm. Herchert. $1,220.

Sarah Hobbs and husband to Isabella Neal. $100.

Dorothea Joerndt and Husband to Henry Lards. $1,200.

Martha Victoria Jones to Susan C. Newberry. $1,800.

Wm. J. Lewis, agt., to George A. Smith. $4,600.

Sarah Pankhurst to Sarah E. Ruple et al. $2.

W. C. Worthington et al. to Sarah E. Ruple et al. $2.

Chas. D. Pickering et al. to L. E. Palmer. $400.

John Lengenfelder and wife to I. H. Melcher. $1,500.

Anson Smith et al. to Wm. N. Goodrich. $1,600.

L. J. Talbot and wife to Martha J. Maltby. $800.

Same to Mrs. S. C. Newberry. $1,440.

Z. P. Taylor and wife to same. $1,500.

Geo. S. Wright and wife to Mary J. Hill. $4,000.

Chas. S. Edwards by etc., to Lizzie E. Keyes Churchlee. $934.

Frank Yager by etc., to J. C. Ferbert. $600.

John Jounger et al. by etc., to Michael Conrad. $1,000.

Jan. 2.

J. M. Curtis and wife to Harriet Fowler. Three thousand four hundred and thirty dollars.

J. M. Curtis and wife to Michael Goldovski. Seven hundred and fifty dollars.

Catharine Ehrbar and husband to Sophia Engel. Three thousand dollars.

John Herig to C. D. Reichardt. Nine hundred dollars.

Isaac May and wife to Simon Fraser. Nine hundred and twenty-four dollars.

Nicholrs Meyer and wife to Michael Malnoweki. One thousand eight hundred dollars.

Robert H. Mack and wife to Marthat O. Palmer. One thousand six hundred dollars.

Jabez S. Stoneman by assignee, etc., to Jacob Stoneman. Two hundred and twenty-six dollars and fifty cents.

Jacob Stoneman and wife to Ann Stoneman. One hundred and fifteen dollars.

George Weckerling to Catharine Striebenger. One dollar.

BILLS OF SALE.

Dec. 28.

Hugh Harrison to Robert Rupert.

Robert Rupert to Rebecca Harrison.

Dec. 30.

George Smith to Miss Sulia Smith. Six hundred dollars.

George Smith to Louis Schaaf. Eight hundred dollars.

MECHANICS' LIEN.

Nancy D. Coates against Lorenzo Cook. Ninety-five dollars.

Mary A. and F. W. Woodbridge against W. H. Cain. Twenty-three dollars and forty-seven cents.

D. L. Jaques againss T. J. Carran. Fifty dollars and one cent.

Same against G. E. Home. Fifty dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending January 3d, 1879, against the following Persons.

Mary Carl et al. One hundred and five dollars.

Dietrich Herchert. Three hundred and sixty-one dollars and sixty-one cents.

Anton Hassenpflug. Seven hundred and seventy-one dollars and forty-five cents.

J. W. Block et al. Thirty-two dollars.

Thos. Slackpole. Four hundred and eight dollars and eighty-five cents.

Cornelius DeHoudt, Jr. One thousand and fifty-two dollars and seventy-five cents.

A. J. Ball. Seven dollars and forty cents.

Phillip Kruger. One hundred and stxteen dollars and nine-six cents.

Jacob S. Solomon et al. Eight hundred and eighty dollars and eighty cents.

S. J. Fox et al. One thousand and fifty-seven dollars and forty-seven cents.

Wells & Wedge et al. Two thousand one hundred and twenty-five dollars and thirty-six cents.

A. C. Brown. Four hundred and thirty-four dollars and thirty-five cents.

A. C. Brown. Five hundred and sixty dollars and nineteen cents.

Fanny Launder. One hundred and one dollars and seventy-five cents.

John W. Sargeant et al. Five thousand two hundred and ninety-three dollars and eighty-three cents.

John Brennan et al. Four hundred and twenty-seven dollars and forty-one cents.

Joseph Kosok. Five hundred and fifty-eight dollars and sixty cents.

August Merz. Five hundred and forty-seven dollars and sixty-seven cents.

H. M. Crosby et al. Two thousand two hundred and forty-nine dollars and twenty cents.

U. S. CIRCTIT COURT N. D. OF OHIO.

Dec. 28.

3713. The Farmers' Loan and Trust Co. vs. the Wheeling and Lake Erie Railroad Co. Bill of complaint in foreclosure. Turner, Lee and McClue.

3814. Hugh B. Wilson vs. Same. Bill to foreclose mechanics' lien. Otis, Adams & Russell.

3353. John C. Pratt et al. vs. the Cincinnati, Sandusky & Cleveland R. R. Co. Motion to remove trustee of the 2d mortgage bonds issued by said company. S. Barke and W. B. Sanders.

3736. A. Henford vs. Strong, Cobb & Co. Demurrer. Ingersoll & Williamson.

Dec. 30.

3454. John C. Birdsell et al. vs. Silas Barner et al. Amended answer filed.

3759. Payson, assignee, vs. Brown and Page. Discontinuance field. Cause discontinued at plaintiff's costs.

Dec. 31.

3303. Henry C. Mackres vs. Henry Z. Chandler et al. Motion for distribution of proceeds of sale. McKinney & Caskey.

3444. Samuel Frazier vs. John R. Squire et al. Demurrer of Joseph H. Brown, Richard Brown and Joseph G. Butler. Jones & Murray.

Jan. 2.

3353. John C. Pratt vs. The Cincinnati, Sandusky and Cleveland R. R. Co. Receiver's report for the quarter ending Jan. 1st, 1879.

3815. Second National Bank of Jefferson vs. Sydney H. Cook, treas. Bill filed. Injunction allowed.

3816. Farmers National Bank of Ashtabula vs. same. Same. Same.

3817. Ashtabula National Bank vs. same. Same. Same.

3585. John Hancock Mutual Life Ins. Co. vs. T. W. J. Drause et al. Sale confirmed and deed ordered.

3922. Wm. Godfried et al. vs. Joseph Stoppel. Settled and costs paid. No record.

Jan 3.

3444. Samael Frazier vs. John B. Squire et al. Demurrer of Edward M. McGillin to answer and cross-peti-

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tion of Squire vs. Paine. M. & Arrell.

2235. Daniel J. Fallis vs. The trustees of Porter township, Delaware Co., Ohio. Rejoinder. E. J. Estep and Carper & Vanderman.

U. S. DISTRICT COURT N. D. OF OIHO.

Dec. 30.

566. J. Nelson Tappan, trustee, etc., vs. John P. Robison et al. Bill of complaint. Estep & Squire.

Dec. 31.

1562. Wm. Patterson, assignee, vs. The Society for Savings et al. Answer. W. V. Marquis.

1567. Abner McKintey vs. James A. Saxton & Co. Petition.

Jan. 3.

1559. Addis E. Knight, assignee, etc., vs. Caroline Gerstte. Answer of Abraham Schaffener. Jones & Murray.

—— Same vs. Same. Answer of Henrietta Schaffner.

—— Same vs. Same. Answer of Hugh B. and P. Wick. Same.

—— Same vs. Same. Answer. Same.

1528. Patterson, assignee of Marchand, vs. The Society for Savings et al. Answer of Thomas Mittenberger. West, Walker & West.

1568. Julius N. Cowdery, assignee, etc., vs. William S. Kemohan et al. Petition. M. A. Calhoun.

Bankruptcy.

Dec. 28.

1795. In re. Wm. Gibbs. Discharged.

1454. In re. Wm. Finke. Petition for discharge. Hearing Jan. 30, 1879.

1960. In re. Wm. H. Rukord. Petition for discharge. Hearing Jan. 30, 1879.

1893. In re. Andrew P. McKinley. Petition for discharge. Hearing Jan. 30, 1879.

1939. In re. Nicholas H. Hammond. Petition for discharge. Hearing Jan. 30, 1879.

Dec. 30.

1825. In re. Francis A. Nolze. Discharged.

1850. In re. Jaac P. Brownlee. Discharged.

1673. In re. Henry S. Fitch. Discharged.

1911. In re. Saml. N. Mendelson. Discharged.

Dec. 31.

1815. In re. Levi H. Cohn. Discharged.

1791. In re. Wm. May. Answer to a specification in answer to discharge.

Jan. 2.

1816. In re. Joseph Wolf. Petition for Discharge. Hearing Jan. 21.

1628. David Ketcham et al. Same. Hearing Jan. 20.

1852. John E. Marsh. Same. Hearing Jan. 22.

1766. Geo. S. Pollock. Same. Hearing Jan. 25.

1828. John M. Faber. Same. Hearing Jan. 24.

1983. In re. Andrew McAdams. Same. Hearing Jan. 25.

1891. In. re. C. C. Roberts. Same. Hearing Jan. 25.

1871. In re. John H. Benson. Same. Hearing Jan. 22.

1906. In re. Harman H. Shielus et al. Same. Hearing Jan. 24.

1904. In re. Wm. D. Edwards. Same. Hearing Jan. 24.

1961. In re. James Westfare. Same. Hearing Jan 22.

1821. In re. Wm. M. Shorb. Warrant issued for first meeting of creditors Jan. 22, 1879, before J. D. Lewis, Register at Alliance.

1861. In re. Hugh McFadden. Warrant issued for first meeting of creditors Jan. 23, 1879, before H. C. Hedges, Register at Mansfield.

1952. In re. W. S. Sanford. Warrant issued for first meeting of creditors Jan. 22, 1879, before Franklin Sawyer, Register at Norwalk.

1030. In re. Geo. Kung. Warrant issued for first meeting of creditors Jan. 23, 1879, before H. C. Hedges, Register at Mansfield.

1784. In re. A. & G. Rettberg. Exceptions to specifications in opposition to discharge by Stoppel, Miller et al.

—— Same. Exceptions and answer to specifications of Joseph Stoppel.

Jan. 3.

1812. In re. C. A. Updegraff. Petition for discharge. Hearing Jan. 21.

1858. In re. Frank S. Atwater. Demurrer and motion to specifications of the Remington Agricultural Co. in opposition to discharge. Wm. B. Sanders.

J. G. Pomerene.] [H. J. Davies.

Pomerene & Co.

LAW STENOGRAPHERS,

19 1-2 PUBLIC SQUARE.

J. G. Pomerene U. S. Commissoner, Official Stenographer of the Common Pleas, Probate and District Courts of Cuyahoga county, and Notary Public.

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WE are not without encouragement when old subscribers call and pay their subscriptions for the LAW REPORTER and ASSIGNMENT for 1879, and say that they would rather pay ten dollars per year than do without them. This was done in a number of instances during the past week.

IN the case of Stanton, an infant, by next friend vs. Ruggles et al., on trial during the week past, in the Court of Common Pleas, counsel for defendants, before any testimony was offered, having asked the Court to order a separation of the plaintiff's witnesses, the plaintiff was sent out, counsel for the plaintiff having stated that the management of the suit out of court had been solely under the charge of the next friend, and the latter was permitted to remain. We believe it is not the uniform practice of courts in this State to order a seperation of the witness. Whether the practice is a wise one or not, is, perhaps, a debatable question.

THE LAW REPORTER for 1879 will be devoted to the publication of Legal Decisions of the U. S. Supreme Court, U. S. Circuit and District Court, Syllabi of Decisions of the Supreme Court of Ohio; important decisions of the Supreme Courts of other States, and decisions of the State District and Common Pleas Courts of Ohio, especially of Cuyahoga county.

In addition will be published a complete report of the proceedings of the U. S. Circuit and District Courts in this District, Eastern Division; Actions Commenced, Judgments Rendered, Motions and Demurrers Filed in Cuyahoga Common Pleas, Deeds, Mortgages, Bills of Sale and Mechanics' Liens recorded in the office of the Recorder of said county, and all assignments made under the State insolvent law.

CUYAHOGA COMMON PLEAS.

NAV. TERM, 1878.

GEO. P. BURWELL VS. THE HAZARD HAME CO.

Exceptions to report of Referee Bill of Exceptions must be taken on the Trial before to Review Action, etc.

CADWELL, J.:

This case was heard upon exceptions to the report of a referee. So far as the exceptions taken by Sloss, Rock and Hosmer are concerned, there is nothing for the Court to pass upon except that taken by counsel for Sloss to certain questions asked by counsel for Sloss in regard to a conversation had between him and the treasurer or Secretary of the company which was objected to and by the referee ruled out, to which there was a bill of exceptions taken. I do not think there is any ground for the exception, but that the referee acted properly in ruling out the evidence. The Supreme Court has decided repeatedly, and the code is explicit on that subject, that a trial before a referee proceeds in all respects as a trial before a court, and there is no way to review his report upon the findings of fact and law, except by taking a bill of exceptions to this court on exceptions to the report. This is a court of error, and stands in the same relation to a referee as the District Court to the Court of Common Pleas. There is nothing then that we can act upon in regard to the exceptions taken by Hosmer, Sloss and Rock.

There is one other party, Festus C. Bolton, who takes exceptions to the report of the referee, as to his conclusion from the facts which are all stated in the bill of exceptions, regularly prepared and signed by the referee at the time and made a part of his report; so that I think that is properly before this court and it is simply this question: The referee finds that Bolton, and several others

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whom it is not necessary to name, being stockholders in the Hazard Hame Co., and the Hazard Hame Co. being indebted to certain banks and other persons for liabilities incurred on account of the company—that Bolton, by agreement between the stockholders and with the assent of the First National Bank and other banks, in lieu of the indebtedness on these bank notes gave his own individual notes, one for two thousand dollars and the other for four thousand dollars; that they both belonged to the First National Bank of Ohio, and that by agreement with the bank and all parties concerned, Festus C. Bolton gave his individual notes, in lieu of and in payment of the original notes, and that these notes were accepted by the banks as payment of the original indebtedness, and the referee was asked to find that Bolton was a creditor of the corporation to the extent of that liability, further finding that when those notes of Bolton became due suits were brought upon them and judgment recovered against him. The referee found, however, that he was not entitled to stand in the relation of creditor for the reason that he had not in fact paid those judgments. In that respect I think the referee was wrong, for if the original indebtedness was actually paid off, Bolton paid for the corporation the debt of the corporation at the request of the corporation, and it may be implied although the bill of exceptions does not state specifically that it was at the request of the corporation, yet it was at a meeting of the stockholders of the corporation and the bank accepted. It is fair to infer that if it could have any knowledge of that fact, and it was done at the request of the corporation, then the old indebtedness of the corporation had been extinguished, and Bolton by assuming to pay their liabilities by giving his own notes, which were received in payment, we think did pay that debt to the corporation, and that thereby he became a creditor of the corporation. This, of course, could have no other effect.

It was argued to some extent that he having paid that debt, that he should have the privilege of setting off against his individual liability as a stockholder the amount of this indebtedness which he had assumed. But we do not think that that position is tenable, and that it would not be a fair thing to have this record stand in the way it does by the report of the referee, forever barring him from placing himself, should it become necessary, in the position of a creditor of the corporation. And for this reason the exceptions taken by Festus C. Bolton are sustained and the report of the referee is set aside in the respect that it finds that he is not a creditor of the corporation.

Ford, P. P., W. J. Hudson for defendant.

D. W. Gage for plaintiff.

JANS ZOETER VS. A. W. LAMSON.

Ejectment—Land Contract—Defective Petition, etc.

Whether an action of ejectment may be maintained by the owner of the legal title as against a defendant in possession by virtue of a land contract, recorded by the plaintiff, query.

A petition in such a case which does not aver that the plaintiff has complied with the terms of the contract on his part is defective.—[ED. LAW REPORTER.

CADWELL, J.:

This is a demurrer to the answer and is rather a novel proceeding. The action purports to be for the recovery of real property, or what would be considered an action of ejectment and for the use and occupation of the premises after a certain time. I have never known in my experience, under the code, of an action of this kind being brought under such circumstances. The plaintiff says that he is seized in fee of the following lands, and that defendant unlawfully keeps plaintiff out of possession; and there is the further averment that the defendant entered into possession under a contract of purchase, but for three years past has utterly neglected to comply with the terms of payment of the whole amount of the purchase price; that four annual payments have fallen due and unpaid; that on or about the 14th day of October, 1878, the plaintiff notified the defendant of the recision of said contract and demanded possession of said premises.

For a second cause of action the plaintiff says that the defendant entered into possession unlawfully withholding to his damage in the sum of three hundred dollars, and asks judgment for the recovery of the possession of the property, and for a lien.

There is nothing whatever stated in the petition as to what the terms of that contract were. It was under a contract of purchase he says. There is no averment in the petition that the plaintiff has ever complied with any of the terms and conditions of that contract, but says that he rescinded the contract on a certain day and gave the party notice.

Now the defendant, by his answer and cross-petition, says that he admits that the plaintiff holds the legal title to the premises and that he entered into possession of the premises by virtue of the contract of purchase, and he admits that plaintiff on the 14th of October, 1878, notified this defendant that he had rescinded said contract. He further says that on the 8th day of October, 1874, the defendant entered into an agreement in writing with the plaintiff, of which the following is a copy: "Agreement entered into this 8th day of October, 1874, between Jan Zoeter and A. W. Lamson, whereby said Jan Zoeter this day agrees to sell to A. W. Lamson a certain house and lot situated upon the south side of Superior street between Norwood street and Denham avenue, being the first lot east"—and so on, describing the property.

Then follows: "Said house being now in course of erection and completion, said house to be finished in every respect by said Zoeter in a good workmanlike manner, with inside walk and fences, well and cistern, lot graded and sodded, and barn, all to be conveyed to said Lamson by a good warranty deed free of incumbrances when finished. Said A. W. Lamson agrees to pay the said Zoeter for the same the sum of $8,000, $2,000 down, the balance $6,000 in four equal annual payments, secured by a mortgage on said premises, and at 7 per cent. interest; said payments to bear date the day when possession is given of said Lamson. This contract is subject to verbal arrangements between the parties as to the manner of finishing said house. Now the defendant goes on and says that after the house was completed, he did pay the $2,000 and a little over a thousand dollars more within a few days thereafter, and he says that previous to the time of taking possession of the premises, the defendant had paid to the plaintiff the full amount of said down payment of $2,000, and on or about the date said house was completed to wit: the 15th of December, he prepared a mortgage deed to be executed by himself to the plaintiff to secure the deferred payments provided for in the contract, and that up to the time when the house was finished, he had fully performed all of said contract on his part to be performed, all of said contract on his part to be performed; and that it then became the duty of the plaintiff, under and by reason of the terms of said contract, to free said premises from all incumbrances and then and there to convey the same to this defendant

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by a good warranty deed; that the defendant then and there prepared a warranty deed of the premises from the plaintiff, in due form, and requested him to execute and deliver the same to the defendant and then there informed the plaintiff that he was ready to execute and deliver to the plaintiff a mortgage to secure the deferred payments. He says that at the time the house was finished and possession of the same given to this defendent, there was an incumbrance on the premises, a mortgage lien, which was then a valid lien on the premises, and which remained and continued to be a valid lien on the premises for more than two years thereafter until on or about the second day of June, 1877; that since that date when said house was finished, down until the second day of June, 1877, the plaintiff disregarding the conditions of said contract on his part to be performed, failed and neglected to have said premises freed of the incumbrance theron. Then he goes on to set forth that he paid in all, the sum of $2,942.25 on the premises, showing that the defendant himself was entirely in default; that he had never tendered him the deed as he had stipulated in his contract. There is no averment contained in the petition to show that he had. The petition itself would be demurrable because the pleader has not set forth that he has performed all the conditions of the cantract upon his part to be performed. I do not undertake to say whether an action in ejectment could be maintained under circumstances like this; but it certainly never could until the plaintiff had performed all the conditions upon his part. I have not examined the statute. Formerly, before the adoption of the code, a party who held a mortgage upon premises might commence an ejectment suit to turn the mortgagor out upon a breach of the conditions of the mortgage. That certainly cannot be done now; but he must foreclose his mortgage, and we think, in a case of this kind the rule ought to be that the party should stand in the same relation to his grantee under a written land contract that a mortgagor and morgagee would stand. However, I do not undertake to pass upon that question.

Now, here is a demurrer also to that part of the defense set forth in what is called the cross petition. Now, if the plaintiff has rescinded the contract without complying with or offering to comply with or being in a condition to comply with the terms and conditions of that contract, and turns the party out of possession, he must make him good; he cannot rescind the contract while he is in default, unless he places the other party in as good a condition as he was before. He is bound to pay for all the improvements and repay all the purchase money paid to him.

The demurrer to this answer and cross-petition is overruled.

E. D. Starke, for pltff.

Pennewell & Lamson for deft.

SUPREME COURT OF N. Y.

GENERAL TERM. SECOND DEPT.

MARY A. MUMPER, ADMINISTRATRIX ET. AL., APPELLANTS, VS. BENJAMIN F. RUSHMORE, SHERIFF, ETC., RESPONDENT.

Decided September, 1878.

ATTACHMENT — ASSIGNED PROPERTY.—When an attachment is issued on property in which the debtor's interest has been assigned previously, but which at the time of such assignment, and of the issue of the attachment, is in the sheriff's possession on an attachment of another creditor issued previous to such assignment, action will not lie against the sheriff for false return because he refused to attach or use such property to satisfy execution issued in the suit in which the second attachment was procured.

Where the interest in the property is not in the hands of, or under the control of the assignor, actual delivery by him to the assignee is not essential, since the deed passes the title between them.

Action was brought against a sheriff for false return on a warrant of attachment on an execution upon judgment obtained in the attachment suit.

The property of one P. was attached February 5, 1877.

On the 3d of said month P. had made a general assignment for the benefit of his creditors. This was duly filed on said day, and the assignee also went into possession at that time.

When the attachment was issued defendant was in possession of the assignor's property, under a levy made on the execution of another creditor, January 8, 1877.

Sale on said property was made February 14, 1877.

The action was dismissed on the ground that the property of the debtor had passed from him under the assignment, and that therefore the attachment and execution younger than such assignment did not authorize the sheriff to hold or levy such property which he held on the execution of a date earlier than that of the assignment. Plaintiff appeals from the judgment entered on such dismissal.

Held, That non-suit was right. The assignment transferred the assignor's interest in the property to the assignee, subject only to the attachment issued prior thereto.

Under the circumstances an actual change of possession of the property assigned was not necessary. The deed transferred the title as between the parties to it, and the non-change of possession did not render the assignment void as to the creditors of the assignor, since both the common law and the statute in affirmance thereof make the retention of the property by the assignor and not the non-delivery to the assignee evidence of fraud. When the assignment is of an interest in a property not in the assignor's possession, or under his control, an actual delivery is not required. 2 R. S., 136, § 5; Klink vs. Kelly, 63 Barb., 623; Ball vs. Loomis, 29 N. Y., 412. Plaintiff had no right under the circumstances to require the sheriff to enforce the attachment without indemnifying him.

Judgment affirmed with costs.

Opinion by Gilbert, J.; Barnard, J., concurs.—*N. Y. Weekly Digest.*

U. S. DISTRICT COURT, DISTRICT OF INDIANA.

NOVEMBER TERM, 1878.

In the Matter of the Interferance of the President with the Prosecution of Casey W. Miller before the Grand Jury.

The Grand Jury, having the case of Casey W. Miller, charged with embezzlement in the First National Bank of Indianapolis under investigation, came into open court and reported to Judge Gresham that the District Attorney had received instructions from the President of the United States against prosecuting a certain party for alleged embezzlement in the First National Bank of Indianapolis, that they had been requested to investigate the matter and desired to know from the Court whether it was their duty to proceed with the case, instructions of the President to the District Attorney to the contrary notwithstanding. Whereupon Judge Gresham charged them, in substance, as follows:

Charge by Judge Gresham:

When you were impaneled at the beginning of the term you swore that you would diligently inquire and true presentment make of such matters as should be given you in charge, or might otherwise come to your knowledge touching violations of the criminal statutes of the United States;

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that you would present no one through envy, hatred or malice, and that you would have no one unpresented through fear, favor, affection, reward or the hope thereof. You could not if you would, escape the obligation of this oath by heeding the instruction of the President in this particular case. The President may, if he feels so inclined, interfere, even in advance of indictment, by exercising the pardoning power. In no other way has he the slightest authority to control your action. He has it in his power to pardon the alleged offender, and unless he is willing to take this responsibility he has no more right to control your action than the Czar of Russia. If you believe the President's instructions to the District Attorney were indended to prevent you from making the fullest examination into the matter now before you, and from returning an indictment against the accused if the evidence should warrant it, you should feel inspired with additional determination to do your duty. The moment the executive is allowed to control the action of the courts in the administratien of criminal justice their independence is gone. It is due the President to say that the Court does not believe he has any desire to encroach upon the judiciary, or that he contemplated any unwarranted interferance by his instructions to the District Attorney. The District Attorney says in open court that he is ready and willing to aid you in any examination of this case which you may feel called upon to make. He and his assistants are faithful officers, and will render you all necessary aid in this as in other cases."

U. S. DISTRICT COURT, DISTRICT OF OREGON.

DECIDED AUGUST 30, 1878.

VIOLET W. ELLIOTT VS. JOSEPH TEAL.

Action to Recover possession of Real Property.

Before FIELD and DEADY, Judges.

(1.) MARRIED WOMEN. At common law a married woman could not convey her real property except by matter of record, as by fine and recovery.

(2.) IDEM. The common law rule is not changed in this respect by the statutes of Oregon, except that a married woman may convey her real property by joining with her husband in a conveyance thereof; and therefore a conveyance by her alone, or in pursuance of a power executed by her, is void.

(3.) HUSBAND'S INTEREST IN WIFE'S ESTATE. At common law, by virtue of the marriage, the husband became seized of an estate in the inheritance of his wife for their joint lives; and this rule is not changed by the statutes of Oregon, which provide further that upon the death of the wife the husband shall be tenant by courtesy, whether they had issue born alive or not.

DEADY, J.:

This action is brought to recover the south half of the donation of William J. and Violet W. Berry, the same being the wife's half of claim No. 52, in township 10 south, range five west of the Wallamet meridiam, and containing 319.90 acres.

The defendant Teal answered, denying the ownership of the plaintiff, or her right to the possession of the premises, and alleging title in himself.

The cause was tried by the court, without the intervention of a jury, upon the following agreed state of facts:

The plaintiff is a citizen of California, and the defendant a citizen of Oregon, and the premises in controversy are worth more than $5,000; that said premises are the wife's half of the donation of the married persons William J. and Violet W. Berry, for which a patent issued to them for their respective shares thereof on October 8, 1866; that said William J. and Violet W. were duly divorced on August 9, 1865, and the plaintiff herein is the same person then so divorced, and known as Violet W. Berry, and that the said William J. Berry is still alive; that on December 14, 1854, the plaintiff executed a power of attorney to William J. Berry aforesaid, authorizing and empowering him to sell and convey the premises in controversy; that on February 5, 1855, said William J., in consideration of the sum of $2,000, for himself and as the agent in fact of the plaintiff, executed a conveyance of the said premises to Henry Fuller; that on July 22, 1855, the plaintiff, in consideration of the sum of $1,400, also executed a conveyance of the premises to said Fuller; and that the defendant, by means of sufficient conveyances, has succeeded to all the rights in the premises that said Fuller acquired by the two conveyances aforesaid.

The plaintiff bases her right to recover the possession of the premises upon the ground that both the power of December 14, 1854, and the conveyance of July 22, 1855, executed by her, were contrary to law, and therefore void.

At common law a married woman could not dispose of her freehold except by some matter of record, as a fine and recovery. (1 Black. 293; 2 Kent, 150: Bish. M. W. § 586; Wash. R. P. 581; Wythe vs. Smith, 4, Saw. 232; Mott vs. Smith, 16 Cal. 657; Dow vs. Gould & Curry Co., 654.)

It follows then that the separate conveyance of the premises by the plaintiff during her coverture with Berry is void, unless specially authorized by statute. The only statute of Oregon upon this subject is the "act relating to alienation by deed," etc., of January 13, 1854, (Or. Laws, 515), the second section of which provides that the real property of the wife may be conveyed by the joint deed of the husband and wife. The deed of the wife, unless her husband assents to it by joining in the execution of it, by becoming a party to it, is therefore unauthorized and void; and so the conveyance of July 22, 1855, being the seperate deed of the plaintiff, and not the joint one of herself and husband, was made without authority of law, and is therefore void and of no effect.

The power of attorney to her then husband, Berry, is also void, because unauthorized by statute. In Mott vs. Smith, *supra*, it was held that a married woman cannot invest another with power to sell her interest in real property without a statute to that effect; and Mr. Chief Justice Field, delivering the opinion of the Court, gives the reason for the conclusion as follows: "To the efficacy of a conveyance by a married woman, it is essential that she join with her husband in its execution, and state, on a private examination at the time, separate and apart from him, and without his hearing, that she executed the same freely, without fear of him or compulsion, or under influence from him, and that she does not wish to retract its execution. This private examination—this determination of the will as to the retraction of the execution—are not matters which can be delegated to another." (See also 1 Wash. R. P. 564; Dow vs. Gould & Curry, *supra*.) The power and seperate conveyance of the plaintiff being mere nullities, the plaintiff's interest in the premises is unaffected by them. Notwithstanding them, she is still the owner of the premises, and entitled to the possession of the same.

But by the conveyance of February 5, 1855, Berry, the then husband of the plaintiff, conveyed all his interest in the premises to the defendant's grantor. Although this conveyance, so far as it purported to be the deed of the plaintiff, was void, so far as it was the deed of Berry in his individual capacity, it was valid, and operated to pass any interest which he

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then had in the land. This interest was an estate for his own life. By the common law, upon the marriage of a man with a woman seized of an estate of inheritance, he becomes seized of the freehold *jure uxoris* during their joint lives; and if he has issue by her born alive, then for his own life absolutely; in which latter case, if he survive the wife, he is styled tenant by courtesy. (1 Black. 126. 2 Kent. 108; Bish. M. W. § 529; Starr vs. Hamilton, 1 Deady, 275; Wythe vs, Smith, *supra*, 21; Jackson vs. Stevens, 16 John, 116.) But by section 30 of the act of January 16, 1854, relating to estates by dowry and courtesy (Laws of Or. 588), it is provided that upon the death of the wife the husband shall be tenant by courtesy, whether they had issue born alive or not. So that, in any event, Berry, at the date of his conveyance to Fuller by virtue of the common law and the statute, had an estate for his own life in the premises, which passed thereby to Fuller, and is now vested in his grantee, the defendant.

The plaintiff is not entitled to the possession of the premises during the existence of the particular estate cast upon the husband, Berry, by the marriage. Her interest in the property is the estate in reversion after the termination of the freehold vested in the defendant, and therefore she cannot maintain this action. She was not at the commencement of this action, and is not now, entitled to the possession of the premises. There must be a finding for the defendant accordingly.

Addison C. Gibbs, for the plaintiff.
H. Y. Thompson and George H. Durham, for the defendant.

[Reported by R P. FLOOD.]

COURT OF COMMON PLEAS.

Actions Commenced.

Jan. 2.

14420. James Watton et al. vs. Jas. H. Sprackling. Money only. W. S. Kerruish.

14421. E. M. Allen & Co. vs. R. W. Peters. Appeal by defendent. Judgment Dec. 31. Estep & S.

14422. Geo. A. Reynolds et al. vs. Joseph Sparrow et al. Replevin. Hutchins & Campbell.

Jan. 3.

14423. A. M. Harman vs. Edward S. Turner et al. To subject lands. A. T. Brewer.

14424. Theresa B. Brant vs. The Hartford Fire Ins. Co. Appeal by defendant. Judgment Dec. 8, 1878. H. W. Canfield. H. W. Goulder.

Jan. 4.

14425. Harriet N. Drew vs. Josiah Brown. Money and to subject lands. Caldwell & Sherwood.

Motions and Demurrers Filed.

Jan. 3.

2139. Elasser vs. Naftel et al. Motion by deft. Geo. Klooz, to strike the amendment to the petition from the files.

2140. Wheaton vs. Mitchell, admx., etc. et al. Demurrer by plaintiff to the answer of M. A. Mitchell.

2141. Caursky vs. Wilcox. Demurrer to the petition.

Jan. 4.

2142. Newman vs. The Singer Manf. Co. Motion by deft. to require plff. to make his petition more definite and certain.

2143. Spencer vs. Cunningham et al. Motion by plff. to require defts. R. & T. E. Cunningham to make their answer more definite and certain.

2144. Drea, adm., vs. Carrington et al. Motion by defts. Miles D. Carrington and Theo. B. Casey, for separate jury trial.

2145. Foote et al. vs. The City of Cleveland. Motion by defts. to require deft. Chester L. Foote and all others for whom he has the right to sue in this action to eparately state and number his causes of action.

2146. Bebout vs. Smith. Motion by deft. to strike irrelevant matter from petition.

2148. Mahon, Jr., vs. Gallagher. Motion by defendant to strike petition from the files.

2148. Burns vs. The C., C., C. & I. Ry. Co. Motion by deft. to make Christian Hagemeyer a party deft.

2149. Kirby vs. Beck et al. Demurrer by defendant Te Pas, to parts of answer of Robert and Matilda Beck to his cross-petition.

2150. Baumen & Co. vs. Krames. Motion by deft. to require plffs. to give security for costs, with affidavit, etc.

2151. Same vs. same. Same.

2152. Sanders vs. Wylde et al. Motion to require defts. Wilde & Denham to make answer more definite and certain.

2153. Meek vs. Linas. Motion to strike from plff's petition the alleged exhibits A and B, and to make the first cause of action more definite and certain.

Jan. 6.

2154. Sobiety for Savings vs. Umbstaeter et al. Motion by deft. Citizens Saving and Loan Ass'n. to confirm report of Amos Denison, Referee.

2155. Daniels vs. Baldwin. Motion by deft. to dismiss action.

Jan. 7.

2156. Dangleheiser vs. Wigmans, exr., et al. Motion by plaintiff to confirm report of J. D. Cleveland, Referee.

2157. Rathenballker vs. City of Cleveland. Demurrer to the answer.

2158. Ferbert et al. vs. Archer et al. Motion to require deft's to make their answer more definite and certain.

Jan. 8,

2159. Hoffman vs. Fitzgerald et al. Motion by defts. to dissolve and vacate injunction or restraining order.

2160. Smith vs. Somerville et al. Motion by deft. J. W. Scott, for oder to sell personal property.

2161. Gauss vs. L. S. & M. S. Ry. Co. Motion to require plff. to give security for costs.

2162. Stolz vs. Koester et al. Motion by plff. to strike answer of deft. Wm. Tramp, from the files.

Motions and Demurrers Decided.

Jan. 8.

1667. Krause vs. Kramer. Overruled.

1866. Spranke, Morse & Co. vs. Williamson et al. Overruled at plffs. cost. Plff. have leave to amend their petition.

2150. Baumer & Co. vs. Kramer. Granted.

2151. Same vs. Same. Same.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending January 11, 1879.

MORTGAGES.

Jan. 4.

C. H. Canon and wife to Eli N. Canon. $469.

F. and S. O'Neil to Henry Wick & Co. $125.

Daniel Sheriden to The Citizens Savings and Loan Ass'n. $900.

Thomas Davis et al. to J. P. Davis. $550.

D. P. and Harriet, L. Foster to Cit. Sav. and Loan Ass'n. $1,500.

Wm. F. and Augusta D. Tonne to Manuel Halle. $200.

Linne and J. H. Ortee to Elizabeth Weeks. $350.

John S. Stoneman and wife to Jacob Stoneman. $2,500.

Zabez S. Stoneman to John Spear. $3,000.

Jan. 6th.

John Koepke and wife to Philipina Lorenz. $300.

George Zahn to John T. McDonald $200.

C. H. Williams and wife to Gottfried Loesch. $1,800.

Geo. W. Tracker to Wm. S. Carroll. $5,560.

Jas. W. Kingshury to James W. Grimshaw. $1,200.

Jan. 7.

John Ueffing and wife to Herman A. Jansen. One thousand dollars.

John G. Haserot and wife to Hiram Barrett. Two thousand dollars.

Jacob Rockert and wife to Michael Woelky. Four hundred dollars.

Harvey D. Greely to Harriet Hickox. Five hundred dollars.

H. D. Warnicke and wife to Louis Krueger. Nine hundred dollars.

Wm. Weaniels to N. Scheplein, Treas. C. F. I. V. One hundred and fifty dollars.

Ellen and M. C. Parker to T. A. Selover. Three hundred dollars.

Jan. 8.

G. H. Smith and wife to Lyman H. Freeman. One thousand dollars.

J. W. Brott to R. Marlow. Three hundred dollars.

John and Bertha Kaercher to J. Scheidler. Six hundred dollars.

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John Fitzgerald to H. H. Little. Six hundred dollars.

Jan. 6.

Henry D. Masena to U. J. Senter. Ffty dollars.

Henry T. Smith and wife to S. H. Chavelier. Three hundred and forty-four dollars.

J. M. Nowak and wife to Gustav Schmidt. Three hundred dollars.

Henry Stark and wife to R. Harlow. Twenty-nine hundred and fifty-four dollars.

Corentha A. Gilbert and husband to John Rodgers. Thirty-five hundred dollars.

Henry and Alice James to Wm Biddulph. Fourteen hundred dollars.

Thomos T. Seelze to H. H. Little. Fourteen hundred dollars.

W. H. and Jane Pope to R. B. Dayton. Two hundred dollars.

Erasmus Krennel to John Knize. One hundred dollars.

James Eastwood and wife to Delia L. Hamilton. Five hundred dollars.

Jocob Smith to B. C. Clark, admr. Five hundred and eighty-three dollars.

Jan. 10.

Ferdinard & Stephenia Herz to Mary Steidle. $450.

Jacob Kevarick and wife to Bohemiar Society, St. John. $150.

H. M. Hanna to Clara W. Benedict. $8,000.

Thos. H. White and wife to Almira C. Hand. $7,000.

Miria and Geo. Miller to Henry Castle. $3,000.

Chas. E. Wyman and wife to Cyrus Swartwood. $1,000.

CHATTEL MORTGAGES.

Jan. 4.

Luanna P. and Chas. Foljambe to E. Shaffer. $100.

Wm. G. McConnell to John C. Weber. $100.

J. and Lena Eruch to L. and P. Zimmerman. $200.

Cornelia A. and Wm. T. LaRue to A. W. Bailey. $30.

Henry Biddle and wife to Franklin Leonard. $180. Jan. 6.

T. W. Hammond to A. and D. H. Chambers. $466.32.

C. H. Williams and C. E. Wyman to Gottfried Loesch. $1,800.

Geo. Rettberg to Ph. Linn. $100.

C. J. Kuler to Margaret Handley. $1,055.

Jan. 7.

Simon Goodhart to L. and D. Marx. One thousand two hundred dollars.

L. B. Silver to F. D. Clewell et al. One thousand five hundred dollars.

Jan. 8.

Bernard Reitza to Thekla Schmidt. One hundred and thirty dollars.

Michael and Katherine Stumpf to Sprankle, Morse & Co. Six hundred dollars.

Benjamin W. Holliday to Lewis Buffete. One thousand six hundred and twenty dollars.

F. C. Dress to Cleveland Burial Case Co. Two hundred and fifty-eight dollars and twenty-two cents.

Jan 9.

Geo. H. Closs to Sabetla Closs. Eleven hundred dollars.

O. N. Wood to R. Harlow. Five hundred and forty dollars.

Richard Davis to Henry Body. Five hundred dollars.

Miles O'Mally to Henry Body. Three hundred dollars.

Sherburn Blodgett to Howard M. Bull. Sixty dollars.

Barbara Wist to Anna Maria Sirl. Two hundred and ninety-five dollars and eighty-four cents.

Thomas Brown and wife to H. Haines. Three hundred and seventy-five dollars.

Jan. 10.

Bichard O'Roarke to Conrad Deubal. $100.

Chas. Brunel to J. M. Degue. $50.

Peter Carr to John O'Keefe. $100.

J. B. and E. B. Myers to E. W. Goddard. $134.

J. D. Fuller to J. A. Smith. $25.

Jacob F. Koblenger to Geo. Trunk. $200.

F. E. Marsh to A. H. Bailey. $111.

F. E. Marsh to A. H. Bailey. $100.

Geo. N. Adams to Wm. N. Shaw. $200.

DEEDS.

Jan. 3.

Dudley Babowin and wife to Dorothy Cooper. $813.

Burton and Moses to Caroline Beyerlie, ex. of land and $1.

Serephna Brainard to Geo. R. Whitney. $775.

George and Mary Cockburn to Wm. L. Haldine. $950.

J. M. Curtis and wife to Frederick Kulo. $1,320.

T. Stackpole et al. to Metcalf Gilmore. $26.90.

J. T. Brooks, assignee, to Metcalf Gilmore. $1.

Lazarus Fuldheim to Moses Fuldheim. $5.

Moses Fuldheim to Regina Fuldheim. $5.

William J. Gordon and wife to Wm. H. Stewart et al. $3,825.

Thomas Graves, Mas. Com., to H. T. Hoppensack. $510.

John Sherry et al. by etc., to W. J. Crowell. $934.

Jan. 4.

Cornelius and Lucy C. Burgis to Wm. Thornburgh and wife. $3,000.

Mrs. Ann M. Clark to Mrs. Sarah C. Gaylord. $4,781.25.

Mrs. Ellen Cahil to Daniel Cahil. $1,500.

James M. Curtiss and wife to Nicholas Meyer. $7,750.

F. Carr and wife to M. E. Sullivan. $6,500.

J. M. Curtiss and wife to Wm. F. Swining. $900.

Eliza S. Clark and G. E. Herrick, admr., &c., to Sarah Catharine Gaylord. $4,781.25.

John L. Hyde to Wm. C. Fair. $1,000.

H. H. Kerr to H. Haines. $2,000.

Sarah A. and Joseph Moss to Thomas D. West. $1,500.

Mathew Yaras by Mas. Com. to L. E. Holden. $405. Jan. 6.

Chas. A. Brayton et al. to Sarah Ryan. Six hundred dollars.

A. E. Burlison and wife to John Whitcomb. Four thousand one hundred and fifty dollars.

Same to same. One thousand two hundred dollars.

H. B. Curtiss to Mrs. C. S. Curtiss et al, One dollar.

Abram Dunham to Hattie Dunham. One thousand six hundred dollars.

Chas. O. Evarts and wife to Jas. Morris. Eight hundred and fifty dollars.

Ezra S. Gillette and wife to Emma E. Worthington. Six hundred dollars.

Jas. M. Hoyt and wife to Elizabeth Bohner. Seven hundred and ninety dollars.

Manuel Halle and wife to Augusta D. Tonne. Four hundred dollars.

Ambrose M. McGregor and wife to Mary C. Smith. One thousand dollars.

Marcus C. Parker and wife to R. D. Freer. Twenty thousand dollars.

Edwin Richards and wife to H. S. Francis. Seven hundred and fifty dollars.

Wm. Uhink and wife to John Uhink. Five thousand dollars.

Jan. 7.

Samuel S. Coe to John G. White. One dollar.

R. D. Freer and wife to Ellen Parker. Eight thousand five hundred dollars.

R. D. Freer and wife to M. C. Parker. Three thousand dollars.

Christian Golding to Geo. R. Goulding. Four thousand dollars.

L. E. Holden and wife to H. H. Little. One thousand dollars.

Mary Higgins et al. to J. M. Mack. Two hundred and forty dollars.

Arthur and Catharine P. Quinn to Myron T. Merrick. Ten dollars.

Myron T. Merrick to Catharine P. Quinn. Ten dollars.

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Henry and Sarah E. Haines to Anna M. Brock. Two thousand dollars.

H. A. Vaughn and wife to Freeman O. Brentford. One thousand six hundred dollars.

Susanna H. and Geo. P. Vetter to Joseph Wrubel. Sixty dollars.

John S. White to Gertrude S. Coe. One dollar.

Barbara Berchold by F. Nicola to Philippine Zwilinder. One thousand three hundred and sixty-two dollars.

Sarah Manchester et al. by Mas. Com. to Perley Fuller. Eeight hundred dollars. Jan, 8.

Henry Ashley and wife to Bertha M. Willes. One thousand one hundred and fifty dollars.

Titus N. Brainard and wife to The Riverside Semetery Ass'n. Seventy-five thousand dollars.

Richard Cunningham and wife to Patrick Barry. One hundred and fifty dollars.

Peter Gerlach and wife to Mrs. Eliza Stempel. Five thousand dollars.

John Jastle et al. to John Kaercher. Eighteen hundred dollars.

Catherine Kreiger to Caroline Body. Thirteen hundred dollars.

Henry a..d Sophia Paepeke to August Bergwold. Eight hundred and fifty dollars.

John Palmer and wife to Wm. M. Warren. Three thousand dollars.

Alex. Sacket and wife to Mack Foslik. Six hundred and sixty-one dollars and fifty cents.

Henry Weamals et al. to Wm. Weamals. One dollar.

Seth S. Wheeler, admr., etc., to Wm. Weamals. Three hundred dollars.

W. M. Warren and wife to Fred M. Warren. Two thousand dollars.

Carl Zingler and wife to E. D. Stark. One dollar.

Christian F. Best by Felix Nocola, Mas. Com. to Wm. Bingham, trustee. Three thousand dollars.

Jan. 9.

Henry J. Brooks et al. to Helen A. Lee. Three thousand dollars.

L. H. Chavalier and wife to Henry T. Smith. Three hundred dollars.

Louis Klobitz to Ignatz Klobitz. Five dollars.

John Pekar and wife to Frank Pekar and wife. One thousand dollars.

Abner Royce and wife to Chas. W. Hills. Three thousand and forty dollars.

J. B. Heller, assignee of etc., by Thos. Graves, Mas. Com.. to Theresa Beckman. Two thousand six hundred and sixty-seven dollars.

BILLS OF SALE.

Louisa Boltz to Chas. F. Boltz.

Louisa Boltz to John E. Boltz.

ASSIGNMENTS.

Jan. 7.

John Voelker to Gustav Schmidt. One dollar.

Judgments Rendered in the Court of Common Pleas for the Week ending January 10th, 1879, against the following Persons.

Euclid Avenue Opera House. Three thousand seven hundred and ninety-two dollars and fifty cents.

Altrg Kennedy et al. Five hundred dollars.

Patrick Carr et al. Two hundred and fifty dollars and seventeen.

Edgar Slaght. Four thousand eight hundred and thirty dollars and thirty-eight cents.

Jacob Leibold. Nine hundred and fourteen dollars and ninety-one cents.

Wm. West and H. L. Blair. One thousand one hundred and fifty-seven dollars and seventy-six cents.

Jasper Burlingame. Eleven hundred and five dollars and fifty cents.

A. I. Hubbard. Two hundred and seventy-fiive dollars and seventy-two cents.

E. Adams. One hundred and twenty-two dollars and seventy-three cents.

T. W. Parr. Seven hundred and ninety-nine dollars and nineteen cents.

Henry Kramer. One hundred and one dollars and eighty-one cents.

Henry Sorter. Eighty-three dollars and ninety-four cents.

Samuel Guynn. Two hundred and eleven dollars and sixty-two cents.

Fred Seibert. Four hundred and ninety dollars and fifty cents.

John T. Deweese. Fifteen hundred and seventy dollars and sixteen cents.

Henry Kramer. Five hundred dollars.

U. S. CIRCTIT COURT N. D. OF OHIO.

Jan. 4.

2235. Daniel J. Fallis vs. the trustees of Porter Township. Rejoinder filed. E. J. Estep.

3303. Henry O. Mackres vs. Herry Z. Chandler et al. Sale confirmed. Deed ordered.

3397. A. B. Freeman vs. Moses R. Brailey. Motion for new trial. Overruled. Deft. excepts. Judgment for plaintiff for $508.42.

Jan. 6.

2427. John Thomas vs. Peter Rose. Motion for a new trial. Overruled. Judgment against plaintiff for costs.

3075. Farquhar McRae vs. The Detroit and Cleveland Steam Navigation Co. Motion for new trial. Overruled. Judgment against defendant for costs.

3043. Merchants and Manufacturers Bank of Detroit vs. The Commercial National Bank of Cleveland. Motion for new trial. Overruled. Judgment on verdict for $2,729.21 with interest from April 1st, 1878.

3081. Jacob Bosser et al. vs. W. T. Roop et al. Motion for a new trial. Overruled. Sudgment on verdict for $647.25, with interest from Jan. 1, 1877.

3792. The President and Managers of Delaware & Hudson Canal Co. vs. Chas. L. Crawford et al. Judgment by default. Damage $2,-478.52.

3797. Singer M. Co. vs. S. E. Henderson. Motion on petition filed. John Coon; Humphry & Stewart.

3818. First Nat. Bank of Akron vs. David R. Paige et al. Bill filed. Injunction allowed. Oviatt & Allen.

Jan. 7.

3819. The Singer Manf. Co. vs. T. P. Miller et al. Petition for money and subjection of real estate. John Coon and F J. Wing.

3189. John Shade vs. The First National Bank of Lima. Motion to require plaintiff to seperately state and number causes of action. Irvine & Brice.

Jan. 8.

3693. A. J. Thomas vs. The Slavanska Life and Benevolent Ass'n. Decree.

3373. Washburn & Moen Man'g Co. et al. vs. The Ohio Steel Barb Fence Co. et al. Decree.

3371. Same vs. Same. Same.

3372. Same vs. Same. Same.

3506. John C. Birdsell et al. vs. Fred'k Stroeble. Answer. C. H. Norris, and Willey Sherwood & Co.

3646. Herbert C. Walker vs. John McLain. Amended answer and cross-petition. Green & Tucker.

3820. Benjamin S. Coggswell, assignee, vs. Joseph A. Redington. Transcript on appeal filed from Dist. Court.

Jan. 9.

—— Mer. Na. Bank of Toledo vs. E. B. Hall, treas. Injunction allowed.

3693. H. A. Thomas vs. The Slavorska Lipa Benevolent Ass'n. Decree for complainant for eight thousand eight hundred and twenty-

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six dollars and ninety-one cents. Decree for defendant, John Koffstein, for nine hundred and eighteen dollars and two cents. Grannis & Griswold.

3821. Henry C. White, assignee, vs. John D. Rockafellow et al. Pleading filed. W. J. Boardman.

3444. Samuel Frazier vs. John R. Squire et al. Demurrer to cross-petition.

3706. The Grover and Baker S. M. Co. vs. Philip McCue et al. Reply to answer of Thomas W. McCue. Oits, Adams & Russell.

3807. The First Nat. Bank of Cleveland vs. Moses E. Watterson. Bill of complaint. R. P. Ranney and Baldwin & Ford.

Jan. 10.

3382. Rinhard B. Johnson vs. The Lycoming Fire Ins. Co. Leave given to defendant to cross-examine witnesses whose depositions have been filed by the plaintiff.

3795. James H. Dunham, trustee, vs. Buckeye Mutual Fire Ins. Co. Leave to amend petition in 15 days.

3799. J. M. Henderson, assignee, vs. James Talcott. Leave to file answer in 10 days.

3822. E. P. Needham et al. vs. J. W. Caldwell et al. Money only. Foster, Hinsdale & Carpenter.

3518. John C. Birdsell et al. vs John Morement et al. Replication. M. D. Leggett & Co.

3467. Same vs. John Gage et al. Same. Same.

3378. Same vs. William Richards. Same. Same.

3505. Same vs. Ezra Slatter. Same. Same.

3458. Same vs. Geo. Copelaı d. Same. Same.

3454. Same vs. Silas Baker et al. Same. Same.

3387. Same vs. John W. Smith. Same Same.

2705. Jos. L. Hall vs. Deibold, Norris & Co. Stipulation as to hearing of case.

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1564. Fitch Adams et al. vs. W. M. Patterson. Answer. H. D. Goulder.

1559. A. E. Knight, assignee of Abraham Shaffner, bankrupt, vs. Abraham Shaffner. Replication of plaintiff to the answer of Enterprise B. I. Society of Youngstown, O. Clark & Knight.

1662. Joseph Desotell et al. vs. The Steam Tug William Goodnaw, etc. Intervening answer of the Summit Mine Coal Co. Mix, Noble & W.

Same. Same vs. same. Intervening answer of the Cuyahoga S. Fur. Co.

Same. Same vs. same. Intervening answer of John Maglet. Same.

1663. The Dry Dock Engine Works vs. same. Same. Same.

Same. Same vs. Same. Intervening answer of the Cuyahoga Steam Furnace Co. Same.

Same. Same vs. Same. Intervening answer of Summit Mine Coal Co. Same.

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1189. Peleg R. Arnold vs. The Pittsburgh & Boston Mining Co. Motion of sundry defts. to set aside decree and re-instate, etc. J. M. Webster.

1679. W. Bingham vs. Schooner Wm. Young. Libel for supplies. Mix, Noble & White.

Bankruptcy.

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1921. In re. Wm. Jones. Petition for discharge. Hearing Jan. 21.

1842. In re. Wm. J. Miller. Petition for discharge. Hearing Jan. 21.

1783. In re. Saml. Weil et al. Discharged.

Jan. 7.

1889. In re. Geo. E. Kile. Discharged.

1578. In re. M. W. Pinkerton. Discharged.

1648. In re. Shepard & Bostwick. Motion by Jacob Reigel & Co. to strike off assent of creditors to discharge. Hutchins & Campbell.

Jan. 8.

1934. In re. McHenry and Claflin Manf. Co. Order entered confirming composition.

1621. In re. Abel C. Haines et al. Discharged.

1605. In. re. James S. Trimble. Discharged.

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1872. In re. Leonard Lynde. Discharged.

1756. In re. Edward H. Everett. Discharged.

1805. In re. Dennis J. Lawler. Discharged.

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1962. In re. Wm. A. Smith. Hearing Jan. 27.

1651. In re. Gremier, Sourbeck & Co. Hearing Jan. 29.

1874. In re. Chas. N. McDonald. Hearing Jan. 27.

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1776. In re. John E. Hood. Hearing Jan. 27.

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2021. In re. Joseph S. Bell. Hearing Jan. 27.

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JUDGE WELKER does not recognize the right of counsel in a case to require him to put his charge to the jury in writing. In State Courts in some of the States the Judges are by law in all cases required to reduce their charges to writing.

IN our head-note to the decision in the case of Zoeter vs. Lamson, published in our last issue, for "recorded" read "rescinded."

THE Common Pleas Assignment at $3.00 per annum is less than 10 cents per single copy. It is but a little more than a year since that attorneys paid 25 cents per copy, and, at that rate, paid one-half more than they now pay for the REPORTER and Assignment together. Should we cease to publish it, no doubt they would be willing to pay that price again rather than do without it.

THE LAW REPORTER for 1879 will be devoted to the publication of Legal Decisions of the U. S. Supreme Court, U. S. Circuit and District Court, Syllabi of Decisions of the Supreme Court of Ohio; important decisions of the Supreme Courts of other States, and decisions of the State District and Common Pleas Courts of Ohio, especially of Cuyahoga county.

In addition will be published a complete report of the proceedings of the U. S. Circuit and District Courts in this District, Eastern Division; Actions Commenced, Judgments, Rendered, Motions and Demurrers Filed in Cuyahoga Common Pleas, Deeds, Mortgages, Bills of Sale and Mechanics, Liens recorded in the office of the Recorder of said county, and all assignments made under the State insolvent law.

SUPREME COURT OF WISCONSIN.

OPINION FILED DECEMBER 12, 1878,

PETER RIESS V. DELLES ET AL.

Rights of Holder of Personal Property to Secure Himself.

1. Where one holds personal property to secure himself against a liability which he had incurred for the general owner, he may maintain replevin against the sheriff who has levied upon the same for the creditor of the general owner, and as against the sheriff he is to be regarded as the absolute owner.

2. In such case, where the defendant gives the statutory undertaking and retains the property, the plaintiff, under SEC. 39, Ch. 132, Taylor's R. S., may elect when he takes judgment, to take the property or its value.

COLE, J. There is no bill of exceptions in this case, and the only question to be considered is, was the judgment warranted by the complaint and facts found by the Circuit Court. The action was commenced on the 14th day of July, 1876. The complaint alleges in substance that the plaintiff was the owner and lawfully possessed of the personal property described of the value, etc., which the defendant on the 12th of July, 1876, wrongfully took from his possession and unjustly detained to his damage, etc. The defendant answered, denying all the allegations of the complaint, and, as sheriff, justified the taking by virtue of an execution issued upon a judgment against one Christopher Kraus, in favor of James W. Vail and William H. Landolt. The Circuit Court found that the plaintiff is the owner of the property mentioned in the complaint, and is entitled to the possession and return thereof; that the value of the property is a sum stated; that the defendant took the same as alleged in the complaint, but found no damages for the wrongful taking and detention. The Circuit Court likewise found that the plaintiff took title to said property to secure himself and to others named against any liability and damages in consequence of having become sureties for Christopher Kraus, as town treasurer for the town of Port Washington for the year 1876, and had no other interest in the same.

The judgment recites that the action was tried by the court, a jury having been waived, "and the court having found that the plaintiff was owner in fee of the property mentioned in the complaint and was entitled to the pos-

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session thereof; that the defendant took the same as alleged in the complaint; that the value 'was the sum named;' that the damage to the plaintiff for the taking by the defendant was six cents; that the plaintiff was entitled to the return of said property or the value thereof * * * * and the plaintiff herein waiving judgment for the delivery to him of said property by the defendant and asking judgment for the value thereof and damages for the taking," it was adjudged that the plaintiff recover from the defendant and the sureties in the undertaking the sum of ——— (the value of the property found by the court) and six cents damages for the taking and costs.

Now it is said by the learned counsel of the defendants that this judgment was not warranted by the facts found. It is objected that the court did not find, as stated in the judgment that the plaintiff was the absolute owner—or owner "in fee"—of the property; but did find that he held it merely to secure himself and others against a liability which he had incurred for the general owner, Kraus, and for no other purpose. The presumption from the finding is that the whole legal title, with the possession, was vested in the plaintiff conditionally as mortgagee, and this was sufficient to enable him to maintain the action; Frisbie v. Langworth, 11 Wis. 376; Welsh v. Sackett, 12 Do. 244. The words "in fee" in the connection in which they are used are obviously without meaning. For as against the defendant the plaintiff is to be regarded as the absolute owner.

Again it is said the finding was made in June, 1877, and is that the plaintiff is the owner of the property and is entitled to the possession thereof. It is insisted that this refers to the rights of the plaintiff when the action was tried and not to his rights when the suit was commenced. This criticism seems to us without force. The finding relates to the title and possession of plaintiff when the suit was commenced and must be so construed. It is further objected that to entitle the plaintiff to a judgment for the value of the property it must appear in the finding that he waived a return. In this case the defendant gave the statutory undertaking and retained the property. The plaintiff had the option under section 39 chapter 132 Tay. R. S. to take judgment for the recovery of the possession of the property or absolutely for its value. But we know of no provision that requires the plaintiff to exercise that option before the finding is made. We suppose it is sufficient if he exercises his election when judgment is taken. From the recital in the judgment already quoted it will be seen the plaintiff waived a delivery to him of the property and asked a judgment for its value. This is all that was necessary for him to do to show that he exercised the option given him by statute. The court failed to find any damages for the taking of the property but the judgment awards six cents. It is likewise objected that this was error. Concede that it was, still it is not such an error as will work a reversal of the judgment: High v. Johnson 28 Wis. 72. The maxim de minimis applies. Hass vs. Prescott 38 Wis. 146.

It follows from these views that the judgment of the Circuit Court must be affirmed.

SUPREME COURT OF MICHIGAN.

ANNA E. RUSSEL ET AL. V. THE PEOPLE'S SAVINGS BANK.

Married Women not Liable on Indorsements for Corporations in which they are Stockholders.

COOLEY J. (Abstract). Mrs. Russel, a married woman, being a stockholder in a corporation called the Detroit Car Works, which was indebted to the savings bank on a note, to prevent suit against it indorsed over to the bank a note held by herself against the Hamtramck Iron Works, and is now sued on the indorsement.

Held, that she is not liable. A contract of suretyship does not come within the statute, Comp. L., 4803; it is not one by which a married woman contracts in respect to her own property, or any part of it. She pledges merely her personal responsibility, having in view only the benefit of another, and not any advantage to her own estate. It makes no difference that the suretyship was for the benefit of a corporation in which she was a stockholder. She was not legally identified with it, and contracts for the benefit of the corporate estate are not contracts for the benefit of the estate of one of its corporators. Talbot v. Scripps, 31 Mich., 268. The result, whether beneficial or injurious would have been incidental and circuitous, following not directly a contract made on her own behalf, but indirectly a contract made on behalf of another.

Judgment reversed, with costs, and new trial ordered.

Henry Russel, C. A. Kent, of counsel, for plaintiffs in error. C. J. O'Flynn, for defendant in error.

JAMES E. TRYON V. THE EVENING NEWS ASSOCIATION. ERROR TO THE SUPERIOR COURT OF DETROIT.

Libel:—Newspaper Article:—Imputation of Tale-Bearing.

CAMPBELL, CH. J. (Abstract.) Action for libel, grounded on an article in the *Evening News* relating that Tryon, a reporter of the *Tribune*, having insinuated himself into the good graces of a sergeant of police, learned from him his private opinions of varions matters and things (not specified in the article) concerning the police department and carried them to headquarters, which caused the officer's suspension for one month. The article stated that "on no other journal in the city" (than the *Tribune*) "could such a thing have been possible," and added that "there is not a patrolman on the force who does not sympathize with Thomas, and who does not condemn the reporter who made public a private conversation." The publication was proved and not justified, and the court directed a verdict for the defendant, holding the article not libelous.

Held, Error. There can be no pretense of privilege, for the general public, to whose instruction or entertainment all newspapers are supposed to be devoted, has no concern with the lawful doings and affairs of private persons. The test to be applied is, whether this article had any tendency to injure plaintiff or bring contempt or ridicule upon him. Courts in determining what is libelous cannot declare in advance just what words or charges must be included in the article complained of. The same words may, according to their purpose and surroundings, or their use sincerely or ironically, be very harmless or very injurious. The necessity of frequently meeting and speaking to reporters would require gentlemen to be closely on their guard and to treat them with scanty civility unless they were understood to be worthy of being trusted, and the imputation of tale-bearing, which might destroy one's reputation with the press as well as in society, cannot be considered as containing no cause of complaint.

Judgment reversed, with costs, and new trial granted.

Maybury & Conely, for plaintiff in error; Henry W. Montrose, for defendant in error.—*The Michigan Lawyer.*

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CUYAHOGA COMMON PLEAS.

JANUARY TERM, 1878.

CHARLES L. CRAWFORD ET AL. VS. THE PENNSYLVANIA COMPANY.

Freight Discrimination—Action agst. R. R. Co. to recovery penalty, etc., etc.

JONES, J.:

This is an action brought for the plaintiffs to recover about $160,000 of the defendant, which is a foreign corporation operating certain other railroads in Ohio, by reason of certain alleged excessive charges (running through a series of years, from 1871 to 1875) on the transportation of coal for plaintiffs from Clinton Station, and other points, which are claimed to be violations of the statutes of 1871 and of 1872, amendatory thereof, to be found in volume 68 page 78, and volume 69 page 27, Ohio Laws.

The petition in this case is very voluminous, and contains some five or six hundred causes of action for as many alleged separate and distinct violations of the statute.

The defendant demurs to each and every one of said alleged causes of action, except the 257th and 258th, on the grounds that the petition does not contain facts sufficient to constitute a cause of action; and for the reason that on the face of the petition each and every one of said causes of action is barred by the statutes of limitation.

On the oral argument of this demurrer two things seemed to be substantially agreed upon by the counsel on both sides, to wit:

1. That the petition contained such averments that the plaintiffs right to recover depended upon whether the proper construction of the statute in question was the one given to it by the plaintiffs or the one given to it by the defendant and his counsel; the plaintiffs insisting that the effect of the statute was to prevent any greater rate of charge by any railroad company for transportation per ton and per mile for a short distance than for a long distance, or, in other words, that it requires such companies to charge a uniform rate per mile for long or short distances for the same kind of freight carried in the same direction. On the other hand, defendant's counsel insist that the statute was penal in its character, and that it should be strictly construed, and that the effect of it was only to prohibit them from charging a larger sum for transporting property any particular distance than it does for the same property in the same direction for an equal or greater distance, but that the statute does not establish a uniform rate per mile, and does not prevent a railroad company from charging the same price for a short distance as it does for a longer one.

2. It seemed to be conceded on the hearing that the plaintiff's petition showed that the defendant, the Pennsylvania Company, was the lessee, under and by virtue of the act of March 19, 1869, vol. 69 page 32, O. L., of the various railroads it was operating in carrying the said coal of the plaintiffs, in regard to which the discrimination and overcharge is alleged. But on a careful examination of the various allegations of the petition, I do not think that either of the facts apparently conceded by counsel are therein set forth.

In other words, I think there are allegations in the plaintiff's petition which are broad enough, if proven, to entitle them to recover under the statute whichever construction is to be given to it. For the petition does contain a statement that the defendant charged a certain sum per ton, for, say fifty-four miles from Clinton station to Cleveland, being more by so many dollars than it charged certain other persons and corporations named for freight of same kind for an equal or greater distance, and more than it charged various named persons for certain greater distances named in the petition. This being the case I cannot hold that the plaintiffs' case, as made in their petition, is not within the provisions of the statute; and it also obviates the necessity of at present deciding whether the plaintiffs or the defendant's construction of the statute is the correct one. If, however, both parties are willing to stipulate that the petition may stand or fall upon their respective constructions of the statute, I will pass at once on its construction, as I have examined it carefully and made up my mind in regard to it.

3. This action being for the recovery of a *penalty* imposed by a statute, is barred by the statute of limitations one year from the time the cause of action occurred, unless the statute was prevented from running under section 21 of same statute, by reason of the absence from the State of the said defendant a foreign corporation.

The defendants insist that by a certain statute passed March 16, 1868, foreign railroad companies are authorized to lease certain other connecting lines of railroad or enter into an arrangement for their common benefit, provided it is sanctioned by two-thirds of the stockholders of the road to be leased at a meeting called for that purpose, and that when this is accomplished the lesser may sue and be sued in all cases for the same causes and in the same manner as a corporation of this State might be if operating its own road.

They further insist that such foreign corporation so leasing roads within the State, is required by statute to maintain an office on the line of the road so leased where legal process can be at all times served on it; and that by reason of these provisions the defendant, though a foreign corporation, was not absent from the State nor for a single moment without the jurisdiction of its courts or beyond its control from the time of the contraction of the liability to the plaintiffs, if any there was, up to the time this suit was begun in this Court.

But I hold that this point cannot be fairly made or decided on this hearing, for the reason that it does not appear in the petition that the Pennsylvania Company ever leased any of the roads in question, or any other roads in the State of Ohio, or that it ever acted under said statute in any way, or that the stockholders of any such leased roads ever ratified or assented to any arrangement under said statute, or that said defendant ever established an office for the service of process on the line of said leased roads, as required by the statutes. The allegation in the petition that defendant was "running, contributing and operating" said road is not sufficient to show that it was acting under said statute. The point here sought to be made is a new and interesting one under the laws of this State. I think, however, that it does not arise in the case at present. I therefore, on the whole matter, hold that the petition does contain facts enough to constitute a cause of action, and that there is nothing at present in the petition to show that the running of the statute of limitations has not been prevented by reason of the absence of the defendant as a non-resident corporation.

The demurrer of the defendant to the plaintiff's petition is therefore overruled.

The defendant excepted and was given leave to answer by February 10th.

Judge J. P. Bishop for plaintiff and Ranney for defence.

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[Reported by R. P. Flood.]

COURT OF COMMON PLEAS.

Actions Commenced.

14426. Herry Steigemier vs. The Hibernia Ins. Co. Money only. Stone & Hessenmueller.

14427. Thomas Owens et al. vs. D. R. Walsh et al. Money only. Bishop, Adams & Bishop.

14428. Elizabeth Stielar vs. Adam Poe et al. Money only. Wm. Clark.

14429. Geo. Gee vs. The Painesville, Canton and Bridgeport Narrow Gauge R. R. Co. et al. Equitable relief. Jordon, Jordon & Williams, Estep & Squire, H. C. Ranney.

14430. Sarah Stevens vs. H. U. Jordon et al. Money and equitable relief. Mitchell & Dissette.

14431. Margaret Deitz, widow, etc. vs. Frederick Minut et al. Dower, Robison & White.

14432. Lucretia H. Prentiss vs. Chas. McCradden et al. Money and to subject lands. Baldwin & Ford.

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14433. C. J. Longdon et al. vs. Julius C. Schenk. Appeal by defendant. Judgment Dec. 23. Gilbert, Johnson & Schwan; Stone & Hessenmueller.

14434. The State of Ohio in complaint of Bella Galvin vs. John S. Hughes. Bastardy.

14435. Claus Fiedman vs. Jacob Byer. Appeal by deft. Judgment Dec. 19.

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14436. Tabitha Dunn et al. vs. C. F. Norton et al. Injunction and relief. W. S. Kerruish.

14437. C. D. Reichard vs. Geo. E. Wagner et al. Appeal by deft. Judgment Dec. 11. Gollier & Brand; Echo Heisley.

14438. John H. Sargeant et al. vs. John Gillen. To set aside contract for account. Sale of land and relief. J. S. Grannis.

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14439. Edward Hessenmueller vs. G. A. Rauchfuss et al. Money and to subject lands. Stone & Hessenmueller.

14440. Therese Platten vs. Jehial Stewart et al. Same. Same.

14441. Wilhelmine Silberg vs. Arnold Fountain. Same. Same.

14442. Carlos M. Stertevant et al. vs. F. Lowe et al. To subject lands and for equitable relief. Gilbert, Johnson & Schwan.

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14443. William Williams vs. Anton Bletsch et al. Money and equitable relief. E. D. Stark.

14444. Joseph Wiesent Pratt vs. Antonio Cordano. Appeal by plff. Judgment Dec. 21, 1878. Wm. Clark; Jas. Quayle.

14445. Chas. F. Norton vs. Gall et al. Money and foreclosure. Foran and Williams.

14446. Mary Henger vs. Jacob Borger. Money only. W. S. Kerruish.

14447. The Citizens' Savings and Loan Association vs. E. O. Briggs, trustee, etc. et al. Foreclosure and relief. Estep & Squire.

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14448. Edward Owens vs. M. F. Purdy. Appeal by deft. Judgment Dec. 11. Wm. Clark; McMillen & Morton.

14449. Michael Lennon vs. Same. Same. Same. Clark & Caufield; same.

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14450. John B. Ketchum et al. vs. Thomas Thompson. Money, to subject lands and relief. Noble and Lutes.

14451. Emanuel Rosenfield vs. E. H. Dachenhauser et al. For sale of lands and foreclosure. W. H. Gaylord.

14452. O. A. Kinney vs. Emma E. Decker et al. Money and equitable relief. Mitchell & Dissette.

14453. G. H. Foster et al. vs. C. J. Keeler et al. To subject land. James Lawrence.

14454. Geo. Willey et al. vs. Wm. H. Gabriel et al. Money only. Bolton & Terrell.

14455. The Sheridan Horse Nail Co. vs. H. V. Hartz. Replevin. Hutchins & C.

Jan. 11.

14456. Bingham & Phelps vs. E. W. Allen. Appeal by deft. Judgment Dec. 16th. Taylor; J. S. Nesbit.

14457. Joseph G. Hussey vs. Standard Iron Co. et al. Money and specific relief. R. P. Ranney and Ranney & Ranney.

14458. Kleine, Detmer & Co. vs. F. X. Sykora et al. Money and to subject land. Stone & Hessenmueller.

14459. Moritz Reinhard et al. vs. Richard Kinkelaar et al. Money only.

14460. Lucretia H. Prentiss vs. Peter Ziegler et al. To subject land. Baldwin & Ford.

14461. M. A. Kneeland vs. Clarence M. Bixby et al. Money and equitable relief. P. P.

14462. John Kirby vs. Lucy J. Cole et al. Equitable relief. Mix, Noble & White.

14463. Louis J. Feliere vs. C. H. Scheurer. Equitable relief. J. H. Webster.

14464. Mrs. E. Williams et al. vs. The Singer Manufacturing Co. et al. Appeal by plff. W. C. McFarland.

Jan. 13.

14465. Ludwig Paiser vs. Andrew McAdams. Appeal by defendant. Judgment Dec. 17, 1878.

14466. Benj. S. Coggswell vs. S. M. Sargent. Appeal by deft. Judgment Dec. 13, 1878. John P. Willey, Francis H. Wing.

Jan. 14.

14467. James Maygrory vs. Patrick Corkill. Money only. H. & C. C. McKinney.

14468. H. N. Noyes et al. vs. John T. Deweese. Money only. Thomas J. Carran.

14469. J. R. A. Carter vs. Caroline M. Ingram et al. To subject land. Wm. K. Kidd.

14470. Arnold Green as admr. of the estate of Herman L. Hoffman, deceased, vs. Horace Wilkins. Money only. Arnold Green.

14471. James J. Evans vs. H. J. Holbrook. Money only. Foran & Williams.

Jan. 15.

14472. Chas. Coan vs. John J. Ryan. Dissolution of partnership and appointment of receiver. Jackson & P.

14473. David Hoffman vs. Augustus Fay et al. Money only. Bolton & Terrell.

14474. Andrew Cunningham vs. the L. S. & M. S. R. R. Co. Appeal by deft. Judgment Jan. 10, 1879. John C. Coffey; Mason & King.

14475. Leek, Doering & Co. vs. Wilfred F. Hale et al. Appeal by deft. Judgment Dec. 20, 1878. Ivary Plaisted.

14476. Arnold Green as admr. etc. vs. The Ohio National Bank et al. Equitable relief. Arnold Green.

14477. The N. Y. Graphic, etc. vs. The King Iron Bridge Co. Appeal by deft. Judgment Dec. 17, 1870.

Motions and Demurrers Filed.

Jan. 9.

2163. Barber vs. Luse et al. Motion by Thos. Bridges to be substituted as party plaintiff in this action.

2164. Ketchum vs. Manning et al. Motion by deft. J. S. M. Hill, to vacate judgment and decree rendered herein in favor of defendant Mayzille Z. Brown.

2165. Hubbard vs Hubbard et al. Demurrer by plaintiff to answer of defendant S. G. Parker.

2166. Bennington et al. vs. Prather. Motion to make the petition more definite and certain.

2167. Downs vs. Charlton. Motion to separately state and number causes of action and make petition more definite and certain.

Jan. 10.

2168. Randerson vs. Whitney, constable, etc. Demurrer to the amendment to the petition. Sullivan.

2169. Levire vs. Seymour. Motion by deft. to vacate judgment with affidavit.

2170. Seeley vs. Murphy. Motion to require plff. to give security for costs with affidavit.

2171. Urmetz vs. Liebold et al. Motion by deft. J. C. Brewer, for leave to file supplemental answer.

Jan. 11.

2172. Baumer & Co. vs. Kramer. Motion by deft. to consolidate case No. 14198 with No. 14197.

2173. Horn, Jr. vs. Holcomb et al. Motion by plff. to strike redundant, irrelevant matter from answer of J. P. Kohler.

2174. McElrath vs. Clark. Motion by deft. to require plff. to give additional bail for costs.

2175. Williard v. Russell. Demurrer to answer.

2176. Mason et al. vs. Utley et al. Demurrer to the petition.

2177. Same vs. Same. Motion by deft. Fanny Utley, to dismiss petition as to her.

2178. Boest et al. vs. Doran. Demurrer to the petition.

2179. Hartness vs. Savage et al. Motion by plff. to require defts. to give other bail for appeal.

2180. Backus et al. vs. Aurora Fire and Marine Ins. Co. Motion by plff. to strike deft's motion, No. 2131, from the files.

2181. Kerruish vs. Campbell et al. Demurrer by deft. to the petition.

2182. Hutchinson et al. vs. Fitzgerald and garn. Motion by plffs. for a new trial.

2183. Smith vs. the C., C., C. & I. Ry. Co. Motion by plff. for a new trial.

Jan. 13.

2184. Alexander vs. McCarty. Motion to require defendants to give bond for costs.

2185. Eyerdam v. Allen. Motion by defendant to dismiss action for want of prosecution.

2186. Haycox et al. vs. Grigsby, Jr., et al. Motion by defendant Wm. Grigsby, Jr., to set aside judgment rendered on plaintiff's demurrer to his answer.

Jan. 14.

2187. Krause vs. Stolle. Motion by plaintiff to strike out from answer.

2188. Backus et al. vs. Aurora Fire and Marine Ins. Co. Motion to make the petition more definite and certain refiled.

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2189. Coan vs. Ryan. Motion by plaintiff for the appointment of a receiver.
2190. Ketchum vs. Manning et al. Motion by defendant, Helen M. Leach, to vacate interlocutory decree in favor of deft., Mayzille Z. Brown.

Motions and Demurrers Decided.

Jan. 11.

1169. Crawford et al. vs. Penn. Co. Overruled. Defendant excepts. Defendant has leave to answer by Feb. 10.
1553. Hartness & Huling vs. Arms et al. Sustained.
2155. Daniels vs. Baldwin. Granted.
2148. Burns vs. the C., C., C. & I. Ry. Co. Granted.

Jan. 15.

233. Smith vs. Bender. Overruled. Plaintiff has leave to file reply.
1972. Com. National Bank vs. Burt. Overruled.
2011. The City of Cleveland vs. Hawkins. Overruled. Defendant excepts.
2067. Lewis vs. Slaght. Overruled. Defendants have leave to amend answer by Jan. 20.
2074. Clements vs. Rosenblat. Granted. Action dismissed at plaintiff's costs.
2079. Weightman vs. Goulding. Overruled. Plaintiff excepts. Defendant has leave to amend.
2083. Beigher vs. Goldsmith. Overruled. Plaintiff has leave to reply.
2096. Bigelow vs. Barrett. Overruled. Defendant excepts.
1097. Zirker vs. Hatch et al. Sustained. Plaintiff has leave to amend petition by payment of costs.
2098. Belle vs. Low. Overruled. Defendant has leave to amend by Jan. 20.
2100. Blackman vs. Kane. Overruled.
2111. Clark vs. Morgan. Overruled.
2112. Same vs. Murphy. Overruled.
2113. Third National Bank of Sandusky vs. Geissendorfer. Overruled. Plaintiff excepts.
2143. Spencer vs. Cunningham et al. Withdrawn.
2162. Stolz vs. Koester. Granted. Defendant has leave to file answer by Jan. 18.
2171. Urinetz vs. Leopold et al. Defendant has leave to file supplemental answer by Jan. 18.
2180. Backus et al. vs. Aurora Fire and Marine Ins. Co. Granted. Defendant has leave to file answer.
1821. Huy vs. Geib et al. Granted.

RECORD OF PROPERTY TRANSFERS.

In the County of Cuyahoga for the Week Ending January 17, 1879.

MORTGAGES.

Jan. 11.

Geo. H. and Bessie B. Honeywell to W. W. Honeywell. Nine hundred dollars.

Joseph Wilwerschied and wife to John Roesch. One hundred and eighty dollars.

Christian Engel and wife to John Engel. Two thousand dollars.

Joseph L. and Eliza J. Grannis to John Nepper. One hundred dollars.

Ellen L. Likely et al., to Frederick Geip. Two hundred dollars.

Wilson Harris and wife to R. C. White. Two thousand five hundred dollars.

Joseph Kolar and wife to Joseph Forejt. One hundred dollars.

Mary Jordan to Allen Armstrong. One thousand dollars.

Henry J. and Ella M. Cohen to Marz and Robinson. One thousand dollars.

Mary McLaughlin to Jacob Schroeder. Four hundred and nintey-three dollars and thirty cents.

Jan. 13.

Francis A. & C. E. Wyman to Margaret Robinson. $2,000.

Helen M. Smith to Cyrene B. Smith. $150.

Wm. Shaub to James M. Curtiss. $300.

Geo. J. Keidel to James M. Curtiss. $300.

Leopold Frank to James M. Curtiss. $300.

Wm. Hinck to James M. Curtiss. $300.

Christian Kenebec to James M. Curtiss $250.

Frederick Flick, to James M. Curtiss. $200.

Jemima and John Horner to James M. Curtiss. $740.

Henry Kobale and wife to James M. Curtiss. $500.

Jacob and Charlotte Beard to M. B. Gary. $65.

Charles W. Hills and wife to Loeb Halle. $800.

J. A. Barger and wife to Frederick Schoenbeit. $400.

Wm. B. Parish and wife to the Society for Savings. $5,000.

Geo. Mitchell to Asbacher & Scheur. Four hundred and thirty dollars.

H. P. Bates to W. J. Hudson. One hundred and sixty-five dollars.

E. H. Cowper to George J. Warden. Eighty dollars.

Jan. 14.

A. W. Poe to Albert Doran. $350.

Jacob Hauptman and wife to Wm. Eggers. Two hundred dollars.

Elizabeth and Joseph Prasek to Kathrina Sluka. Three hundred dollars.

A. R. Stevens and wife to the Citizens Building and Loan Ass'n. Five hundred dollars.

Charles L. Whiting to Hannah Neville. One thousand five hundred and twenty dollars.

Mary A. and Nelson Rathburn to M. S. Hogan. Five hundred dollars.

Frederick Behm and wife to Jacob Wuslagel, Sr. One hundred and fifty dollars.

C. J. Sullivan to John P. Wehnes Five hundred and twenty-five dollars

Jan. 15.

John Martin and wife to Geo. Deitz. One hundred and fifty dollars.

S. F. Guilliford and wife to A. K. Spencer. Five thousand dollars.

Wm. F. Scheider to Society for Savings. One thousand dollars.

Mary A. & E. P. Bleckensdeifer to Amasa Stone. Five thousand dollars.

Electy Ashcraft to the Society for Savings. One thousand five hundred dollars.

H. B. Curtiss and wife to John P. Hart. Six hundred dollars.

John Schwan and wife to Gustav Begalke. Eleven hundred and fifty dollars.

John Budbyl and wife to M. S. Hogan. One hundred and twenty-five dollars.

Muranda C. and Zenas King to Geo. and S. H. St. John. Nineteen thousand dollars.

Sylas Snow to Webster Roberts. One hundred and twenty-five dollars.

J. Hune to J. P. Wehnes. Two hundred and fifty dollars.

Frederick Warlock to John Vanderan. Five hundred dollars.

Kate Black to Susan Lunde. Six hundred dollars.

Jan. 16.

James Doll to John Scheidler. Four hundred and twenty-seven dollars.

Stillman Beown and wife to Eliza A. Gates. Two thousand dollars.

M. P. Haywood and wife to Saml. Squire. Five hundred dollars.

Chas. Jaite and wife to Alfred H. Wick. Two thousand dollars.

Wm. W. Welsh and wife to Dorothea Bohrer. Four dollars.

S. F. and wife to Milton Morton. Three thousand dollars.

Thos. Wilson to Noyes and Bro. Two hundred and forty-seven dollars and sixty cents.

Francis Crawford to Adolph Meyer. Fifteen thousand dollars.

Maria P. Kaupfe to Louis Klingham. Two hundred and forty-one dollars.

Jan. 17.

Helena and Wm. Kahn to John Harr. Two hundred dollars.

R. C. Curtiss and wife to Cha. W. Moses. One hundred and twelve dollars,

Casper Schaffer to Henry Gehaner. Five hundred and fifty dollars.

Maria Doyle to F. H. Furness. Four hundred and thirty-one dollars.

Henry E. Bohn and wife and Herman Stuhr and wife to Edward H. Bohn.

Frank Vacker and wife to Carl Beezer. Three hundred dollars.

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CHATTEL MORTGAGES.

Jan. 11.

C. C. Stevens and Thomas Axworthy. Forty dollars.

Mary Fuchs and Ignatius Fuchs to Manuel Halle. One thousand dollars.

W. R. Knights of Pythias to John Wuest. Four hundred dollars.

Anna E. and G. F. Boehninger to G. W. Cady & Co. Four hundred dollars.

Joseph Chandler to W. H. Price. Four hundred and eighty-six dollars.

Jan. 14.

Wm. R. Ogden to Henry C. Brainard. Six hundred dollars.

Peter P. Spitzig to Frederick Spitzig. Three hundred dollars.

Anna Brook and E. T. Scott to Sterling & Co. Two hundred and seventeen dollars and fifty cents.

Lewis Clark to Horace M. Harmon. One hundred and fifty dollars.

Lewis Clark to John Greiner. One hundred and eighty dollars.

Lewis Clark to Leonard G. French. Three hundred dollars.

Wenzel Langmeir to Amos Langmeir. One hundred and thirty dollars.

Jan. 15.

J. M. Clemens to D. S. Clemens. One thousand and fifty-seven dollars.

Isaac Frank to H. Blake. One hundred and fifty dollars.

August Muhlhausler to C. D. Erhard. Three hundred and ten dollars.

Kingsbury Fisher to Geo. Norris. One hundred and fifteen dollars.

Mary Snyder to Mrs. Julia Snyder. Twenty-five dollars.

M. Moynahan to John W. Heisley. One hundred dollars.

Dunn & Gaul to Simms & Petton. Fourteen hundred dollars.

Jan. 16.

Wm. C. North to Miriam Kent. Six hundred dollars.

Patrick Shane to Wm. D. Butler. Forty dollars and seventy cents.

Mrs. Ella Pendleton to Cleveland Furnace Co. Thirty-one dollars and eighty cents.

J. R. Winne to Cleveland Furnace Co. Thirty-two dollars.

N. A. Coleman to E. Holmes. Forty dollars.

Jan. 17.

Frederick Baab to Moses Roskoph. Fifty dollars.

I. M. Gamble to Frank Leonard. Sixty-one dollars and fifty cents.

S. C. Goodman and wife to W. D. Butler. Sixty-six dollars.

Glaser Bros. to Charles Scherer. Seven hundred and twenty-two dollars.

Glaser Bros. to Louis Reese. Fourteen hundred and eighty-three dollars and fifty-nine cents.

Andrew A. Walton to Louis W. Ford. One thousand and ninety-six dollars and fifty cents.

Herman F. Leypoldt to Michael Bertsch and Michael Burkle. Twelve hundred and sixty-five dollars.

DEEDS.

Jan 10.

Albin Albrect and wife to Joseph Hartmueller. Seven hundred and eighty-five dollars and eighty-five cents.

J. T. Brooks, assignee, to Thos. M. Jovin. One dollar.

W. S. Porter and E. E. Pope and wives to Thomas M. Jovin. One thousand dollars.

Otis B. Benton, assignee of Chas. G. Barkwell, to A. A. Jackson. Twenty-five dollars.

Griswold & Dunham to the Cleveland Linseed Oil Works. Seventy-five thousand dollars.

Christian Freitag and wife and William Aenis and wife to Frederick Hourin. One dollar.

J. C. Gates and wife to E. R. Perkins. One dollar.

Frederick Kinsman to John and Annie Raus. Three hundred and ninety-six dollars.

Theodore and Clara Lamars to Herman Lamars. Two thousand dollars.

Luther Moses to John H. Ford. Fifteen hundred and sixty dollars.

Henry L. Taylor and wife to Helen M. Edwards. One dollar.

Julius M. Bret et al., by Thomas Graves, Mas. Com., to J. Craig Smith. Four hundred dollars.

Joseph Artel, et al., by Felix Nicola, Mas. Com., to Frederick Kinsman. One hundred dollars.

Jan 11.

Emma McCarthy and husband to Joseph Armstrong. One dollar.

Joseph Armstrong to Wm. N. Honeywell. Five hundred dollars.

E. H. Bohm and wife to Henry E. Bohm and Hermann Stuhr. Two thousand dollars.

Louisa A. Cooh and husband to Herbert F. Taylor. Twenty-five thousand dollars.

James M. Hoyt and wife to Geo. R. Tinnerman. Four hundred and fifty dollars.

J. H. Dangerfield and wife to R. R. Holden. Five thousand dollars.

R. R. Holden to M. A. Dangerfield. Five thousand dollars.

Chauncey S. Ransom and ife to Bowler, Maher and Brayton. Three hundred and eighty dollars and thirty-three cents.

Lemuel M. Southern and wife to Amasa Stone. One dollar.

Jan. 13.

O. M. Burke et al, to Henera McQuister Four hundred and twenty-five dollars.

J. M. Curtiss and wife to Leopold Frank. Seven hundred and twenty dollars.

J. M. Curtiss and wife to Frederick Flick. Seven hundred and twenty dollars.

J. M. Curtiss and wife to William Hinck. Seven hundred and twenty dollars.

J. M. Curtiss and wife to Jemima Hormer. Eleven hundred and twenty-five dollars.

J. M. Curtiss and wife to Frederick Jacobs. Ten hundred and eighty dollars.

J. M. Curtiss and wife to Geo. J. Keidel. Eight hundred and eighty dollars.

J. M. Curtiss and wife to Christian Kebineck. Seven hundred and twenty dollars.

J. M. Curtiss and wife to Henry Kobabe. Twelve hundred dollars.

J. M. Curtiss and wife to Wm. Schaub. Eight hundred dollars.

J. M. Curtiss and wife to Chas. L. Serferd. One thousand and eighty dollars.

W. L. Cutter, ex. etc., to Henry Kramer. Two thousand dollars.

Andrew Gurscheimer et al. to Jacob Laubscher. Two thousand dollars.

John J. Hennesey to Joseph Fergham. Eight hundred and seventy-five dollars.

Maria K. Nukel to John Nukel. Three hundred dollars.

Jacob S. Barger to Julius Mueller. Five dollars.

Julius Mueller to Lucy A. Barger. Five dollars.

C. C. Rogers and wife et al. to John T. Carroll. One thousand three hundred and sixty dollars.

Phebe Weer to John V. Hanna. Three thousand and fifty dollars.

Sam'l Bishop by Mas. Com. to John S. Healy. Two thousand and one dollars.

Jennie Martin to Chas. Ensign. One dollar.

Jennie and Edward Martin to Chas. Ensign. One dollar.

Jan. 14.

Joseph Bores to Maria Bures. One dollar.

Henry C. and Emma C. Brainard to Nath. M. Griffeth. Thirty-one hundred dollars.

G. M. Buhrer, trustee, to J. L. Ross. One dollar.

E. F. Davies and wife to I. C. F. Brothers. Six hundred dollars.

J. C. F. Brothers to W. B. Roberts et al. Six hundred dollars.

Sereno P. Fenn and wife to H. Clark Ford, trustee. One dollar.

H. Clark Ford, trustee, to Mary A. Fenn. One dollar.

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W. V. Craw and wife to H. Meillender. Five hundred dollars.

John D. Carpenter and wife to John F. Weh. Eight hundred dollars.

John S. Healey and wife to W. G. Kirby. Eight hundred dollars.

Fanny Johnson to Russell A. Brown. Five hundred and fifty-five dollars.

Catharine Lechter and husband to Paul and Theresa Kovar. Two hundred and fifteen dollars.

Hannah Neville to Chas. L. Whiting. Two thousand five hundred and twenty dollars.

Wm. J. Lewis to Francis Stanley. Thirty-five hundred dollars.

A. J. Sanger, assignee in bankruptcy et al. to Geo. Seitz et al. One dollar.

Joseph Steiska et al. to Elizabeth Prasek. One dollar.

Abel P. Wilkins and wife to Julia C. Wood. Twelve hundred and fifty dollars.

Jan. 15.

Peter Bender and wife to Mary Belek. Twenty-two hundred dollars.

John Chamrada to John Pinta. Five dollars.

Same to Alvis Ruzek. Five dollars.

Catharine Feusier to Sarah Mullen. Two thousand dollars.

James M. Hoyt and wife to the 5th Evangelical Reform Church. Six hundred dollars.

Fanny Johnson to Holland Brown. Five hundred and fifty-five dollars.

Emma C. King and husband to Mary A. Blickersderfer. Fify-seven hundred nollars.

Frederick Kinsman to John Krato Chiel. Two hundred and fifty dollars.

Sarah Mullen to Catharine Fusier. Two thousand dollars.

Catharine Newman to Joseph Stanley. Eleven thousand one hundred and fifty-four dollars and twenty-four cents.

Leopold Preissing and wife to A. R. Dixon. Eight hundred dollars.

M. C. Rogers and wife to David E. Holly. One dollar.

C. D. Reichardt and wife to Augustine Matzman. One dollar.

F. G. Rowe and wife to J. M. Page. Four thousand four hundred and twenty-seven dollars.

Fanny Van Wie et al. to Catharine Dougherty. Five hundred dollars.

Society for Savings to Wm. H. Schneider. One thousand three hundred and ninety-five dollars.

Jas. D. Cleveland, special Mas. Com. to Eliza J. Sweetser. Sixteen thousand and seventy-five dollars.

C. C. Southern by S. M. Eddy, Mas. Com. to the Society for Savings One thousand three hundred and thirty-four dollars.

Jan. 16.

E. E. Whitney and wife, C. F. Glasser and wife and Ferdinand Glasser and wife to A. Bradley. One thousand five hundred dollars.

Andrew Dall and wife to James Dall. One dollar.

Louis Fetterman to Fredolin Hirz. Fifty dollars.

Bernard E. Schmolin by Thos. Graves, Mas. Com. to Chas. Juite. Four thousand and fifty dollars.

Elizabeth Barkwill et al. to Frank and Antonia Marak. Three hundred and sixty dollars.

John Light and wife to Felix E. Reynolds. One thousand dollars.

Felix E. Reynolds and wife to Peter J. Huette. One thousand dollars.

Louisa Crawford et al. by Mas. Com. to the Merchants National Bank. Three thousand three hundred and thirty-four dollars.

Nelson Sanford by Felix Nicola, Mas. Com. to Adolph Mayer. Two thousand two hundred dollars.

John Bennett and wife to Ruth Holmes. Eighteen hundred dollars.

Minerva Bennett to Ruth Holmes. Eight hundred dollars.

Mary M. Craig and husband to Hester Pear. Two hundred dollars.

C. T. and Frederick Glasser and wife to A. Bradley. Twenty-six thousand five hundred dollars.

Albert G. Hammer and wife to Chas. Hammer, trustee. One dollar.

Geo. W. Hale and wife to Anna E. Patterson. One hundred dollars.

Adolph Meyers and wife to Francis Crawford. Twenty-two thousand dollars.

Patrick N. McCarthy, admr. etc. to Joseph Draessler. Two hundred and fifty dollars.

Joseph Reuscher and wife to Frederick E. Ruffine. Forty dollars.

Elisha Savage and wife to James Galvin. One hundred and seventy dollars.

Thomas Walton to C. T. Glasser, E. E. Whitney and Ferdinand Gleaser. One dollar.

ASSIGNMENTS.

Jan 13.

Christian Nesper to Edward Hessenmueller. Bond one thousand dollars.

Glasser, Whitney & Co. to Loren Prentiss. Bond fifty thousand dollars.

MECHANICS' LIENS.

Jan. 13.

Dexter McClintock to A. W. Laurie. Fifty-seven dollars and eighty cents.

Mary D. Coates to James R. Warren. Twenty-four dollars and seventy-seven cents.

JUDGMENTS.

Geo. Mueller. $17.36.
Wm. Ottman. $1,147.78.
Mrs. Carrie Seymour. $55.88.
Frank Williams and garn. $105.22.
Geo. F. Berse et al. $989 60.
John Magnordt. $1,823.05.

U. S. CIRCUIT COURT N. D. OF OHIO.

Jan. 11.

3242. I. Van In Wagen vs. A. H. Burhaus. Motion overruled. Leave to file answer in 20 days.

2362. Fannie Dunn vs. the Commonwealth Life Ins. Co. Motion to make 4th amended reply more definite and certain. Overruled.

3679. A. A. Hutchins & Bro. vs. the Cleveland Iron Co. Motion to dismiss plaintiff's petition overruled. Leave to answer in ten days.

3619. In 19 cases wherein Mary Jane Vesey et al. are plaintiffs and various parties are defendants, the plaintiffs were ordered to give continual security for costs and defendants have leave to file amended answer for 20 days.

3794. Commercial National Bank vs. John Croker. Answer. Grannis & Griswould.

3825. Matthew Godfried et al. vs. C. Schneider. Bill for injunction and relief. Banning & Banning.

3826. Same vs. Kopp & Mueller. Same. Same.

Jan. 13.

3727. Frederick J. Prentiss vs. Silas B. Giddings et al. Decree for complainant, $3,663.10. Also decree for Buskhaus, $163.40. Order to sell mortgaged premises.

3449. B. F. Sturtevant et al. vs. G. A. Rhodes et al. Decree for complainant.

3827. H. B. Claflin & Co. vs. Gilkey & Perry. Petition filed. De-Wolf & Schwan.

Jan. 15.

3828. Herman Weiller vs. Joseph Stoppel. Money only. W. J. Boardman & W. M. Webster.

2625. Ellsworth vs. Ellsworth. Continued.

3078. Jenks et al vs. Cooper. Same.

2176. Diemer vs. Hasting. Same.

3168. Cochran vs. Applegate. Dismissed for want of prosecution.

Jan 16.

3153. Crowl vs. Fisher et al. Dismissed for want of prosecution.

3194. Duerr vs. Firemans' Fund

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Ins. Co. Leave to amend replication within six days.

3193. John Heffron vs. B. C. and L. M. Stanley. Judgment for plaintiff for $250.

3779. A. A. Hutchinson & Bro. vs. Cleveland Iron Co. Dismissed at the cost of defendant. Leave given to withdraw acc't attached to petition.

Jan. 17.

3829. Barthold Schlesinger et al. vs. Geo. Cooper et al. Petition for money only. Bolton & Terrell.

3810. The Davis S. M. Co. vs. John M. Boyd et al. Motion to dismiss action. Ranney & Ranneys.

U. S. DISTRICT COURT N. D. OF OHIO.

Jan. 11.

1523. Perry Prentiss, assignee, vs. Henry C. Meyer et al. Answer. Estep & Squire. N. L. Brewer.

Same. Same vs. Same. Answer of Henry C. and Benj. C. Meyers. Same.

Jan. 14.

1523. Perry Prentiss, assignee, vs. H. C. Myers et al. Answer bill of V. L. Myers. N. L. Brewer and Estep & Squire.

——. Same vs. Same, etc. Answer of bill of B. F. Myers. Same.

Bankruptcy.

Jan. 11.

1950. In re. James S. Oviate. Discharged.

1775. In re. Willard R. Knowlton. Discharged.

1368. In re. Frank Kahlo. Answer and cross-petition of Kahlo. Lee & Brown.

Jan. 13.

1697. In re. Thomas Barlow. Discharged.

Jan. 15.

1949. Jas. Smith et al. vs. L. Prentiss. Bankruptcy. Objection to discharge. P. B. & F.

1630. In re. Geudon Conkling. Discharged.

1511. In re. Kirian R. Andrews. Discharged.

1707. In re. Chas. A. Lewis. Petition for discharge. Hearing Jan. 28.

1920. In re. Newshuler. Petition for discharge. Hearing Jan. 29.

1914. In re. Silas Bigelow. Petition for discharge. Hearing Jan. 31.

Jan. 17.

1829. In re. Ralph Cohn. Discharged.

1985. In re. Thos. H. Johnson. Petition for discharge. Hearing Jan. 31.

TIMES OF HOLDING COURT IN OHIO FOR 1879.

COMMON PLEAS.

Muskingum, January 13, April 28, November 3.
Morgan, March 11, June 10, October 16.
Noble, January 20, May 5, October 20.
Guernsey, February 18, May 27, November 11.
Belmont, February 4, May 20, November 11.
Monroe, January 13, April 28, October 16.
Jefferson, February 24, June 9, December 1.
Tuscarawas, January 27, May 19, November 3.
Harrison, January 6, April 28, October 15.

NINTH DISTRICT.

DISTRICT COURT.

Trumbull, April 3; Portage, April 21; Lake, March 27; Geauga, March 31; Ashtabula, March 17; Mahoning, March 17; Columbiana, April 14; Carroll, April 10; Stark, April 3.

COMMON PLEAS.

Carroll, January 13, May 5, September 15.
Stark, January 13, May 5, October 13.
Columbiana, February 3, May 19, October 13.
Mahoning, January 13, May 5, September 8.
Trumbull, February 10, May 26, October 13.
Portage, January 13, May 5, September 8.
Lake, February 10, May 26, October 13.
Geauga, January 13, May 5, September 15.
Ashtabula, January 13, May 5, September 15.

OFFICE OF THE SECRETARY OF STATE, COLUMBUS, O., Nov. 25, 1878.

I hereby certify that the above is correctly copied from the official lists returned to this office.

[SEAL.] MILTON BARNES, Secretary of State.

J. G. Pomerene.] **[H. J. Davies.**

Pomerene & Co.

LAW STENOGRAPHERS,

19 1-2 PUBLIC SQUARE.

J. G. Pomerene, U.S. Commissioner, Official Stenographer of the Common Pleas, Probate and District Courts of Cuyahoga County, and Notary Public.

MARCUS P. NORTON.

Attorney and Counselor-at-Law, Troy, N.Y.

SOLICITOR AND OF COUNSEL IN PATENT CASE.

SAMUEL B. CLARKE,

Attorney-at-Law, - New York City.

ASSISTANT U. S. DISTRICT ATT'Y P. O. BUILDING.

ELMER POULSON,

Attorney and Counselor-at-Law, No. 222 East 36th Street, New York.

Between 2nd and 3rd Avenues.

TO THE PROFESSION.

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The Cleveland Law Reporter.

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OUR next issue will contain an abstract of a decision made by Judge Prentiss a few days ago in the Ford-Holden case, now on trial in the Common Pleas Court, as to the right of the defendant to show by the cross-examination of the plaintiff that he, the plaintiff, had entered into certain champertous contracts since the institution of the suit.

WE give below a plan for attorneys' briefs for the preparation and trial of cases. The author is the Hon. C. I. Walker of the Ann Arbor Law School.

1. Make an abstract of the pleadings.

2. Draw out a statement of facts which it is needful to prove in order to sustain your cause of action or defense.

3. A statement of the facts which the other side must prove to sustain its case.

4. Not only know your testimony but have careful minutes of its important points sufficiently full that no important matter is overlooked.

5. Arrange carefully the order in which you wish to put in your testimony. There is a natural order in the arrangement of facts, as in an argument.

6. See your own witnesses and in the better sense drill them. It is absolutely necessary to know what they have to say.

7. Examine those points which *may* arise as well as those that *must* arise. Block out your argument in advance. This, of course, can only be done in outline. This systematic method is in every way beneficial, and often settles the question of victory or defeat.

THE Committee on Law Reform of the Illinois State Bar Association at a recent session of that organization, reported in favor of legislation providing for short hand reports of proceedings of courts of record in that State as follows:

"*To the President and Members of the State Bar Association of the State of Illinois:*

Your Committe on Law Reform, to which was especially referred the subject of short-hand reports for courts of record in this State, would respectfully report that they find, upon examination of the statutes of the following States, viz: Maine, New York, New Jersey, Pennsylvania, Ohio, Kentucky, Indiana, Michigan, Wisconsin, Minnesota, Iowa, Nebraska, California and Georgia, and Wyoming and Washington Territories, that provisions have been made for short-hand reporters to attend the sittings of courts of record in those States.

Your Committee would further report that upon inquiry of, and information derived from, the judges of courts in those States, where short-hand reporters are a part of the organization of the court, as a matter of economy, and for the attainment of exact justice, legislative provisions for short-hand reporters, have proved to be a great benefit.

Your Committee have also made inquiry of the judges of Circuit Courts in all the States for their opinion as to the necessity for short-hand reports in cases tried before them, and the uniform opinion has been expressed by them, that, as a matter of economy and of certainty in the attainment of justice, a law providing for short-hand reporters to take the testimony in causes tried in their several courts ought to be enacted, and that the several counties in which the courts are held, would be, in both points given, benefitted by such a provision.

Your Committee have prepared a draft of, and herewith present, a bill for an act providing for short-hand reporters for the Circuit Courts of this State and for the Superior Court of Cook county.

Your Committee recommend that this bill be referred to a committee of three to be appointed by this honorable body, who shall take in charge the drafting of a bill of the general scope of that herewith presented, adapted to every part of the State, and who shall cause the same to be presented to the Legislature, and endeavor to secure its passage.

Signed by Messrs. E. B. Sherman, H. A. Neal, James Shaw, L. B. Crooker, H. T. Vallette, O. H. Wright."

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SUPREME COURT OF WISCONSIN.

APPEAL FROM THE CIRCUIT COURT, DODGE COUNTY.

HENRY SPIERING VS. JULIUS H. ANDRAE.

Slander—Calling a Justice a Fool, etc., Actionable.

Words Charging a public officer with not having a capacity to properly perform the duties of his office, and directly tendeng to prejudice him therein, are actionable *per se*.

TAYLOR, J.—This is an action for slander. The plaintiff alleges in his complaint, that at the time the alleged slanderous words were spoken by the defendant, he was, and for many years previous thereto, had been a justice of the peace, and acted as such, in the village of Maysville, in the county of Dodge; that the defendant in a public speech in said village, at a public meeting, in the presence and hearing of a great number of persons, in speaking of the plaintiff as said justice of the peace, maliciously spoke the false and defamatory words following: "The reason I did not take out any second papers was, that I did not want to sit as a juror before such a d——d fool of a justice." No special damage was alleged in the complaint. The defendant answered, admitting the speech, but alleged that the words were not spoken of, or concerning the plaintiff, and denies that he used the word "such a d——d fool," but that the words used were "a d——d fool of a justice." At the trial the defendant objected to the introduction of any evidence on the part of the plaintiff, for the reason that the words set out in the complaint were not actionable. The court sustained the objection, and ordered judgments of non-suit, with costs, to be entered against the plaintiff. The plaintiff excepted, and afterwards moved for a new trial, which was also denied, and the plaintiff excepted. Judgment was rendered against the plaintiff.

The only question is, whether the words set out in the complaint were actionable, *per se*. The complaint alleges, that the words were spoken of the plaintiff as a justice of the peace, and we think this claim is sustained by the allegations of the complaint. The defendant does not simply say of the plaintiff that he "is a d——'d fool,' but that he did not want to sit as a juror before such "a d——'d fool of a justice." It is clear that the defendant meant to be understood by this language, that he considered the plaintiff an unfit person to exercise the duties of a justice of the peace on account of his ignorance and incapacity, and that the defendant purposely abstained from becoming a citizen of the United States, that he might not be compelled to perform the duties of a juror, in a court held by such a fool.

Starkie says: "Words are actionable without proof of special damage, which directly tend to the prejudice of any one in his office, profession, trade or business:" Starkie on slander, 110. In Lansing v. Carpenter, 9 Wis. 541, it is held that words spoken of an officer which diminished public confidence in his official integrity, and thus injure him in the business of his office are actionable. In Gattlemet v. Aubaches, 36 Wis., 515, the same rule is repeated. The present Chief Justice in the opinion, says: "We take it to be an elementary rule, that words are actionable which directly tend to the prejudice of any one in his office, profession, trade or business." That was an action brought for charging the Chief Engineer of the fire department of Racine with being drunk at a fire, which it was his duty to extinguish. The case of Weil v. Attenhofen, 26 Wis., 708, is not in conflict with these decisions. In that case, the words were not spoken of the plaintiff in his profession or business.

The words spoken by the defendant in the case at Bar, clearly, and in most contemptuous terms, charge the plaintiff with a want of capacity to perform properly the duties of his office, and directly tend to prejudice him therein. There are some cases which hold, that charging an officer with mere ignorance and want of capacity to perform the duties of his office are not actionable, *per se*. Such was the opinion of Justice Nott, who delivered the opinion in the case of Mayrant v. Richardson, 1 N. & M. (S. C.) 347. We think, however, the great preponderance of authority is, that words charging an officer with gross ignorance and incapacity are actionable, *per se*. Such is the opinion of Starkie. See his work on Slander, 4th English edition, 182 and 184. Townsend, in his work on the same subject, §194, says: "It is said; however, that it is actionable to charge ignorance or unskillfulness, if it amounts to gross ignorance or unskillfulness. This seems only another mode of imputing such ignorance as unfits the person for the proper exercise of his art, of misconduct therein." Again, §196, he says: "As regards language concerning one in office, the same general principles apply as to language concerning one in trade. Language concerning one in office, which imputes to him a want of integrity or misfeasance in his office, or a want of capacity, generally, to fulfill the duties of his office, or which is calculated to diminish public confidence in him, or charges him with the breach of some public trust is actionable." The following are some of the cases which hold, that words charging an officer with gross ignorance of the duties of his office or profession, are actionable without alleging any special damages: Howe v. Prim, Holt 652, 3 Salk, 694; Day v. Buller, 3 Wils. 59; Ouslaw v. Horne, ib. 186; Pearl v. Jones, Cro. Car. 382; Moises v. Thornton, 8 Term R. 303; Baker v. Morful, 1 Sid. 327; White v. Carroll, 42 N. Y. 161; Robins v. Treadway, 2 J. J. Marshall (Ky.), 540. In the case of White v. Carroll, *supra*, the defendant, in speaking of the plaintiff as a physician, called him a "quack." Justice Southerland, in delivering the opinion of the court, says: "To call a physician a quack, is in effect, charging him with a want of the necessary knowledge and training to practice the system of medicine, which he undertakes to practice. * * * There cannot be any doubt, I think, that to falsely and maliciously call a physician a quack, is actionable."

Certainly, the language used by the defendant, imputed a want of capacity and ability on the part of plaintiff to discharge properly the duties of his office, and was calculated, if believed by his hearers, to diminish public confidence in him as a justice.

We are not yet prepared to say that the citizen, in the exercise of his right to criticise the acts and qualifications of those holding office, may publicly make false and malicious charges as to their honesty, or their capacity to discharge the duties of the office held by them. Though the citizen has the right to criticise those in office, and a just and truthful criticism, may be a wholesome corrective of abuses of official positions, such criticism should be honest, and founded upon truth and not falsehood.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

L. J. TRIBERT & E. P. HARMON, for appellant.

S. W. LAMOREOUX for respondent.

SUPREME COURT OF OHIO.

JANUARY TERM, 1878.

Hon. Wm. White, Chief Justice; Hon. W. J. Gilmore, Hon. George

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W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Judges.
TUESDAY, January 14, 1879.

General Docket.

No. 390. The City of Lima v. Nelson McBride, Auditor of Allen county. Mandamus.

OKEY J.:

1. If two statutes provide for the levy of a road tax, and the record of the board of county commissioners, levying such tax, is susceptible of a construction which bases the levy equally well on either statute, but as applied to one the levy is excessive, and applied to the other is not excessive, such levy will, *prima facie*, be regarded as based on the latter act, although the tax therein mentioned can only be levied to provide for a particular condition of the roads, whils the other act is general, and the levy actually made is in general terms.

2. Where the county commissioners, intending to make a levy of taxes for road purposes under the act of April 30, 1869, (66 O. L. 60), cause such levy to be entered on the record, in general terms, the tax will not be regarded as invalid, or made under the act of 1877 (74 O. L. 92), on the mere ground that the record does not show the existence of facts which warranted the levy under the former act.

3. The council of a municipal corporation is not entitled to control any part of the taxes levied for road purposes under the act of April 30, 1869, (66 O. L. 60), except as provided in the supplementary act of 1873 (70 O. L. 118).

Peremptory writ refused.

Isaac Gillen et al. vs. Laura A. Kimball et al. Error to the District Court of Lawrence county.

Boynton, J.:

A testator devised to his wife, during life or widowhood, all his real estate, accompanied by a bequest of personality as follows: "And all my personal property, household goods and provisions, including moneys and credits of every description which may be thereon at the time of my decease, during her natural life, she, however, selling so much thereof as may be sufficient to pay my just debts." He devised the remainder in said real estate to his three daughters in unequal portions. He bequeathed to one of his daughters $1,500, to another $1,000, to a daughter of a deceased son $500, and to her mother $5; said legacies to be paid at the death of his widow, and declared that the legacy to the granddaughter, and the one to her mother, together with a tract of land conveyed to the son before his decease, made for them an equitable share in his estate. He also declared that if "at the death of my said wife there should be any of my said personal property or money, hereby devised to my said wife and heirs, left unconsumed," it should be divided between his three daughters and their heirs; and concluded as follows: "It is my will that all my money deposited or otherwise, is to be left on deposit at interest during the natural lifetime of my said wife, except the interest to be drawn and used by her as she may need." He appointed his wife executrix of the will.—

Held: That the bequest of personal property together with "moneys and credits of every description, to the wife, during life, includes money and United States bonds on deposit in bank, and that what remains unconsumed of the same at the widow's death, is to be applied to the payment of said legacies, the residue to be equally divided between the testator's three daughters.

Judgment reversed.

No. 33. William D. McCracken vs. Shannon Clements. Error to the District Court of Crawford county. Judgment affirmed.

Motion Docket.

The State ex. rel. Joseph E. Lower vs. Elihu Thompson. Motion for leave to file a petition in quo warranto.

White, C. J.—Held:

Where a relator prosecutes a civil action in quo warranto under the rerevised code in his private right, he is not required to obtain leave to file the petition; but the action must be brought in the county in which the defendant resides or may be summoned, in accordance with section 10, chapter 5, title 1 of the Act. (75 O. L. 611).

Motion overruled and the right to issue process from this court denied.

No. 22. Lewis M. Dayton et al., executors, etc., vs. A. P. Bartlett, administrator, etc. Motion for leave to file a petition in error to the Superior Court of Cincinnati. Motion granted.

No. 26. Bonham Fox vs. the State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Warren county, and to take the cause out of its order for hearing. Motion granted.

No. 28. Daniel G. Dearborn vs. the Northwestern Savings Bank et al. Motion for leave to file a petition in error to the Court of Common Pleas of Lucas county. Motion overruled on the ground that the plaintiff must seek his remedy in the District Court.

No. 32. Ohio ex. rel. Clinton Riley vs. John Blain, township clerk, etc. Motion to dispense with printing in cause No. 242 on the General Docket. Motion granted.

No. 33. Aberlin Wheeler vs. the State of Ohio. Motion to take cause No. 558 on the General Docket out of its order. Motion granted.

CUYAHOGA COMMON PLEAS.

NOVEMBER TERM, 1878.

STATE OF OHIO VS. O. H. BENTLEY.

Malpractice of Attorney—Misconduct in Drawing Affidavit—Demurrer to Information sustained, etc.

CADWELL, J.:

After a careful consideration of the information in this case, I am satisfied that it cannot be sustained, simply upon the ground that it does not show misconduct, and therefore does not show good cause. There is no bad motive charged, nothing charged as that it was done by way of revenge, mischief, to extort money or anything else of that kind. I hold, and have already held in one other case, that it is not necessary to charge th the defendant committed a crime, nor that the act was done while acting in the capacity of an attorney, but that in order to make "good cause" under the general terms used by the statute "for misconduct in office or for good cause shown," there must be misconduct, not necessarily misconduct as an attorney, because, if it is misconduct as an attorney simply, a man might be guilty of all manner of crimes and the court could not disbar him. Now, in regard to this information, it contains a single count and paragraph. "For cause first, that on or about the 24th day of May, 1878, the said O. H. Bentley aided and assisted in procuring one Phillip Godletter to sign and make oath to an affidavit wherein one —— —— was charged with the commission of a crime when the said Bentley well knew that the said Godletter"—that is, the person who signed the affidavit, for it does not state whom he aided and assisted. It does not state what crime —— —— was charged with. Perhaps that would not be necessary,—"when the said Bentley well knew that the said Godletter did not know the person charged with the offense." That is the first accusation. Would it be misconduct on the part of an attorney if a man comes to him and says, "Now, I have been informed that a crime has been

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committed upon the street. I wish you to draw an affidavit. I don't know it myself, but I have been informed that such is the fact, and it is necessary to take immediate steps to arrest the party;" and the attorney draws the affidavit? The person applying to him says, "I don't know the fact myself," but he makes the usual affidavit and swears that a crime has been committed "as he verily believes." I can see nothing wrong in that. It is a thing that is done rerepeatedly, frequently and properly, so far as I am able to discover.

But a furthor accusation is, that he did not know the person charged with the offense, and that he knew nothing whatever of the alleged offense. That might all be, under what I have already said. This person might come in—say a crime of robbery has been committed upon the street, assault and battery, murder, anything of that kind, and say to the attorney, "I do not know any of these facts, but it is reported to me that such has been the case; I do not know the man—designate him as John Doe—or do not know the fact, but I verily believe a crime has been committed." Would there be anything wrong in any attorney drawing an affidavit in that way? I am unable too see wherein there would be any misconduct on the part of an attorney or anybody else in thus drawing an affidavit, or assisting in having it done or in procuring the party who thus gave the information to the attorney to assist him in procuring the affidavit.

Now, there is nothing in this information which would negative the idea that exactly that state of facts might exist. It further avers, "and that he did not understand the language in which it was written." That Bentley knew that this person that made the affidavit did not know the person that had commitred the crime, did not know the facts in relation to the crime, and did not understand the language in which the affidavit was written. That all may be. He may be a German; he may be a Bohemian, a Frenchman, any other nationality. The affidavit may be written in English and the person making the affidavit may not understand the English language, but there is nothing in this information to negative the idea that the contents of the affidavit were made known to the person who made the affidavit in a language which he did understand. He may have had an interpreter to interprit it in a language which he did understand. [Reads.] "All of which facts, as aforesaid, the said O. H. Bentley well knew"—suppose he knew all those facts, it cannot be said that he is guilty of any misconduct—anything improper, so far as I am able to discover, "when he so aided and assisted in procuring said Godletter to sign and make oath to said affidavit, and also that the said O. H. Bentley well knew at the time aforesaid that the person so charged had been once arrested for the same offense and duly discharged therefrom." Persons are frequently arrested charged with an offense, examined before a magistrate and duly discharged. But there is nothing in the statute that prevents any other person making an affidavit and causing his arrest again. Nor can I see anything improper in an attorney making an affidavit for a person who wishes to make complaint when he knows that that person has been arrested once and discharged. If it had been charged that he made this affidavit when he knew that this person had been arrested and tried for the offense and acquitted, and that therefore would know that he could not be held to answer again, that would charge misconduct; but there is nothing of the kind in the information. Had it been charged that he knew that no crime had been committed on the first part it would have charged him with misconduct. Had it been charged that he knew that the person making the affidavit knew that there was no such person or that no such offense had been committed, it then would have charged him with misconduct. Had it been charged that the affidavit was made in a language which Bentley knew that the affiant did not understand, and that the contents were not made known to him in a language that he could understand, then it would have charged Bentley with misconduct. But none of these things appear. And I cannot see wherein there is any misconduct alleged against the defendant in this case. For that reason the demurrer will be sustained.

JOHN C. HUTCHINS For the State; A. M. JACKSON For Deft.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending January 25, 1879.

MORTGAGES.

Jan. 18.

Albert Doran o. A. W. Poe. $350.

G. L. F. Gegleum et al. to Martin A. Kleugmen. $100.

Richard Woodley to Charles D. Woodbridge. $1,100.

J. M. Nowak and wife to Gustave Schmidt et al. $400.

Same to James M. Hoyt. $112.51.

James Lang and wife to John G. Spear. $750.

Helen Douse to H. Wain. $1,000.

Catharane and David Davis to Jay Odell. $250.

Margaret S. Keliher to David K. Clint. $1,000.

Francis H. Bowman to Barbara Hemmerling. $100.

Jan. 20.

F. Goldsmith to M. F. Koch. $616.38.

Levi Goldsmith to same. Same.

Hattie Dunham to The Berea Savings and Loan Ass'n. $400.

James H. Peck to James Walker. $1,000.

John and Sarah Glass to S. T. Everett. $3,000.

Henrietta and Chas. Kramer to John Ribel. $850.

Frederick Gallof to Frank Luther. $250.

James Murphy and wife to Frank Evers. $400.

Barbara Gerstacke to Jacob Mueller. $1,250.

Elizabeth Stevenson to Myro L. Paine. $200.

John B. Bruggeman and wife to Jacob Mueller. $4,500.

Henry and Ellen Wilcox to Wm. Garrett. $200.

Geo. H. Gailock to Amelia Gailock. $1,200.

Same to Angeline Hausman. $900.

Charlotte and John Schroeder to Emily W. Thompson. $600.

Jacob Cramer and wife to Zusaaran. $200.

Mrs. Victor Studer to Henrietta Fickleshen. One hundred and thirty-five dollars.

Jan. 21.

Harriett Wells to John H. Wells. One hundred and seventy-four dollars and ten cents.

Geo. D. and Hattie B. Williams to Alexander C. Caskey. Four hundred dollars.

Michael J. Hellackey to Mrs. Marienne B. Sterling. One thousand and eighty dollars.

Amos N. Clark and wife to Francis H. Wager. Five hundred dollars.

Levi Goldsmith to M. F. Koch. Three hundred and eight dollars and nineteen cents.

C. L. Russell and wife to The Citizens' Saving and Loan Ass'n. One thousand seven hundred and fifty dollars.

John Brenner et al. to Henry

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Grautman Sr. Three hundred dollars.

Mary C. Disbro to H. F. Adams. One hundred dollars.

Rachael L. Pelley to Anna D. Parmley. One hundred dollars.

J. Estep to Society for Savings. Three thousand five hundred dollars.

Frederick Scheerer to Thomas Dixon. Three hundred and eleven dollars and seventy-five cents.

L. and C. Sherwood to H. J. Caldwell. Two thousand five hundred dollars.

C. Sherwood and wife to Charles Howard. One thousand seven hundred and seventy-nine dollars.

Hattie E. and F. H. Woodward to The People's Savings and Loan Ass'n. One thousand dollars.

Jan. 22.

Henry and Christian Bruch to Nicholas Meyer. Five hundred and fifty dollars.

Frank Bocan and wife to Vaclav & Joseph Odvody. Two hundred dollars.

Louise Gorns and husband to Louise Keppler. Eight hundred dollars.

Justus Schaffer and wife to Casper Schaffer. Two thousand dollars.

Erie Class of Ger. Ref. Church of N. A. to H. W. Kammer. Five hundred and fifty dollars.

John Skoula and wife to The St. John Nepomuk Society. One hundred dollars.

Walter Clough and wife to Israel D. Wager. Three thousand five hundred dollars.

John Cunningham and wife to M. S. Hogan. One hundred and fifty dollars.

Elizabeth and John Peter to Ulrich Gerber. Seven hundred and forty-eight dollars.

Edward Holden to Silas S. Langdon. One hundred and fifty dollars.

Jan. 23.

Alexander Bauer and wife to Wm. Dewald. One thousand five hundred dollars.

Hannah A. Farnsworth to Fanny Johnson. Five hundred dollars.

Wm. Bottcher and wife to John Rock. Two hundred and forty-two dollars.

Seborius Burhem to James Anderson. One hundred dollars.

Louis Staller and wife to Jacob Mueller. Two thousand four hundred dollars.

Johann Schank and wife to George Gerstacker. One thousand dollars.

W. P. Horton to The Citizen's Sav. and Loan Ass'n. Five thousand five hundred dollars.

Wm. E. Martin and wife to S. W. Porter. One thousand and twenty-five dollars.

J. W. Maxwell to J. N. Olds. Four hundred dollars.

CHATTEL MORTGAGES.

Jan. 18.

John H. Grawley to Mary P. Coit. $295.

Jan. 20.

W. C. Jones to Joseph Butler. Thirty dollars.

Thos. Reynolds to Payne, Newton & Co. Two thousand three hundred dollars.

Joseph Tegardine to D. H. Kimberly et al. Seven hundred dollars.

Jan. 21.

John Lowrie Jr. to John Lowrie Sr. Two hundred and fifty dollars.

J. J. and Mary Greenbrier to Henry Schlatneyer. Three hundred and twenty-seven dollars.

Michael Burkel to J. C. Weber. One thousand dollars.

Jseph W. and Salome A. Britton to Hezekiah S. Chase. Nine thousand dollars.

J. Carney to J. Lournant & Son. Two hundred and sixty-three dollars and seventy-five cents.

Newell E. Smith to Henry H. Stevens. Four hundred and forty dollars.

Jan. 22.

Mrs. S Rowland to Morris Silverstone. Ten dollars.

Herevy Dodge to Wm. Kuehenbecka. Four hundred dollars.

N. J. and Wealthy Marcellus to James Gibbons. Three hundred and fifty dollars.

Jan. 23.

Geo. Stahl to John M. Burmann. One hundred dollars.

H. R. Hurd to H. Davidson. Three hundred and fifty dollars.

DEEDS.

Jan. 17.

Carrie and A. A. Bailey to Arabella S. Newcomb. $2,475.

R. C. Curtiss and wife to Charles W. Moses. $400.

Wm. Gilden and wife to Samuel H. Kirby. $1,000.

John Jaster et al. to John Kaercher. $1,800.

Henry J. Miller and wife to F. R. Hamline. $325.

Nicholas Naegele and wife to Isaac and Myer Hoffman. $2.500.

John Peterjohn and wife to Mary Dorr. $5.

Samuel Prugh and wife to H. C. Schloman. $5.

F. W. Smith et al. by Mas. Com. to Henry Haines. $2,397.

Frederich Carroll by Mas. Com. to C. W. Moses et al. $195.

P. R. Smith by Mas. Com. to Maria Doyle. $631.

Noyes B. Prentice by Sp. Mas. Com. to John Hancock Mutual Life Ins. Co. $2,134.

B. J. Wheelock et al. by Felix Nicola Mas. Com. to Leverett Farbell. $1,500.

Joseph A. Bixley by John M. Wilcox, Sheriff, to Geo. Deitz. $867.

Levi F. Bauder, County Auditor, to Jas. R. Warren. $940.

Caroline Byerle to E. D. Burton. $1.

Levi F. Bauder, County Auditor, to Maggie Denning. $940.

Jan. 18.

Levi F. Bander, Co. Auditor, to Geo. Lavayea. $87.14.

J. M. Curtiss and wife to John Kulow. $1,320.

Richard Dewey and wife to Oliver E. Dewey. $6,000.

Benj. F. Farrington et al. to James T. Campbell. $1.

Russell Hall and wife to Lydia Hall. $300.

James M. Hoyt and wife to Joseph H. Nowak. $300.

W. H. Rose and wife to Margaret McDowall. $500.

John Rentner and wife to the East Cleve. R. R. Co. $1.650.

John C. Sanders et al. to Wm. D. Sanders. $7.

Wm. B. Sanders to Wm. D. Sanders. $1.

Same to Mrs. A. G. Sanders. $1.

Same to Mary E. Smith. $1.

Same to John C. Sanders. $1.

Same to Mrs. A. G. Sanders. $1.

Second Presbyterian Society to T. D. and Eliza P. Crocker. $39,000.

Wm. Uhinek and wife to Charles Uhinek. $5,000.

Same to same. $1,000.

Michael O'Neill et al. by H. C. White Mas. Com. to Henry Pletscher. $268.

Jan. 20.

Chas. Barkwell et al. to Joseph Malaz. Four hundred and twenty dollars.

Same to Anton and Mary Doozak. Three hundred dollars.

Robert A. Carran and wife to R. R. Holden. Two thousand dollars.

R. R. Holden to Sarah W. Carran. One dollar.

Wm. Cowley to Wm. Pope. One hundred dollars.

William Pope and wife to Hannah Cowley. One hundred dollars.

G. G. Hickox et al. to John Gynn.

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Fifteen thousand one hundred and forty-two dollars and eighty-four cents.

Anna and John Kotala to Vaclav Kotrsal. Six hundred and twenty dollars.

John Rock and wife to Wm. Bottcher. Seven hundred and twenty dollars.

Albert G. Smith and wife to Chas. O. Scott. Thirteen thousand dollars.

Geo, Zelling to Elizabeth Rand. One thousand dollars.

Emily W. Thompson to Charlotte Scherer. Nine hundred dollars.

Andrew Steinmetz by Felix Nicola Mas. Com. to Manuel Halle. One thousand dollars.

Jan. 21.

John Agsero and wife to D. E. Hollister. Sixty dollars.

Johanna DeClair to Lovesta Shimrod. Two thousand dollars.

Chas. F. and Ellen Glaser to Alrah Bradley. One dollar.

James Langhorn and wife to Frederick Schneerer. One thousand two hundred dollars.

H. P. McIntosh to Susan M. Gillette. Four hundred dollars.

Adam W. Poe to John Chandler. Five hundred dollars.

Wm. Thornburgh and wife to Lucy C. Burgess. Two thousand three hundred dollars.

David and Rosina Waldenmaire to Andreas Frederick. Four hundred and eighty dollars.

Gottlieb Kuebler by Felix Nicola Mas. Com. to Edward M. Matthews. Three thousand three hundred and fifty dollars.

Wm. N. Raynolds Mas. Com. to Geo. D. Williams. Four hundred and sixty-seven dollars.

Jan. 22.

Chas. D. Bishop and wife to Kirke D. Bishop. Four hundred dollars.

W. H. Williams et al. to J. Barnard. Thirty thousand dollars.

Joshua Barnard to Louisa Brewster. Seven hundred and fifty dollars.

Same to Ira Cleveland. One thousand six hundred dollars.

Same to Mattie M. Clapp. One thousand six hundred dollars.

Same to Sarah M. Frost. One thousand six hundred dollars.

Same to Jonathan Packard. Three thousand dollars.

Same to Edward Talbot. One thousand six hundred dollars.

Same to Wm. H. Williams. Two thousand dollars.

Jas. Carroll and wife to Thos. Donovan. Two hundred dollars.

I. G. Clewell and wife to Jas. Hassmer. Four hundred and fifty dollars.

Julia M. and Herbert A. Gorham to Olive A. and M. B. Lukens. ——

Delia M. Hamilton to Margaret Davis. Eight hundred and fifty dollars.

Geo. G. Hickox et al. to Anna Wassumpner. Four hundred dollars.

Edward Holden to Silas S. Langdon. Two thousand and fifty dollars.

Nicholas Myer and wife to Orlo F. Fist. One thousand one hundred dollars.

Geo. Schrauft and wife to Edward Belz. Five dollars.

Edward Belz to Margaret Schrauft. Five dollars.

Lovesta Sherwood to Johanna De Clair. Two thousand dollars.

John H. Sargent and wife to Barbara Gammel. Five hundred dollars.

Levi F. Bauder, Co. Auditor, to E. H. Williams, Auditor's deed. Twenty-seven dollars and fifty-five cents and 9-100.

Henry Ingham and wife to Wm. T. Norton. Two thousand seven hundred dollars.

Geo. A. Noderer and wife to Edward Krekel. Forty dollars.

Francis M. Wagar and wife to David H. Wagar. Two thousand one hundred dollars.

Chas. Schuman and wife by Thos. Graves, Mas. Com. to Geo. T. McIntosh. Six hundred dollars.

Jan. 23.

Chas. Barkwill et al. to James Becka et al. Three hundred dollars.

Same to Frank and Barbara Wataka. Four hundred and forty-two dollars and fifty cents.

Same to Mary Kabalee. Three hundred dollars.

Same to Joseph and Mary Janacek. Five hundred and ten dollars.

Same to James and Annie Maus. Three hundred dollars.

Same to James and Julia Paterka. Three hundred dollars.

Same to John and Annie Stifka. Three hundred dollars.

Same to Frank Sladik. Three hundred dollars.

Elizabeth Barkwell et al. to Joseph and Annie Skim. Three hundred and ninety dollars.

Thos. Hird to Ann Elizabeth Norris. One dollar.

E. Hunnewell et al. to James H. Page. Four thousand five hundred dollars.

Alexander Kimberly, personally and as exr. etc. to R. Spinks. Six hundred dollars.

John H. and Sarah Olds to J. W. Maxwell. Seven hundred dollars.

Henry L. Hills by Felix Nicola Mas. Com. to Robert Curtiss. One hundred and thirty-four dollars.

Wm. West et al. by Mas. Com. to Samuel Plumer et al. Three hundred and thirty-four dollars.

Joseph E. Hartman by Sheriff to Frank W. Minchin. Five hundred dollars.

David E. Hally and Wife to E. Grasselle. Seven hundred and sixty dollars.

Chas. O. Evarts and wife to W. T. Stumm. Nine hundred dollars.

Geo. M. Atwater and wife to H. J. Johnson. Eight hundred dollars.

James M. Curtiss and wife to Wm. J. Stueve. Seven hundred and twenty dollars.

Chauncey Fitch and wife to Margaret A. Rittenberg. Three hundred and fifty-three dollars.

T. G. Clewell and wife to James Phillips. One dollar

BILLS OF SALE.

Jan. 20.

J. W. Blake to Theo. Donberg. Forty-three dollars.

Jan. 23.

Richard Bardsworth to Lewis H. Wye. Two thousand five hundred dollars.

MECHANICS' LIEN.

Ira and Solon Smith to William T. Upham. Two hundred and thirty-four dollars and thirteen cents.

Jacob Ridde to Frank Kadlicek. Thirty-eight dollars and sixty-four cents.

Judgments Rendered in the Court of Common Pleas for the Week ending January 24th, 1879, against the following Persons.

Wm. V. Craw et al. Two hundred and eighteen dollars, and five thousand eight hundred and seventy two dollars.

Salero Mining and Man. Co. One thousand two hundred dollars.

Henry Haslem. Twenty-nine dollars.

Martin Ehrbar et al. Five hundred and seventy-five dollars and twelve cents.

Wm. F. Hale. Five hundred and sixty-nine dollars and eighty-five cts.

Samuel Dicks. One hundred and twenty-five dollars and forty-eight cts.

Richard Cunningham. Four thousand eight hundred and sixty-four dollars and sixty-three cents.

Andrew Dall. Two hundred and twenty-five dollars and forty-eight cts.

W. E. Pedrick. Forty.six dollars. Forty-five dollars.

Vaclav Purma, alias etc. Four hundred and seventy-one dollars and ninety cents.

Joseph James, guardian etc. Six hundred and seventeen dollars and forty-three cents.

G. Wolf. Two hundred and sixty-five dollars and sixty cents.

Chas. Balch et al. Four thousand two hundred and sixty-seven dollars.

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U. S. CIRCUIT COURT N. D. OF OHIO.

Jan. 18.

3192. E. A. Pierce v. Railway Passenger Assurance Co. Ordered remanded to Com. Pleas Court of Ashtabula Co.

3698. Boyd & Jaques v. Spencer Munson. Demurrer sustained. Leave piven plff. to amend petition in 15 days.

3724. Rowan vs. Hibernia Ins. Co.. Judgment against deft. by default for $642.90.

3681. Clapp vs. Crawford et al. Decree for complainant for $9,332.15 and order to sell mortgaged premises.

3795. Dunham vs. Buckeye Mutual Fire Ins. Co., Shelby. Leave to amend petition by interlineation.

3810. Payson Assigee vs. Saxton. Demurrer filed.

3788. Davis S. M. Co. vs. Boyd et al. Motion to dismiss action filed.

Jan. 20.

3262. Truman admr. vs. The Penn. Co. Verdict for plff. for four thousand dollars.

3272. M. D. Bacon vs. William Moore. Continued with leave to amend pleadings by plff. etc.

3242. Van In Wagen vs. Burhaus. Continued by consent.

3326. Same vs. Oscar Townsend. Same.

3810. Davis S. M. Co. vs. John W. Boyd et al. Dismissed without prejudice. Leave given to withdraw petition.

2820. Coggswell, assignee, et al. vs. Redington, assignee etc. Motion to dismiss the appeal.

3194. Duerr et al. vs. the Firemen's Fund Ins. Co. Amended reply filed.

Jan. 21.

3365. Bradford vs. Lennon. Reply to amended answer of John Lennon filed.

3262. Tiernan admr. vs. the Penn. Co. Motion for a new trial filed.

Steadman J. Rockwell of Kingsville, Ashtabula Co., admitted to practice.

Jan. 22.

3300. In case of Farmers Loan and Trust Co. vs. Painesville & Youngstown R. R. Co. the Ashtabula and Youngstown R. R. Co. and Penna Co. ask leave to file a petition to compel the Receiver of the Painesville & Youngstown R. R. Co. to repair a bridge in city of Warren in accordance with a decree rendered in the Common Pleas Court of Trumbull Co.

3546. Domestic S. M. Co. vs. Jas. L. Smith. Leave given to file amended answer instanter. Answer filed.

3831. Rachael E. Connell vs. Robert N. Downey et al. Petition. Money only. Estep & Squire and John McS.

3353. John C. Pratt vs. The C. S. & C. R. R. Co. et al. It is ordered that affidavits in support of motion be filed by Feb. 8, and affidavits opposing same to be filed by March 1. The order heretofore made, referring the claim of S. Kelly to Homer Everett, modified so that either party may take depositions before any proper officer upon giving legal notice.

Jan. 23.

3832. Union Paper Bag Machine Co. vs. The Cleveland Paper Co. Bill filed. Geo. Harding.

3833. Same vs. same. Same.

3834. The 2d National Bank of Akron, Ohio, vs. David R. Page, treas. Bill filed. Issuing service of etc. waived. Injunction allowed.

U. S. DISTRICT COURT N. D. OF OHIO.

Jan. 18.

1559. Addis E. Knight, assignee, vs. Caroline Gerster. Reply to answer of H. P. & P. Wick et al.

Jan. 20.

1562. William Patterson, assignee, vs. the Society for Savings et al. Answer and cross-petition of J. H. Rhodes, receiver.

Bankruptcy.

Jan. 21.

1963. In re. Marcus Grossman. Discharged.

1530. In re. Geo. L. Mason. Discharged.

1957. In re. Hugh F. Marshall. Discharged.

1701. In re. Oscar W. Crowell. Discharged.

1644. In re. Lyman T. Soule. Petition for discharge. Hearing Feb. 6th.

2022. In re J. Key Wilson. Same. Same.

1963. In re. Darius Baldwin. Petition for discharge. Hearing Feb. 6th.

1562. In re Miller B. Dow. Objection to discharge of Northway & B.

1800. In re H. Harvey's Sons. Specifications in opposition to discharge. H. McKinney and Ranney & Ranney's.

Jan. 22.

1919. In re. John P. Mansfield. Discharged.

1961. In re. James Westfall. Discharged.

1800. In re. H. Harvey's Sons Exceptions to specifications in opposition to discharge. H. L. Terrell.

Jan. 23.

1593. In re. Geo. R. Cunningham. Petition for discharge. Hearing Jan. 6th.

COURT OF COMMON PLEAS.

Actions Commenced.

Jan. 17.

14478. H. B. Tibbets vs. The Jewett & Goodman Organ Co. Appeal by deft. Judgment Dec. 28. M. B. Gary; Prentiss & Vorce.

14479. Elizabeth Gallop vs. Charles L. Kramer et al. Money only. M. A. Kneeland and Nesbit & Lewis.

14480. J. S. Healy et al. vs. Chas. W. Ames. Money only. H. T. Corwin.

14481. Z. P. Brinsmade vs. the Forest City Ins. Co. et al. Money and equitable relief. A. T. Brinsmade.

14482. Abraham Strauss, assignee of etc., vs. Mrs. S. M. F. Duncan et al. Relief. F. Strauss and Grannis & Griswold; J. M. Stewart.

Jan. 18.

14483. Lorenz Gleim vs. Frederick Ro h et al. Money, sale of mortgaged premises and relief. Geo. A. Kolbe.

14484. Elizabeth Wesley vs. Anna M. Jackson. Injunction and relief. Riders.

14485. Austin C. Dunham et al. vs. Jacob Brodt. To subject lands and relief. Prentiss & Vorce.

14486. The Society for Savings vs. Rudolph Wetzel et al. For sale of land and other relief. S. E. Williamson.

14487. Same vs. Arnold Scherer et al. Money and sale of land. Same.

14488. Same vs. John Stillins et al. Same. Same.

14489. Same vs. John Page et al. Same. Same.

14490. Elias S. Root et al. vs. Christian or Christian Sell et al. Money and to subject lands. Baldwin & Ford.

14491. Lyman Little vs. David W. Lewis et al. To subject land and for relief. Kessler & Robinson.

14492. Morris E. Gallup et al. vs. Francis M. Wager et al. Money and to subject lands. Stone & Hessenmueller.

14493. Conrad Schweutner vs. J. Philpot. Money only. G. A. Young and M. B. Gary.

14494. Conrad Schweutner vs. J. Philpot. Money only. Gustav A. Young and M. B. Gary.

14495. Patrick Smith vs. Seth W. Johnson. Injunction and equitable relief. Chas. L. Fish.

14496. Wm. Bingham & Co. vs. Christian F. Boest et al. Money and to subject lands. E. K. Wilcox.

14497. Albert K. Spencer vs. Anna Shiely, adm'x. of estate of Michael Shiely. Money only. Baldwin & Ford.

14498. C. H. & H. B. Potter vs. Sarah Hearst et al. Money and to subject lands. Caskey & Canfield.

14499. B. F. Taber et al. vs. H. J. Holbrook et al. Appeal by deft. Judgment Jan. 11. F. C. McMillen; J. M. Stewart.

14500. Anton Kalleet vs. the City of Cleveland. Appeal by deft. Judgment Dec. 21. Arnold Green; Heisley, Weh & W.

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14501. Frank Gershinksky vs same. Same. Same. Same.
14502. Richard Murphy vs. same. Same. Same. Same.

Motions and Demurrers Filed.

Jan. 17.

2191. Savage vs. McAdams et al. Motion to require plff. to give additional bail for costs.
2192. Taylor vs. Ferguson et al. Motion by deft. Wm. Ferguson to make the petition more definite and certain.
2193. Everett vs. Ryan et al. Motion by plff. for a new trial.

Jan. 18.

2194. Pelton as treas. etc. vs. Pritchard et al. Motion by plff. to require defts. to make their answer more definite and certain.
2195. Bemis vs. Nicola et al. Motion by defts. to require plff. to make petition more definite and certain.
2196. Chamberlain vs. Wilson S. M. Co. Demurrer by deft. Wilson S. M. Co. to the petition.
2197. Same vs. same. Demurrer by defendant S. E. Henderson to the petition.
2198. Taylor exr. vs. Gardner et al. Motion by plff. to strike answer of A. S. Gardner from the files.

Jan. 19.

2199. Same vs. same. Same. Same.
2200. Kirkpatrick vs. Nokes et al., trustees etc. Motion by deft. to strike from petition to require plff. to separately state and number causes of action and to elect upon which he will rely.
2201. Kirby vs. Beck et al. Motion by deft. John Te Pas, to require defts. Robert and Matilda Beck to separately state and number their defences to his cross-petition.
2202. Rabaut vs. Willson, otherwise, etc. Demurrer by plff. to 2nd and 3d grounds of defense.
2203. Schult vs. Schmittendorf et al. Demurrer by plff. H. Papke to 1st cause of action of plff.'s petition.
2204. Same vs. same. Motion by deft. H. Papke, to require plff. to make his second cause of action more definite and certain.

Jan. 20.

2205. Lowe & Co. vs. Le Duke et al. Demurrer by plff. to answer of deft. Wm. Murphy.
2206. Edelman vs. Le Duke. Motion to require deft. to give bail for costs.
2207. Gardner vs. the American Wood Preserving Co. Motion by plff. for a new trial.
2208. Kennedy et al. vs. Corrigan et al. Motion by defts. Merriam & Morgan for a new trial.
2209. Corning & Co. vs. The Northern Transit Co. Motion by deft. to strike petition from the files, and to dismiss action.
2210. Fowler vs. Zimmerman. Motion by deft. to require plff. to separately state and number defences of his reply.
2211. Johnson vs. Brown. Motion by plff. to strike the answer from the files.

Jan. 22.

2212. People's Sav. and Loan Ass'n. vs. Weigel et al. Motion by defts. John J. and Emma Weigel to set aside sale on interlocutory decree made herein with consent of plff.
2213. Stow vs. Gilbert et al. Demurre by plff. to answer and counter claim.
2214. Wenham & Son vs. Higgens et al. Motion by plffs. to amend and modify decree.

Jan. 23.

2215. Maxwell vs. Clark. Motion by deft. for a new trial.
2216. Hackett et al. vs. Streator. Motion by deft. to dismiss action for want of a petition.
2217. Cohn, admr. etc. vs. the L. S. & M. S. Ry. Co. Motion to require plff. to give bail for costs.
2218. Hazleton et al. vs. Rider et al. Motion by deft. for a new trial.

Motions and Demurrers Decided.

Jan. 18.

2103. Leffingwell vs. Butler et al. Overruled.
2110. Young vs. Altman et al. Sustained.
2115. Barrett vs. O'Brien. Sustained as to 1st specification, overruled as to 2d.
2117. People's Savings and Loan Ass'n. vs. Weigel et al. Granted.
2126. Halle vs. Schaefer et al. Overruled. Deft. has leave to answer by 25th.
2127. Holmes vs. Holmes et al. Overruled.
2137. Farrington et al. vs. Fournier et al. Overruled. Deft. has leave to answer instanter.
2139. Ellsasser vs. Naftel et al. Overruled.
2142. Newman vs. Singer Man'f'g. Co. Granted.
2140. Bebout vs, Smith. Granted. Plff. excepts and has leave to file amended petition.
2147. Mahon Jr. vs. Gallagher. Overruled at cost of plff. Plff. has leave to amend verification.
2149. Kirby vs. Beck et al. Deft. has leave to withdraw his demurrer and file motion to make Beck separately state and number his defences to cross-petition.
2152. Sanders vs. Wilde et al. Granted.
2153. Meek vs. Linas. Overruled.
2158. Ferbert et al. vs. Archer et al. Overruled. Plff. has leave to except.
2163. Barker vs. Luse et al. Overruled. Deft. excepts. Thos. Bridges has leave to become deft. and file answer by Jan. 25.
2172. Baumer & Co. vs. Kramer. Granted.

Jan. 21.

2156. Dangleheisen vs. Wigman extr. et al. Report confirmed.

Jan. 22.

2198. Taylor exr. vs. Gardner et al. Motion withdrawn. Plaintiff has leave to file another motion by 27th.
2199. Same vs. same. Same.
2210. Fowler vs. Zimmerman. Granted. Plff. allowed to number his defences.
1877. Wick et al. vs. Hurd et al. Withdrawn.
1907. Sprague vs. Stockley et al. Withdrawn.
1908. Same vs. same. Same.
1909. Same vs. same. Same.

J. G. Pomerene.] H. J. Davies.

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Book Notice.

A TREATISE ON THE LAW OF TORTS, OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT. By Thomas M. Cooley, LL. D. Chicago: Callaghan & Co., 1879.

The preface to the above work is as follows:

"In preparing the following pages the purpose has been to set forth, with reasonable clearness, the general principles under which tangible and intangible rights may be claimed, and their disturbance remedied in the law. The book has been written quite as much for students as for practitioners, and if some portions of it are more elementary than is usual in similar works, this fact will supply the explanation."

Its publication is proof, of course, that, in the judgment of its distinguished author, just such a work is needed by those for whose use it is intended. The correctness of that judgment, among the latter, will not be disputed. That this need is abundantly supplied by "Cooley on Torts," will be apparent by an examination of the work itself. It is divided into twenty-two chapters, as follows: 1. The General Nature of Legal Wrongs. 2. General Classification of Legal Rights. 3. Civil Injuries, their Elements and the Remedies for their Commission. 4. The Parties who may be held Responsible for Torts. 5. Wrongs in which two or more Persons Participate. 6. Wrongs Affecting Personal Security. 7. The Wrongs of Slander and Libel. 8. Injuries to Family Rights. 9. Wrongs in respect to Civil and Political Rights. 10. Invasion of Rights in Real Property. 11. Injuries by Animals. 12. Injuries by Incorporeal Rights. 13. Neglects of Official Duty. 14. Immunity of Judicial Officers from Private Suits. 15. Wrongs in Respect to Personal Property. 16. Frauds or Wrongs Accomplished by Deception. 17. Wrongs in Confidential Relations. 18. Responsibility of the Master for Wrongs Done or Suffered by Persons in his Employment. 19. Nuisances. 20 Wrongs from Non-Performance of Conventional and Statutory Duties. 21. The General Principles Governing Redress for Negligence. 22. The Place of Evil Motive in the Law of Torts.

CUYAHOGA COMMON PLEAS.

JANUARY TERM, 1870.

Action for Fraud—Champertous Contracts—Cross-Examination of Plaintiff as to, etc.

The defendant sought to show by the cross-examination of the plaintiff (the action having been brought to rescind a contract for the sale of certain mining stock by the plaintiff to defendant upon the ground of fraud), that since the commencement of the action the plaintiff had entered into certain champertous contracts under which the parties with whom the plaintiff made the same, were to furnish means for the continued prosecution of the plaintiff's action, and to share in the proceeds of any recovery that might be had therein by the plaintiff.

Held: 1. That it was not a proper subject of cross-examination.

2. That the making of such champertous contracts by the plaintiff did not constitute any defense on behalf of the defendant to the plaintiff's claim, and therefore furnished no ground for a dismissal of the action.—[ED. LAW REP'R.

PRENTISS, J.:

The question to which objection was taken by the counsel for the plaintiff was put to the plaintiff on his cross-examination by the defendant. The question sought to draw out the fact that after the institution of this action he had entered into a champertous agreement with Eells. Bolton and Harris for the continued prosecution of this action. The plaintiff did not testify at all in respect to this alleged champertous agreement. It was no part of his case to prove or disprove this champertous agreement.

The first inquiry is, then, whether or not, under any rule of cross-examination, the inquiry could be made of this plaintiff. It is said it may be made for the purpose of showing the interest of this plaintiff in the suit; for the purpose of showing the feelings of this plaintiff towards the defendant; for the purpose of showing that in the original inception and in the continued prosecution of this suit, this plaintiff is influenced by passion or prejudice, by hostile and unfriendly feelings towards the defendant. This alleged champertous agreement (there are three of them perhaps) has been submitted to the Court, and the Court has read it.

So far as the first ground or reason on which it is claimed that this inquiry may be made of this witness is concerned—as to having a tendency to show interest in the event of this suit—that interest is clearly manifest. It is perfectly apparent without any proof of this kind. The witness is the plaintiff in the action. He is prosecuting a claim which he insists he has against this defendant. And proof of this alleged champertous agreement would show no larger interest in this plaintiff than is perfectly apparent from the fact of his being the plaintiff in the action. If it has any tendency to show the extent of his interest in this action its tendency would be to show that he had a lesser interest than would be apparent or obvious from the fact that he is the plaintiff in this

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suit;—that he has parted to Eells, to Bolton and to Harris with some portion of that interest; and instead of such proof affecting on that ground, the credibility of the testimony of the plaintiff, it would have a directly opposite effect, if the extent of the interest of a party in a suit affects at all his credibility on the ground of its being larger or smaller in the controversy. Testimony is not wanted for that purpose, inasmuch as there is abundant testimony in the admitted facts of the case aside from that.

Then is it competent for the purpose of showing the feelings which influence the plaintiff in the prosecution of this action? What do the contracts show? They show simply that he has made some arrangement with other parties who have claims of perhaps the same character as those which this plaintiff is prosecuting in this action, by which he has acquired some interest in those claims. But whatever interest he may have acquired in those claims is not a subject matter of inquiry in this suit, inasmuch as those other claims are not being litigated in this action.

But how does it evince any unkind, unfriendly or hostile feeling, or any passion or prejudice on the part of this plaintiff, that he has made an arrangement by which he has acquired an interest from other persons in claims of a similar character? I do not think that fact has any sort of tendency to show anything of the character for which these contracts are sought to be introduced in this action. So I do not think that this cross-examination is a proper cross-examination of this plaintiff upon the grounds upon which it is assumed to be a proper cross-examination of the plaintiff.

Then is there any other ground upon which this cross-examination is permissible? Now the one other ground upon which this cross-examination may be permissible is this: That under a decision of the Supreme Court of this State, notwithstanding there is no examination of the witness by the party calling him in respect to a matter, it is proper for the opposite party to inquire of the witness in respect to any facts which the party calling him is required to prove in order to sustain his claim. Now the plaintiff, in respect to the making of these alleged champertous contracts is under no sort of obligation growing out of anything thus far appearing in the case to make any proof in regard to them.

So that in my judgment the rule established by the Supreme Court will not make the cross-examination of this plaintiff competent in this case. I do not think then the inquiry which is proposed to be made of this witness upon cross-examination can be made.

But it is said that this is competent because upon its being made known in any form or manner to the Court that these alleged champertous contracts existed—if they are actually champertous contracts—the Court ought to compel a dismissal by the plaintiff of this action, if the plaintiff would not voluntarily dismiss the action. That involves the question whether or not it is competent in this case for this defendant to prove, as a matter of independent proof, the fact of the making of these contracts. It is not necessary for me at this time to dispose of that question, but inasmuch as the question has been fully argued by counsel, it may be expected by them that I shall dispose of it, and perhaps it is as well at this time to dispose of that question. The contracts, it is said, are not only objectionable upon the ground of their being champertous contracts, but objectionable upon the ground that they show a conspiracy on the part of the parties to these contracts, to oppress, to wrong, and to injure the defendant, and the Court, whenever such a disposition is manifested by a party—proved to exist in a party—ought not, by any act that it may do, sustain or approve such a purpose or such a disposition on the part of the party who evinces any such purpose or disposition.

Now, in the first place, it is said by the defendant's attorney that this is not a defence to this claim; that even if the conspiracy existed, or even if the champertous contracts existed, they constitute no defense to the plaintiff's claim. If they constitute no defense to the plaintiff's claim, I do not see how it is proper for the defendant to make proof of these facts. Assuredly upon the ground, and only upon the ground, that they constitute a defense to this action, can such proof be made by the defendant as independent proof. If they amount to anything as affecting this action, they constitute a defense to the action, it seems to me. They constitute a defense for the pupose of disposing of this action. It is claimed on the part of defendant here, that these facts being made known to the Court, the Court ought upon those facts to dispose of this action; and if the Court ought to dispose of this action upon the existence of those facts being in proper form made known to the Court, it seems to me to that extent—to the extent of the disposition of this action, they must necessarily and inevitably constitute a defense to the action. If they constitute no defense whatever to the action, then I do not think that the Court has anything whatever to do with proof of them. It is said that they constitute no defense, and when they are made known to the Court, the Court ought to compel the dismissal of the action by the plaintiff, or ought to dismiss it itself.

Now how is it possible that these champertous contracts can be any objection to the further prosecution of this claim asserted by the plaintiff in this action. The claim is not founded at all upon any champertous contracts, not founded upon any conspiracy at all. It existed anterior to the making of this champertous contract and this conspiracy, and wholly independent of them. It is not sought, through or under this conspiracy or these champertous contracts, to recover anything in this action of the defendant; but upon a pre-existing and original claim in favor of the plaintiff against this defendant this recovery is sought. Now suppose that these contracts are champertous, and suppose that they are justly amenable to the criticism that there was a conspiracy formed by and through them—assuming all these facts, do these facts make any sort of defense either equitable or legal, to the recovery of that pre-existing and independent claim? I cannot see how it is possible that it can affect the claim. It existed wholly independent of it, and anterior to it, and I do not think myself that because of the existence of these alleged champertous contracts that the plaintiff is obliged to go out of court and to remain out of court until those champertous contracts are abrogated by and between the parties to them. Certainly that view of the case is sustained by several decisions; in Massachusetts, in New York, and one decision in England in which the Courts have said and decided that a champertous contract, although illegal, could not affect at all a legal cause of action which existed in favor of the plaintiff against the defendant. It was no ground whatever of defense to that cause of action, and in no one of those cases referred to by counsel for defendant has the Court undertaken to assume that it would be proper, because of the alleged champertous contracts, to compel the plaintiffs in those actions to dismiss the actions or to dismiss them itself. Now, it seems to me it would be very strange, where those contracts in all those cases were acknowledged to be champertous contracts, to be ab-

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solutely null and void, giving no rights to either party whatever—it seems to me it would be strange if they could affect the right of the plaintiff in those cases, to prosecute the action which was commenced, perhaps, in some instances or subsequently prosecuted, because of the existence of those champestous contracts. The Courts have intimated nowhere that they would interfere with the prosecution of those actions by reason of them. Now it is said here that if the Court does not thus dispose of this action, it will be aiding in the enforcement of these champertous contracts. It seems to me, that the court does not furnish any aid whatever to those champertous contracts in the way of enforcing them by allowing the plaintiff to prosecute this suit. Those champertous contracts are absolutely void because they are champertous, and no obligation grows out of them on the part of this plaintiff or exists because of them to the parties with whom they were made, so that the Court is not called upon to enforce them. It does nothing in the way of enforcing them. It leaves the parties just exactly where they would have stood if these advances had been made without any champertous agreement. So far as the plaintiff is concerned in reference to making compensation to some person who furnished him aid for the purpose of the prosecution of the suit, he is at liberty if he chooses to do so to perform this contract, but because of the existence of the contract he is under no sort of obligation to perform, it being illegal and void.

Now how can it be said that the Court furnishes any aid in the way of enforcing this contract by simply refusing to determine that the plaintiff shall go out of court because of the existence of it? It is a contract that is absolutely void under which nobody has any rights whatever. Now if that suit should result in favor of the plaintiff, he may if he chooses, do what he has a mind to, notwithstanding that contract, with the recovery which may be had in this action. He may give it to the parties with whom he has made the contract, or he may withhold it from the parties with whom he has made this contract. This contract does not impose upon him any sort of obligation whatever, and the court is not in any way, it seems to me, under such circumstances, by refusing to dismiss this action, aiding any of the parties to that contract in respect to the claims which apparently exist under the contract, but do not in law or in equity exist under it. That is the view which I entertain of the question which has been made in this case. And, it seems to me, that the testimony is not proper; either as independent proof on the part of the defendant or by way of cross-examination can it come into this case of the plaintiff. I sustain then the objection to the testimony.

Judge Tyler: I don't understand the Court in its illustrations to pronounce or determine that the contracts are champertous or not.

The Court: I have not undertaken to say, but I have a very decided opinion in reference to the character of this Eells contract.

SUPREME COURT OF OHIO.

JANUARY TERM, 1878.

Hon. William White, Chief Justice. Hon. W. J. Gilmore, Hon. George W. McIlvaine, Hon W. W. Boynton, and Hon. John. W. Okey, Judges.

TUESDAY, January 21, 1879.

General Docket.

No. 555. Joseph Heck, executor of Ernst Heck vs. Mary Heck. Error to the District Court of Hamilton County.

Okey, J.:

Where the appraisers of the personal estate of a decedent first appointed, failed to make the widow any allowance for her year's support, and the Probate Court, on her application, appointed new appraisers to make such allowance, the executor or administrator should have notice of the proceedings; but the irregularity of making the order and allowance, without such notice, should be corrected in the Probate Court; and where application was made to the court for the purpose, and overruled, and the record does not show that any injustice was done, no ground of reversal is shown.

Judgment affirmed.

David Horst vs. Levi Dague. Error to the District Court of Wayne County.

Boynton, J.:

A testator directed his executor, by his will, to sell his real estate, and after having set aside a specified sum for the support of his widow, to divide the remainder of the proceeds of the sale among his eight children. After the testator's death, and before the executor sold said real estate, S., a son of the testator, mortgaged his interest therein to secure the payment of a loan of money.—Held: That such mortgage operated as an equitable assignment to the mortgagee of the interest of S. in the proceeds of the sale of said real estate by the executor.

Judgment reversed and judgment for the plaintiff.

Benham Fox vs. the State of Ohio. Error to the Court of Common Pleas of Warren county.

McIlvaine, J. Held.

A verdict on an indictment for rape, finding the defendant not guilty of the crime charged, but guilty of an *attempt* to commit the same, is not sufficient, under section 5, chapter 7, title 2, of the Penal code (74 O. L., 352) to convict the defendant of an assault with intent to commit rape.

Judgment reversed. Boynton, J., dissented.

The Second National Bank of Cincinnati vs. Robert Hemingray. Error to the Superior Court of Cincinnati.

Gilmore, J.:

1. The general rule in equity, as at law, is, that joint debts cannot be set-off against separate debts, unless there be some special equity justifying it.

2. If there are such equities, the bankruptcy of the party against whom they exist, is sufficient ground for the allowance of the set-off against notes not due at the time of the assignment.

3. Where a banker induced a firm to continue its deposit account with him, by deceptively holding himself out as being still the holder of negotiable notes made to him by the principal member of the firm, when in fact he had assigned them as collateral security for a debt; and there was an understanding between the firm and the banker, from the course of dealing between them, that the notes of the individual member were to be paid through the deposit account of the firm, and which he had a right to treat as his own for that and other purposes; on the bankruptcy of the banker's.

Held:

That after satisfying the debt for which the notes of the individual member were held as security, the latter, as against the assignee of the bankrupt, is, in equity, entitled to set off the firm account against the balance due on the notes.

4. In an action on a negotiable note which the plaintiff holds by assignment before due, in consideration of, and collateral security for a loan made by him to the insolvent payee, against whom the maker is entitled to an equitable set-off to the note; the plaintiff will be limited in his recovery against the maker to the amount of the debt,

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which the note secures, and will not, in addition thereto, be allowed the amount of his attorney's fees in prosecuting the action.

5. The set-off as to the Allen note, and the deposit account of R. Hemingray & Co. is allowed in favor of R. Hemingray against the assignee in bankruptcy of Homans. The motion of the Second National Bank to be allowed the amount of its attorney's fees is overruled.

Motion Docket.

No. 21. William M. Corry vs. Hugh Campbell. Motion to correct the mandate issued in cause No. 537 on the General Docket of December term, 1874. Ordered: that mandate be issned to the District Court to carry the original decree of the District Court into execution, notwithstanding the mandate heretofore directed to the Common Pleas Court.

No. 29. Mary A. McCague, by her next friend, vs. Thomas Miller et al. Motion to dimiss cause No. 26 on the general docket. Motion overruled.

No. 30. Mary A. McCague by her next friend, vs. Thomas Miller et al. Motion for leave to file a supplemental petition making the legal representatives of Thomas Miller, deceased, parties to No. 26 on the general docket. Motion granted.

No. 32. Thomas H. Johnson vs. Aaron G. G. Moreton. Motion for leave to file petition in error to the Superior Court of Cincinnati. Motion overruled.

No. 36. John Dunaman vs. the State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Greene county. Motion granted.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending February 1, 1879.

MORTGAGES.

Jan. 24.

P. F. McGuire to S. G. Baldwin. Nine thousand dollars.

Same to same. Five thousand dollars.

H. J. Johnson to G. M. Atwater. Six hundred dollars.

John H. Behlke and wife to James M. Curtiss. Seven hundred and fifty dollars.

Martin Collins and wife to same. Five hundred dollars.

Wm. J. Stewbe to same, Three hundred and thirty-five dollars.

Wm. Cowley to Catharine Cochran. One thousand dollars.

Betsey Biddleeum to Harriet Armstrong. Ninety-five dollars.

Ashahet W. Strong to E. J. Foster. Three hundred dollars.

Carl and Henrietta Betheke to Citizen's Sav. and Loan Ass'n. Four hundred dollars,

Ephrain West and wife to Reuben Strauss. One hundred and thirty dollars.

Lispenard S. Webb and wife to South Cleveland Banking Co. Four thousand five hundred dollars.

Jan. 25.

Henry Burns and wife to H. F. Hopkensack. Seven hundred and eighty-four dollars.

John Dipley to M. K. Brown. One hundred and fifty dollars.

John Gehring to J. C. Ferbert et al. exrs. One thousand two hundred dollars.

Wm. T. Long and wife Karoline Byerle. Four hundred and fifty dollars.

Garrett A. Newkirk and wife to Cornelius Veeder. Nine hundred and eight dollars.

Edson J. Letts and wife to Kate A. Miller. One thousand dollars.

Hiram Henderson to Citizen's Sav. and Loan Ass'n. Eight hundred dollars.

Isabella and Thomas Neal to Charlotte Schearer. Five hundred and fifty dollars.

Geo. W. Corlett and wife to Samuel A. A. and H. B. Plumer. Four thousand dollars.

Isabel W. Strong to Jacob Briecher. Sixty dollars.

Jan. 27.

A. W. Poe to Albert Doran. $350.

Wm. Kulow to John Ribel. $400.

Joseph Woudrak and wife to Mathias Martineck. $400.

Catharine and Louis Hermann to Fanny Evers. $475.

Jan. 28.

Carl Zutis and wife to J. B. Rasmussen and wife $750

Israel Steeves and wife to M. S. Hogan. $270.

Detrick Wehage et al. to Casper Fenmeyer. $100.

Adam Poe and wife to Henry Shaus. $500.

Gottfried Rittberger and wife to Geo. Goodhart. $800.

Harall Konarski and wife to Stainslaus Mucha. $80.

John Gehring to John C. Ferbert et al,. exr. etc. $300.

Karl and Maria Grosse to Clotilde Grosse. $400.

Franz Rothenbucher and wife to Joseph R. Oppenheimer. $1,000.

Edward W. Johns to G. M. Atwater. $750.

Joseph Rothenbucher and wife to I L. McClurg. $480.

Thomas Hoban and wife to Eva M Kelley. $500.

R. O. Beswick and wife to Emily Powell. $1,500.

Jan. 29.

Thomas Smith and wife to Joseph Smith. One hundred dollars.

Geo. A. Potter and wife to H. B. Spencer. Five hundred dollars.

Wm. and Jane Garvey to Sarah Flynn. Two hundred dollars.

Henry Kramer and wife to Catharine Hitchen. Five hundred and eighty dollars.

Frauk Kohout and wife to Carl E. F. Severn. Two hundred dollars.

John Hogan and wife to Anna and Thomas Hunt. One thousand six hundred and fifty dollars.

Thomas Hornel and wife to J. G. Denzel. Four hundred dollars.

Gerhard Koenders to Gottlieb Allmendinger. Nine hundred dollars.

John Gridley Edson to Simon Koch. Five hundred dollars.

Mary and M. Smith to Geo. Hester. One hundred and eighty-one dollars and eighty-one cents.

Jan. 30.

Sophia M. Miller and husband to Wm. L. Miller. $1,500.

Same to Same. $2,500.

A. L. Aumich to The Citizens Savings and Loan Ass'n. $100.

John P. Wick and wife to Chas. Lear. $2,000.

Betsey Huggett et al. to Abraham Lancing. $300.

T. A. Wilmot to Theodore Dorkey. $741.37.

Nattie and John Gamon to C. N. Sheldon. $705.

Hannah and Mathew Strauss to H. H. Hatch. $60.

G. W. Newcomer and wife to A. Zeitmann. $700.

Bridget Finn to M. S. Hogan. $400.

G. W. Newcomer and wife to A. Zeitman. $1,000.

Theodore Rheiner to Carl Brandt. $175.

Annie and Henry Fournier to A. J. Wenham et al. $500.

CHATTEL MORTGAGES.

Jan. 24.

O. H. Bentley to Flora N. Harris. $1,000.

Philip Capello to August Hand. $50.

Harry Aiken to D. A. Matthews. $60.

Chas. McCradden to Anna Mahony. $250.

Isaac Schaungold to Joseph Metzerbaum. $200.

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B. L. Wilson et al. to Everett, Weddell & Co. $1,300.

Same to Azariah Everett. $244.78.

John E. White to H. J. Coit. $1,-590.

Jan. 27.

E. D. French to S. Brainard's Sons. $175.

Rodney D. Dougherty to Patrick Maloney. $220.

W. G. Lane to Jacob Wagemen. $145.

Isaac Frank to H. Blahd. $55.

Rudolph Huelsan to Otto Huelson. One hundred and eight dollars.

Chas. D. Gaylord to E. F. Gaylord. $1,304.49.

A. H. Weed to George F. Pierce. $80.

Jan. 28.

Chas. D. Gaylord to Jackson Iron Co. $2,597.86.

Same to E. F. Gaylord. $13,333.-91.

James Manning to Annie D. Stough. $1,000.

Chas. Stover to David Coeier. Three hundred and forty dollars.

L. G. Middough and wife to Andrew Platt. Two hundred and sixty-ty-five dollars and eighty cents.

Pleasner & Co. to Meriam & Morgan Pr'ff'e Co. One thousand one hundred dollars.

Geo. F. Terrell to Gage & Canfield. One hundred and fifty dollars.

Jan. 29.

A. Casson to Hyde, Oakes & Hinkley. Six thousand and eighty dollars.

Mary L. Hayes to M. Sullivan. Sixty dollars.

Elizabeth Koestle to H. Mueller & Co. One thousand two hundred dollars.

Frederick Krasa to Joseph David. One hundred dollars.

Jan 30.

Megerth & Kertz to G. M. Kortz et al. $194.

Same to Wm. Kertz. $175.

Isaiah Turner and wife to J. A. Beidler. $25.37.

John G. Steiger to Wm. Wilkins & Co. $400.

Sam'l and Ellen Gimmell to C. H. Seymour. Three hundred and sixty dollars.

Philip Loretz to L. Koblitz et al. Eeighteen dollars.

Wm. Edwin Nicholls to Geo. B. Swingler. One hundred dollars.

C. S. Selmen to S. Brainard's Sons. One thousand and thirty dollars.

Conrad Deuble and wife to Isaac Leisy & Co. One hundred dollars.

DEEDS.

Jan. 24.

G. W. Atwater to Louis Hieman. $200.

Chas. Barkwell et al. to John and Annie Kubu. $350.

J. M. Curtiss and wife to John F. Behke. $1,080.

Same to Martin Collins. $1,032.

Richard Cunningham and wife to Wm. G. Rose. $2,500.

E. J. Foster to Asabel W. Strong. $1.

Alfred Robinson and wife to Mary Bruce. $3,000.

John Granny and wife to J. S. and H. J. Giles. $1,500.

Louis J. Feliere to Joseph Droessler. $1,000.

Geo. J. Hickox et al. to Sarah J. Roach. $400.

J. E. Ingersoll and wife to Samuel A. Fuller. $1.

Fanny Johnson to Harret A. Farnsworth. $800.

Karl Kamman and wife to Theresa Roquett. $1,500.

B. Sturm and wife to Barbara Bahatz. $150.

Reuben Yeakel and wife to Isaac Y. Moyer. $1.

James H. Hardy et al. by Mas. Com. to Wm. Ryan. $671.

Jan. 25.

David P. Badger and wife to E. Henry Dackenhausen. $2,000.

Albert Darrow to Frederick Banyert. $300.

Mary A. Fuller to Ellen E. Boest. $1,500.

H. D. Goulder, assignee in bankruptcy, to F. F. Siger. $1.

Catharine Hurd and husband to H. E. Davidson. $800.

Same to same. $1,230.

In re J. H. Holmes to H. W. Bill, assignment of bankrupt effects.

H. F. Hoppensack and wife to Henry Burns. $784.

Luther Moses and wife to Cora E. Waters. $1.

Same to Frank E. Waters. $1.

Martha W. Raymond to Chas. Colvin. $2.

Josephine V. McFadden to T. A. McFadden. $2.

T. A. McFadden to Mrs. Sarah Francis. $300.

Same to Josephine V. McFadden. $2.

E. D. and A. S. McConkey to M. McDermott. $1

W. M. and Amanda W. Patterson to Francis F. Siger. $1.

Estate of D. P. Rhodes by R. R. Rhodes, att. to D. R. and Davis Hawley. $500.

Joseph Storer and wife to Joseph Halle. $750.

Geo. Greenleese et al. by Mas. Com. to Go. W. Corlett. $1,067.

Jan. 27.

Levi F. Bauder, Co. Auditor, to James Tousley. $1.22.2.

Same to same. $3.66.6.

Chas. Barkwell et al. to Chas. and Frances Zinnar. Four hundred and thirteen dollars and thirty cents.

Geo. Brownell and wife to Robert D. Smith. One thousand five hundred dollars.

J. G. W. Cowles to Geo. Hooper. Four hundred dollars.

Albert Doran to A. W. Poe. One thousand five hundred dollars.

C. W. Moses rnd E. D. Burton to A. F. Gaylord. Six hundred dollars.

Antoney Marck and wife to John Marck. One thousand dollars.

J. V. and Mary Mathivet to Nettie Odell. One dollar.

Thos. Matega to Frederick Schmaly. Eight hundred and seventy-five dollars.

Marcus & Magdalene Walcher to Albert Doran. One dollar.

James Walker, admr. etc. to F. M. Cochran et al. Two thousand three hundred and eighty-eight dollars and twenty-five cents.

Samuel Prugh by Felix Nicola Mas. Com. to Adam W. Poe. Four hundred dollars.

Alvis Krejci by R. D. Updegraff to Chas. A. Bulkley. Eight hundred and one dollars.

Jan. 28.

Chas. Barkwell et al. to Conrad Schmidt. Seven hundred dollars.

W. E. Cheney to W. Faulkner. One dollar.

Lewis Eckerman to Flora A. Dickson. One thousand two hundred dollars.

Frederick Kinsman to Carl and Annie Kallal. Three hundred and ninety dollars.

A. W. Morgan and wife to Royella B. Cooper. Five dollars.

Mathias Martinek and wife to Joseph Wondrak. Five hundred and fifty dollars.

Sarah S. Cozad to J. H. Wade. Two thousand six hundred and fifty dollars.

John Chee and wife to Karall Konarske. Four hundred dollars.

Albert D. and Eliza Sowders to John Stacy. One hundred and eighty dollars.

Adelia M. Nute to Ephraim Nute. One dollar.

Frank L. Raymond and wife to Edmund and Wm. Walton. One thousand six hundred dollars.

A. B. Ruggles and wife to Stephen Gifford. Four hundred and fifty dollars.

Adrian C. Stone to Montraville Stone. Two thousand dollars.

Joseph Scleicher and wife to Conrad Maser. Two thousand dollars.

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Lansing Van Pelt to Hiram Van Pelt. One thousand six hundred dollars.

Moses Warren and wife to Andrew Platt. Eight hundred dollars.

F. A. Wilmot and wife to Carl Zuter and wife. Seven hundred and fifty dollars.

Heirs of T. G. Wehage to Deitrick Wehage. One dollar.

Chandler Waters and wife to Adelia Burnett. Three thousand dollars.

M. M, Jones by Felix Nicola Mas. Com. to Citizens' Savings and Loan Ass'n. One thousand three hundred and thirty-four dollars.

C. A. Muerman by Sp. Mas. Com. to John B. Trevor. Twenty thousand dollars.

Gustav Schmidt. admr., by Felix Nicola Mas. Com. to the Citizens' Savings and Loan Ass'n. One thousand six hundred dollars.

Jan. 29.

Michael Anderson to Mary Anderson et al. One dollar.

Louisa and John F. Becker to J. M. Becker. Two thousand dollars.

Sarah E. Hays and husband to Frank L. Raymond. Four thousand two nundred dollars.

Arthur Odell and wife to Catharine Brew. Eight hundred dollars.

Edwin Augustus Swain to D. H. Kimberly. One dollar.

Carl Schoenbeck and wife to Johanna Schoenbeck. Five hundred dollars.

Same and John Schoenbeck and wife to Fritz Schoenbeck. Five hundred dollars.

John Morath and wife to B. Almendinger. Six hundred dollars.

Gottlieb Almendinger and wife to Elias Almendinger. Thirty-nine dollars.

Jacob Almendinger and wife to same. Thirty-nine dollars.

Elias Almendinger to Gottlieb Almendinger. Thirty-nine dollars.

Geo. Almendinger to same. One hundred and twenty-five dollars.

Hubbard Cooke, trustee, et al, to Hermann Gold. Three hundred and twenty dollars.

Geo. A. Noderer and wife to John Aubrey. Forty dollars.

Ephraim Nute to Mathias Palecek and wife. Three hundred and ten dollars.

Napoleon B. Dixon and wife to Geo. Hefner et al. One thousand two hundred dollars.

James Decker and wife and Jan Zoeter and wife to Frank Nahouse. Seven hundred and twenty dollars.

Sarah Flynn et al to Wm. and Jane Garvey. One thousand and fifty dollars.

W. W. Hazzard to Chas. Geib. Eight hundred and sixty-five dollars.

Reuben Hall to George Mitchell. Eight thousand five hundred dollars.

N. Heisel et al. to Geo. H. Hooper. One thousand nine hundred and six dollars and eighty-seven cents.

Seneca C. Mower and wife to Chas. Geib. Seven hundred dollars.

Nettie and J. M. Odell to Sarah E. Hays. One dollar.

W. L. Stearns and wife to S. B. Corrigan. Seven hundred dollars.

Joseph Storer to Rufus B. Swift. Three thousand two hundred and sixty-three dollars.

Fannie Van Wie and husband to Valentine Christ. Nine hundred dollars.

Mary J. Wannemaker and husband to John Wannemaker. Seven hundred and seventeen dollars.

Christian A. Warnake to Ernest Woehman. Three hundred dollars.

Jan. 30.

G. M. Atwater to Henry Beckman. $1,000.

Same to Rosa Mann. $1,120.

Carl Brandt and wife to Theodore Rheiner. $475.

M. I. Blair and wife et al. to Martin Rath. $1,225.

Chas. F. Demme to Michael Bram, trustee. $1.

Michael Bram, trustee, to Barbara Demme. $1.

Herod Green and wife to Hattie Garman. $600.

Vaclav Prosek and wife to Anton Sklenicka and wife. $330.

Wilson M. Patterson. assignee etc. to Louisa Beckman. $24,500.

Chas. Gates and wife et al. to Charlotte R. Van Orman. $382.50.

Rachael Potts et al. to Alonzo A. Gillette. $15,000.

Laurence Scott and wife to Hiram Barret. $2,500.

Major Smith and wife to Calvary Morris. $133.60.

Geo. Thomas and wife to G. W. Welker. $795.

Mary C. Whiting et al. to M. J. Higley. $50.

MECHANICS' LIEN.

W. Course to Ralph T. James. Sixty-three dollars and five cents.

BILLS OF SALE.

John Kabella to Joseph Vlua. Eighty dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending January 29th, 1879, against the following Persons.

Geo. A. Butler et al. One hundred dollars and eighty-two cents, and two thousand and eighty-seven dollars and forty.three cents.

W. B. Peck. Sixty-two dollars and sixty cents.

L. Umbstaetter. Five hundred and twenty-nine dollars and seventy-four cents.

M. Stumpf. Seventeen dollars.

Louisa C. Baltz. Four hundred and fifty-nine dollars and seventy-eight cents.

S. G.Parker. Two hundred and seventy-five dollars and ninety-two cents.

Thomas Ward. One hundred and twenty-eight dollars and thirty-seven cents.

Frederick Buehne. Thirty-two dollars and twenty-six cents.

E. Slaght. Seven hundred and fifty-two dollars and sixty-three cents.

Conrad Hornung. One hundred and fifty dollars.

E. Geiger et al. One hundred and forty-five dollars.

H. F. Leypold. Fifty-five dollars and fifty-two cents.

James F. Tallant. Thirty-one dollars.

Wm. Pritchard. Four hundred and sixty-eight dollars and fifty cents.

Highland Coal Co. Five thousand six hundred and fifty-eight dollars and eighty-one cents.

U. S. DISTRICT COURT N. D. OF OHIO.

1643. In re Daniel Cobaugh. Petition for discharge. Hearing Feb. 6.

1628. In re David Ketcham et al. Discharged.

1843. In re John Austin. Discharged.

Jan. 25.

1821. In re Wm. M. Shoeb. Petition for dicharge. Hearing Feb. 6.

1906. In re Shields & Keidler. Discharged.

Jan. 27.

1983. In re Andrew McAdams. Discharged.

1625. In re Dwight J. King. Discharged.

1668. Archibald McGregor et al. Discharged.

1776. In re John E. Hood. Discharged.

1891. In re Chas. C. Roberts. Discharged.

1769. In re John Langdon. Discharged.

1668. In re John McGregor. Discharged.

Jan. 28.

1949. James Smith et al. vs. L. Prentiss. Answer to specifications.

2032. In re W. R. Gerrard. Discharged.

1665. In re Joseph D. Wickery. Discharged.

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1868. In re Andrew Barnes. Petition for discharge. Hearing Feb 12th.

1868. In re Frank Barnes. Petition for discharge. Hearing Feb. 12.

Jan. 30.

1811. In re. George Weimer. Order for 2d and 3d meetings of creditors.

1874. In re. Chas. J. McDowell. Discharged.

1811. In re. Geo. Weimer. Petition for discharge. Hearning Feb. 14.

U. S. CIRCUIT COURT N. D. OF OHIO.

Jan. 23.

3828. Herman Weiler vs. Joseph Stoppel. Demurrer. Wilson & Sykora.

3410. George Russ vs. Penna. Co. operating etc. Demurrer and brief. R. P. Ranney.

Jan. 25.

3835. Samuel G. B. Cook vs. the Sandusky Tool Co. Bill of complaint. Geo. H. Howard; M. D. Leggett & Co.

Jan. 27.

3802. Ohio National Bank of Cleveland vs. Moses G. Watterson, Treasurer of Cuyahoga county. Answer. Grannis & Griswold.

3803. First National Bank of Berea vs same. Same. Same.

3804. The Merchants' National Bank of Cleveland vs. same. Same. Same.

3805. The Commercial National Bank of Cleveland vs. same. Same. Same.

3806. The Second National Bank of Cleveland vs. same. Same. Same.

3807. The First National Bank of Cleveland vs. same. Same. Same.

3808. The National City Bank of Cleveland vs. same. Same. Same.

3498. John C. Birdsell et al. vs. Geo. C. Underwood. Answer filed.

Twenty cases in which Mary Jane Veazil and husband are plaintiffs, and various parties defts. The rule day for filing an amended answer is extended to the 10th day of February.

John P. Greene. Admitted to practice in the United States Circuit Court..

Jan. 28.

3834. Second National Bank of Akron vs. D. R. Paige. Injunction allowed; bond fixed at $1,000.

3610. Second National' Bank vs. G. K. Raynolds et al. Leave to reply instanter. Reply filed.

Jan. 29.

3382. Richard B. Johnson vs. Lycoming Fire Ins. Co. Reply. Estep.

3382. Same vs. same. Amendment to amended answer. Pennewell & Lamson.

Jan. 30.

3794. Com. Nat. Bank of Cleveland vs. John Croker. Reply filed.

3444. Samuel Erazier vs. John R. Squire et al. Plaintiff's reply to amended answer filed. Answer to cross-petition filed.

COURT OF COMMON PLEAS.

Actions Commenced.

14503. J. T. Mathivet et al. vs. same et al. Injunction and relief. W. J. Hudson and J. W. Heisley.

14504, B. F. Talbar et al. vs. H. J. Holbrook et al. Appeal by deft. Judgment Jan. 11. F. C. McMillin. J. A. Smith.

Jan. 21.

14505. Laura W. Hilliard et al. vs. Martha J. Watson alias etc. et al. To set aside deed and for equitable relief. Bolton & Terrell.

14506. John Hewitt et al. vs. Henry Wiltz et al. Money, to foreclose judgment lien and for equitable relief. Wm. V. Tousley.

14507. Omer Gallup by etc. vs. A. F. Shermer. Money only. M. A. Kneeland and Nesbit & Lewis.

14508. Leverett Alcott et al. vs. G. L. Nichols et al. Money only. M. R. Keith.

14509. John Eberhard vs. Frederick Morlack et al. To subject real estate to payment of judgment and for equitable relief. Hadden & Bacon.

14510. Isaac Hays, doing business as I. Hays & Co., vs. Ferdinand Meese et al. Money and foreclosure. John J. Carran.

Jan. 22.

14511. Richard McCurrey vs. The L. S. & M. S. Ry. Co. Money only. Foran & Williams.

14512. Christian Kinkel vs. Theresa F. Heath. Money and to subject land. Foster, Hinsdale & Carpenter.

14513. Lucy B. Burridge vs. Sarah J. Field et al. Money and to subject land. Stone & Hesseumueller.

14514. The Cin., Wab. & Mich. R. R. Co. vs. The Citizen's Sav. and Loan Ass'n. Garn. Money only, with att. Ranney & Ranneys.

14515. James H. Cooper vs. William T. Upham. Appeal by deft. Judgment Dec. 20. D. W. Canfield.

14516. Mirriam and Morgan Paraffine Co. vs. Jay H. Stewart et al. Money only. M. B. Gary and Sam'l. S. Church.

14517. Peter Kirchoff vs. Frederick B. Scherner. Money only. Hutchins & Campbell.

14518. Russell Osborn vs. John O'Donnell. To set aside land contract, account, sale of land, and for other relief. J. S. Grannis.

Jan. 23.

14519. John G. Stewart vs. Chas. Balch et al. Cognovit. Campbell & Voorhees; L. R. Critchfield.

14520. Joseph Kindl vs. Joseph Negedly. et al. Money and to subject lands. T. E. Burton.

14521. Thomas Shindler vs. Frank Kudoria. Appeal by deft. Judgment Jan. 11. F. P. Sykora and J. M. Nowak.

14522. The Missionary Society of the Evangelical Ass'n. of North America vs. Geo. Lawrence et al. Money and foreclosure. W. W. Adrews.

14523. Wm. Short vs. Nathaniel Martin et al. Money and relief. E. P. Wilcox.

14524. Ohio Agricultural Co. vs. Jacob Hoffman. Appeal by deft. Judgment Jan. 6. Hutchins & Campbell; E. S. Stark.

Jan. 24.

14525. Andrew Olson vs. National Lloyds Ins. Co. Money only. W. C. Rogers and C. L. Richmond.

14526. Mary W. Rockwell et al. vs. Thamas Gallagher et al. Money and equitable relief. E. J. Latimer.

14527. Michael Helliard vs. The Forest City United Land and Building Ass'n et al. To enforce individual liability of stockholders of insolvent corporations and for equitable relief. DeWolf & Schwan and A. Greene.

14528. Lorenzo Carter et al., exrs. etc., vs. Samuel S. Coe. et al. Money and to subject land. Ingersoll and Williamson.

14529. Andrew Eucher et al. vs. James H. Hardey et al. To set aside deeds and for relief. Nesbit & Lewis.

14530. C. P. Born vs. Elizabeth Wesley et al. Equitable relief and appointment of receiver. J. P. Willey and Wallace Smith; L. J. Rider.

Jan. 25.

14531. Samuel B. Prentiss vs. Alexander McLeod et al. To subject land. Baldwin & Ford.

14532. Eveline Felker vs. Chas. Hauser et al. Money and to foreclose mortgage. Haddeen & Bacon.

14533. Minnie Hogan by etc. vs. Adam Kuhn. Money only. Street & Bentley.

14534. Maud Hogan by etc. vs. same. Same. Same.

14535. John Hogan by etc. vs. same. Same. Same.

14536. Eva Long and husband vs. Francis Burkhardt et al. Partition. Henderson & Kline; E. H. Eggleston.

14537. Henry Wick et al. vs. W. H. Newton et al. To foreclose mortgage- Gilbert & Johnson.

14538. Same vs. James Butler et al. Money and relief. Same.

14539. Henry Wick vs. Frank King et al. Money and to foreclose mortgage. Gilbert, Johnson & Schwan.

14540. Araminto J. Alford vs. Adam M. Wager. Money only. W. W. Andrews.

14541. Orville Alfrord vs. same. Same. Same.

14542. Adolph Mayer vs. Caroline Probert et al. Money and to subject lands. S. A. Schwab; S. A. Schwab.

14543. Chas. Schmidt et al. vs. Joseph Bilek. Money only. Wilson & Sykora.

14544. David McKee et al. vs. E. Raab. Money only. Mix, Noble & White.

14545. J. R. Goldson and Chas. Lemon, partners etc. vs. Henry Knoedel. Money only. Mix Noble & White.

14546. John Gynn vs. Andrew Mog et al. Money and foreclosure. W. S. Kerruish.

14547. Sarah E. Ruper vs. Leonard Finster et al. Money and sale of lands. James Quayle; P. P.

14548. Gerhard Weibe vs. Henry Esser et al. Money and to subject lands. Kessler & Robinson.

14549. Xenophon C. Scott vs. Emma Bobbitt et al. Money only. J. T. Brooks, John McSweeney and Emery & Carr.

Jan. 27.

14550. G. F. Beuse vs. Adam Kneff. Money only. C. W. Coates.

14551. Thomas Clothier vs. James Tem-

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pleton. Appeal by deft. Judgment Jan. 20th.

Jan. 28.

14552. Geo. Yockers vs. R. H. Emerson. Money only. P. L. B. and R. A. Davidson.

14553. Chas. Simmons et al. vs. the City of Cleveland etc. Injunction and relief.

Jan. 29.

14554. John Cavanaugh vs. Bridget Sheeron. Money only. Foran & Williams.

14555. Mrs. John Townsend vs. Charles Tiedeman. Error to J. P. Francis J. Wing; A. W. Beman.

14556. Seymour W. Baldwin vs. Edmund P. Walcot et al. Money and to subject land. Baldwin & Ford.

14557. Elias P. Needham et al. vs. Henry S. Fassett. Money only. Foster, Hinsdale & Carpenter.

14558. Chas. Mudler vs. John Berger et al. Money, to subject land, and for relief. A. Zehring; Gustav Schmidt, W. C. McFarland.

14559. Jesse P. Bishop, trustee, vs. Thomas McKee et al. Money, to subject land, and for equitable relief. Bishop, Adams & Bishop.

14560. Leonard Case vs. Martin Ehrbar et al. Money only. Ranney & Ranney's.

14561. Mrs. Mary E. McMahon vs. H. Hogreve. Appeal by deft. Judgment Dec. 31st.

14562. Stephen Mack vs. R. P. Malone. Cognovit, Emery & Carr; Henry N. Johnson.

14563. Joseph Slrl vs. C. R. Dunham. Money only. Arnold Green.

Motions and Demurrers Filed.

Jan. 24.

2219. Born vs. Wesley et al. Motion by plff. for the appointment of a receiver.

2220. In re First German M. E. Church by trustees for leave to sell, etc. Report of trustees and motion to confirm sale.

2221. In re Tabernacle Baptist Church and Society by Trustees for leave to sell real estate. Motion to confirm sale.

2222. Peoples' Savings and Loan Ass'n. vs Pfahn et al. Motion by plff. to strike repugnant matter from answer of defts., Frederick and Christian Pfahl. and to make same more definite and certain.

2223. Gallup vs. Cramer et al. Demurrer by deft. Chas. L. Cramer to the petition.

2224. Bell vs. Tiedman. Motion by deft. to require plff. to make his petition more definite and certain.

Jan. 25.

2225. Yahraus vs. Herig. Motion by plff. for new trial.

2226. Loesch vs. Knippenberger et al. Motion by deft. Ella Coleman fo the appointment of a receiver.

2227. Williams vs. Bletsch et al. Demurrer by deft. Anton Bletsch to the petition.

2228. Same vs. same. Demurrer by deft. Geo. B. Fleming to the petition.

2229. Same vs. same. Demurrer by deft. Mrs. Geo. B. Fleming to the petition.

2230. Heisley exr. vs. Williams et al. Demurrer by deft. Mary A. Williams to the petition.

2231. Same vs. same. Demmurrer by deft. Maggie Dening to the petition.

2232. Cuyahoga Co. Agricultural Society vs. The City of Cleveland. Demurrer to the answer.

2233. Trafton vs. May et al. Motion by defts. Catharine May, Burrett W. Horton, Helen C. May and Eva K. May, to make the petition more definite and certain.

2234. Williams vs. Smith et al. Motion by Celestia S. Smith to dismiss action as to her, or to strike petition from files and to separately state and number causes of action.

Jan. 27.

2235. Jennings vs. Ford et al. Motion by plff. to grant prayer of referee for a discharge and to set case down for trial or for a re-reference of case.

2286. Tyler vs. Brown. Motion by Deft. to dismiss action for non-compliance with former order.

2237. Weitzel vs. Pincombe. Motion to require plff. to give additional bail for costs.

2238. McClurg vs. Morris et al. Demurrer by plff. to answer of Robert S. Walker.

2239. Same vs. same. Demurrer by plff. to answer of Youngstown Coal Co.

2240. Stolz vs. Koester. Motion by plff. to strike amended answer of Wm. Traup from the files.

2241. Cogswell vs. Sargent. Motion by deft. to strike case from the files.

Jan. 28.

2242. Busch vs. Davis. Motion by plff. for a new trial.

2243. Dangleheisen vs. Wigman exr. et al. Motion by plff. to approve the return of the commissioners fixed herein.

2244. German vs. Luth. Motion by plff. to dismiss appeal for non-compliance with former order.

2245. Church vs. Carpener. Motion by deft. to strike answer from the files.

2246. Born vs. Wesley et al. Motion by deft. Elizabeth Wesley to strike the petition from the files.

Jan. 29.

2247. Herschner vs. Rheinheimer et al. Demurrer to the answer.

2248. Seibert et al. vs. the St. Clair St. Ry. Co. Motion to require plffs. to give bail for costs.

2249. Chamberlain vs. The Wilson S. M. Co. Motion by plff. to make answer of F. H. White more definite and certain.

2250. Warmington et al. trustee. vs. Street. Motion by plff. to strike answer from the files for a non-compliance with former order.

2251. Cooke, trustee, vs. Krejci. Motion to require plff. to attach copy of contract sued on to the petition.

2252. Clark vs. White. Motion by deft. for a new trial.

Motions and Demurrers Decided.

Jan. 25.

619. Gause vs. the L. S. & M. S. Ry. Co. Sustained. Plff. excepts.

1585. Lehman vs. Morrison. Granted. Case dismissed.

1911. Bleasdale vs. Pope. Sustained.

2118. Bell vs. Low. Sustained. Deft. has leave to amend his answer by Feb. 10th by payment of costs.

2129. Zoetor vs. Lamson. Overruled.

2135. Henke vs. Carran. Overruled.

2140. Wheaton vs. Mitchell, admr. Overruled. Plff. excepts.

2161. Gause vs. L. S. & M. S. Ry. Co. Granted. Plff. to give security for costs by Feb. 10th or case will be dismissed.

2165. Hubbard vs. Hubbard et al. Sustained.

2166. Bennington et al. vs. Prather. Sustained as to the 1st and 2d; overruled as to the 3d and 4th specifications. Plffs. have leave to file amended reply by Feb. 8th by payment of costs.

2167. Downs vs. Charlton. Sustained. Plff. has leave to file amended petition by payment of costs.

2168. Randerson vs. Whitney, constable. Sustained. Defts. Have leave to file amended answer by Feb. 1st by payment of costs.

2175. Willard vs. Russell. Sustained. Deft. has leave to amend.

2179. Hartness vs. Savage et al. Granted to give bail within ten days.

2181. Kerruish vs. Canfield et al. Sustained. Has leave to amend by Feb. 10th.

2185. Eyerdam vs. Allen. Overruled.

2188. Backus et al. vs. Aurora Fire and Marine Ins. Co. Sustained.

2212. Peoples' Savings and Loan Ass'n. vs. Weigel et al. Motion sustained at cost of plff.

2189. Coan vs. Ryan. Motion granted. H. N. Johnson, receiver. Bond $600.

2119. Edwards et al vs. The Highland Coal Co. Granted. Defts. Timothy Banning, M. W. Wright except.

2121. The Tabernacle Baptist Church and Society by trustees for leave to sell real estate. Sale confirmed.

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WE shall publish an important decision of Judge Voorhes of Holmes county in our next issue.

THE Sixth Assignment of cases for trial is the last that will be made at the present term of the Common Pleas Court.

OUR readers will find an important decision by Judge Jones in this issue. It is, we understand, the first reported decision ever made on that question in this State.

JUDGE TILDEN overruled a challenge to the array made by the defendant in a liquor case tried to a jury in the Probate Court during the present week,—the ground of the challenge being that what is known as the Cuyahoga county jury law, under which the jury was summoned, had been repealed by the adoption of the new code in September last. There are two jury laws in force in Cuyahoga county, but the general law on the subject is disregarded. If such a state of things can properly exist in respect to the matter of juries, it is difficult to see why it could not exist in respect to any other subject matter of legislation.

SUPREME COURT OF OHIO.

JANUARY TERM, 1878.

Hon. William White, Chief Justice. Hon, W. J. Gilmore, Hon. George W. McIlvaine, Hon. W. W. Boynton, and Hon. John W. Okey, Judges.

TUESDAY, January 27, 1879.

General Docket.

White, C. J.:

In the matter of the assignment of judges to hold district courts under the act of May 10, 1878, entitled "An act to change the Common Pleas districts of the State," etc., (75 O. L. 139); and the act of May 13, 1878, amending the first named act (75 O. L. 537).

These acts undertake to reconstruct the Common Pleas districts of the State. The eight districts existing outside of Hamilton county, are reduced to four, and the subdivisions are, in the main, left as they existed under the former organization.

As organized under these acts the second district consists of seven subdivisions; the third of eight subdivisions; the fourth of six subdivisions, and the fifth of eight subdivisions.

Section 2 of the act first named provides that "in each judicial district three Common Pleas judges shall be designated and assigned to hold the District Courts in such district."

Section 3 is as follows: "The Supreme Court, or a majority of the judges thereof, shall designate said three Common Pleas judges in each district, and by rule of court, or otherwise, arrange for a presiding judge in holding District Courts."

In Section 4 it is provided that "in fixing the term of courts in each of said districts, a majority of said designated judges shall fix the time for holding District Courts, and they, with the other Common Pleas judges, the times for holding the Common Pleas Courts, as now provided by law."

The act providing and fixing the terms of court requires the judges, or a majority of them, in each Common Pleas district, on or before the first day of November in each year, to issue their written order to the Clerk of the Court of Common Pleas of each county in the district, specifying the commencement of the terms of the District Court, and of the several terms of the Court of Common Pleas in each of the counties of the district. S. & S. 600.

It becomes, therefore, of the highest importance to know whether the terms of the Courts of Common Pleas and the District Courts are to be fixed by the judges of, and with reference to, the districts as constituted by the acts first above named, and the courts held in accordance with these acts, or whether the terms of the several courts are to be fixed and the courts held in the several districts as they existed independently of said acts.

If the acts are constitutional, the terms of the courts must be fixed by the judges of the new districts, and with reference to such districts; and the several courts must be constituted and held in accordance with the provisions of the acts. But if the acts are unconstitutional, the terms of the courts must be fixed, the courts constituted and held as they would have been had the acts not been passed.

The first question with which we are met, in entering upon the duties required of us by the act as amended, is whether it is competent for the General Assembly to devolve upon this court, or the judges thereof, the duty of designating from the judges of the Court of Common Pleas, those who are to hold the District Courts as prescribed by the acts.

Some members of the court question the authority of the General Assembly to devolve the duty upon us. But in

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the opinion of the majority we would not be warranted in refusing to perform the services required of us by the act, if the plan or scheme of reorganization contemplated by the act could, consistently with the constitution, be carried into effect.

The object of providing for the organization of the new districts in the mode prescribed by the act, was to secure the permanent holding of the District Court in each district by the three judges of the Court of Common Pleas designated for the purpose. The new districts were formed by the consolidation in whole or in part of the former districts, allowing the subdivisions to remain substantially as they were for all the purposes of the Court of Common Pleas. This was in effect creating the new districts for the purposes of the District Court alone, without reference to the Court of Common Pleas; and the purpose of consolidating the former districts was to so enlarge them that the holding of the District Courts in each might occupy all the time of the judges assigned to hat duty.

In being called upon to set this new organization of the courts in motion two questions arise:

1. Whether the act, in so far as it undertakes to reconstruct the Common Pleas districts of the State, in the mode therein provided, is constitutional.

2. Whether the District Courts can, consistently with the constitution, be constituted in the districts thus sought to be created, as provided in the act.

In determining the answers to be given to these questions, it is to be observed, in the first place, that our judicial system was established and organized by the constitution itself. The districts and the subdivisions of districts were formed, and the courts of the several districts fully organized by the constitution, independent of any aid from the General Assembly.

The plan upon which the Common Pleas districts and the subdivisions were constituted, and Courts of Common Pleas organized, is found in sectionthree of the judicial article of the constitution.

The section is as follows:

"SEC. 3. The State shall be divided into nine Common Pleas districts, of which the county of Hamilton shall constitute one, of compact territory, and bounded by county lines; and each of said districts, consisting of three or more counties, shall be subdivided into three parts, of compact territory, bounded by county lines, and as nearly equal in population as practicable; in each of which one judge of the Court of Common Pleas for said district, and residing therein, shall be elected by the electors of said subdivision. Courts of Common Pleas shall be held, by one or more of these judges, in every county in the district, as often as may be provided by law; and more than one court, or sitting thereof, may be held at the same time in each district."

The mode of constituting the District Courts is prescribed by section five, which is as follows:

"SEC. 5. District Courts shall be composed of the judges of the Court of Common Pleas, of the respective districts, and one of the judges of the Supreme Court, any three of whom shall be a quorum, and shall be held in each county therein, at least once in each year; but if it shall be found inexpedient to hold such court annually, in each county, of any district, the General Assembly may, for such district, provide that said court shall hold at least three annual sessions therein, in not less than three places: provided, that the General Assembly may, by law, authorize the judges of each district to fix the time of holding the courts therein."

Section 12, article 11, apportions the State for judicial purposes in accordance with section 3 of the judicial article above quoted.

The county of Hamilton is constituted the first district, which it is declared shall not be subdivided. The remaining counties of the State are formed into eight districts, each district being composed of three subdivisions: and thus section three, as above quoted, as respects the formation of the districts and subdivisions, is carried into full effect.

The constitution likewise provides for the first and the subsequent election of the judges; and thus by its own provisions completes a permanent judicial system for the State.

The only power conferred upon the General Assembly to interfere with the system thus established is found in section 15 of the judicial article. This section is as follows:

"Section 15. The General Assembly may increase or diminish the number of the judges of the Supreme Court, the number of the districts of the Court of Common Pleas, the number of judges in any district, change the districts, or the subdivisions thereof, * * * whenever two-thirds of the members elected to each House shall concur therein; but no such change, addition or diminution shall vacate the office of any judge."

It was claimed by the learned counsel who submitted an argument to us in support of the constitutionality of the act that the power conferred by this section of the constitution of the General Assembly, increase or to diminish the number of districts, authorized the diminution of the number of districts established by the constitution, in the mode provided for by the act, leaving the subdivisions substantially as they were before.

This, it seems to us, is a clear misapprehension of the power. The districts to which the power refers are organized districts. The new districts which, by diminution, are to take the place of the former districts, must be constituted upon the plan laid down by the constitution for the formation of districts. The districts of the State may be made less in number, but the principles upon which they are formed must remain the same. Whether the districts are increased or diminished in number, they must nevertheless be constituted in accordance with the requirements of section 3 of the judicial article. Each district must be composed of compact territory, and be bounded by county lines; and each district "consisting of three or more counties" must "be subdivided into three parts of compact territory, bounded by county lines, and as nearly equal in population as practicable." Section 3 furnishes a permanent rule for the organization of districts under the judicial system established by the constitution; and, while full authority is given by section 15 to increase or diminish the number of districts, yet, in the exercise of this authority, the new district must be organized in accordance with the principles laid down in section 3.

If, on the other hand, section 3 is not to govern in the organization of new districts, and two or more districts may be consolidated into one, leaving the internal organization by sub-divisions to remain as they were before; it follows, upon the same principle, that all the districts of the State may be consolidated without disturbing the existing sub-divisions.

The effect of this would be to extend the jurisdidiction of each judge of the Court of Common Pleas throughout the State, without regard to the subdivision in which he may have been elected, for the judges of the Court of Common Pleas are judges of their respective districts, and not of the mere sub-divisions thereof. The sub-division of the districts is for election purposes merely. Harris vs. Gest. 4 Ohio

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S., 472; Railroad Company vs. Sloan. 31 Ohio S., 1.

The further effect would be that all the Common Pleas Judges of the State would, under section 5 of the judicial article already quoted, become members of the District Court to be held in each county of the State.

This would be the substantial destruction of the system ordained by the constitution. A principle adopted in the reorganization of the districts of the State, which leads to such results, cannot be reconciled with the constitution.

It may here also be remarked, that if the third section is the basis, as we think it is, on which all new districts must be formed, and it operates as a limitation upon the power of creating new districts, and the observance of its requirements will, practically, operate as a check against the making of such districts either too large or too small, for the public convenience.

Again: Authority is not only given to increase or diminish the number of districts, but also to "change the districts or subdivisions thereof;" and it is said that the power to change must be understood in its generic or unlimited sense; and, consequently, that power is given to multiply the subdivisions of a district at the discretion of the General Assembly.

The argument is, that as the General Assembly may diminish the number of districts, and as they are not limited in the number of subdivisions that may be created in a district, they may consolidate districts and adopt the subdivisions existing at the time of the consolidation.

If the assumption as to the meaning and force of the word "change," in the connection in which it is used, is correct, such result would follow; but it seems clear to us that the assumption is not warranted.

In the first place, it seems quite plain that the power given to "change the districts," taken in the connection in which the terms are used, has reference to altering the territorial limits of the districts; that the word "change" is used in the same sense as applied to the subdivisions as it is when applied to the districts.

In the second place, the power to "change the districts or the subdivisions thereof" is limited by the conditions prescribed in section three in respect to the mode in which the districts and subdivisions are to be constituted. If the power is not thus limited there is no restriction against the division of counties, in changing the districts or subdivisions. Section three requires the districts to be formed of compact territory and to be bounded by county lines. It also requires each district to be subdivided into *three parts* of compact territory, which are also to be bounded by county lines.

The declaration that the districts shall be divided into three parts of compact territory is as explicit and imperative as the declaration that the districts and subdivisions shall be formed of compact territory, and that counties shall not be divided; and in exercising the power of changing the districts or the subdivisions, the one requirement of the section can be no more disregarded than the other.

It is also said that the authority to reduce the number of subdivisions of a district below three, is implied from the general power given in section fifteen to reduce the number of judges in a district.

It is, however, conceded that the power of reducing the number of judges is not unlimited; and that the power is subject to the implied limitation that the number in a district cannot be reduced below what is required to constitute the District Court. But it is said the judges in any district may be reduced to two, for the reason that two judges of the District and a judge of the Supreme Court is all that is required to constitute the District Court.

That this position is untenable, it seems to us is obvious. It is an attempt to overthrow the express requirement of section 3, which declares that each district shall be sub-divided into three parts, by an implication sought to be raised from the general power given in section 15 to increase or diminish the number of judges in a district.

The implication would seem to be that the number of judges in a district cannot be reduced below the number of subdivisions, rather than that the general power to diminish the number of judges carried with it by implication the power to diminish the number of subdivisions.

It is not necessary to the exercise of the power of reducing the number of judges that the number of subdivisions should also be reduced. Under the power given of changing the districts or diminishing their number, or where the judges in a district have been increased, ample occasion may arise for the exercise of the power of reducing the number of judges, without affecting the subdivisions.

A further answer to the position is, that section five which provides for the organization of the District Courts, shows, by clear implication, that the number of judges in each district was not intended to be less than three. The section declares that the "District Courts shall be composed of the judges of the Court of Common Pleas of the respective districts, and one judge of the Supreme Court, *any three of whom* shall be a quorum."

It could not have been intended that the number of judges competent to hold District Courts in the several districts might be diminished permanently to the number essential to constitute a mere quorum.

But it appears that the General Assembly, commencing as far back as 1862, have repeatedly exercised the power of creating a fourth subdivision in a district. On the faith of such legislation, the subdivisions of districts have been reorganized, and judges have been elected, who have exercised and are still exercising the functions of office under such authority. And it is urged that this constitutes such a practical construction of the constitution in respect to the power in question, and such a general acquiescence, as that the power ought not now to be drawn in question. How this may be in regard to the particular instances, we are not called upon in the matter before us to determine. But such action cannot be made the basis or foundation of a new innovation, which, if carried out, we cannot but regard as, in its effect, subversive of the judicial system established by the constitution.

In regard to the second question namely, whether the District Courts can be constituted, in the districts sought to be created by the act, as therein provided, little need be added to what has already been said. For if the districts which were sought to be created by the act fail, the mode prescribed for organizing District Courts in such districts must of course fail.

It is apparent from the provisions of the act, that the object, as already remarked, of organizing the new districts was to secure the permanent holding of the District Courts in each district by the judges designated for the purpose. Section four provides, that the "designated judges shall not be required to hold Common Pleas Courts, and shall continue to act as such District Court judges until the expiration of their several terms for which elected, unless sooner relieved by assignment otherwise by the judges of the Supreme Court." * * *

And in section six it is provided that

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the Common Pleas judges not assigned, as aforesaid, to hold District Courts, shall be subjected to the orders of the judges so assigned or a majority of them."

We do not mean to question the authority of the General Assembly by legislation to require such an apportionment of the judicial force of the district as to secure the efficient administration of justice in both the Courts of Common Pleas and District Courts throughout the district.

But where, as in the present instance, it undertakes to consolidate districts and to provide for the assignment of part of the judges, during their term of office, to the performance exclusively of District Court duty, and the remainder of the judges to the performance of the duties of the Court of Common Pleas, it assumes an authority which, in our opinion, is clearly not warranted by the constitution.

We fully assent to the doctrine that a statute which has received the sanction of the General Assembly should only be held void, as repugnant to the constitution, when the repugnancy is clear, and the provisions of the statute and of the constitution cannot be fairly reconciled.

But the constitution must be interpreted and effect given to it as the paramount law of the land, equally obligatory upon the legislature as upon other departments of the government and individual citizens, according to the spirit and intent of its framers, as indicated by its terms. An act violating the true intent and meaning of the instrument, although it may not be within the letter, is as much within the purview and effect of a prohibition as if within the strict letter; and an act in evasion of the terms of the constitution, as properly interpreted and understood, and frustrating its general and clearly expressed or necessarily implied purpose, is as clearly void as if in express terms forbidden. People ex rel. vs. Alberton 55 N. Y. 55.

Gilmore, Boynton and Okey, J., concurred; McIlvaine, J., dissented.

Motion Docket.

No. 41. A. A. Jewett vs. Valley Railway Company. Motion to take cause No. 446 on General Docket out of its order for hearing. Motion granted.

No. 42. Nicholas Kershaw, administrator, vs. Richard Snowden. Motion to revive cause No. 231 on the General Docket. Motion granted.

CUYAHOGA COMMON PLEAS.

JANUARY TERM, 1879.

GEORGE GAUSE, PLAINTIFF, VS. THE L. S. & M. S. R. R. CO.

Liabilities of Railroad Companies to Penalties—Rights of a Common Informer—Who can Maintain the Action?

1. The act of May 4th, 1869, requiring railroads to use certain kinds of heating apparatus so constructed that it will extinguish the fire when the cars are overturned, is not unconstitutional.

2. The act should not be so construed as to destroy its force as a remedial and preventive statute.

3. Under said statute a common informer, though entitled to one half the penalty, cannot maintain the action in his own name, but that action must be brought in the name of State of Ohio.

JONES, J.:

This is what is known in law as a *qui tam* action, and is brought by an informer, to recover the penalty provided by the act of May 4th, 1869, entitled:

"An act to protect more effectually the lives of railroad passengers from casualities by fire."

Section 1 of said act is as follows: "That each railroad company in this State shall, when necessary to heat any of its cars, do so by heating apparatus so constructed that the fire in it will be immediately extinguished whenever the cars are thrown from the track and overturned; and it shall be unlawful, for any railroad company in this State to allow any other railroad company or persons, to run any cars upon its roads, unless the heating apparatus in such cars conforms to the requirements herein prescribed."

Section 4 of the same act provides, "That every railroad company violating the provisions of this act shall be liable to a *forfeiture* of not more than five hundred dollars nor less than one hundred dollars, to be recovered in an action of debt *upon the complaint* of any person before a Justice of the Peace in any county in which such violation may occur; one half of the penalty shall go to the complainant and the other half to the State of Ohio for the benefit of common schools."

The petition of the plaintiff avers substantially, that on the 5th of April, 1877, the defendant was a duly organized corporation, under the laws of the State of Ohio; and was then and there owning, running and operating its railroad running from Buffalo through Cleveland to Toledo; that on said date, it became necessary to heat certain of its passenger cars, to-wit: Nos. 7, 66 and 85, while carrying passengers over said road and within Cuyahoga county; and that at said time and place it did not heat its said cars with apparatus so constructed, that the fire would be immediately extinguished if the cars should be thrown from the track and overturned, but did heat such cars and each of them by an ordinary wood stove. He prays a judgment for five hundred dollars as provided by the statute.

The defendant demurs to this petition for the reasons following:

1st. That it does not state facts sufficient to constitute a cause of action.

2d. That there is a defect of parties plaintiff in the action.

On the argument of the demurrer it is insisted on the part of the defendant,

1st. That the statute in question is not one the State has any power to make.

2d. That the statute should be construed that there can be no violation of it and penalty incurred by a railroad company merely refusing to comply with the law, but there must also have an accident actually occurred in which the apparatus did not actually extinguish the fire.

3d. That the petition in the case is defective in not setting forth that *there was in existence* and *accessible* to defendant, at the date in question an apparatus so constructed that it would comply with the requirements of the statute in question.

4th. That the plaintiff is not the proper person to bring the suit.

The statute above quoted, though highly penal in its character and therefore strictly to be construed, so far as the recovery of the penalty is concerned, has for its avowed object the protection of railroad passengers from fire while traveling on railroads. I think there can be no doubt of the full power and authority of the State to enact any reasonable rules and regulations, that will accomplish this purpose, or which have a tendency to increase the safety of operating or traveling on such means of conveyance. Railroads are great public necessities, and managers thereof should be held by the law making power to a high degree of diligence, in fully and safely subserving the purposes for which they are created.

In hearing this demurrer the wisdom and propriety of this legislation to accomplish the purpose will be presumed.

The object of the statute is *clearly not* merely to *punish* a *wrong* after it has been perpetrated, but it is

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remedial in its nature and is intended to *prevent* the happening of accidents by means of fire.

I cannot therefore accept the construction of the statute sought to be given to it by the defendant in the case, to-wit: that defendant is not liable to any penalty until the cars have been actually overturned, without the apparatus provided having extinguished the fire. To give this construction to the statute would be to destroy its whole force and effect as a remedial statute, and it would utterly fail to subserve the purpose intended. Accidents of the exact kind described are ordinarily of such rare occurrence that it would be cheaper for a railroad company when one occurred, to pay the penalty provided by law, than it would be to fuanish and equip all its cars with apparatus such as is described in the statute.

I do not think it necessary here to decide the proposition as to whether the petition should show that such an apparatus was in existence and available to defendant or not, as another proposition in the case is to my mind conclusive in deciding the rights of this plaintiff. I will proceed to consider then the question whether this plaintiff can himself maintain this action. Although there are many *penal* statutes in Ohio there is a remarkable absence of authority on any questions pertaining thereto, and especially on this particular question.

But there are a large number of authorities in other States which hold with almost unvarying unanimity, that where a penalty is given by a statute, either in whole or in part, to an informer, that he cannot for that reason maintain the action; but can only do so when he is *expressly authorized* by the statute to maintain the action in his own name, and this evidently so on principle, as well as authority. The State *makes* the law, *creates* the penalty, *owns* and *enforces* the collection of it, and it only can maintain an action for it, unless it has delegated the right to some one else in distinct terms to sue for and collect in his own name; and even in such a case the informer should state in his petition that he prosecutes as well for the State as himself, so that it may appear of record who are entitled to the respective shares. The statute in this case provides that the penalty may be recovered in an action of debt upon the complaint of any person, but there is no express authority given for such person to be the plaintiff in the action or to maintain the suit in his own name; that wherever the statute does *not* do so the informer is merely interested in the proceeds of the suit, but has no right to maintain it. There are numerous instances in the statutes where different persons are authorized to sue in such cases, but the right is given in clear and distinct language as, for instance, "it shall be lawful for any person to sue," "may bring action in the name of," "to be recovered at the suit of," etc., etc. I remember but one instance authorizing a civil suit where the words "to be recovered on complaint of" etc. are used; and these words were used in authorizing an assessor to sue when the money clearly belonged to the State and the assessor not interested in it.

If there were any doubt on this point, on general principles, I think it is settled by a statute of the State.

Sec. 7 of the act for the appointment of a commissioner of railroads and telegraphs, Swan & Saylor, page 77 provides that "all prosecutions against railroad companies for forfeitures, penalties or fines, shall be by action in *the name of the State of Ohio*, etc., etc., etc.," and this act having been passed two years before the statute in question I see no reason to doubt its applicability in the absence of an expcess promise of the later act authorizing the informer to sue in his own name.

On the whole case, therefore, I hold that the plaintiff, George Gause, has no right to maintain the action he has attempted to maintain, in his own name; but that the action must be maintained by the State of Onio itself on complaint of the informer.

The defendants demurrer to the plaintiffs petition is, therefore sustained.

J. A. Sinette for plaintiff; James Mason for defendant.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending February 1, 1879.

MORTGAGES.

Jan. 31.

Henry Ingham to Wm. Tousley. $1,280.

H. G. Sepher and wife to J. C. Spietn. $500.

Same to same. $500.

Ignatz and Rosa Stein to Henry Schaus. $500.

James Mellor and wife to Rebecca Strange. $200.

Geo. and Caroline E. Newman to The Citizens' Savs. and Loan Ass'n. $1,800.

Jones Walling and wife to J. B. Rasmussen and wife. $350.

Feb. 1.

J. Bernard to R. A. How. $900.

Hiram C. Hayden et al. to D. E. Hayden. $3,400.

Same to Mrs. Jas. H. Childs. $800.

Henrietta A. Goodsell to Azariah Everett. $3,500.

Sarah A. Allen and husband to Cemina W. Allen. $352.

Casper Schaefer and wife to John F. Finkemier. $1,200.

A. B. Ruggles and wife to Mary Paton. $1,500.

Same to same. $1,500.

Frank Murgatroga to Wm. Chisholm. $400.

Joseph Widen and wife to David Waldenmaier. $237.

Feb. 3.

John Comyne and wife to Mathew Haggerty. $575.

Franz Hantak to Frank Rybak. $400.

A. Brankman and wife to Amelia C. Lerche. $1,300.

James Dempsey to Alice B. Carpenter. $50.

David Robertson and wife to B. S. Cogswell. $875.

Feb. 4.

Ellen Johnson to Thos. B. McKearney. $1,150.

Alonzo Waters to Lucien Smith. $250.

Peter Logan and wife to John L. Miller- $168.

A. L. Van Arman ond wife to R. A. Brown. $135.

Samuel Foljambe to Horace Wilkins. $3,000.

Frank Nohouse and wife to N. A. Gilbert. $75.

Helen Darrow to J. C. Forman. $1,200.

Freeman H. Morris and wife to Mrs. M. B. Crowell. $2,000.

Frederick Arnold and wife to Lorenz Englehardt. $400.

William Harrison and wife to Thomas Reid. $1,500.

G. W. H. Young to Davidson Bros. $226.50.

Sylvester T. Fuller et al. to A. H. Chase. $970.

Feb. 5.

Henry N. Johnson and wife to T. E. Burton. One hundred and twenty-five dollars.

Wm. Hamilton and wife to George A. Norton. Four hundred dollars.

John Rude and wife to Max Oppenheimer. Five hundred dollars.

Peter Newman and wife to David Waldenmaier. Three hundred and twenty-seven dollars.

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Mary and Philip Hussey to Mrs. Homer B. De Wolf. One thousand five hundred dollars.

James McCrosky and wife to James M. Robertson. Six thousand three hundred and seven dollars.

Georgiana and George Periera to M. S Hogan. Three hundred dollars.

Wm. Laird to Wm. Tousley. Eight hundred dollars.

Geo. Newman and wife to The Citizens' Savings and Loan Ass'n. Eight hundred dollars.

Thos Halpin and wife to Geo. Newbrand. Two hundred and eighteen dollars.

David Mandlebaum and wife to Henry M. Knowles. Two thousand dollars.

Esther and John M. Hague to Susan A. Salter. One huudred and sixty-two dollars.

Henry J. Brooks and wife to Mary E. Brooks. One thousand five hundred dollars.

Feb. 6.

Christian Moelkerning and wife to Heinrick Birsick. $400.

John Modra and wife to Katharine Prochaska. $600.

Wm. Baxter to Emma Paton. $750.

Same to same. $675.

Same to same. $675.

Philip Witzel et al. to P. L. Baum. $200.

Wm. E. Osborn to Ignatz Riehle. $160.

Alice F. Mathews to E. F. Collins. $417.71.

Chas. Zucker to same. $340.26.

Job D. Stark to I. J. Silois. $330.

Jacob Hoffman to John Schmittel. $400.

Daniel Lucas and wife to Daniel Lockyear. $1,000.

CHATTEL MORTGAGES.

Jan. 31.

Alexander Hunter to E. Holmes. $145.

A. M. Wright to S. Brainard's Sons, $257.50.

Christian Berner to Vaclav Lukas. $32.

Rosa Sutta to W. C. Rogers. $99.-50.

Geo. L. Linde to Chas. Togler. $200.

Michael Newberger to Emanuel Rosenfelt. $250.

Feb. I.

A. Cuper to Eruistena Levi. $300.

Pauline Umbstaetter and husband to Wm. Given. $500.

Geo. Minger to trustees of Cuyahoga Tribe O. R. M. $54.

Henry S. Coleman to Fred Geminer. $12.50.

Miles H. Harman to Chas. H. Gehring. $600.

Feb. 3.

Geo. W. Freind to Oscar Townsend. $60.

A. Sulter to W. Buschman. $150.

M. J. and J. B. Kellam to Oscar F. Stowe. $500.

Casper Shultz and wife to John Hanson. $100.

Saura, R. S. and D. Holmes to Wm. Walkden. $500.

Erastus Smith to Elijah Smith. $250.

Chas. W. Stearns to Empire Stove Co. $582.

Isaac G. Scranton to H. P. Weddell. $483.34.

John Greening to Robert Jeffrey. $401.75.

Feb. 4.

A. Rudolph to A. H. Balley. $85.

L. C. Conover to Andrew Platt. $50.

G. S. Egts to same. $275.

Feb. 5.

H. Clay Smith & Co. to Jones & Van Wie. Three hundred and thirty dollars.

E. A. Briggs et al. to Erastus Briggs. Two thousand five hundred dollars.

Geo. Rettberg to Philip Linn. Five hundred dollars.

Wm. J. Ranney to Mrs. H. S. Ranney. Three thousand dollars·

Mathew Johnston to Michael Murphy. Three hundred and twenty-five dollars.

Philip Hussey and wife to Wm. D. Butler. Seventy-seven dollars.

Feb. 6.

Sarah Ketterer to Jacob Otto Raeder. One hundred and fifty dollars.

John O'Brien to Lewis Schaaf. Two hundred and sixty-three dollars and sixty cents.

Edward Miller to John Brennan. Five hundred dollars.

E. Wiseman and Minnie Harvey to C. Patter Jr. One thousand six hundred and fifty dollars.

W. A. Babcock to A. W. Bailey. Fifty-eight dollars.

Edward Raab to Wm. Raab. One hundred and seventy-five dollars.

DEEDS.

Jan. 31.

Henry Beckman et al to G. M. Atwater. $1.

Luther Battles Jr. to G. A. Bennett. $500.

Cleveland & Mahoning Valley R. R. Co. to L. S. & M. S. Ry. Co. $9,000.

Joseph and Mary Kozak to Ignatz Stein. $1,035.

Jacob Kurtz to Richard Wellington. $500.

Nicholas Meyer and wife to Andreas Bartel. $1,000.

Solomon Meyer and wife to B. S. Cogswell. $25,000.

J. B. Rasmussen and wife et al. to F. A. Wilmot. $3,150.

Robert D. Smith to Chas. E. Licehurst. $1,000.

Philip Clarke by Thos. Graves Mas. Com. to Conrad Mohn and wife. $1,-200.

Feb. 1.

Thomas Impett and wife to Frederick Teitjen. $5.

Frederick Teitjen to Elizabeth Impett. $116.

Wm. V. Carew by Thomas Graves Mas. Com. to A. Wienes, vice pres., etc. $9,500.

John Gebhard and wife to Mathew Mares. $750.

David Waldemaier and wife to Joseph Weider and wife. Three hundred and sixty dollars.

Joseph Athens and wife to Emma Patten. Eight thousand dollars.

County Auditor to D. Z Herr, auditor's deed. One hundred and three dollars and twenty-five cents and five mills.

Irvinia E. Brown and husband to Fred S. Smedley.. One thousand two hundred dollars.

B. S. Cogswell and wife to Solomon Mayer. Five hundred dollars.

James M. Gates to A. B. Gardner. Six hundred dollars.

A. B. Gardner and wife to Elnoria E. Gates. Six hundred dollars.

Henry P. Johnson to Frank A. Porter. Six hundred and thirty-five dollars,

N. D. Meacham et al., admrs. of John Clark, to Mathias Deitz. Four hundred dollars.

Lucy J. Prather to Anna C. Prather. Four thousand dollars.

Chas. G. Pickering et al. to Wolf Leopold. Four hundred and fifty dollars.

Jane E. and Chas. Ruprecht to Cornelius Newkirk. One tnousand two hundred dollars.

Mary Schuster et al. to Gertrude Schuster et al. One thousand six hundred dollars.

Chas. S. Tierhurst to H. D. Goulder, trustee. Two hundred and five dollars.

Fanny M. Bailey and Sarah T. Stevens by Thos. Graves Mas. Com. to A. H. Wick. Two thousand eight hundred and forty dollars.

Anton Hassenpflug et al. by Mas. Com. to Magdalene Steinbrenner. Eight hundred and thirty-four dollars.

Chas. J. Jimerson by Felix Nicola Mas. Com. to J. R. A. Carter. Nine hundred dollars.

Frank Rahan and wife to Welchoir Frank. Two hundred dollars.

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Robert H. Dougall to Geo. H. Hopper. One hundred dollars.

Edward Brody and wife to Jesse Sims. Three thousand seven hundred dollars.

Alvina Schaefer to Mary S. Brainard. Eight hnndred dollars.

Feb. 3.

Chas. O. and J. C. Evarts to John Ramsey. Six hundred and fifty dollars.

Mary A. and Chas. M. Flynn to Alanson Wilcox. Five hundred and fifty dollars.

L. B. French to L. B. French, Jr. One dollar.

L. B. French Jr. to Fannie A. French. One dollar.

Hiram Gay to Jonathan R. Gay. Seven hundred and fifty dollars.

Chas. Hanson to Heinrech Kiefer. One thousand nine hundred and twenty-five dollars.

Heirs of Jonathan Parr to Ellen Bail. One dollar.

Martin C. Taylor to Marion M. Taylor. Five hundred dollars.

Edwin G. Tolson to Ad Willard, trustee. One dollar.

Ad Willard, trustee, to Mary Ann Tolson. One dollar.

Edwin A. Swain to Solon C. Grannis. One dollar.

Martin C. Taylor to Barbara Taylor. Five dollars.

Chas. Brennen by Thos. Graves Mas. Com. to Frederick Seelbach. Two thousand six hundred and seventy-five dollars.

James A. Kaighm by Felix Nicola Mas. Com. to Everett D. Stark. One hundred and twenty dollars.

F. Joseph Durgette et al. by E. M. Eggleston Mas. Com. to Harriet Jane Armstrong et al. Four thousand four hundred and thirty-eight dollars.

Feb. 4.

Bridget Bolan to Mary Campbell. One thousand five hundred dollars.

Chas. Calvin to Henry Body. Three thousand one hundred dollars.

Kelian Egart and wife to John Egart. One thousand seven hundred and thirty-nine dollars.

John Gibbons et al. by Thomas Graves Mas. Com. to L. W. Ford. Eight hundred and sixty-eight dollars.

Samuel E. Adams to Albertena Adams. Eight hundred dollars.

Albertena Adams to Ruth L. Adams. Eight hundred dollars.

Robert R. R. Rhodes and wife to Carl Weidenman. Four hundred and eighty dollars.

Margaret W. Craw and husband to John P. Lutz et al. One thousand eight hundred dollars.

The Citizens' Savings and Loan Ass'n. to The Cleveland Rolling Mill Co. One thousand five hundred dollars.

Thos. Cunat and wife to Frank Bocan. Eight hundred and fifty dollars.

J. A. Burns et al. to Thos. Alexander. Sixty-five dollars.

F. W. Bell and wife to Alfred N. Meade. Two hundred dollars.

Alfred N. Meade and wife to F. W. Bell. Six hundred dollars.

Leonard G. Foster and wife to Miriam Eldridge. Two thousand three hundred dollars.

Geo. W. French and wife to V. C. Taylor. Thirty dollars.

Geo. Kunszynski and wife to Victor Zarenczny. Two hundred dollars.

Thalia W. Thatcher and wife to Mrs. Lucinda E. Johnson. Nine hundred and seventy-five dollars.

A. L. Van Orman and wife to R. A. Brown. One thousand dollars.

Charlotte Van Orman to R. A. Brown. Six hundred dollars.

Warren F. and Carrie A. Walworth to Nelson Moses. One dollar.

James R. Worswick to Augustina N. Worswick. Love and affection.

Frank Macho et al. by Mas. Com. to Frank Macho. Five hundred and twenty-six dollars.

Robert R. Rhodes and wife et al. to the trustees of the German Methodist Episcopal Church. Four hundred and eighty dollars.

Wm. Meyer et al. to Philip Mattern. Four hundred and fifty dollars.

Hubbard Cooke, trustee, et al. to Julius Rechlaffel. Four hundred dollars.

Wm. J. McConnoughey and wife to Jacob Strohm. One thousand four hundred dollars.

Sybert N. Nelson to Harry S. Nelson. Four thousand dollars.

C. H. Robertson and wife et al. to B. L. Pennington. One dollar.

Standard Oil Co. to City of Cleveland. Five hundred dollars.

Solomon Silvernar and wife to Sigmund Maim. Five hundred and fifty dollars.

W. F. Walworth and wife to John Sinnott. One hundred dollars.

David Waldemaier and wife to Peter Newman and wife. Three hundred and twenty dollars.

John Masek et al. by Mas. Com. to Lyman Little. Two hundred and sixty-seven dollars.

Henry Nieberding by Felix Nicola Mas. Com. to Jacob Frost et al. Three thousand nine hundred dollars.

Ritchie Holbrook and wife to Emerson Hazen. Two thousand dollars.

Emerson Hazen and wife to Ann Holbrook. Two thousand dollars.

Chas. and Ann Avery to A. J. Marvin. One dollar.

Henry J. Brooks and wife to Henry M. Brooks. One thousand five hundred dollars.

Rebecca De Groate to Rosannah S De Groate. One dollar.

Same to Harrison De Groate. One dollar.

Same to Ellen R. Woodburn. One dollar.

Rosannah De Groate et al. to Rebecca De Groate. Five dollars.

Robert Lardner and wife to Bowler, Maher & Brayton. Seven thousand five hnndred dollars.

Israel S. Converse and wife et al. to May Hussey. Two thousand three hundred dollars.

Wilhelm Henrich and wife to F. C. McMillin. One dollar.

F. C. McMillin to Catharine Henrich. One dollar.

G. E. Herrick, exr. and trustee, etc. of Ell. N. Keyes to Mary A. Sly. One thousand nine hundred dollars.

Richard Jenkins and wife to Richard Woodley. One thousand four hundred dollars.

BILLS OF SALE.

Feb. 1.

Joseph Sykora to Mary Kabella. $105,-50.

Judgments Rendered in the Court of Common Pleas for the Week ending February 5th, 1879, against the following Persons.

R. P. Malone. $356.

Jerusha A. Bissell et al. $1101.20.

Willard B. Thomas. $1,670.23; $65.65; $1,604.58.

David I. Jones. $19,830.22.—Judgment obtained on old Jackson Iron Co. judgment in nature of revivor.

Frank Tausek. $367.14.

C. B. Clark. $199.40.

E. B. Upham, admr. $319.48.

Ingham, Somerville & Co. $200.

Estate of P. S. Ruggles. $300.

John P. Holt. $24.

Sophia Bellett, extx., et al. $108.14.

Lucy A. Russell et al. $4,317.60.

Bernard McCarty. $307.89.

Geo. W. Barket et al. $126.87; $121.80.

Jacob McGlenen. $234.77.

Frederick Dohnert et al. $1,110.95.

J. A. Schultz. $131.21.

ASSIGNMENT.

Chas. Gaylord to Theo. E. Burton. Bond $4,000.

U. S. DISTRICT COURT N. D. OF OHIO.

Jan. 31.

1744. In re Leroy W. Sandford. Discharged.

1920. In re L. Newshuler. Discharged

2019. In re Jacob F. Stough. Petition for discharge. Hearing Feb. 15.

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2023. In re Andrew Ohl. Petition for discharge. Hearing Feb. 15.
1865. In re James Estep. Petition for discharge. Hearing Feb. 15.

Feb. 1.

1958. In re Thos. H. Johnson. Discharged.
1851. In re Henry N. Kendall. Discharged.
1939. In re Nicholas H. Hammond. Discharged.
1725. In re Jacob H. Silberton. Petition for discharge. Hearing Feb. 17.
1602. In re Martin S. Ballard. Petition for discharge. Hearing Feb. 17.

Feb. 3.

1838. In re Conrad B. Krause. Discharged.
1780. In re W. A. Brown. Petition for discharge. Hearing Feb. 17.

Feb. 4.

1852. In re John E. Marsh. Discharged.
1283. In re Geo. Williams. Petition for discharge. Hearing Feb. 22.
1586. In re Eli Parsons. Same. Same.
2012. In re D. P. Bower. Same. Same.
1933. In re Silas F. Hanks. Same. Same.
1763. In re L. E. Benton. Same. Same.
2012. In re D. P. Bower. Order for second and third greetings of creditors.

Feb. 5.

1931. In re Price J. Wilson. Discharged.
2037. In re John Dunn. Petition for discharge. Hearing Feb. 25.
1923. In re Ira A. Chase. Same. Same.
1738. In re Adam Bahl et al. Same. Same.
1401. In re T. A. Cross. Same. Same.
1870. In re E. K. Chamberlain. Same. Same.
1640. In re H. W. Johnson. Same. Same.
1932. In re John H. Klosser. Exceptions to report of Register on exceptions to claims.

Feb. 6.

2022. In re J. Key Wilson. Discharged.
1782. In re John F. Knapp. Petition for discharge. Hearing Feb. 25.
1704. In re Samuel Miller. Same.

U. S. CIRCUIT COURT N. D. OF OHIO.

Jan. 31.

3365. Jos. P. Bradford vs. John Lennon et al. Verdict for plff. for $1.
3390. Isaac A. Benedick vs. Peter W. Ish. Motion for new trial.
3680. Wales & Co. vs. Miller, Jamison & Co Motion overruled. Trial to court. Judgment for deft. for cost.

Feb. 1.

3365. Joseph P. Bradford vs. John Lennon et al. Motion for a new trial.
3698. S. B. Boyd et al. vs. Spencer Munson. Amended reply.
3836. Second National Bank of Cleveland vs William West et al. Petition for money only. Chas. D. Everett.
3839. Ferdinand Pardulls vs. The Penn. Co. etc. Transcript.
3646. Herbert C. Walker vs. John McLain. Leave given plff. to file his reply instanter.
3828. Weiler & Ellis vs. Joseph Stoppell. Demurrer sustained. Leave given plff. to file amended pleading in ten days.
3447. Victor Vincent vs. Anthony Ernst. Continued by consent until next term.
3597. Wm. H. Hathaway vs. George Hannes. Continued by consent until next term.

Feb. 4.

2597. John P. Vinton et al. vs. Homer, Hamilton & Co. Appeal allowed.
3738. United States vs. Edward Howard et al. Settled and costs paid.
3830. Same on complaint of John Lennon et al. vs. G. G. Neff. Case dismissed at cost of complainant.

Feb. 5.

3183. Joshua Register vs. James Warswick et al. Amended answer filed. A stipulation as to testimony filed.

Feb. 6.

3838. Josiah Boyer vs. the Balt. & Ohio R. R. Co. Transcript filed by deft.
3825. M. Gottfried et al. vs. C. Schneider. Motion for additional bail for costs filed.
3826. Same vs. Anton Kopf et al. Same.
Elias Wolf vs. Moses Schaffner et al. Three cases of same parties continued by consent.

[Reported by R. P. FLOOD.

COURT OF COMMON PLEAS.

Actions Commenced.

Jan. 31.

14564. Amos Denison vs. David I. Jones. Money only. Tyler & Denison.
14565. Jacob Coblitz vs. Moritz Stork et al. Appeal by deft. Judgment Dec. 31.
14566. Geo. Molter vs. Erastus Kremel et al. Money and sale of land and relief. J. S. Grannis.

Feb. 1.

14567. Emelie Goetz vs. Ferdinand Kreselbeck et al. Money, to subject land and relief. A. Zehring; Gustav Schmidt.
14568. Samuel B. Prentiss vs. Neil Campbell et al. To subject land. Baldwin & Ford.

Motions and Demurrers Filed.

Jan. 31.

2253. Holden vs. Heard. Motion by plff. to strike out from answer and make more definite and certain.
2254. Same vs. same. Demurrer by plff. to second defense of answer.
2255. Williams vs. Bletsch et al. Motion by plff. for the appointment of a receiver.
2256. Maurer vs. Lowe et al. Motion by plff. to confirm sale and for distribution of proceeds.

Feb. 1.

2257. Woodbridge vs. Kain et al. Motion by plff. Patrick Ligue for new trial.
2258. Hittell vs. The City of Cleveland. Demurrer by plff. to second and third grounds of defense of answer.
2259. Platt vs. Reader et al. Demurrer by plff. to second, third and fourth defenses of answer.
2260. Morse vs. Sullivan. Demurrer by plff. to the petition.
2261. Wooster, assignee, substituted for Maxwell, vs. Clark. Motion by deft. to tax certain costs against the plff., and to re-tax certain costs before J. P.
2262. Hayes et al. vs. Holbrook et al. Motion by deft. Chas. Burnside to require plffs. to separately state and number causes of action.
2263. Steiler vs. Poe et al. Motion by deft. to strike out from the petition.
2264. Foote et al. vs. Henderson. Motion by plffs. to require deft. to make the answer more definite and certain.
2265. Thayer vs. Hoogland. Motion to strike out from the petition.

Feb. 3.

2266. Dunn et al. vs. Norton et al. Motion by defendants to vacate order continuing the restraining order herein.
2267. Karbel vs. Fisher. Motion by deft. for judgment on the pleadings.

Feb. 4.

2268. Lock vs. Marquardt et al. Motion by Felix Nicola to confirm his report as Receiver and for his discharge with allowances for services.
2269. Droz vs. Roeman et al. Motion by plff. to strike answer of deft. Roemer from the files.
2270. Same vs. same. Motion by deft. Frederick Fehr, admr., to strike the answer of deft. Roemer to his cross-petition from the files.
2271. Same vs. same. Motion by deft. Manuel Halle to strike answer of deft. Christiana Roemer to his cross-petition from the files.

Feb. 5.

2272. Myers, Rouse & Co. vs. Schmidt, admx. etc. Motion by plffs. for a new trial.
2273. Farnsworth & Co. vs. Ballou. Same.

Motions and Demurrers Decided.

Feb. 1.

2214. Wenham vs. Higgins. Granted.
2223. Gallup vs. Kramer. Overruled. Deft. has leave to answer by Feb. 10.
427. Bell vs. Hickox. Withdrawn.
1968. Wilber vs. The Board of Police Comrs. Sustained.
2010. Brownlee vs. Montpelier et al. Sustained. Plff. excepts.
2015. Foster vs. Hardy. Withdrawn.
2107. Nowak, exr. etc. vs. Bursik. Sustained. Defendant excepts.
2123. Picket vs. Mathews. Overruled. Deft. has leave to answer by Feb. 1.
2141. Caunsky vs. Wilcox. Overruled. Deft. excepts.
2170. Seeley vs. Murphy. Granted.
2173. Horn Jr. vs. Holcomb et al. Overruled.
2186. Haycox et al. vs. Higsby Jr. et al. Overruled.
2187. Kruse vs. Stolle. Granted.
2192. Taylor vs. Ferguson et al. Overruled. Deft. has leave to answer by March 1st.
2200. Kerkpatrick vs. Nokes et al., trustees etc. All matter in petition from 17th to 36th line, inclusive, stricken out. Balance of the motion granted. Deft. has leave to answer by Feb. 10.
2194. Pelton as treas. etc. vs. Pritchard et al. Withdrawn at the cost of plff. by consent.
2205. Lowe & Co. vs. Le Duke et al. Overruled.
2206. Edleman vs. Le Duke. Sustained. Plff. to give bail by Feb. 16.
2191. Savage vs. McAdams et al. Granted. To give bail by Feb. 22.
2217. Cohn, admr. etc., vs. L. S. & M. S. Ry. Co. Granted. To give bail by Feb. 15.
2240. Stolz vs. Koester et al. Overruled at cost of deft. Deft. has leave to file amended answer by Feb. 6th.

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The Cleveland Law Reporter.

VOL. 2. CLEVELAND, FEBRUARY 15, 1879. NO. 7.

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MEASURE OF DAMAGES.—An interesting question was raised in the case of Rock vs. Stoneman, tried at the present term of the Common Pleas Court before Judge Hamilton, as to the measure of damages. The action was brought to recover damages for a breach of contract to grade a street lying between lands of the plaintiff and defendant. By the contract the plaintiff was to dedicate twenty feet and the defendant thirty feet for the street, and the defendant was also to do the grading. The plaintiff alleged that the street remained in an impassable condition, and in consequence he was without practicable access to his lands, which, he alleges, would have been greatly enhanced in value if the street had been graded. On behalf of the plaintiff the measure of damages was claimed to be: 1. The difference in value of the plaintiff's lands with ar without the street; or

2. The value of the land dedicated by the plaintiff to the street together with expenses incurred by him in accommodating former allotments to the street in question; or

3. The loss which the plaintiff has sustained by non-access to his lands.

The Court held the measure of damages to be "the difference between the use of the property of the plaintiff for the purposes for which he designed it, as understood between the parties at that time, and what would naturally and proximately flow from a failure to build that road"—down to the time of the commencement of the action.

JUDGE DODGE, of Tiffin, decides that a wife cannot maintain an action for seducing the husband's affections from her. A contrary decision was made by Judge Hamilton of our Common Pleas in the case of Scheurer vs. Scheurer, published in THE LAW REPORTER, vol. 1, page 233. Judge Cooley, in his excellent work on Torts, p. 227, in a note on the same subject, says: "We see no reason why such an action should not be supported, when, by the statute, the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her."

SUPREME COURT COMMISSION

January Term, 1878.

Hon. W. W. Johnson, Chief Judge; Hon. Josiah Scott, Hon. Luther Day, Hon. D. Thew Wright, and Hon. T. Q. Ashburn, Judges.

WEDNESDAY, January 22, 1879.

No. 75. J. L. Miller vs. S. C. Brown. Error to the District Court of Cuyahoga county.

Wright, J.:

An owner of ground, with whose consent an adjacent proprietor occupies a portion of his premises on which to build a joint wall, cannot tear such wall away after a building has been erected thereon upon the faith of his acquiescence in its location and construction.

Judgment affirmed.

No. 23. Union Insurance Company of Dayton vs. McGookey & Moore. Error to the District Court of Wood county.

DAY, J. Held:

1. Where there is nothing in the terms of a policy of insurance which requires the truth of the representations in the application therefor to be averred as precedent to a right of action on the policy, a good cause of action may be made in a petition founded on the policy, without setting forth the application and averring the truth of the representations therein; but the falsity of such representations, where they are such as to invalidate the policy, may be set up by way of defense.

2. Where it is provided in a fire policy that the insurer, in lieu of paying for a loss in money, may rebuild or replace the property destroyed, such provision is in the nature of a condition subsequent, available only at the option of the insurer; it is, therefore, unnecessary to aver in the petition in an action on the policy for the amount of the loss, that the insurer refuses to rebuild or replace the property destroyed.

3. Where a policy requires notice of a loss to be given to the insurer immediately after the fire, such notice is a condition precedent to a right of action on the policy; but in such action, under the provisions of section 121 of the Code, it is a sufficient averment of the performance of the condition for the plaintiff to state in his petition that he has performed all the conditions on his part to be performed.

4. Although a demurrer to a petition for want of a material fact is erroneously overruled, if the fact is properly put in issue by the subse-

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quent pleadings and the case is tried thereon, the judgment cannot be reversed for error in overruling the demurrer.

5. The District Court, on error pending therein, may, but it is not required, to consider errors in the record not assigned; therefore, a judgment of affirmance by the District Court will not be reversed for error not assigned in that court.

6. The correctness of a verdict of a jury or finding of facts on the evidence, is not necessarily brought in review by a general assignment of error, that the judgment was rendered for the wrong party; to require such review, the overruling of the proper motion for a new trial must be assigned as error.

7. A general assignment of error, that the judgment was rendered for the wrong party, strictly raises only the question whether the proper judgment has been rendered upon the pleadings and findings of fact; but, where all the evidence is properly embodied in the record, it necessarily raises the question of law as to whether there is any evidence tending to sustain the finding of facts; if there be such evidence, and the proper judgment has been rendered, on the pleadings and facts found, where there is no other assignment of error, and affirmance of the judgment by the District Court, is not erroneous.

8. Where an agent of an insurance company, acting within the general scope of the business entrusted to him as such agent, fills up in his own language an application for insurance from the statements of the insured fully and truthfully made, receives the premium and issues a policy duly executed by the insurer on such application, the insurer will not be permitted, when a loss happens, to defeat the policy by denying the truth of the application, nor the authority of the agent in the transaction, although he has transcended his authority, unless the insured is chargeable with knowledge of his having exceeded his authority.

Judgment affirmed.

No. 52. Collins vs. Davis. Error to the District Court of Belmont county.

By the Court:

C. recovered a judgment aganst D. in the Court of Common Pleas. On error to the District Court D. obtained a reversal of this judgment and the case was remanded for a new trial. Without objection by C., it was again tried in the Common Pleas, C. being present prosecuting his action, and judgmen was rendered in favor of D. Afterward C., upon leave granted and upon the record of the District Court, filed a petition in error in the Supreme Court to reverse said jndgment of reversal—Held: That C., by again prosecuting his action on its merits in the Common Pleas to final judgment without objection, waived the right to prosecute error to reverse said judgment of reversal.

Petition in error dismissed.

No. 9. City of Portsmouth vs. Marietta & Cincinnati Railroad Company as reorganized. Error to the District Court of Scioto county. Settled and dismissed.

No. 20. A. C. Diebold et al. vs. E. C. Hibben et al. Error to the District Court of Clinton county. Settled and dismissed.

No. 21. Ohio ex rel. Attorney General vs. Seth Evans. Quo warranto. Dismissed.

No. 43. Benjamin Hibbish vs. Milton Moore. Error to the District Court of Summit county. Judgment reversed on the ground that it is not supported by the evidence. Two members of the court dissenting. No further report will be made.

No. 46. Jacob Ostermyer et al. vs. Theresa Starhalter et al. Error to the District Court of Seneca county. The facts do not warrant a reversal of the judgment in this case. Judgment affirmed. No further report will be made of this case.

No. 49. James M. Briggs vs. Thomas H. Rose. Error to the District Court of Licking county. Judgment affirmed on the authority of Markward vs. Doriat, 21 O. St. 637. No further report will be made of this case.

No. 56. The Pittsburg, Cincinnati & St. Louis Railroad Company vs. William Snyder. Error to the District Court of Fayette county. Judgment reversed on the grounds, 1st. That the court erred in rejecting evidence to show a consideration for the special contract set up by plaintiff in error, and in charging the jury that aid contract was invalid. 2d. In allowing a witness to give his opinion as to the amount of damages sustained. No further report will be made of this case.

No. 65. Mary Bruen et al. vs. Azariah Compton. Error to the Superior Court of Cincinnati. Judgment of the General Term reversed, on the authority of Preston vs. Compton, 30 O. S. 299. No further report will be made of the case.

No. 66. Charles Moulton et al. vs. Marian L. Bassett. Error to Superior Court of Cincinnati. Judgment affirmed. No further report will be made of this case. Scott, J., dissented.

No. 67. David Gorham vs. Francis A. Berryhill. Error to the District Court of Greene county. Dismissed for want of proof of service of summons in error, or waiver of such service, and for want of proof of service of printed record and plaintiff's argument.

JANUARY TERM, 1879.

Hon. W. W. Johnson, Chief Judge, Hon, Josiah Scott, Hon. Luther Day, Hon. D. Thew Wright, and Hon. T. &shburn, Judges.

WEDNESDAY, Jan. 29, 1879.

No. 50. Joseph A. Burrows vs. A. B. Casler. Error to the District Court of Greene county.

Ashburn, J.:

Where under the statutes in force in 1868, contiguous territory was attached to a town corporation for road purposes, a street commissioner of the town might lawfully enter upon and take from lands situated near a public road, needing repair in such territory, material required and necessary to repair such road, although the land from which the material was taken was in another and different road district.

Judgment affirmed.

No. 63. John Jones and others vs. John A. Lloyd and others. Error to the District Court of Gallia county.

Scott, J. Held..

1. Where a widow elects not to take under the will of her deceased husband, she can take nothing in virtue of the bequests made to her by the will, in lieu of dower.

2. Whilst a will should be read and construed by the light of the circumstances under which it was executed, yet such circumstances can affect its construction, only when it appears that they were known to the testator at the time of its execution.

2. The term *heirs*, when used in a will, is inflexible, and should be so construed as to give effect to the manifest intention of the testator as ascertained by a due consideration of all the provisions of the will.

Where a testator makes a provision for his wife, in lieu of dower, and directs that in the event of her claiming dower, the balance of certain personal property bequeathed for her support "shall be shared equally among my heirs," the word "*my heirs*" will be construed as meaning *my next of kin*, or, *my heirs according to the statute of distribution, exclusive of my wife*;

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though his wife, in case of intestacy, would, under the statute, have taken all such personal property.

5. Hence, where the brothers and sisters of the testator are his *next of kin*, and are recognized as such by the statute of descent and distribution, after the wife, they are to be regarded as the legatees under such will—in case the widow declines to accept its provisions.

Judgment of District Court reversed and judgment entered for the plaintiffs in error.

No. 45. William Edgar vs. Fidelia Richardson. Error to the District Court of Wood connty.

Day, J.:

A wife deserted her husband, and, after being defeated by him in an effort to obtain a divorce, went to parts unknow and remained away about three years. On her return to the neighborhood of her husband she declared that during her absence she had obtained a divorce, but declined to tell where she had been. A few years after, her husband, with a view of marrying again, if she had obtained a divorce, sent a messenger to inquire of her as to the truth of the matter relating to the alleged divorce, to whom she stated that she went away to procure a divorce without interference from her husband, and that she did obtain a divorce, and hoped he would marry again. Soon after he communicated this information to the defendant, and they were married; and about the same time his first wife also married again, and lives with her second husband. A few years later her first husband died, childless and intestate; thereupon, his first wife, claiming to be his heir, conveyed a tract of land, of which he died seized, to the plaintiff, who brought this action against the second wife to dispossess her of the land; and on the trial of the case, the first wlfe testified that she never procured a divorce. Held:

1. That the admissions of the first wife, that she had obtained a divorce, though relating to a matter of record, were, as against a party claiming under her, admissible evidence.

2. A finding upon such evidence—corroborated by her conduct—in accordance with the truth of such admissions, though contradicted by her unsupported testimony, would not be clearly against the evidence, and therefore could not be regarded by a reviewing court as erroneous.

Judgment affirmed.

No. 38. Henry Haynes vs. Daniel Haynes et al. Error to the District Court of Hocking county.

Johnson. Ch. J. Held:

1. Where a will has been signed for the testator, by another person, in his presence and by his express direction, in the absence of the attesting witnesses, the acknowledgment of the fact by the testator in the hearing of the witnesses, which is requisite, is not required to be made in any particular form of words or any specified manner; but if by signs, motions, conduct, or attending circumstances, the attesting witnesses are given to understand, by the testator, that he acknowledges the signature thereto as his and the instrument itself as his will, it is sufficient.

2. It is not necessary in addition to such an acknowledgement, that the testator should acknowledge to each or both the attesting witnesses, that such signing was done in pursuance of his previous express authority and in his presence by the person signing for him.

3. The fact of such signing and the authority to sign, when done in the absence of the attesting witnesses, may be shown by the acknowledgment to the witnesses, or by other competent testimony, or may be presumed from the facts and circumstances of the case.

4. The due execution of a will cannot be assumed in the face of positive evidence to the contrary or in the absence of all proof on the subject, except perhaps in case of ancient wills, merely because it purports to be the will of the testator, and the attestation is in due form; yet it will not be defeated by the failure of memory or corruption of the attesting witnesses, if it can be established by other competent testimony.

5. The original will, when not lost or destroyed, and not a copy from the record in the Probate Court, used in the pleadings, should be produced to the jury in proceeding to contest its validity.

Such will is the basis of inquiry and the trial, verdict and judgment should be responsive to the question, whether that testator be the last will of the testator or not.

6. Where in such copy a devise of lands reads, "Eighty-six acres off the *east* side" of a half section owned by the testator, and the original will reads, "*west* side," instead of the "east side," and the jury finds "the paper writing produced" to be the will, and the court adjudges "the paper writing mentioned in the petition" to be such will, the judgment does not follow to the verdict, and the whole record leaves it uncertain what is the proper reading of the testator's will.

7. If upon the face of the will it is apparent that it has been altered in a material provision, and evidence is offered tending to show that such alteration was made since its execution, as well as to show that it was made before; it is the duty of the jury in case the will is established, to determine the question in dispute, and establish the will as it read when executed.

8. If it appears that such alteration was made before execution, than the paper writing as it reads after such alteration is the will; if made after the execution, and such alteration does not invalidate the instrument, then the jury should by special verdict establish the will as it read before such alteration.

9. Proceedings to contest the validity of a will under the statute are in the nature of an appeal from the order of probate thereof, and all the material facts in the issue, are to be heard and determined *de novo* as though such order of probate had not been made; except that such order of probate is prima facie evidence of the due attestation, execution and validity of the will, and the burden of proof is on the contestants to invalidate it.

Judgment reversed.

No. 69. Caleb Dodsworth vs. Joseph Jones et al. Error to the District Court of Butler county. Judgment affirmed. No further report will be made.

No. 71. Jacob Hamish vs. William A. Spangler, executor. Error to the Superior Court of Montgomery county.

Judgment affirmed on the authority of Widoe vs. Webb, 20 O. St., 431. No furher report will be made of the case.

No. 73. Samuel Woodward et al. vs. Albert Stien. Error to the Superior Court of Cincinnati. Judgment affirmed. No further report will be made.

No. 76½. William A. Jones vs. Seth C. Foster. Error reserved by the District Court of Pike county. Judgment reversed on the authority of *Howard vs. Thomas.* (12 O. St., 201).

SUPREME COURT OF OHIO.

DECEMBER TERM, 1878.

Hon. William White, Chief Justice. Hon. W. J. Gilmore, Hon. George W. McIlvaine, Hon. W. W. Boynton, and Hon. John W. Okey, Judges.

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TUESDAY, February 4, 1879.

General Docket.

No. 558. Carlin Wheeler vs. The State. Error to the Court of Common Pleas of Allen county.

Okey, J.:

On A.'s trial for a crime, he relied on insanity as a defense, and as evidence tending to prove the defense, offered a record from the Probate Court showing that four years previous to the commission of the crime, an inquest had been held in that court and that he had been adjudged insane and confined in an asylum—Held: That the evidence was admissible.

Judgment reversed and cause remanded for a new trial.

Nicholas Sibila vs. Rebecca A. Bahney. Error to the District Court of Stark county.

Boynton, J. Held.

1. Where a variance between the allegations of the pleading and proof is not material with the meaning of Section 131 of the code, the fact that the pleading was not amended to conform to the proof, as provided for by Section 132, will not constitute ground for the reversal of the judgment on error.

2. In an action brought under the seventh section of the act to provide against evils resulting from the sale of intoxicating liquors, as amended April 18, 1870, it is not necessary that the liquor be sold in violation of the act of 1854. If sold in violation of any act prohibiting the sale, or furnished in violation of the act of 1866 (S. & S., 748), the action will lie.

3. The provision of said amended section which creates a liability on the part of the seller for an injury resulting from intoxication to which the liquor unlawfully sold or furnished by him contributes only *in part*, is not in conflict with the constitution.

4. In an action brought by a married woman under said amended section for an injury to her means of support in consequence of the intoxication of her husband, it is not error for the court to refuse to charge, that, "if the jury award the plaintiff any amount by way of exemplary damages, they should not consider the fact, if such they find it to be, that certain of the illegal sales were made on Sunday."

5. Where it appers in such action that the damages awarded by the jury are excessive, the court on error, on a *remittitur* of such excess, may affirm the judgment.

Unless a *remittitur* to the amount of the first verdict, as of the date of the second, be entered, a new trial will be ordered. If entered the judgment will be affirmed.

Gilmore, J., is of opinion that the judgment should be reversed on the grounds that improper and prejudicial testimony was admitted, and that the charge of the court, as to the acts of 1831 and 1866, is erroneous.

No. 95. William B. Dinsmore, Trustee of Adams Express Company vs. William K. Tidball et al.

Error to the District Court of Stark county.

McIlvaine, J. Held:

If a principal, having knowledge, or a belief founded on reasonable and reliable information, that his agent is a defaulter, requires sureties for his fidelity in the future, and holds him out as a trustworthy person, whereby such security is obtained, he cannot afterwards avail himself of a guaranty so obtained from a person who was ignorant of what was known to, and ought to have been disclosed by, the employer.

Judgment affirmed.

Thomas L. Rhea vs. David Franklin Dick et al. Error to the District Court of Butler county.

White, C. J. Held:

Under Section 557 of the code (67 O. L. 116), a person in possession of real property may maintain an action to quiet his title against a person who claims an estate or interest in the property adverse to the title of the party in possession. It is not necessary that the adverse claim should relate to or affect the right of present possession. Collins vs. Collins (19 O. S. 468). explained.

Judgment reversed and cause remanded.

No. 577. John Dunaman vs. The State of Ohio. Error to the Court of Common Pleas of Greene county. Judgment reversed and new trial ordered, the verdict not being sustained by sufficient evidence.

Motion Docket.

No. 37. Timmons vs. The State. Motion for leave to file petition in error to reverse the judgment of the Court of Common Pleas of Hamilton county.

Gilmore, J.:

The force necessary to push open a closed, but unfastened transom, that swings horizontally on hinges over an outer door of a dwelling house, is sufficient to constitute a breaking in burglary under our statute, which requires a *forcible* breaking

Motion overruled.

No. 44. The State of Ohio vs. Thomas B. George et al. Motion for leave to file a petition in error to the Superior Court of Montgomery county. Motion granted and cause set for hearing March 13, 1879.

No. 45. John Dunaman vs. The State of Ohio. Motion to take cause No. 577 on the general docket out of its order for hearing. Motion granted.

No. 46. Mary Atcherly et al. vs. Mary Ann Dickinson. Motion to dismiss cause No. 569 on the general docket. Motion passed for notice to plaintiff in error.

HOLMES COUNTY COMMON PLEAS.

JANUARY TERM, 1879.

CATHARINE SHREVE vs. LOUIS PARROTT.

Married Women—Liability of, at Law, Upon Contracts—Vacation of Judgment of J. P. for Errors not of Record, etc.

VOORHES, J.:

The plaintiff files her petition in this court asking the reversal of judgment rendered by John Lindsey, a Justice of the Peace, on the 13th day of May, 1878.

She avers in her petition that the defendant brought his suit before said magistrate against I. N. Shreve and Catharine Shreve to recover the amount due upon two promissory notes, for the sum of $80 each, dated July 20th, 1877; one due January 1st, 1878, and the other March 1st, 1878. Said notes were each signed by said Israel N. Shreve and Catharine Shreve, and payable to the said Louis Parrott.

After making several continuances of the cause on the 11th day of May, 1878, the case was tried by said magistrate upon testimony, and a judgment rendered in favor of Parrott against said Israel N. Shreve and Catharine Shreve for the sum of $135.

The plaintiff now asks this Court to reverse said judgment as to her, for the reasons set out in her petition, to-wit: She at the time of signing the notes and at the time said judgment was rendered was a married woman, being the wife of the said I. N. Shreve. That the notes were given to Parrott to secure the payment of an individual indebtedness of the husband, and that she at the time was in no way indebted to or liable in tort to the said Parrott.

She claims that the Justice erred in rendering judgment against her upon these notes, she being a married woman at the time they were given and no consideration therefore moving to

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her, she being merely a surety for her husband.

The law is clearly settled in this State that to make a married woman liable in an action at law upon her contracts, it must be upon such a contract as she is enabled to make under the law. By the act of the Legislature passed April 3, 1861 and amended by the act of March 23, 1866, she is empowered during coverture to contract for labor and materials for improving, repairing and cultivating her separate real estate, and to lease the same for a term not exceeding three years. These acts give the wife absolute control over her own property and makes her liable in a suit at law upon such contracts as she is enabled therein to make.

But for a married woman to make her property liable for the payment of her agreements in equity, "something more than merely incurring the obligation, which the law would create if she were a single woman is necesary to effect the estate of a married woman, in order to bind her separate estate by a general agreement it should appear that it was made by her with reference to and upon the faith and credit of her estate, under such circumstances as makes it equitable that such charge should be enforced. 30 O. S. R., 147."

If the facts set forth in the plaintiff's petition are true, this judgment very clearly is based upon such a contract as she had no statutory power to make, so as to afford to Parrott a right to enforce it at law, and if it is still such a contract as he might be enforced in equity, then has he failed to invoke the aid of a court possessed of chancery powers, but is found in a court powerless to afford him a remedy upon the contract which he procured from the plaintiff.

The Justice having rendered a judgment against the plaintiff, and it not appearing of record that she was at the time of making the contract and of rendering the judgment a married woman, the question arises whether or not this court has power to relieve her of the error of fact of which she complains. A solution of this question requires that we look to our Code of Practice and see if on complaint in error against the proceedings in an inferior court we can look beyond the record and relieve a party from an error not apparent therein.

In division 4, chapter 6, of the act to revise and consolidate the laws relating to civil procedure, passed May 14, 1878, found on page 673 of the acts of 1878, it is provided in section 1, that a Court of Common Pleas or a Superior or District Court may vacate or modify its own judgment or order, after the term at which the same was made for the reasons therein stated. One of, and the 5th reason therein given is, "For erroneous proceeding against an infant, married woman, or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings. Such error is brought to the judicial notice of the Court, under the provision of sec. 5, of the same chapter by filing a petition, verified by affidavit setting forth the judgment, or order the grounds for vacating or modifying the same, and if the party making the complaint was defendant he must set forth in his petition his defence to the action. From this provision of the law it is manifest that a party may be relieved from an error not only in *law*, but also of *fact*, when application is made to she same Court in which the error occurred.

The case before the Court, the error complained of being one *coram Vobis*, instead of *coram Nobis*, presents the further question: how this Court's power to relieve a party from an error of *fact*, committed in an inferior Court, can be invoked.

By reference to the act of the Legislature regulating the jurisdiction and procedure in error, page 803 of the acts of 1878, it is provided in section 2, that a judgment rendered or final order made by a Probate Court, Justice of the Peace or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the Court of Common Pleas, may be reversed, vacated or modified by the Court of Common Pleas. This section confers on this Court ample powers to vacate, reverse or modify any judgment rendered by a Justice of the Peace of the county. But again, can it be done without the error complained of appearing in the record? Sec. 3 of the same act, provides that a judgment rendered or final order made by the Court of Common Pleas, or any superior court may be reversed, vacated or modifed by the District Court for errors appearing on the record. A like provision is made in section 4, for the Supreme Court to reverse, vacate or modify any judgment or final order made by any court board or tribunal mentioned in said sections 2 and 3.

From the statute it would appear that the District Court and the Supreme Court can reverse, vacate or modify judgments and final orders, when the error complained of is manifested in the record. But the Court of Common Pleas is not interdicted from considering an error not apparent by the record. It has power as ample to review the record of a Justice of the Peace when properly brought before it as it would to review its own judgments and orders, to purge them from such errors as should not be permitted to stand, one of which is, an erroneous judgment rendered against a married woman, which could be heard in the court rendering the judgment only by being brought to judicial notice by a petition. If the Court may reverse, vacate or modify its own judgments at a term subsequent to rendering it, for the error that it was erroneously rendered against a married woman, we think the power of this Court is ample to review the judgment of a Justice and reverse it for the same cause.

It being admitted by the parties that the plaintiff at the time she gave the notes and at the time the judgment was rendered, was a married woman, and it not being denied that the notes were given for the individual indebtedness of the husband, we think the judgment as to the plaintiff must be reversed.

Hon. Wm. Reed for plaintiff; Stilwell & Hoagland for defendant.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending February 13, 1879.

MORTGAGES.

Feb. 7.

Thomas Axworthy and wife to Hiram Barrett. $8,300.

David Proudfoot and wife to The Society for Savings. $3,300.

Sherman W. Thomas and wife to Daniel Johnson. $1,150.

N. & B. Mills to Caleb Jewett. $7,000.

Same to Annie E. Bronson. $5,000.

Peter Luvins and wife to Magdalena Baehr. $154.

J. G. W. Newcomer and wife to Mary M. Chester. $140.

Feb. 8.

Henry Steigmeyer to Conrad Westeweller. $500.

Prentice Sked to Albert Rowlee. $350.

Auna Maria Groh to C. L. Miller. $500.

John D. Pake and wife to Frederick Busch. $250.

Hellen Darrow to John D. Darrow. $600.

Austin Stanton et al. to Ludwig Hundertmark. $550.

James O'Callahan and wife to John Widmeyer. $500.

L. O. Jones and wife to F. C. Bemes. $1,000.

Feb. 10.

Samuel Hoffman to Joseph Lehman, Sr. $600.

Catharine Dougherty to John W. Fawcett. $300.

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Henry Prochaska and wife to John W. Taylor, admr. of estate of W. Ptochaska, deceased. $3,248.40.

Jacob F. Koblenzer and wife to Anna Maria Weiss. $400.

Peter Groth and wife to Esther Wilner. $1,000.

Lester N. Gallup to L. A. Wilson. $1,-500.

William Cobblideck to W. S. Hogan. $170.

Landert Miermans and wife to John Oehlsner. $450.

Stephen Ashby to Webb F. Cleveland. $105.

Alfred Sutton to Harry Hicks. $104.

Feb. 11.

Martin R. Kent to Henry Carter. $300.

Regline Skazzky and husband to Eva M. Kelly. $700.

Catharine and John Riley to the Society for Savings. One thousand five hundred dollars.

Kirke D. Bishop to the Citizens' Savings and Loan Ass'n. One thousand five hundred dollars.

Joachin A, Schultz and wife to the Gegenseiteger Schutz Verein. Five hundred dollars.

Alexander and James Forbes to Thomas and William Maize. Eight thousand dollars.

Catharine Rosbach and husband to Michael Thimke. Three hundred dollars.

Michael Brown and wife to S. H. Kirby. One hundred dollars.

Feb. 12.

Eleanor Gates and husband to B. Williams. Two thousand dollars.

Same to same. One thousand dollars.

Samuel H. Cowell and wife to W. S. C. Otis. One thousand two hundred dollars.

Chas Mertin. and wife to Michael Heffner. Four hundred and fifty dollars.

Christine Hauser and husband to Josephine Hartmueller. Seven hundred dollars.

James Fitch and wife to Eliza S. Clark et al., admrs. Four thousand dollars.

E. and A. Mitermiler to Wm. Tousley. One thousand six hundred dollars.

Matilda and Augusta Smith to M. S. Hogan. Two hundred and fifty dollars.

Catharine Scheurer and husband to Belthasa Schneider and wife. Two hundred dollars.

Feb. 13.

D Betts and wife to Paul Fought. One thousand seven hundred and seventy-six dollars.

Christian Pontlitz and wife to Biernbaum Two hundred dollars.

Ursula Hofer to John Jenny. Five hundred dollars.

Joseph Reinhart and wife to Fred Hirz. Fifty dollars.

Elizabeth Worthy et al to Chas R Brooke. One thousand two hundred dollars.

Geo Mitchell to Reuben Hall. Eight thousand five hundred dollars.

John Asper and wife to Rosanna Murry. One hundred and fifteen dollars.

James Connelly and wife to The Citizens' Savings and Loan Ass'n. Four hundred and fifty dollars.

W S Hubbard to H B Hubbard. Three thousand dollars.

Chas Burkhardt and wife to Peter Ruppender. Four hundred and thirty-seven dollars.

CHATTEL MORTGAGES.

Feb. 7

John Phillpot to Lorenz Gleim. $230

Peter Riley to the Davis S. M. Co. $940.

Henry Kramer to John G. Kramer. $2,-200.

Same to St. Joseph's Hospital. $3,000.

Same to John W. Hepas. $2,000.

Same to Catharine Hahn $700.

Same to Herman Linevers. $500.

Same to John Frederick. $1,800.

Theodore Kurtdz to Rollin T. Holden. $7,000.

R. M. Cordes to George J. Hoffman.

Feb. 8.

Henry Kramer to Anton Wenzing. $1,-200.

Same to P. Burns. $500.

Same to Margaret Magengast. $500.

John Kartonck to Mary Krejci. $250.

D. D. McDonded to D. C. Day. $400.

I. Edwards to Harrison Robinson.

Henry Prochaska et al. to Wm. H. Gaylord. $210.

Feb. 10.

Mrs. S. P. Drake to Miss S. Thomas. Forty dollars.

Henry Kramer to Henry Hendricks. Four hundred and twenty-five dollars.

Same to John Ursom. One thousand dollars.

O. H. Bradley to D. W. Loud. Four hundred and eighty-six dollars.

A. L. Colwell to A. G. Colwell. One thousand three hundred and fifty dollars.

H. Kramer to L. Molon. Four hundred dollars.

Louisa Smith to Felix Girstein. One hundred and twenty-five dollars.

Chas. H. Robison to James B. Savage. Three hundred and fifty dollars.

Fred Burns et al. to Mary Dettrick. Five hundred dollars.

Briggs & Briggs to Thos. Axworthy. Three hundred dollars.

Chas. and H. Brand, to C. R. Sanders. Eighty-five dollars.

James M. Gamble to Wm. D. Butler. Sixty-six dollars.

Feb. 11.

John A. Worley to H. R. Leonard. Forty-two dollars.

Geo. Shumann to M. Kreebusch. Fifty dollars.

A. and H. Fourier to Anna Kinney.

Samuel Lord to Wm. Bowler. One thousand six hundred and twenty-eight dollars.

Feb. 12.

J. H. Oakley to M. C. Brown. Forty dollars.

Wm. Lenour and wife to Henry Kessler. Fifty dollars.

Samuel Law to A. W. Bailey. One hundred and eighteen dollars.

James Sweeney and wife to J. Wm. Ball. One hundred and fifty dollars.

Feb. 13.

G W Sturdevant to A W Bailey. Fifty dollars.

Martin Graf and wife to Felix Nicola. Five hundred and fifty dollars.

David Miller to Mary A Rider. Two hundred and fifty dollars.

Chas C Townsend to C W Loomis. One hundred and eleven dollars.

Hannah Boyd to F Krauss & Co. Forty-six dollars and fifty cents.

Benjamin Kingsborough to Simeon Streeter. One hundred dollars.

Florence J Kelly et al to H R Leonard. One hundred and ninety dollars.

DEEDS.

Feb. 6.

John Becke and wife to W. H. Babcock. One thousand dollars.

Ellen T. Boest and husband to Job D. Stark. One thousand five hundred dollars.

S. H. Cowell and wife to Wm. H. Brett. Two thousand five hundred dollars.

J. M. Curtiss and wife to Thos. Maynard. Eight hundred and eighty dollars.

E. F. Collins to Alice E. Mathews. Six hundred dollars.

Same to Chas. Tucker. Four hundred and ninety-two dollars and eighty cents.

Theo. Donberg et al. to Soren Malling. Two thousand four hundred dollars.

Chas. E. Ferrell and J. C. Coffey and wives to D. C. Washington. Seven hundred dollars.

Chas. E. Main to T. H. Graham. Five dollars.

T. H. Graham to Alice L. Main. Five dollars.

Jairus T. Sturtevant to Robert Gane. Two hundred dollars.

Robert Gane to Geo. Hewes. Two hundred and fifty dollars.

Minerva Graves to George Hughes. Fifteen dollars.

James and Lucy King to Robert Clive. Two thousand six hundred and seventy-five dollars.

Helena Kolin to Flora A. Dixon. Three hundred dollars.

Chas. Leavitt and wife to Lerdent Merman. Eight hundred and fifty-five dollars.

The Ohio Chair Co. to Samuel C. Pratt. One dollar.

James Paton and wife to Adeline Hill. Five hundred dollars.

B. L. Pennington and wife to R. D. Swain. One dollar.

Ignatz Biehl and wife to W. E. Osborn. Nine hundred and fifty dollars.

E. D. Stark and wife to Charlotte Scheurer. One hundred and thirty-five dollars.

Martha Van Wie to Jacob Hoffman. One thousand four hundred and fifty dollars.

John M. West to Wm. L. West et al.

Frederick Newman by Mas. Com. to Margaretha Rapp. Four hundred dollars.

Joseph Reisler by Thos. Graves Mas. Com. to A. H. Wick. One thousand four hundred dollars.

A. B. White et al. by Felix Nicola Mas. Com. to James W. Carson. Two hundred and forty-four dollars.

Feb. 7.

Hiram Barrett and wife to Thomas Axworthy. Twelve thousand dollars.

Chas. Breves and wife to Laura A. Blanchard. Five hundred dollars.

Emma J. Gates to Henry Kessler. Two thousand dollars.

J. Christian Maess and wife to Alice L. Maess. Two hundred and fifty dollars.

Chas. O. Evarts and wife to Roscius R. Ruggles. Eight hundred dollars.

M. Moor to L. W. Guild. Two hundred and seventy-five dollars.

Same to same. One hundred and seventy-five dollars.

Thomas Axworthy and wife to Hiram Barrett.

Nathan H. Burns and wife to Susan M. Burns. Two hundred dollars.

Wm. Brayley and wife to Michael Woodbridge. Three thousand dollars.

B. L. Pennington and wife to E. H. Robertson. One dollar.

John Rock to Anton Leisenheimer. One thousand one hundred and twenty-five dollars.

Michael O'Neill et al. by H. C. White, Mas. Com. to Azariah Everett. One thousand three hundred and thirty-four dollars.

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Feb. 8.

W. A. Wilcox to Barbara Beck. One dollar.

F. C. Bemis and wife to Eleanor Jones. Two thousand six hundred dollars.

John George Benzing, att'y. etc, to Susan K. Vetter. One dollar.

Karl and Maria Grosse to Martha A. Barch. Two thousand two hundred dollars.

Mary Hussey and husband to Sarah Duffy. Three thousand and thirty dollars.

Christian Huge to Henry Miller. Five dollars.

Frederick Huge and wife to same. Three thousand dollars.

L. O. Jones and wife to F. C. Beamis. Six thousand dollars.

R. P. Myers and N. Schneider to Jacob Lehr. Eight hundred dollars.

Chas. H. Robison and wife to James B. Savage. One dollar.

James B. Savage to Julia A. Robison. One dollar.

Edward Russell and wife to Thomas A. Harris. One hundred dollars.

George Schneider, admr. of Gottlieb Hofer, to Ursula Hofer. Eight hundred dollars.

Wm. Robertson by Mas. Com. to John Hancock Mutual Life Ins. Co. Eight thousand four hundred and sixty dollars.

Feb. 10.

Levi Bauder, Co. Auditor, to K. A. Hayes. Forty-six dollars and thirty-four cents.

J. Barnard to W. S. Barnard. One thousand six hundred and twenty-five dollars.

W. H. James and wife to Noadiah P. Bouler. Two thousand five hundred dollars.

Chas. E. Brown and wife to John Kovar. One hundred and eighty-nine dollars.

Same to James Masek. One hundred and eighty-nine dollars.

Ebenezer Jennings to Henry Lawson. Two thousand six hundred dollars.

Mathew Shearon to Bridget Shearon. Two dollars.

Annie E. Forrester and husband to J. L. Denham. Ten dollars.

F. H. Morris and wife to Wm. Cobbledick. Seven hundred dollars.

Seely P. Mount and wife to Marie J. Wackerman. Ten thousand dollars.

Tyler, admr. etc. of Newzel Prochaska, to Henry Prochaska. Five thousand three hundred and fifty dollars.

Christian Engel and wife to Perlette Frazee. One hundred dollars.

O. H. Payne to W. F. Terrieff. Two thousand four hundred dollars.

A. G. Plummer. to S. A. A. and H. B. Plummer. One dollar.

Michael Spelman by Felix Nicola Mas. Com. to Thomas H. White. One thousand four hundred and sixty-seven dollars.

Feb. 11.

Thos. J. Carran, trustee, to Matilda and Augusta Smith. One dollar.

Lewis Eckerman to Harrison R. Edwards. Eight dollars.

David Holley and wife to Mary A. Coates. One dollar.

Barbara Hantrath to J. A. Tweedy. Four thousand dollars.

Kirk D. Bishop to Samuel H. Cowell. One thousand five hundred dollars.

Samuel H. Cowell and wife to Kirk D. Bishop. Four thousand dollars.

J. C. Coates and wife to A. S. Gorham. One dollar.

Philip and Elizabeth Nold to Messrs Auld & Conger. Eight hundred dollars.

Henry J. Cohen and wife to Christian Cohen. One dollar.

N. Coe Stewart and wife to C. L. Hotze. One hundred and eighty dollars.

C. L. Hotze to N. Coe Stewart and wife. Quit claim deed.

Orlando Van Hise and wife to Barney McClernon. Two hundred dollars.

Ferdinand Stearns and wife to Elijah Stearns Jr. One thousand dollars.

Elijah Stearns Jr. to Elizabeth Stearns. One thousand dollars.

Wm. Story and wife to Israel D. Nager. Six thousand dollars.

D. R. Barlow by Mas. Com. to Geo. W. Hale. Four hundred and ninety-five dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending February 13th,'1879, against the following Persons.

Fritz alias Frederick Schubert et al. Six thousand three hundred and seventy-three dollars and thirty-three cents.

Isabrand Clevering et al. Four hundred and seventy-nine dollars and fifty-one cents.

Geo. Loall et al. Four hundred and sixty-seven dollars and seventy-eight cents.

Chas. Hogg. One hundred and fifteen dollars and twenty-three cents.

Samuel S. Calhoun et al. One hundred and twelve dollars and thirty-four cents.

Chas. W. Ames et al. Six hundred and sixty-six dollars and forty cents.

Joseph Chandler. One hundred and forty-nine dollars and seventy cents.

W. P. Johnson. Three hundred and twenty-two dollars and fifty-eight cents; three hundred and thirteen dollars and fifty cents.

John Rakos. Three hundred and fifty-nine dollars and seventy-four cents.

Frederick Schwartz et al. Eight hundred and eighty-seven dollars and thirty-four cents.

Chas B Brown et al. Eight hundred and ninety-six dollars and forty-three cents; six hundred and eighty-eight dollars and seventeen cents; two hundred and twenty-six dollrrs and ninety-eight cents.

James Sweeney et al. One hundred and twenty-four dollars and ninety-eight cents.

Gustav Matzaum. Two dundred and seventy-one dollars.

H T *Hower* et al. Seventeen thousand two hundred and thirty-four dollars and eighty-six cents.

Edward S Garner. One thousand two hundred dollars and ninety-five cents.

R O White. Two hundred and forty-six dollars and sixty cents.

E B Whaley. Four hundred and fifty-eight dollars and seventy-seven cents.

Frederick Doehleman. Eighty-one dollars and fifty cents.

U. S. CIRCUIT COURT N. D. OF OHIO.

Feby. 7.

3482. Richard B. Johnson vs. The Lycoming Ins. Co. Verdict for plaintiff $3,000.

3425. Franklin Brush Co. vs. J. M. McKinstry et al. Continued at cost of defendant LePrevost.

3839. The National City Bank of Cleveland vs. Henry Gilbert et al. Bill. Grannis & G.

3840. Same vs. Wm. B. Gilbert et al. Same.

3919. Singer Manf. Co. vs. Isaiah P. Miller et al. Answer of the defendant the Canton B'l'g Assn. James J. Clark.

3828. Herman Wile vs. Joseph Stopple. Amended bill. W. J. Boardman and J. H. Webster.

3791. Lewis E. Rosenburg vs. Henry Harris. Answer. Caldwell & Sherwood.

Feb. 8.

3837. Ferdinand Pardulos vs. the Penn. Co. Answer. J. T. Brooks & Rush Taggart.

3819. Singer Manf. Co. vs. J. P. Miller et al. Answer and cross-petition of T. C. McDowell filed.

2362. Fanney Dunn vs. Commonwealth Life Ins. Co. Demurrer overruled and leave to reply.

3593. Malinda B. Gates vs. Amandor Gates. Demurrer to answer sustained.

2922. A. J. Nillis vs. Samuel Bachtel. Overruled.

3201. First National Bank, Galion, vs. W. C. Neal et al. Motion for new trial overruled. Judgment for deft. for costs.

2871. Phoenix Mutual Life Ins. Co. vs. Ira Lewis et al. Motion for new trial overruled. Judgment on verdict for plaintiff for $5,957.20.

3535. Samuel Turrell vs. A. P. Buell, exr. Motion to strike motion from files overruled. Plff. motion withdraw. Leave given deft. to file amended answer upon payment of costs.

3321. Singer Manf. Co. vs. J. W. Purviance et al. Hearing upon demurrer to answer and taken under advisement.

Feb. 10.

3382. Richard B. Johnson vs. The Lycoming Fire Ins. Co. Motion for a new trial. Pennewell & Lamson.

3841. H. O. Moss vs. Arizona & New Mexico Ex. Co. et al. Bill. Wm. B. Sanders.

32. Jacob Riegel & Co. vs. Shepherd & Bostwick. Petition for review. Hutchins & Campbell.

Feby. 11.

3819. Singer Manf. Co. vs. J. P. Miller et al. Answer and cross-petition of Joseph Sherly. Also answer of W. K. Miller, guard.

3822. E. P. Needham & Co. vs. J. W. Caldwell et al. Leave given plff. to amend petition.

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3819. The Singer Manf. Co. vs. Isaiah P. Miller et al. Leave given defts. to file answers and cross-petition instanter.

Feby. 12.

3896. Benjamin Hazaman vs. Geo. A. Bemes et al. Judgment pro. confesso.

Feby. 13.

3831. Rachael C. Connell vs. Robert N. Downey et al. Motion to make petition mare definite and certain. Green & Marvin and H. & C. C. McKinney.

3840. The United States vs. The Cleveland, Mt. Vernon and Del. R. R. Co. Money enly. John C. Lee.

3841. H. O. Moss vs. The Arizona and N. Mex. Ex. Co. Answer. S. Burke.

U. S. DISTRICT COURT N. D. OF OHIO.

Feby. 11.

1585. The United States vs. Geo. W. Lyman et al. Petition.

Feby. 12.

1563. Geo. W. Canfield vs. The 1st National Bank of Garrettsville. Answer- Estep & Squire.

1558. Same vs. Same. Same.

1586. Joseph D. Horton et al., assignees, etc. vs. The 1st National Bank of Ravenna. Petition. J. D. Horton, C. A. Reed.

1523. Perry Prentiss, assignee, vs. H. C. Myers et al. Reply. Prentiss & Vorce.

Bankruptcy.

Feby. 7.

2039. In re. George Kunz. Petion for discharge. Hearing February 26.

1593. In re- George R. Cunningham. Discharged.

Feby. 8.

1644. In re. Lyman T. Soule. Discharged.

1828. In re. John M. Faber. Same.

1871. In re. John H. Benson. Same.

2025. In re. Lewis S. Davis. Petition for discharge. Hearing February 24.

1888. In re. Thomas A. Thomas. Petition for discharge. Hearing February 26.

Feby. 11.

1661. In re. Taylor Clay. Discharged.

1962. In re. Wm. A. Smith. Discharged.

Feby. 12.

1969. In re. D. L. Davis. Petition for discharge. Hearing Feby. 26.

COURT OF COMMON PLEAS.

Actions Commenced.

14569. Andrew Platt vs, Chas. E. Reader et al. To foreclose mortgage and for equitable relief. J. B. Buxton.

14570. Ann H. Jackson vs. Chas O. Roberts, guard. etc. For order vesting plff. with rights etc. of feme sole and to mortgage or convey real estate. W. M. Lottridge,

14571. L. J. Talbot vs. James Thorpe. Equitable relief. Emery & Carr.

14572. Thos. Quayle et al. vs. Geo. Angel et al. To subject land. A. T. Brewer.

14573. A. B. Ruggles. admr. of the estate of Philo S. Ruggles, vs. J. F. Gallagher et al. Money and to subjects land. Tyler & Dennison.

14574. John W. Tyler vs. E. W. Towner et al. To subject lands. P. P.

Motions and Demurrers Filed.

Feb. 6.

2274. Marshall vs. Robison et al. Motion by plff. for a new trial.

2275. *H*orrigan et al. vs. City of Cleveland. Motion by deft. for a new trial.

2276. Wilson vs. *H*iggins. Motion to require plff. to separately state and number causes of action in his amended petition.

2277. Droz vs. Roemer et al. Motion by defts. Ferbert Gehring and Deobald, exrs. etc., to strike from the files the answer of the defts. Roemer to their cross-petition.

2278. Reichard vs. Wagner et al. Motion by deft. Geo. E. Wagner to make petition more definite and certain.

2279. Same vs. same. Demurrer by deft. Mrs. Geo. E. Wagner to the petition.

Feb. 7.

2280. Bebout vs. Smith. Motion by deft. to strike out from amended petition and to strike case from docket.

2281. Witkowsky vs. *H*umphrey et al. Motion by defts. for a new trial.

2282. Rock vs. Stoneman. Motion by plff. for a new trial.

2283. Burritt vs. Jones. Demurrer to the answer.

2284. *H*offman vs. Fay et al. Motion to require plff. to separately state and number causes of action, and to make petition more definite and certain.

2285. Ruple vs. Schantz et al. Motion by plff. to set aside appraisal, and for a reappraisal.

Feb. 8.

2286. Canfield vs. Thorp et al. Motion by deft. for new trial.

2287. State of Ohio on behalf of Ann Parker vs. McGinnis et al. Demurrer by plff. to 1st and 2d defenses of answer of deft. Pat McGinnis.

2288. Norton vs. Gall et al. Motion by defts. to require plff. to separately state and number causes of action.

2289. Zoeter vs. Lamson. Demurrer by plff. to the answer and cross-petition of deft.

2290. Barnum vs. Kramer. Demurrer by plff. to the 2d and 3d defenses of answer.

2291. Kirkpatrick vs. Noakes et al., trustee etc. Demurrer by defts. to the petition.

2292. Myers vs. Shearer et al. Motion by deft. to strike out 2d and 3d causes of action as irrelevant etc.

2293. Schoeneman vs. Montpelier. Demurrer to the petition.

2294. Morgan vs. same. Same.

2295. Law vs. Newcombe et al. Motion by deft. G. W. Barnes for a new trial.

Feb. 10.

2296. Ballou vs. Farnsworth et al. Motion by deft. to dismiss for want of petition.

2297. Smyth vs. Quigley et al. Motion by plff. for confirmation of assignment of dower and to apportion costs.

Feb. 11.

2298. Ruple vs. Schwantz et al. Motion by defts. A., M. and A. Schwantz for order for new appraisement etc.

2299. *H*adley vs. Kingsborough. Motion to require plff. to give security for costs.

2300. Droz vs. Roemer et al. Motion by deft., Cuyahoga Lodge No. 2, I. O. O. F., to strike the answer of the defts. Roemer to its cross-petition from the files.

2301. *H*erenden Furniture Co. vs. Euclid Ave. Opera *H*ouse et al. Motion by D. Graham for leave to file an answer herein.

Feb. 12.

2302. Magrory vs. Corkill. Motion by deft. to quash summons.

2303. Richmond vs. Foster, assignee etc. Motion by plff. for a new trial.

2304. Newman vs. Singer Man'g. Co. Motion by deft., S. M. Co., to make amended petition more definite and certain.

2305 Same vs same. Demurrer by defts Dawley and Kingsley to the answer.

2306 Crawford et al vs Penn Co. Demurrer by plff to 2d defense of answer.

2307 Cook vs Bathwell et al. Motion by plff for order on receivor to take possession of property put in his hands by order of court, or show cause why he should not be removed.

2308 Rogers vs *H*ughes et al. Demurrer by plff, Jacob Streibinger, to cross-petition of deft.

Motions and Demurrers Decided.

1768 Mayer vs Small et al and garns. Stricken off.

2038 *H*offman vs *H*offman et al. Granted. To give bail in ten days.

2120 McLaughlin et al, exrs, vs King et al. Sustained.

2124 Gibbons vs Byrider et al. Overruled.

2136 Same vs same. Same.

2138 *H*eil et al vs Wolf et al. Sustained.

2159 *H*offman vs Fitzgerald et al. Overruled. Injunction granted. Bond $500.

2164 Ketchem vs Manning et al. Granted.

2190 Same vs same. Same.

2169 Levine vs Seymour. Overruled.

2174 McIlrath vs Clark. Granted.

2195 Bemis vs Nicola et al. Overruled.

2196 Chamberlain vs Wilson S M Co. Overruled.

2197 Same vs same. Same.

2202 Rabaut vs Willson. Sustained.

2224 Bell vs Tiedeman. Overruled.

2236 Tyler vs Brown. Sustained.

2247 Kirschner vs Rheinheimer et al. Sustained.

2249 Chamberlain vs Wilson S M Co. Overruled.

2104 Rogers vs *H*ughes. Granted.

2076 *H*erenden Furniture Co vs Euclid Avenue Opera *H*ouse. Report confirmed.

Feb. 13.

2256. Maurer vs Lowe et al. Granted by consent.

LAW BOOK FOR SALE.

COOLEY ON TORTS. Just issued. $6.50. Apply at this office.

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The Cleveland Law Reporter.

VOL. 2. CLEVELAND, FEBRUARY 22, 1879. NO. 8.

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J. G. POMERENE,

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THE UNITED STATES DISTRICT ATTORNEY, by Gen. Ed. S. Meyer, Assistant, on Wednesday instituted suit in the U. S. Circuit Court in this city, on behalf of the United States against the Cleveland, Columbus, Cincinnati & Indianapolis Railway Co., for the sum of $68,588.74, being amount of Revenue tax due from the Bellefontaine Railway Co. By the consolidation of latter road with the C., C., C. & I. Ry. Co., the petition alleges that the last named Company is liable for the tax.

WE have two copies of "Cooly on Torts." Will sell one of them.

THE index to Vol. 1 will be published next week, and delivered with the next issue of this paper.

THE assignment of cases for March Term will be published on Wednesday of next week. It will be the only assignment for the term. On the 17th of March the Common Pleas Judges will leave the city to hold District Court.

THE HON. JOHN BAXTER, Circuit Judge, and the Hon. Martin Welker will commence calling the chancery docket the 3d day of March under the assignment made by the Clerk for the January Term. The first and second weeks of March will be devoted to chancery business. On March 3d Judge Baxter will take up the error and appeal docket.

A BILL has been introduced into the Legislature by Mr. Foster of Cuyahoga to establish a municipal court in cities of the first class. It is now in the hands of a committee, and, with amendments, will be reported back to the House in a few days for its action. At a meeting of the Bar of this county August 2d, 1878, in this city, a committee was appointed to draft "a suitable Bill to remedy the evils now existing in the administration of justice by Justices of the Peace." We presume Mr. Foster's Bill is the work of that committee; but a measure of the importance of the Bill in question should not be carried into a law without the support of at least a majority of the Bar in the cities in which the law is to operate. Let a meeting of the Bar in this county be called to inquire and determine whether the Foster Bill should become a law.

CUYAHOGA COMMON PLEAS.

MAY TERM, 1878.

REBECCA DALTON VS. WILLIAM BARCHAND.

Breach of Marriage Contract.

HAMILTON, J.:

This is an action brought for a breach of promise of marriage. The plaintiff alleges that at the date of the contract she was a single woman and the defendant a single man; that the defendant to induce her to enter into the contract represented that he had a large farm, well stocked, and that he was willing and able to provide her with certain means of support, and that as a condition precedent and as part of his contract he would give her, prior to the marriage, $500 in cash, and $500 in a note secured by a mortgage, and would then marry her within a reasonable time. She avers that he has not done any of these things, and lays her damages at $10,000. A motion is made to separately state and number the causes of action. We think there is but one cause of action,—a breach of the marriage contract,—contained in the petition, and the motion is overruled.

W. S. KERRUISH for plaintiff.

NEFF & NEFF for defendant.

A. TEACHOUT VS. THE CITY OF CLEVELAND.

Lien of Attested Account Filed with City—Who should be made Parties, etc.

HAMILTON, J.:

The plaintiffs aver the making of a contract between one A. J. Piper and the City of Cleveland for the building of certain hospital buildings in this city; that they furnished the contractor, A. J. Piper, with certain material for the purpose of building these hospital buildings; that he failed to pay them, and they filed an attested account with the city as the owner of the hospital building; that the city in due time gave the contractor a copy of the attested account; that the contractor failed to notify them or the city that he contested the account, and that it has not been paid, either

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by the contractor or by the city. The plaintiffs therefore say that the city is liable, and it having refused to pay them the amount of this contested account they bring this action.

The defendant, by way of answer, in its first defense, says that it admits the making of the contract with A. J. Piper, the contractor, and that it denies everything else. For a second defense it says that the amount due the plaintiffs has been fully paid by the contractor; and for a third defense says that the material furnished by Teachout & Co., the plaintiffs, was furnished for other buildings than the hospital building and did not go into the construction of these buildings at all; and says further there are several parties who have filed mechanic's liens—that is, attested accounts—with the city, and sets out what they are; and further states that all of the amount that was due Piper had been paid before the filing of this attested account of the plaintiffs with the exception of one hundred and forty-nine dollars and some cents; and therefore asks that if any judgment is to be rendered against the city that an account be taken of all these different accounts that have thus been filed by all of the parties, and that the amount be prorated among them. A motion is made that the averment contained in the answer that these materials were furnished for other buildings than the hospital buildings be stricken out. It is claimed in behalf of the plaintiffs that the city having failed to pay under the state of facts related in the petition, to-wit: an attested account having been filed by the plaintiffs and no denial of it having been made by the contractor, that he is to be considered, by the express language of the statute, to have consented thereto, and that the amount of it cannot be questioned; that it is not therefore in the power of the city at this time to make a defense for the contractor; that it is of no sort of consequence to the city to whom it pays these funds, and cannot deny that the material was furnished for the purpose averred.

It is further asked that the answer be made more definite and certain by setting out what proceedings have been had in regard to them.

As to the point whether the city can make the defense that the materials were not furnished for this building, I am inclined to the opinion that it became necessary for these plaintiffs to aver that these materials were thus furnished—that it was a material averment in the petition, of which the plaintiffs would have to make proof upon the trial of the case; and that any party they seek to make liable upon that state of facts, has a right to come in and deny that it is true. But however that may be, I think under the state of the pleadings here, that we cannot proceed to determine the controversy between the parties in this case without the presence of these other parties that are said to have filed attested accounts. This is a fund in the hands of the city, and all these parties are given a lien upon it by the express language of the statute, but they are entitled to to be paid *pro rata* out of that fund. The order therefore will be that the defendant bring in these other parties who have filed attested accounts, and for the present this motion will be passed until the coming in of those parties.

Caldwell & Sherwood for plaintiff.

Heisley & Weh for defendant.

The Lessees of The Public Works vs. The City of Cleveland.

How Action to be Brought for Injury to Canal—When the Lessees May Bring, etc.

Hamilton, J.:

Plaintiffs say in their petition that they had leased the Ohio Canal, from Cleveland to the Ohio river; that they are in the use and occupation of it and so have been since the year 1861; that they rented it for a period of ten years; that the time of their lease has been extended for another ten years, and that they have, for all this time, been in the use and occupation of this property. They say that the City of Cleveland is a municipal corporation under the laws of this State, and that it, in the year 1870, caused certain drains to be made in a portion of the territory of said city, and describing it in the petition between certain points; and that by reason of those drains dirt and filth have accumulated in the canal—washed in by means of the defective construction of the drains themselves and the imperfect manner in which they have been maintained by the city; and that a vast accumulation of material of that kind has occurred from time to time during these years, and they had been compelled to excavate the canal at great expense to themselves; that it has retarded the navigation of the canal; that it has interfered with their business as such lessees, all of which to their damage in the sum of three thousand dollars.

To this petition a demurrer is interposed by the City, and one or two points are taken which, perhaps, are unnecessary to notice until we come to the proposition in which it is asserted that there is a statute in this State by which it is required that in the case of damage to canals or public improvements, whether the canals are owned by the State or owned by incorporated companies, an action for an injury to the canal shall be commenced and maintained in the name of the State of Ohio, and provides that the proceeds of whatever judgment may be rendered shall be paid to the collector nearest the spot where the injury occurs; for it is said the statute having made it mandatory to sue in that name, the remedy being given in the name of the State, these lessees have no right whatever to commence this action in their own name.

It might possibly be argued with considerable force that although the statute prescribes that any party who thus obstructs the canal shall be liable to be sued in the name of the State of Ohio, the statute having been passed prior to the code, the code itself changes the rule. It may be argued perhaps with some force, that by the act by which these lessees came into possession of this property, they have the same rights that the State of Ohio has by the enactment itself; yet the statute seems specific upon that point, and I am referred to a case that was passed upon substantially between the same parties and perhaps under a like state of facts at the September term of this Court, 1877, in which a demurrer to the petition was upheld. I therefore treat it as having been passed upon and adjudicated that the action should be commenced in the name of the State for an injury to the canal. But on referring to that petition, it seems to me it is not as broad as the present petition. In this petition there is not only an allegation of an injury to the canal but the allegation of an injury to the business of the lessees.

By looking at the statute it will be seen that for any injury to the canal, the remedy is by an action in the name of the State of Ohio. But suppose as incident to that injury, or as outside of it, express damage has resulted to somebody else as a consequence of the injury itself; that an obstruction is placed in the canal and a man navigating the canal is injured by the obstruction—now the fact that in an injury to the canal itself the remedy should be by an action in the name of the State, does not render it necessary that all cases of resultant injury, growing out of such obstruction should be commenced in the name of the State; and in this case there is a

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general averment that the lessees were injured in their business, that their business was retarded and broken up in a measure. That is not an injury to the canal itself, but an independent transaction, and for that they have a right to maintain an action.

The demurrer being general, going to the whole cause of action, we think should be overruled.

GRANNIS AND BURTON for plaintiff.
HEISLEY & WEH for defendant.

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 25, 1879.

THOMAS K. BEST VS. FRANCIS GOHLSON.

Waiver of Homestead—Must Appear in the Acknowledgment of the Deed.

Where the certificate of acknowledgment of a deed does not include the words of the statute, nor any equivalent words or waiver of the homestead right, the statute is inoperative, and the deed should not be construed as releasing or waiving the homestead right.

So, where a trust deed, executed by the husband and wife, contained in the body of the deed a waiver as to both, but in the certificate of acknowledgment a waiver as to the wife only, *held*, that the homestead right of the husband was not affected and did not pass by the deed.

Homestead is a right secured to both the husband and wife by positive enactment, and of which they cannot be dispossessed except by their voluntary action in the mode provided by statute, and courts have no rightful authority by mere construction to aid the defective execution of a power given or created exclusively by statute, nor to dispense with those formalities which the Legislature has seen fit to provide to secure its due execution.—[ED. LEGAL NEWS.

SCOTT, J.—This action was forcible detainer; was originally commenced before a Justice of the Peace, and from the judgment rendered in that court against defendant, an appeal was taken to the Circuit Court, where, upon a trial of the cause before the court without the intervention of a jury, defendant was found not guilty, and the case is to be heard in this court on plaintiff's appeal.

That title to the premises in controversy, which plaintiff insists is the paramount title, he obtained under a trust deed executed by defendant, in the execution of which his wife joined with him. On default being made in the payment of the indebtedness secured, the trustee, on the application of the holder, advertised the property and sold it, under the power contained in the trust deed, at which sale plaintiff became the purchaser and received a trustee's deed for the property. After demand made upon defendant this suit was brought to recover possession of the premises.

By one clause in the body of the trust deed the grantors waived and released all right and benefit of homestead in the premises under the homestead act, which was signed by defendant and his wife. The certificate of acknowledgment as to the husband is in the usual form but makes no mention of the "release and waiver of the right of homestead." As to the wife the certificate is fuller, and states that after being made acquainted with the contents of the deed, among other things she relinquished "all her right and advantages under and by virtue of all laws of said State relating to the Exemption of Homestead."

The defense is the premises are, and had been long before and since the execution of the trust deed, the homestead of defendant on which he has and does reside with his family, and that there had been no valid release of his homestead rights therein, in accordance with the provisions of the statute. The trust deed under which, as we have seen, plaintiff derives whatever title he has to the premises, was made in 1873, and should have been acknowledged in the manner provided in the act entitled, "conveyances," in force July 1st, 1872. That act provides "no deed or other instrument shall be construed as releasing or waiving the right of homestead, unless the same shall contain a clause expressly releasing or waiving such right, and in such case the certificate of acknowledgment shall contain a clause substantially as follows: 'Including the release or waiver of the right of homestead,' or other words which shall expressly show that the parties executing the deed or other instrument intended to release such right."

The certificate of acknowledgment in this case as to the husband, does not include the words of the statute nor any equivalent words, that indicate he expressly intended to release or waive all homestead rights in the premises. Without such words in the certificate of acknowledgment, the statute is imperative, and no deed or other instrument shall be construed as releasing or waiving such right.

The reference made to the 4th section of the Homestead Act of 1872, does not aid plaintiff's view of the law. That section, and as the same is re-enacted in 1873, is simply a transcript of the acts of 1851, and 1857, on the same subject. The provision is, the release or waiver of the homestead, to be valid must not only be in writing and subscribed by the parties, but must be "acknowledged in the same manner as conveyances of real estate are required to be acknowledged." Construing the two sections together, as the rule is we shall do, there is no necessary conflict between the 4th section of the Homestead Act, and the 27th section of the Conveyance Act cited, and both sections may stand. The manner in which conveyances of real estate are required to be acknowledged is prescribed in the "Conveyance Act," and on turning to the 27th section of that act, it will be seen it is absolutely imperative that any release or waiver of homestead to be valid, in such cases the certificate of acknowledgment must contain certain words which expressly show the parties executing the deed or other instrument intended to release or waive such right. No subtle construction ought to be adopted to defeat the policy of the law to preserve a homestead for the benefit of the failing debtor and his family. Courts have no rightful authority by mere construction to aid the defective execution of a power given or created exclusively by statute, nor to dispense with those formalities which the Legislature has seen fit to provide to secure its due execution. Homestead is a right secured to both husband and wife, by positive enactment and of which they cannot be dispossessed except by their voluntary action in the mode provided by statute. It is protected by the strongest guaranties of the law from forced sales or execution or otherwise and the policy of the law as often declared by this Court is, it shall be preserved for the benefit of the debtor and his family. The exemption is absolute, except the premises are alienated in the mode prescribed in the statute; and as we have said no release of homestead is valid unless by the voluntary action of the parties intended to be benefited in conformity to the law that confers power to alienate it.

The point is made that defendant has not shown by proof such facts as entitle him to a homestead on the premises, because he has not negatived the words of the statute—the "debt or liability incurred" was not "for the purchase or improvement thereof." On this branch of the case, defendant testifies that in 1866, which was before the making of the trust deed, he was the head of a family consisting of a wife and minor children, and that he resided then and ever since with them on these premises, and now claims the same as his homestead. It is true he does not state the indebted-

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ness secured by the trust deed was not incurred for the purchase or improvement of the property now claimed as a homestead, but plaintiff in rebuttal proved that a small portion of the money mentioned in the notes secured, was used to take up a previous encumbrance on the property and that the "balance of the money was by defendant's directions paid to his son."

This evidence would fully warrant the court in finding, as we must understand it did, that the indebtedness secured by the trust deed was not incurred either for the purchase or improvement of the homestead property..

The finding of the court was warranted by the law and the evidence, and the judgment must be affirmed, which is done.

Judgment affirmed.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending February 20, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Feb. 14.

Thomas Kenny and wife to Charles A. Oatis. $700.

B. L. Pennington and wife to Robert Harlow. $1,000.

Jane Hews to Jane Zoeter. $400.

James Gates and wife to The Society for Savings. $1,000.

O. P. Newcombe and wife to D. K. Clint $2,000.

Ella M. and H. W. White to Thomas H. White. $5,500.

Ida A. and Henry W. White to same. $5,500.

Feb. 15.

Frederick Goldsmith and wife to Nathaniel Newburgh. $1.

Andrew Platt and wife to Moses Warren. $200.

William Thomas to I. J. Dewzel. $200.

C. G. Bolster to James M. Stewart. $200.

John Rock and wife to S. V. Harkness. $12,500.

Mary A. Tamblyn to Hiram Hulburd. $2,000.

Robert E. Eddy and wife to Daniel McCune. $1,050.

Feb. 17.

Julius Wajahn to Caroline Moenlk. $500.

John N. Heucke and wife to Nicholas Oehlrick, exr. $585.

William F. Speilh and wife to John Hay. $6,000.

Joseph Malejak and wife to Clara Zimmerman. $500.

John Rock and wife to S. V. Harkness. $12,500.

Eliza Fish and husband to Sarah E. Haines. $400.

Feb. 18.

James McCraskey and wife to Elizabeth McCraskey. Six hundred dollars.

Stevenson Burke to Kate A. Miller. Thirteen thousand five hundred dollars.

Lydia French to The Society for Savings. Six hundred dollars.

Ann Tournier and husband to D. W. Loud. One hundred and sixty-nine dollars.

W. C. Northrop to George E. Bowman. One hundred and fifty dollars.

Bowler, Maher & Brayton to Robert Larnder. Five thousand dollars.

E. C. Dignon to James M. Curtiss.

Feb. 19.

*H*enry Gerould to Thomas J. Clapp. One thousand dollars.

William Clark and wife to Emanuel Ball. Two hundred and fifty dollars.

John A. Bishop and wife to Catharine Spiess. Eight hundred dollars.

John Schickler and wife to Adam Kuhn. One thousand dollars.

James Kenevan to Edward Maloney. Two thousand seven hundred dollars.

Charlotte *H*unter and Elizabeth Mather to Mary Mather. One thousand two hundred and fifty dollars.

*F*eb. 20.

Peter Rodebender and wife to N *H* Dickerman. Two thousand dollars.

Michael Murphy to Isaac Kidd. One thousand dollars.

Gottlieb Kraft and wife to Betsey Southam.

George T Dowling and wife to David K Klint. *F*ive thousand dollars.

George *H* and Addie L Walker to Samuel *H*opkins. Three hundred and ninety dollars.

John D Briggs to J *H* Webster. Two thousand four hundred dollars.

CHATTEL MORTGAGES.

Feb. 14.

J. F. Tainter to H. W. Boardman and Charles E. Bingham. $200.

Hhilip Farley to Charles E. Bingham. $680.

George Newberry et al to C. R. Heller. $50.

D. W. Johns et al to C. W. Kraus. $2,100.

Thomas M. Hammond to Jane A. Hammond. $6,000.

M. C. Cox to H. R. Leonard. $55.

Feb. 15.

Forest City Paper Box Company to William V. Haynes. $100.

John C. Lester to Koblitz Bros. $11.75.

A. R. Trattner to Martin Haas. $42.

Louisa White to William D. Butler. $49.50.

John H. Rorke to E. B. Bauder. $42.

Feb. 17.

Nellie Fairbrothers to H. Hart. $187.

Samuel Lord to William Bowler. $3,000.

C. R. Stuart & Co. to Mary E. Stuart. $310.

William B. Gilbert to Merts & Riddle. $250.

Balthasar Stumpp to J. L. H. Sommer. $100.

L. D. Middaugh to B. L. Pennington. $140.

Joseph Salzer to Valentine Kerner. $100.

Feb. 18.

W. P. Williams to J. G. Ruggles. Three thousand six hundred and twenty-seven dollars.

Hugh Lyle to F. H. Heuke. Four thousand dollars.

O. B. Burrows to Hickox & Co. One thousand nine hundred dollars.

James Manning to E. D. Stark Two hundred dollars.

William McHale to Michael Carroll. Five hundred dollars.

Charles H. Jewell and wife to William D. Butler. One hundred and thirty-eight dollars.

Feb. 19.

Richard W. *H*enderson to G. E. *H*errick. One hundred and twenty-three dollars.

O. F. Gibbs to L. D. Mix. *F*ifty dollars.

William Duge to Charles Kroft. One hundred and thirty dollars.

L. Sheiss to A. W. Bailey. One hundred and fifty dollars.

Anna P. Schutt to John Cink. One thousand five hundred and ninety dollars.

L J Wheeler to G W Smith. One hundred and seventy dollars.

*F*eb. 20.

James Summers to J Krause. *F*ifty-three dollars.

Albert T Townsend to Benton, Myers & Co. One thousand two hundred dollars.

A W Jackson to Vincent, Sturm & Co. One thousand three hundred and seventy-one dollars.

Captain W B Gayles to Maggie Moynahan. Three hundred and ninety-one dollars.

DEEDS.

Feb. 11.

J. B. McConnell et al. by Geo. W. Mason, Sp. Mas. Com. to Sun Ins. Co. One thousand seven hundred dollars.

Feb. 12.

Levi F. Bauder, Co. Auditor, to John Rock. Fifty-seven dollars and twenty-eight cents.

Dorothea Beard and husband to Gottfried Baesler. Three hundred and fifty dollars.

Joseph Hartmueller and wife to Christian Hausers. Nine hundred dollars.

Mary A. Gill et al. to Stella S. Hapgood. Six hundred and three dollars.

Major Smith and wife to Calvary Morris. Thirty-three dollars and sixty-six cents.

Celia A. Gates et al. to Jas. H. Gates. Two thousand six hundred and sixty dollars.

John Green to Jane Donohue Keller. One hundred dollars.

Cora A. Halloway to Hetty A. C. Bennett. Two thousand dollars.

Elizabeth Neeker to Anna Zeller. Forty-six dollars.

Chas. McColm to T. J. Talbot. Four hundred and thirty dollars.

Geo. W. Shepherd and wife to Ebenezer Demond. Four dollars.

Elizabeth Shafer etc. to Anna Zeller. Two hundred and eighty dollars and ninety-six cents.

Balthasar Scheurer and wife to Catharine Scheurer. Nine hundred and fifty dollars.

Seth W. Sheldon, trustee, to Nelson Holland. Two thousand two hundred and thirteen dollars.

Margaret Harrison et al. by E. H. Eggleston Mas. Com. to Barzilla A. Robenette. One hundred and sixty dollars.

Feb. 13.

Levi F Bauder, County Auditor, to Wm Edwards. *F*ifteen dollars and sixty-nine cents.

*F*reeman *O* Bradford and wife to *H*enry Romp. One thousand dollars.

John L Denham and wife to Emily G Case. Three thousand one hundred dollars.

N P Glazier to Anna Kotasek. *F*our hundred dollars.

James *H*all and wife to Reuben *H*all. Two thousand seven hundred and fifty dollars.

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Rosanna Murry to John Aspen. One hundred and fifty dollars.

B L Pennington and wife to Wm Norris and wife. Eight hundred dollars.

Thos H White and wife to Ida A White. Seven thousand five hundred dollars.

Charles B Bernard Mas Com to Mary Pritchard. Three thousand dollars.

Feb. 14.

Charles W. Bishop to Eliza W. Bishop. $10.

Sarah B. Chipman and husband to same. $2.

Elizabeth Dawes and husband to Anna M. Mikling. $1.

Martha Fry and husband to Louisa Schenck. $250.

E. Hessenmueller and wife to same. $5,000.

Thomas Larter and wife to Jane Hews. $738.

L. J. Talbot and wife to Hannah Beyer. Five hundred dollars.

L. M. Tatum and wife to Anna M. Meckling. Thirteen dollars.

Wachter Am. Erie Printing Co. to August Thieme. Ten thousand dollars.

Feb. 15.

Herod Green and wife to Jane Burns. Eight hundred dollars.

Daniel McCue and wife to R. E. Eddy. Four thousand dollars.

Same to same. Five hundred dollars.

Flora Sutherland to Mary Jane Sutherland. Two thousand three hundred and sixty dollars.

T. H. and R. C. White to Terrence McKeon. Six hundred and forty-eight dollars.

Feb. 17.

Josiah Hale to Mary M. Peck. Two hundred dollars.

W. B. and Mary M. Peck to James H. Peck. Two hundred dollars.

Frederick Mull and James Walker to James H. Peck. One thousand one hundred and fifty dollars.

Charles Arnold and wife to George Halsted. Eighty dollars.

Levi F. Bauder, County Auditor, to J. Mandlebaum. One hundred and thirty-two dollars.

Same to same. One hundred and nineteen dollars.

Albert Bates and wife to John Hewett. Nine hundred and fifty dollars.

Henry C. Cook to George Johnson. One dollar.

William Ferris to Marcia M. Rogers. Three thousand five hundred dollars.

George Leick and wife to John T. Eaton. One thousand two hundred and sixty dollars.

John W. Sargeant by Felix Nicola Mas Com to William S. Pierson. Six thousand five hundred dollars.

Samuel Foljambe to Charles and Theodore Foljambe. Six thousand dollars.

Jacob Hoffman and wife to Frederick Danert. Seven hundred and fifty dollars.

John S. Healy to Thomas C. Garfield. One thousand six hundred and twenty-five dollars.

O. J. Hodge to Laura W. Hilliard. Two thousand dollars.

J. E. Ingersoll and wife to A. S. Parmalee and J. E. Ruprecht. Nineteen thousand five hundred dollars.

F. J. Lambert and wife to Eliza Fish. Six hundred dollars.

John Mass and wife to Mathias Salad and wife. Five hundred and fifty dollars.

L. M. Southern and wife to Patrick Kelley. Seven hundred and fifty dollars.

Robert R. Rhodes et al to John N. Henckc. One thousand four hundred dollars.

Ambrose Dunham and wife to Carl Schreiber. Four thousand five hundred dollars.

Solon F. Knapp to John C. Schneider. Five thousand dollars.

L. J. Talbot and wife to Sarah M. Hayden. One thousand nine hundred dollars.

James F. Kaighin by Felix Nicola Mas Com to Citizens' Savings and Loan Ass'n. One hundred and twenty dollars.

Amanda M. Patterson et al by Felix Nicola Mas Com to Elijah Sanford. Four thousand six hundred and seven dollars.

Loren B. Silver by same to Citizens' Savings and Loan Ass'n. Four thousand dollars.

Henry C. White Mas Com to Frank L. Wait. Eight hundred dollars.

Feb. 18.

James M. Hoyt and wife to John and Ellen Dalton. Eight hundred dollars.

William C. Schofield to Cecelia Brush. Seven hundred and thirty-one dollars.

Honora A. Callaghan to Honora Callaghan. Five dollars.

Harriet A. Herr and husband to John Herr. Two thousand five hundred dollars.

R. R. Rhodes and wife to Mary Walch. Five hundred and sixty dollars.

Harriett A. Lamson et al to S. G. Parker. One thousand two hundred dollars.

Clark & Payne to Michael Morrison Sr. Seven hundred and twenty dollars.

F. L. Wait and wife to Sylvia Lamb. Eight hundred and eighty dollars.

Mary A. Ayers to Berton Stanfield. Five hundred dollars.

Harry D. Sizer to Horace A. Hutchins. Twenty thousand five hundred dollars.

Feb. 19.

Charles D. and Harriet J. Bishop to Charles G. Pickering. Four thousand dollars.

Carl and Hannah Beyer to L. J. Talbot. Five hundred dollars.

Mary A. Coates and husband to Ann Butler. Five hundred dollars.

John S. Miller and wife to William Clarke. Four hundred dollars.

William F. Hannaford to Olive Marble. Five hundred dollars.

William Norris and wife to B. L. Pennington. One thousand two hundred and fifty dollars.

J. C. Schenck et al to Theresia Huber. Eight hundred dollars.

S. S. Stone and wife to James Kenevan. Three thousand three hundred dollars.

William Van Noate and wife to Oliver Taylor. One thousand two hundred dollars.

Oliver Taylor and wife to Charlotte Van Noate. One thousand two hundred dollars.

Wilson M. Patterson, assignee of Joseph and Charles Marchand, to Henry J. Burrows. Ten thousand dollars.

Same to J. Howard Mansfield. Ten thousand dollars.

The trustees of the Tabernacle Baptist Church and Society to the trustees of the 1st German Congregation of M. E. Church of Cleveland. Six thousand five hundred dollars.

John M. Wilcox, Sheriff, to B. S. Wheeler. Two thousand one hundred and thirty-four dollars.

Annie M. Simpson to H. P. McIntosh. Four hundred dollars.

Feb. 20.

T. J. Quayle and wife to H. Southam. Three hundred dollars.

Betsy and Richard Beardsworth to W. T. F. Donald. One thousand seven hundred and fifty dollars.

John Jirousek to John Ledinsky and wife. Six hundred and fifty dollars.

J. H. Webster and wife to John D. Briggs. Four thousand six hundred dollars.

Vincent Calisbury, as guardian, etc, to Lydia Lawson. Sixty dollars.

Benjamin Lawson et al to Lydia Lawson. One dollar.

Judgments Rendered in the Court of Common Pleas for the Week ending February 20th, 1879, against the following Persons.

Feb. 14.

E P Cunningham. Two hundred and sixty-seven dollars and sixty cents.

Mary Yahraus. Six hundred and fifteen dollars and fifty-two cents.

Louis Schafer. One thousand three hundred and fifteen dollars and seventy-eight cents.

Feb. 15.

E Edgerton et al. Thirty dollars.

A Oehlhoff et al. Twenty dollars.

H Kramer. Five hundred and sixteen dollars and three cents.

City of Cleveland. One hundred dollars.

Feb. 17.

Emma E Decker et al. Thirty-four dollars and eighty cents.

John T Deweese et al. Four hundred and nineteen dollars.

H J Holbrook. Six hundred and twenty-two dollars and forty-four cents.

Christian F Boest. One thousand eight hundred and eighty-two dollars and seventy-two cents.

James Booth. Seven hundred and seventy-two dollars and seventy-four cents.

L Umbstaetter et al. Forty-four thousand and four hundred and ninety-six dollars and fifty-eight cents.

Feb. 19.

Edward Cleff. Five hundred and seventy-six dollars and ninety-one cents.

Arnold Fontein alias Fondein. One thousand six hundred and eighty-two dollars and ninety-five cents.

F X Sykora. Two hundred and sixty-five dollars and sixty-eight cents.

Caroline M Ingram et al. Nine hundred and fifty-one dollars and forty cents.

Feb. 20.

Antoni Spurny. Three hundred and seventy-five dollars and twenty cents.

H O Price et al. Two hundred and ten dollars.

S Hoffman. One hundred and fourteen dollars and ninety-six cents.

U. S. CIRCUIT COURT N. D. OF OHIO.

Feb. 14.

In 20 cases wherein Mary Jane Veasey et al is plaintiff and various parties defendants, the rule day for filing an amended answer was extended to Feb. 20.

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Charles M. Copp, of Cleveland, was admitted to practice as counselor at law and proctor in admiralty.

Feb. 15.

3420. George Dwight Jr. vs E. K. Chamberlain. Replication to amended answer. T. K. Bolton.

3546. The Domestic S. M. Co. vs James L. Smith. Same. Same.

3828. Herman Weiler vs Joseph Stoppel. Motion to strike amended bill from files. Wilson & Sykora.

3843. The Merchants' National Bank vs The Union Iron Works. Petition for money only. Baldwin & Ford.

Feb. 17.

3844. Floyd C. Shepherd vs Jas. H. Humason et al. Bill filed for appointment of receiver. Order appointing Rillman Bartholomew receiver. Hutchins & Campbell.

3845. Samuel Pennington et al vs Francis T. Woodford et al. Petition for money only.

Feb. 18.

Edward J. Fenn vs Phœnix Ins. Co. Verdict for plaintiff for $2,216.-47.

Feb. 19.

3846. The United States vs the C. C. C. & I. Ry. Co. Petition for money only. John C. Lee.

3794. Com. Nat. Bank of Cleveland vs John Crocker. Jury waived. Trial to court. Judgment for plaintiff as to right of property and for costs.

2528. Levinia Ball vs William Allen. Death of suggested plaintiff suit revived in the name of Cornelius Altman, admr.

3726. Same vs same. Same.

John T. Brothers of Lima, Ohio, this day admitted to practice.

U. S. DISTRICT COURT N. D. OF OHIO.

Feb. 13.

1587. The United States vs Ignatz L. Drucker et al. Petition. John C. Lee.

Feb. 14.

1720. T. W. Nally vs Schooner Southwest. Libel for supplies. Mitchell & Dissette.

1719. Same vs Schooner Scheuman. Same. Same.

1721. Alexander Inglis vs Schooner William Young. Same. Charles M. Copp.

1588. The United States vs Bernhard H. Wertheimer et al. Petition. John C. Lee.

1589. Same vs George Krauss et al. Same. Same.

Feb. 17.

1722. John Moyer vs Schooner William Young. Libel for supplies. H. D. Goulder.

1723. George Field vs Kate Richmond. Same.

1724. Ulysses Atwater vs Schooner William Young. Same. Hall Bros.

Feb. 20.

1648. George Presley et al vs the tug Peter Smith. Intervening answer of George Presley et al to the petition of Henry H. Hudleston against the proceedings of the sale of said tug. A. T. Brewer.

Bankruptcy.

Feb. 14.

1948. In re John A. Seaton. Discharged.

Feb. 15.

1601. In re Joseph P. Barker. Petition for discharge. Hearing March 17th.

1612. In re Henry Barts. Same. Same.

1857. In re W. J. Morrovy. Same. Same.

1943. In re Charles A. Raynolds. Same. Same.

1944. In re Charles Rawson. Same. Same.

1952. In re W. S. Sanford. Same. Same.

1992. In re Charles Easly. Same. Same.

2051. In re Samuel Cove. Same. Same.

1859. In re William R. Anderson. Same. Hearing March 18.

1946. In re John McGregor. Same. Same.

2000. In re Samuel S. Taylor. Same. Same.

2050. In re John Holland. Same. Same.

1766. In re George H. Pollock. Discharged.

1981. In re William C. Lautner. Same.

1892. In re Josiah Robbins. Same.

1948. In re John A. Seaton. Same.

Feb. 17.

1602. In re Martin L. Ballard. Discharged.

1643. In re Daniel Cobough. Same.

1705. In re Joseph Feasly. Petition for discharge. Hearing March 18th.

Feb. 18.

1899. In re William and Joseph Askins. Order confirming composition.

1725. In re J. H. Silverthorn. Discharged.

Feb. 19.

1454. In re William Finke. Discharged.

1717. In re Lewis Bros. Same.

1765. In re F. K. Shawhan. Petition for discharge. Hearing March 20th.

1818. In re William K. Foltz. Same. Same.

1956. In re V. T. Kingman. Same. Same.

1789. In re John O. Green. Same. Same.

Feb. 20.

2055. In re Edward Groose, Petition for discharge. Hearing March 6th.

1969. In re Joseph De Bow. Same.

1904. William D. Edwards. Discharged.

COURT OF COMMON PLEAS.

Actions Commenced.

Feb. 2.

14575. John W. Street vs. Richard C. Parsons et al. Money only. Street & Bentley.

14576. Sarah E. Haines vs. Eliza Jane Lambert et al. To subject land. G. H. Foster.

14577. Clemenz Stolz vs. Louise C. Boltz. Money, to foreclose mortgage, and for equitable relief. Hadden & Bacon.

Feb. 3.

14578. C. A. Krauss vs. L. Zimmerman. Appeal by deft. Judgment Jan. 22. Wilson & Sykora; Robison & White.

14579. Isaac M. Brown vs. H. A. Smith. Money only. Robison & White.

14580. James Conner et al. vs. James Graully, admr. etc. et al. To subject land, injunction and other relief. G. H. Barrett.

14581. Joseph Uher vs. J. H. Slawson et al. Money, to subject lands, and relief. Babcock and Nowak.

14582. Frank Kaftor vs. the City of Cleveland. Money only. Chas. F. Morgan.

14583. Wm. Branch vs. Woodruff Sleeping and Parlor Car Co. Appeal by deft. Judgment Jan. 16. H. H. Pappleton.

14584. Lucien Crawford vs. F. M. Mills. Appeal by deft. Judgment Jan. 6.

Feb. 4.

14585. Babcock, Hurd & Co., partners, etc. vs. Geo. W. Burket et al. Cognovit. John W. Heisley; Echo M. Heisley.

14586. Same vs. Same. Same. Same.

14587. Martin Knecht vs. Louis Knight. Money only. Kessler & Robison.

14588. Sigmund Mann et al. vs. Jacob McGlenen. Cognovit. Geo. M. Zeigler; Wm. B. Sanders.

14589. Wm. Ryan vs. Elizabeth McClusky et al. Equitable relief and sale of land. T. H. Graham.

14590. James Parker et al. vs. Elizabeth Hoosick et al. Money, to forelose mortgage and relief. Geo. H. Groot.

Feb 5.

14591. Samuel G. Baldwin vs. John Kneale et al. To subject lands. P. P.

14592. Levi Booth vs. H. A. Massey et al. Relief. Grannis & Griswold.

14593. In re application of and proceedings of W. S. C. Otis, to vacate a por-

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tion of J. H. Sargent's subdivision etc. To vacate allottment. E. P. Blikensderfer.

14594. A. W. Harmon vs. City of Cleveland. Appeal by deft. Judgment Jan. 18. Heisley, Weh & Wallace.

14595. H. D. Richmond vs. Thos. Graves admr. etc. Appeal by deft. Judgment Jan. 21.

Feb. 6.

14596. Geo. D. Brainard vs. Johanna Devine et al. Foreclosure and sale of land. P. Prentiss.

14597. John Kleinhenz vs. The St. Boniface Society. Money only. Gilbert, Johnson & Schwan.

14598. Liberty Lodge No. 3, A. O. G. vs. Geo. Young. Money and to subject land. W. C. Kerruish and F. K. Collins.

14599. L. B. Eager vs. Fanny Johnston. Appeal by deft. Judgment Jan. 16. Wm. Abbey; Marvin, Taylor & Laird.

14600. Geo. Buskirk vs. Herman Schwab. Appeal by deft. Judgment Jan. 9. Geo. Schindler; Frederick Beuhne.

Feb. 7.

14601. The Commercial National Bank vs. Robert Lowe et al. Replevin. W. J. Boardman.

14602. Amasa Stone vs. Theodore Voges et al. Money only. B. R. Beavis.

14603. Daniel Gay vs. Wm. Gay et al. To recover possession of land and for money. Chas. L. Fish, J. K. Hord, W. T. Bukner.

14604. Tabitha Dunn vs. Chas. F. Norton. Money only. W. S. Kerruish.

14605. L. B. Eager vs. John Allen et al. Appeal by deft. Judgment Jan. 27.

14606. Chas. Patterson vs. Geo. T. Pierce. Appeal by deft. Judgment Jan. 24. J. M. Stewart; R. A. Davidson.

14607. Tobina Falk et al. vs. The Grand Lodge of the North and Southwest of the American Jewish Order of Kesher Shel Barsel. Money only. W. C. McFarland.

14608. Wm. J. Crowell vs. Mary A. Leonard et al. Money and to subject lands. S. A. Schwab.

Feb. 8.

14609. T. K. Bolton vs. David Hoffman et al. Money only. Bolton & Terrell.

14610. Sarah L. Babcock vs. The Manhattan Life Ins. Co. Money only. Baldwin & Ford.

14611. Lawrence Reister vs. The Lake Shore Foundry. Money only. James Fitch.

14612. John De Veny vs. S. L. Thorpe. Money only. P. P.

14613. Samuel Brooker vs. Paulina Hartman. Money only. Arnold Green.

14614. W. W. Spier vs. J. & I. Lehman. Appeal by deft. Judgment Jan. 16. L. Van Scotten.

14615. Christian Sousler vs. John Dewar et al. Appeal by deft. Judgment Jan. 11. Street & Bentley.

14616. Benjamin Fontain vs. John Dewar et al. Same. Same.

14617. Jacob Free vs. C. G. Murphy et al. Judgment Jan. 15. Street & Bentley.

14618. Allen Armstrong exr. etc. of Heman Barnum, deceased, vs. J. F. Storey et al. Money and to subject lands. J. M. Coffenberry, E. P. Blickensderfer.

14619. Con. Sullivan vs. Geo. T. Pierce. Appeal by deft. Judgment Jan. 24. J. M. Stewart; Davidson and Baldwin.

14620. Horace W. Hubbard vs. J. K. Hord, admr. etc. of John Drum, deceased. Money only. Mix, Noble & White.

14621. Ede. Sawtelle vs. Edward R. Whiting et al. Money and to foreclose mortgage. Gilbert, Johnson & Schwan.

14622. John C. Heimberger vs. Court Pearl of the Rhine A. O. F. Money only. John T. Sullivan.

14623. W. W. Andrews vs. Henry Lester et al. Equitable relief. P. P., and P. H. Kaiser.

14624. The Willow Bank Coal Co. vs. Chas. L. Crawford et al. To foreclose mortgage and relief. Ranney & Ranneys; J. H. Webster, Ingersoll & Williamson. Wm. B. Sanders, Willey Sherman & Hoyt.

14625. Geo. W. Canfield vs. the City of Cleveland. Injunction and relief. Gage & Canfield, Robison & White.

14626. Chas. C. Baldwin vs. Elijah Worthington et al. To subject land. Baldwin & Ford.

14627. John H. Sargent et al. vs. Sebastian Sauer et al. To rescind contract, for account, sale of land, injunction and relief. J. S. Grannis.

Feb. 10.

14628. Edward Dudley vs. Ann Ward et al. Money and foreclosure. J. L. Athey.

14629. J. H. Peck vs. Joseph Chandler. Cognovit. J. A. Smith; F. H. Kelly.

14630. Henry Wick et al. vs. Chas. W. Ames. Cognovit. O. J. Campbell.

14631. Daniel D. Voorhies vs. Samuel S. Calhoun et al. Cognovit. Sith S. Wheeler; Frank N. Wilcox.

14632. The State of Ohio ex rel. Alice Kilbane. Bastardy. John T. Sullivan; Wm. Clark.

Feb. 12.

14633. Melchoir Hout vs. Frank Heier. Money only. Babcock & Nowak.

14634. Noah N. Spafford vs. John F. Shuttle et al. Money and sale of mortgaged premises. G. A. Hubbard.

Feb. 12.

14635. H. S. Adams vs Adam Greenlee et al. Appeal by defts. Judgment January 11. Eck M. Heisley; Ball & Raynolds.

14336. Tod, Wells & Co. vs B. W. Smith et al. Money only. Ball & Raynolds.

14637. Rebecca Schwanz vs William C. Lyons et al. Money and to subject lands. S. A. Schwab; P. P., S. A. Schwab.

14638. Frasier and Ransom vs J. T. Wilson. Appeal by deft. Judgment January 21.

14639. Richard Shean vs John Shean. Specific performance and other equitable relief. Adams & Rogers.

14640. Thomas Pelkington vs James Grant. Appeal by deft. Judgment January 13. Sanders.

Feb. 13.

14641. In re Trustees of the Tabernacle Church and Society vs John Bennett et al. To change name of incorporated society.

14642 Andrew Platt vs R. D. Harper et al. Money, to foreclose mortgage, and for equitable relief. J. B. Baxton.

14643 Same vs John Garland. Money and equitable relief. Same.

Feb. 14.

14644 Joseph H. Redett & Sons vs E. P. Cunningham. Cognovit. Foster, Hinsdale & Carpenter; I. K. Davis.

14645 V. C. Taylor, as assignee etc., vs Lucius W. Curtiss et al. Money and relief. George S. Kain; W. W. Andrews.

14646 Francis A. Bates et al vs J. M. Henderson as assignee etc. Relief and allowance of claim. Ranney & Ranneys.

14647 Lorenz Gleim vs Peter Provo. Money only. George A. Kolbe.

14648 Azariah Everett et al vs The Union Iron Works Co. Money only. J. H. Webster.

14649 Henry Micklish vs J. T. Harrison. Money only. R. A. Davidson.

14650 Mary Ann Munson vs William Fulton, guardian etc. To quiet title. Jackson & Pudney; Robison & White.

Feb. 15.

14651 Elisha Savage vs A. B. White et al. Money and sale of mortgaged lands. G. H. Hubbard.

14652 Norman C. Baldwin vs Frederick C. Pelton, late treasurer, etc. Money only. Baldwin and Ford.

14653 Dora A. Dahnert vs C. L. Russell et al. Equitable relief. Safford & Safford.

14654 H. Haines vs George Zaun. Money and to subject lands. H. J. Caldwell

14655 Charles Daus et al vs Robert Evans et al. Money and to subject lands. Gilbert, Johnson & Schwan.

14656 Silas C. Short vs Ransom Metcalf et al. Money and relief. E. P. Wilmot.

14657 Edward Stanley vs C. L. Russell et al. Money only. Mix, Noble & White.

14658 Lydia R. Chase et al vs The City of Cleveland. Money only. Same.

14659 Gottlieb Ulmer vs Martin Ulmer. Money only. S. Burke and William B. Sanders.

14660 Frank Seifert vs H. Kramer. Cognovit. Mix, Noble & White; C. F. Morgan.

14661 The Onondaga Iron Company vs The Union Iron Works Co. Money only. Baldwin & Ford.

Feb. 17.

14662 J. M. Nowak vs John T. Sullivan. Appeal by deft. Judgment February 1. W. A. Babcock; J. M. Stewart.

14663 Peter McDonough vs the C C C & I Railway Co. Money only. Foran & Williams.

14664 Jacob Greis vs J. W. Walkey et al. Foreclosure. John W. Heisley.

14665 L. A. Willson et al vs William Macy et al. In aid of execution and for equitable relief. Wilson & Sykora.

14666 Isaac Reynolds vs E. A. Stein. Appeal by deft. Judgment January 25th. Bolton & Terrell.

Feb. 18.

14667 Frank Parker vs George H. Class. Equitable relief. Mix, Noble & White.

14668 The 2d National Bank of Cleveland vs Robert Marbach et al. Money, sale of lands and relief. B. R. Beavis.

14669 Caroline Mayer vs Jacob Mayer et al. For assignment of dower. Jackson & Pudney.

Motions and Demurrers Filed.

Feb. 13.

2309 Wightman vs Goulding. Motion by plaintiff for the appointment of a receiver.

Feb. 14.

2310 Hoffman vs Morrison. Motion by Arnold Green, administrator of plaintiff, for order substituting him as party plaintiff in place of M. D. Lewis, admr.

Feb. 15.

2311 Hoffman vs Fay et al. Motion by defendant Michael Cyrus to strike from petition as irrelevant etc.

2312 White vs Wettrick. Motion by defendant for a new trial.

2313 Richardson vs Vassler et al. Demurrer by plaintiff to the answer of C. Vassler.

2314 Alford vs Wagner. Motion by defendant to strike from the petition as irrelevant etc.

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2315 Alford vs same. Same.
2316 Tiedman vs Byer. Motion by defendant to strike from the files.
2317 Jennings vs Doyle et al. Motion by defendant for a new trial.
2318 McCarty vs Vaughn. Same.
2319 Hickox et al vs Ford, administrator etc. Demurrer to the answer.
2320 Elasser vs Naftel et al. Demurrer by plaintiff to the answer of George Kloaz.
2321 Reichard vs Wagner et al. Motion by defendant George E. Wagner to strike from files all papers attached to the petition.

Feb. 17.

2322 Jones et al vs Smith et al. Motion by plaintiff to strike from the files the cross-petition of defendants Smith and Stevenson, and the answer of defendant Cokran.
2323 Le Vine vs Seymour. Motion by plaintiff for leave to enforce judgment, notwithstanding supersedeas bond.
2324 Koblitz vs Stark et al. Motion by plaintiff to dismiss appeal and strike transcript from files.
2325 Cook vs Bothwell et al. Motion by defendants Everett, Weddell & Co., to direct sale of vessels advertised by United States Marshall, and to direct receivor to intervene in that suit for surplus after payment of admiralty liens.
2326 Schultz vs Betterly et al. Motion by plaintiff to stay further proceedings on execution and to enter satisfaction of judgment on record.

Feb. 18.

2327 Hunt vs Fuller. Motion by defendant for a new trial.
2328 Taylor, by etc, vs Graves et al. Motion by defendant Thomas Graves for a new trial.
2329 Parker vs Closs. Motion by plaintiff for the appointment of a receiver.
2330 Halle vs Beck et al. Motion by plaintiff to refer case to referee with notice of motion and consent to reference by defendant John Huntington.
2331 Johnson, by etc. vs Holmden et al. Demurrer by plaintiffs, Thomas and E. J. Holmden, to paragraph 1 of reply to amended answer.
2332 Same vs same. Motion by same to strike from reply of same as irrelevant.
2333 Backus et al vs Aurora Fire and Marine Insurance Co. Demurrer to amended petition.
2334 Brant vs Hartford Fire Insurnnce Co. Motion by defendant to dismiss action for want of petition.

Feb. 19.

2336 Case vs Craig. Motion by defendant for new trial.
2337 Cink vs Colbrun. Same.
2338 Newton, assignee, vs Whitman et al. Motion by defendant to set aside appraisal.
2339 Williams vs the C C C & I Ry Co. Motion by plaintiff to strike from answer as irrelevant.
2340 Owens vs Purdy. Demurrer to answer.
2341 Lennon vs same. Same.
2342 Wick et al vs Newton et al. Motion by defendants to make the petition more definite and certain.
2343 National City Bank, etc, vs Raible. Motion by defendant for new trial.
2344 Lewis Jr, by etc, vs Lane. Motion to require plaintiff to give additional security for costs.
2345 Lock vs Marquardt et al. Motion by plaintiff for order for distribution of proceeds in hands of clerk.

Feb. 20.

2346 Williams et al vs Singer Man'g Co et al. Motion by defendant to require plaintiff to separately state and number causes of action and to strike certain matter from petition.
2347 Strauss, assignee etc, vs Duncan et al. Demurrer by defendant A Rashgower to the petition.
2348 Eells, trustee, vs Kinsman Street Railroad Co et al. Motion by defendants Amasa Stone, the Commercial National Bank, and D P Eells and others, admrs etc, to dismiss action as to C F Emery and to strike his original and supplemental answer and cross-petition from the files.
2349 Hurlbut vs Reinthal et al. Demurrer by defendant to reply.
2350 Eells, trustee, vs Kinsman Street Railroad Co et al. Motion by defendants D P Eells et al, admrs etc, Amasa Stone, Commercial National Bank, W R Porter and R Everett, admr, to dismiss action as to defendant Samuel F Perly, exr etc, and to strike his answer and cross-petition from the files.
2351 Hamlin vs Robison et al. Motion by plaintiff to confirm partition made by Sheriff. Granted.
2352 Leslie et al vs Mueller, survivor etc. Motion by plaintiff to strike answer from the files.
2353 State of Ohio ex rel J C Hutchins, Pros Atty, vs Hardy. Demurrer by defendant to 2d ground of complaint of information.
2354 Same vs same. Demurrer to 3d ground etc.
2355 Ashcraft vs Grosse et al. Demurrer by plaintiff to 1st defense of answer of Charles Grosse to the amended and supplemental petition.

Motions and Demurrers Decided.

Feb. 14.

2211 Johnson vs Brown. Overruled at defendant's cost. Defendant has leave to amend answer by February 17th.
1764 Reed vs Berchtold et al. Overruled.
1875 Mygatt, trustee, vs Cleveland & Newburgh Railroad Co. Withdrawn.
1876 Same vs same. Same.
2267 Koebel vs Fischer. Overruled.
2268 Lock vs Marquardt et al. Report confirmed.
2310 Hoffman vs Morrison. Granted. Plaintiff has leave to amend without cost.

Feb. 20.

2144 Drea. admr, vs Carrington et al. Overruled. Defendants except.
2351 Hamlin vs Robison et al. Granted

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CUYAHOGA COMMON PLEAS.

JANUARY TERM, 1879.

ANNIE REHAK VS. JOHN M. WILCOX, SHERIFF.

The re-filing of an original chattel mortgage, with all proper indorsements, is a substantial compliance with the statute.

Although the mortgagee of chattels neglects and fails to re-file his mortgage (or copy) within a year from and after the first filing, yet if he does so re-file it after the year, he will, in the absence of fraud, be protected and his mortgage will be valid, as against an execution creditor, whose execution is not levied until *after* the second filing.

JONES, JUDGE:

This case comes into this Court on error from a Justice of the Peace, to reverse a judgment rendered by said Justice in favor of the defendant, in error, also defendant below.

The plaintiff in error held a valid and regular chattel mortgage from a society called the "Slavonska Lipa" upon its personal property, which said chattel mortgage was duly filed with the County Recorder in manner and form required by law, on the 20th of October, 1877, at 4 P. M.

Said mortgage was not, nor was a copy thereof, re-filed "*within thirty days next preceding the expiration of the term of one year*" as the statute directs it shall be; but said mortgage was duly verified and re-filed on the 21st day of October, 1878, at 10.06 A. M., about one day after the expiration of the year.

One John Kopstein had recovered a judgment against said Society at the March Term, A. D. 1878, of the Court of Common Pleas, and after the re-filing of said mortgage said Kopstein ordered out an execution directed to the Sheriff of Cuyahoga County, who, on the 24th of October, 1878, made a levy on the property mentioned and described in plaintiff's mortgage. The plaintiff thereupon replevined the property under her mortgage from the Sheriff, and in the trial below the Justice found that the mortgage to the plaintiff had no validity, as against the levy of the defendant who was the Sheriff who levied the execution.

It is conceded that the mortgage was given to secure a just demand, and that this demand had not been satisfied when the levy was made.

The important question is whether the mortgage had ceased to be a valid lien as against the defendant, involving, as it does, the further question as to whether the re-filing of the mortgage after the expiration of the year from the first filing, is effectual to protect the mortgagee as against an execution creditor, where the execution is not levied until after the second filing.

This question, so far as I can ascertain, has never been decided in this State.

Our statute on this subject reads as follows: "Every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of *one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage*, together with a statement exhibiting the interest of the mortgagee in the property at the time last aforesaid claimed by virtue of such mortgage, shall be again filed in the office, &c—Vol. I. S. & C. p. 475 and 476.

In the 7 O. St. Rpts., p. 198 it was held that the *re-filing of the original mortgage* with the proper and requisite indorsements, is a substantial compliance with the provision contained in the above statute—and I think that there is nothing in the statute that invalidates a chattel mortgage filed after the expiration of one year from the first filing as against liens acquired *subsequent* to the second filing. If a mortgagee wishes to maintain a *continuous* lien by his mortgage he can only do so by complying with the statute, and re-file within thirty days next preceding the expiration of the year; but if he does not do so, but allows the thirty days or the year to elapse, and re-files the original mortgage properly verified (or a copy) after that time and if it is so re-filed and *before* other intervening liens occur or attach, his mortgage while so re-filed, in the absence of fraud, must prevail against subsequent liens on the property described in the mortgage.

There is nothing in the statute that will make such a mortgage invalid as between the mortgagor and mortgagee if the original or a copy is not filed within the thirty days, &c. as between the mortgagor and morgagee it will always be valid; if not re-filed (it is all the same a valid mortgage), becomes inoperative, dormant and invalid as against creditors and purchasers—and upon being re-filed will become valid and revived as against such creditors and purchasers whose

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liens had not attached during the interval.

Entertaining these views, the judgment below must therefore be reversed.

STONE & HESSENMUELLER,
Atty's for Plaintiff in Error.
WILLSON & SYKORA,
Att'ys for Defen't in Error.

SAGE VS. THOMPSON.

In this case Judge Jones held that a purchaser at a tax sale had no lien upon the property purchased for the amount of the purchase, the penalty and interest.

APPELLATE COURT OF ILLINOIS.

FIRST DISTRICT.—OPINION FILED, Nov. 19, 1878.

STEPHANI VS. CATHOLIC BISHOP OF CHICAGO.

Where a lessee of real estate covenanted to pay all water rates, and all assessments whatever levied thereon, or charged on said premises. *Held*, not to include State, county and city taxes for general purposes.

The opinion of the court was delivered by

PLEASANTS, J.:

In each of two leases of several lots in the city of Chicago, bearing date respectively, July 1, 1858, and January 1, 1859, between the defendant in error of the first part, and the plaintiffs in error of the second part, was contained the following covenant: "And the said party of the second part, their heirs, executors, administrators and assigns, agree further to pay (additional to the rents above specified,) all water-rents and all assessments whatsoever levied thereon, or charged on said premises, for and during the time for which the lease is granted;" and the single question presented by this record is, whether the "assessments" so mentioned included State, county and city taxes, for general purposes.

Whatever other meanings may be attached to the term in various connections, the parties here have assumed in their agreement that at the time of the execution of these leases, it was the proper designation of some or of all kinds of public charges upon real estate in the city of Chicago, and employed it accordingly. The plaintiffs in error claim that it applied only to such as were imposed to meet the cost of local and compensating improvements; since more commonly known as special assessments, while the defendant in error insists that it included as well the general taxes above mentioned. It is to be observed that in this inquiry there is nothing in the context to guide us. From the use of the term alone, as otherwise shown, or as the subject of common knowledge or of judicial notice, we are to arrive at the meaning, which of its own unaided force, it then conveyed.

In support of the claim for the broader signification, the following are adduced as instances of such use. Section 2 of chapter V. of the city charter of 1851, confers power to levy and collect "taxes" on real and personal estate, when required, among other purposes, "for the erection of a city hall or bridewell: Provided, the estimated cost * * * may be apportioned assessments." Manifestly the term was not here used to signify the taxes, but the proceedings raising them. The antecedent clause authorized the apportionment of the cost into installments, and this provided for its collection—not in such installments for that was already implied; but "by (means of) a series of annual" proceedings here called "assesments." Laws of Ill., 2d session of '49 and '51. p. 149.

Section 6 of the same chapter provides that if at the close of any municipal year it shall be found that there has been expended in any division of the city for strictly local purpose more than its relative proportion, "it shall be the duty of the common council the ensuing year to increase the general taxes in such division by the amount of such excess," and at the same time "to abate such excess from the assessment in the other divisions." In this instance—and in the singular number—it would seem to indicate a statement or representation in some form, of the amount of the taxes in the divisions referred to.

But whatever is meant, since it was something that was to be abated, or abated from before any taxes were to be collected, it could not have been those taxes. Section 49 of the General Revenue Act of 1845, declares that the assessment shall be a lien on the personal property of all persons owing taxes from and after the time the assessment books are received by the collector for the State and county taxes due thereon, and no sale," &c. Scates Statutes, p. 1080.

A lien is a tie that binds property to a debt or claim for its satisfaction. It is always either a statute, a writ, or a record, an instrument or a proceeding, and so necessarily distinct from the debt. The assessment here declared to be a lien for the tax, for that reason can not be the tax. It is the proceeding by which the tax is imposed, and so the Supreme Court appear to consider it, although that question was only incidentally referred to in Hill vs. Figley, 23 Ill., 420. Section 254 of the Revenue Act of 1874 also declares that, "the taxes assessed upon personal property shall be a lien upon the personal property of the person assessed from and after the time the tax-book is received by the collector." R. S., 1874, p. 899. This provision is substantially the same as the one last above quoted, and it is argued that the substitution in this, of the word "taxes" for the word "assessment" in that, shows that they bear the same sense. But it will be noticed that it is not the "taxes" which are declared to be a lien upon the property, but the "taxes assessed," and these are the terms substituted for "assessment." A tax assessed is a sum found and declared to be due for a public purpose by some prescribed proceeding, and it is this proceeding which is here intended as what constitutes or creates the lien, just as when we say, somewhat loosely, that a mortgage debt or a judgment debt is a lien, we mean and are understood to mean, that the mortgage or judgment constitutes or creates the lien for the debt. That the proceeding and not the money debt is here referred to, further appears from the application of the same term "assessed" to the person in the same manner as to the property.

Lastly, the language of Mr. Justice Breese, in The State of Illinois vs. The Illinois Central R. R. Co., 27 Ill., 64, is cited as illustrating and sanctioning the use of the term in the broad sense here claimed. Having stated that upon the list of the stock, property, and assets of the company mentioned, "the auditor assessed a tax," &c., he adds, "and for the nonpayment of this assessment, this suit is brought." The auditor assessed the tax, took some proceedings to impose it, and to manifest the fact and the amount, this proceeding then was distinct from the amount, and the expression relied on "non-payment of the assessment," is clearly elliptical for non-payment of the debt or amount ascertained by the assessment." Doubtless numerous instances might be found in which very scholarly judges have written of the non-pay-

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ment of a judgment or of a note, and yet it would scarcely be contended that they regarded the record or note as meaning the money mentioned in them.

The foregoing are all the instances which have been adduced to show a meaning of the term assessments as used in this State, which would include general taxes. The majority of them occurred since the execution of the leases in question, but to our apprehension neither of them shows it. It is often used to signify a proceeding which does include them, but here it was used as a proper specific designation of the charges upon the property; and in that sense we are not advised of any usage or authority which even recognises it. Nor does the addition of the term whatsoever operate to extend the meaning, for they must still be "assessments." On the other hand examples showing that in its use as such designation it signified specifically and exclusively those charges imposed upon real estate by authority of the city to defray the expense of local improvements in proportion to the benefits received are so numerous, clear, and well known, as scarcely to require a reference to them. See the Charter of 1837, Laws of 1836-7, p. 541; the Charter of 1851, chapters VI., VII., VIII., the amendatory acts of 1854, Laws of 1854, p. 218 § 8; and of 1852. Private Laws of 1857, p. 902, § 42, and for the provisions of the General Statutes, Scates' Statutes, pp. 202, 1006. Throughout these enactments the distinction between the designations, taxes and assessments, and the things thereby respectively designated is uniformly observed. It seems also to have been recognised by the Supreme Court in The Canal Trustees vs The City of Chicago, 12 Ill., 403, and the numerous cases arising on proceedings for assessment must have made it quite familiar in the community.

In this state of facts it would be unprofitable to inquire for the popular meaning of the term in question as stated by lexicographers, or for its significance, as used in the statutes or judicial decisions of other States. For we suppose that this contract is to be construed in the light of the legislation and usage of this State, and if they affix a definite meaning to it the parties are conclusively presumed to have so employed it. We are constraided to conclude that they do, and that the meaning so affixed does not include the general taxes.

The Circuit Court instructed the jury otherwise, and they found a verdict for the defendant in error for the amount of such taxes paid during the series of years for the execution of the leases to the institution of this suit, which the Court refused to set aside.

For these errors the judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

U. S. CIRCUIT COURT, S. D. OF OHIO.

THE UNITED STATES VS. GUS. CLARK.

On Motion to Quash the Indictment Against Clark—The U. S. Laws Constitutional.

BAXTER, J.:

The defendant was a judge of the election held recently in Cincinnati, at which members of Congress were voted for, appointed by the State authorities, and stands indicted, under section 5,515 of the revised statutes, for unlawfully neglecting to perform certain duties enjoined on him as such judge by the laws of Ohio. He appears and moves to quash the indictment, not because it is not within the purview of the act of Congress under which it is fraimed, but on the ground that section 5,515, declaring such neglect of duty an offense against the United States and punishable by indictment in the Federal Courts, is unconstitutional and void. And in support of this position, learned counsel have referred us to the case of the Commonwealth of Kentucky vs. Dennison, Governor, etc., 24 Howard, 66. We have been familiar with this case for a long time, and at the request of defendant's counsel have re-examined it with considerable care. The facts are that the Governor of Kentucky had, in pursuance of the act of Congress in that behalf enacted, made a demand on Gov. Dennison, then Governor of Ohio, for the apprehension and surrender of an alleged fugitive from the former State, but Gov. Dennison refused to comply with that requisition. Thereupon an application was made by the Commonwealth of Kentucky to the Supreme Court of the United States for a mandamus to compel Gov. Dennison to perform the duty imposed upon him by the law. The Court refused the mandamus, and said: "The act does not provide the means to compel the execution of this duty nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with such power. Indeed, such a power would place every State under the control and dominion of the general government, even the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution has no power to impose upon a State officer, as such, any duty whatever and compel him to perform it; for, if it possessed this power, it might overload the officer with duties that would fill up all his time, and disable him from performing his obligations, and might impose on him duties of a character incompatible with the dignities to which he was elevated by the State."

We recognize in this decision an authority binding on us. And if that case and this are alike, defendant's motion must prevail. The duty of providing by law for the arrest and return of fugitives is imposed by the Constitution exclusively on Congress. And in exercising the power thus conferred, Congress saw fit to impose the duty of causing fugitives to be arrested and surrendered to the demanding State on the Chief Executive of a State in which the fugitive might be found. The duty thus enjoined on the Governors of the States was generally exercised by them in all proper cases. But in the case of the Commonwealth of Kentucky vs. Dennison, the latter declined to act, and the Supreme Court, as we have already seen, when applied to for a mandamus to compel him, held that the Federal Government could not require him to perform such a duty. The language of the Court was, of course, employed with reference to the facts of the case then before it.

But the duty of providing for the election of members of Congress is a matter in which both the Federal and State Governments have an interest. "The times, places and manner of holding the elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators."

So it will be seen that the obligation to provide for the election of members of Congress is one that attaches to both the General and State Governments. And under the legislation upon the subject, the States hold the elections through officers of their own selection. But this duty is not left entirely to State Supervision. It is performed under and in pursuance of the laws of both powers. The

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Federal Government does not assume to overload a State officer with duties inconsistent with his dignity, or with "his obligations to the State." Nor does it undertake to compel such officer to perform such duties which, under the constitution, are imposed exclusively on the Federal Government, as was true in the case of the Commonwealth of Kentucky vs. Dennison, but commands a faithful compliance on the part of such officer, in any matter pertaining to the holding of such elections and certifying returns, etc., that he is required by the State laws to do and perform. And any willful refusal or neglect to do any one or more of the things thus required, is declared to be a crime against the United States, and made punishable by indictment in the Federal Courts.

We think the law is within the constitutional powers of Congress and a very proper and delicate exercise of the national authority. The law being, as we think, valid, this Court has jurisdiction of the offense charged in the indictment, and plaintiff's motion to quash will be disallowed.

U. S. DISTRICT COURT.

Western District of Tennessee,

(January 11th, 1879.)

IN RE STEELE.

EXEMPTION—CONSTRUCTION OF THE TERMS "OTHER ARTICLES AND NECESSARIES" AND "WEARING APPAREL."

A watch of small value, necessary in the business of a commercial man, held properly allowed to the bankrupt as a necessary article. The words "other articles and necessaries," and "wearing apparel," as used in the bankrupt law, construed.

HAMMOND, J.:

By agreement between the assignee and the bankrupts, the question is submitted for the opinion of the court, as if on certificate of the register, whether or not the refusal of the assignee to allow them each his gold watch as exempt property, is proper under the circumstances set out in the agreement of facts. John Steele has been allowed, and claims no exemption except this watch, which is described as "a plain old style, single-case gold watch, which he has owned for twenty-five years or more, and which would scarcely sell for twenty-five dollars." R. L. Steele has been allowed household furniture worth not more than one hundred dollars. The kind and value of the watch is not stated.

The decisions on this subject are conflicting. I have examined a good many cases on the general subject, and find that the conflict grows out of the divers views as to whether the particular articles claimed are necessaries or luxuries, useful or only ornamental. It is said in Montague vs. Richardson, 24 Conn., 338, that each case must depend upon its own particular circumstances. I think this is a correct view, and that in some cases the assignee may and should allow a watch or other time-piece, and in others he should not. These parties were a firm of merchants, and their valuable assets had been surrendered to their creditors. They proposed to engage again in commercial pursuits. It was held in Harrison vs. Mitchell, 13 La. Ann. 260, that a desk and an iron safe were exempt as necessary implements to carry on the business of a commercial man.

It would not be doing any great violence to the meaning of the term "wearing apparel" as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word "apparel," as given by lexicographers, is not confined to clothing; the idea of ornamentation seems to be a rather prominent element in the word, and it is not improper to say that a man "wears" a watch or "wears" a cane. The exemption law of Arkansas says that "wearing apparel shall be exempt, except watches." Ark. Dig. 503, 504; James' Bankruptcy 58; Avery & Hobbs' Bankr. 68. In Peverly vs. Sayles, 10 N. H. 356, under a statute which exempted "wearing apparel necessary for immediate use" it was held that an overcoat and a suit of clothes "to go to meeting in," were included. In Ordway vs. Wilbur, 16 Me. 263, cloth sent to a tailor to be made into clothes was in that form held to be exempt as "apparel,"

In Bumpus vs. Maynard. 38 Barb. 626, the debtor was in bed—his clothes were on a chair, and his watch on a table. The officer was sued for refusing to levy on them, and it was held that they were exempt as "wearing apparel," notwithstanding they were not on the person. There were some expressions in the case which indicate that possibly the Court did not intend to include the watch as "wearing apparel," but it is probable they did. It was decided in Smith vs. Rogers, 16 Ga. 479, that a watch was not wearing apparel. But in Mack vs. Parks, S. Gray, 517, it was held, in a case where an officer with an attachment asked the debtor to let him look at his watch, and being permitted, tore it from his person by breaking the cord to which it was attached, that the watch was exempt from seizure at common law, because by that law wearing apparel on the person was exempt from levy or distraint. See Freeman on Ex., sec. 232.

We have no State statute in Tennessee, that I can find, exempting wearing apparel, and we depend on this cammon law principle for immunity in such cases. It is said in Richardson vs. Duncan, 2 Heisk, 220, that our exemption laws are to be liberally construed, and that is the universal doctrine of modern times. In that case it was held that an "ass" is included in the statute which exempts "a horse. mule or yoke of oxen;" and in Webb vs. Brandon, 4 Heisk. 285, an ox-wagon is included in the description—"one two-horse wagon."

But, whether a watch may be included in the statutory exemption of "wearing apparel" or not, it certainly may be allowed as "other necessaries" under certain circumstances.

The act (Rev. Stat. 5045) says: "There shall be excepted from the operation of the conveyance the necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars." Under this clause the late Judge McDonald, of the District of Indiana, held *in re* Thiell, 4 Biss. 241, that a cheap watch might be included, but the same learned judge held *in re* Cobb, 1 N. B. R. 414, that mere articles of luxury and ornament, such as watches, pianos, and the like, should not be allowed. *In re* Graham, 2 Biss. 449, Hopkins, J., refused to allow watches. Some other cases, cited in the district courts, where the identical question has been considered, have not been accessible for examination; but I presume, as in these cases, they all turn on the question whether or not the particular watch, under the circumstances, was an article of necessity only, or an article of luxurious ornament, in which too much money had been invested to allow it in justice to the creditors. It will be found in all the cases where the law does not exempt *the article itself*, when value is immaterial, that this question of the reasonable or unreasonable value of it controls the case. The question is to be determined not solely by an appraisement of the par-

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ticular article, but also by the attendant circumstances, or, as this statute puts it, "having reference in the amount to the family, condition, and circumstances of the bankrupt." The assignee is to determine the question, not by mere arbitrary choice on his part, but by the exercise of a sound legal discretion, subject to the final decision of the court, in the exercise of its supervising power, re Feely, 3 N. B. R. 66; re Thiell. 4 Biss. 241.

The phrase "other article and necessaries" is a comprehensive but indefinite expression, and I have been at pains to discover the principle that is to direct the assignee and the court in the exercise of the discretion. This act is framed like other exemption acts, and, doubtless, with full knowledge of the adjudications of the State courts under similar statutes. In Leavitt vs. Metcalf, 2 Vt. 342, the statute exempted "such suitable apparel, bedding, etc., and articles of household furniture as may be necessary for up-holding life." It was held that "one brass timepiece" was included, and the court say there were two former decisions exempting the "debtors' only timepieces," but they are not cited. "It must be admitted," says the court, "that there is a great convenience in a family having some means of keeping time, even in health, but more especially in sickness. We do not pretend that a time-piece is absolutely necessary for subsistence, and also many other articles that have always been considered exempt under this statute. The word 'necessary,' or 'necessaries' has ever been considered in legal language to extend to things *of convenience and comfort* and to things suitable to the situation of the person in society, and is not confined to things absolutely necessary for mere subsistence." An instructive case is that of Hitchcock vs. Holmes, 43, Conn. 528, where it is said we may "pass beyond what is strictly indispensible, and include articles which, to the common understanding, suggest ideas of comfort and convenience. But having done this, the obligation is upon us to exclude all superfluities and articles of luxury or ornament." Certain expensive furniture, including a costly clock, were, therefore, excluded; but a dissenting Judge thought the clock should have been allowed. A piano was thought to be a luxury, because "it is not an article of mere comfort, and does not minister to a want universally felt." Dunlap vs. Edgerton, 30 Vt. 224. In Garrett vs. Patchin, 29 Vt. 248, it was said the term "necessaries means that which is convenient or useful—which a man procures for his own personal use, unless extravagant." And see Montague vs. Richardson, 24 Conn. 338, which cites McCullough vs. Maryland, 4 Wheat. 316; Davlin vs. Stone, 4 Cush. 359, which says "the articles may be of that plain and cheap character which, while not indispensible, are to be regarded amongst the necessaries of life, as contradistinguished from luxuries." See, also, Wilson vs. Ellis, 1 Denio, 462, and *re* Thornton, 2 N. B. R. 189. Guided by thse humane and liberal principles of construction, I should say that to a commercial man a plain, and not extravagantly costly watch, such as this bankrupt owns is in the quaint language of the Vermont Statute, "necessary for upholding life." The watch of John Steele should be allowed. As to the other I cannot determine, its value not being stated. If the parties can not agree, they have leave to make further application in this matter.—*The Central Law Journal.*

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending February 27, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Feb. 21.

John M. Filkins to James M. Curtiss. $300.

Mary A. Gill to the Society for Savings. $5000.

S. B. Ingersoll and wife to The Cit. Sav. and Loan Ass'n. $1,300.

John T. Meng to Norman O. Stone, $3,000.

Feb. 22.

Theodore F. Geiger to H. R. Leonard. $55.

Mary A. and Christopher Ayers to Alexander Rodgers. $2,100.

Fredericke Murlock to G. H. Griswold. $200.

Feb. 24.

F. H. Gyssler and wife to Julius Mueller, $900.

Feb. 25.

Mary Bilek to John Halicek. $100.

Joseph Dressler and wife to Menbrand. $600.

Feb. 26.

John Moore to Rhodes & Hartnell. $454.

Margaret and Geo. H. Adams to Alva Bradley. $2,000.

Sophia and John Gerling to Ralph T. King. $1,000.

Wm. Kuchembecker to Chas. Dodge. $100.

F. F. Way to Almira D. Hamline. $900.

Martin Ulmer to Philip Wagner. $550.

Catharine and Louis Herrimann to Fanny Evers. $500.

Feb. 27.

Frank Frey to M. Mittleberger & Sons. One thousand dollars.

Adolph Mader to The University Gegenseitigen Feuer Versiehering Unterstilzung Verien. Six hundred dollars.

Christoph C. Koch and wife to Bar-Kresz. $400.

Moritz Rheinhard and wife to Jacob Schroeder et al. Eight hundred dollars.

Patrick Kelly and wife to S. M. Southern. Two hundred and twenty-eight dollars.

W. C. Loomis and wife to John D. Pullen. Three hundred and twelve dollars.

CHATTEL MORTGAGES.

Feb. 21.

S. A. Burnett to Adam Knopf. $75.

J. C. Kurtz to A. W Bailey. $67.50.

D. H. Kelly to A. W. Bailey. $85.

Henry Kramer to Geo. Voerg. $600.

O. H. Johnson to G. B. Senter. $125.

Feb. 22.

Geo. F. Mowbray to Thos. C. Jones. $109.

Hiram Woodworth to Horace H. Baker. $1,250.

C. T. Scheurer to Wm. C. Wilson. $185.

Feb. 24.

J. H. Alexander to Wm. G. Alexander. $500.

Henry Bleking to Henry Merseburg. $100.

Feb. 25.

Wm. B. Gillert to J. H. Alexander. $500.

Same to I. J. Kretch. $595.

W. E. Lewis to John I. Nesbit. $35.

Chas. Jenkins to Margaret Kenney. $300.

A. W. Beman to Erastus Carter. $856.

Feb. 26.

Thos. M. Hammond to Morris & Rundle. $2,000.

Violet Preston to Wm. D. Butler. $46.

Henry S. Seaman to The Ger. Fire Ins. Co. $98.

John W. Warner to Chamberlain, Gorham & Perkins. $200.

Reynolds Bros. to Jones & Van Wie. $218.

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Jacob Smith to Dr. Wm. Clark. $50.

Maitland & Payne to Geo. Worthington & Co. $280.

Thorp Holmes to H. R. Leonard. $60.

Feb. 27.

Esther Byer to C. W. Coates. Twenty dollars.

M. L. Worth to Cordelia Alden. One hundred dollars.

Wm. A. Gilbert to Sarah J. Gilbert. Five hundred dollars.

O. A. Ross to C. H. Smith. Two hundred and fifty dollars.

Peter Rooney to Richard O'Rourke. One hundred and fifty dollars.

DEEDS.

Feb. 21.

John O. Brown and wife to Joseph H. Brown. $1.

Andrew Burchner and wife to John E. Miller. $5.

John S. Bullard to Geo. Murch. $1,236.

J. M. Curtiss and wife to John M. Felkins. $945.

Wm. Carman and wife to Frank J. Squire. $500.

John Gierman and wife to Wm. Guenther. $1,500.

E. A. Hoffman et al to Geo. A. Orwig. $1,000.

A. J. Marvin and wife to James Payne. $480.

Catherine McGilligan to Bernard Leiding et al. $3,000.

Bernard Leiding to Catherine McGilligan. $2,500.

Nannie R. Leland to Chas. E. Leland. $1.

John E. Miller and wife to Margaretha Burchner, $5.

Norman O. Stone and wife to John T. Meng. $4,000.

Feb. 22.

Rochus Bender and wife to John Mooney. $2,500.

W. W. Dille to A. L. Moses. $4,000.

Same to Mary E. Moses. $1,500.

William Edwards to John Edwards, $750.

William Flutter and wife to Jacob Stoneman. $900.

Frederick Grammes and wife to Colgate Hoyt. $6,500.

John Mooney and wife to Rochus Bender and wife. $2,500.

R. D. Levain et al to J. C. Hammeter. $4,000.

Louisa W. Witter to Mary A. Gill. $6,000.

John Marquardt by Felix Nicola, Mas. Com. to Maria Lock. $1,000.

Zerniah M. Bigelow et al, by Sheriff, to S. T. Everett. $2,910.

Same to Same. $2,810.

Same to J. H. Marshall. $1,187.

Feb. 24.

Mary Ann Bagget to Robert Bagget, $5.

Geo. W. Canfield to David Boyd. $640.

Christian Coben to Ella M. Coben. One dollar.

Lester Cochran and wife to Francis M. Cochran et al. One thousand dollars.

Sargent & Dixon to Adam Scheurmann. One dollar.

John Kleina and wife to Wilhelm Waschlefski. Eight hundred and fifty dollars.

Chauncy Leuty and wife to Leonard Straight. Three hundred and fifty dollars.

A. Louisa Lewton and husband to John Decker. Seven hundred and twenty-six dollars.

Austin Moore, admr. of John Stanton deceased, to Thomas Murray. Three hundred and seventy-five dollars.

Same to John Murthough. Four hundred and thirty dollars.

B. Rauchfuss and wife to Christine Kiefer. One dollar.

Mrs. Marianna B. Sterling to Alice R. Guy. Two thousand dollars.

Eleonora Scheuermann et al, adms. of the estate of Adam Scheuermann to Christina Hauser. Five dollars.

Wm. J. Cook, by Felix Nicola, Mas. Com. to The Citizens Savings and Loan Association. Three thousand two hundred dollars

Feb. 25,

Levi Bauder, Co. Aud., to W. C. Storer, Auditor's deed. Six dollars and sixty-two cents.

Same to same. One dollar and ten cents.

William H. Capener and wife to Catherine E. Angel. Five dollars.

Alfred Elwell and wife to Ellen S. Flint. Three hundred and fifty dollars.

David McGrath to Wm. Williams. One dollar.

Wm. Williams to Mary McGrath, One dollar.

John Hemmeter and wife to Jane Bell Spingler. Two thousand five hundred and fifty dollars.

Estate of D. P. Rhodes to John Moore. Four hundred and fifty-six dollars.

Martin Tibbits and wife to N. P. Glazier. Five dollars.

Feb. 26.

Patrick W. Doyle to A. McAllister. One dollar.

H. F. Hoffensack and wife to Frederick Fath. Eight hundred dollars.

Henry Johnson to Mary C. Mireau. One dollar.

Lydia Lamson to Susan Parsons. One dollar.

Elias Sims to Theodore Warnke and wife. Four hundred and eighty dollars.

R. H. Strobridge and wife to Lake View & Collamer R. R. One hundred dollars.

Feb. 27.

Carrie Arnold to Semantha L. Baldwin $250.

Theo Bartlett to John Prindeville. $650.

Jas H Clark and O H Payne to John Huntington $2,160.

Seth A Abbey to Francis Maria Freeman $5.

Catharine Murphy and husband to Nathan C Winters $8,000.

Josephene and Frank Swemton to Frank Kinkov $1,600.

E R Whiting to L H Johnson $1,800.

Betsy Wild et al to Frank Wild $1,500.

Arthur McAllister and wife to Helen Doyle $1.

Judgments Rendered in the Court of Common Pleas for the Week ending February 27th, 1879, against the following Persons.

Feb. 21.

Alonzo S. Gardner et al. $7,386, $1,105.22.

Henry Knœdel. $267.27.

E. Raab. $404.79.

J. Philpott. $352.70.

A. Montpelier. $88.74, $69,41.

Fred. Engel, Sr. $622.67.

Sarah Jane Van Namee. $1,562.67.

Feb. 24.

James T Wilson et al. $329, $5,714.

Rocky River Stone Co. $380.83.

Feb. 27.

J B Ramsdell. $357.49.

L S, M S Ry Co. $1820.

E Fitzgerald and garn. $96.

U. S. CIRCUIT COURT N. D. OF OHIO.

Feb. 21.

3485. John C. Birdsell et al vs John Lenhart et al. Replication. M. D. Leggett & Co.

3483. Same vs John F. Letterer, Same.

3482. Same vs Adam Lutz. Same

3465. Same vs Lewis Flick et al. Same.

3455. Same vs Daniel Borderer. Same.

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3469. Same vs Henry Gunghluff et al. Same.
3472. Same vs Jacob Hearr. Same.
3498. Same vs Geo. Underwood, et al. Same.
3424. Campbell Printing Press Co. vs The Leader Printing Co. Settled, each party to pay their own costs. No record.

Feb. 22.

3272. Marquis D. Bacon vs Wm. Moore. Amended bill filed.

Feb. 24.

3836. Second National Bank of Cleveland vs Wm. West et al. Separate answer of John M. West. Pennewell & Lamson.

Feb. 25.

3847. Chas. Supe vs C. A. Krauss et al. Petition for money only. Geo. S. Kain.
3798. Union Paper Bag Machine Co. vs Cleveland Paper Co. et al. Time for filing answer extended to 1st Monday in April.
3575. Carrie J. Lyon vs Samuel P. Chesne et al. Death of plff. suggested. Action filed in the name of Henry F. Lyon, admr.

Feb. 26.

3844. Floyd C. Shipard vs James H. Harrison. Answer to cross bill of J. H. Humison. Henderson & Kline.
3848. Jos. Large et al vs Mary Smith et al. Order for service by publication.

Feb. 27.

3802. Ohio National Band of Cleveland vs M. G. Watterson, Treaurer. Replication.
3803. First National Bank of Berea vs Same. Reply.
3804. The Merchants' National Bank of Cleveland vs Same. Same.
3805. The Commercial National Bank of Cleveland vs Same. Same.
3806. The 2nd National Bank of Cleveland vs Same. Same.
3807. The 1st National Bank of Cleveland vs Same. Same.
3808. National City Bank of Cleveland vs Same. Same.
Louis D. Seward, of Akron, this day admitied to practice in the U. S. Court.

U. S. DISTRICT COURT N. D. OF OHIO.

Feb. 22.

83. The United States vs One Capper Still, &c., &c. Information in rem. John C. Lee.

Feb. 24.

1586. Horton & Reid, Assignees, vs First National Bank of Revenna. Answer of M. Stewart et al.
——. Same vs Same. Answer of Wright & Russell. M. Stewart.

Feb. 25.

1590. The United States vs Willoughby P. Mader, et al. Petition for money only. John C. Lee.

Bankruptcy.

Feb. 21.

1770. In re James M. Brown. Petition for discharge. Hearing March 22.
2034. In re Hiram Ohl. Same. Same.
1807. In re Marchand & Son. Same. Same.
1785. In re Wm. M. Smith. Same. Same.

Feb. 24.

2012. In re Buckland P. Bower. Discharged.

Feb. 25.

2042. In re Harrison G. Robeson. Petition for discharge. Hearing March 24.
1548. In re Thomas Dodd. Same. Hearing March 20.
1913. In re Philo P. Safford. Same. Hearing March 24.
2025. In re Lewis L. Davies. Discharged.
1977. In re Chas. and Lewis Chorman, bankrupts. Charges and specifications against discharge of bankrupts. A. L. Jones.
1870. In re Chas. H. Clark and Henry Gilbert, bankrupts. Motion on the part of H. Gilbert to vacate entry of dismissal and to have case reinstated as to himself. G. H. Foster.

Feb. 26.

1811. In re Geo. Weimer. Discharged.
1882. In re E. Burrell. Petition for discharge. Hearing March 24.
2011. In re P. S. Baun. Same. Hearing March 20.

COURT OF COMMON PLEAS.

Actions Commenced.

14671. Almira Dickinson, exrx of Ann Lard, vs Elizabeth Weidenbauer et al. To subject land. Baldwin & Ford.

Feb. 19.

14672. Joseph H. Alexander vs J. W. Schmidt, Supt. of Police. Habeus Corpus S. E. Adams and Foster, Hinsdale & Carpenter.
14673. Samuel Mason vs George W. Tufts et al. Relief. Robison & White.
14674. Henry Caster vs Elizabeth Rafenstein et al. Foreclosure of mortgage. C. W. Coates.
14675. Samuel W. Duncan vs Joseph Marchand et al. Money and to subject lands. Wm. K. Kidd.
14676. Norton C. Meeker vs James H. Slosson. Equitable relief and to quiet title. P. H. Kaiser and R. N. Denham.

Feb. 20.

14677. Frederick Kinsman vs John Meller et al. Money and equitable relief E. J. Latimer.
14678. Philip Reidenbach vs Jacob Trunk. Appeal by defendant. Judgment February 10th. John C. Lester.
14679. Schmidt and Hoffman vs Antoni Spurny. Cognovit. Felix Nicola; George B. Solders.
14680. John M. Henderson et al vs The City of Cleveland and Moses G. Watterson. Injunction and equitable relief. P. P.
14681. Walter C. Humistone vs Nicholas C. Luders et al. Money and equitable relief. Hord, Dawley & Hord.
14682. Catharine H. Birney as admx etc vs Horace Wilkins. Money only. Arnold Green.
14683. Christopher F. Emery vs The Union Iron Works Co., John M. Hendersoc, assignee, etc. Bernard & Beach; Virgil P. Kline.
14684. Stephen Powers vs Arthur J. Erwin. Money only. T. E. Burton.

Feb. 21.

14685. Amelia Wallace vs Willie P. Russell, admr of the estate of John Newcomb, deceased. To subject lands. Otis, Adams & Russell.

Feb. 22.

14686. Joseph H. Alexander vs B. J. Treacy. Money only. Foster, Hinsdale & Carpenter.
14687. Arthur F. Bartges vs New York Life Ins. Co. Money only. J. H. Rhodes.
14688. Miles H. Hannon vs George Buskirt. Appeal by defendant. Judgment February 10th.
14689. J. G. Probst vs Jacob Oerther et al. Mouey, to subject land and relief. A. Zehring; Gustav Schmidt.
14690. Leonhard Stroebel vs Richard Kinkelaar et al. Same. Same.
14691. Ellen Walch, an infant by Patrick Walch, her next friend, vs Horae B. Van Norman. Money only. Geo. A. Groot.
14692. Peter M. Arthur vs. Werner Clares et al. Money and to subject lands. Foster, Hinsdale & Co.

Feb. 24.

14693 Hubbard Cooke, trustee, vs Michael Drager and garn. Money and equitable relief with att. J A Smith.
14694 Same vs John Pottowski, &c, garn. Same. Same.
14695 Geo Usher, admr of the estate of John Gattner, deceased, vs H Marhoefer. Appealed by ———. Judgment Feb 8th. John W Heisey.
14696 Alice M Alford vs Adam M Wagner. Money only. W W Andrews.
14697 Wm C Fair vs John H Whicher. Money only with att. Emery & Carr,
14698 Jennie E Edwards ex. of Joseph S Edwards, deceased, vs A Gilchrist et al. Error to Probate Court. Tyler & Dennison; T E Bur-

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ton, W H Gaylord.

14699 James H Cady vs Geo F French, et al. Money only. Martin Dodge.

Feb. 25.

14700 Thankful Abbey vs John Wallace et al. Money and to subject lands. H J Caldwell.

14701 Thomas Mullaly vs James Moss. Money only. Geo B Solders.

14702 Charles Mills by Nicholas Marxen, his next friend, vs Chas Robinson. Appeal by deft. Judgment Jan 31. W S Kerruish; S M Eddy.

14703 C R Atwell vs Noble H Merwin. Money and to subject lands with att. Safford and Safford.

Motions and Demurrers Filed.

Feb. 21.

2356 Weitzel et al vs Russel, admr, &c. Motion by deft for a new trial.

2357 Baum us Kribs. Same.

2358 Eucher et al vs Hardy et al. Demurrer by deft James H Hardy to the petition.

2359 Same vs Same. Demurrer by deft. Mary A Hardy to the petition.

2360 Filiere vs Scheuren. Demurrer to answer.

2361 Same vs Same. Demurrer to the cross—petition of deft.

Feb. 22.

2362 Johnson et al by &c, vs Meyer. Motion by pl'ffs to strike out from the answer.

2363 Ruggles, admr &c, vs Gallagher et al. Demurrer by plff. to answer of J F Gallagher.

2364 Weaver vs Terrett et al. Motion by pl'f to re-instate case on docket.

2365 Brinsmade vs Forest City Ins Co, et al. Demurrer by def'ts E P Brainard and D C Coolman to petition.

2366. McCurry vs L S & M S Ry Co. Motion by deft't to strike from petition as irrelevant &c.

2367 Peoples Savings & Loan Ass'n vs Bousfield, et al. Motion by def't Coggswell, assignee, &c., to amend judgment.

2368 Little vs Lewis. Demurrer to answer.

2369 Olson vs National Lloyds Ins. Co. Motion by National Lloyds to set aside serving of summons.

2370. Newcomb et al vs Jones, assignee, &c. Motion by deft for a new trial.

2371 Lowe vs Capener. Motion by deft to require pl'ff to give security for costs.

2372 Connor et al vs Graulty, admr, &c, et al. Motion by deft to strike out from petition.

2373. Heinberger vs Court Pearl of the Rhine, A O F, No 6263 et al. Demurrer by deft Court Pearl of the Rhine, A O F, No. 6263, to the petition.

2374 Same vs Same. Demurrer by all defts except Court Pearl of the Rhine &c to the petition.

Feb 24.

2375. Knittal vs L S & M S Ry Co. Motion to require pl'ff to give bail for costs.

2376. Kleinhenz vs St Boniface Society. Demurrer in the petition.

2377. Bemis vs Nicola, et al. Demurrer by def'ts to the 3rd cause of action in the petition.

Feb. 25.

2378. Eells, trustee, vs Kinsman St Ry Co et al. Motion by deft, C F Emery for the, appointment of a referee herein.

2379 Hutchins, guard, &c, vs L S & M S Ry Co. Motion by def't for a new trial.

2380 Johnson vs Ohio Life Ins & Trust Co et al. Motion by pl'ff for an order to obtain service by publication on unknown heirs.

Motions and Demurrers Decided.

Feb. 22.

43 Bronson et al vs Stoddart et al. Overruled. Deft. has leave to plead by 29.

1435 Same vs same. Same.

1469 Same vs same. Same.

1919 Sage vs Thompson et al. Overruled.

2105 Tiedeman vs O'Hallahan et al. Sustained.

2201 Kirby vs Beck et al. Sustained. Robert and Mathilde Beck have leave to answer by Mar. 5.

2203 Schult vs Schmittendorf et al. Sustained.

2204 Same vs same. Overruled.

2222 People's Savings and Loan Association vs Pfahl. Motion to strike out overruled. Motion to make certain sustained.

2241 Coggswell vs Sargent. Sustained.

2244 German vs Luth. Sustained.

2245 Church vs Capener. Overruled at cost of deft., and deft. required to amend in ten days.

2250 Warmington et al, trustees, vs Street. Sustained—exceptions by deft.

2253 Holden vs Heard. Motion to strike out overruled. Motion to make certain sustained.

2254 Same vs same. Overruled.

2259 Platt vs Reader et al. Demurrer to the 2nd, 3rd and 4th defences sustained. Deft. excepts.

2260 Morse vs Sullivan. Sustained. Plff. has leave to amend petition without cost by March 5th.

2263 Stieler vs Poe et al. 1st specification overruled. 2nd granted. Defendant has leave to answer by March 29.

2269 Droz vs Roemer et al. Overruled.

2270 Same vs same. Overruled at cost of deft. Roemer.

2271 Same vs same, 1st and 3d specification overruled at plff"s cost. 2nd overruled at deft's cost.

2277 Same vs same. Overruled. Furbert Gehring has leave to reply by March 1.

2300 Same vs same. Overruled.

2288 Norton vs Gall et. Sustained. Plff. has leave to amend by March 5.

2292 Myers et al vs Shearer et al. Granted by consent. Plff. has leave to amend by Feb. 25.

2293 Schoneman vs Montpelier. Overruled.

2294 Morgan vs same. Same.

2276 Wilson vs Higgins. Same. Deft. excepts.

2280 Bebout vs Smith. Sustained. as to striking out. Deft. excepts.

2307 Cook vs Bothwell et al. Withdrawn.

2338 Newton, assignee, vs Whitman et al. Granted.

2345 Lock vs Marquardt et al. Granted.

2356 Wentzel et al vs Russell, administrator, etc. Overruled.

2364 Weaver vs Terrett. Granted. Case reinstated; costs of term to be taxed to plff. and plff. has leave to amend petition by interlining the words "One Vale's Patent Chair," without costs.

2379 Hutchins, guard., etc., vs The L. S. & M. S. Ry. Co. Overruled.

Feb. 24.

1250 Linden vs Droz. Withdrawn at deft's cost.

1267 Poe vs Wicken, admr., etc. Overruled.

2296 Ballou vs Farnsworth et al. Withdrawn by deft.

Feb. 26.

2351 Hamlen vs Robison et al. Granted.

2297 Smyth vs Quigley et al. Sustained.

2069 Kingzette vs Sheets et al. Leave given to deft. to file additional affidavits.

947 Greenhalgh vs Field. Continued by consent of plff.

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The Cleveland Law Reporter.

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Book Notice.

WE have now the completion of Abbott's great work on the Law of Corporations, in volume 2d just received, covering all the cases English and American from 1869-1879. It is a supplement to the very large volume published ten years ago, digesting every corporation case down to that time.

The work embraces all branches of the Law of Corporations. Under the titles of the various specific corporations, such as banks, insurance, manufacturing and mining companies, municipal corporations, railroad companies, religious corporations, savings banks, telegraph and turnpike companies, etc., the law more particularly applicable to each of them is presented.

Municipal corporations, the leading kinds of companies organized for business purposes, and the religious and benevolent societies, have their places respectively in the volume. And those general subjects which affect all the different corporations, such as charters, powers, agents, officers, seal, are distinctively treated.

The object of this work is to relieve labor, in respect to the subject of corporations, by an exhibition of the substance of the authorities, so fully and accurately stated, and with such details of all requisite collateral information, that the Digest may be useful either as a guide through the original reports, or as a substitute for them, where access to them cannot be had.

The two volumes are extra large octavo of over eighteen hundred pages and contain an amount of matter that would easily fill four volumes of ordinary size.

Supplied by Ingham, Clark & Co., 217 Superior street, Cleveland, Ohio.

CUYAHOGA COMMON PLEAS.

JANUARY TERM, 1879.

FREDERICK WILLSON VS. ERWIN HIGGINS.

Trespass — Separately Numbering of Causes of Action in, etc.

JONES, J.:

The plaintiff's amended petition sets forth that on or about the first of January, 1876, he was and has ever since remained the owner of and been in the possession of certain land in Mayfield, Ohio,—giving a full description of the lands. That the defendant being in the possession and occupancy of the adjoining premises, he says that on or about the first of January, 1875, and on diverse times and days between said date and the first of April, 1878, entered said premises, and dug and opened an artificial ditch across the highway to and upon said premises of the plaintiff, causing water, etc., to pass over on the ground of the plaintiff, washing and tearing the roots of his hedge and injuring his premises, causing them to be muddy, and prevented the plaintiff from using them during the said term; and further says by an amended petition filed August 29th, 1878, that the continued acts aforesaid from time to time, and acts so done in continuation, constituted a continuing and permanent injury to the premises.

The defendant moves the court to require the plaintiff to separately state and number his causes of action, his theory of the case being that each time the defendant entered the premises constituted a separate and distinct cause of action.

This motion was once or twice granted in this case.

Gould says in his admirable work on Pleadings, Section 86, "In trespass when the plaintiff sues for different wrongs of the same nature committed by continuation or repetition, on several different days, he may recover all of them, on one count, by including in it as many days, or as long a period of time as his case may require." Especially is this so where the continued trespasses are of a permanent nature; as in a case like this—digging a ditch, and the water continually running through the plaintiff's premises in consequence.

The rule for separately stating and numbering is to be applied where the several tresspasses is a mere repetition of the injury, and where the results of each injury are clearly distinguishable from each other—where what is done by one trespass is clearly separate and distinct, and the injury separate and distinct from the injury done by another trespass. If these trespasses in this case are a continuing and permanent injury, in my judgment the de-

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fendant in this case is not entitled to have the plaintiff separately state and number his causes of action. He has but one cause of action and that one is well pleaded. The motion is overruled.

PRENTISS, BALDWIN & FORD for plaintiff.

TYLER & DENISON for defendant.

SUPREME COURT OF OHIO.

DECEMBER TERM, 1878.

Hon. W. J. Gilmore, Chief Justice. Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Hon. William White, Judges.

TUESDAY, Feb. 18, 1879.

General Docket.

Nos. 507 and 530. The State ex rel. Attorney General vs. Samuel W. Courtwright and Peter A Laubie. Proceedings in quo warranto to oust the defendants from the office of Judges of the Court of Common Pleas in the Fourth subdivisions of the Fifth and Ninth districts.

Okey, J., announced the conclusion of the court, overruling the demurrer to the answers, and rendering judgment for the defendants. Boynton and White, J. J., dissented.

Motion Docket.

No. 38. Horace Kelley et al. vs. The City of Cleveland et al. Motion for an injunction in cause No. 383 on the General Docket. Motion overruled.

No. 39. William C. Scofield vs. The City of Cleveland. Motion for an injunction in cause No. 385 on the General docket. Motion overruled.

No. 40. William Chisholm vs. The City of Cleveland. Motion for an injunction in cause No. 464 on the General Docket. Motion overruled.

TUESDAY, Feb. 25, 1879.

General Docket.

No. 556. David Norman vs. Joseph Shepherd and Nathan H. Shepherd. Error to the District Court of Coshocton county. On motion, and by consent of parties, it is ordered that the printing of the record be dispensed with.

No. 580. Charity A. Alexander vs. B. Johnson and wife. Error to the District Court of Brown county Proceeding dismissed because the petition in error was not filed within the time prescribed by the statute after the rendition of the judgment sought to be reversed.

Motion Docket.

No. 47. James W. Wilson et al. vs. William Cummings, Treasurer of Lucas county. Motion to take cause No. 449 on the General Docket out of its order for hearing.

No. 48. The State of Ohio, on the relation of Edward Howard and Albert Howard, partners as E. Howard & Co., vs. Carrington S. Brady, Auditor of Licking county, Ohio. Motion for a writ of mandamus. Alternative writ allowed.

No. 50. George B. Kennedy vs. The State of Ohio. Motion to take cause No. 557 on the General Docket out of its order for hearing. Motion granted.

No. 51. Mary Ann Huston vs. Thomas Crooks, executor, et al. Motion to take cause No. 531 on the General docket out of its order for hearing. Motion granted

No. 52. The State of Ohio on the relation of William B. Hayden, Richard Nevins and D. H. Royce vs. P. W. Corzilius, treasurer of the City of Columbus. Motion for writ of mandamus.

Alternative writ allowed.

TUESDAY, March 4, 1879.

General Docket.

No. 164. Robert Sanderson and others vs. The Ætna Iron and Nail Company and others. Error to the District Court of Cuyahoga county.

OKEY, J.:

Land was conveyed to a manufacturing company in payment for shares of its capital stock, and the company, exceeding its powers, rescinded the contract, reconveyed the property and cancelled the stock, but no actual fraud or unfairness appeared, and no complaint of the transaction was made for sixteen months, during which time the company became insolvent, and the land reconveyed was sold to an innocent purchaser—Held: That a stockholder, having full knowledge of the facts from the beginning, is precluded, in equity, by his laches, from asserting the invalidity of such rescission.

Empire Transfer Company vs. Blanchard, 31 O. S. 650, followed. Judgment affirmed.

Motion Docket.

No. 55. Elmer Cessna vs. the State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Holmes county. Motion overruled.

No. 53. Thomas McGuire vs. James McGuire and John McGuire. Motion for a supersedeas bond in No. 373 on the General Docket. Motion granted staying execution, on the plaintiff in error giving an undertaking to the defendants in error in the sum of $500, condition according to law, with sureties to be approved by the clerk of the Court in which the judgment is entered.

SUPREME COURT OF MAINE.

MAY 8, 1878.

HARDY, ADMINISTRATRIX, VS. TILTON.

When a sheriff has money in his hands which he has collected on execution, he cannot apply it on an execution in favor of another party and against the person in whose favor the first execution runs.

Case against the sheriff for the misfeasance of his deputy, Jeremiah J. Walker, in not paying over money collected on an execution.

The defendant pleaded the general issue, with a brief statement that his deputy, Walker, paid over to the plaintiff the money collected on the execution with the exception of $39.63 which said money, then in his hands as deputy sheriff, he in his said capacity had taken as the property of the estate of the said Warren Hardy, deceased, on an execution then in his hands for collection, in favor of Micah W. Norton, and against the plaintiff, to satisfy said execution and his fees thereon; and that Walker applied the $39.63 to the satisfaction of said execution, and his fees, and returned the execution fully satisfied. The parties introduced documentary evidence in support of their respective allegations; upon which the presiding justice ruled that the defense was not made out; and the defendant alleged exceptions.

The opinion of the Court was delivered by

WALTON, J.

The question is, whether an officer, who has collected money on an execution, can apply it in satisfaction of an execution against the person for whom it was collected, both executions being in his hands for collection at the same time. We think not. The attempt has often been made to attach or levy upon money thus situated; but it has uniformly been held that money, while in the hands of an officer who has collected it under legal process, is *in custodia legis*, and not the subject of attachment or levy. The leading case in this country was decided by the Supreme Court of the United States as long ago as 1801. A sheriff, having collected money on an execution, levied thereon an execution which he held against the person for whom the money was collected. The Court held that the levy could not legally be made. Turner

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vs. Fendall, 1 Cranch, 117. Many similar decisions have been made by the State courts. Willis vs. Pitkin, 1 Root, 47; Prentiss vs. Bliss, 4 Vt. 515; First vs. Miller, 4 Bibb., 311; Dubois vs. Dubois, 6 Cow., 494; Reddick vs. Smith, 4 Ill., 451; Dawson vs. Holbrook, 1 Ohio, 135; Crane vs. Freese, 1 Harrison, 305; Conant vs. Bicknell, 1 D. Chip., 50; Bank vs. Beaston, 7 G. & J., 421; Jones vs. Jones, 1 Bland. 443; Blair vs. Canty, 2 Speers, (S. C.), 34; Burrell vs. Letson, 1 Strobh. (S. C.), 230; Clymer vs. Willis, 3 Cal. 363; Reno vs. Wilson, Hemp., 91; Dawson vs. Holcomb, 1 Ham., 275; Wilder vs. Bailey, 3 Mass., 289; Thompson vs. Brown, 17 Pick., 462. Some of these cases relate to attempts to attach the money on writs; others to efforts to reach it by trustee process; others where, as in this case, attempts were made to levy executions upon it, but the same principle runs through them all, namely, that money collected by an officer on legal process, while it remains in his hands, is to be regarded as *in custodia legis*, and not the subject of levy or attachment in any form.

Exceptions overruled.

NOTE.—The English courts in Douglas, 231, have held that where a sheriff has in his hands money collected by him on another execution in favor of the defendant and he can find no other property of the defendant, the Court may order him to apply the money on the execution; but the contrary doctrine is held in 9 East., 48. The case of Smith vs. Reddick, cited in the principal case, and that of Campbell vs. Hosbrook, 24 Ill., 243, hold that where the execution is in the hands of a constable he cannot levy an execution or attachment on money in the hands of a sheriff.—*The Monthly Jurist.*

SUPREME COURT OF WISCONSIN.

OPINION FILED NOV. 14, 1878.

ADAM SCHNUR, APPELLANT, VS. JAMES H. HICKCOX, ET. AL., RESPONDENT.

APPEAL FROM MILWAUKEE.

RIGHT TO WITHDRAW TENDER FROM COURT.—Where a party makes a tender and pays the money into court, it is an admission on his part that there is that much due, and hence that the money absolutely belongs to the plaintiff, and the defendant has no right to withdraw it.

The plaintiff has the right to judgment and costs, where the verdict or finding is greater than the sum paid into court; but the execution should issue only for the balance.

The action is upon the official bond of the defendant Hickcox as Clerk of the Circuit Court of Milwaukee county. The other defendants are the sureties in such bond. Hickcox ceased to be such clerk before the action was brought.

It appears from the pleadings and proofs that when Hickcox was clerk of said court, one Mrs. Schnur brought an action on contract against the present plaintiff, who answered thereto a tender to Mrs. Schnur of $150 in satisfaction of the contract, which sum he paid into court. The action was afterwards tried and the Court found for the plaintiff therein, and found also that no tender of the sum due on the contract had been made. Judgment was ordered for such plaintiff for the sum found due on the contract, but no judgment has been entered. The controversy was settled by the parties, but the terms of the settlement do not appear.

When Hickcox went out of office he retained this $150 in his hands, and still retains it. His failure to pay the money to the plaintiff in this action (who claims that it is his money) after due demand, is assigned as a breach of the bond in suit.

The Court directed the jury to return a verdict for the plaintiff for the penalty of the bond; but afterwards on motion of the defendant Hickcox who alone defended the action, made an order setting aside the verdict and granting a new trial. From this order the plaintiff has appealed.

The opinion of the Court was delivered by

LYON, J.

A tender made before suit, to be available, should be pleaded and the money tendered paid into court for the benefit of the plaintiff. When this is regularly done if the plaintiff fails to prove a cause of action for a greater amount than was tendered, judgment goes for the defendant for his costs, but the money paid into court belongs to the plaintiff. It also belongs to him if the defendant fails to prove a valid or sufficient tender; and in such case the plaintiff is entitled to judgment at least f r the sum paid into court and for costs, but execution goes only for the balance of the judgment after deducting such sum.

The principle upon which these rules are founded is, that the tender (even though insufficient) and the payment into court for the plaintiff, of the money tendered, is a conclusive admission that the amount so paid in is due the plaintiff; and hence, that the money belongs absolutely to him, whatever may be the fate of the action. Becker vs. Boon, 61 N. Y., 317; Logne vs. Gillick, 1 E. D. Smith, 398; Read vs. Ins. Co., 3 Sandf., 54; Slack vs. Brown, 12 Wend., 390.

Applying these rules to the present case the result is, that the $150 paid into court belonged absolutely to Mrs. Schnur, for whose benefit it was paid, and still belongs to her unless she has assigned it to some other person, or has done some act equivalent thereto. It does not appear that she has made any transfer of the money. Although that action was settled, we are not informed of the terms of the settlement. It may well be that she retained her right to the money in the settlement, and is still entitled to it. The question whether it remains her money or whether she has parted with her title to it ought to be settled by the proper court before the action is brought on the bond of the clerk for neglecting or refusing to pay over the money to any person other than the party for whom it was paid into court.

In contemplation of law the money is held by the Court for Mrs. Schnur, and it seems very clear on principle and authority that no other person should be allowed to recover it until the Court in whose custody it is shall upon proper proceedings and proofs so order.

We think the plaintiff should apply to that court, on notice to all parties interested, for an order requiring its late Clerk, Mr. Hickcox, to pay over the money to him, and if he shows himself entitled thereto, the Court will make such order. Until that is done we do not think the plaintiff can maintain an action on the official bond of Mr. Hickcox for the recovery of the money. We also think that the fact that Mr. Hickcox has gone out of office will not affect the jurisdiction of the Court in the premises. Because the record fails to show any such proceedings, a judgment of non-suit could not have been disturbed. Hence the plaintiff is not in a position to attack the order for a new trial, which is, or may be, more favorable to him than a non-suit.

It may be observed that it was the duty of Mr. Hickcox, on retiring from the office of clerk, to pay over this money to his successor His failure to do so is a breach of one of the conditions of his official bond for which an action on such bond may be maintained by the proper party.

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But this is not such an action. The order of the Circuit Court granting a new trial must be affirmed.

RYAN, C. J., took no part in this cause.

NOTE.—See Hammer vs. Kaufman, 39 Ill., 87.

THE UNION NATIONAL BANK OF OSHKOSH, RESPONDENT, vs. R. P. ROBERTS ET AL., APPELLANTS.

APPEAL FROM CIRCUIT COURT, WINNEBAGO COUNTY.

MEASURE OF RECOVERY ON NOTE HELD AS COLLATERAL.—The general rule is, that where a note is held as collateral, the holder can recover of the maker the whole amount of the instrument, but where the maker would have a good defense against the payee, the holder can recover only the amount of the debt for which he holds the note in pledge.

The opinion of the court was delivered by

RYAN, C. J.

A rehearing of this appeal was granted on the question of the amount which the respondent was entitled to recover.

The learned counsel of the appellants took the position that because the respondent held the note in suit as collateral security for a note of the payee of much less amount, and because the record disclosed defenses to the note as against the payee, the respondent's recovery should be limited to the amount for which the note of the appellant was collateral.

The general rule is that a plaintiff recovering on an instrument held as collateral is entitled to recover the entire amount. Hilton vs. Waring, 7 Wis. 492; Plants M. Co. vs. Falvey, 29 *Wis.* 200; N. *W.* M. L. Ins. Co. vs. G. F. Ins. Co., 10 *Wis.*, 446. It is true that Dixon, C. J., throws some doubt on the rule in Kinney vs. Kruse, 28 *Wis.*, 183; and there are cases elsewhere in conflict with it. But the rule has been established in this court for twenty years, and still appears to be the proper one. If the holder of the collateral recover more than his principal debt he recovers it for the use of his principal debtor. Plants M. Co. vs. Falvey, supra. But there are exceptions to the rule. As between the pledgor and pledgee, when the securities pledged are the obligations of the pledgor, the pledgee which he would be obliged instantly to restore to the defendant. So where can only recover his principal debt: Jesup vs. Bank, 15 *Wis.*, 331. For it would be worse than idle that a plaintiff should recover an amount the collateral is in the hands of a *bona fide* holder, without notice of a good defense against his assignor, the general and better rule appears to be, that the pledgee can recover the amount of his principal debt only. Bank vs. Chapin, 8 Metc., 40; Stoddard vs. Kimball, 6 Cush., 469; Bond vs. Fitzpatrick, 4 Gray, 89; Fisher vs. Fisher, 98 Mass., 303; *Williams* vs Smith, 2 Hill, 301; Duncan vs. Gilbert, 5 Dutcher, 521.; Valette vs. Mason, 2 Carter, 287. There are other cases to the same effect, but it is sufficient to give these from the brief of the learned counsel for the appellant. And this Court holds this to be a proper exception to the general rule. For it would be manifestly unjust to allow a plaintiff to recover for the use of his assignor, what the assignor could not recover for himself.

The question here is, therefore, whether the evidence in this case discloses a defense against the payee of the note.

The defenses here set up are that the note was altered by the agent of the payee, and that it was originally made by a partner of the appellant's now deceased, to pay his individual debt. The learned Judge of the court below found that the alteration was made without the knowledge, consent or permission of the payee; and that the note was given for price of chattels appertaining to the business of the partnership, purchased by the partner giving it ostensibly for the use of the partnership.

All the evidence bearing on these have been considered; and the preponderance of evidence seems to be in favor of the findings; certainly not against them. This Court cannot therefore assume to disturb the findings. Ely vs. Daily, 40 wis., 52.

The note in question was counted on as payable to McDonald or bearer. And on the argument of the first hearing, the alteration was discussed by counsel on both sides, as one changing the note from order to bearer. The former opinion so treats it. This appears to have been inaccurate in terms, though possibly the alteration had the effect of making the note payable to bearer. On that no opinion is now expressed; but it is deemed proper to note the accuracy.

The judgment of the court below is affirmed.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending March 7, 1879.
[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

March 1.

William Edwards to William Short. $545.

Louisa and Timothy Southern to G. I. Jones. $300.

Amos N. Clark to E. D. Stark. $2000.

J. B. Rasmussen and wife to Mary E. Moffett. $300.

Mathew Weitz to J. G. Denzel. $400.

Henry Ehnfelth to Sarah E. Haines. $1100.

George Savage and wife to John Dease. $300.

Henry H. Dodge to The Citizens' Loan and Building Association. $2800.

Orlan D. Chase to S. H. Kirby. $500.

Wm. Hadley and wife to Barbara Raeth. $200.

H. C. Miller and wife to John B. Coffinberry. $120.

March 3.

W. H. Williams to Horr, Warner & Co. $4200.

Wm. H. Sly and wife to Na. Life Insurance Company U. S. A. $1500.

E. B. Cornell to Edward S. Turner. $800.

Vaclav Sauckp and wife to John Karda. $300.

John Lawlow and wife to Thomas Axworthy. $1600.

Mary Bilek to Peter Benda. $600.

Frederick Smitka and wife to Everett Holley. $800.

Isabella Brown to Barbara Hemmersly. $100.

Roman and Catherine Goepperd to The Citizens' Savings and Loan Association. $1000.

March 4.

Elisha Robinson and wife to George W. Bromley. $2000.

John Myer Jr. and wife to John R. Wagner. $50.

L. C. Haines and wife to Frederick Haster. $290.

Francis and J. W. Stanley to William J. Lewis. $600.

Joseph E. and Caroline Propst to F. A. Wilcox. $125.

Vaclav Strenad to Frank Velieman. $167,

March 5.

Ellen Fitzgerald to S. S. Stone. $150.

Samuel B. Marshall to The People's Savings and Loan Association. $1300.

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Elizabeth Porter to Samuel Muntner. $2225.

Mary A. and Thomas P. McMahon to Richard Crocker. $300.

March 6.

Marie Lock to Albert Doebbler. $150.

Julia A. Higby et al to E. B. Pratt. $900.

March 7.

George E. Jones and wife to L. F. Beere. $400.

Julia Hosmer to William S. Wortman. $2500.

Jacob F. Wagenbauer and wife to Encampment No. 7, A. O. G. F. of Cleveland. $150.

Wm. Hamilton and wife to Thomas McFarland. $250.

Robert E. Eddy to Luke F. Jones. $250.

Lizzie and John S. Fovargue to Hiram Day. $500.

A. E. Fovargue and husband to Fred Seelbach. $2000.

Mathias Morrvitz and wife to Chris Hoehn, admr. $400.

CHATTEL MORTGAGES.

March 1.

James W. Pearce to Wm. Bowler. $5000.

Joseph H. Johnson to same. $2,000.

Alexander Merory and wife to Wm. Roelfo. $150.

J. O. Davidson to Cleveland Saw Mill and Lumber Co. $301.

Wm. H. Van Wie et al to Rodney D. Dougherty. $500.

March 4.

R. J. McClain to the Cleveland Burial Case Co. $132.

Charles D. Day to A. W. Bailey. $125.

W. H. Battner to H. P. Bates. $100.

Robert Hartley to Cobb, Andrews & Co. $1040.

Loura J. Dodge to Charles Kaestle. $400.

March 5.

Joseph Pusdrofoke to William Pleis. $150.

Gault & Vining to White S. M. Co. $112.

March 6.

A. W. Garr to J. Krauss & Co. $172.

L. A. Bailey to John Robertson. $125.

John T. Becker to Henry Steigmier. Forty dollars.

March 7.

O. H. L. Castle to John G. Nesbitt. $90.

Jacob Voelker to Philip Voelker. $1043.85.

J. A. Strobart to Wm. Wilson. $450.

Wm. Pleis to Katrina Pusdrofoke. $150.

G. W. Lynde to C. C. Lane, trustee, etc. $131.50.

Nauert and Savage to Anthony H. Nanert. $1000.

W Lamp to J. E. Hall. $118.17.

DEEDS.

Feb. 28.

Levi Bauder, Co. Aud., to Michael Wooldredge and wife et al. $141.18.

James M. Curtiss and wife to Eliza C. Degnon. $1280.

Flora A. Dixon to M. A. White. $1200.

Solon C. Grannis to J. S. Grannis. $2000.

Anna C. and Victor Gutzwiller to Francis F. Sizer. $2500.

Edward Guentyler and wife to John Froelich. $1.

David Z. Herr and wife to Elizabeth Bender. $700.

F. Leonard to G. A. Parker. $82.

Mary and Charles Metzger to Aenis & Froelich. $1.

Clarabel A. Rowe to Francis M. Davis. $9000.

Harvey Stephens et al to Susanna Tuttle. $1.

John Tomes to Susanna Tuttle. $800.

W. H. Wilder to Joseph Urmetz. $1.

March 1.

Samuel Sandert and wife to Louisa Southern. $1.

Charles H. Palmer, guardian, to Mathew Weitz. $1050.

The Nat. Life Ins. Co. of U. S. of Am. to W. W. Sly. $2500.

John McNeil to Eliza Morris. $750.

Catherine McCabe et al to Maggie Degnon. $5.

Henry Hames and wife to Henry Ehupetht. $1100.

James M. Hoyt and wife to—$400.

Mary W. Bradbury et al to Philip Eisel et al. $2.

P. H. Beckwith and wife to Henry J. Burrows. $7000.

Trustees of 1st German Congregational Church etc. to Trustees of Tabernacle Baptist Church. $6510.

March 3.

Mary Davidson to Elisha Savage. $30.

Charles Barkhill et al to Vaclav Canat. $450.

Loftus Gray and wife to G. H. Owing. $350.

Charles E. Leland and wife to George S. Leland. $1.

Joseph H. Mann and wife to Phineas Dalloff. $2300.

John I. Nesbit and wife to M. A. Kneeland. $200.

John R. Rhodes et al to heirs of Henry Homek. $700.

Ferdinand Svaboda, exr. etc. of Anton Claloúphy to Rosan Kuban. $700.

Sabaz S. Stoneman and wife to John G. Spear. $4500.

Edward S. Turner to E. B. Cornell. $1000.

Lorenzo Thayer to Thomas Bradley. $150.

James Walker to John Agnew. $60.

Ella and Wilson J. Willis to Catharine Goeppert. $7700.

March 4.

Lyman B. Biers to Wm. K. Corlett. $23500.

Hetty Ann C. Bennett and J. D. Bennett to W. H. Doane. $12000.

Same to same. $5000.

E. S. Gillette and wife to Asa Gillette. $2958.

Isabella A. Houlder to Joseph E. Propet. $1500.

Nicholas Myer and wife to Martin Becker. $850.

August Modrov and wife to John W. Varues. $10.

John W. Varues to Amelia Modrov. $10.

T. J. Talbot and wife to Darthula W. Moore. $3000.

W. J. and C. F. Waterbury et al to George J. Johnson. $2.

T. H. and R. C. White to Thomas Mulleux. $720.

Edgar Slaght et al by Mas Com to The Society for Savings. $5200.

George Hadlow to Henry R. Hadlow. $2500.

March 5.

David Edwards and wife to The City of Cleveland. $2000.

James H. Salisbury to William J. Gordon. $1.

Rachael Hawley and husband to Lynus Clark. $4100.

Reuben D. Swain and wife to John C. Hemmeter. $700.

John C. Hemmeter and wife to Ezra P. Frink. $1.

C. P. Jewett and wife to The City of Cleveland. $2000.

John A. Jennings, surviving exr. and trustee of the estate of Brewster Pelton, deceased, to the City of Cleveland. $400.

A. W. Poe and wife to William Voelker. $1200.

Uri Richards and wife to Letitia E. Richards. $889.

Elizabeth Stoll and husband to D. C. Taylor. $1500.

Andrew O'Neil et al, heirs at law of Michael Fitzgerald, deceased, to Ellen Fitzgerald. $10.

William Ottmanus by Felix Nicola, Mas Com, to Clemens Stolz. $800.

Jane Story et al by Mas Com to George Deitz. $3500.

March 6.

George W. Brook et al to Edward Greenfield. $600.

William S. Goodrich to Jerusha Sickles. $500.

G. E. Herrick and wife to Louisa S. Hoel. $3750.

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Ferdinand Ost and wife to Frank Ost. 0$20.

Ella M. Poe to Anna Gleick. $1000.

Christian Winkler and wife to Jacob Theobald. $200.

Deitrick Herchert et al, by Felix Nicola Mas. Com., to C. A. Umbstaetter, trustee. $235.

Mary Kirk et al by C. C. Lowe, Mas. Com., to John Connell. $334.

H. T. Hower et al by C. C. Lowe, Mas. Com., to John Welch. $4607.

Judgments Rendered in the Court of Common Pleas for the Week ending March 6th, 1879, against the following Persons.

Feb. 27.

Meriam & Morgan. $735.47.
Patrick Tigne. $238.
T. E. Newcombe et al. $341.94, $50, $261.45.

Feb. 28.

J. S. Stoneman et al. $428.15.
James Martin. $1640.75, $48.

March 1.

Chauncy Fuller. $75.

March 3.

Henry S. Fassett. $423.50.
Richard Kinkelaar et al. $1602.13.
Antonia Cordano. $3.25.
Wm. Morris. $2166.66.

March 4.

J. D. Bauer. $586.71.
Wm. Lockyear and garnishee. $4900.
E. W. Towner et al. $274.93.
Louisa C. Boltz. $286.33, $327.60.
Clarence M. Bixby et al. $42.10, $441.29

March 5.

Samuel J. Tunscatt. $80.
J. C. Ransom et al. $139.78, $413.

ASSIGNMENT.

J. G. Scranton to W. M. Raynolds. Bond $1200.

MECHANICS' LIEN.

B. S. Cogswell to John J. Cain. $69.36.

U. S. CIRCUIT COURT N. D. OF OHIO.

Mar. 1.

3358. Rummington et al. vs. Atwater. Referee's report filed.

2427. John Thoman vs. Peter Rose. Allowance made to District Attorney.

3813. Farmers Loan and Trust Co. vs. Wheeling and Lake Erie R. R. Leave to answer by April 1st, 1879.

3814. Hugh B. Williams vs. Same. Same.

3825. Gottfried vs. C. Schneider. Plff. given one week to file counter affidavit.

3826. Same vs. A. Kapp et al. Same.

3795. Dunham vs. Buckeye Ins. Co. Leave to amend petition in ten days.

3573. 1st National Bank of Akron vs. Jos. Moore et al. Leave to defendant, J. M. Poulson, assignee, to file amended answer by April 1st, 1879.

Mar. 3.

2945. Aaron J. Nellis vs. Peter Everhart. Order allowing complete exhibits to be forwarded to Philadelphia.

3462. Birdsell et al. vs. John N. Cole. Demuerer overruled. Leave to answer instanter.

3480. Same vs. S. Kirkpatrick. Same. Same.

3818. First National Bank of Akron vs. David R. Page, Treas. Answer. Humphrey & Stuart.

3834. Second National Bank of Akron vs. Same. Same. Same.

Mar. 4.

2874. Isaac Baughman et al. vs. The Milburn Wagon Works et al. Motion for more time to take complete testimony filed.

3355. The Stillwell & Bierce Man. Co. vs. Calvin A. Crunninger et al. Motion by deft. to strike out evidence.

March 4.

2556. Clinton Garrett vs Penn. Co. Demurrer overruled. Leave to answer in 30 days.

3321. Singer Man. Co. vs J. W. Purvlance et al. Demurrer sustained.

2524. Spalding, Woodward & Co. et al vs John Bachelder. Dismissed.

2526. Abner W. Sawyer vs Levi S. Mabie et al.

11. Eliza M. Simmons vs J. M. Rhodes, assignee. Overruled.

March 5.

John Johnston of Akron this day admitted to practice in the United States Court.

3604. Edward Smith et al vs tug L. P. Smith et al. Motion to dismiss appeal. H. L. Terrell.

2537. John D. Easter et al vs Edwin Bayliss. Continued.

2593. William K. Miller vs Aetna Man. Co. Continued.

2621. John D. Easter et al vs Charles Cranz, assignee. Continued.

2622. Henry F. Mann vs same. Same.

2706. Joseph L. Hall vs Charles Diebold et al. Same.

2737. Charles W. Marsh vs Charles Cranz. Same.

2738. Same vs Edwin Bayliss. Same.

2740. G. B. Turner et al vs Jonathan L. Booth. Same.

2746. Wedge Block Pavement Company et al vs James Steele et al. Same.

2768. Reuben Hoffeins vs Charles Cranz et al, assignees. Same.

2769. Same vs Bucyrus Machine Works et al. Same.

2770. Same vs Fremont Harvester Co. et al. Same.

2781. Ogro J. Hale vs Northern Transportation Co. et al. Same.

2822. Northwestern Mutual Life Insurance Co. vs John Lockie et al. Same.

2873. Lester C. Beardsley et al vs H. B. Hunt et al. Decree pro confesso.

3046. George C. Burdett vs Tappin Rice Co. Dismissed without record at cost of complainant.

3047. Same vs same. Same.

3053. Albert Brown et al vs Cleveland Co-operative Stove Co. Same.

3234. Marcus Prince vs Frederick Beir et al. Same.

3725. William T. Carter vs Henry H. Adams et al. Judgment for $27,537.15.

3051. James Parks et al vs Martin C. Gibbs et al. Continued.

3149. Charles F. A. Henricks vs Cleveland Non-Explosive Lamp Co. Same.

3183. Joshua Register vs James R. Worswick et al. Same.

3191. Charles H. Billings vs Daniel A. Clark et al. Same.

3204. Henry Greenbaum et al vs James Ward et al. Same.

3214. American Cotton Tie Co. et al vs James Cartwright et al. Same.

3220. Lavinia F. Thompson et al vs George W. McCook. Continued.

March 6.

3296. John C. McLain vs Delia R. Carr. Continued.

2299. Same vs same. Same.

3304. Johnathan S. Craft vs C. Aultman & Co. Same.

3346. Lydia W. Andrews, guardian, etc, vs Frank M. Stearns et al. Same.

3320. August Vozler et al vs Max Ernst. Same.

3340. Aaron J. Nellis vs Luke Lennox. Same.

3349. James H. Van Dorn vs Stephen H. Osborn. Same.

3355. Stillwell & Bruce Man. Co. vs. C. A. Croninger. Motion to restrain defendant's taking testimony overruled.

2874. Isaac Baughman et al vs Milburn Wagon Works. Complainant has 90 days to take testimony and defendant 90 days to reply.

3801. C. W. Filmore et al vs Johnston W. Wooley et al. Continued.

3652. First National Bank of Geneva vs Sydney H. Cook, treas. Pro confesso.

3653. A. R. Flint vs G. F. Lewis. Amended petition filed. Ranney & Ranneys; Caldwell & Sherwood.

U. S. DISTRICT COURT N. D OF OHIO.

Feb. 28.

1568. Chas. R. Grant, assignee, vs. Wm. H. H. Welton et al. Answer of Louisa A. and Frank E. Welton and Ransom Cole. J. A. Kohler.

1565. Same vs. Same. Separate answer of Wm. H.H. Welton. Same.

1558. Geo. W. Canfield vs. The 1st National Bank of Garrettsville.

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Reply to answer of defendant. Gage & Canfield and R. P. Ranney.

1565. Same vs. Same. Same. Same.

1563. Chas. R. Grant, assignee, vs. Wm. H. H. Welton et al. Answer of Louisa Welton. J. A. Kohler.

Mar. 3.

1368. James Carrothers, assignee, etc., vs. Benj. F. Southwark. Motion to set aside sale and decree. Swayne & Swayne.

1560. Wm. M. Patterson, assignee, etc., vs. Mary Ann Farran. Answer. Burke & Saunders.

1561. Same vs. Samuel Gibson et al. Same. Same.

Mar. 4.

1660. Edward Brook et al. vs. Schooner Russian. Petition of Geo. Presley et al. against the proceeds of the Schooner Russian.

March 5.

1731. William H. Radcliffe et al vs schooner A. M. Moss, etc. Libel for repairs. H. D. Goulder.

Bankruptcy.

Mar. 3.

1294. In re. Flinn Bros. Exceptions to accounts of assignee. Motion to set aside. Ingersoll & Williamson.

1294. Same. Exceptions to account of Register. Same.

1974. In re. Samuel Foust. Petition for discharge. Hearing March 24th.

1971. In re. Geo. Steese. Same. Same.

1834. In re. C. L. Morehouse. Same. Same.

1868. In re. Andrew and Frank Barnes. Discharged.

1520. In re. Chas. P. Snider. Motion to set aside sale. Hord, Dawley & Hord.

1844. In re. Norton C. Stone. Petition for discharge. Hearing March 24.

1812. Updegraff & Johnson. Discharged.

Mar. 4.

1894. In re. James Burnside. Discharged.

1899. In re. Andrew Smith. Petition for discharge. Hearing March 24th.

1822. In re. Joel H. Luther. Discharged.

1893. In re. Andrew P. McKinley. Discharged.

March 5.

2030. In re George Kunz. Discharged.

1888. In re Thomas A. Thomas. Discharged.

March 6.

1821. In re William Shorb. Objection of George McGrath to discharge.

March 7.

1799. In re A. Stockwell. Discharged.

COURT OF COMMON PLEAS.

Actions Commenced.

Feb. 25.

14704. Joseph Keary vs Henry C. McDowell et al. Equitable relief. Mix, Noble & White.

Feb. 26.

14705. George J. Johnson vs Ohio Life Insurance Co. and Trust Co. etc. Equitable relief and to quiet title. W. H. Gaylord.

14706. Rosa Klein vs William H. Thomas. Money only. H. W. Canfield.

14707. Michael Giel vs Melchior Neff. Money only. John Deveny.

14708. Frank Clermont vs Lester Cochran et al. Money and to subject lands. Tyler & Denison.

14709. Mrs. J. Slesfka vs Mrs. E. Yahrus, admx, etc. Error to J. P. Willson & Sykora; J. A. Smith.

14710. John S. Healy et al vs Valentine Gleich et al. Money and foreclosure. H. T. Corwin.

14711. James Scribner & Co., partners etc, vs C. N. Van Doom. Appeal by defendant. Judgment January 25. Robison & White; J. J. Elwell.

Feb. 27.

14712. A. E. Adams and S. C. Ford, partners etc., vs J. B. Ramsdell. Cognovit. Estep & Squire; E. K. Wilcox.

14713. H. W. Libbey vs Henry Brinsley Sheriden. Money only. Wallace Smith and Arnold Green.

14714. Augusta Raebel vs Frederick Eichenmueller. Money, account, sale of land and relief. J. S. Grannis; M. B. Gary.

14715. Clemens Stolz vs Louisa C. Boltz. For appointment of receiver and equitable relief. Hadden & Bacon.

14716. Henry L. Hills vs William B. Higby et al. Appeal by defendant. Judgment January 28. Babcock & Nowak; Abner Slutz.

Feb. 28.

14717. Michael Shannon vs The City of Cleveland. Error to Police Court. Kessler & Robinson and H. W. Canfield.

14718. The Society for Savings vs Fred W. Schnadt et al. Money and sale of land. S. E. Williamson.

14719. Same vs Henry A. Smith et al. Money and sale of Land. Same.

14720. Same vs Joseph Doorah et al. Money and sale of land. Same.

14721. Charles A. Crumb et al vs J. S. Stoneman et al. Cognovit. S. S. Marsh; A. L. Hyde.

14722. Lucy A. Rowley vs James H. Slawson et al. Money, sale of mortgaged lands and relief. B. R. Beavis.

14723. James H. Badson vs Wesley L. Beach. Appeal by defendant. Judgment Feb. 20.

March 1.

14724. W. H. McCurdy et al vs Franz K. Mayer. Equitable relief. E. A. Angell; Mix, Noble & White.

14725. Nelson Moses vs Henry Hank. Money and foreclosure. R. N. Denham.

14726. James M. Nash vs Lester L. Hickox et al. Estep & Squire and Van Hyning & Johnston.

14727. Franklin Coal Co. vs George Bruch et al. Money and foreclosure of mortgage. Gilbert, Johnson & Schwan.

14728. Edward Schmeidling vs William Buehrer et al. Money only. George B. Solders.

14729. C. Schneider, surviving partner etc, vs John Eimer et al. Equitable relief. J. H. Schneider; Gustav Schmidt.

14730. L. A. Russell vs Thomas J. Carran, assignee etc. For allowance of claim. S. M. Eddy.

14731. John Wagner vs Conrad Beck. Money only. John W. Heisley.

14732. John Rock vs. Wm. Britt et al. Money and to subject lands. C. W. Coates.

14733. Henry Coster vs W. R. P. Brown et al. Money, foreclosure of mortgage and sale of land. C. W. Coates.

14734. A. Weimer, vice president, and J. Rohrheimer, treasurer of Jewish Orphan Asylum vs Caroline Roskopf et al. Money and equitable relief. S. A. Schwab.

14735. James M. Coffinberry et al vs David M. Darland et al. Foreclosure of mortgage and equitable relief. Henderson & Kline.

14736. W. S. Chamberlain et al vs Benjamin Kingsborough et al. Money, to subject land and relief. A. Zehring; G. H. Foster, Gilbert, Johnson & Schwan.

14737. Eva C. Speith vs Jay H. Stewart et al. Money only. Willey, Sherman & Hoyt.

14738. Charles H. Sayle et al vs William Patterson et al. Money and to foreclose mortgage. H. Clark Ford.

14739. B. F. Morse vs Amos N. Clark. Money only. Hutchins & Campbell.

14740. Andrew Wirth vs George Bading et al. Money and relief. J. W. Heisley.

March 3.

14741. S. C. Lewis, exr, vs William Jones et al. Money, foreclosure and relief. J. J. Carran.

14742. Calvin W. Blish vs Charles H. Blish. Money and to subject lands. Willson & Sykora.

March 4.

14743. George Dunn vs Laughlin Smith et al. Money and equitable relief with att. W. K. Smith.

14744. H. W. Page et al vs J. D. Bauer. Cognovit. P. P.; B. R. Beavis.

14745. Fred A. Brand vs Aaron Higley et al. Money and to subject lands. Gollier & Brand.

14746. Daniel Branner vs S. W. Schnadt et al. Money and to subject land. W. S. Kerruish and F. K. Collins; Stone & Hessenmueller.

14747. John Weber, Jr, vs Chris A. Nanert. Money only. Foster, Hinsdale & Carpenter.

14748. Elias A. Root et al vs George Smith. Money only. Baldwin & Ford.

14749. John S. Crawford vs The Phoenix Mutual Life Ins. Co. Money only. J. B. Fraser.

14750. The Society for Savings vs Ellen Ford et al. For sale of real estate. S. E. Williamson.

March 5.

14751. Mattie May Myers vs Julius Kebler. Appeal by deft. Judgment Feb. 5. W. S. Kerruish.

14752. Frederick Schmoldt vs Thomas Graves et al. Equitable relief. Arnold Green.

14753. Rebecca Schwartz vs J. O. Humphrey et al. Money and to subject lands. S. A. Schwab.

14754. Fred Krauss et al vs C. S. Hu

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son. Money only. A. H. Weed and M. W. Pond Jr.

14755. George P. Hunter et al vs G. N. Foster, admr etc. Money only. George P. Hunter.

March 6.

14756. Isaac Kidd vs Michael Murphy et al. Money and to subject mortgaged premises. J. T. Logue.

14757. Amasa Stone vs L. M. Southern et al. Money and sale of mortgaged land. B. R. Beavis; W. J. Boardman.

Motions and Demurrers Filed.

Feb. 26.

2381. Archer vs. Archer et al. Motion by plaintiff to dismiss appeal.

2382. Same vs Coon. Same.

2383. Telschow vs Stockey et al. Motion by plaintiff for the appointment of a receiver.

Feb. 28.

2384. Zoeter vs Lamson. Motion to strike the amended petition from the files.

2385. Belle vs Lowe et al. Motion by plaintiff for the appointment of a receiver, with notice and acknowledgment of service, etc.

2386. Gillette vs. Kidd. Motion by plaintiff to dismiss appeal, with notice of motion and acknowledgment of service.

2387. Stolz vs Koester et al. Demurrer by plaintiff to the 1st and 2d defenses of defendant William Tramps' amended answer.

2388. Cooke vs Draeger. Motion by defendant to dismiss attachment, with affidavit of Michael Draeger and August Draeger.

March 1.

2389. Platt vs Raeder et al. Demurrer by defendants Charles E. and Emily S. Raeder to 1st, 2d, 3d, 4th, and 5th causes of action in the petition.

2390. Sawtell vs Whiting et al. Demurrer by defendant J. H. Wrenn to the petition.

2391. Wilcox & Gibbs S. M. Co. vs Follett et al. Motion by defendant L. B. Kinney, to require plaintiff to make his account and statement attached to his reply more definite and certain.

2392. Bennington et al vs Prather. Demurrer by defendant to the petition and amendment to the petition.

2393. Valley Railway Co. vs The Hemlock Valley Railway Co. et al. Motion by defendants John G. Moore and John C. Fogg to dissolve the temporary injunction allowed herein.

2394. Schmidt vs Tausch et al. Motion by defendant C. Fleidner, for a new trial.

2395. Greer, as admr etc, vs Wilkins. Demurrer by plaintiff to the answer.

2396. The Central Bank vs John Mullen et al and garn. Motion by defendants John Mullen and Mrs. Maloney to dissolve attachment.

2397. Bronson et al vs Staddart et al. Demurrer by defendant Jesse P. Bishop to the petition.

2398. Daniels vs Baldwin. Motion by plaintiff to strike from answer as irrelevant etc.

2399. Same vs same. Motion to require defendant to make his answer more definite and certain.

2400. The Cleveland Mechanics' Land, Building and Loan Association vs Field. Motion by defendant for a new trial.

2401. Spencer vs Shiely, admx etc. Motion to require defendant to make his answer more definite and certain.

2402. Hewett et al vs Wiltz et al. Motion to require plaintiffs to make their petition more definite and certain.

March 3.

2403. Downs vs Charlton. Motion by defendant to strike petition from the files.

March 4.

2404. Everett vs Ryan et al. Motion by deft John Kennedy to require plff to give bail for costs.

2405. Brunner vs Schnadt et al. Motion by deft for the appointment of a receiver.

2406. Ford vs Hogan et al. Same.

March 5.

2407. Collins vs Kerstine et al. Demurrer by defts to the amended petition.

2408. Vincent, Sturm & Co. vs Wettrick et al. Motion by deft R. C. White for leave to file supplemental answer.

2409. Zoeter vs Lamson. Motion by plff for the appointment of a receiver.

2410. Platter vs Stewart et al. Demurrer by plaintiff to the answer of deft J. S. Stewart.

2411. Strauss, assignee, vs Duncan et al. Motion by defts Hannah and A. Raschgour to require deft Mrs. S. M. F. Duncan to make her answer and cross-petition more definite and certain, and to separately state and number causes of action and defense.

March 6.

2412. DeVeny vs Thorp. Demurrer to the petition.

2413. Franklin Coal Co. vs Bruch et al. Motion by plaintiff for the appointment of a receiver.

Motions and Demurrers Decided.

2226. Loesch vs Kneppenberger. Granted. W. H. DeWitt appointed receiver.

2388. Cooke vs Draeger. Motion withdrawn. Case settled.

2316. Tiedman vs Byer. Overruled. Plff has leave to amend without cost.

2330. Halle vs Beck et al. Overruled.

NOTICE.

Notice is hereby given to the unknown owner of the 1st volume of American Cyclopædia used in the trial of case, Davis vs. Maltby, May Term, 1878, that the same can be found at the office of Messrs. Tyler & Denison, they having been unable to find, after diligent inquiry, an owner for the book.

J. G. Pomerene.] [H. J. Davies.

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CUYAHOGA CO. DISTRICT COURT meet on Monday, the 17th inst. We shall publish reports of as many of the cases decided as may be practicable; and we trust that the Judges of that Court will so far respect the wishes of the Bar of this city that they will deliver decisions, not off-hand at the close of the argument, but upon stated days of the week.

CUYAHOGA COMMON PLEAS.

MARCH TERM, 1879.

ALIDA JOHNSON, ET AL., BY, ETC., VS. NICHOLAS MEYER.

Trespass—Guardian—Authority of to sell Real Estate—When Purchaser from Guilty of Trespass, etc.

Charge to jury by
JONES, J.

Gentlemen of the Jury: This is an action brought by sundry minors heirs of Martin Johnson, deceased, by their next friend, against Nicholas Meyer, defendant, and the averment of the plaintiffs' petition is this: That about 1872, the defendant Meyer unlawfully and forcibly entered the premises of plaintiff on Columbus street, broke into his close between Columbus and Johnson streets on the one side, and Clark avenue and Walton avenue on the other, and that he then and there tore down, carried away, took to pieces a barn then and there a part of the realty, part of the landed property of the heirs of the value of $800, and that he converted this property to his own use. That is entire the allegation of the plaintiffs' petition.

The defendant comes in and answers, and denies substantially all the allegations of the plaintiffs' petition,—denies each and every specification except such specification as he expressly admits. He does not expressly admit any material allegation, so that substantially the burden is upon the plaintiffs to prove all such facts as are essential to make out their case.

To entitle the plaintiffs to recover in this case, they must show that at the time this injury was committed, they, the plaintiffs, were possessed of this property. That they substantially had the ownership is not denied here. It is conceded upon the trial that they were the owners in such manner and form as is provided by Martin Johnson's will. That is the substantial concession on the other side of this case. Martin Johnson died, seized, it is admitted, of this property; and the plaintiffs, by that admission, admit that these children of this mother were possessed of this property with such title as this will gave to them severally and collectively.

Now then, as I have said, the plaintiffs must make out substantially that they had the ownership and possession of this property at the time that this injury was committed. They must show that the defendant unlawfully entered this close and took away and converted to his own use this property. Now I charge you that if he the defendant, entered this close by permission of the guardian for any lawful or ordinary purpose, that did not give the defendant the right to enter the premises and despoil and carry away any portion of the property. A guardian, as such, has no right himself to remove or despoil any portion of the real property, to carry it away or reduce it or remove it in any way whatever, without the consent of his wards or without the assent of the Probate Court. And any one who may know of his guardianship, and that the property is the property of the wards, cannot protect himself against an action for removing or despoiling any portion of the realty by mere proof that the guardian authorized it or that he had paid the guardian for it. I think the true situation in this case is simply then that the guardian is the trespasser in such case, and that the person to whom he sells and who is authorized by him to carry it away is also a trespasser and that they may be liable jointly or severally; that if one of them makes satisfaction of the claims, that satisfies both; that both or either of them may be sued until there is a satisfaction made for the injury; that an action against one is no bar to an action against the other; and the Probate Court, on its own motion, requiring Mr. Hornsey to put this item into his account for wrongfully selling this property, is no bar to this proceeding. If it had been true that at the instance of the heirs he had been made to account for the very identical money that he had sold this property for, that might amount to a ratification of the act of sale,—an election to take the proceeds instead of to go for the article. But there is nothing in the proceeding of the Probate Court

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that is a bar to this proceeding, or that should affect it in any way whatever. There was something said in the argument about this property having been changed from realty into personalty, but I do not know whether any request will be made on that subject or not. The guardian could not change it from realty to personalty by moving it from one portion of the lot to another. It would be realty after removal as much as it was before. There are many instances where buildings placed upon property are not considered a part of the realty; but I do not know that any such question as that can fairly occur in this case from the proof in the case. If counsel on either side claim that there is a fair question to be made of that I will cheerfully respond to any request that may be made upon the subject.

If you find that this was the close of these plaintiffs, either in whole or in part; if they had possession of it exclusively or in connection with their mother under the terms of this will, and although they went away temporarily and left it in the possession of the guardian, I hold that their possession is still sufficient to enable them to maintain an action for trespass for any such injury that is complained of in this case. If you find they had possession; that it was on their close that the injury was perpetrated, then the question arises, how much are to be the damages? I think the true rule of damages in this case is this: You are to give these plaintiffs a sum of money that will compensate them for the injury that they have sustained. I do not mean by that to include the injury that their mother also sustained at all, but leave them to recover simply an amount of money that will be equivalent to satisfy any injury that they have received. And, of course, in estimating that, you will have to take into account the ownership of this property, as provided by this will, in the mother—ownership and possession to a certain extent.

Carefully examine the case. I see no reason in this case, and it is not claimed by counsel, that there should be any cumulative damages; it is a case for compensation, to make these plaintiffs good for the injury they have suffered, that they have sustained by being deprived of this barn and its use.

Now gentlemen, I believe I have substantially covered the law points in this case; I will, howevery, specifically respond to the full requests that are made by counsel on either side.

The plaintiffs request me to say "That the occupation and possession of a guardian is the occupation and possession of his wards." I think that is correct.

2. That the powers of a guardian appointed by the Probate Court, are limited by law, and while he has a right to care for the property of his ward, he has no right to waste it;" I leave that out because I do not think it is of any importance in the case. He has no right to sell the real estate of his ward, or any of it, without the order or decree of the Probate Court having jurisdiction in the matter. I charge you that is law.

3. "That every one dealing with a guardian in his trust capacity, is presumed to have knowledge of his powers, conferred by law, and is chargeable with knowledge of such powers." I think that is law.

4. "That if a guardian, by a breach of his trust, convey any portion of the estate in his hands to a purchaser who had notice of his being a guardian, the wards may maintain an action against the purchaser for the value of such property although he has paid the guardian for the same." That is the law.

5. "That if the jury shall find that the defendant entered upon the property of plaintiffs at the request of the guardian, John Hornsey, and having paid him for this barn, tore it down and removed it from their premises; if they shall also find that he was acting in this matter without authority of law,—then the defendant is liable to respond to plaintiffs for the full value of the barn." That is inconsistent with what I have already said, and I refuse to charge that as the law for the reason that it asks me to charge that these plaintiffs shall recover the full value of the barn. I say you may give these plaintiffs full compensation for any injury that they have suffered in consevuence of the loss of this barn. Both parties derive their title from this will; and, by this will it appears that the wife has a one-third interest in this property during her lifetime, and for a certain time she has a possessory interest in this property with her children. You may take this fact into account in estimating how much these children have lost by having been deprived of this barn. I refuse therefore the 5th request.

6. "A barn standing upon the property of these plaintiffs, which was left them by their father, is a portion of their real estate,"—that is hardly so, —"a part of the realty, and their guardian would have no right to sever it nor dispose of it without the order of the Probate Court." That is what I have already said, substantially.

7. I am asked to charge the jury "That the measure of damages in this case is the value of the barn as it stood upon the realty, before it was severed from the realty." I have already given you a different rule from that in estimating the value of the barn. I will give it now qualified to an extent. In estimating the value of the barn, you will estimate it as to what it is worth upon the realty, and in estimating what damages these plaintiffs have suffered you will take into consideration, as I have already said, what their real rights are in the property and what other people's rights are in the property.

Now I have been also requested to charge numerous charges on the part of the defense. I am asked to charge,

1. "That to maintain this action, the plaintiffs must satisfy you that they were in the actual possession of the premises at the time of the committing of the wrongs complained of, or the right to the possession of the same." I say yes, but that possession may be by their agents or guardian, as well as by personal possession.

2. I am asked to charge, "If you find that John Hornsey was, at the time of the doing of the wrongs complained of, the duly appointed guardian of the property of the plaintiffs, then that the said John Hornsey was entitled to the possession and control of the said estate owned by the plaintiffs." Now I decline to say that to you. I say that a guardian is entitled to the possession and control of his ward's real estate, but in view of the provisions of this will which is in evidence here, I decline to say that John Hornsey was entitled to the possession of this property, and I think there seems to be no dispute, substantially, between counsel on either side, that Mr. John Hornsey was actually exercising guardianship over this property at that time, so that the point is of no very great consequence one way or the other.

3. I am asked to charge, "That John Hornsey, as the guardian of the plaintiffs, was by law authorized and entitled to collect and receive from the defendant, compensation for the injury claimed to have been committed by the defendant in removing said building—and that if he did so, no recovery could be had in this case." I refuse that charge. There is no such question in this case. Nobody has denied that this damage was done and that afterwards Hornsey settled for it.

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There is no such question as that in the case, as I understand it, and I refure the charge.

4. I am asked to charge that, "If the jury find that the defendant paid to John Hornsey as the guardian of the plaintiffs at the time he took the barn away, in full for the same, and entered said premised and removed said barn with the consent and permission of said guardian, then the plaintiffs cannot recover." I refuse that because I think the guardian had no right, either himself or in connection with Mr. Nicholas Meyer, to remove that barn without authority.

5. I am asked to charge, "If the injury complained of was caused by the misconduct of the said Hornsey as the guardsan of the said plaintiffs, then the said Hornsey is liable on his bond as such guardian, and his sureties on said bond are likewise liable with him on said bond." I refuse it as of no consequence in the case. Whether he is liable or not liable, the fact that he is liable does not release him from any liability that he may have incurred to this estate.

6. I am asked to charge, "From the amount you find the defendant liable for, if you find him liable in this action at all, you should deduct the amount you find he paid to the said guardian, from the sum you find him liable for." I refuse this; there is nothing in the proot whatever, going to show that this estate has ever got this money. The mere fact that Mr. Hornsey authorized the trespass made him a trespasser himself. They were both trespassers; and the fact that one of these trespassers paid the other money does not relieve the one that pays, nor the other, from liability to respond to the state therefor.

7. I am asked to charge, "If you find that the said Hornsey in his account as guardian of the plaintiffs, in settling with the Probate Court of this county as such guardian, has been charged with the amount paid to him by the defendant for said barn, and find that the defendant did pay the same to said guardian, then the said sum so paid to him by the defendant and accounted for by said guardian in said settlement and accounting with said Probate Court, should be deducted from any sum you may find the defendant liable for in this case." I refuse it. I do not think that the record shows that he was definitely charged in that record with an amount paid by anybody for the barn, but that it shows that he was charged as a wrong-doer with having converted the barn to his own use, and that it was worth that much. No proof is offered that the said amount has ever been paid over to the heirs and I hold that this is no satisfaction to them whatever or any bar to this action.

MARVIN, LAIRD & TAYLOR, for plaintiffs.

B. R. BEAVIS and HENRY MCKINNEY, for defendants.

SUPREME COURT OF OHIO.

DECEMBER TERM, 1878.

Hon. W. J. Gilmore, Chief Justice. Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Hon. William White, Judges.

TUESDAY, Mar. 11, 1879.

General Docket.

The United States Rolling Stock Company vs. The Atlantic & Great Western Railroad Company. Error to the District Court of Summit county.

BOYNTON, J.:

1. Where a contract made by an agent is voidable at the election of his principal, such election must be made within a reasonable time after full knowledge is acquired by the principal of the circumstances under which the contract was made, otherwise it will be binding upon him.

2. Where, upon full knowledge of all the facts affecting his liability, the principal promises to pay an account stated of the amount appearing to be due from him under a contract previously voidable at his election, he thereby ratifies the contract.

3. A contract made between two corporations through their respective Boards of Directors, is not voidable at the election of one of the parties thereto, from the mere circumstance that a minority of its Board of Directors are also directors of the other company.

4. The plaintiff and defendant by their respective Boards of Directors, entered into a contract whereby the plaintiff agreed to supply the defendant with all the rolling stock required in the operation of its railway for the period of seven years, at an agreed rental to be paid monthly. The five persons composing the plaintiff's Board of Directors were members of the defendant's board, which consisted of thirteen persons. At the meeting of the defendant's board, at which the terms of said contract were agreed upon and confirmed, there were present only eight directors, two of whom were directors of the plaintiff.

The plaintiff supplied the rolling stock as agreed, and the defendant received and used the same in the operation of its railway for the period of nearly two years and a half, when the contract was terminated—

Held: If it be assumed that the contract, under the circumstances of the case, was voidable, in equity, at the election of the defendant within a reasonable time after the same was made, for want of a quorum of directors at the meeting at which the contract was agreed upon and confirmed, who were not directors of the plaintiff, the delay in exercising the election to avoid it operated as a waiver of the right so to do; and, consequently, an instruction to the jury, that such right existed at the time of the trial, was erroneous.

Judgment reversed and cause remanded.

No. 383. Horace Kelly et al. vs. The City of Cleveland et al. Error to the District Court of Cuyahoga county.

MCILVAINE, J., held:

1. An ordinance providing that the cost of improving a street "shall be assessed upon all the lots and parcels of land benefited thereby in proportion to the number of feet front in each," is not in conformity to, or authorized by, section 576 of the municipal code of 1869.

2. Non-abutting lots and lands are not subject to assessment for the cost of a street improvement, unless the same be designated and the amount to be assessed thereon fixed by the Board of Improvements or City Council in pursuance of section 579 of said code.

3. For the purpose of apportioning the cost of a street improvement in proportion to benefits, the Council cannot require the Board of Improvements or a committee of freeholders to report an estimated assessment under section 584, until the property to be charged therewith and the amount to be assessed thereon has been determined and fixed in pursuance of section 576, and if non-abutting property be embraced of section 579.

4. Where the provisions of section 576, as to abutting property, and of 579, as to non-abutting property, are disregarded in proceedings to assess specially the cost of improvement, the assessment is invalid and the case does not come within the curative provisions of section 550.

Judgment reversed, demurrer to answer sustained and cause remanded to the District Court for such further proceedings as may be authorized by law.

No. 386. S. O. Griswold vs. F.

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W. Pelton et al. Error to the District Court of Cuyahoga county.

GILMORE, C. J.:

1. In an assessment by frontage upon abutting land in bulk, section 542 confines the assessment to the front of such land to the usual depth of lots, which is to be ascertained in the manner prescribed in said section; and the per centum limitations of section 543 apply to the value of the frontage to that depth after the improvement is made.

2. Where an assessment has been made and placed upon the duplicate of the county upon land in bulk, the depth of which exceeds the usual depth of lots, to pay for the improvement of a street upon which it abuts, the collection of such assessment will be enjoined at the suit of the owner of the land, without prejudice to the right of the corporation to collect the amount properly chargeable against the frontage of the land.

3. In an action to enjoin the collection of such an assessment, which is a proper charge against the abutting front of the land, the parties may so frame their pleadings as to enable a Court of Equity, on finding the assessment to be merely irregular and defective, to proceed under section 550 to ascertain the amount properly chargeable against the front of the land. Jndgment reversed and cause remanded.

No. 385. William C. Scofield vs. The City of Cleveland et al. Error to the District Court of Cuyahoga county. Judgment reversed on authority of No. 383, Kelly vs The City of Cleveland.

No. 459. Israel Allsbacher et al. vs. The City of Cleveland. Error to the District Court of Cuyahoga county. Judgment reversed on authority of No. 383, Kelly vs. The City of Cleveland, and cause remanded.

Motion Docket.

No. 54. Milton H. Miller vs. J. T. Sullivan & Co. Motion for leave to file a petion in error to the Superior Court of Cincinnati. Motion overruled. The judgment at the special term was reversed by the Court in general term, on a bill of exceptions embodying all the evidence. The case is not in a condition to entitle the plaintiffs in error to have the judgment of reversal reviewed by this Court. Revised Code, section 775, Ohio Laws, 805; Hammond vs. Hammond, 21 Ohio Statutes, 620.

No. 56. Albert Dickey, John Archey and Solomon Ferguson vs. The State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Darke county. Motion granted.

No. 58. Samuel Wharton et al. vs. W. J. Kelly, treasurer, etc. Motion to take cause No. 510 on the General Docket out of its order for hearing. Motion overruled.

U. S. CIRCUIT COURT, W. D. TENNESSEE.

A. H. H. DAWSON VS. RICHARD C. DANIEL.

1. EXECUTION.—Is not void because it issues prematurely. If issued while motion for a new trial stands adjourned, the irregularity is cured as soon as such motion is denied; and this is, especially so, where the order of adjournment provided that the same was granted, but without prejudice to plaintiff.

2. SEMBLE.—That the proper practice to prevent the issuance of an execution, where motion for a new trial is not disposed of, is to ask and obtain stay of execution.

3. WATCHMAN.—His withdrawal by levying officers no abandonment of levy. His presence not necessary to hold title.

3. WHAT CONSTITUTES AN ABANDONMENT.—To constitute an abandonment of a right secured, there must be a clear unequivocal and decisive act of the party; an act done, which shows a determination in the individual not to have a benefit which is designed for him.

HAMMOND, J.:

The plaintiff recovered judgment by default, against the defendant, on the 6th day of June, 1878, for $2,610.69 and costs. At the same term, and on the 13th day of June, 1878, the defendant moved to set the judgment aside and for leave to plead; whereupon the court made the following order: "In this cause the application of defendant to vacate the judgment rendered herein at the present term of this court, is continued to the next term of the court without prejudice to either party."

After the adjournment of the term, and on the 5th day of July, 1878, execution issued on this judgment, which, coming into the hands of the Marshal, was, by him, on the 9th day of July, 1878, levied on certain leasehold property belonging to the defendant, and it was advertised for sale. The Marshal indorsed his levy on the writ at the time he made it, but on the 16th day of August, 1878, returned it into court, with the following indorsement annexed to that of the levy: "And on the 17th of August, 1878, in obedience to an order of court, issued by Hon. John Baxter, I return this writ without further proceedings hereunder."

The plaintiff now moves for a *venditioni exponas* to compel a sale of the property. The defendant resists the motion on two grounds: first, that the execution prematurely issued, and is void; and secondly, that the levy has been abandoned by the Marshal.

It appears by the affidavits filed, that the Marshal, when he made the levy, placed a watchman in charge of the property, and when he returned the writ, he withdrew him, and left the property as it was before.

The letter of the Circuit Judge to the Clerk of the Court, dated Knoxville, Aug. 5, 1878, and his letter of the same date to Messrs. Gault & Patterson, attorneys for defendants, transmitting the letter to the Clerk to them, are offered in evidence by defendant, in opposition to the motion, and are relied upon, together with the letter of the Clerk to the Marshal, as an order of the Court, recalling the execution, and as evidence of an abandonment by the Marshal of the levy, and also as an adjudication by the Circuit Judge, of the questions involved in this motion.

If I supposed the action of the Circuit Judge was intended to be a decision of the rights of the parties, I should certainly enforce it by my judgment on this motion, whatever my own opinion might be. But it is apparent that it was not intended, and could not have been. It does not purport to be an adjudication at all. Certainly not, upon the right of property as affected by the levy, but only a letter of advice to the Clerk. He says to the Clerk: "My suggestion is that you issue a paper to the Marshal, reciting the fact that the executions were issued without authority, and request him to return the same unexecuted." In the letter to the attorneys, after suggesting to them that the application made to him is informal and unknown to the practice of the Court, he expresses the opinion that the executions issued prematurely and should be recalled, and that the Clerk and Marshal may possibly be liable for any action they have taken, but it seems to me he carefully avoids doing anything more than suggest to those officers that under the circumstances they should proceed no further. By no possible construction can they be construed into an adjudication that because the execution was prematurely issued the levy was void, nor could he have intended that the Clerk and Marshal should personally have assumed the responsibility of an abandonment of the levy. It is not even an adjudication that the execution was prematurely issued, but simply a suggestion of a mode by which this

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and all other questions involved might be adjourned into the court for its determination, when all parties should be present, and he distinctly declines to determine the question as an *ex parte* application, such as was made to him

At this present term of the court, the motion of the defendant to vacate the judgment was heard and overruled, and now the question is whether or not a *venditioni exponas* shall issue.

It may be assumed that the execution did issue prematurely, but unless that fact rendered it void, the levy is good. Did it have this effect? In the case of Hapgood vs. Goddard, 26 Vt., 401, it is said by the Court that "ordinarily courts of law refuse to set aside executions, when that, and that only, has been done which is required to be done now, although done prematurely."

In the case of Stephens vs. Brown, 56 Mo., 23, cited by defendant's counsel, and in Freeman on Executions, §§ 24, 25, on the point that it is error to issue execution before a motion for a new trial is determined, we find a precedent for this case. The defendant in that case filed a petition for a new trial, which was continued under advisement until the next term, and in the meantime execution issued, and the plaintiff was put in possession of the land. At the next term the motion for a new trial was overruled. He filed a motion to quash the execution, because prematurely issued, and that was overruled. The defendant appealed, and the Supreme Court of Missouri says: "It was erroneous to issue an execution before the motion for a new trial had been disposed of. But as the case resulted in favor of the plaintiff this error caused no injury to the defendant." And the judgment refusing to quash the execution was affirmed.

In Mollison vs. Eaton, 16 Minn. 426, it was held a harmless irregularity to issue execution before the judgment was docketed, although a statute positively required a judgment to be docketed in another county before execution could issue. It was not such an irregularity as made the judgment void, and the levy was allowed to prevail over a warrant of seizure from the Bankruptcy Court.

It may well be doubted whether the plaintiff did not have a right to issue this execution at the time he did. It was ruled in the order of continuance itself that it was not to operate to his prejudice. I have been unable to find the question decided in Tennessee. I do find elsewhere that the rule is that, unless the order of continuance directs a stay of execution, the plaintiff may issue the execution immediately, at the risk of having it rendered a nullity by the decision of the motion for a new trial in favor of the defendant: Erie R. R. Co. vs. Ackerman, 33 N. J. Law, 33.

But I do not decide this here, as it is unnecessary to the determination of the rights of the parties. The levy was not void because the execution issued erroneously, and now that the motion for a new trial has been overruled, the plaintiff should not, because of a mere irregularity, be deprived of the fruits of his diligence.

Nor do I think the levy was abandoned by the Marshal. He only stayed his hand at the point to which the proceedings had progressed, when it was arrested by the letter of the Clerk. The service of a watchman was not necessary to his title, and his withdrawal was unimportant. The Supreme Court of Tennessee, in the case of Breedlove vs. Stump, 3 Yerg. 257-276, has declared the rule for all cases where abandonment of a right is relied on, thus: "To constitute an abandonment of a right secured, there must be a clear, unequivocal and decisive act of the party; an act done which shows a determination in the individual not to have a benefit which is designed for him."

The question is argued by counsel on both sides, whether this is real or personal property, on the assumption that unless it is real property a *venditioni exponas* cannot issue. The writ is used to compel a sale of personalty levied on, as well as a sale of realty. It is true that the Sheriff may, in case of a levy on personalty, go on and sell after the return of the *scire facias*, without a *venditioni exponas*, while in case of a levy on realty he cannot, but in either case it is proper to issue a *vend. ex.* wherever it becomes necessary to enforce a sale: Campbell vs. Low, 2 Sneed, 18; Overton vs. Perkins, M. & Y. 375, S. C. 10, Yerg. 328; Thompson vs Phillips, 1 Bald. 246-267; Tidds Pr. 1,020; Freem. Ex. § 57-58.

It is therefore unnecessary that I should decide the question argued as to whether the leasehold is real or personal property.

There were two judgments, but the facts were the same in each.

Humes and Poston, for plaintiff.

Geo. Gault and Wm. S. Flippin, for defendant.

L. D. McKissick, for Fourth National Bank, under trust deed.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending March 14, 1879.
[Prepared for The Law Reporter by R. P. Flood.]

MORTGAGES.

March 8.

Edward Greenless and wife to Joseph Parks. $200.

Anna Louisa Fagan and husband to Eliza Hanlon. $150.

Jacob Schurr to Jay Odell. $2000.

Henry Shanks and wife to Thomas Downie. $5000.

Frank Ost to John Dickow. $200.

W. S. Pennell and wife to S. H. Kirby. $200.

George D. Hinsdale to Josiah Brown. $2800.

March 10.

Charles Marshall to John Panther, president of The St. Josephs B. Association. $200.

Henry D. Southorn and wife to Sarah Hornsey. $1500.

Alexander H. Burk and wife to George H. Happen. $1895.

George M. Kortz and wife to John Mancher. $950.

William Kortz and wife to Carl Denheimer. $300.

Mary E. Brown to V. C. Stone. $305.

Mary J. Field and husband to C. R. Saunders. $500.

Clara C. Schamls to Anna M. Dunkelspiel. $1200.

Elizabeth Weirs et al to Rosina Becker. $3300.

Joseph Hermann and wife to Thomas Kurfese. $325.

Jacob Buerklin to Jacob Mueller. $325.

Annie Hoyer Kachle et al to Joseph Perkins et al. $898.

Matthias F. Schulte and wife to James Barrett, trustee. $1024.43.

Alfred S. Hayden and wife to Luther Battles. $200.

R. L. and Emma A. Palmer to John Karda. $500.

E. Louisa and Hubbard Cooke to N. E. Backus. $6000.

March 11.

D. J. Wilder and wife to Geo. O. Baslington. $1000.

Vaclav and Anna Parma to J. C. Koehler. $450.

John Kaiser and wife to Barbara Demine. $300.

Mary Boettcher to The Citizens' Savings and Loan Ass'n. $1000.

Augustus F. House and wife to Robert Cleave. $250.

M. A. Kneeland to Giles W. Kneeland. $250.

March 12.

Eunice H. Williams to Healey

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Bros. $100.

James Harvey to John Beavis. $350.

H. Maley to John Wright. $300.

Almon P. Turner to Georgia Bartlett. $4000.

W. A. Daucey to F. Granger. $300.

Pelton Ave. M. E. Church to R. H. Roberts. $800.

March 13.

Herman Hadler and Wife to Christian Weber. $611.50.

Cornelius Newkirk and wife to S. H. Kirby. $350.

Ernst Zschack and wife to John Hersins. $400.

Christian Kapermack to Wm. Brown. $150.

Elah S. French and wife to Frederick Buggert. $750.

Wm. Carey and wife to Henry Wick & Co. $700.

L. C. Hains and wife to C. S. Wheeler. $300.

March 14.

Mary H. Solloway and husband to Gustavus A. Hyde. $1800.

Wm. Baker Jr. and wife to Wm. Baker, Sr. $1000.

Henny George to Isaac Reinthal. $450.

Enoch Graves to Mary A. Coates and husbanp. $350.

Esther Kneen and husband to Charles H. F. Sohn. $1800.

CHATTEL MORTGAGES.

March 8.

Alice E. Fovargue to Daniel Fovargue. $4000.

Michael and Catharine Stumpf to Sprankle, Morse & Co. $400.

March 10.

Samuel Darby to G. Wheeler. $125.

John Beznoska to Thomas Palivec. $80.

L. D. Parker to J. C. Campbell. $150.

I. Harris to Charles Becker. $20.

Henry Gilbert to G. Crampton. $1055.90.

J. M. Johnson to W. I. Hudson. $140.

March 11.

Wm. H. Harkins to Rolland C. White. $300.

James M. Naghton to E. B. Cary. $110.

Daniel Catoir to David L. Lowry. $400.

Charles A. Kennard to Samuel S. Marst. $38.

M. J. Gallagher to William Adams. $20.

March 12.

Elisha Sterling to Theodore H. Sterling. $400.

L. Hammond to the A. S. Herenden Furniture Co. $160.

Andrew McDonald to Patrick 'Rourke. $500.

March 13.

Wm. H. Parkins to Charles S. Foote. $3600.

Tobith A. Dunn et al. to Margaret McDonald, $45.

Orville D. Ford to Lewis Ford. $1375.

Philip Wenz and Louis Shelberger to R. Lindemueller. $75.

H. W. Libbey to Caroline C. Patch. $1000.

Anton Sindelas to Carl Sclyler. $50.

J. J. Atwater to C. S. Gates, admr. of the estate of D. Skinner, deceased. $242.

March 14.

Barbara Kuebler and husband to Philip Gaensslen. $225.

A. Robinson and L. Frank to Julius Frank. $200.

H. P. Bates to J. M. Deyne. $110.

Charles Walther to Peter Walther. $130.

H. F. Procter to F. L. Baymond. $40.

DEEDS.

March 7.

John D. Carpenter to Henry G. Carpenter. $22000.

Frederick O. Clark and wife to Mary E. Snow. $2000.

Henry Hunting and wife to John Newmann. $565.

Mary B. Jones to Elizabeth Ulrich· $643.

Henry Harr and wife to William Menka. $400.

Cardine and Joseph Propst to Isabella A. Houlder. $4000.

W. H. H. Peck et al to Matthias Marovitz. $480.

George F. Spreng and wife to John Painter, Jr. $1.

Casper Schoffer and wife to Ernst Prasse. $1350.

Adeline Maukowskie and husband Manuel Halle. $550.

By Thomas Graves, Mas. Com., to Robert S. M. Sewell, exr. etc. $625.

Sophia Sperce by S. M. Eddy, Mas. Com., to Hiram Day. $1667.

March 8.

Nelson Moses to D. M. Alvord. $660.

William H. Rose and wife to William Rose. $1050.

C. C. Rogers et al to W. C. Loomis. $1250.

R. E. Wingard and Ellen M. Wing to M. A. Sprague. $100.

Josiah Brown and wife to George D. Hinsdale. $3300.

James Gayton to John Gayton. $5.

John Gayton to Mary A. Gayton. $5.

March 10.

Joseph C. Bailey to Clarence H. Burgess. $5.

Morris E. Gallup, admr. of the estate of W. E. Brown, deceased, to Mary Ella Brown.

Mary Ella Brewn to V. C. Stone. $4601.

Charles and C. S. Barkwell et al to Ellen Jackson. $360.

Lydia M. Calkins and husband to E. Louisa Cooke. $7100.

J. D. Carpenter and wife to Herman Hadler. $650.

Mathew Farrel and Maggie Franklin to Mary and Ella Farrel. $1.

Martha A. Gould and husband to C. R. Saunders. $670.

Christian Hoffman and wife to Christian F. Krauss. $900.

N. Heisel et al to Joseph Krs. $600.

Isaac Levy and wife to Fannie Wallace. $2550.

Jacob Mueller and wife to Jacob Buerklin. $875.

James P. Mills and wife to E. J. Kennedy. $1.

P. F. McDonald to Samuel Pool. $475.

Ezra Nicholas and wife to Mary Ada Short. $2550.

A. S. Palmer and wife to Kate S. Hanna. $13000.

Silas Rossiter and wife to Mary Gabel. $1150.

Warren F. and Carrie A. Walworth to W. A. Minor. $1200.

Theodore H. Robbins and wife to Clara C. Schambs. $2600.

Vaclav Purma et al by C. C. Lowe Mas. Com. to Frederick Koeckert. $500.

H. F. Leypoldt by Felix Nicola, Mas. Com., to The National Life Insurance Co. of Vermont. $1700.

March 11.

John Hess and wife to Charles H. Norton. $2060.

Frederick Kickert and wife to Vaclav Purma and wife. $525.

S. O. Tennesmann, admr. of Wm. Boettcher, deceased, to Mary Boettcher. $2100.

Levi Bauder, County Auditor, to Elizabeth Cole. Auditor's deed. $9.04.

Caroline Bezenle to Wilhelmine Hugger. $500.

James Corrigan and wife to Michael T. Carroll. $600.

March 12.

H. S. Baldwin to Benjamin Franklin. $1300.

Benjamin Franklin and wife to Honor G. Baldwin. $1300.

Richard Dewey to O. E. Dewey. $2500.

Charles O. Evarts and wife to Theodore E. Burton. $3000.

Wm. P. Gahan to E. D. Stark. $550.

F. M. Irvine to Charles Rose. $1,-250

Gustav Schmidt and wife to Henrietta Fichelschehr. $1.

Jacob Wentz to Henry Schodar, One thousand dollars.

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Ellis E. Shaw to Caroline A. Loveland. Ten dollars.

Andrew P. Worth and wife to John H. Janes. One thousand five hundred dollars.

August Gneuss by Felix Nicola, Mas. Com., to Philip Gaensslen. One thousand four hundred dollars.

Henry R. Hadlow and wife to Schewbke. Seven hundred and fifty dollars.

March 13.

Levi F. Bauder, Co. Aud., to S. H. Kirby, Auditor's deed. $127.29.

George H. Chandler, trustee, to James Brekenshire as trustee for Eunice Abbott. $1.

W. C. Cole to Elizabeth Cole. $1200.

Marie L. Chase and husband to Fitch Raymond. $300.

Annie and Joseph Chlunskey to Philip Rick. $2300.

Same to same. $500.

Hubbard Cooke, trustee, et al., to Earnest Zachack. $450.

C. O. DeHondt and wife to Barbara Duckat. $1325.

Thomas Flood to Joachin Gerkin. $900.

Loftus Gray and wife to Benson Bradley. $600.

Windle W. Hollis and wife to Samuel Stoney. $1000.

Charles W. Hills and wife to Isabella F. Wilson. $7000.

James P. McKinstry and wife to Thomas McKinstry. $2000.

C. R. Saunders and wife to Mary J. Field. $670.

Joseph Hrubec and wife to Frank Kirkes and wife. $600.

Alexander McLain by W. I. Hudson, Mas. Com., to George E. Massey as executor of Edward S. Massey. $1667.

Lillie J. McClain by same to Henry S. Northrup et al. $1000.

J. H. Rhodes, Mas. Com., to E. G. W. Leffingwell. $1334.

George H. Chandler, trustee, to James Brackenshire as trustee for Eunice Abbott. $1.

Same to same. $1.

Judgments Rendered in the Court of Common Pleas for the Week ending March 13th, 1879, against the following Persons.

March 6.

Thomas Thompson. $1615.25.

James Steele et al. $400.

March 10.

George Marshman et al. $1059.

David Hoffman et al. $4495.04.

H. A. Smith. $1054.82.

March 12.

J. F. Gallagher. $1253.49.

Edward P. Walcott et al. $1381.87; $73.85.

E. O. Briggs, trustee. $3373.30; $111.09.

M. B. Lukens et al. $40.66; $596.86; $500; $406.

F. N. Clark et al. $108.63; $631.26.

Lewis Gardner. $892.61.

March 13.

Sarah J. Field et al. $2120.

Leonard Finster. $603.73; $446.88.

MECHANICS' LIEN.

Wm. H. Burton to Chas. Thomas. $74.02.

U. S. CIRCUIT COURT N. D. OF OHIO.

Mar. 8.

3223. Stephen B. Sturges, assignee, etc., vs Mary Jane Hickox et al. Exceptions to masters' report.

March 10.

3600. William G. Winslow et al vs schooner S. S. Osborn etc. Exceptions of claimant and appellant to report of A. J. Ricks as Special Master. Prentiss & Vorce.

3849. Reuben D. Swain et al vs schooner Orphan Boy etc. Copies of pleadings etc. in District Court.

3358. Sam Remington et al vs E. F. Atwater et al. Report of referee confirmed. Judgment for plaintiff for $1192.37.

March 11.

Bradford Howland of Ravenna this day admitted to practice in the U. S Court.

3548. H. B. Leavins vs Andrew Brunner et al. Decree.

3228. Samuel Plumer et al vs L. M. Southern et al. Dismissed by plff. without prejudice.

3272. Marcus D. Bacon vs Wm. Moore. J. E. Stephenson, assignee, made deft. with leave to file answer and cross-petition instanter. Answer filed.

March 12.

3835. Samuel G. Block vs Sandusky Tool Co. Answer. M. D. Leggett & Co.

22. Hamson Wilt vs Edson F. Stickney. Motion. J. E. Ingersoll.

March 13.

3832. The First National Bank of Galion vs. A. C. Neil et al. Petition. H. C. Carhart and Estep & Squire.

March 14.

3676. Frederick J. Prentiss vs. Elizabeth Koester. Amended answer. John W. Heisley.

3429. E. J. Fenn vs Phœnix Fire Ins. Co. Affidavit of N. H. Bostwick.

—— Same vs same. Affidavit of E. J. Fenn.

—— Same vs same. Affidavit of Sadie Harper.

U. S. DISTRICT COURT N. D. OF OHIO.

Bankruptcy.

Marce 8.

1562. In re Wilber B. Dow. Discharged.

1923. In re Ira A. Chase. Same.

1499, In re A. A. Stoppel. Same.

1640. In re Hiram M. Johnson. Same.

1846. In re David N. Fury. Petition for discharge. Hearing March 31st.

2008. In re Thomas A. O'Rourke. Same. Same.

2006. In re Augnstus Salter. Same. Same.

1763. In re Lucius A. Benton. Specifications in opposition to discharge. Willey, Sherman & Hoyt.

March 10.

1917. In re Charles Chorman, bankrupt. Exceptions to charges and specifications of A. L. Jones. Grannis & Griswold.

1586. In re Joseph D. Horton et al, assignee of Lyman N. Hall, bankrupt, vs The 1st National Bank of Ravenna et al. Answer. G. F. Robinson.

1586. Same vs same. Answer of 2nd National Bank of Ravenna. L. Day and G. F. Robinson.

March 12.

1865. In re James Estep. Discharged.

1933. In re Silas E. Hunch. Same.

March 13.

1702. In re William Mathers. Discharged.

1771. In re Adolph W. Semplein. Same.

March 14.

1704. In re —— Feasby. Specifications against discharge.

1705. In re Samuel Miller. Same.

1586. In re Eli Parsons. Specifications in opposition to discharge.

2041. In re Elijah Worthington. Petition for discharge. Hearing March 25.

Amendment and Addition to Rules of Practice in U. S. Circuit Court.

Ordered that Rule 16 of the Circuit Court be amended so as to read as follows:

All parties instituting suits in this court shall be required to give security for costs, before or at the commencement of any suit by them; and the party by whom any cause shall be removed from a State Court into this court at or before the docketing of such cause in this court shall be required to comply with this rule; which security shall be by stipulation substantially in the following form and to be signed by some person or persons resident of the district who shall be satisfactory to the Clerk, to wit: "I ——— ——— acknowledge myself security for all costs for which ——— may be liable in this suit." Provided that if any party at the time of beginning the suit or filing

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of papers for removal at any time during pendency of suit when requiured to give such security, or shall make and file with the Clerk an affidavit that he is unable to give security for costs for the prosecution of his or her suit and that he believes he has a just cause or action, and shall also file with such affidavit a written statement of his attorney that he has examined his client's case and believes that said client has a just cause of action, then such suit may be prosecuted without the stipulation for costs above required; and *provided* further that the forgoing shall not be so construed as to prevent the Court from making such special rule or order as to the giving of security for costs as right and justice may require.

Ordered, that the following be added to the Rules of this Court as Equity Rule 53 of Circuit Court:

In the absence of the Judge holding the court the Clerk is hereby vested with general power to name Commissioners to take testimony as provided in the 67th Rule of Practice in Equity prescribed by the Supreme Court.

COURT OF COMMON PLEAS.

Actions Commenced.

March 7.

14758. F. H. Penfield vs James Fitch et al. Money, to foreclose mortgage, and equitable relief. Wm. V. Tousley.

14759. C. H. Clark vs H. F. Laypoldt. Money only. Goulder & Zueker.

14760. William Ryan vs Mary Gleich et al. Money and to subject land. T. H. Graham.

14761. George Williams vs John Greening et al. Equitable relief. Gage & Canfield.

Motions and Demurrers Filed.

March 7.

2414. Tod, Wells & Co. vs Smith et al. Motion by defendants, The Commercial National Bank of Cleveland and George W. Mason, to require plaintiffs to give bail for costs.

2415. Williamson, trustee, vs Lake View & Collamer R. R. Co. et al. Motion by defendant, G. F. Lewis, to determine and end the Receivorship, to stop the further operation of the road and to appoint a custodian of the property, etc.

2416. Everett vs Ryan et al. Motion by defendant John Kennedy for a new trial.

2417. Lindgren vs Crocker et al. Motion by defendants for a new trial.

2418. Rogers vs Getchel et al. Motion by defendant, Caroline E. Q. Getchel, to dismiss as to her and strike case from docket or to strike out from amended petition.

2419. Quayle et al vs Angel et al. Motion by plaintiff to refer case to referee with acknowledgment of service of notice by attorney of defendant Angel.

March 8.

2420. Burnham & Banton vs Wilcox et al. Motion by plaintiffs for a new trial.

2421. Kafton vs City of Cleveland. Demurrer by defendant to the petition.

2422. Reister vs Lake Shore Foundry Co. Motion to require plaintiff to make petition more definite and certain.

2423. Foster et al vs Heller et al. Motion by plff. for new trial.

2424. Uher vs Slawson et al. Demurrer by defendant J. H. Slowson to the petition.

2425. Case vs Ehrbar et al. Motion by defendants to require plaintiffs to separately state and number causes of action.

2426. Liberty Lodge No. 3, Ancient Order of Good Fellows, vs George Young et al. Demurrer by deft. George Young to the petition.

2427. Same vs same. Demurrer by defendant Charlotte Young to the petition.

March 10.

2428. Haley vs Patterson. Demurrer to the amended petition.

2429. Isaac Hays, doing business as, etc. vs Meese et al. Demurrer by plaintiff to answer of Caroline Meese.

2430. Sanders vs Wilde et al. Motion by deft. to strike jointed answers of Wm. Wilde and James Denham from the files.

2431. Freeborn vs Bankhardt. Motion to strike out redundant and irrelevant matter from answer.

March 11.

2432. McDonald vs Swan et all. Motion by deft. Michael Bray for a order for renewal of undertaking on appeal herein.

2433. Eberhard vs Morlack et al. Demurrer by plff. to 1st, 2d and 3d defenses of answer of deft. Morlack.

2434. Tod, Wells & Co. vs Smith et al. Demurrer by deft. W. B. Hancock to the petition.

March 12.

2435. Short vs Metcalf et al. Motion to require plff. to give security for costs.

2436. Cunnington vs L. S. & M. S. Ry. Co. Motion to strike out from petition as irrelevant and dedundant.

Motions and Demurrers Decided.

March 8.

2184. Alexander vs McCarty. Overruled.

2226. Dum et al vs Norton et al. Stricken off.

2290. Baumer et al vs Kramer. Sustained as to 2d defense, overruled as to 3d.

2291. Kirkpatrick vs Noakes et al, trustee. Overruled.

2229. Hadley vs Kingsborough. Granted. Plff. ordered to furnish security by March 18.

2302. Magrory vs Corkhill. Granted. Leave given to issue alias summons.

2390. Sawtell vs Whiting et al. Withdrawn.

March 10.

2406. Ford vs Hogan et al. S. Fitch appointed receiver to collect rents. Bond $500.

2385. Belle vs Lowe et al. John Bell appointed receiver. Bond $500.

March 12.

2334. Brant vs Hartford Fire Ins. Co. Granten.

2340. Owens vs Purdy. Overruled.

2341. Lennon vs same. Granted.

2363. Ruggles, admr., etc., vs Gallagher et al. Demurrer sustained.

March 13.

2413. Franklin Coal Co. vs Bruch et al. Granted. Wm. T. Quilliams appointed receiver. Bond $600.

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The Cleveland Law Reporter.

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J. G. POMERENE,

EDITOR AND PROPRIETOR.

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WE take this occasion to return our sincere thanks to fifteen of our subscribers who have paid us a year's subscription in advance. We are highly gratified at the success of our collector, and in this connection call attention to the advertisement in another column for the sale of this paper.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

PETER AND CATHARINE WIRTZ VS. GEORGE LEICH, ASSIGNEE OF THE ALLEMANIA INSURANCE COMPANY.

Mortgage—Transfer of Securing Negotiable Promissory Note—As to Payments made by Mortgagor to Previous Holder Without Notice of Transfer—Entitled to Benefit of in Equity, etc.

LEMMON, J.:

The petition of the plaintiff below alleges that in the month of March, 1872, one Frederick Buehne made his note to the Allemania Insurance Co. for the payment of four hundred dollars, and then proceeds to set out that in the year previous, 1871, one Peter Beckner and others made, executed and delivered to one Gustav Schmidt a mortgage upon the premises described in the petition for the securing of a note of $850, then made and delivered by Peter Wirtz and Catharine Wirtz to Schmidt. It proceeds then to allege that this note and mortgage by these parties was subsequently assigned and transferred by Schmidt to Frederick Buehne. This transfer is charged to have been made in August '72. Then it proceeds to allege that in September, '73, Frederick Buehne assigned this note and mortgage to the Allemania Insurance Company as collateral security to the $400 note which he had given to the Allemania Insurance Company in 1872, that there is a larger amount due on the last note, and asks for a judgment against Frederick Buehne for the amount claimed to be due on the note given by him, $400, and interest payable annually, and that the premises described in this mortgage be subjected to sale and the proceeds be brought into court and applied in discharge of that judgment against Frederick Buehne, etc , and for other relief.

An answer is filed to this petition which alleges that the defendants, Peter and Catharine Wirtz, made payments larger in amount than the credits; that these payments were made in good faith by them to Frederick Buehne after he had disposed of the notes and mortgage to the Allemania Insurance Company, without notice of any interest in the Allemania Insurance Company in this mortgage.

The Court of Common Pleas upon the trial of the case below must have held, as their judgment shows, that the transfer of the morgage and note that was thus given by these parties, taken by the Allemania Insurance Company as collateral security, vested absolutely all interest in the note and mortgage in the Allemania Insurance Company, and all the rights and remedies between the parties would exist as though all the parties at that time had notice; in other words, that any payment made on this mortgage and note held by the Allemania Insurance Company as collateral was a payment which the party could not take advantage of in his defense, that he should have seen that the payments when made were indorsed upon the paper by the party to whom the payments were made, and that making payments without securing such indorsements, was carelessness for which the parties were not entitled in equity to have stand as against the Allemania Insurance Company. This involves the question as to what are the respective rights of parties upon the transfer of a mortgage from one person to another. Cases have been cited, decisions of the Supreme Court of Michigan and Wisconsin, and also a decision of a very eminent Judge of the Supreme Court of the United States—Justice Swayne, in each case holding that where a mortgage had been given to secure a debt evidenced by a negotiable promissory note that the mortgage, being an incident to the debt, partakes of the negotiable character of the note and is so far affected by it that the commercial rule applicable to negotiable paper is applicable also to the mortgage, and these cases have been cited and pressed upon our attention. These cases, except the last one, have been examined by our own Supreme Court; and in a very able discussion of this subject by our Supreme Court, in an opinion announced by Judge Ranney, the matter is exam-

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ined apparently from the earliest decisions of the Courts of England and through the various holdings of our Supreme Courts in various States, down to the time of the making of this decision contained in the 14th Ohio St. Reports made in December, 1863. Since this decision the decision of Justice Swayne has been made.

In commenting upon the decisions in Michigan and Wisconsin upon this subject, Judge Ranney uses the following language: "But the direct question arising upon mortgages given to secure negotiable paper, has arisen in two of the new States of the west, whose courts are entitled to high respect for their learning and ability, and it has there been held, that the quality of negotiability is so far imparted to such mortgages, as to make them available in the hands of a *bona fide* indorser of the paper, without any regard to the equitable rights of the original parties."—Here citing the cases that are pressed upon our attention.—"In the first of these cases, decided by the Chancellor of Michigan, in 1843, no reasons are assigned, or authorities cited; and in Dutton vs. Ives, decided by the Supreme Court in 1858, the doctrine is again advanced upon the authority of Reeves vs Sently, and the two Wisconsin cases, reported in 3 and 4 Chandler. On referring to the first case decided in that State (Fisher vs. Otis), we find it professedly based on authority, and it serves to show upon what a slender foundation a line of decisions may be made to rest. The Court say: 'This doctrine is sustained by respectable authorities, and by reason and sound policy which have long ruled in relation to commercial paper;' and Powell on Mortgages, 908, and note are cited. Mr. Powell certainly did *suggest* the question, whether such a distinction might not be made. His exact position is thus stated by Mr. Coventry in the note: 'When it is said that a debt is not assignable at law, it must be understood with this restriction, that if it be secured by a negotiable instrument, such as a bill of exchange, the legal interest will pass by indorsement, and this has induced the learned author, in the next paragraph of the text, to *suggest* whether, in such a case, the rule of the mortgagee's liability would apply.' The rule here referred to, is that announced by Lord Loughborough in the leading case of Matthews vs Wallwin, 4 Ves., 126, that the assignee of a mortgage takes it subject to all equities which could be asserted against his assignor. Now, it may fairly be assumed, that Mr. Powell supposed that such a distinction could be judiciously made; but it must be admitted that he had then no authority to base it upon, that neither the judicial records of England nor of any of the old States, furnish any evidence that it has ever been adopted, and that it was first acted upon, nearly half a century after the suggestion was made, by a new State upon another continent. Under such circumstances, it cannot be reasonably claimed, that we are at liberty to regard it as an *established* principle, and we can only adopt it when we are convinced that it is correct in principle, and consistent with the analogies of the law. The reasons for supposing it to be so, are well stated in the case of Croft vs. Bunster, 9 Wis. Rep., 510. The reason assigned, it is said, why the assignee can recover no more in equity than is actually due from the mortgagor to the mortgagee, is, that he could recover no more at law on the bond or covenant, and the reason ceasing as to negotiable securities, the rule also ceases to have application; that the debt is the principle thing, and the mortgage the mere incident, following the debt wherever it goes, and deriving its character from the instrument which evidences the debt."

Now, after referring to these authorities, the Court says: "In a general sense, it may be very well and very correct, to speak of a mortgage as an incident to the debt it is created to secure; but the importance of this mere term may be easily overrated. It certainly is not one of the incidental effects of the creation of the debt itself, and it can only be made to have relation to the debt by the force of the contract contained in the mortgage; and is *incident* to the debt only in the same sense that every independent contract, having for its object the payment or better security of the debt, is incidental to it. The existence of the debt, is the occasion out of which they arise, and the subject of their various provisions; but they embrace all the elements of a perfect contract in themselves, and are enforced by appropriate remedies, according to their own stipulations."

The conclusion to which the Supreme Court come, after a very full discussion of all these cases, is as follows: "A long experience has demonstrated, that they are not necessary instruments of active trade and business; and we but follow in the footsteps of the ablest and wisest judges, when we say, that the harsh rule which excludes equities, and often does injustice for the benefit of commerce, should not be applied to them. This remits them to the position they have so long occupied—that of mere choses in action, and whether standing alone, or taken to secure negotiable or non-negotiable paper, they are only available for what was honestly due from the mortgagor to the mortgagee." Now recognizing that to be the doctrine established by our Supreme Court in this regard, we are brought to another question, whether this rule, thus recognized, must not be so far limited as to cause it to apply only to the equities which exist at the time of the assignment and transfer, or whether, in the broad language of our Supreme Court, the mortgage is to be treated as a chose in action—whether there is any limitation to this designation of it, or whether, like other choses in action, it has all the properties which pertain to a chose in action at common law. It is well understood by the bar that where a mere account is transferred by one to another, the debtor is protected, if in good faith he subsequently without knowledge on his part and without notice, pays it to the party to whom he originally owed it; that as to the debtor, he is not estopped from showing that payments were made and from availing himself of them until the assignee of the chose in action has given him notice. It is the duty of the assignee to give notice to the debtor.

Now does that principle apply here? Is a mortgage a chose in action for some purposes and not for others? We are unable to find any authorities—we know of none—that distinguish a mortgage from a mere matter of account—a claim upon an account. If the same rule governs, then we say that the payments made in good faith without notice, without knowledge, to the person who has been the holder of the paper—of the mortgage, is a payment, and in a court of equity, should be regarded as a payment and as a defence to the extent of the payments thus made. Applying this principle to this case, we think the Court of Common Pleas erred in so far as they refused to allow these payments made to Frederick Buehne after the transfer of the mortgage to the Allemania Insurance Company.

There will be, as stated by counsel, an amount still due upon this mortgage after deducting these payments so made; and for this amount the Allemania Insurance Company may have a decree for the sale of the property.

No judgment is asked against these

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parties. The judgment of the Common Pleas Court will therefore be reversed and either such judgment entered here as should have been entered in the Court of Common Pleas or the case be remanded for further proceedings in the Court of Common Pleas.

McKinney & Caskey, for plaintiff.
B. R. Beavis, for defendant.

ORPHANS' COURT OF PHILADELPHIA.

Opinion March 1, 1879.

DARMODY'S ESTATE.

Sur Exceptions to Adjudication.

A surviving husband is primarily liable for the expense of a wife's funeral, suitable to the rank and fortune of the husband. Although the undertaker may, in such case, recover from the executor of the deceased wife, the executor may in turn recover from the husband.

Penrose, J.:

The exemption of a married woman from liability for necessaries furnished to her, arises not only from the paramount duty of the husband to support her, but from her own inability to bind herself except in the manner and to the extent authorized by the Act of Assembly.

Hence, as held in Sawtelle's Appeal, 3 Norris, 306, her estate is not responsible even for medical attendance during her last illness, where it is not shown that she herself had requested the physician's services.

But this disability to contract is personal to her, and is limited by the period of coverture. It does not extend to her executor, who may bind her estate for expenses incurred in the regular course of administration. Of the duties imposed upon him the first is the burial of the decedent. The right to make the necessary contract for this purpose, and to apply the assets in his hands in discharge of the obligation thus created, follows as a matter of course.

The paramount duty of the husband, however, as between himself and his wife's estate, still remains; just as in the case of any other debt paid by the wife, but for which he is primarily liable. We cannot assent to the doctrine that his obligation in this respect is only under the Poor Laws; or that it "extends simply to furnishing the means of a burial which shall conform merely to *public decency*." If this be so, then the text books are all wrong, and we must overrule the decision of Lord Loughborough, in Jenkins vs. Tucker, 1 Henry Blackstone, 90, which has been accepted as law since 1788. See Addison on Contracts, *52; Macqueen on Husband and Wife, *183; Ib. *191; Reeves on Domestic Relations, 164, etc., etc., etc.

In Jenkins vs. Tucker, *supra*, the wife having died while her husband was abroad, her father directed and paid the expenses of her burial. The husband having, upon his return, refused to pay the father, suit was brought. It was held, all the judges concurring, that under such circumstances "a third person who voluntarily pays the expenses of a wife's funeral (suitable to the rank and fortune of the husband), though without the knowledge of the husband, may recover from him the money so laid out."

No argument is furnished against this doctrine by the case of Lawall vs. Kreidler, 3 Rawle, 300, which simply decides that the husband's estate is not liable for the funeral expenses of his widow; a necessary corollary of the principle that the wife's authority to bind her husband is revoked by his death: Williams on Executors, *1503.

If the law be as we have stated, it follows that though the undertaker in such a case as the present may recover from the wife's executor, just as in Jenkins vs. Tucker he might have done from the father, who employed him, the executor may in turn recover from the husband.

The precise point was decided in Bertie vs. Lord Chesterfield, 9 Modern Rep. 31, where the executor of a wife having a separate estate, with power of disposal by will, having paid the amount of a judgment obtained against him by the undertaker for her funeral expenses, filed a bill in equity against the defendant, to whom the husband, who had subsequently died, had bequeathed £6,000 per annum, subject to the payment of his debts.

It was decreed (Lord Macclesfield, Lord Chancellor), that "the husband is subject by law to pay the funeral expenses in burying the wife, and therefore that the plaintiff should be reimbursed out of the estate in the defendant's hands, together with his costs at law and in this court."

As the parties in the present case are all before us—the husband claiming a distributive share of his wife's estate—we may, under well settled principles, while awarding payment to the undertaker, charge the amount against, and withhold it from the share of the husband.

Under the third exception it is claimed, that while it is conceded that a mother's appointment of guardian cannot, as such, be sustained, she may, under such designation, appoint a trustee or curator of the estate which she gives to her children; just as a grandfather (Vanarstdalen vs. Same, 2 Harris, 384) or a grandmother (Smithwick vs. Jordan, 15 Mass. 113) may do. Such a power necessarily flows from the maxim which gives to the bestower of a gift the right to regulate its disposal.

But here the testatrix has not in terms, as in the cases cited, conferred upon the person whom she names as guardian, the care and management of the estate. The gift seems to be directly to the children with executory limitation over in the event of their death during minority. It is true that some implication of an intention that the "guardian" shall have control of the estate is afforded by the provision dispensing with security for the money coming into his hands. But the provision, while insufficient to show clear error on the part of the auditing judge, makes it apparent that the interests of the children will be better protected by adhering to the adjudication in this respect, and placing their estate in the custody of the regularly appointed guardian, whose responsibility cannot be questioned, and under whose care loss is scarcely possible; and by whom, should the contingency mentioned in the will happen, the property can be surrendered to the party ultimately entitled.

The third exception is dismissed.

The order of business for the U. S. Courts for the coming April Term will be as follows:

Jury causes in District Court April 1st to April 16th, inclusive.

Jury cases in Circuit Court from Thursday, April 17th to Saturday, May 10th, inclusive.

The printed assignments for the Circuit Court will be ready for distribution next week.

FOR SALE.

This paper is for sale. Unless we can dispose of it between this time and the first of July next, Vol. II will then end with an index. The Assignment, however, will be continued until the end of the year.

To subscribers who have paid us $5.00 in advance for The Reporter and Assignment we will refund $1.00 at that time. The same to those who have paid a year's subscription for The Reporter alone. Call on or address the proprietor.

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RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending March 21, 1879.
[Prepared for THE LAW REPORTER by R P. FLOOD.]

MORTGAGES.

March 15.

Emily S. Reader and husband to Mary A. Higgins. $200.
Martin J. Doyle to S. S. Stone. $550.
Frank Konzana and wife to John Junge. $500.
Same to Andrew Scheule. $500.
John C. March and wife to Henry Norris. $300.
Mike McDermott to A. W. Bishop. $500.
Joseph Bregtman to Beuma J. Perkins. $1000.
Joel Rice and wife to Lutecia Busby. $200.

March 17

George W. Hale and wife to S. H. Kirby. $400.
Bridget O'Donnell and husband to The Society for Savings. $600.
John Jackson and wife to John A. Tweedey. $100.
Joseph Klinz to Elizabeth Lauer. $500.
Byron Bradlev and wife to E. S. Carter. $600.
Belle Needham and husband to Ferdinand Dryer. $3700.
Fannie Wallace and husband to The Society for Savings. $600.
Margaret Travers and husband to James H. Spraikling. $100.
Bridget McHugh to Daniel E. Leslie. $144.
William McDonough and wife to The Society for Savings. $200.
Alfred Williams to George H. Williams. $700.

March 18.

Patrick McKusker to The Society for Savings. $300.
Lucy A. Miner to John Rodgers. $500.
Carl Schmittendorf and wife to John Riebel. $425.
Jacob Goldman to Max M. Heller. $200.
Philipp Rick to John Karda. $400.
George P. and Mary M. McKay to Louis Gross. $2403.52.
William C. Fair to William Gall. $366.
N. A. Waring et al to The Society for Savings. $18000.
John A. Kelly and wife to Noble F. Wood. $700.
Richard Kennedy to M. Kennedy. $300.

March 19.

Thomas Sarter and wife to Ella J. Wright. $1000.
Mary M. Van Pelt and husband to William Richardson. $750.
Henry Tiedt and wife to Henry Knapp. $300.
Frederick Kling and wife to John Siberle. $500.
Mary A. McKay and husband to John McKay, Sr. $1000.
Anton Cipra to Fred C. Koeckert. $190.
John Stohm and wife to W. J. McConoughay. $400.
John Whitcomb and wife to C. L. Pritchard et al. $360.
John Cady to Margaret Karner. $400,
H. and H. E. Avery to Luther Moses. $2000.
Lucy A. Russell and husband to The People's Savings and Loan Association. $1700.
Lewis W. and Addie M. Day to Margaret Clark. One thousand four hundred and fifty dollars.
F. B. and T. Stackpole to executor of the estate of George Worthington. One thousand two hundred and fifty dollars.
Julia M. Greene and husband to The People's Savings and Loan Association. Four hundred dollars.

March 20.

D. C. Washington to S. H. Adams. $500.
Fred Hirz and wife to John Leberle. $300.
Jane S. Barriball and husband to M. S. Robertson. $290.
Mary Ann Cowley and husband to same. $300.
Myra A. Stardart and husband to Joseph F. Cooper. $1200.
F. Omenhaeuser to F. G. Clewell. $600.
James Kyser and wife to The Society for Savings. $1500.
Simon Gundermann and wife to J. J. Bicks. $500.
Charles Wilbur and wife to Annie Neville. $1800.
Peter Goldsmith to Mary B. Jones. $500.
Mary Ann and Thomas Collings to Reuben Gates. $1000.
Solomon Myer to J. C. Kentz. $50.
Elizabeth Wells and husband to Barbore Reihm. $100.

March 21.

James Crawford and wife to D. W. Loud. $1600.
L. H. Russell and wife to Wm. Williams. $10000.
A. J. Holland and wife to Otis Farrer. $440.
John Boessing and wife to Christian Haas. $300.
Luman B. Oviatt and wife to Mrs. Soloma Gardner. $1200.
Same to Rufus B. Munger. $1200.

CHATTEL MORTGAGES.

March 15.

Rigina Tratner to Frank Fry. $200.
Wm. H. Buttner to C. R. Heller and M. Rogers. $17.
Wellington P. Cook and wife to Daniel Geissner. $2000.
Charles D. Day to Henry Kessler. $140.

March 17.

E. W. Allen to J. Krauss & Co. $62.
Charles Galberg to same. $66.
Mrs. A. W. Gaw to same. $116.
H. Miriam to S. J. Miller. $120.
Robert Quigley to Robert Hilborn. $100.
Caroline Mullor and husband to George J. Griffen. $816.

March 18.

James and Susanna Henon to A. W. Poe. $50.
Otis D. Crocker to C. Potter Jr. & Co. $500.
Philip Schardt to Otto Arnold. $25.

March 19.

Benson & Hall to the A. S. Herendon Furniture Co. Forty-eight dollars.
Isaiah Turner and wife to M. D. Butler. One hundred and two dollars and fifty cents.
Same to same. One hundred and two dollars and fifty cents.

March 21.

Frederick Mick to Adam Ressler. $500.
Brutus Jackson to Clarence A. Walker. $100.
H. M. Libbey to Cordelia C. Patch. $1,000.
Same to John A. Ensign. $275.42.
D. M. Becker to C. R. Heller. $125.
Alonzo E. Bradley to W. H. Gates. $50.
Charles Feller to Sarah L. Babcock. $95.
Thomas J. Costello to Peter Reidy. $100.
Hartley & Hynes to the Campbell Printing Press Co. $1050.
Samuel Harrison to Nellie Speed. $200.

DEEDS.

March 14.

Olivia K. Johnston to Kate J. Hepbrum. $100.
George M. Hepbrum and wife to Olivia K. Johnston. $100.
Worthy Green and wife to Sherman M. Burton. $1100.
J. B. McConnell et al., by Felix Nicola, Mas. Com., to Jas. M. Jones. $61.
Henry B. Vattler and wife to John Decombe. $650.
D. C. Taylor and wife to Elizabeth Stoll. $1200.
Charles H. F. Sohn to Esther Kneen. $3000.
Gustav A. Hyde and wife Mary H. Sollowaz. $5000.
Daniel Myers and wife to James M. Coffinberry. $1999.

March 15.

Charlotte Baird and husband to Barzilla S. Harrison. $2000.
Henry Giles to Edward Heinton. $1.

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Rebecca B. Holton to J. W. Holton. $1.

S. V. Harkness to Mrs. Bridget J. Doyle. $375.

Mary J. Higgins to Emily S. Reader. $815.

Elmira D. Hamlin et al to Leverett Tarbell. $3300.

John Kovar and wife to Mary Dlouha. $200.

Frederick Kinsman to Frank Korzana. $300.

B. Lawson and wife to N. P. Knight. $900.

Annie Lewis and husband et al to Samuel Whitlock. $1.

Nelson Moses to Moses G. Watterson. $1.

George W. Morgan and wife to Isbelle C. Holly. $8000.

Adolph Mader et al to Charles B. Paddock. $1150.

Annie Lewis and husband et al to Richard Whitlock. $1.

Real H. Rice and wife to Joel Rice. $50

Wm. E. Rose and wife to Minnie E. Whitlock. $1050.

S. S. Stone and wife to Forest City Varnish, Oil and Maphtha Co. $12,-500.

Volney R. Warren to Portland Hyde. $2400.

Edward P. Williams and wife to Wm. Williams. $1.

March 17.

Richard Beardworth and wife to Lewis H. Nye. $300.

Philipp J. Brunner and wife to Frederick J. Brunner. $1500.

Sargent & Dixon to Carl Schneider and wife. $450.

Israel Hubbard and wife to Emeline Warren. $1000.

Ann Lewis et al to Mary Foster. $1.

Elizabeth and Daniel Sauer to Joseph Kling. $1200.

T. J. and E. H. Towson to W. R. Smellie. $700.

L. J. Talbot and wife to Sam H. Cook. $1620.

Sydney Downey to Frank Wagner. $740.

Neal Norton and wife et al to Neal Campbell. $1.

John Wright to H. Moley. $350.

William Wissing and wife to Johanna Brinning. $475.

Thomas Wills and wife to Samuel Hoyt. $75.

George D. and Hattie B. Williams to Belle Needham. $6700.

Thomas Graves, Mas. Com., to Lewis H. Nye, exr., etc. $180.

Same to The Brooklyn Kranken etc. $305.

Allen D. Blakeslee, admr. etc., et al by E. H. Eggleston, Mas. Com., et Samuel Deace. $2133.34.

March 18.

Sydney Cooper and wife to Henry Carter et al, exrs. of the estate of Alonzo Carter, deceased. $100.

Lewis Gross and wife to Mary Ann McKay. $8500.

Joseph Homolka and wife to Bartolemy Klima. $300.

Enoch S. Jaynings and wife to Cassius M. Stearns. $3000.

Frederick Kreideman and wife to Frank Senk. $410.50.

James H. McCartney to Joseph G. McCartney. $3000.

A. W. Poe and wife to Ella M. Poe. $2500.

Charles Curtiss and wife to John A. Kelly. $150.

Same to same. $550.

M. Kennedy and wife to Richard Kennedy. $1700.

M. S. Budgers to Minut Stebbins. $200.

H. F. Taylor and wife to Louisa A. Cooke. $7500.

John Voelker and wife to Gustav Schmidt, assignee. $1.

August Vedder and wife to Simon Fithel. $2400.

William V. Craw et al, by Felix Nicola, Mas. Com., to Marcus Gusdorf. $3350.

Susan S. Hall et al, by S. S. Lowe, Mas. Com., to Maria L. Skinner. $1400.

Joseph James, guardian of heirs of T. D. Rand, by Charles B. Bernard, Mas. Com., to Benjamin S. Wheeler. $500.

March 19.

Caroline Bappel and husband to Morton W. Cope. One thousand one hundred dollars.

Morton W. Cope to Phillip Bappel and wife. One thousand dollars.

Margaret Clark to Addie M. Day. One thousand eight hundred dollars.

T. P. Crocker and wife to John Otto. One thousand dollars.

J. D. Clary and wife to W. G. Rose. One thousand five hundred dollars.

Henry Campbell and wife to Andrew G. Steinbrenner. One thousand dollars.

Olivia S. Cooke to Patrick Welsh. Four hundred and forty dollars.

Catharine Doyle to Mary A. Doyle. One hundred dollars.

Trustees of Erie St. M. E. Church to L. B. Oviatt. Two thousand eight hundred dollars.

Patrick Glynn and wife to W. G. Rose. One thousand five hundred dollars.

John H. Hoeffner and wife to Frederick Miller. Five dollars.

David Z. Herr and wife to Reason A. Schnuck. Three thousand six hundred and twenty dollars.

George W. Brooks, trustee, et al to James G. Clemens. Six hundred dollars.

George A. Bennett and wife to Ellen E. Ramsdell. Six hundred and fifty dollars.

Henry Huge and wife to Frederick Prasse. One thousand dollars.

Nelson Moses to James G. Coleman. Four thousand three hundred and twenty dollars.

Charles Muller et al to E. S. Ganson. One dollar.

J. J. McClintock and wife to H. B. Gildard. Two hundred dollars.

Fred C. Koeckert and wife to Anton Cipra. Two hundred and ninety dollars.

Fred H. Miller and wife to Mary Hoeffner. Five dollars.

H. F. McGinness and wife to C. C. Rogers. Four hundred and fifty dollars.

Ella M. Poe to Addie M. Day. Four hundred and fifty dollars.

C. T. Pritchard et al, admrs. of Wm. Pritchard, deceased, to John Whitcomb. Five hundred and forty dollars.

D. C. Washington to G. E. Herrick. One thousand six hundred dollars.

John Marquardt, by Felix Nicola, Mas. Com., to The Citizens' Savings and Loan Ass'n. One thousand six hundred dollars.

March 20.

B. S. Cogswell to Fred A. Alden. $5.

Fred A. Alden to Peter Kimball. $2000.

H. E. Adams and wife to D. E. Washington. $2100.

Robert Barber and wife to Perry Powell. $2275.

T. G. Clewell and wife to F. Ohmenhaeuser. $600.

William Honeywell and wife to Samuel W. Honeywell. $3650.

Samuel W. Honeywell and wife to Caroline E. Honeywell. $1.

Caroline E. Honeywell to Fred Honeywell. $550.

Charles Hill and wife to Katharine Havelicek. $1000.

Reuben Gates and wife to Mary Ann Collings. $1500.

Richard Morrow and wife to Richard H. Morrow. $550.

August Meuma and wife to Joseph Muzzio. $1200.

C. A. Meurman, assignee of George Rettberg, to B. S. Cogswell. $260.

H. P. McIntosh to R. W. Teeters. $900.

R. W. Teeters to Olive M. McIntosh. $1.

Anna Neville and husband to C. W. Wilbur. $2200.

Vaclav Odvody to John Jeroushek and wife. $665.

Charles W. Stearns and O. D. Stone and wife to Emma R. Garlock. $1200.

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S. Truscott to C. C. Carter. $150.

Judgments Rendered in the Court of Common Pleas for the Week ending March 19th, 1879, against the following Persons.

March 15.

A. E. Scranton. $60.
Henry Leidheiser. $13.75.
Magdalena Schnell. $45.
W. E. Lown. $666.81.
Henry Leidheiser. $27.12.
A. R. Mitchell. $335.20.
Nicholas Meyer. $225.

March 17.

C. O. Hart, as assignee of Roberts Man. Co. $237.
G. A. Rauchfuss. $2373.35.
G. F. Gallagher. $1254.75.
George Marshman et al. $838.
Phillip Bellmuth et al. $602.
L. Newshuler et al. $102.53; $1160.27.
Charles Patterson. $567.92.
S. J. Fox et al. $1056.09.

U. S. CIRCUIT COURT N. D. OF OHIO.

March 15.

3734. W. H. Robinson vs Thomas C. Boon et al. Demurrer to petition. Sustained with leave to amend.

2235. Daniel J. Fallis vs Trustees of Porter township, Del. Co. Demurrer sustained to rejoinder and special pleas stricken out.

3600. Wm. G. Winslow vs schooner S. S. Osborne. Master's report confirmed. Appeal to Supreme Court.

3603. Union Paper Bag Machine Co. vs Cleveland Paper Co. Decree for complainant, and patent sustained. Infringment declared. Reference to A. J. Ricks to take account and report damages sustained by complainant by defendant's infringment. Defendant allowed to manufacture, on executing proper bond to indemnify complaint.

3262. James Firman, admr., vs [illegible] Penn. Co. Motion to set aside [illegible]rdict and for new trial allowed, upon payment of cost of trial.

3556. Clinton Garrett vs Penn. Co. Answer. J. T. Brooks and Rush Taggart.

March 17.

3814. Hugh B. Wilson vs The Wheeling & Lake Erie R. R. Co. et al. Demurrer to bill. Wickham & Wildman; Pennewell & Lamson.

3822. E. P. Needham et al vs J. W. Caldwell et al. Motion. Pennewell & Lamson and H. J. Caldwell.

—— Same vs same. Same. Same.

3836. The Second National Bank of Cleveland vs Wm. West et al. Reply. C. D. Everett.

5797. Singer Manufacturing Co. vs J. E. Henderson et al. Motion sustained and leave to amend in ten days.

2867. John Ingham, exr., et al vs Lake Shore Foundry. Reinstated.

3797. Singer Man. Co. vs J. E. Henderson et al. Motion sustained by interlineation.

3734. W. H. Robison vs Thomas C. Boone et al. Demurrer sustained by interlineation.

March 18.

3563. Commercial National Bank of Cleveland vs F. W. Pelton, treas., etc. Injunction allowed. Deft. to pay costs. Deft. appeals.

3826. M. Gottfried et al vs Anton Kopf et al. Time for filing extended to April 15. Case continued to next term.

3825. Same vs C. Schneider. Same.

March 19.

2235. Daniel J. Falles vs the trustees of Porter township. Decree sustained.

3853. Second National Bank of Toledo vs Ann Shiely, admr. etc. Petition for money only. Bishop, Adams & Bishop.

March 20.

3313. The Western Union Tel. Co. vs The Sandusky, Mansfield & Newark R. R. Co. Leave for the Baltimore & Ohio R. R. Co. to file an answer in 30 days.

3816. The Farmers' National Bank of Ashtabula vs Sydney H. Cook, treas. Demurrer to bill. W. P. Howland, att. for treas.

3817. The Ashtabula National Bank vs same. Same.

3815. The Second National Bank of Jefferson vs same. Same.

3801. The First National Bank of Geneva vs same. Same.

3854. James W. Hane vs The Travelers' Ins. Co. of Hartford. Transcript of record from Common Pleas Court. Lynch, Day and Lynch; Geo. E. Baldwin.

March 21.

3855. Martin L. Hall et al. vs. Geo. B. Clough et al. Bill of complaint. M. D. Leggett.

3856. Same vs. Solomon H. Schmuck et al. Same.

3857. Same vs. Wm. C. North. Same.

3662. John C. Birdsell and The Birdsell Man. Co. vs. John N. Cole et al. Replication. M. D. Leggett.

Frank Delenbough to-day admitted to practice in the U. S. Court.

U. S. DISTRICT COURT N. D. OF OHIO.

Bankruptcy.

March 15.

941. In re Milton C. Beard. Petition for discharge. Hearing March 31st.

1940. In re John A. Kolp. Same. Hearing April 9th.

1916. In re Delanzon Dimon. Same.

1827. In re Elijah Baird. Same. Hearing March 31.

1739. In re S. H. Pew et al. Same.

March 17.

1832. In re Lewis Harsh, bankrupt. Exceptions to specifications opposing discharge.

March 18.

1943. In re Charles A. Raynolds. Discharged.

1944. In re Charles Rawson. Same.

2051. In re Samuel Cove. Same.

1522. Peter Remy, assignee in bankruptcy of the estate of Robert Bell, Jr., etc., et al vs Bernard Wolt et al. Amended bill in equity. M. May.

March 19.

1757. In re Wm. Bobertson. Petition for discharge. Hearing April 19th.

1857. In re Asabel J. Mowry. Discharged.

1946. In re John McGregor. Same.

2050. In re John Holland. Same.

1612. In re Henry Baute. Same.

1757. In re Abner McKinley, assignee, vs James A. Saxton et al. Answer. George E. Baldwin.

March 20.

1797. In re John W. Ferree. Discharged.

March 21.

1548. In re. John A. Dodd & Son. Discharged.

1859. In re. Wm. R. Anderson. Same.

1818. In re. Wm. K. Foltz. Same.

1396. In re. Jacob Newhard. Petition for discharge. Hearing April 19.

CUYAHOGA DISTRICT COURT.

6. Minerva A. Sprague, extx., et al vs E. A. Buck et al. Continued.

10. James Seabron vs Jacob Vanderwerf et al. Passed for settlement.

11. Bernhard Bohn vs The Valley

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Ry. Co. et al. Settled and costs paid. No record.

25. John Price vs L. E. Holden et al. Passed for settlement,

51. Albert W. Powell, admr., vs William C. Eckerman et al. Continued.

54. Adam Christ vs Valentine Christ et al. Same.

63. Mary E. Iddings vs Charles W. Stearnes et al. Same.

80. Wiggins et al vs Campbell et al. Heard. Decison reversed.

89. Marianna B. Sterling vs The City of Cleveland et al. Continued.

92. Jeheal S. Stewart vs Charles Cranz, Jr., et al. Same.

97. Sullivan vs Farrilly.

101. The City of Cleveland vs Nicola et al.

107. Kelly et al vs The State of Ohio.

108. English, admr., vs McAuly et al.

136. Melanctor Barnett vs The City of Cleveland et al. Continued.

145. Westminster Church of Cleveland vs Henry Newberry, trustee, Passed for settlement.

164. O. M. Lowe et al vs J. R. Sprankle. Passed for settlement.

202. Lucy A. Rouse et al vs John Grannis, admr., et al. Dismissed for want of prosecution.

229. D. W. Gage, admr., etc., vs W. E. Pedrick et al. Settled.

245. Theodore B. Starr vs Harriet M. Thompson. Continued.

301. John Bausfield vs Charles B. Bernard, assignee, etc., et al. Continued by agreement of parties.

203. The Kinsman St. R. R. Co. vs Reason. Heel of docket.

224. Webster, admr. etc., vs Ballard et al.

252. Wilson vs Giddings et al. Heel of docket.

253. Wills vs Webster et al. Judgment of Common P.eas reversed. New trial granted.

281. Stark vs Benton et al. Submitted.

282. Wilson vs Avery. Heel of docket.

283. Williams vs Overton. Petition dismissed. Injunction dissolved. New trial overruled. Plff. excepts.

284. Gilmore vs Pelton, treasurer etc.

288. Graham et al vs The Lane Mattress Co. Decree for Plff. Injunction made perpetual.

291. Newark vs The City of Cleveland.

299. Chambers vs the Vilas National Bank of Pitts.

307. Wilson S. M. Co. vs Pelton, treasurer, etc.

308. Smith vs Tointon et al. Order.

309. Rittberger et al vs Flick et al. Trial set for 24th.

311. Wirtz et al vs Leich, ass'e., et al. Judgment of Common Pleas reversed.

312. Wells vs Robertson.

313. Umbstaetter et al vs Burnside. Judgment of Common Pleas affirmed.

314. Sykora et al. vs. The Forest City Mutual Ins. Co. et al. Judgment of Common Pleas reversed. Case remanded.

315. Hunting vs. The Shelby Buckeye Mutual Fire Ins. Co. Same entry.

316. Perura vs. Keenan et al. Order.

317. Molhumes vs. The City of Cleveland.

318. Otis vs. The Euclid Av. Opera House.

COURT OF COMMON PLEAS.

Actions Commenced.

14762. Jennie Werwage vs John Rennick. To vacate judgment and for injunction. Mitchell & Dissette.

14763. C. H. & H. B. Potter vs William Decker et al. Foreclosure of mortgage and sale of lands. Caskey & Canfield.

14764 Robert Jeffrey vs John Greening. Money only. Neff & Neff.

14765. John Needham vs The City of Cleveland. Money only. Jackson & Pudney.

14766. George W. Noble vs Isadore Roskopf. Money only. Robison & White.

14767. Hannah Fuller vs Maria Slaght et al. To subject lands and equitable relief. J. A. Smith.

14768. Seth M. Cady vs The Cleveland Silver Mining Co. Money only. Henderson & Kline.

14769. Wm. McHale vs Albert Porter et al. Appeal by deft. Judgment February 12. Avery and Ambush; Rider.

14770. Frederick Roesling vs John A. Edam et al. Money only. Charles D. Everett.

14771. John F. Morse vs Abner M. Jackson et al. Foreclosure of mortgage. Hutchins & Campbell.

14772. L. Rottman vs R. N. Hull et al. Money only. J. J. Carran.

14773. Wm. C. Schofield vs Patrick Merriam. Money and equitable relief. Henderson & Kline.

14774. Same vs John Rowe. Same. Same.

14775. Same vs William Gibb. Same. Same.

March 10.

14776. Sohn S. Davis et al vs George Marshman et al. Cognovit. H. C. Carhart; E. J. Estep.

14777. Solomon Lodge No. 16, I. O. B. B., vs S. Thorman et al. Money and foreclosure. J. J. Carran.

14778. Valentine Lederly vs John Weisbarth et al. Money, to subject land and for relief. Robison & White.

14779. F. H. Furniss vs Aaron Higley et al. Money and foreclosure of mortgage; Wm. V. Tousley.

March 11.

14780. The Township of Brooklyn vs George J. Duncan et al. Money only. Ranney & Ranneys.

14781. Andrew Eucher et al vs Mary A. Hardy et al. Money and relief. Nesbit & Lewis.

March 12.

14782. S. M. Goldsmith vs William Mai et al. To set aside mortgage deed and for equitable relief. Jackson & Pudney.

14783. Joseph Lawrence vs Jones Manche. Appeal by deft. Judgment Feb. 17. Wm. Clark.

14784. H. C. Williams vs D. C. Lowrie. Appeal by deft. Judgment February 18th. Foster, Hinsdale & Carpenter; C. W. Coates.

14785. Sarah E. Ruple vs John F. Parkhurst, admr. of the estate of F. S. Ruple, deceased. Equitable relief. James Quayle; George T. Chapman.

14786. George E. Hartnell et al vs James Mayshek et al. Money, to subject land and for relief. Robison & White.

14787. Same vs John Goldowske et al. Same. Same.

14788. William R. Ried vs Marcus F. King et al. Money only. T. E. Burton.

March 13.

14789. John Crowell vs Rebecca Woodworth. To foreclose mortgage. P. P.

14790. Andrew Platt vs John Garland. Injunction. J. B. Buxton.

14791. George Willey et al vs Major Smith et al. Money and to foreclose mortgage. Bolton and Terrell.

14792. E. B. Hale & Co. vs Harrison Z. T. Lynch. Money and to subject land. Same.

March 14.

14793. E. B. Hale & Co. vs Oliver J. Smith. Money and to subject land. Bolton & Terrell.

14794. Joseph Aultman vs Zenos King et al. Appeal by defts. Judgment Feb. 17. S. W. Shumway.

14795. William James vs same. Same. Same.

14796. Edward Kenna vs The Cleveland Rubber Co. Money only. W. S. Kerruish.

14797. Louis Harms vs Andrew Eucher et al. Lewis & Castle.

March 15.

14798. James H. Burgert vs Henry Pomerene. Account, appointment of receiver and injunction. Jackson & Pudney.

14799. George E. Hartwell et al vs J. Kover. Money, to subject land and relief. Robison & White.

14800. Christian Bommer vs Henry Buschner et al. Money, to subject lands and relief. Gustav Schmidt.

14801. Frederick Kretzdorn vs Gottfried Fritz et al. Money, account, sale of land and relief. J. S. Grannis.

14802. C. D. Gerrish vs T. S. Wight. Error to J. P. Thomas Lavan.

14803. William C. Schofield vs Carl Bartels. Money and equitable relief. Henderson & Kline.

14804. Same vs Jacob Hirt. Same. Same.

14805. Same vs George Wieland. Same. Same.

14806. A. C. Caskey vs Fanny Johnson, guardian, et al. Relief. P. P.

14807. Charles Gates et al vs William Wells et al. Money and to subject land. Mitchell & Dissette.

14808. John W. Heisley, guardian, etc, vs Julia McNally. Money and foreclosure. J. W. Heisley.

14809. Romelia S. Folsom vs John T. Strong et al. Partition of real estate. Mix, Noble & White.

14810. Walter Scott vs George Buskirk et al. Money only. Neff & Neff.

March 17.

14811. E. J. Estep vs Lewis Clark. Money only. Estep & Squire.

March 18.

14812. Jacob Leatherman. assignee of the Western Reserve Bank, vs Thomas W. Cornell et al. Injunction, relief, and to vacate decree. W. V. Tousley.

14813. John S. Davis et al vs George Marshman et al. Cognovit. H. C. Carhart; E. J. Estep.

14814. Isabel F. Brayton et al vs Alleyne Maynard etc. Equitable relief. Henderson & Kline; S. E. Williamson.

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14815. James McDonald vs J. W. Scott. Appeal by deft. Judgment March 3. E. M. Brown; Hutchins & Campbell.

March 19.

14816. The State of Ohio on complaint, etc., vs Wm. Swinburn. Bastardy.

14817. The L. S. & M. S. Ry. Co. vs N. B. Gunn. Error to J. P. G. W. Mason and J. H. King; L. J. Rider.

14818. Hiram H. Little vs Henry Thoman et al. Money and to subject land. Ingersoll & Williamson.

14819. John J. Biglow vs Franz Karl Meyer et al. Money and foreclosure of mortgage. G. T. Smith.

14820. P. Gallagher vs T. R. Reeve. Appeal by defendant. Judgment February 20. E. D. Stark.

March 20.

14821. Albert Stofnofsky vs M. Klein. Appeal by deft. Judgment March 13th. Charles A. Stible; M. A. Foran.

14822. Jacob Flick vs Samuel Ewbank, defendant. N. B. Coleman, garn. Money only (with att.). J. A. Smith.

14823. J. L. Aldrick vs S. C. Hall et al. To subject land. G. W. Shumway.

14824. William Smith vs Am. But. Overseaming and S. M. Co. Appeal by defendant. Judgment March 3. J. A. Hardy.

Motions and Demurrers Filed.

March 13.

2437. Lehman vs Holbrook et al. Motion by plff. for the appointment of a receiver.

March 14.

2438. Patterson vs Smith. Motion to require plaintiff to give security for costs.

2439. Durand vs same. Same.

2440. Baxter vs Washington et al. Motion by defendants for a new trial.

March 15.

2441. Cleveland, Linndale & Berea Plank Road Co. vs Higley et al. Demurrer by defendant F. R. Smith to the petition.

2442. Tod, Wells & Co. vs Smith et al. Motion by defendant, Mahoning National Bank of Youngstown, to strike the petition from the files.

2443. Stohlman vs The City of Cleveland. Motion by plaintiff for a new trial.

2444. Tod, Wells & Co. vs Smith et al. Motion by defendant, The Commercial National Bank of Cleveland, to strike the petition from the files.

2445. Same vs same. Motion by deft. George W. Mason to strike the petition from the files.

2446. William Bingham & Co. vs Boest et al. Motion by plaintiff for the appointment of a receiver.

2447. Needham et al vs Fenton et al. Motion by plaintiffs to require defendant Horace Fenton to make his answer more definite and certain.

2448. Chase et al vs City of Cleveland. Demurrer to the petition.

2449. Buskirk vs Schwab. Same.

2450. Koch et al vs Brown et al. Demurrer by deft. Sarah Brown to 2d cause of action of plaintiffs' petition.

2451. Micklish vs Harrison. Motion by defendant to strike from petition.

2452. Savage vs White et al. Motion by defendant Mathew G. Rose to require plaintiff to separately state and number causes of action and to strike petition from the files.

2453. Stanley vs Russell et al. Demurrer by defendant C. L. Russell to the petition.

2454. Chamberlain vs Wilson S. M. Co. et al. Motion by defendant William G. Wilson to discharge attachment herein.

2455. Pelton vs same. Motion by same to dismiss action as to him.

March 18.

2456. Budd vs Kline. Motion by deft. for new trial.

2457. Natt vs Natt et al. Motion to confirm sale etc.

March 19.

2458. Hall vs Cozad et al. Motion by defendants Daniel Duty and Sarah L. Duty to vacate decree and for injunction.

2459, Miriam and Morgan Paraffine Co. vs Stewart et al. Demurrer to the answer.

March 20.

2460. Hoppensach vs Laughenheder. Motion by plff. for injunction.

Motions and Demurrers Decided.

March 14.

2440. Baxter vs Washington et al. Granted. Plaintiff excepts.

March 15.

2143. Stohlman vs The City of Cleveland. Overruled.

2446. Wm. Bingham & Co. vs Boest et al. Overruled.

947. Greenhalgh vs Field. Continued.

2257. Weitzel vs Pincombe. Granted. Plaintiff in error to give additional bail in $100, by giving bond etc.

2285. Ruple vs Schantz et al. Granted.

2298. Same vs same. Overruled as to selling on time. Granted as to selling sub-lots separately.

2301. A. S. Herenden Furniture Co. vs Euclid Avenue Opera House Co. Granted. Leave to defendant Graham to file answer by 22d inst.

2394. Schmidt vs Tausch et al. Overruled. Defendant Fleidner excepts.

2401. Spencer vs Schielly, admx. etc. Granted. Defendant to specify how payment was made, and if in money, in what amount.

2408. Vincent, Sturm & Co. vs Wettrick et al. Granted.

2411. Strauss, assignee, vs Duncan et al. Overruled.

2415. Williamson, trustee, vs The Lake View & Collamer R. R. Co. Granted.

2446. Bingham & Co. vs Boest et al. Granted.

2460. Happensack vs Laughenheder. Restraining order allowed on plffs. giving bond conditioned to law in the sum of $300.

J. G. Pomerene.] [H. J. Davies.

Pomerene & Co.

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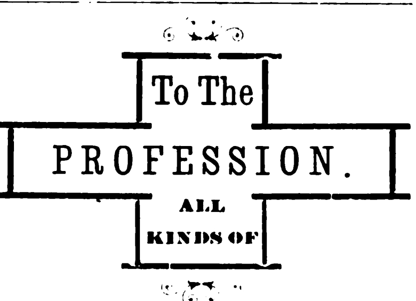

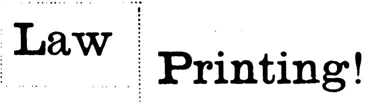

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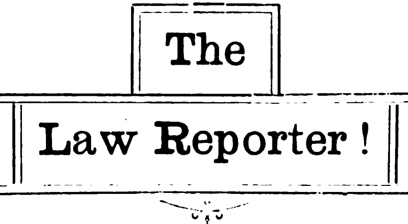

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CUYAHOGA DISTRICT COURT.

X. C. SCOTT VS. HUDSON.

Pleadings—Construction of—Discretion of Court to permit Reply—Judgment notwithstanding the Verdict, etc.

WATSON, J.:

This action was originally brought before a Justice of the Peace and went from his decision to the Common Pleas on appeal. In the Common Pleas the defendant put in two pleas, the first of which was matter in abatement. "Now comes said defendant, and as a defense to plaintiff's petition filed herein and says, that previous to the service of summons upon him in this action, the moneys in his hands, alleged in plaintiff's petition to be due from the said defendant to the plaintiff, were attached by process of garnishment issued out of this court in an action herein pending in which one Emma Bobbitt is plaintiff, X. C. Scott and said plaintiff is defendant, and that said attachment remains in full force and undischarged." Then the second is (the action being brought upon an account for services as a physician), that the services rendered were not of the value claimed—the plaintiff's claim being over $108, and with interest $114 and a fraction. He says they were only of the value of $50, not of the value claimed by the plaintiff, and he prays to be discharged.

It is a little difficult to tell what that second plea really is. It is not in bar. The first plea is matter of abatement, and he prays that he may be discharged with his costs. After putting in this he amends it, this plea being filed January 29th, 1876, November 21, 1877, by putting in a general denial as against the plaintiff. "Now comes the defendant and for his amendment to his second defense says, he denies each and every allegation contained in said plaintiff's petition."

There he defends to the cause of action. The defendant, while the pleadings stood in this form, moved for judgment and, as claimed in argument here, that after the service of the notice in the garnishee process the money was tied up in his hands and the plaintiff was not authorized to bring his suit. We are not inclined to carry this doctrine to that extent. Now, it will be observed by this plea, when the matter in abatement is pleaded, this defendant does not offer to pay that money into court. In the original answer he admits himself in debt $50, and alleges Miss Bobbett had brought suit against the plaintiff, and that the process in garnishment had been served upon him.

Now that was simply a matter in abatement and he might set it up. It did not go to the cause of action at all, and we think that he should have made his defense then complete. He should have come in and showed himself ready to pay what was in demand and put it where the Court could dispose of it, to those to whom it properly was going. But he did not do this. He then went on and put in a further answer which is in mitigation, for the purpose of reducing the amount, and finally he denies.

Now here is then, from the very start, an issue as to the very merits of the plaintiff's case. After answer was in and amended, he moved for judgment, and all that we know about the action of the Court is that that was not granted; but the plaintiff asked leave to reply, and got leave to reply, and did reply, in which he set up that the attachment process was dismissed and the process of garnishment against the defendant had expired with the attachment in favor of Miss Bobbett. We think in that condition of things that it was not all error for the Court to permit that to be replied. He asked for judgment on his pleadings before the reply. It was clearly within the discretion of the Court to permit a reply, and the Court did and we find no error in that. Then after that reply was in an issue was regularly formed between these parties and they went on and called a jury to try the original case upon the account, and judgment was rendered then for eighty odd dollars against the defendant. In that condition of things, after the verdict, he comes and asks for a judgment, notwithstanding the verdict.

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Now we do not regard this as a case where a party can come in and ask for a judgment notwithstanding the verdict. The plaintiff had tendered issue by his original pleading. That issue had been regularly joined, and these parties treat the issue presented to the Court and the jury, and the jury determined the case in favor of the plaintiff and the Court rendered judgment for the plaintiff.

Now do not think that there should be any disturbance of this judgment. We do not find any error for which we ought to interfere.

We then affirm judgment.

R. J. Winters for plaintiff; F. J. Wing for defendant.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

AUGUSTIN MATZAUN VS. THE STATE OF OHIO.

Judgment of Reversal on Record and Assignment of Errors, etc.

WATSON, J.:

In this case we find this condition of things: The plaintiff in error was prosecuted in the Probate Court on the charge of obtaining money by false pretenses, and as a general result, got into jail at the end of the prosecution. This is a petition in error brought rather to review the situation than anything else. The petition assigns various errors, and it is based upon the proceedings of the Probate Court and for those proceedings we are referred to a paper that is made a part of the petition, and is said to be a copy of the record referred to in the petition. That record is in these words, substantially: Transcript filed Oct. 24, 1877. Information: Continued from term to term, and continued to Jan. 1878 term. Jan. 7th, 1878, to the Court, and the Court fine defendant $25 and costs. Motion for a new trial overruled. January 15, 1878. *Causare* issued by order of the Prosecuting Attorney. Then it says —"certified to the County Auditor Jan. 10, 1878," and "H. P. Bates, J. P.," written on the page above that. Then we find these marginal notes: "Costs." Then there is the Judge's costs, the Sheriff's costs, the prosecuting witnesses' costs, and transcript-$33.35, witnesses $18.90, and fine $25, making an aggregate of $81.73 and Judge's increase 40——

Now I have read everything that is in that paper, and the plaintiff in error commences assigning errors, and it is assigned that there was no information; that the information was not read; in other words, there was no arraignment; that there was no plea; that there was no trial; that there was no verdict; that there was no judgment. And we are asked to reverse this catalogue of nothings. The trouble we have had in it, is, we find nothing under the sun to reverse, and the plaintiff in error is in jail; and we have determined that we will render a judgment of reversal of these nothings, and relieve the plaintiff in error from her duress, imprisonment, and let the thing rest at that. (*Sotto voce* to his associate on his right: Hadn't I better add a recommendation to mercy?)

Mr. Hutchins.—I might suggest that in that part, like the rest of it, the opinion of the Court amounts to nothing, as the plaintiff never was in jail.

Court.—Well, we note here "judgment reversed" and we will leave to those who may be interested in it to find the judgment and plaintiff discharged from imprisonment. There is nothing to remand, and nothing to do, and that order, I think, will dispose of it.

A. M. JACKSON, for plaintiff.

J. C. HUTCHINS, for defendant.

HARBAUGH VS. BATES.

Promissory Note—Consideration of, etc.

HALE, J.:

This case comes here by a petition in error. Two grounds are relied upon for the reversal of the judgment; first, that the verdict is not supported by sufficient evidence; second, that there was error in the charge of the court. The action in the court below was on a promissory note made by plaintiff in error, Harbaugh, payable to the order of D. W. Caldwell, which was for $200, dated July 27, 1875. The petition was in the ordinary form of a petition upon a promissory note under section 122 of the code.

The answer of Harbaugh alleged that the note was wholly without consideration. He says that he gave this note to Caldwell in consideration that Caldwell was to enter his services as a solicitor for Life Insurance; that he was the general agent for a Life Insurance Company here in the city of Cleveland, and Caldwell was to enter his employment as a solicitor for Life Insurance. That he failed and refused to enter upon the service contemplated at the time this note was given. I am not sure but it ought to be without consideration upon grounds of public policy.

They go to trial; Harbaugh testifies that he was the general agent of a Life Insurance Company; that he made this arrangement with Caldwell to enter his services, that Caldwell neglected to do so, and, therefore, the note is wholly without consideration. Caldwell upon the trial testified that he made a conveyance of land to Harbaugh in consideration of the note.

There is very little outside the testimony of these two witnesses that will aid in solving the question, who is right about it. It depends very much upon the credibility of those two witnesses. Of course they were before the jury. One testified squarely against the other, and we think it is not in any condition to be disturbed by a reviewing court upon the ground that the jury was wrong in the finding made.

The other objection to the judgment is, that the court erred in the charge, and all there is about it in the record is that the Court instructed and charged the jury among other things as follows, to wit: "If security was given for the debt, it cannot be claimed that it was without consideration; if a conveyance of land was made as security, then there can be no failure of consideration, unless it be shown that the title to the land failed." While the Court speaks here of a security under the testimony offered, it must have been intended by the Court and understood by the jury to mean, if the consideration of this note given by Harbaugh to Caldwell was the conveyance of land by Caldwell to Harbaugh, then there was a good consideration for the note unless the title to the land failed. There was no other claim that could be made upon the testimony; no claim that Harbaugh had secured this note to Caldwell. And while the term security is used here, it must have meant the consideration of the note. It must have been so understood by the jury. And from these isolated sentences, one or two having been taken out, we are not able to say that there was any prejudice growing out of this charge.

The judgment of the Court below will be affirmed.

Hord, Dawley & Hord for plaintiff; Bates & Hammond and A. T. Brown for defendant.

SUPREME COURT OF OHIO.

DECEMBER TERM, 1878.

Hon. W. J. Gilmore, Chief Ju

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tice. Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Hon. William White, Judges.

TUESDAY, Mar. 18, 1879.

General Docket.

Rush R. Sloan vs. Andrew Biemeller. Reserved from the District Court of Erie county.

WHITE, J. Held:

1. The rule of the English Common Law that the owners of land situated on the banks of non-tidal streams, though navigable in fact, are owners of the beds of the rivers to the middle of the stream, is not applicable to the owners of land bounding on Lake Erie and Sandusky Bay.

2. The right of fishing in Lake Erie and its bays is not limited to the proprietors of the shores; and the right of fishing in these waters is as public as if they were subject to the ebb and flow of the tide.

3. The *prima facie* right of the public is not rebutted by proof of the mere uninterrupted enjoyment of the privilege of fishing for the period requisite to perfect a title by prescription; the mere lawful exercise of a common right for that period does not establis an exclusive right.

4. Where no question arises in regard to the right of a riparian owner to build out beyond his strict boundary line, for the purpose of affording such convenient wharves and landing places in aid of commerce as do not obstruct navigation, the boundary of land, in a conveyance calling for Lake Erie and Sandusky Bay, extends to the line at which the water usually stands when free from disturbing causes.

5. A deed conveying land contained a reservation in the following terms: "And the said grantee shall not have the right to sell or remove sand from said premises, nor shall he have the right of fishing in either the lake or bay, the same being expressly reserved by the said grantor. The said grantee shall have the right, however, of landing on either the bay, or lake shore for other purposes than to take sand, fish, or carry to and from seines and fishing tackle, all of which rights are exclusively reserved by the grantor, so that he may lease the same or sell the same." Held:

1. That the attempted exclusion of the grantee by the first clause of the reservation from the right disconnected from the shore, of fishing in either the lake or bay, is inoperative.

2. The right reserved to the grantor is the exclusive right of landing on either shore to take sand, fish, or to carry to and from the shore seines and fishing tackle to be used in the adjacent waters in direct connection with the shore; and the inhibition against the carrying of fishing tackle to and from the shore by the defendant, has reference to tackle to be used in connection with the shore in contravention of the right reserved to the grantor; and does not forbid the storing of tackle on the premises conveyed, which is not thus used.

Judgment for defendant.

No. 361. John M. Wilcox vs. Francis A. Nolze. Error to the Court of Common Pleas of Cuyahoga county.

OKEY, J. Held:

1. The power of a judge to discharge an alleged fugitive from justice, under the act of 1875 (72 O. L., 79), is essentially the same as under the habeas corpus act (75 O. L., 754).

2. The provision of the constitution of the United States (Art. 4, sec. 2) and the act of Congress (U. S. Revised Statutes, sec. 5,278), which provide for the extradition of those who shall "flee from justice and be found in another State," are confined to persons who are actually, and not merely constructively, present in the demanding State when they commit the acts charged against them; and in a proceeding on habeas corpus for discharge from arrest on a warrant of extradition issued by a Governor, in compliance with the requisition of the Governor of another State, parol evidence is admissible to show that there had been no such actual presence of the accused in the demanding State.

Judgment affirmed.

No. 362. The People of the State of New York vs. Francis A. Nolze. Error to the Court of Common Pleas of Cuyahoga county.

Petition in error dismissed on the authority of Sheldon vs. McKnight (34 O. S., 316).

Thomas E. Sturgeon vs. Henry L. Korte. Error to the Court of Common Pleas of Muskingum county.

BOYNTON, J. Held:

1. An inmate of a county infirmary, who has adopted the township in which the infirmary is situated as his place of residence, having no family elsewhere, and who possesses the other qualifications required by law, is entitled to vote in the township in which said infirmary is situated.

2. Such inmate is not under such legal restraint as to incapacitate him from adopting the township in which the infirmary is situated as his place of residence.

Judgment affirmed.

Motion Docket.

No. 46. Mary Atcherly and William Shields, trustees, vs. Mary Ann Dickinson. Motion to dismiss proceedings in error to the District Court of Licking county.

GILMORE, C. J.:

1. Section 23 of the code, as re-enacted in 1878, relates to the time within which an original action may be recommenced, or claims set up by the defendant in such an action may be re-asserted, if either party "fails otherwise than upon the merits;" and has no application to proceedings in error.

2. Where a proceeding in error was transferred to the Supreme Court Commission, and by it dismissed for want of preparation as required by rule, and a motion was subsequently made before it to reinstate the proceeding, which was overruled, such action of the Commission is final.

Motion granted. Proceedings in error dismissed.

No. 61. Hannah M. Maud et al. vs. William Maud. Motion for a rehearing of a cause decided by the late Supreme Court Commission.

By the Court:

This court has no power to re-hear a cause decided by the late Supreme Court Commission, on the ground that the same was erroneously determined. Motion overruled.

No. 57. Edward Dille vs. The State of Ohio. Motion for leave to file a petition in error to the District Court of Hardin county. Motion granted.

No. 59. Henry Roney vs. John W. Gosnell. Motion to stay execution of final order of the District Court of Licking county. Stay of execution of the judgment is ordered on the execution of an undertaking by the plaintiff in error to the defendant in error in the sum of $300, with surety to the acceptance of the Clerk of the District Court, condition to abide by and perform the judgment of the District Court in the event that the same is affirmed.

No. 60. Charles King vs. Julia King. Motion to take causes No. 549 and 579 on the General Docket out of their order for hearing. Motion overruled.

No. 62. Jane Boshore vs. George Canning and Isabella Canning. Motion for leave to file a petition in error to the District Court of Mahoning county. Motion dismissed.

No. 63. Fisk, Silliman & Co. v. The Lake Erie Coal and Oil Mining Co. Motion to reinstate cause No.

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284 on the General Docket of December Term, 1877. Motion overruled.

BELMONT COUNTY COMMON PLEAS.

OCTOBER TERM, 1878.

DANIEL W. CADY VS. THE INCORPORATED VILLAGE OF BARNESVILLE.

An Ordinance Declared Unconstitutional and Void.

The plaintiff in error was arrested by the Marshal of the Village of Barnesville on the 9th day of May, 1878, under an ordinance of said village, the 4th Section of which reads as follows:

"That it shall be unlawful for any male-person to walk or ride in company with any lewd female or common prostitute, or to stand or converse with her upon any street, alley, lane or public ground within the corporate limits of said village."

Upon the trial before the Mayor, the plaintiff in error pleaded guilty to the charge of walking and conversing with a certain woman, but denied any knowledge of her character. Thereupon, the Mayor fined the plaintiff in error, and adjudged the costs against him. To reverse the judgment, the petition in error was filed at the Court of Common Pleas. Plaintiff, by his counsel, maintained:

1. The incorporated village of Barnesville had no power to pass the ordinance in question either expressly or arising from implication. Section 199 of the Municipal Code, passed May 7th, 1869, provides that corporations shall have power to "suppress and restrain disorderly houses and houses of ill-fame, and provide for the punishment of all lewd and lascivious behavior in the streets and other public places." Walkir and conversing with any woman is not an act of "lewd and lascivious behavior."

2. The ordinance is in conflict with Article 1, Section 1, of the Constitution of Ohio.

3. The ordinance is in conflict and is inconsistent with the general laws of the State (Chap. 9, Sec. 2; Crim. Code, also Chap. 9, Sec. 8; City of Canton vs. Nist, 9 O S., 442.)

4. The ordinance is indefinite and uncertain. The ordinance provides that "any male person," etc. A child three years of age would be liable, if the ordinance was of legal effect.

5. The ordinance is void because it does not require a *scienter* as the gist of the supposed offense.

OKEY, J.:

Held that the ordinance was unconstitutional and of no legal effect; that it was unauthorized by the Municipal Code, conferring powers on municipal corporation by the Legislature, and being inconsistent with the other laws of the State, was void. The judgment of the Mayor was therefore reversed.

B. D. SINCLAIR, for plaintiff in error.

J. W. WALTON, contra.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending March 27, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

March 22.

Robert Kirk and wife to James Howe. $450.

Maria Slaght to Sarah Branch. $3,000.

Nelson E. Baker and wife to Joseph White.

J. O'Malley to Orrin F. Frazer. $1,938.30.

Horace Benton to The Society for Savings. $5,000.

E. Port and wife to Eunice Wells. $750.

Cornelius Newkirk and wife to The Peoples' Savings and Loan Association. $400.

Horace Benton to John R. Jewett. $5,000.

March 24.

Morton O. Maley and wife to Eli N. Cannon et al. $1,000.

J. S. and H. J. Giles and wives to D. L. Tenkell. $600.

Frank E. Miller and wife to Mrs. Theresa Champlin. $2,500.

W. P. Cook and wife to V. P. Kline. $9,000.

Ella M. Webb and husband to S. W. Porter. $1,050.

Carl A. E. Budde to Theodore Walzer. $300.

Anton Mraz and wife to Joseph Zedmik. $350.

Waldemer Otis to The Citizens' Savings and Loan Ass'n. $9,000.

William Cranage and wife et al. to same. $2,000.

March 25.

Lydia E. Locke and husband to Henry Romp. $500.

Trustees of the 6th German Reformed Church to B. Sturm. $1,800.

S. B. and B. A. Baltz to same. $150.

John O. McGregor and wife to William Baxter. $231.

James W. Venning to Andrew Freese. $1,400.

Albina Tauss and husband to W. H. Coit. $1,020.

John B. Mathews to Ella E. Mathews. $150.

Thomas Tompkins and wife to Hill Bros. & Thompson. $635.

Same to Hiram Welsh. $1,523.

Frank Zink and wife to Adam Rauch. $164.

March 26.

Samuel Williams to Elbridge Ganyard. One hundred dollars.

Charles Rentner and wife to Elsie R. Krause. One thousand six hundred dollars.

Gustav Schultze and wife to Simon Koch. Four hundred dollars.

Frank B. Beckwith and wife to Nancy Stilson. Five hundred dollars.

Eber W. Allen and wife to C. K. Mix. Seven hundred dollars.

Anna E. Romp to Elizabeth Wesley. Two hundred and fifty dollars.

John Wolpf to Henry M. Knowles. One thousand two hundred dollars.

Same to J. M. Jones and J. M. Henderson. One thousand two hundred dollars.

Maggie Degnon to The People's Savings and Loan Ass'n. Five hundred dollars.

Frank H. Fahle and wife to same. One thousand dollars.

John Given and wife to Josiah Stacey. One thousand dollars.

March 27.

Henry Laluchle and wife to George Roth. Four hundred dollars.

Same to Zucker. Four hundred dollars.

J. C. Weber to Jacob Schroeder. Three thousand dollars.

Caleb Patterson and wife to Henry Parker. Five hundred dollars.

George Hesel and wife to The Socity for Savings. Four hundred dollars.

James M. Coffinberry to Allen Armstrong, exr. of Henry Brown. Three thousand three hundred and fifty dollars.

W. P. Cook and wife to M. Holmes. Ten thousand dollars.

John Castello to John McCabe. Six hundred dollars.

Annett M. Selden to Wm. Hutchins. Three hundred dollars.

Jacob Lanx to Robert Spinks. Seven hundred dollars.

Catharine Lang et al. to the trustees of the German Wallace College, Berea, O. Three thousand five hundred dollars.

George Hesel and wife to George Hesel, Jr. Three thousand four hundred dollars.

March 28.

M. R. Hughes and wife to George Kent et al. $2,000.

John Frey and wife to Frederick Deiner. $400.

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Frank F. Bolte and wife to Frederick Vogt. $700.
Barbara Bauman and husband to Alve Bradley. $3,100.
Welcome Ransdell to S. H. Kirby. $125.

CHATTEL MORTGAGES.

March 22.

Francis B. Putnam to James A. Brown. $200.
Henry Reeves to James H. Peck et al. $160.
Caroline Newkirk to L. Saunders. $40.
Mary Bopp to P. S. Mills. $125.
R. B. Rriggs to Wm. V. Tousley. $47.
Hannah Wormser and husband to D. A. Odell. $143.
F. T. and W. M. Hollinger to Cleveland B. B. Ass'n. $135.
Willbald Meyer to Isaac Leisy & Co. $600.

March 24.

A. B. Gillson per etc. to C. R. Heller. $35.
John Lavermer to George A. Zimlick. $170.
Philip Nagusky to Martin Haas. $30.
Simon Kirnan to Same. $31.
F. Omenhaeuser to Hubbard Cooke, trustee. $175.
Abbe L. Moliere et al. to James H. Wooley. $700.

March 25.

W. E. Robinson to D. S. Robinson. $300.
Robert J. McClane to Cleveland Burial Case Co. $560.
Saxton & Smith to same. $450.

March 26.

Henry Janowitz and wife to T. K. Bolton, agt. One thousand seven hundred and fifty dollars.
Robert C. Brown to Cohn, Sampliner & Co. One hundred and fifty dollars.
John Haney to John Leberle. Forty-one dollars and fifty cents.
William Freeman to W. D. Butler. Seventeen dollars and fifty cents.
Henry Reeves to John F. Hobbs. Two hundred dollars.

March 27.

Jacob Miller to Frederick Schneider. Seventy-five dollars.
C. R. Brewer & Co. to W. H. Brown. One hundred dollars.
W. G. Cooke to James Moriarety & Bro. One hundred and two dollars.
F. W. Ensign to Mrs. M. R. Bundy. Five hundred dollars.
Adam T. Becker to George Rettberg. Sixty-five dollars.
Miss Jessie Moore to M. Silverstone. Forty dollars.

March 28.

Susanna R. Schultz to Peter Schmidt. $225.
Wm. Hanne to Healy Bros. $110.
Lily McLean to D. A. Shepard. $140.
John Rasch to Carolton A. Byerle.

DEEDS.

March 21.

Mrs. Catharine Biehl et al. to C. Frese. $1,500.
James Cross and wife to Isaac M. Daggett. $2,500.
Owen Coleman and wife to Cornelius Newkirk. $1.
Edward M. Flynt and wife to Lemuel A. Russell. $9,500.
O. J. Hamilton and wife to Delia L. Hamilton. $100.
Delia M. Hamilton to Emma C. Hamilton. $100.
Alvin R. Hurd and wife to A. H. Wick. $2,400.
Same to same. $2,700.
Same to same. $1,600.
Frank Uhler and wife to John B. Kuratko. $1.
John B. Kuratko to Anna Uhler. $1.
Ernst A. Neipert and wife to G. F. Forleg. $1,100.
George W. Ott and wife to Alexandria Benetz. $1,200.
Loritta J. Pier to David M. Marsh. $2,250.
Edward Varina to C. H. Stevenson. $150.
Miss A. E. Melavan and J. Brown, by John M. Wilcox, Sheriff, to A. W. Sawyer. $167.

March 22.

Levi F. Bauder, Co. Aud., to G. A. Galloway. $61.93.
Jane Hobart to Orrin J. Ford. $1.
Orrin J. Ford to Harry P. Hobart. $1.
H. C. A. and George Buckham to Frank M. Lyon. $900.
Ann Gormly to Nelson Purdy and Charles M. Neil. $1,800.
Anna Gleason and husband et al. to Gilbert McFarland. $1,200.
Alice Horning and husband to John T. Stoney. $3,500.
George E. Hartnell and wife et al. to Frank Slavick and wife. $550.
Lucy Houck, admx. of the estate of Henry Houck, deceased, to Emma Dreher. $1,000.
James Masek and wife to W. F. Rudy. $189.
W. F. Rudy to Barbara Masek. $2.
William Sander and wife to Bridget Reiley. $400.
John Quinn to Francis Quinn. $900.
John Thompson and wife to Libbie Jane Thompson. $3,200.
Vaclav Soukup and wife to Mathias Novak and wife. $300.
Magdalene Schmidt and husband to Louisa Gabel. Quit claim.
J. H. Rhodes, Mas. Com., to Geo. Malter. $3,100.

March 24.

W. H. Brew and wife to T. K. Bolton. $1.
A. J. Broadwell and wife to Anna Bredhaft. $250.
Edward H. Bohn and wife et al. to Valley Ry. Co. $1,500.
Phineas Dollaff and wife to William Kreiger. $792.
George E. Hartnell and wife et al. to James Blaha. $550.
James W. Hoyt and wife to A. H. Wick. $600.
George G. Hickox et al. to Patrick McDermott. $400.
Martin O'Maley et al. to Eli N. Connor et al. $2,000.
Eli N. Connor et al. to M. O'Maley. $1,000.
Anna Johanna and Mathilde Lauer to Eva Lauer. $5.
Francis Quinn to Catharine Quinn. $900.
Lyman H. Robbins and wife to Joseph Diebold. $950.
Louisa C. and P. A. Searle to Ella M. Webb. $3,500.
Frank Zirk and wife to F. and E. Werkmeister. $750.
Wm. H. Brown by Thomas Graves, Mas. Com., to T. Kelly Bolton. $1,-667.
J. C. Leach et al. by H. C. White, Mas. Com., to M. B. Kent. $800.
Thomas Stackpole et al. by C. C. Lowe, Mas. Com., to The Cleveland Malleable Iron Co. $100.

March 25,

Levi F. Bauder, Co. Aud., to S. G. Baldwin. Auditor's deed. $107.28.
Mary B. Jones to Peter Goldsmith. $500.
Olive A. and M. B. Lukens to Albrina Lauss. $2,600.
Wm. H. Locke and wife to H. Romp. $1,000.
H. Z. T. Lynch and wife to Frederick Schneider. $400.
James Gibbons to Dennis H. McBride, trustee. $10.
Dennis H. McBride, trustee, to Sarah J. Gibbons. $10.
Kate and Nickel Nickels to Henry Romp. $1,200.
Lorenz Pfeil and wife to John Albrecht. $1,125.
Frederick Schneider and wife to Emma Lynch. $400.
Thomas Weist and wife to George A. Case. $1,095.
Jerusha A. Bissell et al. by C. C. Lowe, Mas. Com., to Bernhard Strum. $1,500.

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March 26.

W. L. Cutter, exr. of the estate of O. Cutter, deceased, to Norman W. Cutter. Ten thousand dollars.

John Koble and wife to Charles Chervanke. One thousand dollars.

Martin Krejci and wife to Joseph Lipe and wife. Eleven hundred and fifty dollars.

Frank Mills to Ann H. Jackson. One thousand dollars.

John Rippinhagen to Frederick Rentner. Seven hundred dollars.

Frederick Rentner and wife to Mary Reppinbager. Seven hundred dollars.

E. D. Stark and wife to Simon Hovey. One thousand eight hundred dollars.

John Grotzinger and wife by W. I. Hudson, Mas. Com., to Phillip Mueller. Three hundred and sixty-seven dollars.

March 27.

William Baxter to John A. McGregor. Five hundred and fifty-nine dollars.

George C. Hickox et al. to Charles H. Farwell. Five hundred and twenty dollars.

Same to Louisa Seymour. Four hundred and forty dollars.

Same to Peter B. Young. Four hundred dollars.

George Lenz and wife to Susanna Schmidt. Two thousand eight hundred and fifty dollars.

John McCabe to John Castello. One thousand two hundred dollars.

William C. Northrop to George E. Bowman. Two hundred and seventy-five dollars.

Philip Rick and wife to Joseph Chlumskey. ——

Same to same. One hundred and twenty-five dollars.

John F. Storey and wife to James M. Coffinberry. Seven thousand five hundred dollars.

Minnie E. Edwards, executrix of Joseph Edwards, deceased, to Frank Belle. One thousand five hundred and one dollars.

David Z. Herr and wife to Claus Tiedeman. Sixty-six dollars.

C. A. Kinney and wife to Mary C. McDermitt. Four hundred dollars.

James Wallace and wife to Robert Wallace. Five hundred dollars.

Robert Wallace and wife to James DeDermott & Co. Four hundred dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending March 27th, 1879, against the following Persons.

March 20.

A. T. Brinsmade et al. $162.40; $436.72; $10,170; 531.49.

J. W. Street. $1,122.35.

J. B. Glenn. $9,800.78.

Mary A. King et al. $8,879.09.

March 21.

Wilhelm Sehrt. $1,397.68; $217.80.

Henry Esser et al. $930.24; $65.76; $209.50; $465.11.

Burnham & Benton. $364.32.

George Caunter et al. $399.45; $391.18.

Alexander Bauer. $580.34.

March 22.

E. E. Coe. $475.75.

March 25.

Charles L. Crawford et al. $11,110.90; $8,032.26; $565.11; $1,353.60; $796.59; $14,169.98; $2,530.48.

March 26.

William Hart. $107.89; $107.64.

March 27.

William Hart. $901.24.

U. S. CIRCUIT COURT N. D. OF OHIO.

March 22.

8285. Happock & Co. vs. Duerr et al. Demurrer overruled and leave to answer in 40 days.

3325. First National Bank of Lima vs Alstetter. Motion overruled. Judgment for defendant for costs.

3382. Johnson vs Lycoming Ins. Co. Motion overruled. Judgment on verdict for costs.

3439. Fenn vs Phœnix Ins. Co. Same.

3678. Lendall vs Smith. Leave to file exceptions and demurrer to complaints, etc.

3847. Charles Lupe vs C. A. Krauss et al. Answer. Foster, Hinsdale & Carpenter.

3850. United States vs W. J. Pratt. Answer filed.

3857. Same vs Luder D. Pratt. Same.

March 25.

3858. Wm. M. Gibson vs Conrad Schuler et al. Petition for equitable relief. Uhe, Critchfield & Huston.

2874. Isaac Baughman et al. vs Milburn Wagon Works et al. Plaintiffs ordered to give security for costs.

3353. John C. Pratt vs The C., S. & C. R. R. Co. The order requiring Special Master to report at this term, modified so as to extend the time in which to close the testimony to April 8, 1879. Report to be made as soon thereafter as practicable.

March 26.

3859. Aldredge Benzeger et al. vs Henry Kramer. Petition for money only. Willey, Sherman & Hoyt.

3553. John C. Pratt et al. vs Cincinnati, Sandusky & Cleveland R. R. Co. et al. Petition concerning payment of rental.

3174. Benjamin S. Coggswell, assignee, vs Sarah Bausfield et al. Order of March 14 modified by substituting the name of Benjamin S. Coggswell as receiver in place of H. D. Goulder, declined.

3353. John C. Pratt vs The C., S. & C. R R. Co. Order modified authorizing receiver to pay rental on and after the 1st of June, 1877, 20 per cent of the gross earnings, in place of the amount authorized in former order.

3727. F. J. Prentiss vs Silas B. Giddings et al. Report of Master confirmed.

March 27.

3681. Dewight P. Clapp vs Chas. Crawford et al. Sale confirmed and deed ordered.

3480. John C. Birdsell et al. vs Daniel Kirkpatrick. Replication. M. D. Leggett & Co.

3509. Same vs Adam Sherer. Same. Same.

3508. Same vs H. A. Shumaker. Same. Same.

3507. Same vs J. J. Shumaker. Same. Same.

3439. Same vs David Cull. Same. Same.

March 28.

2873. Beardsly et al. vs Hunt et al. Decree for complainants.

3843. Mutual National Bank vs Union Iron Works Co. Judgment for plaintiff. $3,264.27.

2871. Phœnix Mutual Life Insurance Co. vs Lewis et al. Motion to dismiss attachment overruled.

3272. Marquis D. Bacon vs William Moore. Motion to strike amended bill from the files. Ranney & Ranneys.

8573. First National Bank of Akron vs Joseph Moore et al. Amended answer. W. H. Upson and J. M. Poulson.

U. S. DISTRICT COURT N. D. OF OHIO.

March 21.

1591. Benjamin S. Cogswell, assignee, etc., vs Ohio Wooden Ware Man. Co. Bill in chancery. Willey, Sherman & Hoyt.

March 28.

1566. Charles R. Grant, assignee, vs Wm. H. H. Wilton et al. Replication.

—— Same vs same. Same.

—— Same vs same. Same.

Bankruptcy.

March 22.

1901. In re John Dellemot, Jr. Discharged.

1816. In re Joseph I. Walf. Same.

March 24.

1737. In re Leo R. Tuttle. Petition for discharge. Hearing April 19.

1864. In re Vaupel & Moore. Same. Same.

March 25.

1785. In re William M. Smith. Discharged.

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March 28.

1800. In re H. Harvey's Sons, bankrupts. Specifications in opposition to discharge.

CUYAHOGA DISTRICT COURT.

319. Clewell vs Duffner. Heel of docket.

320. The Merchants' Bank of Canada vs Chapin et al. Reversed as to question of costs and affirmed as to balance.

321. Raymond et al. vs White, Mas. Com. Judgment affirmed. Plff. excepts.

322. Higley vs Clewell Stone Co. Continued by agreement.

323. Witham vs Hubbell, Brown & Co. Judgment of Common Pleas affirmed. Plaintiff excepts.

324. Hudson vs Scott. Judgment affirmed.

329. Gates vs Jordon et al. Heel of docket.

330. The Forest City Pipe Works vs Caffey. Judgment of Common Pleas reversed. Cause remanded.

332. Robbins et al. vs De Forest et al.

335. Patterson vs Silver. Continued.

336. Filbert vs Davis et al.

337. Harbaugh vs Bates.

338. Surburg vs Davis et al. Heel of docket.

339. Witham vs Hubbell, Brown & Co. Judgment of Common Pleas affirmed.

341. Bletsch vs Robertson.

342. Robertson vs Daniels et al. Passed.

343. Crumb et al. vs Trieber.

344. Filly vs The City of Cleveland.

345. Baldwin vs Carter.

346. Beavis et al. vs Messenger, exr. etc. Judgment affirmed. No penalty.

347. Hester, admr. etc., vs Cole. Continued.

348. McCarty vs Alger.

349. Everett vs Bentz et al.

350. Palmer vs Palmer et al.

351. Matzaun vs The State of Ohio.

352. Harrington vs same.

353. The City of Cleveland vs Geisendorfer. Passed for settlement.

355. Dunn vs Dunn et al. Appeal dismissed.

357. The Ohio National Bank of Cleveland vs Bolton.

358. Kane vs The Wilson and Hughes Stone Co.

359. Schmidt vs Levy et al.

361. Seyler vs Corbin et al.

362. Brown et al., admrs., vs Laughlin et al., exrs. etc., et al.

363. Clark et al., admrs. etc., vs Benton et al. Leave to defendant R. M. N. Taylor, to file supplemental answer instanter.

364. Cleveland Mechanics' Loan and Building Association vs Broderick et al.

365. Ranney vs Hardy et al. Leave to deft. to file supplemental answer instanter. Plff. has leave to amend petition instanter without costs. Plff. has leave to amend and make A. W. Horton party deft.

366. Wenham vs Campbell et al.

367. Nusbaum vs O'Grady.

368. The Mutual Life Insurance Co. of Chicago vs Follett. Passed.

369. Schnell vs Rittenger. Continued.

370. Rockefeller et al. vs Timmins.

371. Fish vs Randerson et al.

372. Merrick et al. vs Mack.

373. Williams vs Wagner et al.

374. Bohaslav vs The Standard Oil Co.

375. Carter vs Wanser et al.

376. Sibfield vs The City of Cleveland.

377. Noble vs Pelton, treas. etc.

378. Burt et al. vs The City of Cleveland et al.

379. In re Tracy et al., exrs. of Joseph B. Lyon, deceased.

380. Cooke vs The Ohio National Bank et al.

381. Jedlicke et al. vs the State of Ohio.

382. Kahnheimer, by etc., vs Heller.

309. Gottfried Rittberger et al. vs Jacob Flick et al. Perpetual injunction allowed. Motion for new trial by defendants overruled.

312. Jacob Welti vs Stewart Robinson. Judgment below affirmed with costs; plaintiff excepts.

336. William Filbert vs F. O. Davis et al. Judgment affirmed with costs.

82. John Bletsch vs Stewart Robinson. Judgment affirmed with costs; plaintiff excepts.

358. S. C. Kane vs The Wilson and Hughes Stone Co. Judgment affirmed; plaintiff excepts.

363. Eliza S. Clark et al., admx. etc., vs John J. Benton et al. In hands of court.

381. Mathias Jedlicka et al. vs The State of Ohio. In hands of court.

385. Lord, Bowler & Co. vs. L M. Chaffee, ass'e. etc. Same entry.

387. Eveline T. Foote vs Margaret Withington, and Same vs Jacob Fetterman. On hearing.

281. E. D. Stark vs B. B. Burton et al. Judgment reversed with costs and case remanded and deft. Homes excepts.

382. Joseph Kahnheimar by etc. vs C. R. Heller. Judgment of Common Pleas affirmed; deft. excepts.

386. Susan C. Cash vs John L. Cash. Appeal on the question of alimony. On hearing.

COURT OF COMMON PLEAS.

Actions Commenced.

March 20.

14824. William Smith vs The Am. But. Overseaming and S. M. Co. Appeal by deft. Judgment March 3. J. H. Hardy.

March 21.

14825. Moses G. Watterson, treas. etc., vs M. C. Younglove. Money only. T. J. Carran.

14826. Henry C. Goodman et al. vs Christian Gregerson et al. Money, foreclosure, and equitable relief. Goodman & Glover, H. H. Little.

14827. James W. Pearce vs Emily Morgan, administratrix of etc., et al. Money and to foreclose mortgage. S. S. Wheeler.

14828. In re the application of Claus Tiedman to vacate a part of the town plat of Linndale etc. To vacate town plat. A. W. Beman.

March 22.

14829. Conrad Schwentner vs J. Philpott et al. For the subjection of lands and for equitable relief. S. A. Young and M. B. Gary.

14830. Morgan, Root & Co. vs E. E. Coe. Cognovit. George S. Kain; Thomas T. Johnson.

14831. Philip Getrost vs Andrew Tranchier. Money, to subject lands, and elief A. Zehring.

14832. Anna Kramer vs Barney Tighe et al. Money and sale of mortgaged land and premises. A. Zehring.

14833. J. R. A. Carter vs Josiah W. Turner et al. Money and to subject land. Wm. K. Kidd.

14834. W. S. C. Otis vs Marcus E. Cozad et al. Money and to subject lands. E. P. Blickensderfer.

14835. Lotarei Caster vs Julius Reichweir et al. Money and to subject lands. Willson & Sykora.

14836. Thomas Impett vs Carl Vick et al. Money and to subject lands. Mitchell & Dissette; Babcock & Nowak.

14837. The Hibernia Ins. Co. vs Laurene Connelly et al. Money and sale of lands. W. S. Kerruish.

14838. Same vs John Mahoney et al. Money and foreclosure. Same.

14839. Same vs Henry Koch et al. Same. Same.

14840. Cleveland Malleable Iron Co. vs Cleveland Hazard Hame Co. Money only. J. H. Webster.

14841. Same vs same. Same. Same.

14842. Morgan Anderson et al. vs Geo. W. Pach et al. Money only.

March 24.

14843. The Citizens' Savings and Loan Association vs Jacob F. Koblenzer et al. To subject lands and for relief. Estep & Squire.

14844. W. D. McBride et al vs J. G. Coates et al. Money and to subject lands. G. H. Barrett.

14845. William V. Tousley vs Jas. Kehrion et al. Appeal by defendant C. R. Heller. Judgment February 21.

March 25.

14846. The Citizens' Savings and Loan Association vs William West et al. To subject land and for relief. Estep & Squire.

14847. Same vs Aaron Higley et al. Same. Same.

14848. James Wallser vs Michael McDermitt. Appeal by deft. Judgment Feb. 25, 1879.

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March 26.

14849. State of Ohio, on complaint of Kate Cofferey, vs Michael Long. Bastardy. A. M. Jackson; M. A. Foran.

14850. Same, Mary Gruber vs Fred Sahs. Bastardy.

14851. J. A. Redington vs John Stambaugh Jr., et al. Money only. Estep & Squire.

14852. S. Henry Benedict et al. vs William Hart. Cognovit. Prentiss & Vorce; A. J. Marvin.

14853. Same vs Same. Same. Same.

14854. Joseph K. Emmet vs Burke C. Taylor. Injunction and relief. Ranney & Ranneys.

March 27.

14855. Charles C. Baldwin vs Justin E. Thayer et al. Money and to subject land. Baldwin & Ford.

14856. William Scherrer vs Worswick Manufacturing Co. Money only. Foster, Hinsdale & Carpenter.

14857. Leverett Alcott et al. vs William Hart. Cognovit. M. R. Keith; A. Alexander.

March 28.

14860. Charles and Lucy M. Brannan vs Wm. P. Johnson. Money only. Goulder & Zucker.

14861. Mrs. Rebecca O'Malia vs Joseph Bailey. Appeal by defendant. Judgment March 12. G. H. Barrett; Kessler & Robinson.

Motions and Demurrers Filed.

March 21.

2461. Stone vs Voges et al. Demurrer by plaintiff to 2d cause of defense of the answer of Henry Wagner.

March 22.

2462. Bebout vs Smith. Demurrer to amended petition.

2463. Armstrong, executor etc., vs Story et al. Motion by defendant John F. Story to strike out from petition.

2464. Same vs same. Same from cross-petition.

2465. Taber et al. vs Holbrook et al. Motion by defendants Wilcox and Burnside to require plaintiffs to give bail for costs, to strike from petition, to require plaintiffs to separately state and number causes of action and to make petition more definite and certain.

2466. Alexander vs Tracy. Demurrer to petition.

2467. Willson et al. vs Macey et al. Demurrer by defendant to the petition.

2468. Humestone vs Suders et al. Demurrer to petition.

2469. Negelspach, guardian etc., vs Mutual Life Insurance Company of New York. Motion by defendant to strike from reply.

March 24.

2470. McCurdy vs Mayer et al. Demurrer by Catharine Mayer to the petition.

2471. Weiner vs Roskopf et al. Demurrer by defendants to the petition.

March 27.

2472. Kirby vs Beck et al. Demurrer by defendant John Te Pas to parts of amended answer of defts. Matilda and Robert Beck.

2475. Dahnert vs Russell et al. Demurrer by Dorah A. Dahnert to the answer of defts. C. L. and L. A. Russell.

2474. Same vs same. Demurrer by defendant F. W. Dahner to answer and cross-petition of deft. Russell.

Supreme Court of Michigan.

AGENTS FOR SALE OF PROPERTY: —UNDISCLOSED DOUBLE RETAINER PREVENTS RECOVERY.

WILLIAM R. SCRIBNER ET AL. VS. ALLEN P. COLLAR. Case made from Kent.

GRAVES, J.:

(Abstract.) Plaintiffs recovered judgment for certain commissions on an exchange of real estate effected for defendant under an arrangement made in writing and signed by defendant in a book kept by plaintiffs for such entries. After designating the property and the price and setting down the amount to stand on mortgage and the terms of credit and rate of interest, it proceeded as follows:

"I hereby place the above described property in the hands of Messrs. Scribner and Potter for sale or exchange for farm property at my option, and agree to pay them a brokerage commission of two and one-half per cent. when sale or exchange is made, and further agree to render all the assistance I can in making such sale or exchange.

At the same time, unknown to defendant, plaintiffs were under a similar retainer from persons by the name of Warren, who had a farm they wished to sell or exchange, and soon plaintiffs facilitated the power of negotiating and the parties through plaintiffs' aid consummated a trade.

Held, That the undisclosed arrangement to receive pay from both sides is contrary to public policy, and affords no ground of action to recover pay for the service. Under this contract plaintiffs were not merely to exercise the office of bringing the parties together; the writing placed the property in plaintiffs' hands, reserving an option as to whether the final disposition should be a sale or exchange. It cannot be said that plaintiffs really acted as mere middlemen, for this would be a departure from the writing.

Judgment reversed, with costs, and new trial.

CHAMPLIN & MORE, for plaintiffs.

S. A. KENNEDY, for defendant.

—*Michigan Lawyer.*

J. G. Pomerene.] [H. J. Davies.

Pomerene & Co.

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CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

THOMAS M. TILLEY VS. THE CITY OF CLEVELAND.

Authority of Board of Police Commissioners to Remove Doorman Without Trial, etc.

TIBBALS, J.:

The only question on the record in this case is made on demurrer to the amended petition filed below by the plaintiff in error. The petition briefly states that on the 19th day of April, 1876, the plaintiff was appointed doorman at the Central police station by the Board of Police Commissioners of this city; that he duly entered upon the discharge of the duties, continuing to hold that position until the 27th day of September of the same year, when, without notice or trial, he was deprived of his insignia of office and notified by his superior officers that his services were no longer required; that he was discharged. He avers that he reported daily, for a long period, prepared to render necessary service to the Board, and that in the month of March following he presented his claim for wages and demanded a proper certificate from the Board, which was refused. They still refuse to give him a certificate that he may draw his pay, and his suit is for the wages during that time.

The question made by the demurrer is simply whether this statute, authorizing the organization of the police force of the city, and providing for the appointment of patrolman, covers his case, so that he, in fact and in law, was a patrolman within the meaning of the statute. If that be so, then he has been deprived of his office without being notified, without charges being preferred in writing, and without a trial. Of course, the demurrer admits that this has not been done. The statute on the subject is to be found in the 73d volume of the Ohio Laws, 5, 8, 9, and 10 sections, page 48, and has been referred to as decisive of the question. By the 5th section the Board of Commissioners is authorized to make the appointment of various officers, superintendent, captains, lieutenants, sergeants, patrolman, the number being limited according to the population. They are authorized also to appoint special patrolmen to be reported to and approved by the council. They are authorized to detail from this force certain detectives who shall act as secret police, and the mode is prescribed as to how these appointments are to be made,—from those most meritorious of the police in the service. Then following that general authority to appoint is this provision: "Said Board shall also appoint such suitable persons to act as doormen, janitors, attorney of police, and telegraph operators as the demands of the service may require, and who shall receive such compensation as the Board may determine, in no case, however, exceeding the salary paid patrolman; said Board shall also have power, for cause to be assigned on a public hearing, and on due notice according to rules to be promulgated by them, to remove or suspend from office or for any definite time deprive from pay any member of such police force; to make rules and regulations for the government and discipline of said force, and shall cause the same to be published, and to make and promulgate general and special orders to said force through the Superintendent of Police."

Now it is claimed under this section that this doorman is a member of the police force; therefore, he is to be deprived of his office in the same manner prescribed by the other section as to all of the policemen. It will be observed that thus far there is no mode pointed out as to the manner in which these parties are to be tried. But the 8th section provides this provision. "The qualification, enumeration and distribution duties, mode of trial and removal from office of each member of said police force, shall be particularly defined and prescribed by rules and regulations of the Board of Police; and no person shall be appointed to or hold office in the police force aforesaid who is not a citizen of the United States and a resident of the city; and provided that no superintendent, captain, lieutenant, sergeant,

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or patrolman shall be removed therefrom, except on written charges preferred against him to the Board of Police, and after an opportunity shall have been afforded him of being heard in his defense; but the Board of Police shall have power to suspend any member of the police department of the city pending the hearing of the charges preferred against him; and provided," etc., as to other matters. Section 10 provides:

"Any citizen of any such city, with a view to the trial and suspension or removal from office of any officer or patrolman of the police force may, on oath in writing, prefer or make, before the Board, charges or complaint touching the character or competency, or affecting the acts, conduct or omission of such officer or policeman, or for violation of or misconduct, as defined or prescribed by the rules and regulations of the Board, and said Board, after reasonable notice in the discretion of the Board, to the person charged, shall proceed to the trial of said officer or policeman on said charges or complaint."

Now it will be discovered at once that there certainly has been described in these sections more officers or persons than are designated as officers and patrolmen. It will be found also that the parties entitled to this written notice to the charges to be preferred in writing are limited to the officers and patrolmen; indeed they are all limited. They are designated as "superintendent, captain, lieutenant, sergeant, or patrolmen" who shall not be removed except by this mode.

Now it is said that a doorman is a policeman—a patrolman. If that be so, then we are at a loss to give a construction to this section. First, here is a provision, after the general provision for making these appontments, that the "Board may appoint as many special patrolmen as the exigencies of the case may require." What shall be said of that? Are they patrolmen in the general sense of the term, who shall hold their office during good behavior, and shall not be removed except upon written charges! It would seem that the Board ought not to be hampered by any such construction of the statute. It may be necessary to appoint for a few days, a large number of special patrolmen, many more than the needs of the city for general purposes would demand. Yet if this construction is true, these patrolmen would be entitled to this formal proceeding before the city could retrieve itself of the burden of that unnecessary number of officers. Again, here is a provision that the Board may detail for special work, denominated secret service, secret police, and that they are to be detailed from its regular patrolmen of the city in the order of merit. Then this provision would be entirely unnecessary, because if the doormen were patrolmen it would clearly be within the power of the Board to detail to this special duty a doorman, or any number that they might need for their stations. But it seems to be an additional power, "Said Board shall also appoint such suitable persons to act as doormen, janitors, attorney, telegraph operators, as the demands of the service may require."

Now there may be times when they will need more doormen and janitors, and more attorneys, and more telegraph operators than at other times, and if such an emergency should occur, it would seem, under the construction claimed for this section, that they must all receive this notice in writing, and be publicly charged and tried before their services can be dispensed with. But if that claim is true, there is no more authority for removing a doorman without these public charges, than there would be for removing an attorney whose services may be required and may not. It is entirely in the discretion of the Board to call to their aid those services, and yet would it not be rather a sigular construction to place upon the statute that, because an emergency arises requiring the employment of an attorney, that that attorney could fasten himself upon the city for all time until he had been publicly tried. For what would he be tried? I should trust no emergency would arise requiring the trial of an attorney in order to his removal.

Again the same reasoning will apply to janitors. Can it be said that janitors whose services may be needed during the winter, perhaps twice or three times the number required during the summer season, when spring arrives and their services are no longer needed, charges must be prepared? What would those charges be? That warm weather had set in and therefore they could not properly discharge their duties.

The construction contended for would certainly lead us to a very unnatural rendering of this section.

But, it is claimed, because the general term used in the 8th section refers to all of them, that it must include all. The limitation of the 5th and 8th sections must be taken together, for neither section is complete without the other. The one provides for the organization and the adoption of the rules, and the other prescribes the mode in which their trial shall be conducted and the manner in which they may be discharged.

Now, we feel very clear that upon this point this party is without any remedy; that it is not, and ought not to be considered the policy of the law, where parties are employed for this general service, that the appointing power is without authority to dismiss them when occasion may require.

There may be good reasons, indeed there are good reasons why these officers and patrolmen ought to be taken out of the power and influence of parties, for their services are rendered to the public, for the protection of the public peace, and the good government of the city, and they ought not to be in the control of any political party or power. Hence the wisdom of that provision that these men by their long and faithful service, by their competency as shown by that service, shall be retained in their places, except charges shall be sustained against them. But no such construction can apply to a mere doorman whose duties are dissimilar to those of a general patrolman or from any of the other officers.

It therefore follows that the demurrer was properly sustained.

A. M. Jackson, G. C. Dodge, Jr., for plaintiff; Heisley, Weh & Wallace for defendant.

E. D. STARK VS. E. P. BENTON, Et AL.

Promissory Note—Relations same as Between Original Parties may be Shown, etc.

WATSON, J.:

The action in the court below was brought upon the following instrument:

"CLEVELAND, July 31, 1875.

Sixty days after date I promise to pay to the order of Robert Holmes one hundred and twenty-five dollars at the First National Bank.

Signed, BYRON G. BURTON,
and endorsed, ROBERT HOLMES."

Now at the trial of the case, in explanation of the relations of the parties, the plaintiff offered to prove that the note upon which the action was brought was given by defendant Burton to Holmes and to him in renewal, and to satisfy and take up a note for the same amount held by the plaintiff and made by the defendant Burton and indorsed by the defendan

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Holmes. "That, first, said note admitted to have been indorsed by Holmes as accommodation indorser for Burton, was indorsed by the plaintiff, and sold by him to E. W. Goddard, who held the same when it became due; that the same was duly protested for non-payment, and that notice of demand and non-payment was duly and legally made upon the plaintiff Stark and defendant Holmes as indorsers; that the said Stark had been compelled to pay and take up the same upon the demand of the said Goddard, and had then demanded payment from the said Holmes as his prior indorser to the said Burton, the maker, and that instead of paying the same, they, the said Holmes and Burton, gave to the plaintiff Stark the note upon which this suit is brought; but the Court refused to hear the said evidence and ruled and held that the same was both irrelevant and incompetent as proof in the case, and did hold and rule that the defendant Holmes could be held only as an indorser, and as such was entitled to have the note presented for payment at the time and place where due, and was entitled to legal notice of the demand and non-payment and what parol testimony was incompetent to show that the liability of the defendant Holmes was anything other than that of indorser." To this exception was taken and the case is brought up on error, and these are the assignments of error: "That the Court erred in ruling out the evidence offered by the said plaintiff Stark on the trial of said action, and in his ruling as to the law as set forth in the bill of exceptions herein."

The first assignment of Stark is that said judgment was given for the said Holmes when it ought to have been given for the said Stark according to the law of the land.

Now as it appears upon its face the presumption would be that this plaintiff was sueing as indorsee, the maker and indorser of the promissory note. But we hold that that is by no means a conclusive presumption. This was an action between the original parties, but in order to show that this man was not an indorser but really a principal upon the note, a joint maker in the note, and that form of the note was adopted for the purpose of making the parties jointly liable to Stark.

Now we think it of very little consequence what the form of this paper was. The circumstances existing between these parties at the time the note was given was fair to be shown as between the original parties. No question as to the bona fide holder of commercial paper was involved. It was between the original parties. No question of public policy was involved in it. As between the original parties the plaintiff sought to show the relations that existed between them when this paper was given in order to enable the Court to look at the case as these parties looked at it, and from the same standpoint that they viewed it, in order to determine what their intent was as to this paper, to see what reason there was for their making it in this form. We think that evidence was clearly admissible; that the relations of the parties under these circumstances should have been shown; we think these parties were, under the circumstances, joint makers. When this note was made, they were both indebted to Stark for the paper that had been taken up or had passed into the hands of Goddard. It is true, the one was liable as maker and the other as indorser of the paper. but there was a fixed, legal liability between the two, and they might be jointly sued upon it. We think then that when they got this paper up in this form they both became makers of the paper and that Holmes is a principal debtor in it and the payee or endorsee, Stark, need not make a demand and give notice, in order to hold him liable.

E. D. Stark, for plaintiff.

Henderson & Kline, for defendants.

SUPREME COURT OF ILLINOIS.

Opinion Filed Feb. 22, 1879.

TIMOTHY M. BRADLEY VS. WM. COLBAUGH ET AL.

Instructions—Assuming facts as proven—Attachment—Agreement between Creditors.

An instruction which assumes that certain material facts have been proven, is erroneous, because it usurps the province of the jury.

An agreement between creditors that one of them shall institute attachment proceedings, and the goods attached be sold for the benefit of all parties to the agreement, is not within the statute of frauds unless made "with intent to disturb, delay, hinder or defraud creditors or other persons."

Nor is such agreement against public policy, unless it appear that it was the intention of the parties to it, to use the process of the court for purposes other than those mentioned in the agreement.

It appears that the time when the agreement was made, whether before or after the attachment, presented a material issue in the case.

On the 23d day of January, 1874, Mortimer and Debost, claiming to be creditors of William Kurka, sued out of the Superior Court, a writ of attachment against his estate and effects, on the ground that the debtor had departed from the State. This writ was placed in the hands of the Sheriff, and was by him levied on a stock of goods that, it was said, belonged to the attachment debtor.

When the goods were seized, the officer acting, placed them in the hands of LeGros, as custodian, to be by him held for the Sheriff. On the 7th day of February, 1874, Swinburn, who was an acting constable, levied upon the goods while in the possession of the Sheriff's custodian, by virtue of a distress warrant, issued by Coolbaugh, Powers & Wheeler, against William Kurka and E. A. LeGros, and also by virtue of a writ of attachment in favor of John McIntyre, against the same defendants, and took the goods into his own possession; and such proceedings were afterwards had that the goods were sold to satisfy the amount due plaintiffs in the distress warrant, and attachment proceedings against Kurka and LeGros.

Although Mortimer & Debost obtained judgment against William Kurka, in the attachment case for the sum due them, no portion of the goods seized under the writ in their favor, was ever applied in discharge of the same, nor were any of the proceeds of the sale of the goods apportioned for their purpose.

This action was brought in trespass in the name of Timothy M. Bradley, for the use of Mortimer & Debost, against Coolbaugh, Powers & Wheeler, John Morris, John McIntyre and William Swinburn, to recover the value of the interest the beneficial plaintiffs had acquired in the goods under the attachment.

In obedience to a rule laid upon the nominal and beneficial plaintiffs and their attorneys, the latter produced in court an agreement entered into between Mortimer & Debost, Ellis & Harrop and E. A. LeGros, all of whom were creditors of the attachment debtor. That agreement recited that the parties thereto were creditors of the attachment debtor, stating the amounts due each, respectively, and that there were other small creditors for wages and rent; and then provided that Mortimer & Debost should commence an attachment suit against Kurka in the Superior Court, procure LeGros to be appointed custodian of the goods levied upon, and that at the Sheriff's sale he should become the purchaser of the whole stock at a certain price, and pay for the same with

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his notes at two and four months, with surety for a sum agreed upon for the use of the other parties to the agreement. It seems to have been contemplated that other creditors might institute legal proceedings against the property of Kurka, and in that event a *pro rata* rebate was to be made from the amount of the notes to be given by LeGros.

On the production of the agreement, defendant gave it in evidence, and it was read to the jury. The case was three times tried in the lower court, on the first and second trials the jury found for the plaintiff and assessed his damages. Both verdicts were set aside on motion of defendants. Before the cause was submitted on the third trial, McIntyre and Swinburn were dismissed out of the case, and the suit thereafter proceeded against the other defendants. On the last trial, under instructions from the Court to do so, the jury found defendants not guilty, the motion made by the plaintiff for a new trial, was by the Court overruled, exception taken, and plaintiff brings the case to this court on appeal.

Our understanding is, the case was defended in the court below on two grounds; first, that the goods levied upon by the attachment writ, were the property of LeGros & Kurka, partners, and the surrender of the goods to LeGros, one of the partners, dissolved the attachment, and, second, that the attachment was void because of the agreement entered into between the attaching and other creditors of Kurka. No discussion has been had on the first proposition by counsel for defendants in this court, and the defense is placed solely upon the question whether the attachment was valid, and not whether it had been dissolved or not.

On the trial, the Court instructed the jury "as a matter of law, that the agreement between Mortimer & Debost, Ellis & Harrop, and E. A. LeGros, for the commencement of an attachment suit against William Kurka, was fraudulent and void as to other creditors of William Kurka, than those who signed it; and as it is proven in this case, and is not disputed upon the evidence that Coolbaugh, Powers & Wheeler were creditors of Kurka at the time said agreement was entered into, and that said attachment was commenced in pursuance of said agreement, the jury are instructed that said attachment was void as to Coolbaugh, Powers & Wheeler, and they must therefore find the defendants not guilty."

That this instruction invades the province of the jury, is a proposition so plain it admits of little discussion. It assumes material facts essential to the defense to be true that depend on testimony for their existence, some of which are matters of contention between the parties.

It is apparent the verdict in this case finds no fact, and the services of a jury might as well have been dispensed with.

The instruction is faulty in more than one respect. It assumes as true that the attachment suit was commenced in pursuance of the agreement between the attaching and other creditors of Kurka. Upon that question there is not a particle of evidence in the record except that which may arise by inference from the existence of the contract, if in fact it existed before the attachment suit was commenced. The contract is without date, and whether it was executed before or after the attachment suit was commenced, is left in grave doubt by the evidence. Defendants assert, with great confidence, that it was executed before that suit commenced. It must be conceded the argument in favor of that position has force in it, and might, with great propriety, have been addressed to the jury. On the other hand, LeGros, who was himself a party to it, testified it must have been after the original attachment was levied upon the goods by Swinburn. Counsel makes a point against this evidence that it was read from the testimony of the witness given on a former trial, before the production of the agreement, but it is not perceived how that fact militates against it. If it was true then, it is still true. Conflicting as the evidence is on this vital question, the jury should have been permitted to find the fact without the interference of the Court.

It is faulty for another reason. It asserts that is proven in this case, and is not disputed in the evidence, that Coolbaugh, Powers & Wheeler were creditors of Kurka. This statement is not warranted by anything found in the record, and is palpably variant from the fact. Defendants' claim was against LeGros & Kurka, so it was not accurate to say they were creditors of Kurka. The distress warrant issued and the evidence offered by defendants show the claim defendants were seeking to enforce was against LeGros and Kurka, and they are estopped by their acts from asserting the contrary. They never claimed to be creditors of Kurka alone.

Another clause of the instruction is still more objectionable. It asserts, as a matter of law, that the agreement between the attaching and other creditors, for the commencement of the attachment suit, was fraudulent and void as to other creditors of the debtor. One reason assigned on the argument why the agreement was fraudulent and void, is that it is within the fourth section of the Statute of Frauds; but to bring it within the purview of that statue, it should have been added, the agreement was made "with intent to disturb, delay, hinder or defraud creditors or other persons." Without that qualfication, the instruction is not law. With what intent the agreement was entered into by the parties signing it, was a question of fact wich it was the province of the jury to find, from all the facts and circumstances in evidence.

Another argument made against the agreement is, it is against public policy, and for that reason is void. The object as expressed in the agreement itself is, that it was for the benefit of said creditors that the best sum should be realized out of said stock, and proper title passed to the purchaser without large law expenses. That, in itself, is not an unlawful purpose, and it is stating the law too broadly to so declare. Unless the testimony should show it was the intention of the parties to use the process of the court for purposes other than that mentioned in the agreement, it is not understood how it would contravene any sound public policy. Clearly, it was simply to avoid litigation, and accomplish by a single suit, what would otherwise require a multiplicity of actions, incurring large law expenses, and if that could be done without injury to any one, it would not be an abuse of the process of the court.

For the error of the Court in giving the instruction it did on behalf of defendants, the judgment is reversed and the cause remanded.

Judgment reversed.

SCHOLFIELD, J.—I think the agreement was *per se* frauduleut as to creditors.

BAKER, J.—I concur with Mr. Justice Scholfield.

BECKER & DALE, for appellants.

FULLER & SMITH, for appellees.

—*Chicago Legal News.*

CUYAHOGA DISTRICT COURT.

383. Gaffitt et al. vs the City of Cleveland. Continued.

384. Prentice et al. vs Armstrong, assignee. Dismissed.

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385. Lord, Bowler & Co. vs Chaffee, assignee, etc.
386. Cash vs Cash. Decree.
387. Foote vs Withington,
388. Traley et al. vs Donnelly. Passed.
389. Foote vs Fetterman.
390. Hudson vs Walcott et al.
391. Kolar vs Bailey et al. Appeal dismissed.
392. Denham vs Wright.
393. Wick & Co. vs Stone.
394. Bartlett et al. vs City of Cleveland.
395. Libbey vs Raymond et al.
396. Brown vs Hunkin.
397. Holkins et al. vs Donohue.
398. Hicks et al. vs Cubbon.
399. Pearsall vs Elmer et al.
400. Russell et al., admrs. etc., vs Steinacker. Dismissed by plaintiff in error.
401. Watton et al. vs Sawyer, by etc.
402. Slawson, Meeker & Co. vs Moses. Passed for settlement.
403. Rose vs Wheeler.
404. Conover et al. vs Harrison et al.
405. Hills vs Harrison.
406. Young vs Parish.
407. Sterling et al. vs the City of Cleveland.
408. Stopple vs Woolner et al.
409. Jindrak vs Jindrak.
410. Reuscher vs Hudson et al.
411. City of Cleveland vs Beaumont.
412. Robison vs City of Cleveland.
413. Sheldon et al. vs Brennan et al.
414. Reglien et al. vs the City of Cleveland.
415. Sykora vs Youngling et al.
416. Hinman vs Rogers et al. Settled. Costs paid. No record.
417. Buchholz vs The Nordyke and Norman Co.
418. Harman vs Walter et al.
419. Keiper vs the City of Cleveland.
420. Sherman et al. vs Pelton, treasurer, etc.
421. The Continental Life Ins. Co. vs Robinson.
422. Clark vs Hicks et al.
423. Brainard et al vs Rittberger.
424. Goetz vs Balbach.
425. McIlrath vs House et al.
426. Sherwin et al. vs Brigham.
427. Duke vs Coggswell et al.
428. Backus et al. vs The Aurora Fire and Marine Ins. Co. of Cincinnati.
429. Heisley vs Stokes.
430. Hale et al. vs Caldwell, assignee etc.
431. Evans, Van Epps & Co. vs Leslie.
432. Giddings vs Palmer.
433. Eichler vs Foss, alias Voss, et al.
434. Watkins vs Strong et al., trustee.
435. Compton vs Foreman.
436. Adams vs Hitchcock et al.
437. Coleman vs Sherwood.
438. Smith et al. vs McDowell et al.
439. Brewer et al. vs Maurer.
440. Hoffman vs Raymond et al.
441. Engel vs Lovejoy et al.
442. Sullivan vs Rider.
443. Henry vs Mathivet.
444. Clark vs Kelly et al.
445. Corlett et al. vs Derby.
446. Gill vs Hickox et al.
447. Gates vs Richmond.
448. Burwell vs the Hazard Hame Co.
449. Eager vs the State of Ohio ex rel J. C. Hutchins etc.
450. Little vs Carran et al.
451. Riddle vs McHugh et al.
452. Lehman vs Morrison.
453. McGee vs The Cleveland Organ Co.
454. Hull vs Kilfoyl.
455. Clark vs Wooster, assignee, etc.
456. Hittell vs Smith et al.
457. O'Donnell vs The Hibernia Ins. Co.
458. Seymour vs Levire.
459. Euclid Ave. Opera House vs Graham.
460. Edwards et al. vs The Highland Coal Co.
461. Beckwith et al. vs Reid.
462. Dunbar vs Dunbar.
463. McCarty vs Everett et al.
464. Devereux, receiver, vs Mornton by etc.
465. Shafer vs McLouth et al., admrs. etc.
466. Wilcox et al. vs Corning & Co.
467. Steiger, administrator etc., vs Wohlleber.
468. The Valley Ry. Co. vs The Hemlock Valley Ry. Co.
257. Kelley et al. vs The City of Cleveland.
258. Scofield vs same.
190. Griswold vs Pelton, treasurer etc.
469. Fuller vs Winters.
470. Newman, admr., etc., vs Butler.
471. Foster et al. vs Heller et al.
472. Dormeyer vs Haltnorth.
473. Rusch vs Davis.
474. Beckwith vs The City of Cleveland.
475. Levake et al. vs Hoppen.
476. Flynn vs Tilley.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending April 4, 1879.

[Prepared for THE LAW REPORTER by B. P. FLOOD.]

MORTGAGES.

March 29.

Bartholomy Palick and wife to David Short. $460.

B. H. Jones and wife to Grace Lathrop. $1000.

Dwight E. Bassett and wife to Robert Spinks. $3.400.

Wellington Tea to The Citizens' Savings & Loan Association. $2100.

Frederick Fey to Harriet B. Leavens. $2000.

Same to Lewis A. Hall. $500.

John Somer and wife to John Geo. Arnold. $800.

John P. Lertz and wife to Anna Kemmerling. Five hundred dollars.

Brerton Stanfield to John Stoneman. Two hundred dollars.

Joseph Harrison to Catharine Baum. Four hundred dollars.

Caroline and Joseph Fisher to Jeanette Strauss. One thousand dollars.

March 31.

Amelia Heinsohn and husband to Lauretta Decker. $600.

Warren A. Kyle and wife to The Society for savings. $500.

John Taltavall to Lewis Buffett. $1,500.

Charles J. Green and wife to The Society for Savings. $1,200.

Frank Orda to Joseph Tembeck et al. $250.

Caroline Smith and husband to W. J. Gordon. $2,750.

Peter Riley to A. G. Mason. $150.

Ann Eliza Holmes and husband to Sarah E. Haines. $1,400.

April 1.

Thomas Brennan and wife to Samuel Kalzenstein. $2,000.

Michael Schwandt and wife to Julius Sauer. $500.

Oswald Kraushaar to Geo. Kraushaar and wife. $675.

Edward Kohn and wife to The Society for Savings. $600.

Isaac Jameson and wife to Harris Allen. $150.

Norman W. Cutter to The Society for Savings. $4,000.

Edward Murfet Jr. and wife to The Pittsburgh National Bank of Commerce. $1,000.

Lydia M. Huddleston and husband to Eben Hoe. $600.

Oliver C. Scovill et al. to H. R. Vincent. $8,000.

Oliver C. Scovill to John A. Vincent. $4,000.

Alvira Cobb and Alva Bradley to

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Warren Newton, guard. $8,083.
Maria A. Eldridge and husband to George Presley. $3,000.
Caius C. Cobb and wife to Edward W. Andrews. $7,500.
Alvira Cobb and Alva Bradley to Helen A. Tyler. $4,072.
Same to Helen A. Mason. $12,-225.
Peter Gehres and wife to Jacob Mueller. $2,400.

April 2.

Robert Dana to Hugh Hanna. $1,-000.
A. J. Hubbard to F. H. Hamlin. $250.
Edward Keating and wife to Mary Kohlman. $250.
John A. Vincent to Caius C. Cobb.
Abraham Teachout and wife to Schuyler A. Pratt. $3,000.
John A. McDermott to Cornelia Hamilton. $11,000.
Frederick Volk and wife to Elise Geirson. $500.

April 3.

Lizzie Laub to Melissa J. Morgan. $1,500.
John Kachel and wife to Conrad Westeweller. $400.
Levi Bargert and wife to Lewis A. Hall. $15,000.
Frank and Anton Kalar to Maria Mauma. $200.
Robert Foster and wife to The Society for Savings. $5,000.
James Eastwood and wife to Franklin Clement et al. $600.
Hugh Evans and wife to Charles Bourch. $250.
G. O. King and wife to Samuel H. Albro. Five hundred dollars.
William H. Samfrecht to First National Bank of Cardington. One thousand two hundred dollars.

April 4.

John Pfiel and wife to Margaret Inglas. One thousand five hundred and forty dollars.
Emma and Adolph Rettberg to L. H. Solomonson. Five thousand four hundred and fifty dollars.
Gottlieb Schnelke and wife to M. A. Collings. Two hundred dollars.
P. W. Tuttle and wife to F. H. Cannon, guardian. Three thousand dollars.
Jan te Kemple and wife to A. J. Nahuis. Seven hundred dollars.

CHATTEL MORTGAGES.

March 29.

Wm. Williams to A. W. Bailey. Thirteen dollars.
H. H. Hendrick to S. S. Marsh. Eighty dollars.
Frank Klust and wife to E. F. Collins. Six hundred dollars.
W. J. Daugherty to C. S. Bremmar & Co. Sixty dollars.
Louis and Maggie Lewis to P. O'Brien. One hundred and fifteen dollars.

March 31.

John Stoll to Louis Behrens. $100.
E. E. Clark to A. G. Strauss. $25.
Chester E. Lyman to Charles H. Jones. $2,000.
Same to same. $500.
James Pyke and wife to William D. Butler. $45.
George A. Beves to William H. King. $100.
W. W. Hazzard to J. Krauss & Co. $47.
Resin Randolph to William H. Shaw. $60.
Charles Randall to same. $25.

April 1.

T. Davis and husband to A. E. Whitney. $83.
Samuel Jamison to C. C. Scott. $200.
M. A. and H. W. Canfield to C. J. Keller. $563.
August Neiper to C. E. Gehring. $250.
George C. Koss to M. C. Doud. $600.
O. H. Bradley to L. L. Bradley. $75.

April 2.

Adolph Schildhauer and wife to Christian Engel. $800.
George C. Rose to J. H. Peck. $1,-208.
Joseph Rebok to Frank Rebok. $150.
J. H. Darton to W. J. Wilson. $150.
George C. Ross to Melton Dow. $300.

April 3.

Briggs & Briggs to J. Lowman & Son. One hundred dollars.
Georgia Porter to Henry Hart. Three hundred and four dollars.
W. H. Reese et al. to T. B. Coffinberry. Forty-five dollars.
Daniel J. Higgins to Jacob Mall. Five hundred dollars.
A. J. Bond to H. R. Hurd & Son. Twenty-six dollars.

April 4.

H. B. and E. Belding to Caroline Stratton. $190.
T. Thomas to H. Konigslow. $159.
A. Henderson et al to C. R. Heller. $52.
A. H. Weed to G. E. Burton. $100.
Henry Janowitz to same. $499.

DEEDS.

March 29.

C. W. Lepper to J. M. Ammon. Nineteen dollars and forty-two cents.
Wm. B. Blackman to David Harding. Twenty dollars.
Edwin Northrop and wife to Andrew Peters, Jr. Onet housand dollars.
Norris Perry and wife to Lucy Minor. Six hundred dollars.
S. M. Brooks by Thos. Graves, Mas. Com. to John H. Ammon. Two thousand six hundred and sixty-eight dollars.
David M. Dorland by S. M. Eddy, Mas. Com. to The Society for Savings. Nineteen hundred and thirty-four dollars.
Henry A. Smith by same to same. Three hundred and forty-five dollars.
H. T. Hower et al. by James Quayle, Mas. Com. to Barbara Bauman. Twenty-six hundred and seventy-five dollars.
Noyes B. Prentiss by Spec. Mas. Com. to Frederick J. Prentiss. Two thousand nine hundred and ninety-five dollars.
Same to Dwight P. Clapp. Eight thousand six hundred and ninety-six dollars and sixty-six cents.

March 29.

Jeannette Stearns and husband to Caroline Fisher. $1250.
M. D. Butler, adm'r of, etc., to. Chas. C. Reid. $667.
Chas. Colvin and wife to Mary L Miller. $1.
Caroline Fisher and husband to Meyer Straus. $1.
J. W. Holmes and wife to Edward Walton et al. $1100.
Frederick Knoll and wife to Andrew Schell. $250.
Ida B. F. Lillie to Charles B. Marble. $150.
Jacob Miller and wife to James Sheriden. $1.
John L. Reynolds and wife to Tobias E. Miller. $763.
David Short to Bartolemy Patek and wife. 1050.
Marguardt Schnadt and husband to Adam Kropt. $5500.
Caroline Stratton, ex'r, et al., to Mrs. Mary Pring. $706.
Frederick Schwartz and wife to Sophie Schwartz. $1.
Mrs. Susan D. Tedd to Mrs. Margaret C. Clark. $1.
By Thomas Graves, Mas. Com., to Edward Napp. $1335.
Anne M. Brooks et al., by C. C. Lowe, Mas. Com., to The Society for Savings. $8656.

March 31.

James Flynn to Daniel O'Donnell. $360
Jacob Kurtz to William Weber. $400.
William H. Kees and wife to John P. Humphrey. $5.
John B. Gregory to same. $1.

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Barney McClernon to same. $200.
Joseph Lemberk and wife to Frank Droder and wife. $510.
Cornelius Newkirk to William A. Hall. $1,100.
John Piper to James Scroggins. $10.
C. T. Pritchard et al., admrs. of estate of William Pritchard, deceased, to James Horey et al. $260.
Jacob Reiter and sister to S. H. Kirby. $2,000.
James R. Ruple, admr. of Anna G. Hoagland, deceased, to James Bertram. $1,200.
Joseph Rotherbucher and wife to Joseph Sattler. $3,600.
Richard Cunningham et al. by H. C. White, Mas. Com., to A. K. Spencer. $4,010.

April 1.

Peter Gehres and wife to John Miller. $1,000.
R. M. Huddleston and wife to Mary E. Harbaugh. $1,500.
A. G. Harbaugh and wife to Lydia M. Huddleston. $2,500.
H. Haines and wife to Anna Eliza Holmes. $1,700.
Catharine Howard and husband to Mathew Patterson. $625.
Thomas Jonas and wife to W. P. Johnson. $5.
William J. Johnson to Geo. James. $14,000.
Bernhard Krauss and wife to Jacob Wageman. $1.
Maria E. Ketchum to Isaac F. Siddall. $1,000.
Edward Napp and wife to Peter Gehres. $3,700.
Marcia M. Rogers to Wm. Ferris. $3,000.
William K. Smith and wife to William P. Johnson. $75.
Edmund and William Watton to Anna Eliza Holmes. $1.

April 2.

J. M. Curtiss and wife to Mary Bruch. $960.
Caius C, Cobb and Helen M. Cob to J. A. Vincent. $20,000.
Jacob Cherryholmes and wife to Anson M. Meyers. $2,000.
Hubbard Cooke, trustee, et al. to Matthew W. Kress. $480.
Hiram Day and wife to Joseph Day. $600.
Maggie Kelly and husband to Michael Fetzer. $1,400.
Martin Hipp and wife to John J. Blatt. $1,000.
Luther Moses and wife to B. S. Coggswell. $900.
Noble H. Merwin to Emma A. Shryock. $1.
John Shanohan and wife to James and Mary Walsh. $700.
Mary Tappin to Edward Keating. $1.
L. J. Talbot and wife to Ellen Moriarty. $880.
Joshua Whiting and wife to J. F. Eckert. $950.
James E. Wyatt to Thomas M. Dunbar. $48.

April 3.

Sames Andrews, admr. with will annexed, of John Lassended, dec'd., to Leborious Burhenn.
Martin P. Case and wife to John M. Watkins. One thousand five hundred dollars.
Joseph Hiram and wife to Frank Kolar. Three hundred and sixty-five dollars.
James M. Hoyt and wife to Mrs. Henrietta B. Sherman. Eight thousand two hundred and eighty dollars.
Richard Whittaker to Edward Hobday. Four thousand dollars.
Edward Hobday and wife te Jacob J. Wolf. One thousand and seventy-five dollars.
Elizabeth Kemball and husband to G. O. King. Five thousand dollars.
Rebecca S. Pritchard and husband to Celia D. Pritchard. Two thousand five hundred dollars.
Timothy W. Skinner by Samuel M. Eddy, Mas. Com., to J. E. Ingersoll. Four thousand dollars.
William West by George W. Mason, Mas. Com., to The Sun Ins. Co. One thousand dollars.

U. S. CIRCUIT COURT N. D. OF OHIO.

March 31.

3174. Benjamin S. Coggswell, assignee, etc., vs Sarah Bausfield et al. Motion to vacate appointment of receiver.
3273. L. C. Beardsley et al vs H. B. Hunt et al. Motion to set aside and modify decree filed.
2922. A. J. Miller vs Samuel Bechtel. Motion to dismiss overruled and cause continued
2873. S. C. Bairdsley et al. vs H. B. Hunt et al. Decree opened up, cause dismissed as to H. B. Hunt, continued as to J. T. Hunt.

April 1.

3347. People's Savings Bank vs Morris et al. Death of Wm. Morris suggested.
3359. Bates et al. vs Armstrong et al. Dismissed by plaintiff.
3702. Frazier vs Burrows et al. Leave to amend answer in 60 days.

April 2.

2873. L. C. Beardsley et al. vs H. B. Hunt et al. Decree for complainant as against defendant T. J. Hunt only.
3734. W. H. Robinson vs T. C. Boone. Leave to file answer by April 25.
3725. Wm. T. Carter vs. Henry A. Adams. Receiver's report filed. Sale confirmed and report of referee confirmed and referee discharged.

April 4.

3835. Cooke vs The Sandusky Tool Co. Replication filed.

U. S. DISTRICT COURT N. D OF OHIO.

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124. Presley & Co. vs tug Peter Smith. Motion to correct decree.
83. United States vs One Copper Still, etc.

Bankruptcy.

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3034. In re Hiram Ohl. Discharged.

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1827. In re C. W. Levilly et al. Elijah Barrd discharged.
1977. In re Charles Chomen et al. Amended specifications in opposition to discharge.

April 2.

1846. In re D. N. Frurry. Discharged.
1637. In re Charles E. Church. Petition for discharge. Hearing April 19th.
1807. In re C. L. Turley et al. Discharged.
1821. In re William M. Shorb. Same.
1834. In re C. L. Morehouse. Specifications in opposition to discharge.

April 3.

1780. In re William A. Brown. Same.
1813. In re Field D. Warren. Petition for discharge. Hearing April 19.

April 4.

1970. In re Allen H. Jones. Discharged.
1866. In re Levi H. Simbert. Petition for discharge. Hearing April 26th.
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14860. Charles and Lucy M. Brannan vs Wm. P. Johnson. Money only. Goulder & Zucker.

14861. Mrs. Rebecca O'Malia vs Joseph Bailey. Appeal by defendant. Judgment March 12. G. H. Barrett; Kessler & Robinson.

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14862. George Philips vs George H. Crossman et al. To foreclose mortgage and real estate. Robison & White.

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14864. Oliver Taylor vs A. L. Van Orman. Appeal by deft. Judgment March 21. A. Green.

14865. Anna H. Jackson vs Jerome Jackson et al. For privilege to sell mortgage or convey real estate. W. M. Lottridge.

14866. Thomas Brennan vs Dora Pageladner et al. Money and sale of land. P. W. Ward.

14867. David C. Baldwin vs Christian Gregerson. Money and to subject lands. Baldwin & Ford.

14868. Charles Colahan, guardian of Mary H. Coleman, vs Loren Prentiss et al. Money only. Baldwin & Ford.

14869. J. Kurtz et al vs E. D. Loomis et al. Equitable relief and to subject land. J. M. Stewart and D. Cook.

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14873. Henry Wick et al. vs Maria Zimmerman et al. To subject lands. T. E. Burton.

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14874. Maria Wallace, guardian, etc., vs Erie Lodge, I. O. O. F. Appeal by defendant. Judgment March 10. Goulder & Zucker, and Hord, Hawley & Hord; E. K. Wilcox, and A. H. Weed.

14875. Frederick H. Hill vs Knickerbocker. Life Insurance Co. Money only, with att. A. H. Weed and W. W. Pond.

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2476. Caskey vs Johnson, guardian, et al. Demurrer by defts. Fannie Johnson, guardian, et al., to the petition.

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2482. Hills et al. vs Lambert et al. Demurrer by plaintiff Amelia Lambert to the petition.

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April 1.

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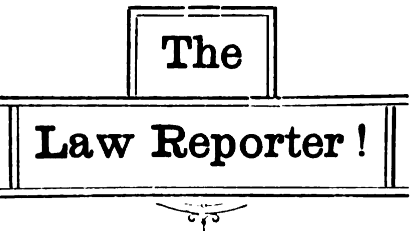

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AT THE January Term of the United States Circuit Court Mary E. Sibley recovered a judgment against the Incorporated Village of Chardon for $2,566.66 and costs. The judgment has never been paid, and the relator now asks an order from the court compelling the village to levy a tax sufficient to pay the judgment, costs and interest. The court allowed an alternative writ of mandamus as asked, returnable Friday, April 25th.

The judgment was rendered in an action brought by the plaintiff to recover for a personal injury occasioned by a defective sidewalk in the Village of Chardon.

IN many of the counties in Pennsylvania, by act of the Legislature and by rules of court, a legal periodical published weekly in the county is made the medium for the publication of *all* legal advertisements to be made in that county, of whatever kind, the publication of which is required by law. In this State, one who desires to know what legal advertising is being done must consult every newspaper of general circulation published in the county. The Pennsylvania plan is better than the "Ohio idea," and we would like to see it in operation in this State. Our legislation might be modified at least so as to make it proper to publish such advertisements in a paper of the class of the LAW REPORTER. The publication of legal advertisements in such a paper would be an efficient means of extending its circulation. If members of the Bar would interest themselves in the matter, the desired modification of the law might be secured, resulting, of course, in the establishment in this city of a legal periodical upon a profitable and enduring basis.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

LEWIS B. HARRINGTON vs. THE STATE OF OHIO.

Assault — Indictment — Verdict of "Guilty of Assault" a Sufficient Response to Indictment Charging Assault and Battery.

WATSON, J.:

We find that the plaintiff in error was prosecuted in the court below for an assault and battery. It is alleged that he made an assault upon Wm. Hall and then and there did beat, wound, strike and otherwise ill-treat him, Hall. No question was presented in the course of the trial as to the admissibility of the evidence or the charge of the Court.

But this verdict was rendered by the Jury: "We the Jury in this case, being duly empanelled and sworn, do find the defendant guilty as charged in the indictment of an assault," and there the verdict ended. It does not respond to the allegation in the information, that a battery was committed, and out of this verdict arises the only question there is in the case.

Now, an assault, we understand to be an attempt with a present purpose and the ability to accomplish it, to inflict a corporal injury upon another, unlawfully, maliciously, wantonly. A battery is complete when the assault is accomplished.

The jury cannot convict of a battery without convicting of an assault, but they may convict of an assault without convicting of a battery, and that battery includes the assault.

In this case the defendant is found guilty of an assault. It is claimed here in argument that he may be again prosecuted for a battery, as the verdict does not respond to the entire indictment. If the battery is part of the same act with the assault, he cannot be convicted of the battery, without being punished twice for the same act, although the verdict does not respond to the whole of the indictment, that would be the effect. We regard the verdict as a sufficient

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response to the charge made in the information and we think the Court has committed no error.

The judgment will be affirmed.

S. E. ADAMS, for plaintiff.

J. C. HUTCHINS, for defendant.

MERCHANTS' BANK OF CANADA VS. A. B. CHAPIN ET AL.

As to Costs in Establishing Claim Against Assignee for Benefit of Creditors, etc.

HALE, J.:

This case is brought here by a petition in error. Two grounds of error are relied upon. It seems that in September, 1873, Richardson and Wardsworth made an assignment to A. B. Chapin for the benefit of creditors. The plaintiff in this action made a claim against the estate and against the assignors which was disputed by the assignee and by the assignors. The statute provides that when a claim is rejected by the assignee that action must be brought within thirty days, and if the claim is established, the judgment of the court is that it be allowed, the costs being in the discretion of the cour . Instead of bringing the action under that statute against the assignee, the plaintiff brought this action joining the assignors, Richardson and Wardsworth, with the assignee. No objection was taken to the form of the action, and the case went to trial resulting in the establishment of the claim, and verdict in favor of the plaintiff for something over $600. The court, treating the action as severable, rendered judgment against the assignee—that the claim be allowed against the estate, and in its discretion, charged the cost of establishing the claim against the assignee to the plaintiff (and the plaintiff paid it), and rendered judgment for the entire claim against the assignors, Richardson and Wardsworth, together with the judgment for costs for something over $30. The assignee, although the claim had been established, neglected to pay upon that claim the dividend to which the plaintiff was entitled, and action was brought upon the bond of the assignee against the assignee and the surety, and it is the rulings in that case of which complaint is made. The first is this: The plaintiff claims that the claim and costs incurred against the assignors should be the sum upon which it should receive a dividend, while the defendant claims that the extent of the dividend should be upon the claims excluding costs. The court below held that the claim as established, the judgment excluding costs, should only share in the dividend, and it is claimed that the court erred in so holding, and I understand counsel to concede that the case stands precisely as it would had the plaintiff commenced a separate action against the assignors after the assignment to establish his claim against the assignors, that in that case he would be entitled to a percentage upon the costs as well as upon the claim.

It will be borne in mind, that to establish this claim against the assignee, the statute provides that suit may be brought against the assignee, leaving the question of cost in the discretion of the court. We understand that when the assignment was made for the benefit of creditors, it was for the benefit of the then existing creditors, and that the assignee refused to allow the claim and the plaintiff to share in that trust fund.

The statute provides a mode in which that question should be determined, leaving it in the discretion of the court to apportion the costs. That trust fund, in our judgment, should only be chargeable with the cost incident upon establishing the rights of the claim to share in that trust fund. The party might pursue the assignors, if he saw fit, outside. It does not bar his claim against them. They may have accumulated property after the assignment, which he desired to pursue and subject to his judgment, but when the trust fund is charged with the cost and expense of establishing the claim against the assignee, to that extent only can the assignee be liable for costs. If the other doctrine is held that in establishing this claim against the assignee, it is in the discretion of the court to make the plaintiff pay the costs; or as against the assignor that the assignee should pay the costs it would be, in our judgment, an inconsistency. We do not think the Court erred in that holding. But it seems that after this action was commenced upon the bond, the sureties upon that bond, after the case had been in court for some time, paid to the attorneys of the plaintiff, the amount the plaintiff was entitled to, if this question of costs was excluded, and it was stipulated in the receipt given that it should be without prejudice as to the cost or anything else in the case, and they litigated the case farther as to whether this question of costs should come in, resulting against the plaintiff's claim in that behalf.

The court below refused to allow a recovery for costs; held that judgment must be for the defendant and that plaintiff must pay the costs. At the time the action was brought the situation was this: The plaintiff had a good and valid claim; he commenced his action upon it; it was afterwards in part paid. But at the time the payment was made he was entitled to his claim and the costs made up to that point in establishing it; and the receipt specifically saves to him that right. We think that the finding of the Court, should have been that at the time of the commencement of the action the claim existed precisely as it did exist, that after the commencement of the suit so much had been paid upon it, and that plaintiff was entitled to his judgment for costs up to the time he received that payment; and for that reason we think the judgment was wrong, and to that extent it may be modified, rendering the same judgment here that should have been rendered in the court below.

MIX, NOBLE & WHITE, for plaintiff.

G. H. FOSTER and A. W. LAMSON, for defendant.

E. S. HOLKINS ET AL. VS. CORNELIUS DONAHUE.

Assessment of Damages in Action of Replevin on Failure of Plaintiff to Prosecute, etc.

Error to the Court of Common Pleas. This was an action of replevin. At the January Term, 1878, of the court below the case came on for trial, and the plaintiff failing to appear, the defendant, with the assent of the Court, under Section 279 of the code, waived a trial by jury and tried it to the court, and the Court rendered judgment for defendant for $122.50 and costs.

At the next term the plaintiffs appeared by counsel and moved to set aside the judgment because the defendant's damages had not been assessed by a jury. And the Court sustained the motion and set aside the judgment to which the defendant excepted and took the case to the District Court.

The District Court reverse the action of the court below in setting aside the judgment and affirm the judgment.

W. C. ROGERS, for plaintiffs in error.

GOLLIER & BRAND, for defendant in error.

NOTE.—The decision in this case in

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the Common Pleas Court will be found in vol. I. of the LAW REPORTER, 123.

GOTTFRIED RITTBERGER ET AL. VS. JACOB FLICK ET AL.

Dedication of Lands for Road Purposes—Change of Route—Abandonment by Public—What Constitutes, etc.

HALE, J.:

This case presents an interesting question and one, as we apprehend, not definitely passed upon by our Supreme Court. The case was tried in this Court upon an agreed statement of facts. The plaintiffs seek by injunction to restrain the trustees of Newburgh and Bedford Townships and a supervisor of a road district within one of those townships, from opening across the lands of the plaintiffs a highway claimed to be a part of an old State road laid out many years ago. From this agreed statement of facts it appears that on the 20th of January, 1823, the Legislature of the State authorized the laying out of a State road leading from Cleveland to the Ohio river. The agreed statement of facts does not disclose just when or along what line the road thus authorized was laid out, but a road was opened running from Cleveland to the Ohio river passing through the townships of Newburgh and Bedford. The road in 1859 had been used by the public, according to the agreed statement of facts, more than 21 years, that is, the part here known as the Cleveland and Bedford Road. This road, in passing through the township of Newburgh, passed through lands owned by one A. L. McCurdy, and over and through a steep hill. In 1859. this road, at each edge of the hill, was fenced up, and a new route opened at about the base of the hill, diverging from the old route at one side and meeting it at the other. That change was commenced in the fall of 1858, and was completed in the spring of 1859. On the first of June, after the new route had been used for public travel, the trustees of Newburgh Township entered into an agreement with McCurdy, who owned the land over which the old road passed, also the land which was appropriated for the new route, and in that agreement McCurdy covenants to donate the land then in use for the new route, and the old road was to be fenced up, and it was fenced up at that time, the trustees paying McCurdy for doing the work and fencing it up. From that time on the road has been used as a road, and been improved by the public as a highway. In 1873, it became necessary to lay out a county road, connecting with the State road at this point, and the commissioners starting at the initial, point for that county road, commenced in the road as then designated "The Cleveland and Bedford Road." McCurdy allotted the land he owned with reference to this new route, sold it and made conveyances of the same as bounded by the State road as then made. The grantees, these plaintiffs, have entered into possession of the lands thus conveyed to them, and have improved them with reference to the new route, building a portion of the house and a portion of the barn, and digging a well upon the old road, both the public and the owners of the property treating this change as a permanent one. Now after nineteen years the successors of the trustees, and the supervisors, who entered into the agreement, seek to enter upon the old line and establish and open up to the public the State road as formerly used prior to 1859, notwithstanding the improvements and the action that has been taken in respect to it.

Now, we place no very great reliance upon the agreement, as such, between the trustees and McCurdy. We do not suppose that the trustees had any power to contract or othorwise to vacate that road. But how stands this new line as a dedication? The public have used and improved it for nineteen years. The supervisor each year worked upon it. Other roads have been connected with it, and this county road in no way could get connection with this State road except through this new route. The owners of the property have improved their property with reference to it, sold and conveyed with reference to it, so that I take it there can be no two opinions that the new route of this State road has become dedicated to the public in a way that McCurdy and his grantees are bound by it, and that must stand as a fixed fact. No matter what is done with the new route, the old must stand as the road or as a route, under well settled rules as to facts that would constitute a dedication.

Now, as a part of that transaction, this old route was given up by the public and has been abandoned, the public have made no claim to it for a great length of time. The owners of the land over which it passed have improved it as private property, building upon it, and improved it in every way—made it a portion of an allotment. Now, if it is said this new route shall be dedicated to the public, and the public shall hold the old route and the new, it is subjecting the land of these persons to a new service, when, in fact, they gave up the one that they might have the other. While we are not prepared to hold that the simple non-user of the road for a period less than 21 years would operate as an abandonment by the public, we are prepared to hold that that is an element to be taken into consideration in determining whether the public have abandoned the road, and that the abandonment of the road may be inferred from a non-user for a period less than 21 years in connection with other facts and circumstances, which clearly indicate on the part of the public the intention of abandonment. In this case we hold the facts and circumstances to be such as to authorize the Court to hold that there was an abandonment of the old route on the part of the public. It would be grossly inequitable, in our judgment, to make any other holding in the case, and while it may possibly be necessary under the rules of law to do so, we are disposed to pass it along to the next court to make that holding.

The decree will be that the injunction be made perpetual.

STONE & HESSENMUELLER, for plaintiffs.

HENDERSON & KLINE and MIX, NOBLE & WHITE, for defendants.

SUPREME COURT OF TENNESSEE.

DECEMBER, 1878.

RIVERS, EXR., VS. THOMAS ET AL.

APPEAL FROM MONTGOMERY.

Indorsements Past Maturity—Guarantor.

A person who indorses a past due note at the request of the maker, pursuant to a contract with the payee for further indulgence, is liable as guarantor.

The opinion of the Court was delivered by

COOPER, J.:

The bill is filed to hold the defendant, N. L. Thomas, liable as security or guarantor of the payment of a note, and to subject to the satisfaction of the recovery certain property conveyed by him to his son without consideration. It is conceded that the conveyance will not avail against the complainant's demand if established,

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and, consequently, that the Court has jurisdiction of the whole case under the Code, sec. 2,488.

On the 14th of February, 1859, the defendant, J. J. Thomas, executed his note under seal to the testator of the complainants, payable one day after date, for $2,337. In the month of February, 1871, one of the complainants called upon the said Thomas for the payment of the note, when the latter proposed, if the complainants would wait on him, to give his brother, the defendant, N. L. Thomas, as "security upon the note." They, thereupon, went together to the residence of N. L. Thomas, and the said N. L. Thomas, at the request of J. J. Thomas, wrote his name on the back of the note. The testimony leaves no doubt that the object of the visit, the obtaining of additional security on the dote in consideration of forbearance of suit, was explained by the debtor to his brother before the signature of the latter was indorsed, and that the indorsing brother knew he was assuming, and intended thereby to assume, whatever responsibility the act created. The complainants did forbear to sue for about a year, the maker of the note in the meantime becoming insolvent. No demand of payment of the note was made of the maker subsequent to the indorsement, nor, of course, was any notice of non-payment given to the defendant, N. L. Thomas. The words, "I guarantee the payment of the within note," were afterwards written, at the instance of the complainants and by their counsel, over his name as indorsed.

It is not denied that an agreement to forbear suit for an indefinite time, which would mean a reasonable time, or an actual forbearance would constitute a sufficient consideration to sustain a promise to guarantee the payment of the note. Tappan vs Campbell, 9 Yer., 436; Johnson vs. Wilmarth, 13 Met., 416; Sto. Prom. Notes, sec. 186. And the evidence shows due diligence by the complainants to collect their debt from the maker, and that the latter became insolvent before the expiration of the reasonable time of forbearance, if these facts are at all important in determining the rights of the parties. Something was said in argument upon the point whether parol testimony was admissible to show the contract between the parties. But the decisions of this State, in accord with the weight of authority in other States, are, that, as between the immediate parties, parol evidence is admissible to show the actual agreements upon which an indorsement of negotiable paper is made, and that the indorsement may be filled up accordingly. Comparree vs. Brockway, 11 Hum., 360; Iser vs. Cohen, 1 Baxter, 421; Dan. Neg. Instr., secs. 710, 1,765; Sto. on Prom. Notes, sec. 459; Rey vs. Simpson, 22 How., 341. And where the promise has arisen out of some new consideration of benefit or harm moving between the new contracting parties, it is not within the statute of frauds. Hall vs. Rogers, 7 Hum., 536; Sto. Prom. Notes, sec. 457. The note under consideration is negotiable under our statute. Code, section 1,957. The contest is, therefore, narrowed down to the liability incurred by the indorsement, either implied by law or shown by the proof.

The decisions on the presumptive status of an irregular indorser of a negotiable note, in the absence of any evidence whatever of intent or contract, are irreconcilably in conflict. When nothing appears but the instrument itself bearing the name of a third person as indorser before the name of the payee, and the suit is by indorsee for value before maturity, some courts treat such third person as a joint maker; some as a surety or guarantor in the sense of joint maker; some as secondarily liable as a guarantor; and some as a second indorser. 1 Dan. Neg. Instr., sec. 713. The weight of authority is, perhaps, at this time in favor of considering him in such case, as a second indorser. For, the Supreme Court of Massachusetts, with which Court the doctrine of holding such indorser as a co-maker originated, afterwards considered that, if the point were new, he should be treated by third parties simply as a second indorser, leaving the payee and himself to settle their respective liabilities according to their own agreement. Union Bank vs. Willis, 8 Met., 504. Between the payee and such indorser the weight of authority, as we have seen, is that parol proof of the facts and circumstances which took place at the time of the transactions, and of the intention and agreement, is admissible. 1 Dan. Neg. Instr., sec. 711. And such is the settled doctrine of this State, while in the absence of such proof our courts have adopted the rule that the irregular indorser is to be treated only as a second indorser. Comparree vs. Brockway, 11 Hum., 355; Clouston vs. Barbiers, 4 Sneed, 336; Brinkley vs. Boyd, 9 Heis., 149; Iser vs. Cohen, 1 Baxter, 421. In the last of these cases, which was a suit by the payee of the note against the indorser, it was accordingly held that an indorser may, by agreement, enlarge his liability, and that it is competent, upon the trial, to show by parol evidence the nature and extent of his undertaking. The indorsement sued on was made before the delivery of the note to the payee, for the accommodation of the maker, and the evidence disclosed the fact that when the payee objected to the form of the paper, the indorser said it was the same thing as if he had signed his name on the face of the note, and he was held liable as a co-maker.

The principle of our decision is unquestionably sound, though there may be some doubt as to the correctness of its application to the facts of one or two of the cases. In Brinkley vs. Boyd, 9 Heis., 149, there was nothing to rebut the legal presumption that the defendant intended to become a legal indorser. "The proof does not show," says the eminent Judge who delivers the opinion of the Court, "any understanding, intention or agreement on the part of Brinkly as to the nature of the liability assumed by him in said indorsement." To the extent of the actual rulings on the facts, the decision is sustained by the general principle, although the payee of the note may have had reason to suppose, from the nature of the transaction, that the defendant intended to assume a higher grade of responsibility, or at any rate, a responsibility to him. For it may be that the defendant was induced to indorse the note for the accommodation of the maker under the assurance that he was to be second, and not first indorser. As between the payee and the indorser, whatever may be the rights of innocent third parties, the former may well be required to know that the latter can only be made liable to him by agreement either express or fairly implied from the conversations between them, or the facts and circumstances shown in proof.

In Comparree vs. Brockway, 11 Hum., 355, it does not appear that the payee had ever had an interview with the defendant whom he was suing as indorser, nor that the witness examined was present when the indorsement was made. The witness proved that the defendant agreed to indorse the note as accommodation indorser of the maker for the payee's benefit. It does not appear that the liability of the defendant as indorser was fixed by demand and notice, and it does not appear that the blank indorsement was filled up by the plaintiff's counsel by writing above it, "for

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value received I promise the payment of this note to R. H. Brockway." The opinion of the Court was delivered by Judge McKinney, one of the most logical reasoners and accurate thinkers of the judges who have presided in this court. The logic of this argument is, that there is no sufficient proof to sustain the indorsement as filled up, that the indorsement is consequently a blank indorsement, and the defendant might have been charged as indorser. The mode he suggests by which the defendant might have been charged as indorser is that the payee could have indorsed the note, thus making it negotiable and putting into circulation, and at the same time taking care to restrict his own liability. This suggestion is, apparently, sanctioned by the Chancellor in the Court of Errors of New York, in Hall vs. Newcomb, 7 Hill, 417. But there is a good deal of point in Senator Bockee's reply in that case to the suggestion, that "this sort of finesse and shuffling game is below the dignity of the law." And the point has been directly ruled otherwise upon a similar case to the one Judge McKinney thought he had before him, namely a blank endorsement without more, before delivery to the payee, in Phelps vs. Vischer, 50 N. Y., 66. Feeling the narrowness of his standing ground Judge McKinney, with commendable caution, concludes his opinion thus: "We go no further than to hold that a blank indorsement in a case like the present creates no other liability than that of an ordinary commercial indorsement; and that the indorser, in the absence of countervailing proof, cannot be held bound in any other or different form." In this view the decision is in accord with the general principle recognized.

In Clouston vs. Barbiere, 4 Sneed, 336, the suit was by the payee against the indorser as a joint promisor with the maker, that the defendant, in the presence of the payee, agreed to go the maker's security, and, upon this consideration, the payee agreed to give up any lien on the property sold. The witness was, however, not present when the notes were given. The learned judge who delivers the opinion of the Court in this case, holds that the word "security" might apply as well to an indorsement as to a liability as co-maker of the note, and as the defendant did become indorser, instead of surety on the face of the paper, he must be treated as an indorser. This case, he says, "can only be regarded as a blank indorsement of commercial paper, and as such, could only be filled up with a general indorsement, leaving to the indorser all the advantages and liabilities incident to that character, and none other or different." Conceding the correctness of this conclusion, the decision was also in accord with the principle recognized by our courts.

I am free to say that, while conceding the correctness of the law as announced in these opinions, I think it was wrongly applied to the facts of these cases. There was evidence in both of them to show knowledge on the part of the indorsers of the facts of the case, and an intention on their part to become directly bound to the payees for the price of the consideration received by the makers of the notes on the faith of the indorsement. If they could not be held liable as indorsers, and it is conceded in the first case that it could only be done by indirection, what Senator Bockee styles a "sort of finesse and shuffling game," and it seems to be taken for granted in the last case that it could not be done at all, then upon the universally recognized maxim, "*ut res magis valeat quam pereat*," they ought to have been held as guarantors or co-makers. At any rate, there was enough evidence in both cases to have gone to the jury upon the question of intent, and their verdict would doubtless have been as it was on the first trial in the Brockway case in favor of the plaintiffs.

The case before us differs from all of these cases we have been considering in two respects. In the first place the indorsement was made after the maturity of the note, and therefore, the presumption of law arising from a blank indorsement at the inception of negotiable paper does not arise. In the second place the indorsement was made in the presence of the personal representative of the payee, upon a new consideration then passing and under such circumstances as to demonstrate that the indorser intended to become bound directly to the payee.

In his masterly summary of the liabilities created by irregular indorsements, Mr. Justice Clifford says that if the indorsement be subsequent to the making of the note, at the request of the maker, pursuant to a contract with the payee for further indulgence, the indorser is liable as guarantor. Rey vs. Simpson, 22 How., 341. In Vermont the courts hold the indorser liable as co-maker. Strong vs. Riker, 16 Vermont, 554. All the other cases which I have been able to find treat such an indorser as a guarantor. Irish vs. Cutter, 31 Maine, 536; Tenney vs. Prince, 4 Pick., 385; Beckwith vs. Angell, 6 Conn., 315; Camden vs. McCoy, 3 Scam., 437; Oakley vs. Boorman, 21 Wend., 588; Greenough vs. Smead, 3 Ohio St., 315; Sto. Prom. Notes, secs. 133, 477; 1 Dan. New. Instr., 715. I find no case where he has been treated simply as an indorser. And, even if the presumtion of law arising solely from the indorsement of a past due note were the same as in the case of an indorsement at the inception of the note, the facts and circumstances attending the indorsement in the present instance would remove the presumption and bring it within the authorities.

The decree of the Chancellor must be reversed with costs, and a decree entered here in accordance with this opinion.—*Memphis Law Journal.*

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending April 11, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

April 5.

Michael Pflug and wife to Henry Krapf. $900.

Albert E. Akins and wife to Joseph Turney. $600.

William Winterbrun and wife to same. $500.

Charles A. Pope and wife to Barbara Walker. $500.

Susan E. Ganson and husband to M. S. Hogan. $1,200.

Henry J. Cohen and wife to Solomon Austrian. $2,200.

Betsy E. Stone et al. to V. C. Taylor. $300.

Lorenz Pfeil and wife to George Fred. Schraff. 500.

Casimer Kaestle and wife to The Citizens' Savings and Loan Ass'n. $1,500.

April 7.

Marie Mikes and husband to Barbara Kresz. $200.

Robert Barber and wife to George Chappel. $1,000.

John Bauer and wife to Elizabeth Schnauffer. $100.

April 8.

Morris R. Hughes and wife to A. B. Ruggles. $1,100.

Fred Lammermeier and wife to John C. Hall. $700.

George H. Rose to Charles H. Loomis. $7,200.

John Cooney and wife to Stoughton Bliss. $500.

John M. Jackson to Thos. Clague. $750.

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William Ried and wife to M. S. Hogan. $850.
Caroline Kellogg to Alva Bradley. $4,000.
Vaclav Beran to Ama M. Rapp. $400.
F. H. Flick et al. to C. H. Stilson. $1,800.
John Kern and wife to Mathew Darmstadt. $100.
Henry Legrofe and wife to Henry J. Lertig. $700.
Richard Gilmore to Sarah O. C. Webb. $3,250.
Henry J. Meinberg and wife to John Riebel. $900.

April 9.

W. W. Hazzard to Henrietta B. Johnson. One thousand dollars.
Charles E. Hemhans to Samuel Brown. Eight hundred and fifty-four dollars.
Phillip Carl to Hannah Baker. One thousand dollars.
Wm. H. Gabriel and wife to The Society for Savings. Five hundred dollars.
Caroline N. Clark and husband to Amasa Stone. Five thousand dollars.
Justus Schaefer and wife to Michael Rice. Two thousand six hundred dollars.
James Tearron and wife to M. S. Hogan, Two hundred dollars.
Wm. Shumer to Daniel Shumer. Three thousand two hundred and seventy dollars.
Michael O'Neil to the John Hancok Mutual Life Ins. Co. Seven hundred dollars.
Margaret Dougherty and husband to Lloyd & Keyes. Three hundred dollars.

April 10.

Gottlieb F. Hurlebaus and wife to Conrad Westerweller. One hundred and fifty dollars.
John Hild and wife to Simon Fishel. Nine hundred dollars.
Adam Rauch to Apolonia Fitterman. Three hundred and fifty dollars.
Charles Fick and wife to Clemens Stolz. One thousand five hunred dollars.
Jacobus Van Boven and wife to The Society for Savings. Two hundred dollars.
Melchior Unterzuler and wife to same. Eight hundred dollars.
Sherburne H. Wightman and wife to Wm. G. Rose. One thousand dollars.
Christian Hoehne and wife to Fisher & Childs. Seven hundred dollars.
Joseph Fitzee and wife to The Citizens' Savings and Loan Ass'n, Five hundred dollars.

April 11.

Thomas Ramsay and wife to J. H. Morley & Co. Two thousand one hundred and sixty-eight dollars.
Elizabeth Wasbarth and husband to F. A. Sanders. One thousand dollars.
Charles O. Evarts and wife to The Citizens' Savings and Loan Ass'n. Five hundred dollars.
Catharine Hook and husband to George Hoefner et al. Five hundred and fifty dollars.
Amelia M. Cady and husband to Josiah Stacey. Two thousaud five hundred dollars.
John W. Walkley and wife to E. Dresbach and wife. Eight hundred and forty-five dollars.

CHATTEL MORTGAGES.

April 5.

F. E. Marsh to A. W. Bailey. $211.
M. S. Slayton to G. W. Slayton. $1,000.
Dr. E. Goetz to Sterling & Co. $119.
William G. McConnell to C. E. Gehring. $65.
Andrew Mehling and wife to Christian Reif. $800.

April 7.

Anna Golden to J. Krauss & Co. $185.
Wm. H. Butner to W. H. Butler. $57.
John Garwood to George Schindler. $40.
William Hindley to C. R. Heller. $48.
Rose Briggs to Edwin Day. $100.

April 8.

Edwin Hart to Horace Wilkins. $1,380.67.
Maurice B. Sturtevant et al. to Wertz & Riddell. $58.
Same to same. $150.
Oscar Moody to The Cleveland Fur. Co. $92.
A. E. McOmber et al. to John Given. $1,500.
Thomas McKinstry to Samuel G. Baldwin. $255.
M. C. and M. M. Cox to A. W. Bailey. $60.
John S. Birchelhaupt to Hally & Spangler. $3,322.
Thomas Hodges to H. B. Wood. $50.

April 9.

Mrs. M. Kessler to S. O. Green. $250.
Maggie Krapp to Adam Gulliford. $75.
A. G. Hopkinson to Addison J. Farron. $375.
Thomas Jones and wife to E. D. Stark. $192.
Joseph Bellone to H. Konigslow. $110.

April 10.

T. M. Talcot to Deborah C. Wayne. Five hundred dollars.
Ashel Baldwin to Mackey & Pardee. Two hundred and forty dollars.
M. Donohue to Anne Kilfoyl. One hundred and twenty-five dollars.
Thomas Ramsay to Truman Denham and wife. One thousand three hundred and eighty dollars.
L. Hotfield to James Malcolm. Six hundred dollars.
C. A. Bean to Geo. A. Robertson. Sixty dollars.

Apiil 11.

Thomas Ramsay to J. H. Morley. Two thousand onc hundred and sixty-eight dollars.
G. F. Beebe et al. to A. Goldsall. One hundred dollars.
John C. Lester and wife to George E. Fox. Fifty dollars.
John W. Miller to Geo. P. Bunker. One hundred dollars.

DEEDS.

April 4.

Hubbard Cooke and wife to Wilhelmine Keuger. $240.
Thomas Collings and wife et al. to Gottlieb Schnelke. $900.
Thomas Dixon and wife to Henry Schodar. $1.
Eliza C. Hill, exrx, to Charles Miller. $875.
From George S. Hickox et al. to Susan R. Webber. $440.
Wm. J. Morgan to Andrew J. Foster. $3,775.
Luther Moses and wife to Jacob Aulenbacker. $1,060.
Patrick McManaman and wife to T. H. Graham. $400.
Helen A. Mason and C. H. Mason to Alvira Cobb and Alva Bradley. $12,478.
Nancy Phipps to same. $2,520.
John G. Steiger and wife to John Henle. $350.
Miriat Silk to James Silk. $1.
Henrietta S. Somerville and husband to George W. Smith. $1,450.
Helen A. Tyler to Alvira Cobb and Alva Bradley. $4,159.
George B. Tyler et al., minors etc., by etc. guardian, to same. $8,319.
John Van der Stolpe and wife to Jan te Kempel. $566.
William Breisie et al., by H. C. White, Mas. Com., to John Crowell. $733.

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James D. Cleveland, Sp. Mas. Com., to Frederick K. Collins, trustee. $26,484.

George M. Atwater and wife to Austin Powder Co. $3,500.

A. Barber and wife to Philip Carl. $2,365.

William Baxter to Mary E. Egbert. $1,161.

John Barge and wife to Anna Nahuis. $1.

Edward R. Perkins and wife to Hubbard Cooke. $1.

April 5.

Henry Hunting and wife to Henry Meier. $900.

T. W. Hartley and wife to H. C. Whetridge. $1,000.

H. C. Whetridge to Ann Hartley. $1,000.

Henry Krapf and wife to Michael Pflug. $3,500.

George R. Krause to Charles Rentner. $1,600.

Herman F. Koenig and wife to H. Fred Volt. $1,100.

Augustina Matzaun and husband to Cornelius Newkirk. $1.

John Menger and wife to Elizabeth Luke. $760.

Samuel F. Stranahan to John Stranahan. $3,000.

John Stranahan to Samuel F. Stranahan. $4,300.

William Wagner and wife to Chas. A. Pope. $1.

Mary Ann Williams to —— $500.

John Zalabak and wife to Matey Peterka. $250.

J. Mandlebaum, by Thos. Graves, Mas. Com., to Henry Schares. $334.

April 7.

Lynus Clark and wife to Rachel Hawley. $1,600.

Horatio B. Carpenter and wife to Ida Hinkley. $300.

Henry Houk and wife to Nelson Moses. $875.

James M. Hoyt and wife to May Marona. $150.

William Meyer et al. to Edo Classon. $3,200.

Minnie P. Wightman to Mary C. Wightman. $1.

Mary C. Wightman to Minnie P Wightman. $1.

Mathew Weitz to Jacob Schmidt. $350.

Lynus Clark and wif to Edwin H. Hawley. $1,400.

April 8.

L. F. Bauder to S. G. Baldwin, Auditor's deed. $27.75.

George N. Atwater and wife to Dan P. Eels. $6,900.

Alois Allen and wife to A. W. Harmon. $9,000.

Christian Buddenhagen and wife to J. H. Cannon. $10.

J. H. Cannon to Christian Buddenhagen. $10.

Adam Bachle and wife et al. to Andrew Schell. $850.

R. D. and A. A. Barnard et al. to Charles Booth. $2,000.

Richard Fudge and wife to S. H. Gleason. $3.

Same to same. $115.

James Hoyt and wife to Mary Marona Stanek. $150.

The People's Savings and Loan Association to Mrs. Susan Kelly. $1,300.

G. J. Rhodes and wife to Flora C. Rhodes. ——

E. D. Stark to James N. Gahan. $300.

C. H. Stillson and wife to F. H. Flick. $3,750.

Amasa Stone and wife to Flora A. Stone. $1.

Christian Laeful and wife to Caroline Ray. $2,000.

Susan Parsons to Charles Tollzien. $150.

Lydia Lamson to same. $190.

Charles Tollzier and wife to Joseph Ward. $640.

Mathew Weitz to Jacob Schmidt. $1,050.

April 9.

Frank Dougherty and wife to Frank A. Spencer. One dollar.

Frank A. Spencer to Sarah Dougherty. One dollar.

Louis Gardner to Nelson Moses. One thousand dollars.

James N. Gahan to E. D. Stark. Eight hundred dollars.

Simeon Hovey and wife to Sarah D. Stark. Five thousand dollars.

John Hancock Mutual Life Insurance Co. to Michael O'Neil. One thousand two hundred dollars.

Hugh Keenan et al. to W. H. Powers. One thousand three hundred and forty-four dollars.

William Kitchen to E. D. Stark. One dollar.

Joseph Lupinek and wife to Josephine Havlin. One thousand one hundred dollars.

Justus Shafer and wife to Rudolph Berg. One thousand eight hundred dollars.

John P. Schmitz and wife to Louisa Friedrick. Six hundred dollars.

Peter Diehl, by Felix Nicola, Mas. Com., to E. D. Stark. Thirty-four dollars.

Sarah Jane Beerse, by E. B. Bauder, to Sarah E. Haines. One thousand and one dollars.

Levi F. Bauder, Co. Aud., to H. Haines. Aud. deed. Fifty-two dollars and eighteen cents.

Same to same. Forty dollars and fifty-six cents.

Samuel H. Crowell and wife to Geo. H. Happen. One thousand five hundred dollars.

April 10.

Geo. Grossman to Margaret Grossman. Five dollars.

Susannah T. Hutchinson and husband to Augustus J. Milner. Four hundred dollars.

Lyman Little and wife to J. Streibinger. One dollar.

Charles H. Robison and wife to Elizabeth Robison. One dollar.

George W. Walker and wife to David Smith. Six hundred dollars.

David Smith to Sarah M. Ellis. Six hundred dollars.

Simon Fisher and wife to Anna May Hild. Three thousand dollars.

U. S. CIRCUIT COURT N. D. OF OHIO.

April 5.

3300. Farmers' Loan and Trust Co. et al. vs The Painesville & Youngstown R. R. Co. et al. Motion for order to re-appraise. Turner, Lee & McClure and Otis, Adams & Russell.

3678. Ephraim Kendall vs Fred W. Smith et al. Demurrer of deft. O. W. Tinan to amended replication of complainant to Tinan's answer. J. H. Webster.

—— The United States ex rel Maria E. Sibley vs the Village of Chardon, O. Mandamus.

April 7.

8832. Union Paper Bag Machine Co. et al. vs The Cleveland Paper Co. et al. Answer. M. D. Leggett.

3833. Same vs same. Same. Same.

—— The National Bank of Mansfield vs Stephen B. Priest, assignee, etc. Petition in error. Estep.

—— Stephen B. Priest, vice etc., vs The Farmers' National Bank of Mansfield. Petition in error and transcript in District Court filed.

April 8.

Albert H. Weed, Esq., admitted to practice in the U. S. Courts.

3400. Joseph Stroud et al. vs Susan Peterman et al. Leave given plff. to withdraw bill.

April 9.

3852. The First National Bank of Galion vs T. N. Anderson et al. Demurrer of Anderson. Willey, Sherman & Hoyt.

—— Charles Ensign, exr., vs The City of Cleveland. Petition

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filed. Willey, Sherman & Hoyt and P. P. Ranney.

3321. Singer Man. Co. vs J. W. Purviance et al. Judgment for plff. for $2,242.96 against the defts. Purviance and Berry.

April 10.

3825. M. Gottfried et al. vs Schneider. Rule for answer extended to May 15.

3826. Same vs Anton Kopf et al. Same.

April 11.

3149. Charles F. A. Hinrich vs Cleveland Non-Explosive Lamp Co. et al. Leave given defendants to withdraw former answer and file another instanter.

U. S. DISTRICT COURT N. D OF OHIO.

April 7.

1739. William H. Radcliffe et al. vs schooner Emma. Answer of Hiram Henderson, owner etc. W. J. Boardman.

April 8.

1254. Samuel Humphreville, assignee etc., vs J. N. Hatch, etc. Reply. Ingersoll & Williams.

Bankruptcy.

April 7.

1807. In re Marchand & Sons. Discharged.

1819. In re George T. Perkins. Petition for discharge. Hearing April 26th.

1831. In re Z. Greenwald et al. Same. Hearing April 30th.

1937. In re Browning & Steele. Same. Same.

1993. In re Henry H. Adams. Same. Hearing April 26th.

April 8.

1770. In re James W. Brown. Exceptions to specifications etc. Grannis & Griswold.

1887. In re Edwin J. Prentice. Petition for discharge. Hearing April 26th.

1873. In re Joseph Berman. Same.

April 9.

1566. In re Enos Larkin. Petition for discharge. Hearing April 26.

2849. In re Andrew Smith. Discharged.

April 10.

1576. In re Bowman & McNeil. Petition for discharge. Hearing April 26th.

941. In re Miller C. Bland, bankrupt. Motion to dismiss.

COURT OF COMMON PLEAS.

Actions Commenced.

April 4.

14880. Esther Byers vs James Forest. Money only. Foran & Williams.

14881. Lewis Heiman vs A. A. Lawrence. Appeal by deft. Judgment March 10. A. Green, Wm. Clark.

14882. Ella Neice vs Romain S. McClintock. Appeal by defendant. Judgment March 7.

April 5.

14883. William Doyle et al. vs A. Cunnington. Money only. James Wade.

14884. Hollis Barr et al vs Sophia Lavenbager et al. Foreclosure of mortgage and equitable relief. Wheeler & Wilcox; W. V. Tousley.

14885. Wm. A. Gilbert vs Geo. Gilbert et al. Money only. Otto Arnold.

14886. H. W. Libby vs Henry Castor et al. Appeal by plff. Judgment March 10. Wallace Smith; E. W. Goddard.

14887. Adam Mery vs Gertie S. Egts et al. Money and to subject lands. Kessler & Robinson.

14888. George Hoodley vs Isaac W. Page et al. Money and to subject land. Baldwin & Ford.

14889. J. R. Goldson et al. vs George Schaefer et al. Money only. Mix, Noble & White.

14890. Loia E. Bucher vs S. H. Laman. Appeal by deft. Judgment March 14. Thomas Lrvan; I. & P.

14891. David C. Baldwin vs Ignatz Schneider et al. Money and to subject land. Baldwin & Ford.

14892. Albert K. Spencer vs Anna Shiely, aministratrix, etc. Money only. Baldwin & Ford.

14893. Hezekiah J. Winslow vs Cornelius L. Russell et al. Money and equitable relief. James Fitch.

14894. E. W. Clark vs Andrew Wirshing. Error to J. P. Estep & Squire; Prentiss & V.

April 7.

14895. F. H. Furnis vs Otto Radinshewski et al. Money, foreclosure and receiver. Wm. V. Tousley.

April 8.

14896. John M. Chandler vs W. L. Miller. Appeal by defendant. Judgment March 14. Hyde & Marsh; Ranney & Ranneys.

14897. William Bloch vs Richard Sheehan. Injunction. S. M. Eddy and Henderson & Kline.

14898. Josephine Ruescher vs John Ruescher et al. Equitable relief. A. Green.

14899. Charles F. Boltz vs A. McAdams. Appeal by deft. Judgment March 12. Peter F. Young; G. S. Kain.

14900. Henry A. Mastick et al. vs Wm. Cone, Sr., et al. Partition. Prentiss & Vorce.

14901. Jacob Stien, Sr., vs Jacob Stien, Jr. Equitable relief. Gilbert, Johnson & Schwan.

14902. Frederick Kinsman vs Martin Krejci et al. Money and equitable relief. E. J. Latimer; C. L. Latimer.

14903. W. H. Schneider vs Albert Linden. Appeal by defendant. Judgment March 11.

April 9.

14904. Susan Gibbons vs Patrick McAllister et al. Partition, account and relief. Geo. B. Solders.

14905. Wm. J. Stewley vs George C. Shumway et al. For correction of deed and for equitable relief. W. H. Gaylord; G. W. Shumway.

14906. Edward B. Mitchell vs William Pate, Jr., et al. Money, account and equitable relief. R. F. Paine.

April 11.

14907. Wick Bros. & Co. vs Alexander W. Brownlee. Cognovit. Sydney Strong; E. A. Angell.

14908. Thomas W. Courtney vs same. Same. Same.

14909. The Westminster Church vs The Erie St. M. E. Church and the Board of the Church Erection Fund, etc. To foreclose mortgage. Ranney & Ranneys; Ranney & Ranneys.

14910. E. B. Pratt vs John M. Wilcox. Money only. A. T. Brewer.

14911. William Hanne vs Rosina Barnes et al. Money and relief. Ingersoll & Williams.

Motions and Demurrers Filed.

April 5.

2489. Penfield vs Fitch et al. Demurrer by deft. James Fitch to 2nd and 3d causes of action.

2490. Same vs same. Motion by deft. James Fitch to strike from petition and make more definite and certain.

2491. Hubbard vs Hord, admr. etc. Demurrer to the answer.

2492. Kidd vs Murphy et al. Demurrer by deft. Michael Murphy to the 1st cause of action.

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Brief and Record

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Book Notice.

A General Index to the English Common Law Reports. Volumes LXXXIV. to CXVIII. inclusive. By Samuel W. Pennypacker, E. Greenough Platt, and Samuel S. Hollingsworth, of the Philadelphia Bar. Vol. III. Supplement. Philadelphia: T. & J. W. Johnson & Co., Law Booksellers. No. 535 Chestnut Street. 1879. $5.00 net

The above volume, while it is styled a General Index to the English Common Law Reports, is, at the same time, to a large extent, a digest, expressing, rather than simply suggesting, the points decided in the cases. The profession is assured by the publishers that the work will be found a reliable guide, and may be safely used, even where its statements cannot be verified by an examination of the reports. It is complete in three volumes. The two preceding volumes were commenced by the Hon. George Sharswood, and completed by the Hon. George W. Biddle and Richard C. McMurtrie, Esq. The three volumes are furnished to the profession for $12.00.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

O. H. P. HICKS ET AL. VS. WILLIAM CUBBON.

Replevin — Actual Consideration of Chattel Mortgage or Bill of Sale may be shown—How far Husband Bound by Instrument Signed Alone by Wife in His Presence, etc.

HALE, J.:

The action below was an action in replevin brought by William Cubbon to recover certain personal property claimed by virtue of a bill of sale or chattel mortgage, a copy of which is attached to the bill of exceptions. That instrument was filed with the Recorder of this county, I suppose, as a chattel mortgage, but there was no affidavit upon it showing the consideration, other than it recites that it is in consideration of one dollar; and it is signed alone by Mary Clark, the wife of George E. Clark. The defendant Hicks was a constable. An execution had been placed in his hands against George E. Clark, and he levied upon the property in question under that execution as the property of George H. Clark, and the controversy in the action was whether the plaintiff Cubbon should hold this property by virtue of his bill of sale executed to him by Mrs. Clark or whether the constable should hold it by virtue of his levy, made upon the property as the property of George E. Clark. The question then was, first, whether Clark or his wife owned the property, second, whether the plaintiff below by virtue of the instrument executed to him by the wife got such a right in the property as he could hold it. The bill of exceptions does not disclose all the testimony, but it shows that the plaintiff below gave evidence tending to show that the property belonged to Mrs. Clark; that this instrument was executed to him and he received the property as absolutely his in payment of a debt of one thousand dollars which Mrs. Clark and Mr. Clark owed to him;

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that the consideration, although recited in the instrument as being one dollar, was really the payment of a debt of one thousand dollars; and gave evidence tending to show that Mrs. Clark owned the property; that the fact that the instrument was filed as a chattel mortgage was simply at the instance of Mrs. Clark and not at his own; that he knew all the time that he had the absolute ownership of this property and he rested his case.

Then the defendant Hicks, to maintain the issue on his part, offered evidence tending to show that Clark owned the property, and then further asked Clark, who was upon the witness stand, "What was the consideration of the bill of sale of December 8, '75, and for what purpose was it given?" Bear in mind that the instrument under which the plaintiff below was claiming recited the consideration as being one dollar. On the trial he had undertaken to explain the consideration and to show that it was one thousand dollars and that he received the property for the one thousand dollars and it became his absolutely. Then this question was put: "What was the consideration of that conveyance?" An objection was interposed to this question and the Court sustained the objection. How there could be a shadow of a doubt as to the competency of that question is more than we can see. Three or four answers could be given to it. The consideration of that instrument was open for explanation at any time. There was plainly an error, we think, in that ruling. Again, the Court seemed to think that the jury might go wrong and might find this property to be the property of Clark, and that would defeat the plaintiff below, so to cover that contingency and to have this instrument, although not signed by Clark, upon this property and convey it to the plaintiff below, notwithstanding it belonged to Clark, the Court of its own motion charged the jury as follows, "That if George E. Clark was present, when said written instrument was executed and delivered, and assented thereto, it was as much his instrument, and he was as much bound thereby, as if he had executed and delivered the same by his own hand to the defendant." That is, the plaintiff was claiming under an instrument executed by Mrs. Clark, signed by her alone. The Court does not say that certain facts might intervene that would estop Clark from claiming this property himself, but says that if he was in the room when his wife signed this chattel mortgage or bill of sale he was just as much bound by it as if he had signed it himself. We think there is error in this, and the judgment will be reversed.

W. C. Rogers, J. W. Heisley, for plaintiff.

W. S. Kerruish and Gollier & Brand, for defendant.

MILAN D. WIGGINS ET AL. VS. M. N. CAMPBELL ET AL.

Effect of Mortgage by Contractee upon Property Held by Land Contract—Rights of Assignee of Contract Transferred Subsequent to Mortgage and Without Notice Thereof, etc.

Hale, J.:

This case was tried in the early part of the term and presents some difficult questions. The facts, so far as it is necessary to note them, are these: On the 24th day of May, 1872, E. F. and L. R. Payne were the owners of lot seven in their allotment in Newburgh, and at that date executed and delivered a contract of the lot to a man by the name of Ward, who went into possession of said lot seven on the 11th of April, 1873, and assigned that contract to M. N. Campbell, and M. N. Campbell took possession under it. On the 3d of March, 1873, the Payne brothers executed a contract of lot 9 in the same allotment to a man by the name of Charles Wright, who assigned that contract to Winslow Wright, and on the 3d of October, 1873, Winslow Wright assigned the contract to M. N. Campbell, so that M. N. Campbell thus became the equitable owner of lots 7 and 9 in the Payne allotment, and went into possession thereof. Being thus in the possession, holding the contract, and having paid a considerable portion of the purchase money, on the 11th day of January, 1874, he executed a mortgage to the plaintiff Milan D. Wiggins to secure the payment of four promissory notes. That mortgage is in the ordinary form of a mortgage upon real estate. Those notes became due on the 15th of July, 1874, on the 15th of January, 1875, the 15th of July, 1875, and the 15th of January, 1876, respectively. The first of those notes has been paid, the one due July 15th, 1874. The second note is owned by the plaintiffs Runnals and Wiggins. Some contest was made as to that, but it was conceded in the argument that that must be the finding. The last two notes are owned by the defendant A. J. Wenham, and that was conceded in the argument. On the 9th of February, 1875, M. N. Campbell assigned to his brother William Campbell these two contracts that he had for lots 7 and 9, more than a year after the execution of the mortgage. Now, we suppose it to be settled by the case of Churchhill et al. vs. Little et al., 23 Ohio St., 301, that the execution of a mortgage by a contractee upon property held by him by land contract operates as an assignment of the contract, so that under the mortgage in this case, Wiggins became the assignee of M. N. Campbell of the contract, and of his equitable interest in the property to the extent of the mortgage, and when the assignment of the contract was subseuuently made to his brother William, he also became the assignee of the equitable interest that was left, and the situation of the respective parties at that time was this: The Payne brothers held the legal title to those two lots in trust, first, for the payment of the amount due to them; second, the amount due upon the mortgage; and, third, the amount due to William Campbell. That was the legal effect as it then stood prior to the transactions, we shall refer to hereafter. On the 26th day of March, 1875, a little more than six weeks after the contract was assigned to William Campbell he paid up the contracts to Payne brothers and took a deed of these lots, an absolute conveyance to himself, thus clothing his equity with the legal title; so that while he had an equitable interest in those lots, prior to March 26th, 1875, he did not acquire the legal title until that date.

Now, we find, as a matter of fact, at the time the assignment of the contract was made to William Campbell he did not have actual notice of this mortgage, and it not being an instrument, considering the state of the title, that was required to be recorded, no constructive notice can be chargeable to him. Then the question presents itself whether William Campbell had actual knowledge of this mortgage at the time he took the conveyance from Payne brothers, and thereby acquired his legal title. To determine this question we must look into the transaction between these two brothers. William Campbell resided in the State of Iowa and is, perhaps, a man of some means in that State. M. N. Campbell resided here. The property was here. He went to Iowa, and the assignment of the contract took place there. William Campbell says that he agreed to pay his brother $5,000, for the property, and upon looking into the transaction we find it

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was paid in this way: (1) An old debt of a thousand dollars that had existed for a long time and barred by the statute of limitations in the shape of an account and a note. Neither the note nor the memorandum, which he says contained the account, is produced. (2) A note of $1,400 due in one year, which, to meet the exigencies of this case, he paid within two months; but that note is not produced. (3) Another note of $1,260 due in two years, but that is not produced. (4) $1,363 in cash, and of that $500 was going to Payne brothers for balance due them on land contract. William Campbell, in his testimony upon the witness stand, said that he did not have notice of the mortgage at the time he took the deed; but looking into a deposition that he gave formerly, and which was evidence in this case, we find that he there says that within two or three weeks after the transaction in Iowa, after his brother returned to Ohio, that his brother wrote him all about the mortgage and condition of affairs, and that the deed was not received for more than six weeks afterwards. We think, under the circumstances of this case, I am myself very clear, although the Court are not entirely unanimous upon the proposition, that William Campbell, at the time he received the deed, should be charged with actual knowledge of the existence of that mortgage. Then what are the rights of the parties? It is conceded that Payne brothers held this legal title in trust for the amount that was coming to them, and for the equities that were outstanding in favor of the Wiggins mortgage, and in favor of William Campbell. The mortgage was prior in time to the assignment of the contract, and conceding the latter to have been a bona fide transaction, the equities were equal, except that the one represented by the mortgage was prior in time. Then if a suit had been brought by the Payne brothers theirs would have been the first equity, the mortgage next, then the equity of William Campbell. Now, if William Campbell received the legal title from Payne brothers with a knowledge of the situation he took it subject to the same equities and burdened with the same trusts. A transfer of the legal title from Payne brothers to William Campbell, he having knowledge of the equities of the case, would not change the situation. We hold that M. N. Campbell has the first lien for the amount that he paid to Payne brothers with interest thereon, that the mortgage securing the three notes, one in favor of the plaintiff and the other in favor of Wenham, is next, and the balance should go to William Campbell and the decree may be taken accordingly.

TYLER & DENISON, for plaintiffs.

J. J. CARRAN, for defendant Wenham.

CRITCHFIELD and PECK, for defendant Campbell.

SUPREME COURT OF OHIO

DECEMBER TERM, 1878.

Hon. W. J. Gilmore, Chief Justice. Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Hon. William White, Judges.

TUESDAY, April 15, 1870

General Docket.

No. 233. Edward Malone vs the City of Toledo et al. Appeal. Reserved in the District Court of Lucas county.

BOYNTON, J. Held:

Under the Constitution of 1802, the Legislature, in the exercise of the right of eminent domain, possessed the power to appropriate to public use the fee simple title to lands, where, in its judgment, the public necessities require it; and the title acquired by the State by the appropriation of lands for canal purposes under the eighth section of the act of February 4, 1825, (2 Chase, 1,472), was an absolute estate in fee.

Demurrer sustained and petition dismissed.

No 94. Patrick Murduck et al. vs George Lantz et al. Error to the District Court of Vinton County.

McILVAINE, J. Held:

1. Where a married woman, seized in fee of an ancestral estate, joins with her husband in a written agreement to exchange her estate for other property, and dies before the execution of deeds of conveyance, leaving her husband and brothers and sisters, but no children surviving her, the ancestral estate will pass to and vest in the brothers and sisters, subject to the life estate of the husband.

2. In such case the surviving husband succeeds to no interest or estate in the property that was agreed to be conveyed to the wife in exchange for her ancestral estate, which his creditors can subject to the payment of his debts.

3. The mere fact that during the lifetime of the wife, the possession of the property was exchanged in accordance with such agreement, did not prevent the descent of the ancestral estate according to the statute in such case made and provided.

4. Proceedings instituted under section 5 of the act to provide for the execution of real contracts in certain cases (S. & C. 260), to obtain an order authorizing the administrator to convey lands in execution of a written agreement signed by the intestate while under coverture, are unauthorized and void for want of jurisdiction.

5. Such proceedings do not, as matters *in pais*, estop the parties thereto, who acted under a mutual mistake as to their rights, from claiming their inheritances under the statute of descents.

Judgment reversed and cause remanded to the District Court.

No. 456. Philo Chamberlain vs the City of Cleveland et al. Error to the District Court of Cuyahoga county.

GILMORE, C. J.:

1. To enable a municipal corporation to pay for a local public improvement it may, by assessment, take from an individual whose lands are subject to assessment and specially benefitted by the improvement, such a portion of the costs thereof as is the equivalent, but not in excess; of the special benefits conferred thereby.

2. The whole amount of the assessment must be apportioned amongst the several lots and parcels of lands specially benefitted in the proportion that the special benefit to each lot or parcel bears to the whole special benefits conferred by the improvement.

3. Where the proceedings in an appropriation assessment on the principle of special benefits, merely shown upon their face, that the aggregate amount of the assessment is placed on "benefited property," it will not be conclusively presumed that the assessment is limited to the special benefits conferred, or that it has been properly apportioned amongst the several lots or lands assessed.

4. If the opening of a street rendered it practicable to open another contemplated street which could not have been opened before, and this fact of itself, specially benefits lots adjacent to the new street, such special benefits may properly be considered in estimating the special benefits conferred by the opening of the new street.

5. Where the Assessing Board made an assessment on the basis of $157,749.89, and the Equalizing Board added over $9,000 to the assessment and equalized it on the basis of

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$166,777.50—Held: That the action of the Equalizing Board was unauthorized.

6. An assessment that was provided for in the ordinance ordering land to be appropriated for the opening of a street, may be subsequently made and collected to pay the costs of the appropriation, although the city, in anticipation of the collection of the assessment, and to enable it to pay for the lands, may have issued its bonds and pledged the faith of the city for their payment, and notwithstandg the bonds, owing to delays in making the assessment, may have been paid before the assessment was collected.

7. After notice of the assessment is given, as required by section 585 of the municipal code of 1860, all persons interested are bound to take notice of the subsequent proceedings.

8. The per centum limitations contained in section 543 are to be ascertained by the actual value of the benefitted property, at the time and in view of the appropriation.

9. Where the city council determines that the amount of the assessment does not exceed the value of the benefits specially conferred, its judgment in the premises, in the absence of fraud, is final and conclusive, unless modified by the council before the final confirmation, as provided in section 588; but when the municipal authorities in levying special assessments, do not undertake to determine the amount of the special benefits conferred, either in respect to the amount assessed, or in the apportionment of the burden, the assessment may be enjoined; and in an action for that purpose parol evidence may be introduced to show that the authorities did not act on the proper basis.

Judgment of the District Court reversed, and the injunction made perpetual, without prejudice to the right of the city to make a new assessment.

No. 213. John Larney vs City of Cleveland. Error to the Police Court of the City of Cleveland.

By the Court:

1. Where a greater punishment may be inflicted on a conviction for a second or subsequent violation of a criminal law, than for the first, the fact that the offense charged is a second or subsequent offense must be averred in the indictment or information in order to justify the increased punishment.

2. A sentence of imprisonment "to commence after the expiration of former sentences" is too uncertain and indefinite. Section 18, Ohio Statutes, 47. 22 Ohio Statutes, 405.

Judgment reversed and cause remanded to the Police Court.

No. 305. Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company vs Emma J. Green, an infant, etc. Error to the Superior Court of Montgomery county. Compromised as per agreement on file and remanded to the Superior Court to carry the compromise into effect.

No. 457. Erastus Cushing vs the City of Cleveland. Error to the District court of Cuyahoga county. Judgment reversed, and the injunction made perpetual without prejudice to the right of the city to make a new assessment.

No. 458. O. A. Brooks et al. vs the City of Cleveland. Error to the District Court of Cuyahoga county. Judgment reversed, and injunction made perpetual without prejudice to the right of the city to make a new assessment.

No. 460. Henry N. Raymond et al. vs the City of Cleveland. Error to the District Court of Cuyahoga county. Judgment reversed and injunction made perpetual without prejudice to the right of the city to make a new assessment.

Supreme Court of California.

RICHARD MARLOW, PLAINTIFF AND RESPONDENT, VS. ELLEN E. BARLEW ET AL., DEFENDANTS AND APPELLANTS.

Mortgage Foreclosure—Separate Property of Married Women.

A married woman has power to make a promissory note, and execute a mortgage of her separate estate to secure its payment.

In an action brought upon the note and mortgage, the usual judgment may be rendered against her for the amount due on the note, and ordering that the mortgaged premises be sold, and a judgment be docketed for the deficiency.

STATEMENT OF FACTS.

This action was brought on April 3d, 1877, on a promissory note for $1,350, dated February 3d, 1877, due thirty days after date, signed by Ellen M. Barlew, wife of John M. Barlew, and secured by her mortgage on certain lands which she had received by will from John Hansen, who died on August 24th, 1874. The remaining facts are disclosed in the opinion. A deed of foreclosure was granted, from which defendants appealed on November 26th, 1877.

BY THE COURT.

Action to foreclose a mortgage of real estate. On the 3d day of July, 1874, John Hansen and Hannah Hansen being the owners, as husband and wife, of certain community property, including the mortgaged premises in controversy, united in the execution of a deed purporting to convey all their community property to William Nelson, in trust, to the effect that he should convey to John Hansen a certain portion of the community property, including the mortgaged premises, to hold as his separate property, and also that he should convey to Hannah Hansen the remaining portion of the community property to hold as her separate property. Nelson thereupon, and in pursuance of the deed of trust, executed deeds, whereby he purported to convey to the respective parties the portion of the community property to which each was entitled, according to the terms of the deed of trust. Hannah Hansen also executed a deed purporting to convey the mortgaged premises to John Hansen, her husband, as his separate property; and thereafter he devised the same to Ellen E. Barlew, one of the defendants, who afterwards executed the promissory note, deed and mortgage in suit. It is alleged in the complaint that Hannah Hansen claims that the above mentioned deeds were ineffectual to vest the title to the mortgaged premises in John Hansen in severalty, and that she is the owner of the undived half thereof. The note and mortgage in suit were executed by Ellen E. Barlew alone, but her husband is made a defendant, and also Hannah Hansen. The defendants severally filed general demurrers to the complaint, the demurrers were overruled, and the plaintiff had judgment against Ellen E. Barlew for the amount due upon the note; and it was also ordered that the mortgaged premises be sold for the satisfaction of the amount due, and, if there should be a deficiency after the sale, that a judgment therefor be docketed against her. It was also adjudged, in the usual form, that the defendants claiming, etc., subsequent to the mortgage, be forever barred and foreclosed, etc.

Can a married woman make a promissory note and secure its payment by the execution of a mortgage on her separate real estate? It is provided by section 158 of the Civil Code that "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried." The words, "*any engagement or transaction respecting property*," are sufficiently compre-

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hensive to include a promissory note or mortgage; they may not be the most apt to express the legislative intent, but there is no room for doubt that it was the intent to give married women the same power and capacity to contract that an unmarried woman possesses, subject to certain limitations and restrictions mentioned in the Code. Previous to the adoption of the Code, she could mortgage her real estate, provided the husband united in its execution, but under the Code his signature is unnecessary. She was deprived of the capacity to make a contract for the payment of money by section 167 of the Code, as first adopted; but the section was repealed in 1874. The limitations and restrictions upon her capacity to contract, and the special provisions respecting the mode in which she was required to contract, as provided by the laws formerly in force, were designed not only for her protection in dealing with third persons, but also for her security against the improvidence, coercion, undue influence or fraud of her husband. But the Code has abrogated almost all of those limitations and restrictions and has relieved her from the disabilities under which she formerly labored, and in respect to her property and contracts, has taken away the sort of supervision or control which the husband formerly exercised. The rents, issues and profits of her separate property becomes her separate property; and she may "convey her separate property" without the consent of her husband. [Section 162.] Her earnings are her separate property. [Sections 168 and 169.] She and her husband may hold property as joint tenants, tenants in common, or as community property. [Sec. 161.] They may "alter their legal relations" as to property, and may, in writing, agree to an "immediate separation, and may make provisions for the support of either of them and of their children during such separation." [Sec. 159.] The property, in respect to which they may "alter their legal relations," would seem to include property held by them, as mentioned in section 161—in joint tenancy, tenancy in common, and as community property, and perhaps such as is, or would become, the separate property of either. The "legal relations" which they occupy as to property, must include the ownership, possession, and the power to transfer, incumber and charge the property, presnt and future. In making contracts after altering their "legal relations" as to property, no other or different capacity is given to the husband than to the wife, nor is any different mode prescribed for the wife—except that the acknowledgment of her conveyance of real estate must be made as provided in sections 1093 and 1191. The separate property of the husband is not liable for the debts of the wife contracted before marriage [Section 170], but her separate property is liable for her debts contracted before or after marriage. [Sec. 171.] She may sue or be sued alone, when the action concerns her separate property, or her claim or right to the homestead, or is between herself and her husband: or when she is living separate and apart from her husband [Section 370, Code of Civil Procedure.]

In Wilson vs. Wilson, 36 Cal., 447, it was held that the wife could maintain an action against her husband on a promissory note made before marriage. In view of the foregoing provisions of the Codes, and others that might be mentioned, tending to show the removal of the disabilities of coverture, it would seem beyond all question that the wife has competent power to make a promissory note, and to execute a mortgage of her real estate to secure its payment. If she is under any disability in this respect, she has not the capacity of an unmarried woman in making contracts—or entering into engagements or transactions—respecting her property, as conferred upon her by section 158. The making of promissory notes and the execution of mortgages are among the most common and ordinary contracts respecting property; and in view of the almost entire removal by the Codes of the common law disabilities incident to coverture, a married woman should not be denied the capacity to contract in that mode, unless the prohibition is clearly indicated by the Code. In my opinion, the defendant, Ellen E. Barlew, had competent capacity to execute the note and mortgage, and they are binding upon her and her interest in the mortgaged property. Parry vs. Kelly, No. 5489, October Term, 1877, is clear authority to the point that a married woman is as competent to execute a mortgage as a *femme sole;* and it was also held that her mortgage of the community property was not void in the extreme sense.

Is the defendant, Ellen E. Earlew, liable to a personal judgment for the amount due upon the promissory note, and for the sale of the mortgaged premises, and for the deficiency that may remain after the sale? The answer is obvious. The usual responsibility upon the note and mortgage accompanies the power of their execution, there being nothing in the Code limiting the responsibility.

The remaining question discussed by counsel—whether the husband and wife have power, by deeds through a trustee, or directly to each other, of portions of the community property, or by both of those modes, to vest the title of the respective portions in the grantee in severalty?—although from what has already been said, and it may not be difficult of solution, cannot be authoritatively decided at this time, because it does not arise in the case. In an action to foreclose a mortgage, a title claimed adversely to the mortgagor cannot be litigated. [Hitchcock vs. Clarke, No. 4810, October Term, 1875.] The judgment, as rendered, does vot affect the title alleged to be claimed by Hannah Hansen.

Judgment affirmed. Remittitur forthwith.

We concur: RHODES, J.
CROCKETT, J.
MCKINSTRY, J.

MOORE, LAINE and LEIB, attorneys for plaintiff and respondent.

E. M. GIBSON, attorney for defendants and appellants.

COURT OF COMMON PLEAS, HOLMES COUNTY.

MARCH TERM, 1879.

JUDSON L. HUGHS VS. FARMERS' INSURANCE CO.

Insurance—Rights of Parties, how fixed—Making of one Cause of Action Part of Another, etc.

VOORHES, J.:

Petition set out contract with agent of defendant on March 17, 1874, to insure a barn at $800, and application directs agent to answer all questions, blanks for which are on application.

A policy was issued on March 19, 1874, and the note given for premium was paid. On March 28, 1878, the barn was destroyed by fire. A policy of insurance is only evidence of the contract, and whether issued at all, immediately or before the loss or after matters not, as a recovery can be had without a policy. The rights are fixed at the date of contract.

I think, unless the intention is shown otherwise, that when terms were settled with the agent the insured was bound to pay the note and

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the defendant was bound to pay the loss if a loss occurred.

On demurrer to petition which set out the contract and issuing of the policy in accordance therewith, and allegations of performance of all the conditions, can the defendant, who does not deny any allegations, but admits by demurrer the allegations, and who has the plaintiff's money, deny its liability? I think not. Demurrer overruled.

Can the pleader refer to a former cause of action and make it a part of a second cause of action?

If he makes the statement in the following cause of action that he makes it a part of his cause of action, I see no reason why he cannot do so. I will overrule the demurrer to the second cause of action.

REED, STILWELL & HOAGLAND, for plaintiff.

U. S. CIRCUIT COURT N. D. OF OHIO.

April 14.

3689. Pool vs Seiberling. Settled and costs paid. No record. April 14, 1879.

3847. Charles Lupe vs C. A. Krause et al. Reply. George S. Kain.

April 17.

3752. Payson, ass., vs John Murray. Dismissed by plff.

3753. Same vs Garfield et al. Same.

3751. Same vs M. P. Goodell. Same.

3779. Same vs Whiting. Same.

—— John Benzer et al. vs Joseph Askins et al. Reply. Cunningham & Brotherton.

3795. James H. Dunham vs The Buckeye Mutual Fire Insurance Company. Answer. S. S. Bloom; A. T. Brewer.

April 18.

3704. Amos R. Eno vs Louisa Crawford et al. Decree with order to sell mortgaged premises.

2394. Mart vs Erie Railway Co. Continued.

2754. Victor S. M. Co. vs Oatman et al. Overruled and judgement on verdict.

3074. Bank of Commerce vs Card. Dismissed without prejudice.

2241. Yeoman vs Schuyler. Dismissed for want of prosecution.

U. S. DISTRICT COURT N. D OF OHIO.

April 17.

1613. Ja[illegible] E. McLain, assignee, vs Edwin Bayliss and wife et al. Bill in equity to sell land. Pease & Baldwin.

Bankruptcy.

April 12.

1790. In re S. Stein. Discharged.

1910. In re Ernst M. Knippenberg. Discharged.

April 14.

1953. In re Bernard McCue. Discharged.

1351. In re Theodore B. Wyne. Same.

1254. In re Robert H. McMann. Same.

1912. In re Phil T. Safford. Same-

April 15.

1448. In re Theodore A. Paul. Petition for discharge. Hearing May 3.

1833. In re Jonathan P. Buxton. Same. Same.

1428. In re Joseph Erhard. Same. Hearing April 30.

1880. In re Andrew J. Wilkin. Same. Hearing May 7.

1561. In re Jacob C. Kurtz. Discharged.

April 16.

1951. In re David S. Alexander. Petition for discharge. Hearing May 3d.

1610. In re John B. Eberly. Same. Same.

1690. In re Jacob S. Alberger. Same. Same.

1918. In re Andrew J. McCartny. Same. Same.

1645. In re Evan J. Evans. Same. Hearing May 7.

1601. In re Conrad Schroer. Same. Same.

1992. In re Charles Easly. Discharged.

1682. In re Thomas M. Webb. Same.

April 17.

1982. In re Abraham J. Tschantz. Discharged.

2042. In re Harrison G. Robison. Same.

1896. In re Elias A. Keyes. Petition for discharge. Hearing May 7.

1895. In re Milo O. Keyes. Same. Same.

April 18.

1586. In re Eli Parsons, bandrupt. Answer to specificatians in opposition to petition for discharge.

1999. In re Nathan New. Petition for discharge. Hearing May 3.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending April 18, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

April 14.

Henry Janowitz and wife to Philip Satarius. $250.

Joseph Blazek and wife to Frank Becka, Prest. etc. $150.

John Hearvin and wife to same. $100.

W. P. Hudson and wife to Rufus. P. Force. $2,000.

Joseph Steinkamp and wife to The Society for Savings. $1,000.

John D. Spotz to Christian Leupal. $1,600.

R. M. Rover and wife to D. Leuty. $1,000.

Geo. Foote and wife to L. P. Foote. $1,000.

Julia M. Robinson te al. to A. E. Whiting. $1,000.

April 15.

A. W. Poe to R. H. Roberts. $600.

Charles Heiser to Juliaetta Holly. $900.

M. H. Brett to Almira D. Hamlin. $1,469.

April 16.

Mary Polac and husband to Philip Baeger. $350.

John Cooney and wife to G. O. Baslington. $2,000.

Patrick Fitzgerald and wife to M. S. Hogan. $250.

Theresa Heiser and husband to Gegenreitiger Schutz Verein. $300.

Frederick Zeitzleman and wife to Jacob Wetz. $700.

Alonzo M. Dairs et al. to James Keyte. $1,500.

Joseph Lipe and wife to John Karda. $500.

Emily Brainard to The Society for Savings. $1,000.

Elizabeth Hower and husband to George Bartlett. $4,000.

Seth Williams and wife to John G. McFate. $2,300.

Rauel Camak and wife to Louis Scheurer. $1,000.

John Cox to Nicholas Atten. $300.

April 17.

Joseph Jenkins to A. S. Fare. One thousand two hundred dollars.

John Dogen and wife to Christ. Ulrich. One hundred dollars.

Emily C. Beach to Georgie Bartlett. Five thousand dollars.

George Sinclair and wife to Emily L. Stanley. Two thousand dollars.

Sidney Lawrence and wife to Berea S. and L. Ass'n. Two thousand five hundred dollars.

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Robert Brown to Christian Hunkler. One hundred dollars.

April 18

Frank Muir and wife to Melchior Hout. $225.

M. C. Younglove and wife to The Citizens' Savings and Loan Ass'n. $2,700.

Frederick Ullrich to Samuel Hickson. $190.

John Madigan and wife to John C. Henny. $100.

Ellen Wisner and husband to R. J. Perkins. One thousand dollars.

John Nesbit to C. F. Emery. Eighty dollars.

CHATTEL MORTGAGES.

April 14.

John Bernard to Vaclav Stadnek. $250.

J. S. Clark to J. B. Goodrich. $20.

E. S. Marquette to M. Gelhardt. $200.

Mary T. York to W. I. Hudson. $76.

Albert Bussler to Frederick Wilt. $100.

April 15.

Wm. B. Wilcox to John M. Mathias. $58.

R. W. Henderson to Sloss Bros. $252.94.

Mrs. E. Falkner to J. Lowman & Son. $75.

Flora A. Campbell to Wm. I. Hudson. $300.

J. H. Mills and John Lynch to Edward Miller. $350.

H. W. Libby to Scoville & Emerson. $200.

Same to same. $150.

W. Filmer to H. Benhoff & Son. $30.

C. S. and A. Strank to F. Emerick. $16.

A. Branel et al. to C. R. Sanderson. $109.

John H. Parker to E. Scoville. $633.

George Hawk and wife to Barbara Amberger. $1,000.

Barbara Reubler and husband to Phillip Gaenssler. $300.

Kasper Lenze to J. J. Carran. $300.

Clara A. Emerson to W. W. Lanndon. $600.

J. F. Grother to J. J. Carran. $51.

Michael Tavernier to John Lee. $345.

Frank D. Bosworth to H. R. Lawrence. $70.

Patrick Carey to J. Cunningham. $225,

April 17.

M. B. Sturtevant to Mrs. Ella M. Ford. One thousand two hundred and ninety-four dollars and fifty cents.

Same to same. Two hundred dollars.

Charles Riehm to Wm. H. Shaw. Thirty-three dollars

R. H. Goulding to J. O. Green. Eighteen dollars.

Morary Judd to W. H. Hartman. Two hundred dollars.

Mary J. Gregg to G. B. Shafer. Fifty-nine dollars.

Arthur Thomasson to Anderson H. Bowman. Two hundred dollars.

April 18.

Mable E. Gray to H. R. Leonard & Co. Four hundred and ninety dollars.

Daniel F. Banks to Same. Sixty dollars.

George Rettberg to Kate Rieger. One hundred and fifty dollars.

Briggs & Briggs to William A. Heinsohn. Seventy-two dollars.

J. Willey Smith to J. C. Pierce et al. Two thousand dollars.

Andrew Jackson to A. Scheurer. One hundred and twenty-five dollars.

Daniel Cournier to Francis Wagner. Ninety dollars.

DEEDS.

April 11.

C. Booth et al. to S. G. Barnard. et al. $2,000.

Same to same. $2,000.

Sarah Branch, exrx., et al. to Francis A. Wood. $3,600.

N. P. Glazier to John Barbec. $400.

Daniel Draper and wife to Charles Draper. $1,500.

John Kelly and wife to Nera Wilson. $1,100.

Frederick Kinsman to John H. Cawin. $396.

Charles G. Pickering et al. to Geo. Rhoden. $400.

Henry Sanford and wife to Henry Sanford, Jr. $1,600.

Henry Sanford Jr. and wife to Polly Sanford. $1,625.

Van R. Sarromer to James Goss, exr. $582.

Esther M. Thompson and husband to Edward W. Clark. $800.

April 12.

Emily Erwin and husband to O. J. Campbell, trustee. $1.

R. D. Mix, admr. of Mehling, deceased, to George Hoefener. $625.

Charles Loehr and wife to J. E. Erwin. $1.

J. E. Jones and wife to Alva Jones. $2,800.

Martin Hipp and wife to Laura D. Shepherd. $10,000.

Robert Day to Delamer Rockafeller. $10,000.

Robert C. Corlett and wife to Portland Hyde. $1.

Same to same. $1.

William Brooker to Youngs T. Morman. $2,000.

Harry Soestos and wife to Chauncey Leutz. $1,600.

Henry Thomas to Wm. R. Orchard. $2,000.

Adam Schneeberger and wife to Goll. Schenrer. $2,000.

Arnold Tontein, by C. C. Lowe, Mas. Com., to Wilhelmina Selberg. $1,000.

Peter Raab to Peter Miller. $1,275.

April 14.

John Huntington to Adolph Geuder. $1,350.

L. B. Hemler and wife to Harriet D. Ingersoll. $3,500.

Harry Haines et al. to E. Holmes. $789.

Same to same. $2,000.

G. G. Hickox and wife to Katy Doubravo. $3,600.

Wm. McDermott and wife to Mrs. C. L. Holmes. $2,500.

Wm. W. Phillips and wife to G. B. Solders. $1,000.

George B. Solders and wife to Charlotte Phillips. $1,100.

W. H. H. Peck et al. to H. Janowitz. $480.

Austin R. Smith and wife to J. C. Lowman. $2,400.

J. W. Simpson and wife to C. M Knowles. $600.

Christian Teufel and wife to John D. Spatz. $3,000.

Aaron Walker to Marinda Walker. $1,560.

George Zaum to Henry Phipps. $875.

Levi F. Bauder to Emeline Ford. Aud. deed. $90.

Henry Brown and wife to F. C. Gallup. $1,200.

Frank C. Gallup to Sarah Brown. $1.

Elizabeth Dwyer and husband to G. J. Griffin. $600.

John E. Erwin to Wilhelmina Loehr. $1.

Wm. Ford and wife to M. P. Case. $1,000.

April 15.

Joseph Burk and wife to Eva E. Eckstien. $5.

Wm. Buecher and wife to I. Reele. $3,700.

John Brassell to Ann Stoneman. $10.

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N. Heisel and wife to Franz Hobart. $255.

T. A. Lowe and wife to W. C. Fair. $1,500.

A. W. Mayer to Josephine E. Denger. $1,200.

Patrick Macanolty to City of Cleveland. $30.

Charles W. Moses to Antonette B. Yates. $1,440.

Barbara Miller and husband to Moritz Zeittler. $425.

John Smith to B. B. Heazlit. $2,-360.

Mary A. Jugnith by Mas. Com. to Sarah F. Wade. $500.

April 16.

Carrie and George W. Eaton to Webb A. Strong. One thousand dollars.

George Hoefner and wife et al. to Catharine Hook. Six hundred and fifty dollars.

John L. Johnson to Casper Funk. One thousand three hundred dollars.

Nelson Moses to Charles W. Moses. Four hundred and eighty dollars.

Robert W. Peal and wife to Edmund Walton et al. One dollar.

Louisa S. Staats to Kate E. Cole.

Phillip Stepp and wife to John Huntington. Four thousand five hundred dollars.

Estelle Vaughn to Olive Amis. Twenty-five dollars.

Wm. Williams to Margaret Clark. Three thousand dollars.

P. W. Ward, admr., etc., to Patrick Fitzgerald. Six hundred dollars.

By Thomas Graves, Mas. Com., to Elizabeth Lenzer. Seven hundred dollars.

John M. Wilcox to Clifford C. Natt. One thousand four hundred dollars.

Clarissa A. Burwell to Elizabeth J. Sturm. One thousand five hundred dollars.

John Barth and wife to John Van Dreil. Four hundred dollars.

E. W. Clark and wife to Lewis Brooks and wife. Five thousand and twenty-five dollars.

April 17.

John Cooney and wife to Mary J. Cooney. $1.

Mary J. Cooney to Jane Cooney. $1.

Hubbard Cooke et al., trustees, to Elizabeth J. Leather. $450.

E. J. Estep and wife to Stevenson Burke. $1,000.

Lucien Gunn and wife to Margaret Rummage. $100.

James M. Hoyt and wife to John W. Taylor, exr. $1.

George Leick and wife to Angelika Van Loyen. $786.

Anna Lewis et al. to Grace Ward. $1.

Emma H. Anderson and husband to J. W. Simpson. $1,200.

COURT OF COMMON PLEAS.

Actions Commenced.

April 11.

14912. Sohn T. Sullivan vs Mary Lanigan et al. Money and sale of mortgaged premises. P. P.

April 12.

14913. J. B. Cowle et al. vs S. Griffin et al. Money only. Foster, Hinsdale & Carpenter.

14914. J. A. Risser vs H. W. Libbey. Appeal by deft. Judgment March 15.

14915. Louis Heiman vs the State of Ohio. Error to Police Court. A. Green; J. C. Hutchins.

14916. Wm. C. Schofield vs Edward Bunn. Money and to subject lands. Henderson & Kline.

14917. Wm. H. Compton vs Alva N. Bachelder. Money only. John W. Heisley.

14918. John Hancock Mutual Life Ins. Co. vs Mary J. Gardner et al. Foreclosure of mortgage and sale of lands. C. B. Bernard.

14919. Winifred Harding et al. vs Rockport & Dover Plank Road Co. Money only. Baldwin & Ford.

14920. J. Earnest et al. vs H. Kramer. Money only. Willey, Sherman & Hoyt.

14921. C. H. Williams et al. vs I. Hoffman et al. Money only. A. T. Brewer.

14922. Amasa Stone vs James Collister et al. Money, sale of mortgaged premises and relief. B. R. Beavis.

14923. Echo W. Heisley et al. vs Martin Morrison et al. Equitable relief. J. I. Nesbit.

April 14.

14924. Sherburne & Moonan, partners etc., vs S. Hogan. Appeal by deft. Judgment March 26. J. J. Carran; Mix, Noble & White.

14925. Oscar Krauschair vs Charles Beeker et al. Appeal by deft. Judgment March 15. H. W. Canfield; W. S. Kerruish.

April 15.

14926. Wm. Feran vs Henry M. Claflin et al. Money only. Geo. C. Dodge Jr. and J. M. Steward.

14927. John Wooldridge vs Mary Channing. Money only. A. Slutz.

14928. Wm. Murphy vs Bernard Rafferty et al. Money, injunction and equitable relief. Street & Bentley.

14929. John E. Asling vs H. W. Eighme et al. Appeal by deft. Judgment March 24. G. A. Hubbard.

14930. Bernard Rafferty vs Wm. Murphy. Appeal by deft. Judgment March 26. Street & Bentley.

14931. H. Wilkinson et al. vs James Hughes. Appeal by deft. Judgment March 17. J. A. Smith; Foran & Williams.

14932. Jacob Wolf vs C. C. Stevens et al. Money and to subject lands. S. A. Schwab.

April 16.

14933. Daughters of Israel, No. 1, vs Gottlieb Sheurmann et al. Money and to foreclose mortgage. Stone & Hessenmueller.

14934. German Mutual Protection Association vs Jacob Heene et al. Money and to subject lands. P. F. Young.

14935. George W. Gardner et al. vs Arthur Dunn et all. Money and to foreclose mortgage. Ranney & Ranneys.

April 17.

14936. J. A. Redington et al. vs John Outhwaite. Money only. Stone & Hessenmueller.

14937. Mary L. Miller vs Lurana E. Price et al. Foreclosure of mortgage and other relief. Pease & Baldwin.

14938. Peter J. Diemer vs Andrew Gerkshiemer et al. Money and to subject lands. Stone & Hessenmueller.

14939. K. A. Raeder vs Wilson Treat. Money only. George B. Solders.

April 18.

14940. Martin Ehrbar vs Caroline Dahler et al. Foreclosure of mortgage and equitable relief.

14941. Doningos M. Peneira vs George Buskirk et al. Money only. Neff & Neff.

Motions and Demurrers Filed.

April 11.

2493. Clark vs Warshing. Motion by deft. for additional bail for stay of execution. Notice of motion with acknowledgement of service and affidavits etc.

April 12.

2494. The Township of Brooklyn vs Duncan et al. Demurrer by deft. John T. Johnson to the petition.

2495. Same vs same. Demurrer by defendan Thomas James to the petition.

2496. Schneider, surviving partner, etc., vs Einer et al. Motion by plaintiff to require defendant S. H. Kirby to make his answer more definite and certain.

2497. Eucher et al. vs Hardy et al. Motion by defendants James H. and Mary A. Hardy to require plaintiffs to separately state and number causes of action or to elect upon which prayer of their petition they will proceed.

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THE Cuyahoga District Court adjourns to-day *sine die*.

WE expect to publish the assignment of cases for May Term early next week.

THE CALIFORNIA LEGAL RECORD has been merged in the *Pacific Coast Law Journal*, published by W. T. Baggett & Co., San Francisco, California.

A PORTION of the list of mortgages will be found on the last page in this issue, having been mislaid and not discovered until the paper was made up and ready for press.

WE omit in this issue our advertisement for the sale of this paper. It has brought no buyers. There seems to be no person in this city much inclined to legal journalism. In connection with legal job printing the business is a profitable one.

L. M. and E. C. SCHWAN, of this city, have opened a branch office in Elyria, Ohio, for the practice of law in that place. L. M. Schwan is a member of the firm of DeWolf & Schwan, and E. C. of the firm of Gilbert, Johnson & Schwan of this city.

WE have a number of important decisions made at the present term of the District Court in this county, which we shall publish. The number might have been much greater but for the plan of one of the courts deciding, as a rule, at the close of the arguments. In disparagement of that method of disposing of cases, it may be truly said that decisions thus made will more likely be appealed from than decisions made with more care and deliberation.

CUYAHOGA COMMON PLEAS.

MARCH TERM, 1879.

GEORGE E. CLARK VS. O. P. HICKS ET AL.

Homestead—Right of Selection by Judgment Debtor of Personal Property in Lieu of, etc.

WATSON, J.:

This was an action of replevin in the court below. From the bill of exceptions it appears that testimony was given in that court tending to show that the plaintiff was the head of a family, a resident of Ohio, and was not the owner of a homestead, nor was his wife the owner of a homestead, and that all the property of any and every kind and description which he possessed at the time of the levy mentioned in the petition was about $70 worth of personal property, besides the specific articles of personal property described in the petition, and there was testimony tending to show that said property was worth not to exceed $270, and none was given tending to show that it was worth as much as $400. There was also testimony tending to show that on the day said property was levied on by the defendants and before advertisement or removal of the same, suit was brought and process in this case was served on the defendant in replevin setting forth as one of the grounds of replevin that said property was exempt from execution or legal process, and there was testimony tending to show that said plaintiff at the time of the said levy had personal property other than that described in the petition of a value greater than $1,500, the whereabouts of which the plaintiff, at the time of said levy and at the trial, refused to disclose; and there was testimony tending to prove that there was a copartnership existing between the said George E. Clarke and Mary Clarke at the time of the said levy, and that the notes and chattels levied on were the property of said copartnership; and there was testimony tending to show that the plaintiff had suffered large losses to the amount of $10,000 within

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the said time. In that state of the facts the Court charged the jury, among other things, as follows: "It is denied by the defendant that the plaintiff at the time of the levy had no other property than this levied on, but it is said he had a large amount of other property to the amount of two or three thousand dollars, and has it yet secreted. It is for you to find out the truth of the matter. He might pay other debts with his property, but he could not put his property in some one else's hands to hold for him and then claim that this property levied on is exempt. But if you find that the plaintiff is the head of a family"—he gives here the test or rule to determine the question—"and not the owner of a homestead and has no other property but this, then it is exempt to him, unless it is partnership property, and the debt for which the officer levied was a partnership debt. Evidence has been offered tending to show that George E. Clarke and Mary Clarke were in partnership at the time and that this was partnership property. Now, if you find the fact to be so, then I charge you as a matter of law there can be no exemption against a partnership debt out of the partnership property, and George E. Clarke could not then select partnership property as exempt."

Now, we hold that in giving this test for the guidance of the jury in their deliberations there was error. It did not depend upon whether the party had other property. The question was whether he was the owner of a homestead and head of a family, and had put himself in a position to select this property as exempt, and had accordingly made the selection. The fact that he had other property did not cut him off from making a selection of this, for he could have selected this property or any other that he had in lieu of it. The question was not to be tested by the fact of the ownership of other property. This instruction is in the charge in chief, and is not of itself in a condition to be acted upon by this Court in reviewing the judgment; but we proceed further with the case, and we come to the special instructions that were requested. This is the second request: "The plaintiff requests the court to charge the jury that the exemption laws of Ohio are to be administered and upheld without reference to either the ignorance, negligence, mismanagement or improvidence of the debtor asking the exemption as a protection, and though the debtor's conduct in incurring the debts may be morally unjustifiable, nevertheless, the question in the administration of these laws is what the debtor has, not what he might have or ought to have or we might suspect him to have"—which the Court refused to charge and stated he had already charged the jury on that point, and charged that the jury might look into all the testimony for the purpose of determining the fact—whether the plaintiff had any other property, to which refusal to charge as requested and to the charge as given the plaintiff excepted.

Now the Court could not be asked to make double charges. We take it for granted that the statement of the judge that he had sufficiently charged upon that subject is literally true, and in so far as the main part of this request is concerned it does not interfere with the judgment as it was rendered, but when he adds that they might look into all the testimony for the purpose of determining the fact whether or not the plaintiff had other property, we think, that in that the Court gave a charge that ought not to have been given, but one which was well calculated, under the circumstances, to mislead the jury; for in the body of his charge he told them the question involved was whether the plaintiff below had other property, and that that affected the question of his claim to the exemption of the specific article he was then laying claim to. We think that should have been omitted. It was not necessary to the answer. He had answered in full the request, but there was then appended a remark which, taken in connection with the charge in chief, could not well help misleading the jury, and it may have resulted in a verdict that ought not to have been given. That, however, we cannot say, for we cannot judge of the facts. They are not before us. The case will be reversed and remanded.

Gollier & Brand and W. S. Kerruish, for plaintiff.

J. W. Heisley and W. C. Rogers, for defendant.

CALVIN W. RANNEY VS. J. H. HARDY ET AL

Tibbals, J.:

This case comes into this court on appeal. The plaintiff below filed his petition for the foreclosure of a mortgage on certain premises described in the petition, dated May 9, 1872. The mortgage covers three lots in different subdivisions in this city and they are known and have been treated in the case as lots 17, 28 and 67 in these different subdivisions. A large number of persons are made parties defendant who claim liens upon the premises. They file their several answers, making issues, and by far the greater portion of them have really no interest in the case, first, because it is conceded that in no event can their claims be reached, the property being inadequate for that purpose, and there is no contest over a large portion of them. The points which have been urged and which are in dispute are few. Briefly stated the facts are these: The lands were owned by J. H. Hardy, and in point of priority of time, it is conceded that on the 23d of April, 1872, Hardy, by contract, sold lot 17 to one McKennon, who, by virtue of the contract, entered into possession of the lot and premises, and who in time transferred his contract to Scanlon, and Scanlon in turn to Caldwell, who are now both answering defendants. The possession has been continued in those three parties ever since the making of the contract and taking possession under it. Payments, however, were made on it to the extent of twenty dollars prior to the 9th day of May, 1872, at which time Hardy executed a mortgage to Ranney upon the three lots, 17, 28 and 67, thus covering the lot that had been sold to McKennon the month before. In August, 1873, a mortgage on lot 28 was executed to a Mrs. Yates, also including other lots not in controversy in this proceeding; so that the question arises mainly upon the priority of liens. Ranney is now deceased. On the 4th of May, 1874, by a written release upon the contract Ranney released lot 67 from the mortgage. It is claimed by Hardy and others having an interest in that direction that this was a mistake; that it was intended to release lot 17. That question of fact has been submitted to the court upon the testimony, and it is sufficient for us to say that while the testimony is somewhat conflicting, it appears that Hardy and Ranney both went out to examine these lots for some purpose, and after they returned to their office lot 67 was in fact released, and we have been compelled to come to the conclusion in view of all the facts that the proof is not sufficient to warrant us in holding, as against this written release of lot 67, that it was intended to release lot 17. We, therefore, hold against the parties desiring the correction of the alleged mistake in that regard.

The next question is as to the priority of the contract held by Scanlon,

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or now by Caldwell, as against the Ranney mortgage. Upon that we are not fully free from doubt. It is a very close question. The proof shows that this contract was executed on the 23d of April, 1872, and that McKennon was placed in possession of this lot 17 by virtue of that contract—had open, notorious, exclusive possession; that is, constructive notice to the world. At this time there was no lien upon the premises. On the 9th of the following month, as shown by the testimony, and not controverted, Ranney had actual knowledge that McKennon was in possession of this lot, having gone with Hardy to examine the property, so that he took his mortgage with actual knowledge of that fact on the 9th of May. He placed the mortgage upon record, which, of course, as a general proposition, was constructive notice to everybody, and as a general proposition it is undoubtedly true that his claim upon the unpaid purchase money would be a prior claim. We have been cited to the case of Jefferson vs Dallas, 20th Ohio State, 68, by both sides; and it is not very much amiss to say that the case comes very nearly sustaining both sides. That is one reason why we are in trouble; but the reasoning of the Court in that case has enabled us to reach a conclusion. In that case a young man, who was the owner of the premises, conveyed them to his mother by contract; he had paid a part of the purchase money, and thereafter was sued by a young lady for a breach of promise of marriage. While that suit was pending the mother paid the residue of the purchase price, and, as the Court says, with full knowledge of the pending of the suit against her son, which subsequently went to judgment against the young man, and he executed his deed to her. The young lady sought to reach $850 unpaid purchase money in her proceeding, while the mother undertook to quiet her title by claiming that she had the land by contract prior to the commencement of the suit and prior to the creating of any lien upon the premises by reason of the judgment. The Court in that case held that to the extent of the unpaid purchase money it should be applied in payment of this judgment lien, and in doing so they use this language: "The legal title to the premises remained in the vendor, and the most of the purchase money remained unpaid until March 11, '64, when, with full knowledge of the pending of the suit against her vendor, the defendant in error paid the residue of the purchase money amounting to eight hundred and fifty dollars and received a conveyance of the premises. Now it is claimed on behalf of the plaintiff in error, that to the extent of the purchase money remaining unpaid on the first day of the term, her judgment became a valid lien upon the lands in question; and the defendant in error has no equitable right to the discharge of such lien, and the quieting of her title, without accounting to the judgment creditor for this residue of the purchase money," and the court sustained that view of it.

It is claimed on one side that case is an authority even to hold that this mortgage having been placed on record on the 9th of May, 1872, and before the payment of a large amount of the purchase price by Scanlon or Caldwell, that it ought to that extent reach it; and as a general rule that would undoubtedly be true; but the courts certainly have held that this matter of determining the priority of equities is a matter depending upon the facts in each case. It does not follow any particular rule. While the general rule is, that the equities being equal, that which is prior in point of time shall be maintained, yet that a junior equity may be superior in point of merit; and with that well settled principle we have undertaken to dispose of this question. Now, it is fair to presume that McKennon before purchasing these premises investigated the title, and if so, he certainly found it clear as to this lot 17. There was no encumbrance upon it. He then would take his contract and the question then arises, whether he would be authorized in view of that fact to continue his payments from time to time in accordance with the terms of the contract, having taken open and notorious possession of the premises, so that the world is bound to know that he owned it or had at least a claim to it, so as to put everybody upon inquiry? Or should he, before making each and every payment, small as they were, be required to go to the Recorder's office to examine and ascertain whether a mortgage had been put upon the premises? Had he not a right to presume that he would be fairly dealt by? He had bought the premises, held the equitable estate and had the right to make payments. If that were all there was in the case it would still be doubtful; but in addition to that follows this other question which we hold is established in the case, and that is, that Ranney, before taking his mortgage, had actual notice of this possession by McKennon. Now, what was his duty in the premises? Ougut he, with that fact before him, to be permitted to take a mortgage from some one else than the one in possession of the premises, simply because he had the legal title, place that mortgage upon record, and then, without any notice whatever by him to the contractee in possession, claim that that party should be held responsible for the payment a second time of this purchase money, paid by him in good faith without any knowledge of the existence of that mortgage?

Now, in determining the merit of these two equities, and solely upon that ground, we are constrained to hold in favor of the party holding the premises by contract; that as between these parties his equity is superior, and has therefore a prior claim.

Another claim is that Mrs. Yates, who has a mortgage only upon lot 28, although not taken until August, '73, ought to be permitted to push Ranney over upon some other lots. We find no warrant for this at all, because her mortgage is largely behind all of them. Ranney's mortgage upon lot 28 is prior more than a year in point of date. We therefore hold against that claim. A decree may be taken according to this statement of the decision.

L. H. WARE, for plaintiff.

J. H. GRANNIS, FORAN & HOSSACK, BISHOP & ADAMS, and MIX, NOBLE & WHITE, for defendants.

SUPREME COURT OF OHIO.

DECEMBER TERM, 1878.

Hon. W. J. Gilmore, Chief Justice. Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Hon. William White, Judges.

TUESDAY, April 22, 1870

General Docket.

No. 466. A. A. Jewett vs The Valley Ry. Co. Error to the Court of Common Pleas of Cuyahoga county. Reserved in the District Court.

OKEY, J.:

1. When ten per cent. of the capital stock of a railroad company has been subscribed, and the corporation has been fully organized under the general acts relating to railroad companies, assessments on subscriptions to the capital stock may be made and enforced, although the whole amount of such stock, mentioned in the certificate of incorporation, may not have been subscribed.

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2. If a statute in force at the time a subscription to the capital stock of a railroad company is made, authorizes an extension of the line of the road, the subsequent exercise of such power by the company will not affect the subscription.

3. Where a railroad company changes a terminus of its road from one county into an adjoining county, under the act of 1872 (69 O. L., 163) the mere fact that the route to the new terminus, selected by the company, passes through a portion of a third county, will not invalidate existing subscriptions to the capital stock.

4. Where one having possession of an agreement to take shares in the capital stock of a corporation, after subscribing in good faith for shares of such stock, induces others to subscribe on the faith of his subscription, and subsequently, without the knowledge of the other subcribers, alters the paper by reducing the number of his shares, and delivers the instrument in that condition to the secretary, who is also a director of the company, this will not affect the liability of one thus induced to subscribe, although, at the time of such delivery, the person making the alteration explains the same to the secretary, who makes no objection thereto.

Judgment affirmed.

The State ex rel. the Attorney General vs the Columbus Gas Light and Coke Co.

Information in *quo warranto*.

WHITE, J. Held:

1. Where a corporation acting under a special charter is invested with franchises to be exercised to subserve the public interest, the terms upon which the corporation may be required to discharge its duties to the public are subject to Legislative supervision and control, unless it clearly appears from the terms of its charter, that it was the intention to exempt it from such interference.

2. Under a special charter granted prior to the adoption of the present Constitution, the defendant was empowered to "manufacture and sell gas" for the purpose of lighting the city of Columbus. The grant was exclusive for the term of twenty years. The charter contained no provision as to the price to be charged for gas, nor on the subject of meters—Held: That the defendant was subject to the provisions of the act of March 9, 1867 (S. & S., 160), restricting the price to be charged for the use of meters.

Judgment for the State on the third plea.

No. 557. George B. Kennedy vs The State of Ohio. Error to the Court of Common Pleas of Trumbull county. Judgment reversed on authority of Kennedy vs The State. 34 Ohio St., 310.

Motion Docket.

April 15.

No. 64. Albert Dickey et al. vs the State of Ohio. Motion to take cause No. 608 on the General Docket out of its order for hearing. Motion granted.

No. 65. John Ells vs the State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Columbiana county. Motion overruled.

No. 66. The State of Ohio ex rel. the Attorney General vs Henry O. Bonnell et al. Motion to strike from the files the petition in quo warranto in cause No. 585 on General Docket. Motion withdrawn.

No. 67. Edward Dille vs the State of Ohio. Motion to take cause No. 610 on the General Docket out of its order for hearing. Motion granted.

No. 68. The State of Ohio vs Harriet Stermer. Motion for leave to file a bill of exceptions to the Court of Common Pleas of Fairfield county. Motion granted.

No. 69. Dill, Chapman et al. vs Samuel Sollars. Motion for leave to docket a reserved case. Motion granted.

No. 70. Louis H. Pike and Kate D. Pike vs Robert Cummings. Motion for diminution of record and for new manuscript in cause No. 137 on the General Docket. Motion granted.

No. 71. State of Ohio ex rel. E. Howard & Co. vs Corrington S. Brady, auditor, etc., et al. Motion to take cause No. 599 on the General Docket out of its order. Motion overruled.

No. 72. Ohio ex rel. George Laskey and Stephen Laskey vs the Board of Education of School District No. 1, Perrysburg township, Wood county, Ohio. Motion to take cause No. 303 on the General Docket out of its order. Motion granted.

No. 73. Andrew McLaughlin and Dennis Parsons vs Belle Stults. Motion to take cause No. 330 on the General Docket out of its order. Motion overruled.

No. 74. The State of Ohio ex rel. John R. Summerton vs Franklin F. Mark et al. Motion for leave to file a petition in mandamus. Motion overruled on the ground that the application should be made to the District Court.

No. 75. John Tod et al., executors etc., vs Jeremiah Stambaugh et al. Motion to take cause No. 451 on the General Docket out of its order. Motion overruled.

No. 76. Harding Johnson vs The College Hill Railroad Co. Motion for judgment on the record in cause No. 590 on the General Docket. Motion overruled.

No. 461. O. A. Brooks et al. vs the Cleveland. Error to the District Court of Cuyahoga county. Judgment reversed and injunction made perpetual without prejudice to the right of the city to make a new assessment.

No. 462. Stephen V. Harkness et al. vs the City of Cleveland. Error to the District Court of Cuyahoga county. Judgment reversed and injunction made perpetual, without prejudice to the right of the city to make a new assessment.

No. 463. William Williams vs the City of Cleveland. Error to the District Court of Cuyahoga county. Judgment reversed and the injunction made perpetual without prejudice to the right of the city to make a new assessment.

No. 464. William Chisholm vs the City of Cleveland. Error to the District Court of Cuyahoga county. Judgment reversed and the injunction made perpetual withot prejudice to the right of the city to make a new assessment.

April 22.

No. 77. William Grey vs the State of Ohio. Motion for leave to file a petition in error to the District Court of Ashtabula county. Motion granted. Execution of sentence suspended; recognizances fixed at six hundred dollars.

No. 78. The Commissioners of Athens county, Ohio, vs The Baltimore & Short Line Railroad Co. Motion to take cause No. 356 on the General Docket out of its order. Motion overruled.

No. 79. Howes, Babcock & Co. vs Johnson & Beck et al. Motion to take cause No. 624 on the General Docket out of its order and to stay execution in the Court of Common Pleas. Motion to take out of order overruled. The motion to stay execution of so much of the order of distribution, as ordered the Receiver to pay out of the third installment due November 30, 1880, the sum of $1,130.63, to William L. Ralston, is granted, on the plaintiff executing an undertaking to said Ralston in two hundred dollars,

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with security to the acceptance of the Clerk of the District Court conditioned according to law.

No. 80. Milo Sharpe and Joshua M. Nettleton vs The Lake Shore & Michigan Southern Railway Co. Motion for leave to file a petition in error to the Common Pleas of Ashtabula county.

Motion overruled on the ground that the remedy must be sought in the District Court.

SUPREME COURT OF PENNSYLVANIA.

WAINWRIGHT'S APPEAL.

APPEAL FROM THE DECREE OF THE ORPHANS' COURT OF PHILADELPHIA COUNTY.

Impeachment of Will, etc.

Threats, violence, or any undue influence, long past, and not shown to be in any way connected with the testamentary act, are not evidence sufficient to impeach a will.

SHARSWOOD, J.:

It is strongly contended that there were disputed facts disclosed by the evidence from which the jury might have found that an undue influence was exerted over the mind of the testator. It is clearly settled that the constraint which will avoid a will must be one operating in the act of making the will. Threats, violence, or any undue influence, long past and not shown in any way to be connected with the testamentary act, are not evidence to impeach a will. McMahon vs. Ryan, 8 Harris, 329; Eckert vs. Flowry, 7 Wright, 46; Thompson vs. Kyser, 15 P. F. Smith, 368. In an issue *devisavit vel non* on the allegation of undue influence by the mother of an illegitimate child, the legatee in the will, the unlawful cohabitation of the mother with the testator, is not of itself sufficient evidence from which a jury could infer undue influence. Rudy vs. Ulrick, 19 P. F. Smith, 177. It is true, that if there are other facts, unlawful cohabitation may be a circumstance of weight. Dean vs. Rigby, 5 Wright, 317; Main vs. Ryder, 3 Norris, 217. In the case before us there was not a scintilla of evidence of the existence of any influence over the mind of the testator in the testamentary act. His capacity was perfect. The act was free and voluntary—a reputable member of the bar was called in, everybody was excluded from the room, when his instructions were given, and the will, when afterwards drawn in form, was executed in the presence of the two witnesses who attested it. There was never a case in which a will was executed less liable to exception on this ground. It is true that the testator and residuary legatee had never been lawfully married. But for a year at least he had cohabitated with her as his lawful wife, acknowledging her to be his wife. He was not on good terms with his brothers and sisters, the present contestants, and on many occasions had expressed his intention of providing for the residuary legatee. It is contended, however, that she had falsely represented to the testator that he had seduced her. It is more than doubtful whether the letter of May 2, 1874, so much relied on by the appellants, was not the testator's own work, intended to justify him in the eyes of his friends in living with the woman, and it is difficult to believe that he was deceived by it. How can it, by itself, justify the conclusion of undue influence in the testamentary act? Say that it was intended by her to induce him to remove her from the condition of a common prostitute, and take her under his protection. Why might not her care and attention, her faithful performance of all the duties of a wife, though she did not have the lawful relations, making his home peaceful and comfortable, produce in him a natural and legitimate affection for her sufficient to account for the not unreasonable provision made for her in his will? It is clear to us that this circumstance alone is not sufficient to justify a jury in finding a verdict against the will. If, upon the whole evidence, such a verdict ought not to be allowed to stand, an issue ought not to be avoided. Upon a careful examination of all the testimony this is our conclusion.

Decree affirmed and appeal dismissed at the cost of the appellants.

HOLMES COUNTY COMMON PLEAS.

JOHN HORN VS. BOWEN BROTHERS.

Action to Quiet Title.

The plaintiff claims under a lease dated in 1872, of 37½ acres of valuable coal land. The defendant by cross-petition avers that a lease was executed to Vaunest & Byers in 1865, through whom defendant claims title. Plaintiff replied that the lease of 1865 contained stipulations for payment of a yearly amount of $160 until mining operations were commenced—or on failure that the lease becomes void.

During the trial the defendant offered in evidence a record of the Probate Court showing a sale to defendant of the interest of F. Shattuck in the lease under which defendant claims, sold as personalty, to which plaintiff objected, on the ground that the instrument under which defendant claims is not a chattel, but realty—not being a lease for a term certain, an but absolute sale of the mineral.

Plaintiff cited sec. 20 S. C., 505, 1 S. C., 1142; 11 O., 355, 357, 8; 13 O., 334 and 362; Bing. on R. Property, 295. The Court overruled said objection and admitted said record, holding said instrument to be a chattel, and capable of sale by administrator, to which plaintiff excepted. The Court cited 7 O., 119.

STILWELL & MAXWELL, for plaintiff.

U. S. CIRCUIT COURT N. D. OF OHIO.

April 19.

Edward W. Laird of Cleveland admitted to practice in United States Courts.

3854. Jennie W. Hane vs Travelers' Ins. Co. Leave to answer by June 15.

3867. Anna Oviatt vs Phœnix Mutual Life Insurance Co. Petition for money only. John Coon and F. J. Wing.

April 22.

3868. Martin L. Hull et al. vs James S. Kellogg. Subpœna.

3425. Franklin Brush Co. vs. J. M. McKinstry et al. Motion to set aside continuance.

April 25.

3860. The Michigan Mutual Life Insurance Co. vs. Seneca Mower et al. Demurrer to petition of complainant by N. J. Kelly. Foster, Hinsdale & Carpenter.

U S. DISTRICT COURT N. D. OF OHIO.

April 18.

1731. W. H. Radcliff et al. vs the schooner A. H. Moss. Petition of Solomon Austriun for remnants and surplus proceeds.

April 19.

1583. David L. Wadsworth, assignee, vs John Clark et al. Answer of Corr, Warner & Co.

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April 21.

1567. Abner McKinley, assignee, vs James A. Saxton & Co. et al. Answer and cross-petition of James A. Saxton. Lynch & Day and W. M. McKinley Jr.

April 22.

1613. John E. McLain, assignee, Ed Bayliss, exr., et al. Answer of John Hoskin.

1613. Same vs same. Answer of Edwin Bayliss and Cordelia E. Bayliss.

1613. Same vs same. Joint answer of John E. Coleman and Joseph Coleman.

Bankruptcy.

April 19.

2036. In re A. W. Beman. Petition for discharge. Hearing May 7.

1940. In re John A. Kolp. Discharged.

1621. In re James Ward. Same.

April 21.

1836. In re John A. Ellsler. Discharged.

2013. In re James E. Irwin. Petition for discharge. Hearing May 7.

1637. In re Charles E. Church. Discharged.

1916. In re Delanzor Dimon. Same.

2046. In re David M. Sommerville. Petition for discharge. Hearing May 14.

April 22.

1875. In re Fred Schmoldt Jr. Petition for discharge. Hearing May 14th.

1618. In re Joseph W. Harrington. Discharged.

2039. In re William Pope and W. H. Haemner. Petition for discharge.

2039. Same. Same. Same.

2061. In re A. I. Truesdell. Same.

1576. In re Albert L. Bowman, bankrupt. Specifications in opposition to discharge of, etc.

April 23.

1757. In re William Robertson. Discharged.

1979. In re Seymour S. Fowler. Petition for discharge. Hearing May 14th.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending April 25, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

April 19.

James Wilmot et al. to Samuel Dean. $650.

Henry Coyar to L. W. Clark. $150.

C. C. Nott and wife to The Society for Savings. $500.

Henry Houtz and wife to A. K. Spencer. $2,000.

Eunice E. Weeks and husband to Martha H. Willis. $700.

John Derrer to Philip Huy and wife. $1,170.

Wm. J. Townsend et al. to Wm. H. Gaylord. $2,500.

E. H. Thies and wife to Colgate Hoyt, trustee. $1,000.

Fred Harder et al. to Jacob Stoneman. $300.

Dennis Flynn and wife to The Citizens' Savings and Loan Association. $300.

April 21.

Rachel Le Pelly to Anna D. Parmely. $800.

D. C. Lindsley and wife to Horatio Lindsley. $1,100.

David F. Lewis and wife to Moritz Reinhard. $800.

John Hahn to Sarah E. Haines. $1,000.

Michael Prechtel to The New York Bab't. Union for Ministerial Education. $1,000.

Thorp Holmes to Colgate Hoyt, trustee. $800.

Adam Poe and wife to Joseph L. Cooper. $500.

Masonic Hall Ass'n. to The People's Savings and Loan Association. $500.

April 22.

James Flynn to James Foley. $50.

L. W. Latum to Edmund Walton et al. $6,179.22.

Harriet Lord and husband to M. S. Hogan. $115.

Daniel Wagner and wife to George Halter. $100.

Wm. Ryan and wife to S. W. Porter. $200.

Henry L. Talbot and wife to The Citizens' Savings and Loan Ass'n. $2,000.

Catharine Watson to Daniel Whelan. $500.

April 23.

William Coughlin and wife to M. S. Hogan. $400.

Carl Ferdinand Schendel to Frederick Seelbach. $1,500.

Harriet P. Gogen et al. to Henrietta Gallup. $12,000.

Frederick Waschlewsky to Prokap Kadlik. $250.

Theresa Roquett and husband to Elizabeth Rains. $650.

Henry Gallowitz and wife to Ernst C. Schwan. 120.

John Tomes and wife to The Society for Savings. $1,500.

William Eggers and wife to Alva Bradley. $1,500.

John M. Zoller and wife to Moritz Rheinhard. $3,800.

John Wright to James Lee. $300.

James Kemp to William Andrews. $618.

Sophia Sturm to The People's Savings and Loan Ass'n. $700.

Fred Young and wife to same. $450.

April 25.

Joseph Beres and wife to Conrad Westweller. Two hundred dollars.

Pitkin S. Bull and wife to Dudley Pettibone. One hundred and thirty-one dollars.

H. A. Heimsath and wife to Charles Heimsath. One thousand dollars.

M. S. Wright to The Society for Savings. Five hundred and fifty dollars.

Huldah H. Collins and wife to Scott G. Williams. Six hundred and sixty-six dollars.

H. M. Brooks and wife et al. to Thomas Hobart. Four thousand dollars.

CHATTEL MORTGAGES.

April 19.

S. H. Bates to B. Bates. $144.

S. C. Walcott to D. E. Strong. $2,500.

J. D. Elworthy to E. L. Elworthy. $540.

April 21.

Mary Dantze to Mary Loek. $500.

Peter Lucas to Nicholas Brill. $200.

Edward R. Taylor and wife to F. M. Swift. $1,373.

Oscar Lewis to The J. M. Brunswick & Balke Co. $400.

April 22.

M. L. and D. E. Hall to William K. Corlett. $250.

H. N. Corlett to same. $7,500.

George Stahl to G. W. Burman. $50.

April 23.

The Bristol & South Wales Railway Wagon Co. to The Cleveland, Tuscarawas Valley & Wheeling Ry. Co. $65,268.

F. H. Rippenburg to Jacob Smith. $150.

J. M. Gunn to F. T. Beckwith. $35.

Cunningham & Zorry to George Dunn. $50.

April 25.

Rodney E. Dougherty to John W. Fawcett. Five hundred dollars.

D. J. King to E. Q. Potter. Thirty dollars.

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Harry House et al. to George Ball. Thirty-three dollars.

G. F. Beebe to George Hall. One hundred and thirty dollars.

Andrew Bishop to George Hall. Three hundred and twenty-five dollars.

DEEDS.

April 18.

George Herberth and wife to Chas. Herberth. $100.

Charles Herberth to Mary Herberth. $100.

Mary A. Munson to Thomas A. Goulder and wife. $360.

J. G. McFate and wife to Persis S. Williams. $4,000.

Louis F. Schwab and wife to Francis Ames. $200.

John J. Wall and wife to W. I. Hudson. $4,500.

T. H. and R. C. White to E. A. Wilson. $720.

William H. Brew by Mas. Com. to M. C. Younglove. $3,600.

Israel S. Converse and wife to N. O. Stone. $16,000.

Michael Deiter and wife to Daniel Wagner. $820.

Osbourne Gray et al. to Addie T. Brown. $1.

Henry R. Hatch to Arthur E. Hatch. $1.

April 19.

Elizabeth Barkwell to Hubbard Cooke, trustee. $1.

Charles Curtiss and wife to Henry Coyer. $200.

W. S. Chamberlain and wife to V. A. Wobaril. $800.

Luther A. Cobb and wife to Lucy A. Miner. $85.

Louisa Gobel to Magdaline Schmidt.

Hubbard Cooke to Frank Kuchar. $60.

W. H. Farthman and wife to Maria E. Laugenheder. $420.

Catharine and Horace Fenton to L. C. Fenton. $8,000.

Caroline Green to James B. Green. $8,000.

James B. Green to Caroline Green. $15,000.

Albert M. Harman and wife to Jacob Alten. $2,500.

Julia M. Humoford and husband to S. H. Bishop. $425.

Jacob Stoneman and wife to Frederick Harden and wife. $825.

J. W. Sykora and wife to H. Schmidt et al. $1,900.

Seth Williams et al to R. G. Gardner. $320.

April 21.

Bridget Callahan to Patrick Farrell. $750.

John Cormick and wife to Patrick Cormick. $5.

Wm. Bucher and wife to Samuel H. Cowell. $1.

Mary E. Besker and husband to Alice Horning. $650.

J. F. Brown et al. to T. H. L. Gray. $1.

Theodore Harris, assignee of Samuel Barnett, to Adolph Mayer. $400.

Henry and Sarah E. Harris tc John Hahn. $1,500.

George A. Galloway to Sarah E. Harris. $1.

Erastus F. Gaylord to Thorp Holmes. $400.

Theodore Stafford and wife to Lewis H. Gilmore. $3,000.

Lewis H. Gilmore to Clarinda H. Stafford. $8,000.

Angeline A. Coller to A. H. Keety. $130.

Jennie E Edwards, extx., etc., to Ellen E. Hillyer. $134.

German Maxtel to Wm. Maxtel. $600.

J. H. Holmes by H. W. Bell, Mas. Com. to J. J. Wightman. $4,000.

Akin C. Miller and wife to James B. Taylor. $1,800.

H. Haines and wife to H. H. Kerr. $2,500.

C. S. Russell and wife to Laura E. Goodnit. $600.

J. H. Holmes to J. J. Wightman.

David F. Lewis and wife to Mary Woodbridge et al. $2,750.

William Warr to Henry Eichem. $650.

J. Waldenmier and wife to J. D. Leip, trustee. $200.

J. A. Merriam to Edward Merriam. $500.

April 22.

Levi Bauder, County Auditor, to James H. Cady, Auditor's deed. $61.39.

Ernest Kretzel and wife to Johanna Boldt et al. $400.

Wendelin Kolbe and wife to Kasper Kraefewrki. $375.

Patrick Madden to Bridget Abrams. $350.

J. V. Mathivet to Mary H. White. $2,500.

Louis Schafer, by Felix Nicola, Mas. Com., to Moses Holle. $1,334.

Reuben Yenkel and wife to Madison Avenue Church of U. Ev. Ass'n. $600.

John W. Walkley and wife to same. $1,000.

W. F. Walworth and wife to Cornelius Loomey. $350.

Edward Walton and wife to L. W. Tatum. $1.

Charles F. Uhl and wife to Mary A. White. $100.

Mathias Novak and wife to Joseph Novak. $600.

Patrick McNamara and wife to M. Coughlin. $1.

April 23.

William Andrews and wife to Jane Kemp. One thousand two hundred and fifty dollars.

Jacob Allen to John J. Shepherd. Two thousand five hundred dollars.

Joseph Bellen and wife to William Coughlin and wife. Six hundred and fifty dollars.

John Bauer and wife to Charles Gumlich. One thousand dollars.

James Corners and wife to Bowles A. Brainard. Three hundred and twenty-five dollars.

Ferdinand Eggers and wife to William Eggers. Five thousand five hundred dollars.

A. G. Horbaugh and wife to Martha E. Sage. Three thousand five hundred dollars.

Prokap Kadlik ro Fred Waschlevsky. Seven hundred dollars.

James Lee and wife to John Wright. One thousand dollars.

Ann Parish and husband to Frederick Young. Eight hundred and thirty-six dollars.

Fred Seelbach and wife to Carl F. Schendel. One thousand five hundred dollars.

April 24.

Elijah Mathew and wife to J. P. Mathews et al. Five hundred dollars.

David Waldemaire and wife to George Kimmel. Three hundred dollars.

Austin C. Dunham et al., exrs. etc. to Jacob Brodt. Five hundred and forty dollars.

Cornelius Spelman and wife to James Fitzgerald. One thousand dollars.

Charles F. Spencer and wife to Eltzabeth Compton. One dollar.

Osborne Gray et al. to Anna M. Curtiss. One dollar.

George W. Calkins to John G. Cornell. Eight hundred and fifty dollars.

Daniel Wilbemaier and wife to Anna M. Rapp. One thousand two hundred dollars.

W. S. Chamberlain and wife to Ferdinand Strauss et al. Eight hundred dollars.

George W. Calkins to Chancey D. Stedwell. Eight hundred and fifty dollars.

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COURT OF COMMON PLEAS.

Actions Commenced.

April 18.

14942. James Crawford vs The Herald Publishing Co. Money only. Jackson & Pudney.

April 19.

14943. Henry Wick et al. vs C. L. Russell et al. Money only. Arnold Green.

14944. Winonah S. Hecker vs Henry C. McDowell.

14945. Henry Wick et al. vs William Kahn et al. To foreclose mortgage and for equitable relief. Arnold Green.

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14952. Anne Walworth vs Michael Becker, exr. etc. Money only. T. E. Burton and Henderson & Kline.

14953. Francis Bailey vs Sarah N. Fletcher. Money only. Gilbert, Johnson & Schwan.

14954. William Norton vs John G. Whigan. Money only. Lewis & Castle.

14955. Lehigh Valley Coal Co. vs J. V. O. Yates. Money only. Ingersoll & Williamson.

14956. Cleveland Malleable Iron Co. vs Cleveland Hazard Hame Co. Money only. J. H. Webster.

14957. Anna Smith vs George Buskirk, Constable. Appeal by deft. Judgment March 25. W. H. Canfield.

14958. Hiram H. Little vs. John Geisendorfer et al. Money and to subject lands. Foster, Hinsdale & Carpenter; Willson & Sykora, W. J. Boardman, Thomas Graves, W. F. Hinman, Charles D. Everett.

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14960. Charles Heller vs Jacob Kahn et al. Appeal by defendant. Judgment March 31.

14961. John Gughans vs The Baldwin University. Money only. Neff & Neff.

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April 16.

2499. Ruescher vs Ruescher et al. Demurrer by defts. to the petition.

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2504. Free vs Murphy et al. Same.

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2506. Goodman, admr. etc. vs Gregerson. Motion by deft. Christian Gregerson to require plff. to separately state and number causes of action.

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2508. Raynolds vs Stien. Demurrer to the petition.

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2510. Dangleheisen vs Alexander, admr. Motion by plff. to sustain her exception to referee's report.

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Same to same. One hundred and twenty-five dollars.

J. P. Mathews and wife to same One hundred and twenty-five dollars.

George M. Prestage and wife to same. One hundred and twenty-five dollars.

Jacob Brodt and wife to Loren Prentiss. Four hundred and fifty-nine dollars and forty cents.

John G. Cornell and wife to G. W. Calkins. Three hundred dollars.

Chauncey J. Stedwell and wife to same. Six hundred dollars.

Wm. A. Hinsohn and wife to Chas. Lasch. Two thousand three hundred and fifty dollars.

Anne Maria Papp and husband to Magdaline Baehr. Eight hundred dollars.

CHATTEL MORTGAGES.

April 24.

George E. Tyrrill to Elizabeth H. Cope. $150.

L. C. Beardsley to Rubber Paint Co. $600.

R. B. Whitmore to William Whitmore. $462.

R. A. Gillette to John O. Davidson. $722.

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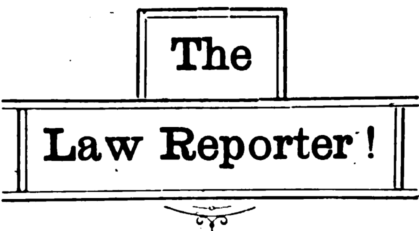

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Book Notice.

Bless Upon The Law of Pleading Under the Code of Civil Procedure.

Judge Philemon Bless (formerly of Northern Ohio) has given us a treatise upon pleading as modified by a code, that expressly commands the attention of the profession in Ohio. They have felt the lack of a book in precise pleading. This book seems to meet the case on the judgment of high authorities. Judge Bless seems to have felt the importance of the question how far the old rules of pleading, etc., were in force as rules of substantive law under the new practice, and the answers he has given may be regarded as a contribution of permanent value to our American law.

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Since the printing of the assignment case 10,210 has been substituted for 10,212, assigned for Tuesday, May 13. Attorneys interested will take notice.

SUGGESTIONS TO YOUNG ADVOCATES.—If the law is in your favor, you must contend for the sanctity of law. You may state that the only difference between a civilized and a savage state is, that one has laws and the other has none. But we may as well be without laws, if they are not to be observed. But if the law is against you, then say that law is mere convention—that what is law in one state is not law in another—and what is law to-day may not be law to-morrow; and hence we should always be guided by principles of equity, which being natural and universal, must be superior to law.—*Aristotle.*

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

IRAL A. WEBSTER, ADMINISTRATOR, AND EDWARD H. VAN HUSEN VS. CHARLES J. BALLARD ET AL.

Administrator—Application by to sell Real Estate to Pay Debts—Proper Parties in Such Proceeding—Whether Appealable, etc.

ROUSE, J.:

This case comes into this court by appeal. The trial has occupied a great length of time. It has been closely contested as to the facts and the law, very ably argued by counsel, numerous authorities referred to, and all the light apparently thrown upon the subject that can be, and the matter is before us now for final decision.

The petition is filed by Iral A. Webster as administrator of the estate of David Morrison, deceased; and Edward H. Van Husen is joined with him in the petition. The petition sets forth in substance that Webster is the administrator of David Morrison, deceased; that the personal estate which has come to his hands as administrator is not sufficient to pay the debts of the deceased, the charges of administration and the allowance for the support of the widow and children for a period of twelve months; and therefore he asks authority from the Court of Common Pleas to make sale of real estate.

Now, when an administrator finds that the personal estate in his hands is not sufficient to pay the debts, charges of administration and the allowance to the widow and children, what is he to do? The whole thing is provided for by statute. Before going into this case to see what has here been done in fact, I propose to refer for a moment to the statute upon the subject to see what is the duty of the administrator in such a case, who should be made parties, what the court is to pass upon when the proper parties are before them, and will then take up the petition and the proceedings and see what in fact has been done.

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Section 117 of the statute governing executors and administrators provides as follows: "As soon as the administrator shall ascertain that the personal estate in his hands will be insufficient to pay all the debts of the deceased, with the allowance to the widow and children, for their support twelve months, and the charges of administering the estate, he shall apply to the Court of Common Pleas for authority to sell the real estate of the deceased."

"In order to obtain such authority, the administrator shall file his petition either in the Court of Common Pleas of the county in which the real estate of the deceased or any part thereof is situate, or in the court which issued his letters of administration."

"The real estate liable to be sold as aforesaid shall include all that the deceased may have conveyed with intent to defraud his creditors, and all other rights and interests in lands, tenements and hereditaments."

As to the parties the statute provides: "The widow, if any, and the heirs or persons having the next estate of inheritance from the deceased, if known to the administrator, shall be made parties defendants to such petition."

The next and subsequent sections provide for service of notice upon the heirs, widow, or the persons having the next estate of inheritance, and so on; and if they are non-residents of the State, or their names or residences unknown to the administrator, service shall be made by publication for four weeks.

These parties, the widow and heirs, or the persons having the next estate of inheritance, if known to the administrator, having been served with notice of the pendence of his application, what is the next thing? "If the court are satisfied that the defendants have been duly notified of the pendence of the petition as above prescribed, and that it is necessary to sell real estate of the deceased to pay his debts, they shall order the real estate, or so much thereof as may be necessary for the payment of the debts, to be sold."

Now, these are the provisions of the statute governing an administrator. First, if he shall find that the personal estate is not sufficient to pay the debts, charges of administration and the allowance for the support of the widow and children, he shall apply to the Court of Common Pleas or to the Probate Court which issued his letters of administration for authority to sell real estate. The real estate liable to be sold is the real estate of the deceased, including all lands that he has conveyed for the purpose of defrauding his creditors, and also any interest that he may have in real estate. The parties to be made defendands to this petition are the widow, if she is living, and the heirs, or the persons having the next estate of inheritance, if they are known to the administrator. And when they are brought before either the Probate Court or the Court of Common Pleas, what is the question to be passed upon by the court? "If the court are satisfied that the defendants have been duly notified as above prescribed, and that it is necessary to sell real estate," then they shall make an order for the sale of real estate. Now that is the subject-matter to be passed upon either by the Probate Court or the Court of Common Pleas, in whichever the administrator elects to file his petition.

"The petition shall, if the court require it, set forth the amount of debts due from the deceased, as nearly as they can be ascertained, and the amount of the charges of administration, the value of the personal estate and effects, and a description of the real estate, and the value thereof, if appraised." Now, this is only necessary if the court require it; otherwise, all that need be contained in the petition is simply a statement by the administrator that he is administrator of the estate, that the personal effects in his hands that have come to him as administrator are not sufficient to pay the debts of the deceased, the charges of administration and for the support of the widow and children, and ask authority to sell real estate, without setting forth the value of the personal property in his hands, or without any description of the real estate that he desires to sell.

Now, these things being borne in mind, what has been done here? In August, 1874, the plaintiff, Iral A. Webster, filed his petition as an administrator, there being joined with him one of the creditors, Van Husen. He sets forth in that petition that he is the administrator, duly qualified and acting as such; that the personal estate that has come into his hands amounts only to about $300; that the debts against the estate are very large, amounting to several thousand dollars; that the charges of administration will amount to several hundred dollars; and he asks an order of the court to sell real estate, and points out what real estate he desires to be sold. First, he names a tract of land, embracing some eleven or twelve acres, lying now within the limits of the corporation, and called in the argument Glen Morrison, which he says was conveyed by the deceased for the purpose of defrauding his creditors. He then names several other pieces of property; but as only two others have been referred to in the evidence and by counsel, I will speak of them only as contained in the petition. He says, in addition to this Glen Morrison which he claims has been fraudulently conveyed by the deceased, that the wife of the deceased (David Morrison being the deceased and Charlotte Morrison his wife) was the owner of a lot on the Public Square in this city, on which she had given a mortgage; that there was a large amount due on that mortgage of principal and interest, and that her husband, David Morrison, deceased, paid off this mortgage, at one time paying $1,805 principal and interest on the mortgage, and prior to that having paid some $200 or $250, and cleared off this mortgage for the benefit of his wife. It was claimed in the petition that this gave David Morrison an equitable interest in that property, but it is not so claimed in the argument of the case by the counsel for plaintiff. The substance of the claim is this: A man who was in debt, and whose money should go first to pay his debts (Van Husen's debt existing against him at the time), voluntarily paid off in the sum of about $2,000 a mortgage belonging to his wife—that he paid money for his wife to the amount of $2,000, you may call it, and she paid it (it would amount to the same thing) to extinguish the mortgage. Well, suppose that be so. Here is an averment that this deceased, David Morrison, has voluntarily given to his wife the sum of $2,000, when at the same time there were large debts outstanding against him, to the extinguishment of which this money should have been applied, and it is now practically sought to recover from Charlotte Morrison and her heirs that $2.000 in *money*. It is money that is sought to be recovered, not real estate. The petition can only embrace a request that the court grant authority to sell real estate. This is personal property—*money*. No order of the court is provided by the statute for the recovery of personal property—*money*. None is needed. So far, then, as that is concerned, it is simply a desire of the administrator to recover personal property—money—to the extent of $2,000. It is not a petition to sell lands or an equitable interest in lands, but, so far as that is concerned, a petition to recover personal property—

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money. Then it is improperly embraced in this petition. It should simply be a petition for authority to sell lands or an interest in lands.

The third thing embraced in the petition and relied upon as a cause of action is this: that David Morrison in his life time was the owner of some five or six thousand acres of land in West Virginia; that within twenty days after Van Husen had recovered his judgment against him in 1857, and the judgment amounted to over $8,000, he fraudulently conveyed these five or six thousand acres of land lying in West Virginia to John Barr in trust for his wife, Charlotte C. Morrison; that the conveyance to Barr was made for the purpose of defrauding creditors. The amended petition sets out that John Barr afterwards conveyed this estate to Charlotte C. Morrison, the wife of the deceased, and that she is deceased, that his property descended to her heirs, that her heirs have since sold this property lying in West Virginia and turned it into money and have now in their possession the proceeds of this sale to the extent of $6, 400, and the petitioner desires to subject that to the payment of the debts of the deceased. Now, what is the outcome of the claim as to this third matter in the petition, this $6,400 in money now in the possession, as is alleged, of the heirs of Charlotte C. Morrison—the proceeds of the sale of this six thousand acres so claimed to have been fraudulently conveyed? These heirs are residents here and have the money now in their hands. The administrator seeks to compel them to account for this money. Now, this again is personal property—money. No order of the Probate Court or Court of Common Pleas is necessary to enable the administrator to go ahead and recover money of these parties directly. It is not a petition to sell real estate. It is not a petition to sell an interest in real estate, but a petition to compel these heirs of Charlotte Morrison to account for money in the sum of $6,400, the proceeds of the sale of the lands so fraudulently conveyed to John Barr. Now, that beiug so, that is out of the case. That is personal property There is no claim of any authority to set aside that sale of lands in West Virginia. The plaintiff is simply calling upon these heirs to account for money in their hands. That is the shape in which it is treated by the parties upon both sides. That is *money*. That is not, then, properly embraced in the petition for an order to sell real estate, for it is not real estate, nor an interest in real estate; it is money. Nothing prevents nor has prevented him from suing these parties directly, and, if he can make out a case, recovering the money in their hands.

So that the proceeds of this West Virginia land which is now in money may be laid aside from this petition. The $2,000 given by David Morrison to his wife to extinguish the mortgage on her own lot is money. That may be laid aside. Then what is left in the petition? It is simply a petition for an order to sell lands, and the single parcel of land for which authority is sought to sell, is the twelve acres lying on the other side of the river)Glen Morrison). We will therefore confine our attention to that. By whom is this petition to sell real estate filed? By the administrator. What does he set forth in his petition? That there are not personal assets sufficient to pay the debts of the deceased, the charges of administration and a year's support to the widow and children; and asks for authority to sell real estate. What is the question before the court on that petition? If the court are satisfied that the defendants have been duly notified of the pendency of the petition and that it is necessary to sell real estate of the deceased to pay his debts, they shall order the real estate, or so much thereof as is necessary, to be sold. Now, what question was properly and is properly before the court under this petition? It is this, and nothiug else, so far as the administrator is concerned: Is it necessary to sell real estate of the deceased to pay his debts? Now, who are the parties defendant to that petition provided by statute, and who alone? The heirs of David Morrison (his widow being dead). Who are they? His twelve children. Have they all been made parties? They have. They are all in court, and were in the court below. Now, what single subject-matter was there before the court below on the petition? It was this: Is it necessary to sell the real estate of the deceased to pay his debts? The administrator could tell his story. The heirs could tell their story. They might say that the administrator had the personal property in his hands with which to pay the debts; they were the parties owning the real estate, and there was no necessity to come to the real estate, and all that. That was the only subject to be passed upon by the court,—Is it necessary to sell the real estate of the deceased, or is there personal property enough?—that is all there was of it. Now, by this proceeding, who are the defendants? Simply the heirs of David Morrison, deceased,—nobody else. No provision for bringing in the fraudulent grantee. No provision even for setting out a description of the land, unless the court shall require it. No provision for bringing in the fraudulent grantee; no day given him there in that court in any shape or form.

But it being claimed that this was property fraudulently conveyed by the deceased for the purpose of defrauding his creditors, there is this other provision. If the court shall order real estate to be sold to pay the debts of the deceased, then section 120 provides as follows: "If the administrator shall be ordered to sell any lands so fraudulently conveyed by the deceased, he may, before sale, obtain possession by an action of ejectment, counting as upon his own seizin; or may file a bill in chancery, to avoid the fraudulent conveyance."

Having first on this petition got an order of the court to sell real estate, he may then as the next step either commence an action in ejectment against the fraudulent grantee, or he may file a bill in chancery to set aside the fraudulent conveyance; but until he gets that order he cannot take a a step in that respect; nor is the fraudulent grantee in the petition for authority to sell real estate a party before the court in any shape or form, nor has he anything whatever to do with it—no day in court there. The simple question on that petition is, as provided in section 128, where the administrator is the plaintiff and the heirs of the deceased are defendants, is it necessary to sell real estate to pay the debts of the deceased?

Now, if the court grant authority to sell real estate, then, if the claim is that there is real estate that has been fraudulently sold, the administrator may then commence his suit against the fraudulent grantee in ejectment, counting upon the seizin in himself, or he may file his bill in equity to set aside the fraudulent conveyance, and not till then. Such is the law.

Now, who has been properly in court, and who alone? There is no petition to sell an interest in real estate. If there were, there is another provision of the statute that provides who shall be made parties where the administrator desires to sell an interest in real estate. He shall not only make the heirs, but he shall also make the persons parties holding the legal title, and also other persons parties to whom any payments upon the real estate may become due. Then it

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is necessary to sell an interest in real estate—the court shall order it to be done. It further provides how it shall be done But there is no claim in this petition of an interest the parties desire to sell. So it is simply a petition to sell lands because the personal property is not sufficient.

Now, who have been properly and legally before the court? The administrator filing the petition on the one side and the heirs of the deceased on the other, and they alone. What has been properly submitted for the court to consider, they being all properly before the court, and nobody else properly before the court? Solely this: Is it necessary to sell the real estate of the deceased to pay his debts? The court having heard the administrator on the one side and heard the heirs on the other, refused to grant such an order, and there the case stands.

From that refusal of the court to grant authority to sell real estate, an appeal is sought to be taken to this court. Can an appeal be taken from the Court of Common Pleas in such a proceeding? This is a special statutory proceeding so far as the administrator is concerned. It is neither a suit at law nor a suit in equity; it is not a civil action; it is a statutory proceeding. The statute provides that the administrator may file his petition for order to sell real estate either in the Court of Common Pleas or in the Probate Court. The Probate Court has full jurisdiction. The Court of Common Pleas in that matter has no more extended jurisdiction than the Probate Court. It was filed by election of the administrator in the Court of Common Pleas. The Court of Common Pleas have refused to give the order, and the plaintiff's appeal is here, or sought to be. The decision in the 15th Ohio State is plain that in case of a special statutory proceeding there is no appeal from an order of the court; that it is neither a suit at law nor a suit in equity, and not a civil action. Then, so far as the administrator is concerned, there is no appeal to this court.

But there is another party, and who is he? Let us read the opening of the petition. "The said Iral Webster, suing as administrator as aforesaid, and the said Edward H. Van Husen, suing as a creditor of said David Morrison in his own behalf and in behalf likewise of all other creditors of said David Morrison who see fit to join in this suit and contribute to the expenses thereof, state to the court as follows: That the said Webster was duly appointed by the Probate Court within and for Lorain county, administrator of the estate of David Morrison, who died in Oberlin in said county the 1st of May, 1868, and on the 7th day of said May the said Webster duly qualified himself to act as such, and entered upon the performance of his duties as such administrator immediately thereafter; that debts and claims have been presented to him for allowance to the amount of seversl thousand dollars, and the year's support to the widow allowed by the Court is a thousand dollars, and the costs of administration will be several hundred dollars, and the personal property belonging to said estate will not exceed three hundred dollars."

The question here is whether the joining of a creditor with the administrator takes this whole thing out of the statute and somehow transforms it or transmogrifies it into a suit in equity, in which the administrator is a party as well as Van Husen. It will be borne in mind that the administrator may file his petition either in the Probate Court or the Court of Common Pleas, as he elects. The one has the same jurisdiction as the other. Suppose this petition had been filed by the administrator in the Probate Court of Lorain county. What could that court have said? "We have read the petition. We see here the administrator is the party plaintiff. We see that the heirs of the deceased are made parties defendant. So far so good. You ask for the sale of the real estate because there is not sufficient personal property to pay the debts of the deceased. So far so good. But you have got a party here joined with you that we know nothing about. He represents himself as a creditor of the estate. Well, he has filed his claim with you, and you have allowed it, and you file his petition as a representative of the creditors, and to raise money to pay off this other creditor who is now suing with you and all other creditors; he is acting in your behalf, and at the same time he is undertaking to act for himself. Now, you ask in your petition for authority to sell real estate. So far so good. That is just what you can do under the statute. And you with him further ask the court to set aside fraudulent conveyances, and all that, making a sort of bill in chancery." The Probate Court would say, "So far as that is concerned, we have no authority. We have no jurisdiction to sit as a court of chancery in any shape or form. We can simply sit as the statute provides. You can come in with your petition, and the statute provides that the administrator shall file the petition himself; no provision for the creditors to join with him; and the very creditor who joins and attempts to sue in his own behalf has filed his claim with you and you have allowed it, and you are bringing this suit in his behalf. We cannot recognize him; know nothing about him. You ask for the setting aside of conveyances of real estate as fraudulent. We have no jurisdiction in that matter. All we can do is to hear you upon the single question, Is it necessary to sell real estate? If you show it to us to be so, we will make the order. That is as far as we can go. If you do not, we will refuse it."

Then has Van Husen, a creditor, who filed his claim with the administrator, by whom it has been allowed, and the administrator who has filed this petition for an order to sell real estate to pay off this and all other creditors, a right to join in an attempt to have these conveyances set aside and the real estate sold either for his own benefit or the benefit of all the creditors? The Probate Court would have no jurisdiction in such a proceeding and would not do anything with it. The Court of Common Pleas has no further jurisdiction in this matter than might be exercised by the Probate Court. Our courts, following the decision in the 1st Ohio State, do not favor the interference of a creditor with the estate of the deceased in any shape or form. The administrator, the court say, is the party to whom all assets, real or personal, belong for the payment of the debts of the estate, and that they will not favor the intervention by a creditor except so far as to get the real estate into the hanas of the administrator, who alone is to dispose of it. They also say in that decision that if a creditor should file a petition in his own behalf and in any way get a conveyance set aside and recover upon it, he cannot hold a dollar of it; he must pay it all over to the administrator for the general benefit of the estate; and that no vigilance ot a creditor will avail him in that regard as to getting his debt paid in preference or in a larger proportionate amount than the other creditors of the deceased.

Cases have been referred to of this kind: Where an administrator has been in collusion with the heirs and has refused to take any proceedings. The court recognizes such conduct as fraudulent, and in a case of that kind a creditor may file a petition to compel him to do his duty, or may do the

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same thing that the administrator ought to do.

But in this case the administrator files a petition—is doing his duty in every respect. The debts against the estate are apparently in excess of the personal assets. He has filed his petition in the Court of Common Pleas and asked for leave to sell real estate, making the heirs defendants—done his full duty throughout—and the court have refused his application.

There is no pretense of a reason why a creditor should seek to intervene in this case, separate from the administrator or conjointly with him. The statute provides that the *administrator* shall file his petition—not the administrator and a creditor, or the creditors. The administrator shall be the plaintiff in the suit, and the assets recovered in behalf of the creditors. If, then, a creditor should also commence a suit, there would be this state of things: An administrator set to work by the creditors to recover assets to pay all the debts of the deceased, and a creditor seeking to recover the same thing for himself. That cannot be done. Now, we are clearly of the opinion, so far as Van Husen is concerned, that he has wrongfully interfered in this case—that he is not a proper party, and that so far as the petition refers to him, further than simply to state that he is a creditor with others, it is to be disregarded. That this is simply a statutory proceeding by the administrator in the Court of Common Pleas, and might have been in the Probate Court, making the heirs of David Morrison parties, and properly nobody else could be made a party. The sole question to be determined is, Is it necessary to sell the real estate of the deceased to pay his debts? That was the only question in the court below to be passed upon, and, as we have said before, it is sought to appeal from the decision there made. This is a statutory proceeding; not a suit at law; not a suit in equity; and the appeal must be dismissed.

R. F. PAINE and HENRY MCKINNEY, for plaintiffs.

R. P. RANNEY. W. W. ANDREWS and ARNOLD GREEN, for defendants.

SUPREME COURT OF OHIO.

DECEMBER TERM, 1878.

Hon. W. J. Gilmore, Chief Justice. Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Hon. William White, Judges.

TUESDAY, April 29, 1870

General Docket.

Sextus Sloan vs Joseph Hubbard. Error to the Court of Common Pleas of Trumbull county. Reversed in the District Court.

WHITE, J. Held:

1. Under section 6 of the act of April 18, 1865, "to restrain from running at large certain animals therein named," (S. & S., 7), cattle found running at large may be taken up, whether they are at large with or without the consent or fault of the owner. Within the meaning of the section, the animals named in the act are at large "contrary to its provisions" when they are at large without the permission provided for in the second section of the act.

2. The right given by the sixth section of the act, to take up and confine animals running at large is not affected by the failure of the township trustees to establish a pound under the authority conferred by the supplementary act of April 12, 1367. (S. & S., 9).

Judgment reversed and cause remanded for a new trial.

No. 589. The State of Ohio vs Thomas George, trustee, et al. Error to the Superior Court of Montgomery county.

BOYNTON, J.:

1. The execution and delivery of the bond required by the act of April 6, 1876, (73 O. L., 275), and the supplementary act of April 24, 1877, (74 O. L., 466), are conditions precedent to the right to exercise the powers which said acts were designed to confer.

2. An eviction of the lessees of the public works of the State from that portion thereof known as the Canal Basin, in the city of Hamilton, by the City Council of said city, before such band was executed and delivered, was wholly unauthorized by the State; and such eviction constitutes no defense to an action by the State to recover the rent that accrued during the continuance of the eviction.

Judgment reversed and cause remanded.

Gilmore, C. J., and Oakey, J., dissented.

No. 86. James Crooks et al. vs Mary Crooks. Error to District Court of Mahoning county.

MCILVAINE, J. Held:

1. A deed for the conveyance of land executed by a husband to his wife, without the intervention of a trustee, and intended as a suitable provision for her, though void at law, may be enforced in equity.

2. But such deed will not be enforced in equity to the prejudice of the rights of creditors or of children for whom no provision has been made.

3. Where a child complains against such provision for the wife, the burden of showing that no provision had been made in its favor rests upon the complainant.

4. When the grantor delivers his deed to a third person to be delivered by him to the grantee at the death of the grantor, without reserving to himself any control over the instrument, and such deed is delivered accordingly to the grantee, the title passes to the grantee upon such last delivery, and, by relation, the deed takes effect as of the date of the first delivery.

Judgment affirmed. Boynton, J., dissented from the petition.

No. 610. Edward Dille vs The State of Ohio. Error to the Court of Common Pleas of Hardin county.

GILMORE, C. J.:

1. The constitutional right of a person accused of felony "to appear and defend in person and with counsel," cannot be denied or its exercise unreasonably abridged; but the court may limit the argument of the accused of his counsel, provid'l that the accused is not thereby deprived of a fair trial.

2. On the trial of one charged with a felony, eleven witnesses were examined, and the evidence, which occupied half a day in its delivery, was circumstantial and conflicting. The accused was defended by two counsel, who were limited by the court, to thirty minutes in the argument to the jury—Held: That this was an abuse of power which prevented a fair trial.

Judgment reversed, and the cause remanded to the Court of Common Pleas for a new trial.

White and McIlvaine, J. J., dissented, being of the opinion that the limitation of the argument did not, considering the case presented in the record, prevent a fair trial.

Motion Docket.

No. 81. George Brooks vs The State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Trumbull county. Motion granted.

No. 82. Mary Acherly et al. vs Mary Ann Dickinson. Motion for stay of execution in cause No. 636 on the General Docket. Motion overruled.

No. 83. Mary Acherly et al. vs Mary Ann Dickinson. Motion to

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dismiss the petition in cause No. 636 on the General Docket. Motion granted and petition dismissed.

U. S. CIRCUIT COURT N. D. OF OHIO.

April 26.

3866. Ann Oviatt vs the Mutual Life ins. Co. Motion to set aside service.

April 28.

3159. Elias Wolf vs Moses Schaeffner et al. Motion for new trial. S. O. Griswold.

3839. The National City Bank vs Henry Gilbert et al. Answer of Henry Gilbert. G. N. Foster.

April 29.

3812. David W. Young vs The Baltimore & Ohio R. R. Co. Leave to file amended answer.

April 30.

3861. The United States ex rel. Maria E. Sibley vs the Village of Chardon. Demurrer.

May 1.

3262. Tierman, admr., vs The Penn. Co. Motion for new trial.

3795. Denham, trustee, vs The Buckeye Mutual Fire Ins. Co. Reply filed.

U S. DISTRICT COURT N. D. OF OHIO.

Bankruptcy.

April 28.

1878- In re Oliver Creed. Petition for discharge. Hearing May 20.

1819. In re George T. Perkins. Discharged.

1866. In re Louis H. Lambert. Same.

1993. In re Henry H. Adams. Same.

1974. In re Samuel Faust. Same.

April 29.

1885. In re Clay Keyerta. Petition for discharge. Hearing May 20.

April 30.

1813. In re Field D. Warren. Discharged.

1636. In re John A. Gardner. Petition for discharge. Hearing May 14th.

1475. In re M. H. Farnsworth. Discharged.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending May 2, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

April 26.

Caroline and H. B. Wood to E. B. White. $500.

John B. Bush to William Eggers. $175.

F. B. and C. B. Trout to E. S. Trout. $580.

Wm. Eggers and wife to Ferdinand Eggers. $5,500.

John W. Walkey and wife to Rebecca Proudfit. $200.

William Henrich and wife to Henrietta Fickelsher. $800.

John Kueale to Daniel Gourne. $2,000.

April 28.

Emma L. McElrath and husband to Robert Cleaver. $600.

Maria E. Sangenheder and husband to W. H. Farthman. $400.

Paul Langrebe to Edmund Walton et al. $2,000.

John W. Lees to Geo O. Baslington. $500.

Paul Laugrebe and wife to Conrad Westerweller. $700.

Thomas A. Herron and wife to Joseph Hyman. $295.

Minnie E, Wheelock to B. J. Wheelock. $400.

April 29.

Hannah Rylance et al. to S. H. Kirby. Three hundred and fifty dollars

Barbara Schneider to M. and H. Eiderman. Two hundred dollars.

Margaret Horrigan et al. to M. S. Hogan. Three hundred dollars.

Clark Williams et ux. to E. S. Carter. Two thousand five hundred dollars.

Jane Pollock et al. to Mrs. Harriet Leavens. Two thousand dollars.

Eliza Davis et al. to A. K. Spencer. Five hundred dollars.

April 30.

August H. George and wife to Robert Lamden. $1,000.

Henry Shunks to G. H. Bateman. $500.

B. R. Beavis and wife to The Citizens' Savings and Loan Association. $2,000.

May 1.

James McGuire to Agnes B. Goodman. $350.

John Allgeier and wife to Conrad Allgeier. $800.

Joseph Mares to Anna Raus et al., guardian etc. $500.

Wm. H. Barres to Jason Robbins. $4,500.

Frank H. Ruple to James Ruple. $100.

M. Peck and wife to Ira Fitzwater. $73.37.

Minot Stebbens to same. $104.45.

Henry Bieber to Julius C. Hasselhuhn. $900.

Adolph Gruder to the Citizens' Savings and Loan Association. $5,000.

John Kaiser and wife to Frank McNeil. $500.

May 2.

Charles A. Pennell and wife to J. Schrieber & Co. Five hundred dollars.

Elizabeth Hildebrandt and husband to Jacob Mueller. Eight hundred and fifty dollars.

Anna E. Holmes and husband to The Society for Savings. Three hundred dollars.

Julia M. Van Tine and husband to S. R. W. Heath. One thousand four hundred and ten dollars.

George M. Heard and wife to Henrietta Gallup. Two hundred dollars.

Wm. Sorge and wife to Charles Elsasser. Two hundred and forty dollars.

Stephen Donlon and wife to John Riebel. Three hundred dollars.

John Gannon and wife to William Hendy. Seven hundred dollars.

Catharine B. Stahl and husband to Wm. F. Steiger. Nine hundred and seventy dollars.

Wm. Murphy to Berea Savings and Loan Ass'n. One thousand dollars.

Ellen M. Sherwood and husband to Ida T. Ford. Seven hundred dollars.

James Bailey et al. to James T. Whitmore. One thousand dollars.

CHATTEL MORTGAGES.

April 26.

Reuben Riblet to S. H. Kirby. $45.

J. C. Kurtz to William H. Shaw. $60.

Frederick Schordt to John Jingling. $40.

John D. Castle to Eli C. Green. $125.

April 28.

John J. Nesbitt to A. S. Adams. $650.

Charles Gleason and James Shannon to H. Koningslow. $20.

Barbara Oppman and husband to John Strebel. $7,500.

April 29.

J. E. Benson et ux. to L. W. Munroe. Fifty dollars.

G. H. Loomis to Beidler & Nicola. Five hundred and twenty-six dollars.

Mrs. J. Rowland to M. Silverstone. Seventy-two dollars.

F. N. Clark to Sam'l. Montgomery. One thousand and fifty dollars.

W. J. Harrison to A. Campbell. Three hundred dollars.

Mrs. David Cummings to Vincent, Sturm & Co. Sixteen dollars.

M. O'Neil to A. M. Harman. One thousand two hundred and twenty-six dollars.

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R. E. Spinks to Merts & Riddle. Three hundred and fifty dallars.

April 30.

W. H. Rogers to Scoville & Emerson. $40.

Helena S. C. Gashill to S. M. Stone. $215.

John Regan to Sam Rosenberg. $150.

Lucy A. Russell to S. J. Everett. $7,000.

H. and C. Ehrenfeld to Adam Fuhrman. $50.

May 1.

Mary E. Parker to Allen W. Harris. $1,050.

Henry Bleking to Frederick Suhr. $300.

S. O. Edison et al. to B. F. Rouse et al. $5,000.

Thomas R. Reeve to Cleveland, Brown & Co. $7,250.

A. J. Sigmind to F. Sigmind. $300.

Charles Eilert to Eugene Heidelberger. $350.

A. T. Phillips to C. Knowles. $48.

May 2.

K. Hartman to A F. and H. Straler. Three thousand one hundred dollars.

Philip Stauder to Peter Stauder. Sixty dollars.

F. Missner to Jacob Mueller. One hundred and thirty-five dollars.

John Harrison to C. E. Shattuck. Fifty-three dollars.

Daniel Schwab to Striebenger Bros. One hundred and twenty-five dollars.

DEEDS.

April 25.

J. Z. Feliere and wife to Patrick O'Brien. $1,161.

Louis J. Feliere to same. $1,125.

Mary Lancker and husband to S. H. Kirby. $1.

Michael McEmery to Julia Spoohler. $1,000.

Jason Kibbins to Pithian S. Bull. $102.

Edmund Whittam to Joseph P. Whittam. $1.

April 26.

Alice E. Fovargue and husband to Elizabeth Mather et al. $558.

Cornelius Newkirk and wife to Jacob Schroeder and wife. $50.

James Sweeny and wife to Mary Sweeny. $450.

Clark Towner and wife to Haver Goetz. $390.

Frank Lupa and wife to Anna Blazek. $600.

Ruel H. House, by Felix Nicola, Mas. Com., to Erasmus D. Burton. $335

James Collister and wife to Dave Charlesworth. $2,200.

Maria T. Chase to Amanda M. Patterson. $3,000.

Alfred B. Darby, assignee, etc., to H. W. Putnam. $75.

Wm. Doyle and wife to Lorenz Schmidt. $1,150.

Wm. H. Doan and wife to Cornelius Newkirk. $1.

April 28.

Gottfried Fritz and wife to Jacob Fritz. $600.

E. J. Foster, trustee, to Morris R. Braggins, $1.

H. Haines and wife to L. B. Oviatt. $1.

Wm. W. Hazzard to Margaret Feare. $3,500.

German Mantel to Ellen E. Boest. $5.

Emma L. McElrath and husband to Robert Clevave. $1,800.

A. W. Poe and wife to Gaston G, Allen. $315.

Peter Rustz and wife to Catharine Arnold. $1.

Oliver H. Root and wife to Wm. Riblet. $1.

Joseph Sykora and wife to D. D. Pickett. $300.

Edmund Walton et al. to Paul Landgrebe. $2,750.

Ashley Ames et al. to John Healey. $425.

C. M. Allen and wife to John A. Fitzwater et al. $2,092.

Morris E. Briggens and wife to E. Johnson. $1.

April 29.

Hattie Dunham to Avis Dunham. $1.

H. B. Dean and wife to Hannah Bylance. $3,200.

Charles Gumlich to Catherine Bauer. $1,050.

Charles Hassler and wife to Susan Baldwin. $7,500.

Eliza A. Hall to Lewis Hadley. $1,500.

Julietta Holly to Charles Heiser. $1,200.

Mercy J. Sharks and husband to Alanson Wilcox. $1.

James Strong and wife to A. J. and A. A. Wenham. $1,000.

Frank Stevens and wife to Robert J. Coombs. $900.

Wm. Baxter to Margaret Horrigan. $400.

Lyman Benjamin and wife to M. A. Gaskill, $451.

A. R. Beckwith et al. to H. L. St John. $750.

Charles Bassett to Michael Fitzgerald. $125.

Charles E. Church to H. L. Stanton. $1,000.

April 30.

Wm. Sommitz to Elizabeth Peter. $1,900.

Simpon Thorman and wife to Kauffman Hays et al. $50.

J. M. Curtiss and wife to Rosina Priesmeyer. $780.

Robert Cleave and wife to Emma L. McElrath. $2,400.

Paul P. Condit to Harvey Rice. $1.

Harvey Rice to Florence V. Condit. $1.

Parmelia E. J. House and husband to Belle Raymond. $4,500.

Rosa Koblitz and husband to Louis Koblitz. $4,500.

Louis Koblitz to Rosa Koblitz and husband. $4,500.

John H. Lower and wife to Lucy A. Miner. $440.

Lucy A. Miner to Charles O. Rhodes. $1,200.

Robert Lardner and wife to August H. George. $2,050.

O. M. Burke et al. to Thomas Thomas. $2,050.

Same to Emma Thomas. $2,400.

May 1.

H. B. Curtiss and wife to E. S. Root. One thousand two hundred dollars.

George C. Entrican to George W. Dillon. One hundred dollars.

Julius E. French to Wm. H. Price. Six thousand six hundred dollars.

Adolph Geuder and wife to James H. Clark. Six thousand five hundred dollars.

Agnes B. Goodman et al. to Jane McGuire. One thousand three hundred dollars.

James M. Hoyt and wife to Eugene S. Martin. Four hundred dollars.

George C. Hickox et al. to George Stramford. Four hundred dollars.

Harriet D. Ingersoll to W. H. Hazzard. One thousand five hundred dollars.

Frederick Kinsman to Frank Kohout. Five hundred and twenty-eight dollars.

S. W. Moses to Hugh Graham. One thousand two hundred dollars.

Frank Matousek to Frank Kohout, Jr. Three hundred dollars.

W. H. Newland et al. to Jennie M. Knowlton. Six hundred dollars.

John Painter, Jr., to John Moore. Three thousand five hundred dollars

Jason Robbin to Wm. H. Barriss. Six thousand dollars.

Robert R. Rhodes et al. to Joseph Krivanek and wife. Four hundred and fifty dollars.

Anna Raus to Joseph Mares. Six hundred and twenty-five dollars.

J. W. Sykora admr. of John Raus, to Anna Raus. Four hundred dollars.

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John L. Reising to Mary O. Reising. Eight hundred and forty dollars.

Gurta Schmidt, assignee, etc., to Wm. A. Lyon. One thousand dollars.

A. P. Winslow et al. to Mary O. Rising. Four hundred and fifty dollars.

P. Snalling and wife to Newman Robinson. Six hundred dollars.

John D. Carpenter and wife to Heinrich Hadler. Six hundred and fifty dollars.

Frank Rocan and wife to Joseph S. Koula. Three hundred and twenty-five dollars.

John Creagen and wife to Frederick Baggert. Nine hundred dollars.

Catherine Brew and husband to Hiram H. Little. Fifteen thousand five hundred dollars.

Elizabeth C. Compton and husband to W. H. Price. Six thousand three hundred dollars.

ASSIGNMENT.

Hazard Hame Co. to H. Clark Ford. Bond $25,000.

COURT OF COMMON PLEAS.

Actions Commenced.

April 22.

14962. Valentine Stang vs John Beck. Relief and specific performance of contract. E. M. Brown.

14963. James Manche vs E. W. Goddard et al. Money only. W. S. Kerruish.

14964. John R. Jewett vs T. K. Dissette et al. To subject lands and for other relief. Foster, Hinsdale & Carpenter.

April 23.

14965. The Society for Savings vs Frederick Enget et al. Money and sale of land. S. E. Williamson.

14966. Patrick Buckley et al. vs The Forest City United Land and Building Association. To vacate decree. Foran & Williams.

April 24.

14967. Elizabeth S. Fait vs Sarah Stevens et al. Money only. Tyler & Denison.

14968. Ellen Fitzgerald vs Max Grossman. Money only. Hord, Dawley & Hord.

14969. Hrman Mulder vs Joseph Lay. Appeal by deft. Judgment April 5.

14970. Thomas H. West vs John L. Johnson et al. Injunction and equitable relief. W. C. Rogers.

14971. Caroline M. Green vs James B. Green et al. Money and equitable relief. Hord, Dawley & Hord and J. M. Stewart.

14972. Israel D. Wagner vs John F. Strong. Money only. Babcock & Nowak.

14973. Max Strauss vs Solomon Weiskoph. Money and foreclosure. Grannis & Griswold and Frank Strauss.

14974. John Imke vs Henry Nebe et al. Money and equitable relief. Alex. Hadden.

April 25.

14975. Samuel B. Prentiss vs James W. Simpson et al. To foreclose mortgage. Baldwin & Ford.

14976. W. H. McCurdy et al. vs The Cleveland Hazard Hame Co. Money only. E. A. Angell.

14977. G. S. Wheaton vs Charles R. Stewart et al. Money only. Willson & Sykora.

14978. Manuel Halle vs Adam Seipel et al. Money and sale of lands. Goulder, Hadden & Zucker.

April 26.

14979. J. Ernest Jones vs R. A. Wheelock et al. Relief, account, and appointment of a receiver. Prentiss & Vorce.

14980. Louis Albrecht vs Frederick Gerling et al. Money, to subject land, and for equitable relief. Willson & Sykora.

14981. W. B. Thomas vs H. Starke et al. Money only. Street & Bentley.

14982. Cohn M. Smith vs E. W. Scripps et al. Money only. E. D. Stark.

14983. Elizabeth Barkwill vs Henry Kreuger et al. Money, sale of lands, injunction and equitable relief. W. S. Kerruish.

14984. Sophia Engel vs Catharine Ehrbär et al. For correction of deed and relief. W. S. Kerruish.

14985. William C. Engel vs The City of Cleveland. Money only. W. S. Kerruish.

14986. Gottfried Loesch vs Edward Hessenmueller. Money only. J. A. Smith.

14987. Ezra Seaman et al. vs Joseph M. Brainard et al. Equitable relief. Pennewell & Lamson.

14988. George Hasenpflug vs George Rading et al. Foreclosure of mortgage and sale of real property. Caskey & Canfield.

14989. Elizabeth M. Taylor vs William Harrison. Money, foreclosure of mortgage, and sale of real property. Caskey & Canfield.

14990. John A. Ellsler vs Sarah J. Van Namee et al. Money and further relief. J. H. Webster.

April 28.

14991. Andrew Platt vs Chatles L. Reader. Injunction and equitable relief. J. B. Buxton.

14992. M. M. Spangler vs L. W. Ford et al. Equitable relief and to quiet title. Safford & Safford.

14993. Sheriden Horse Nail Co. vs Leader Printing Co. Error to J. P. Hutchins & Campbell.

14994. Frederick Banko vs Anton Henger. Money and Foreclosure of mortgage. W. S. Kerruish.

14995. Amasa Stone vs George H. Burt et al. Money only. B. R. Beavis.

14996. William Colbert vs Charles Becker. Appeal by deft. Judgment March 28. H. W. Canfield.

14997. The State of Ohio, etc., vs James Forrest. Bastardy.

14998. Same vs William Goodhart. Same. S. E. Adams; Heisley & Heisley.

14999. Same vs Jason Holton. Same.

April 29.

15000. Vaclav Soukup et al. vs Mathias Novak et al. Injunction and equitable relief. Stone & Hessenmueller.

15001. John Riebel vs Samuel Gynn. Money, account, sale of land and relief. J. S. Grannis; Gustav Schmidt.

15002. George Deubert vs John Beznoska. Money, account, sale of land and relief. J. S. Grannis; Gustav Schmidt.

15003. Hans Hanson vs Frederick Nobis et al. Money and to foreclose mortgage. S. S. White,

April 30.

15004. S. H. Peck vs Melissa Dow et al. Appeal by defts. Mance and Hase Constables. Judgment April 19. W. S. Kerruish.

15006. Henry Wick & Co. vs G. A. Schmidt et al. Appeal by defendant. Judgment April 5. Gilbert, Johnson & Schwan and J. M. Stewart; Pennewell & Lamson.

15007. Sacob Ruecker vs Martin Graf. Money only. Stone & Hessenmueller.

15008. J. W. S. Mitchell vs Josiah Minse. Money only. Foran & Williams.

15009. Alamanza Roberts vs Lewis Clark et al. Money and to subject lands. J. C. Poe.

15010. James Corrigan vs The City of Cleveland. Money only. W. S. Kerruish.

May 1.

15011. Amelia A. Streater, admx., vs James Wells. Appeal by defendant. Judgment March 22. Robison & White; W. B. Higby and P. Kaiser.

15012. Mary Boyer, admx. etc., vs Herman Beckman. Appeal by deft. Judgment April 26.

15013. The City of Cleveland vs B. Dreker. Money only. Heisley; Weh & Wallace.

Motions and Demurrers Filed.

April 25.

2511. Badson vs Beach. Motion by plff. to dismiss appeal.

April 26.

2512. Reding vs Stainbaugh Jr. et al. Motion by defendants to require plaintiff to make his petition more definite and certain, and to give his true name.

2513. Atwell vs Merwin. Motion by defendant to require plaintiff to make his petition more definite and certain, and to attach copy of alleged contract thereto.

2514. Barkwill vs Krueger et al. Motion by plff. for the appointment of a receiver with notice, etc.

April 30.

2515. Otis vs Cozad et al. Demurrer by plaintiff to 2d paragaph of the answer of Cozad.

2516. Nowak vs Sullivan. Demurrer to the petition.

2517. Teacherman, Assignee, etc., vs Cornell et al. Motion by plaintiff for injunction and restraining order.

J. G. Pomerene.] [H. J. Davies.

Pomerene & Co.

LAW STENOGRAPHERS,

J. G. Pomerene U. S. Commissoner, Official Stenographer of the Common Pleas, Probate and Dist.ct Courts of Cuyahoga County, and Notary Public.

19 1-2 PUBLIC SQUARE.

The Cleveland Law Reporter.

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THE ROMAN CIVIL LAW.

I.

No one of our many legal writers has ever translated into English the Roman civil law as compiled by a commission appointed by the Emperor Justinian, nor has any comprehensive treatise or work been written in our language upon the subject of that compilation. This fact is due, no doubt, to the overwhelming mass of learning to be found in that body of laws. A complete translation would require the labor of many years. All students of the Roman civil law agree that it presents a wide field for profitable investigation, and is in itself a store-house of legal wisdom. Notwithstanding this, very few of the legal profession in this country claim to have any knowledge upon the subject. It is scarcely mentioned by instructors at our law schools and colleges. Nor is our knowledge of the Latin language in this country sufficiently thorough to enable us to read with facility the Roman civil law in the original text. A translation into English would seem, therefore, to be almost a necessity to those who may desire an extended knowledge of the subject.

As found in the books of Justinian, the Roman Civil Law constitutes the foundation of the laws and jurisprudence of Europe, and to-day, in our own country, exerts an influence upon our municipal law, especially in branches of equity.

The "corpus juris civilis" is a term signifying "the body of civil justice." The Roman civil law is also at times referred to as the "Book of Justinian," a work which had an early and extended circulation throughout all Europe.

The Roman jurisprudence, termed the ancient, embraced the period from the foundation of Rome to the adoption and publication of the twelve tables, which were the first written laws known to the Romans. These tables related to law suits, robbery, theft, trespass, breach of trust, rights of creditors over their debtors, rights of fathers and families, inheritance and guardianship, property and possession, damages, common rights of the people, funerals and marriage, etc.

They consisted of old laws, usages, and customs, which prevailed under the ancient kings; and in part were taken from the laws of Greece.

The Romans were governed by these tables for many centuries. As civilization advanced changes were made, new laws enacted, and finally in the Augustan age the body of the Roman law had grown to vast proportions. It had been accumulating for fourteen centuries prior to the reign of the Emperor Justinian, and was made up of the leges, the plebiscita, the senatus consulta, the leges actiones, the edicta, and responsa prudentium, and were all laws either regularly enacted or were the opinions of able jurists, which came to have the force and effect of law.

It is said that at that time, A. D. 527, these laws were scattered through two thousand book and in upwards of 3,000,000 verses.

Justinian undertook to reduce this mass of laws into one systematic code, for practical use. He appointed a commission composed of 13 jurists and civilians, who agreed upon the general plan of the work, and they constituted themselves into three committees, each of which undertook to deal with a definite portion of the whole mass of juristic literature, and afterward again met and composed the "corpus juris civilis," being the name applied to the legal compilations made by this committee. This "corpus juris civilis" is the greatest monument to Justinian's fame. This immense compilation was made in the sixth century, and it took from the year A. D. 527 to 565 to complete it. It was termed as we have said, "corpus juris civilis," and was ratified by the Emperor Justinian, and became exclusively the law of the land, and consisted of four parts:

First—The Institutions; containing the elements of the Roman law, in four books, and designed for the use of students.

Second—The Pandetcs or Digest; being a vast abridgement, in fifty books, of decisions of praetors, and the writings of sages of the law, and is a true exposition of the develop-

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ment of the Roman laws from the foundation of Rome, to the period when Rome became the mistress of the world.

Third—The Codex or Code; in twelve books; being a collection of all imperial statutes from the Emperor Hadrian to Justinian.

Fourth—The Novellae or Novels of Justinian, a collection of new imperial statutes.

Such is, in brief, the original formation and history of the Roman civil law. It became and was retained as the law of the land exclusively until in the feudal ages, when this body of laws (known as the corpus juris civilis) was neglected and fell into disuse, and so continued until about the twelfth century. Then it was that trade and commerce began to revive throughout Europe, and matters relating to private rights and personal contracts, and the duties that flow from them, required new laws, while no system or code of laws had ever been passed in any of the other European countries. The jurisprudence of those countries was of the simplest and rudest character, totally inadequate to meet the wants of their growing business and commercial interests. The School at Bologna in the twelfth century soon began to attract attention; the civil law was there expounded by able jurists. This school became renowned, and by degrees it was found that the Roman civil law was adapted to the countries of Europe and especially valuable in subjects relating to private rights and personal contracts, in respect to which the laws of those countries furnished inadequate security. Then it was that the Roman civil law, as well as the corpus juris canonici, (the law governing ecclesiastical matters), passed into the European countries as lex scripta, and has been so treated and considered ever since the year 1600.

In matters of civil and political liberty the civil law cannot be likened to the English common law, but in matters relating to private rights and personal contracts it is very valuable, and this feature of that law especially, led to its adoption by the countries of Europe.

It was owing to the peculiar circumstances that existed at that time, as we have endeavored to show, that the Roman civil law passed into those countries as lex scripta. We do not, however, mean to be understood as saying that it was adopted in all its details. Institutions peculiar to France, England, Germany and Spain have always been governed and judged by the laws of those countries. Having now taken up considerable of your space, we will conclude here, and defer our further discussion of this subject till your next issue. H.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

JAMES WRIGHT VS. R. N. DENHAM ET AL.

Rules to Noting Exceptions and Requests to Charge for Review on Error, etc.

ROUSE, J.:

In the Court of Common Pleas the plaintiff filed his petition, setting forth that on a certain day the defendants made and executed their note for the sum of $2,500, payable to the order of one S. G. Baldwin, indorsed by Baldwin to himself, who was the owner and holder thereof; that the note was past due and no part of the same had been paid, and asked for a judgment thereon. To this petition R. N. Denham made no defense. J. L. Denham, one of the parties charged as a maker of the note, came in and answered. He admitted indorsing his name on the back of the note, but said he did it not as a maker, but as an indorser,—that he was an indorser, and an indorser only, upon the note; that when the note became due no demand was made upon him for payment, and no notice given him of non-payment; in other words, that the note was not protested for non-payment, and that thereby he was discharged so far as the note was concerned.

The issue then made by the pleadings is this: J. L. Denham was charged in the petition as a maker of the note; the answer set up a denial that he was a maker and alleged that he was an indorser and an indorser only, and was discharged from payment because no protest had been made of the note; and that is the only issue in the case, and on that issue a trial was had before a jury, who brought in a verdict in favor of the plaintiff, on which verdict judgment was rendered by the court.

The errors assigned in the bill of exceptions are: 1. Error in the charge of the court. 2. Error in refusal of the court to give charges requested by the defendant. "To which refusal to charge as requested by said defendant, and to which charge as given by said court to said jury, the said defendant excepts." In the first place he excepts to the charge of the court as a whole. Looking at the bill of exceptions we find the charge was in writing; that it covers some 6½ pages of legal cap; that it consists of numerous propositions. Now, it is well settled by decisions of the Supreme Court in the 25th O. S., 30 and 32 O. S., that where the charge consists of several propositions, if the defendant desires to except, he must, at the time the charge is delivered, specify what propositions of the charge he excepts to, giving the court a chance to hear his reasons, and if the court, in their better judgment, find they have erred as to those propositions in the charge already given, they may correct them upon the spot. But where no propositions are specifically pointed out as excepted to, and the exception is general to the charge as a whole, the Supreme Court have decided that the District Court or the Superior Court need not review that on error. That is the case here. The charge is lengthy, consisting of numerous propositions. The exception is simply to the charge as a whole. We therefore lay that charge and the exceptions here wholly aside for that reason.

The next exception is to the refusal to charge as requested. We find that ten requests were handed up to the court by the defendant and requested to be given in charge to the jury. Of these ten requests the first five were given and the last five were refused to be given by the court. It is not then true as a matter of fact that the court refused to charge as requested by the defendant. The court charged in part as requested, and refused to charge in part as requested by defendant. It gave five of the requests to the jury and refused to give five.

But suppose this refers simply to what the court did refuse to give in charge—the last five requests. The exception is to the refusal of the court to give the whole of those five requests to the jury. Now, it is well settled by a decision of the Supreme Court that unless the party specifies the particular requests which he excepts to as having been refused by the court, but excepts simply to the refusal of the court to give the whole, if any one of the requests is unsound, the court is correct in refusing to give the whole, because the request is to give the entire request.

Now, were the whole five requests sound law? The first of the five requests is as follows: "If J. L. Denhem did not sign said note as indorser but as maker, then in that case, his name being upon the back of the note,

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the presumption is that he was surety and not principal upon said note."

Now, what was the issue in this case? The issue was, is this defendant a maker or an indorser? Now, what is requested to be given in charge? In substance, that if the jury find the answer of the defendant is not true—that he was not an indorser bnt a maker as charged by the plaintiff—then the presumption in his name being upon the back of the note, that he signed as surety and not as principal. Now, no such issue was made by the pleadings. The request is that if he is found to be a maker, the presumption is that he is surety and not principal. That would simply have misled the jury. It was not a charge material to the issue. The court properly refused to give it.

Now, that is one of the five requests that the court refused to give. We will say that all of the other four were sound law. The request is to give the whole five. One was not proper to be given. The exception is to the refusal of the court to give the whole five. That point is equally well settled by the decisions of our Supreme Court—that where several requests are asked to be given to the jury, one of which is unsound, and the exception is to the refusal of the court to give the whole, it is not error on the part of the court to refuse to give the whole. That we find to be the case here.

We find then that there was no error on the part of the court in refusing to give the whole five of these charges, and that the exception is not well taken.

Judgment of the Common Pleas affirmed.

JACKSON & STEWART and HERRICKS, for plaintiff in error.

FRANK KELLEY and R. F. PAINE, for defendants.

WICK VS. GREEN.

Liability of Defendant Purchaser Retaining Part of Consideration of Purchase as Indemnity Against Lien to the Holder of such Lien in an Action to Recover its Amount Independent of Implied or Express Promise to Pay. etc.

HALE, J.:

The defendant in error, who was the plaintiff below, brought her action in the Court of Common Pleas against Henry Wick, the plaintiff in error, to recover a specified sum which she alleged Wick had assumed and agreed eration or purchase price of certain premises purchased by Wick of one Wallace. This alleged agreement was not contained in the conveyance itself, and on the trial in the court below it was sought to be established by parol. It was claimed in argument that Wick could only be liable by virtue of an express promise made at the time of the conveyance, and that any parol promise by him to pay the debt would be within the statute of frauds and therefore void. This claim, we think, will bear investigation, and to decide it with any degree of confidence that we are right would require more time for investigation than we have been permitted to devote to it. But we have looked through the whole case, and we are unable to see how we can sustain this verdict under the charge of the court, having investigated very fully, in another case, the principles of law upon which the liability in a case of this kind is founded.

Now the Court, after making a statement of the conveyance and of the claims of the respective parties, says, "You have a right in considering this question"—that is as to the liability of Wick—"to look at all the facts and circumstances as related by the witnesses. You need not stop to inquire who offers the testimony. It is your duty to judge of the facts, and I will say to you in brief that if you come to the conclusion—if the weight of the testimony supports the conclusion that at the time of the conveyance of the real estate by F. T. Wallace to Henry wick for the consideration of $33,000, any portion of the $33,000 was retained—withheld by Wick from Wallace, to secure or to provide against any supposed lien that this plaintiff may have had at the time of this conveyance, and it was talked of, understood, and assented to by Wallace that the money thus retained by Wick was retained to secure him against any supposed lien or any lien in fact in favor of this plaintiff—if the testimony satisfies you of that state of facts, the plaintiff is entitled to your verdict. This excludes the idea of his implied promise or agreement to pay," thus leaving it simply upon the naked fact of the making of the conveyance and retaining of the money by Wick as indemnity against a lien that Mrs. Green was supposed to have. We have read this charge through twice from beginning to end for the purpose of seeing whether, taking it altogether, it could be sustained, under this charge if Wick kept back in that arrangement for his own protection a to pay to her as a part of the consid- certain amount of that $33,000, that Mrs. Green, without any reference to an implied or express promise, might recover. We feel compelled to say that is not the law, that the natural result of that charge would be to prejudice the jury, and give them a wrong basis upon which to found a verdict. We think upon this charge, without passing upon all the questions that have been argued by counsel, that the case must be reversed and they may take their chances on the main question that was argued, which, to say the least, must be considered a doubtful one.

S. BURKE, for plaintiff in error.

E. J. ESTEP, for defendant in error.

SUPREME COURT OF OHIO.

DECEMBER TERM, 1878.

Hon. W. J. Gilmore, Chief Justice. Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Hon. William White, Judges.

TUESDAY, May 6, 1879.

General Docket.

No. 76. Joseph Westlake vs Casander Westlake. Error reserved in the District Court of Jackson county.

GILMORE, C. J.:

1. A wife may maintain an action for the loss of the society and companionship of her husband, against one who wrongfully induces and procures her husband to abandon or send her away.

2. In such an action, the declarations of the husband, made in the absence of the defendant, as to the cause of his abandonment or putting his wife awa: are inadmissible.

Judgment reversed, and cause remanded for a new trial.

White and Okey, J. J., concur in the reversal, but are of opinion no cause of action is shown in the record.

No. 82. The City of Tiffin vs John C. McCullough et al. Error to the District Court of Seneca county.

MCILVAINE, J. Held:

1. Where the owner of a stone quarry by blasting with gunpowder, destroys the buildings of an adjoining land owner, it is no defense to show that ordinary care was exercised in the manner in which the quarry was worked.

2. The owner of a stone quarry hired a person "to go into the quarry, quarry stone therein, break the same to a certain size and pile them up so they can be measured," and "had no other or further control" over the em

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ploye who was "to furnish and find the gunpowder and other tools," and receive compensation at the rate of $1 per perch; and the employer by blasting with gunpowder destroyed the buildings of an adjoining proprietor. Held: That the employer is liable for the injury inflicted by the employe.

Judgment affirmed.

No. 92. Samuel Shorten et al. vs David T. Woodrow et al. Error to the Superior Court of Cincinnati.

BOYNTON, J. Held:

1. The 17th section, as amended February 12, 1868 (S. & S., 397) of the act regulating the mode of administering assignments in trust for the benefit of creditors, operates only upon fraudulent transfers, conveyances and assignments made by the debtor himself.

2. An insolvent debtor purchased real estate, and with the fraudulent intent to conceal from his creditors his interest or ownership therein, caused the vendor to convey the premises to a third person, who, at the debtor's request, conveyed the same to the latter's wife. Held:

1. That neither of said conveyances falls within the operation of the 17th sec ion of the act above referred to.

2. That the wife, in equity, holds the legal title to the premises conveyed, subject to the right of her husband's creditors to subject the same to the payment of their claims.

Judgment reversed and cause remanded.

No. 97. The Lawrence Railroad Company vs The Commissioners of Mahoning county. Error to the District Court of Mahoning county.

OKEY, J.:

1. The Legislature cannot create a liability for acts as to which there was no liability when they were committed; but where a remedy exists, the Legislature may change it, as well as to acts theretofore as those thereafter done.

2. The act of March 7, 1873 (79 O. L., 53), which provided a new remedy against those who place obstructions in public highways, applied as well to existing obstructions as those subsequently placed therein.

3. A Railroad company wrongfully laid its track in a public highway, and after it had continued the obstruction more than six years, an action was brought against it under the act of 1873. Held: That neither the limitation of four years, nor that of six years, was a bar to the action.

3. Under the act of 1873, relating to obstructions in highways, the measure of damages, ordinarily, is the cost of removing the obstruction and restoring the highway to its former condition.

4. Where an obstruction is created in a State or county road, and the corporate limits of a municipal corporation are extended over a part of the road so obstructed, the County Commissioners cannot maintain an action for the obstruction of that part of the highway which is within the limits of the corporation.

6. An action by the County Commissioners, brought for the obstruction of a county road, was pending at the time of the passage of the act of March 7, 1873; and on May 31, '73, the court, by consent of parties, mabe an order that the cause should stand as though commenced on that day. Held: That the action must be regarded as one prosecuted under the act of 1873.

Judgment reversed and cause remanded for new trial.

Motion Docket.

No. 85. Otto Whitte vs. Phillip Lockwood. Motion to stay execution in cause No. 643 on the General Docket. Motion overruled.

No. 86. Frank Campbell vs. the State of Ohio. Motion to take cause No. 646 on the General Docket out of its order for hearing. Motion granted.

U. S. CIRCUIT COURT N. D. OF OHIO.

May 1.

33. First National Bank of Oberlin et al. vs Lorin Prentiss. Petition in review. Prentiss & Baldwin.

May 2.

3839. The National City Bank of Cleveland vs Henry Gilbert et al. Reply. Grannis & Griswold.

3840. Same vs Wm. G. Gilbert et al. Motion. Same.

3246. Hugh McConnell vs The Florence S. M. Co. Demurrer. R. F. Pain.

3850. The United States vs W. J. Pratt. Affidavits of W. J. Holden, J. A. Brown, W. J. Pratt, E. F. Atwater, W. J. Pratt, B. F. Fay, H. W. Mather. and A. Pratt.

3174. B. S. Cogswell, ass'e., vs Sarah Bausfield. Appeal bond.

May 3.

John E. Ensign admitted to practice in the United States Courts.

3342. William Boyle vs Penn. Co. Motion for a new trial. Hutchins & Campbell.

3853. Second National Bank of Toledo vs Anna Schielly, admx., etc. Answer. Hamilton & Ford and Ingersoll & Williamson.

May 5.

James B. Fraser admitted to practice in United States Courts.

May 7.

3549. Rufus Eaton, admr. vs W. C. Holgate et al. Bill of revivor. Willey, Sherman & Hoyt.

May 9.

3864. Charles Ensign vs The City of Cleveland. Motion to make more definite and certain and to strike out.

3865. S. M. Milliard vs George H. Burt et al. Demurrer to petition.

U S. DISTRICT COURT N. D. OF OHIO.

May 2.

1611. Mahlon C. Rouch, assignee of John B. Eberly, vs the creditors of same. Answer of Hay, Stebbins & Co. Downing & Yocum.

1611. Same vs same. Answer of Sarah Walmer. Same.

1586. J. D. Horton et al., assignees of L. W. and H. R. W. Hall, vs Lyman W. Hall et al. Answer and cross-petition of John C. Beatty. Rockwell & Hatfield.

May 3.

1670. William Wise et al. vs the schooner Gold Hunter etc. Petitions against the proceeds by John M. Wilcox, sheriff, and Patrick Ryan, and intervening answers of same parties to petition of Frank C. Brockway.

May 6.

1584. Lewis Flattery, assignee, etc., vs Greenwald et al. Answer of Harriet Greenwald.

1741. J. B. Cowle et al. vs steam tug H. B. Wilson. Answer of A. J. McIntyre.

Bankruptcy.

May 2.

1366. In re John Seifert. Discharged.

1729. In re Harlam H. Brown. Same.

1720. In re Frederick G. Brown. Same.

1936. In re Jacob Stambaugh. Petition for discharge. Hearing May 20th.

1597. In re Wm. E. Cox. Same. Hearing May 14.

May 3.

1831. In re estate of Z. Greenwald & Son, bankrupts. Specifications in opposition to discharge.

1537. In re James D. Edwards. Petition for discharge. Hearing May 20th.

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2047. In re Edwin Bayliss. Order for hearing May 14.

May 5.

1833. In re Jonathan P. Burton. Discharged.

1918. In re Andrew J. McCartney. Same.

1939. In re John M. Greiner. Petition for discharge. Hearing May 20th.

May 6.

1428. In re Joseph Erhart, bankrupt. Opposition and specifications against discharge of. Robison & White.

1357. In re Theodore B. Wire. Discharged.

2004. In re John C. Dildine. Petition for discharge. Hearing May 28.

1688. In re Charles L. Barkwell. Same. Hearing May 20.

1539. In re Cirley. Same. Hearing May 28.

2004. In re John C. Dildine. Order for 2d and 3d meetings of creditors.

May 7.

1566. In re Enos Larkin et al. Discharged.

May 8.

1739. In re Samuel H. Pew et al. Discharged.

1844. In re Morton C. Stone. Same.

2031. In re James E. Irwin. Same.

1837. In re H. A. Saliday. Petition for discharge. Hearing May 28.

May 9.

1996. In re Fred W. Smith. Petition for discharge. Hearing May 28.

1912. In re Spencer Munson. Same. Same.

2008. In re Thomas A. O'Rourke. Discharged.

1645. In re Evan J. Evans. Same.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending May 9, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

May 3.

Henry D. Pratt and wife to Susan Lockhead. $772.

Hannah M. Axtell et al. to Homer Tyrrell. $1,890.

Anna B. Holland and husband to The Society for Savings. $600.

Kate G. O. Woods to George W. Mason. $1,537.

Ephraim A. Wilson and wife to L. W. Ford. $200.

George Mesker et al. to J. A. Frederick. $572.70.

Mary E. Warner and husband to the Com. National Bank. $1,200.

Belle Raymond and husband to W. W. House. $875.

Lucius T. Tambling to J. W. Taylor. $6,000.

Olive K. R. Marshall and husband to J. R. A. Carter. $575.

Edmund Walton et al. to Alfred Eyears. $2,887.

Same to same. $2,887.

May 5.

C. W. Thompson to Julius Klefeld. $375.

Warwick Price to Tammy Mead. $300.

Magdalena Bertset to Sophia Hahn. $700.

John Sitzenstock and wife to Peter Grenewald. $300.

Arthur S. Norway and wife to John Beavis. $300.

William Newbold and wife to Benjamin Stevens. $62.

Orvin Boylin and wife to Charles Schmidt. $900.

Margaret Diehl and husband to The Society for Savings. $800.

Katie Doubravo and husband to Celia Wendorff. $500.

Edwin Giddings and wife to Kate R. Palmer. $1,000.

Ellen Lucy to Phillipena Du Zulinder. $1,400.

May 6.

David Crowl and wife to William Hendy. $800.

Richard Hilberen and wife to The Society for Savings. $150.

Timothy Maloney and wife to Norvert Generan. $800.

Gottfried Rittberger et al. to A. L. McCurdy. $888.

Soloman Little to G. G. Hickox. $440.

Oswald Wetzel and wife to F. H. Biermann. $700.

Sarah Burlingann and husband to Norman E. A. McLeod. $1,000.

A. A. Pope to S. C. Smith. $2,000.

Daniel Walter and wife to Sebastian Feig. $375.

May 7.

Terrizaza Helzoun et al. to Aurelia F. Brooker. Two hundred and ninety dollars.

Mary N. Parmelee and husband to Oliver N. Hart. Two thousand five hundred and two dollars.

Adam Fisher and wife to J. G. Armann and wife. Four hundred and fifty dollars.

Frederick Karberg and wife to Frederick Roehl. Two hundred dollars.

John Mackin and wife to Patrick Casey. Three hundred and fifty dollars.

Elizabeth Porter to Samuel Mautner. Four hundred dollars.

Samuel Mautner and wife to The Citizens' Savings and Loan Ass'n. Four hundred dollars.

Adam Miller and wife to Magdalena Steinbrenner. Eight hundred and fifty dollars.

John M. Cleve and wife to Lewis W. Ford. Seven hundred dollars.

May 8.

Thomas Twelvetree et al. to Thomas Bowlon. Three hundred dollars.

Jacob Klein to W. S. Chamberlain. One thousand three hundred and forty-seven dollars.

Honora McCarty to Henrietta Hoffman. Three hundred dollars.

Marcus A. Brown and wife to The Society for Savings. Three thousand dollars.

Same to same. Five thousand dollars.

Jacob Riedel and wife to Augustus Keit. Four hundred dollars.

Neil Gallagher and wife to The Society for Savings. Two thousand three hundred dollars.

Emanuel Rosenfeld to George J. Johnson. Six thousand dollars.

Peter Loesch and wife to the trustees of Gegenseitiger Schutz Verein. Two hundred dollars.

G. H. Oglesby to James M. Oglesby. One thousand two hundred dollars.

Laura A. Blanchard and husband to R. T Morrow. Four hundred and fifteen dollars.

Elizabeth Fries and husband to Louis Naumann. Six hundred dollars.

L. C. Tanney and wife to E. G. Krause. One thousand dollars.

Vincenz Melcher and wife to Marie Reich. Eight hundred dollars.

May 9.

M. Breen and wife to Isaac Kidd. Five hunred and fifty dollars.

Betsey McGee to C. C. Baldwin. Eight hundred dollars.

Jacob Miller to Charles Dauss. Three hundred dollars.

Marian B. Knapp and husband to V. C. Stone. Four hundred and twenty-five dollars.

Mary Heuscher and husband to Wm. Plies and wife. One thousand dollars.

Jacob Schumaker and wife to The People's Savings and Loan Ass'n. Three hundred dollars.

CHATTEL MORTGAGES.

May 3.

Morris O'Connell to John Kingsborough. $275.

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George Newburg to Robert Harlow. $237.

Thomas Philip Horan to Wm. H. Shaw. $50.

Ida M. Blanchard to R. T. Morrow. $35.

Summit Mine Coal Co. to Azariah Everett. $10,000.

David Caton to C. E. Gehring. $500.

May 5.

William Krause to Ludwig Kirchenberg. $70.

Ann Wilson to C. R. Heller. $17.

Wallace Moss to Richard Cunningham. $55.

George Burdick to Clev.. Fur Co. $25.

C. B. Carey to Jacob M. Degue. $100.

William Leonard to C. R. Saunders. $125.

Thomas Gregory and wife to Wm. Galbraith. $600.

Joseph Curley to Vincenzo Pellettiene. $55.

May 6.

E. R. Whiting to T. H. Johnson. $400.

George Hawk to W P. Schneeberger. $1,000

Eliza White to Honore Wilkins. $115.

Fred Amberger to Barbara Weigand. $100.

J. H. Wiseman et al. to Cleveland Furniture Co. $500.

John W. Goodrich to Refus Carpenter. $300.

Jerimeah O'Callahan to Thomas Gallagher. $1,500.

David Talmage to H. A. Leonard. $31.

May 7.

A. B. Shellentrager to Charles C. Shellentrager- One thousand dollars.

A. Cupa to Ernestina Levi. Three hundred dollars.

May 8.

James Y. Black and Son to James Cunningham, Son & Co. Four hundred dollars.

David Coamier to same. One hundred and eighty-two dollars.

J. H. Miller to J. M. Watkins. Sixty dollars.

Edward Opliu to John G. Poole. One hundred and twenty-five dollars.

R. A. Davidson to E. O. Frederick. One hundred dollars.

May 9.

T. Dunn et al. to Stoll & Black. Three hundred and seventy dollars.

Thomas C. Quayle to *Wm.* Cubbon. Three hundred and eighty-five dollars.

Peter Fink to Merts & Riddle. Seven hundred and fifty dollars.

Wm. F. Steiger to Lawrence Dennerle. Five hundred dollars.

H. *W.* Aiken to H. Koningslow. One hundred dollars.

F. Kinkor to same. One hundred dollars.

C. Duebner to John L. Ordner. Eighty dollars.

wm B. Gilbert to George L. Chapman. Eight hundred and twenty-seven dollars.

DEEDS.

May 2.

Stephen Donlon and wife to John Gannon. $2,000.

John Gannon and wife to Bridget Donlon. $1,000.

David Z. Herr, to Bell Schmick. $950.

Jacob Mueller and wife to Elizabeth Hildebrandt. $1,050.

Adam Miller and wife to Jacob Miller. $500.

Michael Mooney to P. F. McGuire. $10.

Elizabeth McClusky to John Arscott. $1,250.

John Riley and wife to Daniel Shurmer. $5,500.

Henry Buffert, admr., etc., to Margaretta Oberle. $1,100.

John Stephan and wife to J. M. Bailey. $4,000.

Mary H. Sterling and husband to Laura W. Hilliard. $20,000.

Augusta Tobien and husband to Benjamin Waud. $9,000.

Benjamin Waud and wife to Augusta Tobien. $6,000.

Max Wertheimer and wife to Jacob W. Hain. $5,700.

May 3.

George W. Foote, guardian etc., to John H. Green. $700.

Alexander Snow and wife to Kate F. Barnes. $2,500.

Robert Sprothberry et al. to George Sithelm. $1,150.

Minerva Cabel to Elvira R. C. Cody. $1.

Wm. H. Chickering to John Philid Birk. $8,000.

Same to John Handertmark. $1,200.

Margaret W. Craw and husband to Arthur Hughes. $8,000.

John Dracket, admr. etc., to Ellen Lucy. $2,000.

J. A. Ensign et al. to Wm. Herbert. $1,710.

Michael Fetzer and wife to Maggie Kelly. $600.

A. S. Gardner and wife to Lucius T. Tambling. $12,000.

Patrick Murray to Newell Bogue. $4,000.

Caroline Newman and husband to Lewis Link. $1.

F. L. Raymond and wife to Parmelia E. J. House. $1,750.

Elisha Savage and wife to Claxton Tyler. $20.

Dwight Smith and wife to S. Wright Smith. $3,000.

Mary C. Smith and husdand to Alvin J. Harvey. $1,500.

Lucius Southwick et al. to Charles Southwick. $1.

T. H. and R. C. White to Carl Stein and husband. $648.

Michael Spelman, by Felix Nicola, Mas. Com., to Jacob Weislogel. $400.

F. M. Bailey et al. to B. F. Whitmore. $4,500.

Hubbard Cooke and wife to Charles Hickox. $20,000.

Alfred Eyears and wife to Edmund Walton et al. $8,250.

John Goedecke and wife to William Grant. $2,500.

Catharine Allen and husband to Alexander Butchat. $900.

May 5.

John Corrigan and wife to H. C. Burt. $2,500.

Ferdinand Elliott to James A. Beerrer. $750.

John Geipendorfer and wife to Frank Hauska. $750.

Olivia N. Hart and husband to Mary H. Parmalee. $7,500.

George C. Hickox et al. to William Milvard. $400.

Morand Judd to Christian Fritz. $1,000.

Francis B. McBride et al. to H. A. Hutchins. $750.

Martha Proctor and husband to Anna M. Heimlich $1,400.

Joseph Stanley and wife to Eliza J. Crane. $2,000.

Peter Strengel and wife to John Lehet. $287.

L. J. Talbot and wife to T. R. Hand. $867.

Sherman W. Thomas and wife to Daniel Johnson and wife. $1,500.

Catharine Fowler et al., by Mas. Com., to Wm. Hendey. $902.

Same et al., by etc., to Peter R. Crawford. $750.

May 6.

Charles D. Bishop and wife to Josephine E. Bishop. Six thousand dollars.

Mary Daniels to Henry Weatherbee. Nine hundred dollars.

Anton Friend and wife to Joseph C. Friend. Five dollars.

William Hendy and wife to David Crowl and wife.

A. L. McCurdy to Gottfried Ritt-

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berger. One thousand two hundred dollars.

Magdalena Steinbrenner and husband to Adam Miller. Eight hundred and fifty dollars.

Gustav Schmidt, assignee, etc., to Charles Schmidt. Three thousand two hundred dollars.

Mary Ann Williams to Maggie Demming. Five dollars.

Charles Block, by Felix Nicola, Mas. Com., to John G. Bruggeman. One hundred and sixty dollars.

George G. Hickox and wife to Solomon Little. Two thousand five hundred dollars.

Same et al. to same. Four hundred and eighty dollars.

Isabella G. Jewett to Edward Bailey. Two thousand dollars.

John Pecka and wife to Mathias Poskocil. Three hundred and ninety-six dollars.

Mary J. Towner et al. to David Johnson. Seven hundred dollars.

Louis C. Boltz, by Felix Nicola, Mas. Com., to Clemens Stolz. Two thousand eight hundred and sixty-seven dollars.

May 7.

John M. Cleve and wife to Mathias Otto and wife. One thousand and five dollars.

James M. Coffinberry and wife to James Jewett. One thousand two hundred dollars.

Theresa Beckman to Jonathan Neal. Three thousand dollars.

Perrilia F. Brooker to Terezije Hezoun. Three hundred and twenty dollars.

George W. Canfield and wife to Julia A. Merryfield. Eleven thousand four hundred and sixty-seven dollars.

Julia A. Merryfield to Jeannett L. Canfield. Eleven thousand four hundred and sixty-seven dollars.

N. P. Glazier to John Bartek and wife. Four hundred and sixty dollars.

Jonathan Owen and wife to Lucy A. Owen. One thousand dollars.

G. A. Schmitt and wife to Mills Mack. Two thousand six hundred dollars.

J. J. Carran, assignee of G. A. Schmitt, to same. Two thousand five hundred dollars.

William Watter and wife to John Koot. One thousand five hundred dollars.

Edward Costello, by Mas. Com., to The Citizens' Savings and Loan Ass'n. Three thousand six hundred and seventy dollars.

William Grigsby, Jr., et al. by Mas. Com. to W. H. Black. Eight hundred and ten dollars.

Jarah Jane Van Namee by same to Charles Haasler. One thousand six hundred dollars.

May 8.

George A. Butler and wife to Eliza Pellett. One hundred dollars.

Patrick Carr et al., by C. C. Lowe, Mas. Com., to Neil Gallagher. Four thousand three hundred and five dollars.

Thomas J. Hobbs and wife to Geo. P. Phillips. One dollar.

H. L. Terrell and wife to Thomas H. White. Six thousand five hundred dollars.

James W. Johnson and wife to Henry S. Northrup et al. Twenty dollars.

George J. Johnson et al. to Emanuel Rosenfeld. Eight thousand dollars.

Thomas H. White and wife to E. W. Terrell. Twelve thousand dollars.

James Paton and wife to Anna Cowley. Four hundred dollars.

Martin Cowley and wife to May Jones. Four hundred and fifty dollars.

Dudley Baldwin and wife to Harvey W. Murrey. One dollar.

Martin Cowley and wife to Mary Jones. Four thousand five hundred dollars.

George P. Phillips to Thomas J. Hobbs. One dollar.

E. G. Krause to L. C. Tanney. One thousand eight hundred dollars.

Catharine Logan to Annie L. Gardner. Two hundred dollars.

George Presley and wife to J. M. Coffinberry. One thousand three hundred dollars.

Edward Cliff and wife et al. to Charles Becker. Four hundred dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending May 10th, 1879, against the following Persons.

May 5.

Cleveland Silver Mining Co. $748.12.
C. M. Nan Doorn. $195.85.
James Moss. $150.95.
H. Marhofer. $174.
Joseph Bilek. $403.02.
Bridget Sheeron. $281.33.
George Smith. $427.57.
J. O. Humphrey. $3,884.
Loren Prentiss et al. $1,185.23.
John Norway et al. $1,170; $750.
D. Catoir. $218.
Jacob H. Arter. $409.
John Greening. $451.
H. F. Leypoldt. $362.55.
Wm. McHale. $114.
W. H. Capener. $149.80.
Daniel Graef. $1,217.33.

May 7.

J. W. Thomas. $370.
Frank Kudora. $106.87.

COURT OF COMMON PLEAS.

Actions Commenced.

April 29.

15004. Annie Rose Blannerhassett vs Charles H. Von Tager et al. To foreclose mortgage and for equitable relief. Hord, Dawley & Hord.

May 2.

15014. Patrick Govigan Sr. vs John Davis et al. Appeal by deft. Davidson. R. A. Davidson.

15015. Isaac Levy vs John Geisendorfer et al. Money and sale of land. Goulder, Hadden & Zucker.

15016. Charles Lederer et al. vs George Bading et al. Money and equitable relief. Hord, Dawley & Hord.

May 3.

15017. Sprankle, Morse & Co. vs Joseph Plojhart et al. Money, sale of lands, relief and appointment of receiver. Ball & Raynolds.

15018. Henry S. Fitch vs H. C. Kerstine. Appeal by deft. Judgment April 21. W. V. Tousley; H. W. Canfield.

15019. John G. Steiger vs Johann Biel et al. Equitable relief. Weed & Dellenbaugh.

15020. Carloss R. Atwell vs Frederick Hempy. Money and to subject land. Safford & Safford.

15021. E. B. Hale & Co. vs J. H. Burgert et al. Money only. Bolton & Terrell.

15022. John Newman vs Frederick Gabel et al. Money and sale of land. W. S. Kerruish.

15023. Morris W. Stanley et al. vs Abram H. Stanley. Account and equitable relief. Grannis & Griswold.

15024. Isabella Crawford, by etc., vs Wm. Tompkins. Money only. Jackson, Pudney & Athey.

15025. Caroline M. Green vs James B. Green. Money and equitable relief. Hord, Dawley & Hord.

15026. The State of Ohio on behalf of Catherine Murphy vs Michael Burns. Bastardy.

15027. R. E. Mix et al. vs William H. Kelley et al. Equitable relief. Mix, Noble & White.

15028. George Lenz vs Abis Neiman et al. Money, to foreclose mortgage, and relief. Gilbert, Johnson & Schwan.

14029. John Laubritzky vs Ohio Steel Barb Fence Co. Money only. Same.

15030. Margaret Bower vs Charles Bower et al. To set aside deed, to correct, and relief. John K. Corwin.

15031. Sereno Fenn vs George W. Crowell et al. Money and equitable relief. Baldwin & Ford; Gilbert, Johnson & Schwan.

15032. Gottfried Reindl vs Leonard Preissing. Money and equitable relief. Ech. Heisley.

15033. David H. Beckwith vs Maria E. Kretsch et al. Sale of mortgaged premises and relief. James Wade.

15034. Ansel S. Gardner vs Rosanna Logan. To foreclose mortgage. Goulder, Hadden & Zucker.

May 5.

15035. Bryan Bank vs John Norway et al. Cognovit. Robison & White; H. N. Johnson.

15036. Same vs same. Same. Same; same.

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15037. H. W. Putnam vs D. Catoir. Cognovit. Henderson & Kline; E. H. Eggleston.

15038. George D. Mix vs Jacob H. Arter. Cognovit. Bauder & Davis; A. Carpenter.

15039. H. B. DeWolf et al. vs Joel W. Shuman. Money on.y. Henderson & Kline.

May 6.

15040. L. M. Charlton vs J. M. Wilcox, sheriff. Habeus corpus. J. A. Smith.

15041. Luther Lilly et al. vs Benjamin Chappell et al. Injunction and equitable relief. Mitchell & Dissette.

15042. A. L. and A. B. Schutt vs J. Schwartz. Appeal by deft. Judgment April 15. Stre t & Bentley.

15043. Emily S. Camp vs Randall Stetson. Money only. Marvin, Taylor & Laird.

15044. John Hutchins et al. vs Samuel H. Turrell et al., admrs. etc. Equitable relief. Hutchins & Campbell.

15045. Claus Tiedeman vs The Cleveland, Linndale & Berea Plank Road Co. Money, to subject lands, franchises, personal property and other relief. A. W. Beman.

15046. X. C. Scott vs Levi Burger. Appeal by deft. Judgment April 15. J. M. Stewart, W. B. Sanders.

May 7.

15048. In re John F. Biente to sell real estate unincumbered and discharged from dower. To sell real estate, etc. J. K. Corwin.

Motions and Demurrers Filed.

May 1.

2518. The Township of Brooklyn vs Duncan et al. Demurrer by deft. W. J. Johnson to the petition.

2519. Burgert vs Pomerene. Motion by defendant to dissolve injunction and vacate order appointing receiver.

May 3.

2520. Smith vs Clymonts et al. Motion by defts. to discharge attachments and garnishee process.

2521. Robinson vs The Continental Life Insurance Co. etc. Motion to require plff. to give bail for costs.

2522. Wells vs Chatterton. Motion to require defendant to give new bail for appeal.

2523. Belle vs Lowe et al. Demurrer by plff. to answer of John J. and Fanny Lowe.

2524. Cleveland Hay Car Co. vs White et al. Motion by defts. Dunn and Gall to continue restraining order.

May 2.

2525. Crawford vs Mills. Motion by deft. to discharge attachment.

2526. Gilbert vs Gilbert et al. Demurrer by defendant J. M. Richards to the petition.

2527. German Mutual Protection Association vs Heene et al. Demurrer by deft. Jacob Heene to the petition.

2528. Marse & Co. vs Plojhart et al. Motion by plffs. for the appointment of a receiver.

May 3.

2559. Otis vs Cozad et al. Demurrer by plff. to 1st paragraph of answer of deft. Justin L. Cozad.

2530. Byers vs Forest. Demurrer to the petition.

2531. Clewell Stone Co. vs Cleveland City Forge and Iron Co. Demurrer to the petition.

2532. Platt vs Reader et al. Motion by deft. Charles F. Reader to dissolve or modify injunction.

2533. Hill vs The Knickerbocker Life Insurance Company. Demurrer to the petition.

2534. Birney, admx., etc. vs Wilkins. Same.

2535. Folsom vs Strong et al. Demurrer by plff. to answer of Mary L. and John T. Strong.

2536. Tod, Wells & Co. vs Smith et al. Motion by defendant, The Commercial National Bank, to strike the petition from the files.

2537. Same vs same. Motion by deft. George W. Mason to strike the petition from the files.

May 5.

2538. Gates vs Jordan et al. Motion by plaintiff for the appointment of a receiver.

2539. Tod, Wells & Co. vs Smith et al. Motion by deft. Mahoning National Bank of Youngstown to strike the petition from the files.

2540. Schmoldt vs Graves et al. Motion by defendant Caroline Schmold to require plaintiff to elect on which cause of action he will proceed, and to strike out remaining causes.

2541. Hawkins vs Madigan et al. Motion by plffs. to confirm the report of Perry Prentis, receiver.

May 6.

2542. The United States Mortgage Co. vs Jones et al. Motion by defendant to set aside appraisal and for a new appraisal.

2543. Gates vs Gordon. Motion by plaintiff to have case noticed for trial and placed on docket of noticed cases.

2544. Walker vs McDermitt. Motion by defendant to dismiss action for want of a petition.

2545. Everett vs Janowitz et al. Demurrer by plff. to answer of deft. R. Crawford.

2546. Wick et al vs Zimmerman et al. Motion by plff. for the appointment of a receiver, with notice.

2547. Tiedeman vs The Cleveveland, Linndale & Berea Plank Road Co. Motion by plaintiff for the appointment of a receiver.

2548. Maurer vs Lowe et al. Motion by plaintiff for leave to sell property at a specified sum named in the motion.

May 7.

2549. Dunn vs Gilchrist. Motion to require defendant to amend his answer.

May 8.

2550. Tod, Wells & Co. vs Smith et al. Motion by defendant, Mahoning National Bank of Youngstown, to strike amended petition from files.

2551. Parker vs Hills et al. Motion by plff. for new trial.

Motions and Demurrers Decided.

May 6.

2542. The United States Mortgage Co. vs Jones et al. Motion granted and new appraisal ordered.

May 7.

1244. Perkins et al. vs The City of Cleveland et al. Motion struck off by consent.

1245. Morrison et al. vs same. Same.

1474. John Agnew vs same. Same.

2055. Loesch vs Brown et al. Same.

2289. Zoeter vs Lamson. Demurrer withdrawn.

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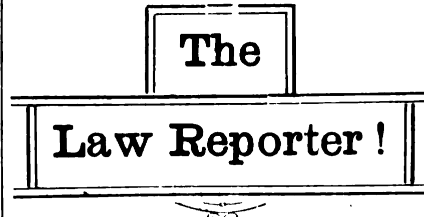

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THE ROMAN CIVIL LAW.

II.

In our first article we briefly pointed out the origin of the Roman civil law—that it passed through three periods, namely, the period of custom or original rudeness; second, the period when many distinctions arose and confusion in the law existed; and third, the final and successful codification which raised the Roman law to the dignity of a science. The names lawyer and philosopher were then synonomous.

As a distinguished writer has stated: "The history of the Roman law may be divided into four periods. The first, from the foundation of Rome to the enactment of the twelve tables, A. U. C. 305, B. C. 449—infancy. The second from the twelve tables to the accession of Augustus, A. U. C. 723, A. D. 31—youth. The third from the accession of Augustus to the death of Alexander Severus, A. D. 235- manhood. And the last from the death of Alexander Severus to the reign of Justinian—decay."

The third period was the flourishing period of Roman jurisprudence. We before observed that from the twelfth century throughout Europe, England not excepted, it was the foundation of all instruction in law, and the basis and source of jurisprudence excepting in matters of civil and political liberty, and institutions of non-Roman characteristics. It mitigated barbarity in the middle ages, and was the most important source of the codes and laws of Europe. But it was not the only source of those laws. They contain elements derived from sources other than that of the Roman civil law.

First: The *corpus juris canonici*, relating to ecclesiastical matters.

Second: General laws of the different countries; as the legislation of Maximillian in 1512; the Carolina, passed during the reign of Charles V. in 1532, and which forms the basis of the criminal law of Germany; the code Napoleon, etc.

Third: Long usage and custom; rules established in practice; and the decisions by the Supreme Courts.

Through the operation of these causes the civil law has been greatly modified, and in many instances entirely abrogated in the nations of Europe.

These changes in the civil law are particularly marked in the law of succession, and in the law of family. Because of these great changes in the civil law, it has been argued that the study of that law as found in the books of Justinian was not beneficial. With equal force it might be said that because Blackstone, or the first part of the Institutes of the laws of England, (termed the commentary upon Littleton), contains much that is now obsolete or very greatly modified, that it is therefore useless to study those commentators.

In Austria it was at one time thought that the study of the civil law was not advantageous, and for a time its study was abandoned. The consequence was that her law writers, jurists and lawyers failed to maintain the reputation for great learning and high legal attainments which they had formerly sustained. About twenty years ago the error of this step was discovered, and the study of the civil law was resumed. Likewise in France, when the code Napoleon was adopted, the study of the civil law was neglected. A result like that in Austria attended this step, and the study of that law was there soon after resumed, and has ever since continued. In the shape we have presented and defined this law and as it existed at the time it passed into the European countries, it is to-day and will continue to be taught in all the universities abroad, for two reasons; first, because of the vast amount of learning it contains, second, because it has left an impress upon the people of those countries, which will not be easily effaced.

Within the past few years a marked revival of the study of this law has taken place in England, where students are supposed to become familiar not only with the writings of English authors and commentators, but also with that mine of legal lore, the Digest. Such is the size

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of the work that few can master more than a small part.

The subjects treated of in the Pandects may be arranged under four heads:

1st, Introductory or general matter.
2d, The law of family.
3d, The law of property.
4th, The law of obligation.

The great difficulty experienced in studying this law arises from the want of method in its arrangement. Titles treating of any of the above subjects must be sought in widely distant parts of the work.

The Pandects are divided into seven parts and fifty books. The books are subdivided into titles, of which there are four hundred and thirty-two, the titles into laws or fragments, and the laws into paragraphs. They contain some repetitions and contradictory laws. In case of a conflict of the laws of the Pandects with those of the Institutes or the Code on any question, the rule "*lex posterior derogat priori*" applies. The laws of the Pandects supersede those of the Institutes; those of the Code supersede those of the Pandects, and those of the Novels supersede those of the Code.

So in case of conflict between any of the sources or elements that go to make up the jurisprudence of the European countries, the same rule applies, that is to say: if by custom or practice a rule or law has been established and exists decisive of a given question, it will govern; if not, recourse is had to the general laws; if that does not furnish the rule, the canonical laws may, and after it, the civil law, in the order of its composition as stated.

There can be no doubt that a knowledge of the Roman law would tend to the improvement of our own laws, and would be valuable to every purpose of liberal education. All the best writers commend this law as a mine of argument and equity and advise its study as a fitting preparation for the duties of the lawyer.

The jurists whose opinions and decisions are most frequently mentioned in the Institutes and Pandects, are Papinian, Paulus, Caius, Ulpian, and Modestinus.

In conclusion we wish to quote the language of a learned English professor of law in expressing his belief recently that some knowledge of the Roman system of municipal law would contribute to improve their own:

"Every one who desires that the student should possess competent notions of the objects of legal science—that his ideas of the subject should be coherent and systematic, not flung at random upon each other like a heap of stones—that he should be able to pursue the subject into its smallest ramifications, and remark its finest varities and shades of difference—that he should be a master of philosophical jurisprudence, and therefore never disposed to sacrifice the ends to the means, must begin the education of such a person with a complete system, containing comparatively few laws, but numerous rules for their employment and elucidation. Thus trained, the jurist, wherever the stage be laid on which he is called to tread, whether it be to frown down chicane among time-servers, pettifoggers and courtiers in England, or to mitigate the horrors of the yoke of the rapacious stranger by an enlightened, steadfast and impartial equity above the din of violence and extortion, will perform his part with grace and dignity; *and where will he find a system so complete, so long and so deeply meditated, refined by such vast experience, and improved by the application of so many centuries, as the Roman Law?*" H.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

BRAINARD VS. RITTBERGER.

Where a Petition Contains more than one Cause of Action, whether each should Contain a Prayer for Juddgment, etc.

HALE, J.:

The defendant in error filed a petition in the Court of Common Pleas to enforce the collection of four promissory notes and foreclose a mortgage given to secure the same. The petition contained five causes of action, four of which were founded upon the notes and the fifth upon the mortgage. The first four causes of action describe the notes, but neither contains a prayer for judgment. To these a demurrer was interposed on the ground that they do not state facts enough to constitute causes of action. The demurrer was overruled by the court below, and that ruling, it is alleged, was erroneous. It is claimed that there should have been a prayer for judgment at the close of each cause of action. At the close of the cause of action on the mortgage there is a prayer for judgment specifying the exact amount due upon each note and also a prayer for a decree for a sale of the premises. The question presented is whether in a petition setting up several causes of action there should be a prayer for judgment added to each cause of action, or whether the causes of action are demurrable for the absence of such prayers. Precisely what the practice has been I am not aware. Every fact is stated in each of those causes of action essential to a recovery. Then after stating all the causes of action the relief is demanded. If that practice is allowable under the code I think it is the better practice, and I see no reason why it is not allowable. Several causes of action may be joined in the same petition. We are not disposed to disturb the judgment on that ground.

The fifth cause of action presents a question of more difficulty. The other causes of action are upon the notes, and a copy of the notes is attached to the petition. The causes of action allege the giving of the notes and the amounts due upon the notes. The fifth cause of action starts off in this way: "The plaintiff further says that his fifth cause of action against G. H. and A. W. Brainard"—then there is this language—"for the purpose of securing the payment of said above mentioned and described notes said G. H. Brainard"— Then further on: "The plaintiff further says that said above mentioned and described notes and said mortgage securing the same were given by said G. H. and A. W. Brainard as aforesaid for the balance of the purchase money due the plaintiff for said described real estate." I only read enough of this exception to show the point made. The first objection to this cause of action is that the notes referred to in it are not fully described; that the words "above mentioned and described notes" is not sufficient. The claim is made that if the pleader had said, "the notes above described and the allegations relating thereto are hereby adopted and made a part of this," it certainly would have been sufficient.

We are not disposed to disturb the judgment upon that ground. A copy of these notes is attached to the petition. They are fully described. It is impossible to treat these as separate papers. The copies are attached and referred to as "the above mentioned and described notes." We are inclined as against this demurrer to hold this petition good.

There is another serious question: Having set out the mortgage and the record of the mortgage, etc., the breach is alleged in this way:—not saying that the condition of the mortgage has become broken and the

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amount unpaid—"The plaintiff says that there is now due and owing him from said defendants G. H. Brainard and A. W. Brainard on the first of said notes," and so on with the other notes—alleging, as it is said, a legal conclusion. It is said that that amounts to nothing and must be treated as nothing against this demurrer. We are disposed, on the whole, as against a demurrer, to hold this cause of action also good, but we would advise the attorneys not to repeat the experiment,—if they have another petition to draw, to draw it in a different shape.

We will affirm the judgment.

TYLER & DENISON, for plaintiff in error.

STONE & HESSENMUELLER, for defendants in error.

N. C. BREWER VS. MARTIN MAURER.

Liability of Married Woman on Agreement to Assume Payment of Mortgage upon Real Estate Purchased by her—Also of her Grantee who Assumes to pay Same Mortgage, etc.

HALE, J.:

This action in the court below was brought by Martin Maurer against the defendants Brewer and Truscott. The petition alleges this state of facts: That on the 27th of January, 1872, one George Braundel was the owner of certain premises in this city. On the 3d of May, 1875, Braundel conveyed the premises to Mary Braundel, the wife of a brother. But before the conveyance to Mary Braundel, George Braundel had executed a mortgage upon the premises to secure the payment of some $16,000, and at the time of the conveyance to Mary Braundal, there was a balance due upon that mortgage. In the conveyance to her, there occurs this clause, "that the said grantee assumes a certain mortgage given by grantor to Martin Maurer January 27th, 1872, and interest thereon as a part of the purchase money."

On the 18th of October, 1875, Mary Braundel, her husband, John Braundel, joining with her, conveyed these premises to L. B. French, and in that conveyance there is contained this clause: "The above is made subject to a certain mortgage for $1,500, made by George Braundel to M. Maurer, and which the said grantee hereby assumes and covenants to pay." On the 24th day of December, 1875, French conveyed to these defendants, Brewer and Truscott, and that conveyance contained the same conveyance on the part of Brewer and Truscott that is contained in the deed of Mrs. Braundel to French. The mortgaged premises were sold and failed to pay the mortgage, as I understand it from this petition, and this action is brought against Brewer and Truscott, the last grantees, to recover the balance due on the notes secured by that mortgage, not paid by the sale of the premises. The question is whether the action in this shape can be maintained. Brewer and Truscott file two or three separate answers; but they rely upon their first answer. That answer raises this question, and it is said by the counsel for the plaintiff in error that the judgment may be affirmed or reversed as we find upon that question. The premises were conveyed by George Braundel to Mary Braundel, a married woman, with an agreement on her part to assume to pay this mortgage. She passed it along to French, and French to these defendants. It is admitted that if George Braundel had conveyed directly to the detendents Brewer and Truscott with the agreement that Brewer and Truscott should pay the mortgage, that agreement could be enforced in the present shape; but it is said the agreement between George Braundel and Mary Braundel, she being a married woman at the time of the conveyance, imposed no liability either in law or equity upon her, and she, therefore, not being liable, her grantee is not liable. Now, the decisions in N Y., in the 10th of Paige, recognize the doctrine that an agreement on the part of a debtor with a third person to pay his debts, may be enforced by the creditor. They lay down that proposition, and they say where the contracting party is not personally liable for a debt, he cannot contract with a third party and make a valid contract with that third party to pay his debt. That case was reviewed in several New York cases, and lastly in the 69th of N. Y., all the case adhering to the doctrine that as a pre-requisite to the fixing of the liability of the grantee to pay the debt of the grantor, the grantor must have been liable, to pay the debt.

These cases, so far as we have been able to examine them, do not meet precisely the question in this case as to the non-liability growing out of incapacity, as in the case of a married woman. But while in New York they hold to this doctrine clearly, as first considered in the 10th of Paige, down to the 69th New York Reports, in a very recent case decided in that State, it was sought to extend this doctrine so as to hold that because the grantee was a married woman, and, therefore, by reason of her disability not liable for the debt, that her grantee was not liable to her creditors. But under the legislation of that State, a married woman, in accepting a conveyance of real estate with an agreement upon her part to pay the incumbrance or debt of the grantor, would be liable, and hence her grantee would be liable upon similar contracts.

I concede that the statute of New York is somewhat broader than our own, but the principle upon which they put that claim is simply this: that under the statute of New York, she is authorized to purchase and hold as a separate property real estate, and as an incident of her power to purchase, she may contract a debt for the same.

Now, so far as I am aware, our Supreme Court have not decided this precise question that I am now discussing—the exact liability that a married woman incurs by the purchase of real estate, which, when the conveyance is made, becomes her separate real property under her sole contract.

Our statute provides in relation to married women, by its second section, that "any personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture by gift, bequest or inheritance, or by purchase, with her separate money or means, or be due as the wages of her separate labor, etc., shall remain her separate property and under her sole control."

By the first section as amended, "any estate or interest, real or equitable, in any property belonging to any woman at her marriage, or which may have come to her during coverture, by conveyance, gift, devise or inheritance, or by purchase with her separate means or money, shall, together with all rents and issues thereof, be and remain her separate property and under her control."

Now in this recent case in New York the same position was taken. It was insisted in that case that she could not bind herself by a contract for the purchase of land, if she has no antecedent estate to be benefited, or if the purchase is not made for the purposes of trade and business. Now, the Court in commenting upon their statute say, that the intention of the legislature was to confer upon married women a general capacity to enter into an executory contract to pay for property purchased by her; that that

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is indicated by the 7th and 8th sections of the act of 1860, as amended by the act of 1862, by inserting the word purchase in the first clause of the section.

In our statute there is an absolute authority to purchase with her separate means, and under our code, in all cases relating to her separate property, she may sue and be sued and bring an action in her ownname. Now, what is the inference that they draw from these amendments? That the Legislature had in view the acquisition by a married woman of the title to property by purchase; and by implication from the provisions exempting the husband from such liabilities for the wife's contracts and bargains in respect to property purchased by her, she may bind herself by a contract to pay the consideration price of land conveyed to her.

Now while we tread upon new ground here, with very many doubts, we are disposed to hold that under the legislation of our State as it now exists, it cannot be said that a married woman who purchases land and causes it to be conveyed to her, which becomes her sole, separate property, incurs no liability by such purchase, and in so holding, we dispose of the case, and we are disposed to hold that she incurs such a liability in the purchase of land; that in the assuming of the mortgage, or by agreeing to pay his creditor, she assumed a liability. She could assume a liability directly to her grantor for the purchase price of the land thus conveyed to her. That being so, a contract could be made by her with her grantee whereby her grantee should become liable to pay the debt that she was bound to pay. This is the only question in the case and the same ruling was made below. We are disposed to hold that this contract was a valid contract upon which the holder of this mortgage has a right of action against the party who assumed and agreed to pay the mortgage.

The judgment below will be affirmed.

E. Sowers for plaintiff in error.

C. F. Morgan for defendant in error.

Note.—The decision in the above case, made in the Court of Common Pleas, will be found on page 348 in Vol. I of the Law Reporter.

U. S. CIRCUIT COURT N. D. OF OHIO.

May 10.

3797. The Singer Manufacturing Co. vs Campbell. Demurrer to petition filed.

May 12.

3870. James Boyd et al. vs John Hays et. al. Bill for foreclosure filed Russell & Adams.

May 13.

3826. Matthew Gottfried et al. vs Anton Kopp et al. Separate answer of Rudolph Mueller.

May 14.

3614. F. T. Moffitt et al. vs Second National Bank of Cleveland. Motion for a new trial.

3556. Clinton Garrett vs the Penn. Co. Motion for a new trial filed.

May 15.

3826. Matthew Gottfried et al. vs Anton Kopp et al. Answer of Anton Kopp.

U S. DISTRICT COURT N. D. OF OHIO.

May 12.

1566. J. Nelson Taffan, trustee, vs John P. Robison et al. Answer. Ranneys.

May 13.

1670. William Wise et al. vs Schooner Gold Hunter. Claim and answer of Frank C. Brockway to the petition of Patrick Ryan.

—— Same vs same. Same of to petition of J. C. Wilcox.

May 15.

1742. George Goble et al. vs schooner Delos DeWolf. Answer. Willey, Sherman & Hoyt.

1731. W. H. Radcliff vs schooner A. H. Moss. Answer of Solomon Austin to petition of John Garlich.

—— Same vs Same. Answer and cross-petition of 2d Nat. Bank of Sandusky.

1522. Peter Reimy, ass'e. etc., vs Bernard Wolf. Answer.

Bankruptcy.

May 10.

2041. In re Elijah Worthington. Discharged.

1990. In re John J. Benton. Same.

1832. In re Lewis Harsh. Order dismissing specifications and for discharge.

May 12.

1999. In re Nathan New, bankrupt. Specifications in opposition to discharge. H. H. Pappleton.

1943. In re Thomas H. Chance. Petition for discharge. Hearing May 28th.

1932. In re John H. Klosser. Same. Same.

1945. In re Gaines A. Woolf. Same. Same.

1773. In re Hugh D. Morthland. Discharged.

May 13.

1610. In re John B. Everly, bankrupt. Specifications and objections to discharge of by Wayne Co. National Bank et al.

2020. In re Eli J. Ohl. Discharged.

1044. In re DeWitt C. Connell. Same.

U. S. CIRCUIT COURT. D. INDIANA.

November Term, 1877.

GODLOVE O. BELUN VS. THE WESTERN UNION TELEGRAPH CO.

Duty of Telegraph Company—Measure of Damages.

1. It cannot be expected that a message left for transmission with a telegraph company at a small station shall be forwarded and delivered at its destination as quickly as though it had originated at a large office.

2. At a small station it is not the duty of the company to keep more than one operator, and if a message is left with a messenger during the operator's absence, and the message was forwarded on the operator's return after a reasonable absence, the company is not guilty of negligence.

3. If the usual line of business between the two points is through a repeating office, the company is entitled to a reasonable time for the delay on account of other business at such repeating office.

4. Where the face of the dispatch does not indicate that the sender is liable to sustain loss if the dispatch is not promptly forwarded, and the company is not so informed, it is liable only for nominal damages.

Action for alleged damages caused by delay in transmitting a telegram from Monticello to Lafayette, Indiana. The telegram was left by the plaintiff with the messenger, at the telegraph office at 11:55 A.M., April 2nd, 1877, and forwarded by the operator on his return from dinner at 12:45, and delivered at the office of A. O. Belun, to whom it was addressed, at 3 P.M., a few moments too late, as plaintiff claimed, to enable the desired transaction to be closed.

Gresham, J., charged the jury as to the law as follows:

It was the duty of the Telegraph Co. to send the message with reasonable dispatch. What was a reasonable time for sending a dispatch, you will determine from all the facts and circumstances. It is in evidence and not disputed that Monticello is a small town where little business was done by

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the Telegraph Co.; that the usual line for business between Monticello and LaFayette was through Logansport, where there was a repeating office; that on the other line there was only a single wire, used exclusively for railroad business, with no repeating office at Reynolds.

Under the circumstances of this case, one competent operator and a message boy at Monticello was force enough for that office, and it was not negligence in the Telegraph Co. for the operator to leave the office in charge of the messenger while he was absent a reasonable time at dinner; but whether the absence on this occasion, was or was not reasonable is a question for the jury.

It was not the duty of the Telegraph Co. when the message was left at its office, to forward it to LaFayette as quickly as electricity would carry it.

In determining what was a reasonable time, you will take into consideration what has been already said about the necessary force at Monticello, the absence of the operator at dinner, and the further fact that the message had to go through the office at Logansport, and the delays it was liable to encounter there on account of other business.

If under the instructions already given, you find that the plaintiff has a cause of action, you will next determine the measure of damages. The dispatch, which was not written upon one of the printed forms of the Telegraph Company, reads thus: "Take separate deed to Marks for White, Fountaine, Tippecanoe and Iowa, 4, and meet me at office at 9 to-night. (Signed) G. O. Behm."

It is not insisted that when the dispatch was left with the operator at Monticello, he was informed of the nature of the business to which it related. You will remember that the plaintiff sent the dispatch to the office from the hotel, by the boy or young man named Crooks. Was the company informed by the mere reading of the dispatch, of the nature of the contract between the plaintiff and Reynolds, that the plaintiff had a valuable contract with Reynolds, to secure the profits of which it was important the dispatch should be sent to LaFayette promptly and without delay?

Unless you think from the mere reading of the dispatch, the Telegraph Co. was fairly informed of the nature of the contract between the plaintiff and Reynolds, and that the plaintiff was liable to sustain loss if the same was not promptly forwarded and delivered at LaFayette, the plaintiff is in no event entitled to more than nominal damages. It would be unjust to the Telegraph Co. to hold it responsible for damages without limit, when it is not informed by the dispatch itself or otherwise, that the sender might sustain heavy loss unless the message be transmitted and delivered immediately, or without delay.

If you find that the face of the dispatch informed the Telegraph Co. of the character of the contract between the plaintiff and Reynolds, if, in fact, there was a contract at all, and that the same was not fraudulent and void; that there was negligence in forwarding the dispatch to LaFayette; that Reynolds would have complied with the contract on the 2d of April, but for the company's negligence, then the plaintiff is entitled to a verdict for the difference between three hundred dollars, the contract price, and the fair value of the land bargained for.

But if you find there was nothing on the face of the dispatch to inform the company that the plaintiff would sustain loss if it was not promptly forwarded, and yet you find that the company was negligent, then you will find against the defendant for nominal damages only.

And, if you find there was no negligence in receiving and transmitting the dispatch, you will find for the defendant.

Verdict for defendant, and judgment accordingly.

JOHN R. COFFROTH and S. A. HUFF, for plaintiff.

McDONALD & BUTLER, and JOHN A. STEIN, for defendant. — *Chicago Legal News.*

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending May 16, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

May 10.

Joseph Stafford and wife to J. Buchan. Three thousand two hundred dollars.

J. Wehinss et al. to J. Rocket. One hundred and thirty-eight dollars.

Eliza and M. Campbell to Patrick Casey. Five hundred dollars.

S. Aytberger and wife to J. P. Wehres. Four hundred and nine dollars.

F. Strauss to C. O. Scott. Two thousand five hundred dollars.

N. Seeler to Ralph Worthington. Six thousand five hundred dollars.

Orrin Moore to exrs. of George Worthington. Four thousand nine hundred and fifty dollars.

Jno. Connell and wife to P. Kneen, exr. One thousand eight hundred and twenty-five dollars.

Trustees of Ursuline Academy to F. Vandervelt. Eight thousand dollars.

Jno. Connell to F. Cain. One thousand dollars.

W. W. Sly and wife to Martha Wills. Seven hundred dollars.

G. G. Wilsey to Cit. Sav. and Loan Ass'n. Three hundred dollars.

G. W. Foote to C. E. Bolton. Five hundred dollars.

Jno. Hodgman and wife to Soc. for Sav. Five hundred dollars.

Elias Glaser ond wife to Margaret Gaertler. One hundred dollars.

E. Hessenmueller and wife to Robert Yerch. One thousand three hundred dollars.

Mary Doefler to Kate Robeckeck. One thousand dollars.

Thomas Uher to G. G. Hickox et al. Forty dollars.

Mary Davis to H. Wick & Co. One hundred and seventy dollars.

May 12.

Seymour Hale and wife to Fitch Adams. $3,162.

Samuel J. Dugan and wife to T. K. Bolton. $300.

Same to Emma Knox. $76.

Patrick Sweeney to John Sharkey. $136.

Catharine Bowen and husband to Philip H. Huey. $355.

The Cleveland Paper Co. to The Sun Ins. Co. $4,500.

George H. Demorth to Gertrude Dewitt. $100.

Same to same. $200.

May 13.

Daniel Shull and wife to William Higson. $1,246.60.

Heinrich Coleman and wife to E. H. Miller. $1,000.

Charles E. Reader and wife to Jas. S. Prescott et al. $150.

Gilbert A. Bray to L. F. Biers. $450.

May 14.

John Biggs and wife to John Hicks. $1,200.

John Miller to Casper Wilbert. $213.

Franz H. Helms to H. G. Siemem. $300.

Charles W. Taylor and wife to Cornelia N. Heckmann. $2,500.

Harvey W. Murray and wife to R. B. Murray, guard, etc. $628.

Emeline Robinson to Helen M. Chamberlin. $175.

James H. Salisbury to William J. Gordon. $2,500.

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May 15.

Margaret J. Smith and husband to J. M. Custer. $850

Thomas Albon and wife to George B. Swingber. $800.

Margarette Klein to John Basek. $500.

Ferdinend Kresbeck to Jacob Mitter. $2,000.

Esther Hurlburt and wife to Ludwig Hundertmark. One hundred and fifty dollars.

Ludwig Koepka et al. to the Brooklyn Kranken Unterstuetzungs Verein. Four hundred dollars.

May 16.

Albro Simpson to T. M. Ford, five hundred dollars.

James M. Ferris and wife to Lyman P. Foote, fifteen hundred dollars.

Charlotte McMunn et al. to M. A. Wellington, one thousand dollars.

Lottie A. Briggs and heirs to Mary Collins, three hundred dollars.

Sheldon Beckwith and wife to D. H. Benjamin, two hundred dollars.

Trustees of the East Madison Church, of the Evangelical Association to The Mis. Soc. of The Evang. Ass'n., twelve hundred dollars.

Patrick Cain a wife to Thomas Martin, three hundred dollars.

Thos. Brogan and wife to Ludwig Hundertmark, one hundred and twenty dollars.

CHATTEL MORTGAGES.

May 10.

Jno. Schwab to Dunn & Gaul. Two hundred dollars.

G. K. Wilhelm to S. Brainard's Sone. Three hundred and twenty-five dollars.

Hugh Brown to Sterling & Co. Two hundred and eighteen dollars.

M. S. Castle to R. A. Davidson. One hundred and thirty dollars.

A. A. Stoppel to Joseph Stoppel. Two hundred and ninety-five dollars.

H. Dornbrook to Isaac Leisy & Co. Four hundred and twenty-five dollars.

M. Kraus to George Loell. Ninety-five dollars.

Joseph Lukes to Emil Lukes. Sixty dollars.

Catharine Senter to Jane McGuire. One thousand and eight dollars.

May 12.

A. W. Grier to A. W. Bailey. $34.

Benjamin Schrauer to John Hallauer. $150.

George B. Huston and wife to E. F. Lewis. $108.

May 13.

Fred Mattmueller et al. to Felix Nicola. $1,400.

C. M. Kohler to J. Krauss & Co. $98.

W. H. Colson to James Colson, in trust etc. $375.

Wm. Hindler to C. R. Heller. $78.

Charles A. Kennard to F. W. Coffin. $85.

George Menger to Jacob Stephan. $500.

Charles E. Reader to James S. Prescott et al. $150.

George G. Miner to Edwin Cowles. $100.

H. Berchtold to W. G. Andrews. $315.

L. J. McGeagh to E. C. Green. $300.

Charles P. Kelso to S. J. Miller. $120.

May 14.

Michael Conlin to Jared B. Wells. $469.

William J. Tate and wife to same. 800

May 15.

Daniel Catoir to David L. Lowrey. four hundred dollars.

Solomen Sampliner to Simon Sampliner. One thousand dollars.

John Rising and wife to Patrick Barrey. Seventy three dollars.

John M. Gillette and wife to C. C. Latimer et al. Two hundred dollars.

Josephine Stein and husband to C. W. Doudleday. Forty dollars.

Sammuel Brummer to Christian Brummer. Ninety-two dollars.

May 16.

John Maitland to C. A. Selyer, two hundred dollars.

Hubert Phillips and wife to Dwight Selden, one hundred and ten dollars.

Florence J. Kelly et al. to M. A. Gilbert, two hundred and twelve dollars.

Henry Williams to Wm. H. Shaw, thirty dollars.

J. M. Nowak to Mary Nowak, five hundred dollars.

DEEDS.

May 9.

Charles Chamberlain and wife to Sarah Jane Conkerton. $275.

Rebecca B. Halton to Reuben Hatch. $1.

Michael Hayes and wife to Catharine Graney. $1,000.

James S. Ogelsy to V. C. Stone. $1,500.

Joseph Stanley and wife to Robert Powell. $1,000.

Charles M. Scheily and wife to John M. Scheily. $5,500.

C. E. Terrell et al. to J. B. Waterton. $1.

J. B. Waterton, exr., et al. to Minnie A. Terrell. $1.

Same to Luella J. Waterton. $1.

Same to Elizabeth A. Waterton. $1.

W. F. Walworth and wife to Nelson Moses. $100.

Thomas Wagner and wife to Charles Chamberlain. $480.

May 10.

John Bucher and wife to Joseph Stafford. $4,250.

John Cashman to Patrick Cashman. $5.

Frank W. Ranney to J. B. Cowle et al. $4,000.

J. B. Cowle et al. to Frank Wright. $3,000.

Frank Wright to Catharine Cowle. $3,000.

H. W. Hanna and wife to S. H. Mather. $500.

George G. Hickox et al. to Thomas Wher. $400.

L. A. Johnson and wife to B. L. Pinnington. $2,000.

Philip Kneen, exr., etc., to John Cannell. $3,650.

Lewis Link and wife to Eliza E. Huggard. $175.

R. D. Mix, admr. etc., to Appolonia Fellarmann. $845.

William E. Romp to Alice Damp. $700.

Jacob Rockert and wife to Johanna Tramp et al. $558.

Charles O. Scott to Ferdinand Strauss. $3,500.

Silas S. Stone and wife to Thomas H. Lamson et al. $18,000.

John A. Vincent to Kate S. Hanna. $500.

A. E. Biglow and wife to A. P. Northway. $300.

C. E. Bolton to George W. Foote. $2,000.

Vaclav Auschperk and wife to G. G. Hickox. $545.

May 12.

J. Wm. Ball to Moses Warren. $1,500.

E. W. Clark et al. to George Sage and wife. $900.

William J. Gordon and wife to Caroline A. Smyth. $5,750.

James M. Hoyt and wife to Catharine Bauer. $800.

R. C. Hutton to Elizabeth Hutton. $1,500.

M. Jackson, trustee for H. G. Hull, to James Murphy. $400.

Rodert Knox and wife to Samuel J. Dugan. $600.

Luther Moses and wife to Thomas Whitehead. $2,000.

Cornelius Newkirk and wife to John Cain et al. $100.

John Packard to Henry Giles. $2,555.

John Sharkey to Patrick Sweeney. $1,250.

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Sun Ins. Co. to Cleveland Paper Co. $5,500.

Edwin Fuller et al. to Howe Sewing Machine Co. $880.

May 13.

Levi F. Bauder, County Auditor, to Wm. Walton, Auditor's deed. $17.

Heir of Frederick Bethel, dec'd., to Augusta Fally et al. $1.

Eliza J. Langdon and husband to Edmund Holden. $2,050.

W. C. Nichols to Wm. O. Jenks. $1,500.

Asabel North and wife to Edmund Walton. $1,084.

William West, by Thomas Graves, Mas. Com., to G. A. Bray. $708.50.

Anton Freund and wife to Francisco Dolezel. $1,500.

May 14.

William Frederick Roeder es al. to Fred M. Dobbert. $5.

Rice & Keith, assignees, to Royal Whiton. $1.

Henry Sieman and wife to Franz H. Helms. $500.

Casper Wilbert to John Miller. $650.

Archer Webb, admr. etc., to Thomas Albon. $900.

F. X. Sykora, by Thomas Graves, Mas. Com., to H. Detmer. $110.

E. O. Briggs, trustee, etc., to The Citizen's Savings and Loan Ass'n. $2,000.

Leopold Neuschenler et al., by Felix Nicola, Mas. Com., to The Citizen's Savings and Loan Association. $1,300.

John Biggs and wife to John Hicks. $2,300.

John Hicks and wife to John Biggs. $1,200.

John H. James to Harriette L. Worth. $1,400.

May 15.

Emily J. H. Credland to Grace J. Credland. One dollar.

Thomas J. Clapp and wife to Albro Simpson. One thousand dollars.

Wilhelmina Libby and husband to George Hilbert. One thousand five hundred dollars.

D. P. Putnam and wife to Albro Simpson. One thousand two hundred dollars.

Gustav Schmidt, admr., etc., to Margaretta Klein. Seven hundred and fifty dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending May 15th, 1879, against the following Persons.

May 8.

Johanna Devine. $1,263.81; $94.
John G. Steiger. $447.09.

May 10.

Warren F. Walworth. $4,000.
Nathaniel Martin et al. $200.
John Johnson. $1,001.

May 12.

Martin Ulmer. $797.90.
John Wallace. $674.53.
Marcus F. King et al. $2,477.57.
Lewis Clark. $673.90.
Joseph Bailey. $300.
John Mensinger et al. $2,540.69.
Richard Justice. $282.92.
Marcus E. Cozad et al. $28.82; $4,927.
J. Kooer. $673.36.
Aaron Higley. $1,271.22.
John M. Jones. $368; $1,315.73; $96.

May 13.

Wm. Britt et al. $157.
Benjamin Kingsborough. $2,653.

May 20.

Wm. Murphy, Jr. $54.73.
Patrick Merriman. $524.
Jacob Hirt. $377.
Isaac W. Page et al. $953.60.

May 15.

H. Kramer. $333.41.

COURT OF COMMON PLEAS.

Actions Commenced.

May 7.

15049. Mary P. Dawley vs Ohio National Bank et al. Equitable relief, Horton & Conant and Hutchins & Campbell.

15050. In re application of Josiah Venning et al., of the Bible Christian Church, for leave to borrow money on church property, etc. For leave to borrow money, etc. Myron T. Herrick.

15051. S. Mann, Austrian & Co. vs J. W. Thomas. Cognovit. W. B. Solders.

15052. Charles D. Woodbridge vs M. J. Isham et al. Money and foreclosure. Henry T. Cowin.

15053. H. H. Comstock vs W. C. Hall. Appeal by defendant. Judgment April 8.

15054. Joel Hall vs Josiah Lay. Same. Judgment April 18.

May 8.

15055. Mrs. H. J. Walker vs Bailey, Whitmore & Co. Appeal by defendant. Judgment April 28. Ambush & Avery; A. T. Brewer.

15056. C. M. Sturtevant et al. vs George W. Stafford et al. To subject lands and for equitable relief. Estep & Squire.

15057. W. H. McCurdy et al. vs The Cleveland Hazard Hame Co. et al. Equitable relief. J. H. Webster.

15058. Max E. Sand vs Anna M. Sirls et al. Equitable relief. Weed & Dellenbaugh.

May 9.

15059. Fanny Stanley vs Samuel Vose et al. Relief. J. P. Green.

May 10.

15060. David P. Badger vs E. Henry Dachenhausen. Foreclosure, sale of land and relief. Wm. E. Preston.

15061. Daniel W. Duty vs Joseph P. Bailey. To subject lands. Henderson & Kline.

15062. J. H. Morley & Co. vs John G. Steiger. Cognovit. Weed & Dellenbaugh; S. A. Schwab.

15063. Arthur J. Wenham et al. vs Matthew Nichols et al. Money, to subject land and relief. Babcock & Nowak.

15064. Frederick Vogt vs John Bennitt. Money only. Street & Bentley.

15065. Sigmund Mann et al. vs John G. Zimmermann et al. Money, sale of real estate and relief. Gustav Schmidt; John W. Heisley, Hord, Dawley & Hord.

15066. Amasa Stone vs G. L. Nichols et al. Money, sale of mortgaged premises and relief. B. R. Beavis.

15067. Mary James vs Fletcher Hartshorn et al. Money only. P. H. Kaiser.

15068. John H. James vs same. Same. Same.

15069. Albert Felcome vs Geo. Rockert. Money only. Street & Bentley.

15070. John S. Prather et al. vs Thomas Elwood. Money only. Bolton & Terrell.

15071. William K. Smith vs John G. Sax et al. Relief and to subject lands. P. P.

May 12.

15072. Leverett Alcott et al. vs John Wensinger et al. DeWolf & Schwan; M. R. Keith.

15073. Ambrose Anthony vs Wm. Farrell. Equitable relief. Safford & Safford.

15074. Wm. Humiston vs Stearns Stone Co. Appeal by deft. F. M. Stearns. Judgment April 16.

15075. A. Trattner vs J. Schwartz. Money only. Street & Bentley.

15076. F. M. Keener vs Richard Justice. Cognovit. W. Z. Davis; Frank N. Wilcox.

15077. Myra M. Holden vs James B. Ward. Money only. Adams & Rogers.

15078. A. J. Wenham & Son vs E. Andress et al. Appeal by defendants. Judgment April 24th. E. Plaisted, William Robison; F. C. McMillan and W. A. Babcock.

May 13.

15079. Ivory Plaisted vs Margaretta Oberle. Money only with attachment. P. P.

15080. Dorathea Dressel vs Solomon Mayer. Money only. Stone & Hessenmueller.

15081. Julius A. Resser vs S. T. Brightmore. Appeal by defendant. Judgment April 28. C. D. Everett; W. C. Rogers.

15082. Henry L. Hills vs The Cleveland Malleable Iron Co. Henry Haines interpleaded. Appeal by defendant Haines. Judgment April 15th. E. Hobday; H. J. Caldwell.

15083. Desdemona Gaylord vs W. B. Peck et al. Money and foreclosure. H. T. Cowan; George F. Peck.

May 15.

15084. Marienne B. Sterling vs J. H. F. Nuxhall et al. Injunction and relief. M. M. Hobart.

15085. Louisa Brunner vs Barbara Schindler. Money and relief. W. S. Kerruish; Gustav Schmidt.

15086. H. Clark Forde, assignee of The Cleveland Hazard Hame Co., vs The Cleveland Hazard Hame Co. etc., et al. To subject and for sale of land. Baldwin & Ford.

15087. Jacob Stoneman vs William Bailey. Money only. Pennewell & Lamson.

Motions and Demurrers Filed.

May 9.

2552. Rafter vs Rafter. Motion to require plff. to give bail for costs.

2553. Warmington et al. vs Street. Motion by plaintiff for order directing Sheriff to sell personal property at private sale etc.

2554. Bronson et al. vs Stoddard et al. Suggestion of the death of plaintiff Amos

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Stoddard and motion by Benjamin F. and Charles Stoddard, Lydia Wadsworth and Mary Jane and Eliza Robinson for leave to be made parties plaintiff in place of deceased.

2555. John Hancock Mutual Life Ins. Co. vs Gardner et al. Demurrer by deft. Benjamin F. Whitmore to the petition.

2556. Same vs same. Demurrer by defendant Mrs. B. F. Whitmore to the petition.

May 10.

2557. Murphy vs Rafferty et al. Motion by defts. to dissolve the restraining order with affidavit of George Nichols.

2558. Lennox vs Purdy et al. Demurrer by plaintiff to the amended answer.

2559. Heiman vs Lawrence. Motion by deft. to strike from petition irrelevant matter, etc.

2560. Stein Sr. vs Stein Jr. Motion by defendant to require plaintiff to elect upon which cause of action he will proceed etc.

2561. Williams vs Hoffman et al. Motion by defendants to require plaintiffs to make their petition more definite and certain.

2562. Libby vs Castor et al. Motion by deft. to make petition more definite and certain.

2563. Tod, Wells et al. vs Smith et al. Motion by defendant Commercial National Bank to strike amended petition from the files.

2564. Same vs same. Motion by deft. George W. Mason to strike amended petition from the files.

May 12.

2565. Picket vs Matthews. Motion by pltf. to strike out from answer and make same more definite and certain.

2566. Davis vs Heller. Motion by deft. to dismiss case and strike petition from the files.

2567. Cubbon vs Hicks. Motion by defendant for a new trial.

May 13.

2568. Derby vs Corlett et al. Same.

2569. Sprankle, Morse & Co. vs Plojhart et al. Motion by defendants Joseph and Julia Plojhart to vacate order appointing receiver.

May 15.

2570. Long et al. vs Burkhardt et al. Motion by plaintiffs to confirm proceedings and report of commissioners and for order to sell premises at public sale for cash.

2571. Dangleheisen vs Alexander, admr. etc., et al. Motion by pltf. for the appointment of a receiver.

2572. Loesch vs Brown et al. Demurrer by defts. Henry Shanks and James Gillespie to new matter in reply of deft. Louis Henniger to their joint answer.

2573. Smith vs Scripps et al. Demurrer to the petition.

Motions and Demurrers Decided.

May 7.

2528. Sprankle, Morse & Co. vs Plojhart et al. Granted. James Lawrence appointed receiver.

2553. Warmington et al. vs Street. Granted.

May 8.

2409. } 2384. } Zoeter vs Lamson. Granted. O. H. Bentley appointed receiver. Defendant excepts.

2442. } 2441. } 2536. } 2539. } 2445. } 2537. } Tod, Wells & Co. vs Smith et al. Granted. Plaintiffs have leave to amend their petition instanter.

May 10.

1246. Case vs City of Cleveland et al. Stricken off.

1247. Hurlburt vs same. Same.

1475. Allen vs same. Same.

1476. Morgan vs same. Same.

2145. Foote et al vs same. Overruled. Defts. have leave to file an answer in one week.

2157. Rathenbuecher vs same. Overruled.

2232. Cuy. Co. Agr. Soc'y. vs same. Sustained. Deft. excepts and has leave to answer within two weeks.

2248. Seibert vs St. Clair St. Ry. Co. Granted. Pltf. to give security within 30 days.

2391. Wilcox & Gibbs S. M. Co. vs Follet et al. Sustained. Pltf. excepts.

2531. Stone vs Cleveland City Forge and Iron Co. Demurrer withdrawn. Deft. has leave to answer.

2543. Gates vs Jordan et al. Granted.

2544. Walker vs McDermitt. Dismissed without prejudice at plaintiff's cost.

May 13.

2342. Wick et al. vs Newton et al. Withdrawn.

2230. } 2231. } Heisley, exr. etc., vs Williams. Demurrer of deft. Williams overruled and of deft Demming sustained. Pltf. has leave to answer by June 15th.

2262. Hays vs Holbrook et al. Overruled.

2278. } 2279. } Richard vs Wagner et al. Sustained.

2283. Burrett vs Jones. Overruled.

2284. } 2311. } Hoffman vs Fay. Overruled. Deft. excepts; has leave to answer by May 24th.

2321. Richard vs Wagner et al. Overruled.

2367. People's Sav. and Loan Ass'n. vs Bausfield et al. Stricken off.

2520. Smith vs Clymonts et al. Pltf. has leave to file affidavit by May 25th, and defts. leave to file affidavits by June 1st.

2538. } 2543. } Gates vs Jordan et al. Pltf. have leave to file affidavits by May 22, and defts. have leave to file affidavits by May 30. Defts except.

J. G. Pomerene.] [H. J. Davies.

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THE ROMAN CIVIL LAW.

III.

We have thus far endeavored to give but an outline of this law. To gain a *knowledge* of the history of the civil law would require special study, preliminary to the study of the law itself. Many books have been written upon its *history*, tracing it from the foundation of Rome to the time of Justinian.

We have said that this law was adopted by other countries as lex scripta. But it was only the municipal part of that body of laws that was adopted—not the criminal, international or constitutional law. This was because *it* especially had merit, and because it contained rules and regulations respecting private rights and personal contracts, as to which the laws of those countries were deficient.

There are many who insist that we have our own system of laws, our own jurisprudence, and need not go back two thousand years for information and study. So has England its own system and code of laws, its own jurisprudence; likewise France, Germany, Spain, Austria, and Italy. Why is it that so much time is devoted at all the universities of these countries to the study of *this* law?

Every people in its primitive state or condition had certain rules and regulations that were characteristic of that people and answered all purposes and wants. These rules had their origin in custom and habit, and were of binding force. This is also true of the Roman people, but as they advanced in intelligence and power there was a like development and enlargement of their laws and jurisprudence to meet their growing needs and demands.

This especially distinguishes the Roman jurisprudence from that of any other country or people. It was a steady and natural growth and development from a primitive system to a science; while the jurisprudence of other countries, although in part representing some of the characteristics of that people, yet contains a great deal and many elements borrowed or adopted from other sources.

In other words, the civil law is the work and product of the Roman people exclusively, originating in custom and perfected to a science. It developed from within, without aids from foreign sources. In the third century the Roman jurisprudence was perfect, and so remained until the sixth century, when (as the Roman empire began to decline) this body of laws, as we have said before, became a confused mass, which led to the compilation of Justinian's books. This individuality, characteristic of the Roman civil law, is wanting in the jurisprudence of all other countries. It is explained on the theory that Rome and its people were isolatod, dependent upon their own resources, and thus were necessarily compelled to build up a jurisprudence exclusively their own.

Therefore it is that this law has uniformity, was made a complete system, refined by large experience, and perfected by many ages of care and study; and for these reasons it is retained as the basis of instruction in all the universities abroad.

DIGEST—TITLE I, BOOK I.

The title to which we will first refer is that in the Digest, Book I, Title I. The subject of this title is "de justitia et jure," (concerning justice and right or law). This title is sub-divided into twelve laws or fragments, and each law into two or more paragraphs. It is made up of the writings and opinions of Papinian, Pomponius, Gaius, and Paulus. The title begins as follows: (Law I.) "Juri operam daturum prius nosse opertet, unde nomen juris descendat. Est autem a justitia appellatum; nam ut eleganter Celsus definit, jus est ars boni et aequi." (He who wishes to study law (or right) first should know the derivation of the word law (or right). It is so called from the word justice; for law, (or right,) as Celsus has elegantly expressed it, is the science or knowledge of all that is right and just).

We have no word in our language that will express the meaning of the Latin word jus (juris) as used in the above quotation. The word right will

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perhaps express it better than our word law—we have used both. The Romans used the word *jus* in various senses, and to express different meanings; hence it will be difficult at times to give the correct meaning, in rendering a translation in English.

Law, its sources and formation is then the subject of discussion.

The following are some of their principles and doctrines in this book on this point:

All law is natural or positive. Nothing that Natural law forbids can be commanded (so as to bind the conscience.)

Nothing that Natural law commands can be forbidden (so as to bind the conscience).

In this sense Natural law is immutable.

Positive law is established by the will of the legislator.

(Law 1). Law has two principal parts or divisions, (hujus studii duae sunt positiones, publicum et privatum,) namely, Jus publicum—public law, Jus privatum—private law.

Public law pertaining to the state—the Roman government.

Private law pertains to individual rights and interests.

Jus privatum, private law, is made up of three elements, (Privatum jus tripertitium est), namely:

a. *Jus naturali* (natural law or law of nature).

b. *Jus gentium* (International law or law of nations).

c. *Jus civile* (civil law).

Jus naturale. The "*jus.*" "*Quod natura omnia animalia docuit*"—the law that nature has taught all beings,—meaning the law that all beings capable of pleasure and pain obey, submission to which is not a lesson of reason, but the dictate of instinct and the condition of their existence.

The *jus gentium*, — international law, (*solis hominibus inter se commune*), is founded in part on natural, in part on positive law.

It is that law without which the intercourse between human beings, not acknowledging any common superior, and therefore between independent states, could not be carried on.

Jus civile, is the law established and followed by a community.

This "*jus civile*" is again divided into *jus scriptum*, (written law), that is law formally passed by legislative authority, and *jus non scriptum*, (unwritten law), that is law not originally sanctioned by legislative authority or by an edict, but the growth of custom arising most frequently from the interpretation (of what law was) of learned men, and which became incorporated with jurisprudence by tacit consent.

(Law 10). "*Justitia est constans et perpetua voluntas jus suum cuique tribuendi. Juris praecepta sunt haec; honesi vivere, alterum non laedere, suum cuique tribuere*"—justice means the invariable and general purpose and aim to give to each one his right. The maxims of the law are these: to live honestly, to molest or injure no one, and to concede to each one his due.

H.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

M. E. BECKWITH & SONS VS. W. R. REID.

Which of Two Innocent Parties shall Suffer by the Fraud of a Third Party, etc.

TIBBALS, J.:

The plaintiff in the suit below filed a petition on an account for goods sold and delivered by him to the defendant consisting of certain frames and material of that character described in the petition. The defendants' answer setting up the defence *nil debet* and the case was submitted to the Court by consent of the parties and a judgment rendered in favor of the plaintiff for the sum of $6.64. It would seem thus that this litigation is not carried on because a loss of the amount involved would be oppressive to or distress either of these parties, but, I suppose, to settle an important principle. The case certainly must be classed among the exceptional cases—a very peculiar case indeed. It has been very thoroughly presented on both sides, and while I cannot say that in the conclusion we have reached we are entirely free from doubt, yet we are reasonably satisfied of its correctness. We concur in it entirely, having submitted the matter to our associate (Judge Watson) who is not now present with us. It is one of those cases where both plaintiff and defendant have been wronged by the intervention of a swindler, and one or the other, being innocent parties, must bear this burden. The question is, which of the parties shall stand the loss?

The case is substantially this: It appears that a blind boy by the name of Wicks—I will not undertake to recite all the evidence, but sufficient of it so that the case may be understood—applied to Reid for an agency to sell his goods, picture frames, etc., on commission Reid refused to permit him to have the agency to sell goods for him on commission, but said to him that he would fill any orders he might obtain from other parties: that he would not pay him anything for his services; that he must get his pay from the parties of whom he obtained his orders. The boy assented to that arrangement with Reid. With that understanding Reid delivered to him his price list and samples of goods, and thus the boy went into business. He applied to Beckwith & Sons to make a sale of goods by sample; Beckwith & Sons informed him they were not dealing with Reid, that they were dealing with another firm, and inquired of him why he did not sell for that firm. Wick replied that he could not get compensation of them; that he could from Reid, and for that reason he was selling Reid's goods. Beckwith & Sons said to him that they did not desire any account with Reid; that he had applied to them before for that purpose; but they would buy goods from him (Wick) and pay him for them upon delivery, and that he must get his compensation out of Reid. To that proposition Wick assented. Thus we see the position of both these parties—both of them perfectly innocent except that each knew that Wick was dealing with the other. Reid knew, or it was reported to him, as subsequent events show, that he was dealing and selling goods to Beckwith & Sons, and Beckwith & Sons knew that they were purchasing goods of him that he had got of Ried. First, Beckwith & Sons, upon one of their cards, made out an order for a bill of goods, amounting to some $14, not signing their names to it, and not addressing it at all to Reid,—merely upon the back of their card making a list of goods that they desired. Wick took the order to Reid. Reid filled it, with the exception of one or two articles that he did not have in stock, so informing Wick, and Wick informing Beckwith & Sons, of that fact, and asking if a delay of a day or two would be objectionable, and was informed that it was not, and subsequently Reid himself made the same inquiry of Beckwith & Sons and received the same answer. Shortly after all the goods were received and the bill was brought around by the clerk of Reid to Beckwith & Sons, who paid the clerk, and afterwards told Wick that Reid had sent around the bill and they had paid it to the clerk. Wick informed them that that was all right and that he would get his commission

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from Reid. Thus we have the parties dealing with full knowledge of each other through Wick, but in total ignorance as to the true relations that Wick sustained to each party. The transaction ended. Shortly after Wick came again to Beckwith & Sons to solicit the purchase of another bill of goods, and they made out in like manner upon a card, a list of the items they desired, having Reid's price list, which was complete, and they knew precisely the price to be paid. They gave the list to Wick and Wick took it to Reid, and Reid filled the order and delivered to Wick the goods. Wick delivered the goods to Beckwith & Sons and they paid him in full for them. Shortly after Reid sent around his bill demanding payment, and was for the first time informed that Wick had been paid, and thereupon he brought this suit, and the question arises as to which of these parties shall suffer in consequence of the dishonesty of this boy. That, of course, necessitates the determination of the question as to who was the party in fault,—who was instrumental in bringing about this fraud? Was it Reid, in the relation that he sustained to Wick in thus sending him out upon the community, or did he act in good faith and have reason to believe that Beckwith & Sons understood that they were dealing with him simply, and that they had no right to pay Wick? There cannot be any doubt about the proposition that if the possession of goods is wrongfully or fraudulently obtained—tortiously obtained by one party, that no title vests in that party to the goods and he cannot convey title to any one else. On the other hand, the exception to that is where one party has held out a person as his agent, and has entrusted him with the possession of his goods, clothing him with the apparent authority to sell and receive the pay. Then the party paying would be authorized to pay the person thus held out to be the agent.

Now, this case rests upon one or the other of these two propositions. They are well settled. We have been cited to a case in the 72d Penn., Barker vs. Dinsmore, which it is claimed is decisive of this case. One branch of the syllabus in that case is this: "The owner cannot be divested of his property without his consent unless he has placed it in the custody of another and given him an apparent right to dispose of it."

Now it is upon that proposition that this case turns and is to be disposed of. That case in Pennsylvania is quite similar in its swindling character to the present case, but was very much more disastrous in its consequences, as it involved something over $3,000. The case was briefly this: It seems that a man by the name of John Dinsmore was the owner of nearly 8,000 pounds of wool, and that a man came to him claiming to be a cousin of one William Barker, who was the senior member of the firm of William Barker Jr. & Co., who were wool merchants doing business at Pittsburgh. He represented himself in that capacity and asked Dinsmore if he had any wool to sell, and was informed that he had. Barker then informed him that he was a cousin of the Barker referred to, and that he would again come in on Monday and examine the wool, and then left him—going to Barker & Co. with another and different representation which will appear shortly. But he obtained from Barker & Co. their wool sacks and directed them to be shipped to him at the point where John Dinsmore lived but under the name of Martin Dinsmore—changing the first name, and, of course, in that way he obtained possession of the sacks and bought the wool. The arrangement between him and John Dinsmore was that the wool should be shipped on the cars in the name of John Dinsmore, the real owner of the wool, and consigned to the firm of Wm. Barker Jr. & Co., Pittsburgh, or their order. That is a material thing to take into account in this connection. The shipment was made in his name to the real firm, so that had it gone there, the real firm would have known with whom they were dealing; but instead of the wool reaching the real firm, this man went to the depot, and by some arrangement, succeeded in getting the wool into his possession from the railroad officials, and directed them to deliver it to the firm, so that he appeared to the firm, as he had originally, as to them, the seller, and drew the money for the wool and left. Now Barker Jr. & Co. claim that he came there to them and represented himself as Dinsmore, residing where the real Dinsmore did, and as having that quantity of wool to sell, showed them samples, and they agreed upon the price in case it corresponded with the samples. It was to be delivered to them at a certain time; he represented himself as the owner of the wool, so that he sustained two relations, both in name and in character to these parties. Then the question came up, of course which of these parties should suffer.

Now, to show the materiality of some of these propositions necessary to be considered, I desire to read briefly a portion of the charge of the court below. I see that the judgment in that case was affirmed, and Barker & Co. were held liable to the plaintiff for the value of the wool. The Court charged the jury among other things: "The plaintiff, as we have said, took the bill of lading in his own name as the consignor with the name of the defendants' firm as consignee. Thus far, at least, it would seem the title to this wool, as well as the right of possession, remained in the plaintiff, and he might at any time have stopped it *in transitu* before it reached this city; and down to the time it was delivered to the defendants there is no evidence going to show that the plaintiff ever delivered this wool to this pretended partner, or in any way placed it under his control. That party had nothing to do with the shipping the wool, nor had he any right whatever to touch it if he was not a member or or agent of the firm of Wm. Barker Jr. & Co., and it is clear from the testimony of the defendants that he was neither. Whatever control, therefore, he undertook to exercise over it in his own individual interest, was done without the slightest authority from the plaintiff."

Now, Justice Williams, in commenting upon the facts in the case, in reviewing the case, says: "Nor was the wool delivered to him by the plaintiff. It was delivered to the railroad company to be carried to Pittsburgh and there delivered to the defendants to whom it was consigned by the plaintiff. Under the contract of shipment the company had no right to deliver the wool to any person except the consignee, and their delivering it to defendants vested in him no property or right of possession as against the plaintiff. The principle which underlies this case, and by which the rights of the parties are to be determined, is this: The selling of goods by one who has tortiously obtained their possession, without the consent of the owner, vests in the purchaser no title to them as against the owner * * * nor had he any apparent or implied authority from the plaintiff to sell or dispose of it. It is clear then that he could convey no title by this sale, that being so, the defendants acquired no title by their purchase, though they purchased it for a fair and valuable consideration in the usual course of trade, without notice of the ownership or of any suspicious circumstances calculated to awaken inquiry or put them on their guard. The case is a hard one in any

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aspect of it. One of two innocent parties must suffer by the fraud and knavery of a swindler who had no authority to act for either."

That is unlike this case, for Wick had authority to act in the premises, as we shall shortly see. "But the law is well settled that the owner cannot be divested of his property without his own consent, unless he has placed it in the possession or custody of another, or given him an apparent or implied right to dispose of it."

Now in the light of that principle, which it is said is well settled, let us look at this case. Reid, in the first instance, placed samples in the hands of this boy Wick, and placed his price list in his hands. He had knowledge that he was about to sell goods to Beckwith & Sons. He thus armed him with an apparent authority to represent that he was selling his goods, and at prices he had fixed for him to make the sales, but, it is true, without any authority to receive the money. That is the only limitation. The other authority was complete. He might go to Beckwith & Sons and procure from them orders to any amount, the only limitation was—"I will not pay you." He goes to Beckwith & Sons and sells them a bill of goods; that sale is recognized by Reid, for he sends around his bill to Beckwith & Sons; they pay his clerk. It is claimed on the part of Reid that was a notice to Beckwith & Sons not to pay Wick but to deal with them—that the goods were theirs. On the other hand, is it not evidence to Beckwith & Sons that Reid recognized Wick as his agent to sell and deliver his goods? The mere fact that payment was made to another clerk would not, it seems to us, militate against the right of Beckwith & Sons to believe that this young Wick represented Reid and had authority to sell and deliver his goods. He thus situated makes another sale of goods, and delivers those goods to Beckwith & Sons and they pay him.

Now, what were Beckwith & Sons bound to infer? Unlike this case in Pennsylvania, young Wick did not tortiously get possession of the goods, and as between Reid and Beckwith & Sons, Reid put Wick in possession of the goods intentionally, and purposely, with the knowledge that he was going to deliver them to Beckwith & Sons. Now, did he not thus give him an apparent authority in the delivery of those goods to Beckwith & Sons to receive the pay? Did he not hold him out as his agent? Reid knew that Wick was rightfully in possession of those goods with authority to deliver them. The only limitation upon this authority of Wick was simply as to his receiving the pay. This case is so different from the Pennsylvania case that, it seems to us, it is not in point. Indeed, the very elements that were wanting in that case, by reason of which they held the purchaser of the wool liable, are elements in this case. There the wool was substantially stolen—was obtained by a sheer trick, with no intention on the part of the plaintiff to give him possession of one pound of wool. This property was actually and intentionally put into the possession of young Wick. In the other case the swindler had no authority to deliver the wool to Barker & Co. In this case Wick had complete authority to deliver the property to Beckwith & Sons, and the simple question is, having that authority, were not Beckwith & Sons fully authorized to infer that accompanying the right to deliver possession was the right of receiving the pay for it?

Now we reach the conclusion that that was a necessary inference on their part; that they were justified in paying this boy, and when we inquire as to who was the instrumentality of enabling this boy to perpetrate the fraud, we find that without Reid's action no fraud would have been perpetrated. It seems to us that he is the party that held this boy out as his agent to sell his goods and the community might treat him as Reid's agent, and a payment to him on a purchase of goods of him, would be a payment to Reid.

We, therefore, thinkthat the Court below erred in its decision, and we will reverse the judgment and remand the case.

ESTEP & SQUIRE, for plaintiff in error.

MIX, NOBLE & WHITE, for defendants in error.

WAYNE COUNTY COMMON PLEAS.

JAMES W. CHRISTY VS. QUINCY A. KEEFER ET AL.

New Trial—Misconduct of Jury, etc.

The action was brought upon a promissory note for $1,000, made to the plaintiff by Quincy A. Keefer as principal and J. H. Keslar and Joseph Bricker sureties. The defense was forgery. Evidence was given on the part of the plaintiff tending to show that Kessler had signed a number of notes for Keefer. On behalf of the defendant evidence was given tending to show that Keefer had forged various notes for various amounts, and fled the country, and the other defendants denied having signed the notes. Verdict for the plaintiff for the full amount of the note. A motion was made for a new trial on the ground that the jury were guilty of misconduct in that during the trial, before the evidence was completed, a number of them experimented upon imitating the signatures.

The Court, Voorhees, J., granted the motion.

JOHN MCSWEENEY, SR., and C. C. PARSONS, JR., for plaintiff.

E. S. DOWELL and J. R. WOODSWORTH, for defendant.

SCHUYLKILL COUNTY COMMON PLEAS.

THE CITIZENS' BUILDING AND LOAN ASSOCIATION, OF SHENANDOAH, VS. JOHN PHILIPS.

In an affidavit of defence, it is not sufficient to aver that, the defendant has a receipt for money, he should swear he made payment, or it was made for him, and that he expects to be able to prove it.

WALKER, J.:

This is a proceeding by *Sci. Fac.* on a mortgage for $600 by the defendant to the plaintiff (a Building and Loan Association).

One of the conditions of the bond and mortgage is that when default shall be made in the payment of either principal, interest, or monthly contributions for the space of six months, after the same shall become due and payable, then the whole shall become due and recoverable; and by the 14th article of the Constitution of the Association, the directors are then authorized to collect the same by legal process.

The defendant in this case swears, that the principal debt is not yet due, and that he has paid all the monthly dues, premiums and interest up to the time of the *last payment*, and that nothing is due up to the day of the *last payment*. When the *last payment* took place he does not say. *That* time is material to unable the court to determine whether payment of money has been made according to the constitution and by-laws of the association, and also to rebut the allegation of the plaintiff that the defendant is in arrears six months.

The receipt in itself is not payment of money, for it might have been procured by fraud, mistake, or by parting with no money. And though it is *prima facie* evidence of payment, yet in an affidavit of defence (in my opin-

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ion) it is not enough for a defendant to swear he has *prima facie* evidence of payment; he should swear that he made the payment, or that it was made forhim, and that he expects to be able to prove it, for he knows the fact if true.

From the affidavit it further appears, that the word "payment" is erased and over it is written the word "receipt," conclusively showing that the defendant has purposely avoided swearing to the required payment within the six months.

The affidavit in this respect is bad for uncertainty.

If the defendant will make and file an affidavit within ten days that the last *payment* was made within six months from the date of the issuing of the *Sci. Fac.*, then the court will grant him relief.

And now, 14th April, 1879, the rule is made absolute.

S. G. M. HOLLOPETER, for rule.

I. J. LITCHENBERGER, *contra*.

—*Schuylkill Legal Record.*

U. S. CIRCUIT COURT N. D. OF OHIO.

May 19.

3873. Robert G. Dunn et al. vs Archibald McGregor et al. Action for libel. Amount claimed $50,000. H. and C. C. McKinney.

May 20.

3866. William H. Robinson vs Thomas C. Boone et al. Answer. Estep & Squire and Ambler.

May 22.

3875. Wm. Kyle vs Wm. Schmidt. Petition for injunction. Marvin, Taylor & Laird.

3874. The Lamb Knitting Machine Man. Co. et al. vs The Franz & Pope Knitting Machine Man. Co. Bill in equity. George Harding.

May 23.

3603. Union Paper Bag Machine Co. vs Cleveland Paper Co. Motion to suspend injunction filed by deft. Also report of defts. as to bags manufactured filed.

U S. DISTRICT COURT N. D. OF OHIO.

May 15.

3872. The United States vs James Atkins et al. Petition filed.

3825. M. Gottfried et al. vs C. Schneider. Answer filed.

Bankruptcy.

May 14.

1910. In re Ernest H. Knippenberg. Discharged.

1789. In re John O. Green. same.

May 15.

2021. In re Joseph S. Bell. Discharged.

1759. In re Crane & Granger. Same.

1751. In re James McCurdy. Petition for discharge. Hearing May 28th.

May 16.

1999. In re Nathan New. Motion to strike out specifications in opposition to discharge.

1999. In re same vs same. Demurrer to specifications in opposition to discharge.

1909. In re Martin Wagner. Discharged.

1696. In re James L. McClurg. Same.

1770. In re James M. Brown. Same.

1976. In re Starr O. Latimer. Petition for discharge. Hearing May 31st.

May 17.

1929. In re Thomas J. Knapp. Discharged.

1921. In re William Jones. Same.

1873. In re Joseph Berman. Same.

May 19.

2039. In re Pope & Hammer. Discharged.

1864. In re Vaupel & Moore. Same.

May 21.

1925. In re Jay C. Gage. Petition for discharge. Hearing July 2.

1936. In re Jacob Stambaugh. Discharged.

1537. In re James D. Edwards. Same.

1688. In re Charles G. Parkwill. Same.

1895. In re Milo O. Keyes. Same.

May 22.

1914. In re Silas Bigelow. Discharged.

2047. In re Edwin Bayliss. Order confirming resolution of composition.

May 23.

1951. In re David S. Alexander. Discharged.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending May 23, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

May 17.

Joseph Valak and wife to F. H. Biermann. $300.

John Bartek and wife to Elizabeth Schrauffer. $200.

Horace W. Dewey to Wm. H. Fry. $150.

Maria E. Langenheder et al. to Frank Leuk. $100.

Chauncy Giddings to The People's Savings and Loan Ass'n. $4,100.

Margaret W. Barnes and husband to R. P. Myers et al. $120.64.

John Clein et al. to Margaret Rapp. $400.

Charles Seelbach and wife to John Junge. $650.

Eliza Hughes to The Cit's'. Sav. and Loan Ass'n. $7,500.

A. N. Murphy and wife to Jacob Mandlebaum. $200.

May 19.

Daniel Theobold and wife to William Tousley. $800.

William F. Schneider and wife to Louisa J. Vogel. $3,000.

John Martin and wife to trustees of G. W. College. $150.

May 20.

Ignatz Koblitz and wife to Moses Koblitz. $400.

R. F. Smith and wife to Amanda F. Smith. $1,000.

Catharine M. McNaly to The Socy. for Sav. $100.

John Herr to John Hundretmark. $850.

May 21.

Henry Giles and wife to John H. Green. $320.

Wm. Hale and wife to Hiram Day. $900.

Emily P. Boylston et al. to same. $1,000.

John Zimmerman to the Citizens' Savings and Loan Ass'n. $950.

Frank Kessler and wife to Catharine Smith. $300.

Emma Haskins and husband to Nicholas Meyer. $1,524.90.

Anna Garothorp and husband to Lewis W. Ford. $150.

Thomas Lynch and wife to M. S. Hogan. $100.

May 22.

Jacob Hinkle and wife to Joseph Steiger. Four hundred dollars.

Richard Jennings and wife to G. O. Baslington. One thousand dollars.

May 23.

J. J. McClintock to Alexander Rodgers. One thousand five hundred dollars.

John Berger and wife to Maria Karda. Four hundred dollars.

Henry J. Sherwood and wife to The Society for Savings. Three hundred dollars.

Joseph Melchior and wife to Anna Keiser. Two hundred dollars.

David Johnston to Mary J. Towner. One hundred dollars.

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George P. Vitter and wife to Henry Baker. Six hundred dollars.

Mary James and husband to Eva Fox. Eight hundred dollars.

Elizabeth Castle and husband to Isaac P. Lamson. Three hundred and fifty dollars.

CHATTEL MORTGAGES.

May 17.

Henry Hookaway to George Williams. $30.

Am. Casteel Co. to Peter Weiser. $540.

Michael Doherty to Thomas Wagner. $23.

L. F. Young to S. Brainard's Sons. $300.

Charles Harvey to same. $275.

May 19.

Joel Odell to E. D. Young. $200.

Thomas H. Jewell to C. F. Norton & Co. $400.

Michael Riley and wife to Martin Carlin. $609.90.

May 20.

Ludwig Rohde et al. to Simon Fisher. $800.

J. H. Clark to A. H. Bailey. $106.

Charles H. Blish to Ransom O'Connor. $75.

J. H. Wiseman et al. to The Co-operative Printing Co. $3,500.

May 21.

Henry C. Smith to D. C. Taylor. $200.

Joseph Beznoske to Frank Rybak. $250.

Michael Carroll to John Theobald. $200.

Solomon Sampliner to Simon Sampliner. $500.

Theddeus M. Talcott to Debora C. Main. $500.

S. Grossman et al. to George Worthington & Co. $66.

May 22.

R. A. Wheelock to J. E. Jones. Three hundred and fifty dollars.

Ed. Kirkholder to John T. Sullivan. One hundred and twenty-five dollars.

J. Hasplin to Strong, Cobb & Co. Five hundred dollars.

T. B. Putnam to James A. Brown. Two hundred dollars.

August Aultman et al. to John Walworth. One hundred and twenty-five dollars.

Lewis Jones to J. O. Greene. One hundred and ten dollars.

May 23.

P. R. Malley et al. to H. A. Wallin. Seven hundred dollars.

Mrs. Maggie Knapp to E. D. Young. Eighty dollars.

Wm. H. Flood to John F. Uthe. Eight hundred dollars.

H. F. Bigger to Hamilton Bigger. Two thousand five hundred and fifty-one dollars.

Same to C. A. Green.. One thousand five hundred dollars.

Same to same. Two thousand and sixty-three dollars.

Same to Hamilton Bigger. Two thousand five hundred and fifty-one dollars.

Same to C. A. Green. Two thousand and sixty-one dollars.

Same to same. One thousand five hundred dollars.

Same to same. One thousand five hundred dollars.

Frank A. Carber and wife to William D. Butler. Ninety-seven dollars.

Wm. Hindley to same. Sixty-nine dollars.

DEEDS.

May 16.

John M. Schiely to Frances F. Sizer. $5,000.

Wm. A. Schielly to John M. Schiely. $8,000.

Christian D. Stetson and wife to Thomas Martin. $5.

J. J. Shepherd and wife to Asabel North. $1.

Thomas Martin and wife to Patrick Cain. $400.

Henry C. Miller to John G. Maier and wife $600.

Wm. Murphy and wife to A. N. Murphy. $1.

May 17.

Margaret Rapp to John Cain et al. $600.

Kate Clark to Ann Manning. $10.

Anna M. Conger and husband to Huldah H. Collins. $1,800.

A. H. Jackson to R. H. Cummer. $1.

Michael Manning and wife to Kate Clark. $10.

Thomas Donohue to L. M. Mott. $1,000.

L. M. Mott to Ellen M. Donohue. $1,000.

Luther Meses and wife to Isaac Wolf et al. $1,000.

Jane McGuire to Agnes B. Goodman. $1,200.

Caroline Newman and husband to Margaret J. Smith. $1,800.

Same to same. $8,000.

Abraham Tristle and wife to Sarah Schreufaerber. $800.

Jabez S. Stoneman and wife to Jabez Stoneman. $5,400.

Scott T. Williams and wife to Huldah H. Collins. $1,000.

Henry A. Wise and wife to Edmund Walton et al. $1,750.

Josephine Wagner and husband to Mary M. V. Keil. $2,500.

Jacob Liebold et al., by Thomas Graves, Mas. Com., to Jacob Uhrmetz. $1,500.

Theresa T. Heath, by E. B. Bauder, Mas. Com., to Edward G. Powell. $536.

Caroline W. Ingham, by C. C. Lowe, Mas. Com., to J. R. A. Carter. $750.

Louis Umbstaetter et al., by H. C. White, Mas. Com., to Eliza Hughes. $11,950.

Amelia A. Streator, admx. of David G. Streator, dec'd., to B. A. Robinett. $260.

Anna Russell to Sarah E. Dempsey. $2,700.

John Cain et al. to Gustav Schmidt. $1.

David Magar and wife et al. to H. L. Sook. $3,000.

Edwin Giddings et al., by E. H. Eggleston, Mas. Com., to Chauncey Giddings. $9,050.

H. H. Prugh to Anna Bruehler. $1,500.

Anna Bruehler to Fred Newman. $2,000.

B. A. Robinett to Amelia A. Streator. $200.

May 19.

Wenzet Krechtel et al. to August G. Kiel. $5.

Alfred Kellogg and wife to S. S. Stone. $45,406.

James Manson and wife to M. M. Northrop. $1.

James Murphy and wife to Louis Hundertmark. $600.

Francis W. Parson and wife to O. G. Kent. $12,000.

Bernard Seyfried and wife to John F. Galster. $800.

Frank M. Stearns and wife to John Martin. $800.

Thomas R. Whitehead to Georgiana Moses. $2,000.

A. J. Wenham & Son to James Strong. $1,300.

John George Meyer, by W. I. Hudson, Mas. Com., to Wm. Shillew. $500.

Charles Patterson, by G. Hester, Mas. Com., to Elizabeth Hower. $500.

Wm. H. Beaumont and wife to Stevenson Burke. $1,000.

Ahira Cobb and wife to S. S. Stone. $30,000.

Max M. Heller and wife to Peter Stengl and wife et al. $1.

May 20.

John F. Bente to George P. Vetter. $1,400.

James D. Cleveland and wife to James Coughlin. $575.

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Leonard D. G. Hamilton and wife to Hiram C. Culver. $300.

Thomas Hird to Mary L. Lapham. $1.

Mary Janes to Anne Cowley. $450.

Mary A. Leonard and husband to Katie C. Clements. $1,150.

Joseph Luker and wife to S. Stein. $5.

S. Stein and wife to Francisco Luker. $5.

Charles W. Moses to Elizabeth L. Stevens. $600.

R. P. Myers et al. to Margaret M. Barnes. $355.

Charles Winter to Carl Gest. $1,050.

Mathew Collins, by Thomas Graves, Mas. Com., to Mary Harper. $400.

Catharine Smith to Frank Kessler and wife. 420.

May 21.

Thomas Reilly and wife to William H. Gaylord. Two thousand six hundred dollars.

Thomas D. West to Sarah A. Moss. One dollar.

Joseph Storer and wife to Maurie Weidenstahl. One hundred dollars.

John Moran, by Thomas Graves, Mas. Com., to Peter Dunn. One thousand eight hundred and sixty seven dollars.

Citizens Saving and Loan Association to John Zimmerman. One thousand four hundred and fifty dollars.

Bridget Hayes and husband to Rosanna Atkins. One dollar.

August G. Keil to Mary Knechtel. Five dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending May 21st, 1879, against the following Persons.

May 15.

Joseph Marchand et al. $5,470.66.
Charles H. Blisch. $3,936.

May 16.

F. Fahle $501.25.
Andrew Mehling. $1,004.27.
Wm. A. Morris. $3,451.55; $156.88.
Jacob Zuelling et al. $75.
Sarah A. Fletcher. $556.34.
Cleveland Hazard Hame Co. $612.20.
Jahn Outhwaite. $10,000.
A. S. Hudson. $901.60.
George F. French. $190.95.
Aaron Higley. 94.65.
C. L. Russell. $153.92.
Harrison C. T. Lynch. $416.87.
Oliver J. Smith. $597.20.
Julius Reichwein. $563.24.
Andrew Franchier. $338.
Hannah Korpee et al. $845.84.
Sophia Richter. $21; $340.30; $676.

May 21.

Wm. C. Northrop. $40.

COURT OF COMMON PLEAS.

Actions Commenced.

May 16.

15088. Cyrille Mahen vs The L. S. & M. S. Ry. Co. Appeal by deft. Judgment May 13. Goulder, Hadden & Zucker; Geo. W. Mason.

15089. Herbert O. Kennedy vs Joseph Lay. Money only. Estep & Squire.

15090. Fred W. Weber vs F. Fahle. Cognovit. Johnson & Schwan; B. W. Haskins.

15091. Tyler & Denison vs S. J. Miller et al. Money only. P. P.

15092. Ezra Nicholson vs John Cassidy. Money and equitable relief. Mitchell & Dissette.

15093. Jacob Mueller et al. vs Edward Niggle et al. Equitable relief. A. Zehring.

15094. P. O'Neil vs The Hibernia Ins. Co. of Ohio. Money only. P. P.

15095. Michael Murphy vs Matthew Haggerty. Money only. P. P.

May 17.

15096. Philip Hill vs Sam S. Marsh et al. Money, to subject lands and relief. Willson & Sykora.

15097. Elias P. Needham et al. vs C. Hadley. Money and equitable relief. Foster, Hinsdale & Carpenter.

15098. Louis Weiss vs Martin Hartlieb et al. Money, to subject lands and relief. A. Zehring.

15099. Mary Braun vs B. Lied et al. Money, sale of lands and relief. Johnson & Schwan.

15100. Edward Walker vs W. L. Cottrill, exr. etc. Money only. James Wade.

15101. Wm. F. Schoonmaker vs George H. Burt et al. Money and relief. Mix, Noble & White.

15102. M. M. Spangler & Co. vs Alex. Ewald et al. Money only. J. H. Schneider.

15103. Henry Wick et al. vs George Adam Schmidt. Money, to foreclose mortgage and equitable relief. Arnold Green.

15104. In re Frank Schaffer for change of name. Willson & Sykora.

15105. John Derrer vs Robert Lynn et al. Foreclosure. John W. Heisley.

May 18.

15106. Henry Hirchkowitz vs Hannah Korper et al. Cognovit. Willson & Sykora; J. M. Stewart.

15107. John Schindler vs Benjamin Schrauer. et al. Foreclosure and sale of land. Goulder, Hadden & Zucker.

15108. Sarah Bartlett vs Philander Snelling et al. Money, to subject lands, and for equitable relief. Robison & White.

May 20.

15109. Frank W. Bell vs S. H. Foster et al. Money only. Hord, Dawley & Hord.

15110. Charles Geib vs Anton Sindelar et al. Equitable relief. E. Sowers; C. L. Latimer.

15111. M. E. McMahon vs H. Hogreve. Appeal by defendant. Judgment April 27.

15112. H. L. Hyde et al. vs William Barnard et al. Equitable relief. Robison & White.

15113. J. H. Klossen vs Robert H. Dougall. Appeal by deft. Judgment May 6. M. Rogers; W. V. Tousley.

15114. The Society for Savings vs E. K. Chamberlain et al. Money and sale of lands. S. E. Williamson.

15115. John A. Vincent et al. vs H. C. Brainard et al. Money only. G. W. Lynde.

15116. W. C. Stone vs Joseph Kerkel et al. Appeal by defts. Judgment May 1st. Baldwin & Knight; George Menger.

May 21.

15117. George C. Wratten vs Wm. C. Northrop. Cognovit. B. W. Haskins; Truman D. Peck.

15118. Henry Betzer vs A. J. Wells et al. Money only with att. N. M. Flick.

15119. In re application of A. T. Peet for a writ of habeas corpus vs John M. Wilcox, Sheriff. For writ of, etc. L. J. Rider.

15120. George Koch vs John G. Meyer et al. Money, to subject land and relief. A. Zehring; W. S. Kerruish.

15121. E. B. Pratt vs S. W. Johnson et al. To subject land. A. T. Brewer.

15122. Ralph T. King vs Wm. Davis. Money and to subject land. Bishop, Adams & Bishop.

15123. Emma N. Gould vs Andrew Platt. Error to J. P. N. A. Gilbert; Ingersoll & Williamson.

15124. Anton Palliwitz vs W. F. Judson. Appeal by deft. Judgment April 25.

15125. M. S. Hogan vs John Beck. Appeal by deft. Judgment May 2. E. M. Brown; Jackson, Pudney & Athey.

May 22.

15126. Bothwell vs The Bessemer Iron Co. Money only with att. H. & C. C. McKinney.

15127. Henry N. Raymond et al. vs Michael Thorman. Money only. E. Sowers.

15128. Perry Heazlit vs Alfred Cooper et al. Money only. Frank C. Gallup and Stone & Hessenmueller.

15129. J. K. Hord, admr. etc., vs George Kelly et al. For construction of will. J. K. Hord.

15130. Clara M. Reese vs John Foerstner. Injunction, money and foreclosure. Adams & Rogers.

15131. James O'Maley vs The City of Cleveland. Appeal by defendant. Judgment April 25. ———; Heisley, Weh & Wallace.

15132. Patrick Smith vs Minard Wilcox et al. Money only. Charles T. Fish.

Motions and Demurrers Filed.

2574. Burwell vs Heller. Motion by deft. for new trial.

2575. Rawson vs Patterson et al. Motion by deft. John Patterson to set aside default and pretended service.

2576. Schriber & Co. etc. vs Van Doorn. Motion by defendant to strike out from answer.

May 16.

2577. Daughters of Israel No. 1 vs Scheuermann et al. Motion by plaintiffs for the appointment of a receiver with notice and affidavit of service.

2578. Stone vs Southern et al. Motion by plaintiff to require defendant William Tousley to make his answer more definite and certain and to strike out from same.

2579. Reichard vs Helfer et al. Motion by plff. for new trial.

2580. Brown vs Dittrick, admr., et al. Same.

May 17.

2581. Holden vs Odell et al. Same.

2582. Blum vs Kees et al. Motion by defendants William H. and Caroline Kees to strike petition from the files.

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2583. Baxter vs Washington et al. Motion by defts. to require plff. to give new bail for costs.

2584. Blish vs Blish. Motion by plff. to dispense with advertisement in German paper.

2585. Spencer vs Schieley, admr., etc. Motion by plaintiff to make answer and amendmentr to answer more definite and certain.

2586. Same vs same. Motion by plaintiff to make answer more definite and certain.

2587. Gardner et al vs Quinn et al. Motion by defendant Quinn to require plaintiff to make petition more definite and certain.

May 19.

2588. Filbin vs Loftus et al. Motion by plff. to strike demurrer of Loftus from files.

2589. Bucholz vs The Nordyke & Marmon Co. Motion by defendant to dismiss action.

2590. Norton vs Gaul et al. Demurrer to the answer.

May 20.

2591. U. S. Mortgage Co. vs Gilbert et al. Demurrer by plaintiff to answer of Gilbert.

2592. Dalton vs Barchard. Motion to require plaintiff to give security for costs.

2593. Atwell vs Hempy. Motion to require plff. to make petition more definite and certain.

2594. Ruecker vs Graf. Motion to require plff. to give security for costs.

2595. Droz vs Bremen et al. Motion by deft. Eichenberger for the appointment of a receiver.

2596. Manche vs Goddard et al. Motion by all the defts. to make the petition more definite and certain.

May 21.

2597. Quayle et al. vs Angel et al. Motion by plaintiff to confirm report of referee etc.

2598. Hoffman vs Fay et al. Demurrer by deft. Cyrus to the petition.

2599. Davis vs The Kelly Island Lime Co. Motion dy deft. for a new trial.

2600. O'Mara et al. vs Molitor et al. Motion by pltf. for new trial.

2601. Lederer & Son vs Miller et al. Demurrer to the answer.

2602. Noack vs Koebler. Motion to require plff. to give security for casts.

2603. Gregerson vs Herr et al. Motion by deft. Herr for appointment of commissioner to take depositions in Germany.

May 22.

2604. White receiver, vs Ingersoll et al. Demurrer by deft. Spencer to 2d cause of action in the petition.

2605. Koechert vs Weber et al. Motion by plaintiff to dispense with German advertisement.

2606. Prentiss vs Campbell et al. Motion by plaintiff for the appointment of a receiver, with affidavit of plff. and appearance to motion of deft. Avery.

2607. Ingham vs The Baldwin University. Motion by deft. to make petition more definite and certain.

Motions and Demurrers Decided.

May 14.

2419. Quayle vs Angell et al. Sustained and referred to G. A. Laubscher by consent of parties.

May 17.

2069. Kingsette vs Sheets et al. Granted. Defendant has leave to answer instanter.

2322. Jones et al. vs Smith et al. Overruled.

2355. Ashcroft vs Grosse et al. Overruled. Plff. has leave to answer within two weeks.

2360. Filiere vs Scheurer. Overruled.

2361. Same vs same. Sustained.

2371. Lowe vs Capener. Granted. Plff. to give security for costs.

2372. Connor et al. vs Graulty, admr. Sustained. Plff. has leave to amend by striking, etc.

2376. Kleinbenz vs St. Boniface Society of Cleveland. Sustained. Plaintiff excepts.

2383. Felschow vs Stoskey et al. Overruled.

2403. Downes vs Charlton. Overruled for non-compliance with rule.

2453. Stanley vs Russell et al. Stricken off for same reason.

2479. } Meeker vs Slawson. Overruled.
2481. } Deft. excepts.

2484. } Cady vs French. Stricken off for
2486. } non-compliance with rule.

2511. Badson vs Beach. Withdrawn.

2548. Maurer vs Lowe et al. Granted.

2570. Long et al. vs Burkholdt et al. Granted.

May 21.

2333. Backus et al. vs Aurora Fire Ins. Co. Sustained. Plaintiffs have leave to amend.

2402. Hewett et al. vs Wiltz et al. Sustained.

2449. Buskirk vs Schwab. Overruled.

2451. Micklish vs Harrison. Withdrawn. Leave to defendant to answer instanter.

2467. Willson et al. vs Macey et al. Overruled. Defts. except. Leave to deft. to answer in 10 days.

2489. Penfield vs Fitch et al. Overruled.

2490. Same vs same. Overruled as to 'strike out,' sustained as to 'make more definite.'

3524. Hubbard vs Hord, admr. Sustained. Defendant excepts.

2498. Weber Jr. vs Nauert. Overruled. Deft. excepts.

2485. Dickenson vs Weidenbaum. Withdrawn by consent of plff.

2500. Platt vs Garland. Sustained. Deft. excepts.

2507. Cleveland Malleable Iron Co. vs Cleveland Hazard Hame Co. Granted. Deft. has leave to answer by May 3.

2509. Furniss vs Radenschewski et al. Sustained. Plff. excepts.

2512. Redington vs Stambaugh Jr. Granted.

2516. Nowak vs Sullivan. Overruled. Deft. excepts.

2524. Cleveland Hay Car Co. vs White et al. Granted and restraining order continued, etc. Deft. excepts.

2527. Ger. Mut. Protection Association vs Heene et al. Sustained. Plaintiff excepts.

2532. Platt vs Reader et al. Overruled. Deft. excepts.

2589. Bucholz vs The Nordyke and Manson Co. Overruled. Deft. excepts.

2160. Smith vs Sommerville. Granted.

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AND AT

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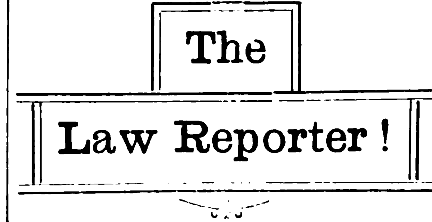

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SHORTHAND AND BILLS OF EXCEPTIONS.—The incorporation in bills of exceptions of a literal transcript of the testimony, as taken down by a stenographer upon the trial, should be prohibited. A large amount of the labor of reviewing courts, necessitated by this practice, might be avoided, without detriment to litigants, and much of the expense of litigation saved to the parties, by requiring the testimony, for bills of exception, to be put in a condensed form. It is hardly an exaggeration to say that in most cases three-fourths of the matter contained in the transcript of the stenographer's notes of a trial in court is the merest trash. To illustrate:

The attorney asks the witness a question, which is objected to. The stenographer has taken down the question, and if the court overrules the objection the attorney conducting the examination repeats the question already down, or very likely he asks a different question, and then it may be that the same question is repeated two or three times, in as many different forms, by the attorney in putting it, before he permits the witness to answer.

We have before us in a printed record a specimen question of the latter character, supposed to be a literal transcript from the stenographer's notes, containing one hundred words, that should have been embraced in less than twenty. Then we find in the same record the following as a stenographic report: "Q. When was that put there?" [Cannot hear the witness, his back being turned this way and speaking in too low a voice.] "Q. Why is it enclosed in brackets?" "A. [Cannot hear the witness."] "Q. Go to the item of Dec. 31st and read it?" "A. * * * *" "Q. Look at page 318, what do you find there? [Witness reads in an inaudible voice and being standing with his back turned about ten or fifteen feet away, I cannot hear distinctly what he says]." Why should such stuff as the above go into a bill of exceptions?

WHO has some shares of Law Library Association stock to sell cheap?

THE ROMAN CIVIL LAW.

IV.

Book I. of the Digest, Title I., as we have stated, treats of and considers law.

1st, as natural law or positive law, —positive law as distinguished from natural, being that established by the will of the legislator.

2nd, as *Jus publicum*,—public law, —being the law concerning the relation of the citizen to the state, and its institutions and policy.

3d, as *Jus privatum:* and that this law is made up of three parts or elements:

a. *Jus gentium*,—international law —founded in part on natural, in part on positive law, and constitutes a principal part of public law.

b. *Jus naturale*,—law of nature.

c. *Jus civile*,—the civil law.

4th, as *Jus civile*.—and this law made up and composed of the *jus scriptum*, that is, law formally promulgated by the legislative authority, and deriving its authority from a written instrument; and *jus non-scriptum*, that is, law, not originally sanctioned by formal promulgation. but the growth of custom.

JUS PRIVATUM.

Made up of three elements, the *jus gentium*, *jus civile* and the *jus naturale*.

A. The *jus civile* and *jus gentium*.

Law 6.—The *Jus civile est, quod neque in totem a naturali vel gentium recedit, nec per omnia ei servit; itaque quum aliquid addimus vel detrahimus juri communi, jus proprium, id est civile, efficimus.*

Law 7.—Jus autem civile est, quod

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ex legibus, plebiscitis, senatus consultis, decretis principum, auctoritate prudentum venit.

The *jus civile* is that law which neither entirely deviates or differs from the law of nature or international law, nor guided by it in every respect. If we will therefore add something to the common law or take away some parts of it, then we obtain and effect a peculiar law, i. e. the just civile.

The jus civile is that law which has its source and origin in laws, popular assemblies, resolutions of the Senate, and Imperial ordinances.

The jus gentium is the jus–solis hominibus inter se commune (the law that is common to men alone), and differs from the jus naturale, the jus–quod natura omnia animalia doceit—the law that nature has taught all beings) meaning men as well as animals).

The sources of the civil law have been given.

The civil law was the sole and only law known and used by the Romans for the first 500 years of Rome's existence. Up to and during that time no need was felt by them for any other law. They had been thus far, as it were, an isolated people, and having no intercourse with other people, the civil law during that period was confined to narrow and selfish limits. But about this time Rome and her people came in contact with and their intercourse with foreign nations increased, by reason of which it became necessary for them to know and apply the law of other countries and States in the administration of Roman justice. This broadened the views of the Roman jurists, and in this wise it came about that the notion arose of a law common to all nations, namely, the jus gentium. The common source of all law was found in the common consciousness of right implanted in our nature, and thus by degrees this jus gentium was received and applied by the Romans in their administration of justice and law; and from this time until the classical period these two elements of private law (namely, the jus civile and the jus gentium), although in opposition in many respects, existed side by side; they were finally blended, that is to say the opposition between the two became less and less, and finally became lost with the increase of Roman knowledge, and thereby the narrow circle of municipal justice became enlarged, and, if anything, it may be said that the jus gentium triumphed over the jus civile, when the difference between them had finally ceased.

To illustrate these two elements, it may be said that the rules applicable to certain contracts, such as emptio, (purchase); venditio, (sale); locatio, (leasing); conductio, (hiring); &c., were common to the jus gentium and the jus civile; on the other hand, marriage as between Roman citizens, the power of the father over his children, some of the most important rights of property, as mancipatio, (delivery); usucapio, (acquisition); &c., and the whole law of inheritance belonged exclusively to the civil law, the jus civile.

Lex. Ex hoc jure gentium introducta bella, discretae gentes, regna condita, dominia distincta, agris termini positi, commercium, emtiones, venditiones, locationes, conductiones, obligationes, institutae, exceptis quibusdam, quae a jure civili introductae sunt.

From this law of nations, wars arose, people became separated, realms were founded, property became fixed, farms were measured off, commerce, purchases, sales, and obligations and agreements confirmed, except certain matters that were introduced through the civil law.

These illustrations point out the differences, and go to show also that the civil law was exclusively Roman—it was national, as distinguished from the jus gentium, the law that is universal and common to us all. Both were positive laws. As has been stated they finally became blended, and when that was accomplished the law had reached the science, as we find it in the Pandects.

B. The jus naturale.

The Roman jurists say that there is a third element of jus privatum, viz., the jus naturale.

Law 1. Jus naturale est. quod natura omnia animalia docuit; nam jus istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascunter, avium quoque commune est. Hinc descendit maris atque feminae conjunctio, quam nos matrimonium appellamus, hinc liberorum procreatio hinc educatio; videmus et enim cetera quoque animalia, feras etiam, istius juris peritia censeri.

Jus naturale is the law that nature has taught all beings: for this law is not peculiar to man alone, but is common and natural to all living beings that are created on earth and in the sea, as well as to the birds of the air. The conjugal relation of man and woman proceeds from this law, called marriage; the begetting of children and educating them; and we know that all beings, even the wild beasts, practice and obey this law.

The Roman jurists then regarded man in a three-fold light.

1. As an animal; and as such he was subject to the jus naturale.
2. He was subject to another law; the jus gentium.
3. He was subject to the law established in his own community, governed by positive and arbitrary rules; the jus civile.

In illustration of this we may refer to several familiar doctrines.

It is a part of the law of nature that a guardian shall watch over the interests of his ward; but the precise limit of his responsibility is fixed by the civil law.

The law of nature requires the parent to provide for his children; when that duty shall cease is part of the civil law—the positive law. The law of nature allows a man to dispose of his property. The positive law can, and does restrict that right in various ways.

In view of what has been said, many insist that in truth the jus naturale is not a distinct element of the civil law, but is a part of the jus gentium, and that therefore the jus privatum is composed of but two elements, namely: the jus gentium and and the jus civile.

The jus naturale can at most apply but to the physical part of man, and has its source there, and can not be considered or treated of judicially.

The jus gentuim emanates from the understanding of men. The jus civile has its source in laws. H.

COURT OF COMMON PLEAS NO. 4, OF PHILADELPHIA.

LLOYD VS. UNDERKOFFER.

A married woman can become a lessee of premises and is bound by all the covenants of the lease signed by her.

A failure of the constable to set apart property under a claim of the exemption law is not a defense in replevin for goods distrained for the rent.

ELCOCK, J., delivered the opinion April 5th, 1879.

This was a replevin for goods distrained upon for rent of premises occupied by plaintiff, a married woman, under a written lease from the defend-ant. On the trial the lease was admitted in evidence which contained a waiver of the law of 9th April, 1849, exempting property to the value of $300 from levy and sale, etc. It is contended that the lease made by a

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married woman is void, and that no right of distress can be founded thereon. A lease with possession thereunder differs from the ordinary contracts in relation to the rights of married women. That a married woman can receive a grant coupled with conditions or subject to payment of a rent, and that she can enter into such a cantract, her husband not objecting, cannot be doubted since Baxter vs. Smith, 6 Binney, 427; see also Borts vs Borts, 12 Wright, 382; Harrington vs Gable, 2 W. N., 509; and even her bond in payment of purchase money is good as against the land conveyed. Patterson vs. Robinson, 1 Casey, 81; Ramborger vs. Ingraham, 2 Wright. 146; Glass vs. Warwick, 4 Wright, 140. That she had power to waive the benefit of the exemption law as part of the condition of the grant to her is equally clear. If she is liable for one she is for all the covenants.

The question, moreover, cannot be raised in this action, which is simply to determine the title to the goods on the premises. As none were appraised or set apart it cannot be said any claim for them was made or allowed. Unless appraised and set apart the goods in suit did not become plaintiff's property by virtue of the exemption law. Demand must be made of the constable or person making the distress at a proper time and in a proper manner for the benefit of the act, and if he fails to perform the duty demanded he is liable in an action.

The jury was properly instructed on all these points.

Rule discharged.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

THE CONTINENTAL LIFE INSURANCE COMPANY VS. JOSEPH M. ROBINSON.

Life Insurance—Rights of Insured on Refusal of Company to Issue Paid up Policy in Accordance With Terms of Policy, etc.

TIBBALS, J.:

The plaintiff below brought his action against the Continental Life Insurance Company to recover a certain amount claimed to be due to him by reason of a policy of life insurance. The petition avers that on the 7th day of March 1871 the plaintiff in error issued a certain policy of insurance upon his life for the sum of one thousand dollars for the period or term of twenty years, and among other things that the policy contained the following provision, that if after the receipt by this Company of two or more annual premuims upon this policy default shall be made in the payment of any subsequent premiums when due, then, notwithstanding such default, this company will convert this policy into a paid up policy for as many twentieth parts of the sum thereof insured as there shall have been complete annual premiums paid, when such default shall be made; provided that this policy shall be transmitted to and be received by this company and application made for such conversion within one year after such default; and further avers that the plaintiff had made four annual payments, after the making of which, on the 6th of April, 1875, he returned his policy, having made up his mind not to make any more paymenta, and requested that the company comply with this provision of the policy, and issue to him a paid up policy for the amount, which would be two hundred dollars, by the terms of the policy payable on the 7th of March, 1894, except in case of his death prior to that time; he avers that he has kept the provisions of the policy on his part, and that the insurance company neglected and refused to issue to him the policy, and he, therefore, asks a judgment against the Company for two hundred dollars and interest thereon.

The Insurance Company, by way of answer, denies that the plaintiff has complied with the provisions of the policy by him to be performed, and says that while the plaintiff has paid the four annual premiums a portion of it was paid in money and a portion of it by note, and by the terms of it he was to pay the interest on those premium notes in advance; that he has failed to make the payment of the installment of interest due March 7th, 1875, which he should be required to pay before he would have a right to demand a policy, and they therefore deny that they are required by the terms of the policy to issue to him any policy at all.

The case was tried to the court by consent of the parties. The bill of exceptions sets out all of the evidence. The court found that the plaintiff was entitled to a judgment for the $200 and interest, and rendered a judgment accordingly. The Insurance Company seeks to reverse that judgment on the ground,

1. That the judgment is not sustained by sufficient evidence — is against the weight of evidence.

2. Is contrary to law.

3. Error in overruling motion, etc.

This brings up the question of the rights of the parties under this provision of the policy. There is not a doubt but what the plaintiff, if he had complied with his part of the contract, was entitled, at the hands of the Insurance Company, to a paid up policy for $200, which would be payable on the 7th of March, 1894, or sooner in case of his death.

Two propositions are submitted: First, whether the evidence sustains the judgment. Now, by what law is this plaintiff entitled to a present judgment for two hundred dollars and interest, when by the terms of his contract all he is entitled to is that the Company issue to him a policy payable in 1894? The Supreme Court of Connecticut, in a case somewhat similar to this, (Albany Law Journal of March 8th, 1879,) recently decided:

"Where an insurance company refused to receive premiums and to recognize a life policy as in force, *semble*, that the insured has two remedies: (1) to elect to consider the policy at an end and sue for an equitable value thereof; (2) to bring a suit to have the policy adjudged to be in force; and, perhaps, a third remedy, to tender the premium and test the forfeiture in an action on the policy where by its terms it becomes payable."

If that be correct why is it not applicable to this case? The insured then had two remedies: (1) to elect to consider the policy at an end, (2) and he had a right to put an end to the policy according to its terms.

Now, evidently, the insured undertook to treat this policy as at an end and to recover the full amount that would be payable to him upon his death or at the end of the full term, March, 1894. In this we think he was wrong. He was entitled to recover only the equitable value of the policy. It is said that this question was not saved because in the motion for a new trial it was not claimed as one of the grounds of the motion that the amount found was excessive. The error assigned is, however, that the evidence does not support the judgment; that it is contrary to law. We find both—and the judgment is therefore reversed.

E. SOWERS, for plaintiff in error.

HORD, DAWLEY & HORD, for defendant in error.

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THE CITY OF CLEVELAND VS. WILLIAM H. BEAUMONT

Liability of City for Damages for Nuisance in Corrupting Stream by Conducting Sewerage from Workhouse Under its Control Thereto, etc.

HALE, J.:

The plaintiff below alleged in his petition in substance that he was the owner of certain premises in that portion of the city formerly known as Newburgh township, through which ran a stream known as Kingsbury run, the water of which he was accustomed to use, and that he resided upon said premises, that the city purchased what is now known as the workhouse lot and erected upon it the Workhouse, and in connection therewith built a sewer emptying into this stream above the premises owned by the plaintiff Beaumont for the purpose of the drainage of the lot and carrying off the offal and offensive matter into the stream; and the allegations are that in doing so the waters of the stream were corrupted and thrown upon the premises of the plaintiff, by reason of which the plaintiff was deprievd of the use of the water, in consequence of which his premises were much injured and his family became sick, and he brought suit to recover damages of the city based upon that state of facts. A recovery was had in the court below against the city, and it is complained that error was committed in that proceeding: first, that the court erred in overruling a demurrer interposed by the city to the petition. That I will discuss very briefly in connection with another proposition made in the case which goes to the entire case. It is this: that this workhouse or enterprise, whatever it may be, the erection of the building and construction of the sewer—that it is a public penal institution, a part of the system instituted by the state for the preservation of order and the punishment of its offenders, and although to a certain extent under the control of the city, it is in reality a state institution of such a public nature that the city is not liable for anything connected therewith. In support of that proposition a very large number of cases was cited. It is not my purpose to review those cases in detail: suffice it to say we have examined those cases, and in our judgment they undoubtedly establish the doctrine that the city is not liable, for instance, for the negligence or unlawful acts of its police officers; not liable for the negligence of firemen appointed and voted for by the city. It is argued by counsel for the city that these cases establish the doctrine that the city is not liable in this class of cases.

It is claimed on behalf of the defendant in error that this workhouse is a private enterprise of the city, so to speak, at all events of such a character that the city is as liable for any injury done in connection with its operations as a private individual would be under the same circumstances; that a private individual owning the Workhouse premises and doing what the city has done would be liable. We think if a private individual had owned these premises, had erected this workhouse, built this sewer and had corrupted this stream—had done precisely what this petition says was done, and what the jury found was done—that there can be no doubt that individual would be liable for the injury done.

Now the city took possession of this property, a conveyance was made to the city; the city built the Workhouse and under the statute assumed the control of it. It is wholly within the control of the city.

The complaint in this case is not that any agent of the city has been negligent or acted unlawfully. It is the thing itself that is complained of. The sewer was built by the city. We do not think we can liken this case to the cases that have been cited and relied upon in the argument.

The case decided by the Supreme Court of Minnesota referred to, is almost identical with this case. In that case it was held that a municipal corporation, under the circumstances existing in that cese, is lioble to the same extent that a private individual would be. I see no reason why it should not be. If a city needs a man's property and takes it, it must pay for it. The day is gone by when cities, under the claim of improvements, or any claim, can confiscate a man's property. If a city does an injury to any one in building a workhouse or sewer therefrom, I see no reason why it should not be liable just as an individual. At all events, we are not disposed to reverse the judgment upon the theory that the city is not liable under the facts alleged in the petition and disclosed in the testimony.

Now, beyond that, there were certain matters growing out of the trial on account of which, it is claimed. this judgment should be reversed: first, the exclusion of evidence, and that appears in this form: A man by the name of Force, a civil engineer, was upon the witness stand and was asded the question, "Mr. Force, I will ask you to turn your attention to the stream below Kinsman street, where the sewer now empties; that is a Woodland avenue sewer; I will ask you if the stream there is of sufficient capacity to carry off all the sewerage that is turned into the place, including the sewerage from the Workhouse." Objected to by attorneys for the plaintiffs. That question was withdrawn. "I will ask you, Mr. Force, if the city has adopted a system of sewerage and districted the city in reference to that subject?" That question was objected to by the plaintiff and the objection sustained. Now, that question was simply preliminary, asking if the city has adopted a sewerage system. That was objected to. Strictly, perhaps, that question should have been answered; but the mere fact that the city had adopted a system of sewerage and districted the city, would not be prejudicial one way or the other, unless something further in a legitimate way was offered to be proved. But this question was immediately followed by counsel with this statement: "Counsel for the defense then stated that he desired to prove by this witness upon that point, that the city of Cleveland is districted off into sewer districts, and that this Workhouse is in sewer district No. 7, as formed by the authorities of the city of Cleveland by resolutions and ordinances of the city, the Workhouse and system of sewerage was adopted and flowed, as it did flow, into a run in the rear of the Workhouse, and we wish also to show that the sewers, the main sewers in the several districts of this city, flow into the several streams which respectively flow into the Cuyahoga river and also into the Cuyahoga river and lake. That upon this system in controversy, five main sewers of the city empty in accordance with the sewerage system the city has adopted by the authorities of the city, and that other sewers in various parts of the city empty into streams of a like kind, as well as into the Cuyahoga river and the lake."

Objection was made to that ana the court sustained the objection and told the party to go on with the case.

Now, on looking into this whole case, it very plainly appears that this sewer complained of had no connection with anything but this Workhouse. Still we are bound to take this offer just as it is; but, under the circumstances, we would not feel authorized

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to go one single step further than we were obliged to go in passing upon this question of evidence; because from the plat and the testimony, taking the whole testimony together, it is plainly shown that this was a private sewer, built from these premises directly to this run, and had no connection with anything else until a year or two after, when the city constructed a sewer upon Kinsman street, and at that time it was changed into that sewer.

Now, what I mean to say is, that legitimate testimony, to prove these facts, should have been before the court, and ruled upon by the court. No ordinance was presented by which it was claimed this sewer had been established, which the court could say was or was not competent, but the facts were proposed to be shown by the witness upon the stand, and not by any record.

We are inclined to hold, under the circumstances of this case, that the proof offered to be made, which was offered as a whole, which was denied and to which exception was taken as a whole, was not legitimate to be made in the way proposed; that if there were any ordinances showing that the city was districted into sewer districts, that those ordinances should have been presented and offered in evidence to prove the fact. We are not disposed to disturb the case on account of the exclusion of this testimony in the shape that it stands.

It is said that the court erred in the charge to the jury. Taking the charge as a whole it was very considerate in view of the character of the case. Certain propositions are singled ont which, it is claimed, are erroneous. The first is this: "There is no difficult question of law in this case, and the definitions of a nuisance, which have been read in your hearing, are not controverted by anybody. It is well for you, however, to bear in mind that the law as given you by the Court is this: 'It is a maxim of the law that every person, while he has the right to the enjoyment and use of his own property, must so use and enjoy it as not to disturb his neighbor in the enjoyment of his, or in his health, his comfort or his convenience, and this rule applies just as well to a corporation as to an individual, and it applies as well to a municipal corporation—a city—as to a private corporation or manufacturing company. The same rule applies to all persons whether natural or artificial." As an abstract proposition we see nothing wrong with it. We think it states a correct principle of law; and in the view we have taken of this case we see no reason why it was not proper to be given in connection with the rest of the charge.

The second proposition in the charge which is complained of is: "Now, although there may be impurities arising from those other causes, yet unless they are sufficient to account for the destruction of the water to the extent claimed by the plaintiff—and he has shown what he has claimed—and to account for the sickness caused to himself and family, unless those other impurities shall constitute, or the evidence satisfy you that the other impurities caused that, and you are satisfied those impurities would not exist without an extraordinary deposit cast into the stream from the Workhouse and its premises, why, this plaintiff would still be entitled to recover, although there might be a portion of the impurities arising from some other sonrce. But the burden of proof is upon the plaintiff in this case. It is incumbent upon him, by a preponderance of the evidence to satisfy you that these impurities of the stream—that the water was spoiled—that the health of himself and family were injured by the impurities cast into the stream by the defendant—by the city."

I read the whole of the clause. Exception is taken to a part of the clause, stopping in the middle of the clause. Taking the whole clause together, it seems to us, that it states it clearly and with remarkable fairness. The last part of the charge objected to is this: "It is not claimed that you would be entitled to return a verdict for mere nominal damages, five cents or ten cents, for a bare breach of or doing a technical or legal thing, but that it must be some substantial, actual damage, and that is a question for you to determine if you find for the plaintiff."

Now, there is an exception to that. It is said that is wrong; that it gave the jury to understand, if they found for the plaintiff, they must go up on the damages, they must not stop at a small amount. But it seems to us, all there is of that is to say to the jury, "If you find that this defendant has suffered merely nominal damages, no substantial injury, you must find for the defendant." He goes on to add, in order to make it more definite: "It is not whether you should be stingy or liberal, the question is, what damage actually has the plaintiff sustained? You cannot inflict damages upon the city by way of punishment or by way of teaching the city what to do hereafter,"—that it was no case for exemplary damages; saying that if they find that the plaintiff has suffered substantial damage they cannot go forward and inflict a penalty upon the city. That, it seems to us, was as favorable to the city as it could ask.

The jury retired, and failing to agree were brought into court, and the court was asked a question by the jury, which the Court answered in this way: "The defendunt had no right to convey sewerage or offal into the stream to such an extent as to damage or injure the plaintiff, and if it did the plaintiff can recover." That statement of the Court standing alone is a little *sharp*, but if given to the jury in connection with the rest of the charge before their retirement certainly no fault could be found with it; however, we are not prepared to say that the jury, on receiving this instruction, felt it incumbent upon them to disregard all that the Court had said prior to their retirement, and therefore we think it must be considered in connection with the charge of the Court, and so considering it there certainly was no error.

We are relieved from reviewing the case upon the facts. Very likely the verdict is large enough; but looking at the whole case we find no reason for reversing the judgment of the court below.

Heisley, Weh & Wallace, for plaintiff in error.

Estep & Burke, for defendant in error.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending May 29, 1879.

[Prepared for The Law Reporter by R. P. Flood.]

MORTGAGES.

May 24.

Ann Hutchinson et al. to John Cannell. $500.

Godfrey E. Brown and wife to Arthur Walkden. $1,500.

Katharine Kriz to Wm. Gauch. $300.

Mary J. McAbee and husband to H. M. Knowles. $1,000.

Wm. R. King et al. to Nancy J. Young. $400.

May 26.

Ernest Prasst and wife to Carl Kruger. $600.

John Newman and wife to William Maile. $12,000.

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Frank & Bloch to Hannah Aarons. $900.

Frank Nowak and wife to Mary Moravec. $300.

Asma Macouvek to Susan J. Hickox. $445.

Karl A. Baeder and wife to Isabella Heis. $200.

John B. Corlett and wife to Mrs. Harriet B. Leavens. $3,800.

George Newman and wife to The Citizens' Savings and Loan Ass'n. $480.

May 27.

Charles Wabel and wife to Luthee F. Lyman. $1,400.

T. G. and A. M. Clewell to A. K. Spencer. $2,500.

H. A. Watkins to George W. Foote. $1,650.

Karl Windermann and wife to Court Schiller No. 12, I. O. F. $200.

Sarah A. Spafford and husband to P. W. Holcomb.

May 28.

Maty Pekar and wife to Charles Brunel. $360.

J. S. and J. R. Edwards to A. K. Spencer. $3,500.

Catharine A. Freeman to Cleveland City Hospital. $142.

Aemon W. Ross and wife to Samuel Usher. $375.

Simeon Hovey to Ransom O'Connor. $200.

James B. Buxton and wife to Elizabeth H. Cape. $700.

Eliza N. Dunn and husband to Patrick Carey. $600.

Wm. R. Hayman and wife to Gabriel Schaffner. $300.

Jacob Borge and wife to C. H. Bulkley. $4,000.

John Schisler and wife to Martha E. Witzel. $200.

May 29.

Henrietta Pagal et al. to F. J. Goodsmith, guardian, etc. $500.

Same to same. $500.

John F. Bente to Fred Heiss. $350.

D. L. Lowrie and wife to The Citizens' Savings and Loan Association. $600.

Hiram C. Culvert and wife to Louis E. Morse. $175.

CHATTEL MORTGAGES.

May 26.

T. G. Clewell to Elizabeth Barkwell. $175.

F. Sillberg Jr. to F. Leonard. $44.

E. L. Shepard to Hubbard Cooke. $350.

Wm. A. Tipson to John F. Duncker. $500.

Charles Miller to Charles E. Gehring. $1,700.

May 27.

L. A. Johnson to D. K. Bartolett. $200.

Joseph Houstain et al. to C. R. Heller. $33.

G. H. Adams to same. $23.

Robert Holmes to Mrs. M. A. Stevens. $106.

May 28.

Wm. C. Eyring to Louis Weber. $100.

Arthur L. Linn to Wm. H. Shaw. $100.

L. B. Eager to E. G. Jones. $240.

Charles H. Johnston to May Johnston. $7,208.

May 29.

Louis B. Vankerschaver to H. R. Leonard. $130.

Richardson & Hutton to A. S. Herenden Fur. Co. $433.49.

DEEDS.

May 22.

John Hundertmark and wife to John Herr. One thousand two hundred dollars.

John Marshall and wife to Barnhard Seifreid. Eight hundred dollars.

Adelia M. Nute to E. Nute. One hundred dollars.

Eph Nute to Henry J. Thorne. One dollar.

Warwick Price and wife to Elijah F. Davis. One dollar.

Marienne B. Sterling to Simon Alzberger. One thousand and fifty dollars.

S. S. Stone and wife to M. J. Doyle. Seven hundred and fifty dollars.

L. J. Talbot and wife to Charles Roper. Six hundred and forty dollars.

H. P. Wadhams to Mary J. McAbee. Three thousand dollars.

Linus Austin and wife to Austin Powder Co. One dollar.

M. P. Case and wife to Mrs. Ella M. Ford. One thousand dollars.

May 23.

Robert I. Coombs to Carolina S. Stevens. $900

J. G. W. Cowles and wife to H. J. Sherwood. $1,920.

William Boetcher and wife to Sam, Stark. $720.

John Creagan by S. M. Eddy. Mas. Com. to the Society for Savings. $1,058.

Edmund Walton and wife to William Andrews. $1.

Johanna Walf to William Andrews. $650.

Marianna B. Sterling to Elizabeth Castle. $400.

G. J. W. Newcomer and wife to Ann J. Rose. $2,500.

Nicholas Meyer and wife to Emma Hawkins. $3,325.

Albert N. Harman and wife to Lucius M. Zigler. $6,500.

Alonzo A. Snow to Austin C. Ride. $200.

May 24.

Sophia Nelson and husband to Katharine Wirtz. $1.

G. W. and E. A. Stengluff et al. to H. Brockman. $1,125.

A. R. Southworth et al. to Jedediah Southworth. $1,000.

Jedediah Southworth et al. to Sarah Troutman. $1,000.

Same to A. R. Southworth. $1.

Same to Albert Southworth. $1,000.

R. S. Wellington and wife to Charlotte McMumn. $2,400.

John Weist et al. to Hiram Bebee. $1,200.

Mary A. Whiting and husband to L. E. Holden. $150.

George W. Whiting and wife to Manuel Halle. $1.

Samuel R. Welgers to Joseph Oser. $250.

Nancy J. Young to Wm. R. King. $2,500.

Thirza E. Cunningham et al. to Thomas Prescott. $31.

Hubbard Cooke et al. to August Detzing. $650.

Casper H. Hempy and wife to Jacob Zuelling. $1,042.

Henry Lords and wife to Marie Pritchard. $500.

May 26.

Gustav Viltz and wife to John Paines. $500.

Elizebth Coil et al. to Charles B. Coil. $10,000.

Henry Curetor and wife to August Geiger. $600.

Patrick Hyland to Mary Gibton. $850.

Carl Krueger and wife to Ernst Prasst. $100.

Jacob Noggle and wife to George W. Noggle. $800.

May 27.

The Brooklyn Kranken Unter. Verien to Ludwig Koepka et al. $600.

Wm. Fulton, guard., to Julia Merkle. $772.

N. Mark Flick, administrator of estate of, etc., to Henrietta Pagal. Balance of purchase money.

George W. Foote, guardian, to H. A. Watkins. $3,000.

Wm. H. Gaylord and wife to Sarah A. Spafford et al. $2,150.

Joseph Holy and wife to Jacob Cap and wife. $650.

Clark Johnson to William Curtis. $200.

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John Longmaier and wife to Peter Zucker. $200.

Peter Zucker to Maria Kukal. $225.

Mary A. Munson to Julia Merkle. $5.

Isaac Reid to George E. Dunbar. $1.

Sarah A. Spafford and husband to H. W. Gaylord. $4,000.

Michael G. Weidemann and wife to John Weidemann. $1,800.

John Geisendorfer and wife et al., by E. B. Bauder, Mas. Com., to Moses Halle. $1,569.

P. O'Neill and wife, by G. W. Lynde, Mas. Com., to F. H. Furniss. $3,001.

G. A. Paechfuss et al., by Felix Nicola, Mas. Com., to Edward Hessenmueller. $3,334.

Margaret Traverse and husband to Mary Brown. $1,100.

May 28.

John Martin and wife to F. M. Stearns. $400.

Wm. C. Northrop to Henry Romp. $500.

Heinrich Walker and wife to Jobst Heinrich Nolte. $200.

C. Rewell and wife to Elizabeth Lowrie. $1.

A. K. Spencer to J. S. and J. R. Epwards. $4,000.

Gabriel Schaffner and wife to Wm. R. Hayman. $600.

Jabez S, Stoneman and wife to Michael Rice. $820.

Joseph Cauda and wife to Maty Peker and wife. $360.

George F. Safford, trustee, to Wm. Walters. $2,500.

John Heinrich Nolte and wife to Frederick Woehmann. $175.

Susan L. Wild and husband to James B. Buxton. $475.

Wm. B. Brown et al. to Jarvis B. Sexton. $700.

George C. Deitz and wife to Sophia Schlick. $750.

Judgments Rendered in the Court of Common Pleas for the Week ending May 28th, 1879, against the following Persons.

May 23.

Robert Schilling. $36.05.

May 24.

Finlay Bain. $2,174.40.

May 26.

Cleveland Hazard Hame Co. $434 90.
John O'Connor et al. $333.05.
Chris. A. Nauret. $140.47.
J. K. Hord, admr. etc. $723.10.

U. S. CIRCUIT COURT N. D. OF OHIO.

May 26.

3353. John C. Pratt vs Cincinnati, Sandusky & Cleveland R. R. Co. Exceptions to master's report filed.

3869. Fishkill Landing Machine Co. vs Henry B. Campbell. Demurrer to the petition.

May 27.

3313. W. U. Telegraph Co. vs Sandusky, Mansfield & Newark R. R. Co. et al. Answer of the B. & O. R. R. Co. filed.

3347. People's Savings Bank vs Evan Morris et al. Answer of J. L. McClurg.

3853. Second National Bank of Toledo vs Ann Shiely. Reply filed.

U S. DISTRICT COURT N. D. OF OHIO.

May 27.

1586. Joseph D. Horton et al., assignees, vs The First Nat. Bank of Ravenna et al. Answer of Edwin Theobold.

—— Same vs same. Amendment to petition.

—— Same vs same. Reply to answer of J. C. Beatty.

—— Same vs same. Reply to answer of E. Lord, trustee.

—— Same vs same. Reply to answer of M. Stewart.

—— Same vs same. Reply to cross-petition and answer of E. B. Babcock.

—— Same vs same. Reply to answer of Edward Hubball.

Bankruptcy.

May 26.

1875. In re Frederick Schmoldt, Jr. Discharged.

1726. In re Joseph Budd. Same.

1387. In re M. R. Montgomery. Petition for discharge. Hearing July 2nd.

1583. In re George W. Herrick. Same.

2070. In re Aquilla Standiford. Same.

May 27.

1597. In re William E. Cox. Discharged.

May 28.

1890. In re James F. Williams. Petition for discharge. Hearing July 2nd.

1880. In re Andrew J. Wilkin. Discharged.

May 29.

1945. In re Chance & Wolf. Discharged.

1912. In re Spencer Munson. Same.

COURT OF COMMON PLEAS.

Actions Commenced.

15133. Bridget Hayes et al. vs G. L. Nichols et al. Money and equitbale relief. W. I. Hudson.

May 23.

15134. Lena Shallenberg vs Louis Fox. Bastardy. W. S. Kerruish; William Robison.

15135. Henry Wick & Co., partners etc., vs Russell Lime Co., partnership etc. Money only. Arnold Green.

15136. Edward C. Boyd vs Peter Schutthelm et al. Money and to subject lands. Wm. K. Kidd.

15137. Jones Crawford vs Horace Wells et al. Money only. Jackson & Pudney and Athey.

15138. Eliza Smith vs Gertrude Schippercase et al. Equitable relief. Hord, Dawley & Hord.

15139. Mira Kohlman, guardian, etc., vs Adam Sehott, exr. etc., et al. To subject lands and for equitable relief. F. Weizmann.

May 24.

15140. Henry Haines vs Frank A. Arter et al. Equitable relief and sale of lands. H. J. Caldwell.

15141. Charles G. King vs Seth W. Johnson et al. Money only. Bernard & Beach.

15142. George Boehm vs August Doephe et al. Money, to subject lands and relief. A. Zehring.

15143. E. E. Brinkman et al. vs David Law. Appeal by deft. Judgment May 17th. H. W. Gaylord; S. O. Griswold, Clark.

15144. Mary R. Varian et al. vs Fred W. Pelton. Money only. Grannis & Griswold.

15145. Peter Higgins vs same. Same.

15146. Gilbert A. Bray vs Wm. West et al. To quiet title and for equitable relief. Bolton & Terrel, Gage & Canfield.

May 26.

15148. Wm. Ryan vs James Redmond et al. To subject land and for equitable relief. T. H. Graham.

15149. Christian Gabel vs The Independence & Parma Plank Road Co. Injunction and equitable relief. Arnold Green.

15150. Lottie M. Davis vs Thomas Nelson et al. Appeal by defts. Judgment April 29. Estep & Squire.

15151. Frank Dobellaar vs Henry Caster. Appeal by deft. Judgment Feb. 5th. George Schindler; C. W. Coates.

May 27.

15152. Muncie & Richardson vs Humphrey King. Appeal by deft. Judgment May 24. —— ——; P. F. Young.

15153. Bowler & Burdick vs E. Holmes et al. Appeal by defendant Holmes. Judgment April 30. Stone & Hessenmueller; Henderson & Kline.

15154. L. M. Sigler vs same. Same. Same; same.

15155. R. McQuoid vs Andrew Dall. Appeal by defendant. Judgment May 19. Foran & Williams; Henderson & Kline.

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May 28.

15156. John Korijan et al. vs William Bower et al. Money, to subject lands and for relief. Babcock & Nowak; Felix Nicola.

15157. Charles Schmoldt vs Mathew O'Connell. Money only. Arnold Green.

15158. Mary J. Russell, exrx. etc., vs The L. S. & M. S. Ry. Co. Money only. Pond & Fraser.

15159. Isaac Hays vs Parker Hare. Appeal by deft. Judgment May 17. —— —— W. S. Kerruish.

May 29.

15160. John Murphy vs Joseph Kraus. Appeal by deft. Judgment May 13. ——; R. E. Knight.

15161. H. C. Beers vs The Stearns Stone Co. Money and equitable relief. G. A. Hubbard.

15162. H. Haines, treas., vs R. D. Swain. Appeal by deft. Judgment May 10th.

15163. Same vs same. Same.

Motions and Demurrers Filed.

2608. Jones vs Wheelock et al. Demurrer by deft. R. A. Wheelock to the petition.

2609. Same vs same. Same by B. J. Wheelock.

May 23.

2610. Hackett et al. vs Streator. Motion by plff. for leave to amend petition and make a new party plff.

2611. Hall vs Harrington. Motion by deft. for new trial.

2612. Buchholz vs The Nordyke & Marmon Co. Motion by plaintiff for a new trial.

2613. Society for Savings vs Kannon et al. Motion by plaintiff for a new appraisal.

2614. The Commercial National Bank vs Burt. Motion by defendant for new trial.

2615. O'Neill vs Cox et al. Motion to require defts. to give additional undertaking for appeal.

2616. Morse vs Jackson et al. Demurrer by plff. to answer fo Jackson.

May 24.

2617. Carran vs O'Donnell. Motion by deft. to vacate judgment.

2618. Haune vs Barner et al. Motion by plff. to make answer more definite and certain.

2619. Colbert vs Becker et al. Motion by plaintiff to dismiss appeal and for judgment.

2620. Morris, for, etc., et al. vs Colllamer & St. Clair Street Ry. Co. et al. Demurrer by defendants Randall Crawford, Pope, and Harrison to part of amended answer of Collamer & St. Clair Street Ry. Co.

2621. Otis vs Robinson et al. Motion by defts. to strike from petition.

2622. Clewell Stone Co. vs Cleveland City Forge and Iron Co. Motion by plff. to require deft. to elect defences and to strike from answer.

2623. Hasenpflug vs Bading et al. Motion by defendant Bading to make petition more definite and certain.

2624. Sherborne & Noonan vs Hogan. Motion to strike petition from files and dismiss action.

2625. Brainard vs Devine et al. Motion by plff. to omit publicationof sale in German paper.

May 26.

2626. Baxter vs Washington et al. Motion by defendant Russell for a new trial.

2627. Barnard vs Wilcox, sheriff. Motion by deft. for a new trial.

2628. Gabel vs The Independence & Parma Plank Road Co. Motion by plff. for a restraining order.

May 28.

2629. Weber vs Fahle. Motion by defendant to vacate judgment and for a new trial.

2630. Tait vs Stevens et al. Motion by plaintiff to require defendant Jordon to separately state and number his defenses.

2631. Dennis vs The Hibernia Insurance Co. Motion by defendant for a new trial.

2632. Smith vs Baker et al., exrs. etc. Demurrer by plff. to 2d and 3d defenses of answer.

May 29.

2633. Wilcox vs Winslow. Motion by deft. for a new trial.

2634. Gabel vs Panama & Independence Plank Road Co. Demurrer by deft. to the petition.

2635. Hassey vs The Standard Iron Co. Motion by defts. The Standard Iron Co. and M. R. Keith to dispense with German advertisement.

2636. Miller vs Thompson. Motion by plff. for new trial with affidavits of Miller and Street.

Motions and Demurrers Decided.

May 24.

2392. Bennington et al. vs Prather. Overruled. Deft. excepts.

2405. Brenner vs Schnadt et al. Withdrawn.

2412. DeVeny vs Thorp. Sustained. Plaintiffs have leave to amend petition within 30 days.

2424. Uhr vs Slawson et al. Stricken off.

2430. Sanders vs Wylde et al. Sustained.

2447. Needham et al. vs Fenton et al. Stricken off.

2496. Schneider, etc., vs Eimer et al. Withdrawn.

2501. Ferbert et al. vs Archer et al. Sustained.

2523. Belle vs Low et al. Overruled. Plff. excepts.

2545. Everett et al. vs Janowitz et al. Overruled.

2555. } John Hancock Life Insurance Co.
2556. } vs Gardiner et al. Sustained.

2569. Morse & Co. vs Plojhart et al. Granted.

2584. Blish vs Blish et al. Granted.

2587. Gardner et al. vs Quinn et al. Granted.

2591. Buecher vs Graff. Granted.

2605. Koeckert vs Weber et al. Granted.

May 28.

2597. Quayle vs Angel et al. Granted.

2349. Hurlbut vs Reinthal et al. Overruled. Plff. excepts.

2410. Platten vs Stewart et al. Sustained. Deft. excepts.

2426 } Liberty Lodge No. 3, A. O. G. F.
2427 } vs Young et al. Overruled. Defts. except.

2462. Bebout vs Smith. Sustained. Plff. excepts.

2480. Taylor vs Orman. Granted.

2499. Ruescher vs Ruescher et al. Overruled. Defts. except.

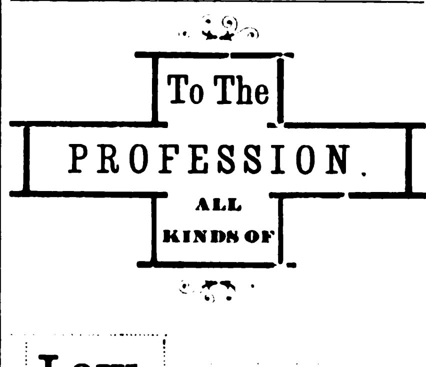
2540. Schmold vs Graves et al. Overruled.

2558. Lennox vs Purdy. Overruled. Plff. excepts.

2575. Rawson vs Patterson et al. Granted.

2602. Noack vs Koebler. Granted. Plaintiff to give security within twenty days.

2458. Hall vs Cozad et al. Granted.



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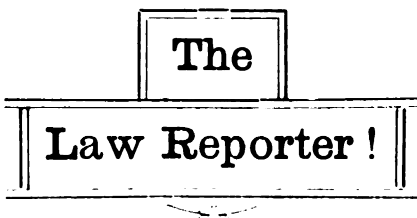

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CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

J. H. DEVEREAUX, RECEIVER OF A. & G. W. R. R. CO., VS. FREDERICK THORNTON, BY NEXT FRIEND, ETC.

Personal Injury—Action for by Infant—Whether Certain Declarations of Employees of Defendant Competent Testimony as Part of res gesta, etc.

TIBBALS, J.:

This was an action brought by the plaintiff below, an infant, by a next friend, to recover damages of the Receiver, operating the A. & G. W. road, by reason of carelessness in the management of a train upon that road, in consequence of which the plaintiff was run over and its arm mangled, rendering it necessary to amputate it.

It seems that the case took somewhat of a novel course in its trial. The charge was that this railroad company, in the hands of a receiver, while in the act of weighing a train of cars upon grounds belonging to the company, covered by numerous tracks, by reason of the manner in which the weighing was done—the sudden starting up and stopping of the train for the purpose of weighing—was guilty of carelessness in suffering this little boy,—being of tender years, only four years and a half old,—in company with another little boy, to be upon the grounds, and in not taking caution to relieve itself from responsibility by not properly caring for the child and removing it from danger. Another complaint is that the grounds were not fenced as required by law; that the company was negligent in the manner in which the weighing was done, and negligent in not warning off the child and taking proper care of it.

It seems that the jury were taken to the premises for the purpose of viewing them, and that while thus viewing them, at the suggestion of one or more of the jurors, the employees of the Receiver undertook to operate a train for the benefit of the jury in a manner claimed to be similar to the manner in which it was operated at the time of the injury. The jury returned and the trial proceeded.

The facts in the case, sufficient to an understanding of the questions presented for our consideration, are these: The parents of this little boy lived from a quarter to half a mile distant, and without their knowledge this child and another boy came upon the premises and were there, as such boys would be, watching the movements.

The weigh-master, seeing the boys near the weigh-house, ordered them to leave. Shortly after that the little boys were seen upon the opposite side, or, at least, were on the opposite side of the train, and the next that is known of them is that one of them, this plaintiff, was run over and his arm crushed, and he was in the act of running away.

The first question I will undertake to consider is as to the competency of certain evidence. A witness by the name of Davok was asked by the plaintiff the following question: "At the time that this accident occurred, what did any of the employees say about it, if anything?" This was objected to by the defendant as improper, etc. Without any ruling by the court, counsel for the plaintiff said, "My intention was to inquire what was said by those who were connected with the train and with the weighing of these cars, if anything?" Thereupon the objection was overruled by the court and the defendant excepted. Then the question seems to be repeated: "State, Mr. Davok, what, if anything, was said then upon the ground by the employees of the defendant connected with the train that ran over the boy, or connected with the scale-house and scale used at the time for weighing cars in that train, and at the time of the accident, concerning the accident?" The defendant objected. The objection was overruled and the witness answered: "Mr. Norton was with me and was very much shocked when we saw the boy"—[interrupted by Mr. Russell:] "Is that after the boy got hurt?" The plaintiff objected and the objection was sustained and the defendant ex-

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cepted. Then follows this question: "State what, if anything, Mr. Norton said? A.—He said that he had sent the boys away from the scale-house a short time before; that he told them they must not play there." The defendant objected to the question and answer. The Court overruled the objection and exception was taken by the defendant. "Q.—Whereabouts were Norton and you standing at the time, during this conversation,—on which side of the cars? A.—We were on the south side; we were some little distance from the scale-house. Q.—How far? A.—Well, I could not say. Q.—And it was right in the midst of the trouble, an excited time? A—.It was right at the time when we saw the boy on the other side of the cars. Q.—Had he been picked up then? A.—No, sir, not when I saw him. Q.—At the time of the conversation was he still lying on the ground? A.—No, sir, he was up himself and running. Q.—Who was with him when he got on his feet? A.—He was alone; nobody had caught him yet; there was a man running after him that was there, an engineer or fireman from the engine." The objection to that is that it is not a part of the *res gesta*. It is claimed upon the part of the plaintiff that it is.

Now, the thing to be shown as a part of the transaction is that the boy was there; that he was injured, and what occurred in connection with that injury. The fact of the injury, of course, is the very gist of the thing to be shown. Was what was said by the employees of the company so connected with the act of the injury, the negligent act charged, as to make it a part of the *res gesta*? It is true the thing itself related to a somewhat prior occurrence. It did not precisely say just what occurred when the boy was immediately injured. But this rule must have a reasonable construction. It certainly was proper to know just what occurred about that time as distinguished from the opportunity to make up anything—say anything, thereby separating it from the transaction. Now, this evidence clearly shows that this conversation took place almost in the act of the injury. The boy was almost in the act of being run over; he was knocked down; he was seen down; he was getting up and running away, and they were shocked. In the midst of the transaction he made the remark, "I had just told those boys to leave; they must not be here." Now, it seems to me, upon a fair and liberal construction, that it comes within the rule, that it is a part of the transaction—a part of the injury—had no connection with anything else. It was necessary for the boy to be there or he could not be injured. Although we regard it as a somewhat close question, whether it is within or without the rule, our judgment upon that proposition is that it is within the rule. We therefore hold that the Court did not err in admitting the evidence.

The next question which I shall consider is the exception to the refusal to give a certain request in charge to the jury. I have already stated that one of the grounds of negligence charged was the omission of the company to fence this portion of its track surrounding this weigh-house and this yard, as a protection. Five or six requests were made, and all of them given save the third: "That the statute requiring railroads to fence their lines is not addressed or intended to prevent or obstruct human beings from entering upon railroad lands, and the mere absence of a fence about this roilroad yard and docks will not authorize you to find a verdict against the defendant in this case."

Now, if the refusal to give that request in charge tended to the prejudice of the defendant, it would seem to be error. The Supreme Court have held that it is necessary for the companies to fence their lines or road, and they go so far as to include their lines in corporations. Possibly the precise question whether that covers the yard and depot grounds and the like, may not have been embodied, but the general proposition is covered. The question of the purpose of that statute has not been determined in this state. It would seem from the language of the statute that the purpose was to protect people who were riding upon the cars, upon the one hand, and to protect stock in adjoining premises upon the other. You must fence suitably to keep stock out; that is for the preservation of stock and of persons. Under a similar statute the Supreme Court of Wisconsin held in a suit similar to this brought by an infant, that if the jury found that that infant received its injuries by reason of the omission of the company to fence its line of road, the company was liable; evidently based upon the idea that it is a duty imposed upon the company to fence its road, and the omission to fence is negligence upon its part; and if that negligence contributes to an injury, the company is liable, even though the purpose primarily was to keep stock from going upon the road; that the purpose is not simply to protect stock but the lives of persons upon the train. It is claimed that this is not within the reason of the statute. We do not undertake to pass upon that question. We do not deem it necessary to do so. The worst feature of the refusal to give this request in charge appears from the latter part of the request: "The mere absence of a fence about this railroad yard and dock will not authorize you to find a verdict against the defendant." The Court refused to say so. The apprehension would be that the effect of the refusal to give that in charge would be to say that the absence of a fence would render the company liable. But it will be noticed that this is only one of the acts of negligence charged. It was not pretended, as appears from the record anywhere, that this alone produced that injury. The case was not tried upon that theory—not submitted to the jury by the Court upon that theory. We are inclined to hold, first, that this was a mere abstract proposition as requested. They could with the same propriety single out any other one thing and say that the mere absence of that would not render it liable, and the mere absence of this and the mere absence of the other, and so go through with all the charged acts of negligence, and in that way, perhaps, obtain a charge which would not be correct. But the strong and the prevailing fact with us is the fact that the Court cured that in its subsequent charge upon that subject.

The Court said afterwards, "Now, another question has been raised here that I must necessarily pass upon. It is claimed that this railway company was guilty, and did not exercise ordinary care or prudence, for the reason that they had no fence along the line of their road, no guard; and counsel as among themselves could not agree very well, I perceived, as to the standard that was fixed by the statute. It seems the Supreme Court, in its wisdom, has declared that the duty of a railway company was to fence its track on both sides from end to end. A legal duty is imposed upon railway corporations to do this thing, and I say to you, that if you find that this track was not inclosed by a fence and proper guard, then I say to you that the law imposed a higher degree of care upon the railway company than it otherwise would do if there was a fence on both sides of their tracks."

It is claimed by counsel here that it is preposterous to contend that a fence should be built to turn men; that the object of the statute was simply to prevent the approach of cattle; that

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the legislature simply fixed a standard —that the fence that was established should be of sufficient capacity to turn cattle. The legislature must necessarily fix a standard; they do not say it shall be an iron fence; they do not say it shall be a wooden fence; a straight board fence or a Virginia rail fence; they leave the railway corporation to exercise its judgment in determining the standard of guard to be used, sufficient to turn cattle. That, in my opinion, is the purpose that the legislature had in view. "Now, our Supreme Court has said where a railroad company fails to do that, that a higher degree of care is imposed upon it by reason of not having this fence, and it is a question for you to consider. You have been on the ground; you have heard all this testimony, and it is a question for you to consider whether that was a place that needed a fence, and ought to have been fenced. If you find a fence unessential, and you find that to be the fact, then I say to you that a higher degree of care is imposed upon that road by reason of the want of that fence. You may take into consideration among other things in determining this question if you find the absence of such a fence contributed to the injury complained of——" Now, very clearly, while that proposition had better have been given in connection with this, than refused, yet, we think the Court gave the correct rule, that is, if a fence was a protection or if its absence was negligence, it imposed a higher degree of care upon the company to look after the child, therefore the jury might consider that fact as bearing upon the question of the negligence that contributed to the injury. That was really the force and effect of that charge and we find no fault with it in that respect other than the manner in which it was put to the jury. The whole charge has been the subject of careful consideration by counsel on both sides. It has been subjected to very severe criticisms. It is enough for us to say that there are no specific exceptions to the charge given other than the refusal to give that request which we have just passed upon. Therefore, no question can be considered concerning it except that which the court is permitted to by taking it as a whole in connection with all the evidence in the case, to determine whether the jury were mislead by it; and that brings us to a general discussion of the case itself. We think the question is an exceedingly close one. The difficulty grows out of this fact: Here was a child clearly shown to be incompetent to take care of itself. As to him the doctrine of imputed negligence could not apply. He was there absolutely free from this principle which would render the company free from liability because of the child's negligence, so that we must treat the case in that light. Now, what was the duty of the railroad company under such circumstances? Upon the one hand it is claimed by the Receiver that it is not the duty of this company to take care of and insure the lives of children who get upon its tracks. That it has a right to run its road in a reasonable manner, and if children are not injured by some positive act of negligence on the part of the company, no liability attaches. While on the other hand it is claimed that the law has fixed upon the company the responsibility of seeing that is does no injury to children incapable of judging and acting for themselves.

Now, we are inclined to hold the latter view of the law to be correct. It will not do to say that a railroad corporation or any other corporation, (but it is not because it is a railroad corporation, or any other corporation —any person, the rule applies to them all,) can do its whole duty by simply directing children to get out of the way of danger when it knows that they are in danger, and when it further knows that they are incapable of caring for each other and for themselves.

In the light of that principle what were the facts in this case? This company engaged in the proper act of weighing its cars. It had a net-work of tracks, covering a wide tract of land, lying bordering upon the docks on the river. It had a weigh-house, had its train of cars; had its employees whose duty it was to weigh the cars. They started up the train, weighed a car, then started up and weighed another, and so on until the whole train was weighed. It is very easy to see that that transaction would be a much more dangerous one to children playing around the train than the running of a train at a rapid rate of speed; although the children are incapable of exercising any judgment upon the subject they would be less likely to go under a train moving at a rapid rate of speed than they would to approach a train standing a part of the time and then suddenly starting up. It is perfectly apparent, because they can see then that the train stands and they have not the slightest idea how soon it will start. They have no ability to determine but what the train may stand there for hours; hence, with perfect safety, under their immature judgment they may approach it. Now, in that situation, if an employe sees a child of that kind about the train, what is his duty? Is it simply to say to that child, "You must not play here; you must run away," the language I have already read? The Court told the jury that would not discharge the duty of the company and we agree with the Court in that charge, that the company was held to the performance of a higher duty. While it was under no obligations possibly to stop its business, it is under obligation to see that a child is removed from danger. Neither is that duty discharged by simply ordering it away. It is the duty of the company to see that the child is away, out of the reach of danger. It is perfectly manifest that the jury found in this case that *directing* these little boys to leave did not accomplish the purpose, and, indeed, counsel admit upon the argument that it was essential to do more than to simply order them away, but to *send* them away, and they argued as if the proof showed they did send them away. The proof does not show that at all. On the other hand, the proof shows very soon thereafter they were on the other side of the train, and that the little boy's arm was crushed by the wheel of one of the cars. Now, it is impossible to say that they sent the child away when the child was there immediately; and the jury could not find that fact. They must have found the reverse, that they did not send them away. True, they set up in their answer that they did, but for reasons which they deemed sufficient they did not undertake to establish that fact; they rested their case upon the evidence made by the plaintiff, and that evidence, although slight, save as you apply this rigid rule—I will not say rigid—this reasonable rule—of law, to their duty, the negligence was found and established. Complaint has been made because the Court insisted upon inserting in the bill of exceptions further evidence, that these parties by consent operated that train then. We are unable to see how we can do anything with that. It is in the bill of exceptions that it was done by consent of the parties and that undoubtedly had its effect upon the minds of the jurors. It is impossible for this court to say what that effect was. We do not think it was incompetent for the parties to agree to put it in the case as a matter of agreement. So that taking the case as a whole and looking this proof all over, and in the

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absence of anything on the part of the defense explanatory of their omission to do this plain duty, we are unable to see—we cannot clearly see that the jury erred. We can say that it is a very close case. We can say that there is some doubt whether the jury found correctly, but we cannot go beyond that in the light of all these facts. Nor can we say, taking the charge of the Court as a whole, and especially while its language seems somewhat obscure, the requests of the railroad company were clear and very pointed and very distinct, and every one of them were given to the jury save the one to which we have referred. On the whole we have concluded to affirm the judgment.

OTIS, ADAMS & RUSSELL, for plaintiff in error.

HENRY MCKINNEY, for defendant in error.

COURT OF APPEALS OF NEW YORK.

DECEMBER 10, 1878

DURYEE, RESPONDENT, VS. LESTER, APPELLANT.

Principal and Agent—Broker—Pleading.

Where a broker employed to sell real estate acts for both buyer and seller, and the fact is unknown to his principals, he cannot recover for his services from either party.

The point as to the double agency of the broker (the plaintiff) should have been pleaded in answer to his action, and raised on the trial; it is too late to raise it for the first time on appeal.

This action was brought by plaintiff to recover commissions claimed to have been earned by him as broker, in effecting a change of personal property for real estate. The complainant averred the employment of plaintiff by defendant as broker, the services rendered by him resulting in a sale, and that he was entitled to the usual broker's commissions, which had not been paid, and demanded judgment for the same. The answer was in substance a general denial. A verdict was rendered for plaintiff. Upon appeal, the principal point relied on was that plaintiff, in the transaction, was acting as broker for both parties to the sale. This point was not raised in the court below.

Held, That the point as to the double agency of the plaintiff should have been pleaded, (1 Chitty, Pl., 501; 6 C. & P., 671; 16 N. Y., 297, or it should have been raised in some form on the trial; it is too late to raise it for the first time on appeal; if raised upon the trial, plaintiff would have had the opportunity of offering additional evidence, and might have brought himself within the case of Rowe vs. Stevens, 53 N. Y., 631.

When a broker to sell is at the same time a broker to buy, the fact of his double agency, if unknown to his principals, is a breach of his implied contract with each to use his best efforts to promote the interests of his principal, and operates or is likely to operate as a fraud upon both, and the law will not in such a case enforce the contract for compensation irrespective of the consideration whether the sale made was or was not advantageous to the party from whom the compensation is claimed. 71 Pa., 259; 1 Al., 494; 10 L. R. Ch. App., 116.

Judgment of general term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by Andrews, J. All concur.—*N. Y. Weekly Digest.*

SUPREME COURT OF VIRGINIA.

MORRIS VS. RAILROAD CO.

Railroad Law — Contributory Negligence—Duties and Responsibilities of Railroad Companies.

1. Morris purchased a ticket to go from one station to another on the Richmond & Danville Railroad. The passenger train having passed before he bought the ticket, he got in a passenger car attached to a freight train; he fell asleep soon after getting in the car; was waked up by the conductor between the stations to get his ticket, and then fell asleep again, was waked up again by the conductor when the train got to the station to which he was going, and told by him to get off, that he was at his destination, and the train stopped long enough for him to have gotten off, but he failed to do so, and fell asleep again. The train was then put in motion, and while the train was backing, the conductor woke him up again and told him to jump off. M. jumped off, was run over by a portion of the train, had an arm cut off, and was otherwise injured. It was 11 o'clock at night when the train reached the station, at which the accident occurred, dark and raining. There were only two lanterns at the station, one in the hands of the conductor, and the other in the hands of a servant of the railroad company, employed at the station. *Held*, While the railroad company was guilty of culpable negligence in not providing proper stationary lamps at the station, and while the conductor was also guilty of negligence, and this negligence on the part of the company and its agent, was the proximate cause of the injury to M., yet M. was also guilty of such contributory negligence as will prevent him from recovering damages for the injuries sustained by him.

2. One, who by his negligence has brought an injury on himself, cannot recover damages for it. But where the defendant has been guilty of negligence also in the same connection, the result depends on the facts; the question in such cases is, 1st, Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant? Or, 2d, Whether the plaintiff so far contributed to the misfortune by his own negligence or want of care and caution, that but for such negligence, or want of ordinary care and caution on his part, the misfortune would not have happened? In the former case, the plaintiff is entitled to recover. In the latter he is not. Citing Railroad Company vs. Jones, 95 U. S. R., 439.

3. Persons to whom the management of railroad companies is entrusted, are bound to exercise the strictest vigilance; they must carry the passengers to their respective destinations, and set them down safely, if human care and foresight can do it. They are responsible for every injury caused by defects in the road, the cars or the engines, or by any species of negligence however slight, which they or their agents may be guilty of. But they are answerable only for the direct and immediate consequences of errors committed by themselves. They are not insurers against the perils to which a passenger may expose himself by his own rashness or folly.

4. A railroad company is not liable for an accident which the passenger might have prevented by orninary attention to his safety, even though the agents in charge of the train are also remiss in their duty. Citing, Railroad Company vs Aspell, 23 Penn. St., 147-149; B. & O. R. R. Co. vs. Sherman's adm'r., Supreme Court of Virginia, not yet reported; Richmond & Danville R. R. Co. vs. Morris, Sup. Ct. of Appeals, Va., Nov. Term, 1878.—*Va. L. J.*

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IN THE SUPREME COURT OF PENNSYLVANIA.

ASAY VS. HAY.

Where, after the defence had closed and the plaintiff had recalled a witness, who testified to the defendant's admission of indebtedness, it was error in the court to refuse the re-examination of the defendant in explanation of his alleged admission. Had it been competent for the defendant to prove in chief what he offered in rebuttal, the court might have refused his recall.

[Error to the Court of Common Pleas No. 4, of Philadelphia county.]

This was an action upon a promissory note for $250, drawn by Dr. A. Merritt Asay to the order of A. M. Stout, and by him endorsed to Alexander Hay, the plaintiff. The defense was, that the note was for the accommodation of both Hay and Stout, and that it was the last of a series of renewals of one, originally drawn to the order of Hay, and by him endorsed to Stout. Offers of letters by Stout to Asay, showing these circumstances, were ruled out by the judge who tried the cause.

In rebuttal, the plaintiff showed that the defendant had admitted his indebtedness under the note sued on, after its maturity. Thereupon the defendant was recalled, and offered to contradict and explain this alleged admission, but he was rejected by the court. This was the third assignment of error mentioned in the opinion.

Another assignment of error was as follows: Because of the instruction of the learned judge as to the defendant's point for charge, which was as follows: "If the jury believe that the note sued on, is a renewal of a former note that was made by defendant Asay to plaintiff's order, for Stout's accommodation, and without advantage to Asay, then the plaintiff cannot recover in this case." The point being affirmed with the following qualification; "That if the plaintiff paid value for the note sued on, he is entitled to recover."

Opinion by TRUNKEY, J., Feb. 17, 1879.

The rulings of the learned judge, with a single exception, set forth in the third assignment, are so clearly right as to need no vindication.

After the defence closed, the plaintiff called Dr. Thomas Hay, who testified to the defendant's admission of indebtedness on the note in suit. That this testimony was pertinent and material is conceded. The defendant offered to rebut it by his own testimony, which was denied. We have examined the bill of exceptions, and fail to find anything to justify overruling the offer. At an earlier stage in the trial, it certainly was not competent for the defendant to prove that he had not made that admission to Dr. Hay, even if he could have anticipated what was to come, and the plaintiff, in cross-examining him, did not inquire concerning it. The matter proved by Dr. Hay was not only new when presented, but could not, in the first instance, have been adduced or drawn out by the defendant. Hence to refuse the rebutting evidence was to allow the damaging proof of the defendant's admission of indebtedness to the plaintiff to go to the jury without contradiction or explanation. Had it been competent for the defendant to prove in chief what he offered in rebuttal, the court might have refused a re-examination of the witness. As to matters that require explanation, or as to new matter introduced by the opposing interest; a party has a right, in rebuttal, to re-examine his witness: Wharton's Evidence, 572.

Judgment reversed, and a *venire facias de novo* awarded.

E. K. NICHOLS, ESQ., for plaintiff in error.

C. F. ZIEGLER and W. A. MANDERSON, ESQS., for defendant in error.

—*Leg. Int.*

U. S. CIRCUIT COURT N. D. OF OHIO.

May 31.

2713. T. Comstock et al. vs The Sandusky Seat Co. Accounts of defendant for month of May filed.

3875. William Kyle vs Wilhelm Schmidt. Four affidavits filed by defts.

June 2.

3858. William Gibson vs Conrad Schuler et al. Answers of Jacob Schuler, George Schuler, Conrad and Hannah Schuler.

June 4.

3876. Samuel Mowry vs Aaron Markley et al. Bill in chancery filed. Osborne & Grosscup.

3877. Thomas W. Shelton vs Samuel J. Ritchie. Same. S. Edgerton, S. Koehler and S. W. McClure.

3878. Brown, Bonnell & Co. vs Herbert C. Ayer et al. Transcript from Common Pleas Court of Washington county filed. T. W. Sanderson; Jones & Murray.

June 6.

2605. U. S. vs Harry Chase et al. Mandate from the Supreme Court of U. S.

U. S. DISTRICT COURT N. D. OF OHIO.

May 31.

1742. George Goble et al. vs schooner Delos De Wolf. Answer of B. F. Greene.

1566. Nelson Toppan vs J. P. Robison et al. Replication.

June 2.

1591. Benjamin S. Coggswell, assignee, etc., vs Ohio Wooden Ware Man. Co. et al. Answer of George W. Calkins. J. B. Fraser.

Bankruptcy.

May 31.

1842. In re William J. Miller. Discharged.

2004. In re John C. Dildine. Same.

June 2.

1976. In re Starr O. Latimer. Discharged.

1737. In re George R. Tuttle. Same.

1755. In re Wilson T. Mickey. Petition for discharge. Hearing July 9th.

June 3.

1254. In re Robert H. W. Mann. Discharged.

June 5.

1997. In re Charles Benson. Discharged.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending June 6, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

May 31.

Charles H. Augstadt and wife to Percis Blann. $500.

Thomas Patterson and wife to The Citizen's Savings and Loan Ass'n. $5,000.

Anton Amada and wife to Maurice N. Halle. $100.

Libbie J. Thompson et al. to Mary A. Deckand. $1,000.

Mary Gibbons to Patrick Hyland. $650.

Robert Dall to F. W. Minchin. $550

Henry Taylor and wife to Phebe W. King. $1,600.

Delia A. Sinter to Soc. for Sav. $5,000.

Charles Stiver and wife to Samuel Katzenstein. $900.

Louis Koblitz to S. Goodman. $500.

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Valentine Buechele and wife to Lucius Harter. $720.

George W. Shepard and wife to Robert Spinks. $200.

June 2.

Frank B. Fox to S. W. Porter. $1,000.

Gustav Matzaun and wife to Samuel G. Baldwin. $800.

June 3.

B. Schlesinger to Hungarian Aid Society. $1,000.

D. T. and J. Slater to Warswick Man. Co. $250.

H. M. Chapin et al. to Com. Nat. Bank. $5,000.

Same to same. $14,000.

Theodore C. Schenck to P. P. Bush. $200.

A. A. Irwin to Barker & Smellie. $32.

Thomas E. Costello to D. P. Foster. $300.

June 4.

John G. Steinbrenner and wife to Simon Koch. $1,080.

S. Van Gilder and wife to Josiah Hurst. $105.

June 5.

Joseph Matthias and wise to G. H. Ittel. $400.

J. W. Edgar and wife to Fred Haltnorth. $1,800.

George B. Swinglea and wife to Margaret Barnes. $600.

Kate Shellenberg to John Nepper. $100.

Martha A. Barch and husband to Lucy C. White. $380.

Thomas Clifton to Betsy E. Smyth. $400.

Henry P. McIntosh to Lavinia W. McIntosh. $2,500.

Jacob Schneider to Harriet Lewis. $600.

Adam Eberts to Jacob Hochstrasser and wife. $150.

Frances M. E. Thompson and husband to Michael Gilfeather. $1,000.

Nicholas McLaughlin and wife to The Citizens' Savings and Loan Ass'n. $1,750.

June 6.

Elizabeth Kaufholz to Elizabeth Peterhausel- One hundred and fifty dollars.

John Parry to George G. Striker. Four hundred dollars.

E. Christian and wife to Elizabeth Smith. One thousand six hundred dollars.

Martin Faheo and wife to Jan Nayengast, Jr. Six hundred and fifty dollars.

Nicholas O. Laughlin and wife to Ransellor R. Peebles. One thousand dollars.

Valentine Hartnagel and wife to Martha H. Willis. Six hundred dollars.

Daniel A. Odell and wife to Huldah P. Young. Five hundred dollars.

CHATTEL MORTGAGES.

May 31.

Alex Forbes to Wm. N. Shaw. $250.

Frank Kain and wife to C. J. Keeler. $109.32.

John Reising to Peter Van Dorn. $55.

W. J. Keeler to J. Krause & Co. $322.67.

June 2.

Patrick Maloney et al. to Stote & Black. $270.

Wm Horning to Louis Zettlemeyer. $60.

Moritz Leibich to Phil Gaensslen et al. $600.

June 3.

J. E. Ingersoll and wife to Asa Brainard. $2,700.

Louisa Bleichert to Louisa Ritter. $800.

Clara Heinrich and husband to Bernah Schletzinger. $1,000.

Arthur L. Drake and wife to Emma Morse. $500.

June 4.

Nattie Sorrell to J. Krauss & Co. $190.

Andrew Steinmetz to Frederick Selbing, Sr. $2,400.

John Kavanagh to S. Brainard's Sons. $250.

Hartley & Hynes to Cobb, Andrews & Co. $400.

Miller & Janison to Kate Sullivan. $1,735.

June 5.

S. W. McDonald to Benjamin Atkinson. $100.

William G. White to E. J. Blandin. $26.

H. J. Webb to C. S. Whiting. $1,940.

L. Van Scotten to W. F. Hinman. $50.

Mrs. A. N. Walton to C. L. Adams. $350.

A. J. Middaugh to C. J. Chaffee. $86.

June 6.

M. Taylor et al. to Mrs. Charlotte Worden. One thousand dollars.

DEEDS.

May 29.

Mary E. Johnson to L. S. Young. $200.

Anton Seevers and wife to Mattie L. Stearns. $800.

S. J. Fox et al., by Felix Nicola, Mas. Com., to S. Mann, Austrian & Co. $195.

Anthony O'Malley and wife et al., by Thomas Graves, Mas. Com., to Charles Adams. $675.

H. H. Little to L. E. Holden. $1.

May 30.

The McNary & Claflin Man. Co. to Charles Mason, $5.

A. B. Ruggles and wife to Andrew Bertofe. $663.

James Paton and wife to Fannie A. Converse. $1.

Clarence H. Burgess and wife to Joseph C. Bailey. $5.

Harman Hitpas and wife to Thompson H. Collins. $1,350.

Heinrich Krueger and wife to Wilhelm Krueger. $240.

May 31.

N. Heisel et al. to Anna Sindelar. $360.

Fred Stokes and wife to Emma Rogers. $300.

C. M. Stone, by Thomas Graves, Mas. Com., to F. W. Minchin. $825.

S. J. Andrews and wife to James Mason. $625.

Eliza M. Barnes to Edward D. Young. $1.

Lucy Hardy to James B. Buxton. $75.

Jerry Henderson and wife to Henry Cowles. $2,500.

John F. Parkhurst, admr. of F. S. Ruple, to Sarah E. Ruple.

W. H. Rogers to Frederick Stokes. $300.

June 2.

John Crocker and wife to Mary A. Wellington. $1,400.

James M. Hoyt and wife et al. to George Guscott. $400.

Michael S. Robertson and wife to Maria A. Cowley. $300.

Alexander Hogg and wife to John Quinlan. $1,775.

Paul Malle to Girard Malle. $1.

Same to Charles E. Malle. $1.

J. K. Peebles and wife to R. R. Peebles. $4,000.

James T. Wilson et al., by Thomas Graves, Mas. Com., to S. Newwark. $3,350.

W. D. Sanders, exr., etc., to W. B. Sanders. $1.

R. A. Brown to Harvey Wilkinson. $700.

George W. Corlette to J. B. Corlette. $1,000.

June 3.

John F. Eaton and wife to Theodore D. Eaton. $500.

O. A. Kinney to Simon Crocker. $3,300.

Sarah A. Spafford and husband to Clara Heinrich. $2,150.

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Emma L. and J. B. Taylor to Edward C. Adams. $1,400.

Wm. F. Walker and wife to John Frieck. $525.

John M. Wilcox to John B. Ketchum et al. $445.

June 4.

James Paton and wife to Mary Jones. $800.

Same to same. $100.

Same to Reese Jones. $275.

James M. Hoyt and wife et al. to Clara M. Wilker. $950.

Louisa Queckenbush to Edward Hobday. $1,500.

Ed M. Sealand and wife to Alexander Forbes. $900.

Susanna K. Vetter and husband to Joseph Weubel. $40.

E. W. Towner et al., by C. C. Lowe, Mas. Com., to John W. Tyler. $875.

J. R. A. Carter, exr. of, etc., to Marquardt Lyons et al. $600.

George W. Hale and wife to Wm. E. Adams. $350.

F. W. Minchin and wife to Robert Dall. $1,350.

June 5.

Levi Bauder, Co. Aud., to Harman Austin. $32.27.

J. N. Edgar and wife to Henry Giles. $300.

John H. Green and wife to J. W. Edgar. $300.

E. Hessenmneller and wife to Oberlie Schacht. $3,000-

Jacob Hochstrasser and wife to Adam Eberts. $500.

Joseph Kleina and wife to Charles Pasta. $700.

James C. Morris and wife to Stephen C. Morris. $2,000.

Mary A. Mitchell as admx', etc., to Delia A. Leuter. $2,000.

Same to Louisa C. Wheaton. $5,-800.

Ella M. Poe to Magdalena Smith. $800.

Same to same. $1.

John W. Tyler and wife to Charles W. Moses, $1,500.

M. M. Spangle, admr. etc., to Fred H. Biermann. $7,890.

Isabrand Clevering and wife, by Mas. Com., to Herman Nykamp. Four hundred dollars.

Martin Hipp, by Felix Nicola, Mas. Com., to J. C. Weideman. Six thousand dollars.

S. Crocker and wife to Laura A. Kinney. Three thousand three hundred dollars.

Margaret Barnes to George B Swingler. One thousand one hundred dollars.

J. M. Curtiss and wife to John Duggan. One thousand one hundred and forty-eight dollars.

Elizabeth Duggan et al. to Marion Smith. Two hundred dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending June 5th, 1879, against the following Persons.

Cleveland Hazard Hame Co. $1,777.98.
H. Janowitz et al. $353.89.
Charles H. Blish.

June 3.

Jacob Stadler. $366.43.

June 4.

Adam Seipel. $389.25.

COURT OF COMMON PLEAS.

Actions Commenced.

May 29.

15164. Catharine Scarr vs Caroline Ruttger et et al. Equitable relief. Foran & Williams.

15165. L. A. Willson et al. vs Jan Koflstein et al. Money, to subject lands and relief. Willson & Sykora.

15166. Fannie B. Miles vs Ishmael R. Jones. Money and foreclosure. Henry T. Corwin.

15167. The Society for Savings vs Ira Lewis et al. Money and sale of lands. S. E. Williamson.

15168. Salina Stone vs Charles H. Blish. Money only. C. M. Sheldon and Hutchins & Campbell.

15169. Adolph Meyer vs George N. Chase et al. To subject land and for relief. S. A. Schwab.

15170. S. G. Baldwin vs A. Walker. Appeal by deft. Judgment April 30. —— Delos Cook.

May 30.

15171. Henry Romp vs Edwin E. Northrop and wife. Money and to subject lands. Robison & White.

May 31.

15172. In re application of H. C. Brainard et al. for leave to sell church property. For leave to sell church property. Johnson & Schwan.

15173. Anna Williams, by, etc., vs Charles P. Kelso et al. Money only. Street & Bentley.

15174. Wm. A. Williams, by, etc., vs Same. Same. Same.

15175. Alphena Williams, by, etc., vs Same. Same. Same.

15176. Henry Williams, by, etc., vs Same. Same. Same.

15177. Eunice Williams, by, etc., vs Same. Same. Same.

15178. Stephen Thomas Williams, by, etc., vs same. Same. Same.

15179. Clark S. Gates vs Harriet G. Spear et al. To subject lands and for relief. C. N. Collins and Willson & Sykora.

15180. Michael Rice vs George Harrison. Equitable relief, injunction, and to recover land. E. Sowers.

15181. Winona S. Hecker vs Henry C. McDowell, as, etc., et al. Equitable relief. Arnold Green.

15182. David C. Herr vs Catharine Reeder et al. Money and foreclosure of mortgage. P. P.

15183. Charles Alber vs John Froelich et al. Money only. Stone & Hessenmueller.

15184. Lucy Everett vs Frederick Bauman et al. Money only. Weed & Dellenbaugh.

15185. The Cit. Sav. and Loan Ass'n. vs John Marquardt et al. Foreclosure and relief. Estep & Squire.

15186. Same vs Henry Tunte et al. Relief and to subject lands. Same.

15187. John L. Johnson vs Thomas H. West et al. Appeal by defts. Judgment May 17. W. C. Rogers.

15188. Anton Smyth et al. vs F. W. Stretman et al. Money and relief. Johnson & Schwan.

15189. J. C. Ferbert et al. vs Joseph Archer et al. To revive judgment, for money to subject land and for relief. Robison & White.

15190. Charles H. Bulkley vs O. D. Ford et al. Money only. Mix, Noble & White.

15191. Wm. Congdon vs Wm. W. Grald et al. Money and equitable relief. Abner Slutz.

15192. J. K. Bolton vs The Cleveland Hazard Hame Co. Money only. R. P. Ranney and Ingersoll & W.

June 2.

15193. John J. Myers vs George A. Myers et al. For appointment of receiver, settlement of partnership ap., and other relief. John Coon & F. J. Wing; W. W. Andrews and R. P. Ranney.

15194. C. W. Schmidt vs Maria E. Grub et al. Account, sale of land and relief. J. S. Grannis.

15195. Joseph Avery vs Miss Vashti Drennen. Money only. H. W. Canfield and W. A. Wilcox.

15196. Arthur Hughes vs Philip Striebinger et al. Appeal by defts. Judgment May 3.

June 3.

15197. Charles Foust vs W. F. Judson et al. Appeal by deft. Judson. William Clark.

15198. A. Frattner vs The State of Ohio. Error to J. P. Street & Bentley.

15199. Same vs same. Same. Same.

15200. Ethan Rogers vs S. A. Babcock et al. Money and to subject land. J. J. Brooks.

15201. W. H. Woodard vs John Williams. Money only. Foran & Williams.

15202. Joseph Polak vs Martin Krejci. Error to J. P. Babcock & Nowak.

15203. Wm. Brush vs Isibrand Clevering et al. Money, to subject land and for relief. A. Zehring.

June 4.

15204. C. R. Heller vs D. C. Kellogg. Appeal by deft. Lewis & Castle. M. B. Gary.

15205. E. Rosenfeld vs Adam Leipel. Cognovit. W. H. Gaylord; J. M. Henderson.

June 5.

15206. John Williams vs P. I. Spenzer. Appeal by deft. Judgment May 12. A. T. Brinsmade; Mix, McKinney, Conway, Noble.

15207. Bernard Schmoldt vs Moses G. Watterson. Money only. Grannis & Griswold; Arnold Green.

15208. Charles E. Ticehurst vs J. A. Gardner et al. Money and equitable relief. Mitchell & Dissette.

15209. Thomas J. Carran vs Henry

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Caster, Appeal by defendant. Judgment May 24.

June 6.

15210. Mary Eason vs Jacob Landesman. Appeal by deft. Judgment May 9. J. A. Hartness; Foran & Williams.

Motions and Demurrers Filed.

2637. Gay vs Gay et al. Motion by plfi. to require defts. to produce certain papapers.

May 30.

2638. Little vs Geissendorfer et al. Demurrer by deft. John Geissendorfer to 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th and 9th causes of action.

May 31.

2639. Masters vs Carson, assignee, etc. Motion by deft. to dismiss action.

2640. Steiger et al. vs Ballinger et al. Motion by defts. Richards et al. for new appraisement.

2641. Rouse & Co. vs Schmidt, admx., etc. Motion by defendant for a new trial.

2642. Harmon vs Snell. Same.

2463. Roberts vs Clark et al. Motion by deft. Clark to strike petition from the files.

2644. Hale & Co. vs Burgert. Motion by defendants to consolidate prayers for judgment.

2645. A. S. Herenden Furniture Co. vs. Euclid Avenue Opera House et al. Motion by plaintiff to confirm 2d report of referee and to order receiver to collect and distribute, etc.

2646. Reichard vs Wagner et al. Motion by defendants to strike the petition from the files.

June 2.

2647. The Wilcox & Gibbs Sewing Machine Co. vs Follett et al. Motion by deft. Kinney to strike plff's supplemental reply to his interrogatories from the files.

2468. Sprankle, Morse & Co. vs Williamson et al. Motion by defts. to make petition more definite and certain.

2649. Prentiss et al. vs Curtis. Motion to require plff. to give additional bail for costs.

2650. Dracket vs Lucy et al. Motion by plaintiff to confirm report of G. B. Solders, referee.

2651. Hilliard vs The Forest City Limited Land and Building Association. Motion by plaintiff to strike out from answer of S. S. Lyon and about 58 others and make same more specific and definite.

2652. Konigslow vs Voegtle et al. Demurrer by plaintiff to answer of C. Voegtle.

2653. Furniss vs Radinschewski et al. Motion by defts. to strike petition and amended petition from the files.

June 3.

2654. Adams vs Reeves et al. Motion by L. W. Ford, referee, to confirm his report and for a decree theron.

2655. Strauss vs Collins. Motion by plff. for new trial.

2656. Wheeler vs Montpelier. Motion by deft. for new trial.

2657. Myers vs Myers et al. Motion by defts. to make the petition more definite and certain.

June 4.

2658. O'Malia vs Bailey. Motion by plff. to strike out from answer as redundant, etc.

2659. Neglespach, guardian, etc., vs The Mutual Life Ins. Co. Demurrer by deft. to plff.'s reply.

2660. Deubert vs Beznowska et al. Demurrer by plff. to answer of John Beznowska.

2661. Same vs same. Motion by plff. to require Ann Beznowska to separately state and number defences of her answer.

2662. McCurdy et al. vs The Cleveland Hazard Hame Co. Demurrer by defendant H. C. Ford to 1st and 2d causes of action of the petition.

2663. Myers vs Myers et al. Motion by defefendant for the appointment of a receiver.

June 5.

2664. Otis vs Robinson et al. Motion by defts. to make petition more definite and certain and to separately state and number causes of action.

June 6.

2665. Ryan vs Madden. Motion by plff. for new trial.

2666. Savage vs McAdams et al. Motion by defts. for new trial.

2667. Branch vs Woodruff Sleeping and Parlor Coach Co. Motion by plff. to strike from answer as irrelevant, etc.

Motions and Demurrers Decided.

May 29.

2582. Blum vs Kees et al. Granted.

May 31.

2265. Thayer vs Hoagland et al. Sustained.

2352. Lesly et al. vs Mueller et al. Granted.

2463. } Armstrong, exr., vs Story et al.
2464. } Withdrawn.

2469. Neglespoch, guardian, vs The Mutual Life Ins. Co. Sustained. Plaintiff excepts.

2483. Hoffman vs Morrison. Sustained.

2522. Wells vs Chatterton. Granted.

2526. Gilbert vs Gilbert et al. Sustained. Plff. excepts.

2554. Bronson et al. vs Stoddart et al. Granted.

2588. Filbin vs Loftus et al. Sustained.

2591. U. S. Mortgage Co. vs Gilbert et al. Sustained. Deft. excepts.

2625. Brainard vs Devine et al. Granted.

2634. Gabel vs Independence & Parma Plank Road Co. Sustained. Plaintiff excepts.

2635. Hussey vs The Standard Iron Co. et al. Granted.

June 4.

2365. Brinsmade vs Forest City Ins. Co. Stricken off.

2418. Rogers vs Getchell et al. Overruled. Deft. excepts.

2421. Kafton vs The City of Cleveland. Overruled. Deft. excepts.

2431. Freeborn vs Burkhardt. Sustained.

2432. McDonald vs Swan et al. Granted.

2452. Savage vs White et al. Sustained. Plff. excepts.

2461. Stone vs Voges et al. Sustained.

2465. Taber et al. vs Holbrook et al. Granted in part, and overruled in part. Plff. excepts.

2468. Humiston vs Linders et al. Stricken off.

2475. Second National Bank vs Marbeck et al. Sustained.

2515. } Otis vs Cozad et al. Overruled.
2529. } Plff. excepts.

2535. Tolsow vs Strong et al. Sustained. Defts. except.

2565. Picket vs Mathews. Overruled.

2573. Smith vs Scripps et al. Overruled. Defts. except.

2577. Daughters of Israel No. 1 vs Scheurmann et al. Granted.

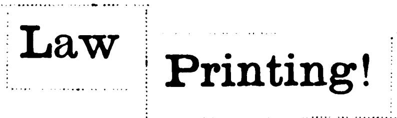
2616. Morse vs Jackson et al. Sustained. Defts. except.

2621. Otis vs Robinson et al. Overruled. Defts. except.

2623. Hassenpflug vs Baden et al. Overruled.

2624. Sherberne & Moonan vs Hogan. Overruled. Deft. excepts.

2640. Stinger et al. vs Bullinger et al. Granted.



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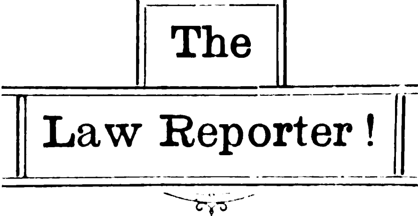

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REPLEVIN OF SHORT-HAND NOTES.—Application was made by an attorney a few days ago to a stenographer in this city for a transcript of a short-hand report of testimony. The stenographer refused to furnish the transcript without permission from the person by whom he was employed to make the report, which, it happened, could not be obtained. A notice was then served by the attorney who desired the transcript to take depositions in an action on behalf of the party in whose interest the transcript was sought. The stenographer was subpoenaed to appear before a Notary Public at a day named and bring with him certain short-hand notes to testify, etc., which he obeyed. About an hour after the taking of the deposition had begun the person for whom the short-hand report was made brought an action of replevin against the stenographer to obtain possession of the short-hand notes. This closed the taking of the deposition, and the replevin proceeding was dismissed. In the absence of any understanding or agreement on the subject between the parties concerned, short-hand notes are the property of the stenographer. He has a right to retain possession of them for his advantage—to make as many transcripts as his employer may desire or may permit him to make for others.

He also has a right to the possession of them for his protection, that he may verify the accuracy of his transcripts should it be questioned, or correct perversions of them by others.

THE articles on the Roman Law published in the *Maryland Law Record*, to which reference is made in the article on that subject in this issue, taken from that paper, were the articles that have recently appeared in the LAW REPORTER on the subject, written by a member of the Cleveland Bar.

No assignment this week. We are informed by Deputy Clerk Weil that it will probably not be made until Friday of next week, unless the assignment last made is exhausted before that time.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

A. M. HARMON VS. HENRY WALTER ET AL.

Aid of Execution—What Proceedings Necessary When Referee Finds Property in Hands of Third Party Belonging to Judgment Debtor—Refusal of Common Pleas to Grant order in such Case not Reviewable in Error, etc.

LEMMON, J.:

This is a petition in error to reverse a ruling in the Court of Common Pleas in refusing to grant an order. A motion was made that the Court confirm a report made by a referee in this case and enter an order for the payment by Henderson of moneys which the referee in his report found to be in his hands. The error alleged is that the Court of Common Pleas refused to sustain the motion, although there were no exceptions to the report filed, and that the Court of Common Pleas refused to enter an order for the payment of this money.

The proceeding below in which this report was made was a proceeding in aid of execution. It appears that the plaintiff, A. W. Harmon, in 1877 had obtained a judgment against Henry Walter and Henry B. Myer, which is still unreversed and, in part at least, unsatisfied; execution was issued, and it was returned unsatisfied, there being no property of the defendants in the county out of which the amount of the judgment could be realized. Thereupon proceedings were com-

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menced in aid of execution, and the matter was referred by the Court of Common Pleas to R. J. Winters as referee, who was required to take and report the testimony and facts to the Court of Common Pleas, and he has made a very full report in the case. The report is not excepted to, and is, probably, so well sustained by the evidence that the parties felt unwilling to except. A motion was then made, first, for the approval of the report, and second, for an order to be entered by the Court of Common Pleas upon J. M. Henderson for the payment over of the moneys that are found to be in his hands by the referee. The Court refused to make an order confirming the report and refused to make an order upon Henderson to pay over this money. It is claimed that the order ought not to have been made for the reason that the finding would not be binding upon parties who were claimants for that money and who were not parties to this proceeding; that although Henderson had this money in his hands, as disclosed by the evidence, he had received it and held it for Mrs. Annie Meyers, who was brought in as a witness for examination in this proceeding.

It was claimed on the one part that because she was examined she ought to be concluded by an order of the Court. But she was not a party to this proceeding; she had no right to examine witnesses; she had no control over the matter. and can it be said that she had her day in court? Would an order in this case have been binding upon Adam Meyer? We think not. We think the Court of Common Pleas did not err in refusing to enter this order. We think that proceedings in aid of execution are intended for the purpose of enabling a party to ascertain where there is property, anything that can be subjected to the payment of a judgment; and then, if successful, may take such proceedings as shall be necessary to reach the property. This view of the matter is apparently sustained by the statute itself. Section 469 reads as follows:

"If it shall appear that the judgment debtor has any equitable interest in real estate in the county in which proceedings are had, as mortgagor, mortgagee, or otherwise, and the interest of said debtor can be ascertained, as between himself and the person or persons holding the real estate, or the person or persons having any lien on, or interest in the same, without controversy as to the interest of such person or persons in such legal estate, or interest therein, or lien on the same, the receiver may be ordered to sell and convey such real estate, or the debtor's equitable interest therein."

Now, clearly, the legislature has been so guarded in the use of language that we are not warranted in believing that it was intended the court should enter an order for the payment of moneys when the parties, claimants to that money, as disclosed by the proceedings, were not before the court, as parties to the proceeding. We think in this respect the Court of Common Pleas took a correct view of this statute in refusing to enter this order.

But is this a case, even if there was error in the refusal of the Court of Common Pleas to approve the report and to order Henderson to pay over this money, which the District Court can review upon error?

This presents the question whether that holding of the Court was a final order in the case. The statute upon the subject reads as follows: "A judgment rendered, or final order made by the Court of Common Pleas, Superior Court of Cleveland, or Superior or Commercial Courts of Cincinnati, may be reversed, vacated or modified by the District Court for errors appearing on the record."

Now, was the holding of the Court of Common Pleas upon this motion a final order within the meaning of the statute? The Supreme Court has very clearly defined what is a final order, in the case of Hobbs vs. Beckwith (6 O. S., 252). An order in the progress of a suit, and before judgment, to be *final* and lay the foundation for a petition in error, must be such as determines the action and prevents a judgment."

Now, this was not such an order. It does not "determine the action" nor "prevent a judgment." The plaintiff in error has a right to bring his action against Mr. Henderson if Mr. Henderson has in his hands moneys that belong to either of the judgment debtors; may charge him as garnishee, or take any other proceeding proper under the circumstances of the case for the purpose of subjecting that money, and the testimony taken in the proceedings in aid of execution, though not binding upon the parties, would aid them in getting at the facts which were to be determintd in fixing the extent of the liability of Mr. Henderson. If the Court had entered this order, it could not have effected the rights of Henderson, because it would have been necessary to bring a suit upon the order, and Henderson could answer that other persons claimed the money, and file his answer in the nature of an interpleader, and require those parties to come in and litigate between themselves, and in that way the party to whom that money belonged might be ascertained, and all the rights of the parties determined.

This proceeding in error to reverse an order, or a refusal to enter an order, under the circumstances an order that could not have been final as between the parties, is not, we think, a proceeding under the statutes of this state, which can be reversed, vacated or modified by this Court upon error. The proceeding in error will therefore be dismissed.

BREWER & WILCOX, for plaintiff.

ROMAN LAW.

[Maryland Law Record.]

The articles on Roman law which appeared in the last two numbers of the *Maryland Law Record* have perhaps awakened the interest of some of the many law students in this state. When once the student has discovered that it will be to his advantage not to depend upon the advice of his seniors in the profession, who have themselves only followed a beaten track, but to seek the path of instruction which has been marked out by the best teachers in England and this country, he may expect to master the very difficult science of law. Of the civil law he has probably learned little, except through the jealous notice which Blackstone has accorded it.

It is chiefly through the writings of Sir Henry Maine that the vast and growing importance of the historical study of law has been impressed upon English students. It could scarcely be expected that the awakening of this interest in England would have any immediate effect upon the American legal mind. It may, perhaps, appear to the casual observer that we have comparatively little interest in the matter; but such is not the case. The growth of law has always been gradual, and to be beneficial it must continue so.

Since fictions have been abolished by the spirit of modern legislation there remain properly but two means for the development of law—equity and legislation. The principles upon which the law is to be developed are of the utmost importance. In this connection we may regard the study of civil law as important.

The average American lawyer, if questioned by his student upon the subject, would doubtless reply that the civil law was a useless study, and that

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the code and the ordinary text-books were sufficient food for any one having in contemplation the practice of law.

Such utilitarian views, we are glad to say, are confined to only a majority of the profession. In a few states, as Louisiana, study of the civil law would seem to be a necessity. In many more of the states, especially in New England, it is becoming more and more a part of the legal education.

It is not proposed, in an article like this, to make an extended examination of the civil law. It may not be amiss, however, to take a glance at a few general facts connected with its history, its influence and its importance to us as the basis of a legal education.

With the public law of the Romans we have little to do. As embodied in the codex it dealt with christianity, the church and other matters of State policy which do not come within the scope of our system of law. The last attempt at its adoption was made by Frederick II., who endeavored to found a Holy Empire upon its maxims. The changed circumstances of our modern civilization has not brought us anything to supplant the private law of the Romans. Indeed, it is based upon principles which are immutable, upon reasonings which are as forcible as they are ancient. The juristic sense is deeply imbued with its spirit at present as it was ages ago.

Every complete system of jurisprudence must rest upon a stable basis; and its arrangement must be precise. Austin has pointed out what was probably the arrangement and division made by the Roman institutional writers, and very clearly shows that it is the historical basis of all arrangements made by modern writers. Even Blackstone, with all his contempt for the civil law, followed it.

The wealth of principles which underlies the Roman law was the outgrowth of what, to us at least, seems a peculiar custom. There was no bench at Rome. The laws were moulded by the bar. The Roman lawyers staked much upon their responses. It is to the rivalry among them that the Roman law owes its excellency. Such an influence is wanting wherever a bench is to be found, and especially is its absence felt in America. With us the *dicta* of a second-class judge, raised to the bench by caucus manipulation, easily override the carefully prepared opinions of a learned writer. This fact is best known to the bar; but as it enables every lawyer to find numerous cases on his side of any questions, it is acquiesced in by all. Such is not the case in England, for there judges are raised to the bench through their merits as lawyers.

There are doubtless many men on our bench admirably qualified for the position, but political influence is too strong a factor and often forces upon us men who are as unscrupulous as they are ignorant. The Roman law was never entirely abrogated in any of the European countries. In the East, under the form of the Basiica, it survived the periods of Greek, Venetian, and Ottoman rule. In modern Greece it was declared to be in force by the constitution of 1835. It was never extinct in Italy. The discovery of the celebrated copy of Pandects merely tended to revive its study. In France it rapidly acquired binding authority. Clovis, after he had conquered France, embraced the christian religion, and it was probably owing to that fact that he permitted the Romanized Gauls to retain the civil law. He did not, however, adopt it for the government of his own people.

The conquerors of Romanized nations generally yielded to the strong influence of the civil law. That such was not the ease in England was owing to peculiar causes,

Five centuries of Romanized domination failed to Romanize the Britons as effectually as it had the Gauls. When the Saxon pirates accepted their invitation to come over to the island, they acted more like men who had come without the formality of an invitation, and at once cancelled the obligation by almost exterminating the Britons. This very effectually stamped out the few traces that had been left by the Romans.

The civil law, though crushed for the time, soon regained a permanent place in British institutions. It crept in through the Ecclesiastical Courts and the Court of Chancery, presided over by an ecclesiastic; the extension of commerce also gave it an impetus it could not have acquired in any other way.

The feudel laws dealt only with matters relating to land, but when personal property began to rise in importance the civil began to take root.

It had long been forgotten that Ulpian and Papinian once sat upon the bench at York when Stephen issued a proclamation forbidding the study of civil law, and a century later the feudal lords declared "that the realm of England hath never been unto this hour, neither by the consent of our lord the king, and the lords of parliament, shall it ever be ruled or governed by the civil law."

But even this repudiation did not prevail. Magna Charta was indebted to the civil law, and "Bracton," the most important of the early text-books, drew from Justinian at least a third of its contents.

The animosity which English jurists so long maintained toward the civil law doubtless led to that ingenious piece of nonsense, styled by those who were borrowing from Justinian, "the time whereof the memory of man runneth not to the contrary."

"There can be no greater delusion," says a late writer, "than to suppose, as was long the fashion to do, that German barbarians brought with them from the forests of Germany the principles and forms which characterize modern societies. 'Do men gather grapes of thorns, or figs of thistles?' Rome is everywhere; we are sheltered by the protecting *ancile* of Rome."

A word as to the abundant means which will enable the American student to pursue the study of the civil law.

"Roman law," by Prof. Hunter, of University College, London, 1873. This work contains the chief steps in the civil law from the Twelve Tables to the end of Justinian's reign. Though the author has departed from the plan of the Roman institutional writers, the work is all that could be desired. It contains copious extracts from the Digest, and embodies a translation of the institutes. Each section gives abundant illustrations.

"The Pandects," by Prof. Goudsmit, of Heyden; "Institutes of Gaius," by Poste; "Institutes of Justinian," by Saunders.

These translations will be sufficient for any student, unless he merely wishes to satisfy an antiquarian curiosity.

As for the literature of the civil law, any public library will afford abundant reading. The more prominent law schools of this country are beginning to attach much importance to the study of Roman law. At Yale there is a complete course, with the degree of doctor of civil law.

Before many years we may hope to see it made the basis of all legal education.

A. R. H.

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SUPREME COURT OF OHIO.

DECEMBER TERM. 1878.

Hon. W. J. Gilmore, Chief Justice. Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Hon. William White, Judges.

TUESDAY, June 3, 1879.

General Docket.

No. 985. The State of Ohio, on relation of the Attorney General vs Henry O. Bonnell et al. Quo warranto.

OKEY, J.:

When the stockholders of a corporation were notified that the annual meeting for the elections of directors would be held at a certain hour of the day fixed by the charter, and the corporation was restrained from holding an election on that day, in consequence of which no meeting was held until several hours after the time fixed in the notice, when a small number of the stockholders, without the knowledge of the others, met, organized and adjourned until the next day, at which time an election was held by a majority of the stockholders, without notice to others who were in the vicinity for the purposes of the meeting, and might have been readily notified. Held: That such election was unfair, and must be held to be invalid, whether the restraining order did or did not bind the stockholders.

Judgment of ouster as to the directors elected in 1879, and restoring those elected in 1878.

No. 14. James T. Davis vs Wm. Williams. Error to the District Court of Lawrence county. The District Court erred in sustaining exceptions to the finding of the master as to the item $531;70, and the decree of that court is modified so as to give Davis this item with interest from April, 1873.

Motion Docket.

No. 84. John Tod et al., executors and trustees of David Tod, vs James B. Hughs, Auditor, and A. Dickson, treasurer of Mahoning county, Ohio. Motion overruled. The stay not being authorizee in such case.

No. 93. J. Ross Mossgrove vs The State of Ohio. Motion for leave to file a petition in error to the District Court of Jefferson County. Motion overruled.

No. 95. Albert Ely vs Festus Cooley. Motion for stay of proceedings and to fix amount of undertaking in cause No. 549 on the General Docket. Motion passed for notice and also for a statement of the grounds for the motion.

No. 96. George Brooks vs The State of Ohio. Motion to take cause No. 648 on hearing. Motion granted.

No. 97. Otto Witte vs P. Lockwook et al. Motion for stay of execution in cause No. 643 on the General Docket. Motion granted.

No. 99. Mary Fannings vs The Hibernia Insurance Co. Motion for leave to file a petition in error to the Court of Common Pleas of Cuyahoga county. Motian granted and cause taken out of its order to be heard with No. 369 on the General Docket.

No. 100. Philip Degenhart and Henry Dreilling vs Louisa D. Cracraft et al. Motion for leave to file a petition in error to the Superior Court of Cincinnati. Motion granted.

No. 101. Joseph Kuhlman vs Louisa D. Cracraft et al. Motion for leave to file a petition in error to the Superior Court of Cincinnati. Motion granted.

No. 102. John Brodwolf vs Louisa D. Cracraft et al. Motion for leave to file a petition in error to the Superior Court of Cincinnati. Motion granted.

No. 103. George Gates vs Louisa D. Cracraft et al. Motion to file a petition in error to the Superior Court of Cincinnati. Motion granted.

No. 104. Henry Kottenbrock vs Louisa D. Cracraft et al. Motion for leave to file a petition in error to the Superior Court of Cincinnati. Motion granted.

No. 105. Philip Degenhart et al. vs Louisa D. Cracraft et al. Motion to take causes No. 690, 691, 692, 693, 694 on the general docket out of order for hearing. Motion passed for statement of the grounds of the motion as required by rule.

No. 94. Murphy & Bros. vs Swadner et al. Motion to modify a judgment entered by the late Supreme Court Commission.

WHITE, J. Held:

1. By sec. 12 and chap. 6 of the code (75 O. L., 675), power is conferred on this court to vacate or modify its judgments or orders, after the term at which such judgments or orders were made; and since the expiration of the Supreme Court Commission this power extends to the judgments and ordeas of the Commission as fully as to the judgments and orders of the court.

2. On the hearing of a motion to vacate or modify a judgment or order, on the ground that it was entered by mistake, parol evidence is admissible.

3. Where the judgment entered on the journal is different from what was intended by the court, but is shown to be such as ought to have been rendered, it will not be vacated or modified as entered by mistake.

Motion overruled.

No. 106. Louisa D. Cracraft et al. vs George B. Schulte. Motion for leave to file a petition in error to the Superior Court of Cincinnati. Motion granted.

No. 107. Louisa D. Cracraft et al. vs G. B. Schulte. Motion to take cause No. 695 on General Docket out of its order. Motion passed for statement of the grounds of the motion as required by rule.

No. 108. John Hildebiddle vs the State of Ohio. Motion to take cause No. 663 on the General Docket out of its order. Motion granted.

TUESDAY, June 10, 1879.

General Docket.

No. 83. Charles A. Preston, Trustee, vs. Henry Brown and wife. Error to the District Court of Huron county.

Boynton, J. Held:

1. The act for the relief of occupying claimants of land operates only in cases where the defendant in possession has been evicted by a title both paramount and adverse.

2. Where a person in the quiet possession of land under an agreement for its purchase made with the equitable owner, is evicted by the trustee holding the legal title, he is not entitled under said act to compensation for lasting and valuable improvements made upon the premises. His possession in such case is not under an adverse title within the meaning of the Statute.

3. In an action for the recovery of real property, an order sustaining a demurrer to a cross-petitian on the ground that the facts stated were not sufficient to constitute a defense to the action, will not preclude the court, after verdict for the plaintiff, from treating the cross-petition as properly in the case for the purpose of awarding to the defendant compensation, in equity, for lasting and valuable improvements made upon the premises.

4. A testator, dying in 1843, devised certain real estate to a trustee in trust, to pay over the rents and profits thereof to the wife of G., to her sole and seperate use; and in case she survived or was divorced from her husband, then to convey the estate to her, her heirs and assigns forever. In case she died the wife of G., the

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estate at her death to be conveyed to her children, and to the legal representatives of such of them as were then deceased. The trustee conveyed the title to G. for life, remainder to his wife, who, jointly conveyed the same to K., upon t.us's similar to those declared in the will of the testator. K., retaining the title, resigned the trust, whereupon B., a son-in-law of G, and wife, was appointed in his stead. B. and wife went into possession of sixty-seven acres of land being a part of the premises devised, and in good faith, and to the knowledge of C., made thereon lasting and valuable improvements, under an agreement with the wife of G., by which said parcel of land was to be conveyed to B., fifty acres of the same by way of advancement to B.'s wife, and seventeen acres for an agreed consideration. Subsequently, in consideratien of advancements made to the remaining children of G. and wife, they, with the exception of one son, released to the wife of B. their contingent interest in said fifty acres. —Held:

1. That B. and wife are not entitled to a conveyance of the legal title under the agreement made with the wife of G.

2. That on being evicted from the premises by the trustee of the legal title, they are entitled, in equity, to compensation for permanent improvement made upon the premises, to be charged as a lien thereon.

Judgment rendered under the act for relief of occupying claimants, reversed, and cause remanded for further proceedings.

No. 89. The Enterprise Insurance Company of Cincinnati vs S. H. Parisot. Error to the Superior Court of Cincinnati.

Gilmore, C. J.:

1. A policy required immediate notice, and proof of loss within thirty days; the notice was given and a protest made out on the day the loss occurred, which was afterwards handed to the insurer's adjuster when he came to investigate the loss, who made the objection that it did not state the cause of loss, but went on and made a full investigation, after which he told the insured that he did not think the insurer would pay, as he had shown no cause of loss, and that it must have been from unseaworthiness of the boat or negligence; but promised that after he made his report he would write and inform him whether the insurer would pay; and he reported all the facts, whereupon the insurer decided that it was not liable, and so informed the agents through whom the insurance was affected, without stating the ground of the decision, and the adjuster did not write to the insured as he had promised—Held: That whether there had been a waiver of proof of loss by the insurer, was properly left to the jury under appropriate instructions.

2. Where a vessel is lost by a peril insured against, the insurer will be liable, although the loss might have been avoided by the exercise of proper care on the part of those in charge of the vessel at the time of the loss.

Judgment affirmed.

Mo. 109. The State of Ohio ex rel., John Koehler vs. John G. Fratz, Trnasurer of Hamilton county. Motion to take cause No. 686 on the General Docket out of its order for hearing. Motion granted.

No. 110. The State of Ohio ex rel. the prosecuting attorney of Hamilton county, vs. Alexander Brown et al. Motion to take cause No. 687 on the General Docket out of its order. Motion granted.

No. 111. Incorporated Village of Arcanum, Ohio, vs. Thomas Gavin. Motion for leave to file a petition in error to the Court of Common Pleas of Darke county. Motion overruled. The remedy, if any, should be sought in the District Court.

No. 112. Cleveland & Mahoning Valley Railroad Company vs. Henry Wick. Motion to dismiss petition in error in cause No. 103 on the General Docket. Passed for notice and statement of the grounds of the motion.

U. S. CIRCUIT COURT N. D. OF OHIO.

June 11.

3879. Geo. R. Sherman vs. The City of Cleveland. Petition for money only. Grannis & Griswold.

3880. Same vs. Same. Bill filed. Same.

June 12

3856. Martin L. Hull et al. vs. Geo. W. Clough et al. Answer of defendants Geo. W. Clough et al. Willey, Sherman & Hoyt.

3855. Same vs. Wm. C. Norton. Answer of defendant. Same.

U S. DISTRICT COURT N. D. OF OHIO.

June 11.

Wm. Radcliffs et al. vs. Schooner Emma. Reply filed. Grannis & Griswold.

Bankruptcy.

June 10.

1932. In re John H. Klosse. Discharged.

June 12.

1969. In re. Joseph Debow. Discharged.

2061. In re. Anderson I. Traesdell. Same.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending June 13, 1879.

[Prepared for The Law Reporter by R. P. Flood.]

MORTGAGES.

June 7.

Wilson Avenue Baptist Church to The Society for Savings. $500.

Florence S. Kain and husband to Louisa C. Hayward, $1,800.

Eliza J. Langdon and husband to Jane Farbes. $2,100.

John Kinkelaar and wife to Moritz Kneinhard, guard, $300.

Same et al. to same. $1,330.

Thomas C. Richmond and wife to Mrs. L. Robbins. $3,000.

Michael Fitzgerald and wife to James Linton. $28.

Hannah Fadigan to Edward Hinton. $440.

Maryette Geissendorfer and husband to George W. Whiteman. $4,000.

C. W. Haslan to Frances Oakes and husband. $100.

Caroline Mathew and husband to Carrie A. Hastings. $1,500.

Ezra S. Gillette and wife to A. Brainard. $1,000.

Maria Sheldon to Silas C. Short. $930.

June 9.

Paul Seeg and wife to Joseph Nauratic. $200.

Elvira Coy to John G. Jennings. $100.

Fred Tousing and wife to John Henry Melcher. $1,000.

Nicholas Heisel and wife The Theological Seminary. $9,000.

Alden Starr to The Society for Savings. $1,000.

Martha Davis and husband to Jane R. A. Carter. $200.

James Hanretty to same. $100.

August Geiger to Anna Cureton. $600.

George Kalb and wife to Joseph Keeley and wife. $150.

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Lizzie Kuchta and husband to St. John Nepomuk Society. $200.

Henry H. Dodge to Mrs. Emma J. Parish. $4,200.

June 10.

Godfrey Nigelspeck and wife to Margaret Stall. $100.

Mary McCue and husband to L. W. Ford. $500.

Katie Dunn to The Society for Savings. $1,800.

Philip Anthony to Albert A. Pope. $200.

June 11.

Geo. Nichols and wife to Philema Spafford. $400.

Lucinda H. Wilkins and husband to Henry P. Sizer. $5,000.

Andrew Hanf and wife to the Society for Savings. $400.

Carolin Koza to same. $400.

Saml. Crobaugh and wife to Francis H. Boswick. $1,000.

Lord, Bowler & Co. to the Citizens' Savings and Loan Association. $3,900.

John Guien and wife to Wm. Guien. $500.

June 12.

Chas. N. Sanford to the Society for Savings. Fifteen hundred dollars.

L. P. Brown and wife to T. H. Cannon, guard. Three thousand dollars.

Nannie E. L. Selloway to Major Solloway. Three thousand five hundred dollars.

Elizah Smith and wife to the Society for Savings. Five thousand seven hundred dollars.

Henry Romp and wife to the Citizens' Savings and Loan Association. Five hundred dollars.

June 13.

Carl L. Peterson and wife to Mary Conrey. Four hundred and twenty dollars.

James Howland to Nettie E. Backus. Ten thousand dollars.

Louisa Schenck and husband to The People's Savings and Loan Association. Three thousand dollars.

Joseph B. Palmer to The Society for Savings. One thousand five hundred dollars.

Martin Clark to George Murch. One hundred and fifty dollars.

Harmon V. Garret to Lucy Hardy. One hundred dollars.

John Pierce and wife to The Citn.'s Sav. and Loan Ass'n. Three hundred dollars.

Same to estate of Ewen C. Swisher. Two thousand eight hundred dollars.

CHATTEL MORTGAGES.

June 9.

James Drake to Leva S. Becherth. $36.

Wm. Krauss to S. Kirchenberg. $120.

Conrad Deubel and wife to Katharine Hartlieb. $200.

Joseph Kraseen to Hermann Paddatz. $75.

Thomas B. Burns to Philip J. Kiedel. $100.

Thomas Elwood to J. Mott & Co. $293.

June 10.

A. S. Hudson et al. to John Howel. $59.

Regine Trattner to C. R. Heller. $125.

James Sweeney and wife to W. D. Butler. $51.

George W. Ball to Joseph H. Ball. $400.

June 11.

L. W. Kingsborough to L. W. Monroe. $100.

Elizabeth Churchward to M. Silverstone. $38.

James Snape to Pond & Fraser. $123.

James Manning to John J. Wightman. $300.

H. Tomson to Jos. Stoppel. $163

Chas. S. Coan to C. O. Benton. $425.

June 12.

Frank A. Barber to Wm. D. Butler. Ninety-seven dollars.

Mary E. Davis and husband to Harris Jaynes. One hundred dollars.

H. H. Schroeder to Muina Schroeder. One hundred dollars.

Tudor D. Pratt to J. W. Scott. Two hundred dollars.

M. C. Cex to H. R. Leonard. One hundred and thirty dollars.

Henry Null to John Scheidel. Three hundred dollars.

Wm. H. Colson to Wm. A. Heinsohn. One hundred dollars.

June 13.

August Fay to Anna E. Kaestle. One hundred and forty dollars.

Ida Brunson to George Hall. Three hundred dollars.

Miss Annie Dooling to same. One hundred and fifty dollars.

Richard Bammerlin to Charles E. Gehring. One hundred dollars.

W. P. Burnell to J. M. Deyoe. Two hundred and fifty dollars.

Morris Welfare to Elias Sims. One hundred and fifty dollars.

John Tyrrell to W. D. Butler. Sixty-nine dollars.

A. I. Truesdell and wife to H. Haines. One hundred and seventy-five dollars.

DEEDS.

June 6.

Maryette Geissendorfer and husband to F. H. Bierman. $1.

Asa Gillette and wife to S. E. Gillette. $2,262.

T. H. Bierman and wife to Maryette Geissendorfer. $2,500.

Elias N. Miller, ass'ne., to Israel E. Bowmann. $50.

George G. Striker et al. to John Purdy. $700.

Fred Wright and wife to John Williams. $910.

John M. Walkins to George S. Wright. $1,200.

Charles Burns and wife to Eliza Heller. $2,000.

George H. Crossman and wife to Israel T. Bowman. $1.

Asa Gillette and wife to Mary C. Cillette. $696.

June 7.

A. A. Jewett and wife Siraphina Cannon. $1,400.

Elizabeth Kaestle to Casimer Kaestle. $5.

Harmon J. Miller and wife to John B Talcat and wife. $500.

A. J. Marvin and wife to Nathaniel Bragg. $1.

Wm. Buddup and wife to Victorine Ball. $2,200.

Julia F. Gray to E. D Surton. $1.

Lucien L. Bishop, exr., to same. $750.

John Coleman and wife to Eliza Merrills. $850.

Sebastian Fieg and wife to Daniel Walter. $475.

Luther Moses and wife to Fannie Moses. $1,600.

Lucretia Robbins to Thomas Richmond and wife. $3,000.

L. J. Talbot and wife to Margaret L. Jones. $640.

Wm. R. Townsend and wife to Alfred T. Newton. $432.

George P. Vetter and wife to John F. Bente. $1,400

Andrew J. Foster and wife to V. C. Taylor. $2,100.

V. C. Taylor and wife to Mary A. Foster. $2,100.

Robert Gane to Lorinda Bancroft. $1,600.

Henry Haines and wife to George A. Galloway. $1.

Louisa C. Hayward and husband to Florence S. Cain. $2,500.

June 9.

J. V. Chapek, adm. etc., to Vaclav Humel. $2,000.

Same to Joseph Fanta. $2,000.

Adam Eyerdam and wife to Barbara Eyerdam. $1,500.

Carrie E. Hastings to Caroline Mathews. $4,500.

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George E. Hartnell and wife et al. to John Vrana and wife. $315

Vaclav Humel and wife to Anna Fauta. $600.

Daniel Johnson and wife to Elizabeth Thomas. $1,500.

Anna Longmaier and husband to Maria Kukral. $1.

J. Mandlebaum to James Jordan. $92.

James Nowak and wife to Joseph Klima and wife. $1,500.

Joseph Nawratil and wife to Paul Sieg and wife. $545.

J. B. McMillan to R. H. Heinton. $876.

Thomas Roach, Jr., and wife to John D. Jeffries. $925.

L. J. Talbot and wife to Abbott & Emerson. $720.

Kate F. Barnes and husband to Fred H. Snow. $3,000.

John W. Clark to John Mullally. $85.

June 10.

Patrick Gibbons and wife to Samuel Gynn. $500.

George B. Hickox et al. to L. W. Ely. $640.

Charles B. King and wife to James M. Hoyt. $1.

Joseph Keely and wife to George Kalb and wife. $750.

Mathias Nicola and wife to Stephan Rychtarik. $500.

A. A. Pope, trustee, and wife to Philip Anthony. $1,350,

Nancy Perkins to Eliza A. Nichols. $1,000.

Sophia Schlick to Philip Amon. $725.

Anna L. Whitney and husband to Robert Clement. $1,500.

Edmund Walton to Wm. Eastwood. $1,700.

Joseph J. Blatt and wife to Gabriel Futig. $1,040.

Michael Cassey and wife to John Barrett. $1.

James Eastwood to Edmund Walton. $1,600.

June 11.

John Guien and wife to Wm. Guien. five hundred dollars.

G. E. Herrick and wife to Mrs. Rosina Brown. Forty-two hundred and ninety-five dollars.

Geo. E. Hartwell and wife et al. to Frank Prakes. Five hundred and twenty-five dollars.

James M. Hoyt and wife et al. to the Board of Education of Newburgh Township. Four hundred and fifty dollars.

Jacob Mandelbaum to P. J. Morrisey et al. One hundred dollars.

James Pator and wife to Mary Pator. One hundred dollars.

Same to same. Eight hundred dollars.

John Rock and wife to Rosine Brown. Seventy-five cents.

J. C. Ransom et al. by Felix Nicola. Mas. Com. to First National Bank of New London. Five hundred and sixty-five dollars.

Philip Ammon and wife to Victoria Carle. Eight hundred dollars.

James Brown and wife to John Nokes. One thousand dollars.

John Nokes and wife to Rebecca Brown. Eighteen hundred dollars.

June 12.

The Citizens' Sav. and Loan Association to Lord, Bowler & Co. $4,500.

John Hall and wife to Joel Hall. $100.

James M. Hoyt and wife to Ann McGarry $720.

Ann and George Neville to C. and W. Wilker. $2,200.

Bridget M. McVey to Conrad Beck. $400.

A. M. Poe to Ella M. Poe. $1,500.

Albert Vanderwise and wife to Sarah Arker. $500.

Wm. H. Beaumont and wife to W. P. Johnson. One dollar.

T. J. Clewell to John Alexander. Seven hundred dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending June 13th, 1879, against the following Persons.

June 7.

Gustav Matzaun. $220.

June 11.

Justin L. Cozad (as surety). $4,927.30.

COURT OF COMMON PLEAS.

Actions Commenced.

15211. E. Rosenfeld vs Adam Leipel. Money only. W. H. Gaylord.

15212. A. K. Spencer vs Fred C. Goff et al. Money and relief. Ingersoll & Williamson.

15213. Wm. T. Smith et al. vs F. Ohmenhausen. Money only. George C. Dodge, Jr.

June 6.

15214. Casper H. Fath vs Jacob Zimmerman et al. Money and to subject land. Stone & Hessenmueller.

June 7.

15215. Seymour Sexton et al. vs James S. Hasmer et al. To Foreclose mortgage. Jones & Murray.

15216. Eliza Smith vs Gertrude Shafer et al. Equitable relief. Hord, Dawley & Hord.

15217. Henry Keller vs Moses G. Watterson et al. Injunction and relief. Grannis & Griswold.

15218. Same vs same. Money only. Same.

15219. A. L. Robinson vs George Tracy et al. Appeal by defts. Judgment May 22. Foster, Hinsdale & Carpenter; W. B. Sanders and B. A. Angel.

15220. The National Life Insurance Co. vs H. F. Leypoldt. Money only. R. J. Winters.

15221. Wm. R. Pearson vs Louis Bohmer. To subject land. Brooks & Hawkins.

15222. Adolph Meyer vs Robert Beggs et al. Money and to subject lands. S. A. Schwab.

15223. James Wade, Jr., et al. vs Ide Frerichs et al. Sale of mortgaged premises and relief. James Wade.

15224. Wm. Murphy vs The Berea Stone Co. Money only. Street & Bentley.

15225. Alvira Cobb vs W. H. Radcliff et al. Money only. Ball & Raynolds.

15226. Frederick Spengel vs Joseph Comsky et al. Money, to subject lands and relief. A. Zehring.

15227. Anna Kilfoyl, guard., etc., vs Fred W. Pelton. Money only. Grannis & Griswold.

15228. Amasa Stone vs same. Same. Same.

15229. Eleanor L. Creighton vs same. Same. Same.

15230. Wm. V. Sked vs Levi Bauder, Co. Aud., et al. Injunction and relief. Grannis & Griswold.

25231. Paul Kinsvater vs Fred W. Pelton. Money only. Grannis & Griswold.

15232. Christian Fay vs Thomas Patterson et al. Money and equitable relief. Mix, Noble & White.

15233. Wm. H. Price vs Jabez Stoneman et al. Money only. N. A. Gilbert.

15234. In re Herman Herschovitz for change of name. For change, etc. Willson & Sykora.

15235. I. H. Moses vs Kenneth McKenzie et al. Money and to subject land. P. H. Kaiser.

15236. In re Jessie N. Shourds et al. vs Kingsley Chapel. For exchange of lands. Foster, Hinsdale & Carpenter.

15237. Seymour Sexton et al. vs James S. Hosmer et al. To foreclose mortgage. Jones & Murray; Henderson & Kline, H. J. Caldwell, Gage & Canfield, E. W. Goddard, Emery & Carr, Hutchins & Campbell, George S. Kain, J. W. Tyler, Bernard & Beach, C. W. Coates, Wm. K. Smith, L. J. Rider, T. H. Graham, Caskey & Canfield, S. M. Stone, T. K. Bolton, D. Z. Herr, W. I. Hudson.

June 9.

15238. Tom. L. Johnson vs the West Side Street Ry. Co. Equitable relief and injunction. George A. Groat.

15239. J. G. Pomerene vs Patrick Smith. Appeal by deft. Judgment May 12. ——; C. L. Fish.

15240. The State of Ohio ex. rel. J. S. M. Hill vs the L. S. & M. S. Ry. Co. Appeal by deft Judgment May 10. Marvin, Taylor & Laird; Andrews and Mason.

15241. Same vs same. Same. Same. Same.

15242. Same vs same. Same. Same. Same.

15243. Same vs same. Same. Same. Same.

15244. Same vs same. Same. Same. Same.

15245. Same vs same. Same. Same. Same.

15246. Same vs same. Same. Same. Same.

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15247. Same vs same. Same. Same. Same.

15248. Same vs same. Same. Same. Same.

15249. Same vs same. Same. Same. Same.

June 10.

15250. John Eichenberger et al. vs Pauline Schwarz et al. Error to J. P. Stone & H.; John T. Sullivan.

15251. Mary May et al. vs Maggie Schrauf et al. Money only. George Schindler.

15252. P. C. Dooley vs Harriet Martin. Error to J. P. J. T. Sullivan; A. Benjamin.

15253. Samuel J. Wannamaker vs H. H. Baxter. Appeal by defendant. Judgment May 15. Andrew J. Sanford; Wm. B. Sanders.

15254. Arthur Hughes vs Henry S. Davis et al. Money only. Caskey & Canfield.

15255. Joseph Piel, surviving partner, etc., et al., vs Henry Kramer et al. To adjust liens and to procure a sale of real estate. Weed & Dellenbaugh.

15256. Andrew Kreugel et al. vs T. D. Crocker. Money only. P. F. Young and Willson & Sykora.

June 11.

15257. S. A. Narian, exr., vs F. W. Strateman. Appeal by deft. Judgment May 23.

June 12.

15258. A. C. McConnell vs Mrs. Ann Kilfoyl, guardian, etc. Appeal by defendant. Judgment June 2. J. M. Stewart; Prentiss & Vorce.

15259. Charles L. Epps et al. vs Carl Seyler. Money only. M. R. Keith.

15260. Alfred Eyears vs G. F. Lewis. Appeal by deft. Judgment May 24. John C. Coffey; Ranney & Ranneys.

15261. P. R. Everett et al. vs Frederick Baumer. Appeal by deft. Judgment May 21. Weed & Dellenbaugh; J. T. Logue.

Motions and Demurrers Filed.

June 6.

2668. Reuscher vs Reuscher et al. Motion by plff. to require deft. John Reuscher to make his answer more definite and certain.

2669. Same vs same. Motion by plff. to require Stone & Hessenmueller to make their answer more definite and certain.

2670. Wick & Co. vs Schmidt et al. Motion by deft. Schmidt to strike out from 1st cause of action in petition as redundant and irrelevant.

2671. McCurdy et al. vs The Cleveland Hazard Hame Co. et al. Demurrer by deft. J. G. W. Cowles to 1st and 2d causes of action in the petition.

2672. Same vs same. Same by J. J. Brooks.

2673. Same vs same. Same by L. P. Brown.

2674 Same vs same. Same by Reuben Yeakel.

2675. Talcott vs Hughes et al. Motion by plff. to confirm report of referee.

June 7.

2676. McCurdy vs the Cleveland Hazard Hame Co. Demurrer by defendant T. D. Crocker to 1st and 2d causes of action in the petition.

2677. Sand vs Sirls et al. Demurrer by deft. to the petition.

2678. Tyler vs Edwards et al. Demurrer by plff. to cross-petition of defts. Crane and Herrick, exrs.

2679. Schwartz vs Humphrey et al. Motion by deft. Humphrey to vacate judgment.

2680. Comstock vs Hall. Motion by defendant to strike petition from the files.

2681. Backus et al. vs Aurora Fire and Marine Ins. Co. Demurrer by deft. to 2d amended petition.

2682. Rogers vs Hughes. Motion by plff. to sustain exceptions to report of referee.

2683. Saunders vs Phelps. Qualified appearance by defendant and motion denying jurisdiction of court to enter default, decree, etc.

2684. Elwell vs Coe et al. Motion by defts. for a new trial.

2685. Moulton et al. vs same. Same.

2686. Miller vs Pennell. Motion by plff. for a new trial.

2687. Willson et al. vs Kopfston, alias, etc. Demurrer by Kopfston to the petition.

June 10.

2688. Thayer vs Hoagland. Demurrer to petition.

June 11.

2689. Strauss vs Weiskoph et al. Motion by plaintiff to make the answer and cross-petition of C. C. Baldwin more definite and certain.

2690. Hill vs Marsh et al. Demurrer by defendant John S. Van Epps to the petition.

June 12.

2691. Keenan vs The Hibernia Ins. Co. Motion by plff. for a new trial.

2692. Cain vs Newshuler et al. Motion by defendant L. Newshuler for a new trial.

June 12.

2693. Mercantile Insurance Company vs Marchand et al. Motion by plff. for a new trial.

June 13.

2694. Albrecht vs Gerling et al. Motion by plff. to dispense with advertisement in German paper.

2695. Harold vs Herald et al. Motion by deft. Deitz to dispense with advertisement in German paper.

2696. Collister et al. vs Myers et al. Motion by deft. Lamprecht to make petition more definite and certain.

2697. Gardner vs Teachout et al. Motion by deft. for a new trial.

Motions and Demurrers Decided.

June 7.

2352. } 2353. } State of Ohio ex. rel. Hutchins, Pros. Att'y., vs Hardy. Overruled. Deft. excepts.

2461. Stone vs Voges et al. Defendant has leave to amend answer within ten days.

2472. Kirby vs Beck et al. Sustained as to 1st defense, overruled as to others. Defts. except.

2643. Roberts vs Clark et al. Granted. Plff. has leave to amend.

2644. Hale & Co. vs Burgert et al. Stricken off.

2606. Prentiss vs Campbell et al. Granted. H. Clark Ford appointed receiver. Bond $200.

June 11.

2287. State vs McGinness et al. Sustained.

2373. } 2374. } Heinberger vs Court Pearl of the Rhine, A. O. F. Sustained.

2381. Archer vs Archer et al. Dismissed without prejudice.

2382. Same vs Coon. Same.

2389. Platt vs Reader et al. Stricken off.

2476. Caskey vs Johnson, guardian, et al. Overruled. Deft. excepts.

2487. Richmond vs Graves, admr. Overruled. Deft. excepts.

2520. Smyth vs Clymonts et al. Granted. Plff. excepts.

2559. Heiman vs Lawrence. Stricken off.

2566. Davis vs Heller et al. Overruled.

2592. Dalton vs Barchard. Granted.

2601. Lederer & Son vs Miller & Co. Sustained defendant excepts.

2629. Weber vs Tahle, Leave given to file affidavits by June 20.

2630. Tait vs Stevens et al. Sustained.

2652. Koningslow vs Voegtle et al. Sustained.

2653. Furniss vs Radinschewski et al. Overruled. Defendant excepts.

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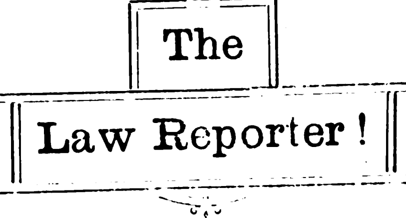

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The Cleveland Law Reporter.

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THERE will be no other assignment of cases in the Common Pleas court this term. Jurors will be discharged next Saturday, June 28th.

WE shall continue the publication of the LAW REPORTER upon the present plan until January, 1880. An effort will be made to secure for it a more general circulation among business men in this city, to whom the record matter which it contains cannot fail to be of interest. We are encouraged to believe that the effort will be successful.

SHORT-HAND AND BILLS OF EXCEPTIONS.—We take the following extract upon this subject from a decision by Judge Watson of the District Court of this county, made five years ago:

"It is said that something over 1800 years ago one man died for all; and I am strongly inclined to think from the looks of the records that are brought up here through the instrumentality of what they call a phonographer, that if he could be persuaded in some gentle way to die, or else to retire from this court, it would be a saving of the lives of all who happen to be called to review cases in this court. It is an absolute fact that, virtually and practically, cases are appealed from the Court of Common Pleas by having a phonographer here to report every word that is said by court, counsel and witnesses; and here is a case where two hundred and forty pages, if not more, have been inflicted upon us, and if the judge of the Court of Common Pleas was compelled to listen to what is recorded in those pages (and he was probably compelled to listen to a great deal more,) it is no wonder he didn't know how to decide a preliminary question on the construction of a contract. It is practically appealing every case into this court and compelling the District Court to pass upon the merits of the case, upon the testimony, instead of deciding upon questions of law. We stop this argument for the reason that we are satisfied that the court below misconstrued this contract, and we do not, as I said before, blame them for it."

It is no doubt often a severe trial of patience to judges to listen to the proceedings before them in the trial of causes. How much more patience-trying must it be to the reviewing court that is compelled to listen to a verbatim report of those proceedings. The great objection to a verbatim report for bills of exceptions is the fact that so much that is immaterial is incorporated in the record. The trouble is that the stenographer generally is allowed no discretion, not even the privilege of omitting repetitions, and it is just as true that in some instances it would not be safe to give him any. He is not supposed to be able to recognize the bearing of all the testimony, and it would not do to permit him to be the judge of what was material or immaterial. We think every case, in which it is important to preserve the testimony, should be reported, that trials ought not to be delayed for the purpose of taking minutes, and that bills of exceptions should contain only a condensed statement of the testimony, which can only be made satisfactorily from a full and accurate short-hand report.

It is hardly just to hold the stenographer responsible for errors committed by the court. And it is too late in the day to question the utility of short-hand in our courts. It is just as essential to have a stenographer

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to take minutes of the evidence as it is important to know accurately what the evidence is. A distinguished New York judge says: "I believe the system [short-hand reporting in courts] must become universal in the taking of evidence. It is liable to abuse when attorneys *print everything reported, however unnecessary,* because they are *too lazy* or *too timid* to *prune out what is not needed for review.*" We think the New York judge places the responsibility, where it belongs. It is the abuse and not the use of short-hand that should be complained of.

CUYAHOGA COMMON PLEAS.

MAY TERM, 1879.

ESTHER BYERS VS. JAMES FOREST.

Slander—Words Actionable per se, etc.

McMATH, J.:

This is an action for slander. The petition avers that the defendant spoke of the plaintiff as follows: "She is a blackmailer;" "She has already blackmailed five or six persons in the 18th ward;" "She has blackmailed persons before and settled the cases in justices' courts." To the petition the defendant demurs, because the words laid are not actionable.

Blackmail is defined to be a certain rent of money, coin, or other thing, paid to persons upon, or near the border, being men of influence, and allied with certain robbers and brigands, to be protected from their devastations, (Wharton's Law Lexicon, p. 101).

In common parlance it is equivalent to, and synonomous with extortion, —the exaction of money either for the performance of a duty, the prevention of an injury, or the exercise of an influence. It supposes the service to be unlawful, and the payment involuntary.

Not unfrequently it is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal, or offers to expose, the weaknesses, the follies, or the crimes of the victim. There is *moral* compulsion, which neither necessity nor fear, nor credulity can resist. It cannot be doubted, I think, that "blackmail" is universally regarded as an unlawful act, but is not a crime or misdemeanor or involving moral turpitude, known to our law as such.

An action can be maintained for words spoken of another imputing to her the act of blackmailing. No case has been cited in Ohio, settling this question, and hence it must be decided on general principles. What words, then, are on principle *per se* slanderous?

It may be said, in the first place, that all words, which impute to a party the commission of an act which is indictable, and a conviction of which will subject the party to an infamous punishment, are *per se* actionable, 13 Mass., 248, 6th O. S. R., 228.

These words do not describe a crime or offense known to our law. Words are actionable *per se* only when they impute an indictable offense, some infectious or loathsome disease, or affect a person in his office, trade, profession or calling. On an examination of the cases, such will be found to be the rule as to words actionable *per se.*

There is no rule that words imputing "great moral turpitude" are actionable, because the court may think that respectable, moral people, would not associate with a person guilty of the act charged. The words here alleged come within neither of these three classes, and hence are not actionable, unless the court proceeds to enact a new rule and declare this case as coming within it, and this we shall decline to do.

The demurrer in this case will therefore be sustained.

FORAN & WILLIAMS, for plaintiff.
R. A. DAVIDSON, for defendant.

[DISTRICT COURT.]

ASA HUDSON VS. S. P. WALCOTT ET AL.

Promissory Note—Notice of Demand and Non-Payment to Indorser when Transfer made after due, etc.

HALE, J.:

This was an action in the court below upon a promissory note which the plaintiff held against the maker, Walcott, and his immediate indorser, Burt. The note was transferred to the present plaintiff after it became due and several questions are made which appear in the record. The petition is in the ordinary form of a petition upon a note to charge a maker and indorser, alleging due demand of payment and notice of dishonor to the indorser. The answer is a general denial, denies that demand of payment and notice had been made; and set up that the name of Burt was put upon the note at the time it became due and long before it was transferred to this plaintiff simply for the purpose of placing the note in bank for collection, and that the note was transferred to the present holder under a distinct agreement that there should be no liability upon Burt as indorser. There is no reply to that answer. In this state of the pleadings the case came on for trial. The tendency of the testimony is only set out. It appears that Burt and Hudson reside in this city; that Bird became indebted to Hudson, and having this note, then past due some sixteen months, desired Hudson to take it; that Hudson agreed to take the note if Wolcott said it was all right; and together they went to Kent, where Wolcott resided and where the note had been left at the bank, and took the note from the bank, but not finding Wolcott there they went to Ravenna and saw Wolcott. Hudson first interviewed Wolcott, making inquiry whether the note was all right or not, Wolcott telling him it was all right, that he could not pay it then but would pay it in thirty days. They return to Cleveland. The note is transferred to Hudson and a receipt given applying it upon the account.

Testimony was given on the part of Burt tending to rebut some of the testimony given on the part of the plaintiff.

The errors assigned in the record are, (1) the Court erred in admitting testimony offered on the part of the defendant against the objection of the plaintiff; (2) in the charge given to the jury; (3) in the refusal to charge the jury as requested by the plaintiff. The last error assigned I will consider first. The fifth request was this: "If the maker of an overdue note is insolvent and that fact is stated by the indorser to the indorsee at the time of the indorsement, then demand and notice is not necessary to make the indorser liable." Two or three authorities are cited by counsel for the plaintiff below which seem to establish the doctrine that a demand in such a case was not necessary; but the weight of authority is decidedly against that proposition—that although the maker be insolvent and the note is transferred after due that demand of payment and notice to indorser is essential to fix his liability, and in the refusal to give this request we do not think the Court erred. The fourth request presents a question of more difficulty. If the question of waiver could be properly made under the pleadings in this case we think that request was proper. The court below could only be justified in a refusal to give this fourth request on the ground that the question was not in the case.

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It is to be observed that in the petition there is an allegation that demand of payment had been made and notice of dishonor given to the indorser. The question is presented whether under the code, the petition containing an allegation of demand and notice, proof of a waiver on the part of the indorser of said demand and notice can be made on the trial. We are unable to find any authoritative decision by our Supreme Court upon this question. Swan in his Pleadings states that it cannot be done; that the facts, if it be demand and notice, or if it be a waiver, whatever facts are relied upon, must be pleaded; that the artificial rule known to the common law has been abrogated by the code. Under the common law system of pleading I suppose it was true that under an allegation of demand and notice an excuse could be given in evidence; whether a waiver could be or not I am not quite clear. I think the authorities are conflicting upon that proposition. Pomeroy, in his work upon remedies and remedial rights, who has struck nearer the spirit and philosophy of the code than any other writer I know of, states that under a code system of pleading it is no longer allowable to allege the performance of an act and then upon the trial prove an excuse for non-performance or a waiver of performance of the act. In support of that proposition he cites a case recently decided in the State of Missouri (52 Missouri) under a code with provisions in this respect similar to our own.

We are inclined to hold upon this question that under the code the fact should be pleaded, and the proof should correspond with the allegations. If then the proof failed to establish the allegations, then there is a failure of the proof.

We think there being only the allegations of demand and notice and the proof having gone, under the rule, to that allegation, on the claim on the part of the plaintiff that it tended to prove demand and notice, that this request was properly refused—because there was no such issue between the parties.

The first proposition was in these words and raises the question of the sufficiency of the demand: "If the jury find that Wolcott, the maker of the note described in the petition, was insolvent, and that Burt, the defendant, when he transferred it to plaintiff for a valuable consideration, and had made an effort to collect it of Wolcott and had failed, and if when he transferred it he said to the plaintiff, pointing to his indorsement, "This is the security I give you for the note," and the plaintiff said, "I will take it if Wolcott, the maker, says it is all right, and that he would pay it," or words to that effect, and then both plaintiff and Burt went to where Wolcott, the maker, was, and the plaintiff had a conversation with Wolcott, asked him if he could pay the note, and Wolcott in substance said that he thought he could pay it soon, or within about thirty days, and the plaintiff communicated to Burt this conversation, and said he would take the note, and then Burt handed him the note, being on the same day, and on the occasion of the visit of plaintiff and Burt to Wolcott to ascertain whether the plaintiff would take the note of Burt, that this state of facts was such demand of payment of the maker by plaintiff and notice to Burt of non-payment as would make him liable as indorser of the note of plaintiff without further demand and notice."

We think that demand of payment and notice of non-payment is essential to fix the liability of an indorser. This proposition assumes, that at the time, and we are asked to say, that this was a sufficient demand of payment of the maker by the present holder—a demand of payment before he owned the note, before the contract was completed by wich it was transferred. The Court was asked to say, assuming that a demand and notice was necessary, that that constituted a demand and notice. We think the Court very properly refused to give that request. The plaintiff requested the Court to charge the jury that if the jury found the facts as claimed by the plaintiff to be true, that there was a sufficient demand and notice under the circumstances te entitle the plaintiff to recover. This request was refused. It will be conceded, we take it, that that was too indefinite.

The Court charged the jury that the plaintiff, to entitle him to recover, must have been the owner of the note at the time the demand was made, and the plaintiff could not have been the owner of the note at the time the plaintiff talked with the maker of the note at Ravenna, if plaintiff had not then agreed to take the note, and that plaintiff's receiving the note immediately after said talk would not date back and make him the owner of the note at the time when plaintiff talked with Wolcott about Wolcott's being able to pay it.

The Court also charged the jury that if they found that on the 27th day of May, 1875, the plaintiff was the owner of the note, and the maker promised to pay it in thirty days, and the indorser agreed to the extension, then, in that case, demand on the maker must be made on the thirtieth day thereafter, without three days of grace and notice given as to the indorser Burt within a reasonable time thereafter; that a demand of payment on the 6th day of July following and notice of non-payment to the defendant Burt, the indorser, the next day thereafter would not be a sufficient notice to hold the indorser because both parties lived in the same neighborhood."

We have had more trouble with this charge of the Court than anything else connected with the case. There are certain expressions in that charge that could not be sustained if they stood alone. That a demand of payment upon one day and notice to the indorser upon the following morning was not sufficient. I do not think that is true. But let us see just exactly what this charge is: The talk at Ravenna, between these three parties, was on the 27th day of May, when it was agreed that this note should be transferred to Burt and Wolcott. The parties have given evidence pro and con of that transaction. Now, that proposition, when we free it from the non-essentials, is this: That when it became due on the 27th of May it was agreed between these three parties that the time upon this note should be extended for thirty days, then demand of payment and notice must be made on the thirtieth day; or, at all events, that it would not be good on the 6th of July, which would be some forty days after. Now, had nothing been said, no agreement made at the time that note was transferred, I entertain no doubt but that the rule would be this: that the demand must be made within a reasonable time, and notice given to the indorser that it stands substantially like a note payable on demand. We are not prepared to say that the Court erred in saying that demand on the 6th of July, under those circumstances, would not be sufficient, and that was the only demand that proof was given tending to show had been made, and hence, the whole proposition can be sustained. There is no error in this proposition if it be true that under the circumstances demand on the 6th of July was insufficient to fix the liability of the indorser.

We are disposed to hold that the Court did not err in the charge as given, and in refusing to give the charge upon that particular subject.

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The defendant also gave testimony tending to show, over the objections of the plaintiff which were overruled by the Court, that the plaintiff had agreed at the time of the transfer of the note to him, to take it at his own risk and was not to rely on the defendant Burt as an indorser. Now, as to the tendency of the testimony, the petition only alleged demand and notice on the 27th day of May. That we find to be before the plaintiff owned the note. We find that under the tendency of the testimony the demand upon that day was insufficient. No steps were taken to fix the liabili- of the indorser. We have held at the present term of the court that as between the immediate parties to the contract that the contract of indorsement is subject to explanation as to the intention of the parties. Had this case been tried upon the issue of a waiver of demand and notice on the part of the indorser we would have been troubled in sustaining this verdict, but on the issues made between the parties we find no error in this record, and the judgment will be affirmed.

HUTCHINS & CAMPBELL, for plaintiff in error.

W. I. HUDSON, for Asa Hudson.

B. W. HASKINS, for Burt.

MATTHIUS JEDLICKA VS. THE STATE OF OHIO.

Action upon Recognizance—Effect of Omission of Word from condition, etc.

TIBBALS, J.:

The action below was brought upon a recognizance entered into by Jedlicka and Prosek in a bastardy proceeding before a magistrate for the appearance of Jedlicka at the Court of Common Pleas. The defendant Prosek, while he admits the execution of this instrument attached, he denies the legal conclusion drawn. It is averred in the petition that the recognizance bound him to appear at the next term of the Court of Common Pleas. He says that the recognizance is indefinate, that it does not fix any time when he was to appear, and that he did appear at a subsequent term of the Court in compliance with the recognizance. A demurrer was interposed to that answer and sustained. The errors assigned are, that the petition is insufficient to constitute a cause of action, and the error of the Court in overruling the demurrer to the answer. The point made arises upon the condition of the bond, "the said Matthias Jedlicka shall personally appear before the Court of Common Pleas to be holden in and for the county aforesaid, at the first day of the term thereof." The word "next" before the word "term" is omitted. It is simply a question whether that word being omitted he was required to appear at the *next* term of the court.

No authorities have been cited upon either side that precisely settle this question. There are those which hold that such instruments are to be strictly construed; others which relax somewhat that rule. The statute provides in this class of cases that the party shall enter into an undertaking for his appearance at the *next* term of the court to be holden in the county. That this bond is indefinite in omiting the word "next" is certainly true; and we have come to the conclusion in view of all the authorities cited on both sides, that since the statute fixes the time at which the parties shall appear, of which he is bound to take notice, and requires him to appear at the first day of the next term; that this bond should be construed in the light of that statute and the two together should constitute the obligation that he entered into and that it makes the point sufficiently definite to hold him. We have therefore concluded to sustain this undertaking and affirm the judgment below.

JACKSON & PDUNEY for plaintiff in error.

WILLSON & SYKORA for defendant in error.

SUPREME COURT OF NEW YORK.

DECIDED APRIL 14, 1879.

CHARLES CRASKE, APPELLANT, VS. THE CHRISTIAN UNION PUBLISHING COMPANY, RESPONDENT.

Appeal from a judgment dismissing the plaintiff's complaint.

LEASE.—When a parol lease is void as being for more than one year, it becomes a lease from year to year from the date when such parol lease was made.

Prior to November, 1875, the plaintiff rented certain premises in New York city to the firm J. B. F. & Co., who in turn sublet a portion thereof to the defendant. In 1875 J. B. F. & Co. went into bankruptcy, and in November, 1875, their lease with plaintiff was cancelled. Defendant retained possession of its portion of the premises and entered into a parol agreement to take a lease for two and a half years. The lease, however, was never executed and the negotiations fell through.

In March, 1876, defendant notified plaintiff's agent that the premises would not be wanted. On the first of May, 1876, defendant moved out and sent the key to plaintiff's office, stating that the premises were surrendered. Plaintiff declined to accept the premises.

This action was then brought to recover the quarter's rent from May 1st to August 1st, 1876.

On the trial the complaint was amended so as to sue for the use and occupation.

At the close of plaintiff's case the complaint was dismissed.

Held, That the parol lease for a longer time than one year was void, but operated so as to create a tenancy from year to year. The dismissal seems to be based upon the theory that the lease expired on the 1st of May, 1876, because there was no time agreed upon, the parol lease being void.

This was an error. The statute, 1 R. S., 744, sec. 1, applies only when no time is agreed upon, which was not the fact here.

When the agreement rests in parol and the time is agreed upon but extends beyond one year, the term is limited to one year only, for which period the agreement is valid and binding under the statute. The consequence is, that for one year from the 1st of November, 1875, the defendant was bound by theagreement made.

Judgment reversed.

Opinion by Brady, J.; Ingalls, J., concurring.—*N. Y. Weekly Digest.*

SUPREME COURT OF MICHIGAN.

Trust Accepted by Proceeding Thereunder—Not Disturbed by Appointment of Administrator—Assignment of Notes by Operation of Trust.

DANIEL LYLE VS. ANDREW L. BURKE.

ERROR TO CASS.

COOLEY, J.:

(Abstract.) Plaintiff in error, as administrator upon the estate of William Burke, brought suit to recover the avails of certain promissory notes, and an additional sum of money which were the property of William Burke in his lifetime; and had been delivered to defendant for him as the purchase price of lands sold to one Smith. The notes were given by

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Smith, payable to William Burke's order. While the defendant held the money and notes William Burke executed and delivered to him a paper, the operation of which is here in question.

Held, 1. A trust is sufficiently accepted by proceeding to execute it.

2. A declaration of trust operates to assign to the trustee the notes from which the trust fund is to be raised, even if not indorsed to him.

3. A trust and not a mere agency is created by an instrument executed and delivered to another, and intrusting a certain specified fund in cash and notes to his "good faith and sound judgment—to use and expend the same as far as may be necessary for the comfortable support" of the party executing the trust and of his sister, during the remainder of their lives, the surplus, if any, to be divided among his heirs according t instructions.

4. Such trust remains in force so long as one of the beneficiaries is entitled to support, and cannot be distributed bythe appointment of an administrator of the maker of the trust.

Judgment affirmed with costs.

Spafford Tryon and F. Muzzy, for plaintiff in error.

O. W. Coolidge and N. A. Balch for defendant in error.

—*Michigan Lawyer.*

U. S. CIRCUIT COURT N. D. OF OHIO.

June 17.

3713. Schwenk vs The Hibernia Ins. Co. Answer filed.

June 19.

3841. H. O. Moses vs. The Arizona & New Mexico Express Co. et al. Amended bill filed making new parties defendants.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending June 20, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

June 14.

S. D. Barber and wife to Amasa Stone. $500.

Katie C. Cleaments and husband to Wm. J. Crowell. $1,000.

John George Gairing and wife to Casper Brickman. $400.

Margaret Heinlein and husband to Frederick Geiss. $400.

George J. Props and wife to Mrs. Elizabeth Stillmann. $381.

Thomas Cole and wife to Gustav C. E. Weber. $100.

Vaclav Zima and wife to Wm. Gaush. $250.

H. Harvey Pratt to Fred Mull. $250.

Barney McClernon et al. to John P. Humphrey. $500.

Joseph Mercer to Annie M. Harper. $760.

June 16.

Mathias Duovak to Joseph Sykora. $150.

The Cleveland Dryer Co. to Abel Fish. $1,450.

John Plog and wife to Henry E. Guentze. $300.

Anna Eliza Holmes and husband to Sarah E. Haines. $1,400.

John Reidy and wife to Henry Claus. $200.

Edwin H. Hawley to Augustus Binear. $450.

Frank Gleason and wife to S. S. Drake. $600.

David Z. Herr to Ulrich Gerber. $762.

John Katasek to Helen Dowse. $336.

Michael Nemes to same. $210.

Barbara Pecka to same. $260.

J. H. Yant and wife to R. C. White. $1,800.

Leopold Fruer to John Murray. $825.

Lydia A. Brinton to D. B. Auagst. $200.

John Barrett and wife to The Citizens' Savings and Loan Association. $600.

June 17.

George L. Leland to A. J. Rogers. $15,000.

L. Muermans and wife to Martina Ollsner et al. $800.

John Widmaier to Charles W. Moses. $1,500.

Fred Schlueter to George W. Canfield. $448.

Edward Flanagan to Henrietta Leckelsher. $1,600.

Elizabeth Cole to Telotsa Cutler. $1,900.

Isaac Strauss and wife to The Society for Savings. $1,500.

Henry C. Bull and wife to Edward Richards. $150.

Charles Schwendeman and wife to Leonard Haefele. $700.

Wm. L. Chamberlain and wife to Charles H. Bulkley. $100,000.

Joseph A. Horning and wife to Charles G. Schmidt. $500.

Fred Bohning and wife to Rosina Becka. $1,200.

Gabriel Fertig and wife to John J. Blatt. $1,000.

Wm Strangward to Ebenezer Ashby. $150.

Robert F. Paine and wife to Marindo H. Rickey. $4,022.

June 18.

Lorenz Sommer to Ernestine Heym. $650.

George Cooth and wife to The Soc. for Sav. $1,000.

George Percea to M. Wikedal. $2,000.

Julius Lambeck to E. C. Williams. $750.

Henriette B. Herman et al. to Jas. M. Hoyt. $6,750.

Wm. M. McBain and wife to Chas. B. Brook. $200.

John Koob and wife to Wm. Wutter. Three hundred dollars.

Mary E. Koss and husband to Thomas H. White, trustee. Two thousand five hundred dollars.

Same to same. Two hundred dollars.

David Pollock and wife to Moritz Reinhard. Two thousand dollars.

June 19.

Patrick Cassidy and wife to The Society for Savings. Four hundred dollars.

John Wagner and wife to Jacob Borger. One hundred and seventy-five dollars.

Joseph Masek and wife to Elizabeth Probet. Two hundred dollars.

Edward O. Qernon and wife to Wm. Gauch. One hundred and fifty dollars.

June 20.

Wm. H. Kees to John Hicks. Six hundred dollars.

Henry Sherbaum and wife to Wm. Hodly. Two hundred dollars.

Philo Moses and wife to Lizzie L. White. Four hundred and fifty dollars.

Mandane L. Worth and husband to Emily E. Warmington. Seven hundred and seventy-five dollars.

CHATTEL MORTGAGES.

June 14.

P. A. Searles to S. Brainard's Sons. $50.

J. W. McGarray to Merts & Riddle. $325.

Emma E. Hoyer to Keil Brothers & Hull. $80.

June 16.

George Rockert to S. N. Brainard. $110.

Kilian Fries to Elijah Fries. $200.

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Thomas B. Hilliard to S. V. Harkness. $559.

Henry Gentz et al. to Cleveland Paper Co. $239.

C. L. Wuestenberg to Elizabeth Bruch. $231.

June 17.

A. C. Christian to M. Silverstone. $22.

Robert J. McClane to David E. McLean. $300.

W. R. Bates and wife to Robert Streehan. $160.

Charles Voelker and wife to Jacob Voelker. $600.

Robert Holmes and wife to T. K. Bolton, agt., etc. $2,982.

Patrick Shean to W. D. Butler. $110.

Samuel Law to A. W. Bailey $150.

June 18.

Kittie Andra to Henry Hart. Fifty-nine dollars.

June 19.

Joseph Kroesner, Jr., to Henry Kroesner. Five hundred dollars.

George Von Metzsch to William D. Butler. Sixty-six dollars.

Hodge & Voight to S. M. Laser. One hundred dollars.

John Leitch to H. R. Leonard. Thirty-one dollars

John A. Weber to Mrs. Maria Weber. Four hundred dollars.

Henry Green to Wm. Johnston. Two hundred dollars.

June 20.

Henry Hamly to Sturtevant & Co. One hundred and nineteen dollars.

John Wetzel to A. W. Bailey. Twenty dollars.

Paul Noack et al. to John F. W. Noack. Two hundred dollars.

John Darley et al. to Conrad Deubel. Seventy-five dollarr.

H. J. Lance and wife to Wm. D. Butler. Seventy-four dollars.

Minnie Nolz to J. Krauss & Co. Ninety-five dollars.

B. F. Worthington to Eden Worthington. Four hundred dollars.

A. C. Jimerson et al. to A. S. Herenden Furniture Co. Eighty dollars.

John Dietz to same. Thirty dollars.

E. H. Colman to same. Ffty-eight dollars.

Philip Schlobohm to same. Thirty dollars.

M. B. McBeath to same. Forty-four dollars.

Michael Bosil to Striebel & Moore. Twenty-one dollars.

DEEDS.

June 13.

A. M. Poe to Ella M. Poe. $1,500.

Albert Vanderwyst and wife to Sarah Arker. $500.

Z. M. Hubbell to John Pierce. $240.

J. H. Luse to John Ellseser. $350.

Eliza J. Ransom et al. to Antoinette B. Yates. $1,300.

L. J. Talbot and wife to I. E. Hawood. $640.

June 14.

Mengee Gottman and wife et al. by Felix Nicola, Mas. Com., to Mary W. Heller. $1,000.

Charles Gates et al. to Reuben Gates. $1.

Joel Hall to Enoch Jacques. $800.

Conrad Kurst and wife to Daniel Alt. $75.

Frank A. Spencer, ass'ne., etc., to Wm. Given. $10.

Reed F. Clark and wife to James Muggleton and wife. $1,400.

Levi Booth and wife to Miriam W. Bateman. $2,000.

Same to same. $2,000.

Mary Dougherty and husband to Catharine McCarthy. $1.

Helen Douse to Michael Hemec. $310.

Same to Barbara Pecka. $310.

John C. Ely and wife to Albert B. Conkey. $2,000.

June 16.

Christian Engel and wife to Paolette Frazee. $100.

John B. Foster and wife to H. D. Stevens. $1,100.

Wilson Gant and wife to Joseph Sykora. $900.

Ezra S. Gillette and wife to M. O. Richardson. $600.

John Murray and wife to Leopold Feurer. $2,000.

Ransom Metcalf and wife to Maria Sheldon. $1,932.

Catharine McCarthy to Julius Dougherty. $$1,000.

Nickel Nickels and wife to Henry Romp. $1,200.

Marienne B. Sterling to John Barrett. $1,037.

Joseph Sykora and wife to Michael Surma. $540.

R. C. White and wife to J. H. Yant. $800.

Benjamin J. Hoadley and wife to E. H. Bush. $1.

E. H. Bush and wife to Mary E. M. Hoadley. $1.

Gary H. Bishop to M. J. Lawrence and wife. $2,500.

James Bryan and wife to T. H. and R. C. White. $1.

Helen Dowse to John Katasek. $412.

June 17.

Robert Harlow and wife to Sarah J. Harlow. $5.

Sarah J. Harlow to Abby J. Harlow. $5.

Clarissa Harris et al. to Patrick Patton. $357.

George S. Hickox et al. to Annie Rice. $400.

Same to Matilda Millington. $936.

James E. Lewis and wife to Solon C. Metcalf. $1,500.

Clarence M. Bixby, by Felix Nicola, Mas. Com., to M. A. Kneeland. $600.

M. A. Kneeland to John J. Nesbitt. $1.

John J. Nesbitt and wife to S. H. Kirby. $1,200.

Thomas Saunders to Jay Odell, trustee. $1.

Jay Odell, trustee, to Rebecca Saunders. $1.

Horace Patter to Solon C. Metcalf. $236.

Adam Drumm to Louisa Drumm. $50.

Louis Gaede to Franz Boes. $3,000.

George W. Canfield and wife to Fred Schluetes. $623.

J. T. Sullivan and wife to John Karr. $1.

Wm. Foss, by Felix Nicola, Mas. Com., to same. $1,000.

M. K. Brown to John Dipley. $200.

S. D. Collins and wife to John Rheinhardt. $50.

S. M. Cody and wife et al. to Jessie Chinnock. $1,150.

June 18.

Lizzie Bushman and husband to Augusta Hobbs. One thousand dollars.

David Burner and wife to Elizabeth Haune. Eight hundred and twenty-two dollars.

Thomas H. Collins and wife to John Fiala and wife. Two hundred and seventy-five dollars.

J. M. Curtiss and wife to Gottlieb Schultz. Seven hundred and twenty dollars.

Sebastian Feig and wife to Barbara Taylor. Five hundred dollars.

Reuben Gates and wife to Anna Huntley. Two hundred and sixteen dollars.

Same to Ruth Truman. Two hundred and twenty-five dollars.

Wm. H. Kees, adm., etc., to Theresa Moelek. Five hundred dollars.

Leonard Maurer and wife to Helen Lehr. Three thousand dollars.

Richard Morrow and wife to Frank D. Morrow. Two thousand dollars.

Marienne B. Sterling to Wm. M.

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McBain. Six hundred and thirty dollars.

Parley Sheldon to S. W. Wheelock. Three thousand dollars.

Alonzo F. Gardner, by C. B. Barnard, Mas. Com., to Mary A. Jones. Seven thousand seven hundred dollars.

Wm. Decker et al., by Thomas Graves, Mas. Com., to Mary L. Miller. One thousand dollars.

M. J. Holly by same to L. J. Miller. Six hundred and seventy-one dollars.

Mrs. Louisa J. Smith et al., by E. B. Bauder, Mas. Com., to Walter D. Travis. Two thousand eight hundred and eleven dollars.

June 19.

Julia F. Brown to E. E. Braukman. One thousand eight hundred and thirty dollars.

C. L. Barnes and husband to W. A. Knowlton. One hundred and fifty dollars.

Lewis Brooker et al., heirs, etc., to George Sage. Four hundred and fifty dollars.

George Sage and wife to Edward P. Clark et al. Two thousand dollars.

Charles Cheswauke and wife to John Kolb. One thousand dollars.

Jacob Gerstemaier to E. Stoneman. Eight hundred dollars.

James M. Hoyt and wife to Herman Junge. Nine hundred dollars.

Same to John Walsh. One thousand and fifty dollars.

The Howe Machine Co. to Alex. Hill. Four hundred dollars.

Joseph Kowelka and wife to Mathias Doora. Eight hundred dollars.

Nicholas Meyer and wife to F. G. Babcock. One thousand two hundred and fifty-four dollars.

Theresa Moelcke to Jacob Lobs. Two hundred and sixty dollars.

Michael S. Robertson to T. G. Davey. Three hundred and sixty dollars.

Lucy A. Shoemaker to W. W. Beelford. Fifty dollars.

Joseph Sykora and wife to Mat Davorak. Five hundred dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending June 19th, 1879, against the following Persons.

June 14.

Fred C. Goff. $12,167.13.
J. T. McAninch et al. $796.20.

June 16.

Thomas Elwood. $360.46.
Henry T. Brown. $1,230.02.
S. G. Sims. $10,078.83.
Seigfreid Schwanger. $438.

June 19.

John Widmaier. $505.20.

ASSIGNMENT.

June 18.

John Widmaier to Henry Pomerene. Bond $2,000.

COURT OF COMMON PLEAS.

Actions Commenced.

June 13.

15262. Allin Gulliford vs Ira Culver. Appeal by deft. Judgment May 24. Ingersoll & Williamson; F. R. Merchant.

15263. In re 1st Congregational Church Society of Brooklyn for leave to mortgage church property. For leave, etc. Otis, Adams & Russell.

15264. Francis Kirk vs Adam M. Poe et al. Money and foreclosure. F. W. Weismann.

15265. Marienne B. Sterling vs John H. F. Maxhall. Equitable relief, sale of land and restraining order. M. M. Hobart.

15266. John Kingsborough vs the canal boat "Clipper." Appeal by deft. Judgment May 28. Ball & Raynolds; J. M. Stewart.

June 14.

15267. John H. Bogrand vs Sullivan S. Wilson. Att. certificate from J. P. E. W. Maxson.

15268. In re change of name of the —— Horse Nail Co. by William Chisholm et al. For change of name. Bernard & Beach.

15269. Alexander McIntosh vs John Gamble et al. Money and to subject land. J. B. Buxton; Stone & Hessenmueller.

15270. Mesach Thomas et al. vs Jacob Job et al. Relief. H. T. Corwin.

12571. Wm. Mack vs Eliza Sewell et al. Money, to subject lands and for relief. T. H. Biermann; Willson & Sykora.

15272. J. F. Freeman vs James Fitch et al. Money and to charge lands. Otis, Adams & Russell.

15273. George Ohl vs J. T. McAnish et al. Cognovit. Foster; Hinsdale & Carpenter; Arnold Green.

15274. Breemaker-Moore Paper Co. vs A. W. Fairbanks et al. Equitable relief. D. A. Matthews; Charles D. Everett.

15275. Smith & Curtiss vs Hannah Koerpel et al. Money only. M. M. Hobart.

15276. Friedericke Wendt vs L. Umbstaetter et al. Money and to subject lands. J. A. Smith.

15277. Casper H. Fath vs Simon Berk et al. Money and relief. Johnson & Schwan; Mix, Noble & White, P. P.

15278. Jacob Hoehn vs Anna M. Sirl. Money and equitable relief. Robison & White.

15279. Maria Donnelly, guardian, etc., vs Mary E. Praley et al. Acc't., appointment of receiver, injunction, and for relief. N. A. Gilbert.

15280. W. S. Jones vs Sabina C. Gabriel et al. To foreclose mortgage and relief. N. A. Gilbert.

15281. S. W. Kirby vs same. Same. Same.

June 16.

15282. In re petition between Charles Wallace Heard et al. legatees and devisees under the will of Charles W. Heard, deceased, etc. Amicable partition. S. O. Griswold; J. K. Hord.

15283. John Bahls vs Fred W. Pelton. Money only. Grannis & Griswold.

15284. George W. Ott vs same Same. Same.

15285. J. T. Avery vs same. Same Same.

15286. Wm. Oxford vs Wm. Baker et al. Money and to subject lands. Estep & Squire.

15287. Jamie Clark vs Lewis Clark. Equitable relief. J. M. Stewart.

15288. Frederick Voegt vs O. F. Hodge et al. For appointment of receiver and for equitable relief. Louis Weber and Arnold Green.

June 17.

15289. Frank Boes vs Wm. Stockinger et al. Money, to subject lands and equitable relief. Peter F. Young and Louis Weber.

15290. Charles P. Born, survivor, etc., vs The Little Mountain Ass'n. Money only. Grannis & Griswold.

15291. C. H. Rodig vs Michael Becker. Money only. E. Sowers.

15292. E. N. Parks vs L. B. Whitney et al. Appeal by defts. Judgment May 21. J. W Stewart; S. C. Coffey.

15293. Richard Edwards vs J. M. Dean. Appeal by deft. Judgment May 20. Foster, Hinsdale & Carpenter.

15294. Second National Bank of Cleveland vs Charles D. Gaylord et al. Appeal by deft. Judgment May 19. Grannis & G.; W. E. Cushing.

15295. Woodward Awl as trustee, etc., vs John T. Deweese et al. Money only. Bishop, Adams & B.

June 18.

15296. Lucas Allen Heard et al. vs Charles Wallace Heard. Partition. R. F. Paine and J. K. Hord; S. O. Griswold.

June 19.

15297. George Brands vs Fred W. Pelton. Money only. Grannis & Griswold.

15298. Peter Deimer vs same. Same. Same.

15299. Frederica Deimer vs same. Same. Same.

15300. Ann Lewis vs same. Same. Same.

15301. Wm. Tompkins vs same. Same. Same.

15302. Harriet L. Martin vs John Garwood. Appeal by deft. Judgment June 5. A. Benjamin; George Schindler.

15303. In re final settlement of Robert McLauchlin, trustee, vs James A. Price, a minor, etc. Final settlement. Estep & Squire.

15304. Lewis Heninger vs Morand Jud et al. Money and to subject land. Stone & Hessenmueller.

15305 C. A. Knecht et al. vs John Wedmaier. Estep & Squire; Richard Bacon.

15306. City of Cleveland vs George Lenze et al. Money only. Heisley, Weh & Wallace.

15307. Same vs George Lenze. Same. Same.

15308. John H. Gause et al. vs John Weidmaier & Co. Money only. Safford & Safford.

15309. In re application of Elias Sims for writ of habeas corpus. Habeas corpus. George L. Chapman.

15310. Philip Sutorius et al. vs Fred

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W. Pelton. Money only. Grannis & Griswold.

1511. John Rock et al. vs same. Same. Same.

Motions and Demurrers Filed.

June 13.

2698. Mintz et al. vs Garham et al., exrs. etc. Motion to require plff. to give bail for costs.

2699. Cain vs Newshuler et al. Motion by plff. Mayer for new trial.

2700. McDonald vs Schwan et al. Motion by defendant Brunn to dismiss appeal.

June 14.

2701. Blum vs Kees et al. Motion by deft. Kees to strike the amended petition from the files.

2702. Penfield vs Fitch et al. Motion by deft. Fitch to require plff. to make amended petition more definite and certain.

2703. McMorran vs Brockway. Demurrer by plff. to the answer.

2704. Otis vs Robinson et al. Demurrer by defendants to the amended petition.

2705. Mills vs Grasselli et al. Motion by plff. for new trial.

2706. Wick & Co. vs Schmitt et al. Demurrer by defts. to the petition.

2707. Richmond vs Graves, admr., etc. Demurrer to the petition.

2708. Risser vs Libby. Motion by deft. to strike answer from the files.

2709. Schoonmaker vs Burt et al. Demurrer by deft. Burt to the petition.

2710. Same vs same. Demurrer by deft. Claflin to the petition.

2711. Bingham et al. vs The City of Cleveland. Motion by plaintiffs for new trial.

2712. DeWolf vs Sherman. Demurrer by deft. to the petition.

June 16.

2713. Williams vs Cohen et al. Motion by E. J. Weil, receiver, for order to insure building.

2714. Telschow vs Stosky et al. Motion by defts. to dispense with advertising sale in German paper.

2715. The Cleveland Paper Co. vs The Celtic Index Pub. Co. Motion by plff. to confirm report of referee and for a decree accordingly.

2716. Wenham vs Nichols et al. Demurrer by plffs. to 1st, 2d and 3d defenses of answer of Catharine Nichols.

2717. Hills vs Higby et al. Motion to require defts. to give a new undertaking for appeal.

2718. Shelly vs Hogan. Motion by deft. for new trial.

2719. Baker, exr., etc., vs estate of Jos. B. Lyon, dec'd. Motion by plff. for a new trial.

June 17.

2720. Williamson, trustee, vs Lake View & Collamer Ry. Co. et al. Motion by sundry defts. to set aside order authorizing receiver to sell engine, or if same has been sold to refuse to confirm the same and set aside such sale.

2721. Byers vs Forest. Motion to require plaintiff to give security for costs.

2722. Jones vs Wheelock et al. Motion by plaintiff for the appointment of a receiver.

June 18.

2723. Koerth vs The Hibernia Insurance Co. Motion by defendant for a new trial.

2724. Alber vs Froelich et al. Demurrer by defts. to the petition.

2725. Williamson, trustee, vs Lake View & Collamer Ry. Co. et al. Motion by J. H. Rhodes, receiver, for authority to buy a new locomotive, etc.

2726. Dangleheisen vs Alexander, admr. etc. Motion by defendant Eliza Voltz to confirm report of J. D. Cleveland.

2727. Liberty Lodge No. 3. A. O. G. F., vs Young et al. Motion by plff. for the appointment of a receiver.

June 19.

2728. In re settlement of Robert McLauchlin, trustee, vs Price, a minor, et al. Motion by trustee to refer his final report to J. D. Cleveland as special master, to confirm report and discharge trustee.

2729. Gilmour vs Pelton et al. Demurrer by defts. Pelton and Benedict to cross-petition of Alexander.

2730. Gay vs Gay et al. Motion by defts. to vacate and set aside verdict and for new trial.

2731. Mintz et al. vs Gorham et al., exrs. Motion by defts. for a new trial.

Motions and Demurrers Decided.

June 14.

2216. Hacket et al. vs Streator. Dismissed without prejudice.

2346. Williams vs Singer Man. Co. et al. Granted.

2352. Lesley et al. vs Mueller, etc. Defendant has leave to answer instanter.

2472. Kirby vs Beck et al. Defendant TePass has leave to reply within ten days.

2477. Schmeidling vs Bucher et al. Overruled. Deft. excepts

2505. Anderson et al. vs Pach et al. Sustained. Plffs. have leave to amend within ten days.

2525. Crawford vs Mills. Granted. Plff. excepts.

2530. Byers vs Forest. Sustained.

2576. Stone vs Southern et al. Sustained.

2590. Morton vs Gaul et al. Sustained.

2608 } 2609 } Jones vs Wheelock et al. Stricken off.

2610. Hacket et al. vs Streator. Overruled. Plffs. except.

2613. Soc. for Sav. vs Kannon et al. Overruled. Plffs. except.

2615. O'Neill vs Cox et al. Granted.

2619. Colbert vs Becker. Granted.

2632. Smith vs Baker et al. Sustained. Defts. except.

2638. Little vs Geissendorfer et al. Stricken off.

2660 } 2661 } Deubert vs Beznowska. Sustained.

2664. Otis vs Robinson et al. Stricken off.

2670. Wick vs Schmidt et al. Withdrawn. Deft. has leave to file demurrer instanter.

2694. Albrecht vs Gerling et al. Granted.

2695. Harold vs Harold et al. Granted.

June 16.

2713. Williams vs Cohen et al. Granted.

June 18.

2339. Williams vs the C. C. C. & I. Ry. Co. Overruled.

2368. Little vs Lewis et al. Sustained. Defts. except.

2433. Eberhard vs Morlach et al. Sustained.

2466. Alexander vs Treacy. Overruled.

2585 } 2586 } Spencer vs Shiely, admx., etc. Overruled. Plff. excepts.

2622. Clewell Stone Co. vs Cleveland City Forge and Iron Co. Overruled. Plff. has leave to reply by July 5.

2714. Telschow vs Stosky et al. Granted.

June 19.

2728. In re settlemant of Robert Mc Lauchlin, trustee of Sames A. Price. Granted.

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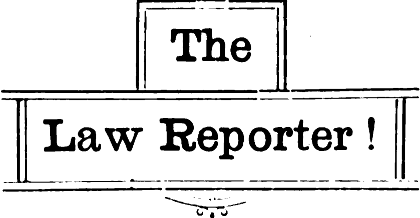

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A WELL ATTENDED Bar meeting was held at Common Pleas Court room No. 1, on Friday, at 4. P. M., to take appropriate action upon the death of William P. Rogers, Esq., of this city, which occurred at Waynesburgh, Ohio, on the 25th inst.

N. A. Gilbert was chosen president and H. M. Hobart secretary.

Remarks were made by Messrs. E. M. Brown and E. J. Ryder upon the character of the deceased, which we omit for want of space.

The following resolutions were adopted:

Whereas, Death has removed from our numbers our esteemed friend and brother William P. Rogers in the prime of life.

Resolved, That the members of Cuyahoga County Bar deplore the loss of one who has shown himself a gentleman, a scholar, and a worthy member of the profession.

Resolved, That we tender our heartfelt sympathy to his bereaved family in this their hour of affliction, and that a copy of these resolutions be transmitted to the parent of the deceased.

Resolved, That a Committee of one be appointed to request leave of the Court to spread these resolutions on its journal.

M. M. HOBART,
MONTAGUE ROGERS,
W. A. BABCOCK,
Com. on Resolutions.

To the Editor of The Law Reporter:

In recent issues of your paper you have given place to some interesting articles on the Roman Civil Law. In one or two of them the writer speaks of the *Pandects* as "a mine of legal wisdom." I assume that he is not giving us hearsay testimony on that subject,—that he is in possession of that "mine,"—and would suggest that he extract therefrom from time to time, as may suit his convenience, some of that "legal wisdom" for publication in future issues of your paper. I make this suggestion for the reason that there is a wonderful dearth of that commodity in certain quarters, which possibly may be due to the fact that no great part of the *Pandects* has ever been translated into English. Let the experiment be tried. It may accomplish much good.

COSHOCTON COMMON PLEAS.

APRIL TERM, 1879.

ALFRED AVERY VS. MAGDALENA ROYER ET AL.

[AFFIRMED AT JUNE TERM OF DISTRICT COURT.]

Ejectment—Relief of Occupying Claimants, etc.

VOORHES, J.:

On the 20th day of March, 1878, the plaintiff filed his petition in the Court of Common Pleas of Coshocton county, against the defendants, claiming that he had the legal title to, and was entitled to the immediate possession of the following real estate, in said county, to-wit: The S. W. ¼ of N. E. ¼ sec. 23, Tp. 4, Range 6—41 acres; also the N. W. ¼ of N. E. ¼ of said sec. 23, containing 40 acres; also 70 acres in the 3d quarter Tp. and 6th Range, described by metes and bounds in his petition. He avers that the defendants on the 1st day of October, 1875, unlawfully and wrongfully took possession of the same, prayed for judgment for possession and damages.

To the petition the defendants filed their answer, denying that the plaintiff owned the legal estate, or any estate whatever in the said premises, or that he was entitled to the possession thereof.

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At the February term, 1879, the case was tried and judgment rendered in favor of the plaintiff. That he was entitled to the possession, and that he recover the sum of $10.00 for the wrongful detention thereof by the defendants.

Whereupon the defendants filed their motion asking further proceedings under the statute for the relief of occupying claimants upon the lands set forth in said petition, and for the valuation of the improvements by them made upon the same.

The statute of 1878, page 766, provides "That a person in the quiet possession of lands, or tenements, and claiming to own the same, who has obtained title to and is in possession of the same, without fraud or collusion on his part, shall not be evicted or turned out of possession by any person who sets up and proves an adverse or better title, until the occupying claimant or his heirs, are fully paid the value of all lasting and valuable improvements made on the land by him, or by the person under whom he holds, previous to receiving actual notice by the commencement of suit on such adverse claim whereby such eviction may be effected, unless such occupying claimant refuse to pay the person so setting up and proving an adverse and better title, the value of the lands without improvements made thereon as aforesaid, and upon demand of the successful claimant or his heirs, as therein provided." One of the provisions is, "when such occupying claimant holds the same by deed, devise, descent, contract or agreement from and under a person claiming title as aforesaid, derived from the records of a public office or by deed duly authenticated and recorded." Section 10 of same act provides, "That the court rendering judgment against the occupying claimant in any case provided by said act, shall at the request of either party cause a journal entry thereof to be made, and thereby the right to have a jury to assess the value of all lasting and valuable improvements is secured and the parties entitled to have such other and further proceedings to that end as is provided in the law."

The question now recurs, have these defendants shown that they are entitled as against the plaintiffs to have an assessment of the value of the improvements made upon the lands in the petition described. To determine this, we must inquire into the respective titles and claims to title of this land as made by these parties.

The parties both claim title from one Daniel Welch; the plaintiff by operation of law, and the defendants by the act of the parties.

The plaintiff claims that Joseph E. Williams and others filed their petition in the Court of Common Pleas of Summit county, Ohio, in October, 1853, against said Daniel Welch. That such proceedings were had thereon, that they recovered a judgment against Welch in December, 1853, for the sum of $186.77. An order of sale was issued by the Clerk of Summit county Common Pleas on the judgment, on the 13th day of May, 1861, directed to Sheriff of Coshocton county, Ohio, who on the 24th day of June, 1861, sold said premises to William H. Upson and N. W. Goodhue, trustees of Henry L. Crowell, Babcock & Hurd, Avery, Hilliard & Co., and H. K. Wells, for the sum of $1,334. This sale was confirmed by Summit Common Pleas, at November term, 1861, and the Sheriff of Coshocton county ordered to make to the purchasers a deed for the premises so sold. Afterwards, at the January term, 1876, the Court of Common Pleas of said Summit county, ordered the Sheriff to make a deed to Goodhue & Upson, trustees as aforesaid, and in pursuance to said order the Sheriff of Coshocton county made a deed to Goodhue & Upson, dated March 13th, 1876. On the 27th day of March, 1876, Goodhue & Upson conveyed to Alfred Avery, the plaintiff, the premises in controversy.

The defendants claim title to the same premises by chain of title from Welch, as follows:

Said Welch and wife, by deed bearing date on the 23d day of June, 1868, conveyed the same to Hall, Marvin & Hoy; the two former one undivided one-half, and the latter an undivided one half, which deed was duly recorded June, 25th, 1868. On the 18th day of November, 1869, Hoy and wife conveyed the undivided one-half to Joseph Royer, which was duly recorded December 7th, 1869. On the 19th day of June, 1872, Hall & Marvin, joined by their wives, made a deed to Joseph Royer for the other undivided one-half, which was recorded October 19th, 1872.

Royer and his wife, on the 21st day of May, 1874, made a deed to John Berdenkercher for the whole premises, and this deed was duly executed and recorded June 5th, 1874. John Berdenhercher and wife on the 17th day of June, 1874, deeded the same premises to Magdalena Royer during her life, and to the other defendants in fee simple, and this deed was duly recorded August 26th, 1874. Thus we have traced the titles relied upon by the plaintiff and the defendants to the land in the plaintiff's petition described.

The plaintiff brought his suit to recover the possession of these defendants upon the strength of his title traced to Welch as aforesaid. To defeat his recovery the defendants relied upon the claim of title from Welch as thus stated. Upon the trial the court found for the plaintiff, whereupon the defendants ask for the benefit of the occupying claimant law, and to sustain their claim they rely upon the chain of title by which they supposed they were the owners in fee simple of the premises in controversy.

Does the statute of 1878, which is but the re-enactment of the former legislation upon this subject, provide the relief here sought by the motion of these defendants? is the material question to be answered from the language of the statute.

A person claiming title to premises derived from a party holding the same by a deed duly authenticated and recorded, although he may be ousted from the premises by a party holding a superior title, is still entitled to be compensated for improvements made while in the quiet possession thereof and claiming to own the same, he having obtained his title and possession without fraud or collusion, and he shall not be ousted or turned out of his possession by the person who may have and assert a superior title, until he is paid as provided for in the statute for the improvements made before he is notified of the superior title by the commencement of a suit for his eviction. Is the status of these defendants such as entitles them to the provisions of the occupying claimant statute? The question has already been settled by this court, that the plaintiff has the superior title to this land, and that whatever supposed title the defendants have is derived from a judgment debtor granted after his interest had been so fixed in the law, that his title must take such course as would be given to it by a judicial sale.

In the case of Vincent vs Lessee of Goddard, 7th O. R., 2d pt., 138, the question is tersely presented as to whether a title derived from a judgment debtor after a levy made shall entitle the party to the benefit of the occupying claimant act as against a purchaser of the same premises at Sheriff's sale, and the answer unequivocally given that such title secures to him no remedy for improvements

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made under such a title and possession. But whether or not such a purchaser could make a deed to another without notice, who should take possession, quietly hold and make improvements, is not settled by this decision. If such a party is within the purview of this statute and is afforded the remedy of the statute upon the fact being established that his grantor had for the premises a deed duly authenticated and recorded is a question for the solution of which we must again consult the statute, and the interpretation given to it by the courts.

In the case of Lessee of Beardsley vs Chapman, O. S. R. 1st, 118, the court says: "That the words of the statute 'by deed duly authenticated and recorded,' does not mean the deed of the occupying claimant, but that it does mean the deed of his grantor, and the court here holds, that the deeds that will afford the relief under the law, is the deed of the occupying claimant, and the deed of the party under whom he holds, and if these deeds are duly authenticated and recorded, purporting to convey a fee simple and nothing in them indicates that the grantor was not seized of such an estate, then is the occupying claimant entitled to his remedy.

We take it to be clearly settled, that if the grantor who conveys to the occupying claimant had for the premises a deed duly authenticated and recorded, and makes a deed in due form to the occupying claimant and he enters into the quiet and peacable possession, and makes valuable and lasting improvements, he is entitled to be paid for the same before he can be evicted, unless it shall appear that he had actual notice of the superior title before making his improvements. Counsel claim that Joseph Royer had actual notice of the plaintiff's claim at the time he purchased and received his deed from Hoy, and that this notice is embodied in the deed so made by Hoy. The deed of Hoy is a warranty deed in the usual form, with the additional proviso, that Royer and his representatives should permit Hoy and his attorneys to defend the title in whatever court Royer might be sued, and providing further that Royer should do nothing to prevent a fair trial of any claim that might be preferred against the title. And further, that should Royer or his representatives lose their title, the damages for such forfeit of title should be fixed and determined as provided for in said deed.

Taking these provisos as a notice to Royer to beware of the claims of others to the property, to whom would he be referred; by whom could he be informed of a claim upon the premises; to whom or where should he go for such information any more than should every grantee receiving a warranty deed for a farm? He has neither person, place or character of a claim pointed out that was likely ever to be preferred against this property. So we think a fair construction of the provisions in the deeds of Hoy, Hall and Marvin to Royer, furnish no notice whatever to Royer that any person held a claim that would likely arise against the property. They, instead of indicating a claim likely to be preferred, merely aim to provide that they shall have the right to defend against it, and if unsuccessful the amount of damages for which they shall be liable, neither of which will, when fairly considered, amoumt to anything more as to the confidence they had in the title to the property they were conveying, than is manifested by the covenants of warranty in every deed made to convey an interést in land. Then we think it is manifest from the record evidence before us that when Royer received his deeds from Hoy, Hall and Marvin he was seized of an estate in fee simple so far as was manifested by deeds duly authenticated and recorded. And looking at these deeds, the presumption of the law is that Royer had a good title to the land, and that his grantors had not been guilty of a penitentiary offense in conveying to him land to which they had no title.

It is true that Royer may have had such actual notice of an outstanding title or claim to the land that he as an occupying claimant could not have asserted his claim for improvements. And I think from the testimony of Mr. Stewart such was the fact. But it is his grantee, if we strike out the trustee, through whom he conveyed his apparent title to these defendants. And would a notice to Royer that would have silenced his right to compensation for improvements, be equally effectual to his grantee without notice,—would his fraud be visited upon an innocent party to whom he had conveyed the apparent title, and who had expended money and labor in making lasting and valuable improvements upon the land? Upon this question we have been furnished no authority for visiting such a penalty upon a party who in confidence of their rights have expended of their money and labor to improve a home, which is now to be swept from them by a superior title of which they were wholly ignorant. We do not think that it makes any difference that this woman and her children received this deed from the husband and parent without a valuable consideration. Love and affection is a good consideration to support a conveyance of land, and when not adverse to the rights of creditors and free from fraud, such a conveyance is just as ample to divest the title of a grantor and invest it in a grantee, as though the *quid pro quo* was an exact and full consideration for the conveyance. The grantee would then stand as the owner with full right to make such improvements upon the land as his judgment, taste or desire might prompt. And the power of the law and of the courts is as ample to protect the rights of a party thus invested with a title, as by any other means known to the law.

Take it then for granted that these defendants have a title to the land by a deed from Royer duly authenticated and recorded, and that Royer at the time he made to them the deed, had a deed or deeds from Hoy, Hall and Marvin, duly executed and recorded, and that they received no notice by the deed from Royer, nor did they have any actual notice of a claim against the title, that they entered into the possession peaceably, and made improvements by building a house, spring house, smoke-house, corn crib, and clearing and fencing land. Are they not one of the parties expressly previded for in the statute "as entitled to be paid for all improvements made by them or their grantor before receiving a notice by the commencement of a suit to oust them from their possession?" We are not able to resist the conclusion that these defendants are clearly within the provisions of the statute, and are entitled to have such further proceedings as will bring to them the rights vouchsafed in the law. There can be no doubt but what these defendants would have been as fully invested with the title to the premises, had the title of Royer been good, as though they were strangers and had paid a full consideration for the conveyance. If so, did they not in the absence of knowledge of an adverse claim, have the same right to improve that any one would have to improve his property? Would they not have the same right to rely upon the title of Royer, and as much expect to be invested with a clear title from him as though they had been strangers? If, then, they had a right to rely upon their title, they would have a right to improve. There is nothing in the law that would make

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the consideration or the relation of the parties an impediment in the way to recover for improvements made upon an honest belief that they possessed a good title.

Magdalena Royer testifies that she had no knowledge of any claim to this property adverse to her title; that she had in good faith, honestly believing that she and the other defendants had the full title to the premises, made the improvements for which they now ask to be compensated. Can we defeat this claim, without first deciding that a wife and children cannot receive a clear title from the parent and ancestor? That in order to make a good title, more than "love and affection" is necessary as a consideration? And that when they receive the title, they must take and hold it effected with all affective notices had by the grantor? Such, we think, is not the law, and is not the spirit of the judicial constructions so far announced upon the statute made to afford justice to the parties. When the claimant can say that at the time of making the improvements he was in the peaceable possession, without fraud or collusion; that he had for the premises a deed duly authenticated and recorded, and that his grantor had, as manifested by record, a similar evidence of his title, he not only brings himself within the letter of the law, but is in perfect accord with the judicial construction put upon the statute by the Supreme Court of the state.

Is it not the language of the statute if the claimant holds the property by deed, devise, descent, contract or agreement from and under a person claiming title by a deed duly authenticated and recorded, that his rights under the statute are oomplete?

If, then, Royer had a deed duly authenticated and recorded, and had died leaving these defendants as his legal representatives, would they not have had a right to rely upon his title and proceed to improve, with full assurance that if afterwards their title should be defeated, they would have such an interest, that in equity it should be awarded to them? This, I think, could hardly be doubted.

Let the motion prevail and such entry be made in the journal as will secure to them the relief asked.

CAMPBELL & VOORHES, for motion.

SPANGLER, POMERENE & STANSBURY, opposed.

CUYAHOGA COMMON PLEAS.

MAY TERM, 1879.

WILLIAM BACKUS VS. THE AURORA FIRE AND MARINE INS. CO.

McMATH, J.:

This is a petition filed by these plaintiffs to vacate a judgment of this court rendered September 3d, 1878. They seek to vacate the judgment upon the ground of irregularity in obtaining the same, and also on the ground of an omission of the clerk in making a certificate.

This suit was originally brougnt by this defendant, the Aurora Fire and Marine Insurance Company against these plaintiffs, to recover upon a penal bond. It appears from the petition that William Backus was the agent of the Aurora Fire and Marine Insurance Company, and as such agent he gave a bond for the faithful performance of his duties, that he would pay over all moneys that should come into his hands as such agent. There seems, from the statements of the petition in the original action, to have been a defalcation. Thereupon the Aurora Fire and Marine Insurance Company brought suit upon the bond and recovered $1,090 with interest.

It appears that in the original action the defendants were in default of an answer. They aver in this petition to vacate that they had employed counsel (an officer of this court) to look after their case. They aver in their petition that they were ignorant of the rules of pleading, and relied upon counsel; and they say that through the negligence of counsel, no answer was interposed in the original action, and a judgment was taken against them.

Now, it that was all there was of it, there is no doubt but they would have a remedy against their attorney. Their ignorance of the rules of pleading would not warrant the vacation of the judgment. They say that they were not present at the time the default was entered, that they knew nothing at all about it. It was their duty to be present as parties in that action, or to see that counsel was present; and their absence or their reliance on counsel would be no excuse and would not warrant the vacation of the judgment rendered. They admit that they were properly summoned, and it is not claimed here that the default was entered before the rule day passed. So that they had their day in court, and had an opportunity to be heard, either in person or by counsel. The judgment which was rendered in the action appears perfectly regular upon its face. It recites the fact that this case came on for hearing. It is not claimed in the petition that it came on out of its order, nor does it appear from the judgment that it came on and was heard out of its order, but it was heard in order upon the pleadings, testimony submitted and the arguments of counsel, and it was the solemn consideration and judgment of the Court that the plaintiff in that action should recover against the defendants the sum of $1,071 and interest. It is not claimed that there was an omission by the clerk to indorse upon the summons originally issued the amount and nature of the demand of the plaintiff. There is no informality pointed out upon which these plaintiffs now rely for a vacation of that judgment. They claim, however, that the clerk omitted to certify in that judgment that Backus was principal, and that the other two parties plaintiff here were his sureties upon that penal bond, and they rely upon that omission as a ground for the vacation of the judgment. The statute requires the clerk, it seems, to make that certificate, or, in other words, it requires the Court to make the certificate; but for aught we can see, the Court had sufficient reason for refusing to make that certificate, and the presumption of law is in favor of the judgment, that it is the proper and only judgment that could have been rendered in the case. For aught that we can see, the Court may have heard testimony upon that point, and may have determined upon the testimony that no such order should appear on the journal of the court. So that we cannot presume any error, so to speak, in the rendition of the judgment in that respect. If the defendants desired that certificate to be made or ordered by the Court, it should have been upon their showing. In other words, they should have affirmatively moved the Court to direct the clerk to certify that Backus was principal upon that bond, and that the other two obligors were merely sureties for Backus. So that the omission of the clerk in that respect is no cause for vacating this judgment.

It is true that the case comes within that paragraph of the code that provides for the vacation of a judgment for any omission of the clerk in the rendition of the judgment. We find the judgment is a proper judgment in

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form. In other words, it contains all the elements of a judgment of the Court of Common Pleas. Every material element is found affirmatively and is set forth in the journal entry making up this judgment. So that it cannot be said, with any regard for the law or the facts, so far as the appearance of the journal is concerned, that there was any error on the part of the clerk in the rendition of the judgment. Suffice it to say that the clerk does not render any judgment. He merely indites the judgment that the Court renders. He is the hand of the Court for the purpose of putting on the rolls or records of the Court the judgment that the Court regards as the proper judgment to be rendered in a given case.

It is not claimed here that the judgment was taken out of rule or before answer day. It is not claimed that the clerk failed or omitted to make the indorsement upon the summons. All things are regular. But it is claimed that the judgment was irregularly obtained. That is the averment of the petition, and upon that ground the plaintiffs seek to vacate it.

It is claimed by counsel that the irregularity need not appear of record. But if the judgment is regular of record, can we presume any irregularity aside from it? Are we not concluded by the record? If it contains all of the *formulæ* of a judgment, can we presume that there is any irregularity in that judgment? It cannot be shown. These parties say that, in point of fact, no testimony was heard by the Court at the time the judgment was rendered. But the judgment says that the testimony was heard. That is the finding of the Court. Can we permit an attack to be made upon a judgment of the Court by an averment that, in point of fact, the Court did not hear testimony, when the Court solemnly adjudicates that it did? In contemplation of law, there must be an end to all things—particularly to a law-suit; and for very wise reasons, it has been the rulings of the courts for ages that when the court, having jurisdiction of the subject matter, has determined the matter to be at an end, that should be the end. Our statute gives the party three years to come in and obtain a vacation of that judgment upon a certain showing. But this petition does not contain that showing. If the plaintiffs could show that this court had no jurisdiction of the persons, or that there had been no service on the defendants or any of them against whom judgment was rendered, the Court could vacate the judgment so far as these parties are concerned and permit a hearing.

We have examined this petition very carefully, and have considered carefully all the authorities cited in opposition to and in support of the demurrer that has been interposed to the petition, and the conclusion to which we have come is that the demurrer to this petition should be sustained.

HUTCHINS & CAMPBELL, for plaintiffs.

MIX, NOBLE & WHITE, for defendants.

SUPREME COURT OF OHIO.

DECEMBER TERM.

Hon. W. J. Gilmore, Chief Justice. Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Hon. William White, Judges.

THURSDAY, June 19, 1879.

General Docket.

Brooks vs. The State. Error to the Court of Common Pleas of Trumbull County.

WHITE, J.—Held:

1. On a charge of larceny it is not necessary to the conviction of the accused that he should, at the time of taking the property, have known, or have had reason to believe he knew the particular person who owned it, or that he had the means of identifying him *instanter*.

2. Lost property which has not been abandoned by the owner is the subject of larceny by the finder.

3. The finder is not bound to make search for the owner. His belief, or grounds of belief, in regard to finding the owner, is not to be determined by the degree of diligence that he may be able to use to accomplish that purpose, but by the circumstances apparent to him at the time of finding the property.

4. Where, at the time of finding the property, he has reasonable ground to believe from the nature of the property, or the circumstances under which it is found, that, if he deals honestly with it, the owner will appear to be ascertained, he will be guilty of larceny, if at the time of taking the property into his possession, he intended to steal it.

Judgment affirmed.

No: 663. John Hiltabiddle, Jr., vs the State of Ohio. Error to the Court of Common Pleas of Richland county.

OKEY, J.:

1. The section in the code of criminal procedure (74 O. L., 349, Sec. 31) dispensing with proof *emissio seminis*, has no relation to capacity, and hence it does not so enlarge the meaning of the statutory provision in relation to rape (74 O. L., 246. Sec. 9), as to include persons not theretofore amendable to that provision.

2. If it appear on the trial of one charged with rape, that he is a boy under fourteen years of age, the burden is on the State to prove capacity to commit the crime, and if the Court enumerate certain facts which are of no determinate value, and say to the jury that if they are proved, the burden is on the accused to show want of such capacity, it is error.

Judgment reversed and cause remanded for a new trial.

U. S. CIRCUIT COURT N. D. OF OHIO.

June 23.

3313. The Western Union Tel. Co. vs The Sandusky, Mansfield & Newark R. R. Co. Reply filed.

June 26.

3881. The National Granite Bank of Quincy vs Amos W. Coates. Petition for money only. Willey, Sherman & Hoyt.

June 27.

3882. Thomas Sayles vs The St. Clair Street R. R. Co. Petition. W. B. Sanders and A. H. Walker.

3883. Same vs same. Same. Same.

3884. Same vs same. Same. Same.

3652. A. R. Flint vs G. F. Lewis. Answer filed. Ranney & Ranneys.

Bankruptcy.

June 23.

1987. In re Oscar S. Jacobs. Petition for discharge.

1758. In re Fannie Parker. Same.

June 25.

1879. In re Oliver Creed. Discharged.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending June 27, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

June 21.

Jacob Borger and wife to John Borger. $4,100.

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H. E. Hewell to P. W. Holcomb. $1,300.

John G. Steiger and wife to S. W. Porter. $2,300.

Thomas Denman to Irene R. Palmer. $150.

John Henry Linnet and wife to Anna M. Linnet. $1,000.

Orlando J. Hodge and wife to The Society for Savings. $9,000.

Caroline E. Honeywell to M. N. Hathaway. $673.

George A. Sash to Mrs. M. W. Burnham. $110.

The trustees of The First Congregational Society of Brooklyn to The Ohio Farmers' Ins. Co. $1,200.

June 23.

Mary Mathers to George Mygatt. $4,000.

J. J. Carran to John Heisley, guardian, etc. $1,000.

John Jirrousek and wife to Joseph Pitra and wife. $250.

Mary Russell et al. to S. W. Porter. $1,000.

Mathias Morowitz and wife to Lehman, Richman & Co. $200.

Joseph Siringer and wife to The Citizens' Savings & Loan Ass'n. $500.

Lilly Reider et al. to Mrs. Harriet Leavens. $5,000.

Daniel Ewold to Marie Cole. $500.

Louisa Wells and husband to Jessie Sims. $200.

June 24.

V. W. Kendall et al. to Charles W. Hills. $1,162.

Adelia L. Brenneis and husband to L. F. and S. Burgess. $465.

John Jones and wife to Carl Svouda. $1,000.

Elizabeth Peter and husband to Philip Mueller. $400.

June 25.

John Corney and wife to L. E. Holden. $500.

Same to same. $1.

Henry Wilkinson and wife to Holland Brown. $400.

James Andrews and wife to Nancy J. Field. $850.

June 26.

John Macken and wife to The Citizens' Savings and Loan Association. $1,000.

Joseph Polak and wife to Ann E. Bott. $1,000.

Jacob Clevering to The People's Savings and Loan Ass'n. $1,800.

June 27,

James Collins and wife to Miriam Thompson. Three hundred and seventy-five dollars.

CHATTEL MORTGAGES.

June 21.

John Borger and wife to John P. Young. $1,891.

John Pike to John Gill. $300.

Andrew Brunner to Henry Kramer. $100.

Isaac Slenker to James Gaul. $700.

John A. Bishop to John Miller. $4,081.

Charles L. Weeks to Union Steel Screw Co. $900.

June 23.

Osbourne Gray to Louis Voss. $500.

June 24.

A. C. Goodwin to A. W. Bailey. $24.

Mary Herke to Henry Striebe. $40.

Mrs. C. E. Buchea to M. Silverstone. $70.

W. R. Ogden to H. C. Brainard. $1,500.

Jennie Clark to Jane McGuire. $200.

Wm. Bowman to Crumb & Baslington. $60.

June 25.

H. A. Gardanier to George W. Pattison. $1,000.

George N. Perkins to Benjamin Sawyer. $50.

Collar & McConnell to J. D. Geddes. $62.

June 26.

A. C. Jamerson et al. to David D. Foster. $500.

John G. Steiger et al. to J. Wm. Ball. $5,000.

F. C. Rich to Maria Hall. $50.

Edward Clark to S. Stein & Son. $80.

A. Nelson to Henry Benhoff & Son. $60.

June 27.

Briggs & Briggs to J. Loman & Son. Four hundred and thirty-one dollars.

A. E. Shackelton to H. R. Leonard. Twenty dollars.

Sebastian Pahler to M. Pahler. Forty-one dollars.

Fitch Raymond to L. J. Washington. Two hundred and sixty dollars.

George S. Caughey to Harvey E. Mann. Two hundred dollars.

DEEDS.

June 20.

W. A. Babcock to J. J. Duffy. $100.

Brewer & Truscott to Fannie Steinfeld. $10,200.

Olivia S. Cook to Abraham Pink. $315.

Elijah Cole and wife to B. F. Worthington. $500.

Ludwig Hagan and wife to John Dickow et al. $1,500.

Paul J. Kreitz and wife to Eleanor E. Schub. $121.

Alice J. Nesbitt and husband to W. J. Gordon. $3,000.

George Nichols and wife to Nancy Perkins. $1,500.

George G. Root to Joseph Jenkins. $200.

Neiley C. Rathburn to John B. McCabe. $600.

Amasa Stone and wife to Lizzie V. Barber. $600.

June 21.

Fred C. Bemis and wife to Trustees of Woodland Avenue M. E. Church. $2,000.

Helen Dowse to Thomas Mikolosek. $480.

Luther Moses and wife to W. D. Taylor. $1,600.

C. J. Keeler and wife to the Church of the Unity. $15,270.

Joseph Kotaler to Michael Mares. $140.

Anna Maria Linnet to John H. Linnet. $2,000.

Alvah B. Ruggles and wife to Margaret Fahey. $5.

June 23.

Thomas Burke and wife to Susan Bolan. $500.

Henry L. Devoe and wife to Almira H. Algier. $200

R. A. Hunt and wife to C. C. Nott. $1.

Clarissa Harris et al. to Thomas Campbell. $100.

George G. Hickox et al. to Mary G. Halligan. $440.

James Jordan and wife to Elizabeth Pletcher. $400.

Luther Moses and wife to H. H. Rudd. $960.

Catharine Moss and husband to James Bryan. $400.

Angeline T. Rosenekrans to Carrie L. Ingles. $2,000.

Same to same. $2,000.

Wm. Stowell et al. to Daniel Mack. $30.

George J. Johnson et al. to L. S. & M. S. Ry. Co. $2,500.

June 24.

Newell Bogue and wife to Hiram Barrett. $800.

A. N. Eggleston and wife to John W. Carter. $1.

Leopold Goldschmidt and wife et al. to Philip Beiger. $438.

Henry M. Hempy to Ella A. Stone. $16,000.

Charles Harder and wife to Barbara Hundertmark. $800.

Jason Jones and wife to Anton Eckerfels. $56.

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Wm. C. Northrup to Henry Romp. $600.

Elisha Savage and wife to Wm. H. Danalles. $250.

George J. Schurr to Leopold Stinebach. $425.

Casper Vogel and wife to John Hackelrath. $580.

June 25.

Citizens' Savings and Loan Ass'n. to Cornelius Barry. $5,072.

John Cooney and wife to L. E. Holden. $1,000.

L. E. Holden and wife to Jane Cooney. $1.

G. E. Herrick and wife to John Stephan. $600.

L. S. Searles, exr., to Thomas Hall. $1,500.

Patrick Smith and wife to Seth W. Johnson. $2.

Harriet I. Sprague to A. R. Wilbur. $1,000

John H. Sargent and wife to Gustav Vonuelker. $300.

June 26.

Ransom Bronson to Henry Pickard. $10.

Catharine Cribbin and husband to T. H. Graham, trustee. $1,950.

T. H. Graham, trustee, to Lawrence Cribbin. $1,950.

Nancy Coates and husband to Mary C. Rogers. $5.

James Flaherty and wife to Wm. Steffen and wife. $1.

Wallace H. Fowler to Alfred G. Hull. $1.

Charles W. Hill and wife to Virginia W. Kendall. $1,512.

Marianna B. Sterling to William Pohlman. $750.

Charles O. Scott to Gilbert A Bray. $1.

John M. Acker and wife to Catharine Loehden. $1,800.

Samuel W. Hornsby and wife to William Coniam. $2,000.

John Rock to N. J. Dickerman. $800.

Gustav Schultze and wife to Wm. R. Coe. One thousand five hundred dollars.

Jno. T. Shepperd and wife to Gustav Schultze and wife. One thousand two hundred dollars.

Ann Lewis and husband et al. to Kate Whitlock et al. One dollar.

Frank Whitlock et al. to Mary Whitlock. Five hundred dollars.

Frank Whitlock to Kate W. Kappler. One dollar.

Isabrand Clevering and wife, by F. W. Cadwell, Mas. Com., to The People's Sauings and Loan Ass'n. Four thousand two hundred dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending June 26th, 1879, against the following Persons.

June 21.

Thomas O'Rourke et al. $337.50.
Adolph Meinicke. $107.54.

June 23.

Michael Thorman. $1,606.
Alfred Capper et al. $518.18.
Solomon Mayer. $588.33.
Joel W. Sherman. $1,582.50.
Wm. Bucher et al. $172.23.
Andrew Kyle et al. $412.50.
M. B. Lukens. $668.20.
M. Berkle et al. $323.53.

June 24.

John Widmaier. $302.20.

June 26.

Michael Byrne. $250.
John C. Jones. $591.95.

ASSIGNMENT.

June 23.

James Corothers to George A. Groot. Bond $3,000.

COURT OF COMMON PLEAS.

Actions Commenced.

June 20.

15312. Daniel R. Tilden vs The City of Cleveland et al. To quiet title and equitable relief. Grannis & Griswold.

15313. Jacob Heimberger et al. vs Jacob Wecker. Money only. Charles A. Stible.

15314. Jane R. A. Carter vs Peter Schutthelm et al. Money and to subject lands. Wm. K. Kidd.

15315. August Mulhausen vs Peter Schell. Money only with att. Baldwin & Ford.

15316. Caroline M. Ensign et al. vs Fred W. Pelton. Money only. Jas. Fitch and John E. Ensign.

15317. Fred C. Bemis vs same. Same. Same.

15318. Cornelius Kervell vs same. Same. Same.

15319. Samuel S. Block vs same. Same. Same.

June 21.

15320. W. F. Cleveland et al. vs O. H. P. Hicks et al. Money only. Safford & Safford.

15321. George Gabele et al. vs Mrs. Jacob Merkel. Money only. Otis, Adams & Russell.

15322. John Munday vs Jacob Hildemyer. Money only. John J. Kelly

15323. Louis Weiss vs Fred W. Pelton. Money only. James Fitch and John E. Ensign.

15324. Sarah Alger et al. vs Wm. Lunn et al. Equitable relief. Johnson & Schwan.

15325. H. F. Hoppersack vs John Zendt. Money only. Same.

15326. Jacob Zuelleg vs Lesette Leick et al. Equitable relief. P. F. Young and Willson & Sykora.

15327. Charles Schmidt et al. vs Joseph Bilek et al. To subject lands and relief. Willson & Sykora.

15328. J. P. Koehler vs Andrew Hauser et al. Money and sale of mortgaged premises. G. B. Solders.

15329. Jacob Bloes vs Adam W. Poe et al. Money and to subject land. F. Weizmann.

15330. J. C. M. Kehler et al. vs Carl Seyler. Money only. Mix, Moble & White.

15331. James Barnett et al. vs C. Koch et al. Money only. Gary & Everett.

15332. Charles Gates vs W. H. Osborn et al. Money and sale of mortgaged premises. Same.

15333. State. ex rel. Samuel T. Le Baron vs The Penn. Co., lessees, etc. Appeal by deft. Judgment May 24. Marvin, Taylor & Laird; Ranney & Ranneys.

15334. Same vs same. Same. Same. same.

15335. Same vs same. Same. Same; same.

15336. Same vs same. Same. Same; same.

15337. Same vs same. Same. Same. same.

15338. Same vs same. Same. Same; same.

15339. Same vs same. Same. Same; same.

15340. In re application of John Murphy for writ of habeas corpus. Habeas corpus. E. P. Slade.

15341. J. M. Richards vs W. E. Preston. Appeal by deft. Judgment June 11. P. P.

June 24

15342. C A. Knecht et al. vs John Widmaier. Cognovit. Estep & Squire; Stephen B. Priest.

15343. Fidel Berchtold vs Seymour C. Prentiss. Injunction and relief. A. J. Sanford.

15344. State in re Samuel T. Le Baron vs The L. S. & M. S. Ry. Co. Appeal by deft. Judgment June 2. Marvin, Taylor & Laird; James Mason, O. G. Getzen-Danner.

15345. Same vs same. Same. Same. Same.

15346. Same vs same. Same. Same. Same.

15347. Same vs same. Same. Same. Same.

15348. Same vs same. Same. Same. Same.

15349. Same vs same. Same. Same. Same.

15350. Same vs same. Same. Same. Same

15351. Same vs same. Same. Same. Same.

15352. Same vs same. Same. Same. Same.

15353. Same vs same. Same. Same. Same.

15354. Same vs same. Same. Same. Same.

15355. Same vs same. Same. Same. Same.

15356. Same vs same. Same. Same. Same.

15357. Same vs same. Same. Same. Same.

June 26.

15359. James M. Worthington vs Julia U. Porter et al. Replevin. Mix, Noble & White.

15360. Anna C. Minch et al. vs Fred W. Pelton. Money only. James W. Fitch; John E. Ensign.

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15361. P. L. Johnson et al. vs same. Same. Grannis & Griswold.
15362. William Bingham & Co. vs Silas Merchant et al. Money only. Grannis & Griswold.
15363. Horace G. Cleveland et al. vs same. Same. Same.

June 26.

15364. Amasa Stone vs John W. Street et al. Money only. B. R. Beavis.
15365. M. M. Spangler vs George L. Chapman. Money and the recovery of real estate. Safford & Safford.

June 27.

15366. Richard Edwards vs J. W. Tyler et al. Appeal by deft. Judgment June 18. Foster, Hinsdale & Carpenter; Tyler & Denison.
15367. W. A. Babcock et al. vs Peter Weiser. Appeal by deft.
15368. Ella A Stone vs the unknown heirs of Alexander Seelye. To quiet title. Henderson & Kline.
15369. Samuel Gynn vs Joseph Salmers. Money, sale of mortgaged lands and relief. B. R. Beavis.
15370. Anne Morrow vs Conrad Knerem. Money only. Thomas Lavan.

Motions and Demurrers Filed.

June 20.

2732. DeVeny vs Thorp. Motion by defendant to strike amended petition from the files.
2733. Voight vs Hodge et al. Motion by plaintiff for the appointment of a receiver, with waiver of notice by deft., the L. S. & M. S. Ry. Co.
2734. Sturtevant et al. vs The Cleveland Organ Co. et al. Demurrer by deft. Drew to the petition.

June 21.

2735. Goodman, admr., vs Gregerson et al. Motion by plff. to strike from answer of deft. Gregerson, and make same more definite and certain.
2736. Society for Savings vs Chamberlain et al. Demurrer by deft. Nannie A. Chamberlain to the petition.
2737. Noonan vs Hogan. Motion by deft. to require plff. to separately state and number causes of action.
2638. Bronson vs Stoddard et al. Motion by deft. Drury to strike irrelevant matter from the files.
2739. Tibbels vs Jewett & Goodman Organ Co. Motion by plff. to require deft. to give additional bail for appeal.

June 23.

2740. Bates vs Quigley. Motion by plff. for leave to file an amended answer.
2741. State on complaint of Esther Byers vs Forest. Motion by deft. to require plff. to give security for costs.
2742. Varian vs Pelton. Motion to require plffs. to separately state and number causes of action.
2743. Higgins vs same. Same.
2744. Badger vs Dechenhausen et al. Motion by plff. to make answer more definite and certain.
2745. Goddard, admrs., etc., vs Cooper et al. Motion by plff. to order receiver to redeem tax title and to pay health department $22.50 for removing night soil.

June 24.

2746. Anna Williams, by, etc., vs Kelso et al. Motion by defts. to require next friend, etc., to give bail for costs.
2747. Wm. A. Williams, by, etc., vs same. Same.
2748. Alphena Williams, by, etc., vs same. Same.
2749. Henry Williams, by etc., vs same. Same.
2750. Eunice Williams, by. etc., vs same. Same.
2751. Stephen Thomas Williams, by, etc., vs same. Same.
2752. Seibert et al. vs St. Clair Street Ry. Co. Motion by defendant to dismiss action.
2753. Dangleheisen vs Weigman, exr., et al. Motion by plff. for re-valuation of land (in partition).
2754. Sutliffe vs Marchand et al. Motion by deft. for new trial.

June 25.

2755. Wilcox vs Winslow. Motion by deft. to re-tax costs.
2756. Long et al. vs Burkhardt et al. Motion by plff. for order to sell property without a re-valuation and at a sum to be fixed by the Court.

June 26.

2757. Wirth vs Bading et al. Motion by plaintiff for the appointment of a receiver.
2758. Baggert vs Anthony et al. Same.
2759. Willson et al. vs Macry et al. Demurrer by plaintiff to the answer.
2760. Laird vs McConnell et al. Motion by defendant Sun Ins. Co. et al., and plaintiff to vacate and set aside sale and judgment decree.
2761. Newton, assignee, vs Whitman et al. Demurrer by plaintiff M. M. Spangler, exr., to the petition.
2762. Spangler vs Ford et al. Motion by plaintiff to require defendant Newton to make his answer more definite and certain.

Motions and Demurrers Decided.

June 20.

2724. Alber vs Froelich et al. Sustained. Plff. excepts.

June 21.

2428. Haley vs Patterson. Overruled. Deft. excepts.
2459. Miriam & Morgan Paraffine Co. vs Stewart et al. Sustained. Defendants except.
2508. Raynolds vs Stein. Overruled. Defendant has leave to answer by June 28.
2562. Libbey vs Castor et al. Overruled.
2595. Droz vs Roemer et al. Overruled.
2596. Manche vs Goddard et al. Overruled. Defts. except.
2646. Richard vs Wagner et al. Granted.
2667. Branch vs Woodruff Sleeping and Palace Car Co. Overruled.
2700. McDonald vs Swan et al. Dismissed without prejudice.
2708. Risser vs Libby. Granted.
2712. DeWolf et al. vs Sherman. Overruled.

June 25.

947. Greenhalgh vs Field. Continued.
2378. Eells, trustee, vs Kinsman St. R. R. Co. Granted. J. H. Rhodes appointed receiver.
2396. The Central Bank vs Mullin et al. and garn. Sustained. Plff. excepts.
2680. Comstock vs Hall. Overruled. Deft. excepts.
2681. Backus vs Aurora Fire and Marine Ins. Co. Sustained. Plff. excepts.
2690. Hill vs Marsh et al. Stricken off.

June 26.

2255. Williams vs Bletsch et al. Granted. O. H. Bentley appointed receiver. Bond $250.
2733. Voight vs Hodge et al. Granted. G. W. Mason appointed receiver. Bond $1,000.

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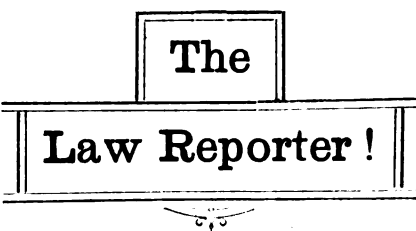

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WE would be very glad at any time to receive the manuscript of important legal opinions of our Common Pleas judges and of Common Pleas and District Court judges in other sections of this State, for publication. We think our judges should give their written decisions first to us instead of giving them to general newspapers that never publish a legal opinion, so far as we have observed, except when it costs nothing to get it. Those papers are at liberty to publish as many of the decisions that appear in this paper as they see fit by giving the proper credit. As a rule we are not able to get local decisions except at a great expenditure of time and labor, by attending the sittings of our courts to report them, often at considerable inconvenience. We are not able to make reports of all the important decisions, and if our Judges were in the habit of writing their opinions in deciding questions of interest to the profession, so that all such decisions could be published, it would greatly tend to a uniformity of decision and practice in our Common Pleas Court.

In favor of the practice of writing opinions, Lord Campbell says: [Lives of Chanc., vol. IV., p. 250.] "If the advice of an individual so humble as myself could have any weight hereafter I would most earnestly emplore judges in all cases of importance to prepare written judgements. The habit not only insures a minute attention to all the facts of the case, and a calm consideration of the questions of law which they raise, but is of infinite advantage in laying down rules with just precision, and it has a strong tendency to confer the faculty of lucid arrangement and of correct composi tion."

HON. RUFUS P. SPALDING of this city has written a very able review of a recent decision of the Supreme Court of the United States in the case of the Northern Transportation Company vs. the City of Chicago, which has been published in a neat pamphlet. The Northern Transportation Company owned a warehouse and wharf on leased premises in the city of Chicago, on the north side of the Chicago river, in close proximity to the river and near its intersection with La Salle street. The city of Chicago, under an act of the legislature of Illinois, undertook the construction of a tunnel under and across the Chicago river, to connect La Lalle street south with La Salle street north of the river, and in doing the work of excavating, etc., in the construction of the tunnel, all access to the warehouse by La Salle street and the river was destroyed for the space of a year, and the Transportation Company, the business of which consisted in the transportation of freight and passengers from Chicago to Ogdensburgh, N. Y., by means of a line of steam propellors, was compelled to rent a warehouse, to its damage, it was claimed, in the sum of seven or eight thousand dollars. To recover those damages an action was brought by the Northern Transportation Company in the United States Circuit Court for the Northern District of Illinois against the city, resulting, under the charge of the Court, in a verdict and judgment in favor of the city. The case was taken on error to the Supreme Court of the United States and the judgment of the Circuit Court was affirmed. Judge Spalding contends that the judgment of the Circuit Court should have been reversed, and that the decision of the Supreme Court is not sound law. His review will repay a careful perusal.

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CUYAHOGA COMMON PLEAS.

MAY TERM, 1879.

IN RE APPLICATION OF ELIAS SIMS FOR A WRIT OF HABEAS CORPUS.

Habeas Corpus—Authority of Notary Public to Issue and Compel Obedience to Subpoena Duces Tecum, etc.

A Notary Public in this state has no authority to issue a *subpœna duces tecum*, and therefore has no power to commit a witness for disobedience to such subpœna. —[ED. LAW REPORTER.]

McMATH, J.:

In the matter of the application of Elias Sims for a writ of habeas corpus the relator avers that he is unlawfully deprived and restrained of his liberty by John M. Wilcox. The return of the writ shows that John M. Wilcox detains the relator by virtue of a mittimus directed to him as Sheriff of Cuyahoga county by Thomas Reilley, a notary public in and for said county. It is recited in the mittimus that on the 19th day of June, 1879, an action was pending in the Court of Common Pleas of said county wherein T. L. Johnson was plaintiff and the West Side Street Railroad Company defendant, and that in behalf of said plaintiff said notary was taking depositions of witnesses in said action, and that the relator, a resident of said county, then and there appeared as a witness in behalf of said plaintiff, and was sworn and examined as a witness, and while his deposition was there being taken, said witness then and there refused to produce the documents and books required to be produced by the subpœna served upon him, and thereupon the undersigned ordered the said Sims to produce said documents and books, which he again refused to do, and said notary public then and there for the said contempt of the said Sims in so refusing to produce said documents and books, ordered and adjudged that he be imprisoned in the jail of said county until he produce said documents and books mentioned in said subpœna.

The relator was a witness under subpœna to aprear before the notary public; was in the presence of that officer; was proceeding with his testimony, and the same was being reduced to writing in the form of a deposition by the officer. There was no refusal of the relator to testify; he answered such questions as were put to him. Nor did he refuse to subscribe the deposition.

The relator, from aught that appears from the mittimus, did all things that he was required to do in obedience to the writ of *subpoena ad testificandum*.

He had been served with a process issued by the notary public, and from the mittimus we may fairly and reasonably presume that the process served upon him was the writ of *subpoena duces tecum*. This writ from its common law character, is a process of the same kind as the *subpœna ad testificandum*, including a clause of requisition for the witness to *bring with him* and produce books, writings, or other things under his control, which he may be compelled to produce as evidence.

Has a notary public authority to issue the writ of *subpœna duces tecum* and enforce obedience to it?

The answer to this question must be found in the Statutes of Ohio, if answered affirmatively.

It cannot be claimed that at common law an officer of this grade had authority to issue the writ of *subpœna duces tecum*. It is a writ of compulsory obligation and effect in the law. In England, before the Stat. 5 Eliz. c. 9., it was otherwise held by the courts, and witnesses were proceeded against as for a contempt when they willfully absented themselves.

But after the enactment of that statute the writ beceme one of compulsory obligation and effect, and had its origin in the right of the court to resort to means competent to compel the production of written, as well as oral testimony, a right essential to the very existence and constitution of a court of common law, which receives and acts on both descriptions of evidence, and could not possibly proceed with due effect without them.

And though it will be always prudent and proper for a witness, served with such a subpœna, to be prepared to produce specified papers and instruments at the trial, if it be at all likely that the judge will deem such production fit to be there insisted upon, yet it is in every instance a question for the consideration of the judge at *nisi prius*, whether, upon principles of reason and equity, such production should be required by him, and of the court afterwards whether having been there withheld, the party should be punished by attachment. And it may be further said that this writ could only go out of courts of record, and could not issue from inferior courts. Under our statutes a justice of the peace has no authority to issue the writ of *subpœna duces tecum*. Neither usage nor consent confers upon justices such authority.

Sec. 7, chapter 3, page 654, O. L., vol. 75, authorizes the clerks of the several courts and judges of the Probate Courts, on application of a person having a cause or other matter pending in court, to issue subpœna for witnesses under the seal of the court, etc. The subpœna shall be directed to a person therein named, requiring him to attend at a particular time and place to testify as a witness. This statute thus far has only provided for the issuance of the writ of *subpœna ad testificandum*. But it is further provided in section 8, that the subsubpœna *ad testificandum* may contain a clause directing the witness to bring with him any b ok, writing or other thing under his control, which he may be compelled to produce as evidence, and this is the writ of *subpœna duces tecum* of the common law. Here, then, is found the only statutory authority for the issuance of the above writs in the Common Pleas, Superior Courts and Courts of Probate, and while Chapter 5, page 988, O. L., vol. 75, authorizes justices to issue subpœnas, etc., it nowhere provides that a clause *duces tecum* may be added. It cannot be claimed that Section 6, chapter 15, page 1,027, confers jurisdiction upon a justice of the peace to issue a writ of this kind. An examination of the last cited section discloses the fact that a very material modification of sec. 202, S. & C., page 804, has been made, and in the new section the word "jurisdiction" is omitted. Hence the statute as now in force applies to *proceedings* only. The authority to issue writs is jurisdictional. Now, it is conceded that notaries have the same authority to issue writs of subpœna and compel the attendance of witnesses for the purpose of taking their depositions or for the purpose of perpetuating their testimony, as justices of the peace, and for a refusal to appear before the officer, in obedience to the writ, or a refusal to testify, or a refusal to subscribe the deposition by order of the officer, the witness may be proceeded against by the officer as pointed out by statute. A court or officer having authority to issue a writ has the authority to enforce obedience to it, and while a notary or justice of the peace has authority to issue writs of *subpœna ad testificandum*, the same authority to issue carries with it power to enforce obedience, and this is found in several statutes. But we look in vain in the statutes for authority of a notary

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or justice to enforce obedience to the writ of *subpœna duces tecum*. Then, may it not be safely presumed that if the law-making power did not in terms confer authority on an officer to enforce obedience to a writ issued by him, that the same law-making power withheld from such officer the authority to issue such writ? Now, by turning to section 9, chapter 3, page 655, volume 75, O. L., we find this statute: "When the attendance of a witness before an officer authorized to take depositions is required, the subpœna shall be issued by such officer."

Now, a notary and justice of the peace are officers "authorized to take depositions," and the attendance of a witness may be enforced by such officer for the purpose of taking such deposition. The deposition is the examination of a witness reduced to writing, and subscribed by the witness, and authenticated by the officer. He is, under the writ, required to attend as a witness. Then, when in the presence of the officer, he must tell what he knows as bearing upon the issue, subject to the rules governing the admissibility of testimony. This is the "witness" referred to in that section. But the writ of *subpœna duces tecum* requires the person named in the writ to do something else than testify; i. e., to appear and bring with him a certain book or a certain writing, particularly describing it. The book or writing may contain evidence, and it is for the purpose of reaching this evidence the writ has been sued out, and served upon the person having in his possession and under his control the book or writing containing the evidence required. The notary or justice derives his authority to issue the writ of *subpœna ad testificandum* from section 9, but it cannot be said that it authorizes him to issue another and different writ requiring the person named to do some other act than to testify, and enforce obedience. Now, by section 2, page 499, S. & S., a notary shall have the same power to compel the attendance of witnesses, and to punish witnesses *for refusing to testify*, which is or may be by law vested in justices of the peace. It is seen that a justice may compel attendance of witnesses and punish the same for refusal to attend after due service, and may punish witnesses for refusing to testify; but under color of the writ of *subpœna duces tecum* he cannot punish for refusal to obey the writ, for he had not the authority of law to issue it. Hence, I find that a notary public has not authority of law for issuing the writ of *subpœna duces tecum*, and, therefore, has no authority of law to enforce obedience to it.

There are other questions raised by the return of the Sheriff that seem to me decisive of this case. It does not appear from the mittimus that the writ of *subpœna duces tecum* had been served on the relator anterior to the 19th inst., nor does it appear that any book or writing was described in the writ, nor does it appear that the book or writing contained evidence pertinent to the issue in the case of Johnson vs. West Side Street Railroad Company, nor does it appear that the book or writing was in the possession or under the control of the relator at the time the writ of subpœna was served on hin, nor does it appear but that the writ was served upon him while on the stand giving his testimony and while the same was being reduced to writing by the Notary, and time was not given the witness to produce the same.

I therefore find no authority of law for the detention of the relator, and the judgment of the court is that he be discharged from the custody of the Sheriff.

[CUYAHOGA DISTRICT COURT.]

COLEMAN VS. SHERWOOD.

Dower—Alimony—Construction of Decree for, etc.

TIBBALS. J.:

The plaintiff below filed her petition against the defendant as a person and also as administrator of the estate of Martin Asper, deceased. The petition recites that in 1873, the plaintiff was the wife of Martin Asper; that she filed her petition in the court below for a divorce and alimony, and for the restitution of her maiden name. She averred in that petition that her husband had made threats that he would dispose of his property in such a way as to prevent her recovering any alimony in case she should get a decree for alimony against him. The case went to trial and she obtained a divorce and a decree for alimony in the sum of $1,000. She avers that she then obtained an injunction against her husband enjoining him from disposing of his property, and she avers that in violation of the injunction, and for the purpose of defrauding her, having some real estate in Minnessota valued at about $8,000, he fraudulently transferred it to the defendant, Sherwood, and that Sherwood had full knowledge of his fraudulent intent, and participated in it; and that he sold the property to some innocent purchaser who is holding the title to the property, and she asks a judgment against Sherwood, her late husband having died since she oblained the divorce. The question arises as to the sufficiency of the averment as to the decree for alimony, which was in these words: "It is further ordered and decreed, that the sum of $1,000 be laid aside for the plaintiff as alimony, to be paid $500 on the 1st day of June, 1874, and $500 on the 1st day of June, 1875, interest after due. The payment of said $1,000 to be made upon condition that the plaintiff relinquish all right to dower in the real estate of the defendant, and said defendant is ordered and decreed to pay the same with interest after due, or, in default thereof, that execution issue as on judgments at law to pay the same."

Now, the claim is that this petition is sufficient for the reason that this is not an absolute decree to her of this alimony, but simply conditional upon her releasing her claim to dower in any real estate she might have. There is another averment to be read in this connection. "She is now and has been since said decree was rendered, willing and ready to relinquish all claim for dower in the said husband's real estate, if he died seized of any, in which she was entitled to dower." There is a further averment that there was some land in Tennessee, but that it was substantially valueless.

Now, in the light of those averments, is that petition sufficient? It is claimed that as a condition precedent she should release her dower in his real estate—that she shall elect to do that and do it before she has a right to claim this thousand dollars or can proceed in its collection; or if that be not true, then it may be likened to the mutual condition—that she must be ready to do it. We are not disposed to regard this as one of those cases requiring any election at all on her part. The language of the decree is absolute in its terms. It decrees her one thousand dollars. It makes it payable at two fixed periods; provides that it shall draw interest, and further, that on default of pay ment, execution shall issue thereon. It is true it contains the language that payments are to be made upon condition that she release her dower in any real estate of which he may die seized.

Now, what should she do? How can she relase her dower? There is not anything to indicate that the husband died siezed of a foot of land, unless it be the averment that there is some in Tennessee. Where is she to

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go to do it? How is she to get a description of the land? How is she to execute this release? Where is she to file her release? With the clerk, when the clerk is directed to issue an execution for the payment of the plaintiff? Who is to determine that question, and where and in what way is it to be determined, that she is to release it? The most that could be said would be that if he has real estate, and she issues execution, he has a right to insist upon her executing that release, and if she fails to do it in accordance with the terms of the decree, then evidently she would be restrained from the collection of that decree for alimony. But how can it be said that that is something which she shall do first? It would seem that the two propositions were to go together, but if there is no evidence to her that he had any real estate, if it is not her power to find out whether he had any real estate, she has a right to the alimony, and if hereafter she should undertake to set up any claim for dower, then would be the time to raise the question that, having elected to take alimony, she would be barred and estopped from making any claim to dower, and the Court would so decree.

With this view, it follows that the demurrer ought to have been overruled. The judgment of the court below is erroneous and will be reversed.

SUPREME COURT OF OHIO.

DECEMBER TERM.

Hon. W. J. Gilmore, Chief Justice. Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Hon. William White, Judges.

THURSDAY, June 19, 1879.

General Docket.

[Continued from last week.]

'Squire Darling vs George C. Williams, admr. Error to the District Court of Van Wert county.

BOYNTON, J.:

1. Homicide is not excusable on the ground of self-defense, although the slayer believes in good faith that he is in immediate danger of death or great bodily harm, and that his only means of escape from such danger consists in taking the life of his assailant, unless there were reasonable grounds for such belief.

2. In an action under the act of March 25, 1851, requiring compensation for causing death by wrongful act, neglect or default, evidence having been given tending to show that the deceased commenced the affray in which he lost his life, the defendant prayed an instruction to the jury, that if the wrong or fault of the deceased contributed to the injury resulting in his death, no recovery could be had in the action.

Held: That the instruction prayed for was properly refused.

Judgment affirmed.

Ohio, on relation of William H. Goss vs W. Randall, Auditor of Warren county. In mandamus.

McILVAINE, J.:

1. Under Section 2, of the act of April 30, 1868, (65 O. L., 260), which provides for an election of a superintendent of the irreducible school fund, created and established for that part of Warren county which lies within the Virginia Military District, "by the members of the Board of Education of the several townships, parts of townships, separate and special school districts, in that part of the county of Warren, entitled to said fund," each member of the several Boards of Education whose districts are composed of territory in whole, or in part only, within the military district, and entitled to share in the fund, is entitled to vote at such election, whether such member resides within the military district or not.

2. By the same section it is made the duty of the Auditor of the county, on a specified day, and in the presence of the clerk of the Court of Common Pleas and Probate Judge, "to open, count and declare the result" of such election from returns signed, sealed and delivered by the clerks of the several Boards of Education" to him before the next Monday after said election. But such Auditor will not be compelled by mandamus to count returns delivered to him unsealed, or sent to him by mail without any disclosure of contents, and opened by him in the absence of the clerk and judge, previous to the day specified.

Peremptory writ refused.

Ohio, on relation of the trustees of Columbus Water-works vs Philip W. Corzelius, Treasurer of Franklin county, and *ex officio* Treasurer of the city of Columbus. In mandamus.

By the Court:

1. That the Treasurer of a city or village having a Board of water-works trustees, is required under section 8, chapter 1 of the Municipal Code of 1878 (75 O. L., 342), to disburse the Water-works funds deposited with him in accordance with section 7 of said act, upon orders drawn by the Board of Trustees and signed by one of the trustees, and countersigned by the clerk of the water-works.

2. Such an order must show upon its face that it is the order of the trustees. The refusal to pay an order drawn in the following form:

"WATER-WORKS ORDER.

"CITY WATER-WORKS OFFICE.
COLUMBUS, O., Jan. 13, 1879.

"Treasurer of Franklin County:

"$39.90. Pay to the order of S. P. Axtell, secretary, thirty-nine dollars, for miscellaneous expense, and charge to water-works fund.

"D. H. ROYCE, Trustee.
"S. P. AXTEL, Secretary.

does not put the treasurer in default, as it does not show that it is the order of the trustees.

Peremptory writ refused.

TUESDAY, June 24, 1879.

David A. Dangler vs. George A. Baker. Error to the District Court of Cuyahoga county.

White, J.:

Four persons, including the defendant, agreed to execute a bond to the plaintiff. One of the persons who was to execute the bond, by fraud procured a bond to be executed and delivered by the defendent, in which the names of two of the persons who were to join in the execution were omitted—Held:

1. That the fraud constitutes no defense to a suit on the bond, where the plaintiff had no notice of the fraud at the time he accepted the same and parted with the property in consideration of which the bond was given.

2. The plaintiff might have required the bond to be executed by all the parties, but he was not bound to do so. He might wave his right to require the bond to be executed by all the parties; and the fact that the bond presented to the plaintiff and accepted by him was the bond of two of the parties only, is no evidence to charge him with notice of the fraud practiced in its procurement.

Judgment affirmed.

Frank Campbell vs. the State of Ohio. Error to the Court of Common Pleas of Huron county.

McIlvaine, J. Held:

1. Upon a trial, under an indictment, containing a single count, charging the defendant with the embezzlement of moneys, where it appears that the moneys were the proceeds of several notes placed in his hands by his employer at different times and

collected by him from different persons and at different times, such facts alone do not constitute a ground for requiring the prosecutor to elect upon which of the sums so collected the state will rely for conviction.

2. A person, having in his possession certain promissory notes as indorsee, who employs an agent to collect the same and account to him for the proceeds, is an *employe* within the meaning of the act against embezzlement; and upon the trial of the person so employed for the embezzlement of the proceeds, it is no defense to show that his employer was bound to account to another for the moneys.

3. Where a person, not engaged in the business of collecting moneys for others as an independant employment, is employed to collect money for another, subject to his direction and control, the relation of principal and agent is thereby created. And in such case the agent may be guilty of embezzlement, although he was to receive for his services a per centage of the moneys collected.

4. When an agent is prosecuted for the embezzlement of his employer's money, in a certain county wherein he had possession of the money and in which it was his duty to account to his employer upon demand being made, it is no defense to show that he had expended the money for his own use in another county.

5. Under an indictment for embezzlement which charges the offense to have been commited after the act of May 5, 1877, (74 Ohio Laws 249, sec. 11,) took effect, the defendant cannot be convicted of an offense committed before the taking effect of said act, notwithstanding the right of the state to prosecute for the violation of a former statute (66 Ohio L. 29, which was repealed by the act of May 5, 1877) was saved by the act of February 19, 1866 (S. & S. p. 1).

Judgment reversed and cause remanded for a new trial.

No. 114. The State of Ohio vs. Thomas W. Harper. Error on exception to the Court of Common Pleas of Allen county.

GILMORE, C. J.:

1. The general rule of evidence is that dying declarations are admissible only when the death of the declarant is the subject of the charge, and the circumstances of the death are the subject of the dying declarations.

2. Upon an indictment for unlawfully using an instrument upon the person of a woman with intent to destroy a vitalized embryo, in consequence of which she died, her dying declarations are inadmissible.

Exceptions overruled.

No. 99. The American Express Company vs the Triumph Insurance Company. Judgment affirmed, on the ground that the proofs of loss were not furnished within the time required by the conditions of the policy. No further report will be made.

No. 111. Ohio, ex rel., Samuel Miller, et al. vs. Abram Colwell et al. Mandamus. The alternative writ having been obeyed, the cause is dismissed at the cost of the respondents.

No. 599. The State of Ohio, ex rel., Edward Howard and Albert Howard vs. Carrington S. Brady, Auditor of Licking county, et al. Mandamus. Dismissed without prejudice at the cost of the relators.

Thursday, June 28, 1879.

No. 264. The Lake Shore & Michigan Southern Railroad Company vs. Rollin C. Hawkins. Error. Reserved in the District Court of Lake county. Settled and dismissed as per agreement on file, signed by both parties to the action. Each party to pay its own costs in the several courts in which said action has been pending.

No. 724. T. J. Raymond vs. The State of Ohio. Error to the Court of Common Pleas of Hamilton county. Judgment reversed on the ground that the indictment is bad.

Motion Docket.

No. 105. Philip Degenhart et al. vs Louisa D. Cracraft et al. Motion to take the "Cracraft" cases out of their order on the General Docket for hearing. Motion granted.

No. 107. Louisa D. Cracraft et al. vs George B. Schulte. Motion to take cause No. 695 on the General Docket out of its order for hearing. Motion granted.

No. 114. Emma O. Craighead et al. vs Elizabeth Huston et al. Motion for stay in execution in cause No. 334 on the General Docket. Motion granted. Execution stayed on the plaintiff's giving bond in the sum of $1,000, to be executed as directed in subdivision 3, section 15, 75 Ohio Laws, 708.

No. 115. The State of Ohio vs John Shannon. Motion to take cause No. 387 on the General Docket out of its order for hearing. Motion granted, and cause to be heard with No. 119 on the General Docket.

No. 117. John Schneider et al. vs Joseph Metz. Motion to take cause No. 594 on the General Docket out of its order for hearing. Motion overruled.

No. 121. Hezekiah S. Bundy vs. Ophir Iron Company et al. Error to the District Court of Jackson county. Motion of Orlando M. Anthony and others, defendants in error, for leave to file cross-petitions in error.

By the Court:

As held in Shinkle vs. First National Bank, 22 O. S., 516, it is competent for a defendant in error to file a cross-petition, asking the reversal of the judgment for errors prejudicial to him, and not assigned in the plaintiff's petition. And as a petition in error may, under the present legislation, be filed without leave of court, the same rule will be applied to the cross-petition.

Motion denied.

No. 98. T. J. Redmond vs. the State of Ohio. Motion for leave to file a petition in error to the Court of Common pleas of Hamilton county. Motion granted and cause taken out of its order and set for hearing September 27, 1879.

No. 116. The State of Ohio ex rel., J. E. Vallgean vs. W. H. H. Cadot, Auditor of Scioto county. Motion for an alternative writ of mandamus. Motion granted and alternative writ allowed.

No. 120. Pittsburg, Cincinnati & St. Louis Ry. Co. vs. Elias G. Beck and wife. Motion for a more complete record in 676 on the general docket, and for an extension of time to print the record. Motion granted.

Thursday, June 28, 1879.

No. 118. Charley Shaffer vs. Moses R. Dickey, Judge, etc. Motion for a writ of mandamus to compel the signing of a bill of exceptions. Writ refused.

No. 123. Martha Crooks vs. The Door, Sash and Lumber Company et al. Motion for leave to file a petition in error, and also for stay of execution, etc. Motion granted, petition in error filed, and undertaking fixed at five hundred dollars.

Hereafter motions will be heard on Thursdays instead of Saturdays.

Court adjourned to September 22, 1879.

U. S. CIRCUIT COURT N. D. OF OHIO.

July 1.

3885. Thos. F. Sunney vs Charles Ensign et al. Petition filed. Ed. S. Meyer.

3886. Middleton Bell vs The Hibernia Ins. Co. Petition filed. Arnold Green.

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3183. Register vs Worstwick et al. Motion to dismiss by deft. M. D. Leggett.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending July 3, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

June 28.

C. F. Helmrich to Otillie Schacht. $700.

George H. Lewton and wife to The Society for Savings. $500.

John Crist to same. $2,000.

Daniel Kennedy and wife to The Citizens Savings and Loan Ass'n. $200.

George W. Corlett and wife to The N. Y. Baptist Union for, etc. $3,300.

Henry B. Finskelaux and wife to Wilhelmine Salberg. $850.

Loritta J. Pier to The Society for Savings. $5,000.

June 30.

Catharine Buehl to Patrick Casey. $160.

Bambard Seifried and wife to John Marshall. $600.

Joseph Mosek to Michael Kraus. $300.

Anson Bildstin and wife to Margaret Stoll. $475.

Fannie E. Jennings to Lillie Ford et al. $3,000.

Dallas Elliot and wife to E. I. Potter. $1,355.

Casper Fink and wife to David M. Johnson. $800.

Frank G. Babcock and wife to same. $300.

Elizabeth Fenton to Charles D. O'Connor. $500.

July 1.

Barbara Wacknitz and husband to Lizie Rehfuss. $350.

James Nolan to Chas. Liening. $333.33⅓.

Joseph A. Day and wife to The Society for Savings. $200.

Jas. Muggleton aud wife to Grace Wroath. $700.

Myron R. Keith and wife to Wm. J. Gordon. $3,096.30.

Rosanna Legan to The Society for Savings. $550.

Henry Bierbaum and wife to J. M. Kathrope. $970.

Herman L. Warbach to August Stohlman. $250.

Bernard Flannigan to The Citizens' Savings and Loan Association. $300.

Chas. A. Smith to Alva Bradley. $700.

Frederick N. Stratemann and wife to Louis Klingman. $700.

Lake Erie Iron Co. to Society for Savings. $4,000.

Chas. A. Smith to Harriett P. Hickox. $2,500.

Geo. Agar and wife to A. Gilchrist. $1,500.

Wm. John Maier and wife to Franz Luther.

July 2.

Mathias Lockisner and wife to Society for Savings. Seven hundred and fifty dollars.

James G. Coleman and wife to John S. Bullard. Twenty-five hundred dollars.

Augusta Altman et al. to Crumb & Baslington. One thousand dollars.

July 3.

W. C. Bosworth and wife to C. B. Lockwood. Four hundred dollars.

Mary Ann Celig to Andrew Wirth. One hundred dollars.

Annie M. Simpson and husband to D. E. Paisley. Nine hundred dollars.

Kate E. Wood et al to James M. Hoyt et al. One hundred dollars.

Edmund F. Atterton and wife to Amasa Stone. Six hundred dollars.

Arma M. Darmstaetter to Rosina Schaffer. One hundred and fifty dollrs.

John A. Glueck and wife to Jacob Dubs. Two hundred and ninety-seven dollars.

Edwin Hart and wife to Thos. H. White. Six hundred and fifty dollars.

Same to same. Eleven hundred and twenty-five dollars.

Patrick F. Dwyer to A. A Pope, trustee. Four hundred dollars.

CHATTEL MORTGAGES.

June 28.

James H. Smith and wife to Marie Smith. $800.

C. H. Blish to Eck Heisley. $100.

Guidon Conkling and wife to Dan P. Eells. $750.

C. H. Blish to J. H. Schneider. $150.

June 30.

Ezra S. Adams and wife to W. I. Hudson. $300.

Joseph Chatterton to John Kurz. $42.

Wm. G. Vial to Henry Hoffman. $300.

David Hoffman to same. $1,000.

Jacob Korel to George Korel. $500.

Henry Kendrich and wife to Joseph Rosenwater. $100.

Levi Copperman to Martin Haas. $40.

Kelly Island Lime Co. to James F. Clarke. $10,597

July 1.

A. H. Winslow to Laura W. Hilliard. Twenty-seven dollars and fifty cents.

J. F. Oneill to C. K. Saunders. Thirty dollars.

J. O. Thorp to J. P. Woodworth. Ninety dollars.

Louis Havre to R. Landaw & Co. One hundred and fifty-six dollars.

Lyman W. Carr to Harriet E. Hill. Six hundred and sixty dollars.

July 2.

L. S. Middaugh to A. W. Bailey. $45.

J. B. Armstrong to Geo. Hall. $200.

Wm. H. Stewarl et al. to Wm. F. Newcomb. $155.

Mrs. Mary Wing to M. Silverstone. $6.

July 3.

John Parry et al to Elizabeth Forschner. Four hundred dollars.

John Stern to L. Holmes. Two hundred and sixty-one dollars and eight cents.

Andrew Ebner to Wm. Ebner. Two hundred dollars.

DEEDS.

June 27.

Henry Haas and wife to Anna M. Magner. $1,000.

Anna M. Magner to Barbara Haas. $1,000.

Seth W. Johnson to M. S. Johnson, trustee. $30.

J. E. Math and wife to A. P. Wells. $450.

Frank Peckav and wife to Anna Peckav. $5.

John Peterjohn and wife to George Peterjohn. $800.

George C. Thomas and wife to Wm. Spafford. $3,000.

Alonzo S. Sanders by C. B. Bernard, Mas. Com., to John W. Taylor, exr., etc. $15,259.38.

Joshua B. Glenn et al. by C. C. Lowe, Mas. Com., to Azariah Everett. $12,500.

June 28.

The Barney & Smith Man. Co. to Gilbert A. Bray. $1.

Otillie Schacht and husband to Carl F. Helmrich. $3,000.

Daniel Jones et al. by C. C. Lowe, Mas. Com., to Edward B. Doane et al. $3,100.

Charlie Barkwill et al. to John Houska and wife. $370.

Frances S. Lane et al. to Thomas H. White and wife. $5,000.

Jane A. Massey to George Henry Lamert. $1,330.

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Same to same. $1,600.
Charles H. Potter and wife to Nathan C. Winslow. $23,500.
Howard W. White et al. to Thomas H. White et al. $1.
Viola M. Wilson and husband to George H. Lannert. $500.
Richard Kinkelaar by Felix Nicola, Mas. Com., to Matilda Kinkelaar. $1,000.

June 30.

Dallas Elliott and wife to E. Q. Potter. $900.
Gordon Foster and wife to Lewis Landen. $2,400.
Wm. Ford and wife to Fannie E. Jennings. $1.
Lillie Ford et al. to same. $10,000.
John W. Galloway and wife to Philena Spafford. $15.
Carrie L. Ingles to Rosa M. Stow. $2,300.
Same to same. $2,200.
Herbert A. Kinney and wife to Amasa Stone. $1.
Ellen Silven to Thomas Perkins and wife. $1,800.
Michael Haps and wife to Edward Belz, trustee. $5.
Edward Belz, trustee, to Bridget Hays. $5.
Margaret Corlett et al. to William Kinsrode. $1.
Wm. Kinsrode et al. to Mary J. Corlett et al. $1.
Same to Louisa Crane. $1.
Ira Lewis and wife to W. C. Scofield. $6,000.
Franz Mottel and wife to Joseph Nosek and wife. $600.
Ada M. Potter and husband to Laura A. Elliott. $2,000.

July 1.

J. M. Curtiss and wife to Duncan McIntosh. $1,125.
Lorenzo Cook and wife to J. D. Rockefeller. $7,200.
J. G. W. Cowles et al. to F. W. Strateman. $1,500.
Wm. A. Davidson to William J. Maier. $550.
Jedediah Hubbell and wife to Jas. E. Hubbell. $25.
James M. Hoyt and wife to Charles Mayer. $850.
Clarissa Harris et al. to Bryan Masterson. $175.
John Jackson et al. to William A. Davidson. $450.
John Knox and wife to John Theobold. $900.
Mathew Lynch to Helen Maher, trustee. $1.
Helen Maher, trustee, to Mary Lynch. $1.
Charles Leiving and wife to James Nolan and wife. $500.
Frederick Mull and wife to John Snell. $55.
Herman Orth and wife to Charlotte Deubel. $8,500.
M. M. Spangler to Anngenette Gilman. $1.
Mathias J. Smith and wife to Fred Mueller. $350.
A. K. Southworth to Albert Southworth. $500.
Albert Southworth to A. K. Southworth. $250.
Fred Schmoldt and wife to Elijah Sanford. $5,000.
John Theobold and wife to John Kohn. $600.
John W. Walkey and wife to Gideon Folk. $1,072.
John Johnson, by William Raynolds, Mas. Com., to Herman L. Marbarch. $300.

July 2.

Sarah R. Benedict to Harriet N. Fitzpatrick. Seven thousand five hundred dollars.
James H. Clark and wife to Albert C. Clark. Two dollars.
Same to same. Two dollars.
Albert C. Clark to Harriet Clark. Two dollars.
Same to same. Two dollars.
Frank Deitz and wife to Reinhard Deitz. Four thousand dollars.
Wm. J. Gordon and wife to Mary C. Keith. Three thousand and thirty dollars.
George P. Karr to Henry Karr. Two thousand one hundred dollars.
Joseph Lehman and wife to Arnold Lehman. Two thousand five hundred dollars.
Henry G. Lick and wife to the trustees of German Wallace College. Six hundred and fifty dollars.
George March to Eliza March. Five hundred dollars.
Society for Savings to Lake Erie Iron Co. Five thousand two hundred and four dollars and sixty cents.
B. F. Worthington and wife to Mary A. Flynt. Two thousand dollars.
C. Newkirk et al., by W. I. Hudson, Mas. Com., to Jacob Mendelbaum. One thousand two hundred and sixty-seven dollars.

July 3.

Marshall L. Shay and wife to Osborn Case. One dollar.
Sherlock J. Andrews and wife to W. W. Andrews. One dollar.
Lewis W. Ford and wife to Sarah E. Rich. Two thousand dollars.
Charles Kaiser and wife to William Kopernik. One thousand seven hundred dollars.
Agnes H. Woodward and husband to John Kullman. Four hundred dollars.
Amasa Stone and wife to Mary E. Atherton. Nine hundred dollars.
Horace Rudd et al. to W. A. Sorter. One dollar.
Same to Hester A. Belcher. One dollar.
Charles N. Sortor et al. to Rachel Rudd. One dollar.
Hiram Barrett and wife to Josephine A. Walsh. One thousand nine hundred and twenty dollars.
Ann H. Hepburn to William Clark. Two hundred dollars.
John Bland to Samuel Bland. Two thousand dollars.
John Crotty and wife to Thomas P. Crotty. One dollar.
N. D. Meacham et al. to William Clark. Five hundred and fifty dollars.
William C. Northrop to George E. Bowmad. Three hundred and thirty-two dollars.
Thomas P. Crotty to Ann Crotty. One dollar.
H. H. Harris and wife to Patrick McGarr. Seventy-five dollars.
N. D. Meacham et al. to William Clark. Four hundred dollars.
William Hall and wife to William Hall, Jr. One dollar.

Judgments Rendered in the Court of Common Pleas for the Week ending July 3d, 1879, against the following Persons.

June 30.

Jay H. Stewart et al. $680.03.
Melchior Neff. $443.30.
James Kehrion. $15.90.
Romain S. McClintock. $84.84.
Seth W. Johnson. $3,672.02.
F. W. Stratman et al. $887.72.
Henry C. Cook. $1,368.98.

MECHANICS' LIEN.

June 28.

Fred Altman and wife to Hugh Harrison et al. $275.

COURT OF COMMON PLEAS.

Actions Commenced.

June 27.

15371. Philip L. Kissler et al. vs Thomas King, sec'y. Board of Police Com'rs., et al. Replevin. Kessler & Robinson.
15372. State on complaint of Emma M. Green vs Michael Corcoran. Bastardy. McMillan & Morton; Willson & Sykora.
15373. Anna Stoeckler vs Frank Jones. Appeal by deft. Judgment June 9.

June 28.

15374. Amasa Stone vs John F. Becker et al. Money and sale of mortgaged property. B. R. Beavis.
15375. Alvah Bradley vs Fred W. Pelton. Money only. James Fitch and John Ensign.

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15376. W. H. H. Peck vs same. Same. Same.
15377. Daniel Jones vs Timothy Sullivan. Money only. G. E. and J. F. Herrick.
15378. Louisa A. Cooke vs Herbert F. Taylor. Money only. Henderson & Kline.
15379. Peter Forney vs Wm. Downie. Appeal by deft. Judgment June 9. Kessler & Robison.
15380. Deborah E. Strong vs John W. West et al. Money only. T. J. Carran.
15381. Alexin B. Judson vs Fred W. Pelton. Money only. Mix, Noble & White.
15382. Charles Wintrick vs Andrew McCormack. Money only. Foster, Hinsdale & Carpenter.

June 30.

15383. State on complaint of Minnie Rosenwald vs John Daw. Bastardy. Gilbert, Johnson & Schwan; George Schindler.
15384. Same Jennie Miller vs Emil Mueller. Same. Young & Weber; S. E. Adams.
15385. Samuel Ashley vs Henry C. Cook. Cognovit. Gary & Everett; S. S. Church.

July 1.

15386. Charles E. Reader vs Andrew Platt. Money only. S. E. Adams and R. T. Morrow.
15387. John B. Richland et al. vs James Welch. Appeal by deft. Judgment June 3. Foster & Carpenter; Foran & Williams.
15388. The Kentucky Distilling Co. vs John Hewett et al. Money only. Arnold Green.

July 2.

15389. A. M. Jackson et al. vs Mary E. Lankester et al. Money only (with att.) Jackson, Pudney & Athey.
15390. C. Koch et al. vs F. Spreng. Money only (with att.). Ingersoll & Williamson.
15391. S. Weditzka vs Barter Swaffield et al. Money only. Arnold Green.
15392. Plymouth Cordage Co. vs Reuben D. Swain et al. Money only (with att.) Ingersoll & Williamson.
15393. Charles D. Everett vs Thomas Hamilton. Appeal by deft. Judgment June 6. Weed & Dellenbaugh; Lewis & Castle.
15394. L. J. Rider vs J. T. Sullivan. Appeal by deft. Judgment June 11.
15395. Patrick Smith vs Seth W. Johnson. Money only. Charles F. Fish.

July 3.

15396. J. P. Malseed et al. vs. F. Spring. Money only, with attachment. R. D. Updegraff.
15397. Society for Savings vs. Peter Rose et al. Mouey and sale of land. S. E. Williamson.
15398. N. Robinson vs. Wm. R. Gleason. Appeal by defendant. Judgment June 26.
15399. Henry Wick et al. vs. John Gerlack et al. Cognovit. Arnold Green; C. M. Stone.
15400. W. A. Fisher et al. vs. Casper Rinner. Cognovit. Stone & Hessenmueller; Arnold Green.

Motions and Demurrers Filed.

June 27.

2763. Hills vs Cleveland Malleable Iron Co. Motion by deft. H. Haines to dismiss action.
2764. Farran vs Tuyle. Motion by plff. to vacate dismissal and to reinstate case with notice of acknowledgment of service.
2765. Maurer vs Lowe et al. Motion by John M. Wilcox, sheriff, for order to pay taxes, etc., from proceeds of sale.
2766. Same vs same. Motion by plff. to confirm sale last made and for distribution of proceeds.

June 30.

2767. Tait vs Stevens et al. Demurrer by plff. to answer of James Jordon.
2768. Gould vs Platt. Demurrer to the petition.

July 1.

2769. Newman vs Gabel et al. Motion by deft. E Goldberg to vacate entry made June 30, '79, and for leave to plead.

July 2.

2770. Wenham & Son vs. Andress. Motion by defendant to strike petition from the files.

July 3.

2771. O'Neill vs. Hibernia Ins. Co. Motion to require plaintiff to seperately state and number causes of action and make petition more definite and certain.
2772. Avery vs. Drennan. Demurrer of defendant by A. C. Hitchcock, her guardian ad. litem, to the petition.
2773. Ticehurst vs. Gardner et al. Motion to require plaintiff to separately state end number causes of action.

Motions and Demurrers Decided.

June 28.

2348. } 2350. } Eells trustee, vs Kinsman St.R. R. Co. et al. Over'd. Deft. excepts.
2417. Lindgren vs Crocker et al. Overruled. Defts except.
2438. Patterson vs Smith. Granted.
2439. Durand vs Smith. Granted.
2720 } 2725 } Williamson, trustee, vs L. V. & Coll'r. R. R. Co. et al. Overruled. Deft. Lewis excepts.
2160. Smith vs Sommerville et al. Stay of sale ordered.
2757. Wirth vs Bading et al. Granted by consent. E. M. Heisley appointed receiver. Bond $250.
2756. Long et al. vs Burkhardt et al. Granted to sell at not less than $2,900.

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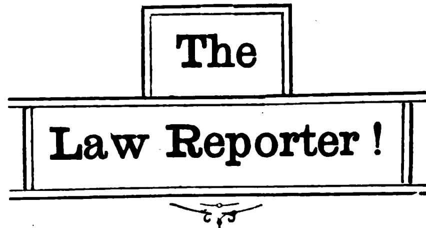

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THE ROMAN CIVIL LAW.

V.

PANDECTS, BOOK I., TITLE I.—(*Lex.* 9—*Gaius.*)

Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur. Nam quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est vocaturque jus civile, quasi jus proprium ipsius civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes peraeque custoditur, vocaturque jus gentium, quasi quo jure omnes gentes utuntur.

(All people who are governed by law and customs, have in part their own, and in part a law universal and common to all men; for the law that every people establishes and enacts for itself is peculiar to the state of that people, and as such is called the civil law; but the law that has its natural source and origin among all people, is recognized by all equally, and is called (jus gentium) international law, because all people are judged by that law.)

Pandects, Book I., Title 2.

De origine juris et omnium magistratuum et successione prudentum.

(Concerning the origin of laws, and (the appointment) of all magistrates, as well as concerning the order of those learned in the law.)

This title is quite lengthy and we omit the details and translation, and will give but the substance.

(Lex. 1.) The principle is laid down by Gaius, that before undertaking to expound or teach the principles of the civil law, it is essential to go back to the beginning, namely, to the founding of Rome, and trace the history of that city, its people and their laws, for the reason that nothing can be complete and perfect unless, when the end has been reached, everything shall have been mentioned that belongs to it.

(Lex. 2, Title 2.) Pomponius in this title then gives a chronological view of the origin and development of the law. He says in substance:

When Rome was founded its people were not governed by fixed laws, the kings governed and ruled arbitrarily. Romulus in time divided the people into thirty divisions and called them Curiae; and through and by these the first laws were enacted. After the expulsion of the kings, the laws that had been passed were all annulled, and the Roman people again lived and were governed by custom. This state of affairs lasted about twenty years, when the want of written laws became felt and a demand for them was made for the better security of person and property. A committee of ten men was appointed, with instructions to frame a body of written laws applicable to the Roman State, and to draw from the laws of Greece in the framing of the same. This committee reported a body of ten laws written on ivory tablets, (in tabulas eboreas,) and were placed on the Rostrum in the Forum at Rome, so that every one might read, and commit the same to memory; and after the lapse of a year or more two more laws were added to this number by this same committee, and thus it happened that these laws ever afterward were called and known by the name of the "twelve tables."

Those professing the law, were called upon in course of time to interpret and explain these laws; controversies arose respecting their meaning. In this wise unwritten declarations and decisions began to be given, and to become fixed, thereby creating the civil law. Actions were framed out of these laws called leges actiones. Therefore it may be said that the first written laws were the twelve tables from which the civil law had its origin as stated, and the leges actiones were framed from the latter. This condition of things lasted about one hundred years, and it would seem that the priests, principally, interpreted these laws and dispensed justice during this time.

The Senate in time acquired control and began to frame and enact all laws. The praetors began also to decide what the law was, and finally the emperor. Pomponius concludes this branch of the subject (namely, the origin of the law) in these words:

Book 2, Title 2, Lex. 2. § 12.

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Ita in civitate nostra aut jure, id est lege, constituitur, aut est proprium jus civile, quod sine scripto in sola prudentum interpretatione consistit, aut sunt legis actiones, quae formam agendi continent, aut plebisscitum, quod sine auctoriate patrum est constitutum, aut est magistratuum edictum, unde jus honorarium nascitur, aut senatus consultum, quod solum senatu constituente inducitur sine lege, aut est principalis constitutio, id est, ut quod ipse princeps constituit pro lege servetur.

(We make use of in our state either the (old) law (*i. e.*, the twelve tables) or of our own law, which without being written rests upon and was established alone by the interpretations of those learned in the law, or (we make use of) the leges actiones, which include and define the form of the action to be adopted, or we use the plebiscites, which were established without the authority or sanction of the patricians, or we use the edicts of the magistrates, from which the praetorian law had its source, or senate resolves, or the constitutions of the emperors, that whatever the emperor himself announced was to be regarded as law).

Pompanius having dwelt at length upon the origin and development of the law the main parts of which we have endeavored to present, then goes on to say that it is next essential to know the names of those magistrates who decide what the law is and who have control of public affairs, and the origin of the various offices and their functions.

(¶ 13.) (Quantum est enim jus in civitate esse, nisi sint, qui jura regere possint), since of what avail is it that laws in a state exist, unless there are those who are empowered to administer it. He then mentions the various officers of state.

(1st Kings, ¶ 14) Quod ad magistratus attinet, initio civitatis hujus constat reges omnem potestatem habuisse. (Regarding magistrates it is well known that with the founding of this state, all power was lodged in the hands of the kings.

(¶ 16). Exactis deinde regibus consules constituti sunt duo; penes quos summum jus uti esset, lege rogatum est; dicti sunt ab eo quod plurimum reipublicae consulerent.

(2d Consuls). (After expulsion of the kings, two consuls were appointed, the law declaring that to them should be given the highest power; they are called consuls, from this, that they were expected to counsel and advise the state in all public matters).

Then in course of events, as the state increased in population and power as foreign wars became frequent, other offices were established as:

3.) CENSORS. — Whose business it was to register the goods of citizens and impose taxes, with power also to censure vice and immorality.

4.) DICTATORS. — Appointed in times of war. Had absolute authority —a quibus nec provocandi jus fuit et quibus etiam capitis animadversio dataest. Huncmagistratum, quoniam summam potestatem habebat, non erat fas ultra sextum mensem retinere. (from whom no appeal could be taken and to whom was given the right and power to chastise and punish with death. These magistrates, since they possessed the highest power, could not be retained or hold said office beyond six months).

After the expulsion of the Kings and about in the 7th century, the Plebrians elected,

5.) TRIBUNES.—Who were elected to protect the people from the oppression of the patricians, and to defend their liberties against attempts that might be made upon them by the senate or consuls.

The tribunes were at first two, afterwards increased to ten.

6.) AEDILES.—Officers or magistrate who had care of the public buildings, streets, highways, public spectacles, etc.

7.) QUAESTORS.—Officers or magistrates who had the management of the public treasury—the receiver of taxes, tribute, etc.

8.) PRAETORS. — Civil officers—a Praetor urbanus—a city judge as distinguished from Praetor Peregrimus, a judge of cases in which one or both parties were foreigners.

9.) THE APPOINTMENT of ten judges.

¶ 34—Ergo ex his omnibus decem tribuni plebis, consules duo, decem et octo praetores, sex aediles in civitate jura reddebant.

(From among all these, ten tribunes of the people, two consuls, eighteen pretors and six aediles imparted and declared the law in Rome.)

Pomponius in this title then names many of the most illustrious lawyers, and in paragraph 35 begins by saying: Juris civilis scientiam plurimi et maximi viri professisunt.

(Many and the best men of Rome taught the science of the civil law.)

Some of the most prominent of these lawyers were Publius Paparius, a learned man, and it was he who collected all the laws enacted by the Kings. Appius Claudius, one of the committee of ten who framed the 12 tables—Sempronius, the only person to whom the Romans gave the appellation of "sophon," the Greek word for "The wise"—Cajus Nasica, Quintus Mucius, Tiberius Coruncanius, the first who taught and instructed in public, Marcus Cato, Publius Mucius, Publius Rufus, Sextus Pompejus, Publius Mucius, Quintus Mucius, Pontifex Maximus.

Paragraph 43 of this title can be found substantially stated by Blackstone in his commentaries, page 13, in his lecture on "The Study of the Law"—"That one Servius Sulpicius, a gentleman of the Patrician order, and a celebrated orator, had occasion to take the opinion of Quintus Mutius (Scaevola), but for want of knowledge in that science, did not understand him (not even the technical terms used by him) and Servius asked him again what he meant; Quintus again answered him, but still he (Servius) failed to comprehend. Scaevola then upbraided him with this memorable reproof: "That it was a shame for a patrician, a nobleman, and an orator of causes to be ignorant of that law in which he was so particuliarly concerned." This reproach made so deep and impression on Sulpicius that he immediately applied himself to the study of that law, wherein he arrived to that proficiency that he left behind him about an hundred and forescore volumes of his own compiling upon the subject, and became in the opinion of Cicero a much more complete lawyer than even Scaevola himself."

H.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

[Watson, Hale and Tibbals presiding.]

FOREMAN VS. COMPTON.

Action for Fraud—Rule as to what Representation must be to be Fraudulent when made upon Information, etc.

HALE, J.:

The action below was brought by Foreman to recover damages for a fraud alleged to have been practiced upon him by the defendant in an exchange of real estate. The petitioner alleges that on May 2, 1876, he was the owner of a house and lot in this

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city, and that on that day he entered into a contract with the defendant Compton by which he conveyed that house and lot to Compton; that the price agreed upon for the house and lot was some $13,000, in part payment of which Compton conveyed to him a section of land in the state of Iowa, also forty lots which were alleged to be in an addition to the village of Highland Park in the state of Illinois. Certain representations are alleged to have been made by Compton in relation to this property. The allegation is that Compton, to induce Foreman to take the property at the price, represented that the Iowa property was good farming lands situated within two miles and a half of a flourishing village, etc.,—a general representation as to its location, condition and quality, and it is alleged that all those representations were untrue. So of the property in Illinois which was represented to be an allotment within a certain distance of the village, when in fact there was no allotment at the time the contract was made.

The tendency of the testimony only is set out. I shall refer to but a small portion of that, which is this: The defendant gave testimony tending to prove that in making said contract and in the negotiations in reference thereto the defendant Compton informed the plaintiff that the defendant had never seen the land or said lots in Compton's addition of said land in said state of Iowa, and that what the defendant said about that was only what he had heard from others. To meet that condition of the testimony the Court gave this charge: "It is a well settled rule of law that parties entering into a contract are each required to act in good faith with the other. The law contemplates good faith. Good faith is manifested frequently in various ways,—by the acts of parties, the declarations of parties and their surroundings, so that when you come to consider the question you may inquire, were these representations as stated by this plaintiff made on the part of the defendant, if they were, did the plaintiff rely upon them? Because, if he did not rely upon them he would not be entitled to recover. If he did rely upon them, then inquire into the character and quality of this land, putting it with the representations made and were they relied upon. Now, it is claimed that the defendant said that he never saw the lands, but got them from some person and that the representations that he received with the land were the representations that he made to the plaintiff at the time. Now, that is sometimes done by men, but the law stamps that representation as a representation of the party and makes them and adopts them as his own. If a man says, "I know nothing about this land, but my agent or neighbor who lives beside this land represented it to me as being good farming land and grazing land, I know nothing about it myself, that is, he says he knows nothing about it himself,—that becomes a representation of the party thus making it unless he says avowedly, "depend not upon my representation; you must see the land for yourself or consult with your friends who may live near the land and depend solely upon what he says." The law will not encourage falsehood. It is not the policy of the law to encourage falsehood. It is not the policy of the law to encourage that species of representation that are put upon John Smith's shoulders by John Jones. For instance, if Jones represents that his information comes from Smith and he puts that forward to you, you have a right to rely—that that is his representation and if you rely upon it he is responsible for the act. On the other hand it is claimed this defendant did not know anything about the land; that he had no means of knowing; that he relied solely upon the representation of the other. Well, if he knew nothing of the land and represented the land to be of a certain quality and character when in point of fact it was not, he is just as much responsible for that act as though he had known what the quality of the land was and had misrepresented it. On this proposition good faith and good morals go together, and the law has never yielded one iota in the union of these two principles."

We are asked to reverse the judgment in this case on that charge. We suppose the law to be that if a person pending a negotiation makes a material representation as within his own knowledge of a fact that he knows nothing about and it turns out that the representation is false, that it is fraudulent. If he makes a statement that he knows nothing about—has no information upon—as within his own knowledge, the other party has a right to rely upon the representations as of a fact that he did know and it may be a fraud. But that is not this charge. This charge says: If he does not know anything about it and tells the party at the time he does not know anything about it, but tells him that all he knew about it he derived from others—just what he did know about it—that it is fraudulent. We supposed the rule in such a case was that you must go one step further and prove knowledge on his part. If he undertakes merely to repeat what another told him, does it honestly, and it turns out to be false, in order to hold him for a fraudulent misrepresentation it is necessary to bring knowledge home to him to show he was in fault. If he has acted honestly in simply repeating what another has told him, we do not think he can be held to be liable. This charge leaves out that element entirely. The jury might well have understood from this charge that if this man owning lands in Illinois and Iowa, had said to Mr. Foreman at the time of this trade that he knew nothing about these lands, but he had been told their condition was such and such, and that Foreman relied upon that without any reference to whether Compton was acting in good faith or bad faith, they were to render a verdict against him, Compton. We do not think that is the law. We have heard this charge read over and have read it carefully again, and there is nothing in it that would cure this error of law contained in the passage that I have read. Indeed, it is not a charge, the province of which is to cure anything; and for this error, without looking into the other errors, we feel compelled to reverse this judgment.

John W. Heisley, for plaintiff.
Estep & Squire, for defendant.

M'GEE VS. THE CLEVELAND ORGAN CO.

Set-off—Rule as to—Evidence of Account Books when Action Founded on Accounts, etc.

Tibbals, J.:

The Cleveland Organ Co., a corporation organized under the laws of this State, commenced an action in the Court below against G. W. McGee and William L. Higgins, upon an account for two organs alleged in the petition to have been sold jointly to the defendants. McGee filed an answer in which he set up an individual claim against the plaintiff as a set-off to the claim of the plaintiff against the two. The court below held that under the issues in the case he could not set off his individual claim against the claim of the plaintiff, that being against him and his co-defendant jointly.

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It was claimed in argument that the relation of surety might be shown between the defendant and thereby entitle proof of a set-off claim to be made, but there was no such claim made in his answer, and the proof in nowise tended to show anything of the kind.

We understand it to be a well settled rule that parties cannot set-off an individual claim against a joint claim, and the court ruled correctly upon that proposition.

The bill of exceptions shows that the account books of the plaintiff were offered in evidence from which it appears that the two organs were charged to these defendants jointly, giving dates and names. No objection whatever was taken to the introduction of the evidence until the giving of the charge to the jury. Then the defendants requested the court to charge that entries made by the plaintiff on its books, without the knowledge or consent of defendants, could not in any manner bind them or be competent evidence for the plaintiff tending to prove any connection on the part of Higgins with the transaction involved in this suit. The court refused to give that request under the issues that were made and the evidence offered in the case. We see no error in that. The suit was founded on an account and the evidence offered was competent. Its weight or effect would be a matter entirely for the jury under the charge of the court. We think there is no error, and the judgment will be affirmed.

M. B. Gary for plaintiff.

Caldwell & Sherwood for defendants.

SUPREME COURT OF ILLINOIS.

Filed, June 20, 1879.

HERMAN SCHROEDER VS. VIRGINIA F. CRAWFORD.

Civil Damage Liquor Law.—*Proximate and remote damages.*—The husband of appellee was killed upon a railroad by a passing train, while in a state of intoxication. *Held,* that the intoxication was the proximate cause of the death, and the defendants were liable.

The cause having been passed upon by the Appellate Court, no questions of fact are considered.

There being no proof of any negligence upon the part of the railroad company, an instruction upon that point was properly refused. The other refused instruction being similar to the one held bad in Roth vs. Eppy, 80 Ill., 288, was properly refused.

The opinion of the court was delivered by

Sheldon, J.:

On the night of May 6th, 1876, James T. Crawford was killed by a train of cars on the track of the Chicago & Alton Railroad Company, between the city of Bloomington and the town of Normal, in this state.

Virginia F. Crawford, his widow, brought this action, under the Dram Shop Act, to recover damages for injury to her means of support, from such death, the declaration alleging it to have been caused in consequence of the intoxication of (deceased), and the action being against certain keepers of dram-shops in Bloomington, as having furnished the liquor which caused the intoxication, and the owners of the buildings in which the liquors were sold; the statute giving the action severally or jointly against such persons. The suit during its pendency having been dismissed as to all the defendants except Schroeder, the owner of one of the buildings, and Dwyer, the keeper of one other of the dram-shops, a verdict and judgment were rendered against Schroeder and Dwyer, for $2,500, and Schroeder took an appeal to the Appellate Court for the third district, where the judgment was affirmed, and from that judgment of the Appellate Court Schroeder appealed to this court.

On this appeal from the Appellate Court where only questions of law are re-examinable, there are but two of the assignments of error, as we regard, to be considered; one, that the damages are too remote, the other respecting instructions.

The facts appearing are, that Sullivan kept a drinking saloon in the building owned by Schroeder, that (decedent) on the day of his death was at Sullivan's saloon in the forenoon from about nine to twelve o'clock, that he procured intoxicating liquor and was intoxicated there, and was there again at two or three o'clock in the afternoon, that from about twelve to three or four o'clock, in the afternoon, with the above exception, he was at Dwyer's saloon, where he obtained intoxicating liquor and was intoxicated when there; that he was seen at another saloon as late as five o'clock, and was still intoxicated; that at ten o'clock at night he was seen intoxicated, and it was raining, that no more was seen of him, and nothing was known of the circumstances of his death, more than that about five o'clock the next morning his dead body was found on the railroad track crushed and mangled, evidently by having been run over by a passing train of cars. To reach his home from Bloomington two railroad tracks had to be crossed.

It is contended on the part of appellant that the proximate cause of decedent's death was the train of cars, that if the intoxication at the time contributed to his death, it was a remote cause, in respect of which there is no liability; and Shuggart v. Eagen, 83 Ill., 56, is cited as sustaining this view. It was there held where an intoxicated person had been assaulted and killed by a third party, that the seller of intoxicating liquor was not liable in damages to the widow for the death. It was there said to be the common experience of mankind that the condition of one intoxicated invited protection against violence rather than attack, and that it was not a natural and probable result of intoxication that the person intoxicated should come to his death by the wilful, criminal act of a third party. The present case is quit different. The death was not caused by the direct wilful and criminal act of a third party. It cannot be affirmed that it was not a natural and reasonable consequence of the intoxication that the person intoxicated, with two railroad tracks lying between him and his home, should in a dark night meet with injury and death upon a railroad track from a running engine or train of cars —that it was not such a consequence as in the ordinary course of things might result. Instances of the very occurrence have come before this court. Emory v. Addis, 71 Ill., 273, was a like action with the present, where the death of the intoxicated person was caused by his being run over on a railroad track, by a passing train, in the same manner as here; and a recovery of judgment by the plaintiff was sustained. The intoxication was held to be the proximate cause of the death.

The action is not a common law action depending for its maintenance on common law principles, but it is a statutory remedy and lies as given by the statute. The statute giving the action is very broad in its terms, declaring that "Every husband, wife, etc., who shall be injured in person or property, or means of support, by any intoxicated person, or *in consequence of the intoxication*, habitual or otherwise, of any person," shall have the right of action. If a person because of being intoxicated, lies down upon, or falls on a railroad track and is unavoidably run over and killed by a

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passing train of cars, the result is in consequence of the intoxication. It is said, there was here an intervening agency which caused the death, to-wit, the train of cars; that that was the proximate cause, and the intoxication but the remote cause; and that the proximate cause only is to be looked to. So it might be said, where one from intoxication lies down and becomes frozen to death, or falls into the fire and is burned to death, or is drowned by a freshet, as in Hacket v. Smelsley, 77 Ill., 109, that the intervening agency of frost, fire and the freshet occasioned the death, and was the proximate cause, and thus no liability nnder the statute. This would be construing away the statute in defeat of its purpose.

It was not the intention that the intoxicating liquor alone, of itself, exclusive of other agency, should do the whole injury. That would fall quite short of the measure of the remedy intended to be given. The statute was designed for a practical end, to give a substantial remedy, and should be allowed to have effect according to its natural and obvious meaning. Any fair reading of the enactment must be that in the instances above, as well as the present, the death would have been in consequence of the intoxication, within the nndoubted intendment of the statute.

We perceieve no error in respect of instructions. The chief complaint is the refusal to charge that the jury should find for the defendants if the death of the deceased was produced by the carelessness of the railroad company, or if there was a failure of proof that it was not produced by the fault of the railroad company.

Without admitting that negligence on the part of the railroad company would bar a recovery, it is sufficient to say that there was no proof whatever as to any negligence of the company, and so no evidence upon which to base an instruction in that respect.

It is supposed that as the declaration alleges that the death was produced without any fault on the part of the railroad company, it was necessary to prove the averment. But if no fault of the company was shown it might be presumed there was none.

The allegation, too, was not material, and so unnecessary to be proved. The ninth refused instruction asked by the defendants was substantially the same as the appellant's fifth refused instruction in Roth vs. Eppy, 80 Ill., 288, which the court there held to have been properly refused.

The judgment of the appellate court will be affirmed.

Judgment affirmed.

WALKER, J.—I am unable to concur in holding the owner of the property liable in this case.

OSBORN & LILLARD, attorneys for appellant.

N. B. REED and KARR & KARR, attorneys for appellee

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending July 11, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

July 5.

Oscar J. Campbell and wife to Charlotte A. Johnson. $500.

Anna M. Groll and husband to The Society for Savings. $500.

W. W. Gould and wife to Charles H. Sessious. $912.

Thomas Dolan and wife to William Hendy. $400.

July 7.

George Tovey to The Society for Savings. $1,000.

William Kapernik and wife to Brooklyn Kranken Unterstuzungs Verein. $400.

John H. Roemer and wife to Bertha Mackler. $300.

Alma R. Pratt to Emily S. Warmington. $1,500.

George Eulnerz and wife to Henry Wertz. $500.

Alden Gulliford to W. A. Lyon. $1,100.

Horace Wilkins to Joseph Colwell. $10,000.

W. J. Morgan and wife to The Society for Savings. $4,000.

John Wilson and wife to same. $1,100.

July 8.

Chas. Hickox and wife to Joseph G. Hussey. $30,000.

John Maitland to Thomas Evans. $2,000.

Mary L. Miller and husband to T. H. White et al. $1,100.

Francis Pinkney to Amanda Derringer. $150.

Samuel Calaban to Chas. Calaban, guard., etc. $1,558.

Wilhelm Reuter and wife to Chrispher Frease. Four hundred dollars.

Kate Havlicek and husband to Horace Wilkins. One thousand dollars.

Susan B. Woodford and husband to Elizabeth Fenton. Two thousand dollars.

Henry Luster to Amanda Derrendinger. One thousand seven hundred dollars.

George Dyke to N. N. Cole. One thousand dollars.

John C. Schroeder to Martin Sperber. Four hundred dollars.

G. M. Hepeburn to J. W. Southworth. One hundred and fifty dollars.

Burton B. Heazlit and wife to John Smith. One thousand three hundred and sixty dollars.

Andrew L. Brenneis to E. E. Lyon. One thousand dollars.

John H. Popper to Susan M. Schley. One hundred and seventy-six dollars.

Josiah Nurse to Rosalind C. Larry. Four hundred dollars.

Daniel D. Tartter and wife to Jacob Mueller. One thousand dollars.

July 9.

Lawrence C. Broughton and wife to Emily C. Warmington. Five hundred and fifty dollars.

Harris Jaynes and wife to The New York Baptist Union, etc. Seven thousand five hundred dollars.

Michael Regan to J. P. Wehres. Four hundred dollars.

Julia A. Hosmer to Sarah E. Clark, guardian, etc. One thousand dollars.

Thomas Mighton to Thomas K. Davidson. Seven hundred and seventy dollars.

July 10.

Robert Fitzrow and wife to Leonard Kitsteiner. Three hundred and fifty dollars.

Harris Jaynes and wife to Alva Bradley. Two thousand dollars.

Michael Watler and wife to Wm. Gauch. Five hundred dollars.

E. D. Stark and wife to The Citizens' Savings and Loan Association. One thousand dollars.

John A. McDermott to Martin Barrisville. Twelve hundred and fifty dollars.

Wm. Weber to Jacob Kurtz. Three hundred and fifty dollars.

Christian Bone to the trustees of the Gegenseitiger Schutzverien. Eight hundred dollars.

July 11.

Michael J. Maloney to Mrs. Margaret Maloney. Two hundred and fifty dollars.

John Tomasek to John Reidel. Two hundred dollars.

Oliver Alger and wife to C. W Schmidt. Five hundred dollars.

CHATTEL MORTGAGES.

July 5.

T. E. Knauff to Amelia Lerche. $100.

Jacob Euch to William N. Shr $100.

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William Leonard to J. M. Degue. $125.

Rudolph Hohage to Henry Lederer. $300.

G. W. Sturtevant to A. W. Bailey. $158.

Paul Schneider to Anna Schneider. $500.

A. M. Jackson to Scoville & Townsend. $300.

July 7.

Joseph Donohue to Luke Joyce. $400.

Rodney D. Daugherty to William Given. $200.

Viek & Meyer to Jacob Meyer. $200.

Louis Umbstaetter to Otto K. Umbstaetter. $1,500.

Same to Louisa May. $1,500.

Richard Blackman to Francis Norton. $300.

William Howell to Edwin Day. $150.

Lucius B. Owen to Emery Owen. $150.

Frederick Roener to J. C. Selby. $100.

July 8.

Chas. Hogg to C. E. Gehring. $563.

Louis Wettrick to E. D. Young. $75.

Emma Laen et al. to John G. Paine. $1,295.

Frederick Roemer to Henry Roemer. $600.

James Templeton to Stahl & Black. $125.

Thos. Riding to C. W. Coates. $50.

Samuel Darby to P. L. Kessler. $300.

July 9.

Erancis Kelley to Mrs. M. A. McKanna. One thousand five hundred dollars.

John Goudy to D. W. Loud. Six hundred dollars.

E. M. Barnes to S. S. Marsh. Seventy dollars.

James T. Denham to Calista M. Wilson. Three thousand dollars.

H. W. Sibbey to Daniel Payne. Eight hundred dollars.

George C. Davies to C. H. Henry. One thousand and fifty dollars.

Annie E. Crosby to Wm. H. Shaw. Fifty dollars.

German Evang. Prot. Church to C. H. Ebert et al. Three thousand one hundred dollars.

Wm. D. Butler to M. C. Hart. Eighty dollars.

Dieterechs & Frary to Meriam & Morgan Paraffine Co. One thousand two hundred dollars.

Jane Cowley et al. to Mary Murphy. Seventy-five dollars.

S. B. Wilson to Susie A. Wilson. Two hundred and fifty-five dollars.

C. J. Keeler and wife to Mrs. Margareth Handley. One thousand one hundred and thirty-five dollars.

July 10.

John Singleton to Wm. Anthony. One hundred dollars.

John Riedel to J. H. Woolnough. Five hundred dollars.

P. L. Baum to R. A. Davidson. Five hundred and seventy-two dollars.

E. J. Shuckcumb to Joanna Dissette. Seventy-nine dollars.

Same to Amelia Abbey. Two hundred and twenty-eight dollars.

Daniel Shay to Mary Shay. Six hundred and eighty dollars.

July 11.

A. Angstedt to W. W. Morrow. Fifty-two dollars and fifty cents.

E. S. Bader et al to Same. One hundred and fifty dollars.

D. E. Getts to same. Sixty-five dollars.

Daniel H. Kelly to Wm. H. Shaw. One hundred and twenty-five dollars.

Bernard Meyer to N. A. Gilbert. One huudred and ninety-five dollars.

C. T. Scheurer to L. W. Monroe. Three huudred dollars.

DEEDS.

July 5.

John G. Elwell and wife to Ernst L. Bargeman. $730.

Abraham Goldsmith and wife to Levi Goldsmith. $700.

Malona R. Gilmore to Israel Hubbard. $5,000.

Robert Gane and wife to George D. Gifford et al. $1,450.

Mary A. Gill et al. to John Sanders. $640.

James M. Hoyt and wife to Mrs. Kate E. Wood. $350.

John Kusa and wife to Albert Mote and wife. $700.

Franciska Minarik to Pozaf Kucera. $500.

C. F. Stumm and wife to Wesley W. Morrow. $520.

Lewis Umbstaetter et al., by H. C. White, Mas. Com., to George Deitz. $8,060.

Wesley W. Morrow to Hiram H. Little. $520.

Ellen S. Stevens to Samuel Penniman, trustee. $6,000.

Samuel Penniman, trustee, to H. H. Stevens. $6,000.

William A. Morris et al., by E. H. Eggleston, Mas. Com., to J. B. Cowle et al. $1,120.

John Sanders and wife to H. E. Ewell. $2,600.

T. H. White et al. to Patrick Lawrence. $720.

Joseph Bartlett, by Thos. Graves, Mas. Com., to H. E. Holden. $4,200.

Charles H. Blish, by C. C. Lowe, Mas. Com., to Calvin W. Blish. $3,690.

Alex. Reid by same to L. E. Holden. $3;334.

Thomas O'Neil to M. J. Gallen and wife. $1,000.

John Madigan and wife to the City of Cleveland. $100.

Conrad Knievin to Joseph A. Kerestler. $5.

Joseph A. Knestler to Anna Kneivin. $5.

Charles L. Crawford, by, etc., to Willard Bank Coal Co. $8,634.

July 7.

Olivia S. Cook to Eli Davis. $480.

Helen Dawse to Joseph Charvat. $310.

Edward Lindsley to James M. Hoyt et al. $1.

Barbara Voelker and husband to E. M. Richardson. $1.

Eliza M. Richardson to Mary E. Johnson. $1.

N. B. Sherwin and wife to Elizabeth C. Compton. $1,000.

Jessie N. Shourds et al., etc., to Fred. C. Bemis. $1,000.

Maria Spuhler to Fred. Paddock. $875.

Elijah Sanford and wife to Fred. Schmoldt. $5,000.

J. P. Harris et al. as trustee, etc., to H. G. Stilson. $1.

Geo. Ballard et al. by C. C. Lowe, Mas. Com. to Fred. Koukert et al. $480.

July 8.

Levi F. Bauder, County Auditor, to James C. Winfield. $1.73.6.

J. H. Brasse to Charles F. Brasse. $500.

C. F. Brasse to Rachael Brasse. $500.

Henry H. Lycn et al. to Edwin E. Lyon. $1,000.

E. E. Lyon et al. to Henry H. Lyon. $1,000.

E. E. Lyon et al. to Adelia L. Brennies. $1,000.

James Corrigan and wife to James F. Clark. $2,500.

John Crowell and wife to John Crowell, Jr. $1,000.

Elizabeth Crowley and wife to Julia J. Cowley Palmer. $600.

Lathrop Cooley to John Smith. $375.

Elizabeth Fenton to Samuel B. Woodford. $5,000.

Mary A. Gill et al. to S. Samplinder, guardian. $2,500.

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Hubbard D. Hollister and wife to Maria S. Dolloff. $1.

John Pinnans and wife to Michael Rice. $1,200.

Alfred A. Pope et al. to Patrick Dwyer. $500.

M. M. Campbell et al., by H. C. White, Mas. Com., to A. J. Wenham & Son. $2,401.

Levi F. Bauder, County Auditor, to Oscar J. Campbell. $34.54.

Same to same. $2.82.

W. E. Gallup, admr., etc., to H. and G. Horder. $2,100.

Fidelia Drake to Sophia Philips. $25.

Sophia Philips to Charles Drake. $25.

John Wellar and wife V. R. Surranner. $1.

James W. Oglevy to George H. Oglevy. $25.

W. L. Stearns and wife to James Oglevy. $2,000.

William Pumfrey to trustees of Storngsville township, etc. $200.

V. R. Surranner to John H. Cappen. $422.

Ira A. Surranner to V. R. Surranner. $2,000.

Sarah Trautman to Jedidiah Southworth. $650.

Christoph Frese and wife to Wilhelm Rueter. $475.

Theron O. Hamlin to Julia A. Hasmer. $5.

E. E. Herrick as exrx., etc., et al. to Oscar J. Campbell. $500.

Emily and James McCreasy to John Remelius. $1,000.

Lumna Swain et al. to J. H. Redington. $1.

Calvin Carn et al., by C. C. Lowe, Mas. Com., to J. R. A. Carter. $2,700.

William I. Hudson, assignee of William Heisley, bankrupt, to Maria A. Martin, admx., etc. $3,334.

Standard Iron Co., by Felix Nicola, Mas. Com., to Charles Hickox. $36,334.

July 9.

Simon Allmyer and wife to Joseph Deitrich. Nine hundred dollars.

Martin Barisville and wife to John A. McDermott. One thousand five hundred and fifty dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending July 11, 1879, against the following Persons.

July 3.

John Gerlach et al. $309.30.
Casper Rinner. $635.14.

July 7.

W. H. Radcliffe et al. $399.55.
H. F. Leypoldt. $1,294.
Thomas H. West et al. $118.17.
Samuel Ewbank and garn. $320.
Amos N. Clark. $80.
John Gerlach et al. $388.58.
Kelly Island Lime Co. $1,356.22.
Marvin & Co. $80.
A. W. Hurlburt. $300.

MECHANICS' LIEN.

July 9.

S. G. Simms et al. to Woods, Perry & Co. $257.83.

U. S. CIRCUIT COURT N. D. OF OHIO.

July 5.

3537. S. H. Terrill vs Abel P. Buell, exr. Motion to modify judgment and retax costs. Prentiss & Vorce.

3888. Jane Wadhaus vs Knickerbocker Life Insurance Co. Petition for money only. H. McKinney and N. W. Goodhue.

3887. Wesley Young vs R. J. Hastings. Bill. Harrison, Olds and Marsh.

July 9.

3889. Cato Grear et al. vs. King Iron Bridge Co. Petition for money only. Ranneys & Ranneys.

3890. Amos R. Eno vs. Hortentia W. Cozad et al. Bill of complaint. Willey, Sherman & Hoyt.

U S. DISTRICT COURT N. D. OF OHIO.

July 5.

1746. In re Ira Budd. Discharged.

July 8.

1488. In re. William Harmon et al. Petition for discharge. Hearing August 6th.

1937. In re. Browning & Steele. Discharged.

COURT OF COMMON PLEAS.

Actions Commenced.

July 5.

15401. Jacob Roguet vs. Mathias Muska, Sr., et al. Money, to subject land and for relief. Babcock & Nowak.

15402. Caroline Stratton vs H. B. Belding et al. Money and to subject leasehold estate. Prentiss & Vorce; C. L. Latimer.

15403. B. S. Coggswell vs. M. S. Castle et al. Appeal by defendants.

15404. Mary E. Lynet vs. Adolph Kline. Money only. Tyler & Denison.

15405. Same vs. Wm. Block. Same. Same.

15406. The Second National Bank vs. E. L. Hills et al. Money and to subject lands. Garey & Everett.

15407. M. Kneebusch vs. Carl Seyler. Money only. Mix, Noble & White.

July 7.

15408. Chas. A. Crumm et al. vs. John Gerlach et al. Cognovit. A. L. Hyde; F. N. Wilcox.

July 8.

15409. Wm. C. Stone vs Charles Becker. Money only. R. E. Knight.

15410. Catharine Clancy vs A. M. Bailey et al. Injunction and other relief. Same.

15411. Margaret Sonnendecker et al. vs Fred W. Pelton. Money only. James Fitch and John E. Ensign.

15412. Robert Simpson vs same. Same. Same.

15413. Joseph Herman vs same. Same. Same.

15414. John F. Beggs vs A. H. Burhaus. Money only. R. E. Knight.

July 9.

15415. Casper Ehrbar Franceska Baumeister, alias, etc. Money only. W. S. Kerruish.

15416. George E. Ehrbar vs same. Same. Same.

15417. John Ehrbar vs same. Same. Same.

15418. The president and managers of the Delaware & Hudson Canal Company vs Charles H. Clark et al. Money only. Burke & Sanders.

15419. Frank Placek vs T. G. Clewell. Money only. Charles F. Morgan.

15420. Jacob Laubscher vs Catharine Scarr. Partition of land. Gus A. Laubscher.

15421. John H. Gause et al. vs John Weidmaier et al. To have assignment declared void and for equitable relief. Safford & Safford.

15422. Wm. Caldwell vs Fred. W. Pelton. Money only. James Fitch and James E. Ensign.

15423. Charlotte Hamburger vs same. Same. Same.

15424. Daniel Hayes vs same. Same. Same.

15425. John Hayden vs same. Same. Same.

15426. Gilbert Gittenger et al. vs same. Same. Same.

July 10.

15427. Jacob Bohnert et al. vs same. Same. Same.

15428. Catharine Griffis vs same. Same. Same.

15429. John C. Hofele vs same. Same. Same.

15430. Andrew Heinz et al. vs same. Same. Same.

15431. George Kuttler et al. vs same. Same. Same.

15432. Gottlieb Kuttler vs same. Same. Same.

15433. Jacob Kuttler vs same. Same. Same.

15434. John Kertz vs. Same. Same. Same.

15435. Julia Metzger vs. Same. Same. Same.

15436. Frederick Moersch vs. Same. Same. Same.

15437. Casper Schazwelder et al. vs Same. Same. Same.

15438. J. W. Seezer vs Same. Same. Same.

15439. Mary W. Fragele vs Same. Same. Same.

15440. Emma Newman vs G. J. W. Newcomer et al. Money and foreclosure. W. S. Kerruish.

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July 11.

15441. Thos. Beckwith vs Fred W. Pelton. Money only. R. F. Paine.

Motions and Demurrers Filed.

July 3.

2774. Woodward vs Williams et al. Demurrer to the petition.

July 5.

2775. Nottingham vs. Sims et al. Motion by defendant Sims to set aside default and for leave to answer.

2776. Muehlhauser vs. Shell. Motion by plaintiff for leave to sell certain property attached pending suit.

2777. Sperget vs. Comsky et al. Demurrer by defendant Freind to the petition.

2778. Kelley vs. Wiggins et al. Demurrer by defendant Clark to amended petition.

2779. Hill vs. Marsh et al. Demurrer by defendant Baker to the 4th cause of action in the petition.

2780. Palliwitz vs. Hudson. Demurrer to the petition.

2781. Smith et al. vs. Ohmerhacuser. Same.

2782. Green, admr., etc., vs. Wilkins. Same.

2783. Eason vs. Landsman. Motion by defendant to strike irrelevant matter from petition.

2784. Schmidt vs. Grabb et al. Demurrer by defendants Mafie E., Carolin and Minnie Grub, Augusta and Frederick Kill, Julia and Johnson Brothers to the petition.

2785. The Clewell Stone Co. vs. The Cleveland City Forge and Iron Co. Demurrer to 2d defense of answer.

2786. Chase vs. Perrier et al. Demurrer by defendant John Perrier to 1st and 2d causes of action of petition.

2787. Morse vs. Jackson et al. Motion by defendant Joseph Bath to strike petition from the files.

2788. Gabile et al. vs. Meakel. Demurrer by defendant to the petition.

July 8.

2789. Ruple vs Schartz et al. Motion by plaintiff for order to pay taxes due and delinquent on premises from proceeds of sale.

2790. Koch et al. vs Spreng. Motion by deft. to dissolve attachment.

2791. Malseed et al. vs same. Same.

2792. Clermont vs Cochran et al. Demurrer by plaintiff to answer of Cochran.

2793. Fisher et al. vs Rinuer. Motion by deft. to vacate judgment and for a new trial.

2794. Brush vs Clevering et al. Motion by defendant Marvin to consolidate this case with No. 13,295.

2795. Taylor vs Hapgood et al. Motion by plff. for a new trial.

July 9.

2796. Kick vs Poe et al. Demurrer by defendants N. B. and Flora A. Dexon to the petition.

2797. Platt vs Reader et al. Demurrer by plff. to 4th, 5th, 6th, and 7th defenses of the answer.

2798. Jones et al. vs Smith et al. Motion by plff. to approve and confirm report of commission in partition.

2799. Haines, treas., vs Swain et al. Motion by plff. to vacate dismissal and reinstate case on docket.

July 10.

2800. Hill vs Marsh et al. Demurrer by plff. to answer of W. B. Baker.

2801. The Second National Bank vs Marbach et al. Motion by plff. to strike out the 1st, 2d and 3d defenses of amended answer of Robert Marbach.

2802. Jones vs Sullivan et al. Motion by deft. Timothy Sullivan to dismiss action as to him.

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T. K. BOLTON.

A meeting of the Cuyahoga county Bar was held at the court-house on Friday, July 11th, 1879, to take action on the death of Mr. T. K. Bolton, which occurred on the 10th inst. On motion of Mr. J. E. Ingersoll, Mr. James Mason was elected president. On taking the chair, Mr. Mason thanked the members present for the honor conferred upon him, and said:

The occasion which calls us together is indeed a sad one. One of our fellow-members of the Bar, one whom we respected, honored and loved, has been stricken down in the prime of his life, and that, too, with but few hours, or perhaps scarcely any, warning. It reminds many of us of a sad occasion some eight or nine years ago, when the father of this young man was also stricken down, without an hour's warning. And we all recur to another occasion, a year ago, when we received the sad intelligence that another of our fellow-members, Mr. Collins, without any warning, had died. We have been reminded on many occasions of our mortality and of our liability to be called hence. Many members of this bar have, within a few years past, been called away from us.

At the conclusion of Mr. Mason's remarks, Mr. W. W. Andrews was chosen secretary.

Mr. Ingersoll then moved that a committee of five be appointed to draft appropriate resolutions to be presented to the meeting. The motion was carried, and the Chair appointed as such committee Messrs. J. E. Ingersoll, Jarvis M. Adams, V. P. Kline, William J. Boardman and H. L. Terrell. The committee retired, and after due deliberation reported the following resolutions, which were unanimously adopted:

WHEREAS, We have learned with sorrow of the decease of Thomas Kelly Bolton, one of our members, and desiring to give public expression to our sense of loss at his death, and to the esteem in which we held him; therefore be it

RESOLVED That in the death of Mr. Bolton, the Bar of Cuyahoga county has lost an able and honorable member, the city of Cleveland a quiet, unassuming, cultured citizen, and his friends and associates a generous, thoughtful, lovable companion.

RESOLVED, That to his family we tender our deepest sympathy in their heavy affliction.

RESOLVED, That, as a further mark of respect, we attend as a Bar the funeral of Mr. Bolton.

RESOLVED, That a copy of these resolutions be forwarded to the family of the deceased.

After the reading of the above resolutions, Mr. Jarvis M. Adams spoke as follows:

Occasions like this are always sorrowful; but there is a certain pleasure in attending a Bar meeting on the occasion of the death of a lawyer whose career has been such as has Mr. Bolton's. It is pleasant to be able to speak, unqualifiedly, words of approbation and praise. I remember that, when Mr. Bolton came to the Bar, I felt, as lawyers are apt to do, a keen interest in the young man, partly on account of his parentage, and partly on account of his own personal merits. I noticed very carefully his conduct and appearance for the first year or two of his professional life, and thought that he bid fair to become one of the first, if not the first, lawyers at our bar. I think he was remarkable for a lack of some of the characteristics that are attributable to young members of the Bar. He was never "showy." He seemed to attain the front at the first, and acquired a reputation for sound judgment and accurate knowledge of the law. He had no "airs," but went at his work as calmly, as thoroughly, and with as little apparent excitement as would be expected from the oldest members of the Bar.

He continued actively in the practice for a number of years, but, after a time, seemed, from his love of learning, from his love of study for itself, inclined to occupy his time in pursuits which had a greater attraction to him. He studied botany and the languages, interested himself in the scientific questions of the day, and soon began to withdraw from the active practice of his profession. Recently he had resumed his place among us as a lawyer; but during all this time, I am informed, he suffered in his health.

A career and a character like Mr. Bolton's are worthy of the praise and imitation of any lawyer. His entire reliableness, his industry, his constant effort, in court and out, to arrive at the right, his love of truth and his energy and activity in pursuing it, —these are characteristics which are peculiarly necessary in the legal profession; and I think that the committee, in the resolutions it has reported, has, if it has erred at all, erred in the modesty of the commendation expressed of Mr. Bolton.

Mr. J. F. Herrick then addressed the meeting as follows:

Although I was not recently a particularly intimate friend of Kelly Bolton, I yet have been so intimately associated with him since I came to Cleveland that I felt I could not let this occasion pass without having a word to say.

I have for years been an interested listener at these Bar meetings, held to consider the loss by death of one of our number—never desiring to obtrude upon what seemed to me the peculiar province of the older men of the profession.

But the death of Kelly Bolton admonishes me that the men of my own age are already, one by one, being called by the angel of death.

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Seventeen years ago this fall, when I first came to Cleveland as a law student, Kelly Bolton was among the first of my acquaintances and friends.

I had at that time the honor and pleasure of membership in a young lawyers' debating club, in which our departed friend was a prominent member. Many of the conspicuous personages of the Cleveland Bar to-day were members of that club. This is the second death from that coterie of friends—the late I. Buckingham having been, according to my remembrance, the first. Although my friendship with Kelly Bolton has been uninterrupted from that time up to his untimely death, it was then that I knew him best, and my memories of him cling closely around that pleasant period of my life and of his. I desire to speak of him as he was then, leaving his maturer years to be described by others.

Reared as he had been by a father eminent in practice as a lawyer and a jurist, being himself a recent graduate of Harvard College and Law School, blessed with abundant means for prosecuting to advantage the further study and practice of the profession which he heartily espoused, and above all, possessing by nature a clear perception, a logical mind, an artist's eye, fluency of speech, greatness and goodness of heart, habits of morality, dignity of bearing and affability of manners—it seemed that fortune had, indeed, smiled upon him. But whatever nature and fortune had done for him, he himself did more. His energy was untiring, his ambitions high, and his determination strong. He relied not upon his fortune, not upon his God-given endowments, but upon his own efforts. He, at that early period in life, recognized fully that his awn exertions alone could make him the man and the lawyer that he aspired to become.

We of that day, and especially of that society, remember Kelly Bolton as a speaker of rare force and eloquence, a ripe scholar and an assiduous student, a man of large reading and general information beyond his years, a man who loved and respected virtue and morality as an artist does a picture, and hated vice as repugnant to his taste and abhorrent to his nature, a generous and courteous foe and a genial friend, an organizer whose judgment was always reliable and a leader of uncommon ability. In that circle of old friends his death had made the greatest possible vacancy. By that circle of friends Kelly Bolton will be deeply mourned and his many virtues kept green in memory.

General J. J. Elwell then spoke substantially as follows:

I have been very well acquainted with Mr. Bolton ever since I have been in the city—twenty years or upwards. He inherited undoubtedly a love for the profession from his distinguished father. It has been very properly said that he was thoroughly master of the elements of law. Probably there is no young man in Cleveland who has had greater facilities for advancement in the profession or who has improved them better than Kelly Bolton. But his health failed him, and I knew how to sympathize with him, and I know that he made a fearful fight for life—that while he desired with all his heart to devote his entire time and talents to the profession, he saw death ahead of him, and it was by his strong will that he lived until the present time.

On motion of Judge Bishop, Mr. Ingersoll was appointed a committee to present the resolutions to the State and Federal Courts, and to request that they be entered upon the journals.

The meeting then adjourned.

THE ROMAN CIVIL LAW.

VI.

The *jus civile*, as has been stated, was divided by the Romans into *jus scriptum* (written law), and *jus non scriptum* (unwritten law).

The sources and forms that make up the *jus scriptum* are thus enumerated by Gaius, Inst. 1, 2, ¶ 3-9:

1) *Leges populi* and *plebiscita.*
2) *Senatus Consulta.*
3) *Constitutiones principum.*
4) *Edicta Magistratuum.*
5) *Responsa prudentium.*

The Romans therefore had five kinds or sources of written laws.

I.—Concerning the *leges populi* and *plebiscita:*

Rome was founded by three tribes, and these united and were called the *Patres, Patricians* (or old citizens). Each tribe was divided into ten *curiae*, making thirty in all. These, when met together to deliberate on public affairs, formed the *comitia curiata, i. e.* the patrician assemblages, and thus constituted, passed laws, called the *leges populi* or *curiatae*. These laws thus passed were the only laws known and enacted up to the reign of the last king.

The *leges plebiscita* were laws passed in the *comitia centuriata*. Plebians were such persons residing in Rome as had either been taken prisoners, or such as had emigrated to Rome. The Plebians, in course of time, also met to discuss and deliberate, and to suggest to the patricians measures they wished to have enacted into laws for their own protection and welfare. In time the plebians also obtained the right to enact laws with the approval of the patricians, and finally became the only law making power.

These assemblages lasted through some eight hundred years, and the laws passed by them form the most fruitful source of Roman law.

II.—*Senatus Consulta.*

This form of written law, being enactments by the Senate, had its beginning during the latter period of the Republic, but was the prevailing mode of legislation after the assemblages above stated had ceased to exist, and during the first two hundred years of the reign of the emperors. The *Senatus consulta* took the place of the laws passed by the assemblages above named.

III.—*Constitutiones principum.*

Meaning the constitutions (so termed) of the Emperors—four kinds: a, *Edicta*; b, *Decreta*; c, *Mandata*; d, *Rescripta.*

Under these names everything was comprised that the ruler thought proper to establish.

The *mandata* were commands of the emperor transmitted to the governors of the provinces.

Decreta were the sentences pronounced on appeal.

Rescripta were the written answers of the emperors to those who asked their opinion on questions of law.

The *rescripta* referred at first only to the particular case, and established no principle; but afterward their number increased in force and efficiency and became a principal part of Justinian's Codex.

IV.—*Edicta Magistratuum*

This source of law is of great importance.

The Roman magistrate's (the *praetor* and *aedile*) duty was, as stated by a distinguished writer, to consider the interest of the suitor, the character in which he sued, and the object he sought to attain. It never occurred to them that two sets of maxims should govern the case, according to the court in which the proceeding was carried on; that in one and the same state of facts, one and the same object being sought, a court of equity was bound to do one thing and a court of law another.

A large number of people living in Rome were not entitled to the privileges of Roman cittzens.

In article IV, we stated that two elements of private law, the *jus civile* and *jus gentium*, stood side by side, and that the Roman magistrates, (the *praetor* and *aediles*), administered law among all, foreigners, as well as Roman citizens, but that the rules of jus civile (the law national in its characteristics) were not applicable to such persons, not citizens. In consequence hereof a system grew up by which justice was administered by the praetors to the peregrini (foreigners), not according to the local law of Rome, but according to the jus gentium. Over this law the Roman magistrate presided, and to mould and develop it was the task of the Roman jurist.

It will be seen that a dualism existed during this period. By the jus civile, the intercourse between the Roman citizens was carried on; by

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the jus gentium the intercourse between the Romans and the natives and citizens of other countries was carried on. In time the civil law, the jus civile, lost its local and exclusive character and imbibed the equity of the jus gentium, and the two thus moulded and developed by the praetor became blended and united, each adding to and completing the other, and finally produced the fabric as we find it in the eighth century. The edicts of the magistrates, (of the praetors and aediles), were the means by which this dualism was removed. Through these edicts, opinions and customs were added to the Roman law, and Roman jurisprudence kept pace with the age and the progress of society.

V.—The *Responsa Prudentium.*

These were the opinions of eminent lawyers incorporated with Roman jurisprudence; such lawyers were Q. M. Scaevola, Hermogenian and Gaius who lived A. D. 169, also Aurelius Papinianus, Julius Paulus, Domitus Ulpianus and Herennius Modestinus.

Two elements or factors must exist in order to create jus scriptum (written law).

1. A properly and legally constituted power or authority to enact laws.

2. A publication.

That it is incumbent upon a judge to decide ex officio, whether a (written) law does exist, *i. e.*, whether these two factors have been properly employed.

"Jura noscit curia."—Written law modifies and changes the common law. We in this country have two kinds of written law—statute and constitutional law.

Pandects, Book I, Title III.

De legibus senatus que consultis et longa consuetudine.

(Concerning laws, resolutions of the Senate, and concerning long usage and custom).

Lex. 1 (Papinian). Lex est commune praeceptum, virorum prudentum consultum, delictorum, quae sponte vel ignorantia contrahuntur, coercito, communis reipublicae sponsio.

(Law is a general maxim or rule, the deliberate opinion of wise men, a restraint or check against transgressions or wrongs, which are committed either voluntarily or through ignorance, an universal engagement or compact of the State; (to obedience).

Lex 2 (Marcian). Demosthenes, the orator, thus defines law: "The design and object of laws is to ascertain what is just, honorable and expedient; and when that is discovered, it is proclaimed as a general ordinance, equal and impartial to all. This is the origin of law, which for various reasons, all are under an obligation to obey; but especially because all law is the invention and gift of heaven, the sentiment of wise men, the correction of every offence, and the general compact of the State; to live in conformity with which is the duty of every individual in society."

Blackstone's definition, vol. 1, page 44: "Municipal law is a rule of civil conduct prescribed by the supreme power in a State, commanding what is right and prohibiting what is wrong."

Harris defines law as a rule of civil conduct, prescribed by sovereign authority, enforced by rewards and punishment.

Lex. 3. (Pomponius). Jura constitui oportet, ut dixit Theophrastus, in his quae epi to pleiston accidunt, non quae ek paralogou.

(Law should (as Theophrastus says) be made and enacted respecting and with reference to such events as often and for the most part happen and occur, not respecting such as happen but casually or accidentally.

Lex 4. Ex his, quae forte uno aliquo casu accidere possunt, jura non constituuntur.

(Laws are not to be made or framed to meet such events as may possibly arise in a single instance).

Lex. 5. Nam ad ea potius debet aptari jus, quae et frequenter et facile quam quae perraro eveniunt.

(For the law ought to exist concerning such events as often and naturally occur, than respecting such as happen rarely and uncommonly).

Lex. 6. (Paulus). The law-maker takes no notice of events that may occur once or twice.

Lex. 7. (Modestinus). Legis virtus haec est, imperare, vetare, permittere, punire.

(The object and purpose of law, is, to command, to forbid, to permit, and to punish).

Lex 8. (Ulpianus.) Jura non in singulas personas, sed generaliter constituuntur.

(Laws are not made for individuals, but generally).

Lex 9. There is no doubt but that the Senate can enact laws.

Lex 10. (Julian). Neque leges, neque senatus consulta, ita scribi possunt, ut omnes casus, qui quandoque inciderint, comprehendantur, sed sufficit et ea, quae plerumque accidunt, contineri.

(Neither the laws nor Senate resolves can be so written, or made, which shall comprehend or include or meet every event that may unexpectedly occur or arise at any time, but it suffices to encompass and comprehend such events as most frequently take place).

Lex 11. Et ideo de his, quae primo constituuntur, aut interpretatione, aut constitutione optimi principis certius statuendum est.

(Respecting (the meaning of) such (laws) which were passed in the beginning (of the State) must be settled and determined either by interpretation, or from the constitutions of the emperor).

Lex. 17. (Celsus). Scire leges non hoc est, verba earum tenere, sed vim ac potestatem.

(To know the laws, means not to be able to keep their words in mind, but the idea, spirit and purpose of the same).

Lex. 18. Benignius leges interpretandae sunt, quo voluntas earum conservetur.

(Laws should receive a liberal interpretation, so that their sense and meaning may be preserved and retained).

Lex. 19. In ambigua voce legis ea potius accipienda est significatio, quae vitio caret, praesertim quum etiam voluntas legis ex hoc colligi possit.

(When a law is ambiguous, that meaning is rather to be given it which will free it of that fault or defect, especially when, by so doing, the meaning and sense of the law can be gathered and inferred).

Lex. 20. (Julianus). Non omnium, quae a majoribus constituta sunt, ratio reddi potest.

(It is not possible to give a reason for all those (laws) which were passed and enacted by our ancestors).

Lex. 21. (Neratius). Et ideo rationes eorum, quae constituuntur, inquiri non oportet; alioquin multa ex his, quae certa sunt, subvertuntur.

(Therefore we ought not to inquire for the reason (of those laws) that were established and passed by them; otherwise much of that which is now fixed and settled (by interpretation, etc.) would be annulled and rendered naught).

H.

U. S. CIRCUIT COURT N. D. OF OHIO.

July 11.

3891. J. V. Ayers' Sons vs J. L. Botsford et al. Bill in equity filed.

July 12.

3879. Sherman vs the City of Canton. Answer filed.

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July 14.

3652. A. R. Flint vs G. F. Lewis. Reply filed. Caldwell & Sherwood.

July 17.

3892. Maria R. DeMars vs Ashley Ames. Bill in chancery filed. Brooks & Hawkins.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

[WATSON, HALE AND TIBBALS PRESIDING.]

SHERWIN, WILLIAMS & CO. VS. D. H. BRIGHAM.

Drafts—Drawee not Liable to Action by Holder who Obtained Them from Insolvent Drawer with Knowledge of such Insolvency.

October 20th, 1875, D. H. B. wrote to C. A. B.: "When you find yourself close up draw on D. H. B. & Co. at the longest time your bank will discount the draft." C. A. B. was then in embarrassed circumstances. November 15th, 1875, C. A. B. indorsed to S., W. & Co. two drafts on D. H. B., dated November 12th and 15th respectively, to take up notes previously given by C. A. B. to S., W. & Co.. HELD:—That D. H. B. is not liable in an action by S., W. & Co. for the amount of the drafts, S., W. & Co., at the time the drafts were transferred to them, having knowledge of the insolvency of C. A. B. —[ED. LAW REPORTER.

TIBBALS, J.:

The errors assigned in the record in this case are, that the court erred in overruling the demurrer of the plaintiff to the answer of the defendant, and in its instructions to the jury. Those instructions were that the plaintiff had entirely failed to make out a case and instructing the jury to return a verdict for the defendant. That instruction was based substantially upon the point made on demurrer, so that the decision of those two questions will dispose of the case. The case is one of considerable importance to the parties, and presents rather a close question. The plaintiffs below filed their petition, in which they recite generally that one C. A. Brigham, doing business in this city under the name of Cleveland Furniture Co., upon two different occasions, executed two notes, one for $505.50 and another for $1,500, payable to the order of Sherwin, Williams & Co.; that Sherwin, Williams & Co., at the request and for the benefit of C. A. Brigham, indorsed those notes so that the funds received by a discount at the bank were for the benefit of C. A. Brigham. They remained upon those notes as indorsers, simply liable as such. It recites further that about the 20th day of October, 1875, said C. A. Brigham became embarrassed in business, and so notified the defendant D. H. Brigham, a brother residing in Massachusetts and doing business there in the name of D. H. Brigham & Co.; and thereupon defendant wrote and sent by mail to C. A. Brigham a certain letter, a copy of which is annexed to the petition and made a part of it, and that the letters D. H. B. & Co. were understood by all the parties to mean the firm of D. H. Brigham & Co. That on the 12th day of November, 1875, the said C. A. Brigham showed and exhibited the said letter to said firm of Sherwin, Williams & Co., also two drafts drawn by C. A. Brigham on and to the said firm of D. H. Brigham & Co., at Springfield, Mass., dated November 12th and 15th respectively, in the sum of one thousand dollars each, payable ninety days after date to the order of C. A. Brigham in the name of Cleveland Furniture Co., and by him the same was indorsed as payable to the order of Sherwin, Williams & Co., and thereupon he requested them to take up and pay the two notes on which they were indorsers, discounted as aforesaid, and receive from C. A. Brigham in consideration therefor the two drafts thus exhibited to him in connection with that letter, with the understanding that C. A. Brigham should pay to Sherwin, Williams & Co. the regular bank discount upon the sum of said two drafts for said ninety days. They further say that in consideration of the premises, said Sherwin, Williams & Co. did rely upon the promise and the agreement of the defendant contained in the letter, agreeing to honor the drafts of the said C. A. Brigham—that they would take up the notes so discounted, and in consideration thereof the money was to be paid as aforesaid; that said Sherwin, Williams & Co. received the two drafts and became the owners thereof and are now the owners. That said Sherwin, Williams & Co., in pursuance of said agreement, took up and paid the notes, and that said drafts were immediately forwatded to Springfield and presented to said D. H. Brigham & Co. for acceptance and acceptance refused; that when they respectively became due they were again presented for payment and payment was refused.

There is a further averment that C. A. Brigham was utterly insolvent, and they ask a judgment against the brother in Springfield for the amount of those drafts, $2,000.

To that petition D. A. Brigham files his answer, and the facts therein stated are briefly these: It is denied that either of the drafts was delivered to the defendant on the 12th of November, 1875, but were never presented until the 16th of November; and he says that on the 12th of November, 1875, these two drafts drawn upon the firm of D. H. Brigham & Co. were presented to the National City Bank for the purpose of having them discounted; that they were indorsed to J. F. Whitelaw as cashier; that the bank refused to discount them, and thereupon, on the 15th of November, three days later, C. A. Brigham took the drafts from the bank and presented them to these plaintiffs; that they had knowledge of the refusal of this bank to discount the drafts, and he requested them substantially to take them in payment of that indebtedness, so that they might assume it themselves and take up the paper, and that they did so; and it is averred that because of the indorsement upon the backs of the drafts to J. F. Whitelaw, cashier, they desired to have it erased—changed—and they returned them for that purpose, requesting new drafts to be made out. This being on the afternoon of the 15th, it was not done, but it was done upon the 16th. New drafts were given for precisely the same amount. In fact, they were duplicates of those, excepting the omission of the name of the cashier upon the back.. But he says that upon the same day, the 16th, and before these new drafts were returned to the plaintiffs, C. A. Brigham had made a general assignment for the benefit of all his creditors, and that the drafts, although doubting the authority to deliver them, at that time under his charge, states that at the request of the plaintiffs and on their demand, it was a part of the agreement, it was done and they were delivered to him, and that they immediately telegraphed to D. H. Brigham to accept these drafts or to pay them.

This brings us to the point which renders it necessary to read the letter, which is dated October 20th, 1875, and contains the following: "When you find yourself close up draw on D. H. B. & Co. at the longest time your bank will discount the draft, making it four months if they will; if not, three months, and we will honor it, one or two thousand dollar drafts, and trust it will make you easy. [Signed] D. H. Brigham."

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Several propositions of law were very forcibly presented, and we might say as to them we would have but little trouble supporting the view taken by the plaintiffs in this case that there was a sufficient consideration for it, that plaintiffs had a right to rely upon it from this letter, addressed as it was to a brother and shown to them. Those facts would not give us trouble. But the serious question in the case is whether the letter will bear the construction claimed by the plaintiff in view of the changed facts. It will be borne in mind that this letter is dated the 20th of October. At that time, it is true, the brother, C. A. Brigham, was in embarrassed circumstances, and the Springfield brother was aware of it, and undoubtedly undertook to relieve him from that embarrassment by writing that letter. But what followed that? On the 12th of November following, a few weeks thereafter (and weeks are important in business matters of this character), this brother presented those drafts to his bank and sought there to do precisely what clearly it was intended he should do, to get them discounted at his bank on as long a time as he could, for the purpose, as the letter expressed it, of "making him easy." He failed to get that done. For some reason, his bank was unwilling to trust him—unwilling to discount the paper—refused to do it. Three days thereafter, being unable to meet his paper which was indorsed by these plaintiffs, undoubtedly feeling desirous of protecting them, he presented these drafts to them, not for the purpose of raising money to carry on his business, not for the purpose of "making him easy," but only for the purpose of indemnifying these plaintiffs from their liability upon this $2,000 of paper; and he undertook to do it for that very purpose so that they might be safe. We might say this would scarcely come within the intent of that letter. It would not relieve him. It would be singling out one creditor, and paying that single debt to that creditor, leaving him in his embarrassed circumstances as to all of his other creditors. We hardly think the brother intended such a use to be made of that letter. That would not accomplish the purpose for which he was rendering himself voluntarily liable to the amount of $2,000. It was not his intention to aid him in that way. But these plaintiffs, finding upon the same day, the 15th, that this paper was not in good shape, and not desiring to present it to their bank, perhaps the Merchants' National Bank, for discount, took it back and requested him to give new paper. While he evidently from the 15th seeing what was inevitably going on the next day, hesitated, but said, as shown by the bill of exceptions, that he would do it; he would sign it over to them—give them new paper precisely like the old.

Now it is claimed on the part of the defendant that the new paper is not equivalent to the old at all—that it is only substituting new paper for the old. The dates were the same, the parties are the same and the papers are the same all the way through. He did not return the paper that evening, and the next morning the plaintiffs sent for him and demanded it, saying it was their paper and it should be done in accordance with their agreement. He then stated to them that he had made an assignment to an assignee for the benefit of all his creditors, and did not know that he had any power or authority to do it—he doubted his authority to give new paper, and called upon counsel, and counsel doubted the authority to draw upon that brother in Springfield, who had no knowledge at all of this transaction, and placing it simply on the ground that he had agreed to, and ought to keep his word, the attorney and party agreed to take and deliver the new paper in that way. After this assignment had been made, they at once telegraphed the party, and, of course, he knew all about it, and the paper was refused.

Now, ought we to say in the light of these facts, that this letter ought to be treated as an agreement on the part of D. H. Brigham to accept those drafts? We feel constrained to hold that it should not be so treated. It would hardly be within the spirit and intent of that letter under such a changed state of the facts as to these parties. From the time that had elapsed and the peculiar circumstances surrounding the giving of this paper, treating it even as paper of the day before, we feel that we would not be justified in so holding. We are not absolutely certain about it. Of course, courts cannot be. In this view, we follow the view taken by the court below, both as to overruling the demurrer to the answer and as to the correctness of the charge to the jury that the plaintiffs had utterly failed to make out any case, and the judgment will be affirmed with costs.

INGERSOLL & WILLIAMSON, for plaintiff in error.

PRENTISS & VORCE, for defendant in error.

[The decision of the Common Pleas Court in the above case will be found in vol. 1, page 22, of the LAW REPORTER.]

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending July 18, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

July 12.

Joseph Charvat to Helen Dowse. $260.

Thomas Mikolasik to same. $425.

Charles H. Walkins to Ann C. Smith. $2,000.

G. C. F. Hayne and wife to Margaret M. Laughlin. $2,100.

Thomas Kays to E. E. Warmington. $300

Hallie Gammon and husband to Lydia A. Baxter. $500.

George King and wife to Alfred H. Wick. $600.

Jane Gittens to A. A. Pope, trust. $136.

Mary A. Osborn and husband to Chauncy Salisbury. $102.

Christopher Ancsini and wife to Adam Knopf. $440.

John Wek and wife to Margaret Rapp. $150.

July 14.

Sophia Crafts to Daniel S. Spaulding. $275.

Charles Bluhm and wife to Moritz Eckerman. $200.

Joseph Kordeska to Joseph Pavlik. $400.

Charles Veik and wife to Margaretha Stoll. $225.

Charles Nauhaus and wife to Margaretta Rapp. $100.

Maryette Geisendorfer and wife to F. H. Biermann. $12,000.

E. Rosenfeld and wife to Henry Wick & Co. $7,000.

Joseph Horok to George W. Canfield. $145.

Charles Thomas to G. G. Hickox et al. $215.

July 15.

Adam Ott and wife to Lorenz Ott. $1,044.

Valentine Wade and wife to Sophia Busse. $975.

Jacob Bender and wife to Fred Haltnorth. $3,000.

Mary A. Scholles to Adam Bohley. $200.

Margaret A. Ellenberger and husband to John Herr. $711.

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Francis Hicks to James M. Curtiss. $500.

Theodore Roesing et al. to Samuel Keller. $375

Same to Hattie M. Heisley. $175.

Rosetta Scowdon and husband to Mrs. S. M. F. Duncan. $2,200.

July 16.

Jacob Ott and wife to Lorenz Ott. $994.

Wm. H. Wilson and wife to Maria M. Pond. $450.

Joseph Oser and wife to Samuel R. Wilgus. $148.

Ralph James and wife to George Biddulph. $930.

Henry C. Kramer and wife to The Society for Savings. $400.

Arnold Stevending and wife to Louis Zimmerman. $350.

James Loveday to Charles McCracken. $50.

Charles D. Bishop and wife to The Citizens Savings and Loan Ass'n. $600.

Edwin Dennison and wife to The New York Baptist Union, for, etc. $4,000.

Rosa Mueller and husband to Mary Meier. $750.

July 17.

G. L. May and wife to M. Asmus. $375.

Melvina Corlett and husband to Margaret Rapp. $200.

Andrew Thomas to R. W. Walters. $100.

Harriet Crawl to Geo. S. Wright and A. T. Brewer. $15,000.

W. D. and Margaret A. Patterson to Dudley B. Wells. $3,663.82.

July 18.

Kate E. Wood and husband to H. L. Peck. Four hundred and fifty dollars.

Rodney Gale to A. Adelaide Richardson. Two thousand dollars.

Thomas Lizzet and wife to E. Heyse, guardian, etc. One thousand dollars.

James M. Ferris and wife to The Poeple's Sav. and Loan Ass'n. Ten thousand dollars.

Sylvester Silsby and wife to J. G. Ruggles, admr. Six hundred and thirteen dollars.

Gary H. Bishop to M. J. Lawrence. One hundred and fifty dollars.

Levi Thomas and wife to Hugh Graham. Two hundred dollars.

CHATTEL MORTGAGES.

July 12.

May A. Smith to L. A. Smith. $1,200.

B. S. Green to H. M. Pomeroy. $90.

Henry Gilbert to John F. Thomas. $200.

Mathew Lee to Patrick Martin. $200.

John M. Acker to Wm. Gumpert. $450.

H. Carlton to Alex Forbes. $104.

Amos. N. Clark to Jacob W. Beck. $150.

W. B. Buxton to James W. Stewart. $90.

July 14.

S. D. Goldsmith to G. Moran. $32.

Henry Noll to H. K. Leonard. $13.

Fred Hull to same. $105.

R. Cunningham to Murza E. Cunningham. $350.

William Tramp to Charles Engel. $500.

Wm. Harrison to Frank Riedman. $2,000.

Alfred Jones to Robert D. Smith. $96.

July 15.

E. M. Brown to W. D. Butler. $63.

Bernard F. Sullivan to C. B. Williams et al. $200.

F. Dantel to J. Rossenwater. $125.

J. H. Hardy to D. Kenaston. $1,000.

July 16.

Louisa A. Cary to Edwin B. Cary. $200.

T. M. Gorsuch to Carl Otto Umbstaetter. $297.

Broadway & Newburgh St. R. R. Co. to William Meyer, trustee. $83,200.

Amasa Doddysman to Nellie A. Hardy. $275.

Thomas O. Quayle to Merts & Riddle. $224.

Wm. B. Gilbert to same. $250.

Cyrel Brabo to William H. Shaw. $30.

July 17.

Maggie Howard to Joseph Stoppel. $100.

John W. Francisco to James A. Bingham. $85.

July 18.

Charles E. Jackson to S. Kraus & Co. Eighty-nine dollars.

John Haney to John Leberle. Eorty-one dollars and fifty cents.

A. O. F. Centennial Cornet Band to Court Little John 5609. One hundred dollars.

Same to Wm. Night et al. Twenty-five dollars.

F. C. Quayle to the Cleveland Burial Case Co. Eight hundred and ninety-eight dollors.

John Gracie et al. to Henry Kessler. One hundred and ten dollars.

Fred Helbert to R. W. Doane. Eighty dollars.

DEEDS.

July 9.

Cornelia Hamilton to same. Twelve thousand dollars.

Charles Ensign, exr. of E. W. Ensign, to same. One dollar.

James H. Houghton and wife to Charlotte Cushman. One dollar.

Abner Hunt and wife to Mary C. McDermott. Fifty dollars.

Casper Kulbrick to R. A. Davidson. One thousand eight hundred dollars.

A. J. Marvin and wife to L. Anthony Pelen. Five hundred and sixty dollars.

T. H. White et al., to Mary F. Miller. One thousand four hundred dollars.

Mary Foster et al. to A. M. Lewis. One dollar.

Noyes B. Prentice special Mas. Com. to Amos R. Eno. Twenty-nine thousand three hundred and twenty-one dollars.

July 10.

Charles Ellsasser to Wm. Sorge. Two thousand dollars.

Leonard Kilsteiner and wife to Robert Fitzrow. Six hundred and fifty dollars.

John L. Miller and wife to John Richings. Two hundred nollars.

Cornelia Smith to Socialer Turnverien. Two hundred and fifty dollars.

Thomas Graves, Mas. Com., to W. H. Barriss. Eighty dollars.

Same to same. Eighty dollars.

Sophia Richler et al., by Felix Nicola, Mas. Com., to Louis Fisher. Nine hundred and twenty-five dollars.

July 11.

Christopher Anisini and wife to Adam Knoph. $5,000.

Adam Knoph and wife to Christopher Anisini. $5,000.

Abigail Seager to Ella Scott. $900.

Thomas Graves, Mas. Com., to W. S. Chamberlain. $1,335.

Same to C. D. Everett. $116.

Julius Richewein, by C. C. Lowe, Mas. Com., to Lalovic Castor. $267.

July 12.

Marie L. Chase and husband to Wm. G. Taylor. $300.

Arminia T. Dolloff et al. to John Wilk and wife. $1.

Wm. H. Brown et al. to same. $594.

Herod Green and wife to Oscar J. Campbell, trustee. $1.

David Z. Herr to Margaret A. Ellenberger. $1,215.

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George G. Hickox et al. to Mary A. Osborn. $400.

Luther Moses and wife to Minnie Barge. $1,450.

Henry Marvin and wife to George King. $1,800.

John M. Wilcox, sheriff, to Richard Orchard. $1,300.

D. D. Pickett and wife to Osear J. Campbell. $300.

Ann C. Smith to Charles H. Watkins. $3,600.

Henry J. Thorne to Carl E. F. Severin. $275.

R. D. Updegraff, Mas. Com , to J. G. White. $340.

John G. White to Mary E. McBroom. $340.

Lorenzo James, exr., etc., by E. B. Bauder, Mas. Com., to Mrs. Abigail James. $650.

Richard Orchard to Thos. Thompson. $2,200.

July 14.

George Armbruster and wife to Paul Schmidt. $1,340.

Huldah H. Collins and husband to Alice Burke Evans. $333.33.

Joseph Drosler and wife to the Evangelical Lutheran Congregation of St. Paul. $350.

J. M. Gilmore and wife to Israel Hubbard. $1,000.

Samuel Hartman and wife to Margaretha Grossman. $1,000.

James M. Hoyt and wife to August Putsch. $850.

Charlotte James to Christ. Kinzig. $550.

Joan Koba and wife to Vaclav Jirava. $500.

Charles Loehr and wife to Henry Ainsworth. $5,000.

Charles W. Moses to R. T. Page. $400.

Solomon Mayer and wife to Jacob Newhouse. $300.

James Paton and wife to Charles Nauhaus. $580.

Judgments Rendered in the Court of Common Pleas for the Week ending July 18, 1879, against the following Persons.

July 11.

John Jonas. $547.40.
Robert Beggs. $6,768.
Ignaz Voegtle. $1,485.12.
John Kortanik. $253.33.
Jehiel S. Stewart. $1,890.

July 14.

W. J. Kennard. $3,689.
J. S. Stewart. $1,793.42.

COURT OF COMMON PLEAS.

Actions Commenced.

July 11.

15442. Franciska Jonas vs John Jonas Cognovit. Willson & Sykora; J. A. Smith

15443. J. H. Smith vs E. A. Gifforn. Appeal by deft. Judgment June 12. C. W. Coates; Goulder, Hadden & Zucker.

15444. John Hart vs The State. Error to J. P. Wm. Abbey.

15445. Wilhelmine Schwab vs Fred W. Pelton. Money only. James Fitch and John E. Ensign.

15446. Louisa Weiland et al. vs same. Same. Same.

15447. Leonard Keitsteiner vs same. Same. Same.

15448. Jos. Ehrbar vs same. Same. Same.

15449. Martin Billingstein vs same. Same. Same.

15450. Anton Schuch vs same. Same. Same.

15451. Martin Faulhaber vs same. Same. Same.

15452. Joseph Nauratel et al. vs same. Same. Same.

15453. John Flint vs Ezekiel Edgerton et al. Money and to subject land. Foster & Lawrence.

15454. The Board of Trustees of German Wallace College vs Anton Hasenpflug et al. To subject land and equitable relief. Same.

15455. W. F. Walworth vs Wettha Beckersgill et al. Money and to subject lands. Wm. K. Kidd.

July 12.

15456. J. W. Scott vs R. Cunningham et al. Money and equitable relief. Marvin, Taylor & Laird.

15457. Nora Kelly vs H. A. Massey. Appeal by deft. Judgment July 3. J. H. Hardy.

15458. David Proudfoot et al. vs The City of Cleveland and treasurer, etc. Injunction and relief. Grannis & Griswold.

15459. Wm. Temple, exr., etc., vs Wm. Pate et al. Money and to subject lands. E. Sowers.

15460. Charles Kuenzer, admr., etc., vs William Closs et al. Money and equitable relief. Henderson & Kline.

15461. M. M. Spangler vs George L. Chapman. Partition of real property. Safford & Safford.

15462. Mary Moersch vs Fred W. Pelton. Money only. James Fitch and J. E. Ensign.

15463. Barbara Dennerle vs same. Same. Same.

15464. Mary Cain vs same. Same. Same.

15465. Jacob Welte vs same. Same. Same.

15466. Robert Deas vs same. Same. Same.

15467. Anton Daiton vs same. Same. Same.

15458. Frank Kaline vs same. Same. Same.

15469. H. R. Sanborn vs Robert B. Wilkinson et al. To subject land. F. R Merchant.

15470. The Grove Coal Co. vs West & Bagger. Money only. Goulder, Hadden & Zucker.

15471. Daniel N. Worley vs George W. Mason, admr., etc. Appeal by defendant. Judgment June 16. J. B. Fraser; P. P.

15472. Anna E. Kaestle vs Mary Jane Abbott et al. Money and to subject lands. Peter F. Young and Louis Weber.

15473. N. G. Hoeller vs Thomas Reed. Appeal by deft. Judgment June 26. C. L. Fish; Z. P. Taylor.

15474. Peter Hecker; Jr., vs The City of Cleveland and treasurer. etc. Injunction and relief. Grannis & Griswold.

15475. Terence Walsh, admr. etc., vs Archibald Wilkinson et al. Money and to subject land. Gary and Everett.

15476. James W. Kingsbury vs Anna M. Brooks et al. Money and to subject land. Same.

15477. Virginia G. W. Forsyth vs C. R. Mix. Noney only. Mix, Noble & White.

July 14.

15478. Jackson Prouty vs John B. Archer and Garn. Money only, with att. Ranney & Ranneys.

15479. A. W. Horton vs The Berea Stone Co. et al. To subject lands and for equitable relief. James Lawrence.

15480. Ignatz Koblitz vs Joseph Rohebek. Money only. J. M. Stewart.

July 15.

15481. Robert C. Tatten et al. vs The Valley Iron Co. et al. To subject lands. Johnson & Schwan; Hyde & Marsh, Chas. M. Copp, J. H. Schneider, Jones & Murray.

15482. First National Bank of Shelby, Ohio, vs Thomas S. Koats et al. Cognovit. T. H. Wiggins; A. M. Jackson.

15483. Maria Moedinger vs Geo. Siebler et al. Money and equitable relief. P. H. Kaiser.

15484. Willis L. Snyder vs Charles Hogg. Money only. S. E. Adams.

15485. A. W. Harman vs H. C. Smith et al. Money only. A. T. Brewer.

15486. Joseph Zack vs Wm. J. Rainey. Appeal by deft. Judgment June 19.

15487. James Novak vs same. Same.

15488. Moses Davis vs Robert Davis et al. Partition, account and relief. A. Slutz.

15489. Marcus Denerle et al. vs Fred W. Pelton. Money only. James Fitch and John E. Ensign.

15490. Aaron A. Walter vs same. Same. Same.

15491. Philip Bohnert vs same. Same. Same.

15492. Jacob Klee vs same. Same. Same.

15493. Fred Geissen vs same. Same. Same.

15494. Sebastian Dall vs same. Same. Same.

15495. Jos. Lembeck et al. vs same. Same. Same.

15496. Charles Ettner vs same. Same. Same.

15497. Susan Raleigh, admx., etc., vs same. Same. Same.

15498. Mary Hopf vs same. Same. Same.

15499. George W. Tibbits vs Henry Lehman. Appeal by deft. Judgment June 17. Marvin, Taylor & Laird.

Julp 16.

15500. Joseph Polak vs Peter Kemmerling et al. Money and to subject lands. Babcock & Nowak.

15501. Michael Woodridge et al. vs Fred W. Pelton. Money only. R. F. Paine.

15502. The City of Cleveland vs George F. Minor et al. Money only. Wm. Heisley.

15503. Meyer Weil vs J. J. Corothers et al. Money and sale of land. Goulder, Hadden & Zucker.

15504. Eliza Laybrook vs Catharine Zueter. Appeal by deft. Judgment June 25. Mix and McKearney.

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15505. Casper Rinner vs W. A. Fisher et al. Injunction and relief. M. Rogers.
15506. Eli McDanel vs F. J. Weed. Money only. J. W. Street.
15507. H. W. Stehr et al. vs J. M. Wilcox et al. Appeal by defts. Judgment June 20.
15508. B. N. Shaw vs J. W. Francisco et al. Appeal by defts. Judgment June 20.

July 17.

15509. Chris Hoehm vs Anton Sievers. Same. Judgment June 19.
15510. T. E. Cunningham vs Mrs. Anna Henry. Same. Judgment June 17. J. A. Smiih; S. G. Baldwin.
15511. John T. Thorley vs E. M. McGillin & Co. Same. Judgment June 28. J. F. Herrick; Henderson & Kline.
15512. Richard Edwards vs the Union Iron Foundry. Same. Judgment June 16. Foster, Hinsdale & Carpenter.
15513. J. H. Slawson vs Noaton C. Meeker et al. In ejectment, to recover possession of real estate and for the rents and profits. Alex. C. Caskey.
15514. William Goldsworth vs Adam Wager. Money only. R. A. Davidson.
15515. Jesse C. Downs vs L. M. Charlton. Same. Same.
15516. Nicholas Weiler vs The Hibernia Ins. Co. Money only. R. T. Morrow.
15517. Isaac Levy vs S. E. Stone et al. For sale of lands. Goulder, Hadden & Zucker.
15518. Daniel McCue vs Robert E. Eddy. Money, sale of lands and equitable relief. J. C. Coffey.
15519. John Dix vs Samuel Dicks et al. Equitable relief. Foran & Williams and J. J. Kelly.
15520. Richard Edwards vs C. Schneider. Appeal by deft. Fost r, Hinsdale & Carpenter. J. H. Schneider.

Motions and Demurrers Filed.

July 12.

2803. Haines, treas., vs Swain. Motion by plff. to vacate dismissal and to reinstate case on docket.
2804. Miles vs Jones et al. Motion by deft. J. Hall to require plff. to make petition more definite and certain.
2805. Vincent et al. vs Brainerd et al. Demurrer by plff. to 2d and 3d defences of answer.
2806. Boes vs Stockinger et al. Demurrer by plff. to the petition.
2807. Clancey vs Bailey et al. Motion by deft. Bailey to dissolve restraining order with acknowledgment of service.

July 14.

2808. Cain vs Newshuler et al. Motion by E. B. Bauder, receiver, to expend not exceeding $20 to fix walls, grates, etc., of dwelling house No. 72 Parkman street.
2809. Reader vs Platt. Demurrer to the petition.

July 15.

2810. Clancey vs Bailey et al. Motion by deft for an order of attachment on A. W. Bailey for contempt in violating restraining order.
2811. Everett vs Bauman et al. Motion by plff. to require deft. Barbara Bauman to separately state and number defenses of answer.
2812. Kilfoyl, guardian, etc., vs Pelton. Motion to require plff. to separately state and number causes of action.
2813. Stone vs same. Same.
2814. Crieghton vs same. Same.
2815. Kindsvater vs same. Same.

Motions and Demurrers Decided.

July 2.

2765 } Maurer vs Lowe et al. Granted.
2766 } Sale continued and deed ordered.
2758. Baggert vs Anthony et al. Granted. E. W. Heisley appointed receiver. Bond $250.

July 5.

2343. National City Bank vs Beible. Overruled. Plff. excepts.
2378. Eells, trustee, vs Kinsman St. R. R. Co. et al. Referred to J. H. Rhodes as Mas. Com. to report.
2739. Tibbitts vs The Jewett & Goodman Organ Co. Granted.
2764. Farrer vs Tuyle. Granted.

July 7.

2712. DeWolf vs Sherman et al. Deft. excepts to the overruling of his demurrer to the petition.
2760. Laird vs Connell et al. Granted.

July 10.

2718. Shelly vs Hogan. Overruled. Deft. excepts.
2727. Liberty Lodge A. O. G. F. vs Young. Granted. John Eberhard appointed receiver. Bond $200.
2160. Smith vs Somerville et al. Order set aside. Deft. Stone has leave to file answer within 20 days.
2745. Goddard, admr., etc., vs Cooper et al. Granted.

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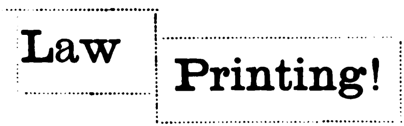

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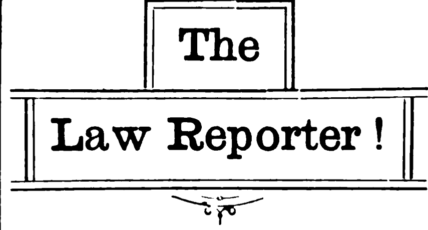

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A PETITION, numerously signed by members of the Bar and others, to reduce the number of Justices of the Peace in this county from eight to six, has been filed with the Probate Judge, who has set August 30th for a hearing in the matter.

BY A recent Illinois statute, Commissioners and Notaries Public are authorized to issue subpœnas requiring the attendance of witnesses; and if any witness so subpœnaed wilfully neglects or refuses to appear, or refuses to testify, or to subscribe his deposition, the Commissioner or Notary may, after reporting to the Clerk of the Circuit Court, attach such witness for contempt, and the Judge of the Circuit Court may fine or imprison him.

ACCORDING to a decision just rendered by the Supreme Court of California, lawyers are not at liberty to decline to appear in the defense of impecunious prisoners, if assigned to that duty by the Court. Judge Clarke of Sacramento requested a young attorney to take charge of the defense in a case where no compensation could be expected, and adjudged a refusal to be contempt of court, for which he imposed a fine. Upon a writ of *habeas corpus* issued by the Appellate Court, this decision was pronounced sound law. The liability to serve gratuitously is declared to be one of the burdens of the legal profession, for which its privileges are ample compensation.

IN THE CASE of The United States vs. Cook County National Bank et al., in the United States Circuit Court for the Northern District of Illinois, before the Circuit Justice, the Circuit Judge and the District Judge, it is decided, Mr. Justice Harlan delivering the opinion of the Court, that "the United States has a prior lien over other creditors, on the proceeds of the sale of bonds deposited as security for the circulation of National Bank bills, as well as a prior claim in the distribution of the bank's assets, for the payment of claims of the government against such bank, and may apply the proceeds of such assets to the payment *pro tanto* of its claim for postal and money order funds deposited in such bank by the postmaster."

On the trial, it was claimed by counsel for the defendants that section 50 of the National Bank Act of 1864 (R. S., § 5,236), repealed or modified so much of the acts of March 3, 1797, (1st Stat., 515), and March 2, 1799, (1st Stat., 676), as gave the government a priority in the distribution of the assets of those indebted to it. The Court, in deciding this point, say:

"It is well settled that repeals, by implication, are not favored by the courts. It must be presumed that the subsequent statute was passed with accurate knowledge of the language and scope of previous legislation upon the same subject. If there was an intention to repeal or modify the prior statute, the further presumption must be indulged that direct terms, for that purpose, would have been employed. In the absence of express words of repeal, it is the duty of the court to give effect to the prior statute, if it be possible to do so, and, unless the repugnancy between the subsequent and prior statutes is so absolute and palpable as to be recognized at once, without the aid of ingenious argument, it should be assumed that the legislative department intended both statutes to stand."

The decision may be found in full

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in the *Chicago Legal News* of July 12, 1879.

MR. J. E. INGERSOLL last Tuesday, in a few appropriate remarks, presented to the United States Circuit Court the resolutions adopted at the Bar meeting of the 11th inst. relative to the death of Mr. T. K. Bolton, with a request that they be entered on the records of the court. Mr. Ingersoll was followed by Mr. F. J. Dickman, who spoke eulogistically of the life and character of the deceased, saying, in substance:

In the beginning of his professional career, Mr. Bolton was quite actively engaged in practice in this court, being retained for the defense in some important cases growing out of an infringement of certain sewing machine patents. He seemed to possess an uncommon power of discrimination—of drawing refined distinctions, of grasping the metaphysics of the patent law, which, it is said, admits of less reduction to precise rules and axioms than any other branch of jurisprudence.

He was not, however, content with the mere intellectual vigor derived from the practice of the law, accompanied as such vigor too often is by narrowing and contracting influences. He desired to liberalize his mind, to extend his knowledge, to refine his taste and to engage in those studies and contemplations that enlarge the intellect and release it from the bondage of error and prejudice. We are told that he had become interested in the study of Natural History, and that he had a fondness for the study of modern languages in order that he might unlock the stores of modern literature. He was betrayed, however, into no exhibition for effect of his pursuits and acquirements. He was of an exceedingly modest and retiring nature. Undemonstrative as he was, it was chiefly to those with whom he was intimate that he revealed from time to time many superior attributes and characteristics which apparently he had kept in the background through fear of display.

In his dealings, he was outspoken and sincere. He had an aversion to the hollow and pretentious. Simple and unostentatious in his own life and habits, he thoroughly appreciated solid worth in others and was ready to recognize it by word and by deed.

He has passed away in the very prime of manhood, but he was long enough among us to impress us with the many sterling traits with which he was endowed. His career, it is true, was comparatively brief; but let us remember, that by yielding thus early to the inexorable law of nature, he leads us all in the advance, in the great career of the hereafter.

Judge Welker then, in a few fitting words, ordered the resolutions and proceedings of the Bar meeting entered upon the journal of the court.

THE ROMAN CIVIL LAW.

VII.

Pandects, Book I, Title III—(Continued).

Lex. 23. (Paulus.) Minime sunt mutanda, quae interpretationem certam semper habeurunt.

(That (law) which has always received the same interpretation, must by no means be changed).

Lex. 24. (Celsus.) Incivile est, nisi tota lege perspecta, una aliqua particula ejus proposita indicare, vel respondere.

(It is unreasonable and unfair, to announce the meaning or to give an opinion, of a law, from an examination (or study) of but one particular part thereof, without an examination and study of the entire law).

Lex. 25. (Modestin.) Nulla juris ratio, aut aequitatis benignitas patitur, ut quae salubritur pro utilitate hominum introducuntur, ea nos duriore interpretatione contra ipsorum commodum producamus ad severitatem.

(No rule of law or equity will permit, that we shall by a harsh interpretation extend and carry to great strictness and severity, and in opposition to their good purpose, such laws as have been introduced and enacted for the good of mankind).

Lex. 26. (Paulus.) Non est novum, est priores leges ad posteriores trahuntur.

(It is not new, that prior laws are attributed and referred to subsequent laws).

Lex. 28. (Paulus.) Sed et posteriores leges ad priores pertinent, nisi contrariae sint; idque multis argumentis probatur.

(Subsequent laws also pertain to and relate back to prior laws, unless they are in opposition (or repugnant thereto); this can be illustrated by many examples).

Lex. 32. De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est; et si qua in re hoc dificeret, tunc quod proximum et consequens ei est; si nec id quidem appareat, tunc jus, qno urbs Roma utitur, sevari oportet.

¶ 1. Inveterata consuetudo pro lege non immerito custoditur, et hoc est jus, quod dicitur moribus constitutum. Nam quum ipsae leges nulla alia ex causa nos teneant, quam quod judicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit, tenebunt omnes; nam quid interest, suffragio populus voluntatem suam declaret, an rebus ipsis et factis? Quare rectissime etiam illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.

Those cases as to which no written laws exist, should be governed by that which has been established by habit and custom; and if these do not exist, or are not applicable to such a case, then apply that which comes nearest to it on the principle of parity of reason or of analogy; and if this also fails to furnish (the rule) for the case, then that law ought to serve the purpose by which the city of Rome was (originally) governed).

Old, inveterate custom is held (and not undeservedly) to be law; and that is law which is established by custom. For since laws bind us all for no other reason than that they are received through and by the judgment and decision of the people, so deservedly too, should that bind us all which is approved of and sanctioned by the people without anything being written; for what difference does it make whether the people declare their wishes by vote, or by the act, and the doing of the act itself?

It has therefore also been correctly declared and held that laws may be abrogated and annulled, not only by the vote and decision of the legislator, but also through disuse, by the tacit consent of all).

Lex. 33. (Ulpianus.) Diuturna consuetudo pro jure et lege in his, quae non ex scripto descendunt, observari solet.

(Long continued custom is wont to be observed and regarded as right and law in those cases which come to us without any written laws pertaining thereto).

Lex. 34. Quum de consuetudine civitatis vel provinciae confidere quis videtur, primum quidem illud explorandum arbitror, an etiam contradicto aliquando judicio consuetudo firmata sit.

(Yet whenever one thinks or expects to rely upon the custom of a city or province, it is important first to consider, in my opinion, whether it has been established, fortified or strengthened after litigation).

Lex. 35. (Hermogenianus.) Sed et ea, quae longa consuetudine comprobata sunt ac per annos plurimos observata, velut tacita civium conventio, non minus, quam ea, quae scripta sunt jura, servantur.

(But as to those things which have been acted upon and approved of by long continued custom and for many years, is as it were, by the tacit consent in its favor of the people, heeded

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and treated as not less binding than those laws which are written).

Lex. 36. (Paulus.) Imo magnae auctoritatis hoc jus habetur, quod in tantum probatum est, ut non fuerit necesse scripto id comprehendere.

(Indeed this law is held to be of such binding force that having tested it and proving acceptable, it has not been deemed even necessary to put it in writing).

Lex. 37. Si de interpretatione legis quaeratur, in primis inspiciendum est, quo jure civitas retro in ejusmodi casibus usa fuisset; optima enim est legum interpres consuetudo.

(If it is sought to arrive at the interpretation of a law, it is well first of all to ascertain by what law of the State, formerly, similar cases were disposed of; custom is the best interpreter of law).

Lex. 39. Quod non ratione introductum, sed errore primum, deinde consuetudine obtentum est, in allis similibus non obtinet.

(When a (custom) has been introduced *erroneously*, through *mistake* or *ignorance*, and afterward retained and strengthened and obtained the power of law by custom, will not however hold good in other similar cases (by parity of reason).

Lex. 40. (Modestinus). Ergo omne jus aut consensus fecit aut necessitas constituit, aut firmavit consuetudo.

(Hence all law has been made or created either by general consent or agreement, or necessity has established it, or custom has strengthened it and made it binding).

Pandects, Book I, Title IV.

De constitutionibus principum.

(Concerning the constitutions of the Emperors).

Lex. 1. (Ulpian.) This title is brief and states in substance that whatever the Emperor commands or ordains has the force of law, because the people passed and conferred upon him absolute power and authority.

H.

SUPREME COURT OF NEBRASKA.

ESTABROOK VS. MARTIN.

Landlord and Tenant — Removal of Fixtures—Rent in Arrears—Condition — Forfeiture.

A tenant was in possession under a lease which contained a clause in these words: "The said J. G. H. is to have the privilege of removing at the end of said term all improvements placed by him on the said premises, only on condition, however, that the conditions of this lease are complied with," and he allowed one quarter's rent (which by the terms of the lease was required to be paid in advance) to be in arrears for thirteen days, when the same was tendered and refused. *Held*—that equity would not enforce a forfeiture of the right to remove such improvements.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

[WATSON, HALE AND TIBBALS PRESIDING.]

DEXTER B. CHAMBERS VS. VILAS NATIONAL BANK.

Promissory Note — Evidence—Defense of Maker that his Name was used as a Device to Raise Money for Benefit of Another, Known to all Parties, may be Shown, etc.

WATSON, J.:

The action below in this case was brought upon three promissory notes payable to the order of White & Co., and signed by Chambers & Co., and they were for various amounts designated in the notes. Chambers is the only defendant who makes any defense, the action being against him and a man by the name of Dodge, and he sets up, in substance, that there was no such firm as Chambers & Co., and that he was not a member of any such firm; that Chambers & Co. meant only A. P. G. Dodge, and that Dodge executed the note, and that its execution was only a device for the purpose of raising money; that it was given for no indebtedness to White & Co., and that instead of using the name of Dodge the name of Chambers & Co. was used, and it went to White & Co. in furtherance of the general object of raising money. He says that there was no consideration for the note; that he was in no way a party to it, and that these facts were all known by White & Co. and by the plaintiff when the plaintiff obtained the note by discount.

When the case came on for trial in the court below, the defendant, in order to make out his defense, asked this question: "You may state what knowledge White & Co. had or any member of the firm had of your relation to Dodge?" He says his relation to Dodge was to transact business for him under a salary; that he had no interest in the business; that he was an employee of Dodge to do Dodge's business. This question was objected to by the attorney for the plaintiff. Judge Burke then stated what he proposed to prove by the answer to the question. "I propose to prove in answer to the question that Chambers was well acquainted with the firm of White & Co. and they with him, and at the time this paper was issued they knew he was not a member of the firm of Chambers & Co." The Court then sustained the objection and the defendant excepted. Then Judge Burke (counsel for defendant) says: "I want to prove in addition to that by the witness that Mr. A. G. P. Dodge, who did the business, in the name of Chambers & Co., was himself a member of the firm of White & Co., and that he knew, as a member of the firm, that this was only his own paper" To that objection was made, the objection sustained and the defendant excepted. Then the question was asked: "You may state at the time this paper was issued what knowledge White & Co. had in regard to whose paper it was." Same objection, ruling and exception. Judge Burke then stated: "I expect to prove in answer to that question that White & Co. knew it was the paper of A. G. P. Dodge made in the name of Chambers & Co."

We were anxious to know, when this case was being argued, whether these objections were to the form or whether it was a mere question of the order of testimony, and we learned that the record did not disclose; but we learned from counsel that, in fact, no such objection was relied upon, but that the decisions were made upon the broad grounds of competency and relevancy.

Now, we think in this the Court of Common Pleas committed an error. Those questions were pertinent. It was a part of the defense. It was a part of the issue to be tried. The allegation was that White & Co., when they received these notes, did actually know the relation that Chambers bore to Dodge; that they knew that the firm of Chambers & Co. was a mere nominal thing; that it simply meant Dodge, that Dodge was himself a partner in the firm of White & Co., and that the firms, in the matter, were acting together for the purpose of raising money and there was no real consideration for the notes. The defendant further alleged that this was all known to the plaintiffs when they took this paper.

As a part of the defense we hold that the testimony was at the time

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competent and the Court erred in ruling it out. The case will therefore be reversed and remanded.

BURKE & SANDERS, for plaintiff.

HUTCHINS & CAMPBELL, for defendant.

[ROUSE, LEMMON & FINNEFROCK presiding.]

MOLHUMES VS. THE CITY OF CLEVELAND.

Street Improvement—Damages—Remedy for, etc.

ROUSE, J.:

This case comes into this court on error to the judgment of the court below in sustaining a demurrer to the petition. The petition alleges that in 1878 the plaintiff was the owner of certain premises, a house and two lots, abutting on Broadway; that the City Council in May, 1878, passed an ordinance for the grading and paving of Broadway, and in July the contract was let for that purpose; that the street was graded according to the specifications of the ordinance for the improvement; that, in making the road-bed and sidewalks, the city constructed a sidewalk on the side of property owned by the plaintiff but six feet in width; that on the opposite side they made it eighteen feet in width, and that there was an ordinance of the City Council at the time that every person who made a sidewalk where the street was four rods wide should make it fourteen feet in width, whereas this was made but six; and the petitioner, in order to enter his house, which, it seems, was close up to the line of the street, erected steps, and the sidewalk being only six feet in width it was necessary to make the steps very steep in order to leave room on the sidewalk for passengers to go by, and so steep that it practically operated to prevent his renting the house, and he has been damaged thereby; that the value of the rent of the house was thirty dollars a month, and that the house could have been rented for that sum per month if proper steps had been constructed, and he asks damages therefor to the amount of one thousand dollars and over.

The plaintiff sets forth that the street was cut down and graded, by an ordinance passed in May, 1878, between three and four feet. Before that could be done it was necessary for the city to pass a resolution declaring the necessity of the improvement, notice of which should be published for two weeks, calling upon all parties who would be damaged thereby to file their claims for damages within four weeks from the time of the publication of the resolution; and then after the improvement was made the parties who had filed their claims could come in and recover their damages.

Now, it must be presumed that the city did its duty in this respect; that claims for damages were filed, and that after the improvement was made damages were adjudged by the Probate Court, and the rule of damages in this case would be what it would cost to lower the building to the present grade of the street. After an improvement, every man has a right to have his building upon the grade of the street. It was admitted in the argument that a claim for damages was filed and damages were awarded.

Now, it seems that the party, although he recovered his damages, which would have enabled him to lower his building to the present grade of the street, put his damages into his pocket and allowed his building to stand where it was and constructed the steps before referred to; so that the real cause of the damage of which he complains is that the sidewalk is so narrow that he cannot from the front of his building construct steps sufficiently slanting to be easy of access, without placing them so far into the sidewalk as to prevent the passage of persons upon the sidewalk.

Now, if the plaintiff had made use of the money he recovered as damages and lowered his building to the grade of the street, none of this trouble could have arisen. No party has a right to put steps in the street at all. If he does so, he commits a nuisance, and the city might remove the steps or prosecute him for maintaining a nuisance. The action is really then brought because this sidewalk is so narrow that the plaintiff cannot put there so extensive a nuisance as he desires by putting in as long slanting steps as would be convenient to get into his house. We think the demurrer to this petition is well taken.

The question as to the city constructing a sidewalk only six feet in width on one side of the street and eighteen feet on the other, whatever our views might be upon it in a proper case, does not arise in this. The claim here is simply one of a right to commit a nuisance. The judgment of the Court of Common Pleas is affirmed.

F. H. KELLY and OTTO ARNOLD, for plaintiff in error.

HEISLEY & WEH, for defendant in error.

INDIANA SUPREME COURT.

JANUARY TERM, 1879.

ALVORD ET AL. VS. SMITH.

1. Action to recover premiums offered by a trotting association. Consideration. An action may be maintained against a trotting association for a premium; the consideration is the same as that offered by way of reward to the public, or to some person; when the act is done, the proposition offering the reward is accepted, and the agreement becomes a contract.
2. Distinction between a wager or a bet and a premium or reward. In a wager there must be two parties, and these two parties are known before the event happens upon which it is laid; in case of a premium or reward, there is but one party until the act is accomplished. A premium is a reward or recompense; a wager is a stake upon an uncertain event.
3. Premiums offered by authorized corporation and by partnership. There is no difference in principle between premiums offered by an authorized corporation and one offered by a private partnership; neither are unlawful.

This was an action by the appellee against appellants to recover the amount of a certain premium offered by them, as the Indianapolis Trotting Association, to the owner of the horse that should make the second best time in a trotting match on the appellant's track.

BIDDLE, J.:

Although the complaint does not contain a direct averment of a consideration for the premium, yet the facts alleged show a sufficient consideration to maintain the action. It is the same consideration as that offered by way of reward to the public or to any person who shall do some act, obtain some thing, or accomplish some purpose which is not unlawful for the person offering the reward. When the act is done, the thing obtained, or the purpose accomplished, the proposition offering the reward is accepted, and the agreement becomes a contract. Harson v. Pike, 16 Ind., 140.

Nor do the facts alleged show a wager or bet. There is a clear distinction between a wager or a bet and a premium or reward. In a wager or bet there must be two parties, and it is known before the chance or uncertain event upon which it is laid is accomplished who the parties are who must either lose or win. In a premium or reward there is but one party until the act or thing or purpose for which it is offered has been accomplished. A premium is a reward or

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recompense for some act done; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known till after the event. The two need not be confounded. Nor can we see anything unlawful or against public policy in such a case. Under our statutes (1 R. S., 1876, 48) encouraging agriculture and authorizing public fairs, premiums are offered for the best draft horse, trotting horse, etc. These premiums are certainly not wagers. As well might an insurance policy be called a wager because it is to be paid on an uncertain event, as to call a premium a wager because we do not know who will be entitled to it until the event happens. We can see no difference in principle between a premium offered by an authorized corporation and one offered by a partnership. Neither are wagers, nor are they unlawful.

Affirmed.

SUPREME COURT OF CONNECTICUT.

PETERS VS. STEWART.

Receiptor—Goods Brought into Another State—Remedy.

Where goods were attached in the State of Massachusetts, and there delivered by the officer to a receiptor, who left them in the hands of the debtor, by whom they were brought to Connecticut and sold, it was held:

1. That the law of Connecticut governed upon the question whether the receiptor could maintain replevin for the goods.
2. That the receiptor was clearly entitled to the immediate possession of the goods as against the debtor, and that this alone would have been enough, under the statute in force when the suit was brought, to sustain the action of replevin.
3. That the purchaser of the goods, if he bought them in good faith of the debtor, could hold them against the receiptor.
4. That the burden of proof was on the purchaser to show that he bought them in good faith.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending July 25, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

July 19.

Harriet Jungman pns husband to Gertrude Marxen. $300.

William Haman to Wm. Spitzig. $145.

Margaret Moses to Hiram Day. $484.

John T. Delsink to The Cit. Savs. and Loan Ass'n. $200.

I. M. Clemens et al to D. L. Clemmons. $1,057.

Balthaser Geid and wife to Fred Haltnorth. $1,000.

James Conway and wife to J. R. A. Carter. $100.

H. B. Gildara and wife to J. J. McClintock. $200.

Fred H. Flick and wife to Lucretia W. Rector. $1,000.

Margaret Wickendrager and husband to J. R. Goldson et al. $315.53.

John Mooney and wife to Laban Ingersoll. $175.

July 21.

Eleanor Jones et al to Henry Allan. $100.

Holland W. Baker to Ransom O'Conner. $535.

H. Herder et al. to R. C. Tarry. $670.

Mary Vral to J. P. Wehnes. $200.

July 22.

Patrick Malon and wife to S. Mann Austrian & Co. $350.

M. S. & C. A. Selden to M. E. Goodwin. $800.

Frederica Kalclow to The Starr. Turn. and Renoroht Society. $75.

Carl Kipparack and wife to John Dickow. $300.

Emil Bishler and wife to Henry Wick & Co. $100.

Charles Case et al to H. M. Shumway. $250.

R. C. Johnson et al to Emelie Lapp. $550.

The Society of the True Dutch Reformed Church to Marcius Verhock. $445.

July 23.

Lawrence Kuchaske and wife to Frederica Reichart. $300.

Rosina Fetterman and husband to Adam Fetterman. $300.

George Downing and wife to J. H. Flaherty. $300.

Louis Zunk and wife to J. N. Hurst. $527.80.

Y. A. Strobhart to Mason, Dorman & Co. $700.

July 24.

Charles H. Smith to Lucinda E. Johnson. $1,200.

Same to same. $600.

Same to same. $3,150.

Same to same. $2,500.

Mary H. Sterling to William E. Parmlee, trustee. $5,000.

Susan B. Woodford and husband to Elizabeth Fenton. $200.

Mary Mather to George Mygott. $2,000.

S. F. Rogers and wife to V. C. Stone. $600.

Henry Strobil and wife to Adam Messer. $800.

Florida G. Blythe et al to The Society for Savings. $15,000.

Mathias Kalbe and wife to Frank Leuk. $750.

Henry Church to George Hewes. $350.

James Cain and wife to Betty Hanne. $500.

Mary Riley and husband to M. S. Hogan. Two hundred dollars.

Helen M. Lowry et al. to The Society for Savings. One thousand one hundred dollars.

James H. Litchfield and wife to Firzah Walkden. One thousand dollars.

Herman Kuehl and wife to Wm. Moehring, Sr Four hundred dollars.

July 25.

Peter J. Riters to Thomas Barry. Nine hundred dollars.

P. Chamberlain and wife to W. W. Butler. Twenty thousand dollars.

Esther R. Shepherd to Elijah Sanford. Three thousand dollars.

George E. Howe and wife to Joel J. Butler. Four thousand five hundred dollars.

August Roehl and wife to Charles Hahn, Jr. Two hundred dollars.

Frank Zarbreicky and wife to J. P. Rink. Three hundred dollars.

Fredolin Ortle and husband to Charlotte Scheurer. Seven hundred and fifty dollars.

CHATTEL MORTGAGES.

July 19.

G. T. Miller to Jacob Flick. $55.

Charles Leavitt to Thomas Beckwith. $7,590.

July 21.

Barry Sullivan to Charles Rauch. $77.

Herrmann Satink to Hubert Boumers. $250.

P. McGary to C. F. Emery. $235.

George C. Adams to James Mansur. $140.

A. R. Fimmin to F. A. Wilmot. $40.

John A. Ellsler, Jr., to Henry B. Hayes. $3,000.

George F. Hegerling to Martin Haas. $37.

W. J. Skinner to Maryette Jackson. $1,000.

July 22.

John W. Miller to W. M. Nichols. $125.

Joseph Polak and wife to Ann E. Bott. $1,000.

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Joseph Houstam to Wm. H. Shaw. $100.

July 23.

J. Seville to Eugene L. Graves. $1.

Elijah E. Ames to A. Benjamin. $106.

J. D. Christian to F. A. Wadsworth. $154.

Cornelius Newkirk to C. R. Sanders. $53.

G. W. Clowell to Aaron Highly et al. $400.

July 24.

George Sinn to W. D. Butler. Seventy-eight dollars and seventy-five cents.

R. G. Chandler to Whitney & Raymond. Eighty-four dollars.

July 25.

Augustus L. Wright and wife to W. H. Shaw. Fifty dollars.

Thomas Jones and wife to William Follamsbee, guardian. Sixty dollars.

Stephen B. Conklin to J. B. Upson et al. Three hundred dollars.

M. J. Baumbaugh to J. D. Jones. One hundred and twenty-five dollars.

DEEDS.

July 14.

Mrs. M. B. Sterling to Michael J. Killacky. $2,100.

L. J. Talbot and wife to Miss L. E. Kleinsmidt et al. $1,400.

Same to same. $640.

G. W. Woodworth and wife to The Sun Ins. Co. $1.

George Angel et al., by C. C. Lowe, Mas. Com., to Thomas Quayle et al. $2,000.

Thomas Graves, Mas. Com., to Anna Kraemer. $534.

Wm. West et al., by G. W. Mason, Mas. Com., to The Sun Ins. Co. $1,000.

July 15.

Sophia Buhsse and husband to Valentine Wode. $1,484.

J. M. Curtiss and wife to Francis Hicks. Eight hundred and eighty dollars.

John Deming et al. to Theodore Roesing. One dollar.

Christian Engel and wife to Thomas E. Stoneman. Five hundred and thirty-eight dollars.

M. J. Lawrence and wife to G. H. Bishop. One thousand dollars.

H. P. Markle and wife to Clara S. Wright. Six thousand dollars.

Luther Moses to Adam Ott. One thousand one hundred and sixty dollars.

W. H. H. Peck et al. to Anthony Krejci. Four hundred and eighty dollars.

Cordelia A. Pelton to Edward Pelton. Five dollars.

John Sheehan and wife to Nicholas Sheehan. One dollar.

Nicholas Sheehan and wife to Hannah Sheehan. One dollar.

George Zulig and wife to Magdalena Steinbrauner. One thousand four hundred and fifty-nine dollars.

Martin Sperber and wife to J. C. Schroeder. One thousand nine hundred dollars.

Bettie Wellsted to Joseph Wellsted. One thousand three hundred dollars.

July 16.

Johanna De Clair et al. to Sarah Hagelin. Three hundred and twenty dollars.

John S. Edwards and wife to John Rauacher. Two thousand six hundred and ten dollars.

Luther Moses to Jacob Ott. One thousand one hundred and forty dollars.

Harriet Ann Shrider to Wm. Winterbrum. Five hundred and ten dollars.

D. C. Taylor and wife to Leopold Grossman. Seven hundred and seventy dollars.

C. L. Tyler to E. L. Meyer. Five dollars.

Almira Burton to B. B. Burton. Two thousand dollars.

Byron B. Burton to Charles G. Pickering. One dollar.

Newel Bogue and wife to Alanson Clark. One thousand eight hundred dollars.

Charles and Charlotte Bade to A. H. Wick. Seven hundred and eighty dollars.

R. H. Chandler to Marianna E. H. Ridge. One dollar.

Gretka Maria Egts and husband to John P. K. Riblet. Six thousand dollars.

Wm. Pohlman, admr., to Mary Ann Scholles. Four hundred and fifty dollars.

James Slaby and wife to John V. Kuratko. Five dollars.

Same to John and Mary Barsa. Five hundred and eighty dollars.

John V. Kuratko to James and Mary Slaby. Ten dollars.

H. C. White, Guardian, etc., to Elbert B. Cornell. Twenty-five dollars.

Andrew Mehling, exr., by Felix Nicola, Mas. Com., to Mrs. Rosa Mueller. One thousand one hundred and ninety dollars.

Almira Burton et al. by same to Charles J. Pickering. Two thousand eight hundred dollars.

July 17.

Frederick Brown et al to Esther Bindewold et al. One dollar.

Philip F. Bindewold and wife to Mary A. Brown et al. Two hundred dollars.

Godfrey E. Brown and wife et al. to Mary A. Brown et al. One dollar.

Eliza Davis to Luther Moses. One thousand dollars.

Luther Moses and wife to Austin Gardner. One dollar.

Thomas Graves, Mas. Com., to C. H. Bulkley. Two hundred and forty-five dollars.

Charles H. Bulkley to William C. Fair. Two hundred and fifty dollars.

Anson M. Mayers to Jacob Cherryholmes. Two thousand dollars.

Mark McGarry, admr., etc., to Margaret Burns. Three thousand four hundred dollars.

Robert R. Rhodes and wife et al. to The Society of the Reformed Dutch Church. Six hundred and twelve dollars.

Ellen H. Socket to W. J. Gordon. One thousand dollars.

H. W. Andrews et al. by J. M. Wilcox, sheriff, to Daniel Tarter. One thousand three hundred and seventy-five dollars.

Nathaniel Martin et al. by same to Wm. Short. One hundred and twenty-eight dollars.

Anna Maria Schantz et al. by same to James Ruple. Three thousand three hundred and fifty-seven dollars.

Elizabeth E. R. Lowe et al., by same to W. F. Newcomb et al. Five hundred and twenty-five dollars.

July 18.

Mary L. Bradford et al to Alice L. Fellows. $1,552.

Alfred B. Darby, ass'e., etc., to Lucina Strong. $500.

John S. Edwards and wife to D. M. Young. $1,085.

James M. Hoyt and wife to Henry Dersek and wife. $400.

R. P. Myers et al to B. L. Rouse. $480.

C. L. Tyler to D. M. Young. $15.

Kate G. P. Woods to Lyman W. Potter. $400.

H. M. Root et al, by Felix Nicola, Mas. Com., to The Society for Savings. $1,358.

July 19.

J. G. Amann and wife to Joseph Burtscher. $900.

Margaret W. Craw to Charles H. Craw. $800.

Elizabeth Donnolly to Mary McKearney. $2,200.

James Dicker and wife et al to Louisa Koller. $1,250.

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Wm. Given and wife to Alexander McIntosh. $500.

N. Heisel et al to Mrs. Catharine Krueger. $1,050.

Laban Ingersoll and wife to John Mooney. $875.

John Mooney and wife to Caleb Oakes. $910.

James McCreary and wife to Hermann Benhoff. $900.

Same to Louisa T. Pearce. $300.

Nicholas Schiplein and wife to William Spitzig. $1,650.

Same to same. $1,000.

William Spitzig and wife to Nicholas Schiplein. $1,650.

Same to same. $700.

Same to same. $600.

Nathan Shippy and wife to Minerva Welton. $500.

John W. Tyler and wife to A. M. Clarke. $500.

Burt E. Tilden and wife to Sarah A. Tilden. $800.

Charles E. Taft and wife to Mrs. Rosella Scowdon. $2,200.

S. C. Hale et al, by Felix Nicola, Mas. Com., to S. L. Aldrich. $2,200.

Franz K. Mayer by same to Nicholas Schiplein. $643.

William Wylde by same to F. A. Sanders. $1,100.

L. Umbstactter et al, by John M. Wilcox, sheriff, to Gottfried Loesch. $1,667.

July 21.

C. C. Baldwin and wife to Thomas Sobey. $850.

Laura W. Hilliard to Mary H. Sterling. $11,000.

L. A. Markham and wife to Wm. H. Wirt. $2,500.

Armia T. Dolloff et al to Mary Vral. $1.

Wm. H. Brown et al, admrs., etc., to Mary Vral. 660.

Jacob Bohnert and wife to Adam Bohnert. $735.

July 22.

Fr. Wm. Mohr and wife to Frederick Brandt. $2,200.

Mary S. Bradford to the wardens and vestrymen of the Parish of Trinity Church.

Newell S. Cozad and wife to Mrs. Augusta Case. $510.

L. A. Heard and wife et al to Florida G. Blythe. $5.

A. L. Moses and wife to George Downing. $5.

Annie O'Loughlin to Eliza O'Loughlin. $1.

James M. Selover and wife to C. H. Sheldon. Exchange.

Jacob Wageman et al to Joseph Fenton. $693.64.

F. N. Clark et al, by C. C. Lowe, Mas Com., to A. L. Moses. $400.

July 23.

C. Henry Borges and wife to Joseph Miller. $7,000.

Board of Education of Royalton to George Mathews. $25.

Michael Hoerz and wife to Charles Hoerz. $1,400.

William B. Haven and wife to Bessie Marriott. $480.

Bessie Harriott to Mary Haven. $480.

Frederick Kinsman to Geo. Vancura. $[illegible].

Fannie Launder to Mercy Li[illegible]. $1,000.

S. F. Osborn and wife to Lewis Zuak et al. $88[illegible].

Warrick Price and wife to F. S. Taylor. $300.

July 24.

A. P. Bern et al to Lissette Leick. One dollar.

Judgments Rendered in the Court of Common Pleas for the Week ending July 24, 1879, against the following Persons.

July 14.

George F. Turrell. $1,080.84.
Hibernia Ins. Co. of Ohio. $302.66.
A. P. Winslow. $[illegible]76.79.
Henry C. Burt. $[illegible]3.29.

July 15.

Thomas Skaris et al. $305.75.
George W. Crowell. $1,990.11.
W. R. P. Bean. $23[illegible].2[illegible].
C. L. Russell et al. $1,581.30.
Wenzel Hoffman. $1,757.28.

MECHANICS' LIEN.

July 21.

Joseph E. Keck to Mary Anderson et al. $5[illegible].00.

U. S. CIRCUIT COURT N. D. OF OHIO.

July 17.

3892. Maria R. DeMars vs Ashley Ames. Bill filed. Brook & Hawkins.

July 19.

3893. Jane F. Marvin, exrx., etc., vs the Powell Tool and Plaster Co. Petition filed. W. R. Keith.

3894. Henry W. Perkins vs The Arizona & New Mexico Ex. Co. Petition filed. W. J. Boardman, O. G. Getzer-Danner.

July 22.

3891. Herbert C. Ayer et al vs Brown, Bonnell & Co. et al. Replication of complainants. H. Crawford and Jones & Murray.

3881. The National Granite Bank of Quincy, Mass., vs Amos W. Coates. Demurrer. Wm. C. Peppett.

July 23.

3841. H. O. Moses vs the Arizona & New Mexico Ex. Co. et al. Motion to compel plaintiff to make new parties.

3860. The Mich. Mut. Life Ins. Co. vs Seneca C. Mower et al. Answer of Nathan I. Kelly.

3835. Sam G. B. Cook vs the Sandusky Tool Co. Amended answer filed.

July 24.

3895. Maria R. DeMars vs F. W. Nichols. Bill filed. Brook & Hawkins.

3868. Martin C. Hall et al. vs James S. Kellogg. Demurrer to bill.

COURT OF COMMON PLEAS.

Actions Commenced.

July 18.

15521. Robert H. McCurdy vs The Cleveland Bethel Union et al. Money and to subject land. G. W. Mason.

15522. Louis Heiman vs Rosa Mann. To charge separate estate of married woman and other equitable relief. A. Green.

15523. Hugh Keefe vs Philip Goldstein. Money only. J. C. Coffey and Hord, Dawley & Hord.

15524. F. McMillan, admr., vs F. W. Pelton. Money only. William V. Tousley.

15525. Caleb Morgan vs same. Same. Robison & White.

15526. Honora Welch vs same. Same. James Fitch and John E. Ensign.

15527. Charles O'Malia vs same. Same. Same.

15528. Michael Unterzuber vs same. Same. Same.

15529. Adam Nichols et. al. vs same. Same. Same.

15530. Joseph Kezser et al. vs same. Same. Same.

15531. Martin Kahn et al. vs same. Same. Same.

15532. Jacob Hochstrasser et al. vs same. Same. Same.

15533. Sebastian Bohnert vs same. Same. Same.

15534. Fred Heilmann vs same. Same. Same.

15535. John Sperber vs same. Same. Same.

15536. John Turek et al. vs same. Same. Same.

15537. Fred Tammer vs same. Same. Same.

15538. Theodore Oldermann vs same. Same. Same.

15539. Dietrich Wechagen vs same. Same. Same.

15540. Ann Patterson vs same. Same. Same.

15541. J. Daisckchlag vs same. Same. Same.

15542. Marion J. Thompson vs same. Same. Same.

15513. Wm. B. Hall vs Otis D. Crocker. Appeal by deft. Judgment June 21.

July 19.

15544. Lorenzo Janes vs Fred W. Pelton. Money only. Grannis & Griswold.

15545. Moses Warren vs Rollin C. White et al. Foreclosure and to subject lands. P. Prentiss; Willey, Sherman & H., C. M. Vorce, A. T. Brewer.

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15546. Thomas L. Willis, exr., etc., vs Charles Whittaker, admr., et al. ? For direction of court respecting distribution of money. Jackson, Pudney & Athey.
15547. Michael Rice vs Bertha Palmer et al. To subject lands. E. Sowers.
15548. Terence Walsh, admr., vs Clarissa A. Brownell et al. Money and to subject lands. Gary & Everett.

July 21.

15549. Julius Humphrey et al. vs Libbie J. Thompson et al. Foreclosure of mortgage and equitable relief. W. C. Rogers.
15550. Mary H. Frew vs Moses G. Watterson, treasurer, etc. Money and equitable relief. Ball & Raynolds.
15551. Frank Lee et al. vs Charles H. Clark et al. Money only. Marvin, Taylor & Laird.
15552. Frank Peck vs Henry Caster. Appeal by deft. Judgment June 23.

July 22.

15553. James H. Laws et al. vs N. Glick et al. Money only. Foster & Carpenter.
15554. H. P. Greenfield vs James Gay et al. Money only. T. K. Dissette.
15555. Peter Hecker vs Fred W. Pelton. Money only. Grannis & Griswold.
15556. Peter Hecker, Jr., vs same. Same. Same.

July 23.

15557. Thomas Beckwith vs Moses G. Watterson. Injunction and relief. R. F. Paine.
15558. Thomas W. Cornell vs Caroline Bates et al. Money and sale of mortgaged premises. H. & C. C. McKinney.
15559. Charles H. Smith vs Henry Haines et al. Injunction and relief. E. B. B. Bauder and Estep & Squire.
15560. J. W. Smith vs H. A. Tunison. Appeal by deft. Judgment June 25. Emery & Carr; J. W. Stewart.
15561. Charles Newman vs Henry Boehmke. Same. Judgment July 16. ——; W. S. Kerruish.
15562. Maria Adam vs Fred W. Pelton. Money only. J. Fitch and J. E. Ensign.
15563. James C. Bartlett vs same. Same. Same.
15564. Thomas Conday et al. vs same. Same. Same.
15565. Phil Haas vs same. Same. Same.
15566. Prokop Kirchendorfer vs same. Same. Same.
15567. Joseph Knittel et al. vs same. Same. Same.
15568. Ignatius Longtin vs same. Same. Same.
15569. Albert Ritzrow vs same. Same Same.

July 24.

15570. In re the Directors of Murphy, Irwin & Co., a corporation, for change of name. Ingersoll & Williamson.
15571. Nancy Pilkington vs Andrew Brennen et al. Money only. Adams & Beecher.
15572. David Wade vs George C. Ross. Same. Same.

Motions and Demurrers Decided.

July 15.

2810. Clancey vs Bailey et al. Granted. Attachment ordered.
2808. Cain vs Newshuler. Granted.
2776. Muelhausen vs Shell. Granted.
2740. Bates vs Quigley. Granted. Defendant has leave to file amended answer within 30 days.
2715. Cleveland Paper Co. vs Celtic Index Pub. Co. Granted. Report confirmed.
2238 } 2239 } McClurg vs Morris et al. Stricken off.
2603. Gregerson vs Herr et al. Granted.
2798. Jones et al. vs Smith et al. Granted.

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HON. ISAAC C. COLLINS, brother of the late William Collins, Esq., of this city, died at Cincinnati early Wednesday morning, July 30th. He was Judge of the Common Pleas Court of Hamilton county from October, 1859, to February, 1862.

MR. W. S. C. OTIS, one of the oldest members of the Cuyahoga County Bar and senior partner of the firm of Otis, Adams & Russell, of this city, died at his residence on Thursday last, in the seventy-first year of his age. Mr. Otis was born in New England in 1808; graduated at Williams College in 1830; was admitted to the Bar in 1832; practiced his profession at Ravenna, Ohio, about eight years, when he removed to Akron; removed to Cleveland in 1854, about which time he was elected vice-president of the Cleveland & Pittsburgh Railroad Company; was appointed attorney for the road in 1855, and has devoted himself ever since to the practice of his profession.

A Bar meeting will be held in court room No. 1 on Saturday, August 2nd, at 10 A. M., to take appropriate action relative to his death.

The U. S. Court will also be opened on Tuesday, August 5th, at 2 P. M., for the same purpose.

THE ROMAN CIVIL LAW.

VIII.

Jus non scriptum, (or unwritten law).

The Romans had five kinds of written law, as stated in article VI.

They also claimed that there were different kinds of jus non scriptum, (or unwritten law), namely:

1. Custom.
2. Opinions and decisions of jurists and judges.
3. The science and theory of the law itself, —"Interpretatio" — Legal Interpretation.

I.—Custom.

Custom or consuetudinary law) may be defined as that which has come to have the force and effect of law, by long continued and uniform practice —popular usage.

The Romans defined custom as "jus moribus constitutum," (that which is established by custom, is law).

To make and establish a valid custom, various and essential elements must necessarily exist.

They are in part given in the laws relating to this subject in Title III.

a. A custom was indicated by the tacit consent in its favor of the people, among whom it was established. (See Lex. 35, Title III, Book I).

b. The rule or maxim which is applied as governing a custom or popular usage, is in truth the cause and origin of that custom or usage; the custom or usage is not, as many suppose, the cause of the rule.

c. The rule or custom must have been in force a number of years; the "consuetudo" must be "diuturna," "per annos plurimos observata;" the precise time is not fixed in the Pandects, and therefore the interpreters infer it is left to the decision of the judge. Many cases must have arisen and been controlled by the same rule; the custom must have become firmly rooted and certain. (See Lex. 35–36 –32).

Blackstone says "that it must have been used so long, that the memory of man runneth not to the contrary. So that if one can show the beginning of it, it is no good custom."

d. Whether in truth the custom is a valid one, depends somewhat upon whether it had been established after litigation; at least, if so established, it thereby pecame unassailable. (Lex. 34, Title III, Book I).

e. The custom must be a fair, reasonable and peaceable one.

f. All cases falling under it, must be controlled by it.

When these elements are found to exist, custom or consuetudinary law is established, and it has then the same binding force as written law. It also serves to fill up the gaps left by the written law. So might a written law (as claimed by some) be repealed

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by it and rendered nugatory, unless the written law contained a provision or clause forbidding or preventing the rise, or the continuance of a custom contradictory or in opposition to the written law.

Consuetudinary law could also be extended and interpreted, the same as written law is.

Two factors must exist to establish jus non scriptum:

1. The rule ittelf.
2. The long continued practice—popular usage.

The custom bears the same relation to unwritten law, as the *publication* does to written law; *i. e.*, usage, is as necessary to make and complete a consuetudinary law, (one form of unwritten law), as a publication is necessary to make and complete a valid and binding written law.

But the true grounds on which custom (and in fact unwritten law) rests, is that it is tolerated, recognized and acknowledged as law by the properly constituted legislative authority.

The judge was presumed to know the unwritten law, as well at the written law. He was to determine "ex officio," whether the custom has been established and does exist. The rule "jura nascit curia" applies as well to unwritten as to written law. But if the judge could not determine it "ex officio," then he might hear proof (which is never permissible respecting written law) upon the question, whether in fact, a custom does exist; and this may be proved; either by witnesses, and it required very many, or by attested documentary evidence.

II.

Another form of jus non scriptum was the "opinions and decisions of jurists and of judges"—the "usus praxis." It was the rule that in all cases the decisions in preceding like cases must be followed. It is our "Stare decisis." It is this principle that enforced precedent in doubtful cases. The judge was bound to follow it, and the rule once laid down in his court in a given case, bound him in a like subsequent case, even though the application of a different rule or decision would seem to him more just and proper. But each court was bound only by its own decisions—not by the opinions and decisions of a higher court.

III.

Another form of jus non scriptum was the science and theory of the law itself or legal interpretations. The "jus respondendi" was what the Romans termed this form of jus non scriptum. It arose from this, that the lawyers and text writers frequently drew conclusions and consequences from and gave opinions elicited by particular applications and sometimes on disputed points of (written) laws, of which the legislator never thought; which conclusions, consequences and opinions were for the most part recognized and acknowledged as law, no change, alteration or addition being made to the written law itself afterward: and then again rules and maxims would be moulded and deduced from the decisions of the judges, which, after that, were relied upon as law.

Through this and the preceding form of jus non scriptum the law or jurisprudence of the Romans was gradually developed. Respecting these forms a learned author says that "in every civilized country there will arise, generated from traditional usage and judicial construction, and general opinion, rules that float in the atmosphere of its tribunals, and which modify, circumscribe, or supply the place of positive legislation. That to provide for every case that can possibly occur in the infinite variety of human affairs, is not only a vain, but as the example of our statutes shews, a most mischevious and preposterous attempt, indicating complete ignorance of all that ought to be present to the mind of a legislator. When the legislator has laid down general rules, has contracted within certain limits the range of judicial interpretation, and has laid down in his code the clearly defined text, to which every citizen in an ordinary case may apply for information as to his rights, his obligations, the course to be taken to obtain redress when he is wronged, and the liabilities to which he exposes himself by violating the rights of others, he has fulfilled his task."

And in support of this we again refer to Pandects, Book I, Title III, Lex. 10:

"That neither the laws nor senate resolves can be so written or made, which shall comprehend, include or meet every conceivable event that may unexpectedly occur or arise at any time, but it suffices to encompass, comprehend and include all such events as most frequently and naturally take place." (Also Lex. 12, same book and title).

The Romans designated laws also either as

1. General laws:—laws applicable to all persons.
2. Special laws:—being such as are applicable to and for the benefit of a single or particular person called also "*privilegia.*"

They also divided a general law into

1. Jus commune: — such as is based on "ratio juris," *i. e.*, the final cause which has induced the legislature to enact the law.
2. Jus singulare: — such as is based on "Beneficium legis," *i. e.*, on equity.

They also designated law as

1. Jus universale:—a law for an entire territory or district, and
2. Jus particulare:—a law for a certain part of such territory or district.

LEGAL INTERPRETATION.

By legal interpretation was meant the aim and purpose of the interpreter to discover the true intention and will of the legislator. The necessity for interpretation arose when the law, from a defective expression, was ambiguous or obscure; or when the sense of the law, however manifest, would, if applied indiscriminately, lead to unjust consequences; or when the letter of the law strictly taken, would or would not comprehend, what the legislator really intended.

The Romans recognized first a *legal interpretation* termed by them; "*interpretatio*," meaning the rule, which the law maker himself declared and deduced from the law itself; second,

The *doctrinal interpretation*, or interpretation made by the judge.

Then they speak of a *grammatical* and a *logical* interpretation. By the former the judge arrived at what the law was from the ordinary meaning of the words used. By doctrinal interpretation the judge arrived at and explained the meaning of the words from the evident intention, reason and spirit of the law.

Then they speak of *Restrictive interpretation* and *Extensive interpretation.*

The *extensive interpretation* is that which includes cases that the letter of the law strictly taken would not comprehend. The *restrictive interpretation* includes cases that the letter of the law strictly taken would comprehend.

An example of the latter, was the law providing that the possessor of an inheritance to which he was not entititled should, after the suit began against him, restore everything as it was at the time the suit was instituted, to the owner. The strict construction of this rule would make him liable for animals that might happen to die during its continuance; which was not the intention of the law maker.

So the law that prohibited man

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from having two wives. The idea of that law strictly taken goes further than was intended. The legislator meant to say, he shall not have two wives at the same time and living. The true intention of the legislator is arrived at in both these cases by what they termed the *restrictive* interpretation.

The extensive interpretation was especially applied on rules or principles of analogy; flowing as it does necessarily from the maxim or law heretofore stated, that it is impossible for human legislation to provide by name for every special emergency.

By analogy is meant the extending a rule of law to cases or facts for which the rule was not intended or enacted. In other words where there is a similarity of facts, the same reason will be made applicable by analogy or extensive interpretation. But this doctrine of analogy, or extensive interpretation cannot prevail in cases of jus singulare and "*Privilegia*," nor where the law expressly prohibits it.

The following are the essential requisites that the interpreter of laws must bear in mind:

1. It is a main rule of interpretation that the whole of the law should be considered, and the parts of it carefully collated with each other. (Lex. 24, Title III, Book I).
2. To consider any other prior enactments made upon the same subject.
3. To consider the character of the times and of the people when and as to whom it was made to apply.
4. The "ratio legis" or final cause which has induced the legislature to enact the law, is the main ingredient of rational interpretation, *i. e.*, the reason and spirit of the law.
5. The meaning of a doubtful law might be elucidated by the language of the legislator in subsequent enactments. (Lex. 26–28, Title III).
6. The interpretation once given must always be adhered to. (Lex. 23).
7. In cases of doubt, custom and the received opinion were established rules of interpretation. (Lex. 37).

H.

NOTES OF RECENT CASES.

Supreme Ct. of Pennsylvania.

INSURANCE.

1. An application for insurance contained the stipulation that the application should form a part of the policy, and all statements therein constitute warranties by the insured. The agent of the company wrote the answers of the applicant to his questions falsely. The truth of the testimony taken was admitted by the company. *Held*, That on motion for a non suit the Court was bound to treat the testimony as true and draw every reasonable inference therefrom in favor of the plaintiff; and it matters not that a portion of the evidence was ruled out before the motion for non suit.

2. The fraud or mistake of an agent, done within the scope of his authority, will not enable the company to avoid a policy to the injury of the insured, who innocently became a party to the contract.

3. Membership in a mutual insurance company dates from the consummation of the contract of insurance; and up to this time, the agent of such a company acts only for the company and not for the insured, and the company is responsible for his mistakes, stipulations in the policy to the contrary notwithstanding. [*Eilenberger vs. The Protective Mutual Insurance Company.*

Opinion delivered by TRUNKEY, J.

U. S. Supreme Court.

MANDAMUS TO DIRECT LEVY OF TAX.

When authority to borrow money or incur an obligation is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it, without any special mention that such power is granted.

A limitation of the means by which the bonds of a municipal corporation were to be paid, should be insisted upon when the suits on the bonds were pending and continued in the judgments. After the bonds have passed into judgment, the indebtedness is absolute; the question of their validity or the means of payment is no longer open.—*U. S. vs. City of New Orleans.*

Opinion delivered by FIELD, J.

Court of Appeals of Maryland.

MARSHALING OF SECURITIES.

Where a creditor has a lien upon two funds for the payment of his debt, and a subsequent creditor has a lien upon one fund only, the doctrine of marshalling of securities by which the creditor having a lien upon two funds may be compelled to resort to that fund which is not common to both is not founded on contract but rests solely upon equitable principles.

To the end therefore that both debts may be paid, it is but just to compel the creditor having a lien upon two funds to resort to that to which a subsequent creditor has no lien, or if the prior creditor has been paid out of a fund not common to both, to subrogate the subsequent lien creditor to the rights of the prior creditor as against the funds to which such subsequent creditor has no lien. But this equity will not be enforced against intervening liens having a superior equity.

A court of equity will not marshal securities to the prejudice of a bona fide purchaser of other property upon which the lien did not operate, and of which he had no notice.—*Moses W. Leib vs. Ann E. Stribling, Admr.*

Opinion delivered by ROBINSON, J.

Supreme Court of Illinois.

CONSIDERATION OF DEED.

When it can be shown to be less than as expressed.—While the general rule is that the consideration of a deed may be explained so as to show the facts, yet in an action on a covenant of warranty brought by a subsequent grantee, the grantor is not at liberty to show that the consideration paid is less than the sum expressed in the deed. Citing *Greenvault vs. Davis*, 4 Hill, 643.—*Ill. Land and Loan Co. vs. Bonner.*

U. S. CIRCUIT COURT, DISTRICT OF OREGON.

B. L. LEWIS VS. THE OREGON CENTRAL RAILWAY CO.

Action to Recover Possession of Real Property.

1. DEMURRER.—A demurrer does not lie to a part of a plea or defense, or immaterial matter therein, but it must deny its sufficiency as a whole.
2. PLEA OF EASEMENT.—A plea which states that the defendant in an action of ejectment is the owner of a perpetual right of way over the premises in controversy, and that the owners thereof granted it the same, is a sufficient statement of the nature and duration of such estate or interest in the premises.

DEADY, J.:

This is an action to recover the possession of lots one in blocks 6 and 10, in the Portland Homestead Association.

The complaint alleges, that the plaintiff is a citizen of the State of California, and the defendant a corporation duly organized under the laws of Oregon, and doing business therein as a railway company; that the plaintiff is the owner in fee simple of said premises, which are of the value of $2,000, and the defendant

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wrongfully withholds the possession of the same.

The answer contains a general denial of the allegations of the complaint, except the citizenship of the parties. It also contains a special defense to the effect that the road of the defendant is constructed over, and operated upon, a certain portion of said premises therein described, and amounting to 56-100 of an acre, of which it is in the possession; that in 1869 said premises were the property in fee simple of Philinder, wife of James Terwilliger, and that said James, who is still living, was then in the possession of the same, and had an estate therein for his own life; that said James was also the agent of his wife to manage said lots, and receive from the defendant compensatson for the right of way across the same, to construct and operate its railway thereon; that as said agent, and for himself in the year aforesaid, said Terwilliger received from the defendant the sum of $1,700 for timber taken by the defendant from the premises, and other lands of said James and Phillinder to aid in the construction of its railway, and in consideration thereof, also agreed that the defendant should have a perpetual right of way over the premises for its railway, and for the consideration aforesaid then granted to the defendant such right of way and it is now the owner thereof; that the defendant, relying upon said agreement, built its railway over said premises, and has used the same ever since for the purpose of operating the same between Portland and St. Joseph; and that the interest of the plaintiff in the premises was acquired from said James and Phillinder after 1869, and while the defendant was in the possession and use of the same for the purposes aforesaid.

The plaintiff demurs to the special defense.

The demurrer is not taken to the whole of this plea or defense, but omits the allegations concerning the ownership of the lots by the Terwilligers and the portion now in possession of the defendant, and also the allegation, to the effect that for the consideration mentioned, said James Terwilliger "granted" to the defendant said right of way, and it is now the owner thereof.

A demurrer does not lie to a part of a plea or defense, but it must controvert its sufficiency as a whole. Redundant and irrelevant allegations may be stricken out of a pleading on a motion, but they cannot be objected to by demurrer.

By §§ 771-775 of the Or. Civ. Code, taken from the Statue of Frauds of 29 Charles II, it is declared that "no estate or interest in real property" other than a lease for a year can be created otherwise than by operation of law or a writing subscribed by the party creating the same, and "executed with such formalities as are required by law;" and that "an agreement * * for the sale of real property or any interest therein" is void, unless the same is in writing and subscribed by the party to be charged.

An easement—as a right of way—is an interest in lands within the meaning of this provision, and can only be created by writing. (1 Wash. R. P., 398; 3 Kent, 452). Upon the agreement it was assumed that it appeared from the defense, that the defendant never acquired any easement or right of way over the premises for want of a conveyance of the same; and the question principally discussed was, that admitting this proposition, whether or not the transaction set forth in the plea amounted to a license to the defendant to enter and occupy the premises for the purpose of a railway track, and if it did, is the same revokable at the pleasure of the licensor? I have carefully investigated the subject, but upon an examination of the pleadings, I find that as they now stand the question does not arise upon the demurrer.

The defendant having alleged in its plea that it was the owner of the track or tract upon which its railway is constructed, and that it had a grant from the plaintiff's grantor of the same, I am of the opinion that there is sufficient in the plea to constitute a defense to the action, notwithstanding oll the other allegations thereof may be immaterial. The code (§ 316) only requires the defendant to plead the nature and duration of its estate in the premises or license, or right to the possession thereof, "with the certainty and particularity required in a complaint." Now, in a *complaint*, it was never necessary to state more than that the plaintiff was the owner of a legal estate or interest in the premises, and entitled to the possession thereof; and whether said estate or interest was created by operation of the law or writing, was unnecessary to state. (*Lamb* vs. *Starr*, 1 Deady, 353). The defendants having alleged that the owners of the premises—the Terwilligers—*granted* it the perpetual right of way thereon, before making the conveyance under which the plaintiff claims, thereby assert every fact which the law implies therefrom. (Chitty, p. 253). A *grant* can only be made by a deed, and the allegation of the existence of a grant necessarily implies a deed, as livery of siezin is implied in the use of the word "infeoffed." The defendant also alleges in terms, that it is the owner of such right of way. In either case, it has sufficiently stated the nature and duration of its right to the possession of the premises, or so much thereof as it defends for. *Witherel* vs. *Wiberg*, 4 Saw., 234.

The demurrer is overruled.

J. H. WOODWARD, for plaintiff.

JOSEPH N. DOLPH, for defendant.

SUPREME COURT OF ILLINOIS.

APPEAL FROM APPELLATE COURT—OPINION FILED JUNE 20, 1879.

THE I. & ST. L. R. R. CO. VS. THE PEOPLE, USE, ETC.

Jurisdiction of Justices of the Peace for Statutory Penalty—Suit in Name of the People—Costs.

In an action in the name of the People for the use of a person named, the people are the plaintiffs and the words for the use of W., add nothing to, or detract from the right of recovery; they may be rejected as mere surplusage. When a recovery is had, the question may arise whether the People or W. shall have the money. By the summons, the suit is declared to be for the use of W., and he is thereby *prima facie* entitled to the money unless resisted. The question whether the People or W. shall have all or part of the penalty is, however, of no concern to the party sued, and in no wise affects their rights.

Justices of the Peace have jurisdiction in actions to recover a penalty under §§ 50 and 51 of the railroad law, although the statute does not name the court in which such penalty may be recovered.

This is in no sense a popular action as denominated in the statute relating to costs, and being prosecuted in the name of the People, costs may be recovered as in other cases.—ED. LEGAL NEWS.

WALKER, J.:

This was an action before a Justice of the Peace to recover a penalty under sections 50 and 51 of the railroad law (R. S. 1874, p. 809). It is claimed that the statute was violated by the company, and that does not seem to be contested.

It is urged that as the 51st section does not state what courts may take jurisdiction, that a Justice of the Peace could not try the cause. That when the statute fails to name the court which shall have jurisdiction,

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the implication is that it is intended to be conferred on a court of general jurisdiction. When the statute does not specify the court which shall take cognizance of the cause and there is no general provision as to other courts, the presumption may possibly be the legislative design is that the penalty shall be sued for and recovered in a court of general jurisdiction.

The thirteenth section of the Justice of the Peace Act, provides that Justices of the Peace, amongst other cases, shall have jurisdiction "in all cases where the action of debt or assumpsit will lie, if the damages claimed do not exceed $200." No one will claim that an action of debt will not lie to recover a penalty given by statute, unless otherwise provided. It being an action of debt and the penalty two hundred dollars, it would violate the language of the statute to hold a Justice of the Peace has no jurisdiction of the case. It is a case where an action of debt will lie, and therefore is unbiased in the statute.

It is urged that as the evidence shows the company crossed another road without coming to a full stop, as required by the statute, within a fourth cf a mile of the place where the penalty sued for occurred, that the two forfeitures could not be separated, and if united a Justice of the Peace would not have jurisdiction. The offenses were separate and distinct as though the roads thus crossed were miles apart. The roads thus crossed belonged to different companies, and the fact that they were only a quarter of a mile apart did not make it one offense. But there were two forfeitures, and the other may no doubt be sued for by any person. We are clearly of the opinion the People, in suing for this, were not required to unite the two causes of action.

The court below did not err in refusing to dismiss the suit. The suit was brought against appellant in the name of the "People of the State of Illinois for the use of Maurice L. Whiteside. The fifty-first section provides that the suit for the recovery of the penalty shall be by action of debt, "in the name of the "People of the State of Illinois, or by any person who may sue for the same." This suit was in the name of the People. They were the plaintiffs, as all know; the words "for the use of Maurice L. Whiteside" add nothing to or detract nothing from the right of recovery. Whiteside is not the legal, but the beneficial plaintiff; all after the name of the real plaintiff may be rejected as surplusage. When a recovery is had, the question may then arise whether the People or Whiteside shall have the money. The suit is by the summons declared to be for the use of Whiteside, and he is thereby *prima facie* entitled to it unless resisted. He might have sued in his own name for himself as well as for the People, but failed to do so, and not being the plaintiff, his bond for costs, if otherwise unobjectionable, was a sufficient compliance with the statute. It is urged that under this statute the whole penalty cannot be recovered by the informer and therefore this suit was improperly brought.

We are unable to see that it is a matter of any concern of appellant as to the disposition the People shall make of the money when recovered. Whether all, or only half of it, shall go to Whiteside, can make no difference to them. Whether he shall have, when collected, all, a portion, or none of the money recovered, in no wise affects the rights of appellant. A recovery in this case would oporate as a bar to a future recovery for the same penalty, and that would seem to be all they have a right to claim. If Whiteside has not used the name of the People in suing, and if he has wrongfully declared the use for himself, the attorney for the People may contest and claim the money for the People. But that is a question between him and the People, and not between him and appellant. There was no error in rejecting evidence that the company had rules requiring the engine-driver to comply with the law in stopping at all railroad crossings, and the rules were in his hands. This evidence would have constituted no defense.

The General Assembly in adopting this police regulation, must have known that the officers having control of the corporation, would not operate it, but would do so by employees, and that body must have intended to and did require these companies to employ men who obey orders, or be responsible for the neglect or refusal. These companies know the legal requirement and must by such rules as may be necessary, compel their employees to observe the law, or respond to the penalty imposed by the statute. The safety of the traveling community demands that these police regulations shall be enforced, and the General Assembly thought necessary not only to render the engineer liable for a penalty but also the company for a penalty for double the amount imposed on the engineer. We now come to the only plausible question presented by appellant. That is whether the People were entitled to recover costs. The 17th section of the cost act (R. S. 1874, p. 299) provides that: "In all suits and actions commenced or to be commenced for or on behalf of the people of this State or the Governor thereof or for or on behalf of any county of this State, or in the name of any person for the use of the People of the State or any county; then, and in every such case, if the plaintiff shall recover any debt or damages in such action or suit, the plaintiffs shall recover costs as any other person in like cases. * * * Nothing in this section contained shall extend to any popular action, nor to any action to be prosecuted by any person in behalf of himself and the people, or a county upon any penal statute." Now this action is prosecuted by the People in their name, and it falls within the provisions of this section, authorizing them to recover costs. This is in no sense a popular action. That is defined to be "an action given by statute to any one who will sue for the penalty, a *qui tam* action." Had Whiteside sued for the People as well as for himself, then this provision would have applied.

No error is perceived in this record, and the judgment of the Appellate Court is affirmed.

Judgment affirmed.

MESSRS. BISHOP & MCKINLAY, for appellees.

—[*Chicago Legal News*].

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Aug. 1, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

July 26.

Henry Unkrich and wife to Elias S. Root. $250.

George H. Ogelvy to John Ogelvy. $1,125.

Stella S. Hapgood et al to U. P. Bailey. $150.

Peter Herke and wife to Fred Halt north. $1,450.

Mary B. Farnsworth and husband to Mrs. D. D. Gregory. $500.

Ella and Saul Bland to Morris Porter. $400.

Same to Oath Kennedy. $600.

John Kressler and wife to Barbara Jacobs. $200.

July 28.

Charles Heerz and wife to Franciska Wilke. $300.

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Henry Mitchell to Catharine Baum. $500.

Mary P. Odell and husband to Residence Fire Ins. Co. $600

Harman Paskert and wife to Wm. Murphy. $300.

John Hogan and wife to Thomas Hunt. $350.

Mary Jane Fairbanks to Charles H. Raynor. $5,400.

Thomas Lynch and wife to M. S. Hogan. $200.

Moses G. Solomon and wife to Mary Burk. $250.

Mary Graham to The Society for Savings. $1,500.

Christina Schick and husband to trustees of Cleveland Lodge No. 136, D. O. H. $1,000.

Charles Reuz to John Riebel. $800.

Mary A. Webquich and husband to Robert Fletcher. $200.

July 29.

Maria Seidel and husband to Otto Seidel. $300.

Frank Macho and wife to Barbara Prinz. $700.

Hermann Koepke and wife to Fred Kriedemann. $100.

Michael Andress and wife to Eli N. Cannon. $300.

Mary Riley and husband to Thomas Moran. $100.

Hannah Koerpel and husband to Rosa Wohlgemuth. $260.

Sarah A. Tilden and husband to Peter Gintz. $350.

E. A. Ginly and wife to A. D. Ginly. $156.

William Smith and wife to Henrietta Gallup. $400.

W. W. Noble to Jane Churchword. $1,000.

Michael Burkle and wife to Everett, Weddell & Co. $467.

Thomas Gaul to The Society for Savings. $200.

Edwin E. Adams and wife to Manual Halle. $1,500.

Julia H. Higby and husband to David Goodsell. $663.

July 30.

H. A. Waring et al to The Society for Savings. $6,000.

John Colbut and wife to Adden Starr et al. $900.

James W. Clark to Martha C. Ford. $4,100.

July 31.

Catharine E. Adams and husband to T. H. White. $2,000.

James H. Cadmun and wife to Carl Bruch. $500.

Mary Haver and husband to Hiram Day. $550.

CHATTEL MORTGAGES.

July 26.

Frank Ludwig to Vincent, Sturm & Co. $69.

Robert F. Paine to Fred S. Smith. $1,136.

July 28.

Ori Carr and wife to Vaughn & Ede. $15.

Aaron Schwab to Jacob Witzel. $150.

Jacob Nier to Joseph Feighman. $200.

Susan Raleigh to Daniel Hayes. $55.

John Ager to C. F. Norton & Co. $150.

July 30.

Anna Howard to P. W. Payne. $24.

Peter Herke and wife to Wheeler & Wilson Man. Co. $52.

Patrick Bary to James C. Batchelor. $71.

James Snape et al to Andrew Plate. $49.

Carl Toll to Theodore Waltzee. $70.

Maggie Howard to Sigmund Lederer. $1,000.

E. Ames & Son to J. G. Ruggles. $100.

July 31.

James Sweeney and wife to W. D. Butler. $250.

August 1.

A. L. Zeleny to Flonian Shovamek. One hundred dollars.

Alford Hubbard and wife to J. Rosenwater. One hundred and two dollars and seventy-five cents.

N. W. Spicer to F. W. Bill. One hundred and eighty dollars.

Richard Beardsworth to Raynolds & Co. One hundred and sixteen dollars.

C. Bauer and wife to Moses Straus. One hundred dollars.

William Ehert to G. F. Krauss. Three hundred and fifty dollars.

DEEDS.

July 24.

Solomon Hammond et al to Joseph H. Turner. One thousand dollars.

Frederick Hecker and wife to Philip Hecker. Two thousand dollars.

Charles Wallace Heard, exr., etc., to L. A. Heard et al. One dollar.

John E. Kennedy and wife to Hattie L. Palmer. One hundred and twenty-five dollars.

Fitch Raymond and wife to E. S. Beckley. One dollar.

Thomas R. Tannatt to Frank Daulte. One dollar.

Frank Daulte to Elizabeth F. Tannatt. One dollar.

Bendina Winters and husband to John H. Janssen. Nine hundred and sixteen dollars.

July 25.

J. J. Barnard to Wm. A. Miner. $350.

Thomas Barry and wife to Peter J. Peters. $1,100.

Jonathan Hale and wife to A. W. Baldwin. $275.

Hiram Humphrey to Margaret O'Neil. $2,634.

A. J. Marvin, trustee, etc., to Emma L. Skinner. $750.

Same to E. Nicholson. $750.

Mary Schwerei and husband to John Theobold. $900.

Catharine Silberg et al to Konrad Marquard and wife. $600.

John Williams to John H. Williams. $1.

July 26.

James Brown, guardian, etc., to S. S. Stone. $100.

Same to same. $100.

Aaron Clarke and wife to William B. Clark. $1.

John G. Steiger and wife to F. E. Dellenbaugh. $2,300.

F. E. Dellenbaugh to Maria M. Steiger. $1.

A. Higly and wife to S. C. Beardsly. $400.

Barbara Jacobs to John Krusler. $400.

Charles Morrison to John Gibbons. $75.

Henry Manning, admr., etc., to S. H. Kirby. $1,000.

Ann Nicholson to same. $5.

A. B. Northrop and wife to Charlotte Risser. $1.

William T. Norton and wife to the trustees of the First Congregational Society. $1,200.

M. A. Sprague to H. R. Stevens. $200.

July 28.

August Birkenfeld and wife to R. E. Mix. $1,000.

Nelson Burke and wife to Carrie J. Solomon. $600.

Thomas S. Colson et al to Henry Picket. $650.

J. H. Edward and wife to Lucius S. Skinner. $600.

James M. Hoyt to G. and F. Hegert. $1,300.

Same to Ellen Molloy. $250.

Henry E. Lavayea and wife to Jas. M. Coffinberry. $2,300.

Felix Nicola and wife et al to Ludwig Egebrecht. $600.

Henry Renker to Emil Schneider. $1,150.

Ellen Silver to John E. Turner. $1,000.

Same to Nellie S. C. Turner. $1,000.

Trustees of the Superior St. M. E.

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Church to Emily G. Corry. $3,780.

John Wuest to Peter Wuest et al. $100.

July 29.

John L. Alarich add wife to Julius Humphry. $3,000.

Roxanna Abbey to John W. June. $1.

Philip Rieber and wife to Peter Daso, Sr. $742.

Angelicke van Loyen and husband to Caroline Brinker. $786.

Caroline Brinker to Johann van Loyen. $5.

Eli N. Cannon and wife to Michael Andress. $520.

Henry Cowles and wife to Mark Burner. $2,000.

Henry Perren and wife to E. W. McDonald. $725.

John Rock and wife to Elizabeth Meyers. $600.

Stearns & Towns to Frank Weigand. $5.

July 30.

Jane Burns et al to O. J. Campbell, trustee. $250.

Aaron W. Dean and wife to Chas. O. Dean. $2,000.

Christian Engel and wife to Peter Kruetz. $640.

Patrick Gavagan and wife to John Gibbon. $300.

Peter Hecker and wife to Edwin H. Gagen. $200.

Amelia Kendrick to Sophia Patingale. $4,500.

Major Smith and wife to Minnie G. Crawford. $163.

Alden Starr et al to Lewis Henderson. $960.

Catharine L. Scovill et al to Elmira L. White. $1.

George H. Wyman et al to E. O. Lord. $883.

N. B. Prentice by Spec. Mas. Com. to The Northwestern Mutual Life Ins. Co. $3,000.

July 31.

Comfort A. Adams et al to Thomas H. White. Twenty thousand dollars.

Almira L. White and husband to Katharine A. Adams. Ten thousand dollars.

Elizabeth Bainbridge, admx., to J. T. Robinson. Seven hundred dollars.

James T. Robinson to Elizabeth Bainbridge. One dollar.

Evelin T. Foote to Jacob Fetterman. Two hundred and twenty-five dollars.

Barney Gewrink to Wm. Gewrink. Three thousand five hundred dollars.

Wm. Gewrink and wife to Bernard Gewrink. Three thousand dollars.

Richard Morrow and wife to Israel Dallas. Four thousand seven hundred and sixty-seven dollars.

H. B. Perkins and wife to same. One dollar.

Same to same. Five dollars.

Christopher L. Pinder to J. Drew Surte, trustee, etc. Five hundred dollars.

Charles H. Stevenson to Edward Varian. One hundred and fifty dollars.

Edward Varian to Sarah A. Varian et al. Three thousand five hundred dollars.

C. E. Shattuck and wife to J. Lee Spencer. Six hundred dollars.

John M. Thomas and wife to Martha C. Hampton. Two thousand dollars.

T. H. White et al to James Dorsey. Six hundred and forty-eight dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending July 31. 1879, against the following Persons.

July 15.

Joseph Hobart. $456.96.
Spencer Corlett et al. $100.
L. B. Harrington. $500.
Robert Linn. $3,094.80.
Thomas C. Bleasdale. $3,620.40.
Susan Turner et al. $1,382.40.
W. H. Capener and Henry T. Shannon. $679.42.
Omer E. Richards et al. $4,447.
A. B. Stockwell. $986.46.
Frank Kemmer et al. $7,843.45.
Henry Reeves. $1,704.36.
J. S. Stewart. $2,322.40.
Cleve., Linn. & Berea Plank Road Co. $9,349.
S. S. Marsh. $1,670.
G. L. Nichols et al. $186.50.
William Davis et al. $1,802.10.
James Redmond et al. $524.55.

U. S. CIRCUIT COURT N. D. OF OHIO.

July 26.

3883. Thomas Sayles vs The East Cleveland R. R. Co. Answer. G. E. & J. F. Herrick.

3884. Same vs The West Side St. R. R. Co. Answer of West Side St. R. R. Co. Same.

3882. Same vs The St. Clair St. R. R. Co. Answer. Same.

3894. H. W. Perkins vs The Arizona & New Mexican Ex. Co Answer of Henry Wick and garnishees. Arnold Green.

July 29.

3353. John C. Pratt vs the C. S. & C. O. R. R. Co. Journal entry overruling motion of L. S. & M. S. R. R. Co. for leave to sue receiver.

3875. William Kyle vs Wilhelm Schmidt. Answer. A. Gehring and Wm. K. Kidd.

3886. Middleton Bell vs the Hibernia Ins. Co. Answer. W. S. Kerruish.

3718. H. T. Parer vs the Balt. & Ohio R. R. Co. Amended answer. Estep & Squire.

July 30.

3891. Herbert C. Ayer et al vs James L. Botsford et al. Motion for reference.

COURT OF COMMON PLEAS.

Actions Commenced.

July 25.

15573. Henry Haines vs George B. Wiggins et al. Partition of lands. H. J. Caldwell.

15574. Gottfried Rittberger vs L. Oberle et al. Money only. DeWolf & Schwan.

15575. Roney Sarmer vs Henry Steigmeier. Money only. W. S. Kerruish.

July 26.

15576. John Mathias et al, partners, etc., vs The Clewell Stone Co. et al. To subject lands. Foster & Carpenter.

15577. Seymour Trowbridge vs Albert Allyn et al. Money and to subject lands. T. K. Dissette.

15578. C. J. Johnson vs O. F. Rhodes et al. Money only. Ingersoll & Williamson.

15579. Joseph E. Upson et al vs the Rocky River Stone Quarry Co. Money and equitable relief. E. H. Eggleston.

15580. The Society for Savings vs John Jungling et al. Money and sale of land. S. E. Williamson.

15581. Same vs Hannah Moore. Same. Same.

15582. Julia E. Smith vs Samuel S. Coe et al. Money and equitable relief. Marvin, Taylor & Laird.

15583. Thomas Harrison et al vs Thomas Ramsey. Money only. James Wade.

15584. Remington Arnold vs Aaron C. McIlrath et al. Sale of mortgaged premises and relief. Same.

15585. S. M. Hickman vs Wm. Betts et al. Sales of lands. H. J. Caldwell.

15586. Bank of New York vs The Northern Transit Co. Money only. Baldwin & Ford.

15587. John Bailey vs J. W. Devereux as receiver, etc. Money only. R. J. Winters and A. M. Jackson.

15588. A. M. Jackson et al, partners, etc., vs Carrie Mayer. Appeal by deft. Judgment July 10. P. P.

15589. The Citizens' Savings and Loan Ass'n. A. A. Jewett et al. Foreclosure and relief. Estep & Squire.

15590. Same vs Robert Lardner et al. For relief and to subject lands. Same.

15591. R. Cunningham vs J. W. Scott et al. Money only. J. A. Smith.

15592. Henrietta Gallop vs Wm. Ward et al. Money, to subject lands and for equitable relief. Willson & Sykora.

15593. Elias Sims vs Thomas Reilley et al. Money only. E. Sowers.

15594. Patrick Smith vs Hannah Smith. Money only. Charles L. Fish.

15595. Creasey Fovargue et al vs Patrick Jacobs et al. Money and to subject lands. Johnson & Schwan.

15596. Anna Nahuis vs Henry Pome-

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rene et al. Money and to foreclose mortgage. Johnson & Schwan; J. G. Pomerene, J. H. Rhodes.

15597. William Haswell vs White Sewing Machine Co. Appeal by plff. Judgment June 28.

15598. Julius Herold vs Conrad Kempf et al. Money and equitable relief. Foster & Carpenter; Arnold Green.

July 28.

15599. Myron A. Spencer et al vs F. N. Clark et al. To subject land. Foster & Carpenter; Myron S. Herrick.

15600. Peter Hecker vs Moses G. Watterson, treasurer, etc. Money only. Grannis & Griswold.

15601. Lorenzo Jaynes vs same. Same. Same.

15602. Daniel K. Corlett vs John Corlett. Equitable relief. Same.

15603. Charlotte A. Marsh et al vs Amanda Bennett et al. Partition and equitable relief. Same.

15604. Henrietta Gallup vs Mary Jane Mead, a widow, etc., et al. To subject lands and for equitable relief. Willson & Sykora.

15605. Michael Kaiser, admr., etc., vs Jerry Reidy et al. Money, to subject lands and relief. A. Zehring; Gustav Schmidt, Mueller & Schmidt.

15606. Charlotte Scheurer, etc., vs Ann Cushin et al. Money, to subject lands and relief. A. Zehring.

15607. Major Smith vs T. S. Paddock. Money only. B. R. Beavis.

July 29.

15608. Edward P. Sheldon vs Charles W. Richardson and garnishees. Money only, with att. Terrell, Beach & Cushing.

15609. Anna Kilfoyl, guardian, etc., vs John Cratty. Money only. Prentiss & Vorce.

15610. Lyman R. Critchfield vs J. G. W. Cowles et al. Money and equitable relief. Arnold Green and L. R. Critchfield.

15611. Benjamin Gates vs C. L. Richmond et al. Money only. Ingersoll & Williamson.

15612. J. O. Raeder vs H. P. Bates. Appeal by deft. Judgment July 3.

July 30.

15613. William Burrows vs Charles Zinzrow. Money only. W. C. Rogers.

15614. Commercial National Bank vs Alfred Greenlee. Money only. Baldwin & Ford.

15615. Francis J. Vacka vs Philip O'Neil. Money only. A. T. Brinsmade.

15616. Hamilton Roosa vs Neil Gallagher. Appeal by deft. Judgment July 5. P. P.; A. T. Brinsmade.

15617. Martha Wilson vs The Cleveland Bethel Union. Money and to subject lands. Henderson & Kline.

15618. Joseph Perkins et al, exrs., etc., vs Thomas F. Keough et al. Money and equitable relief. E. J. Latimer.

15619. Giles Ball, admr., vs William H. Cowle et al. Money only. Prentiss & Vorce.

15620. William Williams et al, exrs., etc., vs Patrick Dolan et al. Money and foreclosure of mortgage. Terrell, Beach & Cushing.

July 31.

15621. Gustavs Terlke vs Hugh Hazzard et al. Equitable relief. W. M. Safford; Charles D. Everett.

15622. T. Joseph Hartcorn vs W. E. Crabb. Appeal by defendant. Judgment July 21.

15623. Jane Kneale vs Richard Dowling et al. Money and equitable relief. W. S. Kerruish.

15724. H. L. Terrell, trustee, vs The Union Iron Works Co. Money and to subject lands. Terrell, Beach & Cushing.

15625. F. B. Hilliard vs Samuel Adams. Appeal by deft.

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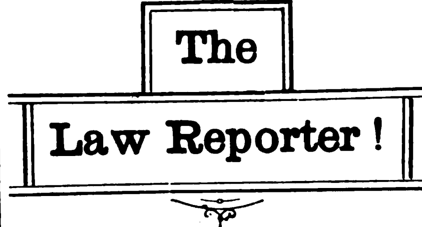

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Book Notice.

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The edition of this book brought out two years ago was the .ullest, freshest and most reliable statement of the law on this subject, and was generally received by the legal fraternity as a better book than any that had preceded it. In printing this new supply, *one hundred pages*, containing over *one thousand new cases*, have been added. The entire ground of negotiable and *quasi*-negotiable instruments has been covered, embracing coupon bonds, stock certificates, bills of lading, negotiable guaranties, etc., etc. It exhibits the rights of the holder or purchaser, under all circumstances, especially those originating in fraud, duress, violation of authority, mistake, misrepresentation, and imposition on infirm or illiterate persons.

This edition is in two very large volumes, each nearly 900 pages, and is supplied at net $12.00.

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W. S. C. OTIS.

A meeting of the Bar was held on Saturday in court room No. 1, to take action upon the death of W. S. C. Otis. The meeting organized by electing Judge Andrews president and O. J. Campbell secretary. On taking the chair Judge Andrews said:

I believe it is understood that this meeting has been called for the purpose of giving the Bar of this county an opportunity to pay their respects to the memory of Mr. William S. C. Otis, an able and distinguished member of our Bar.

It is not my purpose at all to make any extended remarks -- I did not come prepared for that--and there are other gentlemen present who knew Mr. Otis more intimately than I did and whom, I hope, we shall have the pleasure of hearing.

I will say this, however, that Mr. Otis has occupied a prominent position at the Bar of Northern Ohio for a period of more than forty years; and it has always seemed to me that he possessed some qualities that made him an example for the younger members of the Bar. He belonged most emphatically to a class of earnest workers and was a man of indefatigable industry — not fitful industry, not capricious industry, and not dependent upon the pleasantness or disagreeableness of the subject upon which his mind was employed, but he was a man who had a fixed habit of industry that was intense enough and strong enough to resist every temptation to idleness and undue and improper relaxation. The consequence was that in the whole course of his life, for a period of forty years, he exhibited in an eminent degree those qualities, which, in our profession and calling in life, inspire confidence and almost invariably insure success. When such a man is taken away, when his life-work is done, there is a loss to the community and to the profession of which he was a member. I am confident that there will be but one feeling amongst us, that we ought, in some peculiar manner, to give public expression to our sense of the loss which we have sustained as professional men, and of our respect for the memory of our distinguished associate. The meeting is now open for the purpose of enabling us to do that.

On motion of Judge Bishop a committee of five was appointed by the Chair to draft suitable resolutions expressive of the views of the members of the Bar upon the occasion that had called them together. Judge Bishop, Judge D. R. Tilden, Hon. John Hutchins, Judge R. F. Paine and Henry C. Ranney were appointed as that committee. The committee, through its chairman Judge Bishop, reported the following resolutions:

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We, the members of the Bar of Cuyahoga county, having received intelligence of the death of one of our associates, Hon. W. S. C. Otis, as a fitting tribute to his memory and an appropriate expression of our loss do

Resolve, First—We recognize in him one who, for nearly forty-six years, has been an honored member of the legal profession, and the greater part of that time a member of this Bar, and by his industry, perseverance, intellectual ability, and moral worth attained to the first rank of the profession and became an ornament and honor to the same.

Second—That we recognize in him a member and brother in the profession whose life record and example are worthy of imitation, and we here and now express our gratitude that such a record and example are left to us and to the bereaved ones of his family.

Third—We hold in grateful remembrance not only his high attainments as a member of our profession, but his character as a citizen and a member of society, and his sympathy with the good and noble in life, and especially his domestic virtues.

Fourth—That this Bar tender its heartfelt sympathy to the family of the deceased.

Fifth—That as a token of our respect for the deceased and his family we will attend the funeral as a body.

Sixth—That the president of this meeting be requested to communicate a copy of these resolutions to the family of the deceased, and that a committee be by the chair appointed to present these resolutions to the Court of Common Pleas of Cuyahoga county and to the Circuit and District Courts of the United States for the Northern District of Ohio, to be entered on their journals.

Pending the consideration of the resolutions Judge Tilden made the following remarks:

Mr. Chairman: I have known Mr. Otis from his earliest manhood. I became acquainted with him more than forty years ago, and during a portion of our early lives our relations were intimate and confidential. We were associated together in the practice of law for three years, and no man in this early period of his history knew him better and more intimately than myself. It required no sharpness of observation to discover all the leading points in his character, not only these, but all those shadings which we sometimes meet in studying critically and accurately our fellow-men.

It is too common among men, even in their private intercourse to resort to some few disguises in order to recommend themselves to others; at all events to so shape their conversation that they shall suffer no disparagement in the minds of those who listen. To all this Mr. Otis was a remarkable exception. He had no disguises; no one was more thoroughly transparent or more fully revealed and made known his real character to his fellow-men. In this respect he was as artless as a child in his private conversations. Whatever he said was the honest and soberly entertained convictions of his own mind, and he paid little heed to the effect it might have upon the minds of others. Whether it lowered or elevated him in their estimation was to him a matter of indifference. Mr. Otis was a man of unbending integrity. No man ever lived more so. He was not only honest by nature, but this was powerfully strengthened and reinforced by habit. He was, in the truest sense of the word, a business man, and strict accuracy was always aimed at in his business affairs. If a debt was due him, he aimed to secure the last cent, not for the sake of the cent, but for the purpose of adhering to his rule for doing business. In matters of business, precision and accuracy were with him a matter of principle to which long habit had given great prominence. To a mind so organized and trained any departure from these rules was a fault with him scarcely to be excused. So if a debt was due from him, if payment should fall short a single cent it would be a departure from his rule and be a source of annoyance. Yet, with these peculiarities in matters of business, no man was more liberal or more unsparing in the bestowal of his hard-earned possessions than Mr. Otis. He freely gave when assured that his gift would confer a permanent benefit upon others.

This is an outline of the character of Mr. Otis, as I understand it.

One word upon another subject. I have never known one who had greater power for both mental and physical endurance than Mr. Otis. While I was with him I have known him to work from sunrise until 12 o'clock at night and show no more signs of fatigue at the end of the day's work than at its beginning. These powers of endurance have been so exercised as to place him in the front rank of his profession.

Had Mr. Otis had less confidence in his powers of endurance, and had he been more careful to husband the strength with which nature had provided him, with his habits, he could not have failed to reach extreme old age, and had fallen like a shock of corn, fully ripe, and instead of the mental and physical sufferings that have attended the last few years of his life, surrounded as he was by every temporal blessing and hopeful of the future, his last hours should have been his happiest and most peaceful. But this was not to be. He had formed habits which were inexorable in the demands upon his strength. He was compelled to labor on until his mental and physical powers gave way.

This was a fault, but it was combined with so many noble qualities that we readily overlook it. No man has ever crowded into life so much hard labor for useful ends as our departed friend, and we can say of him, what can be said, I fear, of but few of us, that the world is better for his having lived in it.

The following remarks were made by Judge Bishop:

Mr. Chairman: I have but a few words to add to what these resolutions express. My acquaintance with the deceased extends over a period of thirty-three years, some of this time more or less intimate, but I may say of later years my relations to Mr. Otis were not only intimate but confidential. The longer and better I came to know him the higher was my respect and the greater was my esteem for him, not only as a member of the legal profession but for traits that go to make up character.

First, as a lawyer: in this view we are here and now mainly to consider the deceased. He attained eminence, he was successful to a degree that falls to the lot of very few. To have accomplished this he must have been endowed with no ordinary mental powers. Added to these was solid culture in the classical schools and college, in the meantime defraying in part the expenses of this culture by teaching and perhaps other pursuits. In brief, his preparation was thorough, but it was not obtained through the path of ease. The same persevering and indomitable will, industry and high moral character controlled and governed him which was the secret of his success in his profession in after life. This after life—this success in his profession which for twenty-five years has been in our midst—we have many of us seen and witnessed. We have seen him come in and go out

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among us. His name appears in many cases in the State and National reports of some of the most important adjudications. I have read the arguments made by him in some of these cases, with the greatest care, and they would do credit to the reputation of the best lawyers of the age.

Second. But we must remember that the eminent lawyer though he was, that is not all for us to consider. There is a wealth of character, not only in the profession, but as a man, as a citizen, in social life, in moral and religious worth. These will and must be accorded to him by all who knew him well. These—*all* these—are a source of just pride, and a treasure of remembrance to be gratefully appropriated by us here to-day.

Finally, there was his domestic life. We see and know this but superficially; but from this superficial observation we can judge how strong and sacred to him, and to those composing the home, were the ties of the inmates of that home. In remembering him in this relation, our esteem for him as a lawyer is not diminished, but these, and his other characteristics, should and do increase our estimate of him as a lawyer.

I most fully accord with the sentiments of the resolutions which have been read.

Messrs. John Hutchins, J. E. Ingersoll and J. W. Heisley were appointed the committee contemplated in the resolutions, after which the meeting adjourned.

THE ROMAN CIVIL LAW.

IX.

I.—WHEN LAWS TOOK EFFECT.

a. As to time.

It was a general rule that a law took effect only after publication, and did not have *retrospective* force or effect, *i. e.*, laws could not be made to operate upon a subject or contract which existed before the passage of the law. There were two exceptions to this rule. 1. Where *the legislature clearly declared such to be its intention.* 2. Where the legislature in enacting a new law declared therein what meaning should be given to a prior law, and that any other meaning was erroneous. By reason of this exception a new law applied even to matters pending on appeal. Respecting laws that were enacted changing and modifying the matter of form, etc., of wills, the rule was that if the testator lived *after* the publication of the new law, he was not required to conform his will (that had been set up by him before that time) to the provisions and requirements of the new law. Respecting laws that extended or increased the number of years when persons should, in law, become of age, with power to contract, etc., the rule was that it had no application as to such persons who had reached the age of majority, according to the provisions of a prior law but did apply to such who had not reached majority (under a prior law). Respecting laws that changed or increased the time of prescription, the rule was, that the old law applied to the time that had run, the residue of the time, however, fell under the rule established by the new law.

WHEN LAWS TOOK EFFECT.

b. As to place.—Some questions and relations were governed exclusively by the law of the place of residence, *e. g.*, marriage, slavery, etc.

Others by the law of the *rei sitae*—By the law of the place where the property was situated.

Others by the law of the *locus contractus*—the law of the place where the contract was made.

When laws took effect.

c. As to persons.

II. When a law became obsolete or repealed.

a. When the time for which the law was to operate had elapsed.

b. When the reason and purpose for which the law was enacted ceased.

c. By custom, provided there was nothing in the written law prohibiting it.

d. By the passage of another law in its place and it was not required that the new law should in express words repeal the former law.

Ulpian says that a law can be repealed in four different ways:

1. *Abrogare*: When the entire law is repealed.

Derogare: When part of the law is repealed.

Subrogare: When additional provisions and supplementary acts thereto are engrafted on the law.

Obrogare: When a part is repealed and something new is enacted in its stead.

III.—EQUITY.

Grotious defines equity as "the correction of that wherein the law (by reason of its universality) is deficient."

Blackstone says, "that since in law all cases cannot be foreseen or expressed, it is necessary that when the general decrees of the law cannot be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed; hence there can be no rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to positive law, and on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, least thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. That law, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law, which would make every judge a legislator, and introduce most infinite confusion."

The Roman Jurists' notion was, that the principles of equity were those to which the judge must have recourse for the decision of every question, and the solution of every doubt. Whether as stated by a learned writer, the matter at issue be great or small, whether it concerns the life of a citizen or a point of merely technical procedure, every decision that is hostile to the principles of equity, was an unjust decision.

If, as the case put in the Pandects, the letter of the law be rigorously upheld, it must be upheld because equity requires it. If a defect in the law is to be supplied (as put in another case) it must be in obedience to the same grand and all-prevailing principle. That what is equitable can never break in upon the rules of justice, and that what is just never can break in upon the rules of equity.

BOOK L.—TITLE XVI.

De Verborum Significatione.

-The signification of words.-

ULPIAN.—LEX. 1.—Verborum hoc "si quis" tam masculos quam feminas complectitur.

-This expression, "if any one" (si quis) comprehends both men and women.

PAULUS.—LEX. 2.—Cuiusque diei major pars est horarum septem primarum diei,, non supremarum.

-The greater part of each day are the first seven, not the last hours.-

LEX. 5.—"Rei" appellatio latior est quam "pecuniae."

-The word or denomination, "thing" (rei) is broader and more comprehensive than the word "money" (pecuniae).

ULPIAN.—Lex. 6, || 1.—Verbum "ex legibus" sic accipiendum est; tam ex legum sententia, quam ex verbis.

(The expression "according to law" ('ex legibus") is to be understood as referring as well to the sense as to the words of the law).

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Lex. 8.—Verbum "oportebit" tam praesens quam futurum tempus significat.

(The expression "will be necessary" ("oportebit") signifies and refers as well to the present time as the future).

ULPIAN.—Lex. 9. —Marcellus apud Julianum notat, verbo "perisse" et scissum et fractum contineri, et vi raptum.

Marcellus remarks to Julianus that the expression "lost" (perisse) embraces also that which has been cut or torn up and broken as well as that which has been taken away by force.

GAIUS.—Lex. 11.—"Creditorum" appellatione non hi tantum accipiuntur, qui pecuniam crediderunt, sed omnes, quibus ex qualibet causa debetur.

(The appellation "creditors" (creditorum) includes and refers not alone to those who have loaned money, but all to whom for whatsoever reason a debt or claim is due).

Lex. 13.—Res "abesse" videntur (ut Sabinus ait et Pedius probat) etiam hac quarum corpus manet, forma mutata est; et ideo si corruptae redditae sint vel transfiguratae videri abesse, quoniam plerumque plus est in manus pretio quam in re. Abest et ea res quae in rebus humanis non est.

(Such things seem to disappear or pass away (as claimed by Sabinus and approved of by Pedius) where the substance remains, and the form has been changed; and hence such things seem to be lost or missing which when returned are in a ruined condition or transformed, since as a rule there is more value in the work of art, than in the thing itself. Those things are also missing which are no longer on earth).

PAULUS.—Lex. 14.—Labeo et Sabinus existimant, si vestimentum scissum reddatur vel res corrupta reddita sit, veluti scyphi collisi aut tabula rasa pictura, videri rem "abesse" quoniam earum rerum pretium non in substantia, sed in arte sit positum. Item si dominus rem quae furto sibi aberat ignorans emerit, recte dicitur res abesse, etiam si postea id ita esse scierit, quia videtur res ei abesse cui pretium abest. "Rem amisisse" videtur, qui adversus nullum ejus presequendae actionem habet.

(Labeo and Sabinus believe that if a dress or garment is returned in a torn condition, or a thing is returned spoiled or ruined, *e. g.*, a broken cup or goblet, or a painted tablet with the painting rubbed or scratched off, the thing would seem to be lost or missing, because the value of the thing consists rather in the skill and art bestowed upon it, than in the material of the thing. So if an owner should buy an article that was stolen, being ignorant of the theft at the time, and should afterward ascertain this fact, yet it is properly said that the thing is lost, for the reason that he has lost an article who has lost the value or price of it. He appears to have lost an article or thing who has no right of action against any one.

H.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

[WATSON, HALE AND TIBBALS PRESIDING.]

JOSEPH STOPPEL VS. ADOLPH WOOLNER ET AL.

Evidence — Communications Between Attorney and Client—May be Disclosed when—Action of Bailiff Interfering with Deliberation of Jury, etc.

HALE, J.:

In this case but two questions are raised. It is only necessary to state the evidence as it may bear upon those two questions. The defendant in error, on the 29th day of April, 1875, commenced an action against A. A. Stoppel, who was doing business on Michigan street in this city, and a writ of garnishment was issued in that case and process served upon Joseph Stoppel, the father of A. A. Stoppel. A judgment was rendered in the case at the May Term, 1875, of the Superior Court of this city, against the defendant Stoppel. In that case Joseph Stoppel appeared in obedience to the order of garnishment, and answered that he had no property in his hands belonging to A. A. Stoppel. After the judgment had been obtained against A. A. Stoppel, suit was commenced by the defendants in error against Joseph Stoppel, alleging that his answer was false, that he really did have a large amount of property in his possession belonging to A. A. Stoppel, specifically describing it. The petition was afterwards amended, and it then alleged, that on the 26th of January, 1875, A. A. Stoppel was in possession of this store and its contents, and for the purpose of defrauding his creditors he transferred the whole of the property to a man by the name of Rettberg; that Rettberg held it until the 10th of April, 1875, when he transferrnd it to Joseph Stoppel, the father of A. A. Stoppel; that both of these transactions were fraudulent, and known to be such by the parties. The case went to trial and the plaintiff below gave evidence tending to establish the fact that A. A. Stoppel owned these notes; that they were fraudulently transferred to Rettberg and that Rettberg transferred them to Joseph Stoppell for the same fraudulent purpose; that there was a combination between these three parties to cheat the creditors of A. A. Stoppel. The defendant Joseph Stoppel, to maintain the issue upon his part called Rettberg, and Rettberg testified that the transaction was a *bona fide* one; that A. A. Stoppel owed him $2,100, and as consideration of the transfer, he assumed to pay a debt that A. A. Stoppel owed to Joseph Stoppel. O. H. Bentley, an attorney, was also called, and it is to his testimony that exception is taken. He was put upon the witness stand and inquired of as to the conversation with Mr. Rettberg, for the purpose of rebutting the testimony of Rettberg. Before the question asked was answered, counsel for the defendant inquired as to whether the statement the witness was about to make was a statement of facts obtained by the witness while acting in the capacity of attorney for Rettberg, and the witness answered that it was; that it was a conversation and concerned the transfer of the property. The witness then inquired if Mr. Rettberg consented to his making the statement, and the attorney for the plaintiff answered that Mr. Rettberg had consented. Objection was made by the defendant. The court overruled the objection and the defendant excepted. Two objections are taken to this testimony. First, it is said that none of these parties consented to Bentley's testifying except Rettberg; that inasmuch as the testimony affected all, there should have been an express consent of all before Bentley could testify. That presents a question of fact. Taking the evidence as it stands in the record, we think the express consent of Rettberg was sufficient to authorize the court to permit Bentley to testify.

The next question made is that Rettberg not being a party, what Bentley testified could not bind Joseph Stoppel. But it is to be borne in mind that this property that Joseph Stoppel was claiming, was first transferred by A. A. Stoppel to Rettberg, and by Rettberg to Joseph Stoppel. The plaintiffs allege that that was a fraudulent transaction. Rettberg had testified to the entire transaction. All that was inquired of Bentley was as to the statement made

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to him by Rettberg. The effect of Bentley's testimony was to contradict Rettberg as to what was said and done and as to the object of doing what was done. We think it was clearly competent.

The only other question made in the case is this: On the trial of the case, and after the jury had retired, the bailiff went to the jury-room. What he did appears from the bailiff's own affidavit. He says that he was the bailiff and had charge of the room in which the case was tried; that the court could not do anything while the jury was out—was waiting for the jury—and that seeing that state of things he took it upon himself to go to the jury-room, and this is what he says he did: "When this affiant, to facilitate the business of this court, went several times to the jury in their room and into said jury room and told the jury to hurry up, and that the court wanted them to proceed with its other business, and told the jury that the court was waiting for them."

Now, this bailiff must have been a man of considerable forethought and some cheek. He must have had a very decided sense of the responsibilities of the court. It presents a serious question how far interference with a jury in their deliberations can be tolerated. When the case was first stated to us we felt inclined to set aside this verdict on the ground of this interference, fearing the influence of allowing the verdict to stand. But it will be observed that this case was tried before a very careful judge who had personal knowledge of all the facts that transpired. So far as appears from this affidavit the jury might have kicked this bailiff out of the room, just as they ought to have done, and gone on with their neliberations for a day and a half or two days. I don't know how that is. There is nothing in the case to show that the jury were influenced by this to cease from their deliberations, nothing to show that they immediately agreed upon a verdict; nothing to show that any prejudice resulted, or that they were ifluenced at all by it.

Waterman in his work, sanctioned by a California case, states the rule to be this: that where the interference with the jury is not attended with corruption in the latter, and bas not been prompted by a party, [and there is nothing here to show it was,] and it does not appear that any injustice nas thereby been done [and there is nothing here to show that any injustice has been done,] the verdict will not be disturbed, whether the case be a civil, criminal or capital trial or otherwise. Giving force and effect to this rule, which we are inclined to hold as the true rule, we are unable to see that prejudice resulted from this interference with the jury, and the judgment will be sustained.

Willson & Sykora, for plaintiffs in error.

J. H. Webster and W. J. Boardman, for defendants in error.

NOTES OF RECENT CASES.

[To appear in 89 Ill.]

Supreme Court of Illinois.

NEW TRIAL.

Finding from evidence.—Where the evidence, as to the disputed facts of a case, is contradictory, it is for the jury to determine which side is most worthy of belief, and their finding in such a case must settle the controverted facts.

CROSS-EXAMINATION.

Reading books to medical expert to test his knowledge.—Where a physician as a witness, testifies to the symptoms of a disease of which a person died, whose life was insured, and pronounces it *delirium tremens*, induced by the use of intoxicating liquors, paragraphs from standard authors, treating of that disease, may be read to the witness, and he asked if he agrees with the author, on the cross-examination, as one of the means of testing his knowledge, and this is, in no just sense, reading such books to the jury. Great care should, however, be taken by the court to confine such cross-examination within reasonable limits, and to see that the quotations read are so fairly selected as to present the author's views on the subject of examination.—*Conn. Mutual Life Ins. Co. vs. Ellis, admr., etc.*

ACKNOWLEDGEMENT.

Evidence to overcome officer's certificate.—The certificate of an officer to the acknowledgement of a deed is conclusive to the same extent as that of a record, and it can be overcome only by the most clear and satisfactory proof. The evidence of the grantor will not be sufficient to overcome it, nor will it be overcome by the additional testimony of a witness that the grantor's signature is not, in his opinion, in his handwriting.—*Blackman vs. Hawks.*

EVIDENCE.

Time of payment, when not material. —Where payment of a note sued on is claimed and testified to by the defendant, and denied by the party to whom it is said to have been paid, the date of the alleged payment is not material, and it is error to so instruct the jury, although the defendant testifies positively as to to the time.—*Leighton vs. Cummings & Co.*

AGENCY.

When payment to agent is good.— Payments made to an agent are good and obligatory upon the principal in all cases where the agent is authorized to receive payment, either by express authority, or by that resulting from the usage of trade, or from the particular dealings between the parties.

Where a person procured a loan of money from a party living some distance away in the country, or deed of trust security, taking one of the notes payable to himself, and fixed the terms of the loan, and the proof showed that such person for a number of years was the general agent of the lender in the city to loan and collect moneys for him, and that such person furnished him with statements of moneys received on his account and reinvested or paid to him, and that several of the payments made by the borrower had been paid to him by such agent, and various payments of interest after the maturity of the debt, it was *held* the principal was bound by subsequent payments made to such agent, without notice given by him to the borrower not to pay to him.

Same—When special.—The authority of an agent being limited to a particular business, does not make it special; it may be as general in regard to that as if its range was unlimited.

Same—The act of a general agent, or one whom a man puts in his place to tranact all his business of a particular kind, will bind the principal so long as the agent keeps within the scope of his authority, though he may act contrary to his private instructions.

Supreme Court of Iowa.

WARRANTY.

Where the plaintiffs sold one of their "Advanced Combined Reapers," the contract of sale contained the following warranty: "The machines are all warranted to be well made, of good material, and durable, with proper care. If, upon one day's trial, the machine should not work well, the purchaser shall give immediate notice to said McCormick & Co., or their agent, and allow time to send a person to put it in order. If it cannot be made to work well, it will be

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taken back and cash payment refunded." *Held*, the fact that the machine worked well as a mower would not of itself be a compliance with the warranty. It must also be made to work well as a reaper, or the defendant would not be under obligation to keep it, unless the failure to make it work was not his fault.—*McCormick & Co. vs. Bosd, Sup. Ct. Iowa.*

Supreme Ct. of Ill.

NEGLIGENCE—PRESUMPTION OF NOTICE.

It is culpable negligence in a railroad company to permit for a long time an obstruction to lay so near its track, that an operative of the road should come in contact with it and be killed, when on a car engaged in the necessary performance of his duty.

Where an obstruction has remained a long time, the jury are warranted in finding that the railroad company knew of it; notice of an obstruction will be presumed after the lapse of a sufficient time.—*C. & I. R. R. Co. vs. Russell.*

Supreme Ct. of Mo.

JUDICIAL SALE—AGREEMENT TO RECONVEY.

The purchaser, at an execution sale of real estate, gave the defendant in the execution a written promise to reconvey, upon the payment of a specified sum by a day named, but the defendant did not bind himself to make such payment, and the promise was founded upon no consideration. On the same day, the defendant accepted from the purchaser a lease of the same premises, went into possession, and paid rent, but never paid anything in redemption of the property. *Held*, that the promise for re-conveyance was a mere gratuity, giving the defendant an opportunity to redeem, but no vested interest, and that his only interest was in the lease-hold.—*Mess vs. Franklin Ins. Co.*

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Aug. 8, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

August 2.

Anton Thiemke and wife to Frank Marx. $200.

Anna Margarette Haag to Ellen Kelly. $500.

Alva J. Smith and wife to Mrs. C. M. Smith. $1,800.

Mary S. Cary and Geo. W. Stockly to The New York Baptist Union for Ministerial Education. $5,000.

Jacob and Johnson Lobs to Loren Malling. $200.

Henry C. Currier to Burr Van Noate, guardian. $500.

August 4.

Richard H. Knight and wife to L. H. Johnson. $216.

Gottlieb Schumann to Hannah Reger. $200.

Lavinia A. Ruggles and wife to M. H. Streater. $1,000.

August 5.

Susan R. Lee and husband to Richard Putt. $700.

Frances Simmons and husband to James Decker. $400.

Karoline Kozer to The Society for Savings. $400.

Joseph Miller to Fred W. Taylor. $2,000.

August 6.

Marcus C. Parker and wife to Martha Higbee. $800.

John Ried and wife to C. C. Baldwin. $150.

Dorothea Kirchner and wife to The Society for Savings. $500.

Mary Gill to Thomas Holbau. $100.

Peter Numsen and wife to Elijah Sanford. $1,500.

Emily Snow and husband to The People's Savings and Loan Ass'n. $950.

August 7.

Elizabeth Impett and husband to Henry Potter. $350.

Otto J. Vagts to Isaac Kennedy. $500.

Elizabeth Beggs and husband to John Kaelges. $6,000.

Wm. Ruehs to John C. Ferbert, trustee. $600.

Agata Alge and husband to Mathias Simon. $800.

William Clark to Ann H. Hepburn. $125.

John W. Lees and wife to George O. Baslington. $500.

Elizabeth C. Avery to Dollie M. Taylor. $1,300.

Edgar J. Rosecrans and wife to Susan Lynde. $1,000.

A. M. Christyz to Whitcomb & Ball. $90.

August 8.

Christopher Gillett and wife to Joseph Amor, in trust. 5.

Wm. Eastwood to Walton Brothers. One hundred and fifty dollars.

W. H. Stokes and wife to Elizabeth Coil. Three hundred dollars.

Mary McGaun and husband to C. W. Schmidt Six hundred dollars.

CHATTEL MORTGAGES.

August 2.

Andrew G. Miller to Mrs. Amelia Kendrick. $50.

C. R. Steadman to F. A. Wilmot. $40.

James W. and Abbie R. Moliere to C. A. Pelton and Ann O. Doane. $634.50.

Charles Gleason to H. H. Hatch & Co. $50.

A. L. Zeleny to Adam Stephan. $86.

F. B. Putnam to Frank Dumuth. $100.

August 4.

George F. Terrell to D. W. Gage. $100.

Same to Frank Brasington. $411.

August 5.

Simon Zellholm and wife to Jacob Miller. $2,500.

L. W. Lapp to James Welsh. $300.

August 6.

Thornburgh & Burgess to H. W. Canfield. $509.

Charles Vicks to W. D. Butler. $99.

William Maunz and wife to N. A. Gilbert. $100.

John Hays & Co. to William J. Hayes. $1,000.

John Kleina and wife to J. W. Sykora. $225.

Sophie Gentz and husband to Wm. Mueller. $1,237.

John Beznoska to Anton Beznoska. $200.

George Arnold to Catharine Arnold. $175.

August 7.

Francis B. Putnam to James A. Brown. $200.

Conrad Schmehl to Geo. Schmehl. $574.

August 8.

A Hasenpflug to J. H. Schneider. One hundred and twenty-four dollars.

John Mueller to Ronna Barner. One hundred and thirty-five dollars.

A. Middaugh to Anna G. Blanchard. Nine hundred and five dollars.

J. W. McGarroy to Merts & Riddle. One hundred and thirty-five dollars.

DEEDS.

July 31.

Dudly B. Wells and wife to Margaret A. Patterson. Four thousand four hundred dollars.

Ellen M. Wing and husband to Isaac N. Thayer. Four hunered dollars.

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Fred Erdman et al, by Felix Nicola, Mas. Com., to Fred Orlander. One thousand and sixty-seven dollars.

August 1.

Levi Burgert and wife et al to John Colbert et al. $2,037.

J. J. Elwell and wife to Christian Blank. $525.

Gerke S. Egts to Adam May. $1.

Louis Goldsmith to Joseph Mayer. $500.

W. I. Hudson and wife to W. F. Newcomb et al. $4,555.

George C. Hickox et al to Ida W. Ribbet. $400.

Ellen Kelly to Anna M. Haag. $1,000.

Alex McClane and wife to Neal Norton. $6,000.

John Widmaier to Mary Bauer. $1,310.

John P. K. Riblet to C. H. Ingersoll. $6,000.

J. H. Webster, guardian, etc., to W. S. Jones. $825.

Johanna Devine et al, by W. I. Hudson, Mas. Com., to George D. Brainard. $1,000.

August 2.

J. M. Curtiss and wife to John R. Cowley. $3,400.

Moses Fuerth and wife to Jacob Firth. $1,000.

Henry Groethe and wife to Ellen E. Boest. $1.

Elisha H. Hoffman to Henry S. Hirr. $4,200.

Frederick Kinsman to Frank Goldsmidt. $330.

Mary Lanagan to Michael Lanagan $1.

Josephine Lisy and husband to John Riebel. $1,200.

A. W. Poe et al to Mary Gack. $500.

Susanna Southwick et al to Alfred Southwick. $1.

Jos. Turney et al to The South Cleveland Banking Co. $20,148.

John Garland, by Felix Nicola, Mas. Com., to Andrew Platt. $667.

R. D. Harper by same to same. $334.

Mary A. Fieng et al by same to R. M. Laushland et al. $3,000.

Marcus Cozad et al by same to same. $6,802.

August 4.

Hannah Beyer and husband to Gottlieb Schumann. $450.

Julius Breitkreuz and wife to Emilie Marker. $1,800.

David Davies and wife to William Lansdown. $700.

Hiram Hubbard and wife to Mrs. Mary A. Taublyn. $6,200.

John P. Humphrey and wife to Barney McClernon. $740.

Matthias Huder and wife to Josephine Reuscher. $1.

Adam Thrig to L. B. Hemler. $2,500.

Dora Marshall to John Marshall. $1.

John Marshall and wife to Dora Marshall. $1.

Catharine Schardt and husband to John F. Clark. $1,000.

Joseph Storer and wife to Thomas Fleming. $300.

J. R. Warren and wife to John Corlett. $707.

J. H. Weaver and wife to same. $2.

Henry Nebe et al, by Felix Nicola, Maf. Com., to John Imke. $1,000.

August 5.

H. D. Goulder, ass'n., to W. M. Patterson. $3.

John Lebowsky to Sophie Lebowsky. $1.

John O. Donnell and wife to Mary Masterson. $1.

George C. Shumway and wife to Village of Glenville. $1,300.

August 6.

John Barns and wife to Mrs. Catharine Murphy. $1,025.

A. B. Camp to Mary E. Hart. $2,000.

Same to same. $3,500.

Helen Dowse to Joseph Klieman. $390.

H. C. Francis to M. C. Parker. $700.

Henry George to Mary Krummer. $1,500.

Margaret Klein to F. N. Geissen. $1,175.

F. R. Newell and wife to C. E. Shattuck. $540.

Hattie E. McDowell and husband to Mary A. Deckand. $2,575.

Elder R. Stewart and wife to Michael Tierman. $500.

Albert Slack and wife to Peter Jackson- $800.

Peter Jackson to Mary Slack. $1.

Charles Wagner and wife to Esther Bindenald. $350.

T. H. White et al. to Thomas Costello. $720.

Rudolph Wetzel and wife to Edmund Walton et al. $2,000.

Noyes B. Prentice by Spec. Mas Com. to Harriet B. Leavens. $7,417

August 7.

Adams & Goodwillie to James Barnett et al. $800.

Same to same. $75.

Wm. Nichols Beyer to Ellen Kelly. $400.

Robert Beggs and wife to John Koelges. $12,000.

Lottie P. Barnett and husband to J. J. Elwell. $1.

Wm. Clark and wife to Nellie C. Beach et al. $1.

John C. Ferbert to Wm. Ruchs. $900.

Harriet D. Ingersoll to C. F. Lovejoy. $800.

David Short to Wm. Easterbrook. Two hundred and fifty dollars.

A. J. Spencer to Joseph Turney. Eight thousand eight hundred and eighty-three.

W. Vogt and wife to Geo. Vogt. Four hundred and twenty dollars.

Geo. B. How et al to Harriet How. One dollar.

U. S. CIRCUIT COURT N. D. OF OHIO.

August 2.

3896. Allan Sheldon vs. Walton C. Burt et al. Bill filed. Ranney & Ranney's.

August 7.

3897. Commercial National Bank of Cleveland vs Conrad Beck et al. Petition filed. Baldwin & Ford.

August 8.

3853. Second Notional Bank of Toledo vs Anna Schiely, admx., etc. Amended answer. Hamilton & Ford and Ingersoll & W.

3872. The United States vs James Atkins et al. Answer. Estep & Squire.

COURT OF COMMON PLEAS.

Actions Commenced.

August 1.

15626. Elizabeth Schnauffer vs Jehial S. Stewart et al. Money and to subject lands. Kessler & Robinson.

15627. Daniel Krehliel vs George F. Hagerling et al. Same. Same.

15628. William Williams vs John Grady et al. Foreclosure of mortgage and equitable relief. E. D. Stark.

15629. John Cuneen vs Catharine Cuneen et al. For equitable relief and to set aside deed. Foran & Williams.

15630. Catharine McBride vs William Hindley. Appeal by deft. Judgment July 2. R. A. Davidson; H. W. Canfield.

15631. Harriet L. Rose vs George Rose et al. Money only. W. W. Andrews.

August 2.

15632. Walburga Scheurer vs Jacob Hassman et al. Foreclosure of mortgage, sale of lands and equitable relief. Arnold Green.

15633. Mary S. Jones, extx., etc., vs S. H. Kirby as exr., etc. Money only. Robinson & White.

15634. Christian Kimmel vs David Rigger. Money and to subject lands. Willson & Sykora.

15635. Robert H. Dougall vs Fred W. Pelton. Money only. William V. Tousley.

15636. Bernhard Numyer vs Orlo Mathews. Money only. Eddy & Halm.

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15637. Fred Roehl vs Fred P. Schneider. Money and to subject lands. B. R. Beavis.
15638. Andrew Dangelheisen vs Isabella Dangelhisen et al. Money and relief. Kossack & Weber.
15639. Martin Ehrbar vs Michael Burke et al. To subject land. Goulder, Hadden & Zucker.

August 4.

15640. Cataract Lodge No. 245, I. O. of O. F. vs John Maitland et al. Appeal by deft. Judgment July 7.
15641. Antonio Karlinsky vs A. R. Jewett. Money only. Babcock & Nowak.
15642. Adolph Mayer vs A. W. Lamson et al. Money and to subject lands. S. A. Schwab.
15643. Henry Brocker vs Isaac F...k et al. Money and equitable relief. W. S. Kerruish.
15644. John Thorley vs E. M. McGillin & Co. Appeal by deft. Judgment July 21. Herricks; V. P. Kline.
15645. F. McCarney vs R. Edwards. Appeal by deft. Judgment July 5. Taylor & Marvin; Foster & Carpenter.
15646. J. V. N. Yates vs G. F. Lewis. Appeal by deft. Judgment July 16.

August 5.

15647. William Williams vs Vaclav Roebel et al. Money, equitable relief and appt. of receiver. E. D. Stark.
15648. John Anderson et al. vs R. E. Eddy et al. Sale of premises and equitable relief. W. S. Orr.
15649. P. J. Hewett & Co. vs Lizzie Hayes et al. Appeal by def't., Lizzie Hayes. Coffey and Klein; Kessler & Robinson.
15650. Pat. Smith vs H. E. O'Hagan. Appeal by def't, judgment July 14. C. L. Fish; Eddy.

August 6.

15651. Wm. Yost, Treasurer of Missionary Society etc., vs Albert Allyn et al. Money and to subject lands. G. T. Smith.
15652. H. M. Rogers vs. James Lyons et al. Equitable relief and to subject lands. M. & W. C. Rogers.
15653. H. C. White, receiver, vs Ed. T. Bousfield et al. Money only with att. Willey, Sherman & Hoyt.
15654. Lena Lentz et al. vs Emma Fray et al. Partition. Robison & White.
15655. Peter Hecker et al. vs The City of Cleveland and Treasurer, etc. Injunction and relief.
15656. Simon Newmark vs Libbie Bishop et al. Foreclosure. Grannis & Griswold.
15656½. J. M Richards & Co, vs Cuyahoga county. Appeal by plaintiff from County Commissioners. Eddy & Hahn.
15657. Vaclav Kadlicek vs Joseph Rod. Money only. Babcock & Nowak.

August 7.

15658. Frank Scandlon vs N. E. Carroll and garnishee. Money only wehr atty. L. J. Rider.
15659. Elihu M. Bates vs Wm. Pringle et al. Money only. W. C. Rogers.
15660. Hope A. Upham et al. vs John Davison et al. Money and equitable relief. Foster & Carpenter.
15661. Fred Smith vs Philip Koehler et al. Money only. Adams & Beecher.
15662. Margaret Sullivan vs M. Jacobs. Money only. Adams & Beecher.
15663. Anna H. Tracy et al. vs John O. Davidson et al. Money and to subject lands. Coon & Wing.
15664. Mary Ann Wing vs Wm. Jakes et al. Money only. R. T. Morrow.
15665. Ranson Bronson vs Jacob Swader. Money and to subject lands. W. I. Hudson.
15666. In re application of Daniel Bennett for writ of habeas corpus. Tyler & Denison.

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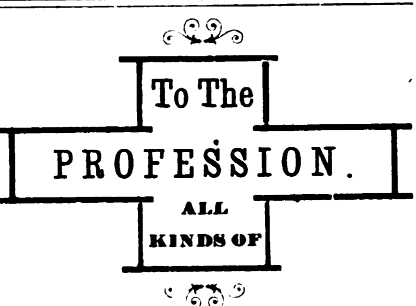

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THE rules of the Court of Common Pleas, as amended at the May Term last are now being printed at this office in both pamphlet and pocket editions, and will be issued during the early part of the coming week. In connection with the rules there is published much valuable information which has been furnished by the Clerk concerning the Journals, Appearance, Execution and Lien Dockets, etc., etc., of the various courts that have existed in this county since the year 1810, giving the Terms of Courts, the letter of the Journal and number of the Execution Docket for each year and term, and the number of the cases to be found in each docket. The names and terms of office of the Sheriffs and Clerks that have served since 1834 are also given. Every lawyer will want a copy.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

[ROUSE, LEMMON & FINNEFROCK presiding.]

CHARLES A. CRUMB ET AL. VS. JUSTINA TREIBER.

Attachment Proceeding — Order in, Binding upon Parties only, etc.

A married woman deposited a sum of money with C. & B., bankers, and thereafter in an action instituted by third parties against the husband alone an attachment was issued and process in garnishment served upon C. & B. and upon the wife. Pursuant to an order of the Court in such action, the Court finding that the deposit in the name of the wife was in fact a credit of the husband, C. & B. paid said sum into court. In an action subsequently brought by the wife to recover of C. & B. the amount of the deposit, *Held*, That such payment by C. & B. did not constitute a valid defense, she not having been a party to the previous action.—ED. LAW REPORTER.

LEMMON, J.:

This was an action commenced in the Court of Common Pleas by Justina Treiber against Charles A. Crumb and others, to recover money claimed to have been deposited by her with the defendants. The defendants filed an answer and amended answer to the petition. In the amended answer they set up first, that the plaintiff is a married woman and has no right to bring the action in her own name. Second, that previous to the commencement of the action a suit had been commenced by other parties against Charles Trieber, the husband of the plaintiff, in which a garnishee process was served upon the plaintiffs in error, and they were ordered by the Court of Common Pleas to pay into Court $668.63, the money that they owed, as determined by the Court of Common Pleas, to Charles Trieber, to be applied in payment of the claim of the plaintiffs in that action, and they claim that payment is a good defense to the action of Justina Treiber, the wife.

A reply is filed, the object of which is simply to set up that the plaintiff was not a party to the suit against Charles Treiber and in no way bound by its proceedings, and it denies all the allegations of the answer. The issue thus made presents the question whether the payment of money by a garnishee in pursuance of an order of the court constitutes a defense to a subsequent action by the real owner of the claim who was not a party to the attachment proceeding.

The first inquiry that seems to present itself to the mind is, what is this proceeding in attachment in Ohio under the present law? Is it a proceeding as the old statutory proceeding in this state was—*in rem?* The old method of proceeding in attachment in this state could only be commenced where the defendant was a non resident upon whom service could not be had within the jurisdiction. We find a case in the Second Ohio Reports where it was assigned as error that the party was within the jurisdiction of the court and the proceeding was reversed. Notice by publication was required to be given and other parties were allowed to come in and prove their claims and share with the party suing out the attachment.

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In proceedings in attachment now a petition is filed as in any other case, and the attachment issues upon the filing of the proper affidavit; but it amounts to nothing unless a judgment is obtained. It is a mere incident to the action.

Now such an action is in no wise an action *in rem*. It is an action against the person, where the persons are brought into court and a personal judgment is rendered—not a judgment as to any particular property.

We are asked to say in such a case that an order of the court that certain property was due to Charles Trieber in an action in which Justina Treiber was not a party was absolutely concluded by an order of the court.

It is said in argument that she was also garnisheed in this case. What of it? A garnishee process served upon her requiring her to answer whether she had any property of Charles Trieber in her possession or whether she owed him any debt did not raise any question as to whether this debt from Charles A. Crumb and others was due to her or not. No issue of that kind was raised. It is said there are authorities which sustain this position, and we are referred to a case in 4 Washington, 503, Mayer, admr. of Lewis Benner, vs Jacob Foulkrod et al., admrs. of George Foulkrod. We have examined that case and will notice it briefly. The facts as stated in the pleadings in that case were these: John A. Holt by last will devised all his real estate to his wife during her life, after her decease the profits of the same to be enjoyed by a daughter during her life, and after her death the property to be sold by his executors and the proceeds to be divided in equal shares amongst the grandchildren of the testator then living except one who was to have two shares. The testator died in 1788; that the will was proved by the executors named; that the daughter died in 1808 and the widow in 1792; that at the time of the death of the widow and daughter the grandchildren living were, Mary C. Sheneck, who intermarried with Louis Benner, the plaintiff's intestate, Elizabeth Sheneck, who intermarried with John Darr, Michael Cooper, Adam Sheneck, Jacob Sheneck, Sophia Sheneck, who intermarried with Jacob Luntz, and Barbara Sheneck, who intermarried with Michael Knurr. That on the 4th of April, 1809, George Foulkrod, the surviving executor, sold the real estate of the testator pursuant to his will, for the sum of $12,000, which he received. In the years 1799 and 1801 Cooper, Adam and Jacob Sheneck severally assigned their shares of the estate of said Holt to Lewis Benner for a valuable consideration, and that previous to the bankruptcy of the said Benner, he agreed with Darr and his wife for the purchase of their share, for which he paid a part of the consideration. That by these transfers, and the purchases, the said Benner became entitled to five-eighths of the estate of said Holt, in addition to the share to which he was entitled in right of his wife. That George Foulkrod died in the year 1811, and the defendants are his administrators. The prayer of the bill is for an account and payment of the shares to which Benner was thus entitled. The answer admits all the material allegations in the bill, but alleges that after the assignments to Benner by Cooper and the two Shenecks, and the purchase from Darr, he (Benner) was duly declared a bankrupt under the bankrupt law of the United States, and the whole of his estate was assigned to A. Burt and J, C. Seton, by virtue of which all his right to the estate of said Holt became rested in his assignees under the commission. That notwithstanding this Benner afterward assigned all the shares, as well as the one to which he was entitled in right of his wife, to Frederick and Henry Amerlong, merchants of New Orleans, who assigned the same to L. Krumbhaar, of Philadelphia, or by some instrument empowered him to receive the amount of said shares. That Burt and Seton as assignees commenced a suit in this court against Foulkrod in April, 1809, to recover the amount of the said shares. and on the 6th of November, in the same year, a verdict and judgment were rendered in their favor for the sum of $7,072.25, including Darr's share. That Kaumbhaar had full notice of these proceedings and acquiesced therein contending only for the share of Mrs. Benner. That for the purpose of obtaining the opinion of this court, whether he or the assignees were entitled to that share, an amicable suit was entered in the name of Krumbhaar vs. Burt and Seton, and that the decision of the court was in favor of the plaintiff in that suit. The answer then alleges that the above judgments have been fully paid and satisfied and that the executor's accounts of George Foulkrod settled and passed by the Orphans' Court, and finally that the judgment obtained by the assignees of Benner under the commission is a bar to the present suit.

The Court did so hold. That suit was decided and payment was made in accordance with it without objection. Then a second action was brought to recover the same matter. How it can be held that that is an authority that may be urged in support of the right of the defendants in this case to excuse themselves from payment because they paid in pursuance of a garnishee order where the party claiming against them was not a party, we are unable to see.

We are also cited to a case in Pennsylvania. But the proceeding in attachment under the laws of Pennsylvania is a proceeding in the nature of a proceeding *in rem*; and we think the case is not an authority in this case. We are asked upon the authority of these cases, which appear to be wholly inapplicable to the present case, to decide that a person who is not a party to an action at law is still bound by the judgment and order of the court in such action. We think the authorities from the earliest periods have been otherwise. That it is against all the settled notions of members of the Bar that practice in the state that a court could hold that an order upon a garnishee to pay over money could bind any persons who were not parties in that proceeding.

It is said it would be a hardship to require them to pay a second time. But the fact appears upon the argument that the case was commenced and was actually pending before they paid over that money. There was no necessity for them paying it over. They might have filed an answer in that proceeding setting up the fact of this garnishment and asking that the parties be brought in and required to litigate with Justina Treiber as to which was entitled to this money and thus protect themselves. They did not choose so to do, but rather to pay it over, and they did so at their own risk and must take the consequences.

The judgment of the Court of Common Pleas must be affirmed with costs.

Hutchins & Campbell, for plaintiffs.

Safford & Safford, for defendants.

COURT OF APPEALS OF TEXAS.

FEBRUARY TERM, 1879.

TOBE HAMPTON VS. THE STATE OF TEXAS.

The declarations of a defendant, when firs caught or found in possession of the sto len property, when he is first approache

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and feels called upon to explain the nature and extent of his possession and how he came by the property, are admissible in evidence either for or against him. The rules of evidence, however, do not permit a defendant, on trial for theft, to introduce his own declarations made when first seen in possession of stolen property as to how he came by it before any adverse claim to it is set up and before any suspicion rests upon him of being the thief.

Appeal from Gonzales county.

ECTOR, P. J., delivered the opinion of the court.

The defendant was indicted, tried and convicted for the theft of a horse colt, the property of one Robert A. Houston. The defendant made a motion for new trial and also a motion in arrest of judgment, both of which were overruled and the case has been brought by appeal to this court.

The proof shows that the colt was missing from its accustomed range near the house of its owner in Gonzales county, about the month of April, 1874, and that it was traded by the defendant to John Jones in the summer of 1874.

The first assignment of error is, that the "court should not have postponed the trial after announcement by both parties and the forfeiture of R. A. Houston's bond, as per bill of exceptions Nos. 1 and 2." In said bill of exceptions it appears that at the Fall Term of the District Court of Gonzales county this case was regularly called in the forenoon of said day, when both parties announced ready for trial. It being then about 12 o'clock, the case was set for the first thing in the afternoon. In the afternoon, there being another case set for the same hour, this case was re-set for the first thing on Thursday morning. The court met on Thursday morning at 8 o'clock, when the counsel for the State announced the absence of the principal witness for the State, to-wit: Robert A. Houston, and asked that the cause be further postponed for a reasonable length of time, to allow the witness time to reach the court before being required to announce, which request was granted over the objections of the defendant. The *scire facias* docket was then taken up and considered until 9¼ o'clock, when the case was again called for trial, whereupon the witness, Robert A. Houston, being again called, on the motion of the county attorney the forfeiture taken as to the witness, Houston, on his attachment bond, an alias attachment was issued by the court for said witness returnable instanter and a further postponement granted until said witness could be found, or until the close of the day. During all this time, defendant was insisting on a disposition of the cause for the term. The witness, Houston, was brought into court during the same day the alias attachment was issued for him, and the parties then went to trial. We do not belive the court acted improperly in thus directing the business of the court, or that any injustice was done the defendant by postponing the case to secure the attendance of the witness, Houston. It is not pretended that any of the defendant's witnesses had absented themselves after his announcement of readiness for trial or that he asked for a continuance on account of any absent witness.

The defendant contends that the court erred in not permitting the witness, John Jones, to testify as to what defendant said in regard to his possession of the colt alleged to have been stolen as set out in his bill of exceptions No. 3.

The county attorney called John Jones, as a witness for the prosecution, and proved by him that he bought the horse colt in question from Tobe Hampton, the defendant, and on the cross-examination, defendant's counsel asked the witness, Jones, what defendant said in regard to the colt he was trading witness, how he, defendant, said he came in possession of said colt. He then asked witness if defendant said anything at the time of sale or purchase of the colt about his authority to gather the horse property of John Blackwell running in Gonzales county, on the west side of the river, and if so, what it was, and whether or not defendant told witness that the colt he was then offering to trade was the property of John Blackwell, and that he, defendant, would see Mr. Blackwell, and get the colt from him and trade it to witness, to all of which the county attorney objected and the court sustained his objection, to which ruling the defendant objected and took a bill of exceptions. This action of the court in sustaining the objections of the county attorney to the evidence offered, presents to us the most difficult question in the entire record. The declarations of a defendant charged with theft made at the time the stolen property is first found in his possession, may be given in evidence by him, and if he gives a reasonable and satisfactory account of his possession, as a general rule, it devolves upon the State to show that his account is false. It is often difficult to determine as to the admissibility or exclusion of such declarations It is safer if there be a question of doubt or uncertainty to solve the doubt by ruling in favor of the accused. In the case at Bar, we believe that the District Court acted right in not permitting the witness, Jones, to answer the questions under consideration which were asked him by counsel for the defendant.

The rule of evidence which allows such declarations to be given in evidence, by the accused, is limited to the time and declarations made by him when he is first caught in possession of the stolen property, where he first ascertains, or it is made apparent to him, that his right to the ownership of said property is questioned by some one else. The declarations of a defendant when first caught or found in possession of the stolen property, when he is first approached and feels called upon to explain the nature and extent of his possession and how he came by the property, are admissible in evidence either for or against him.

This rule of evidence, however, does not permit a defendant on trial for theft to introduce his own declarations made when first seen in possession of stolen property as to how he came by it before any adverse claim to the property is set up and before any suspicion rests upon him of being the thief. The remarks of the judge who presided at the trial, to which the defendant took the fourth bill of exceptions, were but reasons given by the presiding judge to counsel for his rulings upon objections to evidence, and no injury could possibly have resulted from such remarks as were made by him to the defendant's counsel. As was said by this court in the case of Davis vs. The State, 3 Tex. Ct. App., 101: "A judge cannot be too careful in avoiding remarks relating to the evidence or tending in the slightest degree to convey to the jury his opinion of the evidence offered by either party."

The case was fairly submitted to the jury in the charge of the court.

The evidence is sufficient to sustain the verdict of the jury.

The grounds set forth in defendant's motion, in arrest of judgment, are not well taken. The indictment charges the defendant with a specific offense, to-wit, the theft of a colt. The allegation that the animal stolen was a *horse* colt was an unnecessary descriptive allegation, but the State proved that the property taken was of the description set out in the indictment. Unnecessary descriptive allegations do not vitiate an indictment, but must be proved. Warrington vs.

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The State, 1. Tex. Ct. of App., 173; Loria vs. The Stato, 2 Tex. Ct. of App., 298; 1 Bish. Crim. Pro., Sec. 485.

Finding no error in the record which would justify this court in reversing the case, the judgment is affirmed.

CUYAHOGA COMMON PLEAS.

MAY TERM, 1879.

ANDERSON ET AL. VS. PACK ET AL.

Slander – By Husband and Wife in Same Words two Causes of Action When Married Woman must join with Husband in Bringing Action, etc.

McMATH, J.:

The plaintiffs say they are husband and wife and that their business is that of waiters and household work in the employ of the defendants, and they complaim that the defendants spoke "the following words of and concerning one of the plaintiffs, to-wit, that she, meaning the plaintiff ——— Anderson, stole, took, and carried away some towels and pillow cases, and that ——— Anderson, meaning the plaintiff's husband, was concealing the same, meaning that the said ——— Anderson was a thief and hes husband the receiver of stolen property, and that said words were uttered by the defendants and repeated by them at different times and with the express purpose of charging the said plaintiff as a thief and her husband as a receiver of stolen property, and that every one in whose hearing the words were used understood the same to mean a direct charge of stealing and receiving stolen property." They aver that those words are slanderous.

There is a demurrer to this petition on the ground that there is a misjoinder of plaintiffs. The Court holds that a married woman cannot prosecute or defend by her next friend, but her husband must be joined with her unless the action concerns her personal property or is upon her written obligation, etc. (O. L., Vol. 75, p. 606). The reputation of the wife is not her separate property. It is the property of the husband as well. There is not therefore a misjoindor of plaintiffs, and the demurrer is overruled as to that ground.

The next ground of demurrer is that separate causes of action against several defendants are improperly joined. The language of the petition is "the *defendants* spoke of and concerning — " Can such a thing take place? Observation would teach a man that two mouths cannot utter the same words with the same voice. Speech is but sound, a mere vibration of the atmosphere, cognizable only by the auditory sense. From its nature it necessarily follows that the *same* sound cannot be repeated; a *similar* or a *like* sound may be produced, undistinguishable in every respect from the first, and of the like character and signification, but that will not be the same sound. One who repeats a word previously spoken does not utter the identical word, but a similar or like word; he repeats *a like sound* of the same signification as the first. The two sounds are separate and distinct, although each has the same meaning. Hence each publication of oral language is a new, distinct, and separate publication; and while a man and wife are one, in some respects, they do not speak with one voice, but each for him or herself.

The demurrer is sustained.

HIGH JUSTICE COURT.

[QUEEN'S BENCH DIVISION.]

EASTLAND VS. BURCHELL.

The authority of a wife to pledge the credit of her husband, is not an inherent, but a delegated authority. If she binds him, it can only be as his agent.

Where a wife leaves her husband without cause, she carries no implied authority to bind him even for necessaries; but when she is driven away by his fault, he is bound to maintain her elsewhere, and she becomes of necessity his agent to supply her wants upon his credit. In such case only, is the question of the adequacy of an allowance or the suitableness of the goods furnished as necessaries, open to the jury.

Where, however, husband and wife separate by mutual consent, the terms on which the separation is made, are binding on them so long as it lasts; and if one of the terms fixes the amount of the wife's income, she has no authority to pledge her husband's credit for necessaries in the event of such income proving insufficient.

This was an appeal from the Tunbridge County Court on a case stated for the opinion of the court.

The action was brought by the plaintiff, a butcher, against the defendant, who were husband and wife, for £38 for meat supplied to the wife, who at the time was living separate from the husband.

The County Court judge gave judgment in favor of the plaintiff, against the husband for the whole amount.

The husband appealed from this judgment, and on the appeal raised a question as to the rejection of evidence at the trial. The facts relating to this latter point will be found in the judgment.

Watkin Williams, Q. C., for the appellant.

A wife has no authority to pledge her husband's credit when separated from him, such separation being by mutual consent, and arrangements as to the income of the wife suitable to the position of the parties having been made. (Jolly vs. Ress, 15 C. B. N. S., 628.) It is for the plaintiff to show that agency existed between the husband and wife. As to the question of evidence, it is clear from Cobbett vs. Hudson, (1 E. & B., 11,) that a man may be witness and advocate in the same cause. See note to Manby vs Scott, (2 Smith's Leading Cases, 429.)

Kingsford, for the respondent.

As to the second point, the judge was right in refusing the evidence of the advocate; it could only be hearsay. As to the principal question, when parties separate by consent, the question of sufficiency of allowance is for the jury. If it be not paid or inadequate, the husband is responsible for necessaries supplied to the wife. This principle runs through all the decided cases. (See Addison on Contracts, 7th ed., 135; also Hodkinson vs. Fletcher, 4 Camp., 70; Hunt vs. De Blaquiere, 5 Bing., 550; Nurse vs. Craig, 2 B. & P. N. R., 148; Johnston vs. Sumner, 3 H. & N., 261; Biffin vs Bignell, 7 Id., 877.)

LUSH, J., delivered the opinion of the Court.

The questions arising in this appeal are, first, whether the appellant is liable for butcher's meat supplied to his wife between the 13th of March and the 3d of October, 1877, under the circumstances stated in the case; and, secondly, whether the County Court judge was right in excluding the evidence of his solicitor, who tendered himself to prove from his personal knowledge what the exact income of the appellant was, the ground of rejection being that the solicitor was acting as advocate for him in the cause, and that he could only give hearsay evidence.

The appellant and his wife were married in 1850. On the 6th of January, 1876, they separated by mutual consent, the appellant taking charge of the four elder children, the three younger ones remaining with his wife.

By their marriage settlement all the property then belonged to the wife, together with the property which would come to her on the death of her mother, was settled to her separate

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use. A deed of separation was executed by which she was to take and enjoy all articles of personal ornament and dress, and all property and income to which she then was or should thereafter become possessed or entitled, and the savings of all income. The appellant covenanted to pay to the trustee £5 per quarter so long as the three children, or any of them, should be under the age of twenty-one years and continue to reside with her; the wife covenanted that she would maintain and educate the children out of her separate income and the £5 per quarter, and not apply to the appellant for any further pecuniary assistance; and the trustee covenanted to indemnify him from all debts and liabilities thereafter to be contracted by the wife.

The parties continued to live separate under this arrangement, and the appellant had paid the £5 per quarter up to a period subsequent to the accruing of the debt in question. The respondent had never known the appellant, and had only dealt with the wife subsequently to the deed of separation. He supplied the goods, supposing her to be a married woman, but without making any inquiries in the matter.

The only evidence on which the learned judge acted was that of the wife, (it being admitted that the goods had been supplied,) and she stated that she had been ever since the separation in receipt of her separate income, which brought in £297 14s. 2d. per annum, and the £20 a year paid by the appellant, and that she found such income insufficient to enable her to maintain herself and such of her children as resided with her, and to educate them. The case states that she also gave evidence as to the position and income of the defendant prior to her separation, but does not state what that position and income were.

The learned judge decided upon this evidence that the income of the wife was insufficient for the maintenance and education of herself and the children under her care, and thereupon held, as a matter of law, that she had authority to pledge her husband's credit, and did pledge it to the respondent in respect of the meat supplied to her. We are of opinion that this ruling is erroneous. The authority of a wife to pledge the credit of her husband is a delegated, not an inherent authority. If she binds him, she binds him only as his agent. This is a well established doctrine. If she leaves him without cause and without his consent, she carries no implied authority with her to maintain herself at his expense. But if he wrongfully compels her to leave his house, he is bound to maintain her elsewhere, and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means, the sufficiency of any allowance which he makes under these circumstances is necessarily a question for the jury. Where, however, the parties separate by mutual consent, they may make their own terms, and so long as they continue the separation, these terms are binding on both. Where the terms are, as in this case, that the wife shall receive a specified income for her maintenance, and shall not apply to the husband for anything more, how can any authority to claim more be implied? It is excluded by the express terms of the agreement. It is obviously immaterial whether the income is derived from the wife's separate property, or from the allowance of the husband, or partly from the one source or partly from the other. It is enough that she has a provision which she agrees to accept as sufficient. She cannot avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the conditions upon which that consent was given. And it seems superfluous to add that no third person can claim to disturb the arrangement made between the husband and the wife, and to say that he will, by supplying goods to the wife on credit, compel the husband to pay more than the wife could have claimed, that is, the stipulated allowance. He can derive no authority from the wife which she is incompetent to give. We are, therefore, of opinion that any inquiry into the husband's means was irrelevant, and for that reason we abstain from saying more upon the second question than that, if evidence upon that point had been irrelevant, we see no reason why the evidence offered should be rejected.

We do not think it necessary to go through the various cases cited. They are no guides to us, except so far as they exhibit the principles on which the authority of a wife to pledge the credit of her husband rests. Upon that point they are conclusive to show that the capacity of a wife to contract debts upon the credit of her husband is derived from an authority either expressly or impliedly given by him. We need only refer to the two more recent cases of Johnston vs. Sumner, and Biffin vs. Bignell.

We are not concerned to inquire whether in this or that particular case this principal has been rightly applied. We have only to deal with the facts of this case, and applying the principle to them, we hold that the appellant is not liable for the debt contracted with the respondent.

Being satisfied that we have all the materials before use necessary for the determination of the question, it would be a useless expense to the parties to send the case back for a new trial. We, therefore, act upon the wholesome provisions of the Judicature Act, 1875, (ord, 40. r. 10,) and direct that the judgment for the plaintiff below be set aside, and judgment be entered for the appellant.

NOTES OF RECENT CASES.

AGENCY.

The declarations of an agent, to be admissible and bind the principal, must be made at the time of the transaction, and be a part of the *res gestae*. Austin vs. Austin, Sup. Ct. Wis.

ATTORNEYS.

If an attorney buy for himself property upon which his client has a claim, and in reference to which he has in any manner assumed a professional connection, it is for the client alone to say whether he will claim the benefit of the purchase. But as soon as the client learns that the attorney has purchased for himself, he must at once exercise his election if he would claim the benefit of the transaction. Johnson vs Outlan, Sup. Ct. of Miss.

An attorney who is accepted as surety on a bond, cannot plead the fact of his attorneyship to relieve himself from liability on the bond. Wright vs. Schmit et al., 47 Iowa.

A contract to pay a specific sum of money to a lawyer for his services in a suit concerning real estate out of the proceeds of said land when sold by the client, if recovered, is not a violation of the statute against champerty, because the attorney neither pays cost nor accepts the land or any part of it as his compensation. McPherson vs Cox, Supreme Ct. U. S.

DEED.

"Where there are two clauses in a deed, of which the latter is contradictory to the former, the former shall stand," and "where the *habendum* is repugnant and contrary to the premises

it is void, and the grantee shall take the estate given in the premises."

Every deed is expounded most strongly against the grantor and most for the advantage of the grantee, and, therefore, the grantee shall take by the premises if that be most beneficial for him, and not by the *habendum;* and the grantor shall not be allowed by any subsequent part of the deed to retract the gift made in the premises, Winter vs. Gorsuch et al. Ct. of Appeals of Md.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Aug. 15, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Aug. 9.

Mary Embler and husband to R. C. White. $600.

A. W. Baldwin and wife to to Jonathan Hale. $200.

Robert H. Cain and wife to S. H. Kirby, guard. $500.

Henry L. Blair and wife to Will Minor. $1,500.

Mary Bruce to Wikidal ———. $2,000.

Reinhard Deitz to Henry Claus. $2,090.

Johathan C. Sellby and wife to Frances Van Husen. $800.

Aug. 11.

B. Betts and wife to Paul Fought. $1,775.

Mary Goetz and husband to C. W. Schmidt. $600.

R. T. Page to Charles W. Moses. $200.

W. F. Newcombe et al to Martin Maurer. $350.

Samuel H. Shannon and wife to T. H. White. $3,600.

Alfred Gregory and wife to John Beavis. $300.

Ernst Behm and wife to Virginia L. Tiedemann. $250.

Aug. 12.

Anna F. Clayton and husband to Demalin Leitz. $2,500.

John Reidel et al to C. W. Schmidt. $500.

Sophia Sturm to People's Sav. and Loan Ass'n. $150.

Robert Davidson to Alex L. Lockert. $900.

John W. Dodge and wife to H. B. Payne. $300.

Aug. 13.

Samuel H. Smithers and wife to John Pridgeon. $200.

Andrew J. Berwick to Isabel Petch. $400.

Ferdinand Knoebel and wife to John Schraeder. $300.

Sarah A. Pennington and husband to Jacob Mueller. $700.

William Corrin and wife to The Trustees of Monas Mut. Ben. Soc. $250.

Aug. 14.

Peter Schardt to John Karda. $1,000.

J. B. Bruggeman and wife to Smith & Curtiss. $325.

E. J. Kennedy and wife to R. S. Wellington. $500.

John Meyers and wife to John Rock. $550.

Martin L. Hull to Jacob Hall. $3,700.

Alanson Russell to R. C. Black. $400.

Aug. 15.

Martin Geisel and wife to Trustees of the German Mut. Relief Society. $450.

Henry Mueller and wife to The Society for Savings. $1,100.

John Huber to Edward Huber. $3,000.

Samuel Earley and wife to George Cowan. $227.

T. H. Speddy and wife to W. C. Walker. $825.

August Modrov and wife to John G. Spear. $1,500.

Felix Kuiaseawaski and wife to Henrietta Gallup. $405.

CHATTEL MORTGAGES.

Aug. 9.

J. M. Stroanchs and wife to Will E. Ranson. $75.

Mrs. Jane Coates and husband to Levenia D. Athon. $100.

Aug. 11.

Nicholas Ember and wife to John Dodge. $300.

Aug. 12.

George H. Closs et al to W. J. Crowell. $941.

J. W. Dodge and wife to Osman Card. $247.

Aug. 14.

E. M. Brown to E. W. Goddard. $100.

Aug. 15.

Richa Horst and wife to Joachein Horst. $300.

M. C. Hutchinson to Thomas Descin. $310.

Jacob Stodler to Fred Stambach. $300.

K. E. Kritch to H. F. Collier. $132.

DEEDS.

Aug. 8.

P. S. Baum and wife to Eva Kountz. $1.

Israel Dallas and wife to Richard Morrow. $4,767.

Eunice Finch to Sylvester Kenney. $750.

Christopher Gillette and wife to Joseph Amor, in trust. $5.

H. F. Hoppensack and wife to Fred Fath. $100.

Seth W. Johnson and wife to The C. & P. R. R. Co. $24,167.

Thomas H. White and wife to G. C. Mastick. $1.

G. C. Mastick to Almira L. White. $1.

J. J. Shepherd and wife to Edmund Walton et al. $200.

Elijah F. Young to Geo. Barnes. $1.

George Barnes and wife to Mary S. Young. $1.

Aug. 9.

Daniel Arnt and wife to Robert H. Cain and wife. $1,000.

Ellen E. Boest and husband to George P. Vetter. $2,500.

Anna M. Dennis to Fred L. Smith. $1,000.

James M. Hoyt and wife to John Coughlin. $250.

Same to Casper Ebner. $319.

Garnett A. Newkirk to M. E. Johnson. $3,500.

Sarah Patterson and husband to Ellen Gaffney. $1.

Joseph Perkins and wife to H. B. Payne and wife. $1.

H. B. Payne to O. H. Payne. $2.

O. H. Payne to Mary P. Payne. $2.

Charles D. Woodbury and wife to J. S. Clark. $1.

Aug. 11.

Vaclav Korbil and wife to William Williams. $1,033.

George F. Miller and wife to Alfred Gregory. $1,020.

Daniel Oden to Peter Dos, Jr. $650.

William Trapp and wife to Oscar W. Trapp. $1,500.

Joseph Wright and wife to Joseph Quayle. $700.

Aug. 12.

W. H. Doarn and wife to Carrie T. Pease. $6,500.

W. Higson and wife to Erin A. Shull. $1,246.

Edward Messler to John Riedel. $1.

Statiner Merriman to Montreville Stone. $2,105.

Children of Peter Riedel to John Riedel. $150.

Streator, Adams & Adams to Mrs. Jane E. Sloan. $1,550.

Erdman Wendorf and wife to John Hine and wife. $10.

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John Hine and wife to Augusta Wendorf. $10.

T. H. White and wife to Samuel H. Shannon. $6,600.

S. S. Dean et al to Achsah W. Dean. $1.

Aug. 13.

Wm. Bowman and wife to Samuel H. Kirby, $540.

Henry Heinson to Dora Van Hise. $1.

A. A. Jennett to A. M. Gates et al. $1.

Demalin Leuty and wife to Wm. Corrin. $600.

Jacob Mueller and wife to Sarah A. Pennington. $800.

Felix Nicola and wife et al to Ludwig Egebrecht. $600.

Isabel Fetch et al to Andrew J. Berwick. $900.

Henry Zell and wife to Wm. Bolling. $650.

Aug. 14.

James H. Bradbeer to W. C. Walker. $1,250.

George W. Canfield and wife to Minerva Smith. $1,000.

Elizabeth Davis and husband to James Heffman. $100.

Charles H. Hubbell and wife to Alanson Russell. $1.

George Russell and wife to same. $1.

H. T. Russell and wife to same. $1.

J. Mandelbaum to James Cartwright. $418.

J. I. Pinney and wife to The New Eng. Mut. Life Ins. Co. $1,700.

S. D. Smalley and wife to Horatio N. Smalley. $450.

John G. Schmidt and wife to Sigmund Schmidt. $5.

George P. Wetter and wife to Ellen E. Boest. $1,400.

ASSIGNMENT.

Isaac Cook to D. Mandelbaum. Bond $3,000.

U. S. CIRCUIT COURT N. D. OF OHIO.

Aug. 9.

3898. Eugenia Clippinger vs David E. Hill et al. Bill filed. Lee & Brown.

3999. Ralph H. Harman vs Wm. Cubbon et al. Cognovit. Petition, warrant and answer filed. A. T. Brewer; L. W. Ford.

Aug. 13.

3894. H. W. Perkins vs The Arizona & New Mexico Ex. Co. Motion to set aside and vacate service of ummons Arnold Green.

U S. DISTRICT COURT N. D. OF OHIO.

Aug. 14.

1831. In re Z. Greenwall et al. Order referring objections to discharge to H. C. Hedges, register at Mansfield.

1716. In re R. A. De Forest. Petition for discharge. Hearing Sept. 17th.

Aug. 15.

56. In re T. H. B. Carroll. Discharged.

—— In re Thomas V. Moore. Petition for discharge. Hearing Sept. 24th.

Aug. 16.

1356. In re Lewton L. Reed. Petition for discharge. Hearing Oct. 10th.

COURT OF COMMON PLEAS.

Actions Commenced.

Aug. 8.

15667. John Widmaier vs Charles A. Knecht et al. Vacation and modification of judgment. W. S. Kerruish.

15668. The Cleveland Iron Co. vs Pennsylvania Co. Money only. Ingersoll & Williamson.

15669. A. B. Kellogg vs George F. Boehringer et al. Equitable relief. Foster & Carpenter; Coon & Wing.

15670. Marcus Dennerle vs Teutonia Lodge No. 19, A. O. G. F. Equitable relief. Weed & Dellenbaugh.

Aug. 9.

15671. A. Trattner vs D. Max. Appeal by deft. Judgment July 21.

15672. Stewart H. Chisholm vs John S. Sweeney et al. Money only, with att. Terrell, Beach & Cushing.

15673. C. W. Schmidt vs Catharine James et al. Money, to subject lands, and relief. A. Zehring; Schmidt.

15674. James Talcott vs Comfort A. Adams et al. Money only, with att. Hutchins & Campbell.

15675. Sarah F. Wade vs Charles Ruprecht et al. Money only. James Wade.

15676. Charles W. Heard vs Lucius A. Heard. Money only. Grannis & Griswold.

15677. Abraham Halle vs Peter Schell et al. Money and sale of lands. Goulder, Hadden & Zucker.

15678. State ex rel S. T. Le Baron vs The Penn. Co., lessees of, etc. Appeal by deft. Judgment July 14. Marvin, Taylor & Laird; Ranney & Ranneys.

15679. Same vs same. Same. Same. Same.

15680. Same vs same. Same. Same. Same.

15681. Same vs same. Same. Same. Same.

15682. Same vs same. Same. Same. Same.

15683. Same vs same. Same. Same. Same.

15684. Same vs same. Same. Same. Same,

15685. Same vs same. Same. Same. Same.

15686. Thomas Riding vs Andrew McAdams et al. Appeal by deft. Judgment July 10. C. W. Coates.

Aug. 11.

15687. James J. Banks vs Thomas J. Quayle. Money only. J. W. Winterstun.

Aug. 12.

15688. E. S. Gillette vs E. M. Brown et al. Injunction and equitable relief. Pennewell & Lamson.

15689. Charles Byrne, Sr., vs the Superior St. Ry. Co. Appeal by deft. Judgment July 23. Mix, Noble & White; Pennewell & Lamson.

15690. Lizzie E. Engel vs John W. Francis. Replevin. W. S. Kerruish.

15691. The State of Ohio ex rel of Samuel T. Le Baron vs The Pennsylvania Co., lessees of The Cleveland & Pittsburgh R R. Appeal by deft. Judgment July 19. Z. P. Taylor; R. P. Ranney.

15692 to 15707 inclusive. Same.

15708. State ex rel J. S. M. Hill vs The L. S. & M. S. Ry. Co. Appeal by deft. Judgment July 14. Marvin, Taylor and Laird; James Mason.

15709 to 15715 inclusive. Same.

Motions and Demurrers Filed.

July 16.

2816. Edwards vs Taylor et al. Motion to require plff. to give security for costs.

July 17.

2817. Alger et al vs Lunn et al. Motion by deft Wm. Lunn to make petition more definite and certain and to separately state and number causes of action.

July 18.

2818. Clark vs Clark. Demurrer to petition.

2819. Ensign et al vs Pelton. Same.

Nos. 2820 to 2822 inclusive. Same.

2823. Tilden vs The City of Cleveland. Demurrer by deft to the petition.

2824. Bahls vs Pelton. Motion to require plff. to separately state and number causes of action.

Nos. 2825 to 2834 inclusive. Same.

2835. Varian, exr., to Strateman. Demurrer to answer.

July 19.

2836. Stone vs Becker et al. Motion by deft. Becker to require plff. to separately state and number causes of action.

2837. Munday vs Hildemeyer. Demurrer to petition.

2838. 2d Nat. Bank of Cleveland vs Gaylord et al. Demurrer by deft. E. F. Gaylord to 1st and 2d causes of action in the petition.

2839. Stoneman vs Bailey. Demurrer to answer.

2840. Keller vs Watterson, treas. Demurrer by plff. to 3d and 5th defenses of answer.

2841. Williams vs Spenzer. Motion by deft. to strike the petition from the files.

2842. Rodig vs Becker. Motion by defendant to require plaintiff to make petition more definite and certain and to strike there from as irrelevant.

2843. The State ex rel Hill vs The L. S. & M. S. Ry. Co. Motion by plaintiff to dismiss action with affidavit of J. C. Hutchins.

Nos. 2844 to 2852 inclusive. Same.

July 21.

2853. Clark et al, admx., vs Benton et

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al. Motion by deft, for the appointment of a receiver.

July 22.

2854. The State ex rel S. T. Le Baron vs The L. S. & M. S. Ry. Co. Motion by defendant to dismiss action with affidavit of J. C. Hutchins.

Nos. 2855 to 2867 inclusive. Same.

July 26.

2868. Foote et al vs The City of Cleveland. Motion by defendants to dismiss or modify injunction or restraining order.

2869. Minch vs Pelton. Demurrer by deft. to petition.

2870. Johnson vs same. Same.

2871. Spangler vs Chapman. Same.

2872. Bradley vs Pelton. Motion to require plff to separately state and number causes of action.

2873. Peck vs same. Same.

2874. Judson vs same. Demurrer to petition.

July 28.

2875. Ehrbar vs Baumeister. Motion to require plff. to separately state and number causes of action.

2876. Brinkman vs Law Demurrer to the petition.

July 29.

2877. Spencer vs Goff et al. Demurrer by plff. to the answer of Catherine Goff.

2878. Same vs same. Same to J. W. White.

July 31.

2879. John Hancock Mutual Life Ins. Co. vs Gardener et al. Demurrer by plff. to answer and interrogatories of Benjamin F. Whitmon.

2880. Mary James vs —— Hortshorn. Demurrer by plff. to 1st defense of the answer of F. Hartshorn.

2881. J. H. James vs same. Same.

2882. Placak vs Clewell. Motion to require plff. to make his petition more definite and certain.

2883. Eyears vs Lewis. Motion to strike petition from the files.

Aug. 2.

2884. Haines, treas., vs Swain. Motion to strike from petition as irrelevant, etc.

2885. Same vs same. Same.

2886. Sonnendecker et al vs Pelton. Motion to require plff. to separately state and number causes of action.

2887 to 2922 inclusive. Same motion.

2923. Woodridge et al vs same. Demurrer to the petition.

Aug. 4.

2924. Beggs vs Barhans. Motion by deft. to set aside service and strike the petition from the files.

2925. Frew vs Watterson, treas. Demurrer to the petition.

Aug. 5.

2926. Williams vs Koebel et al. Motion by plaintiff for the appointment of a receiver.

2927. Weiner, vice pres., et al vs Roskoph et al. Same.

Aug. 6.

2928. Rogers vs Lyon et al. Same.

Aug. 7.

2929. Herenden Fur. Co. vs Euclid Ave. Opera House et al. Motion by deft. Sylvester Hogan to set aside default against him.

Aug. 9.

2930. Smith vs Giffhorn. Motion by deft to strike from petition.

Aug. 12.

2931. Gay vs Gay et al. Motion by defendants to set aside taxation of costs and to retax costs of May Term.

2932. Beckwith vs Barnard et al. Motion by plff. for an order dispensing with advertisement in German paper.

2933. Grover et al vs Russell. Motion by plaintiff for the appointment of a receiver.

Aug. 13.

2934. Linden vs Droz. Motion for order requiring defendant to show cause why he should not be attached for contempt for violating injunction.

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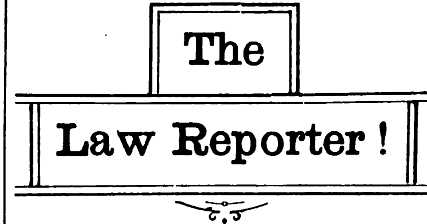

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THE excursion of members of the Cleveland Bar to Nelson Ledges on Tuesday, August 26th, 1879, in respect, at least, to the number that will participate, promises to be a success. Its object is said to be the promotion of social life among attorneys and their families. All who have been invited are desired to take a part.

THE assignment for the September Term will be made early next week. We trust cases that have been tried or dismissed at previous terms will not be assigned so as to cause changes. This has happened hitherto because of the carelessness of attorneys in noticing such cases for trial. It is, however, an error that might be avoided by the person charged with the duty of making the assignment.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

[WATSON, HALE AND TIBBALS PRESIDING.]

WILLIAM FILBERL VS. F. O. DAVIS ET AL.

Mechanic's Lien—Contract to Secure must be with Whom—Affidavit for cannot be Enlarged by Averment in Pleadings, etc.

TIBBALS, J.:

The action in this case below was brought by the plaintiff in error to recover of Fanny O. Davis on an account for labor and materials furnished in the construction of a sewer and furnishing water-pipe for certain premises known as the New England Hotel property. It is sought to subject that property to sale under a foreclosure of a mechanic's lien. It appears from the record that the land was owned by the heirs of Thomas Bolton. now represented by certain trustees; that a lease had been entered into by the decedent in his lifetime with one Willis; that that interest, however, had passed by sale to Beckwith who, it is averred, owned the real estate while the defendant F. G. Baldwin has a lease for a term of years and is the owner of the building sought to be subjected. It is claimed that a mechanic's lien was perfected as against these parties so as to entitle the plaintiff to sell all these premises.

The errors assigned are (1) that the Court erred in sustaining the motion to strike out a portion of the petition. It seems that the plaintiff then obtained leave to file an amended petition and did so. In view of that fact for the purposes of this hearing that will not count. (2) The Court erred in sustaining the demurrer to the original petition. The same may be said of that, (3) The Court erred in sustaining the motion to strike out portions of the amended petition of the plaintiff. As to that I will speak after referring to the other points. (4) The Court erred in sustaining the demurrer to the amended petition. (5) Erred in giving judgment in favor of the defendant. Those two may be considered together In his original petition the plaintiff sets up the facts I have indicated as to the ownership but recites that he furnished these materials and this labor under a contract with one Fanny O. Davis who was then in possession of the premises. In his amended petition he recites the facts more definitely, but still says he made the contract with Fanny O. Davis on behalf of the defendant Baldwin and with knowledge on the part of Beckwith, and seeks by that enlarged state of the facts to extend this affidavit by which he secured his lien so as to cover the interest of these other defendants. In his affidavit to secure his lien he recites that said labor was performed and said materials were furnished in good faith for the purpose of constructing a certain sewer and connections and plumbing to the building standing on lot of land hereinafter described, by virtue of a verbal contract between said William Filbert and said Fanny O. Davis in possession of said premises. That is the averment—that he made his contract with Fanny O. Davis in possession of the premises. It is claimed

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that from the additional facts set up that in point of fact Fanny O. Davis was the agent of these other parties and that her contract was binding upon the owners of the premises—upon Baldwin and upon the owner of the land.

Now, it occurs to us that this lien can only be created by virtue of the provisions of the statute relating to that subject. The party must make his contract with the owner of the premises. If he does not he cannot secure a mechanic's lien. To say that he may cure a defect in his affidavit or that he may enlarge his contract by averments in a petition is simply to say a party may extend the terms of a contract by a pleading, making a contract that he never made. That the plaintiff had a contract with Fanny O. Davis to furnish these materials and this labor is unquestionably true, and as to her he may have a remedy; but he has no mechanic's lien upon the premises by virtue of a contract with Fanny O. Davis, simply a lessee in possession of those premises. We are also unable to see that this is a case where an equitable lien would arise. We therefore find no error in the record and the judgment is affirmed.

J. E. INGERSOLL, for plaintiff in error.

McKINNEY & CASKEY, for defendant in error.

CLARK, ADMX., VS. BENTHEM.

Foreclosure—Priority of Liens—What Property First to be Sold, etc.

HALE, J.:

This was an action to foreclose brought to foreclose a mortgage given by R. M. N. Taylor and his wife to Henry F. Clarke, and presents but a single question. The controversy here arises between Taylor and wife and a co-defendant Wright. Mrs. Taylor in 1870 owned four acres of land in East Cleveland. On the 15th of June of that year she executed a mortgage upon that land in connection with her husband to Jefferson Barr. On the 3d of October a second mortgage was executed upon the whole of the four acres to Henry F. Clarke; — two mortgages upon the four acres. July 20th, 1872, Mrs. Taylor owning the fee in the land, an allottment was made of the land into various sublots. On the 6th of July, 1873, Taylor and and wife conveyed sublot six in that allotment to John J. Benthem, the defendant. In that conveyance Benthem assumed the two mortgages, the one to Barr upon which there were $4,000 due and the mortgage to Clarke on which there were $712.50 due. The language of this agreement in the deed is specific and certain; the conveyance is made subject to the two mortgages which the grantee assumes and agrees to pay. The amount of purchase money which Benthem was to pay Taylor exceeded these two mortgages and to secure the payment of that purchase money Benthem executed a mortgage to Mrs. Taylor. That mortgage was assigned to the defendant Wright. Mrs. Taylor still owns a portion of the four acres, and the question made is between Wright and Mrs. Taylor as to the premises that shall be first sold to pay the Barr and Clarke mortgages. Wright insists that the land now owned by Mrs. Taylor shall be first sold to pay those old mortgages, leaving his claim to be made out of lot six. Mrs. Taylor insists that lot six shall be first sold, leaving Wright to get his pay out of what may remain after satisfying the Barr and Clarke mortgages.

Now, as between the Taylors and Benthem it is very clear that Benthem became the principal and the Taylors sureties for the payment of those mortgages, fixing lot six as the primary source to which the party should look for his lien. Under that state of facts the mortgage on lot six was given. It is insisted that as the mortgage was originally given to the Taylors and by them assigned to Wright, that Wright gets some undefined priviliges that the Taylors would not have. Suppose Bentley had made the mortgage upon the lot directly to Wright, would there be any doubt, as Benthem was bound, between himself and Mrs. Taylor, to pay those mortgages, that Wright would be remitted to the balance of the proceeds of lot six remaining after the payment of the prior mortgages, should there be any, for the payment of his mortgage? The assignment by Mrs. Taylor of the mortgage to Wright does not change the legal rights of the parties. The assignee stands in no more favorable position than did the assignor. Wright holds a third lien upon lot six and the order of the Court is that lot six shall be first sold to pay those old mortgages, and if that fails to satisfy them the other lots may be sold. The decree will be accordingly.

G. E. and J. F. HERRICK, for plaintiff in error.

C. D. EVERETT, for defendant in error,

CUYAHOGA COMMON PLEAS.

MAY TERM, 1879.

GEORGE S. WRIGHT VS. FRED W. PELTON, TREASURER.

Taxation — Jurisdiction of Board of Equalization, etc.

This was a proceeding to restrain the collection of a personal tax claimed to have been illegally assessed in June, 1877, by the Board of Equalization of the City of Cleveland, the plaintiff alleging that in March previous to the action of the Board he abandoned his residence in the City of Cleveland and went with his family to Elyria, Lorain county, to reside, and that he had no chattel property in Cuyahoga county subject to taxation. The Court found that the plaintiff was a resident of Elyria, as claimed, but that after May 10th and at the time of the assessment by the Board the plaintiff did have in Cleveland two iron safes worth $30. No return was made of any chattel property of the plaintiff by any ward assessor. The entry upon the journal of the Board of Equalization was as follows: "9. George S. Wright—and we have information that he has refused or failed to list for several years—$25,000."

The Court (Judge Barber) held, the plaintiff not being at the time a resident of the City of Cleveland, that the Board of Equalization "could only take jurisdiction of such personal property, money and effects, [of the plaintiff,] as were situated in the City of Cleveland at the time they were listed for taxation by the assessor;" which was "at any time before the third Monday in May, in the year 1877, the 16th;" and that the action of the Board in entering $25,000 for taxation was without authority and void. A perpetual injunction was granted.

A. T. BREWER, for plaintiff.

A. J. MARVIN and J. F. WEH, for defendant.

NOTES OF RECENT CASES.

ADMINISTRATION.

Notice of proceeding to remove administrator—Waiver.—Where the administrator of an estate appears, on a notice of proceedings in the county court for his removal, by a creditor, and obtains time, and finally appeals from the order of the county court, he cannot be allowed to insist that the

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notice of the proceeding was insufficient. The sufficiency of the notice becomes wholly immaterial in such case.

BILL OF EXCEPTIONS.

Necessary when finding of the court below is assigned for error.—When the finding of the court below as to facts is assigned for error, the party should preserve the evidence heard, by bill of exceptions, or this court cannot inquire into the alleged error. Ferris vs. Ferris, 89 Ill.

PARENT AND CHILD.

Liability of parent for necessaries furnished his child. — An express promise, or circumstances from which a promise can be inferred, is indispensably necessary in order to bind the parent for necessaries furnished his infant child by a third person.

Where an infant daughter, without her father's knowledge, went to the house of the plaintiff, where her mother was staying wrongfully and against the husband's wish, to see her mother and take her some clothes, and the plaintiff would not let her return, but hid her away in a bedroom, and when the father went in search of her, told him he did not know where she was, it was *held*, that the plaintiff was not entitled to recover of the father for the board and lodging of the daughter. 89 Ill.

HUSBAND AND WIFE.

Liability of husband on account of wife.—In the absence of any special promise of the husband to pay for the board and lodging of his wife, living apart from him, to a third person, he will not be responsible therefor, unless she was living separate from him by his consent, or his conduct was such as to justify her in leaving his bed and board.

Where a wife left her husband's house without his consent, and without justification by his conduct towards her, and went to that of the plaintiff, with her nursing babe, and the husband made repeated efforts by himself and through others to procure her return home, and tried to induce the plaintiff to assist him in the same purpose, but the plaintiff made no endeavor to persuade her to go back to her husband, and forbade the husband coming to his house, it was *held*, that in the absence of any express agreement to pay, the husband was not liable to the plaintiff for the board and lodging of the wife and child.

SAME.

Husband's liability on conditional promise.—Where a wife leaves her home without the fault or misconduct of her husband, and against his wishes, and takes board and lodging with a stranger, and the husband, in order to procure her return, promises to pay her board if she will come back to his house, which is not done, and he notifies the party keeping her that if she does not return by a given day, he will not pay her board, such promise is conditional, and cannot be enforced without a performance of the condition on which it is made. Schnuckle vs. Bierman, 89 Ill.

INDORSEMENT.

Whether as indorser or guarantor.—Where the name of the payee of a note appears in blank on the back of the note, the law raises the presumption of a contract as indorser only, and not that of a guaranty.

Where A is indebted to B, and B requires security, and C agrees to indorse B's note, and A prepares a note payable to C, who puts his name on the same, nothing being said by A or B. to him at the time, this will not show a guaranty on the part of C, even if it were conceded that parol evidence is admissible in such case to show a different contract from that which the law implies. Schnell vs. North Side Planing Mill, 89 Ill.

INSTRUCTION.

Must restrict jury to the evidence.—An instruction which does not restrict the jury to the evidence in the case, is improper. Therefore, an instruction, in an action of trespass for an assault and battery, that the jury are the sole judges of the amount of damages which the plaintiff should recover, without stating that the damages should be estimated from the evidence, is erroneous.

SAME.

Should not embody facts on one side.—Where a part of the facts of a case are prominently brought before the jury in an instruction, it will be erroneous as calculated to mislead or prejudice the jury. The office of an instruction is not an argument of facts, but its sole object is to inform the jury of the law of the case arising from the testimony. Martin vs. Johnson, 89 Ill.

U. S. CIRCUIT COURT, D. IND.

BAILEY VS. CRIM ET AL.

Parties—Innocent Mortgagee.

By the terms of an agreement for the exchange of forms, deeds were deposited in *escrow* to enable one party to borrow money and pay off some incumbrances. The agent, with whom the deeds were left, placed one of them upon record, without the knowledge of either party, and procured a loan upon the land, which loan was then given to one of the parties to pay off the incumbrance, but was not so applied. On a bill filed by the party whose land had been so incumbered before perfecting the exchange, by payment of the incumbrance according to agreement, *held*, that he was not entitled to a priority over the party who loaned the money in good faith; that by placing the deed in *escrow* he put it in the power of the other party, or of the agent, to commit the fraud, and where one of two innocent parties must suffer, he who placed it in the power of the party to do the injury must bear the loss.

GRESHAM, J.:

On the 18th day of September, 1877, Henry Bailey, of Randolph county, and Noah Crim, of Henry county, entered into a written agreement for the exchange of the farms upon which they were then living, each surrendering to the other full possession. Crim's farm was encumbered, and by the terms of the agreement he was to pay all the liens except $2,000 on or before the 25th of December. Deeds were duly signed and acknowledged and placed in the hands of James Brown, a loan agent residing at New Castle, Henry county, there to remain until the terms of the contract were complied with. At the time Brown became custodian of the deeds, it was understood and expected by the parties that Crim, through Brown, would raise money on the land conveyed to him, to remove the incumbrances, less $2,000, upon the land which he conveyed to Bailey. This seems to have been the reason for depositing the deeds with Brown. On the 22d of November, 1877, Brown without the knowledge of either party, had Bailey's deed to Crim recorded in Randolph county, and made one or more unsuccessful efforts to negotiate a loan for Crim. Just what Bailey was to do before being entitled to his deed from Crim, the agreement and evidence fail to show, but on the 29th day of January, 1878, he demanded and received from Brown, Crim's deed for the Henry county land. On the 22nd of April, 1878, James Moorman, of Randolph county, loaned Crim $2,100, and took a mortgage on the land described in

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Bailey's deed to Crim, to secure the loan. This Moorman did in good faith, and without any knowledge of the circumstances under which the deeds had been placed in the hands of Brown, or of Bailey's rights. Instead of applying the money obtained from Moorman to remove the incumbrances on the lands conveyed to Bailey, Crim used it for other purposes, and a few days thereafter went into bankruptcy. Bailey paid off the incumbrances and filed his bill against Moorman and Crim's assignee to enforce his vendor's lien for the amount so paid against the land conveyed to Crim, demanding priority over the mortgage held by Moorman.

Moorman set up his mortgage in a cross-bill, demanding protection as an innocent purchaser. The master reported in favor of Moorman, and the case is now submitted on exceptions to the report. Moorman had reason to believe, and did believe, that Crim was the absolute owner in fee of the lands upon which he took the mortgage. He found Crim in full and undisputed possession under a deed from Bailey, which was duly recorded. It is not pretended that he knew any fact or circumstance which was sufficient to put him on inquiry as to Bailey's rights. While laches cannot be imputed to Bailey for depositing his deed to Crim with Brown as an escrow, yet in doing so Bailey put it in Brown's power to mislead Moorman. On account of Brown's conduct either Bailey or Moorman must suffer loss, and I think the latter has the better equity.

The agent of Bailey, in disregard of instructions, had his deed recorded before Crim had complied with his agreement to remove the liens on the lands conveyed to Bailey. This was Bailey's misfortune. He put it in the power of Brown to inflict the injury, and it would be against natural justice to require Moorman to sustain the loss.

At the time of the exchange, Bailey understood that Brown was to assist Crim in raising money by mortgaging the land described in Bailey's deed. It was in this way that Crim was expected to be able to comply with his agreement to remove the liens, and it may be that Bailey was less surprised at finding his deed to Crim and the latter's chattel mortgage to Moorman recorded than he was by Crim's refusal to use the money in discharging the liens.

It is urged by counsel for plaintiff that the paper placed in Brown's hands by Bailey was no more than an escrow; that the recording of it did not make it a deed; that its delivery without compliance with the conditions upon which it was held passed no title to Crim, and that therefore Crim conveyed no title to Moorman.

Berry vs. Anderson, 22d Ind., 40, and Evarts vs. Agness, 6 Wis., 453, are cited in support of this position. In evarts vs. Agness it was held that the fraudulent procurement of a deed deposited as an escrow, from the depositary, by the grantee, did not operate to pass the title, and that a subsequent purchaser from such grantee, without notice and for a valuable consideration, derived no title thereby, and could not be protected. In Berry vs. Anderson the deed was procured from the custodian, who held it as an escrow, by fraud, and the grantor still remained in possession, which latter fact, of itself, was sufficient to put the purchaser on inquiry. It has been held that a deed delivered to an agent as an escrow and by him delivered to the grantee contrary to the conditions, passes a title voidable only: Blight vs. Schenck, 10 Penn., 285; Pratt vs. Holman. 16 Verm. 530. Without deciding that Bailey's recorded deed to Crim was voidably only, I hold, for the reasons already given, that Moorman cannot be postponed in favor of Bailey: Blight vs. Schenck, *supra*; Haven vs. Kramer, 41 Iowa, 382.

Exceptions overruled and decree in accordance with the master's finding.

WM. GROSE and MARK E. FORKNER, for plaintiff.

HEROD & WINTER, for defendant.

—*Chicago Legal News.*

SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1878.

ALBRITTIN VS. THE MAYOR, ETC., OF HUNTSVILLE.

Municipal Corporations—Liability for Failure to keep Streets, etc., in Repair.

In the absence of an express statute, imposing the duty and declaring the liability, municipal corporations proper, having the powers ordinarily conferred upon them respecting streets and side-walks within their limits, owe to the public a duty to keep them in a safe condition for use in the usual modes by travelers, and are liable in a civil action for special injuries resulting from neglect to perform this duty.

This duty and liability exist under the following conditions: When the place in question is one which it is the duty of the city to keep in safe condition; when the duty appears, upon a fair view of the charter or statutes, to be imposed, or rest upon the municipal corporation as such, and not upon it as an agency of the State; and when the power to perform the duty of keeping in repair, by authority to levy taxes, or impose local assessments, is conferred upon the corporation.

MANNING, J.:

This suit was brought by appellant for damages, for the wounds, suffering, loss of time, and expense to which he was subjected by a fall of about six feet, in the night time, while walking in one of the principal streets of Huntsville, down a precipice or walled place, the upper part of which was on a level with the street or foot pavement on the side thereof, and without a railing or other barrier, or any light burning near it to prevent persons who, like plaintiff, did not know of its existence, or should not see it, from being precipitated down the descent. By the fall, it is alleged, appellant's leg was broken, and had to be afterwards amputated; from which and the bruises he received, resulted great pain, sickness, long confinement and expense, and also the inability and injury of being a cripple for life. It is alleged that it was defendant's duty to have had such railing, barrier or other safeguards erected along said precipice, to prevent accident thereby: that it had existed in the dangerous condition it was then in, for a year or more before appellant's fall, and that, notwithstanding its knowledge of such condition, defendant negligently failed and omitted to perform said duty, or otherwise cause the dangerous nuisance to be abated. This is the substance of the complaint.

The charter of a municipal corporation is a public act of which the courts take judicial notice, without any recital of its provisions in the pleadings: Smoot vs. Wetumpka, 24 Ala., 121; Case vs. Mayor of Mobile, 30 Ala., 538; Perryman vs. Greenville, 51 Ala., 510.

In March, 1870, a statute was passed, entitled "an act to establish a new charter for the city of Huntsville. The name given to the corporation is the Mayor and aldermen of the city of Huntsville." According to section 2, the corporate limits embrace an area of lands two miles square whose center shall be the center of the public square in said city, etc. Section 4 provides that the government of said corporation shall consist of, and its corporal power shall be exercised by a

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mayor and eight aldermen, who shall be elected; and section 17 enacts, among many other important provisions, that they shall have power and authority to declare, prevent and remove nuisances; * * to erect and repair bridges; to construct drains and sewers, and to keep them in repair; * * * to keep in repair the streets, avenues and alleys of said city; to discontinue and close them when expedient; to widen or change their direction, and open new ones; * * * to pave, gravel, macadamize or otherwise improve any street or part thereof; to provide the means therefor (if deemed expedient and proper) by assessments on the owners of property to be benefitted thereby, or by assessments on the property to be thus benefitted, and to collect and enforce such assessments as other taxes; * * * to provide for the punishment by fine or fine and imprisonment, or by imprisonment, or by work on the streets, or other work of the city, of any breach of the laws, by-laws, ordinances of the corporation; * * * and to pass all such laws and ordinances as may be necessary or proper to execute the powers in this charter granted, or as may be expedient for good government of the city." Acts of 1869–70—412.

These, and many other provisions in the charter show that Huntsville was a city of consequence, and that it was endowed as such with ample powers and faculties, and an organization for the exercise of them, by which it was designed to make this city, in a very large degree, independent in its internal administration of State and county officials. Was it so charged by this legislation with the duty of keeping the streets in order. as to be liable to appellant for the consequences of the accident to him? The Circuit Judge was of the opinion that it was not. He sustained the demurrer to the complaint, not on the ground that its averments were defective, but (as the judgment entry recites) because there is no duty imposed upon the defendant to keep the streets of said city in repair, or to put up guards or barriers in cases and under circumstances as alleged in the complaint. We shall not, therefore, scrutinize the counts in the complaint to see whether or not they could be made better by amendment. The declaration in Smoot vs Wetumpka (24 Ala., 116,) might be advantageously consulted in the preparation of such a complaint.

Probably it was under the influence of the case just referred to that the Circuit Judge reached the conclusion that the city was not liable in the present cause. The particular duty of keeping the streets in repair was enjoined on the municipal authorities of Wetumpga, in express terms; ample authority to raise the means of doing so was conferred upon them, while the inhabitants of the town were at the same time expressly exempted from working on the public roads of the county. Some stress was laid by the court on these facts, and the case did not require more to be said than the court did say, to-wit:—Where a particular duty is enjoined, and no discretion is vested in the corporation as to whether it will not perform it, * * and having the means for performing this duty, the corporation willfully or negligently fails to perform it, in consequence of which failure an extraordinary injury happens to an individual, we see no reason why an action will not lie as well against it as against an individual for a similar omission of duty that works an injury to another: 24 Ala., 121.

But the court did not say it was only in such a case that a municipal corporation would be liable to one so injured. The subject has been so studied, and the judicial decisions in respect to it examined, and the results expressed in carefully considered language by Judge Dillon, in his excellent work on Municipal Corporations. After showing that the same law is not applicable to counties and their subdivisions, called in New England "towns," and like *quasi* corporations, he says: It may be fairly deduced from the many cases on this subject referred to in the notes, that in the absence of an express statute imposing the duty and declaring the liability, municipal corporations proper having the powers ordinarily conferred upon them respecting bridges, streets and side-walks within their limits, owe to the public the duty to keep them in a safe condition for use in the usual modes by travelers, and are liable in a civil action for special injuries resulting from neglect to perform this duty. Such a duty and liability are considered to exist without a positive statute when the following conditions concur:

1. The place in question, whether a bridge, side-walk, or street, must be one which it is the duty of the corporation to repair or keep in a safe condition. And this duty (to keep in repair) if not specifically enjoined, must arise upon a just construction of a charter or statutes applicable to the corporation.

2. This duty or burden must appear upon a fair view of the charter or statutes to be imposed, or rest upon the municipal corporation as such, and not upon it as an agency of the State, or upon its officers as independent public officers. (This however in general appears sufficiently when the municipality sought to be made liable exists under a special charter or general act, which confers upon it peculiar powers and privileges as respects streets, their control and improvement, not possessed throughout the State at large, under the general enactments, concerning roads.)

3. The power to perform the duty of maintaining the streets in a safe condition by authority to levy taxes, or impose local assessments for the purpose, must (as it almost always is) be conferred upon the corporation. * * When the duty to repair is not specifically enjoined, and an action for damages caused by defective streets is not expressly given, still both the duty and the liability, if there be nothing in the charter or legislation to negative the inference, has often, and in our judgment properly, been deduced from special powers conferred upon corporations, to open, grade, improve, and exclusively control public streets within their limits, and from the means which by taxation and local assessments, or both, the law places at its disposal to enable it to discharge its duties: sec. 789.

The long extracts are made because of the evident pains taken by the learned author to state the doctrine which is the result of the decisions on the subject, in the exact extent and with its just qualifications in words selected with judicial care for accuracy. In the case of Robbins vs. Chicago, 2 Black., 422, in the Supreme Court of the United States, it is said: It is well settled that a municipal corporation having exclusive care and control of streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that may be dangerous; and if this plain duty is neglected, and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault and has so used the street as to produce the injury, unless it was also a wrong doer.

This was a case in which, also, a person was injured by a fall that might have been prevented if a railing had been put up by the property

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holder who had caused the excavation to be made.

It is quite plain after examining the provisions of the charter of Huntsville in the light of the law, as above set forth, that the city is liable for all the damages sustained by appellant, if the precipice referred to had existed in its unguarded and dangerous condition within observation by the people generally, for such a length of time as must have enabled it to be known, and appellant did not bring the disaster upon himself by his own culpable negligence in not avoiding an obvious peril.

The Circuit Judge erred in his ruling, sustaining the demurrer, and the judgment must be reversed and the cause be remanded.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Aug. 22, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Aug. 16.

Joseph Quayle to Joseph Wright. $500.

Anthony Spurney and wife to Jacob Mueller, $2,000.

Francis Burrow to John Duffy. $550.

J. C. Maguire and wife to Elsie R. Krause. $300.

Kumgunda and Adam Roth to Wm. Yunglas. $475.

Peter H. Rustto Henry Wick & Co. $450.

Frank Marswick and wife to Jacob Birnbaum. $300.

Aug. 18.

Julia J. C. Palmer and husband to Henrietta Gallup. $600.

William Kewry and wife to John Weden. $300.

Henry Steigmyer and wife to Conrad Gruenewald. $300.

Charles W. Heard et al to The Society for Savings. $16,000.

Susan B. Woodford and husband to Rachel Truesdell. $1,567.

Theodore C. Schenck et al to W. H. Gaylord. $1,000.

Anna Ellsasser et al to Adam Knoph. $4,100.

Joseph Cooper and wife to Sarah Preston. $694.

J. G. W. Cowles and wife to W. H. Gaylord. $266.

Aug. 19.

Anthony Spurney and wife to Schmidt & Hoffman. $380.

Frank H. Strieby to Marienna B. Ketchum. $100.

Daniel J. Longell and wife to Amasa Stone. $400.

Mary Ann Nolan to Azariah Everett. $579.

Redmond Walsh to same. $1,000.

Austin C. Gardner and wife to John Maxwell. $500.

W. D. Bennett and wife to Thomas Papson. $150.

Herman Schubert to Charles H. Potter. $1,500.

Harriet Hubbell and husband to Wm. Knox. $1,020.

Aug. 20.

Heinrich Koenker to Christopher Frese. $400.

Catharine Scarr to The Society for Savings. $1,200.

Albert Soulek and wife to N. Heisel et al. $268.

George Mueller and wife to The Society for Savings. $1,000.

Simeon Hovey to Ransom O'Connor. $250.

Wm. Corlett to Mary A. Gill et al. $631.

Carl L. Peterson and wife to Mary Consey. $420.

Anton Trengle and wife to Maria Riech. $400.

Julius F. Grothe and wife to Detlef Stuehm. $148.

Aug. 21.

John J. Raeder and wife to The Society for Savings. $2,300.

Ellen Kelly to Margaretta Beyer. $350.

John Meinel and wife to Margaret M. Lanchland. $800.

George D. Williams and wife to J. Wm. Ball. $300.

Wm. Probert and wife to Anna A. Brekenridge et al. $3,500.

Diana Hewett to Mary A. Hardy. $350.

Aug. 22.

James Hooper and wife to E. F. Collins. Three hundred dollars.

Anton Prusa and wife to Henrietta Gallup. Three hundred and fifty dollars.

N. H. Ambler and wife to The Socieey for Savings. Four thousand dollars.

George Ruhl and wife to Robert F. Schade. Six hundred dollars.

Henry Nerdlinger and wife to P. H. Kaiser. Two thousand three hundred dollars.

Clewell Stone Co. to 2d Nat. Bank. Twelve thousand seven hundred and sixty-five dollars.

CHATTEL MORTGAGES.

Aug. 16.

M. A. and H. W. Canfield to Henry Robinson. $228.

Aaron Schwab to Abraham Forch. $300.

John Kingsborough to Wickham & Co. $1,500.

Max Phister et al to Athens Mills Co. $450.

Aug. 18.

Levi Haldman and wife to Charles T. Cromwell. $9,817.

James Carlton to Norman H. Foote. $100.

Edward Clark to M. E. Wolverton. $500.

Aug. 19.

George Mueller to Henry Warful. $400.

Aug. 20.

S. P. Vining to W. H. Marsh. $125.

O. B. Main and wife to W. D. Butler. $224.

Aug. 21.

Mike Mendelson to Sloss Brothers. $263.

W. C. North to James W. Field. $1,000.

James Mitchell to Robert Bartlett. $850.

Aug. 22.

J. H. Wiseman et al to The Co-operative Printing Co. Two thousand dollars.

Mechanics' Lien.

Aug. 20.

William Trump to Frederick Mencke. $500.

DEEDS.

Aug. 14.

Martha R. White to Alanson Russell. $2.

Peter Wassermeyer, exr., etc., to Hermann Keller. $4,050.

L. S. Holden et al by R. D. Updegraff to Charles H. Bulkley. $2,600.

Alfred B. Hinman et al by same to same. $6,053.

Aug. 15.

Board of Education to Jos. Verity. $1,250.

Isaac M. Daggett to Chauncy Killmer. $1,800.

Eliza A. Field and husband to Thomas A. Harris. $4,500.

John Flanagan and wife to Louis Felier. $475.

Louis J. Felier to George Seeley. $1,400.

Mary A. Gill et al to Wm. Corlett. $726.66.

Same to same. $8,000.

Michael Meyer and wife to W. C. Schofield. $2,400.

Rensellor R. Peebles and wife to M. A. Loughlin. $2,000.

Wm. Pate, Jr., and wife to Ed. B. Mitchell. $2,000.

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Aug. 16.

E. D. Burton et al to Jacob Linhart. $504.

John Cavanaugh to Fred Brach. $825.

James M. Hoyt and wife to John W. Mackenzie. $450.

Samantha C. Meehen and husband to Mary Wetton. $267.

Emeline Sheets and husband to Peter H. Rusk. $1,350.

Cynthia A. Watkins to Sarah R. Burke. $536.

James Watkins et al to same. $1.

Sarah R. Burke et al to Jas. Watkins. $1.

Wm. Younglas, guardian, to Kumgunda Roth. $950.

J. B. McConnell et al, by Felix Nicola, Mas. Com., to Waldberger Metting. $270.

Aug. 18.

Jane Burroughs and husband to Aug. J. Kiel. $5.

Bertie K. Barnes et al to Hattie E. McDowell. $850.

Thomas Corry and wife et al to Jane Peterson. $500.

John F. Clark to Catherine Schardt. $1,500.

Anna Ellsasser and husband to Adam Knopf. $10,000.

Christopher Gillett to Jos. Parks, in trust. $5.

J. P. Hughes and wife to Edward Tousley. $837.

George G. Hickox et al to Wm. Yager. $520.

W. C. Walker to Fanny D. Speddy. $1,350.

James M. Hoyt, Jr., et al to Barney Conroy et al. $1.

Adam Knopf and wife to Anna Ellsasser. $12,000.

Aug. G. Kiel to Jane Burroughs. $5.

Marian E. Ketchum to Frank H. Streiby. $100.

Laura L. Otis et al, exrs., etc., to Fred. Ohlrick et al. $180.

Morris Porter and wife to Ella Bland. $1,000.

George Vogt to Victor M. Nusbaum. $420.

Charles D. Woodbury and wife to J. G. Clark. $1.

H. W. Weideman to Emily Snow. $1.

Aug. 19.

Alfred Elwell and wife to August Wussenborn. $450.

John Hickey to May Jane O'Neil. $750.

Wm. S. Holman and wife to The Clev. Paper Co. $1.

C. J. Kuhn and wife to F. H. Hubbard, $3,500,

Samuel Lay to W. D. Bennett. $200.

Wm. F. Meckfessel and wife to Henry Werges. $300.

Mary Ann Nolan to Redmond Walsh. $3,000.

Charles H. Potter and wife to Herman Schubert. $2,000.

Silas Rossiter and wife to N. B. Sherwin. $900.

Amasa Stone and wife to D. J. Langell. $600.

Ignatz Schwartz and wife et al to D. R. Hawley et al. $1,000.

S. H. Solomonson to same. $1.

John Furek and wife to Mathias Martinek. $200.

Thomas Graves, Mas. Com., to Wm. Edwards. $1,667.

Aug. 20.

Israel Dallas to H. B. Perkins. Five dollars.

Same to same. Two thousand five hundred and thirty-nine dollars.

Hubbard Cooke et al to John Courtland Ellis. Eight hundred dollars.

Hiram R. Ferris and wife to Edward P. Kinsella. Five thousand dollars.

Amos R. Eno to Henry Chisholm. Thirty thousand dollars.

Christopher Frese and wife to Heinrich Koenker. Four hundred and seventy-five dollars.

Jacob Laubscher and wife to Catharine Scarr. Nine hundred dollars.

L. J. Talbot and wife to Lena A. Emery. Five hundred and sixty dollars.

Lena A. Emery and husband to J. B. Meriam. Three hundred and fifty dollars.

Amos Townsend to Jane Cooney. Four hundred and fifty dollars.

Aug. 21.

James C. Becton and wife to Hyman Becton. Six hundred and fifty dollars.

Bertha Cohen and husband to Ralph Cohen. Two thousand seven hundred dollars.

Edwin Duty and wife to Wallen D. Travis. One thousand three hundred and thirty dollars.

Thomas Emery and wife to James Klipek. Eight hundred dollars.

Wm. Edwards and wife to John Miend. One thousand eight hundred and fifty dollars.

John H. Greer to Francis L. Whitney. One dollar.

Francis L. Whitney and wife to Johanna E. Green. One dollar.

Hellmuth Gerrett and wife to Eliza J. Crane et al. One thousand four hundred dollars.

W. H. H. Peck et al to Frank Drahus. Five hundred and forty dollars.

U. S. CIRCUIT COURT N. D. OF OHIO.

Aug. 18.

3900. The Northern Mutual Life Ins. Co. vs John M. Francis et al. Bill filed. Willey, Sherman & Hoyt.

Aug. 21.

3901. Carrie F. Pratt, guardian, etc., vs Edward S. Pratt, admr., etc. Petition filed. A. S. Marvin and C. E. Pennewell.

34. In review A. B. Johnson, assignee, etc., vs Wm. Ballentine. Answer filed.

Aug. 22.

3285. Howell Hoppock et al vs E. J. Duer et al. Replication. Hutchins & Campbell.

3893. Jane F. Mann vs Powell Tool and Plaster Co. Demurrer to petition, also to 4th, 5th, 6th, 7th, 8th and 9th interrogatories.

COURT OF COMMON PLEAS.

Actions Commenced.

Aug. 13.

15716. J. M. Nowak, exr., etc., vs Albert Nemetz. Money and to subject lands. Babcock & Nowak.

15717. Clement Sheets vs Carl Seyler. Money only. H. T. Corwin.

Aug. 14.

15718. Ebenezer L. Dodd vs Margaret W. Craw et al. To subject lands and for relief. Grannis & Griswold.

15719. State vs Rollin Horton. Bastardy. W. S. Kerruish; L. A Willson.

Aug. 15.

15720. W. J. Lewis vs The Cit. Savs. and Loan Ass'n. et al. Equitable relief. J. H. Rhodes.

15721. May T. Wick vs Christene E. Maier et al. Foreclosure of mortgage and equitable relief. Arnold Green.

15722. Stella M. Kendrick vs C. E. Cook. Appeal by deft. Judgment July 31. Willson & Sykora.

15723. In re Alfred C. Clemens vs Geo. S. Pay as marshall, etc. Habeas corpus.

Aug. 16.

15724. James O. Krider vs Bernard Lee et al. Money and to subject lands. Hyde & Marsh.

15725. Henry Miller vs David Z. Herr. Money only. C. R. Sanders.

15726. Samuel Foljambe vs Arnold Green, admr., etc. Money only. H. J. Caldwell.

15727. Edgar L. Hart vs Charles F. Glasser et al. To subject lands and equitable relief. Henderson & Kline.

15728. George Ball vs George H. Lamert. Appeal by deft. Judgment July 17. G. A. Kolbe.

15729. P. Cunningham vs R. Lindenmueller et al. Money only. R. A. Davidson.

15730. John H. Chase vs John Larney

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et al. Money and foreclosure. P. P.; W. S. Kerruish.

15731. Hamilton Roosa vs Liberty H. Ware. Money only. P. P.

15732. S. F. Adams, admr., etc., vs Catharine McCarty. To subject lands. Bishop, Adams & Bishop.

15733. Joseph H. Steibel vs William C. Bidle et al. Money and equitable relief. L. Breckenridge.

Aug. 18.

15734. Ralph H. King vs Alvah A. Jewett et al. Money and to subject lands. Bishop, Adams & Bishop.

Aug. 19.

15735. Richard Edwards vs Julius Schiely & Co. Appeal by deft. Judgment August 7th. Foster & Carpenter; Kessler & R.

15736. Wm. Hibbert vs George C. Ross. Money only. W. S, Kerruish.

15737. Hugh Keffe vs Harris Goldstein, Money only. J. C. Coffey; J. P. Dawley.

15738. P. N. Stroup vs J. T. Martin et al. Money only. A. T. Brewer.

15739. E. M. Brown vs James Butler et al. Money and to subject lands. P. P.

15740. Anna E. Bott vs Joseph Polak et al. Equitable relief and appointment of receiver. Babcock & Nowak.

15741. Fred Riter et al vs T. Leach. Money only. Kessler & Robinson.

Aug. 20.

15742. James Kelley vs Wm. Lloyd et al. Money only. R. F. Paine.

15743. The L. S. & M. S. Ry. Co. vs Nicholas Myler. Money only. Getzen-Danner.

15744. Fred Bruch vs Louisa Quackenbush. Money, account, sale of land and relief. J. S. Grannis.

Aug. 21.

15745. Christ. Eggert vs Conrad Erns. Appeal by deft. Judgment July 28. Eck Heisley; F. Buehne, A. H. Weed.

Motions and Demurrers Filed.

Aug. 15.

2935. Denneale vs Pelton. Motion to require plff. to separately state and number causes of action.

2936 to 2973 inclusive. Same motion.

2974. Richards & Co. vs Preston. Motion by deft. to strike petition from the files.

Aug. 16.

2975. Martsn vs Garwood. Motion to make the petition more definite and certain.

2976. Rider vs Sullivan. Demurrer to the petition.

2977. Downs vs Cartlon. Motion by deft. to dismiss action.

2978. Heiman vs Maun. Demurrer to the petition.

2979. Wills, exr., etc., vs Whitaker, admr., etc., et al. Demurrer by defendant Charles Whitaker to the petition.

2980. Peck vs Caster. Demurrer to petition.

2981. Long et al vs Burkhardt. Motion by plffs. to set aside order fixing minimum price at which premises might be sold and for alias order fixing same.

Aug. 19.

2982. Heisley, exr., vs Williams et al. Demurrer by deft. Maggie Deming to the amended petition.

2983. Bott vs Polak et al. Motion by plff. for the appointment of a receiver.

Aug. 21.

2984. Curtiss vs Koerpel et al. Demurrer by plffs. to answers of both defts.

2985. Lankester et al vs Briggs et al. Motion by plff. Mary E. Lankester to confirm report of Z. P. Taylor, referee.

2986. Raquet vs Moska, Sr., et al. Demurrer dy deft. Mary Moska to the petition.

2987. Same vs same. Demurrer by deft. Veronika Tenzer to petition.

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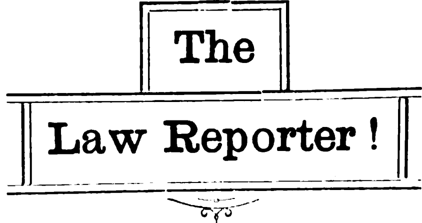

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THE ROMAN CIVIL LAW.

X.

(Book L, title XVI, continued.—The signification of words.)

Lex 23 (Ulpian.)

The word "thing" (rei) embraces appurtenances, as well as rights.

Lex 24 (Gaius.)

Heirship or inheritance (hereditas) is the succession to all the rights which the deceased had.

Lex 25, ¶ I, (Paulus.)

Quintus Mucius says that the word "part" (partis) is something that to the *mind* appears undivided; but when we speak of owning or possessing a part of a thing, it is really a whole.

Lex 26 (Ulpian.)

Scaevola says in the eleventh book of question, that the young are not considered part of the "thing" that has been stolen.

Lex 41 (Gaius.)

The word "weapons," or "arms," (armorum) does not alone signify or denote swords and helmets, but also cudgels or clubs and stones.

Lex 43.

The phrase "necessaries of life" (victus) includes what we eat, drink and need for the proper care and nourishment of the body—whatever is necessary for the life of man. Labeo says that a garment serves one's life and is considered a necessary.

Lex 66.

The word "goods" or "wares" (mercis) pertains only to things movable.

Lex 84 (Paulus.)

The word "sons" (filii) comprehends all children.

Lex 92.

The next (proximus) is whom no one precedes; the last (supremus) is whom no one follows.

Lex 96 (Celsus.)

The sea-shore or strand (litus) is at the point where the high tide of the sea extends.

Lex 108.

One of whom you have the right to demand your money though he be unwilling to pay, is termed a debtor.

Lex 109.

A purchaser in good faith (bonae fidae emptor) would seem to be one who did not know that the thing he bought belonged to any one else, or believed that he who sold it to him had the right to sell it, as for example, as from an agent or a guardian.

Lex 113.

A dangerous sickness (morbus sonticus) is such as hinders one in every transaction he undertakes.

Lex 116.

"Whomsoever else I may have as sons, or son, shall be my heir." Labeo is of the opinion that a daughter is not included (in the above quotation.) Proculus is of the contrary opinion: It seems to me that Labeo follows the words literally, but Proculus rather follows the intention of the testator; I have no doubt but that Labeo is wrong in his opinion.

Lex 118.

Those are our enemies who openly declare war against us or against whom we declare war; others (in enmity with us) are robbers, bandits and plunderers, (latrones aut praedones.)

Lex 121.

The interest which we get from money lent is not the fruit or produce of the money, because it does not issue from the thing itself, but from a new obligation or contract.

Lex 129.

Those born dead, seem neither to have been born, nor begotten, because they never could have been called children.

Lex 133 (Ulpian.)

If any one should use the expression "that something be done or accomplished within or not later than the day of my death," the day of death would be included.

Lex 153.

He who is left in the womb of the mother at the death of the father, is in existence.

Lex 192 (Ulpian.)

The adjunction "or more" (plurisve) signifies but a trifling amount; hence an estimate of ten *or more* gold coins, would include a very paltry sum.

Lex 202.

If it should be written in a last will that the heir shall expend for the purposes of the funeral, or for a mon-

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ument, no more than 100 gold coins, he could not expend a less sum. He might expend a greater, and would not by so doing be considered as violating the provisions of the will.

Lex 234.

Some think that the word "live" (vivere) has reference only to food; but Ofilius in his book to Atticus says, that we mean by that word (live) also garments, spreads and coverings, because no one can live without them.

BOOK L., TITLE XVII.

De diversis regulis juris antiqui.

(Rules of the ancient law.)

Lex 2 (Ulpian.)

Women are excluded from the privilege of holding any civil office. They can neither become judges, nor conduct the functions of a magistrate's office, nor can they prosecute or defend before a Court, nor intercede for another at court, nor appear as agent for any one.

Lex 14 (Pompon.)

In all contracts or obligations in which the day has not been fixed, the debt is due instantly or presently.

Lex 25 (Pomponius.)

There is greater security in a thing than in a person.

Lex 30 (Ulpian.)

Cohabitation does not make or constitute a (valid) marriage, but consent does.

Lex 32.

Slaves are considered as nothing in the eyes of the civil law. This is not so by the law of nature. By that law all men are equal.

Lex 36—Pomponius.

It is a fault for any one to mix into a matter that does not concern him.

Lex 40.

The furious and mad, as well as those who have been prohibited from controling their own property, have no will of their own.

Lex 48 (Paulus.)

Whatsoever is done or said in the heat of passion, is not to be considered as unalterably so unless after a long duration, it should appear that it was said or done as the judgment of the understanding, and hence it would seem that a wife who returned to her husband a short time after such an occurrence has not divorced herself.

Lex 54 (Ulpian.)

One cannot transfer to another more right than he has himself.

Lex 55 (Gaius.)

No one would seem to be doing anything fraudulently who exercises his rights.

Lex 59.

It is well recognized that an heir has the same power and rights, which the deceased had.

Lex 70 (Ulpian.)

One cannot delegate to another the power of the sword, or any right of inflicting punishment with which he has been intrusted.

Lex 99.

He cannot be said to be dishonest who is ignorant of how much he ought to pay.

Lex 103 (Paulus.)

No one should be dragged out of his house.

Lex 106.

Liberty is a thing inestimable.

Lex 107 (Gaius.)

No action lies against a slave.

Lex 108 (Paulus.)

In almost every criminal case, assistance is given to the aged and to the inexperienced.

Lex 110.

Assistance should be given to women when they have been defrauded; not however that they may thereby the easier contrive artifice.

Lex 114 (Paulus.)

In doubtful cases that which is most probable or most general and usual ought to govern.

Lex 118 (Ulpian.)

He who is in slavery cannot acquire ownership of property; for since he himself is owned, it is natural that he cannot possess or own anything.

Lex 119.

He does not alienate who merely gives up the possession.

Lex 122 (Gaius.)

Liberty is more favored than anything else.

Lex 125 (Ulpian.)

The defendant is favored more than the plaintiff.

Lex 126—Ulpian.

When a dispute arises between two respecting a stake or prize, the situation of that one is the best who is in possession.

Lex 145—Ulpian.

One does not seem to cheat or defraud those who know and give their consent.

Lex 147—Gaius.

The special is always included in the general. H.

NOTES OF RECENT CASES.

REPLEVIN.

It is not necessary in replevin that the plaintiff should prove an absolute title to the property: As against a tresspasser or wrongdoer the right of possession is sufficient.

In an action of replevin in this State the plaintiff must show that he is entitled to the right of possession. The defendant may plead *non cepit*, property in himself or in a stranger, inconsistent though these pleas may seem.

The plaintiff's replication to these pleas must set up property in himseif, and on this the issue is joined. And where the defendant pleads property in a third person the burden of proof is upon the plaintiff to show a superior title to that third person.

Upon these pleas of property the defendant, if he succeeds, is entitled to a return of the property without making avowry or cognizance, because they destroy the plaintiff' title. Lamotte vs. Wisner, Ct. of Appeals of Md.

BROKER — COMMISSIONS FROM BOTH PARTIES.

The same agent was retained by different parties on commission to negotiate sales or exchanges of their property, and he brought about an exchange between two of them, neither knowing that he was acting for the other. *Held*, contrary to public policy to allow him a right of action against both, to recover his commissions, even though he had acted in good faith. Scribner vs. Collar, Sup. Ct. Mich.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

[WATSON, HALE AND TIBBALS PRESIDING.]

FOOTE VS. WORTHINGTON.

Dower—Right of Wife to when Divorce Granted by Reason of Aggressions of Husband—Effect of decree for Alimony in depriving from Dower, etc,

HALE, J.:

This case is an application for dower. The petition is in the ordinary form. The question raised is upon the answer. The answer alleges that the conveyance of the lands in which dower is sought was made by the husband in the year 1856; that in the following year the plaintiff made application for a divorce from her husband, which was granted at the May Term of the Court of Common Pleas of the same year by reason of the aggressions of the husband, and that the court awarded to her as alimony a certain lot, described as lot 16 on Detroit street in this city, and granted

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this further order: "It is further ordered, adjudged and decreed, that said plaintiff be forever barred of all right to any of the property of the said William L. Foote, real or personal, and that she shall be forever barred of all claim to dower in any lands which the said William L. Foote then was or at any time theretofore had been seized and perpetually enjoined from instituting any proceeding in any court to obtain such dower." It is then alleged that the plaintiff, Mrs. Foote, after the rendition of this decree, entered into the possession of lot 16, allowed her as alimony, and has enjoyed the benefits of the same ever since the rendition of this decree, and that the decree was so entered with the consent of the plaintiff.

A demurrer is interposed to this answer, and raises the question as to whether the court exceeded its power under the statute in granting a decree that deprived the wife of the right of dower in the lands not allowed to her as alimony. It is claimed on behalf of the defendant that the plaintiff is estopped from claiming dower in those lands. The statute under which the court acted in this case is as follows: That where a divorce shall be granted by reason of the aggressions of the husband the wife shall be restored to all her lands, tenements, and hereditaments not previously disposed of, and she shall be allowed such alimony out of her husband's real and personal property as the court shall think reasonable." She shall have her own property free from any encumbrance by the husband, and the court, in its discretion, may allow her alimony out of her husband's property, real and personal.

Then the statute proceeds: "If the wife survive her husband she shall also be entitled to her right of dower in the real estate of her husband *not allowed to her as alimony* of which he was seized at any time during the coverture and to which she had not relinquished right of dower."

Now, what is the effect of this statute? It is to restore to her in case the dower is granted by reason of the aggressions of the husband all property right which she possessed, and give the court discretion to grant her alimony out of her husband's property, and then leave her to claim her dower estate in the lands of her husband, not allowed her as alimony in case she survived him Manifestly when the court had gone to the extent of granting the divorce and decreeing her alimony it had gone as far as the statute contemplates the court should go, unless this decree, which attempted to cut her out of her dower in the lands of her husband and to perpetually enjoin her from bringing an action in any court to test that right and enforce it, is void by reason of the want of power on the part of the court to grant it. We regard the question as simply whether there was a lack of such power—whether the court exceeded its jurisdiction.

We have examined all the cases that have been referred to by the counsel for the defendant, and they establish the general doctrine of the effect to be given to decrees that are voidable but not void. But in this case before any application had been made for the divorce Foote conveyed away the lot in which the plaintiff now claims dower. He had parted with all the interest or right of property that he had in it at the time that decree was granted, and the court undertook by the decree to say that she should be cut off from dower in the property not then owned by him which he had conveyed away, and to enjoin her from making any application for the right of dower. It does not appear from the decree that it was rendered in pursuance of any agreement made upon the part of the plaintiff by which she took lot 16 as an equivalent to her dower rights. So far as the decree shows the court was only acting in pursuance of that clause of the statute that authorized and required that alimony should be granted out of her husband's estate; and that same statute explicitly declares that in case she shall survive her husband she shall be entitled to dower in the lands of her husband.

Now, we are inclined to think that so far as this decree undertook to settle the right of the wife to dower, a contingent interest that she then had that by the death of the husband ripened into a title—that so far as it undertook to cut her out from the rights which she had it was wholly void and inoperative. Nothing is alleged in the answer showing that she should be estopped by that decree—no agreement or circumstance alleged that shows that she got any equivalent for that right. We are inclined to think that the court below was right in sustaining the demurrer to the answer and in holding that the decree, so far as it undertook to cut her out from her right of dower in the lands of the husband not given her as alimony, was void.

Eddy & Gaylord, for plaintiff in error.

Ingersoll & Williamson, for defendant in error.

TITLE BY ADVERSE POSSESSION.

Title to land by adverse possession is based upon the Statute of Limitations. While the statute does not profess to take an estate from one man and give it to another, yet, it bars the claim of the former owner, and quiets the title of him who has actually occupied the premises for the period prescribed by the statute. The effect of the statute is to transfer the title to the adverse occupant. In Graffius vs. Tottenham, 1 W. & S., 488, Gibson, J., says: "The title of the original owner is unaffected and untrammelled till the last moment, and is vested in the adverse occupant by the completion of the statutory bar." The Statute of Limitations is said by an eminent jurist [Story's Confl. of Laws, sec. 579] to be one "of repose to quiet titles, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity or antiquity of transactions." The *prescription* of the civil law was not as broad in its application as the Statute of Limitations. It being provided that "things movable may be prescribed to after the expiration of three years, and that a possession during a long tract of time, will also found a prescription to things immovable; that is to say, ten years if the parties are present, and twenty years if either of them be absent. Property may thus be acquired * * * if the property was honestly obtained at first." Sanders' Justinian, Lib. 2, title 6.

By the ancient common law, a person might have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, even though his or their enjoyment of it had been suspended for an endefinite series of years. But by the Statute of Limitations of 32 Henry 8, c. 2, it was enacted, that no person shall make any prescription by the seizin or possession of his ancestor or predecessor, unless such seizin or possession hath been within three-score years next before such prescription made: 2 Blackstone Com., 264. By the statute of 21 James 1, c. 16, the period within which an action must be brought to recover possession of real estate was reduced to twenty years.

There can be but one actual seizin of an estate. Two persons cannot be actually seized of the same land at the

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same time, claiming it by title *adverse* to each other: 3 Wash. Real Property, 125. At common law seizin was the completion of the feudal investiture, by which the tenant was admitted into the feud, and performed the rites of homage and fealty: Stearn's Real Actions, 2. Seizin in deed is said to be actual possession of the freehold, and seizin in law is a legal right to such possession. A constructive seizin in deed is said to be equivalent to an actual seizin: Green vs. Litter, 8 Cranch, 244.

Where two persons are in possession at the same time, under different claims of right, he has the seizin in whom is the true title: 3 Wash. R. P., 128, and cases cited. To constitute an actual disseizin there must not only be an unlawful entry upon lands, but it must be made with the intention to dispossess the owner: 4 Kent Com., 488; Smith vs. Bartes, 6 Johns., 218; Bradstreet vs. Huntington, 5 Peters, 439; Ewing vs. Barnett, 11 Id., 41. The *quo animo* in which the possession was taken, is a test of its adverse character, and possession to be adverse must be intended to be in hostility to the true owner; but the question of intention ordinarily, is one of fact, to be submitted to the jury: Magee vs. Magee, 37 Miss., 149. In the case of Yetzer vs. Thomas, 17 Ohio St., 133, it was held that under the Statute of Limitations of Ohio, if a party, established in himself, or in connection with those under whom he claims, an actual, notorious, continuous and exclusive possession of land for a period of twenty-one years, he thereby, except as to persons under disabilities, acquires a title to the land, irrespective of any questions of *motive* or *mistake*. Where a party claims by disseizin, which has ripened into a valid title by lapse of time, he must show an *actual*, *open*, *exclusive* adverse possession for the length of time required by statute: Hawk vs. Senseman, 6 S. & R., 21; Calhoun vs. Cook, 9 Penna. St., 226; Melvin vs. Prop'rs. of Locks et al., 5 Me., 15; Cahill vs. Palmer, 45 N. Y., 484; Robinson vs Luke, 14 Iowa, 424; Booth vs. Small, 23 Id., 177; Horback vs. Miller, 4 Neb., 47. Actual residence upon or enclosure of the land is not necessarily requisite to constitute such possession; acts of notoriety, such as entering upon the land and making improvements thereon, raising crops, felling trees growing on the land, and taxation of the land for a series of years to the person claiming it, and the payment of taxes by him, are competent evidence tending to show adverse possession: Ellicott vs. Deal, 10 Pet., 411; Ewing vs. Barnett, 11 Id., 41; Allen vs. Gilmore, 13 Me., 178; Little vs. Libbey, 2 Greenleof, 242; Miller vs. Shaw, 7 S. & R., 136; Farrer vs. Fessenden, 39 N. H., 277; Horback vs. Miller, 4 Neb., 47. The extent of the possession must be determined by the character of the entry. If a party enters under *color of title* by deed or other written instrument and occupies and improves a portion of the land, he acquires actual possession of all the land embraced in his deed or instrument in writing, and this too although the title conveyed by the deed or other written instrument may have no validity: Prescott vs. Nevers, 4 Mason, 330; Jackson vs Porter, Paine, 457; Bynum vs. Thompson, 3 Ired., 578; Webb vs. Sturtevant, 1 Scam., 187; Kyle vs. Tubbs, 23 Cal., 431; Welborn vs. Anderson, 37 Miss., 155. The Supreme Court of Alabama say: The whole doctrine of adverse possession rests upon the presumed acquiescence of the owner. Acquiescence can not be presumed unless the owner has or may be presumed to have notice of the possession: Benje vs. Creagh, 21 Ala., 151; Brown vs. Cockerell, 33 Id., 47. But actual notice to the owner of the land is not necessary; notice will be presumed from actual occupation of the land.

Merely taking a deed to land is not sufficient to constitute an adverse possession; it must be followed by an actual entry, and it is only from the time of such entry that the Statute of Limitations begins to run: Robinson vs. Luke, 14 Iowa, 424. If a person is in possession under color of title, and occupying a portion of tha premises, it has been held that another person cannot acquire constructive possession by occupying a portion, with color of title to the whole; his possession will be restricted to the part which he actually occupies: Jackson vs. Vermylyea, 6 Cowen, 677. It is held that where possession is claimed of lands held under a color of title, by cultivation of a part, such constructive possession cannot be extended beyond a single lot of land, or single farm: Jackson vs. Woodruff, 1 Cowen, 286. The rule would be different, however, in case of actual occupancy of a portion of each lot or farm described in the deed. As to what constitutes color of title, the authorities seem to hold that if the title under which the party claims, and under which he entered, shows the character and extent of his claim, it is sufficient to constitute adverse possession: Bell vs. Longworth, 6 Ind., 273; Doe vs. Hearich, 14 Id., 243; Jackson vs. Todd, 2 Caines, 183; Jackson vs. Sharp, 9 Johns., 162; 12 Id., 365; 16 Id., 293; 18 Id., 40, 365.

But it is not enough that a claimant enters under a void deed regularly recorded, and causes a survey to be made of the lands according to the deed, and pays taxes on the lands for a number of years, they being wild and uncultivated: Little vs. Megquia, 2 Me., 176; Bates vs. Norcross, 14 Pick, 224. Where a party enters npon land without color of title, his right can never extend beyond the limits actually occupied by him: Barr vs. Gatz, 4 Wheat., 213. To constitute such adverse possession as will bar the right of the owner of the estate, it is essential that the possession should be continued for the period prescribed by the statutes. If the continuity of possession is broken before the expiration of the time fixed by the statute, an entry within the time will render the prior possession unavailing: Pederick vs. Searle, 2 S. & R., 240; Wickliffe vs. Ensor, 9 B. Mon., 253; Holdfast vs. Shephard, 6 Ired., 361; Taylor vs. Burnsides, 1 Gratt., 165; Doe vs. Eslava, 11 Ala., 102. But when one enters upon land claiming title to the same, and continues to reside thereon, he may convey his interest by deed, and if the possession of such person and those claiming under him added together amounts to the the time fixed by the Statute of Limitations, such possession is a bar to a recovery: Overfield vs. Christie, 7 S. & R., 177; McCoy vs. Dickenson College, 5 Id., 254; Fanning vs. Wilcox, 3 Day, 269; McFeely vs. Laugan, 22 Ohio St., 37. No possession can be held to be adverse to one who has no right of entry during its continuance; therefore the Statute of Limitations does not run against a reversioner till the death of the tenant for life, even if the latter has conveyed the estate in fee: Gernet vs. Lynn, 31 Penn. St., 94; Melvin vs Locks et al., 16 Pick., 137; s. c. 17 Id., 255; Raymond vs Holder, 2 Cush., 269. And the reversioner may enter at any time within the period prescribed by the statute after the termination of the particular estate, notwithstanding there may have been a disseizin of the tenant and an adverse possession for more than the statutory period, because the title of the reversioner did not accrue until the determination of the estate of the tenant. The reason is plain, the doctrine of adverse possession being predicated or presumed acquiesc-

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ence of the owner of the land, and the owner having parted with the possession of the tenant, was not in a position to enforce his rights. But in cases of rights of way and common, it has been held that when the tenant suffers a direct and palpable injury to his own possession, that if the landlord had actual knowledge of the injury and submits, he will be bound: Daniel vs. Nott, 11 East, 371. And it has been held that when a disputed boundary line has been adjusted by the agreement of the tenant for life, that such agreement is presumptive evidence to bind the remainder-man: Saunders vs. Annesley, 2 Sch. & Lef. 101.

The authorities uniformly hold that a tenant cannot set up his possession as adverse to his landlord so long as the relation of landlord and tenant continues to exist. But he may show that his landlord's title has terminated, after which he may disclaim the tenancy and make his possession adverse: Nellis vs. Lathrop, 22 Wend., 121; Mattis vs. Robinson, 1 Neb., 5. If the tenant purchases a better title than that of his landlord, he must surrender possession to his lessor before he can avail himself of his new title: Mattis vs Robinson, *supra*. As between trustee and *cestui que trust*, so long as the trust is a continuing one, and is acknowledged and acted on by the parties, the statute does not begin to run; but when it is disavowed by the party in possession, whether it be the trustee or *cestui que trust*, and he distinctly with the knowledge of the other, disclaims to acknowledge the trust and to hold under it, then the possession from that time becomes adverse: Newmarket vs. Smart, 4 Am. Law Reg., 400, and cases cited. But until the trust is disavowed, it continues to subsist, and mere lapse of time, however great, is no bar: Paschall vs. Hinderer, 28 Ohio St., 568. Questions have arisen where the Statute of Limitations has been changed from twenty-one to ten years during the time a party was holding adversely, as to the limitation applicable to the case. It being competent for the legislature to change statutes prescribing limitations to actions, the one in force at the time suit is brought is the one applicable to the cause of action: Bigelow vs. Beman, 2 Allen, 497; Horbach vs. Miller, 4 Neb., 457. The legislature cannot remove a bar or limitation which has already become completed, and can pass no law to take effect on existing claims without allowing parties a reasonable time in which to bring their action before such claims shall be barred by the new enactment; but within these limits there is no restriction on the power of the legislature. Laws quieting a long and undisputed possession of real estate are generally favored. Such laws give stability to titles, encourage improvements, and prevent the assertion of stale titles and claims. When it is clear that the party in possession has brought himself within the statute, courts should have no hesitation in declaring him the lawful occupant. In Spring vs. Gray, 5 Mason, 523, Judge Story says: "I consider the Statute of Limitations a highly beneficial statute, and entitled. as such, to receive, if not a liberal, at least a reasonable construction in favor of its manifest object. It is a statute of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties, or their representatives, when all proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time, or the defective memory, or death or removal of witnesses."—[S. M., in *American Law Register*.

APPELLATE COURT OF ILLINOIS.

SECOND DISTRICT.—OPINION FILED, JULY 21st, 1879.

SARAH BROOKS VS. ZENOS N. HOTCHKISS.

HOMESTEAD.—Where a husband deeded his homestead to a purchaser without his wife's joining in the deed, and afterward deserted her while she continued to reside on the premises, the purchaser can not get possession of the property against the will of the wife by paying her one thousand dollars.

Secs. 8 and 9 of the homestead act, only apply to cases where the party has a lien against the property which he seeks to enforce.

The opinion of the court was delivered by

PILLSBURY, P. J.:

Bill in equity filed by appellee against appellant, praying for an assignment of homestead to her in a lot in the city of Peoria, which had been conveyed to him by Joseph W. Brooks, the husband of appellant, she not joining in said deed. The lot was the homestead of Brooks and wife, at the time of conveyance. Soon after the conveyance the husband deserted his wife who continued to reside upon the premises, claiming the same as her homestead, and refused to give the purchaser possession, although he offered to pay her one thousand dollars. The court appointed commissioners who reported that the premises were not susceptible of division, and the court decreed that she surrender possession of the premises to the purchaser from her husband, upon his depositing one thousand dollars, with the clerk of the court for her use, and she brings the case here by appeal. By the first section of the statute, Rev. Statute, 1874, ch 52, sec. 1, an estate of homestead is given to the householder to the extent in value of one thousand dollars, which estate is not subject to the laws of conveyance, descent or devise. And such estate of homestead continues for the benefit of the wife if the husband shall desert her, and she continues in the occupancy thereof. Ibid.; sec. 2.

And no release, waiver or conveyance of the same is valid unless both husband and wife join therein. Section 4.

No release, or waiver of the homestead by the husband is binding upon the wife, unless she join in such release or waiver. Rev. Stat. 1874, p. 278, sec. 27.

A release by the husband alone, is of no use even as against himself. Richards vs. Green, 73 Ill., 54.

The statute has rendered it impossible for the husband to deprive his wife of the homestead right which is created as much if not more for her benefit than for his, except by her consent, expressed in conformity with the statute. This homestead right, is the right to live upon, occupy and enjoy the premises as a home, and is paramount to any title or interest that the husband can transfer to a purchaser, and even if it be admitted that the deed of the husband may convey the fee in the premises, yet such fee is subject to the occupancy of the householder, or in case he abandons his family, then to the occupancy thereof by them so long as they may desire to remain, or until the husband shall in good faith provide them another home suitable to their condition in life. And he cannot remove her or his family from the homestead without her consent, until such other home shall be provided. Sec. 16, ch. 68, Rev. Stat. 1874.

To permit this deed to stand would allow the husband to do indirectly, by the aid of the court, that which he is prohibited by the statute from doing directly, which can not be tolerated. If such doctrine is to prevail, then the husband can in all cases deprive his wife and family of a homestead by selling it for one thousand dollars less

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than its value, and have the purchaser, through the aid of a court of equity, oust the wife by his payment to her of the one thousand dollars, above the consideration named in the deed, and if a court of equity will interfere in such case no reason is prescribed why it would not compel the husband himself if remaining upon the premises in like manner to accept the one thousand dollars, and surrender possession to the purchaser, for if he still remains in possession, he is the one entitled to the homestead. Richards vs. Green, *supra*. Such a doctrine would fritter away the beneficient provisions of the statute, and destroy all the safeguards therein around the home of the wife and minor children by the law creating the estate.

It is presumed appellee claims the right to advance to appellant the one thousand dollars by virtue of sections 8 and 9 of the statute relating to homestead, but it will be observed these sections provide for the sale of the homestead "where the premises cannot be divided," in cases only when it becomes necessary in the enforcement of a lien in a court of equity. This is not a case of that kind. The appellee has no lien; his is a simple title subject to the estate of homestead in the wife as she did not join in the deed.

Neither is the appellee aided in this case under the statute of partition, chap. 106, for under this statute the court can not order a sale of the homestead, and the payment of one thousand dollars, to the party entitled to the estate of homestead except upon the consent of such party expressed in writing and filed in the court where the proceedings for partition are pending. We perceive no way in which appellant can be divested of homestead in this proceeding.

The decree of the court below will be reversed and the bill dismissed.

Decree reversed.—[*Weekly Jurist.*

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Aug. 29, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Aug. 23.

Susannah Sauer and husband to Frank Hunt. $180.

Mary and Henry Pelton to Alfred Wolf. $175.

Jacob Naegele and wife to Elizabeth Schnauffer. $300.

Adam Hausmann and wife to trustees of Aurora Lodge No. 259, D. O. H. $1,300.

Annie M. Klossen to John H. Klossen. $300.

D. E. Hollister to James Walker. $628.

Thomas H. Peck and Mrs. Augusta D. Peck to Henrietta Gallup. $220.

Aug. 25.

Samantha Hutchinson to John Smith. $317.

Esther and Perry Copper to Henry Laub. $250.

A. R. Hurd and wife to Thomas S. Harback. Consideration, to indemnify bondsmen.

Aug. 27.

Perry Brower and wife to The Society for Savings. $2,000.

James Cullen and wife to Lewis W. Ford. $500.

Jacob Bittel and wife to John Fetzee. $3,500.

J. McDermott to Laura C. Williams. $5,000.

Jennette A. Robinson and husband to The People's Sav. and Loan Ass'n. $300.

Conrad Schwantner to Valentine Kamerer. $1,784.

Dewitt W. Rosecrans to Hiram Day. $100

Frank Kessler and wife to Catharine Smith. $240.

Albert Siegel and wife to Simon Koch. $300.

Katharine Hoffman and husband to J. C. Miller. $250.

Aug. 28.

Aaron Austin and wife to Elizabeth Coit. $200.

Mary C. Burges and husband to N. W. Allen. $700.

Fred Brandt and wife to William Poehlmann. $1,200.

R. M. Sherman and wife to Jane A. Massey. $562.

Frank Manak to N. P. Glazier. $600.

W. V. Craw and wife to Arthur Hughes. $1,800.

Duke Dwyer and wife to Alex. Campbell. $51.

W. P. Cook and wife to P. Pratt. $1,900.

Joseph Kucera to Anna Kucera. $100.

Aug. 29.

John Otto and wife to Andreas Fetzer. Three hundred dollars.

Elizabeth Fassett and husband to The Soc. for Savs. Seven hundred and seventy dollars.

John G. Stiger and wife to John Reibel. Two thousand five hundred dollars.

Elizabeth Harris and husband to J. A. Smith. Three hundred dollars.

N. Miller and wife to Clemens Stolz. Six hundred dollars.

CHATTEL MORTGAGES.

Aug. 23.

Isaac Harris to Martin Haas. $45.

A. J. and W. H. Dennis to G. Marohn. $25.

S. F. Gulliford to F. W. Gulliford. $2,223.72.

Aug. 25.

George W. Robinson to Scoville & Townsend. $560.

A. Root to Stoll & Black. $165.

N. B. Coleman to Wm. D. Butler. $23.

Aug. 27.

George H. Keller to Thomas Magher. $200.

G. H. Fenner to Simon Fenner. $2,400.

Thomas B. Herron to J. S. and J. R. Edwards. $200.

Aug. 28.

Clement E. Parker to W. J. Crowell. $900.

M. V. and W. C. Mally to E. C. Greene. $300.

Aug. 29.

John Ross to Christian Kenzig. Three hundred dollars.

L. J. Thompson to Albert Gaylord. One hundred and fifty dollars.

H. C. Farnum to J. O. Greene. One hundred dollars.

Joseph Beznoska to R. Hermann. Fifty dollars.

DEEDS.

Aug. 21.

P. M. Riser and wife to Elizabeth Knauf. One thousand five hundred dollars.

Clara M. Reese and husband to John Witting. Four hundred and fifty dollars.

James A. Hardy et al by R. D. Updegraff to E. D. Stark. Fifty-one dollars.

Aug. 22.

Valentine Gleich by Mas. Com. to John Healey. $80.

E. D. Stark and wife to Diana Hewett. $250.

John Koelges and wife to Elizabeth Beggs. $10,000.

Francis M. Gant to John Koelges. $1.

Wm. E. Jackson and wife to Sarah A. Jackson. $1.

N. Heisel et al to Albert and Mary Soulek. $420.

Frank Hunt and wife to Susannah Sauer. $280.

Henrietta Gallup to Anton and Elizabeth Prusa. $360.

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Peter Daso and wife to Elizabeth Oden. $650.

Wm. Dwyer to John H. Sargent. $1.

John H. Sargent to Marguerite Dwyer. $1.

Margaret W. Craw to Joseph and Mary Redding. $500.

Aug. 23.

George W. Canfield and wife to Joseph Horak. $200.

Cleveland Paper Co. to Margaret C. Grant. $1.

Margaret C. and James Grant to K. D. Bishop. $190.

Anna Gleich to Hermann Schmidt. $1,050.

George G. Hickox, C. B. Smith and James S. Hosmer to Simon Metzel. $400.

Simon Metzel to Anice Seeman. $400.

Francis and Mary Johnson to C. W. Moses. $3,000.

Gottlieb Kaatz and wife to August Kaatz. $3,000.

August Kaatz and wife to Louisa Kaatz. $3,000·

Charles W. Moses to Francis Johnston. $1,500.

Same to Mary Johnston. $1,500.

Frederick Mull and wife to James Walker. $500.

Edmund Rathburn and wife to Jas. Walker. $125.

Levi S. Stockwell and wife to John P. Kennedy, in trust. $1.

L. W. Tatum and wife to Dora Van Hise. $1.

Aug. 25.

Elizabeth and Robert Beggs to Wm. Body. $4,000.

A. W. and G. H. Brainard to Henry Beckman. $1,130.81.

Same to Ottillia Erlewien. $2,234.-58.

Same to Ernst Koester. $1,040.

B. S. Howard et al to James W. Perkins. $700.

Thomas and Mary P. Quayle to Thomas E. Quayle.

Kate Sullivan to Jerry Miller. $2,-800.

Martin Vistock and wife to Wolentz Michatak. $400.

Patrick Merriman, by Felix Nicola, Mas. Com., to William C. Scofield. $240.

Jacob Hirt by same to same. $154.

Aug. 26.

Mary S. Bradford et al to Emily McCreary. $800.

Dwight P. Clapp and wife to Henry Chisholm. $8,000.

J. M. Curtiss and wife to John Guse et al. $700.

David K. Clint and wife to Mary A. Selover. $1,800.

Robert Codington and wife to Adam Stein. $650.

P. H. Dawson and wife to Sanford H. Bishop. $300.

Wm. Elasser and wife to Catharine Eckermann. $2,500.

Nathaniel P. Glazier to Laura Tibbits. $5.

A. H. George to Wm. H. Humiston. $1.

W. H. Humiston to Mrs. Jennie George. $1.

Henrietta Gallup to Thomas H. Peck and wife. $320.

Margaret Howe to Mary Dunn. $1.

Abby Mays and husband to Ellen Starr. $600.

Patrick Pentoney to James Pentoney. $2,700.

Louisa Stephenson and husband to Elizabeth Fernold. $1,060.

L. J. Talbot and wife to Wm. A. Braund. $1,680.

Aug. 27.

J. H. Beecher and wife to M. Benson. $10.

Jennie E. Edwards, extrx., etc., to Jefferson Barber. $400.

Sarah A. Fletcher to Charlotte A. Kendrick. $1.

J. J. Low and wife to Jefferson Barber. $400.

Nelson Moses to M. Benson. $5.

Valentine Kamerer and wife to Conrad Schwentner. $3,450.

Charles W. Noble, trustee, to Mary Gahan et al. $1.

James Purcell to Emily S. Camp. $1,600.

Elise Rottgard and husband to Edward Belz, trustee. $4.

Edward Belz, trustee, to Elise Rottgard. $4.

John V. Tousley to Wm. Tousley. $6,000.

Jonathan Vickers and wife to W. P. Dalton. $1,500.

Irwin C. Webster and wife to Augustus M. Burke. $1,050.

James Wallace and wife to the heirs and widow of James Gahan. $1.

Aug. 28.

Letitia Bentley et al to Fred Bagget. $3,750.

A. P. Turner to same. $750.

J. Dwight Palmer and wife to same. $750.

E. D. Stark to same. $1,500.

Abel Fish and wife to Cleveland Dryer Co. $1,450.

N. P. Glazier to Frank Mancek. $1,600.

George E. Hartnell et al to Addgunde Hopp. $550.

Cornelia A. Kreitz and husband to John Zimmermann. $5.

U. S. CIRCUIT COURT N. D. OF OHIO.

Aug. 28.

3902. The Goodyear Vulcanite Co. vs Frank E. Campbell et al. Bill of complaint. Willey, Sherman & Hoyt.

3903. Same vs A. B. Curtis. Same. Same.

3904. Same vs Thos. E. Liggett. Same. Same.

3905. Same vs Jacob P. Lowe. Same. Same.

3906. Same vs Virgil H. Reisinger. Same. Same.

3907. Same vs Howard F. Sackett. Same. Same.

3908. The Northern Mutual Life Ins. Co. vs James A. Taggert et al. Bill of foreclosure. Same.

Aug. 29.

3909. The Cleveland Steam Guage Co. vs John P. Holt. Bill in equity. Foran & Williams.

COURT OF COMMON PLEAS.

Actions Commenced.

Aug. 22.

15746. George Beck vs John H. Holmes et al. Money and equitable relief. Robison & White.

15747. C. C. Hubbard vs John H. Johnson. Cognovit. Foster & Carpenter; I. K. Davis.

15748. The Citizens' Savings and Loan Ass'n. vs Thomas Daley et al. To subject lands and for relief. Estep & Squire.

15749. Isaac Reid vs Henry Reeves et al, exrs., etc. Money only. W. S. Kerruish.

Aug. 23.

15750. Laertes B. Smith vs Parker Hare, const., et al. Replevin. Mix, Noble & White.

15751. Jacob Bauknecht et al vs The Clewell Stone Co. et al. Stone & Hessenmueller; Foster & Carpenter, Pennewell & Lamson.

15752. Daniel McClue et al vs Robert E. Eddy et al. Injunction and equitable relief. J. C. Coffey and Hord, Dawley & Hord.

15753. F. H. Henke vs Caroline Heimer et al. Money and foreclosure of mortgage. Estep & Squire.

15754. Samuel Keller vs Benjamin F. Storer et al. Foreclosure. J. W. Heisley.

15755. John C. Brady vs The L. S. & M. S. Ry. Co. Money only. Jackson & Pudney.

15756. Daniel Armdle et al vs C. Miller. Money only. Johnson & Schwan.

15757. The Union Mutual Life Insurance Co. of Maine vs Ernst C. Johnson et al. Money, to subject lands, and for appointment of receiver. E. K. Wilcox.

15758. Marienne B. Sterling vs Daniel McClaskey. Equitable relief, sale of lands, and restraining order. M. M. Hobart.

15759. E. Hessenmueller as admr., etc., vs James Teare. Money only. Stone & Hessenmueller.

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15760. Ohio & Pennsylvania Coal Co. vs Wm. L. Bowler et al. Money only. Ball & Raynolds.

Aug. 25.

15761. Victoria E. Ganson vs Alexander J. Sked et al. Money and to subject lands. E. H. Eggleston.

15762. George Rauscher vs A. W. Poe et al. Money and equitable relief. Adams & Beecher.

15763. John W. Scott vs James Langhorn. Money only. Marvin, Laird & Cadwell and Estep & Squire.

15764. S. Zellahn vs James Bennett et al. Appeal by deft. Judgment Aug. 11.

15765. Maurice Marine et al vs N. Wolinsky et al. Error to J. P. Kessler & Robinson.

Aug. 26.

15766. George Beck, ass'e., etc., vs Mrs. Allen Martin. Appeal by deft. Judgment Aug. 2.

15767. Marcus Rosenwasser vs William Macey et al. Aid of execution and for equitable relief. Willson & Sykora.

Aug. 27.

15768. Anna Kaucky et al vs John G. Hower et al. Money only. Jackson, Pudney & Athey.

15769. Wm. C. Schofield et al vs B. F. McKinn et al. Money only. Henderson & Kline.

15770. Horatio N. Noyes vs Thomas Wilson et al. Money and foreclosure. J. J. Carran.

15771. Solomon Lodge No. 16, I. O. B. B., vs Simson Thorman et al. Same. Same.

15772. Peter Wuetrich vs C. S. Parsons. Appeal by deft. Judgment Aug. 5.

15773. Same vs John M. Wilcox, sheriff. Same. Same.

Aug. 28.

15774. Virginia G. Forsyth vs Robert A. Forsyth. Relief. Estep & Squire.

15775. Arthur Hughes vs Jacob Streibenger. Appeal by deft. Judgment July 21. L. J. Rider; Thomas Emery.

Motions and Demurrers Filed.

Aug. 22.

2988. Wick & Co. vs Russell Lime Co. et al. Motion by plff. for judgment against Russell Lime Co. on the pleadings.

2989. Greenfield vs Gay, admr., et al, etc. Demurrer by defendants to the petition.

2990. State ex rel J. S. M. Hill vs The L. S. & M. S. Ry. Co. Motion by defts. to dismiss action with brief and affidavit of J. C. Hutchins.

2991 to 2997 inclusive, same motion.

Aug. 23.

2998. Edwards vs Union Iron Foundry. Motion by deft. to strike petition from the files.

2999. Morgan vs Pelton. Demurrer to petition.

3000. Pilkinton vs Brennan et al. Same.

3001. Smith vs Coe et al. Same.

3002. Dougall vs Pelton. Same.

3003. Sims vs Reilley et al. Same.

3004. Same vs same. Same.

3005. Herold vs Kempf et al. Same.

3006. Same vs same. Same.

3007. Keller vs Storer et al. Motion by plff. for the appointment of a receiver.

Aug. 26.

3008. Commercial National Bank of Cleveland vs Greenlee. Motion to require plff. to make his petition more definite and certain.

Aug. 27.

3009. Union Mutual Life Ins. Co. of Maine vs Johnson et al. Motion by plff. for the appointment of a receiver.

3010. Upson vs Rocky River Stone Quarry Co. Same.

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WE have a few copies yet left of the New Court Rules. Apply early if you wish to secure a copy.

THE assignment, this week, was not made until Saturday forenoon. The practice hitherto has been to make it on Friday evening of each week. If hereafter it is not made until Saturday we shall be compelled to change the time of issuing the paper and assignment from Saturday to Monday.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

[WATSON, HALE AND TIBBALS PRESIDING.]

WILLIAM BROWN VS. SAMUEL HUNKIN.

Evidence—Impeachment of Witness—Not Allowed by Contradiction of Collateral Testimony, etc.

TIBBALS, J.:

Hunkin brought an action against Brown in the court below on a breach of contract of warranty of soundness in the sale of a horse. The fact of the warranty seems to have been conceded upon the trial; the issue being confined to the question of the soundness of the horse at the time of the sale. The defendant testified to the soundness of the horse. On cross-examination counsel for the plaintiff asked a number of questions which were objected to—the objections overruled and exceptions were taken, and he was required to answer. The witness was asked by plaintiff's counsel why he had subpœnaed one H. L. Stanton as a witness for him. This question was objected to and the objection overruled. The witness answered, "I subpœnaed him to testify to certain facts which Stanton told me last winter he knew about this case." Another question, "Did you not subpœna Stanton to testify that this horse was injured by the plaintiff when crossing a railroad track?" The same objection and ruling was made as to this question. The answer was, "Mr. Stanton told me last winter that Mr. Hunkin had said to him that this horse had had his leg wrenched or strained while he, Hunkin, was driving him across a railroad track, and I subpœnaed him for that purpose." Q. "Did you not threaten Stanton with prosecution or attempt to bulldoze him when he refused to testify?" The objection to this question is to its substance, not to the language, and was overruled. The witness answered "No, sir." Thereupon he rested.

Now, as to this, if this were the only trouble we should say that in the latitude allowed in the cross-examination of a party, it is possible that the court in its sound discretion could permit this party to be interrogated as to why he subpœnaed that witness and had him in court with the view to test the fairness and good faith of the party to the transaction in the trial of the case. We were inclined to hold that this was not an abuse of that discretion. But the defendant having rested his case, the plaintiff in rebuttal called the witness H. L. Stanton, and he was asked, "What did the defendant subpœna you in this case for?" Objection was made to the question, the objection overruled and exception taken. The witness answered, "He expected me to testify that the plaintiff injured the horse in crossing a railroad track". Q. "Did you ever tell the defendant Brown that Mr. Hunkin, the plaintiff, had told you that this horse had his leg wrenched or strained while he, Hunkin, was driving him across a railroad track—did Hunkin ever state any such thing to you?" This was objected to, objection overruled and exception taken. The answer was, "He did not."

We have examined this case with a good deal of care and have been anxious to sustain this judgment, for aside from this, the case seems to have been very fairly submitted to the jury, and the jury found in favor of the plaintiff.

But on what principle can this evidence be admitted? Grant that this collateral matter was properly inquired into, was not the party making the inquiry, under the very well settled rule, bound by the answer that he got? Had he a right to put a witness upon the stand to contradict the testimony he had himself called out?

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It certainly had no relevancy to the case. If it was true that the plaintiff had so stated to Stanton, the latter was the proper one to testify to it. To contradict the witness in this manner is simply introducing another method of impeaching a witness, and it is a method that is not only not known to the law but is expressly forbidden by it. We sought to ascertain if we could not sustain the judgment by saying that the party was not prejudiced, but how can that be said when the defendant, whose evidence was evidently very material for himself in the issue, by this process was completely contradicted by a disinterested witness, the holding that the evidence was admissible, the jury would be justified in treating the evidence as seriously injurious to the defendant.

We must therefore reverse the judgment on the ground of the wrongful admission of that evidence.

THOMAS J. CARRAN, for plaintiff.
W. S. KERRUISH, for defendant.

JOHN BLETSCH V. STEWART ROBINSON.

Action for Breach of Contract—When Contract said to be Separable, etc.

TIBBALS, J.:

The errors complained of in this case are to the charge of the court. To understand the points made we will state the facts in the case. The plaintiff Robinson brought an action against Bletsch in the court below and in his petition alleged that he was a dealer in and manufacturer of staves and headings for barrels; that defendant Bletsch was a dealer in and manufacturer of barrels in the city of Cleveland; that on or about July 7th, 1874, the plaintiff had on hand and was manufacturing for the market, staves at Ansonia, Darke county, Ohio; that William Beaser, who was then and there a broker and dealer in staves and heading at Cleveland and in that capacity was acting as the agent of the plainttff, and that as such agent, although in his own name, Beaser on the day referred to sold to the defendant one hundred thousand green bucked and ended oil barrel staves, and twenty-five thousand green sawed headings, at and for the price of $32.50 per thousand. They were to be good merchantable staves and headings to be delivered on board the cars at Ansonia at the rate of one car per week from February 15th, 1874, until all were delivered, to be paid for on delivery. The plaintiff says he was willing and ready at all times to perform the contract on his part, and that the defendant on receiving and paying for 6,260 of the staves and headings requested that the further delivery be postponed for awhile, which postponement was agreed to by the parties; and was for such a time that the entire time for the delivery of such quantity would have expired at the rate of one car-load per week; that the plaintiff during that time had the staves and headings ready for delivery but was compelled to stack them near the depot at Ansonia, and that afterwards, on September 24th of the same year, the defendant entered into a new contract or arrangement with the plaintiff which was in the nature of an addition to the contract originally made, by which it was agreed that having received under the former contract 6,620 staves and headings and paid for the same, and that the remainder of the staves and headings were ready to be delivered at Ansonia as per contract, it was then agreed by way of compromise that Bletsch would at once commence receiving the balance of the staves at the rate of one car-load per week, beginning with that week, the same to be loaded on the cars in their then present condition, as prepared and stacked at Ansonia, to be delivered and paid for under the terms and conditions of the original contract. They then recite that in case of failure to receive them according to the terms of the new contract that it should be void, and a right of action should accrue to the plaintiff under the original contract. They further stipulate again that they were to be merchantable staves. After entering into that agreement the plaintiff delivered 6,510 more staves and headings on the 1st of October, 1874, and it is alleged that the defendant failed to pay $35.14, part of the contract price thereof, and refused to receive and pay for any more of the staves and headings and refused to complete the contract and arrangement, or any part thereof, whereby the plaintiff's right to sue on the original contract accrued, and he brings suit for the balance due upon that car-load. The plaintiff further recites that the price had declined from $32.50 to $20 per thousand at Ansonia, and he seeks to recover for the breach of that contract the sum of $1,389.

The defendant in his answer takes issue upon several matters, but does not as to the entering into of these two contracts. He admits the execution of the first and the receiving of the first car-load and paying for it, the extension of time, the agreement to receive the balance in the same way, one car-load per week, and he says that car-load was delivered to him; but he denies they were merchantable staves, says they were composed largely of culls; that he was put to great expense in counting them and carting them and paying freight upon them, and he denies that the plaintiff is entitled to recover by reason of any breach of contract because of the defective quality of the remainder of the staves to be delivered, and of those delivered in the second car-load, and by way of counter-claim asks that he be repaid the expense he has been subjected to by reason of the staves and headings being of an inferior quality:

The case was tried to a jury and the question was as to the character of the materials to be furnished under the contract—whether there had been a breach of the contract on the part of the plaintiff in not furnishing the proper staves under the contract, or whether there was a breach of the contract on the part of the defendant in improperly refusing to pay for the staves he had received, and in refusing to receive those not yet delivered but ready to be delivered. Upon those questions of fact arose a very important legal question, and that was whether this contract was a separable contract or an entire one. It was claimed on the part of the plaintiff in error that it was an entire contract, and that the plaintiff having failed to comply with the contract by the shipment of merchantable staves, having shipped culls in lieu thereof, and having been subjected to the expense of returning them and paying freight, that he was under no obligation to pay for the second car-load or to receive the others. While on the other hand it is claimed that this is a distinct and separable contract, each car-load to be paid for on delivery, being a separate contract in itself. Upon that subject the court below charged expressly that it was a separable contract, and in case the jury found with the plaintiff upon this question of fact he would be entitled to recover. To that charge exception was taken and that is one of the material questions in the case.

The case of Loomis, Campbell & Co. vs. The Eagle Bank of Rochester, 10 O. S., p. 328, has been cited and relied upon by the defendant in error as decisive of this case. The agreement in that case was as follows: "We have this day sold Loomis, Campbell & Co. 1,000 kegs (25

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pounds net) of good merchantable blasting powder at $2.30 per keg delivered on board boat at Rochester. Their note at six months from shipment payable in New York City. Half delivered now and balance in June. Signed, E. Gilbert & Co." In that case they shipped the first half. The parties returned the note, and afterwards suit was brought upon the note and they declined to ship the other 500 kegs. It was claimed that was an entire contract, and that they might recover their damages for this breach. The court held that the stipulations as to the two lots of powder were to be treated as distinct, several agreements, and not as one entire contract, and that a claim for damages for the non-delivery of the last lot could not be set up as a counter-claim to an action upon a note given for the first lot brought by the indorser for value and before maturity, even though he had notice of a breach of the second contract at the time of his durchase. The court in passing upon that question say: "The paper, however," (speaking of the contract,) "does not stop here, but proceeds to state *how* and *when* the payments are to be made, from which it appears that the vendees were to give their notes for each shipment as soon as it was made; and these notes, it seems, from the one in suit, were also to be negotiable."

The *mode* of payment then was to be by negotiable note and the *time* of payment immediately upon the shipment of each parcel. The fact that a note was given makes it different from the present case, but not in any material point. "Can it be supposed to have been the intention of the parties to the agreement that after each negotiable note was given, the maker was to maintain a lien upon it for the performance of the other stipulations? We think not. The agreement to ship both lots is written, it is true, upon the paper, unitedly the two lots make up the aggregation of 1,000 kegs, bargained and sold, but in all the essential elements of a contract they are as distinct as if written upon separate slips of paper. It provides a different time for delivery and for payment, and a severable rate of compensation for each lot. No part of the price of the first lot is to be retained, or in any way made dependent upon the shipment of the second."

Now, it is claimed that case differs from this because there was a definite amount to be delivered and paid for —five hundred kegs of powder.

The 16th Wisconsin has also been cited upon this subject, which holds that a contract for the sale of wheat, at a stipulated price per bushel, is entire if the parties understand the delivery of the whole quantity to be a condition precedent to the payment of any part of the price, and such a contract is apportionable if the parties contemplate a delivery in parcels, and that payment should keep pace with the delivery. Where the contract is apportionable, the vendee becomes indebted to the vendor for each portion as soon as it is delivered and accepted without regard to any future breach or non-performance of the contract on the part of the vendor. Now, that was simply a contract for the delivery of one thousond bushels of wheat at a fixed price per bushel to be paid for upon delivery.

The argument against this contract being separable, is founded upon the fact, it is claimed, that there is no distinct quantity to be delivered and paid for. It is true the contract says that it is a car-load, but it is claimed it does not show how many shall be a car-load. It requires counting and culling to determine that. But would not the same principle apply to this case of the wheat—you would have to ascertain the number of bushels. It is true it may be more easily ascertained than you may count staves, but that does not determine the question of the correctness of the legal proposition. In that case if the wheat was defective, and not in compliance with the contract, the party would be under no obligation to receive it, and would have the right to refuse it entirely, or to pay for what he did receive and return the other. We have been cited to a case in the 5th Metcalf by counsel for the plaintiff in error as bearing upon the question, which was this: A party sold a cargo of grain to be delivered in bulk and paid for upon the delivery of the entire cargo. It will be seen at a glance that that is no such case as either the Wisconsin case, the Ohio case, or the one at bar. It is an entire contract, of course. No payment could have been required or demanded until the entire cargo was delivered. It is not a case parallel to the present one at all.

Now, what is the difficulty in determining this matter as to the staves? All it requires is simply that you count the staves. It would be presumed that the contract would be complied with and that none but merchantable staves would be shipped. If that were so, then no culling would be required at all—simply counting—precisely as you would count kegs of powder; precisely as you would measure bushels of wheat to determine the amount of money to be paid. So in this case you ascertain the number of thousands of staves upon each car-load, and payment for the number shipped is absolutely required under the terms of the contract. The fact that there were culls is a matter that does not at all affect the question, for while, doubtless, the party has a right to refuse to receive a car-load that had culls if he chose, yet, if he continued to receive them and put himself to the trouble of culling the staves and returning the culls he ought not be heard to say it is an entire contract. We hold, therefore, that each car-load forms a several contract in itself, to be received by itself, the quantity to be determined and paid for upon that basis.

Another assignment of error is to the charge that the plaintiff was bound to put the staves on the cars as they were stacked in his yard. It is difficult to see what error there could be in that. From the original contract it may be inferred that the plaintiff was getting out the staves and headings for delivery, and in the second contract it was distinctly recited between the parties to the contract that the staves and headings were then in the yard stacked at Ansonia ready for delivery, and the defendant bound himself to receive those identical staves and headings on board the cars at Ansonia in that second agreement. What error can there be then in that charge? It is true he says they were to be merchantable, and that he says they were not merchantable. That does not affect the question at all. Presumably, the plaintiff should have delivered merchantable staves. If what he did deliver were otherwise, the other party might refuse to receive them, or he might receive and pay for what were merchantable and return the culls. We think there is no error in that charge.

Defendant also excepted to the refusal of the court to charge as requested. There was but one refusal and hence it follows that that is specifically excepted to. That was on the subject of the usage prevailing in reference to this subject matter in the city of Cleveland. To make the point intelligible we will have to read the other requests: 1. "That the point of delivery was at Ansonia, Darke county, Ohio, and that being the point of delivery, the plaintiff was bound to deliver at that point or place upon the cars only merchantable staves."

2. "That unless the jury find from

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the evidence that a uniform, notorious and reasonable usage existed in Cleveland, making it incumbent on the defendant to cull staves in Cleveland under the kind of contract on which this action was brought, the defendant was not bound to receive any car-load of staves that were not merchantable as a whole."

3. "That if the jury find such custom existed, they must also find that this contract was made with reference to it, and with the understanding that the contract was to be interpreted thereby. All and each ot such propositions and statements of law were charged by the court as requested.

4. "That if the jury find such custom existed they must also find that the defendant was aware of its existence when he made this contract before he would be charged with any violation of this contract as interpreted by this custom"—which the court refused.

Now, what was the necessity of this last charge of the court, after they had already, at the instance of the defendant, charged the jury that to make that custom and usage binding upon the defendant it must have been a part of the contract itself, and the contract must have been entered into with reference to it and to be interpreted thereby? Why add that he must be aware of it? The court might properly say, "I have already said to the jury they must find knowledge on the part of the defendant of the existence of the custom before he could enter into a contract with reference to it."

Another reason which is entirely conclusive upon the point: The defendant, as shown by the pleadings and by the record, had the entire benefit of this custom or usage at Cleveland where the staves were received. He says that he had the right to compel the party to receive back the culls and he claims the right to recover the expenses of culling and cartage and the amount of freight he had paid. The defendant had the benefit of that to the jury. It is wholly immaterial whether he had any knowledge of the custom or not. He had the benefit of everything that could possibly grow out of it in the case, and could in no way have been prejudiced by it.

There was therefore no error committed on the trial of this case and the judgment is affirmed.

Foran & Hossack, for plaintiff in error.

Estep & Squire, for defendant in error.

APPELLATE COURTS OF ILLINOIS.

Second District.—Opinion Filed July 16, 1879.

BROOKS VS. HOTCHKISS.

Homestead.

The homestead right of the wife cannot be divested except by her consent or in the manner pointed out in the statute. It is the right to live upon, occupy and enjoy the premises as a home, and is paramount to any right or interest that the husband can transfer to a purchaser.

So, where a purchaser of premises, received a deed from the husband, but without the release of homestead by the wife, filed a bill in chancery, asking for an assignment of the homestead in such premises, and the court appointed commissioners who reported that the premises were not susceptible of division, whereupon the court decreed that on the complainant depositing $1,000 in court for the benefit of the wife, she should convey to him her homestead right, *held*, that the wife could not, in this manner, be divested of her homestead right.

Pillsbury, P. J.:

Bill in equity filed by defendant in error against plaintiff in error, praying for an assignment of homestead to him in a lot in the city of Peoria, which had been conveyed to him by Joseph W. Brooks, the husband of plaintiff in error, she not joining in said deed.

The lot was the homestead of Brooks and wife at time of conveyance. Soon after the conveyance the husband deserted his wife, who continued to reside upon the premises claiming the same as her homestead, and refused to give the purchaser possession, although he offered to pay her $1,000

The court appointed commissioners who reported that the premises were not susceptible of division, and the court decreed that she surrender possession of the premises to the purchaser from her husband upon his depositing $1,000 with the clerk of the court for her use, and she brings the case here on error.

By the first section of the statute, Rev. Stat. 1874, Ch. 52, Sec. 1, an estate of homestead is given to the householder to the extent in value of $1,000, which estate is not subject to the laws of conveyance, descent or devise. And such estate of homestead continues for the benefit of the wife, if the husband shall desert her and she continues in the occupancy thereof: Ibid. Sec. 2.

And no release, waiver or conveyance of the same is valid unless both husband and wife join therein: Sec. 4.

No release or waiver of the homestead by the husband is binding upon the wife, unless she join in such release or waiver: Rev. Stat. 1874, p. 278, Sec. 27.

A release of the homestead by the husband alone, is of no avail even as against himself: Richards vs. Green, 73 Ill., 54.

The statute has rendered it impossible for the husband to deprive his wife of the homestead right which is created as much, if not more, for her benefit than for his, except by her consent expressed in conformity with the statute. This homestead right is the right to live upon, occupy and enjoy the premises as a home, and is paramount to any title or interest that the husband can transfer to a purchaser, and even if it be admitted that the deed of the husband may convey the fee in the premises, yet such fee is subject to the occupancy of the householder; or in case he abandons his family, then to the occupancy thereof by them so long as they may desire to remain, or until the husband shall in good faith provide them another home, suitable to their condition in life; and he cannot remove her or his family from the homestead without her consent until such other home shall be provided: Sec. 16, Ch. 68, Rev. Stat. 1874.

To permit this decree to stand, would allow the husband to do indirectly by the aid of the court, that which he is prohibited by the statute from doing directly, which cannot be tolerated.

If such doctrine is to prevail, then the husband can in all cases deprive his wife and family of a homestead, by selling it for $1,000 less than its value, and have a purchaser through the aid of a court of equity, oust the wife by his payment to her of the $1,000 above the consideration named in the deed; and if a court of equity will interfere in such case, no reason is perceived why it would not compel the husband himself, if remaining upon the premises in like manner, to accept the $1,000. and surrender possession to the purchaser, for if he still remains in possession he is the one entitled to the homestead: Richards vs. Green, *supra*.

Such a doctrine would fritter away the beneficient provisions of the statute, and destroy all the safeguards thrown around the home of the wife and minor children by the law creating the estate.

It is presumed defendant in error

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claims the right to advance to plaintiff in error the $1,000, by virtue of sections 8 and 9 of the statute relating to homestead, but it will be observed these sections provide for the sale of the homestead where the premises cannot be divided, in cases only when it becomes necessary in the enforcement of a lien in a court of equity.

This is not a case of that kind.

The defendant in error has no lien; his is a simple title subject to the estate of homestead in the wife, as she did not join in the deed.

Neither is the defendant in error, aided in this case under the statute of partition, Chap. 106, for under this statute the court cannot order a sale of the homestead, and the payment of $1,000 to the party entitled to the estate of homestead, except upon the consent of such party, expressed in writing and filed in the court where the proceedings for partition are pending.

We perceive no way in which plaintiff in error can be divested of her homestead in this proceeding.

The decree of the court below will be reversed and the bill dismissed.

Decree reversed.

—[*Chicago Legal News*.

SUPREME COURT OF ILLINOIS

CHARLES CREIGHTON VS. PATRICK SANDERS.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

STATUTE OF FRAUDS.—Parol leasing—Part performance.—A verbal contract for the leasing of real estate for the period of five years is within the Statute of Frauds, and can not be made a ground of defense to an action by the landlord to recover the possession of the premises. Part performance does not, at law, take the case out of the operation of the statute..

LANDLORD AND TENANT—Extent of term.—Under a verbal lease of premises for five years at a monthly rent, the most that the tenant who has gone into possession can claim is, that the leasing was from month to month, and that he is therefore entitled to thirty day's notice to terminate the tenancy.

SAME—Sufficiency of notice to terminate term.—When a tenant goes into possession of real estate under a verbal leasing for a term of five years, at a monthly rental, which is voidable under the Statute of Frauds, the tenancy will be terminated by thirty days' notice from the landlord showing such intention, although the notice may assign a wrong reason, as, the non-payment of rent.

This was an action of forcible detainer, brought by Patrick Sanders against Charles Creighton, before a justice of the peace, for the possession of certain real estate in the city of Chicago, and taken by appeal to the Circuit Court, where a trial was had resulting in a verdict and judgment in favor of the plaintiff.

The weight of evidence seems to show that the defendant having, for several years before, been in the possession of the premises as a tenant of the plaintiff, on the fourth day of July, 1872, the parties verbally agreed for the leasing of the same premises to the defendant for the term of five years from July 1, 1872, for fifteen dollars per month rent. It was also shown, and not disputed, that defendant, in a few days after such verbal contract, commenced and finally erected a two-story addition to the dwelling house already upon the premises, which cost over $500.

The defendant continued to occupy the premises under such leasing until after this suit was brought, and paid all rent up to May 1, 1874, since which time no rent appears to have been paid. On November 26, 1875, the plaintiff caused to be served upon defendant a notice, as follows:

"To CHARLES CREIGHTON:

"You are hereby notified that, in consequence of your default in the payment of the rent for the months of May, June, July, August, September, October, November and December, 1874, and for the months of January, February, March, April, May, June, July, August, September and October, 1875, of the premises now occupied by you, being situate," etc., (describing them,) I have elected to determine your lease, and you are hereby notified to quit and deliver up possession of the same on or before the first day of January, A. D. 1876.

PATRICK SANDERS.

Chicago, Nov. 19, 1875."

There was no proof of any demand of the rent prior to the giving of such notice.

Mr. Pliny B. Smith, for the appellant.

Messrs. Mattock & Mason, for the appellee.

The opinion of the court was delivered by

SCOTT, J.:

Conceding the contract for leasing was for a period of five years, as defendant insists it was, a mere verbal contract, and never reduced to writing, it was, for that reason, within the operation of the Statute of Frauds, and could not be made a ground of defense to an action by the landlord to recover possession of the premises. The fact there was a part performance of the contract does not, at law, take the case out of the operation of the Statute of Frauds. So this court has expressly ruled in Warner vs. Hale, 65 Ill., 395, and Wheeler vs. Frankenthal, 78 Id., 124.

The utmost defendant can claim is, that the leasing was from month to month, and therefore he was entitled to thirty days' notice to terminate the tenancy. Thirty days' notice of the landlord's election to terminate the tenancy was in fact given, and although the landlord may have stated the wrong reason for it nevertheless it was thirty days' notice to quit and surrender the premises, and that was all defendant was entitled to under the law. He was not and could not be in doubt that it was the intention of the landlord to put an end to the existing tenancy, and the notice given was effectual for that purpose, although it may not have been as accurately worded as it might have been.

The instructions given for plaintiff are not so variant from the law, as we understand it, as to have misled the jury, nor do we perceive any error in the refusal of the court to give the instructions asked by defendant. The latter do not present the law as applicable to the case, and the court did right in refusing to give them.

The judgment will be affirmed.

Judgment affirmed.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Sept. 5, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Aug. 30.

John C. Mock and wife to Conrad Ernst and wife. $1,000.

Levi Chorman to Charles Saylor. $700.

Adelgunde Hopp and husband to George E. Hartnell et al. $300.

Wm. H. Cowle and wife to Everett Holley. $300.

F. D. Everett to Lewis Henninger. $1,900.

Wm. Lee and wife to Charles H. Hall. $100.

John Schutthelm and wife to John Finlay. $3,500.

Henry Clark and wife to C. H. Seymour. $1,200.

Sept. 1.

William Leggott and wife to C. C. Rand. $200.

John Gilbuile to Henrietta Fickelsher. $400.

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Peter Voelker and wife to Barbara Stroebel. $600.
Henry Taylor and wife to Phoebe W. King. $1,600.
Jacob Armbruster and wife to M. Wikidal. $2,500.
Christopher Bender and wife to George Foerber. $125.

Sept. 2.

John Thobold and wife to Matthias Mulchus. $300.
Sarah C. Bennett to Alex. Rodgers. $1,000.
Wallace Patterson to Susan Lynde. $350.

Sept. 3.

A. S. Porter and wife to W. E. Kennelley. $800.
Henry Trukamp to Concordia U. V. Society. $1,000.
Pauline Bloom and husband to J. E. Bryan. $60.
John Kelly and wife to The Society for Savings. $4,000.
William I. Stanley and wife to Mary V. Walton. $2,000.
George Wahl and wife to Charles Knopf. $175.
William Thornburg and wife to John L. Carlisle. $410.

Sept. 4.

The Trustees of Olmstead Falls Lodge No. 264, I. O. O. F., to Maria F. Hubbard. Four hundred dollars.
Same to Mark Hubbard. Two hundred dollars.
James W. Perkins to same. Five hundred and fifty dollars.
Joseph Keller and wife to Frank Luther. One hundred dollars.
Jerry Miller to Kate Sullivan. Two thousand two hundred and seventy-eight dollars and ninety-nine cents.
Charlotte Spear and husband to Irene R. Palmer. Two hundred and seventy-five dollars.

Sept. 5.

Jacob Armbrester and wife to Christopher Seafert. Seven hundred dollars.
S. S. Lowe and wife to Dudley Pettibone. Five hundred and eighty-two dollars.
A. D. Lofkin and wife to J. B. Meriam. Four hundred and fifty dollars.
George Hugh Herringshaw to Geo. Henry Herringshaw. One thousand and fifty dollars.

CHATTEL MORTGAGES.

Aug. 30.

Leonard Lynde to R. H. Davidson. $952.
J. J. Schwind to same. $530.
Chas. Kempert to Augusta Kempt. $70.

Sept. 1.

Jacob F. Koblenzer to Carry Miller. $200.
Michael Kane to Mrs. R. A. Jones. $30.
J. A. Gardner to Frank Wilmot. $100.
George A. Crandall to Theodore Hocke et al. $425.
John Renning to Carl Alex. Raeder. $46.
Andrew Steinmetz to Mertz & Riddle. $678.
Charles Walmann to Maria J. Sullivan et al. $225.

Sept. 2.

J. Kunkle to Michael Kunkle. $125.

Sept. 3.

Mrank Kukrol and wife to Frank Dacek. $150.
George W. Rich and wife to J. M. Deyoe. $87.
Alexander Tilley to James Cunningham & Son. $218.
G. E. Jewett to James R. Lonsdale. $200.
W. R. Anderson to C. H. Henry. $1,050.

Sept. 4.

Isaac W. Blake and wife to Myron S. Herrick. Three hundred dollars.
Wm. Kelley to Edward McDonald et al. One hundred and fifty dollars.
Walter Blythe to Felix Nicola. Two hundred and seventy-five dollars.
Henry Gentz to Potter & Hubbard. Three hundred and seventy dollars and seventy-five cents.

DEEDS.

Aug. 28.

John Zimmerman and wife to P. J. Kreitz. $5.
Charles G. Pickering et al to Frank Warner. $800.
Harriet Sprague to W. H. Doane. $1,000.
R. P. Willis and wife to Chas. E. Patric. $3,000.
Henry Wilson to Harriet L. Wilson. $250.

Aug. 29.

A. J. Broadwell and wife to Amelia L. H. Cunningham. $2,500.
Stephen Byrne and wife to P. H. Monks. $2,000.
John Stoll and wife to Sohn Rieble. $2,500.
H. Monks to Mary Byrne. $2,000.
J. Morley & Co. to John Riebel. $2,500.
Amanda Derindenger and husband to The Cleveland & Pittsburgh R. R. Co. $8,833.
Major Smith and wife to George Willey et al, trustees, etc. $1.
George Deetz and wife to Anna Kalina. $800.
N. P. Glazier to Joseph Horazdovsky. $1,176.
Franz X. Gyssler and wife to Andress Spengler. $500.
H. N. Johnson as assignee of Charles L. Morehouse to T. K. Bolton. $5,000.
W. K. Kidd, admr., etc., to J. R. A. Carter. $2,875.

Aug. 30.

Geo. W. Aikens and wife to John H. James. $850.
William Purser and wife to same. $850.
E. H. Bush and wife to Shelly Luse. $1,000.
Eleanor E. Brown to Louisa C. De Wolf. $2,000.
Thomas B. Cowley and wife to John Rusa. $300.
Conrad Ernst and wife to Mary Mack. $1,050.
George Faerber and wife to Charles E. Gehring. $7,250.
James N. Gahan and wife to Ellen Deegan. $170.
J. D. Reese and wife to Daniel D. Jones. $1.
Daniel D. Jones and wife to Mary R. Reese. $1.
Christian Kreiger to F. D. Everett, $2,400.
Mary Mahony to Henry Schultz. $275.
Michael McDermott and wife to W. R. Huntington. $2,625.
Charles Seyler to Louis Charmann. $12,000.
E. D. Stark and wife to Ellen Degan. $300.
J. M. Nowak, exr., etc., to Mary Kveis. $106.

Sept. 1.

Eunice Abbott to Thomas J. Parkhurst. $1.
James Brokershire, trustee, to Samnel H. Kirby. $1,800.
Asa Dunham and wife to Board of Education of Newburgh Township. $150.
Wm. P. Dutton and wife to Catharine Viekers. $1,500.
James M. Hoyt and wife to John Leberle. $400.
Same to Anna M. Fluck. $450.
Charles Hickox to The Britton Iron and Steel Co. $36,334.
Charles Kendall and wife to Geo. Kendall. $8,000.
Helena Kimmerling to Henry Starke. $1,500.
Anna M. Krauzsteuber et al to Catharine M. Tekemerer. $1,000.
D. W. Lewis and wife to Mrs. George Pencira. $2,000.

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Luther Moses and wife to A. D. Gurley. $1,190.

Felix Nicola and wife et al to Anna E. Kaestle. $1.

Barbara Stroebet to Peter Voelker. $750.

John Downs and wife et al to Sarah Downs. $5.

Alexander McLeod et al, by H. C. White, Mas. Com., to Samuel B. Prentiss. $1,333.

Charles McCudden et al by same to same. $1,200.

Anna Quinn et al by same to Lucretia H. Prentiss, extrx., etc. $2,-066.

Peter Zeigler et al by same to same. $600.

Edward P. Walcott et al by same to Seymour W. Baldwin. $734.

Sept. 2.

Alvah R. Barnard et al to John C. Monks. $5.

John C. Monks and wife to Alvah R. Barnard. $5.

Theodore Holdschlerg and wife to Henry Metzger. $675.

H. A. Massey to H. M. Sherman. $1,150.

Benjamin L. Pennington and wife to Catharine Condon. $1,500.

Charles Ruprecht and wife to A. S. Parmelee. ——

A. Wilmot and wife to Catharine Condon. $5.

Mary J. Warren to Mary H. Quayle. $8,000.

Wallace B. Brooks to Alicia W. Hoffman et al. $1.

Sept. 3.

Ellen E. Boest and husband to Wilhelmina Voelker. One thousand six hundred dollars.

Wilhelmina Voelker and husband to Ellen E. Boest. One thousand four hundred dollars.

Hiram Chappel to Christian Reider. Four hundred and forty dollars.

James Decker and wife to Ernst Masters. One thousand and forty dollars.

Richard Gilmour to Nicholas Hayes. One thousand dollars.

James M. Hoyt to Joseph Kroch. Five hundred dollars.

Daniel W. Hoyt, trustee, et al, to C., C., C. & I. Ry. Co. One dollar.

Same to same. Two thousand three hundred and seven dollars.

Andrew Wershing and wife to same. One thousand three hundred and thirty-two dollars.

Neal Morton and wife to Alexanner M. Lane. Four thousand nollars.

John Prindeville to Thos. Bartlett. Six hundred and fifty dollars.

Michael F. Palmer and wife to Charles Peterson. Seven hundred dollars.

J. W. Schupp to C. C. Hulet et al. Three hundred dollars.

R. S. Wellington and wife to Halet, Holmes & Johnson. Three hundred dollars.

Patrick Aspell to Catharine McIntyre. Five hundred and thirty-three dollars.

Catharine D. Fitzgerald to James Dillow. Three hundred and seventy-five dollars.

Andrew Dillow's heirs to James M. Dillow. ——

Wm. L. Cutter, exr., etc., to Wm. J. Boardman et al. Eighteen thousand dollars.

Sept. 4.

Elias Sims et al to W. S. C. Otis. One dollar.

George Savage and wife to John Dease. Nine hundred dollars.

Matthias Maravitz and wife to Peter Zucker. Four hundred dollars.

Thomas Langshaw and wife to Jas. Lentz. One hundred dollars.

Fred Herold and wife to Walter E. S. Preston. One dollar.

George A. Dodge and wife to Henry Trinkamp. Three thousand dollars.

Neal Norton and wife et al to Mary Norton. One dollar.

John Campbell and wife to same. One dollar.

U. S. CIRCUIT COURT N. D. OF OHIO.

Sept. 1.

3841. N. O. Moss vs Arizona & New Mexico Ex. Co. Demurrer.

3871. Louis C. Roger vs Russell & Co. Replication. Peck & Ritcher of Dayton for complainant.

3890. Amos R. Eno vs O. W. Cozad et al. Answer of T. D. Crosby and L. F. Burns, Legatees, etc. Baldwin & Ford.

Sept. 2.

3910. John G. Beckman vs Henry Reno et al. Petition filed. Bishop, Adams & Bishop.

Sept. 4.

3911. Bank of North America vs The Northwestern Transit Co. Petition filed. Baldwin & Ford.

Sept. 4.

3285. Hoppock et al vs Uhl et al. Answer of Robert Long. Burke & Sanders.

COURT OF COMMON PLEAS.

Actions Commenced.

Aug. 29.

15776. Maurice Perkins vs Henry Chisholm et al. Money only with att. Adams & Beecher and R. F. Paine.

15777. A. B. Ruggles vs Rachael Morgan as admx., etc. Equitable relief. Tyler & Denison.

15778. The St. Clair Street Gravel Road Co. vs The City of Cleveland. Money only. Prentiss & Vorce.

15779. Peter Hoffman vs Peter Schutthelm. Money only. C. W. Coates.

15780. Arnold Hippler vs Eleanor Brune et al. Money, account, sale of land and relief. J. S. Grannis.

15781. Lawrence Allison et al vs C. B. Jackson et al. Error to J. P. Foster & Carpenter; M. C. Hunt and N. A. Gilbert.

15782. John Devand vs Celestine Hippler et al. Money, to subject land and relief. A. Zehring.

15783. Jacob Mueller vs Fred Michel et al. Same. Same.

15784. C. W. Schmidt vs Kate McKone et al. Same. Same.

15785. Edmund Walton et al vs Sophia L. Ackley et al. Money and to subject lands. Pennewell & Lamson.

15786. Daniel Bennett vs Edward T. Granger. Money only. Tyler & Denison.

15787. Ferdinand Welch, admr., etc., vs Thomas S. Paddock et al. Money and to subject lands. Ingersoll & Williamson.

15788. George Gebhard et al vs Allen Co. Mutual Fire Ins. Co. Money only. J. W. Tyler.

15789. John H. Jacobs vs Lucien Crawford et al. Equitable relief. Lewis & Castle.

15790. Elias Cohen vs The City of Cleveland. Money only. G. E. and J. F. Herrick.

15791. Nathan L. Post vs Wm. S. Forrester et al. Money only. Baldwin & Ford.

15792. Wm. R. Smith et al vs M. A. Smyth. Appeal by deft. McGinness. J. J. Carran; Mix, Noble & White.

Sept. 1.

15793. John D. Briggs vs W. C. Hathaway. Cognovit. A. J. Marvin; E. W. Laird.

15794. George T. Smith vs Wm. Cubbon et al. P. P.; H. P. Bates.

15795. Manuel Halle vs John McCarty et al. Money and sale of lands. Goulder, Hadden & Zucker.

15796. Frances M. Knight et al vs Wm. Chisholm et al. Money only. Foster & Carpenter.

15797. Dan McCue vs S. Osterhold, admr., etc. Appeal by deft. Judgment August 4. J. C. Coffey; S. Osterhold.

Sept. 2.

15798. Kate H. Rice vs Marquette & Pacific Rolling Mill Co. and garnishees. Money only with att. Terrell, Beach & Cushing.

15799. Myrtilla Wilkins vs W. W. Wheaton and garnishee. Same. Same.

15800. Michael H. Steele et al vs James H. Burgert et al. Money only. J. G. Pomerene and C. E. Pennewell.

15801. R. P. L. Baber, exr., etc., vs George A. Wood et al. Money only. Bishop, Adams & Bishop.

15802. J. W. Street vs O. H. Bentley et al. Equitable relief. J. W. Street.

15803. Benj. F. Powers vs Ed. E. Roung et al. Money and to subject lands. E. H. Eggleston.

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Sept. 3.

15804. Dr. E. W. Robertson vs C. Worden. Appeal by deft. Judgment Aug. 4. Saffords; M. Rogers.

15805. Clarence A. Smith vs Richard Edwards. Appeal by deft. Judgment August 4. Marvin, Taylor & Laird; Foster & Carpenter.

15806. Anthony Lavalle vs The C., C. C. & I. Ry. Co. Money only. Jackson, Pudney & Athey.

15807. James W. Pratt vs S. H. Lamon. Appeal by deft. Judgment August 7. W. M. Safford; Jackson, Pudney & Athey.

15808. Edwin Duty vs Gleason F. Lewis et al. Money only. Gary & Everett.

Motions and Demurrers Filed.

Aug. 29.

3011. Alger et al vs Linn et al. Motion by deft. G. W. Alger to make petition more definite and certain and to separately state and number causes of action.

3012. Williams vs Grady et al. Motion by defts. Grady and Ann Cassin to make petition more definite and certain.

Aug. 30.

3013. Murphy vs Berea Stone Co. Demurrer to the petition.

3014. Perkins, exr., etc., vs Keough et al. Same.

3015. Richard vs Wagner et al. Motion by defts. to dismiss action for want of petition.

3016. Bainbauer vs Isekeit et al. Mo-Motion by defts. Isekeit to set aside sale.

3017. Same vs same. Motion by Henry Manzelman to set aside sale.

Sept. 1.

3018. Mathias vs Clewell Stone Co. et al. Motion by deft. Bauknecht to consolidate this case with 15751.

3019. Hecker vs Watterson, treas. Demurrer to the petition.

3020. Jaynes vs same. Same.

3021. State on complaint of Mary Lutz vs Horton. Motion by deft. to dismiss action and quash proceedings.

3022. Edwards et al vs Highland Coal Co. et al. Motion by defts. Lyman Webster et al for another reference to Charles E. Pennewell.

3023. Sahr vs Hills et al. Motion by plaintiff to confirm report of H. M. Johnson, referee.

3024. Rawson vs Patterson et al. Motion by deft. John Patterson to set aside sale.

Sept. 2.

3025. Wendt vs Umbstaetter et al. Demurrer by plff. to 2d defense of answer of H. Body.

3026. Gulliford vs Culver. Motion by deft. to dismiss action for want of petition.

Sept. 3.

3027. Bainbauer vs Isekeit et al. Motion dy defts. Isekeit to vacate judgment and decree.

3028. Same vs same. Same motion by Henry Manzelman.

3029. Reibel vs Gynn et al. Motion by plff. for judgment on the pleadings.

3030. Johnson vs West et al. Demurrer by plff. to answer of Ephraim West.

3031. Houghtoling et al vs Brennan et al. Motion by plffs. to confirm report of Alex. Hadden, trustee.

Sept. 4.

3032. Lovejoy vs Duerfeld & Maedji et al. Motion by deft. Carl Seyler for new trial.

3033. Scheurer vs Mielert et al. Motion by plff. to confirm report of E. K. Wilcox, referee.

3034. Holmes vs Wyman, admr., etc., et al. Demurrer by deft. Wyman, admr., to the petition.

3035. Same vs same. Same by Jacob Wyman.

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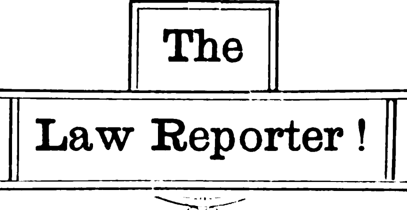

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The Cleveland Law Reporter.

VOL. 2. CLEVELAND, SEPTEMBER 13, 1879. NO. 37.

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THE delay in the appearance of this issue of the LAW REPORTER has been on account of the demand for our type in brief and record printing.

WE owe it to the judge who delivered the opinion in the case of Kane vs. Wilson & Hughes Stone Co., published in this issue, to say that that portion of the opinion preceding the paragraph beginning with "The judge trying the case," etc., we supplied by examining the record, not having been present at the delivery of the forepart of the decision. The remainder is a shorthand report.

Book Notice.

AMERICAN INTER-STATE LAW, by David Rorer,of the Iowa Bar. Author of "Rorer on Judicial and Execution sales." Edited by Levy Mayer,of the Chicago Bar. Chicago: Callaghan & Co., 1879. $5 net.

The author of the above work defines American Inter-State Law, as "the law which governs the American states in their dealings and relations with each other, as well as with the national government, and the extent of recognition and binding force which is accorded the citizens and laws of each state, and of the national government, in the American courts."

Among the subjects treated of, as embraced within the foregoing definition, are, correlation of government, or State and National sovereignty, citizenship and allegiance—suability of States, Inter-State right of suit—jurisdictional requisites; concurrent civil jurisdiction, State and National; common law and civil law of State and National courts; inter-State equity jurisdiction and practice; inter-State law of contracts; rules of property and right in State and National courts; actions and suits on judgments and decrees; inter-State proof of records, judicial proceedings and laws; proceedings by foreign attachment; inter-State discharge by State court; actions for torts and transitory actions; extra Territorial force of laws; statutes of limitation; marriage and divorce; inter-State legal status of persons; legal status and jurisdiction of personal property and personal interests; legal status and jurisdiction of laws; criminal jurisdiction; the police power of the States; inter-State rights; powers and duties of executors, administrators and guardians; private corporations and works existing in two or more States; foreign private corporations, receivers, other trustees and trust funds; admiralty and common law jurisdiction in maratime cases; inter-State commerce, State taxation of National banks, bonds and credits; bankruptcy; writ of habeas corpus; right of common in waste places and waters and right of eminent domain; jurisdiction over State boundary rivers; power of the States to license inter-State ferries; removals to United States Court; transition from Territorial to State governments.

The great number of authorities cited shows how largely the mat-

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ters treated of have been the subjects of judicial investigation in both State and Federal Courts. It will be found to be a very useful work to the legal practitioner.

The chapter which treats of State and National sovereignty would be very profitable reading just at this time, for those political editors and pseudo-statesmen who seem incapable of comprehending that we live under a duality of government, each acting separately and independently of the other within its proper sphere.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

[WATSON, HALE AND TIBBALS PRESIDING.]

SIMEON C. KANE VS. THE WILSON & HUGHES STONE CO.

Contract—Breach of—Rule of Damages, where Work done not According to, etc.

WATSON J.:

The action below was brought by the Wilson & Hughes Stone Company against Kane to recover upon a claim which had been assigned to the plaintiff by a man by the name of Scott, the claim arising out of a contract between Scott and the defendant Kane by which Scott had agreed to furnish, dress and lay in the wall all the stone needed for the erection of a certain building in this city, known as Windsor Block. The petition alleges that Scott had been paid all of the contract price except a part of the last payment which fell due October 1st, 1875—the sum of $600.

The answer denies that the terms of the contract between Scott and the defendant are correctly stated in the petition or that they were complied with by Scott, or that the last payment under the contract ever became payable.

By way of setoff and conterclaim the defendant avers in his answer that the Wilson & Hughes Stone Company, in consideration of the assignment of the claim to it, assumed all the liabilities of Scott to the defendant, and that by the terms of the contract mentioned in the petition Scott agreed to furnish for the building "clear Amherst stone free from spots and discolorations." That afterwards the provision as to Amherst stone was modified so as to allow stone to be furnished from the Ohio Stone Company, likewise to be "free from iron and all spots or discolorations," and it is averred that Scott did not comply with this provision of the contract thus modified, but furnished stone from the quarry of the plaintiff. the Wilson & Hughes Stone Company, which was badly spotted and discolord, rendering the building unsightly and much less valuable than it would have been had Scott complied with the contract.

The defendant further alleges that Scott was guilty of repeated and unnecessary delay, delaying the work two months, whereby the defendant, being liable therefor to the owner of the building, was damaged in the sum of $3,000. The defendant avers a breach of contract by Scott also in respect to pointing up and cleaning down the stone work after it had been laid, and asks a judgment against the plaintiff for the sum of $3,600.

The case went to trial and resulted in a verdict and judgment in favor of the plaintiff for the amount claimed by it, and is now in this court for review. A number of errors are assigned in the record. The first is: The Court erred in admiting evidence offered on the trial by the defendant in error.

The plaintiff in rebuttle put to various witnesses questions relating to the character of the stone in the building—as to whether the stone was spotted or discolored, thereby to contradict the testimony of the defendant's witnesses to the effect that the stone were in fact spotted and discolored. These questions were objected to, the objection overruled, the defendant excepted, and the witnesses answered in substance that that there were none or they observed none.

The judge trying the case said it was proper rebutting evidence, and it occurs to us that it was within the proper range of the discretion of the Court to admit it then even, if it were properly evidence in chief. We regard it as evidence that might be given in chief, though not necessary to be given in chief. It was evidence that related to the defense. It was called out on the defense. They were specific questions for the purpose of explaining or modifying the effect to be given to the evidence that had been given in the case by the other party. We see no reason why it should not have been admitted upon an application to the Court as a matter of discretion, and it will not do to say that, because the Court assigned an improper reason for admitting the evidence, an error had been committed.

The third assignment of error is that the Court erred in its charge to the jury. We have searched the charge for we had supposed that therein was the real question in the case. While we recognize the fact that there are legitimate questions in that we have not been able to agree with counsel that the Court erred. The defendant first asked the Court to charge: "Plaintiff having, in its pleadings, based its right to recover exclusively on contract, and on having carried out the contract, can only recover on proving to your satisfaction, that Scott did the work according to his contract, and cannot in this action recover for work performed not according to contract." This charge the Court refused to give, and the defendant excepted.

The defendant also asked the Court to charge the jury: "The parties having agreed that the work should be done to the satisfaction and acceptance of Blythe the architect, then Blythe's opinion, formed in good faith, is binding on the parties, and if in good faith Blythe was not satisfied with the work, and has not accepted it, and was of the opinion that the building was not completed, then plaintiff cannot recover for the

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$600, which it avers was only payable on completion of the work." This was refused. But the Court did charge upon the subject of these requests, as follows: "In contracts where the materials are subject to the inspection and acceptance of any particular persons, that inspection and acceptance is conclusive, unless there is some fraud or concealment practiced by the person furnishing the materials. If these stone were fairly and honestly exposed to the view of the architect, and he, after such inspection permitted the stone to go in without objection and there was no defect in the stone known to Scott, or which by careful inspection he could not discover, and such stone were accepted by the architect without objection, the architect could not wait until after the building is completed, and then object to a particular stone which had passed his inspection. But if Scott put in stone which the architect had rejected and thus deceived the architect, Scott would be liable unless Kane knew that such stone had been used after being rejected. If Kane knew it or connived at it, then there is no liability of Scott to Kane on account of it, although Kane might be liable to Otis. If imperfect stone went into that building with the assent or without objection on the part of Kane, Kane knowing at the time that they were defective, no claim for damage can be sustained by Kane on account of defects in the stone of which Kane had knowledge, even though he may be liable in damages to Mr. Otis on account thereof." To this charge the defendant excepted.

Now, we are unable to see any error in that. We regard this as a cautious charge—a charge appropriate and in very guarded language. We can see no reason for disturbing the judgment in this case on account of anything that is said in it.

The Court, among other things, after charging the jury that the defendant had withdrawn his claim for an affirmative judgment, that they must first find that plaintiff was a corporation, that Scott had assigned his rights to plaintiff and what was the contract between Scott and Kane, charged the "jury that they must, to enable plaintiff to recover, find that Scott substantially complied with the contract. But this is not a technical rule; it does not apply to immaterial points, but to the substantial requirements of the contracts. If the work was substantially completed then the plaintiff is entitled to recover so much as the materials were reasonably worth after deducting all damages which Kane sustained by reason of defects in the materials or work and for which Kane would be liable to Otis."

On this part of the charge is based another of the principal objections to this judgment or ruling of the Court below. The Court charged if the work done and the materials furnished were not in accordance with the contract, that the plaintiff could recover so much as the work and materials were worth. We understand the rule to be laid down in the 7th of Pickering, and which is approved in the 26th of Ohio by our own Supreme Ccourt and adopted as law, that when work has not been done strictly in accordance with the contract—all the materials may not be strictly in accordance with the contract—where there may be some very small omission in finishing up—that in all cases of that class the party may recover the value of the work and material, less the difference of value between the way in which it is done and what it would be if done strictly in accordance with the contract. But to that the Court should probably have added that in finding out the value of the work the jury should take into consideration the contract price. By adopting the rule in reaching the value of the work the defendant is entitled to the benefit of his contract if he has got a contract. In estimating the value of the work he has done, he ought to have the benefit of it. Although this does not appear in this charge yet we think we are bound to presume that it was given by the Court. This record does not purport to set out everything the judge said in his charge. It says, "it was said among other things." There is no error in the charge as given as far as it goes. We feel that we are bound to presume that the Court below did make all the proper and necessary explanations of the law as laid down in the charge. If the party had found that this was omitted and he relied upon it as error he could very easily have availed himself of it by asking the Court to add to the charge that the jury must, in estimating the value of that work take into consideration the contract price at which the work, was to be done. If that had been done and the Court had refused to give it then it would be apparent upon its face that there was error in the charge. But that not having been demanded, and this charge being "among other things"—it not appearing that it was not given, we cannot presume that that explanation was not given, and for that reverse this judgment. We are not authorized by the law to that.

We. therefore, see no error in this case in the admission of evidence, in the charge or the rulings of the Court in regard to the law of this case.

Mix, Noble & White, attorneys for plaintiff in error.

McKinney & Caskey, attorneys for defendant in error.

CUYAHOGA COMMON PLEAS.

SEPTEMBER TERM, 1879.

HIRAM H. LITTLE VS. HENRY THOMAN ET AL.

Equity of Redemption—Liability of purchaser of, as to encumbrances, etc.

Hamilton, J.:

The petition in this case contains two counts. The first count is founded upon a note and mortgage. In the second count it is sought to obtain a personal judgment against Joseph Stoppel, because it is said that while one Riblet owned the property, he sold the equity of redemption to Stoppel and that Stoppel, in the deed which he took, as

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sumed and promised to pay this note, upon which suit is brought; and that he has failed to pay it. Stoppel files a demurrer to the second cause of action on the ground that it does not state facts sufficient to constitute a cause of action as against him.

It is claimed that the petition nowhere states that Riblet ever assumed to pay this note and mortgage; that it does not aver that he ever became liable in any way to pay this note, but simply avers that he became the owner of the equity of redemption at sometime, and that while so, the owner he sold that equity to Stoppel. and that Stoppel agreed to pay the holder of that note its amount. It does not anywhere appear, it is claimed, that there was any obligation resting upon Riblet to pay this note at all, and that, therefore, there is no sort of privity between the parties. I do not think, however, there is anything in that objection. It seems to me that if a party receives a consideration from another, who is perhaps under no obligation to a third party at all, on account of which he assumes to pay the third party a certain amount of money, that third party may bring his suit and recover upon the strength of that promise. The promissor having received a consideration for his promise, we see no objection to the benificiary bringing suit in his own name to enforce that promise.

But it is said here, there is no consideration named for the promise. Now, under the decision in the 14th O. S., the Supreme Court hold that where the equity of redemption is sold by name to a party, it is to be presumed in law that the party thus getting the equity of redemption assumes to protect the party selling the land, from any mortgage which may be on it, because they say having bought the equity of re demption he never could be benefited in any way by owning that equity of redemption, unless he took care of the mortgage upon the property, and that from the nature of the transaction a promise must be presumed. But we are not forced to such a state of things in this case, because it is expressly stated that he did promise in so many words to pay it, and the nature of the transaction, it seems to me, shows sufficient consideration for the promise. The demurrer will be overruled.

INGERSOLL & WILLIAMSON for plff.

J. W. HEISLEY and STONE & HESSENMUELLER for def'ts.

Editor Law Reporter:

You may some time be in want of a short and portable definition of an "oath." I give you the following, which I made as a footnote,some time since, while reading what Rutherforth says of them. "An oath is a bill of sale on a man's soul, given to the devil, with a defeasance clause conditioned that if he speak the truth, the sale shall be void."

Yours truly,
F. J. T.

Cleveland, Sept. 3, 1879.

NOTES OF RECENT CASES.

USURY.

Discounting paper.—It is not usury to buy a note, in the usual course of business, at a discount greater than the rate of interest allowed by law.

Where a debtor agrees with his creditor to give him a commission of $1,500 if he will find a party who will advance the money then due and about to become due on his notes, secured by deed of trust, and thereby procure him a year's extension of time in the payment, and the legal holder of the notes transfers them by delivery to another party, who agrees with the holder to take them and give the desired extension for $1,500, and money enough to make the interest on the notes equal to ten per cent., and the holder pays such sums and procures the taking and discounting of the notes, the purchaser having no knowledge of the terms upon which the extension had been granted by the legal holder of the notes, the party so taking and discounting the notes will not be chargeable with usury.

ASSIGNMENT.

Defense against assignee, in equity.—In equity, on bill to foreclose a mortgage by the assignee of a note, secured by trust deed, the mortgagor may interpose any equitable defense he has against the original payee or mortgagee arising out of the original transaction; but this rule does not extend to a set-off of a debt due from the assignor to the mortgagor, arising out of a collateral or subsequent matter.

PARTIES.

To bill to foreclose.—On bill to foreclose a deed of trust upon land selected subsequent to the making of the deed of trust, and taken possession of by the South Park commissioners, and condemned by legal proceedings, but not paid for, such commissioners are necessary parties.

FORECLOSURE.

Of land taken for public use.—Where mortgaged property is condemned and appropriated to public use, and the compensation awarded to the owner or mortgag or exceeds the sum due on the mortgage, and is not paid, it is not proper on bill to foreclose to order a sale of the premises. The sum found due should be ordered paid out of the condemnation money. Colehour vs. State Savings Institution, 90 Ill.

CARRIER.

Special contract—Bill of lading —Consignor.—A bill of lading containing a contract restricting or limiting the common law liability of a carrier, in the absence of fraud or mistake, is binding on the consignor, whether it is read by him or not.

The consignor is not bound to accept or agree to the terms of a bill of lading restricting the common law liability of the carrier, but, in such case, it is his duty to notify the carrier, within a reasonable time, of his refusal to accept the instrument.

Carriers may restrict their liability, as insurers, by special contract, but cannot by contract or otherwise exempt themselves from liability for losses which are the result of negligence of them-

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selves or agents. Louisville & Nashville R. R. Co. vs. Brownlee, Court of Appeals of Ky., March 9, 1879.

WARRANTY.

Any affirmation of the quality of the article made at the time of sale intended as an assurance of the fact stated and relied on and acted on by the purchaser will constitute an express warranty. Whether such representations were made with the intention of securing a sale, and were relied on by the purchaser, is for the jury to be informed from the nature of the sale and the circumstances of the particular case. W. G. Crenshaw, President of the Atlantic and Virginia Fertilizing Co., vs. Daniel W. Slye. Ct. of App. of Md.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Sept. 12, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Sept. 6.

Terfil Sikorski and wife to John Conway. $800.

Gottlieb Krause and wife to John Schiedler. $600.

John Berlin and wife to Peter Gestenshlaeger. $400.

Marcus C. Parker and wife to J. H. Dremonn. $2,500.

J. C. Dees and wife to J, P. Voehler. $1,000.

Henry Winkes and wife to Mary O. Sommer.. $400.

Isaac Moore and wife to The People's Savings and Loan Association. $250.

Maria J. Michael to M. S. Hogan. $200.

Sept. 8.

William Higson and wife to Mary H. Darrow. $600.

Same to Hannah Higson. $600.

Sohn Widemair and wife to Charles Pfaff, trustee, etc. $900.

Leah Stearn to Isadore Lehman. $1,500.

George T. Robertson and wife to The Cit. Savs. and Loan Association. $2,000.

John Gibbons and wife to the Soc. for Savings. $400.

Phillip Maltera and wife to Louis Rickesberger. $150.

John Toole to John Kelly. $962.

Sept. 9.

Henry Bliss and wife to Moritz Eckerman. $500.

Mary Bregelman et al to Henry Lammersman. $$1,700.

W. E. Loomis and wife to John D. Pullen. $580.

Matilda E. Morgan and husband to Louisa I. Kent. $1,000.

John Rettger and wite to The Society for Savings. $1,000.

Sarah R. Burke and husband to The Society for Savings. $1,200.

Simeon Hovey and wife to Oscar Hart. $3,000.

August Doeple and wife to John Riebel. $1,500.

Sept. 10.

Samuel Woodhouse to Cleveland, Brown & Co. $507.

May E. White and husband to R. C. White. $1,000.

Edward T. Lufkin to Dudley Baldwin. $600.

Mary Joseph and husband to P. G. Watmough. $3,000.

James L. Higgins to Society for Savings. $1,500.

Albert Zmina to Thomas B. Cowley. $490.

Christ. D. Sixt and wife to Louisa Knies. $200.

John Pollock to G. H. Foster et al. $1,900.

Sept. 11.

Jacob Held and wife to Frederick Haltnorth. $300.

John Kolb and wife to Charles Cherveaker. $1,800.

Mary Ann Johnson to The Society for Savings. $1,400.

Charles Morlboch et al to Philip Hill. $1,500.

Sept. 12.

Herman Goetz and wife to Sophia Xahn. $700.

Hermann Goerrs and wife to John F. Donnelly. $250.

John Frederick Menuit and wife to Magdalena Baehr. $650.

Melatiah Pennington et al to Sarah Walworth. $1,500.

John J. Forbes to Catharine Fowler. $1,200.

J, M. Southam and wife to William H. Archer. $700.

Caroline M. Cook and husband to Sarah A. Ashley. $1,267.

John W. Moore to Hannah Ford. $4,500.

CHATTEL MORTGAGES.

Sept. 6.

Wm. Rogers to Eugene Mathivet. $200.

Sheldon Beckwith to Flavel Beckwith. $350.

Sept. 8.

W. E. and C. F. Pedrick to L. W. Munroe. $600.

David Comier to Martin Dodge. $100.

Sept. 9.

Fred Laub to F. Wentz. $300.

S. C. McDonald to H. J. Palmer. $159.

Sept. 10.

Elias Farrell to David Cormier. $300.

Samuel Woodhouse to Cleveland, Brown & Co. $407.80.

S. H. Lamon to John Evins. $775.

Same to same. $300.

Robert Holmes to Ferdinand Welch admr., etc. $205.

John L. Odner and wife to Isaac Leisy & Co. $2,000.

Sept. 11.

Louis Bamerlin to George Weciel. $250.

John McKay to Maria E. Myers. $300.

Sept. 12.

C. Kuebrick to Peter Eichler. $300.

DEEDS.

Sept. 4.

Andrew Cunningham and wife to Alfred Henry Cunningham. One dollar.

Sept. 5.

Spencer Borden to A. A. Pope. $1,

Mary A. Gill et al to Phillip Anthony. $560.

Frederick Roehl, admr., etc., to Christian Byer. $1,334.

Louisa A. Cook and husband to Charles G. King. $16,500.

Same to Herbert F. Taylor. $25,000.

Jane Donohue Keeler, admx., etc., to Joseph Perkins, $1,100.

George Henry Herringshaw et al to George Hugh Herringshaw. $2,000.

Portland Hyde and wife to Celia H. Ledwell. $3,000.

A. F. Kinkinik and wife to John F. Kinkinik. $50.

Shelby Luse and wife to Jessie H. Luse. $1,800.

Celia H. Ledwell and husband to J. W. Nash. $1,500.

Walter E. S. Preston to Aaron Bloch. $900.

Homer C. Powers and wife to Mary C. Updike. $140.

Herbert F. Taylor to Louisa A. Cook. $1.

Christian Gregerson et al, by H. C. White, Mrs. Com., to David C. Baldwin. $734.

Elijah Worthington et al by same to Charles C. Baldwin. $400.

Sept. 6.

Olivia S. Cooke to albert Birr. Two hundred and fifty dollars.

John Conway to Leopil Sikosski. One thousand five hundred dollars.

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George Downing and wife to J. H. Flaherty. One thousand dollars.

John Flick and wife to Lucretia B. Blakeslee. Four hundred and fifty dollars.

Ozias Fish to Jacob B. Hartman. One dollar.

James M. Hoyt and wife to Mrs. Mary Sprosty. Six hundred dollars.

Converse Mayo, guardian, to Hannah E. Hawley. One dollar.

James Parey to same. One dollar.

Same and wife to same. One dollar.

Mary H. Quayle to Thomas Quayle. One dollar.

John Riebel to Rosa Hanousek. One thousand two hundred and twenty-five dollars.

Elias S. Root and wife to Lititia Bentley et al. Six hundred dollars.

Letitia Bentley et al to H. W. Bell, trustee. One thousand dollars.

E. O. Sherwood to Alanson Clark. Two thousand dollars.

F. M. Stearns and wife to Jacob Schwades. Six hundred dollars.

L. J. Talbot and wife to Malinda Lamb. Six hundred and eighty dollars.

Dorothea Felschow to Charles Felschow. Four hundred and sixty-seven dollars.

Neil Campbell et al by H. C. White, Mas. Com., to Samuel B. Prentiss. Three thousand four hundred and nine dollars.

Wenzel Hoffman by Felix Nicola, Mas. Com., to John Behak. Four hundred dollars.

James Quayle, Mas. Com., to Barbara Hildebrand. One thousand three hundred and two dollars.

John Stosky and wife by C. C. Lowe, Mas. Com., to Dorothea Felschow. Four hundred and sixty-seven dollars.

Sept. 8.

Edward Breen and wife to William Obdar. $300.

William Bucher and wife to George W. Richardson. $1.

J. Twing Brooks, assignee, to H. Stickney. $1.

Sarah B. Cozad, trustee, to C. D. Everett. $650.

Allen P. Cannon and wife to Jane Hamilton. $1,000.

Patrick Donohue and wife to Richard Harrison. $2,000.

Louis J. Filiere to Wm. Obder. $1.

Charles G. King and wife to James M. Hoyt. $1.

John Kelly and wife to John Toole. $2,900.

Aannah Moore to Henry Clauss. $1,200.

Henry M. Tifenbach et al to Philip P. Tifenbach et al. $500.

P. H. Weik to John G. Baker. $2.

Thomas Graves, Mas. Com., to Isaac Wolf. $1,500.

Marianne B. Sterling to Samuel H. Kirby. $875.

Isaac Wolf and wife to Solomon Lodge No. 16, I. O. B. B. $1.

Sept. 9.

Charles Barkwell and wife to Hubbard Cooke, trust. One dollar.

Dudley Baldwin and wife to Edward T. Sufkin. One thousand one hundred dollars.

John Collins and wife to John Gibbons. One thousand dollars.

Conrad Ernst and wife to Frank E. Dellenbaugh. One thousand dollars.

Frank E. Dellenbaugh to Eliza Ernst. One thousand dollars.

Maggie M. Hunt to Mrs. Ellen Hunt. Twenty-five dallars.

R. P. Myers et al to M. W. Clelland. Two thousand one hundred and twenty-eight dollars.

Martin Morrison and wife to Solomia Wieber. Four thousand three hundred and fifty dollars.

Michael McAnarny to Michael Gilfeather. One thousand and fifty dollars.

Moses Pearn and wife to Levi Burgert. One thousand three hundred and seventy-eight dollars.

Andreas Schabel to George Vander Au. Two thousand two hundred dollars.

James Walker and wife to D. E. Hollister. One thousand one hundred and nine dollars.

James Watkins to Sarah R. Burke. One dollar.

Fred Gerling et al by C. C. Lowe, Mas. Com., to R. F. Wadsworth. Four hundred and fifty dollars.

James Quayle, Mrs. Com., to Anna Weigel. Three thousand dollars.

William Wills et al by Felix Nicola, Mas. Com., to Jefferson Fish. Five hundred and fifty dollars.

Sept. 10.

Dudley Balwin and wife to Wm. Walker. One thousand three hundred and fifty dollars.

Thos. B. Cowley and wife to Frank Harlatko and wife. Five hundred and seventy dollars.

Same to Albert Zmina. Five hundred dollars.

Rosina Peihler and husband to Henry Heideloff. Six hundred and seventy-five dollars.

Joseph Stoner and wife to Isaac K. Davies. Eight hundred dollars.

A. C. Stevens and wife to P. Roat Everett. Four thousand three hundred dollars.

J. H. Thorp and wife to W. M. Safford. One dollar.

W. M. Safford to Lucy L. Thorp. One dollar.

Thomas H. White and wife to Mary E. White. One dollar.

Charles N. Sorter et al to Sarah L. Landa. One dollar.

F. Wallace Coffin et al by E. H. Eggleston mas com to Hannah O. Waite. One thousand six hundred and sixty-seven dollars.

Sept. 11th,

Frederick W. Fay and wife to C. M. Ryder. Two thousand three hundred dollars.

C. W. Coates, adm ete to Phillip Hill One thousand eight hundred dollars

Phillip Hill and wife to Charlotte Marback One thousand eight hundred dollars

E H Kneppenberg et al by E K Bauder mas com to C and F Fortlage et al Two thousand nine hundred and thirty dollars

C Fortlage et al to E H Knippenberg Two thousand nine hundred and fifty dollars

E H Knippenberg and wife to Clucus H Collister One dollar

Clucus H Collister to Maria Clara Knippenberg One dollar

Mary Maher to Catharine Busby One thousand six hundred dollars

John Martin to Henry Martin One hundred and thirty dollars

Nelson Moses to Henry Houck Eight hundred and ninety-eight dollars

John Skallion and wife to W Wastok Four hundred dollars

N L Stanton and wife to Frank A Spencer One dollar

Robert Woss to Richard Parsons One dollar

Wm Decker et al by C C Lowe mas com to Charles H Patter and wife Eight hundred dollars

John M Wilcox, sheriff to Ellen Hearnes Seven hundred and thirty dollars

Hills, Turner & Bremeis by Thos Graves mas com to Jacob Finger Nine hundred and sixty-seven dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending Sept. 9, 1879, against the following Persons.

Sept. 1.

The Little Mountain Ass'n. $433.09.
F. Spreng. $514.64; $904.50.
C. R. Mix. $519.38.
O. F. Rhodes et al. $379.69.
John H. Johnson. $128.07.
W. C. Hathaway. $191.55.
Wm. Cubbon et al. $1,517.

Sept. 2.

Wm. Gibb. $656.88.

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Sept. 3.
Peter Schutthelm. $4,685.68.
Sept. 4.
Martin Ehrbar et al. $2,947.45.
Jabez Stoneman et al. $1,544.55.
Sept. 6.
G. W. Whitney. $772.30.
Elizabeth Wusbarth. $261.
Sept. 8.
John Weidemaier. $260.
Peter Schell. $607.81.
Barter Swaffield. $117.74.
Henry Lehman. $58.85.
George C. Ross. $373.42.
Thomas Ramsey. $147.76.
Humphrey King. $20.17.
Wm. Baker. $1,662.40.
Sept. 9.
W. D. Patterson. $3,247.47.
James Eastwood. $5,370.15.
Duerfield & Maedji et al. $563.

U. S. CIRCUIT COURT N. D. OF OHIO.

Sept. 6.
3912. Anthony J. Thomas vs Frank H. Kelly et al. Bill filed. Gary & Everett.
Sept. 9.
3874. The Lamb Knitting Machine Man. Co. vs The Franz & Pope Knitting Machine Co. Answer.
Sept. 12.
3913. Floyd C. Shepherd vs John Flower et al. Bill of complaint. Hutchins & Campbell.

COURT OF COMMON PLEAS.

Actions Commenced.

Sept. 5.
15809. J. W. Miller vs M. L. Hull et al. Money only. Solders and Priest.
15810. Jane R. A. Carter vs Henry New et al. Money and to subject lands. W. K. Kidd.
15811. John J. Jordon vs D. R. Whitcomb et al. Appeal by deft. Judgment Sept. 2. A. J. Sanford; Hord, Dawley & Hord.
15812. S. W. Porter vs J. A. Treat. Same. Judgment August 8. Pond & Fraser; A. T. Brinsmade.
15813. Joseph Perkins et al vs Evan Morris et al. Money only. E. J. Latimer.
15814. H. K. Thurber et al vs Sidney Closs et al. Money only. Kain.
15815. Adolph Meyer vs Edwin Giddings et al. Money and to foreclose mortgage. Estep & Squire.
Sept. 6.
15816. In the matter of the application of T. L. Kerr vs Jacob W. Schmidt, Supt. of Police, etc. Habeas corpus. J. M. Stewart.
15817. John O. Evans et al vs D. C. Melch et al. Money only with att. Grannis & Griswold.
15818. James Grant, admr., etc., vs The C., C., C. & I. Ry. Co. Money only. Jackson, Pudney & Athey.
15819. Edward Schmeidling vs William Bucher et al. Money and to subject lands. Solders; Estep & Squire.
15820. Mary A. Rogers vs Daniel T. Knapp et al. Foreclosure of mortgage. I. A. Webster.
15821. Charles Pope vs Carl Seyler. Money only. Breckenridge.
15822. Clemens Stolz vs Henry Kramer et al. Money and foreclosure of mortgage. Estep & Squire.
15823. Conrad Gaetz vs George Hoffman et al. Money and to subject lands. Louis Weber.
15824. Henry Hookway vs David N. Reese. Money only. W. S. Kerruish.
15825. Isaac Hoffman et al vs Samuel Luster Jr., et al. Money and foreclosure. J. J. Carran.
15826. Henry N. Raymond et al vs Mattie D. Ross. Equitable relief. E. Sowers.
15827. R. B. Sharp vs C. P. Flynn. Appeal by deft. Judgment August 12. Adams & Beecher; James Wade.
Sept. 8.
15828. Sarah E. Haines vs James A. Smith et al. Money and to subject lands. G. H. Foster.
15829. Babcock, Hurd & Co. vs Seymour W. Smith et al. Money and relief. Estep & Squire.
15830. J. Stovering & Co. vs Frederick Hempy & Co. Appeal by defts. Judgment Aug. 27. Brown; H. & K.
15831. George E. Hartnell et al vs Joseph Krupka. Money, to subject lands and relief. Robison & White.
15832. Same vs Safron. Same. Same.
Sept. 9.
15833. The Cit. Savs. and Loan Ass'n. vs James Eastwood. Cognovit. Estep & Squire; G. B. Solders.
15834. H. B. Cochran vs W. D. Patterson. Cognovit. Willson & Sykora; T. D. Peck.
15335. A. Louisa Lewton vs John Lengenfelder. Money, to subject lands and for equitable relief. Willson & Sykora.
15836. Stephen B. Priest vs John Slawson et al. Equitable relief. Solders & Priest.
Sept. 10.
15837. Mrs. B. Jerden vs Mrs. Mary Eggert. Transcript filed by plff., appellee. Judgment July 18. George Schindler.
15838. John Remelius vs Adam Becker et al. Money, sale of lands and relief. Gustav Schmidt.
15839. Louis Albrecht vs Adam M. Poe. Money only. Willson & Sykora.
15840. N. M. Jones, admr., etc., vs Mathias Nichols et al. Relief and to subject lands. Foran & Williams.
15841. M. A. Foran vs Patrick O'Hare et al. Equitable relief. P. P.
15842. In re Arthur McAnaorny vs A. M. Jones, admr., etc. Agreement to arbitrate. Foran & Williams.
15843. The Hibernia Ins. Co. vs Eva Schmidt. Money and equitable relief. W. S. Kerruish.
15844. John Lindemann vs Thomas Gallagher et al. Same. Same.
Sept. 11.
15845. O. H. Payne vs J. H. Clark. Dissolution of partnership, account and relief. Terrell, Beach & Cushing.
15846. Hosea W. Libby vs Daniel Payne. Money and relief. Ensign and Hinsdale.
15847. In re arbitration between George Dietz, Louis Umbstaetter et al. Proceedings to make award a rule of court and for judgment. Willson & Sykora for Dietz.
15848. Sarah Delaney vs Thos. McFadden. Partition. Babcock & Nowak.
Sept. 12.
15849. The Cleveland Steam Gauge Co. vs John P. Halt. Injunction, restraining order and equitable relief. Ranneys and Foran & Williams.

Motions and Demurrers Filed.

Sept. 5.
3036. McBride vs Hindley. Motion by deft. to dismiss action for want of petition.
3037. Marine et al vs Wolinsky et al. Demmurrer by defendants to the petition in error.
3038. White, receiver, vs Bousfield et al and garnishee. Motion by defts. to require plffs. to separately state and number causes of action and to make petition more definite and certain.
3039. Smith vs Koehler et al. Demurrer to the petition.
3040. Kelley vs Walker et al. Motion by deft. S. C. Mowan to discharge attachment.
Sept. 6.
3041. Newton, assignee, vs Whitman et al. Motion by plff. to strike off the demurrer of M. M. Spangler, exr.
3042. Stoddard vs Sawyer. Motion by deft. for new trial.
3043. Parks vs Whitney et al. Demurrer by defts. to petition.
3044. Kehlar et al vs Sayler. Motion by plff. to strike out 1st defense of answer.
3045. Upson vs Rocky River Stone Quarry Co. et al. Motion by deft. to vacate injunction.
3046. Cit. Savs. and Loan Ass'n. vs Lander et al. Demurrer by defts. to the petition.
3047. Hilliard vs The Forest City United Land and Building Ass'n. Motion by plff. to require deft. Wm. Brady to make his answer more definite and certain.
3048. Scheurer vs Hassman et al. Motion by plff. to require deft. Kremel to make answer more definite and certain.
3049. Same vs same. Demurrer by plff. to answer of Mueller & Schmidt.
3050. Same vs same. Demurrer by plff. to 4th defense of Hippler.
3051. The Cleveland Iron Co. vs The Pennsylvania Co. Motion by deft. to require plff. to separately state and number causes of action.
3052. Field vs Greenfield. Motion by deft. for new trial.
Sept. 8.
3053. Stoeckler vs Jones. Motion by plaintiff to vacate judgment and reinstate case.
Sept. 9.
3054. Busch vs Englehardt et al. Motion by Koblenzer for leave to be substituted as party plaintiff with brief.
3055. Ryan vs Carr. Motion to require plaintiff to give additional bail for appeal, with affidavit
Sept. 10.
3056. Loesch vs Knippenberg et al. Motion by E. Hessenmueller to require Master to pay taxes from proceeds of sale.
3057 Meyers vs Wickensdraeger et al. Motion to require plaintiff to give security for costs with affidavit and brief.
3058. Hill vs Marsh et al. Demurrer by defendant Van Epps to petition.
3059 The State ex rel Le Baron vs The Pennsylvania Coal Company, lessees, etc. Motion by plaintiff to dismiss appeal.
3060 McClue vs Osterhold, administrator, etc. Same motion.
Sept. 11.
3061 Stark vs Burton. Motion by plff. Holmes for new trial.

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3062 Stible, assignee, vs Bradley. Motion by plaintiff to strike answer from the files.
3063 Williams vs Wanson et al. Motion by plaintiff for the appointment of a receiver.
3064 Roehl vs Schneider. Motion by plaintiff for judgment on the pleadings, to strike out from answer and to make same more definite and certain, with brief and acknowledgment of notice.
3065 Critchfield vs Cowles et al. Motion by defendants Cowles and Ford to require plaintiff to separately state and number causes of action.
3066 Newmark vs Bishop and as admr., etc. Motion by plaintiff for judgment for amount confessed due by answer.
3067 Heard vs Heard. Same.
3068 Payne vs Clark. Motion by plff. for the appointment of a receiver.

Motions and Demurrers Decided,

Sept. 3.

2264. Foote et al vs Henderson. Withdrawn.
2314 } 2315 } Alford vs Wager. Withdrawn.
2344. Lewis, Jr., by, etc., vs Lane. Withdrawn.
2583. Baxter vs Washington et al. Stricken off.
2649. Prentiss et al vs Curtiss. Withdrawn.
2781. Smith et al vs Ohmenhaeuser. Sustained.
2790. Koch et al vs Spreng. Withdrawn.
2791. Malseed et al vs same. Same.
2981. Long et al vs Burkhardt et al. Order vacated and order of sale issued, etc.

Sept. 6.

2422. Reister vs Lake Shore Foundry Co. Granted.
2425. Case vs Ehrbar et al. Overruled. Defts. except.
2502. Little vs Thomas et al. Overruled. Deft. Joe Stoppel excepts.
2549. Dunn vs Gilchrist. Stricken off.
2552. Rafter vs Rafter. Granted. Plff. ordered to furnish bail by Sept. 27, 1879.
2560. Stein, Sr., vs Stein, Jr. Granted. Plff. excepts.
2576. Schreiber & Co. vs Doorn. Granted.
2598. Hoffman vs Fay et al. Overruled. Deft. Cyrus excepts.
2926. Williams vs Koebel et al. Withdrawn.

Sept. 10.

3024. Rawson vs Patterson et al. Overruled.
2219. Born vs Wesley et al. Overruled.
2233. Trafton vs May et al. Granted.
2258. Hittell vs The City of Cleveland. Overruled.
2331 } 2332 } Johnson, by, etc., vs Holmden et al. Demurrer sustained. Motion to strike out from the reply stricken off.
2387. Stolz vs Koester. Sustained as to 1st defense and overruled as to 2d defense.
2398 } 2399 } Daniels vs Baldwin. Motion to strike out from answer overruled. Motion to make answer more definite and certain grnt'd.
2488. Coleman vs Coffin et al. Overruled.
2492. Kidd vs Murphy. Granted by consent of parties.
2503. Fontain vs Dewar et al. Granted.
2504. Free vs Murphy et al. Sustained.
2707. Richmond vs Graves, admr. Sustained.
2762. Spangler vs Ford et al. Granted.
2785. Clewell Stone Co. vs Cleveland City Forge and Iron Co. Withdrawn.
2883. Eyears vs Lewis. Granted.

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The Cleveland Law Reporter.

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AMERICAN BAR ASSOCIATION

The second annual meeting of the American Bar Association was held at Saratoga, New York, on the 20th ult. The proceedings were opened by the address of the retiring President, Hon. James O. Broadhead, of Chicago, on the changes of the statute law made in the several States and by Congress during the last year. Over two hundred new members were elected. The reports of the Secretary and Treasurer were read and accepted. The report of the Treasurer showed the receipts of last year to have been $1,065.10, and the disbursements $390.23, showing a balance on hand of $734.87. The report of the Executive Committe was read and accepted. Hon. Calvin G. Childs, of Connecticut, read an essay on "Shifting Uses from the Standpoint of the Nineteenth Century." The evening session was opened by the election of members of the general council for the ensuing year. The following named gentlemen were announced as constituting such council: A. M. Rhodes, A. P. Hyde, J. Hubley Ashton, George A. Mercer, Thomas Hoyne, Azro Dyer, James S. Pertle, Carlton Hunt, Skipwith Wilner, Edmond H. Bennett, Obrien J. Atkinson, Joseph Shippen, Charles S. Manderson, John M. Shirley, John W. Taylor, E. F. Bullard, William T. McClintock, Thomas E. Franklin, Luke P. Poland, Robert Ould, John J. Hutchinson, Almond A. Stroud. Mr. Henry Hitchcock, of St. Louis, read a paper on "The Inviolability of Telegrams." Mr. George Mercer, of Savannah, read a paper on "The Relationship of Law and National Spirit." A resolution amending article 4 of the constitution, transferring the election of members to the General Council, was adopted. The Association re-convened on Tuesday morning. The session was opened by E. J. Phelps, Esq., of Vermont, who delivered the annual address, taking for his subject "Chief Justice Marshall, and the Constitutional Law of his time." The election of officers for the ensuing year resulted as follows: President—Hon. Benjamin H. Bristow, of Kentucky. Vice-Presidents—Thomas H. Watts, Ala.; John J. Horner, Ark.; John N. Pomeroy, Cal.; Origen S. Seymour, Conn.; H. H. Wells, D. C.; Anthony Higgins, Del.; A. R. Lawton, Ga.; Thomas Hoyne, Ill.; Thomas A. Hendricks, Ind.; W. G. Hammond, Iowa; Wm. Preston, Ky.; F. P. Poche, La.; R. J. Gittings, Md.; Nathan Webb, Me.; Wm. Gaston, Mass.; Thos. M. Cooley, Mich.; James T. Harrison, Miss.; Henry Hitchcock, Mo.; James Woolworth, Neb.; Gilman Marston, N.; A. Q. Keasbey, N. J.; Clarkson N. Potter, N. Y.; Rufus King, Ohio; George W. Biddle, Penn.; Charles L. Bradley, R. I.; Robert Ould, Va.; E. J. Phelps, Vt. Secretary—E. O. Hinkley, of Maryland. Treasurer—Francis Rawle, of Pennsylvania.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

[WATSON, HALE AND TIBBALS PRESIDING.]

LORD, BOWLER & CO. VS. L. M. CHAFFEE, ASSIGNEE.

Payment by Mistake—Action by Assignee to Recover, etc.

TIBBALS, J.:

An action was brought by the defendant in error against the plaintiff in error in the court below upon substantially this state of facts: that the plaintiffs in error wrongfully presented a claim to him, as the assignee of J. D. Lyons & Co., which they supported by appropriate affidavits, making it a preferred claim—a mechanic's

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lien—which he paid out of funds in his hands, and he averred that subsequently he ascertained that they had no such claim; that they had no claim against the assignors; that they had no preferred claim—no mechanic's lien upon the property of his assignors; that he did not learn those facts until long afer the payment, and for the reason that he paid it through mistake he sought to recover it back from the parties.

The defendants answered, admitting that they presented the claim as a preferred claim; claimed they had obtained a mechanic's lien upor the property of the assignors; that it was properly paid; that they had such a lien; that it was a preferred claim; that there was no mistake on the part of the assignee in paying it to them as a preferred claim. The case went to trial upon the issues thus joined. Considerable evidence was offered upon both sides. It appears that the firm of J. D. Lyon & Co. was composed at one time of three parties, and later of two parties; but during all the time they were known as the firm of J. D. Lyon & Co. It further appears that J. D. Lyon was a partner with one M. J. Hills under the firm name of Lyon & Hills; that the firm of J. D. Lyon & Co. were doing business largely in the northern part of Summit county in the manufacture of cheese, and that Lyon & Hills were engaged in the same business and had a factory at Earlville, Portage county. It appears further that J. D. Lyon, acting for the firm of J. D. Lyon & Co., purchased of Lord, Bowler & Co. an engine and other machinery for the cheese factory at Earlville, Portage county; that the property was bought under a contract with J. D. Lyon & Co.; that it was delivered to the cheese factory at Earlville then supposed to belong to J. D. Lyon & Co. Shortly after this sale to J. D. Lyon & Co. the firm failed—made an assignment to Chaffee. It was within four months after this sale that Lord, Bowler & Co. obtained their mechanic's lien upon the property at Earlville, making the proper affidavit to the account and filing it in the proper place; so that if J. D. Lyon & Co. had been the owners of the property in Earlville they would have had a valid mechanic's lien and preferred claim upon the property. The claim of the plaintiff was that as J. D. Lyon & Co. did not own the property—therefore Lord, Bowler & Co. could not get a lien upon it, and the assignee of J. D. Lyon & Co. was not obliged to regard it as a preferred claim and pay it as such.

It is assigned as error occurring at the trial that the court erred in ruling out evidence offered by the plaintiff in error. The evidence is as follows: [On direct examination of Bowler, one of the defendants below.] "Q. What information did you obtain from Mr. Lyon or Mr. Hill in regard to the property?" This question was objected to, the objection sustained and exception taken. It is sufficient to say in respect to this question that it does not appear what was proposed to be proved by the answer of the witness. It was argued that Hill probably would have said that the property belonged to J. D. Lyon & Co. If there was any presumptien about it it would be the other way. The record very fairly shows that they did not own that property. It could scarcely be presumed that he would testify to what was not the fact, and it might be objected further that it would not be competent for him even to state that fact. We think there was no error in that particular.

It is next said that the Court erred in its charge of the law to the jury and the Court erred in its refusal to charge certain requests.

None of the requests are attached to the bill of exceptions and that matter was waived. To the charge of the Court the exceptions are specific. As to that part of the charge which states that the plaintiff claimed that the defendants were only general creditors. The Court in stating the case said to the jury, "It is not denied, in fact it is assumed, that Lord, Bowler & Co. had a claim against the estate of which the plaintiff was the assignee, but the claim of the plaintiff is that they were only general creditors; that they were only entitled to be paid the same as other creditors."

Now, it is very true that in the petition it is denied that they had any claim at all, but the record is very clear that upon both sides it was assumed that they did have a valid claim against the firm of J. D. Lyon & Co., so that the Court was right in stating the case to the jury as they treated it. It is the province of the Court to state to the jury the issues. Of course, the Court need not make new issues, but it was fairly within the province of the Court to state that they had waived certain averments in the petition. There could not hove been any error in that. The Court said to the jury that "if the plaintiff established the proposition that the money was paid by mistake, then the plaintiff was entitled to recover; but he was very clear in proceeding to state the other proposition incident to it and necessary to the establishment of that, such as the ownership of the property by this particular firm, and the presentation of the claim. If all of those facts were presented by the Court to the jury in connection with the statement that that was the real central point in the case—did the assignee pay that money by mistake?—if he did, says the Court, then he ought to recover it back; if he did not he ought not to recover it back. Bt as a part of the proposition he proceeded to tell them all about the effect of this lien; how it could be created; how it must be established; how it must be shown,—all of those things necessary and incident to the establishment of that proposition.

Now, taking the charge as a whole, upon that subject we think the Court was clearly right. It is not just to the Court simply to take that one clause and exclude all acts explanatory of it and then say that was error.

The next part of the charge relates to what would give the defendant a mechanic's lien upon the Earlville property. The Court in that connection said a man who furnished machinery, or does work towards the erection and repair of a building of this kind—a cheese factory—if he does not go any further than that—a man who furnishes a boiler and does any work in connection with it upon a cheese factory of this kind under a contract with the owner, may have a mechanic's lien upon it within four months from the time the contract was made. Now, they took the necessary steps within four months in order to entitle them to a lien. To determine the question that they did have a lien the lien must have been placed upon the property of this firm J. D. Lyon & Co., and it must have been under a contract with J. D. Lyon. It is said that Mr. Lyon was a member of two firms, and one firm owned this factory at Earlville, and another firm owned the factory at Northfield. * * * * Now, I say to you in order to make this a lien upon the property of J. D. Lyon & Co., if there were two separate firms composed of distinct individuals, their rights would be just as separate as though they had been two single individuals," and then proceeds to illustrate that matter.

Now, what objection can there be to that charge? It charges that in order to make it a lien the property

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must have been sold by contract to J. D. Lyon & Co., and be put upon the property of J. D. Lyon & Co. It is precisely the language of the statute. There can be no doubt but what that is the law. The Court said that in order to make this a lien upon that property it must at that time have been owned by J. D. Lyon & Co.

Now, it was argued that if J. D. Lyon & Co. held themselves out as the owners of the Earlville property, that fact would authorize the parties selling the property to them under such representations to treat that as their property. That is a remarkable proposition. A man represents that he owns property that belongs to somebody else, and upon that representation property is sold to him and put upon the property thus represented to belong to him, and the seller, relying upon the misrepresentations of the purchaser, files a mechanic's lien, and thereby gets a lien upon property that does not belong to the purchaser.

The Court would have been very far from right if it had given such a proposition to the jury. On the other hand the Court was right in saying that if they trusted them without learning the facts it was their misfortune. The Court in illustrating this matter simply say that if Lyon & Co. were the purchasers and the property belonged to another firm that would not authorize the seller to get a lien on the property of the other firm. The proposition is too clear for discussion.

Now as to that part of the charge of the Court as to what constitutes a copartnership, and as to what would constitute a copartnership among themselves. In the first place, there was no question made but what J. D. Lyon & Co. was a distinct copartnership and that Lyon & Hill was a distinct copartnership, and we think the Court clearly defined the relations of the parties to each other.

The Court said in another part of the charge: "The argument in this case has taken a very wide range, and I say to you that the law as given to you by the Court is to control you in your findings in this matter. If counsel have mistaken the issues, discussed questions before you which, in the opinion of the Court, are not pertinent to the issue at all they should be entirely neglected by the jury, and it is only for the jury to answer questions which the court has submitted to you."

I had always supposed it was the duty of the jury to follow the law as given them by the Court as distinct from the law as claimed by counsel. The Court very wisely said to the jury that that was their duty.

In regard to the third defense as to what was necessary for the plaintiff to do, the Court charged that if there was a mistake it was the duty of the plaintiff, as soon as he discovered it, to notify the defendants of the fact and demand of them to return the money paid.

In regard to the second defense the Court said that it constituted no defense even if the facts set up were true. * * *

There can be no estoppel as against the assignee to recover the money back that belonged to the creditors of the firm of Lyon & Co. He had never taken possession of this property of Lyon & Hill; he had no control of it, and no right to control it. We think the Court, therefore, was right in thus disposing of the second defense, that it really constituted no defense. The judgment is affirmed.

MARVIN & HART, for plaintiff in error.

GEORGE H. FOSTER, for defendant in error.

WM. BACKUS ET AL. VS. THE FIRE AND MARINE INS. CO. OF CINCINNATI.

Action on Bond—Failure of Court to Render Judgment against Makers as Sureties cannot be Taken Advantage of in Error, etc.

HALE, J.:

The action in this case below was upon a bond executed by William Backus as principal and L. Schlather aed another as sureties. Backus was appointed agent of this insurance company in Cleveland on the 10th of February, 1875. The condition of the bond was that he should keep a correct account of the moneys received by him belonging to the company and pay over the same to the company, and faithfully perform his duties as agent in accordance with the instructions given to him by the company through its proper officers.

The petition in the case was filed on the 6th day of July, 1878, alleging a default on the part of the agent—that he had collected prior to May, 1878, something over $1,100 which he had neglected to pay over to the company, and a judgment was asked against the makers of the bond. A judgment was entered by default. The record shows that there was no answer filed; that the party plaintiff appeared; that the Court took an account of the amount due and rendered a judgment.

The first error complained of is this: That the judgment was rendered against all as principals, whereas it should have been rendered against Backus as principal, and the others as sureties. A short answer to that is that it was held by the Supreme Court in the case of Kelly et al. vs. Collins, 11th Ohio, 310, upon a statute the legal effect of which was precisely in accordance with the provisions of the code as they now exist, that a matter of that kind cannot be taken advantage of on error. That case is squarely in point.

The next error alleged is that a judgment was taken for a large sum, more than appeared to be due.

The petition in stating the cause of action gives the proper amount. The statement made by counsel in argument is hardly sufficient to disturb this verdict.

The other ground of complaint is this: That interest was added to the amount of the default without a demand upon the sureties. A case was cited to us in which it was distinctly held that interest could not be added, but in looking at that case we find that it was a case upon a bond, and a judgment was taken for the full penalty of the bond. The Court held that interest could not be added on the penalty of the bond. That is not this case. Suppose this case was against Backus alone. The money was due from him to the company from the time he should have paid it over to the company. Now the amount of the default with the interest added to it, falls considerably short of the penalty of the bond. We think under our statute, under the condition of this bond, that the Court properly added interest to the amount of money due.

The last ground of error is that the Court took this account. The record shows that the defendant being in default the attorney for the plaintiff offered to waive a jury.

Without enlarging upon the statute its language certainly is very comprehensive, "may take an account, hear the proof and assess the damages." All we need to hold is that in a case of this kind where the action is upon a bond of this nature, the defendant being in default, the plaintiff appearing may waive a jury and submit the case to the Court for the assessment of damages by the Court without the intervention of a jury, and the party not appearing cannot take advantage of that on error and ask that the case be reversed because of error in his not having a jury trial.

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Those are all the errors that are complained of in this record, and we think we cannot, even though it may result in a hardship, disturb this verdict.

HUTCHINS & CAMPBELL, for plaintiffs in error.

MIX, NOBLE & WHITE, for defendant in error.

SURREME COURT OF TENNESSEE.

SEPTEMBER TERM, 1878.

JAMES COBB VS. CALVIN DENTON ET AL.

CHARITY—What may and may not be the object of a valid devise.—A voluntary association cannot be tha object of a valid devise, but if made to trustees for the benefit of such association, it will be upheld and executed. Cases cited: Green vs. Allen, 5 Hum., 204; Dickson vs. Montgomery, 1 Swan., 348; Goss vs. Ross, 3 Sneed.,211.

WILL—Last clause in must control.—Where a devise in the body of a will is inconsistent with the disposition of the property in the codicil thereto, the latter, as expressing the last intention of the testator, must prevail.

The opinion of the court was delivered by

NICHOLSON, C. J.:

The question in this case is, whether a devise in the will of John Tuoony to the Friendship Church in Polk county, Tennessee, is valid. The will was made on the 26th of August, 1876. In the first item the testator says: "I do hereby will and bequeath all the right, title and interest that I have in and to certain lands in county and State aforesaid, to-wit: The homestead of Conisugua Place, being the land on which I now live, containing ninety acres, more or less." Second item: "I also will to aforesaid church all notes that may be due me, after deducting sufficient for funeral expenses." Third item: ' I also will and bequeath to said church my cotton gin, lot and house, together with all appurtenances thereto belonging." Fourth item: After providing for sale of live stock, etc., and applying proceeds to certain legacies, he bequeaths the residue thereof "to aforosaid Friendship Church." Sixth item: He appoints as executors of his will Rev. Calvin Denton and four others, enjoining upon them to see that the premises of his will in spirit be carried out according to the letter, and he requests his executors to purchase ground ta enlarge the limits of Friendship graveyard.

On the same date of the will he made his codicil: "I desire aforementioned executors to either sell or rent said lands, as they may deem best; in either event only interest or rent to be used, the principal to be retained inviolate, and proceeds to be used, first, by employing and paying a competent minister for said church, etc."

It is manifest, on the face of the will, that Friendship Church was the object of testator's bounty, but it is conceded that Friendship Church is not incorporated, but it is a voluntary association. It is clear, therefore, that as such voluntary association it cannot be the object of a valid devise. Green vs. Allen, 5 Hum., 204.

But it is well settled that the devise will be upheld and executed if it is made to trustees for the benefit of a voluntary association. Dickson vs. Montgomery, 1 Swan, 348.

The intention of the testator, as expressed in the will, taken together, must govern in its construction. The body of the will and the codicil are to be taken as constituting testator's will, and in ascertaining testator's intention, both are to be looked to. 1 William's Ex'rs., 8; 4 Kent., 531. The intention to make the devise of the lands directly to the church is clearly expressed in the body of the will. But if it was the intention of the testator, in adding to the will the codicil, to make the devise to his executors, for the benefit of the church, then this intention, being in conflict with his intention as expressed in the body of the will, must prevail. By the language of the codicil the executors are authorized and empowered to sell or rent the land, in their discretion. Whether they rent or sell, the property devised, or the proceeds, if sold, to be held inviolate as a fund, the rents or interests alone being subject to be applied to the definite objects enumerated,

We are of opinion that this language communicates to the executors the title of the property as trustees, and this, being inconsistent with the devise in the body of the will, it must prevail as the last expressed intention of the testator. As already stated, such a devise is valid, and will be upheld by a Court of Chancery. Goss vs. Ross, 3 Sneed., 211.

The decree of the Chancelor is reversed, and the cause remanded. The costs of the court will be paid by complainant.

NOTES OF RECENT CASES.

RULE TO OPEN JUDGMENT.

If a party who can read signs his name to an instrument without reading it, or if unable to read, does not first demand to have the paper read and explained to him, he is guilty of negligence, and has no remedy at equity or law. Friedman, to use, etc., vs Lindenmuth. — Schuylkill Legal Record.

[To appear in 90 Ill.]

APPEAL.

Trial when part of defendants appeal.—Where one of two defendants appealed from a judgment against both in a proceeding of forcible entry and detainer, and no summons was issued to the defendant not appealing, but the record showed his appearance on the trial amd demurrer to the evidence as to him, and the direction of the court to the jury to find him not guilty, and no further steps were taken against him, and judgment rendered against the defendant appealing, there was held to be no erroı.

VERDICT.

Construed to mean only one defendant.—Where an action of forcible entry and detainer was discontinued as to one of the two defendants for want of evidence against him, a verdict finding the *defendants* guilty was held to be a mere clerical error, the judgment being against one only.

FORCIBLE ENTRY.

When it lies.—Where a tenant in the peaceable possession of land under an unexpired lease is forcibly dispossessed by a constable and another, under a writ of restitution for different premises, and the tenant's goods removed into the street, after which such other person retains the possession, after demand made in writing by the tenant the latter may regain the possession by the action of forcible entry and detainer. The writ of possession for other and different premises could not be pleaded or offered in evidence in justification of the eviction

SAME.

By mortgage.—A defendant in an action of forcible entry and detainer offered in evidence a note given him by the plaintiff and a mortgage to secure the same. It did not appear the mortgagee had ever taken possession, or claimed to take possession under his mortgage, or that he had foreclosed it, or sold or offered to sell the premises by virtue of any power of sale therein, or made any demand for possession. *Held*, the note and mortgage were not admissible in evidence.

LANDLORD AND TENANT.

Right to eject tenant.—A landlord

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has no right, even if there is rent due and unpaid, to forcibly enter into possession of the demised premises, and eject the tenant, without proper process, nor can he give such right to another; and if he takes forcible possession, he cannot give another such possession as will be lawful against the tenant.

INSTRUCTION.

Not based on any evidence.—There is no error in refusing instructions not based upon any evidence in the case, or based upon a defense excluded by the court from the jury.

SAME.

To find for the plaintiff.—It is an invasion of the rights of the jury, and an usurpation of their functions, for the court to determine for them what facts are proven, or attempt to tell them what their verdict should be on a question of fact. This court cannot approve of an instruction to the jury, that, under the facts proven, the law is for the plaintiff, and their verdict should be for him.

ERROR.

When no ground for reversal.—This court will not reverse a judgment merely for an erroneous instruction, where it clearly can see that the verdict must have been the same if the instruction had not been given. In such case the error works no prejudice. —Hubner vs. Feige, Sup. Ct. Ill.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Sept. 19, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Sept. 13.

C. M. Ryder and wife to Fred M. Fay. $900.

John W. Walkey and wife to Mary Clever. $412.

Charles Wilke and wife to Fred Frank. $200.

Cleveland Paper Co. to W. S. Wilcox, trust. $4,000.

Wm. V. Craw and wife to Jacob Schraeder. $1,000.

Maria Clara Kuippenberg and husband to J. C. Wendt. $1,000.

Margaret O'Neil to Hiram Humphrey. $1,734.

F. P. Ingraham and wife to Susan Lynde. $1,500.

Philip Myers and wife to Alexander Rodgers. $300.

Willard S. Camp and wife to The Soc. for Savs. $2,700.

Mary J. Hill to G. H. Foster et al. $500.

John H. Eidam and wife to H. F. Hoppensack. $800.

Sept. 15.

Matilda Ratzow and husband to John Wittimeyer. $300.

Patrick Murphy and wife to Susan Lynde. $550.

Ann S. Gowdy to Fred Geisz. $300.

Bridget Green to Regina Karr. $400.

John Geissendorfer and wife to Arthur Hughes. $6,000.

David Tatum and wife to The Soc. for Savs. $1,500.

Andrew Schreimer and wife to Jane R. A. Carter. $100.

Eliza A. Field et al to L. H. Page. $1,000.

Margaret Keely and husband to Charlotte Scheurer. $400.

Philip Warren and wife to Anne E. Bronson. $1,000.

Sept. 16.

Alzbertha Strasny to Francis Plevny. $265.

Joseph Kleiman to Helen Dowse. $346.

Edward Seiler and wife to Ludwig Hundertmark. $1,200.

Amanda A. Bishoff and husband to M. S. Hogan. $200.

Elise Rottgardt and husband to Mari Schunemann. $300.

Robert Aorsbrugh and wife to Arnold Green, admr., etc. $600.

Mary E. Newkirk to F. H. Furniss. $923.

Sept. 17.

Margaretha Kacher to John Mohler and wife. One hundred dollars.

Louis Ott and wife to Elizabeth Probst. Six hundred dollars.

Phoebe Davis to O. H. P. Bates et al, trustees, etc. One hundred and fifty dollars.

John W. Walkey and wife to David Heffner. Seven hundred and fifty dollars.

Joseph Emisik and wife to Red Soornost No. 3, C. S. P. S. Three hundred dollars.

Sept. 18.

Konrad Marquard and wife to Bernard Marquard. Two hundred and seventy-five dollars.

Nicholas Moses to Edward Huber. Three hundred dollars.

Wm. P. Taft et al to The People's Savs. and Loan Ass'n. Five hundred dollars.

Maria C. Knippenburg and husband to Peter H. Danenhauer. One thousand dollars.

Frederica Schultz and husband to The Soc for Savs. Four hundred dollars.

Christine Schmidt and husband to Tolius Nungesser. One hundred dollars.

Henry Kessler to Frank L. Raymond. Eight hundred dollars.

Cornelia E. Isham and husband to Henry Wick & Co. Two hundred and fifty dollars.

Sept. 19.

F. H. Hubbard to G. H. Foster et al. $1,200.

Patrick Martin to Annie M. Simpson. $400.

Lewis P. Crown and wife to G. E. Herrick. $380.

CHATTEL MORTGAGES.

Sept. 13.

A. B. Schellentrager to D. L. Schlater. $965.

Frank Scheurer to Joseph Agricola. $400.

Johanna Kelley to Michael Ryan. $350.

George Schafer to J. J. Blate. $150.

George Breen to Joseph Stribler. $175.

Sept. 15.

Elizabeth Porter to W. J. Crowell. $1,200.

J. S. & S. Stewart to Guy R. Morse. $700.

Aaron Schwab to Abraham Forsch. $300.

Sept. 16.

Josiah Eastbrook to Striebenger Bros. $709.

Charles S. Coan to Stoll & Black. $250.

Elizabeth L. Nevins to H. Killian & Co. $2,000.

Sept. 17.

Fred Raff to Isaac Leisy & Co. One hundred and fifty dollars.

Thomas Reynolds to Payne, Newton & Co. Two thousand three hundred dollars.

Sept. 18.

Elizabeth A. McDonough et al to Mary McDonough. Two thousand four hundred dollars.

Sept. 19.

Edward Clark to Sterling & Co. $365.

Albert Chandler to C. Donohue. $40.

DEEDS.

Sept. 12.

Kate Austin and husband to John J. Forbes. $1,500.

John T. Donnelly, admr., etc., to Hermann Goerrs. $1,450.

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Elisha Fitch and wife to Emily S. Camp. $1.

Sophia Finney and wife to George Faerber. $1,500.

George Faerber and wife to Sophia Brinker. $1,500.

Abraham Frederick and wife to Gustav A. Laubscher. $725.

Hannah Ford to John W. Moore. $7,500.

N. G. Hoefler and wife to Ashley Ames. $500.

James M. Hoyt and wife to David K. Clint. $50.

Charles Hecker and wife to Peter Hecker, Jr. $3,500.

John H. James to Thomas James. $1,650.

Bernard Lueckemaier and wife to J. W. Beck, trustee. $1.

J. W. Beck and wife to Susanna Lueckemaier. $5.

Bernard Lueckemaier and wife to J. W. Beck, trustee. $1.

J. W. Beck and wife to Susanna Lueckemaier. $5.

Irwin H. Moses to Alonzo Chefrough. $3,000.

Matthew G. Rose to Elisha Sarajo. $120.

M. G. Watterson and wife to Elijah F. Green. $1,100.

Andrew P. Worth, Jr., and wife to John H. James. $850.

The New England Mutual Life Ins. Co. to Nettie C. Reynolds. $79.

Mary Pajer et al by E. B. Bauder, Mas. Com., to Christina Helfer. $1,-425.

William West by Felix Nicola, Mas. Com., to The Cit.Savs.and Loan Ass'n. $800.

Sept. 13.

Charles Ellsasser and wife to Joseph C. Bloch. $1,400.

Joseph C. Bloch to Anna Ellsasser. $1,400.

Emma Dreher to Lucy Houck. $1,000.

Morris E. Gallup, admr., etc., to Samantha A. Hutchinson. $600.

H. F. Hoppensack and wife to Henry C. Meyne. $600.

Edwin Jones and wife to F. P. Inghram. $6,000.

William Lunn and wife to Bernard Rafferty. $400.

Henry C. Meyne and wife to John H. Eidam. $850.

Stephen Miller and wife to Peter Muller. $2,000.

Peter Muller and wife to Mary Miller. 2,000.

Thomas Parkhurst and wife to Mrs. Sarah E. Ruple. $1,500.

James S. Prescott et al to Emily S. Reader. $300.

Elizabeth Stearns and husband to Elijah Stearns. $1,000.

Elijah Stearns to Ferdinand Stearns. $500.

L. J. Talbot and wife to Charles Chandler. $1,500.

Matilda A. Thompson to Emory Sanford. $2,400,

Henry Lehr et al to J. C. Ferbert et al, trustee, etc. $1,000.

Mary Eppele and husband by G. W. Lynde. Mas. Com., to Margaret W. Craw. $1,034.

Jacob F. Kobiinzer by Felix Nicola, Mas. Com., to Louisa C. DeWolf. $3,825.

Thomas Graves, Mas. Com., to Alford H. Wick. $668.

Same to Katharine C. Albrecht. $667.

Joseph Negedly et al by E. H. Eggleston, Mas. Com., to Joseph Kindall. $380.

Sept. 15.

Valentine Becker and wife to Chas. Hibbard. $1.

Charles Hibbard to Elizabeth Becker. $1.

Margaret W. Craw and husband to A. Weider, Vice Pres't., et al, of Orphan Asylum. $300.

J. T. Gallagher to Catharine McIntyre. $8,500.

Fred Rasch and wife to Hubbard Cooke, trustee, et al. $1.

Theresa Scheurer and husband to Edward Bogen. $2,000.

J. Lee Spencer to Fred D. F. Burydorff. $1,300.

L. J. Talbot and wife to Anson C. Barber. $720.

John Wallace to Thankfull Abbey. $800.

Laura L. Otis et al to Albert Reitsenic. $362.

William Schwenkel et al by C. C. Lowe, Mas. Com., to John H. Sargent. $334.

Sept. 16.

Martin Becker and wife to Theodore Donberg. One thousand two hundred and forty dollars.

Luther Moses and wife to George Downing. Two hundred dollars.

George Downing to James G. Coleman. Two hundred dollars.

Theodore Donberg and wife to John Sclacht. Nine hundred dollars.

Same to Fred Wolf. Nine hundred dollars.

Peter Fluck and wife to John Fluck. One thousand dollars.

Catharine Goeppert and husband to H. A. Watterson. Two thousand one hundred dollars.

Arnold Green, admr., etc., to Robert Horsburgh. Nine hundred dollars.

James M. Hoyt and wife to Ernest H. Horst. Eight hundred and twenty-five dollars.

George G. Hickox et al to Michael Kuness. Four hundred dollars.

Nicholas Meyer and wife to Charles Jacobs. Six hundred and fifty dollars.

R. McHoried to John Lilly. Three hundred dollars.

Jenny McNairey and husband to Henry Kessler. Two thousand six hundred dollars.

Francis Plevny to Alzbertha Stiasny. Three hundred and forty dollars.

Mary R. Pope to Rosa Otterbacher. Five hundred dollars.

Isaac Ried to Peter Farrow. Six hundred and fifty dollars.

D. P. Rhodes' estate to George Turner and wife. Seven hundred dollars.

George Storer and wife to R. W. Thompson. Four hundred dollars.

Albert P. Taft and wife to Charles E. Taft. One thousand dollars.

Peter Zucker to Katharine Maravetz. One dollar.

Abby M. Abram et al by C. C. Lowe, Mas. Com., to Wm. J. Tilby. Two thousand dollars.

Albanus A. Moulton, admr., etc., et al, by same to Samantha Day. Three thousand three hundred and thirty-four dollars.

Peter Schutthelm et al by same to E. C. Boyd. Eight hundred and twenty-five dollars.

George F. Turrill et al by E. B. Bauder, Mas. Com., to Jessie H. Morley. Four thousand and ten dollars.

The Valley Iron Co. et al by same to The Cleveland Paper Co. One hundred dollars.

Sept. 17

James Anderson. admr., etc., to Sanford L. Kennedy. ——

Charles W. Bingham to Elizabeth B. Bingham. One dollar.

Aaron Bloch and wife to Bernhardt Baer. Seventy-five dollars.

Jacob Brems and wife to Andrew Schabel. Four hundred and fifty dollars.

R. A. Brown to A. L. Van Orman. One thousand six hundred dollars.

Helen Dowse to Peter Benda. Three hundred and sixteen dollars.

Andrew Dillow's heirs to Mrs. Mary Stebbins. ——

James Eastwood and wife to Martha Barber. $1,000.

J. C. Frederick and wife to Nick Meyer. 950.

The Cheba Radisha to The Benee Abraham Cemetery Ass'n. Two hundred and fifty dollars.

Herman Heller to Catharine Was-

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senmeyer. Four thousand and fifty dollars.

E. A. and Clara C. Randall to Wm. A. Coit. One thousand five hundred dollars.

Alex J. Sked and wife to L. E. Holbrook. Six thousand dollars.

Hattie O. Sackett to Joseph Plachy. Two hundred dollars.

Arthur T. Sales and wife to Helen W. Sayles. Four thousand dollars.

Harriet O. Sacket to John Kocap. Two hundred dollars.

J. C. Hughes by Thomas Graves, Mas. Com., to Nellie S. Talcott. One thousand six hundred and sixty-seven dollars.

Nellie S. Talcot et al to Caroline Stratton. Three thousand dollars.

Christian Teufel and wife to David Weigel. Ten thousand five hundred dollars.

David Weigel to Christian Teufel. Ten thousand five hundred dollars.

Fritz Schubert et al by C. C. Lowe, Mas. Com., to Charles O. Scott. Two thousand one hundred and eighty dollars.

D. M. Dorland et al by E. B. Bauder, Mas. Com., to D. M. Coffinberry et al. One thousand two hundred and ninety-eight dollars.

Sept. 18.

Elijah F. Davis and wife to Conrad Marquard. $390.

Charles Hoase to John Theobold. $110.

E. Hessenmueller to Phyletus Francis. $12,001.

Mary R. Roberts and husband to Cornelia E. Isham. $1.

Hannah O. Wait to Emily E. Wait. $3,500.

Luranne E. Price by Felix Nicola, Mas. Com., to Mary L. Miller. $2,-000.

Leonhard Kittel et al to John Theobold. $330.

Judgments Rendered in the Court of Common Pleas for the Week ending Sept. 18, 1879, against the following Persons.

Sept. 15.

Carl Seyler. $1,352.35.
Orlo Mathews. $121.55.
Union Iron Works Co. $98,584.20.
G. F. Hegerling. $941.14.

Sept. 18.

Peter Schell. $2,216.48.

COURT OF COMMON PLEAS.

Actions Commenced.

Sept. 12.

15850. George E. Hartnell et al vs John Karpinscki. Money, to subject lands and relief. Robison & White.

15851. Ann Goodwin vs Caroline E. Goodman et al. For leave to mortgage land. Ingersoll & Williamson.

Sept. 13.

15852. Abby M. Abrams vs James Lawrence, guardian, etc. To vacate judgment. H. W. Canfield.

15853. In the matter of the petition for habeas corpus of Rose Mary Sary vs W. D. Patterson, Sup't. of the Workhouse, etc. M. Rogers.

15854. Robert R. Rhodes et al vs Isabrand Clevering et al. To subject lands. Ranney & Ranneys.

15855. H. A. Wise vs Wm. Clark et al. Money and to subject lands. Solders and Priest.

15856. Albert Gilchrist vs Wm. B. Higby et al. To subject lands. T. E. Burton.

15857. Angeline S. Roscoe vs Clara M. Stacy et al. Sale of mortgaged premises and relief. Updegraff & McMillan.

15858. Louisa Linge et al vs Joseph A. Bezenah et al. Money only. Same.

15859. Clark S. Gates et al vs Uri Richards et al. Money, sale of mortgaged premises and relief. T. K. Dissette.

15860. Julius Mueller et al vs Mary Gleick et al. To sell lands and for equitable relief. F. Weizmann.

15861. Azariah Everett et al vs W. H. Rogers et al. Money only. Gary & Everett.

15862. Louis Wintz vs G. B. Solders et al. Money and equitable relief. James Quayle; Solders, J. B. Fraser.

15863. Adolph Jacobs et al vs Morris Marx et al. Money only. J. H. Schneider.

15864. Helen Dowse vs the City of Cleveland. Money only. Charles F. Morgan.

15865. J. Murphy vs R. Humphry. Error to J. P. Rider; Thomas Reilley.

Sept. 15.

15866. Henry Caster vs George Miller et al. Sale of lands and money. C. W. Coates.

15867. W. C. Rogers vs J. J. Carran. Appeal by deft. Judgment August 23.

Sept. 16.

15868. George Hester vs Elizabeth Onderkirk et al. Money and to subject lands. P. P.

15869. Elizabeth Reinhart vs Charles Newberger et al. Appeal by deft. Bergin. Judgment Aug. 19.

15871. Henry H. Adams vs Fletcher Furnace Co. and garn. Money only with att. Estep & Squire.

Sept. 17.

15872. J. F. Tummermutt vs C. Kushman et al. Money only. Eddy & Halm.

15873. J. J. Schwind et al vs C. F. Horn et al. Appeal by deft. L. J. Rider and J. E. Rider.

15874. George L. Hartnell et al vs Jas. Phillip. Money, to subject land and relief. Robison & White.

15875. Henry Gay et al vs Wallace Gay et al. To set aside will. J. K. Hord, C. L. Fish, Buckner.

15876. John Griffin vs S. M. Eddy. Appeal by deft. Judgment Sept. 2d.

Sept. 18.

15877. In re John Fleury vs W. D. Patterson, Supt. of House of Correction, etc. Habeas Corpus. Louis Weber.

15878. J. C. Hall vs A. J. Stiles. Money only. Stone & Hessenmueller.

15879. Henry Dunbar vs James Holland. Appeal by deft. Judgment August 18. F. E. Munger; I. L. Gleason.

15880. John Ryan vs Patrick Brennan. Money only. Foran & Williams.

Motions and Demurrers Filed.

Sept. 12.

3069. Schwab et al vs Schwab et al. Motion by plaintiff for new appraisement.

3070. Holden vs Odell et al. Motion by defts. for new trial.

3071. Comstock vs Hall. Demurrer by plff. to 2d clause of answer.

3072. Worley vs Mason, admr., etc. Motion by deft. to dismiss for want of petition.

Sept. 13.

3073. Adams, admr., etc., vs McCarthy. Demurrer to the petition.

3074. Sand vs Sirl et al. Demurrer to answer of defts.

3075. Wells vs Low et al. Demurrer to answer and cross-petition of deft. Stanley.

3076. Johnson et al, by, etc., vs Holmden. Demurrer by deft. Wm. M. Warden to paragraph one of plff.'s reply to his amended answer.

3077. Kojican et al vs Bower et al. Motion by deft. Bower to strike from petition as irrelevant, etc.

3078. Same vs same. Same from the answer and cross-petition of J. M. Nowak.

3079. Same vs same. Demurrer by deft. Bower to petition.

3080. Same vs same. Same to answer and cross-petition of J. M. Nowak.

3081. Banks vs Quayle. Motion to require plff. to give additional security for costs.

Sept. 15.

3082. Cink vs Colbrun. Motion by deft. for new trial.

Sept. 16.

3083. Hoefner vs White et al. Motion by plff. in error for a new trial and rehearing with affidavit.

3084. Tyler vs Edwards et al Motion by deft. Barnes to set aside sale as to sublot No. 53, with affidavit and notice.

3085. Breen vs Moses. Motion by defts. for a new trial.

3086. Maher vs L. S. & M. S. Ry. Co. Motion by deft. to dismiss for want of petition.

3087. Street vs Bentley et al. Motion by plff. for the appointment of a receiver with affidavit.

3088. Bradley et al vs Bauder, auditor, et al. Demurrer by plaintiff to the petition.

3089. Tyler vs Edwards et al. Motion by deft. Barnes to modify enterlocutory decree with notice and affidavit.

3090. Eells, trustee, vs Kinsman St. Ry. Co. Motion by deft. Caroline Brough, A. Everett, admr., George C. Stage et al, to confirm report of J. H. Rhodes, referee.

Sept. 17.

3091. Dennull vs Teutonia Lodge No. 19, A. O. G. F. Demurrer to the petition.

3092. Lehman vs Karl. Motion by plff. for new trial.

3093. Buhrer vs O'Rourke et al. Motion to strike 2d cause of defense from answer of deft.

3094. Lucas vs Egts. Motion to require plff. to give bail for costs.

3095. McLaughlin, exrs., etc., vs Marcy et al. Motion by plffs. to set aside appraisal and for new appraisal.

3096. Rittberger vs Oberle et al. Demurrer by plff. to 1st defense of answer of defts. Krause et al, and motion to extend time.

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Sept. 18.

3097. Dahnert vs Russell et al. Motion by deft. Dahnert to strike from answer of deft. the cross-petition and prayer and dismiss action.

3098. Albram vs Lawrence, guardian, etc. Demurrer to the petition.

3099. The Cleveland Steam Gauge Co. vs Holt. Same.

3100. Baldwin vs The L. S. & M. S. Ry. Co. Motion by plff. for new trial.

Motions and Demurrers Decided,

Sept. 10.

3024. Rawson vs Patterson et al. Granted.

2219. Born vs Wesley et al. Overruled.

2233. Trafton vs May et al. Granted.

2258. Hittell vs City of Cleveland. Overruled. Plffs. have leave to file a reply by Oct. 1st.

2331 | 2332 | Johnson, by, etc, vs Holmden et al. Sustained.

2387. Stolz vs Hester. Sustained as to 1st defense, overruled as to 2d.

2398 | 2399 | Daniels vs Baldwin. Granted.

2488. Coleman vs Coffin et al. Overruled.

2492. Kidd vs Murphy. Granted.

2503. Fontain vs Dewar et al. Granted.

2504. Free vs Murphy et al. Sustained.

2707. Richmond vs Graves, admr. Sustained.

2762. Spangler vs Ford et al. Granted. Deft. has leave to amend answer by Oct. 15.

2785. Clewell Stone Co. vs Cleveland City Forge and Iron Co. Withdrawn.

2883. Eyears vs Lewis. Granted. Plff. has leave to file amended answer.

Sept. 13.

2533. Hill vs The Knickerbocker Life Ins. Co. Withdrawn. Plff. has leave to file amended petition instanter.

2659. Negelspack vs Mutual Life Ins. Co. Sustained.

2689. Strauss vs Weiskopf et al. Granted.

2704. Otis vs Robinson. Overruled. Deft. excepts.

2706. Wick & Co. vs Schmidt et al. Overruled.

2722. DeVeny vs Thorp. Overruled. Deft. has leave to plead by Sept. 27.

2735. Godman vs Gregerson et al. Overruled.

2749. Williams vs same. Same.

2780. Pollinvitz vs Hudson. Stricken off.

Sept. 17.

2319. Hickox et al vs Ford et al. Overruled.

2620. Morris for himself, etc., et al vs The Collamer & St. Clair Street R. R. Co. Withdrawn.

2687. Willson et al vs Kopfstein. Overruled.

2746. Williams, by, etc., vs Kelso et al. Granted. Plff. is ordered to furnish security by Oct. 1.

2747. Williams, by, etc., vs same. Same.

2750. Williams vs same. Same.

2751. Williams vs same. Same.

2759. Willson et al vs Macey et al. Sustained.

2784. Schmidt vs Grub et al. Withdrawn. Defts. have leave to answer by Sept. 20.

2804. Mills vs Jones et al. Granted. Plff. has leave to amend his petition.

2811. Everett vs Bauman et al. Granted.

3076. Johnson et al vs Holmden et al. Sustained. Deft. excepts.

3069. Schwab et al vs Schwab et al. Granted.

3009. Union Mut. Life Ins. Co. vs Johnson et al. Granted. Belden Seymour appointed receiver. Bond $500.

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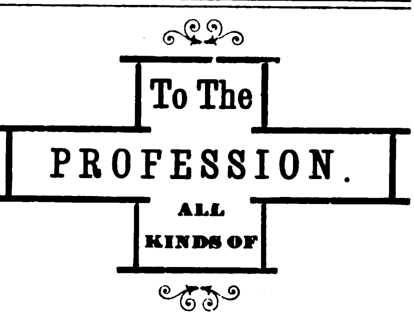

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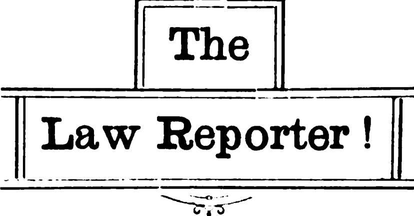

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CUYAHOGA COMMON PLEAS.

SEPTEMBER TERM. 1879.

HENRY L. HILLS ET AL. VS. R. H. LAMBERT ET AL.

Married Women—Contract—Real Estate Broker, Etc.

No judgment can be recovered against a married woman on a contract with a real estate broker to pay a commission for the sale or exchange of her separate real estate.—ED. LAW REP.

CADWELL J.:

In this case there is a demurrer by the defendant, Amelia Lambert, to the amended petition. The petition alleges that the defendants, R. H. Lambert and Amelia Lambert, as husband and wife, entered into a contract with the plaintiffs, who aver that they are real estate brokers and agents, whereby it was agreed, if the plaintiff should succeed in selling or exchanging property belonging to the wife for certain other property, that they would pay to the plaintiff the sum of two per cent. upon the value of the property sold and exchanged, (and that amount was $5,000) and that the plaintiffs are entitled to recover from the defendant the sum of $100, the two per cent. A personal judgment is asked. The petition contains the further allegation: "The plaintiffs further say that said obligation on the part of said defendant, Amelia Lambert, was incurred for the benefit of her separate estate and property, and for the improvement of the same; wherefore the plaintiffs pray for a judgment against the said Amelia Lambert for the sum of $100 and interest," etc.

Prior to the law of 1866 no judgment could be obtained against a married woman upon a contract entered into by her. That statute gives the right to a married woman to make contracts for labor and materials for improving, repairing and cultivating her real estate; but it is not broad enough to embrace a contract with a real estate broker to sell or exchange her real estate. It cannot come under the head of improving real estate, hence no personal judgment can be rendered against her by any court, either Justice or Common Pleas upon a contract of that kind. The plaintiff merely asks for a personal judgment, and there can be no other relief because there is no specific property described in the petition which is sought to be charged. The demurrer is sustained.

PETER HIGGINS VS FREDERICK W. PELTON, TREASURER.

Illegal Assessment—Action Against Treasurer to Recover, Etc.

HAMILTON, J.:

The plaintiff brings his action to recover the amount of an assessment paid during the years 1876 and 1877 for widening St. Clair street, in this city, upon the ground that the assessment was illegal and void. The assessment was paid in several instalments, and they are all grouped together in the petition as one cause of action.

It is claimed on behalf of the defendant that the payment of each instalment constituted a separate cause of action, and a motion is made to require the plaintiff to separately state and number his causes of action.

On behalf of the plaintiff it is contended that there being but one assessment it is but one act,—liken it to a contract for the sale of land, or anything else where the purchase price is payable in instalments, where instalments have fallen due that an action may be brought to recover upon the contract in a single count in the petition, whatever may be due. They also liken it to a note of hand, payable in instalments, and when interest is payable annually—that it would be idle to say that these instalments and interest payable annually should be declared upon as separate and distinct causes of action, but that whatever is due upon the note ought to be sued for in one count in the petition.

It seems to the Court that in analogy to contracts, where different payments are falling due at different times, and to a lease where rent is falling due at different times, that all may be included in one cause of action.

We are of the opinion that it would

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not be good practice to permit a party thus having a contract or lease with different instalments due at divers times to bring separate actions for each instalment; that it would be making unnecessary costs to the defendant. So in the case of this assessment, if the treasurer was sueing for the different instalments due, we think that he should be required to put them in one action. We do not think any division of damages or of the action ought to be permitted. If then the treasurer, if he was commencing an action for these assessments, should unite them in one cause of action, may not the other party who has paid the illegal assessments recover them back in one cause of action? The only answer that can be well made to that position, if any can be made, it seems to me, is upon the theory that the action against the treasurer is founded in tort. That every time he collects such a tax he commits a tortious act, and if he thus commits a tortious act, is it any answer for him to say that he founds his authority for committing the separate and distinct tortious acts upon a common ground? It is certainly not a continuous trespass or tort, and therefore the acts, if tortious, it seems to me, would be separate and independent acts, the collection of each instalment resting upon its own foundation.

But can the act of the treasurer be regarded as tortious? I am aware that there are many authorities that hold that a trersurer who seizes property to pay a tax that is assessed without color of law is guilty of trespass. That, unquestionably, was the former holding in this State. At the same time it was held that if the law providing for the tax was valid, but the assessment was illegal because of some omission or irregularity on the part of those charged with making the assessment, and the duplicate is regular upon its face, that the treasurer should be protected, and that suit in such case should be brought against the parties who illegally assessed the tax or caused it to be done. The treasurer was protected in the same way that a sheriff or constable would be by the regularity of the process served by him.

It seems to the Court that since the passage of the law of 1856 the character of the transaction has been changed, and that the treasurer may be sued in any case to recover an illegal tax paid, not only when he commits an actual trespass in its collection, but when the tax has simply irregularly gotten upon the books; that he stands as the representative of the parties making the assessment and is liable to a suit at law upon two conditions: (1) That the tax is illegal. (2) That he has collected it.

Under the terms of this statute we therefore think, there having been as the Supreme Court said, practically no relief for the tax payer either in equity or at law prior to its passage, that it was the object of the legislature to furnish this remedy for the collection of an illegal tax, and the right of recovery does not depend upon the tortious character of the collection at all. Eliminating from it then by this process of reasoning, if we are correct in it, the character of tortiousness, we think it comes under the head of one transaction, and the action should be for the recovery of the instalments altogether as one cause of action. It is said that a demurrer might lie to some of these instalments. We think that objection is not well taken, as a demurrer will lie to so much of the petition as is shown upon the face of the petition to be barred by the statute of limitations. We are, therefore, of the opinion (and have arrived at it with considerable hesitation) that no injustice will be done to these parties by permitting these actions to go forward in their present form without separately stating and numbering the causes of action, and that under the law they are not separate and distinct causes of action in the sense that they are required to be stated separately. The motions, therefore, in these cases will be overruled.

The argument in support of the demurrer in this case, as I understood it, proceeded upon the theory that the causes of action appear upon their face to be groundless for the reason that the payment of the tax was voluntary. If in any of the cases the question is made by spectal demurrer to any count, whether or not the statute of limitations has run against an assessment or part of an assessment, may be presented to me at some future time. But I proceed to examine the question upon the suggestion made that the petition contains such a state of facts as shows on its face that the assessments were made voluntarily. So far, therefore, as a decision will go in this case, upon that ground the entries may be made. Do these petition show then that the causes of action cannot be maintained because the payments were voluntary? It is declared in the petition that the assessment was made at a certain time, was divided into instalments, and that these instalments were from time to time placed upon the duplicate, and that payments half-yearly were made from time to time upon these instalments as they were entered on to the duplicate. It is further averred in the petitions that these payments were made under the solemn protest of the parties paying to prevent their lands from being returned delinquent and sold. It is now said that that is not sufficient to make a protest, that it was necessary for the parties to wait until the half-yearly payment had been returned delinquent, sent back again to the auditor, again returned to the treasurer and the other half of the taxes returned delinquent and sent back to the auditor, then to the treasurer again, and then wait until the next year's instalments fall due and the lands are finally advertised, and the auditor ordered to sell;—that then payment may be made under protest and not until then; that if it is paid before, when there is no present danger of sale, it is not paid under protest; in other words, that a protest is not enough in all cases to make a payment involuntary. A good many authorities have been cited to that effect. Such undoubtedly was the rule of the common law, and perhaps the rule in this State prior to the passage of the act of 1856, but in the 27th O. S. this subject comes under review at great length by the court, and while the syllabus of that case, which we concede is what we are to be governed by, is not broad enough to include this question in its terms, yet we think from the reasoning of the court that it clearly appears that there are but two things necessary in order to maintain a right of action, to-wit: that the tax is illegal and void, and that the collection has been made under and by virtue of process of law and authority vested in the treasurer by the law to collect it. It is needless for me to examine at any considerable length all these authorities. We think that the clear holding of the court in that case, whatever might have been the law prior to that time is as we have stated, and unless the petition itself shows that the payments were voluntary, the taxes paid may be recovered back. We do not think, from the statements contained in the petition, that the payments were voluntary under the rule as laid down in that case. The demurrer, therefore, must be overruled.

In some of the petitions it is simply averred that these assessments are wholly illegal and void. It was claimed in the argument on the de-

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murrer that was an averment simply of a legal conclusion, and that the demurrer should be sustained for that reason. In other of the petitions the averment is that the assessments are illegal and void, and have been declared so by the Supreme Court of Ohio in an action wherein the present defendant was also defendant. But upon the single averment that they were illegal and void in their inception, it seems to the Conrt that it is also an averment of a fact. Swan, in his treatise upon pleading, states that if the averment is that by the mutual dealings between the parties, the mutual account, the defendant is indebted to the plaintiff that a demurrer will not lie; that although such an averment may be a conclusion from certain other facts, not represented, it is nevertheless an averment of a fact; that it has some of the elements of facts in it, and that a motion should be made to make it more definite and certain in that regard, instead of a demurrer. Holding these views of the case the demurrer, as to this point also, will be overruled.

GRANNUS & GRISWOLD for plaintiff.
HEISLEY & WEH for defendant.

SUPREME COURT OF WISCONSIN.

DAYTON VS. WALSH.

Married Woman's Separate Property—Husband as Agent for Wife.

A married woman purchasing a farm on credit and taking the title in her own name may employ her husband to carry on and manage the farm, without any specific arrangement as to his compensation, and the crops raised under such management will not, by reason thereof, become liable for the debts of the husband.

COLE, J.:—This is a contest between the plaintiff, a married woman, and her husband's creditor, for certain crops grown upon a farm, the title of which is in her. It appears that the plaintiff, having no separate estate, purchased the farm of a third party, paying nothing down, but giving her own note, and a mortgage on the premises conveyed, to secure the payment of the purchase money. There is no claim nor pretense that the purchase by the plaintiff was not a perfectly fair, honest, *bona fide* transaction, free from all imputation of fraud, unless the law condemn such a purchase upon credit. The husband of the plaintiff lives with her on the farm, assumes the direction and control of the business, so far as relates to the farm labor, but carries on the business in the name of the plaintiff, as her agent, and without any agreement as to his compensation for services rendered. The plaintiff has paid from the proceeds of the crops raised upon the farm one year's interest on the purchase money, and, in addition, made a payment of $200 to apply on the principal, and it is admitted that the crops in question were produced by means of the joint labor and management of the plaintiff and her husband. These are the material facts upon which the question of law arises. Can, then, a married woman, under the laws of this State, who has no separate estate, purchase of a third person, upon credit, a farm; take the title in her own name, and hold it for her own use and not for the use of her husband; carry on the farm by means of the agency of her husband, who is employed by her to manage the business, but without any specific agreement as to his compensation; and hold and retain the crops thus raised as her own, or do the crops, under such circumstances, become liable for the debts of her husband?

The doctrine is elementary that at common law a married woman had capacity to take real and personal estate by grant, gift, or other conveyance from any person other than her husband. Equity sustained conveyances to the wife direct from the husband where the rights of creditors did not intervene: Putnam *v.* Bicknell, 18 Wis. 333; Pike *v.* Miles, 23 Wis. 164; Hannon *v.* Orley, Id. 579. As to the real property at common law, where no trust was created, the husband took the rents and profits during coverture or for life, where there was issue of the marriage, while as to the wife's personal property he became the absolute owner, providing he reduced it to possession during coverture. But this rule of the common law, in respect to the rights of the husband in the property of the wife, was changed by statute more than a quarter of a century ago: See chapter 44, Laws 1850. By this enactment it was provided that a married woman might hold as her own separate estate any real or personal property belonging to her at the time of her marriage, and might likewise receive by inheritance, gift, grant, devise or bequest, from any person other than her husband and hold to her sole and separate use any real or personal property, or interest or estate therein, and the rents, issues and profits thereof, in the same manner and with like effect as if she were unmarried; and the same should not be subject to the disposal of her husband, nor be liable for his debts.

This statute removed many of the disabilities which a married woman was under at the common law, and secured to her the full use and enjoyment of her separate estate: See Conway *v.* Smith, 13 Wis. 125; Feller *v.* Alden, 23 Wis. 301; Beard *v.* Dedalf, 29 Wis. 136; Hoxey *v.* Price, 31 Wis. 82: Fenlon *v.* Hogeboom, Id. 172. In McVey *v.* Green Bay & Minnesota Railway, 42 Wis. 532, we had occasion to put a construction on the word "grant" as used in this statute, and it was decided that it included a deed of bargain and sale to a married woman, executed by a stranger, and that a married woman, under such a conveyance, might acquire title to land by purchase, and hold it as her separate estate, if it really were such. But in that case no question arose as to the power of a married woman, having no seperate estate, to purchase on credit, as in this case, because the court held that in absence of all proof upon the subject the presumption was that the consideration was paid by the grantee when the conveyance was executed. Of course, in all cases where the consideration was, in fact, paid by the wife out of her separate estate, the purchase was good and valid. Notwithstanding the Legislature had thus secured to the wife the full use and enjoyment of her seperate estate, and clothed her with power to make legal contracts with respect to it, still her earnings belong to the husband, unless either from drunkenness, profligacy or other cause he neglected or refused to provide for her support: Stinson *v.* White, 20 Wis. 562; Edson *v.* Hayden, Id. 683. But by chapter 155, Laws 1872, the individual earnings of a married woman, except those accruing from labor performed for her husband, are declared to be her separate property. and not subject to her husband's control, nor liable for his debts. This being the state of the statutory law, it follows, and has, in fact, been so ruled, that a married woman may now carry on business in her own name and for her own benefit; may make valid contracts in respect thereto, which may be enforced at law in actions against her; and may enjoy and have the advantage of all the profits arising from such business, in the same manner as though she were sole: Meyers *v.* Rahte, 1 Northwestern Reporter, N. S. page 353. If she have a separate estate it would not be claimed that she could not purchase real or personal property, either for cash or on cred-

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it, to use in carrying on trade or business, and increase her profits. Nor will it be denied, if she have no such estate, that she might get or acquire property by her labor, skill or talents, and hold and enjoy it as "earnings," for so the law declares.

Dr. Webster defines "earnings" to be that which is earned; that which is gained or merited by labor, service or performance; wages or reward. We know that some gifted women acquire or earn large sums of money by their writings, works of art, or by singing or performances on the stage. Others, again, make wealth in carrying on trade, or by sagacious or well-directed efforts in some branch of industry. These earnings and profits the law of this State secures to the married woman as her separate property. Now suppose a married woman is a seamstress, having no estate of her own, may she purchase a sewing machine by means of which she may increase her earnings and make her labor more profitable? Or if she be a music teacher may she buy a pianoforte upon which she can give music lessons? Does not the law allow her to buy these things on credit and acquire a separate estate by her earnings? It seems to us it does. It is but another application of the same principle to permit her to lease or buy a house upon credit in which she may keep a private school, or earn money in keeping boarders; or to permit her to buy a farm in the same manner, and raise stock or grain, and thus acquire a separate estate. It is in perfect accord with the spirit of all the legislation in regard to the property rights of married women to enable her to do these things. It is said that these statntes are remedial in their character; intended to remove the disabilities which the common law attached to married women, and were designed to enable them to have, hold and acquire property which they could call their own, and to earn something for themselves by their skill and labor. They are thefore to be liberally construed to secure the object of their enactment: McVey *v.* The Green Bay & Minn. R'y, *supra.* There can be no doubt but the title to the farm in this case vested in the plaintiff, by the conveyance made to her, the same as though she antecedently had a separate estate with which to pay the consideration. Now may she not hold and enjoy the proceeds of the farm as her own property? Probably, if she had not used the agency of her husband to carry on the farm, and aid in raising the crops, it would not be claimed that he had any interest in them which his creditors could seize upon an execution. But, if the wife is the real owner of the premises, is there any legal objection to her employing her husband as an agent to manage the business for her? There is doubtless more or less reason to suspect the fairness and honesty of such an arrangement, and it should be closely scrutinized to see that it is not a cover for fraud; a mere device to place the husband's property beyond the reach of creditors. But where the purchase of the wife is really *bona fide*, she being the real owner of the property, we do not think the law imputes fraud, or condemns the transaction, from the mere fact that the wife had no separate estate when she made the purchase, and therefore, from necessity, made it wholly on credit.

In Feller *v.* Alden, *supra,* the wife owned land as her separate estate, and cultivated it by means of the agency of her husband and the labor of her minor children. It was held that the legal title to the products and proceeds of the farm was in the married woman, so that they could not be levied on under an execution against her husband. It was said that the wife was at liberty to avail herself of the agency of her husband to manage her separate estate, and still, the produce thereof, with the increase of stock, would belong to her. It is suggested in the brief of counsel for defendant that the doctrine of that case has been overruled by the subsequent decision in Lyon *v.* Green Bay & Minn. R'y, 42 Wis. 548; but there is a mistake. The Lyon case was an action of trespass by the wife for injuries to the grass and crops on her land. This court thought the evidence showed that the husband received the proceeds of the land, and was the real owner of the crops, and was the party to bring an action for an injury to them. There is no conflict between the two decisions as we understand them.

We do not deem it necessary to comment upon the decisions in other States, to which we were cited on the argument, many of which were made under statutes unlike our own.

The question presented is purely one arising upon our own statute, and we feel at liberty to give it that construction which will best meet the object of the Legislature in enacting it.

It follows, from these views, that the judgment of the Circuit Court must be reversed, and the cause must be remanded, with directions to give judgment for the plaintiff for the return of the property or its value.—*Chicago Legal News.*

NOTES OF RECENT CASES.

CONTRACT.

When the statute requires a contract to be in writing, it cannot be partly in writing and partly in parol. Lazear vs. Nat. Union Bank of Baltimore, Md. Court of Appeals.

NATIONAL BANK.

A National Bank has no authority to use such surplus funds as may remain on hand from day to day for the purpose of buying notes. Ibid.

EFFECT OF ADMISSION IN ANSWER.

An admission in an answer in chancery not sworn to binds the parties, and no other proof of the facts is required of complainant. Miller et al. vs. Payne et al., Appellate Court of Ill., 4th Dist.

CONSIDERATION FOR DEED TO WIFE.

Where a wife places money in the hands of her husband and allows him to use it and invest it as his own for a number of years, it will not be a good consideration for the conveyance of land to her by the husband when insolvent. Ibid.

SHARES OF STOCK—PARTIES.

Where one purchases a certificate of stock, he takes the share subject to the equity of the corporation against it. The certificate is only a muniment of title. It does not possess the character of a commercial obligation, and is not governed by the rules of the law merchant.

The corporation is a necessary party in a suit in chancery to cancel shares of stocks alleged to have been fraudulently issued and transferred. Campbell vs. Morgan, Appellate Court of Ill., 4th District.

MARRIED WOMEN.

Contracts and deeds — Estoppel by fraudulent representations. — While contracts and agreements of a married woman, respecting her real estate, and conveyances thereof by her without her husband uniting in the execution thereof, made in 1858, if free from fraud, could not be enforced at law or in equity, yet if a married woman makes a contract or agreement, respecting her real estate, with another by fraudulent means, and thereby obtains an inequitable advantage, a court of equity will hold her estoppel from setting up her coverture to retain the advantage, and equire her to perform the contract, if

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executory, and prevent her from avoiding the same, if executed, or will compel her to place the other party *in statu quo* before she will be allowed to rescind or repudiate such contract or agreement, as the equities of the case may require.

Where a married woman, in 1868, holding the title to real estate in the name she had before marriage, applied for a loan of money, and fraudulently concealed her marriage, representing herself as a widow, and thereby procured the loan upon the execution of a deed of trust upon such real estate in her former name, without her husband joining therein, it was *held*, that in equity she could not avoid the conveyance and retain the money thus fraudulently obtained, and a lien was decreed upon the land for the amount due, and a sale ordered in default of its payment. Patterson vs. Lawrence, Supreme Court of Ill., (90 Ill.)

JURY—CHALLENGE FOR CAUSE.

1. It may be questioned whether by the ancient law, the mere formation and expression of an opinon was sufficient ground of challenge, unless the opinion could be referred to some partiality for or against the party challenging.

2. An opinion formed merely from newspaper reports forms no ground for challenge. If such an opinion is to amount to a disqualification, it would be difficult, if not impossible, in a criminal case of any importance, especially a case of murder, to find twelve jurors of intelligence and character such as the statute law requires.

3. It is evident, from the views of Chief Justices Marshall and Taney, as expressed in 1 Burr's Trial, 367, and in Wharton's Criminal Law, 2981, that the opinion which should exclude a juror must be a fixed and deliberate one, partaking of the nature of a prejudgment. Waters vs. State of Maryland, Court of Appeals of Md.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Sept. 26, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Sept. 20.

Jacob Kamshar and wife to John Rock. $260.

C. C. Lowe to Lucinda Gould. $900.

Valentine Fetterman and wife to Carolina Koehg. $50.

Simon Wetzel and wife to Ignatz Kohn. $400.

Thos. McGinty and wife to Peter O'Dee and wife. $180.

Casper Reimer and wife to Manuel Halle. $1,700.

Wm. and J. E. Clement to Irene W. Miner. $475.

Thos. Dukat and wife to Joseph Beraneck et al. $800.

Jacob Bluim and wife to Henry Bluim. $1,000.

Same to John Roglan. $150.

Same to Andrew Schemer. $200.

Sept. 22.

Joseph Storer and wife to Wm. C. Scofield. $500.

Same to same. $1,000.

Michael Jones and wife to Henrietta Fickelsher. $350.

Vaclav B. Vanek to J. M. Nowak. $100.

Louis Wangelin and wife to Andrew Spangler. $200.

George P. Nelson and wife to Samuel B. Prentiss. $2,500.

Christian Knauer and wife to Andrew Knauer. $603.50.

Daniel McCormick to Joseph W. Past. $220.

Truman Case and wife to The Citizens' Savings and Loan Association. $1,200.

Sept. 23.

Mary Marck to Johann Klein et al. $112.

Paul Sieg and wife to Christ Hoffman. $200.

Frank L. Thompson and wife to T. N. Brainard. $1,200.

Andrew Paul and wife to The Society for Savings. $1,000.

Jeremiah Carroll and wife to Ranson O'Connor. $350.

Sarah G. Donsereau and husband to John S. Bullard. $500.

Edmund Walton et al to The Society for Savings. $2,000.

Frank Srp and wife to Thomas B. Cowley. $250.

Wm. Runnells and wife to S. W. Porter. $2,500.

Mary Kaiser and husband to Moses Halle. $1,000.

Sept. 24.

G. H. Gilbert and wife to Holland Brown. $540.

John Reidy and wife to The Society for Savings. $200.

Chas. Felchaw and wife to Moritz Eckerman. $200.

John Thalon and wife to A. H. Wick. $200.

Alois Truka and wife to Phillip Mueller. $300.

Chancy S. Giddings to Fred J. Prentiss. $2,430.

Same to Wm. Bingham et al. $2,000.

Edward Taylor to H. Wick & Co. Nine hundred dollars.

Sept. 25.

Peter Benda to Helen Dowse. $310.

Fran. Tapa to same. Three hundred and fifty dollars.

Anton Zverina to same. Four hundred dollars.

Thomas edmond to John Ward. One thousand dollars.

Michael Schuetrampf and wife to G. W. Honerighausen. Four hundred dollars.

W. J. McCon oughey and wife to Dudley Pettibone. Eight hundred dollars.

Chas. W. Heard and wife to Mary A. Deckan. Six hundred dollars.

Oliver Arey to Elizabeth Waite. Two thousand seven hundred dollars.

Sept. 26.

M. C. Parker to John Boehm. Three hundred and forty dollars.

John Witting and wife to Clara M. Ruse. Three hundred dollars.

Levi Bauder, Sr., and wife to Julia A. Kopp. Eight hundred dollars.

Robt. Horrocks and wife to T. H. White et al. Two hundred dollars.

Henry Wergest and wife to Frank Leick. Two hundred dollars.

W. F. Meckfessel and wife to Frank Leick. Two hundred dollars.

Jacob Sommer and wife to Mary O. Sommer. One thousand dollars.

Wm. Lamb to Maria Evans. One thousand two hundred dollars.

S. M. Tatum to David Tatum. Eighteen hundred dollars.

Chas. Marquardt et al to J. E. Kappler. Six hundred and fifty dollars.

John Goepper and wife to The Society for Savings. Seventeen hundred dollars.

CHATTEL MORTGAGES.

Sept. 23.

Fred Lonuz to John Schultz. $64.

Thomas McNally to Owen Maguire. $125.

Henry A. Baker to W. H. Carter. $642.

August Fluck to John Fluck. $500.

Sept. 24.

William McWilliams to Lester McWilliams. $884.

Seth H. Sheldon to H. C. Lagomgue. $3,241.

Wm. C. Bidle to I. C. Fahrion. $1,000.

Sept. 25.

Gustave Deucher to Jacob Straub. Fifteen hundred dollars.

John Gibson to Phyletus Francis. Six hundred dollars.

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J. H. Gleason to Wm. S. Wight. Four hundred and forty dollars.

Michael Bassel to Susannah Jacobs. Four hundred dotlars.

Sept. .26

Henry Zum Felde to Felix Nicola. Six hundred and fifty-two dollars.

Geo. M. Miner to Harris E. Mason. One hundred and thirty-five dollars.

Wm. S. Forrester to John G. Boyd. One hundred dollars.

DEEDS.

Sept. 19.

Holland Brown and wife to G. H. Gilbert. $740.

Pat. Filbin and wife to Citizens' Savings and Loan Association. $1,-500.

Emma Keam to Amelia Keam. $400.

William Meyer et al to August Newjahr. $820.

Lewis Nicholson and wife to Ezra Nicholson. $3,000.

Peter O'Dee and wife to Thomas McGinty. $380.

B. L. Pennington to Patrick Martin. $1,200.

E. D. Pelton and wife to Cordelia Pelton. $5.

Marion A. Parmly et al to Almira L. White. $1,400.

Sept. 20.

J. J. Burton to Mary A. Colt. $125.

Ellen E. Boest and husband to Anton Straub. $800.

Robt. Beggs and wife to Emma Rogers. $900.

Lucinda Gould to C. C. Lowe. $1,500.

William Gelling to Mary A. Samricker. $125.

Thos. McGoudy ex. etc. to Harriet Oles. $335.

Harriet Oles to Cynthla S. Hannum. $335.

George C. Hickox et al to Frank Kliment. $480.

John J. Kemish to the Board of Education of Warrensville, O. $550.

Ellen Parker and husband to Thos. Lillies and wife. $1,332,

Elizabeth Porter to Rosa Maschke. $1.

George A. Such and wife to Mary Samricker. $230.

Andrew J. Wells to N. C. Haines. $100.

William Walton to Mary Neff. $62.73.

L. M. Southern by Thos. Graves, Mas. Com., to Fred. M. Sanderson. $2,565.

Elizabeth Hoosick and husband by J. M. Wilcox, sheriff, to Jas. Parker et al. $600.

Sept. 22.

William Baxter to James Aitken. $569.

Frederick Benken and wife to Henry Banka. $1,000.

H. W. Barnes and wife to Charlotte S. Snow. $300.

Mary G. Brown and husband to Harriett O. Sacket. $400.

S. B. Giddings and wife to C. S. Giddings. $1,000.

Catharina Laysey and husband to Michael Halpin. $1,500.

Mary Mahoney to August Zell. $795.

Elizabeth M. Proudfoot to Rebecca Hiller. $5,425.

Joseph M. Past and wife to Daniel McCormick. $700.

Robert Pease and wife to Nelson Willson. $1,984.

Casper Reimer and wife to Harry Schnauffer. $2,000.

Harry Schnauffer to Maria A. Reimer. $2,000.

L. J. Talbot and wife to Mrs. Mary York. $800.

J. S. Van Epps to L. R. Van Epps. $1.

Sept. 23.

F. A. Streiby to Flora A. Riblet. $1,000.

U. H. Birney to same. $100.

James Conway and wife to J. D. Cleveland. $1,500.

Thos. B. Cowley and wife to Frank Srp and wife. $330.

Almon Dunham to Avery Dunham. $700.

Same to Henry Dunham. $700.

Same to Albert Dunham. $700.

Same to Betsy Fay. $700.

Same to Carolina Philbrook $700.

Helen Dowse to Frank Tupa. $500.

Robt. H. Wangelin to Ernst Wagenknecht. $100.

Helen Dowse to Anton Zverina. $500.

Mary J. Field and husband to Marcia B. Livingstone. $1440.

Jefferson Fish and wife to Stephen H. West. $300.

William Hoyt to Lucy O. Case. $5,000.

James M. Hayt and wife to Mrs. Julia P. Doyle. $400.

Ellen Halpin and husband to Catharina Laysy. $2,800.

Wilhelmina Hugger to Heinrich Kindmueller. $800.

Isaac Kidd to Martin Breen. $1,-050.

John Hilby and wife to Jacob B. Moore. $1,500.

Simeon Gurier to Benjamin Gurier. $1,500.

Mary M. Potter et al to Emma Hedges. $11,500.

John Rock et al to William Hirsch. $560.

John B. Tattavall to Margaret L. Roland. $2,500.

John Geissendorfer et al by E. B. Bauder, Mas. Com., to Hiram H. Little. $4,815.

Adam Seipel by Felix Nicola, Mas. Com., to Manuel Halle. $1,000.

L. M. Southern et al by C. C. Lowe, Mas. Com., to Amasa Stone. $1,285.

Sept. 24.

Wilhelm Busbach and wife to Karl M. Kolbe. Five dollars.

Karl M. Kolbe to Felicitus Busbach. Five dollars.

Mary Foss and husband to Thomas Travis. Five hundred and fifteen dollars.

Noble Hotchkiss and wife to James A. Johnston et al. Four thousand dollars.

Orlando J. Hodge et al to Patrick Cullinau. Twelve hundred dollars.

Johannes Kugher and wife to Jas. Dobbie. One dollar.

F. J. Prentiss and wife to Chancy S. Giddings. Four thousand four hundred and thirty dollars.

W. H. H. Peck to Alvis Trieka. Four hundred and eighty dollars.

Nelson Moses to Joseph T. Smith. Twelve hundred dollars.

Rudolph Willbrandt and wife to James Dobbie and wife. Six hundred dollars.

John H. Weber and wife to St. John Congregational Church. One hundred and ninety-five dollars.

Mortimer McMahon by Felix Nicola, Mas. Com., to Moses Hall. Nine hundred dollars.

Fred Siebert et al by C. C. Lowe, Mas. Com., to Fred Mencke. Fourteen hundred dollars.

Sept. 25.

Wm. H. Brown et al exrs. to Frank Mak. Four hundred and sixty-two dollars.

Samuel H. Cowell and wife to Oliver Arey. Three thousand seven hundred and fifty dollars.

Walter G. Cleveland to Jas. Conway. Five hundred dollars

Maria Evans to William Laub. One thousand seven hundred and eight dollars.

James M. Wolf and wife to Chas. Brown et al. One dollar.

James M. Hoyt and wife to Mrs. Josephine Barsa. One hundred and twenty-seven dollars.

J. E. Moses and wife to Margareta Bechenfeld. Four hundred and eighty dollars.

A. G. Shields and wife to The Ovi-att Man. Co. Six hundred dollars.

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Andrew Spangler and wife to John F. Hagedorn. Five hundred and sixty-five dollars.

Lewis Umbstaetter et al by H. C. White, Mas. Com., to the Society for Savings. Three thousand seven hundred dollars.

Chas. D. Cutter and wife to Mrs. Mary S. Foote. One dollar.

Judgments Rendered in the Court of Common Pleas for the Week ending Sept. 25, 1879, against the following Persons:

Sept. 18.

Wm. L. Stearns. $404.54.
I. V. Warner et al. $709.10.

Sept. 20.

John G. Vetter. $741.44.

Sept. 22.

Geo. C. Ross. $584.94.
G. J. W. Newcomer. $203.20.
Lucus Allen Heard. $3,000.
David Morrison. $1,153.10.

U. S. CIRCUIT COURT N. D. OF OHIO.

Sept. 25

3914. Abraham Wolf et al vs The First National Bank of Ashland. Bill filed. Dirlam & Layman.

COURT OF COMMON PLEAS.

Actions Commenced.

Sept. 19.

15881. Isaac Reid vs H. W. Andrews et al. Money and relief. W. S. Kerruish.

15882. In re G. M. Lilleland vs John M. Wilcox, sheriff. Habeas corpus. W. B. Sanders.

15883. Chas. C. Baldwin vs John Berlo et al. Money and relief. Baldwin & Ford.

15884. First National Bank of Norwalk vs I. V. Warner et al. Cognovit. Pennewell & Lamson; Otto Arnold.

15885. A. E. Burinson vs W. D. Savage et al. Money and to subject lands. Robison & White.

15886. John M. Moffit vs Joseph Moffit. Appeal by Dft. Judgment Sept. 1. M. S. Castle.

Sept. 20.

15887. G. M. Lilleland vs C. C. Loyd & Co. Error to Probate Court. W. B. Sanders. Nix, Noble & White.

15888. Casper Frommeyer vs Harvey P. Hobart et al. Money, to subject lands and relief. A. Zehring.

15889. Chas. H. Potter et al vs Helen Gillson et al. To subject lands and relief. A. C. Caskey.

15890. Chas. H. Burrage et al vs Comfort A. Adams et al. Money only with att. Ingersoll & Williamson.

15891. Seymour W. Baldwin vs Philip Clarke et al. To subject lands. Baldwin & Ford.

15892. J. C. Ferbert et al vs Frederick Seiger et al. Money and to charge lands. Robison & White.

15893. Robert M'Laughlin et al exrs., etc. vs Chauncy H. Andrews et al. Money only. Estep & Squire.

15894. N. Mark Flick vs Stephen Miller. Appeal by dft. Judgment Sept. 13.

15895. The German Wallace College vs C. E. Bolton et al. Money and to subject land. Foster & Lawrence.

Sept. 22.

15896. Henry Hilton et al vs Comfort A. Adams et al. Money only with att. R. P. Spaulding and F. J. Dickman.

15897. Valley R'y Co. vs A. A. Jewett et al. Money only. W. J. Boardman.

15898. F. W. Davis vs W. F. Thompson. Appeal by deft. Judgment Aug. 27. N. M. Flick, Thos. Lavan.

15899. Mary A. Rogers vs Anton Hasenpflug et al. Foreclosure of mortgage and relief. I. A. Webster.

15900. Odelia Beal vs Nicholas Aner et al. Foreclosure of mortgage. Hords.

15901. Nicholas Schmidt vs A. E. Barnes. Appeal by deft. Judgment Aug. 26.

15902. B. Landau et al vs Caroline Roskopf et al. Money and equitable relief. S. A. Schwab.

15903. A. E. Barnes vs Nicholas Schmidt. Appeal by deft. Judgment Sept. 4. H. W. Canfield, Foster & Carpenter.

15904. H. B. Callum, receiver, etc., vs Allen Willson et al. Money and to subject lands. F. J. Wing; J. H. Rhodes, C. Walker.

Sept. 24.

15905. Chauncy H. Foland vs Harmon D. Hudson. Money only. Groot.

15906. Robert Spinks vs Monroe F. Ellis et al. Money and foreclosure of mortgage with att.

15907. John H. Sargent et al vs John B. Bruggeman. Money only. J. S. Grannis.

15908. Charles Lederer et al vs George Bading et al. Sale of land and equitable relief. Hord, Dauley & H.

15909. Charles Wall vs Alfred Walker. Appeal by deft. Cook. Judgment Aug. 29. S. G. Baldwin.

Sept. 25.

15910. Charles E. Henshaw vs Samuel Dean. Money only. C. I. Komar.

15911. Charlotte Fisher vs Ide Frericks. To subject land and for equitable relief. C. R. Saunders.

15912. Bridget Reidy admx etc. vs The L. S. & M. S. R'y Co. Money only. Jackson, Pudney & A.

15913. Wenzel Kalliva vs John Reibel et al. Appeal by deft. Judgment Sept. 11. Babcock & Nowak, Smith & Hawkins.

15914. R. A. Wheelock et al vs James E. Jones. Money only. Updegraff & McMillan.

Motions and Demurrers Filed.

Sept. 18.

3101. Williamson, trustee, vs Lake View & Collamer R. R. Co. et al. Motion by Deft. Watterson, treasurer, for order on Master and Receiver to pay taxes.

Sept. 19.

3102. Huettle & Co. vs Hayes et al. Motion by dft. Lizzie Hayes to require pltfs. to give bail for costs.

3103. Geiger vs Howland. Motion by pltfs. for new trial.

3104. Sherwin et al vs Neff et al. Motion by deft. Josephine Neff to strike off supplemental petition of pltffs.

3105. Same vs same. Motion by same as to answer and cross petition of Eureka Lead Paint Co.

3106. Same vs same. Same motion to apply to A. H. Wick.

3107. Rogers vs Getchel et al. Demurrer by deft. Getchel to reply of pltff.

Sept. 20.

3108. Bruggeman vs Kleingries. Motion by pltff. for new trial with affidavit in support thereof.

3109. Jones ex. etc. vs Kirby ex. etc. Demurrer to second defense of answer.

3110. Second National Bank vs Marbach et al. Demurrer by pltff. to first, second and third defenses of amended answer of Robt. Marbach.

3111. Ohio & Penn. Coal Co. vs Bowler et al. Motion to make petition more definite and certain.

3112. Walsh, admr., etc. vs Brownell et al. Motion by deft. Clarissa A. Brownell to set aside service of summons as to her.

3113. Same vs same. Same motion by G. E. Brownell.

3114. Ward vs Van Dueseu Bros. Motion by defts. for new trial.

3115. Henke vs Heimer et al. Motion by defts. Heimer to make petition more definite and certain.

Sept. 22.

3116. Haggerty vs The L. S. & M. S.Ry. Co. Motion by deft. for new trial.

3117. Burns vs Rose. Same.

3118. Kingzette vs Sheets et al. Motion by deft. Peck to vacate dismissal and reinstate case.

3119. Ferbert et al ex. vs Archer et al. Demurrer by pltffs. to second and fourth defenses of answer of deft. Archer.

Sept. 23.

3120. Bingham vs Stone. Motion by deft. Eberlein to strike out from pl'ff's reply to his answer.

3121. The Society for Savings vs Chamberlain et al. Demurrer by pl'ff to third defense of answer of E. K. Chamberlain.

3122. Same vs same. Same to second defense of N. D. Chamberlain.

3123 Bates vs Pringle et al. Motion by pl'ff to require def't Pringle to separately state and number defenses.

3124 Roosa vs Ware. Motion by pl'ff to make second defense of answer more definite and certain.

Sept. 24.

3125 Eyears vs Lewis. Motion by def't to dismiss action.

3126 Richards & Co. vs Cuyahoga Co. Demurrer to petition.

3127 The Citizen's Savings & Loan Association vs Lardner et al. Motion by def'ts to make petition more definite and certain.

Sept. 25.

3128 Smith vs Paddock. Motion by def't to strike out from answer and make more definite and certain.

3129 Rogers vs Hughes et al. Motion by pl'ff for new trial.

3130 Koch et al vs Newshuler et al. Motion by def't Newshuler for leave to file supplemental answer.

3131 Hill vs Marsh et al. Motion by def't for the appointment of a receiver.

3132 DeVeny vs Thorpe. Motion by def't to strike out from amended petition and make same more definite and certain.

3133 Thayer vs Continental Life Ins. Co. Motion by def't for new trial.

Motions and Demurrers Decided.

Sept. 20.

2122 Bingham vs Stone et al. Overruled.

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2178 Boest et al vs Doran. Sustained.
2335 Lowman & Son vs Stohlman. Overruled. Pltff. excepts.
2473 | Dahnert vs Russell et al. Pltfs.
2474 | demurrer to answer of Russell overruled. Pltff. excep s. Demurrer by deft. Dahnert withdrawn.
2482 Hills et al vs Lambert et al. Sustained.
2742 Varian vs Pelton. Overruled. Deft. excepts.
2743 Higgins vs same. Same.
2767 Tait vs Stevens et al. Sustained.
2770 Wenham & Son vs Andrews et al. Granted.
2771 O'Neil vs Hibernia Ins. Co. Granted as to item in ex. "A." Overruled as to balance.
2778 Kelly vs Wiggins et al. Overruled.
2779 Hill vs Marsh et al. Overruled.
2787 Morse vs Jackson et al. Same.
2794 Bruch vs Clevering. Granted.
2796 Kick vs Poe et al. Stricken off. N. B. Dixon et al. have leave to answer by Sept. 27.
2800 Hill vs Marsh et al. Sustained.
2801 Second National Bank of Cleveland vs Marbach et al. Overruled.
2809 Reader vs Platt. Sustained. Pl'ff. has leave to amend his petition by Oct. 4.
2812 Kilfoyl vs Pelton. Overruled. Pltff. excepts and has leave to plead by Oct. 1st.
2813 to 2834 inclusive. Same.
2874 Judson vs same. Overruled. Deft. excepts.

Sept. 24.

3095 Laughlin et al exrs. vs Marcy et al. Granted.
2377 Bemis vs Nicola et al. Overruled. Def'ts except.
1709 State for use, etc., of Board of Education of Berea Village vs Watson et al. Sustained. Pl'ffs except.
2651 Hilliard vs Forest City U. L. & B. Association et al. Overruled.
2671 | McCurdy vs The Cleveland Haz-
2672 | ard Hame Co. Sustained as to
2673 | first cause of action. Overruled
2674 | as to the others.
2676 |
2678 Tylor vs Edwards et al. Overruled. Pl'ff excepts.
2696 Collister et al vs Myers et al. Sustained as to first, second and fourth requests and overruled as to the balance.
2738 Bronson et al vs Stoddard et al. Overruled.
2792 Clermont vs Cochran et al. Overruled.
2797 Platt vs Reader et al. Sustained.
2817 Alger et al vs Lunn et al. Sustained as to first, second and third requests and overruled as to fourth and fifth.
2823 Tilden vs City of Cleveland et al. Overruled. Def't excepts.
2835 Varian exr. vs Strateman. Sustained.
2836 Stone vs Decker et al. Granted.
2872 | Bradley vs Pelton. Overruled.
2873 | Def't excepts.
2886 to 2922, and from 2935 to 2973 inclusive. Same ruling.
2999 | Morgan and Dangall vs same.
3002 | Demurrer overruled. Def't excepts.
3011 Alger vs Lunn et al. Sustained as to first, second and third requests and overruled as to the balance.
3046 Citizens' Savings & Loan Association vs Lardner et al. Def'ts have leave to withdraw their petition and file a motion.

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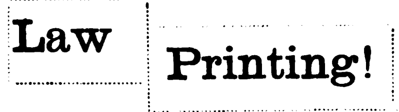

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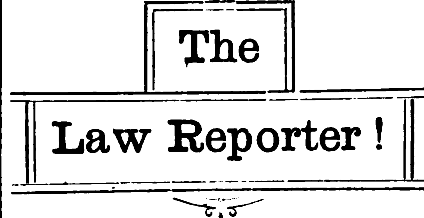

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CUYAHOGA COMMON PLEAS.

SEPTEMBER TERM. 1879.

SECOND NATIONAL BANK OF CLEVELAND VS MARBACH ET AL.

Redundancy in Pleadings—How to be Met, Etc.

HAMILTON, J.:

This is an action brought upon certain promissory notes secured by a mortgage. Certain defenses are interposed by the defendant Marbach, which are separately stated and numbered. It is said that the matter set up in some two or three of these defenses is not sufficient in law to constitute a defense to the cause of action set forth in the petition; that it is irrelevant and redundant matter, and a motion is made to strike out those defenses for that reason. We think that much of this matter is redundant, and that the most, if not all, of them are subject to demurrer. We think, however, the proper method to reach it is by demurrer. A motion to strike out redundant and irrelevant matter supposes that there is something in the defenses, or in the action that is good. If the purpose of the motion is to strike out the entire defense, it is taking the place of a demurrer, a practice that ought not to be permitted. The motion will be overruled and leave given to demur.

B. R. BEAVIS for plaintiff.
A. ZEHRING for defendant.

HARRIET L. MARTIN VS. JOHN GARWOOD.

HAMILTON, J.:

This action was brought before a Justice of the Peace to recover the sum of $15, and comes into this court on appeal. The cause of action is stated in the petition to be "for the use and occupation of certain furniture, and for certain meat, drink, fire, candles, attendance, chattels and other necessaries, which said plaintiff furnished to the defendant," for all of which the plaintiff says the defendant is indebted to her in the sum of $15. A motion is made to make the petition more definite and certain by stating the kind of chattels, drinks and necessaries. We think the defendant is entitled to know something about it.

BENJAMIN for plaintiff; SCHINDLER for defendant.

BOEST ET AL VS DORAN.

Statute of Frauds—When Contract Within, Etc.

HAMILTON, J.:

The action in this case is brought for the purpose of enforcing the specific performance of a contract for the exchange of real estate. The plaintiffs say that at a certain date they were possessed of certain lands in Michigan; that the defendant was the owner and was possessed of a certain house and lot on Taylor street, in the city of Cleveland, which he had put into the hands of a real estate agent for sale or exchange, which agent on behalf of the defendant made a proposition to the plaintiff specifying the terms upon which he would exchange the same for lands of the plaintiff located in Michigan. That subsequently the plaintiff wrote a letter in reply to that proposition accepting it, provided certain modifications were made in the contract. It is said that these modifications were subsequently accepted by the plaintiff, and that the plaintiff further required that some money be paid down to bind the bargain, to-wit: the sum of ten dollars, and he says in his receipt, "Received of E. E. Boest ten dollars as part purchase money on house and lot No 191 Taylor street, as per agreement," signed by said Doran.

It is claimed that the signing of this receipt by Doran, together with the former correspondence between the parties, makes a contract in writing so as to take it out of the statute of frauds. A demurrer is filed to this petition on the grounds that the contract is within the statute of frauds. The transaction was simply this: A proposition was made by one party to the other which was not accepted. He wrote back that he would accept certain other terms. It is said that was accepted, and that subsequently he took ten dollars in money on that bargain and gave a receipt. The receipt

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referred to it as a part of the purchase price of the house and lot as per agreement. The agreement referred to must be the last proposition coming from the defendant, which he says he accepted. It does not appear that this acceptance of this proposition was in writing, unless it can be said having signed this receipt for ten dollars, it is an acceptance in writing. We think that this leaves the agreement to be established by verbal testimony, to-wit, that he accepted the proposition. We think that this acceptance should be averred to have been in writing, otherwise we do not find anything in writing to bind this party. Taking the whole petition together we think the demurrer should be sustained.

ESTEP & SQUIRE for plaintiff.

FORAN & WILLIAMS for defendant.

STATE OF OHIO, FOR THE USE OF THE BEREA BOARD OF EDUCATION, VS. DAVID R. WATSON ET AL.

Action on Bond—Effect of Omission of Obligee, Etc.

HAMILTON, J.:

This action is brought to subject the defendants to liability upon a penal bond, given in the sum of $10,000 for the faithful execution of the duties of the defendant Watson, who, it is averred, was elected and qualified as the treasurer of the school board of Berea Village, it being alleged that as such treasurer he got some ten thousand and odd dollars of money into his hands, which he has converted to his own use, and that he executed this bond with the other defendants as sureties.

A copy of the bond is set out as a part of the petition. It appears from the bond that there is no obligee named in it; neither is there any blank left for the name of the obligee. It is filled up regularly, but nobody named to whom payment is to be made.

Watson makes no answer. The sureties answer, and deny that they ever executed any writing obligatory whatever —they say it is not a bond. They do not deny that they signed this paper, but they say that there is no obligation resting upon them to pay this money.

The case is submitted to the Court upon this petition and answer, and the opinion of the Court is asked as to whether there is a liability in favor of the State of Ohio for the use of this board as against these parties.

We have come to the conclus that we must answer this proposition in the negative—that there is no liability under this bond.

It will be noticed that this is not a petition seeking to reform this bond—to carry out the intention of the parties—but that it is a suit upon the bond.

The Supreme Court, speaking about questions of this character, say that such a construction may be regarded as somewhat technical, and that the ends of justice really require that the intention of the parties should be carried out, and that they should be obliged to pay what they evidently intended to pay, to-wit, the defaults of the principal; but they say, nevertheless, that the common law doctrine is that there must be an obligor and an obligee in every bond, and that while the bond may be left blank as to the date and name of the obligor, where the bond is signed at its conclusion, those blanks being immaterial, and such as can be filled up at any time (and whether filled up or not an action might be maintained upon the bond), yet where a blank is left for the penalty, and a blank left for the name of the obligee, the bond is void.

There is a case reported in the 5th North Carolina Reports which, as I apprehend, is precisely like this. That was an action brought by the administrator of a constable. Judgment had been rendered against a certain party; the judgment creditor had issued an execution and delivered it to the constable, who made a levy upon personal property, and took a redelivery bond, leaving the property in the hands of the defendant. The bond did not state to whom it was payable, but stated that the property should be forthcoming for the use of the plaintiff in the execution, naming him; and the Court held that an obligor and an obligee were both material and essential parts of a bond, and not being named there could be no recovery upon the bond.

As to whether or not this is an instrument that can be reformed in a proceeding in equity, it is not necessary now to determine; but holding as we do that it is void as a bond, there can be no recovery upon it against these sureties. Neither, though Watson does not answer, can there be any recovery against him. It is simply void—payable to no one. Still, Watson, doubtless, can be made responsible irrespective of the bond upon proper allegations.

Judgment will therefore be rendered for the defendants.

S. M. EDDY for plaintiff.

HENDERSON & KLINE for defendant.

SUPREME COURT OF PENNSYLVANIA.

LOGAN VS CASSELL.

Promissory Note—Action by Indorsee Holding as Collateral Security.

In an action by an indorsee against the maker of a promissory note, although the indorsee may have taken the note as collateral security for a loan, which has been repaid by the payee, so that the indorsee has no right of property therein as against the payee, yet the indorsee would be entitled to recover against the maker unless the note had been fully paid to the payee.

MERCUR, J.:

This action was by the indorser against the maker of two promissory notes. They were duly executed and delivered by the defendants to the payee for a valuable consideration. No subsequent failure of consideration is alleged. They were indorsed and delivered by the payee to the plaintiff, in consideration of money received from the latter at the time of the transfer and delivery. It is conceded that they were unpaid at that time, and that the defendant then had no defense against them. One contention on the trial was whether the plaintiff purchased the notes of the payee, or whether they were transferred to him as collateral security only, for the payment of money he then advanced. In either case the plaintiff acquired the possession of them in good faith, and for a valuable consideration paid at the time.

Evidence was given tending to show that after the notes matured in the hands of the plaintiff, the defendant, with knowledge that the plaintiff held and claimed to own them, settled with the payee and took his receipt in payment thereof. In the hurry of trial the learned judge appears to have overlooked the effect of this alleged payment by the maker, and failed to submit the question to the jury. It is true, the court charged that if the plaintiff purchased the notes he could recover their full amount; but if he held them as collateral he could recover only the amount due him on the original debt. So far as this goes it was correct, under the authority of Appleton v. Donaldshn, 3 Barr, 381. But those two questions, both found against the plaintiff, were insufficient to defeat a recovery against the defendant. The plaintiff having obtained the notes in good faith, he might

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maintain an action on them in his own name, although the right of property therein had again passed to the payee. Whether the plaintiff sued for himself, or as trustee for the payee, constituted no defense for the maker, unless he was thereby deprived of some equitable defense which he may have had as against the payee: 2 Pass. on Notes and Bills, 437; Whiteford v. Burckmyer, 1 Gill. 127; Mauran v. Lamb, 7 Cowen, 174; Dean v. Hewett, 5 Wend. 257; Livingston v. Gibbons, 3 Johns, Ca. 263; Brown v. Clark, 2 Harris, 469; Pearce v. Austin, 4 Whar. 489; Holmes v. Paul, 6 Am. Law Rep. 482; Ballentine v. McGeagh, 4 Brews. 95; Way v. Richardson, 3 Gray, 412. Hence, although the notes were taken by the plaintiff as collateral, and he had been fully paid the debt for which they were pledged, so that he had no right of property therein as against the payee, yet still the plaintiff was entitled to recover, unless the defendant had fully paid them to the payee. It therefore follows that the learned judge erred in instructing the jury, that if the notes were held as collateral, the plaintiff could recover only the amount he showed to be due on the original debt, without adding that they must also find the defendant had paid the excess, due from him on the notes, to the payee.

Judgment reversed, and a *venire facias de novo* awarded.

MAYER VS SENYAND ET AL.

Error to the Common Pleas No. 4, of Philadelphia County.

Decedent's estates—Trustees—Fraud—Administrator's purchase at his own sale, when void—Tender.—Where an administrator at the sale of his decedent's estate discouraged bidders with the view of procuring the property himself at a low price, and he purchased it through a third party, though not at a gross undervalue, the sale is fraudulent and void without regard to the price the property actually brought, and the owners of such property are entitled to recovery in ejectment, against such purchaser, without a tender of the purchase money.

Ejectment, by Senyard in right of his wife Elizabeth, James Mayer, and Thomas Mayer against Francis Mayer, for a lot of ground and two houses thereon erected. Plea not guilty.

At the trial, before Briggs, J., the plaintiffs showed title to the premises in John Mayer, through whom the defendants also claimed. The plaintiffs were the children of John Mayer, who, as well as his wife, was dead. The defendant showed that Mary Mayer, wife of John, became his administratrix, and that on her death the defendant became John's administrator *d. b. n.*, on December 3, 1858; that he shortly afterwards petitioned the orphan's court for an order of sale of the decedent's real estate to pay his debts, on the ground of insufficiency of assets; that the schedule of debts annexed to the petition included four hundred and forty dollars, due on a mortgage of the premises given by the decedent to the Union Building Association, and one hundred and ninety dollars due Bridge & Cline; that the order of sale was granted, the premises in suit sold to James Bridge of the firm of Bridge & Cline, for five hundred and eighty dollars, the sale confirmed, and the premises conveyed to Bridge on June 28, 1859; that on June 6, 1860, the defendant filed his account as an administrator, charging himself with five hundred and eighty dollars, the proceeds of the above sale, and crediting himself with three hundred and sixty-four dollars paid on account of the Union Building Association mortgage, and other payments, amounting together to six hundred and thirty-four dollars and eighty-three cents, leaving a balance due the accountant; that on December 5, 1860, Bridge conveyed the premises in suit to the defendant.

The plaintiffs in order to show that the defendant obtained title fraudulently, called one McStay, who testified that he went to the orphans' court sale intending to bid for the premises, that he bid five hundred dollars when the defendant came to him and advised him to stop bidding as Bridge would buy the property at all events, that he stopped bidding accordingly. On cross examination he said he would have given five hundred and fifty dollars for the premises. Another witness testified that before the sale the defendant asked him to bid for him in case Bridge should be absent, that he went to the sale and the defendant told him his man was there. The defendant, when called by the plaintiffs, testified that he paid Bridge his claim of one hundred and ninety dollars, against the decedent's estate; he did not claim credit for this payment in his account and there was some evidence that he had settled this claim on Bridge's conveyance to him of the premises in suit. The defendant admitted that he had not charged himself with their shares of stock of The Wokingmen's Building Association, standing in the decedent's name and worth about three hundred dollars, that he had transferred his stock to Bridge who borrowed three hundred dollars, thereon, which he gave the defendant towards the purchase at the orphans' court sale, that this was the only part of the purchase money that Bridge paid him, and that this three hundred dollars formed part of his payment of three hundred and sixty-four dollars, on account of the Union Building Association mortgage. One witness testified that at the time of the orphan's court sale the premises were worth from eight hundred to one thousand dollars.

The defendant, in rebuttal, called several witnesses who testified that at that time the property was worth from five hundred to six hundred dollars. He showed, that after the sale, Bridge called on a conveyancer and offered to sell the property for seven hundred dollars, and he offered to prove that in consequence of this visit the conveyancer negotiated Bridge's transfer to the defendant. Objected to. Offer rejected. Exception.

The plaintiffs presented, *inter alia*, the following point: (4) If the defendant discouraged bidding at the sale, by McStay and others, and if he procured Bridge to buy the property, and then, by paying Bridge's claim, got a transfer of his title, the verdict must be for the plaintiffs. Affirmed.

The defendant presented, *inter alia*, this point. If the jury believe the defendant, as administrator, purchased at his own sale, plaintiffs cannot recover unless they repay him the price paid by him, as his price was received by the distributees of the decedent, the sale has been affirmed, and the verdict should be conditional, that plaintiffs shall receive a deed for the premises if, within ninety days, they pay the sum of five hundred and eighty dollars. Answer. This is so if you find that the purchase is not tainted with fraud, but if the defendant fraudulently induced any one not to bid, with a view of obtaining the property for himself, you should render your verdict for the plaintiffs.

In his general charge the learned judge said, *inter alia:* "If the defendant arranged with or persuaded any one not to bid so that he, or some one for him, might purchase the property at a less price than he otherwise could, such was more than a mere intention to perpetuate fraud; it was an act done in the execution of a fraudulent design; and if you find that the defendant did this, you should find a verdict for the plaintiffs irrespective of the money he paid."

Verdict and judgment for the plain-

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tiffs. The defendant took this writ assigned for error, *inter alia*, the answers to the above points and the portion of the charge quoted.

Pancoast (with him Sellers) for the plaintiff in error.

Unless there was actual fraud at the orphans' court sale, we were entitled to a conditional verdict. The learned judge instructed the jury that if they found certain facts, the fraud of the defendant was established irrespective of the price of the premises with which he charged himself.

The question whether the property sold for its full value was throughout ignored, especially in the answer to the plaintiff's fourth point. To make a sale absolutely void so that the former owner can recover without repayment of the purchase money, it must be shown that the purchaser, or somebody for him, made false representations, and that by reason of such representations he obtained the property at less than its value. Dick v. Cooper, 12 Har., 222; Sharp v. Long, 4 Cas., 437; Abbey v. Dewey, 1 Cas., 413.

If the rejected evidence had been admitted it would have shown the absence of collusion between the defendant and Bridge.

F. F. Brightly, contra.

The case went to the jury on the question of actual fraud. Whether the price was inadequate or not, the fraudulent intent was shown by the fraudulent expedients. Ejectment lies against a trustee *ex maleficio* without a tender of the purchase money or the value of the improvements. Riddle v. Murphy, 7 S. & R., 230; Gilbert v. Hoffman, 2 Watts, 66; Eberts v. Eberts, 5 Sm., 110; Grim v. Grim, 1 Weekly Notes, 79.

The defendant's account as administrator has not been confirmed. He admitted that he failed to charge himself with the value of the decedent's stock in the Workingmen's Building Association; under these circumstances, a simple charge in an unconfirmed account cannot be considered as a payment to the estate.

THE COURT. This case was put to the jury by the learned judge below as a question of actual fraud. If the defendant below discouraged bidding at his own sale as administrator, with the design of thereby procuring the property for himself it was an actual fraud. Even if he did not succeed so far as to procure the property at an undervalue, that did not purge his action of its fraudulent character. He did become the purchaser through an agent, and it is a violent presumption that he had a fraudulent purpose, or he would not have resorted to fraudulent means to accomplish it. We think, therefore, the rulings of the court below on questions of evidence were right, and that the case was properly submitted to the jury.

JUDGMENT AFFIRMED.

SUPREME COURT OF WISCONSIN.

FREDERICK STICKEL VS EDWARD T. STEEL ET AL.

In August plaintiff bought of defendants a bill of goods on credit of four months from the fifteenth day of September following, and on the same day, and at the same place, bought another bill of defendants, on a credit of four months from October 1st, following. Neither bill was paid. Suit was brought on the first. *Held*, That separate suits might be brought for each bill, and the fact that they were bought at the same time, did not, after the expiration of the credit on the last bill, constitute them one account.

The opinion of the court was delivered by

COOLEY, J.:

In August, 1877, Stickel bought of the copartnership of E. T. Steel & Co. a bill of goods amounting to two hundred and sixty-nine dollars and forty-three cents, at a credit of four months from September 15th, following. On the same day and at the same place he bought another bill of goods of the same parties, at a credit of four months from October 1st, following. Neither bill was paid for when the credit expired, and after both had fallen due, suit was brought in justice's court on the first bill and judgment recovered. Another suit was then brought on the second bill. In that suit Stickel relied upon the first judgment as a bar. His position was, that the two bills only constituted one account, consisting of several items, all due when the first suit wat brought, and that an adjudication upon any part of it was necessarily an adjudication upon the whole, because the account was incapable of being divided up for the purpose of separate actions. Bunwell v. Pinto, 3 Conn., 431; Guernsey v. Carver, 8 Wend., 492; Stevens v. Lockwood, 13 Wend, 644; Bomgesser v. Harrison, 12 Wis., 544. The justice overruled the defense, and gave judgment for the plaintiff, and the circuit court affirmed his judgment. The case is now before us on error.

For some purposes the two bills unquestionably constituted distinct demands. They were made such in their origin, so far as time of payment was concerned, and suit might have been brought upon one before the other was due. Had such a suit been instituted and particulars been demanded, the bill rendered must have been not for so much money constituting a certain part of an account for goods sold and delivered, but for so much money being the price and value of the goods constituting the bill sued upon. For all the purposes, therefore, of a suit instituted promptly when the right accrued, the first bill must have been treated as a separate demand, and could not have been regarded in any other light. But this suit would have left the other bill to be sued in another, and it will not be claimed that the first suit would be a bar to the second under such circumstances. Had no suit been brought upon either bill, the statute of limitations would have barred the remedy upon one, leaving the other for a time untouched. Had a payment been made in recognition of the one thus barred, it would thereby have been revived and renewed for six years more, while the other would have been left to the statutory bar. In short, if the two bills constituted one demand in their origin, they must have become two for all legal purposes when the one fell due before the other, and, if united again by the other falling due, they would be again separated when the remedy upon one was barred, or whenever anything occurred which should render one the subject of a suit when the other was not. But all this is inconsistent with the idea that the two bills constituted a single demand.

The two bills might have been embraced in one action, but as the aggregate amount exceeded the jurisdiction of a justice of the peace, we probably have, in this fact, an explanation of the two suits. We think the plaintiff had a legal right to bring the two suits. The justice refused to give costs in the second suit, and the course taken has been favorable to the debtor, instead of being oppressive. He has been sued in an inexpensive court, and would have been saved the costs of a suit in the court of general jurisdiction but for the *certiorari*.

The judgment must be affirmed with costs.

(The other justices concurred.)

NOTES OF RECENT CASES.

MASTER AND SERVANT.

Negligence in furnishing proper implements.—While it is true that a master who makes his own tools,

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should be held to a high degree of diligence in their manufacture, yet it is also true that where the servant is a workman skilled in the use of such implements, he will also be presumed to have some knowledge of their fitness to be used in the work and will be bound to exercise a corresponding degree of care, and if the defect could be ascertained by the exercise of reasonable diligence, then he assumes the risk in that regard.

An employer who manufactures the implements for the use of his employes is not an insurer as to their safety, but is only bound to exercise every pecaution against danger which a reasonably prudent man would do under the same circumstances. C. & A. R. R. Co. vs. Mahoney, Appellate Court of Ill., 3d Dist.

CONSIGNOR.

Consignee — Carrier — Liability of each— Fraud.— Certain dead hogs were shipped in a railroad car, freight prepaid, by consignors at Vinton to consignees at Cedar Rapids; upon arrival there the car was placed on a side track; a stranger obtained from the railroad company a copy of the "expense bill," and also procured the drayman of the consignees to haul the hogs from the car to the consignees' place of business, and also obtained from them the payment in money of the value of the hogs. In action by the consignors against the railroad company for the value of the hogs: *Held*, that the defendant was not liable, and that the payment by the consignees to the stranger would not exempt them from or make defendant liable to the consignors. Ryder & Mitchell vs. The B., C. R. & N. R. R. Co., Supreme Court of Iowa.

PRACTICE.

Amendments to Avoid Statute of Limitations.—While it is the policy of the law to allow amendments liberally to avoid the Statute of Limitations, such amendments must be confined to a restatement of the original cause of action, and no new cause of action can be stated by way of amendment.

CONTRACT AND TORT.

Where a party under a legal obligation to do an act contracts to do so, suit may be brought either upon the contract or the tort, but where he has been relieved from a legal obligation by any circumstances, and then contracts to do the act, the only remedy is upon the contract, and in an action for a tort plaintiff cannot rely upon the breach of the contract.

ESTOPPEL.

The fact that appellant may have made a contract to furnish cars for the shipment of grain does not estop it from denying its liability as a common carrier when sued for a failure to perform its alleged common law duties.

The only remedy would be by specially declaring upon the contract. Ill. C. R. R. Co. vs. Phelps, Appellate Court of Ill., 3d Dist.

EVIDENCE.

Presumption of title in vendor of real estate.—In an action to recover the purchase price of land sold under a contract to make a good and sufficient warranty deed, where the deed has been tendered, the presumption is that, the vendor has title, and the burden is upon the vendee to show a defect in the title.

Where there has been a trial upon the same subject-matter, and a party claims that the merits had not been tried, the evidence ought to be clear upon that point. Baxter vs. Aubrey, Supreme Court of Michigan.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Oct. 3, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Sept. 27.

John W. Welkey and wife to Chris Emrick. $2,200.

Bridget McHugh to Daniel E. Leslie. $425.

Joseph Kaijzr to Thomas B. Cowley. $229.

Joseph Collins and wife to The Soc. for Sav's. $250.

John F. Hagedorn to Andrew Spengler. $500.

V. Dreher to C. W. Schmidt. $1,200.

Wm. E. May to Wm. F. Thompson. $2,000.

Sept. 29.

J. A. Ensign and wife to William S. Otis. $4.000.

John W. Walkey and wife to John Stull. $786.

Hannah H. Preble to Sarah Crisfield. $400.

Ellen Stare and husband to The People's Savings and Loan Ass'n. $500.

Hilliard Vass and wife to Clemens Hotz. $350.

Sept. 30.

Karl A. Bader to Elice Moeller. $550.

Fred. Miller and wife to Frederick Caleb. $400.

Rosalia Bloch to The Society for Savings. $600.

The Sisters of the Good Shepherd to same. $2,000.

Chas. Waller and wife to J. Sutorious. $450.

Mary Kipp and husband to W. H. Aylord. $124.

A. C. Warnecke and wife to H. O. Bremer. $500.

Hanna Wymer et al to Jacob Mueller. $4,500.

F. J. Dean and wife to The Society for Savings. $700.

E. Currows et al to The Citizen's Savings and Loan Association. $2,. 000.

Oct. 1.

L. Van Dyke and wife to L. Sutorious. $150.

J. E. Ingersoll to Mary E. Campbell. $1,000.

Elizabeth Schuessler and husband to John Scheidler. $400.

Martin Ehrbar and wife to John Thoman. $5,900.

Julius Dougherty to J. H. Webster. $200.

Oct 2.

Phillip P. Wright to Jas. Y. Bloch. Five hundred and fifty dollars.

W. Dykes to The Society for Savings. Fifteen hundred dollars.

Elizabeth Miterneiler and husband to John Staral. One thousand dollars.

Edwin C. Higbee and wife to Melissa B. Higbee. Seven thousand two hnndred dollars.

W. B. Chisholm to Catharine E. Breen. Twelve thousand dollars.

Oct. 3.

J. Lee Spencer to B. L. Penning ton. Sixty dollars.

Alfred Clark to The Citizens' Savings and Loan Association. Two hundred dollars.

Margaret Gustenmaier to The Society for Savings. One thousand dollars.

John Gotterha and wife to Emil Benehl. Five hundred dollars.

Lorenzo Cook to Davidson & House. Two hundred dollars.

John A. Tweedy to Samuel B. Prentiss. Two thousand dollars.

CHATTEL MORTGAGES.

Sept. 29.

J. A. Thomas to R. H. Morman. $265.

T. W. Daily to E. M. Mathews. $360.

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E. G. Briggs to Stoll and Black. $239.
J. A. Griffin to J. M. Mathias. $250.

Sept. 30.

Nicholas Ernst to Alonza Forbes. $118.
J. H. Storer to Scoville & Townsend. $225.

Oct. 1.

Vaclav Snyder to High Lodge C. S. P. S. $632.
E. Goldner to Joseph Stoppel. $100.
August W. Peterson to same. $50.
H. N. Gage to Jabez Burns. $50.
Christopher Bender to Barbara E. Oppman. $1,000.
Joseph Meyer to C. E. Gehring. $1.000.

Oct. 2.

Geo. Sims to N. E. Smith. One hundred and thirty-five dollars.
Chas. Lawrence to Cohen, Sampliner & Co. Two hundred and twenty-five dollars.
E. Goldner to B. Lardau. Two hundred and thirty-five dollars.
John Elworthy to W. W. Honeywell. Three hundred dollars.
B. B. Frasier to E. Rosenfeld. Three hundred dollars.
Geo. Kattles to John Battes. Three hundred and eight dollars.
H. W. Redhead to W. H. Doran. Two hundred and six dollars.

DEEDS.

Sept. 26.

A. Alexander, ass'ne., etc, to B. L. Pennington. $1.
W. P. Cook to R. R. Holden. $1,000.
Same to same. $5,000.
R. R. Holden to Louisa A. Cook. $1.
Herman Mykamp and wife to C. W. Collister. $1.
C. W. Collister to Herman Mykamp and wife. $1.
Mary Evans and husband to Mary Bullock. $850.
E. H. Gager and wife to O. M. Stafford. $1.
O. M. Stafford to Dora E. Gager. $1.
Peter M. Ogarme and wife et al to The Cuyahoga Falls Woolen Mills. $1.
Flora A. Gilbert to Francis Smith. $1,200.
Levi W. Sherman and wife to Jacob Sommer. $1,000.
Andrew Eucher by Felix Nicola, Mas. Com., to Louis Harris. $1,760.
Joshua B. Glenn et al by E. B. Bauder, Mas. Com., to Caroline Parr et al. $1,770.
John Cully by John M. Wilcox, sheriff, to Sophia Engel. $301.

Sept. 27.

Theodore E. Burton to Eliza Thanvette. $2.
Thos. B. Cowley and wife to Jos. Kaizzr. $279.
J. M. Case to Idalla Derning. $125.
Hubbard Cook trustee et al to Louise Godicke. $400.
Henry Hunting and wife to Fred. Bubschartz. $480.
James M. Hoyt and wife to Jeremiah Keenan and wife. $354.98.
Mary E. Jewell and husband to Hiram Barrett. $600.
Fred. Mordhorst and wife to Louis Harris. $2,700.
Lewis Nicholson and wife to E. Nicholson and wife. $1.
E. Nicholson and wife to Araminda S. Nicholson. $1.
J. P. Ranels and wife to Richard Gilmour. $6,800.
Elizabeth Stephen and husband to Joseph Collins and wife. $1.
L. J. Talbot and wife to Aaron Mathews, $640.
W. F. Walworth and wife to Warren Gardner. $150.
Mary A. Woodbrigde et al to Geo. C. Rosins et al. $3,300.
John Eimer et al by Thos. Graves, Mas. Com., to C. Schneider. $280.
G. T. Nichols et al by H. C. White, Mas. Com. to Mary Patton. $224.
Geo. H. Crossman et al by C. C. Lowe, Mas. Com., to Jas. Phillips. $2,920,

Sept. 29.

Jerusha T. Barber to Carolina A. Barber. $700.
Caroline S. Dixon et al to Ellen Starr. $1,343.
Erdman Bogen and wife to Joseph Agricola. $2,000.
Baldwin Quarry Co. to John Nowak. $215.
A. M. Burke and wife to Isaac Richards. $1,960.
Jefferson Borden, Jr., to Milton Reed. $1.
O. M. Burke et al to Thos Williams. $425.
Peter Carbach and wife to John G. Kury. $2,800.
Rodney H. Gould to Emeline Ford. $15.
Jane Hamilton and husband to Alice R. Cannon. $1,000.
James M. Hoyt et al to John Harley and wife. $600.
Johnathan Hale and wife to Maria A. Smith. $350.
Jennie E. Jones and husband to Wm. J. McConoughey. $2,514.
A. M. McGregor and wife to Susie E. McGregor. $2,000.
Francis Rooney and wife to Thankful Tanner. $1,030.
Geo. F. Spring and wife to Daniel Lehman. $1,000.
Joseph Slaght ex. et al to J. G. Kurz. $2,280.
Andrew Vallet and wife to H. C. Brainard. $2,100.
Mary S. Foot and husband et al to W. J. Boardman. $1.

Sept. 30.

Bernard Fox and wife to T. H. White et al. $1,400.
Samuel S. Bloch to Agnes B. Goodman. $500.
Jacob Goldsmith and wife to Cauffman Koch. $8,000.
I. B. Heller and wife to Levi Bauder. $800.
Anna Kirsch to Daniel Alt. $75.
A. M. Mayers to Marian A. Parmley. $1,500.
Franz Naag and wife to Julius Mueller. $500.
Julius Mueller to Anna Naag. $1.
Clara M. Reese and husband to Mary W. Speith. $2,225.
Francis Smith and wife to Fred. D. F. Burgdorff. $800.
Kinney & Servick by Thos. Graves, Mas. Com., to Peter Gintz. $667.
Caroline Probert and husband et al by same to Caroline Probert et al. $5,201.

Oct. 1,

Wm. Bauer and wife to J. H. Schneider. $1.
W. S. Chamberlain and wife to Winnifred J. Barker. $800.
J. G. W. Cowles to Delia S. Colton. $924.
John Edwards and wife to John E. Root. $595.
Geo. E. Hartwell and wife et al to Jacob Kavalski. $460.
E. A. Randall to W. S. Chamberlain. $1.
John E. Root and wife to Edward S. Thornton. $350.
Dwight Smith and wife to Julia A. Smith. $1,000.
John Thoman and wife to Martin Ehrbar. $6,700.

Oct. 2.

Charles Aubele and wife to Julius Mueller. Eight hundred dollars.
Julius Mueller to Anna Aubele. One dollar.
Catharine E. Green to Wilson B. Chisholm. Eighteen thousand dollars.
Chauncy S. Giddings and wife to W. F. Norton. Four thousand three hundred dollars.

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Eliza C. Hall ex. to John Secking. Seven hundred and fifty dollars.

Vaclaw Kofron and wife to Anna Stornek. One thousand three hundred and fifty-four dollars.

H. B. Northrup and wife to Julia Carter. Three hundred dollars.

John O'Neill et al adm. to John O'Neill. Four thousand four hundred and ten dollars.

Phillip Phillips to Clark McCarty. Two hundred and fifty dollars.

Loren Prentiss, ex. admr., to Wm. Dykes and wife. Three thousand dollars.

John Rylance and wife to H. B. Dean. Three thousand dollars.

L. J. Talbot and wife to James B. Thatcher. One thousand one hundred and forty dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending Oct. 2, 1879, against the following Persons:

Sept. 25.

Mary Jane Abbott. $515.67.
Simon Denk. $2,278.80

Sept. 26.

P. H. Sawyer. $3,526.45.

Sept. 27.

Peter Weisser. $21.65.

Sept. 29.

Wm. S. Forester et al. $389.19.
John Maitland et al. $152.80.
Henry Steigmeier. $248.16.
F. W. Strateman. $78.80.
S. A. Babcock et al. $1,179.80.
The Stearns Stone Co. $401.32.

Oct. 1.

Thos. Moore. $24.91.
Wm. Applin et al. $168.27.
Jas. W. Field. $439.47.
The City of Cleveland. $50.

COURT OF COMMON PLEAS.

Actions Commenced.

Sept. 26.

15915. James Irvine vs The Hibernia Ins. Co. Money only. Terrell, Beach & Cushing; W. S. Kerruish.

15916. Anna Longmaier vs A. R. Jewett et al. Appeal by def't. Judgment Aug. 26. Babcock & Nowak.

15917. Holland Reform Church vs John Zoeder. Appeal by def't. Judgment Sept. 22. Johnson & Schwan.

15918. S. H. & E. Bloch vs Babcock & Nowak. Appeal by def't. Judgment Sept. 17.

15919. Geo. H. Smith & Co. vs J. H. Oakley et al. Appeal by def't. Judgment Aug. 29.

15920. John Clements vs Abraham Goodman. Appeal by def't. Judgment Sept. 1.

15921. G. T. Pierce vs Peter Weiser. Transcript filed by pl'ff Appellee. T. D. Peck, A. J. Sanford.

Sept. 27.

15922. L. E. Holden vs Geo. C. Huntington et al. To quiet title. J. T. Logue.

15923. J. B. Kramer vs John Strapp et al. Money and to subject lands. Eddy & Hahn.

15925. D. H. Kelly vs E. J. Foster et al. Appeal by def'ts. Judgment Sept. 16. Arnold Green; Geo. H. Foster.

15924. John M. Henderson et al vs William Maiten et al. To subject lands. P. P.

15926. Henry Claus vs Edward Aurelius et al. Money and to subject lands (with att.) Henderson & Kline.

15927. David C. Baldwin vs Joseph Belek. To subject land. Baldwin & Ford.

15928. William Meyer vs Joseph Umlauft. Money and to subject lands. Johnson & Schwan.

15930. Alonza A. Little vs Rachael Potts et al. Equitable relief and specific performance of contract. Bently and Knight.

15931. The Citizens Savings and Loan Ass'n vs John Powers et al. To subject lands and relief. Estep & Squire.

15932. Same vs Robert Vale et al. Same. Same.

15933. Same vs James Clair et al. Same. Same.

15934. H. B. Payne vs Henry Kramer et al. Sale of mortgaged premises and relief. James Wade, J. A. Smith, Foster & Carpenter, Eggleston, M. N. & W.. W. S. & H., Weed & D., Andrews, Mathews & Johnson, Estep & S.

15935. Fred. W. Huseman vs Henry Tunte, admr, etc., et al. Sale of mortgaged premises and relief. James Wade.

15936. Anna E. Kaestle vs George C. Dodge et al. Money only. Peter F. Young, James Hossack.

15937. Kate Kain vs J. R. Hurst. Appeal by def't. Judgment Sept. 29. Foran & Williams, Foster & Carpenter.

Sept. 29.

15938. In re Lewis C. Dickson vs Schmidt Supt. of Police. Habeas corpus. J. H. Loomis.

15939. State ex. rel. Samuel T. LeBaron vs The L. S. & M. S. Ry. Co. Appeal by def't. Judgment Sept. 28. Marvin, Lewell & Cadwell; G. M. Mason.

15940 to 15958 inclusive. Same.

15959. McFarland Bros. vs Jacob Nau. Appeal by def'ts. Judgment Aug. 30. Henderson & Kline, Tyler & Denison.

15960. In the matter of the assignment of H. L. Whitman. Appeal from Probate Court of M. M. Spengler. Safford & Safford; Baldwin & Ford.

Sept. 30.

15961. Mrs. C. A. Powers vs Jessie P. Bishop. Money only. Ingersoll & Williamson.

15962. Esther Cooper et al vs Sarah E. Cable et al. To quiet title and for equitable relief. Foster & Lawrence.

Oct. 1.

15963. In re L. E. Dixon vs The Supt. of Police. Habeas corpus. J. H. Loomis.

15964. Marcus A. Hanna et al vs Ernest Hemsher. Money only. Ranney.

15965. Quartus Gilmore vs J. William Ball. Money only. Hadden, Goulder & Zucker.

15966. Magdelena Baebe vs Phillip Mattero et al. Money. Sale of mortgaged premises and relief. Stone & Hessenmiller.

15967. Nahum B. Gates vs Atten W. Hubbard. Money only. M. R. Keith.

15968. W. D. Butler to Carolina Green. Appeal by def't. Judgment Sept. 20. Hart & Hurlburt.

Oct. 2.

15969. The Society for Savings vs John Bosten et al. Money and sale of land. S. E. Williamson.

15970. Patrick Gaffney vs The Otis Iron and Steel Co. Money only. Jackson, Pudney & Athey.

15971. Harrison W. Gray et al vs T. G. Sholes et al. Cognovit. Ball.

Oct. 3.

15972. Hawley, Matt etc. vs Carl Seyler. Money only. Thomas Reilley.

Motions and Demurrers Filed.

Sept. 25.

3134. Morris, for himself, etc., vs The Collamer & St. Clair Street R. R. Co. et al. Motion dy def'ts Chandler, Kiug & Welch, admr., to strike out from amended answer and dismiss cross-petittion of Collamer & St. Clair Street R. R. Co.

3135. Johnson vs Rhodes et al. Motion by def'ts to vacate judgment by default.

Sept. 26.

3136. O'Connor vs Schwan et al. Motion by J. M. White to be substituted as party pl'ff and for leave to file amended answer.

3137. Varian et al vs Pelton. Demurrer to the petition.

3138. Heller vs Kellogg. Demurrer to first defense of answer.

3139. Jacobs vs Crawford et al. Demurrer by def't Lucien Crawford to petition.

3140. Cudell & Richardson vs Sargeant et al. Motion by def't for new trial.

3141. Upson vs Rocky River Stone Quarry Co. et al. Motion by pl'ffs for a reference of case, to take acct., etc.

Sept. 27.

3142. Rausher vs Poe et al. Motion by def't Poe to strike from the petition.

3143. Bennett vs Granger. Mo. to require def't to separately state and number and designate defense.

3144. St. Clair Street Gravel Road Co. vs The City of Cleveland. Motion to strike from the petition as irrelevant and immaterial.

3145. Cohen vs same. Demurrer to first, second and third causes of action.

3146. Reichard vs Helfer. Motion by pl'ff for new trial.

3147. Hughes vs Davis. Motion to require plaintiff to make his reply to answer more definite and certain.

3148. Walsh, admr., etc., vs Brownell et al. Demurrer by def't Elizabeth A. Stearns to first cause of action of the answer and cross-petition of def't Henry Romp.

3149. Ruhland vs Welsh. Demurrer to the petition.

3150. Steinbrenner vs Mueller et al. Motion by pl'ff for new trial.

3151. Grover et al vs Russell. Motion by pl'ff to confirm receiver's report and for allowance for services.

3152. Hogan vs Capener. Motion by def't to strike from reply as irrelevant, etc.

3153. Scofield et al vs McKim et al. Motion by def't McKim to dismiss action.

Sept. 29.

3154. Wenham & Son vs Andress et al. Motion by def't Emmors to dismiss action.

3155. In the matter of the assignment of

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H. L. Whitman. Motion by M. M. Spangler for a reference of the case.

Sept. 30.

3156. Wick et al vs Priday et al. Demurrer by def't West to cross-petition of Harms & Chapman.

Oct. 1.

3157. Stone vs Becker et al. Demurrer by def't Becker to amended petition.

3158. Same vs Same. Same by Louisa Becker.

3159. Higgens vs Pelton. Demurrer by def't to petition.

3160 to 3174 inclusive. Same motion.

Oct. 2.

3175. Deitz vs Kallina et al. Motion by def't Miller to vacate decree with attachment.

3176. Quayle vs Kennedy et al. Motion by def'ts Kennedy & Wellington to make petition more definite and certain and to strike out from same.

3177. Everett vs Bauman et al. Demurrer by pl'ff to second defense in answer of Bauman.

3178. Kick vs Poe et al. Demurrer by plaintiff to answer of Nixon et al.

Motions and Demurrers Decided.

Sept. 27.

2703. McMorran vs Brockway. Sustained.

2871. Spangler vs Chapman. Same.

2876. Brinkman vs Law. Same.

2880. James vs Hartshorn. Same.

2881. Same vs same. Same.

2882. Placack vs Clewell. Same. Pl'ff excepts.

2975. Martin vs Garwood. Same.

2977. Downs vs Charlton. Overruled.

2980. Peck vs Castee. Same.

2986. | Ragnet vs Maska, Sr. Sustained.
2987. |

2988. Wick & Co. vs Russell Lime Co. et al. Overruled.

2989. Greenfield vs Gay, admrs, etc. Sustained.

2998. Edwards vs Union Foundry Co. Sustained.

3000. Pelkington vs Brennan et al. Overruled.

3005. | Herald vs Kempf. Same. Same.
3006. | Def't excepts.

3008. Com. National Bank vs Greenlee. Same. Same.

3018. Mathias et al vs Clewell Stone Co. Granted.

3041. Newton, assignee, vs Whitman et al. Overruled.

Oct. 1.

2306. Crawford et al vs The Pennsylvania Co. Overruled. Pl'ffs except.

2434. | Tod, Wells & Co. vs Smith et al.
2[illegible]. | Granted.
2563. |
2564. |

2513. Atwell vs Merwin. Same.

2877. | Spencer vs Goff et al. Overruled.
2878. |

2932. Beckwith vs Bernard. Granted.

3072. Worley vs Mason, admr. Dismissed without prejudice.

3073. Adams, admr., vs McCarthy. Stricken off.

3081. Banks vs Quayle Overruled.

3149. Rushland et al vs Welsh. Withdrawn.

3153. Schofield vs McKim et al. Withdrawn.

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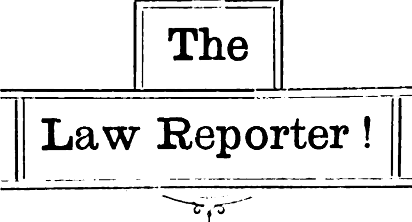

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The Cleveland Law Reporter.

VOL. 2. CLEVELAND, OCTOBER 11, 1879. NO. 41.

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CUYAHOGA COMMON PLEAS.

MAY TERM, 1879.

ROSA M. STOW VS. N. A. GILBERT ET AL.

Breach of Warranty of Covenants in Deed—Eviction in Law, Etc.

HAMILTON, J.:

The petition is brought to recover on account of an alleged breach of certain covenants contained in a deed made by these defendants, Gilbert and Smith, to the plaintiff. It is averred that upon a certain day the premises described in the petition, were sold and conveyed by these defendants to this plaintiff for the consideration of about twenty-five hundred dollars; that eight hundred dollars of it, a cash payment, was paid, and that the balance was subordinate to a mortgage of $1,700 given by these defendants to Linn, from whom they had purchased the premises and given back this $1,700 mortgage to secure the purchase money.

It is set out in the petition that this was a warranty deed, warranting the premises to be free from all incumbrances whatsoever, except this mortgage of $1,700, and with the usual covenants of siezen attached, and that by the express terms of the agreement between them she was to assume and pay this mortgage of $1,700; and set out that she did pay this mortgage debt, and paid it before its maturity. It is further averred in the petition that there was a mortgage running to one Chase, covering these lots and a large number of other lots, being for the original purchase price of the entire tract of which these lots constituted a part. That subsequently to this sale to the plaintiff by these defendants that mortgage was foreclosed, and the premises covered by the mortgage, including these lots, were sold. She avers that her title was therefore lost to her, and she was evicted from the premises.

The case was before the court sometime ago upon a motion to make the petition more specific and certain. That motion was overruled. An answer was interposed, setting up substantially this state of things: admits that they made such a deed; that they made such covenants of warranty of siezen and against incumbrances, and that she assumed to pay the debt, that she did pay it; that she paid it before maturity. It denies all else in the petition, and sets up a special defense, that notwithstanding they made this deed as averred in the petition, expressly admitted by them, containing all these covenants of warranty, as a matter of fact Linn of whom the premises were purchased by these defendants was at the time insolvent, that he has been so ever since; that they were well apprised of the existence of this Chase mortgage, and that this plaintiff was apprised of its existence also, and for the purpose of protecting the interest of these defendants in the premises at the time they executed their mortgage and notes to Linn, they endorsed upon the notes the following stipulations, to wit: "Not transferable until the land described by the mortgage securing this note is cleared from all incumbrances."

They say that this was for the purpose of protecting them so that in case the prior mortgage of Chase against which Linn had covenanted by his deed to them was not paid, that they might make a defense as to this purchase money; and they say she knew of these facts, and state that before those notes matured she went on and paid them to a party who claimed to own them. That a certain amount of discount was made on the notes by reason of their being paid before maturing, and they say in this state of facts, equity and fair dealing would require that this plaintiff should not have paid those notes before maturity; neither should she have paid them after maturity until this incumbrance upon the property had been taken off. Otherwise it leaves them without any protection at all in the case.

Now, we are inclined to the opinion that this is not a good defense to this action. Here are the covenants made by these defendants in express terms warranting these lots against all incumbrances except their own mortgage. It seems to me that they are bound by the terms of their written

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covenant and that they are estopped from saying that such a mortgage existed, and that she should have acted in view of that fact. They further set up that they were obliged to bid in this land through another party; that the time this land was foreclosed under this order of sale that they made arrangements with Chase, if he could, to bid in this land for these defendant for the sum of $900, and that in pursuance of that arrangement he did bid in this land and convey It to these defendants sometime in March prior to the commencement of this action. So that they say that the title to these lots never was lost—never did pass away—that they were bid in by Chase, as he agreed to do, in trust for them. That subsequently they got this deed and the title to the lands became perfect in them; and therefore as a matter of fact there never was any eviction in law, because they had made their covenants good.

Now, we are inclined to think that this is not a good defense. When the case was previously before the court the court held—upon the face of the pleadings—it being averred that the title had been entirely lost to her, swept away by reason of those outstanding incumbrances, against which they had warranted—that her action was maintainable for the consideration money that she had paid, that she might regard it as gone, and that she need not wait for an actual eviction; that it was equivalent to an eviction. But when this answer comes in and sets up a different state of facts—denying that proposition—saying as a matter of fact that the title has always been good; that she never has been disturbed, neither in fact nor in law, we think that constitutes a bad defense to this action. In deciding the case before, the court cited the following: Rawle on Covenants, p. 164: "When an incumbrance is such as entirely to defeat the estate conveyed, but its consequences have not been such as to cause an eviction within the scope of a covenant of warranty, the damages are measured by the consideration money and interest. Where the incumbrance was changed into a title adverse and indefeasible, the plaintiff was entitled to recover the money he had paid for the land with interest; for in such case the estate conveyed is entirely defeated, and the purchaser cannot remove the incumbrance nor can he enter upon and enjoy the land; and it would be idle to require him to purchase it in order that he might be entitled to his damages for the break of the covenant against incumbrances."

Such was the law at that time, and such, we think, would be good law today.

Under this state of facts it appears that the title has not been defeated, and that the incumbrance has not been changed into a title adverse and indefeasible. We do not think that this special defense that is set up here, the payment by the plaintiff of this $1,700 before its maturity—establishes any equity in favor of the defendants at all, so that, notwithstanding she had paid precisely what she had covenanted to pay, the $1,700 mortgage in full, they ought to be entitled by this equity to get back this $900. and have a personal judgment against her for that amount. We do not think there would be any equity in such a claim.

The demurrer to the answer is overruled.

ROBISON & WHITE for plaintiff.
RANNEY for defendants.

September Term.

WARNER ET AL VS. BENTE ET AL.

Motion to Set Aside Masters Sale.

HAMILTON, J.:

This case is before the court on a motion to set aside a sale. On looking into the order made I find that the master was directed to sell "the undivided interest of F. Bente in three several parcels of land."

In the first petition filed in the case it was averred that that interest was an undivided one-eighth in common in these three parcels of land. It is subsequently discovered that the principal defendant, F. Bente, was insane and in the asylum, and the plaintiff comes in and asks leave to file an amended petition, and in that petition he sets out that F. Bente had an undivided interest in these three parcels of land, but fails to aver the extent of the interest, whether it was one-eighth or some other amount, and goes on to set out the fact that the plaintiff obtained a judgment before a Justice of the Peace, filed a transcript. issued an execution and levied on this undivided interest.

One of the other defendants sets up in an answer and cross-petition substantially the same state of facts; saying that on his judgment execution was levied on the undivided interest of Bente in these three parcels of land. Therefore it does not appear anywhere in the pleadings upon which this decree was taken what interest F. Bente had.

One of the objects of this creditor's bill must have been to determine that very question as to what that undivided interest was; but instead of a determination of that question the decree goes on to say that the court takes an account, finds the respective amounts due upon these judgments; that they are liens upon the propeaty, and then orders the interest of F. Bente in these premises sold. An order of sale is issued to sell that undivided interest.

The Master under that order called three appraisers, who make a return to the court that they have appraised the undivided interest of F. Bente in this property. From an affidavit made by the appraisers, and filed in the case, it appears that they appraised a one-eighth interest in common in the three parcels of land subject to the dower interest of the mother of F. Bente, a defendant in the case, he having inherited the property from his father, and subject also to the dower interest of F. Bente's wife. It ought to be remarked, perhaps, that neither F. Bente nor his wife has made any answer in the case at all. Neither does it appear that F. Bente's wife had any guardian *ad litem* appointed for her.

It is said by the attorney who drew this decree and amended petition that he did not allege what the undivided interest was, because he did not know what it was. The court did not ascertain what it was, no evidence was offered on the subject, and yet the master was ordered to sell an undivided interest, which the attorney did not know what it consisted of. and the appraisers go forward and from their acquaintance with the family they undertake to find out what the undivided interest of F. Benee is and appraise it.

The motion to set aside the sale is on various grounds: the informality in the sale, the failure of the master to take certain bids which he might have taken. It is sufficient to say upon that branch of the question that the court has already decided that the motion is not well taken. But the question still remains as to whether under that state of facts, such an order, such a decree and such pleadings in the case there could be any sort of an appraisement in accordance with law.

We are unable to determine how these appraisers could appraise an interest which is not ascertained, which they could not know, except from outside information, the correctness of which nobody can tell.

It seems to me there is a radical de-

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fect in this decree; that it is uncertain, and never can be executed; that there never ought to be a confirmation of a sale thus made. Nobody can tell whether the real interest was appraised or not. Upon a deed being made the auditor can make no transfer of it because no one can tell what the amount was. We think under this state of facts the sale should be set aside, leaving the parties to such remedies as they think they have, either by reinstating the case and determining what this undivided interest is or to take such other course as they see fit.

J. B. FRASER for plaintiff.

DEWOLF & SCHWAN and J. T. SULLIVAN for defendants.

SUPREME COURT OF OHIO.

SEPTEMBER TERM, 1878

Hon. W. J. Gilmore, Chief Justice. Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Hon. William White, Judges.

TUESDAY, Sept. 30, 1879.

General Docket.

Redmond vs. The State. Error to the Court of Common Pleas of Hamilton county.

WHITE, J.:

1. In an indictment for obtaining goods by false pretenses, the pretenses consisted of representations by the accused of the value of several stocks of goods he owned, of the amount of his indebtedness, and of the amount that he was worth. Held: that negative averments in the indictment, which, in effect, merely deny the representetions to be literally true, but which do not negative their substantial truth as a means whereby the accused obtained credit in the purchase of goods, are bad.

2. Where, in such an indictment, the only description of the property is a "certain lot of dry goods," the description is insufficient.

Judgment reversed.

No. 98. William Kircher and others vs. Cynthia Myers. Error to the District Court of Harding County.

OKEY, J.:

1. In an action under the act of 1870 (67 O. L. 102), to recover damages to means of support by reason of intoxication caused by liquors alleged to have been sold continuously, during a period of three years, to a person in the habit of getting intoxicated, the defendant may offer evidence to show that, during the same period, such person became intoxicated by liquors which he had purchased of other persons.

2. Under said act of 1870, for injury to means of support in consequence of intoxication which caused the death of the intoxicated person, damages resulting from the death can not be recovered. Davis vs. Justice, 31 Ohio St., 459, approved.

Judgment reversed and cause remanded for a new trial.

Boynton, J. dissenting from the second proposition of the syllabus.

The Lawrence Railroad Company vs Catharine Cobb. Error to the District Court of Mahoning county.

MCILVAINE, J. Held:

1. In an action for an injury to abutting property by reason of the construction of a railroad on a public street or highway, the plaintiff's title may be established by proof of adverse possession.

2. Where coverture is relied on to save an action from the bar of the statute of limitations, the marriage may be shown by proof of cohabitation as husband and wife.

3. The limitation of two years within which an action must be commenced as prescribed in section 12 of the general corporation act, as amended April 15, 1857, (54 Ohio L., 133), applies only in cases where a railroad is constructed in a highway, or on other public ground, under an agreement with the public authorities, or after condemnation, as provided in said section.

4. In awarding damages for an injury resulting from a tort, compensation in the nature of interest may be included.

Judgment affirmed.

No. 122. Osborn vs. Kistler. Error to the District Court of Huron County.

GILMORE, C. J.:

Where the form of a promissory note, with blank spaces, payable to payee or bearer was printed, and after the spaces were filled, the maker signed his name in front of a device consisting of a bracket and the word seal therein, thus, "[seal]," which device was also a part of the form and was printed in ink—Held:

1. That the device mentioned is a "scrawl seal," and under the statute of this state has the effect of a common law seal.

2. That by affixing his signature in front thereof, the maker adopted the device as his seal.

3. Such a sealed note is only negotiable by virtue of the statute which requires the negotiation to be by "endorsement thereon," S. & C., 862.

4. In an action on such a note in the name of the holder to whom it was transferred by mere delivery, the maker may set up any defense he could have made against the payee.

Judgment affirmed.

SUPREME COURT OF WISCONSIN.

SMITH VS. PHILLIPS.

Chattel Mortgage—Tender after Possession under condition Broken.

Where, after possession is taken of mortgaged chattels by the mortgagee, a tender of amount due is made, such tender not being kept good by bringing the money into court, it will not operate to extinguish the mortgage lien.

Quære, Whether a good and sufficient tender under such circumstances and kept good, will discharge the lien and be deemed equivalent to payment or tender according to the condition of the mortgage.

COLE, J.:

This is an action by the mortgagee to recover possession of certain personal property. The defendant took possession of the property under a chattel mortgage, after default and condition broken. On the same day the plaintiff tendered to the defendant the amount due on the mortgage, with interest, and demanded the property, which amount the defendant refused to receive, and to deliver up the property, until another claim which he held against the plaintiff was paid. This action of replevin was at once commenced, the plaintiff claiming that the tender and refusal had the effect to extinguish the lien, and re-invest the title to the property in him. On the other hand, it is claimed that after the default, where possession is taken under the mortgage, the title at law became absolute and perfect in the mortgagee; the plaintiff only having the right of redemption in equity, or the right to the surplus after sale and satisfaction of the mortgage debt and costs: Flanders vs. Thomas, 12 Wis., 410. These adverse claims in respect to the rights of the mortgagor and mortgagee upon the tender and refusal, where possession has been taken by the mortgagee upon condition broken, raises a very interesting question, and one, so far as we know, which has never been directly passed upon by the court.

The doctrine of this court, as announced in many cases which have

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come before it, is that a chattel mortgage vests in the mortgagee a defeasible title in the mortgaged property, which becomes absolute at law on failure to pay at the stipulated time. But, while this is so, this court at the same time has affirmed the right of redemption in equity of the mortgagor, notwithstanding the forfeiture. But we have never had occasion to consider whether a tender after default, where possession had been taken by the mortgagee, has the effect to discharge the lien and revert the legal title in the mortgagor. The recent case of Musgat vs. Pumpelly, 46 Wis. 1 N. W. Rep., 410, was an action by the mortgagee against the mortgagor to recover possession of the mortgaged property. The defendant had remained in the possession of the mortgaged property, and set up as a defense a tender of the amount of the mortgage debt, made after condition broken. It appeared that the defendant had kept the tender good by bringing the money into court.

This court inclined to the opinion that where there was a tender before a demand of possession was made by the mortgagee, that this would constitute a good defense at law, on the ground that acquiescence by the mortgagee in the continued possession of the mortgagor, without any assertion of right on his part, must be deemed a waiver by the mortgagee of the strict legal forfeiture, according to the conditions of the mortgage, and that a tender before demand of possession has the same effect in law as though made on the day the money became due. At all events it was said that these facts afforded a good equitable defense to an action by the mortgagee to recover possession, where the tender was kept good by the money being brought into court.

But the facts of the case before us are quite different from those appearing in the Musgat case. Here the mortgagee has asserted his right under the mortgage by taking possession of the mortgaged property on default. He is acting on the defensive, claiming to be the owner, and insisting upon all his rights under the mortgage. It is obvious that the plaintiff cannot recover in this action, unless the effect of the tender, at the time and in the manner it was made, discharged the lien of the mortgage, and reinvested him with the legal title. We are quite well satisfied that no such consequences resulted under the circumstances from the tender which was made. The tender has not been kept good by bringing the money into court.

In analogy to the rule laid down in some cases relating to real estate mortgages, it is said that it was not necessary to bring the money into court in order to extinguish the lien of the mortgage; that where the only effect of a tender unaffected is to discharge the lien, and not operate in the way of the payment of the debt, it is not essential that the tender be kept good by bringing the money into court. But the strong intimation in the Musgat case is otherwise. There it was said "that a tender made by the mortgagor after condition broken, he being in possession of the mortgaged property, and keeping the tender good by bringing the money into court when the mortgagee brings the claim," would amount to an equitable defense to such action; and we are very clear that nothing short of this will discharge the lien of a chattel mortgage after forfeiture, and re-invest the title in the mortgagors, where possession has been taken by the mortgagee. But we studiously and carefully refrain from expressing any opinion upon the question whether even in such a case, if the mortgagor make a proper and sufficient tender, and kept it good, that this will discharge the lien and be deemed equivalent to payment or tender, according to the condition of the mortgage. It will be time enough to decide that question when a case arises which fairly presents it upon the record. We consequently hold that what was done by the mortgagor in this case did not have the effect to discharge the lien of the mortgage and re-invest the plaintiff with the title of the property.

In this case the plaintiff had taken the property, and retained it during the pendency of the suit. The court below found that the defendant was the owner thereof at the commencement of the action, and entitled to the possession; that the plaintiff wrongfully took and retained possession of the same, and that the court found the property to be of the value $1,000, and that the defendant's damage, by reason of the wrongful taking and detention, was fifty dollars. It was admitted that the amount due on the mortgage was $442.95. The defendant had judgment for the immediate return and delivery of the property to him, and for fifty dollars damages for the taking and detention. In case a delivery of the property could not be had, the defendant had a judgment against the plaintiff and his sureties on the undertaking, for the value of the property, to-wit: $1,000, and fifty dollars damages for the taking and detention. The latter clause of this judgment is clearly erroneous. The defendant had his election, under the pleadings to a judgment, for a return of the property, and the damages assessed for its taking and detention, or a judgment for the amount due on his mortgage, together with interest and costs. But in taking the alternative judgment, although the legal title to the property was in him, he could only recover to the extent of his mortgage lien, together with interest and costs; and, as his special interest was less than one-half of the value of the property, he had no right to a judgment for its full value: Burke vs. Birchard, 46 Wis. It seems to us it would be unjust to allow him to take a judgment in the alternative for a greater amount than his mortgage debt, together with interest and costs.

The judgment of the Circuit Court is, therefore, reversed, and the cause is remanded, with directions to that court to enter a modified judgment in conformity to this opinion.

SUPREME COURT OF MICHIGAN.

DAVID P. BAXTER VS. ELIZABETH AUBREY.

Evidence—Presumption of Title in Vendor of Real Estate.

In an action to recover the purchase price of land sold under a contract to make a good and sufficient warranty deed, where the deed has been tendered, the presumption is that the vendor has title, and the burden is upon the vendee to show a defect in the title.

Where there has been a trial upon the same subject-matter, and a party claims that the merits had not been tried, the evidence ought to be clear upon that point.

The opinion of the court was delivered by

COOLEY, J.:

Aubrey sued Baxter to recover the purchase price of lands sold to him by executory contracts, and which by the terms of the contracts were to be paid for in annual installments. The installments were all due when suit was brought, and Aubrey had tendered the customary warranty deed and demanded payment.

Two principal objections were made to the recovery—*First*, that Aubrey did not give evidence that the deed she tendered would convey the land; and, *second*, that the matter had become *res adjudicata* in a former suit. The circuit judge held neither objec-

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tion well taken, and Aubrey had judgment.

I. The contracts obligated the vendor, when the purchase was paid, to "execute and deliver" to the vendee "a good and sufficient warranty deed." Baxter claims that this means a warranty deed conveying the title to the land, and that it was not enough for the vendor to tender a deed sufficient in form, but she must go further and show that she had at the time a title which the deed would convey. We think, however, if the vendee accepts a contract in which the ownership of the vendor is assumed, and agrees to pay for the land without requiring the vendor to produce evidences of his title, the burden will be upon him to show defects. The presumption will be, in the absence of any showing, that he satisfied himself respecting the title when he made his bargain. Dwight v. Cublee, 3 Mich., 566; Allen v. Atkinson, 21 Mich., 261.

II. The second objection arises upon the following state of facts: After all the installments had fallen due, Aubrey brought suit on the contracts, and was defeated on trial, and final judgment passed against her. Subsequently she brought this suit; the cause of action being admitted to be the same. On the trial of this cause she undertook to show that the merits were not tried in the former suit. To make this out she testified that she had never tendered conveyance until after the former suit was disposed of, and her attorney in that suit testified "that he was present at and conducted all the former trial; it did not appear that plaintiff had, up to that time, delivered or tendered such deed or deeds as were contracted for in and by said contract and on said trial the defendant objected to the plaintiff's recovery for the reason that it did not appear that any deed or deed, as required by contract, had been tendered or delivered by the plaintiff to the defendant."

This is all the evidence that was given respecting the former trial. The circuit court assumed that the merits could not have been passed upon, because the tender of a deed was a necessary preliminary to a recovery. But if we concede the necessity of a tender it does not follow that the merits were not passed upon in the former action. See Bull v. Hopkins, 7 Johns, 22; McFarlan v. Cushman, 21 Wis., 401. The evidence does not show that the former case turned upon the want of this tender; that the court sustained the objection which was made, or failed to receive and pass upon any evidence that would have been proper had the tender been made. It is consistent with this evidence that the defendant in the former suit may have relied upon and established payment, or some other defense equally meritorious. Where the subject-matter has confessedly been in litigation before, the evidence that the merits were not passed upon ought to exclude all other hypothesis.

As the case must go back for a further presentation of facts, it would be premature to consider it further now. The judgment must be reversed, with costs, and a new trial ordered.

(The other justices concurred.)

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Oct. 10, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Oct. 4.

Louis Naumam to Peter Hirsch. $700.

Sacob Knowalski and wife to G. E. Hartnell et al. $250.

S. Fisher and wife et al to W. J. Crowell. $3,000.

John H. Linnet to Henry Lauge. $1,000.

Thomas Albon and wife to Archer Webb. $1,100.

S. M. Sargeant to Clara W. Benedict, guard. $6,000.

Frederick Mencke and wife to Carl Engel. $1,200.

Helen Dowse to S. H. Kirby. $1,-260.

A. P. Berghoff and wife to The Soc. for Sav. $600.

Same to F. J. Bartlett. $356.

Oct. 6.

Cornelius Donohue to A. H. Koeninglow. $1,700.

Christopher Hollbetter and wife to M. S. Hogan. $200.

Frederick Banko and wife to S. B. Prentiss. $1,200.

Ludwig Egglebrecht, to Charles Egglebrecht. $513.

Michael Brocan to James Ruple. $350.

K. A. Raeder and wife to Herman Peters. $275.

Antonia Jamdrak to F. H. Biermann. $300.

Samuel Bruner and wife to Jacob Schroeder. $375.

Mary A. Munson to Augustus Adams. $3,000.

Frederick Scheidegger and wife to Grace Storm. $300.

Oct. 7.

John Fitzgerald to Mary P. Smith. $1,300.

Heinrich Hundermuller and wife to William Hugger. $300.

Charles Leavitt and wife to The Society for Savings. $2,000.

Mathias Morawitz to S. Mann, Austrian & Co. $350.

Wm. Genrink and wife to The Soc. for Savings. $1,000.

W. T. Norton and wife to S. B. Prentiss. $2,000.

Henry Tunte to Carrie Lewis. $750.

Horace M. Stevens and wife to Warren E. Stevens. $700.

Oct. 8.

W. H. Barries and wife to J. F. Ryder. Eight thousand dollars.

Charles F. Brush and wife to W. H. Barries. Five thousand seven hundred dollars.

Vaclav Mraz and wife to Rad Premel C. S. P. S. One hundred and twenty-five dollars.

Rachael Moffett to Julius A. Moffett. Five hundred and thirty-five dollars and thirty-six cents.

Davis & Hunt to A. K. Spencer. Eight thousand dollars.

George Zahn and wife to Lyman Little. Two thousand nine hundred and fifty dollars.

Frederica M. Wedig and husband to James M. Curtiss. Five hundred dollars.

John Ehrbar and wife to The Soc. for Savings. One thousand dollars.

Maria E. Heil, guard. &c. to Chas. E. Gehring. Two thousand five hundred dollars.

F. J. Pankhurst and wife to Sarah Ruple. Four hundred dollars.

Oct. 9.

Margaret J. Smith and husband to Joseph E. Smith. Seven hundred and eighty-three dollars.

Edward Genet to George P. Vetter. Five hundred dollars.

Ellen Hill to M. S. Hogan. Two hundred dollars.

Michael Connors to Susan C. Cash. Five hundred dollars.

Thomas G. Sholes and wife to Sarah W. Sholes et al. Four thousand one hundred and seventy-eight dollars.

A. J. Schaeffer and wife to Frederick Tappert. Five hundred dollars.

H. C. Brainard et al to W. H. Gaylord. One thousand two hundred dollars.

Vaytech Mares and wife to M. S. Hogan. One hundred and fifty dollars.

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John C. Schroeder and wife to Catharine Hahn. Four hundred dollars.

Hiram Henderson to The Cit. Sav. and Loan Ass'n. Nine hundred dollars.

Oct. 10.

Frank Ziema and wife to Michael Marquardt. Two hundred dollars.

Elizabeth Freese and husband to the Society for Savings. One thousand eight hundred dollars.

John Zielke and wife to Dorothea Remelius. Four hundred dollars.

CHATTEL MORTGAGES.

Oct. 4.

John J. Sitterly to Caroline F. Sitterly. $150.

George and A. Linn to W. D. Butler. $260.

Lewis U. Fletcher to E. C. Greene et al. $400.

Joseph P. Smith to Joseph Keip. $110.

Robert Sinn and wife to N. E. Smith. $100.

Oct. 6.

M. C. Parker to Strong, Cobb & Co. $125.

John R. Blakeslee to Peter Gerlach & Co. $748.

D. Pratt to J. W. Scott. $300.

John A. Ellsler and wife to H. B. Hays. $2,785.

Oct. 7.

Alexander Russell to Hugh Harrison. $600.

Edward Clark to W. C. Jones. $150.

Oct. 8.

W. C. North to W. R. Reid. $379.

Oct. 9.

August Neiper to C. E. Gehring. Three hundred and fifty dollars.

John Graucher to Farmers and Drovers Bank of Carthage, Mo. Two thousand dollars.

Oct. 10.

Frank W. Nichol to M. N. Shaw. One hundred dollars.

DEEDS.

Oct. 2.

J. K. Leonard by Thos. Graves, Mas. Com., to E. K. Krause. One thousand six hundred and sixty-seven dollars.

A. S. Watts et al by C. C. Lowe, to Frank E. Kellogg. Six hnndred dollars.

Daniel Graeff by sheriff to John Young. Two hundred and sixty-seven dollars.

Oct. 3.

E. C. Compton et al to Austin Stone. $5,202.

George Dietz and wife to John Gatterba. $716.

James M. Hoyt and wife to Colgate Hoyt. $1.

Batcher Hartrath to John A. Tweedy. $6,000.

George C. Hickox et al to James P. Robison. $1,200.

Fanny Johnson to Russell A. Brown. $1,200.

Luther Moses and wife to A. C. Gardner et al. $500

A. M. Simpson et al to J. G. Bruggeman. $90.

Walter & Dryer by Thomas Graves, Mas. Com., to Louis Harmes. $1,200.

Oct. 4.

Mrs. Carrie C. Atwood and husband to James M. Hoyt. $1.

F. J. Berttell and wife to to A. P. Bughoff. $1,400.

Sarah R. Burke and husband to James Watkins. $1.

E. T. Collins to Melvine A. Clark. $700.

Wm. B. Smith and wife to Abbie C. Smith. $500.

George Eisenman and wife to Helen Dowse. $1,250.

Mary A. Cooper, by Wm. Raynolds, Mas. Com., to T. E. Burton. $600.

James M. Hoyt and wife to Frank Richter and wife. $1,100.

E. J. Hyde admr. &c., to Andrew Wershing. $2,269.

James Paton and wife to Carl Arndt. $470.

Same to Frederick Krog. $470.

Sam. F. Russell and wife to Milton Morton. $2,400.

Ann Radcliffe to Wm. E. Martin. $785.

Oct. 6.

Newell Bond and wife to Norman W. Cutter. $2,000.

Elevenora Bruner and husband to Margaret Kernan. $1,525.

James Farasay and wife to Bridget Lawler. $1.

Colgate Hoyt and wife to James M. Hoyt. $1.

Henry Hensner and wife to Frederick W. Meyer. $345.

Wm. C. McDermot and wife to Elizabeth Coit. $1,400.

Patrick H. McCarthy, admr. &c., to Margaret Heregan. $510.

Adam Poe and wife to Joseph Poe. $100.

Joseph M. Poe and wife to Austin Powder Co. $1,600.

B. R. Price to Samuel H. Kirby. $1,100.

Jacob Schroeder and wife to Louisa Brenner. $400.

Gustave Schmidt, admr., &c., to Anna C. Gressing. $400.

S, Van Gelder and wife to J. N. Hurst. $300.

Wm. Winter and wife to Louis Weber $1.

Louis Weber to Anna M. Winter. $1.

J. H. Rhodes to Fred. Banks. $1,900.

Ignatz Voegtle by F. Nicola, Mas. Com., to A H. Koenigslow. $1,200.

John M. Wilcox to Antonia Jindrick. $630.

Oct. 7.

Lucy B. Burridge and husband to Chas. F. Brush. $9,700.

Same to W. H. Barris. $9,700.

Samuel S. Bloch et al. to Samuel Lamfrom. $2,800.

Benton B. Babcock and wife to Cyrus P. Leland. $6,500.

A. M. Cole and wife to Henry Ferwood. $1.

Elizabeth H. Douglass and husband to Horace M. Stevens. $1.

H. F. Elbrecht and wife to John H. Elbert. $567

Fred. C. Koeckert and wife to John Bily and wife. $300.

Carrie Lewis and husband to Henry Smith. $1,000.

Charles Leavitt and wife to Aaron T. Whiting. $1,200.

John Murphy and wife to Hugh Bambrech et al. $1,700.

Ezra Nicholson and wife to James A. Kidney. $1,800.

H. R. Newcomb, admr. &c., to Henry Terwood. $500.

Abraham S. Prather and wife to Sarah P. Bemus. $15,000.

Lucy J. Prather to Sarah P. Bemus. $4,000.

L. J. Talbot anu wife to Mrs. A. H. Norton. Five hundred and sixty dollars.

W. H. H. Peck et al to Frank Volin, Jr. Four hundred and eighty dollars.

G. E. Herrick, trustee, &c., to Abraham Aub, et al in trust. Twelve thousand dollars.

Antonia Harold et al by C. C. Love, Mas. Com., to George Deitz. Seven hundred and forty dollars.

Christian Sell et al by same, to Elias S. Root et al. One thousand three hundred dollars.

Oct. 8.

Susan C. Clark to Michael Comers. Jr. One thousand five hundred dollars.

J. M. Curtiss and wife to Frederica M. Wedig. Seven hundred and fifty dollars.

John Hoyt to The Cleveland Paper Co. One dollar.

Wm. Hall, Jr., to Wm. Sixt. Mutual quit claim.

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Wm. Sixt to Wm. Hall. Same.

Joseph Hurley and wife to Vaclav Mrazefe. Three hundred dollars.

S. H. Kirby to Ella McDermott. Two hundred dollars.

Charles Leavitt and wife to Emma Armitage. Five hundred dollars.

Margaret Martin and husband to Charles A. Prentice. Three hundred dollars.

John Paine to James Davis. Six thousand dollars.

Georgia Turner to Anna C. Terrell. Two thousand two hundred dollars.

George P. Vetter to Edward Genet. Two thousand four hundred dollars.

James Walker and wife to Frederick Mull. Two hundred and fifty dollars.

Frederick Mull and wife to Stella M. Smith. Five hundred dollars.

T. H. White et al to Bernard Fox. Nine hundred dollars.

David W. Lewis, by Thos. Graves, Mas. Com., to George Zahn. One thousand eight hundred and fifty-five dollars.

Harriet G. Spear et al by C. C. Lowe, Mas. Com. to Clark S. Gates. One thousand two hundred dollars.

Oct. 9.

Lewis Buffett to J. J. Silvis. Two thousand dollars.

W. H. Gaylord and wife to H. C. Brainard et al. Six thousand dollars.

Joel Hall and wife to John Hall. One hundred dollars.

George C. Hickox to Anna Shattuck. Four hundred dollars.

George Lindner and wife to Edward Belz. One dollar.

Edward Belz to Caroline Lindner. One dollar.

M. H. Morgan and wife to W. H. Gaylord. Four thousand dollars.

Irene W. Miner to J. E. Cleveland. Three hundred and thirty-seven dollars.

James Phillips and wife to Harriet E. Bowman. Five dollars.

Allen Stare and wife to Allen Magowan. One thousand dollars.

Jacob F. Walz and wife to Adam Schaefer. Five hundred dollars.

M. A. Clark by H. C. White, Mas. Com., to James F. Clark. Five thousand eight hundred and thirty-four dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending Oct. 9, 1879, against the following Persons:

Oct. 2.

T. G. Sholes et al. $1,434.47.

Oct. 3.

W. H. Compton. $2,000.

N. G. Chipman. $63.51.

Matthew G. Rose. $93.50.

Oct. 4.

Dominic Killeawley. $498.18.

Ivory Plaisted. $78.50.

Oct. 6.

Carl Seyler. $1,533.17.

Ezekias Edgerton et al. $1,812.69.

William Ward et al. $433.35.

Sophia L. Ackley et al. $1,605.

COURT OF COMMON PLEAS.

Actions Commenced.

Oct. 3.

15973. Alfred Adams vs Ebenezer W. Hubbard. Relief. Ingersoll & Williamson.

15974. Mary Richards vs J. H. Hardy et al. Money. To sell mortgaged premises and relief. M. C. Hart.

15975. Jabez S. Stoneman vs The City of Cleveland et al. Appeal by defendants. Judgment Sept. 13. Stone & H.; Heisley, Weh & Wallace.

15976. J. B. Glenn vs J. S. Jennings. Appeal by def't. Judgment Sept. 12. Wm. Robison; George A. Groot.

Oct. 4.

15977. In the matter of the application of Anna McElroy vs The Mother of the Good Shepherd. Habeas corpus. Wm. Clark.

15978. Eliza Shannon vs Mary Kelly and husband. Money only. J. M. Stewart.

15979. The Sweedenborg Publishing Association vs. Samuel H. Kirby, ex., &c. Money and delivery of property. N. A. Gilbert.

15980. H. E. Dickinson vs C. A. Adams et al. Money only. M. M. Hobart.

15981. Peter Schaffer et al. vs Peter King et al. Money only. Wm. Clark.

15982. Same vs Same. Same. Same.

15983. Charles Burnside vs Emeline Wheeler et al. To subject lands and for equitable relief. Smith & Hawkins.

15984. M. Strauss vs Geo. C. Ross. Money only. H. C. Hawkins.

15985. Daniel Derrendinger et al. vs Seth W. Johnson. Acc't and equitable relief. Marvin, Laird & Cadwell.

15986. D. L. Oviatt vs Chas. Hassler. Money only (with att.) E. J. Blandin and E. K. Wilcox.

15987. J. William Baldwin vs Ed. Vopalecky et al. Money, to subject land and relief. J. W. Baldwin and Willson & Sykora.

15988. Elizabeth Schnauffer vs. Michael Kelly et al. Money and to subject lands. Kessler & Robinson.

15989. State on complaint of Dollie Coram vs Otto Stollsteimer. Bastardy. J. J. Carran; —— R. A. Davidson.

15990. J. W. Tyler vs Wm. Hales et al. To subject lands. J. W. Tyler, ——P. P.

Oct. 6.

15991. John Clinton et al. vs James McHenry and garnishee. Money only, with att. Pennewell & Lamson.

15992. H. B. Cochran vs W. P. Patterson et al. In aid of execution and for equitable relief. Willson & Sykora.

15993. Arnold Hippler vs John Stuehm et al. Money, acc't, sale of land and relief. J. S. Grannis.

15994. Charles Thomas vs. G. L. Nichols et al. Money and foreclosure. H. T. Corwin.

15995. Wesley Sargent vs James J. Carothers et al. Foreclosure. R. F. Paine.

15996. Lucy B. Wilcox vs Wm. B. Hover et al. To subject lands. Bishop, Adams, Bishop.

15997. Wilson Davidson vs Dudley A. Cozad et al. Sale of lands and equitable relief. Hord, Dawley & Hord.

15998. Samuel B. Prentiss vs Sophy Schlick et al. To subject land. Baldwin & Ford.

Oct. 8.

15999. Selina Wilkinson vs A. J. Spencer et al. Money only. Ingersoll & Williamson.

16000. George Laufert vs The State of Ohio. Error to Police Court. Wm. Clark and same; M. Eddy.

16001. George Jockers vs Frank Rathenbucher et al. Appeal by defts. Judgment Sept. 9. Gleason; Updegraff and McMillan.

16002 to 160021 inclusive. State ex rel J. S. M. Hill vs The L. S. & M. S. Ry. Co. Appeal by deft. Judgment Sept. 12.

Motions and Demurrers Filed.

Oct. 3.

3179. Carter vs New et al. Demurrer by def'ts. New to petition.

3180. Brown vs Lutton et al. Motion by pl'ff to dispense with advertising in German paper with affidavit.

3181. Tracy et al vs Davidson et al. Same.

3182. Schofield vs McKim et al. Demurrer to the petition.

3183. Stoltz vs. Koester et al. Motion by plaintiff for judgment on def't. Tramp's answer.

3184. Same vs same. Motion by def't Myer for a decree on his cross petition.

3185. Same vs. same. Same motion by Lindeman.

3186. Wick et al vs Zimmerman et al. Motion by George L. Dake, receiver, for leave to make repairs to premises.

Oct. 4.

3187. Scheurer vs. Scheurer et al. Motion by plaintiff for new trial.

3188. In the matter of the assignment of W. L. Whitman. Motion by G. F. Newton, assignee, to dismiss appeal.

3189. Downs vs Charlton. Demurrer to the petition.

3190. Baber ex. &c., vs Wood et al. Same.

3191. Hookway vs Reese. Same.

3192. Raymond et al. vs Ross. Same.

Oct. 6.

3193. Kilfoyl vs Hull. Motion by def't for new trial.

3194. Gibbons vs. McAllister et al. Motion by plaintiff for an alias order of sale and for a revaluation of premises.

Oct. 7.

3195. Ferbert et al ex. &c. vs. Archer et al. Motion by def't Archer to answer of Cleveland Mechanics' Loan and Building Association.

3196. Libby vs Payne. Motion to require plaintiff to elect causes of action and make petition more definite and certain.

3197. Reidy admr. &c., vs L. S. & M. S. Ry. Co. Motion to make petition more definite and certain.

3198. Wade vs Holden et al. Motion by defendant Cozad to set aside decree, sale of property and report of referee.

3199. Judson et al vs Wade et al. exrs. &c. Motion by pl'ffs to strike from files the answer of Wade and Gorham.

3200. In the matter of the arbitration

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between George Dietz et al. Motion by de-def'ts. Umbstatter et al to set aside award and to vacate proceedings and to make same a rule of court.

Oct. 8.

3201. Myer et al vs Small et al and garn. Motion by defendant for order requiring clerk and garnishee to pay over certain money in their hands to apply on judgment, etc.

3202. Heil vs Thomas. Motion to require defendant to give new bail for appeal.

Oct. 9.

3203. Bronson et al vs Stoddart et al. Demurrer by defendant Dray to the petition.

3204. Heffen vs Perkins. Motion by deft. for new trial.

3205. McCurdy et al vs The Cleveland Hazard Hame Co. Demurrer by H. Clark Ford, assignee, to 1st cause of action of amended petition.

3206. Warren vs White et al. Motion by plff. to dispense with advertising with in German paper.

Motions and Demurrer Decided,

Oct 4.

2837. Munday vs Hildemeyer. Sustained.

2924. Beggs vs Burbans. Granted as to setting aside service of summons. Overruled as to balance of motion.

2929. Herenden Fur. Co. vs. Euclid Ave. Opera House. Overruled.

3021. State &c. Mary Lentz vs Horton. Same.

3026. Gulliford vs. Culver, Dismissed without prejudice.

3036. McBride vs Hindley. Stricken from the docket.

3037. Maine et al vs Wolinsky et al. Same.

3044. Kehler et al vs Seyler. Granted.

3053. Stoeckler vs Joner. Overruled.

3058. Hill vs Marsh et al. Same.

3062. Steible assg. vs Bradley. Granted.

3065. Critchfield vs Cowles et al. Same.

3071. Comstock vs Hall. Same.

3115. Henke vs Heimer et al. Sustained.

3130. Koch vs Newshuler et al. Stricken off.

3151. Graves et al vs Russell. Confirmed.

Oct. 6.

3127. Citizens Savings and Loan Ass'n vs Lardner et al. Sustained.

Oct. 8.

2213. Stow vs Gilbert et al. Overruled.

2702. Penfield vs Fitch et al. Same.

2875. Ehrbar vs Baumeister et al. Granted.

2879. John Hancock Mutual Life Ins. Co. vs Gardiner et al. Overruled as to answer and 1st interrogatory, and sustained as to 2nd, 3rd and 4th.

2982. Heisley ex. vs. Williams et al. overruled.

3098. Abram vs Lawrence guard. &c. Sustained.

3136. O'Connor vs Schwan et al. Withdrawn.

3181. Tracy et al vs Davidson et al. Granted.

2843 to 2852 and 2854 to 2867 inclusive. State ex. rel. J. S. M. Hill vs The L. S. & M. S. Ry. Co. Overruled. Defendant excepts and have leave to answer by Nov 10th.

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CASES for trial at the November Term of the Common Pleas Court must be noticed on or before October 23d.

IN the decision in the case of Stow vs. Gilbert, published in our last issue, the court is made to say that the defense set up "is not a good defense." The word "not" should be omitted. In another part of the decision, referring to the same subject, the word "bad" should be omitted and the word "good" substituted in the sentence.

CUYAHOGA COMMON PLEAS.

MAY TERM, 1879.

ISABELLA DANGLEHEISEN VS. A. ALEXANDER, ADM'R.

Married Women—As to Liability for Maintenance of Family, etc.

MCMATH, J.:

This action is brought by the plaintiff, a married woman, against the administrator of her guardian, who was her mother. Before the settlement of the estate by the guardian she died, and Alexander, her administrator, is called upon to account for the amount in his hands belonging to the plaintiff. The mother of the plaintiff by the last will and testament of the plaintiff's father was made the guardian of the plaintiff and had the absolute control of the estate subject to certain conditions—that she was to rear, educate and maintain the children out of the proceeds of the estate until they became of age, and whatever remained of the proceeds of the estate after providing for the children she might, under the will, appropriate to her own use.

The case is before the court on the confirmation of the report of the referee. In the report of the referee the plaintiff is charged with an item of $350, to which is added interest for the period of ten years for board of plaintiff, her husband and her children by the guardian for a period of about twenty months. It is the opinion of this court that the testimony does not sustain the finding of the referee. There was no agreement between the plaintiff and her guardian that the separate estate of the plaintiff should be charged for the maintenance of herself, husband and children. In the absence of any express agreement the law imposed that obligation upon the husband. It is doubtful whether such an agreement would be binding upon the wife, if made, but that question is not fairly raised in the case. Whatever may be due for the support of the plaintiff, her husband and her children to the estate of the plaintiff's mother, is due from the plaintiff's husband, and not from the plaintiff. In respect to that item, therefore, the report of the referee is overruled.

ARNOLD GREEN for plaintiff.

STONE & HESSENMUELLER for defendant.

SEPTEMBER TERM, 1878

MAX E. SAND VS. ANNA M. SIRL.

Married Woman—Liability of Separate Property of for Debt, etc.

HAMILTON, J.:

This action is brought to subject the property of Anna M. Sirl, who, it is alleged, is a married woman, for the payment of the claim set forth in the petition. The claim in the petition is that at the date of receiving the goods named therein she was a married woman, carrying on business in her own name, to-wit: the grocery business; that she owned real estate in her own right as her separate property; and that she also owned the fixtures and goods in the grocery establishment of which she was the proprietor; that while this state of facts existed she purchased of the plaintiff a certain amount of goods for her grocery business, and that she then and there agreed to charge her separate estate with the payment of the amount of the bill thus purchased.

She denies that she ever promised or agreed to pay this claim out of her separate property, and says that she

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never intended to and did not charge her separate property with the payment of the claim.

To this answer the plaintiff demurs upon the ground that it does not state facts sufficient to constitute a defense. We think the demurrer is well taken.

The averment in the petition is that she bought these goods for her separate use to be used in this business which she was conducting. It is conceded in the answer that she was the owner of the real estate and personal goods named in the petition; that she received the goods upon her request and to be used in her separate business, and then denies she ever intended to or did charged her separate estate. It seems to me to be a denial of the conclusion of law which would result from the facts set forth in the petition. It would seem to the court that if these facts be true, which she concedes to be true, that the law would imply an obligation upon her part to pay the debt, and would, as a matter of equity, charge her separate property with its payment, and to deny that, in terms, she made any express agreement to pay for the goods is, we conclude,not a sufficidnt answer to this petition.

It would be analagous, it seems to me, to a defendant coming in and admitting, when sued upon an account, that he had the goods at his request, and that they were of the value named, denying that he ever promised to pay for the goods. The demurrer will be sustained.

WEED & DELLENBAUGH for plaintiff.

KELLEY and ARNOLD for defendant.

JONES, EX'R., VS. KIRBY, EX'R.

Statute of Limitations—Operation of in Cases of Trust, etc.

HAMILTON, J.:

This is an action brought upon certain writing obligatory executed by the defendant's testator to the testator of the plaintiff. The petition sets up the fact that the plaintiff, Mary C. Jones, was duly appointed the executrix of one Jones, and that the defendant, Kirby, has been duly appointed the executor of another Jones. It goes on to set out that sometime in August, 1859, defendant's testator executed and delivered to the plaintiff's testator the following instrument:

"CLEVELAND, O., Aug. 1, 1879.

I promise for value received to pay to the order of Alenson G. Jones out of a debt due from Nathan S. Jones to my partner Nathan G. Jones, amounting to about eighteen hundred dollars, more or less, and the sum of $300 with interest from date. Said payment to be made out of the first moneys that shall be collected on said debt, after satisfying prior claims given to Garrett Voorhiet and Emeline Voorhies his wife, and another to George B. Holbrook and Salina Holbrook his wife, and another claim now negotiating if given to Galvin Jones. E. M. JONES."

It further says that E. M. Jones, during his lifetime, made this collection in full of $1,800 and more, and that there was more than enough to pay this claim which is prior, in point of time, to the payment of the plaintiff's claim, and that he has wholly failed and refused to pay over to the plaintiff's testator during his lifetime the amount of the claim, and that she, as the executrix, has duly presented this claim for allowance to the defendant, and that it was by him refused. She further says that the claim sued upon originated in a trust obligation of E. M. Jones, deceased; that he became possessed of this money, to-wit: one thousand eight hundred dollars, that was coming to the father of E. M. Jones and of the deceased testator as a trust for the benefit of Alanson G. Jones, and all the other parties named in the instrument. And that he has never executed this trust, but that he collected it sometime in 1866, and that ever since its collection he has failed and refused to pay it over, and therefore he never has executed this trust.

The defendant for one defense answers and pleads the Statute of Limitations. First he denies all the allegations in the petition practically. For a second defense he denies the fact that such a collection was made, or if it was that there was nothing in it, for the reason that more than fifteen years had elapsed and, therefore, the action is barred. To this second defense a demurrer is filed and it is said that the Statute of Limitations does not operate in this case, because this fund being a trust fund by the express provision of the statute it does not operate against a continuing and subsisting trust, it being provided by the express provisions of the statute that it does not operate against a continuing and subsisting trust

It would seem to the court that this case is somewhat analagous to a case where a person is authorized to collect a debt and he collects it, and fails to pay over the money. In such a case the trust is always created, and the obligation arises in that way. It would seem to the court further that this action is founded upon this writing obligatory, and upon the promise to pay expressed in that writing; and it is expressly averred in the petition, that he wholly refused to recognize the obligation of the instrument immediately upon its collection by him —wholly disclaimed ever since any trust relation or anything else—denied any obligation arising under it and refused to pay the money. That seems to be the substance of the declaration.

I suppose if an attorney should collect money as an attorney, and should give his note for that money, the liability would depend upon his obligation upon that instrument, and after the Statute of Limitations has ran against the note, it could not be said it was a subsisting and continuing trust.

It is averred the defendant come into possession of this money by reason of being a trustee and has continued in possession of it by reason of being trustee. Is it a continuing and subsisting trust? Is it not rather in direct negation of that assertion—in violation of any such idea? Simply denies, disclaims any obligation under it at all.

In the 1st O. S. this language is used: "Although it is true, as a general rule, that as between trustee and *cestuy que trust* lapse of time is no bar, yet it is equally true that where the former, with the knowledge of the latter disclaims the trust, either expressly or by acts that necessarily imply a disclaimer, and that unbroken possession falls in the trustee, and those claiming under him for a period equal to that described in the Act of Limitations to constitute a bar, lapse of time, under such circumstances, may be relied upon as a defense."

Now, here was a disclaimor, certainly by the acts of the parties refusing to pay—disregarding the obligation under it—refusing to recognize any obligation. The case of subsisting or continuing trust, we can well understand. For instance: One party, A, gets B to sign a note for him as surety. To secure B he transfers a piece of land to C. And then B has subsequently paid that note. By reason of his being surety the Statute of Limitations runs against the claim as a money claim, yet the property which was put in the hands of C, being a continuing and subsisting trust in C's hands, for the purpose of paying and protecting the interests of B as surety, may be subjected to the

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payment of that claim notwsthstanding the claim itself would be barred. But we think this obligation rests upon this note. There is no fund specifically set apart as a trust fund, so that it could be said it was a continuing and substituting trust.

With these views we think the demurrer must be overruled.

ROBISON & WHITE for plaintiff.

MIX, NOBLE & WHITE for defendant.

SUPREME COURT OF ILLINOIS.

CONTINENTAL INS. CO. VS. HULMAN ET AL.

Insurance—Mortgagee—Other Insurance.

Where R. & R. are insured against loss or damage by fire, and the policy contains the clause "loss, if any, payable to H. & C., mortgagees, as their interest may appear," the mortgage interest is not hereby insured.

And it is the policy itself that determines who are the assured.

Where the policy forbids any other contract of insurance "whether valid or not," other insurance invalidates such policy, though subsequent and containing the same prohibition.

Where J. R. and S. J. R. are insured by the first policy, and S. J. R. alone by the second, the latter, nevertheless constitutes other insurance within the meaning of the clause, forbidding it.

When a party, in proving his loss under a policy, discloses the fact of the existence of another policy, obtained in violation of the conditions of the former, such statement is an admission that dispenses with any other proof against him of such other insurance.

SHELDON, J.,

This was an action brought by Hulman & Cox against the Continental Insurance Company, to recover for the destruction by fire of a dwelling house, upon which the defendants had issued a policy of insurance to Sarah Jane Ryan and John Ryan. The facts appearing are, that on the 11th day of June, 1875, Sarah J. Ryan and John Ryan, her husband, executed and delivered to Hulman & Cox their mortgage upon a lot of ground at Watson, Ill., upon which was the dwelling house in question, to secure the payment of their note to Hulman & Cox, of the same date, for $962.60 payable one y... from date, with ten per cent. per annum interest. On the following day, June 12, 1875, the policy of insurance sued upon was issued by the Continental Insurance Company upon the dwelling house, for the sum of $1,000 to run one year. It recites that the "Continental Insurance Company, of the city of New York, in consideration of the receipt of six dollars, do, by this policy insure Sarah J. Ryan and John Ryan against loss or damage by fire to the amount of one thousand dollars, upon their two-story frame dwelling house, situate, etc. Loss, if any, payable to Messrs. Hulman & Cox,of Terre Haute, Ind.,mortgagees, as their interest may appear." Among the provisions contained in the policy are the following: "If the assured shall have, or shall hereafter make any other contract of insurance, whether valid or not, on the property hereby insured, or any part thereof, without the consent of the company written hereon, then, and in every such case, this policy shall become void. 10. It is hereby mutually understood and agreed by and between this company and the assured, that this dolicy is made and accepted upon and with reference to the foregoing terms and conditions." On the 20th day of May, 1876, the property insured was wholly destroyed by fire, the whole amount of the debt due from the Ryans to Hulman & Cox remaining unpaid, and being greater, including accrued interest, than the amount insured by the policy. John Ryan and Sarah J. Ryan both testified that at the date of the policy sued on, June 12, 1875, John Ryan held another policy of insurance in the Rockford Insurance Company on the house for $1,500; that this policy was surrendered and cancelled June 25, 1875. That on August 11, 1875, Sarah J. Ryan applied for another policy of insurance from said Rockford Insurance Company, and a policy of insurance from that company was issued to her on the property covered by the policy sued on, to the amount of $1,200. It appeared that some time before the date of the mortgage, John Ryan had conveyed the property embraced in the mortgage, to his wife, Sarah J. Ryan. The preliminary proof of loss introduced in evidence, subscribed and sworn to by Sarah J. Ryan, also stated that in addition to the policy sued on, there was other insurance made on the property insured to the amount of $1,200, as particularly specified in accompanying schedule marked "A" wherein was set forth the policy of insurance issued by the Rockford Insurance Company to Sarah J. Ryan, for the term of five years, commencing August 11, 1875, and terminating August 11, 1880, it bearing date August 31, 1875, and being on this property in question, and for the amount of $1,200. It was shown by the defendant, that it had no knowledge of, and never consented to, this other insurance. One of the defenses set up, was that the policy issued on had been made void by the other insurance in the Rockford Insurance Company. We are of opinion that this defense was maintained. There was here another contract of insurance on the property insured, made by the assured, with the Rockford Insurance Company, without the consent of the defendant written on the policy in suit, and it was an express condition of the policy, that in every such case the policy sued on should become void. It is answered against this, that the interests of mortgagor and mortgagee are distinct, and each may be insured without one policy avoiding the other, as being other insurance and that this was the case here—that in the policy issuee by the Continental Insurance Company, Hulman & Cox were the assured, and that it was their interest as mortgagees which was insured; whereas in the policy of insurance issued by the Rockford Insurance Company to John Ryan, and the one to Sarah J. Ryan, they, the latter were the assured, and it was their interest as mortgagors that was insured. It is the written policy itself that must determine who were the assured, and whose interest was insured. It is plainly Sarah J. Ryan and John Ryan whom the policy insures against loss or damage by fire, and it is their interest which it insures. The resort to parol evidence, if that were admissible, shows nothing different. The attorney of the plaintiffs, in the taking of the mortgage, and the agent who made the insurance for the company, concur that the application was to insure the mortgagee's interest, and the agent declined to do so, but would only issue the policy to the Ryans, making the loss, if any, payable to the mortgagees. It is true that the policy was issued and delivered to such attorney, he representing to the agent of the company that the Ryans had authorized him to insure the property in their names, making the loss, if any, payable to Hulman & Cox, and the attorney paid the premium, Hulman & Cox furnishing the money, but he states the amount of the premium was charged to the Ryans and included in their note and mortgage, making the "loss, if any, payable to Hulman & Cox, mortgagees," was not an insurance of their mortgage interest in the property. As said in

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Flanders on Fire Insurance 2nd Ed., 488: "It is merely a designation of the person to whom it is to be paid, and is not an assignment of the policy. Hence it is the damage sustained by the party insured and not by the party appointed to receive payment that is recoverable from the insurers. The insurance being upon the interest of the insured, if he parts with that interest before the fire no loss is sustained by him, and of course none is recoverable by his assignee or appointee. In other words, a policy made "payable to A in case of loss," is an agreement on the part of the insurers that "A" shall recover whatever the person originally insured may be entitled to recover in case of loss; that is, it is a contingent order or assignment of what may become due under the contract, and not an absolute transfer, by virtue of which the assignee acquires the full rights of an assignee of a chose in action." In Franklin Savings Bank Institution vs. Central Mutual Fire Insurance Company, 119 Mass. 240, upon this subject the conrt say: The plaintiffs held a mortgage of the property, and on the day after the policy was issued, an indorsement was made upon it that it was to be payable in case of loss or damage to them, as their mortgage claim may appear. It has been repeatedly held by this court that such an endorsement does not operate as an assignment of the policy, nor as a contract to insure the interest of the mortgagees, but that they can claim only what the party originally insured is entitled to recover under this contract: Fogg vs. Middlesex Mutual Insurance Co., 10 Bush 337; Hale vs. Mechanics Mutual Insurance Co., 6 Gray, 169; Loring vs. Manufactories Insurance Co., 8 Gray, 28. "That the rights of the plaintiffs under the policy, are subject to the conditions therein, is quite clearly the case, under the decisions of this court. In Illinois Mutual Fire Insurance Co. vs. Fix, 53 Ill., 151, after a very full and careful consideration of the subjects in view of opposing decisions upon the point, this court said: "We deem it safer and more just to say, that where a policy is assigned as collateral to a mortgagee, though with the consent of the company, the assignee takes it subject to the conditions expressed upon its face or necessarily inhering in it, and that no recovery can be had merely in consequence of the equities of the assignee, if the assignor has lost the right to recover by violating the terms of the contract;" and to the like effect are Illinois Fire Insurance Co. vs. Stanton, 57 Id. 354; Home M. F. Insurance Co. vs. Haustein, 60 Id. 521. In the latter case where the assignment of the policy was made by the martgagor to the mortgagee, with the assent of the company, it was held that the assignee took the policy subject to the conditions it contained, and that his equities conferred no right. That if the assignor had lost all right of recovery by violating the conditions of the policy, the assignee occupied the same position, and that the memorandum that the loss, if any, should be paid to the assignee as his interest might appear, did not change the rights of the assignee.

Although the present is not the case of an assignment, but of a statement, only, in the policy, loss, if any, payable to the plaintiffs, as their interest may appear, we consider the language and decisions above equally applicable here, as in a case of the assignment of the policy. The loss which was made payable to the plaintiffs, was one which was payable under and by virtue of the policy, and in accordance with its terms and conditions, one of which was, that if the assured, who were John and Sarah J. Ryan, should have or make any other contract of insurance whether valid or not, upon the property, then the policy should become void, and consequently no loss payable. There was such other insurance here—a violation by the assured of this condition—and no loss was recoverable under the policy; and no more so where the suit is in the names of Hulman & Cox, conceding that they have the right to sue, than if it were in the names of the Ryans. The import of the defendant's agreement was, to pay to the plaintiffs any loss to which the Ryans might be entitled under their policy to the extent of plaintiff"s claim as mortgagees. But the Ryans were not entitled to any loss under the policy, and hence there was nothing payable to plaintiffs. It is objected that there was no competent proof of any other insurance; that such insurance could only be shown by the production of the policy of insurance itself, or accounting for its absence. The plaintiffs introduced proofs of loss which set forth, among other things, the policy in the Rockford Insurance Company, dated August 11, 1875, insuring Sarah J. Ryan upon the property in question. Where a party, in proving his loss under a policy, discloses the fact of the existence of another policy, obtained in violation of the conditions of the former, such statement is an admission that dispenses with any other proof against him of such other insurance: N. Y. Central Ins. Co., vs. Watson, 23 Mich. 486; and see N. A. Fire Ins. Co., vs. Zaeuger 63, Ill. 464. And Sarah J. Ryan and John Ryan testified on the trial to this insurance without objection, so far as appears. We are of opinion that proof of the insurance by the Rockford Insurance Company was sufficiently made. And although the subsequent policy insures Sarah J. Ryan alone, we think this avoids the policy equally as if the subsequent insurance had been effected by both the assured. See Mussey vs. Atlas Mut. Ins. Co., 14 N. Y. 79.

It is said that to invalidate the prior policy, the second must be valid, and that the Rockford Insurance Company policy was void by reason of the existence of prior insurance without notice. There are two sufficient answers to this: 1. There is no proof that the policy of the Rockford Company contained a clause invalidating it, if there were prior insurance without notice. 2. The provision of the policy sued on is that other insurance without consent, "whether valid or not," renders the policy void. These words, were, doubtless, inserted to prevent any controversy of the kind suggested. They are not to be disregarded. See Liverpool L. & Globe Ins. Co. vs. Verdier, 35 Mich. 395; Bigler vs. N. Y Cent. Ins. Co. 22 N. Y. 402; Lackey vs. The Georgia Co., 42 Ga. 459. Holding the defense considered sufficient, it is unnecessary to advert to the other points of defense which are made, one of them being that the suit does not lie in the hands of Hulman & Cox. The judgment will be reversed, and the cause remanded.

Judgment reversed.—*Chicago Legal News.*

NOTES OF RECENT CASES.

UNION TRUST CO. VS. RIGDON.

1. PLEDGEE OF COMMERCIAL PAPER.

Rights of, without contract. — While a party holding goods or personal chattels in pledge, may sell them to pay the debts after maturity, a pledgee of commercial paper in the absence of a special contract, has no right to sell such securities, but must collect them, and after paying his own debts, he must account to the pledgor for the balance.

2. SALE OF COMMERCIAL PAPER, WHAT CONSTITUTES.

Where two notes amounting to

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three thousand dollars were held as collateral, to secure about $1,300, and the holder of the notes surrendered said notes to the maker, and also gave up to him seventeen other notes of $127 each, for merely the amount due from the pledgor, such a transaction cannot be called a sale, but is a compromise.

3. AUTHORITY TO SELL NEGOTIABLE PAPER GIVES NO RIGHT TO COMPROMISE.

Appellee transferred to appellant a number of notes as collateral security and gave a written contract authorizing appellant to sell the same at public or private sale. The Appellate Court found the facts to be, that appellant made reasonable efforts to sell the collaterals, and failed to find a purchaser, and that said sale and transfer to the maker of the notes was so made without any collusion or actual fraud, and for the best price that could be obtained for them, so far as is shown by the evidence. Held, that these facts did not warrant a compromise with the maker of the notes held as collateral.

4. CONSIDERATION OF NOTE.

One note given to a person is a good consideration for the making of a note by him to the maker of the note he has received.

5. DAMAGES—MEASURE OF

In a suit for making such a compromise, the amount due on the note so compromised is *prima facie* the measure of damages.

6. EVIDENCE—COMPETENCY OF.

It was not competent to show that appellee was largely indebted to the maker of such notes, as that would merely show that the maker of the notes might have had an affirmative cause of action against appellee, to which appellant was a stranger, he having taken the notes before maturity.

7. It would also have been improper to prove the habit of the maker of the notes to give his paper to appellee as accommodation paper, though it would have been proper to prove that these notes had been so given.

8. REMEDIES—RIGHT OF ELECTION OF.

Even if it should be admitted that as the maker of the notes could be held liable to appellee for the balance on them less the amount he paid, yet as appellee in that case might have two remedies, he has the right to select which he will pursue.

WILLIAM R. PADFIELD VS. CATHARINE PADFIELD.

1. Statute of frauds—Parol contract of sale of land—Part performance.—In a suit for dower in lands claimed by the defendant, who was a son of the complainant's deceased husband by a former marriage, the defense set up a parol sale of the land by the father to the son. It appeared the land in question was the home place upon which the father had ever lived from a time previous to the birth of defendant until after complainant's marriage, and defendant lived with his father on that home-place from his birth until after such marriage. The alleged consideration for this pretended contract of sale was this: That long prior to complainant's marriage the father entered another and different tract of land from the government, in his own name, the son furnishing half the purchase money, the son going into possession and making improvements to the value of two thousand to three thousand dollars, alleging no contract, however, in regard to it. That subsequently, but long before complainant's marriage the son gave up to the father all his claim to the land so entered from the government, and all claims for improvements thereon, and released his father from all claims for wages for labor done after the son became of age; that in consideration for all this the father "sold and set apart" this home-place to the son, as his own, subject to the condition that the latter should keep and take care of his father during his life, and the son alleges that thereupon he, in pursuance of said agreement, at once entered into the actual possession of the home farm, and has been in open possession ever since, and has made permanent improvements thereon of the value of three thousand to four thousand dollars, and in all things performed his said agreement.

At the time of this alleged agreement the father was sixty-four years of age, having then a former wife living with him on the place, and the son was a single man. All the lands were improved and cultivated by the father and son together, and subsequently to the time of such pretended contract of sale they had a settlement in regard to the profits, in which they were to share equally. The lands were always assessed to the father, and the taxes paid from their proceeds: *Held*, even if the alleged contract were clearly proven, there was not such a part of the performance as would take the case out of the operation of the Statute of Frauds.

2. It has been held that "the mere possession of land, under a parol agreement of sale, even with the superadded fact of valuable improvements, will not be deemed part performance if the possession was obtained otherwise than under the contract." The possession here was not taken under the contract and for the purpose of performing it, but the defendant was in the possession at the time of the making of the alleged contract, and had been for a long time before.

3. Furthermore, it does not appear that the defendant was induced by the contract to make the improvements alleged to have been made, over and above what was required by ordinary husbandry, for which he was amply compensated by the rents and profits.—Sup. Ct. of Ill.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Oct. 17, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Oct. 11.

Richard Pearce to John P. Robbins. $400.

Anna E. Middleton and husband to David H. Beckwith. $800.

Dennis D. Burns to Mary P. Smith. $530.

Henry Voss and wife to Charley C. Reid. $700.

James M. Hoyt and wife to Mrs. Eliza J. Meech. $7,700.

Jacob Job and wife to Charlie Brunel. $550.

Christian Dickne to Nicholas Meyer. $890.

Eliza Shepard and husband to Emma Paton. $1,000.

William Horrocks to John Glass. $231.

J. H. Schneider to T. E. Burton. $200.

Orlanda Houghand and wife to James Ruple. $675.

Theodore Sieberich to Dr. Wm. Meyer. $173.

Oct. 13.

August Stumpe to August Luebke. $50.

S. C. Axtell et al to F. W. Bell. $103.

A. W. Poe to Ella M. Poe. $200.

Henry H. Lyon to S. S. Lyon. $1,350.

Stephen Crumpler to Edwin E. Lyon. $1,500.

William S. West to Jay Odell. $2,200.

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Michael Vassler and wife to Laheis Wingesser. $500.
H. J. Webb and wife to Juliette Holly. $170.
James Ferris and wife to F. C. Mansell. $200.
W. R. Thomas and wife to Lewis W. Ford. $600.
W. E. Standart et al to John N. Sargent et al. $3,500.
Leopold Daubek to Helen Dowse. $260.

Oct. 14.

Samuel Taylor and wife to The Cit. Sav. and Loan Ass'n. $700.
Herman Back and wife to William Brech. $500.
Same to Hannah Libbey. $54.
Heinrich Tilke to Margaretha Kaeher. $1,400.
H. T. Palmer and wife to Nelson Moses. $400.
Elias Cohen and wife to The Cit. Sav. and Loan Ass'n. $600.
Joseph T. Smith and wife to Margaret M. Lauchlar. $1,000.

Oct. 15.

Jos. Resnichek and wife to Frank Leuk. $300.
D. Lentz and wife to Fanny W. Low. $3,360.
Stephen Squire and wife to T. T. Heath. $150.

Oct. 16.

Frank H. Quade to Henrietta Gallup. Two hundred and fifty dollars.
James Sharkey and wife to James Hogan. Four hundred and fifty dollars.
W. W. Wells to D. Pettibone. Three hundred dollars.
Eliza A. Arter and husband to H. P. Northrup. Three thousand dollars.
John Kusa and wife to George Deubert. Two hundred dollars.
William Leggett and wife to C. C. Rand. Two hundred dollars.
Martin J. Bender and wife to The Soc. for Savs. One thousand five hundred dollars.

Oct. 17.

Horace Wilkins and wife to J. W. Ramsey & Co. One thousand seven hundred and sixty-seven dollars and twenty-seven cents.
Jacob Heene to Sarah Wright. Two hundred dollars.
Joseph Koblitz et al to Louis Koblitz. Three thousand dollars.
F. B. Squire et al to D. Shurner et al. Twa thousand eight hundred and one dollars.
W. O. Jenks to W. E. Nichol. Fifteen hundred dollars.
John Vewenka and wife to Deutscher Gegenseitiger Unterstutzunga Verein. Five hundred dollars.
Louis L. Strauss to The Society for Savings. Five thousand dollars.
Julius Keils and wife to Peter Mueller. One hundred and fifty dollars.

CHATTEL MORTGAGES.

Oct. 11.

Wm. M. Smith to Alfred Stevens. $300.
John Pinnans to E. B. Wood. $280.

Oct. 13.

M. Manx et al to D. Manx. $226.
John H. Hennstreet to Lewis W. Ford. $572.96.

Oct. 14.

John Preisel to Caroline Beyerle. $250.
Same to same. $400.
J. Vanderwerb to Mills, Jewett & Co. $587.

Oct. 15.

Phil. Reiley to Phil. Morris. $1,000.
Asa S. Hudson to A. R. Hudson. $200.
Same to Nancy Z. Hudson. $300.

Oct. 16.

John Freis to Joseph Staab. Two hundred dollars.
H. B. Belden to C. R. Deland. $200.

Oct. 17.

Sophia Gentz and husband to Geo. Weckerling. Th[illegible] hundred and fifty dollars.
Henry Gertz to Cochaan & Young. Five hundred dollars.

DEEDS.

Oct. 10.

John Brooksmith and wife to Geo. H. Wemer. $1,000.
George H. Wemer to Fredericke Brooksmith. $1,000.
James F. Clark and wife to Jarves M. Adams. $2,917.
A. M. Cole and wife to John Jalke. $1.
H. B. Dean and wife to G. L. Morey. $3,000.
Julius Goldwan et al to Benjamin V. Ornstnee et al. $1,200.
G. E. Herrick and wife to Caroline L. Perry. $1,500.
Hernier A. Hurlbut to Jennie H. Jackson. $8,000.
George C. Hickox et al to Frank Zeima. $400.
H. R. Newcomb et al, admr., etc., to John Zelke. $700.

Oct. 11.

Baxter Clough and wife to John R. Hurst. $10,000.
Wm. Martin and wife to James M. Jones et al. $2,928.
Maria Pohle and husband to Wilhelm Barlag. $1,300.
Henry Romp to George Bowman. $475.
H. C. Rettger to Catharine Scarr. $125.
Charley C. Reid to Henry Voss. $1,000.
James R. Ruple, admr., etc., to Orlando Houghland. $1,000.
M. A. Sackett to Board of Education of Euclid township. $1,000.
V. C. Stone to John P. Robbins. $195.50.
John Tuyon and wife to Alonzo Drake. $50.
Charley Viek and wife to Thomas Impett. $9,400.
John Weisman to John Imke. $800.
B. O. Wilcox to Anna Adelaide Merwin. $1,800.
Heirs of Wm. Ruttger by Thomas Graves, Mas. Com., to Catharine Scarr. $400.
W. I. P. Brown by Felix Nicola, Mas. Com., to Henry Carter. $2,000.
Edwin A. Northrup by same to George E. Bowman. $775.

Oct. 13.

J. G. W. Cowles and wife to Robert Hoffman. $1,035.
Hubbard Cooke, trustee, et al, to John Bailey. $360.
Helen Dowse to S. Doubek. $310.
W. Dwight Fowler to Fred Rasch. $1,800.
Charles Gates et al to Jefferson Fish and wife. $563.
James M. Hoyt and wife et al to Hellmuth Kiekheim and wife. $950.
A. H. Kelly to F. J. Benjamin. $106.
August Luebke and wife to Casper Strumpe. $275.
W. R. Middleton to Wm. Judd, trustee. $5.
Wm. Judd, trustee, to Annie E. Middleton. $5.
A. W. Poe and wife to John Moores. $500.
George H. Wyman et al by J. W. Tyler, Mas. Com., to Fannie G. Shepard. $11,000.
The Cleveland, Linndale & Berea Plank Road Co. by Felix Nicola, Mas. Com., to Charles Teideman. $4,666.
Robert Linn et al by E. B. Bauder, Mas. Com., to W. L. West. $2,495.

Oct. 14.

Miss Hannah Clarke to Marcus Koblitz. $900.
Samuel Hipp to James Lawrence. $900.

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Margaret Kacher to Heinrich Tielke. $3,000.
George Linga and wife to Mary L. Bosworth. $600.
Johanna Klimes et al to Mary Masek. $630.
John Marshall to James A. Montpelier. $8,000.
Nettie Northrup and husband to Wm. Douglass. $13,600.
Amasa Stone and wife to H. M. Flagler. $50,000.
Nancy Woodburn et al to Robert Simpson. $5.
Robert Simpson and wife to Sally Ward. $5.
Same to Nancy Woodburn. $5.

Oct. 15.

Lyman W. Carr and wife to C. C. Baldwin. $1,800.
W. S. Chamberlain and wife to James Starer. $800.
Same to same. $800.
William Douglass to D. Lentz. $5,000.
Mary A. Gill et al to Joseph Resnichek. $560.
Julius Junkermann to Charles W. Loomis. $600.
Jacob F. Walz and wife to James Conrad. $210.

Oct. 16.

John Cain and wife to Orlando Van Hise. One dollar.
Orlando Van Hise to C. Newkirk. One dollar.
Barney McLarnon to same. One dollar.
Henrietta Gallup to Frank H. Quade. Four hundred dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending Oct. 15, 1879, against the following Persons:

Oct. 8.

Adam W. Poe. $608.53.
Edward E. Young. $724.88.

Oct. 9.

Anton Bletsch. $994.95.
Margaret Anthony et al. $949.
William Jones et al. $631.

Oct. 10.

Bernard Blee. $677.82.

Oct. 14.

Lawrence Fiala. $534.13.
Lansing E. Powers. $1,723.50.

Oct. 15.

Anthony Twahig. $2,100.

ASSIGNMENT.

Warren D. Caldwell to A. H. Wick. No bond filed.

COURT OF COMMON PLEAS.

Actions Commenced

Oct. 8.

16022. Diena Nolze vs Robert Proddow. Money only, J. W. Heisley.

16023. Phillip Kraimer et al vs Henry Kramer et al. Money and foreclosure of mortgage. Estep & Squire; Smith.

16024. Dudley Pettibone vs Julius Kent et al. Money only. Same.

Oct. 9.

16025. M. M. Spangler vs Phillip Warren et al.

16026. Wm. Willson vs Phoenix Lodge No. 233, I. O. F. Money only. Smith & Hawkins.

16027. James Sweeney vs J. Wm. Ball et al. Appeal by defts. Judgment Sept. 22. Hart & Hurlbut; Pennewell & Lamson.

16028. State ex rel J. C. Hutchins vs C. L. Richmond. Information for malpractice, etc. J. C. Hutchins; Ingersoll & Williamson.

Oct. 10.

16029. Ralph H. Lodge vs George H. Lodge. Money only. H. & C. C. McKinney.

16030. Wm. B. Bemis et al vs John S. Prather et al. Money and sale of mortgaged premises. Same.

16031. J. K. Hord et al vs N. A. Ice Co. Money only (with att.)

16032. J. R. A. Carter vs Clarissa A. Brownell et al. Money and to subject lands. Wm. K. Kidd.

16033. Wm. Norton vs John G. Whigham. Money only. Robison & White.

16034. Hubbard Cooke, trustee, vs Wm. E. Jones et al. Money and to subject lands. Smith & Hawkins.

16035. The Cleveland Rolling Mill Co. vs Joseph W. Britton et al. Money only. Terrell, Beach & Cushing.

16036. Micholas Meyer vs Caroline Wallace et al. To foreclose mortgage. Estep & Squire.

16037. Fred Lamb vs Mary Maker et al. Money and to subject lands. Johnson & Schwan.

16038. In the matter of the Church of the Unity for leave to sell and mortgage land. E. Sowers.

Oct. 13.

16039. C. C. Regers et al vs Abram Allen et al. Money and equitable relief. T. H. Graham.

16040. The Citizens' Savings and Loan Ass'n. us George H. Wyman et al. To foreclose mortgage. Estep & Squire.

16041. Anna E. Romp vs Robert Wallace et al. Money and to subject lands. Prentiss & Vorce.

16042. Elizabeth T. Rowbottom vs John A. Rowbottom et al. Cognovit. Wm. K. Kidd; L. M. Schwan.

Oct. 15.

16043. James J. Tracy vs same. Same. Same; same.

16044. O. M. Burke et al vs W. C. Winslow et al. Application to appoint appraisers. Estep & Squire.

16045. Franklin J. Dickman vs George Wilson et al. To subject land. P. P.; Alex. Hadden.

16046. Henry McKinney et al. vs J. Newman. Appeal by deft. Judgment Oct. 6. ——; W. S. Kerruish.

16047. Carl Wisner vs canal boat Dolphin. Appeal by deft. Judgment Sept. 20. F. H. Bierman; George Menger.

16048. Albert Fisher vs Esther M. Harris. Error to J. P. L. A. Willson and W. C. Rogers; S. E. Adams.

16049. The Missionary Society of The Evangelical Ass'n, of North America vs Matthias Hausen et al. Money and foreclosure. W. W. Andrews.

16050. B. Landau et al, trustees, vs James Smith et al. Money and to subject lands. S. A. Schwab.

Oct. 16.

16051. Frederick Jemimer vs W. K. Smith et al. Injunction and other relief. Wm. Clark.

16052. H. S. Adams vs John Schaible. Money only. Echo M. Heisley.

16053. Soc. for Sav's. vs Charles H. Griese et al. Money and sale of land. S. E. Williamson.

16054. In the matter of Erie St. Methodist Episcopal Church by T. W. Evans et al, trustees. To encumber church property. Foster & Carpenter.

16055. James Crawford vs Wachter Am Erie. Money only. M. W. Pond, Jr.

16056. Same vs Wm. Kaufman. Same. Same.

Motions and Demurrers Filed.

Oct. 10.

3207. Stone vs Wick et al. Motion by defts. for new trial.

3208. Judson vs Hurlbut. Motion by plff. to strike out parts of answer of defts. Wade and Gorham.

3209. Stow vs Gilbert et al. Motion to require defts. to separately state and number defenses of answer.

3210. The Leader Printing Co vs Wilson. Motion by deft. for new trial.

3211. Cowle et al vs Lake V. & Collamer R. R. Co. Motion by defts. Cavenaugh, Porter, Avery and Swift to re-refer case to J. H. Rhodes, referee. for purposes of exceptions.

3212. Gilbert et al vs Allen Co. Mutual Fire Ins. Co Demurrer to petition.

Oct. 11.

3213. Coyle et al vs The King Iron Bridge and Man. Co. Motion by defts. for new trial.

3214. Jones, admr., vs Nichols et al. Motion by defts. Nichols to strike petition from files.

3215. Kummer vs The German Aid Society of, etc. Motion dy deft. for new trial.

3216. Gilchrist vs Higby et al. Motion by deft. Julia W. Higby to require plff. to make petition more definite and certain.

3217. Long vs Burkhardt et al. Motion to confirm sale in partition, by Wilcox, sheriff, for distribution of proceeds.

3218. Schult vs Schmittendorf et al. Motion by defendants Crumb & Baslington for appointment of receiver with affidavit.

3219. Oviatt vs Hassler. Motion by deft. to discharge attachment with notice.

Oct. 13.

3220. Foster vs Hardy et al. Motion deft. Hardy for a rehearing of the Schaffner claim.

3221. Erwin vs Hutson et al. Motion by deft. for new trial.

3222. Rock vs Britt et al. Demurrer to answer.

3223. Atwell vs Henpy. Demurrer to answer and cross-petition.

Oct. 14.

3224. Liberty Lodge No. 14, A. O. G. F., vs Young et al. Motion by plff. for interlocutory decree.

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3225. Kingzette vs Sheets et al. Demurrer by plff. Rusk to cross-petition of deft. Peck.

Oct. 15.

3226. Mann et al vs Zimmermann et al. Motion by Thomas Graves to set aside appraisal.

3227. Rowbottom vs Rowbottom. Motion by plffs. for sale of chattels by sheriff levied under execution at private sale.

3228. Tracy vs same. Same.

3229. Gilmore vs Ball. Motion to require plff. to give bail for costs.

3230. Sun Ins. Co. vs Flemming. Same.

3231. Banks vs Quayle. Motion by deft. for additional bail for costs.

3232. Cowle et al vs Lake View & Collamer R. R. Co. et al. Motion by defts. to confirm report of J. H. Rhodes, referee, and to appoint him receiver.

3233. Foster vs Hardy et al. Motion by deft. Shaffer to strike out answers and reply to cross-petition of J. H. Hardy, with notice.

3234 to 3243 inclusive. State ex rel J. S. M. Hill vs The L. S. & M. S. Ry. Co. Demurrer to the petition.

Motions and Demurrers Decided,

Oct. 11.

2657. Meyers vs Meyers et al. Dismissed without prejudice.

2753. Dangleheisen vs Wigman, exr., etc., et al. Revaluation ordered.

2805. Vincent et al vs Brainard et al. Overruled. Plff. excepts.

3015. Richard vs Wagner et al. Overruled.

3030. Johnson vs West et al. Same.

3034, 3035 } Holmes vs Wyman, admr., etc., et al. Sustained.

3038. White, receiver, vs Bausfield et al and garn. Granted as to separately stating and numbering. Overruled as to balance of motion.

3048, 3049, 3050 } Scheurer vs Hassman et al. Overruled.

3091. Dennerle vs Teutonia Lodge No. 19, A. O. G. F. Overruled. Defendant excepts.

3118. Kingzette vs Sheets et al. Withdrawn. Leave given defendants E. and M. Sheets, H. Wick & Co. and Peter Raesh to plead by Nov. 1.

3194. Gibbons vs Allister et al. Revaluation ordered.

Oct. 14.

2841. Williams vs Spenzer. Overruled. Plff. excepts.

3016, 3017, 3027, 3028 | Bainbauer vs Isekert et al. Granted as to setting aside sale. Overruled as to balance.

3054. Busch vs Englehart et al. Christian Koblenzer substituted as plff. for John Busch.

3074. Sand vs Sirl et al. Sustained.

3099. Cleveland Steam Gauge Co. vs John P. Holt. Overruled. Defendant excepts.

3109. Sones, exr., etc., vs Rirby, exr., etc. Overruled.

3119. Ferbert, et al, exrs., vs Archer et al. Sustained.

3143. Bennett vs Granger. Same.

3209. Stow vs Gilbert et al. Withdrawn.

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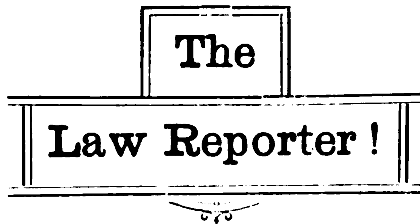

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CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

[Rouse, Lemmon and Finnefrock presiding.]

JAMES BOHASLAV VS. THE STANDARD OIL CO.

Contributory Negligence Question for Jury.

FINNEFROCK, J.:

The plaintiff in his petition states that on the 17th day of July, 1875, and for a long time previous to that time, he was in the employ of the defendant, and on said day was running a planing machine, which in the testimony is called a floater, used for planing off barrel heads, and that while running this machine he was injured, had his left hand cut off, through the negligence and misconduct of the defendant; that on his part he used due care. It is also stated in the petition that while he was in the employ of the company he was put at one thing and at another. This machine at which he was injured was used in the cooper shop designated by the company as No. 3. That his superior who was placed over him in shop No. 3 set the plaintiff to running this machine, and they were engaged in bringing staves with a wheelbarrow to where they were to be put on a platform, and the machine stood close to the passage way between two doors; that there were no guards placed behind him, and the space behind him where persons came by with the staves was very narrow. It is claimed that there was negligence of the company first in this: that the company did not furnish proper machinery and proper conveniences to bring the staves and headings to this platform, and he says there was negligence in this, that they used a wheelbarrow for that purpose having but one wheel, and that it was easily tipped over, and by tipping over the person who was feeding this machine was liable to be thro into the machine and thus injured. Again, the plaintiff complains that there should have been a guard put up behind him, that the company allowed this hand-cart to be taken back and forth between him and the wall, and that there was danger resulting from that. He says the company was also negligent in not furnishing a table upon which these headings could be placed, which should have been placed between him and the wheelbarrow.

To this petition there is an answer substantially denying everything set up in the petition, except the fact that the defendant is a corporation doing business in this city, and that the plaintiff was in its employ.

The answer then states that this wheelbarrow and platform were such as were in ordinary use in a business of the kind in which they were being used, and that there was no necessity for the other protection for the want of which the plaintiff complained; and states, in short, that the plaintiff knew all about the condition of things as they existed before he commenced this employment; therefore, that he entered upon that employment with his eyes open, assuming all the risks incident to that employment.

This case has been tried several times. This probably was the fourth trial. The plaintiff offered his evidence and rested his case. The defendant then made a motion for a non-suit upon the ground that there was no evidence tending to establish or sustain the claim made by the plaintiff in his petition. It was also claimed that there was contributory negligence on the part of the plaintiff and, therefore, he could not recover. But we are not required to pass upon the question as to whether a court has a right when called upon to examine a question as to whether a non-suit should be granted or not to say whether there was contributory negligence on the part of the plaintiff in the case. We apprehend, however, if that question is raised it could very easily be disposed of; that it is not for the court to say whether there was contributory negligence, but that it should go to the jury. But a motion was made to arrest the testimony from the jury and render judgment for the defendant. Where there is an entire want of ev-

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idence to sustain the plaintiff's claim, the Court may direct the jury to return a verdict for the defendant. (24 O. S., 83.)

We were informed in the argument that the Court in this case directed the jury that there was no testimony at all sustaining the plaintiff's claim and that the verdict must be for the defendant, and the verdict was so found. A motion was made to set aside the verdict which was overruled and a bill of exceptions was taken, and the action of the court below is now before us for review.

The only question which is before the court is this: whether the plaintiff in the case offered any evidence which tended to establish his claim. The law is well settled that where there is any evidence tending to establish the claim of the plaintiff it is error for the court to take the testimony from the jury. Under our system the jury is to be the judge of the facts.

It is claimed that there must be testimony tending to establish all the points necessary to be established to constitute a cause of action; that if there are two points to be established and upon one of them no proof is offered that the court, in such a case, ought not to hesitate to take the case from the jury.

The question presented for our consideration is simply, is there any evidence in the case, tending in any degree, to establish the plaintiff's claim. [The court here recited the testimony and continued.] This being the state of the proof ought this evidence to have gone before the jury? The court below in disposing of this case said that he would not allow the testimony to go before the jury, because there was no evidence tending to make out the plaintiff's case. the evidence showing that the plaintiff was guilty of contributory negligence. That contributory negligence is said to be this, that the plaintiff knew these circumstances; that he knew that this car was passing behind him, and knew the character of the wheelbarrow, and knew what kind of a load was brought upon it. It is further claimed that any man who takes charge of machinery is presumed to know the character of the machinery, the dangers that attend the running it —is presumed to know as much about it as the best mechanic in the world, and if he undertakes to run it without knowing the character of it he assumes the risk of all dangers incident to running it. We apprehend that is not quite correct. The court here reviewed the case of Railroad Company vs. Fitzpatrick, 31 O. S., 479.]

Now, taking this case upon the question presented here. Grant that the plaintiff knew of this wheelbarrow, its character, how it was loaded, how it came up, how the heading was taken from it, that there was no table between him and the wheelbarrow, that there was no guard behind him, that there were persons passing between him and the wall with the wheelbarrow, and knew this hand-cart was being run to and fro there by permission of the defendant all the while, but how could he know that this wheelbarrow when brought up—this hand-cart running back of him would strike him and tip these boards over behind him from which he might receive an injury? We think this was a question to go to the jury to say whether he was guilty of any contributory negligence. If the plaintiff was guilty of some negligence on his part it does not follow that he is thereby precluded from a recovery, for, notwithstanding the negligence on his part, if the defendant by the exercise of ordinary care and diligence could have avoided the injury the plaintiff will still be entitled to recover. So that in any event if we say that the plaintiff was negligent in taking these risks, to some extent at least, yet it is a question for the jury, in the first place, to say whether he was negligent in taking the risks, and, if he was, whether the defendant did not exercise proper care and diligence, and if by the exercise of proper care and diligence the injury would have been prevented then, in that case, we apprehend the plaintiff would be entitled to recover. These are all questions of fact for the jury; and we think the evidence in this case was of such a character that it should have been left to the jury to say what the facts were in the case, as to the plaintiff's right to recover. For these reasons we think the judgment below must be reversed.

STONE & HESSENMUELLER for plaintiff in error.

M. R. KEITH and J. E. INGERSOLL for defendant in error.

CUYAHOGA COMMON PLEAS.

SEPTEMBER TERM, 1878

CHARLES E. READER VS. ANDREW PLATT.

HAMILTON, J.:

This is an action in which the plaintiff seeks to recover the sum of $25,000 damages for the publication of a libel by the defendant. The plaintiff sets out that at a certain time his wife was the owner of a certain stable and horses that were insured; that they were lost by fire and the loss was paid. It is then alleged that the defendant "falsely, wrongfully and maliciously contriving to injure the said plaintiff, wrote a letter and published in the letter certain false, scandalous and defamatory matter concerning the said plaintiff, and then sets out a copy of the letter The letter, which is a letter to the Insurance company, substantially says, that the writer, Platt, the defendant in this case, held a mortgage upon this personal property and that he was away in Pennsylvania at the time the fire occurred; that the parties, Mr. and Mrs. Reader, soon after the fire went away, and he says that the amount of the loss paid, and these facts caused considerable comment among the neighbors in relation to the fire. He therefore thinks that an investigation might be beneficial in the case. That is the substance of the letter and all there is of it.

The plaintiff goes on to say by way of innuendo that the defendant meant to charge the plaintiff with the crime of arson; that he meant to charge that he burned the property for the purpose of taking possession of it and of preventing the defendant from taking possession of it and getting the insurance money. It is not quite apparent how he could have any such intention as getting possession of it to prevent the plaintiff from getting possession of it, and getting the insurance money upon an insurance contract to which he was not a party, the property belonging to the wife.

It is stated that the defendant published certain false and scandalous matter, and a copy of the letter is given. There is no allegation as to the particular matters in the letter that are false and scandalous, but that certain facts in the letter were false. What facts? The petition is too indefinite to make any charge in the language used, and the demurrer is sustained.

S. E. ADAMS and R. T. MORROW, for plaintiff.

S. B. BUXTON, for defendant.

NOTES OF RECENT CASES.

1. FAILURE OF CONSIDERATION.

Where a person received the sum $600 and a note of $400, in consideration of defending a brother of the person paying him the money and of securing his acquittal, and made an

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agreement to refund the money and surrender the note if he failed to secure the discharge and acquittal of the accused, by a certain term of court, and the accused did not appear at that nor any subsequent term of the court and had not been discharged, and his failure to appear was not the fault of either of the parties to the agreement, it was held that appellee under the terms of the agreement was bound to refund the money.

2. IMPOSSIBLE CONDITION.

Compensation may be recovered for work done before knowledge of the impossibility.—In the above case appellee is entitled to compensation for the work he did in good faith pursuant to the agreement before ascertaining that the performance of his agreement had become impossible, and this he is entitled to deduct from the $600. Moore vs. Robinson, Sup. Ct. of Ill.

SHERIFF'S RETURN.

What sufficient.—When a sheriff in a suit against a corporation endorsed upon the summons the following return, "September 4th, A. D. 1872. Served by reading and delivering a true copy to Wm. R. Morrison, a director of the defendant, the president of the defendant not residing or being found in my county;" and when a judgment had been rendered by default, upon bill in equity to enjoin the collection of the judgment it was held that the return was sufficient.

2. An objection that the return fails to show *what* was served, and that it is silent as to a copy of what was served is exceedingly technical, and cannot be sustained without giving to the return a strained and unnatural construction.

3. DAY IN COURT.

Where the case had been decided before in this court the former decision is conclusive, although the former case is in law and this in equity, and the case as reported in 72d Ill., 419, is decisive of this.

4. LACHES.

Equity will not relieve against.—Where a party has been served with process, and neglects to appear and defend but suffers judgment to be rendered by default, equity will not relieve from such a judgment. Cairo & St. Louis R. R. Co. vs. Holbrook. Sup. Ct. of Ill.

FRAUDULENT CONVEYANCE—EVIDENCE.

Where a wife deeds property to the husband and the only proof of fraud is the fact that the conveyance was made when the wife was in debt, such evidence will not warrant a decree setting aside the conveyance when the answer deny the allegations of fraud charged in the bill. Tyberault vs. Raneke, Supt. Ct. Ill.

INJUNCTION.

Will not lie to restrain railroad company from operating road on streets in city—Corporate functions. The fee of the streets in a city is in the corporation, and the dominion is absolute in it. The right to control the operation of a railroad running through streets and alleys of cities is a corporate function, which city councils are fully authorized to perform, and a court of chancery can not assume jurisdiction to perform them. The C. & V. R. R. Co. vs. The People, Supt. Ct. Ill.

—*Weekly Jurist.*

SUPREME COURT OF MICHIGAN.

HOYT VS. PAGE.

Compound Interest.

Independent of any statute providing for the compounding of interest, it is not competent to make a valid contract in advance for overdue installments of interest, by virtue of any provision in the obligation on which the interest accrues. The authority to make a separate or severable contract for future interest is not doubted.

Where there are no installments of inserest to become due, but the principal sum and interest are due and payable at one and the same time, it is error to allow interest upon the interest due; the statute providing for the compounding of interest, applies only in cases of interest due by installments.

COOLEY, J.:

The questions involved in this case are questions of compound interest.

The suit is to enforce the payment of two obligations, by the first of which the obligor promises to pay "$1,400 on or before ten years from date, with annual interest at the rate of ten per cent. per annum, and in case such interest is not paid at the end of each year, it is expressly agreed that said interest shall become principal and draw interest at the rate aforesaid," etc. This was dated May 23, 1868.

At the date of this obligation there was no statute in this state expressly providing for the compounding of interest, and it has been generally believed that it was not competent without such a statute to make a valid contract in advance, for interest upon overdue installments of interest. Such was the conclusion of Chancellor Kent, at an early day: Connecticut vs. Jackson, 1 Johns. Ch., 13; Van Benscoten vs Lawson, 6 Johns. Ch., 314; and his conclusion seemed to commend itself to the judgment of our people, as it did to that of judicial tribunals of other states: Sparks vs Garrigues, 1 Binn., 165; Stokely vs Thompson, 34 Penn. St., 210; Hastings vs Wiswall, 8 Mass., 455; Van Hemert vs Porter, 11 Met., 210; Ferry vs Ferry, 2 Cush., 92; Doe vs Warren, 7 Me., 48; Niles vs The Board, etc., 8 Blackfy, 159; Grailes vs Blake, 16 Ind., 160; Leonard vs Villars, 28 Ill., 377. The judgment of Chancellor Kent has recently been criticised in New York, but it has been affirmed by a majority of the Court of Appeals, after full discussion: Young vs Hill, 37 N, Y., 162. In New Hampshire, a different conclusion was reached, at an early day: Pierce vs Rowe, 1 N. H., 197; and this case has been followed in some States: Austin vs Innis, 23 Vt., 286; Preston vs Walker, 26 Ia., 205; Lewis vs Paschal, 37 Tex., 315; Bledso vs Vixon, 69 N. C., 89; and it is not disputed anywhere that after the interest has accrued, a valid promise may be made to pay interest upon it: Camp vs Bates, 11 Conn., 387; Wilcox vs Howland, 23 Pick., 167; Stewart vs Petree, 55 N. Y., 620. That coupons attached to negotiable paper may draw interest after dishonor, is held in some cases: Gelpcke vs Dubuque, 1 Wal., 175; Mills vs Jefferson, 20 Wis., 50; but these coupons are for many purposes a severable contract, and are in the nature of the notes given in advance for interest to become due at a certain time. The authority thus to give a separate or severable contract for future interest was never doubted, and we have no occasion—even if we were so disposed—to question, in this suit, the soundness of the decisions that have held interest recoverable upon them. We are satisfied with the New York rule which forbids the compounding of interest by virtue of any provision in the obligation on which the interest accrues, and are, therefore, of opinion that the court erred in allowing compound interest on the obligation above mentioned.

The second obligation was a mortgage dated February 24, 1872, by which the mortgagor was to pay the mortgagee the sum of $668.66, "one

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year after date, with annual interest at ten per cent." This mortgage, it will be perceived, was given after the passage of the act of 1869, Comp. L. § 1637—by which it is provided "That when any installment of interest upon any note, bond, mortgage or other written contract shall have become due, and the same shall remain unpaid, interest may be computed and collected on any such installment so due and unpaid from the time at which it became due, at the same rate as specified in any such note, bond, mortgage or other written contract, not exceeding ten per cent.; and if no rate of interest be specified in such instrument, then at the rate of seven per centum per annum.

Neither principal nor interest was paid on this mortgage when it fell due, and the Circuit Court computed and allowed compound interest upon it. We think the court incorrect. There were no installments of interest to come due on this mortgage; it was payable, principal and interest, all at one time. Every day after the year was completed, the principal, with interest, up to that day, was overdue; no more overdue at the end of the second year than it was on any day within the year preceding, and therefore, no more payable in yearly installments than in monthly or weekly installments. The statute contemplates cases in which payments of interest fall due by themselves, and may be demanded separate from the principal; but that was not the case here; the principal and interest constituted, at all times, one debt, and any demand or suit for it must have embraced the whole. The words "annual interest at ten per cent.," in such an obligation, can mean no more than this, that the interest shall be computed at ten per centum per annum; they cannot be read as providing for successive installments of interest, where the principal itself is to be paid at the end of the first year.

Our conclusion is, that the court erred in allowing anything more than simple interest on either obligation, and the decree must be modified accordingly. The defendants will recover the costs of this court.

The other justices concurred.

—*Chicago Legal News.*

SCHUYLKILL COUNTY COMMON PLEAS.

ALLISON ADM'R OF BRECKEN VS. THE MOUNTAIN CITY BANKING CO.

1. The entire capital stock of a corporation is a trust fund for the payment of its debts.
2. Where a bank has suspended payment, and is in the hands of a receiver, a stockholder cannot use the check of a depositor in payment of his unpaid subscription to the stock of the corporation.

Case stated and submitted to the court.

PERSHING, P. J., October 29, 1877.

Edward R. Breckens in his lifetime was a subscriber to the stock of the Mountain City Banking Company. He paid but a part of his subscription, and for the balance gave what is expressed on its face to be a "guarantee note for payment of balance on subscription of stock if required for any future assessments. The bank has suspended and is now in the hands of receivers, who, under the direction of the court, are proceeding to collect this and similar notes given by the other stockholders, all of whom, it appears, received certificates of paid up stock in the bank. At the time of the suspension Clay W. Evans was a depositor in the bank. Sometime thereafter, viz.: September 24, 1877, he drew his check on the "receivers of the Mountain City Banking Company to the order of Joseph Allison, administrator," for the sum of one hundred dollars; and this check was tendered to the receivers by Mr. Allison in part payment of the note given by Edward R. Breckens to the bank for his unpaid subscription to its stock. It was refused by the receivers, and this raises the question submitted to the decision of the court.

It is an acknowledged principle that the entire capital stock of a corporation is a trust fund for the payment of its debts. Wood vs. Dummer, 3 Masan C. C. R. 308; Mann vs. Pentz, 3 Comst. 422; Bank of Virginia vs. Adams, 1 Pars. Eq. R. 534. The unpaid subscription to its stock are a part of its assets which can be made available in equity by the creditors, and therefore a general assignment for their benefit passes them to the assignee. R. R. Co. vs. Thomas, 2 Phil. R. 244. In Hume vs. Winyaw & Wando Canal Co., 1 Carolina L. Journal 217, Chancellor Dessaussure held that where the funds of a corporation are not whole and tangible, but consist in the liability of members to be assessed, a court of equity will lend its aid in favor of a creditor of the company to assist him in enforcing the payment of installments required by the members; and will apply the fund so raised to discharge the debt. It is as if it were a subrogation to the rights of the company. (Cited in Ang. & Ames on Corp. 660; Wash. Benf. Soc. vs. Bacher, 8 Harris 429; Bank vs. Adams, 1 Pars. *supra;* R. R. W. Co. vs. Fitler, 10 Smith 124.)

In Wood vs. Dummer *supra*, Judge Story said it appeared so plain to him on principles of law, as well as common sense, that he could not doubt that the charter of our banks made the capital stock a trust fund for the payment of all the debts of the corporation. The bill-holders and other creditors had the first claims upon it; the stockholders had no right until all the other creditors were satisfied. Can the check be used as a set off? The demand to be set off must be such an one as the party has the present right to enforce. Money deposited becomes the absolute property of the bank. The relation is that of debtor and creditor. The holder of a bank check cannot sue the bank for refusal to pay it, in the absence of proof that it was accepted by the bank or charged against the drawer. Bank of the Republic vs. Millard, 10 Wall. 152; Chapman vs. White, 6 N. Y. R. 412; Lloyd et al. vs. McCaffrey, 46 Penna. S. R. 410. The authorities are clear as to the circumstances under which a debtor to a bank may claim the right of set off. One who is a debtor to a bank, the funds of which are placed in the hands of commissioners for liquidation may properly claim a set off for anything due to him from the bank at the date of the assignment. Waterman on Set-off, 24. Debtors of an insolvent bank in the hands of a receiver may set off demands which were due to them from the bank whilst it was doing business against the debts due from them to the bank. Berry vs. Brett, 6 Bos. (N. Y.) 627. A deposit in a bank may be set off against a note of the depositor held by the bank at the time of its assignment. Bank vs. Sherlock, Leg. Int. June 22d, 1877, per Agnew, C. J. And it makes no difference that the indebtedness of the bank to the customer had not matured at the time of the insolvency. Morse on Banking, 41; Pruyn vs. Receiver, 9 Cowen 413 in note. Where a person owes an insolvent bank on a note discounted for himself, he may set off the proceeds of the discount passed to his credit on the books of the bank, but not a check drawn in his favor by another depositor. Waterman on Set-off, 190: 5 Bosw. 341. The bank at the time it closed its doors was in no way indebted to Breckens or his estate; and it seems clear from the authorities cited that a check drawn by a creditor of the bank cannot be used in payment of any part of the indebtedness of

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Breckens to the bank on account of his stock. We think too that the provision in the 27th section of the Act of 16th April, 1850, (Pur. Dig. 144) which directs that the assignees of an insolvent bank, "shall receive in payment of debts due to said bank, its own notes and obligations and the checks of its depositors at par," means such depositors as are at the same time debtors to the bank. Is it not the interpretation of the act, says Agnew, C. J., in Bashore vs. Assignee of F. & M. Bank, Leg. Int. July 13, 1877, that any one may purchase the drafts or orders of a broken bank at any discount, and tender them in payment to the assignees." On the contrary the 5th section of the Act of 16th April, 1850, expressly requires stockholders to pay their shares of the capital stock in gold, silver or notes of specie paying banks of this Commonwealth. (Pur. Dig. 128.)

To allow this indebted stockholder to apply the check of a depositor in payment of his stock, might have the effect of giving one depositor a great advantage over other creditors of the same class. We are pretty well convinced that had the stockholders promptly paid their stock notes at the commencement of its financial difficulties, the bank would not have been compelled to suspend business. Bad faith in this case is not imputed to any one. It is plain nevertheless, that if stockholders in a bank could by paying but the one half of their supscriptions to the stock. and giving their notes for the other half, and by their failure to comply with their contract bring the bank into a condition of insolvency and then discharge their indebtedness by purchasing the checks of depositors, or other obligations of the bank, at a large discount, the temptation to make enormous gains in this way might be too strong for some men to resist it. It is our duty to prevent, as far as we can, honest creditors from rnnning any such risks.—*The Schuylkill Legal Record.*

SUPREME COURT OF TENNESSEE.

CARRIGAN VS. LEATHERWOOD.

Assignment of Judgment—Lien of Attorney.

An assignment of a chose in action is not complete, so as to vest an absolute title, until notice is given to the debtor. This is so, not only as regards the debtor, but likewise as to third persons; and an attachment by a creditor in the period intervening between the assignment and such notice, will take preference over the assignment.

An attorney who has recovered a judgment which is subsequenfly attached, has a lien for his fees, that is prior to the rights of the attaching creditor.

FREEMAN, J.:

The only matter before us in this case arises on the claim of Carrigan, in the cross-bill to the judgment attached by Leatherwood in his original bill.

Without going into a statement of the complicated facts shown in the record, as preliminary historical matters on which the question to be decided are raised, it suffices to say, that two questions are presented by the record for adjudication.

First, did Carrigan by the assignment made by McGee, in November, 1873, of the judgment to which Rhodes was equitably owner,acquire a title to said judgment that would override the attachment of Leatherwood, a creditor of Rhodes?

To this we answer, it is certain he did not, it being in any view of it, an assignment of a judgment, and no notice of such assignment given or brought home to the debtor.

This is almost the precise case of Clodfelter vs. Cox, adm'r., 1 Sneed, 338, and falls unmistakably under the principle therein settled.

The other question is whether Carrigan, as an attorney, can hold the judgments by virtue of his lien as such against Leatherwood's attachment? The Chancellor held that he could not. In this he is in error, we think, to this extent.

The facts are that the judgments had been assigned to Carrigan, but as we have said, that assignment was not perfected as to him against an attaching creditor for want of notice. Carrigan certainly had no general lien on these judgments, as papers in his hands for his other fees for services rendered Rhodes in the case of Pitts vs. State, but he had obtained this judgment of five hundred and three dollars, or about that sum, on the *certiorari* suit in the Circuit Court, and as such had a lien for a reasonable fee on said judgment, so obtained by lien, and of this Leatherwood had notice, he being the party against whom it was rendered. We think, under this statement cf facts, the attaching creditor gets the benefit of the judgment, subject to this lien of the attorney. In other words, his attachment to the judgment takes it subject to this lien, which is entitled to priority. The amount of such fee is not shown in the record, we therefore direct a reference to the clerk of this court, who will report at present term, if practicable, what is a reasonable fee for attention to the *certiorari* case in which the five hundred and three dollars judgment was rendered in the Circuit Court, and Carrigan will be entitled to such sum in preference to the attaching creditor. To this extent the decree below is modified. Costs of this court will be divided between the parties. Costs below as directed by the Chancellor. —*Chicago Legal News.*

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for th Week Ending Oct. 24, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Oct. 18.

T. C. Parsons to J. H. Lindsley. $1,917.57.

Henry Steinfurt and wife to S. S. Lyon. $225.

James K. Higgins to The Cit. Sav. and Loan Ass'n. $1,000.

Susan Bolan and husband to Emile Goetz. $350.

Stephen West and wife to Benj. S. Tyler. $350.

Oct. 20.

John S. Franz and wife to James S. Reed. $500.

A. C. Rowe and wife to J. W. Simpson. $200.

Louisa A. Cook and husband to Charles H. Smith. $4,575.

Oct, 21.

Mary Farnsworth and husband to Mary Danforth. $300

Bridget Rieley to William Lande. $250.

Perum Bohemia School etc, to The City of Cleveland. $3,340.

Frank Savage to Charles McCroken. $300.

John Kritz and wife to Casper Fronmeyer. $300.

Elizabeth Rowbottom and husband to James J. Tracey. $730.

Patrick Croulding to E. Holiday. $250.

Oct. 22.

Theodore N. Bates to Lewis Ford. $200.

F. A. Wyman and wife to W. H. Gaylord. $226.50.

Patrick Durkin and wife to Mary Murphy. $100.

Mary A. O'Connor and husband to James Breen. $400.

Robert Semple to L. E. Holden. $368.

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W. J. Breen and wife to C. H. Dunbar. $200.

Frank Lundik to Helen Dowse. $300.

Oct. 23.

John Hutchinson and wife to M. S. Hogan. Three hundred dollars.

John P. Lutz and wife to J. R. A. Curtiss. Seventeen hundred dollars.

John Sherkey to James Ruple. Six hundred dollars.

Wm. Gibb to The Cit. Savs. and Loan Ass'n. Two hundred dollars.

Jessie P. Bishop and wife to The Codnecticut Mut. Life Insurance Co. Twenty-eight thousand five hundred dollars.

Esther Hurlburt and husband to Ludwig Hundertmark. Fifty dollars.

Oct. 24.

Henry Kumm and wife to William Gabel. $580,

Jas. M. Poe and wife to John S. Johnson. 1,350.

James Crawford and wife to D. W. Loud. 600.

CHATTEL MORTGAGES.

Oct. 18.

J. W. McGarry to Merts & Riddle. $700.

Daniel Duty et al to W.W. Gaines. $4,125.

Charles Kress to F.E. McGuinness. $425.

Oct. 20.

R. J. McLane to Christ. Kazmaier. $325.

Oct. 21.

Jacob Bote and wife to Andrew Patterson. $125.

Same to Helene Weber. $125.

Oct. 22.

S. H. Cohen to M. Bergeman. Two thousand dollars.

A. E. Fowler to The Standard Oil Co. Five hundred dollars.

Oct. 23.

Edward A. Stein to John U. Mayne. One thousand and three dollars.

John Hamilton to F. Wamser and Son. Ninety-five dollars.

Thompson Whitaker to Hiram Burnett et al. Fifty-six dollars.

Pauline Udall to Julius Messmer. One thousand dollars.

Oct. 24.

Jacob Appel et al to Charles Prenfeldt. 150.

Daniel Appel to Jacob Appel. 275.

DEEDS.

Oct. 16.

J[illegible]es M. Hoyt and wife to Frederick Schneerer. Three thousand and fifty dollars.

Susan A. Hand to H. A. Ford. Fifteen thousand dollars.

John Laika and wife to Josephine Kolar. Nine hundred dollars.

Henry Stark and wife to L. D. Stark. Two hundred dollars.

Daniel Schurier et al. to John T. Taylor et al. Five thousand six hundred dollars.

John L. White and wife to H. A. Ford. Three thousand dollars.

John Lewis and wife et al. to Fanny Stoneman. One dollar.

Frank A. Arter et al. by E. B. Bauder, Mas. Com. to Eliza K. Arter. Four thousand two hundered dollars.

John Saner and wife by E. G. Lynde, Mas. Com. to David Latimer. Twelve hundred dollars.

Oct. 17.

Andrew Cramer to Louisa Begler. $2,000.

William Edwards and wife to Patrick O'Brien. $443.

Henry C. Ford and wife to Margaret L. White. $3,000.

Loren Prentiss et al, exrs., etc., to Patrick O'Brien. $443.

Adolph H. Koningslow to Cornelius Donohue. $1,900.

B. L. Pennington and wife to J. L. Duke. $360.

Jeremiah Le Duke to Dennis Molone. $1,025.

Nicholas Meyer to Christian Diemer. $1,400.

W. C. Nichols to W. O. Jenks. $1,500.

John E. Rook et al to C. G. Williams. $1,500.

Amy Barnum et al to C. E. Hitchcock. $700.

L. J. Talbot and wife to Mary N. Ellen. $560.

Caroline S. Welsh and husband to Fanny E. Hall. $3,600.

Henry L. Hills et al by Thomas Graves, Mas. Com., to C. A. Suhr. $935.

S. M. Eddy, Mas. Com., to Christopher Frese. $1,230.

J. H. Schneider by C. C. Lowe, Mas. Com., to Herman S. Adams. $2,015.

Oct. 18.

John A. Bishop and wife to George Basel. $5.

Betsy Breen to Milton Johnston. $50.

Sophia Engel and husband to Catharine Ehrbar. $1,300.

Joseph Duffner to Mathew Duffner. $2.

George C. Hickox et al to Joseph Dubrava. $766.

S. S. Lyon to Henry Steinfell. $650.

Elijah J. McGeah and wife to L. E. Holden. $16,332.

Jacob Voght and wife to James S. Parker. $500.

James S. Parker to C. W. Schmidt. $150.

Annie M. Simpson and husband to Adam Beilstein. $2,000.

Lyda Seymour and husband to John Gehienger. $1,000.

John Gehienger to C. H. Seymour, trustee. $1,000.

Caroline Warler to Francis Barrow. $1.

George Zimmer and wife to John Reed. $2,600.

Barnard Anderson et al by W. I. Hudson, Mas. Com., to S. H. Calhoun. $65.

Same to Frederick Schumann. $66.50.

Same to Wm. Wacks. $195.

Heirs of Joseph Burkhardt by J. M. Wilcox, sheriff, to George Auer. $705.

Same to Jacob Killins. $2,455.

Oct. 20.

Augustus Adams to Irving Hull. $130.

J. B. Bruggeman and wife to Frank Lenk. $8,500.

Fred D. F. Brugdorff and wife to B. L. Pennington. $600.

Adam Beilstein and wife to Annie M. Simpson. $700.

Mary S. Bradford et al to John W. Phillips. $530.

Frances Comley to Maria C. Dauss.

Julia Donohue to Henry Below. $570.

Sarah E. Hays and husband to Adam Beilstein. $1.

John McCrea et al by E. B. Bauder, Mas. Com., to Lewis Henninger. $760.

Lewes Henninger to Gottfried Loesch. $750.

Diantha Knapp and husband to Harriet Gowman. $120.

B. L. Pennington and wife to R. E. S. Snow. $600.

Karl A. Raeder and wife to Elise Moeller. $2,000.

Fred Engel by S. M. Eddy, Mas. Com., to The Society for Savings. $500.

Susan Turner by same to same. $1,200.

Oct. 21.

W. L. Cutter and wife to The Little Sisters of the Poor. $1.

Hubbard Cooke, trustee, et al to Michael Dales. $500.

Same to Carl Hentz et al. $270.

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R. A. Davidson to The Society for Savs. $2,666.75.

Henry Hirt and wife to Gottlieb Wettinger and wife. $900.

George C. Hickox et al to Eliza P. O. Crocker. $800.

Phillip Kramer to Caroline Miller. $1.

Henry Kramer to Phillip Kramer et al. $650.

Norman W. Chamberlain to Francis R. Otis. $5,100.

Henry Kramer et al to Samuel Doerfler. $800

The People's Savings and Loan Association to Thomas Scott et al. $550.

Emeline Stone and husband to Marilla M. Stone. $2,000.

Wm. Short to Lavea A. Holcomb. $180.

Thomas F. Andrews by S. M. Eddy, Mas. Com., to R. A. Davidson. $2,666.75.

Barnard Anderson et al by W. I. Hudson, Mas. Com., to Henry C. Smith. $138.

Jos. Marchand by Thomas Graves, Mas. Com., to Samuel W. Duncan. $5,256.

The Collamer & St. Clair St. R. R. Co. by R. D. Updegraff, Mas. Com., to G. B. Bowers, trustee. $2,650.

Oct. 22.

Geo. Pasel and wife to Mary Bishop. $5.

Helen Dowse to Frank Sandik. $363.

John Hartness to Virgil P. Kline. One thousand three hundred dollars.

L. E. Holden and wife to Robert Semple. Five hundred dollars.

Wm. S. Jones to Chas. B. Bartlett. One dollar.

Patrick McGrath and wife to Chas. W. Prentiss. Two thousand dollars.

Rizia Osterhold to Samuel Osterhold. One dollar.

James H. Pearson and wife to M. J. Lawrence. One thousand two hundred dollars.

Garret Reublin et al to Joseph Brown. Two hundred and eighty dollars.

Charles Ruprecht to L. E. Holden. Three thousand three hundred and forty-nine dollars.

Frank Stupka et al to Jos. Laug. Twenty dollars.

Helen W. Stanley and husband to John Moores. Four hundred dollars.

L. J. Talbot and wife to Hermann Weiller. Five hundred and sixty dollars.

George Gilbert by Felix Nicola, Mas. Com., to U. S. Mortgage Co. Twelve thousand dollars.

William Jones by same to same. Ten thousand, two hundred and seventy dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending Oct. 22, 1879, against the following Persons:

Oct 15.

Alvah A. Jewett et al. $6,850.
John A. Rowbottom et al. $1,950.70; 729.52.

Oct. 17.

Henrich Lenders. $4,630.

Oct. 18

Fred A. Lane. $200.
T. G. Clewell et al. $1,784.92.
J. B. Myers et al. 406.19.

Oct. 20.

A. J. Stiles. $498.25.
M. S. Hull et al. $4,028.24.

Oct. 21.

Ann Clancy. $1,305.50.
Martin Goetz et al. $1,046.

Oct. 22.

P. Staphan. $219.70.
W. C. Bidel et al. $4,531.24.

COURT OF COMMON PLEAS.

Actions Commenced.

Oct. 17.

16057. J. W. Sykora vs T. A. Jungling et al. Appeal by defts. Judgment Oct. 8. Willson & Sykora; E. M. Brown.

16058. James Hickey vs John Gill et al. Equitable relief and injunction. W. W. Andrews.

16059. George Hester, admr., etc., vs Edward Wing et al. Money and to subject lands. George Hester.

16060. Philip Urban vs Uriah Taylor. Money only. Quirk.

16061. Henry Castor vs Charles Hogg. Appeal by deft. Judgment Sept. 17. C. W. Coates; Kessler & Robison.

Oct. 18.

16062. O. C. Gordon vs Ezekiel Edgerton et al. Money and foreclosure of mortgage. N. M. Flick.

16063. W. H. Crawl to Albert M. Harman. Money only. Adams & Beecher.

16064. P. Hayden vs G. M. Heard et al. Appeal by defts. Judgment Sept. 18. W. C. Rogers.

16065. Wm. Bousch vs John Geissendorfer. Money, to subject lands and relief. A. Zehring.

16066. C. W. Schmidt vs Lawrence Ryan et al. Same. Same.

16067. Same vs Simon Hyman et al. Same. Same.

16068. Daniel Hamm vs Conrad Kohl et al. Same. Gustav Schmidt, A. Zehring.

16069. Mary Malvina et al vs Elizabeth Elwell et al. Partition. Grannis & Griswold.

16070. John Rains vs The Sovereign of Industry Co-operative Ass'n. Money only. Jackson, Pudney & Athey.

16071. George H. Adams et al vs T. D. Crocker. Money only. R. F. Paine.

16072. Simon Koch vs Wm. J. Harrison et al. Money and to subject lands. P. L. Kessler.

16073. A. W. Beck vs Peter O'Rourke et al. Same. Same.

16074. Cornelia Whiting et al vs J. S. Dawley and garn's. Money only (with att.) Johnson & Schwan.

16075. Manuel Halle vs John W. Jones et al. Money and sale of lands. Goulder, Hadden & Zucker.

16076. M. Kneebusch vs Carl Seyler et al. Money and equitable relief. Mix, Noble & White.

16077. Henrietta M. Slee vs Charles Goulder et al. Money and to subject lands. Henderson & Kline.

Oct. 21.

16078. Joseph Stoppel vs John Hellman et al. Money and to sell mortgaged premises. Stone & H.

16079. David Latimer vs John Sauer et al. To quiet title. A. J. Sandford.

16080. Charles Becker vs D. W. Loud. Appeal by deft. Judgment Sept. 25. Menger and Coates; J. A. Smith.

16081. John Lay vs Wm. Mason et al. Same. Judgment Sept. 22.

Oct. 22.

16082. The City Nat. Bank of N. Phil., O., vs P. Staphan et al. Cognovit. J. H. Booth and Weed & Dellenbaugh; John B. Graham.

16083. Jacob W. Beck, exr. etc., vs Jos. Urmetz. Money only. Solders & Priest.

16084. The City of Cleveland vs G. A. Myers et al. Money only. Heisley, Weh & Wallace.

16085. E. R. Clarke vs C. B. Clarke. Money only. Mix, Noble & White.

16086. C. P. Barr vs N. W. Libby. Appeal by deft. Judgment Oct. 1. Grannis & Griswold; J. Ensign.

Oct. 23.

16087. James Gayton vs Wilbur F. Hinman et al. Money only. Prentiss & Vorce; Hord, Dawley & Hord.

16088. Joseph Gunn vs W. F. Cleveland et al. Appeal by deft. Judgment Oct. 11. S. M. Brown; Safford & Safford.

16089. Mrs. A. H. Burke vs E. M. McGillen & Co. Appeal by deft. Judgment Oct. 15. Adams & Beecher; Henderson & Kline.

Motions and Demurrers Filed.

Oct. 16.

3244. Cowle et al vs The Lake View & Collamer R. R. Co. et al. Motion by plffs. to modify report of referee and to confirm same.

3245. Berchtold et al vs Blatt. Motion by deft. for new trial.

3246. Wise vs Clark et al. Demurrer by plff. to answer of Clark.

Oct. 17.

3247. Wagner vs Hibernia Insurance Co. Motion by deft. for new trial.

3248. Carter vs Schuttthelm et al. Motion by deft. Schuttthelm to set aside master's sale.

Oct. 18.

3249. McMahon by, etc., vs Rummage. Motion by plff. for new trial.

3250. Bainbaum vs Isekeit et al. Motion by plff. to set aside appraisal and for new appraisal.

3251. Droz vs Roemer et al. Demurrer by deft. Thies to the cross-petition of Ferbert, Gehring and Deobold, exrs., etc.

3252. Kramer vs Storp et al. Motion by defts. to require plff. to file and attach copies of notes with endorsements thereon.

Oct. 19.

3253. Ferbert et al, exrs., etc., vs Seigert et al. Motion by defts. Baldwin and

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Gerlach to requires plff. to separately state and number causes of action.

3254. Schmidt vs Grub et al. Motion by plff. for order of reference.

3255. Berchtell et al vs Blatt. Motion by plffs. for new trial.

Oct. 21.

3256 to 3275. State ex rel S. T. LeBaron vs The L. S. & M. S. Ry. Co. Motion by deft. to dismiss action.

3276 to 3295. State ex rel J. S. M. Hill vs same. Same.

3296. Young et al vs Altman et al. Motion by plffs. to strike answer of Augusta Altman from the files.

3297. Baldwin vs Berlo et al. Motion by plff. to dispense with advertising in German paper.

Oct. 22.

3298. Edwards vs Union Iron Foundry Co. Motion to make the petition more definite and certain.

3299. Cunningham vs Mathivet. Motion by deft. for a new trial.

Oct. 23.

3300. Foster, admr., vs Brocker et al. Motion by plff. for leave to file a supplemental petition and make new parties.

3301. Same vs Hardy et al. Motion by deft. Storer to confirm report of referee so far as relates to him and for interlocutory decree.

Motions and Demurrers Decided,

Oct. 18.

2227, 2228. Williams vs Bletsch. Overruled. Deft. excepts.

2819 to 2822 and 3159 to 3174. Demurrer of F. W. Pelton to petition of various plaintiffs. Sustained as to 1st, 2d and 3d causes of action. Overruled as to balance. Deft. excepts.

2869. Munich vs Pelton. Demurrer sustained. Plff. excepts.

2870. Johnson vs same. Same. Same.

3019. Hecken vs Watterson. Overruled. Deft. excepts.

3020. Jayne vs same. Same. Same.

3110. Second Nat. Bank vs Marbach. Sustained as to 3d defense. Overruled as to 1st and 2d.

3128. Smith vs Paddock. Overruled as to 1st and 2d defense. Granted as to 3d.

3155, 3188. In re assignment of H. L. Whitman. Motion to dismiss granted and case stricken from docket.

3195. Ferbert. exr., vs Archer et al. Overruled.

3196. Libby vs Payne. Granted as far as relates to personal judgment. Overruled as to balance.

Oct. 21.

3144. St. Clair St. R. R. Co. vs City of Cleveland. Granted.

3175. Dietz vs Kallina et al. Overruled.

3233. Foster vs Hardy et al. Granted.

3250. Bainbauer vs Isekeit et al. Granted.

Oct. 22.

2688. Thayer vs Hoagland. Overruled.

3086. Mahon vs L. S. & M. S. Ry. Co. Dismissed without prejudice.

3112, 3113, 3148. Walsh. admr., etc., vs Brownell et al. Overruled,

2035, 3134, 2682, 3129. Rogers vs Hughes. Overruled.

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The Cleveland Law Reporter.

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THE ROMAN CIVIL LAW.

XI.

We have thus far given and briefly discussed the introductory titles of the Pandects.

In the Institutes and Pandects of Justinian the law of obligations is treated of under the head of *things*. But this division of law which so treats them is considered by many writers as inaccurate. Writers on the civil law now, as a rule, classify and group the remaining titles under one of the following heads or divisions, namely:

1. Family law.
2. Property law.
3. Law of Obligations.

Adopting this classification, we shall endeavor to give the various titles bearing upon each of the above branches, and a translation of those parts as are important and of present interest to the profession.

FAMILY LAW.

Book I, title V.

(The status or legal standing of men or persons).

Lex 1—Gaius:

All our law that we make use of relates either to persons, or to things, or to actions.

Lex 2—Hermogenianus:

Since all our law was made for the sake of persons, let us first speak of the status or legal standing of persons and afterward of the other doctrines or principles, following the order of the perpetual edicts.

Lex 3—Gaius:

The first and chief division or classification in the rights of persons, is that all men are either free or slaves.

Lex 4—Florentinus:

Liberty is the natural power to do that which each of us may please to do, whenever the doing of the act is not prohibited or prevented by force or by law.

Parg. 1.—Slavery is that regulation or institution of the law of nations by which one is subjected to the control and made the property of another contrary to natural right. The word slave (servi) comes from this, that the generals were wont to sell their captives and thus keep and preserve them (servare) and did not put them to death.

Slaves are also called *mancipia*, because they are taken from the enemy by the strong hand.

Lex 5—Marcian:

In the condition of slaves there is no distinction, but there are many distinctions among free persons.

Slaves become our property either by the civil law or by the law of nations. By the civil law as when a free person above the age of twenty suffers himself to be sold, that he may share the price given for him. By the law of nations slaves become our property by captivity, or are born slaves when their mother is a slave.

Parg. 2.—Persons are born free when the mother is free, and it suffices that she was free at the time of the birth, although a slave when she conceived; and on the other hand if she was free when she conceived, but a slave when she gives birth to the child, yet it is held that the child is born free. Nor is it different whether she conceived in lawful marriage or without knowing the father, and for this reason, that the misfortune of the mother ought not to prejudice her unborn infant.

Hence this question has arisen, if a female slave with child is made free, but again becomes a slave, or is banished from the State, before the child is born, whether she would give birth to a free child or a slave? It has been decided as more just and reasonable to hold that the child is born free, for it is sufficient for the unborn child, if the mother has been free, although only in the intermediate time.

Lex 6—Gaius:

Freedmen are such as have been manumitted or set free from just servitude.

Lex 9:

In many parts of our law the condition of women is less favorable than that of men.

Lex 10—Ulpian:

It has been asked, to which sex does an hermaphrodite belong? The sex that predominates and prevails shall determine it.

Lex 12:

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It is accepted as true upon the authority of that wise man Hippocrates that a child in the seventh month is perfect; and hence it is assumed that the child born in lawful wedlock on the seventh month is a legitimate son and a perfect birth.

Lex 14—Paulus:

Those are not called or regarded as children who are born with an unnatural shape and without human form; as for example, if a woman gives birth to a monstrosity or to a being that is unnatural. However it is held that a being provided with many limbs, is to be regarded as a child.

Lex 17:

All persons who live within the circle of Rome have acquired the rights of citizenship according to and under the constitution of Antonius.

Lex 19:

The children born in lawful marriage, follow the father; but children born out of the pale of lawful marriage (always) follow the condition of the mother.

Lex 23:

Children born out of the pale of lawful marriage are those who are unable to say who their father is; or such as may be able to, but he is a father who ought not to have been such. All such children are called *spurii*.

Lex 24—Ulpian:

It is the law of nature that he who is born out of the pale of lawful marriage, follows the mother, unless some special law changes this rule.

The Roman jurists make a clera distinction between a person and an individual. These terms were not used by them as identical or as convertible. It was early held that there were persons (*persona*) that were not individuals, and individuals who were not persons. *Persona* (person) meant in the Roman law whoever or whatever was capable of having rights or of becoming the subject of civil rights and obligations, whether abstract or concrete, whether physically existing or the mere creation of law.

But not all those who, physically speaking, were individuals, were persons, as for example, a slave was by them considered an individual, but not *persona*, because a slave could not exercise his reason or will, he could not own anything, he was an individual, a man ("*homo*"), but not capable of having or being subject to rights. A slave had no rights, he was therere not a person.

On the other hand there were many persons (*personae*) that had no physical existence, hence we find a State, a corporation (called "universitates," consisting of a society of citizens united permanently for a public object), the *Fiscus*, or the imperial treasury, all these are spoken of as *personae*, because capable of having rights and being subject to them. These were called also judicial persons (as distinguished from physical persons) because they were created by the legislative powers.

PHYSICAL PERSONS.

The Roman jurists claimed that two elements were requisite to constitute a physical person.

1. A human being—an individual.

2. He must have what they called a status, (correlative of *persona.*)

And the status of a Roman citizen consisted of three elements:

a *Libertas*—Liberty, or the capacity to have and be subject to the rights of a freeman.

b *Civitas*—Citizenship, or the capacity to have and be subject to the rights of a Roman citizen.

c *Familia*—Membership in a family.

1. A human being, an individual, was then said to exist when three elements or facts were shown:

a Birth—separation.

b That there was life after birth and separation.

c That the being has the form and shape of man.

If the being died before birth, *i. e.*, before separation, it was held that there was no existence, for they say, "no one can be said to have lived who has not been born."

If the being died after birth and separation then there was life and existence, and that existence then related back to the time of conception.

But whether there was life after birth and separation, was a fact to be established by proof, and it was claimed by one class of jurists (who went by the name of Proculians) that it depended upon whether the child *screamed*; another class of jurists (who went by the name of Sabinians) said that the proof must show that the child *moved*. Justinian, however, decided that if there was any proof tending to show that there was life, after birth and separation, it would be sufficient, and that the question whether there was *life* or not would not depend merely upon whether the child *screamed* or *moved*. This discussion and Justinian's decision grew out of a case of infanticide.

As a third element it was said that the being must have the form and shape of man. A monstrosity was not regarded as such. But whether it was a monstrosity was for the physiologist to decide, and that the head of the being should control his decision.

This entire subject was especially important, when considered in connection with the law of inheritance, (who the heir was), which law is based on the theory that the person (the *persona*) never dies; that death terminates the existence of the individual, but not that of the person; the heir succeeds to the right of the deceased and the *inheritance* so succeeded to stands *in place of the deceased*. "That death, though it destroyed all rights of the deceased, did not affect his property with regard to which a legal immediately took the place of the physical personalty."

PERIOD OF BIRTH.

According to lex 12 above cited the child born after the 182d day, which, according to their reckoning, was 7 months (26 days to the month), was recognized as a perfect birth.

H.

CUYAHOGA COMMON PLEAS.

SEPTEMBER TERM, 1878

STONE VS. BECKER ET AL.

Foreclosure — Personal Judgment against Grantee of Equity of Redemption—Married Women—As to Subjecting Separate Property of in such Proceeding, etc.

HAMILTON, J.:

This is an action brought to foreclose a mortgage given by John F. Becker and Eliza Becker his wife to secure a note made by Beckers. It seems also by the petition that the grantors of the mortgage have assigned their equity of redemption by deed to the defendant Edward Bronson and that he has assumed and promised to pay the mortgage indebtedness. It further appears by the petition that the indebtedness grew out of a loan of money made by Amasa Stone to Louisa Becker for the purpose of purchasing real estate now owned by her other than that included in the mortgage. The action is an ordinary one to foreclose a note and mortgage and asking for a personal judgment against John F. Becker in the first cause of action, and in the second cause of action asking a personal judgment against Bronson, the present owner of the land, on his obligation in assuming and prom-

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ising to pay the note and mortgage. The third cause of action is against Eliza Becker, a married woman, seeking to subject her separate estate other than that included in the mortgage, by certain averments in the petition saying that at the time of the execution and delivery of this mortgage she was the owner of certain other separate property in her own right, and that this loan was perfected for the purpose of enabling her to purchase this property, and that it was her intention on the execution and delivery of this note, and that she did charge this other separate property, and therefore asks that this separate property of hers other than that included in the mortgage be also subjected to the payment of this claim. The fourth cause of action is for the foreclosure of the mortgage and asking the sale of the mortgaged premises.

Demurrers to this petition are interposed by John F. Becker and his wife Eliza Becker, separate demurrers, but for the same reasons. The first is that several causes of action are improperly joined; second, the several causes of action against the several defendants are improperly joined.

This court at the present term has held that a judgment might be obtained against the purchaser of mortgaged premises, where he had expressly assumed and promised to pay the mortgaged indebtedness, as a part of the purchase price of the land, in the same action in which the mortgage was foreclosed, and a personal judgment had against the maker. This decision was made in following what was supposed to be a prior decision made by another branch of this court. No reasons were given at the time, because, if I may be allowed to speak for myself, I see none. I do not believe in the doctrine. I am of the opinion that a separate cause of action against the party who assumes the mortgage indebtedness and promises to pay it,—an independent obligation,—should be brought in a separate action, and ought not to be joined with the other action to foreclose the mortgage and get a personal judgment. But while in some sense it may be connected with the subject matter of the transaction, what is there to bring it within the provisions of the code, so as to allow a personal judgment against the party thus assuming it? It certainly does not affect the other defendants in the action. It is not enough that all the parties to the transaction are connected with the subject of the transaction, but the judgment in each cause of action must in some way, though unequally, perhaps, affect all the defendants in the action. I give that, however, as my own individual opinion, not concurring in the doctrine that they may be united. But passing that, the ruling of the court being otherwise, I desire to follow it simply to have unanimity in the holdings.

Then the question arises whether this cause of action in this case, where the separate property of the wife independent of the mortgaged property is sought to be subjected to the payment of this claim, can be united also without making it objectionable upon the ground taken in this demurrer. It is my opinion that it cannot be so united, but I am not prepared to extend the doctrine for the reasons already suggested, going beyond what I suppose to be the rule of this court.

Now, Eliza Becker having parted with all the interest she had in that mortgage property, was not a necessary party to the foreclosure at all of the mortgage. She might in some sense be called a proper party so that if she did claim any interest in the mortgaged premises she might be brought in, and she could disclaim it, or simply refuse to answer at all, so that her interest might be finally disposed of. Where the record discloses the fact that the party has parted with her interest in certain realty, it might have been parted with to a trustee, for instance, and she might still have a beneficiary interest in it, and I see no objection to making such a party a party to a proceeding to foreclose. While I say she is not a necessary party, still she might be regarded as a proper party for that purpose. But not being a necessary party she has upon the record, apparently no adverse interest. And how it can be said that we can make an independent cause of action against her to subject her interest in separate property which she owns outside of the mortgage to the payment of this claim, and still say it affects the other party to the transaction sued here, I am unable to see. Certainly the purchaser of this land, Bronson, has no interest in this other property at all, and it is entirely immaterial to him about the other property. He has no sort of interest or connection with or pretense of any connection with her other property. It does seem to me that it in no sense, therefore, affects him. For this reason we think this demurrer is well taken—that all these causes of action cannot thus be joined in one proceeding; that it raises separate issues and makes an amount of costs for somebody to pay.

We think they are joined improperly. For these reasons we are compelled to sustain the demurrer.

R. E. KNIGHT for plaintiff.

CHARLES COATES for defendant.

HENRY MORRIS VS. THE COLLAMER & ST. CLAIR ST. R. R. CO.

Action to Subject Statutory Liability of Stockholders and Unpaid Subscriptions.

HAMILTON, J.:

This is a motion to strike out portions of the answer and cross-petition in this case. The action was brought by Henry Morris as a judgment creditor of this railroad company. He avers that he obtained a judgment upon his claim; that execution issued; that it was returned "no property," and that the company was insolvent; and then sets out the names of the stockholders so far as he is able to ascertain them, and further avers that whether or not the amount of the stock has all been paid in by the stockholders he is unable to say, but asks that the company and stockholders both answer and disclose the facts in reference to them; and that if there be any unpaid stock, he seeks to subject it to his claim, and to the claims of all the other creditors, the action being brought in behalf of himself and all the other creditors of the company; and he further seeks to subject the statutory liability of the stockholders.

Among the stockholders who are made defendants in this action are the parties who are making this motion. These parties come in and by way of answer and cross-petition set up the fact that they are the creditors of the company by reason of holding certain bonds of the company, each one of them setting up by way of answer and cross-petition, that he holds certain of these bonds, and avers that the company is indebted to the amount of that bond to him respectively, and asks that this matter be taken into account, in establishing their liability, and for equitable relief generally in this case.

The company by way of reply to this answer and cross-petition of these parties avers, that at a certain time these parties entered into a written contract with the railroad company by which they were to become purchasers of the rolling stock, the horses and all the movable property of the company, and were to run the road

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for a certain length of time, and one of the considerations of this contract was that they were to pay this identical debt of the plaintiff in this action and some others; that as a matter of fact they did enter into possession of the road and this stock, and they did run it for a certain length of time, and they perhaps see the property going into the hands of a receiver. They say now they want an account taken of the time that they have run the road, and want to be allowed for it in the adjustment of these matters between the company and these defendant stockholders who are in one sense also plaintiffs in the case, so far as their claims against the company are concerned—either want this account taken or want damages for the non-fulfilment of this contract which was thus entered into in writing. A copy of that agreement is set up in this answer and cross-petition of the company.

To this answer and cross-petition of the company these defendants make the following motion: To strike out the so-called amended answer of the defendant, the Collamer & St. Clair St. R. R. Co., or so much thereof as purports to be a cross-petition, or is in the nature of a cross-petition against these defendants, to-wit: that part thereof which commences in these words: commencement and termination given in the motion. It substantially strikes out all the averments in relation to this claim which the company has against these parties as thus averred in the cross petition. Second, to dismiss the cross-petition of the defendants, said railroad company, on its application for affirmative relief against them, because it does not contain a proper subject matter to be litigated against these defendants in this case, the theory of the movers of this motion being that this is an action, as they say, to subject the statutory liability of the stockholders in this company to the payment of these claims. It is, however, something more; it seeks to subject any unpaid subscription or unpaid stock as well as the statutory liability, it being a suit on both of these causes of action to subject both of these funds.

It has been decided repeatedly by our Supreme Court that both of these things may be thus subjected in an action. But it is claimed that this being an action either for damages or for an account upon this contract, really the gist of the action is for a breach of this contract; that this case having gone to a referee, that it raises questions to be tried by a jury, and the referee cannot try it; that the parties have a right to be heard in court to a jury upon these questions, and that it is not a proper subject matter to be litigated here in this form of action; that they must go forward and subject this unpaid stock and the statutory liability of these stockholders; and if they have any rights as between themselves they may litigate between themselves; but that creditors are not obliged to wait until the whole equitable affairs of the company are settled up and disposed of and the assets subjected to the payment of the claim before the statutory liability is reached; in other words, where you sue upon the statutory liability of both causes of action, the unpaid subscription and statutory liability, it is entirely immaterial about these questions of outside matters, these assets of the company, and claim that the company should proceed at once to get judgment against the stockholders without litigating these thousand and one claims of the company, as a matter of fact outstanding, and of an equitable character, but not legally assets that can be reached on execution.

I do not know that this question has ever been presented and passed upon directly by this court, but I have given it such examination as I have been able to, and against my first impression of this matter I have come to the conclusion that the only equitable way to dispose of this whole transaction is to have all these claims litigated in this action. It is for the purpose of subjecting the statutory liability as well as the other, and no way can be found of subjecting it or knowing what it is until those equitable assets are disposed of. To a certain extent it may be that the court has power to say how far this thing shall go, or how far it shall be litigated before proceeding upon the statutory liability. I think as a general proposition that the equitable assets should first be subjected before the statutory liability is reached. You may commence an action against both funds.

But the process of effecting the purposes of the action will be first to subject the equitable assets and then the statutory liability. I see no other equitable way of disposing of the matter. I am referred to Thompson's Liability of Stockholders. I see he holds a different doctrine. The main proposition, however, which he asserts is that both actions may be commenced at the same time; you may commence an action to subject both funds at once without first waiting to dispose of the equitable assets before commencing against the statutory liability. That has also been held in our own Supreme Court. But there is a case in Geargia which seems to warrant the doctrine that you need not wait in a case of that character. Suppose the defendant comes in and pleads that he has equitable assets. It is not necessary to wait to dispose of those equitable assets until you proceed against the statutory liability. That seems to be the general tenor of a paragraph in Thompson on the Liability of Stockholders, and in support of the doctrine refers mainly to a case in Georgia in which there is a very elaborate decision by the Supreme Court of Georgia upon that proposition. That was an action against stockholders of a bank to subject them to liability under a statute in that state for the nonpayment of the bills of the bank, the bank having become in a measure insolvent. Under that statute it seems that bill-holders were permitted to sue the stockholders in a court of law, and the stockholders were liable to respond in an action at law to the extent of the whole of the indebtedness of the bank, and each stockholder was to pay such a proportion of the indebtedness as the amount of the stock owned by him bore to the whole amount of the stock. It will be seen by looking at that case that it was action at law especially authorized to be brought under their statute. This is an equitable action, and held by our Supreme Court to be a proper method of reaching these sort of liabilities. That case in Georgia, when it is looked at, I think will be found to be simply an authority in support of the doctrine that an action may be brought at law where it is so warranted by statute.

Now, it would seem from some of the decisions of our court, where a bill in equity is filed against this statutory liability and against this unpaid subscription to subject these funds, so far as the stockholders themselves are concerned and the company, the parties to the transaction, it is maintained that an equitable lien has been acquired by the commencement of the actions against those specific parties, if so, it simply becomes a question of the order in which those equitable funds shall thus be subjected. This Georgia decision sustains the position that these equitable assets should first be subjected before reaching the statutory liability.

By the express language of our constitution and the statute passed to carry out that provision there is made an

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ultimate secondary fund, the primary fund being the assets of the company, including unpaid stock. That view of the case, I think, is expressly sustained by a case in Ohio and by the opinion of one of the judges in Ohio in deciding a case of this character. (20 O. S., 195.) The action in that case was brought to subject the statutory liability, also the unpaid subscription to the payment of the claims set up in the petition. They hold that the action is well brought. In commenting upon the case the judge delivering the opinion uses this language, but it is made no part of the syllabus which is the real thing decided:

"It seems to us that these causes were properly joined in the same action. The plaintiff sought to subject two funds to the payment of his judgments. One of these funds, the balance due on the subscriptions, was primarily liable. In the event of its insufficiency, and in that event only, he might resort to the other fund, the *pro rata* for the stockholders were individually liable. It is the peculiar province of equity to marshall and apply such funds, and this can best be done where all the parties are before the court."

I do no think there can be any question as to the opinion of that judge upon that subject. We think the doctrine of that case in favor of that theory although it is not a part of the syllabus. Maintaining these views we think the motion should be overruled.

M. R. KEITH for plaintiff.
H. C. RANNEY for defendant.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Nov. 1, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Oct. 25.

Chas. Schultz and wife to George Hessenpflug. $300.

Fred Sperber and wife to William Kaiser. $400.

Geo. Zimmer and wife to The Cit. Savs. and Loan Ass'n. $1,300.

Marcius Verboek and wife to B. F. Brocke. $200.

Engenline Verboek and husband to same. $200.

Adam Thrig to M. F. Herrick. $125.

Oct. 27.

Frances H, Bowman to A. T. Brewer. $111.

Mary Paine and husband to Jane R. A. Carter. $1,500.

Peter Seelbach and wife to Margaretta Rapp. $600.

Jacob Kramer and wife to Joseph Giebel. $3,000.

Mary E. Richerson and husband to Phil. F. Keiper. $500.

Lewis D. Stark and wife to S. W. Porter. $3,000.

Thomas Burk to E. C. Green. $142.

Oct. 28.

Joseph M. Nowak and wife to Chester K. Mix. $500.

J. M. Nowak to Jacob Hefele. $113.

H. H. Dodge to The Soc. for Savs. $5,500.

Fred Bell and wife to Charles Behrens. $300.

Louisa A. Ainger to L. E. Brayman. $1,187.

Mary Marek to W. A. Babcock. $150.

John C. Sanders and wife to Connecticut Mutual Life Insurance Co. $3,500.

Conrad Lasgar and wife to Jacob Rockert. $600.

Margaret Tyerman to L. E. Palmer. $1,200.

Fanny Wallace and husband to The Soc. for Savs. $800.

Elisha Tebbels and wife to Nancy A. Tousley. $800.

Jacob Zier to Margaret McGrath. $300.

Christ. Gertmann and wife to Michael Pfoltzgraf. $700.

J. G. Schneider and wife to same. $650.

Oct. 29.

Hendrina Koch and husband to The Soc. for Savs. $650.

Benj. M. Gierer to G. A. Russell. $152.

Fred W. Mohn to The Cit. Savs. and Loan Ass'n. $1,600.

W. H. Barris to O. L. Jones. $7,000.

Margaret Penty and husband to Cleveland Saw Mill and Lumber Co. $350.

Frank M. Slade and wife to Corintha M. Slade. $1,075.

Peter O'Rourke and wife to E. R. Krause. $650.

John Byzek and wife to Charles Bruml. $150.

John Moores and wife to C. C. Baldwin. $1,600.

Oct. 30.

Charles H. Cannon and wife to Dudley Pettibone. Six hundred dollars.

Mary Smith and husband to Margaret Glenn. Four hundred dollars.

Jas. Smith to Ursula Hofer. Four hundred dollars.

Jacob Nessdorfer and wife to The Soc. for Savs. Three thousand five hundred dollars.

Henry Bayes and wife to William Williams. One thousand two hundred dollars.

R. W. Collins et al to The Cit. Savs. and Loan Ass'n. One thousand dollars.

Mary H. White and husband to M. S. Hogan. Two hundred dollars.

Thomas Brady and wife to Michael Woelky. Four hundred dollars.

Thomas Garfield and wife to The South Cleveland Banking Company. One thousand eight hundred dollars.

Wm. J. Schwind and wife to Ellen Lucy. One thousand eight hundred and sixty dollars.

Patrick Canneen to T. H. White et al. One hundred and ninety dollars.

Lucia E. Bowler and husband to Dudley Pettibone. One hundred and eighty-six dollars.

Oct. 30.

Edward D. Young and wife to T. T. Haydock. Five hundred and fifty-nine dollars.

Russell A. Brown to A. E. Burlison. Eight hundred dollars.

Catharine Clancy and husband to M. S. Hogan. One hundred and fifty dollars.

Katie Waterhouse to Ellen N. Cannan. Seven hundred dollars.

John Gertz and wife to Charles F. Steuber. Seventy-five dollars.

John Alber and wife to Fred Haltnorth. Eight hundred dollarss.

William Mathews and wife to Charlotte Wass. One thousand dollars.

Theodore A. Simond and wife to Caroline Munn. One thousand one hundred dollars.

Miroa J. McEmery and husband to The Soc. for Savs. Six hundred dollars.

Jacob J. Wolf and wife to C. A. Cook. One thousand five hundred dollars.

Nov. 1.

Augustvs Kumler and wife to Henrietta Gallup. Three hundred and forty dollars.

Samuel Logg to Erastus Ives. One thousand one hundred dollars.

Thomas C. Warner to F. M. Sanderson. Five hundred dollars.

Frank Nowak and wife to —— Zedmik. Eighty dollars.

Wm. B. Rich and wife to The Soc. for Savs. Eight hundred dollars.

Wm. H. Cowles and wife to Richard Cowles. Seven hundred and fifty dollars.

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Lucien A. Gerling and wife to Josiah Stacy. Two thousand dollars.

James W. Grimshaw to C. H. Patter et al. One thousand one hundred and fifty dollars.

Herman Kroll to E. Hobday. One hundred dollars.

R. A. Davidson to Philip Miller. Three hundred dollars.

Hannah Fadigan to Eliza Bletsch. Six hundred dollars.

John Rock and wife to S. V. Harkness. Five thousand dollars.

Henry Hunting to J. W. Sykora. One thousand five hundren dollars.

Henry Rehberg and wife to Jacob Weier. Two thousand dollars.

Frank D. Carpenter and wife to the People's Savings and Loan Ass'n. One thousand four hundred dollars.

Colgate Hoyt and wife to Martin L. Kelley. Two thousand dollars.

CHATTEL MORTGAGES.

Oct. 25.

Adam Ihrig and wife to Conrad Dole. $100.

Oct. 27.

Merrick Childs to Walter L. Nichols. $290.

Pohn P. O'Brien to Elizabeth Elwell. $1,000.

John Aurelius et al to Frank Callon. $137.

Oct. 29.

Robert Dayton to C. L. Howell. $1,200.

Oct. 30.

Martin Graf and wife to Felix Nicola. Nine hundred and sixty-eight dollars.

Patrick Henry to Thos. Washington. Three hundred dollars.

Nov. 1.

Christian Metzgar to Gottfried Metzgar. One thousand dollars.

Gottfried Metzgar to Catharine Metzgar. One thousand and ten dollars.

John M. Burkhardt to John Urbar. Five hundred and ten dollars.

Frank H. Rogers to Felix H. Lies. Two hundred and seventy-five dollars.

John W. Francis & Co. to T. O. Greene. Sixty dollars.

DEEDS.

Oct. 22.

Banard Anderson et al. by W. I. Hudson Mas. Com, to Theodore M. Bates. Two hundred and seventy eight dollars.

Same by same to Lewis Ford. Four hundred and fifty five dollars.

Alexander Mc K. Morrison et al by J. M. Wilcox Sheriff to Alexander Mc K. Morrison. Five hundred dollars.

Oct. 23.

Catharine Brew and husband to Christian F. Ziegler. $2,500.

W. S. Chamberlain and wife to John P. Lutz et al. $5;100.

Martin Delaski and wife to F. Rabiska. $297.

Trustees of Erie Classes of Reformed Church of the U. S. to the German Pub. House. $1.

Henry R. Hadlow and wife to Fred Bell. $750.

A. H. Jackson to R. J. Cummer. $300.

Same to same. $1.

Amasa Stone and wife to Mary Metzger. $540.

Catharine Stein to Frederick Sperber. $2,400.

Susena Southwick et al to Lucien Southwick. $1.

Henry Esser et al by Thos. Graves, Mas. Com., to Gerhard Wiebe. $800.

Oct. 24.

Sherman L. Brainard to J. M. Poe et al. $12,000.

Andrew A. Frodenburg and wife to S. J. Cogswell. $1.

Geo. B. Merwin to Arthur Hughes. $100.

John J. Myers and wife et al to George A. Myers. $10,000.

Nich. McEmery and wife to Elizabeth McEmery. $2,500.

Frank Ost to Hellmuth Semlow. $475.

Catharine R Templeton and husbond to Josiah Stacy. $2,112.

Peter Schutthelm et al by C. C. Lowe, Mas. Com., to Jane R. A. Carter. $4,334.

Oct. 25.

Alfred Adams, admr., etc, to Catharine McCormick. $500.

Samuel D. Barr and wife to Edward T. Lafkin. $300.

Mary Boding and husband to Chas. Schultz. $800.

Joseph S. Clark and wife to J. Walter Tyler. $1.

Leopold DeCrane and wife to Emilie Cobelli. $1.

Emilie Cobelli to Mrs. Johanna De Crane. $1.

Emory Farnsworth and wife to C. P. Leland. $6,600.

Loren Gillett and wife to Henry Coyar. $250.

Ignatz Minarik and wife to Jacob Hefele. $625.

H. F. McGinness and wife to Patrick O'Brien. $1,280.

Henry New and wife to Henry Paine. $2,800.

Laura L. Otis et al, exrs., to Marius Verhoek. $560.

Same to Euzelena Verhoek. $560.

Eva Reed and husband to Mary Zimmer. $4,000.

Sarah Branch, ex., et al to Eliza Sherwin. $1,200.

Barnard, Anderson et al by W. I. Hudson, Mas. Com., to Elizabeth Datson. $57.25.

Oct. 27.

James M. Curtiss and wife to John F. Clifford. $100.

H. C. Green and wife to John P. Bradley. $1.

Newton H. Hayes to Edmond J. Jackson. $1,600.

Anna Harbart to Joseph Harbart. $10.

Thomas F. Hansard to Ellen Lacy, $900.

George C. Hickox et al to Robert Koebel. $1,360.

Lucy J. Cole et al to Mary E. Richerson. $800.

H. R. Newcomb et al, admr., etc., to Mary E. Richerson. $800.

Elizabeth Yates and husband to Sarah A. McCutcher. $1,000.

Oct. 28.

Oliver A. Brooks and wife to Cuy. Steam Furnace Co. $600.

Chas. Burkhart to Augustine Matsaun. $1.

Augustine Matzaun to Jacob Hefele. $1.

Barbec Dukat and husband to John Kafron and wife. $350.

Catharine Gilday Mulligan to Martin McGuire. $1.

John Gerling and wife to Lucien A. Gerling. $5,000.

George E. Hartnell and wife et al to Wenzel Swatek. $525.

Jacob Hefele and wife to Joseph M. Nowak. $2,000.

James M. Hoyt and wife et al to Sohn Shookofsky and wife. $450.

Cornelius Linehan to Catharine Callaghan. $50.

W. H. H. Peck to James Buraut. $560.

Jacob Rockert and wife to Conrad Sasgar. $620.

Cora E. Waters to Sara Granger. $1.

Frank E. Waters to Candace Moses. $1.

Mary Jane Mead et al by C. C. Lowe, Mas. Com., to Henrietta Gallup. $267.

Oct. 29.

The Cit. Sav. and Loan Ass'n. to Fred W. Mohr. $2,400.

John Gracie and wife to L. M. Oviatt. $9,000.

James Hickey and wife to John Bean. $190.

O. L. Jones and wife to W. H. Barris. $12,000.

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Wm. Lee and wife to Charles H. Halls. $1,400.

James Langhorn and wife to Eliza Port. $900.

William Mack and wife to Annie Zopf. $1,200.

L. E. Palmer to Margaret Tyerman. $1,800.

Thomas Rorvel and wife to Kate F. Scheller. $550.

George Sauer and wife to David Latimer. $1.

Alex. Sackett and wife to Joseph Hanketa. $300.

Same to Albert Svoboda. $300.

Barnard, Anderson et al by W. I. Hudson, Mas. Com., to Sarah M. Doland. $100.

Christian Pfohl by Felix Nicola, Mas. Com., to the People's Savs. and Loan Ass'n. $1,914.

Oct. 30.

Dudley Baldwin and wife to the A. & G. W. Ry. Co. One dollar.

A. & G. W. Ry. Co. to the City of Cleveland.

March Caloch and wife to Lawrence Kuchasdi. Five hundred dollars.

Cleveland Saw Mill and Lumber Co. to Margaret E. Penty. Four hundred and fifty dollars.

Johanna DeClair and husband to Charles Grass and wife. Ten thousand dollars.

Wm. Eastwood and wife to Thos. Garfield. Two thousand dollars.

Ursula Hofer to James A. Smith. Nine hundred dollars.

James M. Hoyt and wife to Robert Ilett and wife. One thousand dollars.

A. H. Jackson to W. S. Barnum. Five thousand dollars.

Henry Kessler to Jennie B. McNarey. One thousand seven hundred dollars.

Ellen Lucy to W. J. Schwind. Two thousand five hundred dollars.

C. Le Borge and wife to Wm. Gaskin. One thousand two hundred dollars.

Streator, Adams & Co. to Mrs. Mirian J. Preston. One thousand dollars.

Marianne B. Sterling to H. C. Rouse. Eight hundred dollars.

B. Sturm and wife to H. Rehburg. Two thousand dollars.

M. A. Sprague and wife to D. G. Benner. Nine hundred and fifty dollars.

D. G. Benner and wife to Joseph Collier. One hundred and fifty dollars.

Jacob Schroeder and wife to Fred Seelbach. Seven hundred dollars.

Joseph Vondrak and wife to Julia Vondrak. Four hundred dollars.

Wm. Williams to Henry Bayes. Two thousand four hundred dollars.

Harriette C. S. Buckham et al to trustees of the Evangelical Lutheran Church. Three thousand five hundred dollars.

Aaron Higley and wife by G. W. Lynde, Mas. Com., to F. H. Furniss. Seven hundred and thirty-four dollars.

Oct. 31.

Eli N. Cannon et al to Katie Waterhouse, Eight hundred and twenty-five dollars.

Catharine Dougherty and husband to E. Holmes. Four hundred dollars.

Chas. G. King and wife to James M. Hoyt. Two dollars.

Mary M. Miller and husband to John Alber. Three hundred dollars.

W. D. Savage and wife to Russell A. Brown. Two thousand dollars.

A. J. Sanger, ass'gc. etc., to Geo. Seitz et al, trustees. One dollar.

Judgments Rendered in the Court of Common Pleas for the Week ending Oct. 29, 1879, against the following Persons:

Oct. 22.

Jas. Culligan et al. $6,575.83.

Oct. 23.

August Koester et al. $1,396.50.

Oct. 24.

Amalia Beck et al. $606.23.
Robert Holmes. $155.

Oct. 25.

Luther Moses. $331.50.

Oct. 27.

John Legenfelder. $606.54.
David F. Knapp et al. $729.
W. D. Savage. $1,338.77.

Oct. 28.

M. S. Paddock. $655.22.
Thomas S. Paddock. $4,314.27.
Fred P. Schneider. $500.
L. S. & M. S. Ry. Co. $9.000.

Oct. 29.

German Aid Society. $280.
Dr. S. M. Sargeant. $319.89.
King Iron Bridge Man. Co. $4,140.
Mathew Lee. $130.47.

NOTES OF RECENT CASES.

1. DIVISION OF DEMANDS.

Accounts payable monthly are severable.—An indivisible demand can not be divided and collected by separate actions, but there is no rule requiring several distinct and separate causes of action to be joined in one suit, even though it might be proper to do so.

2. When by the agreement of the parties an account was to be settled and become due and payable at the end of each month, the account for each month constitutes a separate demand, and a recovery for the January account would not bar a suit on the December account. Beck vs. Deveraux, Sup. Ct. of Nebraska.

COURT OF COMMON PLEAS.

Actions Commenced.

Oct. 24.

16090. Andrew Brower vs Chauncey Salisbury. Money only. J. C. Coffey.

16091. Henry Wick & Co. vs J. J. Cornthus et al and garn. Money only (with att.) Estep & Squire.

Oct. 25.

16092. C. A. Sahr vs Fred Haltnorth. Money only. Stone & H.

16093. Albert Lukens vs Vaclav Melicher. Money and to subject lands. Willson & Sykora.

16094. Elisha B. Pratt vs Julia A. Higby et al. Replevin certified from J. P.

16095. Seth B. Hunt vs Comfort A. Adams et al. Money only.

16096. Joseph Polak vs Frank Nowak. Error to J. P. Brinsmade; Babcock & Nowak.

16097. Lucy Ann Pomeroy vs John B. Davis et al. To subject lands. O. M. Safford, Bishop, Adams & Bishop; M. B. Gary, Gage & C., Groot, Ingersoll & W., J. C. Hutchins, Estep & S., G. H. Foster, Everett, Webster, Schwan, Winters, Hudson, Marvin, Gus. Schmidt, J. J. Carran, Caldwell, Ranney. Caskey.

16098. Henry Brocker vs Frederick Buscher. Money only. Foster & Lawrence.

16099. John McMahon vs Thos. Gray et al. To adjust account and for relief. Foran & Williams.

16100. Same vs William McMahon. Same. Same.

16101. Cit. Sav. and Loan Ass'n. vs Peter B. Spitzig et al. Money and relief. Mix, Noble & White.

16102. Enterprise Building and Loan Ass'n. vs Wm. Weber et al. Money and equitable relief.

16103. Cit. Savs. and Loan Ass'n. vs Harriet A. Richardson et al. Money and relief. Mix, Noble & White.

16104. Same vs W. W. Richardson et al. Same. Same.

16105. S. S. Drake vs T. G. Middaugh et al. Money and to subject lands. Foster & Carpenter.

Oct. 27.

16106. Hannah Townsend vs Claus Tiedeman. Money only. H. C. Ranney; Wing.

16107. Catharine Stahl vs Phillip Stewart et al. To adjust lease and procure sale of real estate. Weed & D.

16108. The Davis S. M. Co. vs Peter McCormick. To foreclose mortgage, marshal liens, sell real estate and for general relief. M. Stewart; Mason.

16109. Eva Schuman vs Geo. Menger. Money only. Stark.

16110. Wm. Kauffm5n vs John Lederer. Appeal by deft. Judgment Oct. 15. Thos. Robison.

16111. Wm. G. Williams vs Thomas H. Terrell. Appeal by deft. Judgment Oct. 27. Canfield.

Oct. 28.

16112. Ann F. Brown vs Henry Eichler et al. To subject lands. Coon & Wing.

16113. Martin Murray et al vs Michael

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Graham et al. Money only. H. W. Canfield.

16114. Aaron Schwab vs John M. Wilcox, sheriff, etc. Appeal by deft. Judgment Oct. 6.

Oct. 29.

16115. The Mansfield Banking Co. vs H. Charrow et al. Cognovit. P. L. Kessler; Victor Gutzweiler, Jr.

16116. Michael Schaaf vs Heinrich Buescher et al. Money and to subject lands and for equitable relief. Alfred Elwell; E. W. Laird.

16117. Emelia Goetz vs Joseph Brina et al. Money only. Gustav Schmidt; Babcock.

16118. Philip O'Neil vs John Hewson. Money only. P. P.

16119. In the matter of the estate of G. N. Walter, deceased. Appeal by Philip Walter from Probate Court. Wilson & Sykora.

Oct. 30.

16120. The Society for Savings vs Theopilas Clewell et al. Money and sale of land. S. E. Williamson.

16121. William Brandt vs Herman T. Fehlbaber. Money only. Frank Strauss.

16122. Osborn Case vs Geo. Randerson. Recovery of real estate and for money. Solders & Priest.

16123. John Berger vs Maria Karda et al. Money only. Kolbe.

16124. S. S. Drake vs Nicholas Schmidt. To subject lands. Foster & Carpenter.

Oct. 31.

16125. Theresa Kohout vs John H. Devereux. Money only. Babcock & Nowak.

16126. John Healy vs J. S. Healy et al. To quiet title to real estate. H. T. Covin.

16127. J. M. Lutz vs Thomas Kircher. Money only. Robison.

16128. Laura M. Hilliard vs Julius A. Risser et al. Money and to subject lands. Henderson & Kline; W., S. & H.

16129. Jane E. Morgan vs Lewis Breckenridge et al. Money only. Henderson & Kline.

Motions and Demurrers Decided.

Oct. 23.

3248. Carter vs Schutthelm et al. Overruled.

Oct. 24.

947. Greenhalgh vs Field. Continued.

2281. Witowsky vs Humphrey et al. Withdrawn.

Oct. 25.

3134. Morris et al vs Collamer & St. Clair St. Ry. Overruled. Defendants except.

3157, 3158 } Stone vs Becker. Sustained. Plff. excepts.

3186. Wick et al vs Zimmerman et al. Granted.

3201. Mayer et al vs Small et al. Granted.

3254. Schmidt vs Grubb et al. Granted.

3256 to 3295 inclusive. State ex rel S. T. Le Baron vs The L. S. & M. S. Ry. Co. Motion by defts. to dismiss actions heard and overruled, to which deft. excepts and has leave to plead by Nov. 10, '79.

Oct. 27.

3211, 3232, 3244 } Cowles et al vs L. V. & Collamer R. R. Co. Motions withdrawn; report confirmed.

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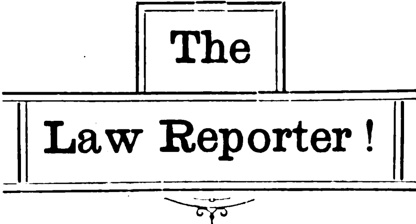

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THE ROMAN CIVIL LAW.

XII.

DEATH.

Death, the Roman jurists say, ends the existence of the individual, but not the person (or personalty) of the individual. That instantly upon death, the person of the individual is taken up by the inheritance (hereditas) and is then received by the heir; the person, therefore, according to their theory, never ceases to exist.

By reason of the legal consequences that attach upon the death of an individual there arises the necessity, they say, of proof not only that death has occurred, but to fix the time of the occurrence so as to be able to dispose of and regulate the inheritance legally.

But in absence of positive testimony the actual period of death was in certain cases regulated by the age of the person and the regular course of nature—as for example, when a person had disappeared and his whereabouts were unknown, and could not be ascertained nor established, then a *praesumptio juris* arose, which was that the law presumed, after the person had reached his 70th year, that he was dead.

If the person was 70 years of age when he disappeared, then the law presumed his death after the lapse of 10 years, *i. e.*, when he had reached his 80th year.

The death of such persons was then publicly proclaimed, the law fixing the 70th year as the time of death in the first case supposed, and the 80th year, in the last case, and governed by these rules the inheritance was divided or legally disposed of.

But it also became of importance to know which of two persons died prior to the other, and especially was this the case when the one was to inherit from the other, and when both would have other legitimate heirs, *e. g.*, where a father and son have perished by the same catastrophe, as in battle, or during an epidemic, or both lost at sea.

It was to be proven, if it could be, which was the survivor, and for this purpose medical testimony was admissible and proper. If it could not be shown which of the two was the survivor, then the law presumed that the father survived the child, if the child was below the age of puberty, and that the child survived the father, if the child was above the age of puberty at the time.

By the Roman law the age of puberty for males was fourteen and for females twelve years.

CHILDREN.

Children were legitimate or illegitimate. A legitimate child was one that was conceived in awful marriage. If the child was born within the time assigned by law the husband of the mother was presumed to be the father until the fact was shown clearly to be otherwise. The mother's relation to the child was always the same, whether the child was legitimate or not.

Marriage pointed out the father. (*Mater semper certa est, etiamsi vulgo conceperit, pater est quem nuptiae demonstrant*)

A child born after ten months from the death of the husband does not inherit. (Pandects 38, 16, 3, D. 11.) But this may be refuted.

"The Roman law rejected the evidence of the married mother to prove her offspring illegitimate, as well because if she was actually cohabiting with her husband, such a matter was hardly within her knowledge, as because the allegation of an act involving the turpitude of the person making it was not to be credited."

An illegitimate child has no father (nullius filius), and hence the child has no relations on a father's side; but such a child has a mother and relations on her side. Illegitimate children were regarded as *sui juris*, independent, *i. e.*, not under the control or power of a father (*patria potestas*).

SEX.

The Roman law recognizes but two sexes, male and female, and as a general rule man and woman stood upon an equal footing and had equal rights under the private law of the Romans.

There were two modifications to this rule.

1. Women were excluded from

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having or exercising any of the rights or privileges of the jus publicum, *i. e.*, they were absolutely excluded from holding any public office.

2. In family matters the husband determined the domicil, he was the superior, she was under his power and authority.

We read in the Roman law only of a *patria potestas* (the power of the father), not of a *matralis potestas*. Women were not allowed to act as guardians, nor could a woman make a will in person.

On the other hand we learn also that women were greatly favored in many cases, *e. g.*, they were indulged and excused for mistaking or not knowing the law, and punishment inflicted upon women was less severe than upon men.

AGE.

The age at which a person should begin to have the capacity to make contracts, his liability for wrongs done, etc., led to the following division on that subject:

1. *Infantia.*—They termed all such persons infants who had not completed their seventh year; meaning such as had not acquired sufficient power of speech to speak understandingly. They were incapable of making a valid contract; and were not answerable or punishable for wrongs committed by them.

2. *Impuberes.*—Persons were called impuberes from the completion of the seventh year till the completion of their fourteenth year for males, and till the completion of their twelfth year for females—at which ages respectively said persons were considered as capable of begetting and bearing children.

3. *Minor aetas.*—Minors between ages of 14 and 25 for males, and between ages of 12 and 18 for females.

4. The Roman law fixed 25 years as the age of majority.

DOMICILE.

"The domicile of a person was the spot on which that person had fixed his permanent residence, and which he has chosen as the abode of his family and himself; to which when he has left it, he means in a short time to return; from which during the continuance of his absence he is a guest, a traveler, an inmate, or a stranger; and on the ending of his absence from which he is at home."

They distinguished clearly between a domicile and a temporary residence. Possession of land or a house was neither necessary nor sufficient to constitute a domicile.

(Sola domus possessio, quae in aliena civitate comparatur, domicilium non facit.) (Pandects 50, 1, 17, S. 13.) The mere possession of a house that one has purchased in another city, does not constitute a domicile. Nor had a resident a domicile in the place he inhabits for the prosecution of his studies.

A domicile, they say, is acquired corpore et animo.

Corpore in this, that one has a residence, *i. e.*, is sojourning.

Animo in this, that he has the *intention* of remaining and to make the place his abode.

A domicile may be voluntary or necessary.

A voluntary domicile is established by one's express declaration or inferred from circumstances and acts. A necessary domicile (domicilium necessarium) is one fixed or implied by law, and is not established nor does it depend upon the voluntary wish or will of the person.

A "necessary domicile" was said to exist in case of

1. All officials and magistrates, being the place in which they were obliged to dwell for the discharge of their duties.

2. The domicile of a soldier was where he was garrisoned.

3. The wife had a necessary domicile, being the place wherever the husband established it.

4. The son's domicile was that of his father—hence a necessary domicile.

A person might have more domiciles than one, *e. g.*, a domicile in the city in the winter, and one in the country in the summer-time; and such a person may be sued in either place.

A person who had no domicile, but wandered about from place to place, was called a vagabond, and the last place he lived in was his domicile, until he acquired another.

"A mere intention to remove without some overt act, is not sufficient to constitute a change of domicile, being no more than a purpose residing in the breast of the party and liable to change; something beyond a verbal declaration, some solid fact was necessary."

D'Argentre says expressly that by domicile he means that of the person when he is sued, and this is in strict conformity with the law of the Pandects. (See work of Mr. Burge.)

A domicile was lost by death or the establishment of another inconsistent with it.

The question of domicile is especially of importance when the jurisdictional duty of a judge is invoked and by the law of which place one's acts and obligations are to be governed.

STATUS, ETC.

We have said that that the status of a Roman citizen was the legal capacity of a person and consisted of three elements, viz.: libertas, civitas and familia. If the first of these was wanting the individual was not a person, but only homo, and as a matter of course whoever had the last, had the other two.

1st element — Libertas. — Liberty was the capacity to have and be subject to the rights of a freeman, and out of this element arose the division of persons into

a Such as are slaves.

b Such as are freed (libertini) freedmen.

c Such as are free by birth (ingenui) freemen.

The institution of slavery, says a writer, was the one thing in which the jus gentium (the law of nations) seemed to be irreconcilable with the jus naturale (the law of nature), and it was this more than anything else that made some of the jurists adopt the three-fold division of law, viz: jus gentium, jus civile and jus naturale.

All slaves were not captured in war. Some were slaves by birth.

Slavery was often inflicted on persons born free, as a punishment. The power of the master over his slaves was at one time unlimited, but was gradually restricted.

A woman was made a slave if she had commerce with a slave. An emancipated slave, if guilty of any gross act of ill behavior towards his late owner, would be remanded to slavery.

Manumission was the process of freeing from "the hand." This also took its rise from the law of nations, for by the law of nature all were born free, and the law of nations introduced the division of three kinds of men, freemen, slaves and freedmen who had ceased to be slaves.

There were many ways in which a slave was freed by the master, *e. g.*, by asserting that the slave *was* free, by last will and testament. A writer on this subject mentions one peculiar mode of manumission which we reproduce. He says: The heirs under a Roman testament accepted all the liabilities of the deceased. When, therefore the debts exceeded the value of the inheritance, the heir named in the testament would probably refuse the inheritance; and, if no one would ac-

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cept the heirship the creditors stepped in and had the estate sold for their benefit. As this was thought a great stigma on the memory of the deceased, a slave was frequently enfranchised by the testator and named heir; and as the slave could not refuse to take the office upon him (being thence called heres necessarius) the sale of the effects, if necessary, was made in his name and not in that of the master. A slave so emancipated became a Roman citizen.—Gai. 1, 21.

2d Element.—Civitas.—Citizenship was the capacity to have and to be subject to the rights of a Roman citizen and under this head the loss of citizenship is also discussed, and out of this element arose another division of persons, viz:

Cives and Perigrini (citizens or members of the State, and foreigners.)

In the early times of Rome the cives or members of the State were divided into patres and plebians, the former of whom had a public and sacred law peculiar to themselves, while they shared with the latter the system of private law. Beyond the State all were hostes and barbari. But as civilization progressed the number of foreigners who resorted to Rome for trade, etc., were so great that they were looked upon as a distinct class, that of "perigrini," and a perigrini was subject only to the jus gentium; citizens of Rome could alone claim the privileges of the jus quiritium; and in time certain rights that were peculiar to the Roman citizen alone, were granted als to the perigrini.

3d element — Familia. — Membership in a family consisted of things as well as persons, and out of this element arose the division of persons into homines sui juris et in alieni juris, *i. e.*, persons dependent and independent.

This entire subject of status and the elements growing out of it forms a large field for discussion in the pandects, which to-day however has almost entirely lost its importance. We therefore have not thought it necessary to enter into a detailed account of the same.

Our laws to-day know no slaves—all are free. Whoever today has the status civitatis has also the other two. In fact it may be said that whatever importance this subject may have to us to-day, it really belongs to the sphere of public law and there only, for in our private law to-day no distinction is made between slaves or freemen, nor between a citizen and a foreigner; all have equal rights.

H.

CUYAHOGA COMMON PLEAS.

J. S. Upson vs. The Rocky River Stone Quarry Co.

Corporation-Liability of Stockholders—Subjecting unpaid Subscriptions and Statutory Liability—Receiver, etc.

Hamilton, J.:

This is an action to subject the statutory liability of the stockholders and unpaid subscriptions of the stockholders. A preliminary injunction was had, restraining the directors from making an assignment, or otherwise interfering with or disposing of the assets of the concern; it being averred that the company is insolvent; that the directors are insolvent; that the treasurer is insolvent, and that it was doing a great peril to the creditor's interests to permit that company, under those circumstances, to go forward and make its collections.

The answer denies the insolvency, and upon an examination of the case, it appears that all the property of the company has been mortgaged for its value and perhaps beyond, if the affidavits of the plaintiff are to be relied upon; perhaps not to the full extent of the affidavits of the defendant are to be relied upon. It is mortgaged to the extent of some six or seven or eight thousand dollars, so that there is nothing tangible to be reached on execution. Execution has been issued and returned no property.

The evidence would seem to disclose that four out of the seven directors are insolvents; it would seem further to disclose that the acting treasurer is wholly insolvent, and some fifteen witnesses produced here by the plaintiff state that all the property of the concern, land and personalty, is worth about $5,000. By the affidavits filed here on the part of the defendants, the value of the property is put at $14,000. There is some controversy about the debts. About six or seven or eight thousand dollars secured debts, covering up by way of mortgages, this property. Then there are other debts, making the whole indebtedness reach somewhere from twelve to seventeen thousand dollars. The company has ten thousand dollars of stock, forty per cent. of which has been called in. There is not more than twenty thousand dollars of stock that is good for anything.

It appears that the operations of this company have not been such as they ought to have been, having failed to pay their debts for a series of several months, perhaps years, have not paid their laborers; that several of these directors are making claims against this company; that they are issuing notes to each other, and that there is no sort of security or safety in permitting this concern, as at present organized, to go forward and make these collections. These matters are all denied. It is claimed that these directors are all acting in perfect good faith; while it is claimed upon the other side, that they have threatened to go forward and make these collections and forfeit any stock that was not paid to them.

The plaintiffs say, therefore, that it would endanger their liability to forfeit the stock by non-payment, as by forfeiting the stock, the unpaid subscriptions could not be reached by the creditors. I doubt whether there is very much in that theory, because under such circumstances, it the debt has accrued and the directors attempt to forfeit the stock for non-payment of an assessment and it works prejudice to existing creditors, it would be considered fraudulent by a Court of Equity. I am aware there are decisions, holding that it does forfeit the stock; that you cannot hold them to a liability after you have done away with the benefits they might have reaped from holding stock. This, as between the parties, is undoubtedly correct. So far as it affects outside parties, it does not have anything to do with it. I am inclined to think it ought to be held fraudulent, so far as the creditors are concerned. Yet, under the whole state of this case, without going into it in all its details, I am not willing to let this company go forward in its present shape and make these assessments and these collections without any assurance that the funds will be applied where they belong.

Application is made for a receiver and for a reference; and the other application is to dissolve this injunction. Now, I am inclined to think, that under the statute providing in case of the insolvency of a corporation or danger of insolvency, so that peril comes to the plaintiff, then a receiver should be appointed. If the doctrine be true, that by the filing of this petition they have got what is termed an equitable lien upon this fund, as between the parties to the transaction, to-wit: the unpaid subscription and this statutory liability which is a trust fund in the hands of the Court, as seems to be held in the 22d of Howard, cited here in argument, it would be manifestly unjust,

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after attachment has been had, so far as these stockholders are to be regarded as garnishees in the case, it certainly would be inequitable and unjust to permit the defendant in the case to take this fund thus secured by attachment or by this equitable lien, and unless these parties are willing to come forward with a bond, so that the Court can be assured that the fund will go where it belongs when collected, a receiver will be appointed in this case, and a reference will be had, as of course it must follow, and the injunction will not be disturbed, because it will be a protection to the receiver.

If we appoint a receiver under the statute, he should have authority to make all the orders necessary to effectually carry out the receivership. While under the provisions of the statute, it may be somewhat difficult to maintain this injunction, yet, the fact of the fractional insolvency of the company, and the fact that a receiver, as I think, must be appointed — under this state of facts I think it unnecessary to disturb the injunction.

E. H. EGGLESTON for plaintiff.

C. M. STONE and B. R. BEAVIS for defendant.

SUPREME COURT OF OHIO.

December Term.

Hon. W. J. Gilmore, Chief Justice. Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Hon William White, Judges.

TUESDAY, Oct. 28, 1879.

General Docket.

No. 767. Henry vs The State. Error to the Court of Common Pleas of Hamilton county.

WHITE, J. Held:

1. Where, in an indictment for uttering a forged receipt, the instrument set out is not *prima facie* a receipt, such extrinsic facts must be averred as are necessary to show that the instrument would, if genuine, have the operation and effect of a receipt.

2. An averment that the instrument set out was a receipt, does not have the effect to change its *prima facie* character. Nor will the character of the instrument be changed by an averment that by the rules of the bank where the instrument was used, it was upon its face a receipt. It should be shown how or in what way, the instrument, if genuine, would, under the rules of the bank, have the operation and effect of a receipt.

Judgment reversed and cause remanded.

No. 131. Wright, Taylor & Co. vs Henry Coller and Jas. V. Owens. Error to the District Court of Wood county.

OKEY, J.:

Where suit is brought on an undertaking given before judgment in a civil action for discharge from arrest, the court in which the cause is pending has power, at any time before judgment is rendered on the undertaking, to grant the bail further time in which to surrender the judgment debtor. Whetstone vs Riley, 7 O. S., 514, explained and qualified.

Judgment affirmed.

No. 16. The Second National Bank, of Cincinnati, vs Joseph L. Hall et al. Error to the Superior Court of Cincinnati.

BOYNTON, J.:

The Southern Ohio Coal Company, by L., its president, executed its promissory note payable to the order of B., its secretary and treasurer, who loaned to the company the sum for the payment of which the note was given. B. was one of several persons in whose name the company was incorporated by a special act of the legislature of Kentucky, with power to carry on the business of mining coal without as well as within the state. The charter authorized the company to borrow money in the prosecution of its business, and declared its capital stock should consist of $300,000 divided into shares of $100 each, to be subscribed and paid for in such manner as the by-laws of the company might prescribe. Only $120,000 of the capital stock was taken. The corporation engaged in mining coal in this State. B. indorsed the note to the plaintiff, informing its cashier that the company was a corporation. In an action by the plaintiff on the note against the stockholders of the company as partners—held, that they were not liable.

Judgment affirmed.

No. 132. C. M. Clements et al vs Isaac Hull. Error reserved in the District Court of Morrow county.

MCILVAINE, J. Held:

A power of attorney, attached to a sealed note payable to bearer, authorizing the waiving of process and the confession of judgment in favor of the *holder* of the note, may be executed in favor of an equitable owner and *holder* to whom the note may be transferred by delivery but without indorsement thereon.

Judgment affirmed.

No. 106. The Lawrence Railroad Company vs Williams. Error to the District Court of Mahoning county.

GILMORE, C. J.:

Where a railroad company occupies a public highway for its track, without appropriating or otherwise acquiring the right to do so, an owner of abutting lands, having the fee in the lands covered by the highway, may proceed under section 21 of the act of 1872 (69 O. L., 95), to compel the company to appropriate the right of way for its road.

Judgment affirmed.

No. 22. Theodore Cook et al., trustees, etc., vs Joseph L. Hall et al. Error to the Superior Court of Cincinnati. Judgment affirmed on the authority of the Second National Bank vs Hall et al., No. 16 on the docket, above announced.

No. 207. Lawrence Railroad Company vs Jacob Heater et al. Error to the District Court of Mahoning county. Judgment affirmed on authority of Lawrence Railroad Company vs Sarah Williams, above announced.

MARYLAND COURT OF APPEALS.

THE FROSTBURG MUTUAL BUILDING ASS'N. VS. BRACE, RICHMOND AND HILL, TRUSTEES, ETC., ET AL.

Certificate of Acknowledgement.

In aid of the certificate the court will look at the whole instrument (this was said in Kelly vs. Rosenberg, 45 Md., 389,) where the date of the acknowledgement was not stated in the certificate though required by the code.

BARTON, J.:

The material facts in this case are correctly stated in the appellants' brief as follows: On the 23d day of March, 1878, "The Frostburg Lodge No. 49, Independant Order of Odd Fellows," an incorporated body, having become involved and unable to meet its obligations, conveyed to the appellees, Brace, Richmond and Hill, all its property for the purpose of sale and distribution amongst its creditors.

Part of the property so conveyed was the Odd Fellows' hall at Frostburg, a large and valuable brick building standing in part upon a lot of ground owned by the said corporation, in fee, and in part upon a lot which the lodge held by an equitable title, and upon which the vendor (McCulloh) held a lien for a balance

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of purchase money. The former lot, embracing about three-fourths of the building, the trustees found to be encumbered by several mortgages, and in their judgment it became necessary, before proceeding in the execution of their trust, to obtain from the court a construction of the rights of the several mortgagees. In this view the several mortgagees concurred, and the bill in this case was filed by the trustees and an amicable suit docketed. The mortgagees having answered, and the case being submitted on an agreed statement of facts, the decree appealed from what was passed.

The mortgage of the appellant was dated April 14, 1876; that of John L. Muller December 11, 1876, and that of Henry Stevens November 24, 1877.

The Circuit Court decreed that these several mortgages are not valid legal conveyances, and that they can operate only as equitable mortgages, that as between themselves they take priority according to their dates, but at the same time decreed "that the amount due upon the mortgage of the appellant, whilst it should be carved out of the fund, ahead of the mortgages of Miller and Stevens, instead of going to the appellant, should be set aside for the purpose of distribution amongst certain general creditors who had become such subsequent to the appellant's mortgage," etc.

The question before us on this appeal is as to the effect and operation of the mortgage held by the appellant.

It was executed by the corporation by Thomas Hill, its attorney, duly appointed for that purpose under the seal of the corporation. The supposed defect in the instrument is in the certificate of acknowledgement, which states that "personally appeared Thomas Hill, attorney for the Frostburg Lodge, No. 49, Independent Order of Odd Fellows, and acknowledged the foregoing mortgage to be his act and deed."

The Circuit Court decided that this certificate is defective, because it states that the deed was acknowledged by the attorney not as the act of the corporation but as his—that is Hill's act.

The code, article 24, section 8, subsection 4, requires that the certificate of acknowledgement shall contain "a statement that the grantor acknowledged the deed to be his act, or made an acknowledgement to the same effect." By section 28 mortgages are required to be acknowledged in the same manner as absolute deeds.

The Act of 1868, chapter 471, section 1, directs the manner in which deeds by corporations may be acknowledged. It providges that "any corporation may acknowledge any deed which such corporation has power to make by attorney appointed by such corporation under the seal thereof, and such appointment may be embodied in the deed."

In the mortgage of the appellant is embodied the appointment of Hill as the attorney by whom the acknowledgement was made. The question turns upon the construction of the words of the certificate. Hill as attorney appeared and acknowledged the mortgage to be his act If instead of the pronoun "his" the pronoun "its" had been used, it is conceded the acknowledgment would be sufficient, because that would impart that the deed was acknowledged to be the act of the corporation. It seems to us to be very strict and technical to declare the mortgage invalid because the justice in his certificate used a masculine instead of a neuter pronoun. Malla grammatica non vitiat.

In aid of the certificate the court will look at the whole instrument (this was said in Kelly vs. Rosenstock, 45 Md., 389), where the date of the acknowledgement was not stated in the certificate though required by the Codo.

The mortgage appears on its face to be the deed of the corporation; it was executed by its corporate seal. Hill, by whom the acknowledgement was made, appeared before the justice in his capacity as attorney of the corporation and acknowledged it to be his act. We think this imports that the deed was acknowledged to be the act of the corporation; the Code does not require that this shall be set out totidem verbis, but it is sufficient if "it be of like effect," or substantial compliance with the provisions of the Code, is all that is required.

In our opinion the mortgage of the appellant is a valid legal instrument, and as such entitled to its legal priority in the distribution of the trust funds under the deed of March 23, 1878.

The decree of the Circuit Court will therefore be reveised in so far as it determined that the mortgage held by the appellant operates as an equitable mortgage only.

It becomes unnecessary to consider the other questions argued in the appellant's brief. As no appeal from the decree has been taken by the other mortgagees or other parties interested, the opinion and decree of the Circuit Court in other respects, except as hereinbefore expressed, stand unreversed. The cause will be remanded to the end that the decree below may be modified in conformity to this opinion, and that the trustees, Brace, Richmond and Hill, may be decreed to execute the trust.

Being all of opinion that in filing this bill the trustees have acted judiciously and in accordance with their duty, the costs of this proceeding will be decreed to be paid out of the trust fund. Windle and wife vs. Keedy, 43 Md., 413.

Reversed and remanded.

—*Maryland Law Record.*

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Nov. 8, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Nov. 3.

Fritz Bucholz to Henry Hunting. $400.

J. M. Sykora and wife to T. H. Brierman. $1,750.

Emanuel Koestle and wife to Elizabeth H. Bersch. $500.

Cyrus P. Leland to Samuel Andrews. $20,000.

Michael Gallagher and wife to The Soc. for Savs. $300.

Julia M. York and husband to Jas. M. Hoyt. $9,000.

Nov. 4.

John R. Hewsto and wife to Sarah E. Haines. $900.

John W. Street and wife to James S. Galvin. $675.

John Raines to William Hendy. $200.

Frank Keiffer and wife to Ludwig Dangeldein. $100.

Mary L. Keeny to The Society for Savs. $1,500.

Chauncy S. Giddings and wife to The People's Savs. and Loan Ass'n. $500.

Charles F. Brusch and wife to Jas. M. Hoyt. $9,112.50.

James L. Kaesner to Wm. Thomas. $255.

Wm. Cranage and wife to The Soc. for Savs. $2,800.

Edmund Bates to John E. Hall. $500.

Joseph Salmons and wife to Samuel Gynn. $370.

Nov. 5.

John Barsa and wife to Jacob Uhler. $200.

Lucien A. Gerling and wife to [illegible] Gerling. $[illegible].

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Peter Balbach to R. R. Rhodes, trustee. $900.

John H. Wecke to Wilhelm G. Hunnan. $800.

J. B. Hirst and wife to W. A. Lyon. $575.

Nov. 6.

Charles Maurer and wife to Catherine Smith. $375.

Mathias J. Moskapp and wife to same. $390.

Annie Seaman to Bernard Joskniek. $100.

B. Bartlett to Wm. Curtiss. $1,100.

Hiram R. Fennimore to Mary C. Curtis. $1,000.

John Beverlin to the Soc. for Savs. $2,700.

John Hudin to Geo. W. Canfield. $587.

Wm. Gray and wife to J. M. Coffinberry. $208.

John Quinn and wife to The People's Savs. and Loan Ass'n. $555.

Leonhard Maier and wife to Magdalena Baehr. $800.

Andrew Schabel to Michael Pfalzgraf. $600.

Katharine Carvan and husband to Gustav Fischer. $400.

Nov. 7.

Thomas S. Lindsley to the Citizen's Savs. and Loan Ass'n. Two thousand dollars.

Caroline Schindler to Fred Deiner. Two hundred dollars.

C. S. Carver and wife to D. Pettibone. Two thousand eight hundred and eighty dollars.

Fred Dahnert to Amelia Barthel. Fifty dollars.

Mary M. Kamerer and husband to Amasa Stone. Five hundred and fifty dollars.

Simon Maester and wife to J. J. Kernahan. One hundred dollars.

Wm. H. Gabriel et al to Mary A. Jones. Two thousand dollars.

CHATTEL MORTGAGES.

Nov. 3.

Henry Stehr to William Stehr. $450.

Louis Laushoer to L. Schlather. $250.

David Morgan to Mary A. Phipps. $100.

Nov. 5.

John Frinkner to L. Schlather. $1,200.

Samuel Rosenberg to L. Konigslow. $105.

Nov. 6.

M. A. Bard to F. D. Bard. $892.

Samuel Barker to A. M. Harman. 1,000.

M. B. Smellie to Samuel Barker. $4,195.

Nov. 7.

Francis Greene to James Hossack. One hundred and eighty dollars.

T. W. McClintock to Harriet N. Drew. Five hundred and eighty dollars.

DEEDS.

Oct. 31.

Norris E. Gallup, admr. etc., to Andrew Haag. Three hundred and seventy-five dollars.

James C. Smith to same. Four hundred and twelve dollars.

Barnard, Andrews et al by W. I. Hudson, Mas. Com., to Flora A. Riblet. One hundred dollars.

Same to F. D. F. Burgdorff. Five hundred dollars.

Barnard, Anderson et al by W. I. Hudson, Mas. Com., to Hermann Wendorff. One hundred and forty-five dollars.

Same to Wm. Wendorff. Fifty dollars.

Same to Charles Wendorff. One hundred and one dollars and fifty cents.

J. C. Bronson et al by Felix Nicola, Mas. Com., to T. H. Higgins. Ninety-four dollars and twenty-six cents.

Nov. 1.

Auditor's deed to Cleve. Iron Co. $18.64.

Louisa Bedlingmeier to B. S. Cogswell. $1.

Thomas H. Bedlingmaier to same. $2.

Israel T. Bowman to Jas. Phillips. $5.

Margaretta Somner and husband to J. W. Beck. $1.

J. W. Beck and wife to John Somner. $1.

Richard Carpenter to Frank D. Carpenter. $2.

James H. Cannon and wife to Samuel Fogg. $1,100.

Wm. G. Rose and wife to Thirza E. Cunningham. $1,000.

Thirza E. Cunningham and husband to Joseph Cunningham. $150.

George W. Canfield and wife to Charles G. Canfield. $5,000.

Same to Julia A. Meryfield. $3,000.

E. J. Foster to A. G. Carpenter. $180.

Eveline T. Foote to Margaret Worthington. $3.

Patrick Goulding to E. Hobday. $20.

E. Hobday and wife to Herman Kroll and wife. $950.

James M. Hoyt and wife to Leander M. Habby. $7,950.

August Koester and wife to Fred. Brasch. $700.

Martin Krejci and wife to Robert Hoffman. $550.

Wm. H. Humphrey, guardian, to B. S. Cogswell. $160.

John M. Malone, exr., etc, to Geo. Dickinson. $2,000.

Charles H. Potter and wife to Jas. W. Grimshaw. $1,650.

Jane Philp to Samuel Sanders. $2,500.

J. W. Sykora and wife to Henry Hunting. $3,000.

Frances M. Rose et al to David A. Wagner. $1.

Joseph Plojhart by W. I. Hudson, Mas. Com., to Loeb Halle. $2,110.

Nov. 3.

William B. Anderson and wife to Charles Gosh. $700.

Samuel Andrews to Cyrus P. Leland. $27,000.

G. H. Foster and wife to Mary Boyer. $1,180.

James Decker and wife et al to Mary Rock. $720.

Charles G. King and wife to James M. Hoyt. $2.

Same to same. $2.

James M. Hoyt and wife to John H. York. $14,258.

John Hicks and wife to William C. Kees. $600.

Henry Hunting and wife to Fritz Buckhold. $450.

Wm. H. Kees and wife to Adolph Klippel. $1,500.

S. H. Mather and wife to Soc. for Savs, $1.

Wm. C. Schofield and wife to Frederick Mohr. $1,000.

F. M. Sanderson and wife to Thos. C. Warner. $2,300.

Gustavus Tielke to Wm. A. Manning. $1.

Godfrey Chodulof by R. D. Updegraff, Mas. Com., to Chas. O. Scott. $4,068.

A. L. Wiggins by Thomas Graves, Mas. Com., to Alexander McIntosh. $910.

Anton Wiebert and wife by Thos. Graves, Mas. Com., to Geo. H. Foster. $1,150.

Frank Klemmer by S. M. Eddy, Mas. Com., to Samuel H. Mather. $11,125.

Rudolph Wetzel by same to Caroline S. Dixon. $2,418.

Nov. 4.

George O. Baslington et al to Margaret Buyer. $3,440.

Runaldo D. Baxter and wife to John W. Street. $1.

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J. G. W. Cowles and wife to Crumb & Baslington. $250.

James M. Hoyt and wife to Charles F. Brusch. $12,150.

Wilhelm G. Herman and wife to J. H. Wlecke. $1,600.

J. H. Hardy and wife to Wm. H. Lynch. $1,200.

W. W. Hazzard to J. J. Holden. $6,000.

J. J. Holden and wife to W. W. Hazzard. $6,000.

Ausler T. Kingsbury, exr., etc., to J. T. Reasner. $225.

Nicholas Meyer and wife to Charles Chervenka. $640.

F. W. Mohr and wife to F. Rockefeller. $3,500.

George A. Moderer and wife to Wm. Mitchell, Sr. $275.

Edwin A. Northrop to Henry Romp. $426.72.

Andrew Peter to same. $400.

Nov. 5.

Charles Blazak and wife to Frank Starat and wife. $750.

John Connell to Alice Desmond. $525.

Barbara Dukak and husband to John Barsa and wife. $375.

Thomas Douberg and wife to Fred Weibohm. $900.

J. S. Edwards and wife to Felix Tyler. $560.

H. H. Hamlin and wife to M. G. Rose. $4,500.

Charles W. Moses to Bryan Callaghan. $2,400.

W. G. Rose and wife to Louisa A. Hamlin. $1,300.

D. R. Rhodes to Peter Balbach. $1,320.

Barnard, Anderson et al by W. I. Hudson. Mas. Com., to Andrew Platt. $173.

Nov. 6.

Albert Allyn and wife to Seymour Trowbridge. Four thousand five hundred dollars.

Wm. Gray and wife to James M. Coffinberry. One thousand nine hundred dollars.

James M. Coffinberry and wife to Jessee Gray. One thousand nine hundred dollars.

Ignats L. Dunker to Grank Maznets. One thousand dollars.

James Paton and wife to R. R. Holden. Two thousand four hundred dollars.

R. R. Holden to Emma Paton. One dollar.

John L. Miller and wife to Wilhelm Manther. Five hundred and ten dollars.

Isaac Y. Moyer and wife to Eva C. Spielt. Two hundred and fifty dollars.

Catharine Oswald to Leonhard Maier. Nine hundred and seventy-five dollars.

D. C. Taylor and wife to James M. Coffinberry. One hundred and twenty-two dollars and forty-seven cents.

Amasa Stone and wife to Mary M. Kamerer and husband. One thousand dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending Nov. 5, 1879, against the following Persons:

Oct. 29.

C. H. Fath. $90.43.
Wm. Pate et al. $1,154.45.
Louisa Quackenbush et al. $667.60.
Thomas Wilson et al. $1,099.58.
Simon Thorman et al. $482.
John Berlo. $1,084.
H. Oharrow et al. $559.45.
Lester Cochran et al. $1,411.52.
James Fetch et al. $674.40.
Joseph Perkins. $125.
Jay Odell et al. $400.24.
Wm. J. Moulton. $4,375.22.

ASSIGNMENT.

Nov. 5.

George French to C. E. Farrell. Bond $3,000.

COURT OF COMMON PLEAS.

Actions Commenced.

Nov. 1.

16131. Henry Romp vs Andrew Peter, Jr., et al. Relief and to set aside fraudulent conveyance. Robison & White.

16132. J. E. Gallagher vs T. W. Davis. Error to J. P. Lavan.

16133. James Johnson vs Margaret Murphy. Same. Same; Bentley.

16134. Thomas E. Arnold et al vs Chas. T. Norton et al. Money only. M. R. Keith.

16135. F. H. Henke vs Leo Hess. Money and to foreclose mortgage. Estep & Squire.

16136. Sohn Cooney vs John Patterson et al. To subject lands. Smith & Hawkins.

16137. Welton Lippencott et al vs Frank Pechoe et al. Money and to subject lands. R. A. Davidson.

16138. Lewis Zettelmeyer vs Arnold Wesen et al. To subject land and for equitable relief. Smith & Hawkins.

16139. Minna Knull et al vs Fred Weber. Appeal by deft. Judgment Oct. 3. C. L. Rosa.

16140. John Albinger vs Robert Hicks et al. Appeal by defts. Judgment Oct. 15.

16141. The City of Cleveland vs Perun, a Bohemian, etc., et al. Money and to subject lands. Wm. Heisley.

Nov. 3.

16142. J. R. Reed vs John J. Thompson. Cognovit. Brooks; Slutz.

16143. Perry H. Babcock et al vs Martin Krejci and garn. Money only (with att.) J. W. Heisley.

16144. Conrad Knerim vs Louis Kuebner. Money only. Bentley.

16145. S. S. Marsh vs Samuel H. Kimball. Appeal by deft. Judgment Oct. 25. H. Clark Ford.

16146. In re assignment of John Gehring. Appeal by S. F. Whitman from Probate Court. Baldwin & Ford.

Nov. 5.

16147. H. B. Perkins vs John P. O'Brien. Appeal by deft. Judgment Oct. 6. E. J. Latimer; Davidson.

16148. Reuben Hall as exr., etc, vs Clara M. Griffin et al. For interpretation of will. F. R. Merchant. Marvin, Prentiss & Vorce, Ingersoll & W.

16149. Luther Battles vs Fred Carrol et al. Cognovit. Robison & White; H. W. Biel.

16150. Alvah Bradley vs Moses G. Watterson, treas. Money only. Jas. Fitch and J. E. Ensign.

16151. Elkanah Lane vs Isaac J. Lewis. Money and to subject land. W. F. Carr.

16152. Emil Rast vs John Russert. Money only. Weed & D.

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16153. Soseph B. Sargent et al vs Frank L. Ford et al. Money only. P. H. Kaiser.

16154. H. B. Claflin et al vs Galen T. Nichols et al. Foreclosure of mortgage and equitable relief. DeWolf & Schwan, Stone & H.; J. W. Heisley, M. Stewart, S. H. Kirby.

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3302. Ford, assignee, etc., vs Forest City B. B. Ass'n. et al. Motion by defts. to set aside reference.

3303. Roehl vs Schneider. Demurrer to answer.

3304. Rheinhart vs Newberger et al. Motion by plff. to strike answer from the files.

3305. Reidy, admx., etc., vs The L. S. & M. S. Ry. Co. Motion to require plaintiff to make petition more definite and certain.

3306. Eyers vs Lewis. Demurrer to the petition.

3307. Heisley, assignee, vs Fath. Motion by deft. for new trial.

3308. Landaw et al vs Roskopf, exr., et al. Demurrer by various defts. to the petition.

3309. Rogers vs Carran. Demurrer to the petition.

3310. Maher vs Slawson et al. Motion by plff. to strike interrogatories from amended answer, to make same more definite and certain, and to separately state and number defenses and set forth copy of partnership contract.

3311. Same vs same. Motion by deft. Meeker to require deft. Slawson to make amended answer and cross-petition more definite and certain.

3312. Noonan vs Hogan. Motion to require deft. to separately state and number defenses and to order clerk to change title of case to correspond with amendment.

Ocr. 27.

3313. Ferbert et al. exr., etc., vs Sieger et al. Motion by deft. Thies for the appointment of receiver.

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3314. Soc'y. for Savs. vs Kannan et al. Motion by plff. for new appraisal.

3315. Bankrecht et al vs Clewell Stone Co. Motion by plff. for appointment of receiver and referee.

3316. Schmidt vs Barnes. Demurrer to petition.

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3317 to 3330 inclusive. State ex rel vs S. T. LeBaron vs The L. S. & M. S. Ry. Co. Demurrer to petition.

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3331. Robinson vs The Continental Life Ins. Co. Motion by plff. for new trial.

3332. Steiger vs Ballenger et al. Demurrer by deft. Smeller to 3d defense of answer and cross-petition of deft. Hittel.

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3333. Marcus Dennerle vs Teutonia Lodge No. 19, A. O. G. Motion to require deft. to separately state and number defenses.

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3334. McMillan vs Merchant et al. Motion by deft. to confirm report of referee.

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3339. Lavan vs C. C. C. & I. R. R. Co. Motion to strike from amended answer as irrelevant.

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3343. Same vs same. Demurrer to 1st and 3d defenses of answer.

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3348. Schwind et al vs Horn et al. Motion by defts. to dismiss petition.

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3350 to 3428. Demurrer by deft. F. W. Pelton to petition.

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3429. The Cleveland Paper Co. vs The Celtic Index Pub. Co. Motion to refer case to master.

3430. Bloch et al vs Babcock et al. Demurrer to petition.

3431. Lamquin vs Nelson et al. Motion by plff. for re-appraisement.

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3432. Cohn, admr., vs L. S. & M. S. Ry Co. Motion to require plff. to give additional bail for costs.

3433. Varian et al vs Pelton. Demurrer to answer.

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3434. Greene vs Wick. Motion by deft. for new trial.

3435. Walsh, admr., vs Brownell et al. Motion by Elizabeth J. Stearns to require deft. Romp to make 1st cause of action of his answer and cross-petition more definite and certain.

3436. Babcock et al vs Krejci. Demurrer to petition.

3437. Same vs same. Motion by deft. to dissolve attachment.

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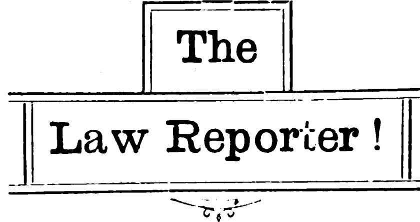

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THE ROMAN CIVIL LAW.

XIII.

Another division relative to the rights of persons may be found in

BOOK I, TITLE VI.

De his qui sui vel alieni juris sunt.

(Those who are independent and those who are subject to the power of others).

Lex 1—GAIUS:

We now come to another division relative to the rights of persons; for some persons are independent and some are subject to the power of others. Let us first speak of those who are subject to the power of others, for if we ascertain who these persons are, then we will learn who are independent. Let us first therefore learn who are in the power of masters.

¶ 1. Slaves are in the power of masters, a power derived from the law of nations; for among all nations it may be remarked that masters have the power of life and death over their slaves, and that everything acquired by the slave is acquired by the master.

¶ 2. But at the present day none of our subjects may use unrestrained violence towards their slaves, except for reason recognized by law. For by a constitution of the Emperor Antonius Pius, he who without any reason kills his own slave, is to be punished equally with one who has killed the slave of another. The excessive severity of masters is also restrained by another constitution of the same emperor.

Lex 2—ULPIAN:

For when a master is cruel or excessive to his slave, or denies to him sustenance or wantonly disgraces him, the duty of the President is then made clear from a rescript of Antoninus Pius which was addressed and sent to Aurelius Marcianus. The following are the terms of this rescript: "The power of masters over their slaves ought to be preserved unimpaired, nor ought any man to be deprived of his rights. But it is for the interest of all masters themselves, that relief prayed on good grounds, against cruelty, the denial of sustenance, or any other intolerable injury, should not be refused. Examine, therefore, into the complaints of the slaves who have fled from the house of Julius Sabinus, and taken refuge at the statute of the emperor; and if you find that they have been too harshly treated, or wantonly disgraced, order them to be sold, so that they may not fall again under the power of their master; and if Sabinus attempt to evade my constitution I would have him know that I shall severely punish his disobedience."

Lex 3—GAIUS:

Our children begotton in lawful marriage are also in our power. This power is peculiar to the Roman citizen.

Lex 4—ULPIAN:

For some Roman citizens are fathers (of family), others are sons; some are mothers and others are daughters. Fathers are those who are independent, whether adults or under age; the same in respect to mothers; sons and daughters are those who are in the power of another. For the child that is born to me and my wife is in my power, so also is the child born to my son and his wife, that is my grandson or my granddaughter, so also my great grand-children and all my other descendents, are in my power.

Lex 5:

The nephew after the death of the grandfather relapses or falls back into the power of the son, that is into the power of his father, and so also do the great grand-children and all the other descendents fall back either into the power of the son, if he lives and remained in the family, or into the power of their father, who was in the power of another before them. This is true not only of children by birth, but also of children by adoption.

Lex 6:

We call him a son who is born to a husband and wife. But if we suppose the husband to have been absent (for the sake of argument) during ten years, and at his return home to find a child of a year old in his house, I adopt the opinion of Julianus, that the child is not the husband's son. However, Julianus says that he is not to be endured, who being in constant cohabitation with his wife, refuses to

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acknowledge the son as his own. But it seems to be the law and in this opinion Scaevola concurs, if it can be proved that the husband, from supervening infirmity, or any other cause, has not cohabitated with his wife, or was in such a state of health as to make procreation impossible, that the child born in his house, though with the knowledge of the neighbors, is not his son.

Lex 7:

If a father has suffered punishment so as to have lost his citizenship or been reduced to slavery, then there is no doubt but that the nephew succeeds to the place of the son.

Lex 9—POMPONIUS:

In public matters a son has rights and privileges of a father. Therefore it is that he can hold office and be appointed tutor or guardian.

Lex 10—ULPIAN:

When a judge shall have pronounced against one the duty to maintain and support a child, the truth as to whether it is his child is still to be determined, for the question of maintenance cannot be made to prejudice the cause of birth.

De his qui sui vel alieni juris sunt. Patria Potestas.

"Jus" in the above sentence means will power, and is so used in all the relations of private law in this connection, but is not so used in matters of public law. He who is alieni juris, had not an independent will, but his will was carried out through the head of the family. Hence a person under the power of another could not hold or acquire property—all belonged to the pater familias; whatever he earned belonged to the father. The following were said to be under the power of another, *i. e.*, alieni juris.

a) Slaves. A slave was, eo ipso, alieni juris. A slave was property of his master, and as a being he was subject to the will of his master.

b) Liberi—children.

c) Uxor—wife.

Hammond gives a clear idea of this subject; he says: "The Roman family in the peculiar shape it assumed under the Jus Ruiritium was modeled on a civil rather than on a natural basis. The tie which bound members of the same family was not that of blood; it was their common position in the midst of an artificial system. For the formation of such a family a legal marriage was an indispensable preliminary; but it was only a preliminary, and the peculiar charter of the family did not in any way flow from the tie. The head of the family was all in all. He did not so much represent as obsorb in himself the subordinate members. He alone was sui juris, *i. e.*, had an independent will; all the other members were alieni juris, their wills were not independent, but were only expressed through their chief. The pater familias, the head of the family, was said to have all the other members of his family in his power; and this power (patria potestas) was the foundation of all that peculiarly characterized the Roman family—at the head of the family stood the pater familias alone. Beneath him came his children, sons and daughters, and his wife. If a daughter married she left this family and passed into the family of her husband; but if a son married, all his children were as much in the power of the pater familias as the son himself. Thus all the descendants through the male line were in the power of the same person. And it was this that constituted the link of family relationship between them, not the natural tie of blood. When the pater familias died, each of the sons became in his turn a pater familias; he was now sui juris, and all his own descendants through the male line were in his power. Each of the daughters, as long as she remained unmarried, was also sui juris; but directly she formed a legal marriage, and thereby entered into her husband's family, she passed into the power of another.

It will be seen therefore that the head of a Roman family exercised supreme control and authority over his wife, his children, his children's children and his slaves. He was their owner as well as their master. He alone was sui juris, and all the other members of the family were alieni juris. The whole group, that is, the head of those in his power, were the familia. The head was the pater familias, signifying a person who was not under the power of another. Hammond then proceeds and says that persons who were under the power of another could not hold or acquire any property of their own. All belonged to the pater familias; and whatever the son acquired was acquired for the father. In matters of public law the filuis families labored under no incapacities; he could vote or hold a magistracy, but in all the relations of private law he was absolutely in his father's power. He could not make a will for he had no property to dispose of; nor bring an action for nothing was owing to him. But in respect to property acquired by the son certain changes were afterward made, *e. g.*, the son became to have complete ownership in property acquired in war (castrense peculium) and afterward the father only had the usufruct during his life of everything coming to the son in any way except from the father himself.

Neither marriage nor age, nor anything except emancipation, terminated the power (the patria potestas) of the father over his son; and hence a son might rise to the highest public dignities, even that of consul, and yet he would remain in the power of his father. If a daughter married, she passed as we have seen from her father's power into that of her husband.

Upon the subject of Emancipation Hammond says: The distinction between the legal and the natural family is illustrated by its being possible for a member of the legal family to quit it and become an entire stranger to it, and for an entire stranger to be admitted to it and be as completely a member as if he were a son of the pater familias. The mode by which the change in either case was accomplished was by a fictitious sale. Every Roman citizen could sell himself to another by the peculiar form of sale called mancipatio; the father sold the son to a nominal purchaser, who was supposed to buy the son—and it was declared by the law of the XII. tables that a son thrice sold by his father should be free from his power, and the ceremony was therefore repeated three times and the son was then emancipatus or sold out of the family.

When a stranger, being himself alieni juris, wished or was compelled to enter a family, the process was effected by adoption. Here again, then, was another sale, the pater familias of the family he quitted being the seller, and the pater famalias of that he entered being the purchaser.

H.

CUYAHOGA COMMON PLEAS.

November Term, '79.

HENRY C. WHITE, Receiver, etc., v. J. E. INGERSOLL et al.,

Insolvent Corporation—Action by Receiver, etc.

RECEIVER of an Insolvent Corporation cannot, as such officer, bring action to subject the statutory liability of stockholders of such corporation, to payment of its debts.

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BARBER, J.:

This is a demurrer to the second cause of action in the petition.

1. That the plaintiff has not capacity to sue.

2. The petition does not state facts sufficient to constitute a cause of action.

The action is brought by Henry C. White, receiver of the Atwater Coal Company, and in the second cause of action, seeks to collect of the stockholders of the Atwater Coal Company, which is averred to be a corporation, an amount equal to the amount of stock held by each on account of their collateral statutory liability.

The petition first states that plaintiff is receiver of the property and assets of the Atwater Coal Company and trustee for the creditors of said company, as hereinafter stated. It then sets forth the organization of the corporation, the subscription to the stock, entrance upon business — incurring of liabilities and insolvency of the corporation and dissolution of the corporation by decree of the late Superior Court, at its June Term, 1875; and plaintiff's appointment as receiver of all and singular the assets and effects of said corporation and trustee for its creditors agreeable to the statutes of Ohio; that he qualified and entered upon his duties. That he has assets to the amount of $3,000 and no more to meet liabilities. That debts to a large amount have been proved—to such an extent that after applying all of the assets of the corporation, an assessment of at least fifty per cent. upon the solvent stockholders of their personal statutory liability will be required to pay all the liabilities. And he prays an account may be taken, and it may be ascertained how much will be required to be assessed on the stockholders, and that the several stockholders may be ordered, adjudged and decreed to pay into the hands of plaintiff such assessment on their stock to the extent of the lawful liability of such as shall be necessary and adequate to pay the just debts and bona fide creditors and the costs and expenses of this suit and the winding up and settlement of the affairs of the corporation.

To this petition the above demurrer is filed by one of the stockholders.

It is necessary only to pass upon the first question made by the demurrer: Has the plaintiff capacity to sue in this action to subject the statutory liability of stockholders?

The plaintiff is appointed under the provisions of an act to provide for the voluntary dissolution of corporations. Section 476 reads, "Such receivers shall be vested with all the estate, real and personal, of such corporation from the time of their having filed the security hereinbefore required and shall be trustees of such estate for the benefit of the creditors of such corporation and of its stockholders." Section 477: "Such receiver shall have all the power and authority conferred by law upon trustees to whom assignments have been made for the benefit of creditors."

Receivers then have by statute only the same power with respect to the statutory liability of stockholders as trustees to whom assignments have been made for the benefit of creditors —and in the case of Wright et al. vs. McCormick et al (17 O. St., 86) expressly hold that such trustee has no authority or control over that liability, but that it is collateral and conditional to the principal obligation which rests on the creditors and is to be resorted to by the conditions only in case of the insolvency of the corporation or when payment cannot be enforced against it by the ordinary process. It is a security provided by law for the exclusive benefit of creditors over which the corporate authorities can have no control.

The rights of the receiver are limited to the estate, real and personal, of the corporation of which alone they are trustees. As to that estate they act for the creditors and for the stockholders. No authority is given them to act for the creditors as to anything else.

The plaintiff cites the case of Story vs. Furman, 25 N. Y., 214. That was a case based upon a local statute for the county of Herkimer passed April 16, 1852, in which authority was given the receiver to collect the personal liability of the stockholders and the principal question in that case was whether that act was constitutional. The judge (Smith) expressly states the general doctrine in that State, the law with respect to personal liability of stockholders being substantially the same as ours, to be that the receiver cannot maintain such an action. So far as that case is authority in this case it is against the plaintiff.

The demurrer must be sustained.

BALDWIN & FORD for demurrer.

ROBISON & WHITE, *contra*.

SUPREME COURT OF OHIO.

December Term, 1878,

Hon. W. J. Gilmore, Chief Justice. Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Hon. William White, Judges.

TUESDAY, Nov. 4, 1879.

General Docket.

The Board of County Commissioners of Hamiltou County vs. Edward E. Noyes. Error to the Superior Court of Cincinnati.

WHITE, J. Held:

1. The capacity of the County Commissioners to sue is not limited to the cases enumerated in section 7 of the "Act establishing Boards of County Commissioners and prescribing their duties." In the cases enumerated in section 7 they are not only authorized but required to sue.

2. Where a cause of action in favor of the county arises out of a subject-matter within the control of the Board of County Commissioners suit may be brought thereon in the name of the Board, unless, by statute, the suit is required to be brought in some other mode.

3. Where work has been done on account of the county, under an agreement with the Commissioners, and has been accepted and paid for, no action lies at the suit of the Commissioners, in the absence of fraud or mistake, to recover back the money thus paid.

3. In such action, where it is averred in the answer that the work was done on account of the county, in pursuance of a contract with the Commissioners, the presumption is that the contract was duly entered into. If the alleged contract is sought to be impeached by the reply as being void as against the county for noncompliance with the requirements of the act of March 9, 1866, relating to the duties of County Commissioners (S. and S., 86), the reply ought to show that the subject-matter of the contract is within the purview of that act. Whether if the contract was shown to be made in contravention of the act last named, it would make any difference as to there being no right to recover back the money, quære. Judgment affirmed.

Wm. W. Weir vs Harrison L. Day et al. Error to the District Court of Portage county.

McILVAINE, J. Held:

1. Under the act of May 1, 1873, entitled "An act for the reorganization and maintenance of common schools" (70 Ohio Laws, 195), Boards of Education are invested with the title to the property of their respective districts in trust for the use of public schools, and the appropriation of such

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property to any other use is unauthorized.

2. A lease of a public school-house for the purpose of having a private or select school taught therein for a term of weeks is in violation of the trust, and such use of a schoolhouse may be restrained at the suit of a resident tax-payer of the district.

Judgment reversed.

MARYLAND COURT OF APPEALS.

April Term, 1879.

GEO. W. TINGES VS. MAYOR AND CITY COUNCIL OF BALTIMORE.

It is well settled by the decisions of this court that an intent on the part of the owner to dedicate his land to the particular use alleged is absolutely essential, and unless such intention is clearly proved by the facts and circumstances of the particular case no dedication exists.

It is not necessary to enumerate the several modes by which this intention may be established. One of them is the sale and conveyance of lots bounded upon a street, designated in the plan and plot of a city. If the vendor is the owner of the bed of such street, his lease or conveyance to the lessee or purchaser implies a grant or covenant that the street thus indicated and called for shall be and remain forever open to the use of the public, free from all claims or interference of the proprietor of the estate therein inconsistent with such use.

The purchaser of a lot calling to bind on a street not yet opened by the public authorities is entitled to a right of way over it, if it is the lands of the vendor, until it reaches some other street or public way.

BRENT, J.:

The Mayor and City Council of Baltimore passed an ordinance in May, 1877, to condemn and open St. Paul street from Johns street to North avenue, as laid down on Poppleton's plat.

The commissioners for opening streets, in the exercise of the duties required by this ordinance, having ascertained that the appellant was the owner of one-half of the bed of the proposed street, from Townsend street north 182 feet to a twenty foot alley, condemned the same and allowed therefor only nominal damages.

An appeal was taken to Baltimore City Court, where the judgment and action of the Commissioners were reviewed and affirmed.

From that court the present appeal is taken, and involves the propriety of the action of the court in granting the instruction to the jury asked for by the appellee and in refusing the second instruction asked for by the appellant.

The facts in the case, as they appear from the record, are but few, and these are undisputed.

Lot A owned by the appellant (the twenty foot alley above referred to), and lot B owned by the Baltimore City Passenger Railway Company, as designated upon the plat filed in the case, and constituting about three-fourths of the square from Townsend street to North avenue, and from St. Paul street to Calvert street, were formerly owned by the Cookes. Their possessions also extended west of St. Paul street to what was known as the Hanson Mill Road, thereby making them the original owners of the bed of that street from Townsend street to North avenue.

In March, 1851, two of the Cookes, William T. and Warren E., being minors, Charles F. Mayer was appointed a trustee by the decree of Baltimore county court to lease this property. He accordingly effected a lease for ninety-nine years to Henry Mankin of several lots, among them the lot now owned by the appellant. This lease was executed in September, 1854, and the lot in question is thus described: "Beginning for the same at the northeast corner of St. Paul street and Townsend street, and running thence on St. Paul street northerly 173 feet to an alley 20 feet wide, to be laid out at the distance of 175 feet to the northerly side of said alley from the south side of North avenue as widened to 150 feet, thence easterly on that alley and parallel to Townsend street (wherewith said alley is to be parelled) 122 feet to Hargrove alley, then southerly on Hargrove alley 173 feet to Townsend street, then westerly on Townsend street 122 feet to the beginning."

Mankin failed to pay the rents reserved by this lease; the trustee (Mayer) brought an action of ejectment against him, and on the 7th of July, 1877, recovered a judgment which was subsequently enforced by a writ of possession.

After this lease and ventry, and before any disposition of the lot now owned by Tinges was made, the Cookes, all of whom had arrived at majority, executed a lease for ninety-nine years to the Baltimore City Passenger Railway Company of lot B designated on the plat. This lease was made on the 17th of July, 1877, and the lot is described as follows: "Beginning for the same at the corner formed by the intersection of the south side of North avenue and the west side of Calvert street, and running thence westwardly bounding on the south side of North avenue 264 feet to St. Paul street, southwardly bounding on the east side of St. Paul street 175 feet to a 20 foot alley, thence easterly bounding on the north side of said alley, with the right, use and privilege thereof, and parallel with North avenue 264 feet to Calvert street, and thence northwardly bounding on the west side of Calvert street 175 feet to the beginning."

In May, 1877, the appellant acquired title to the lot in questian, deriving the same through the Cookes by a deed to him from Hiram Woods, trustee, and others.

Upon these facts the court instructed the jury that if they found from the evidence the Cookes were "the owners of the property lying in the bed of St. Paul street" from Townsend street to Hanson Mill road (now North avenue), and that prior to the conveyance to Hiram Woods and to the passage of the ordinance for the opening of St. Paul street, the said Cookes had leased portions of said property between townsend street and the Hanson Mill road, and in the said leases had described the lots so leased as bouuding on the east side of St Paul street, then said leasing was a dedication of the bed of St. Paul street so owned by them from Townsend street to Hanson Mill road, and refused to instruct them as prayed by the appellant, that there is no evidence to be found in the lease to the Baltimore City Passenger Railway Company of any intention to so dedicate that part of St. Paul street.

It is well settled by the decisions of this court that an intent on the part of the owner to dedicate his land to the particular use alleged is absolutely essential, and unless such intention is clearly proved by the facts and circumstances of the particular case no dedication exists. McCormick et al vs Mayor, etc., of Baltimore, 45 Md., 524.

It is not necessary to enumerate the several modes by which this intention may be established. One of them is the sale and conveyance of lots boundedudon a street, designated in the plan and plot of a city. If the vendor is the owner of the bed of such street, his lease or conveyance to the lessee or purchaser implies a grant or covenant that the street thus indicated and called for shall be and remain forever open to the use of the public, free from all claims or interference of the proprietor of the estate therin in-

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consistent with such use. 45 Md., above cited. The lessors of lot B to the City Passenger Railwao Company were the owners of the bed of St. Paul street from Townsend street to North avenue at the time of their iease. In binding this lot in their deed of lease on the east side of St. Paul street it was clearly a dedication of that street as far south as Townsend street. This is not only settled by the principle announced in the case just referred to, but comes strictly within the case of Hawley vs. Mayor, etc., of Baltimore, 33 Md., 270. There it was held that the purchaser of a lot calling to bind on a street not yet opened by the public aatharities is entitled to a right of way over it, if it is the lands of the vendor, until it reaches some other street or public way.

The appellant seeks to confine this doctrine and limit it in the present case to the twenty foot alley, which was set apart for the use of lots A and B, which extends eastwardly to Calvert street. This is not a street or public way within the meaning of the case in 33 Md. The first street or public way southwardly from North avenue down St. Paul is Towusend street, and to this street the dedication to the the public use of St. Paul street must be held to extend by the terms of the lease of lot B to the Railway Company.

If the case rested alone upon the lease of Mayer, trustee, to Mankin, we would not hold it to be sufficient evidence of a dedication. But taken in connection with the subsequent lease of lot B we think it is strongly corroborative of of the dedication established by the terms of that lease.

From these views it follows that we think there was no error in the instructions given by the City Court.

Judgment affirmed.

—*Maryland Law Record.*

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Nov. 14, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Nov. 8.

George P. Vetter to Samuel Osterhold. $588.

Colgate Hoyt and wife to Jessee P. Bishop. $12,812.

Marie Welch and husband to Arnold Reppler. $200.

Charles Marshall and wife to Peter Weigel. $800.

Jas. Sweeny to Martha E. Wetzel. $200.

J. A. D. Mitchell and wife to The Citizens' Savings and Loan Ass'n. $100.

Jacob Wagner and wife to Susan M. Swain. $800.

Thomas C. Bleasdale to John Rodgers. $3,000.

Louisa B. Powers and husband to The Soc. for Savs. $5,000.

Nov. 10.

Elihu B. Moses to Manuel Halle. $600.

Jacob Armbruster and wife to Moses Marcuson. $2,150.

Giovanni Schiappacasse and wife to Luigi Schiappacasse. $3,000.

Charles Seelbach and wife to Catharine Hahn. $250.

Fred Schwsitzer and wife to Fred. Haltnorth. $4,000.

Charles F. Brusch to James M. Hoyt. $6,450.

Wm. R. Smellie and wife to The Soc. for Savs. $1,500.

James Klipie to A. A. Jewett. $300.

John Casper and wife to Jacob Woelker. $150.

Nov. 11.

Marguret B. Carl and husband to The Society for Savings. $500.

Henry Schunemann and wife to Moretz Eckerman. $450.

Herman Michager and wife to Wm. Brant. $250.

R. D. Updegraff to Jacob Welker. $700.

John Moores to Robert E. Eddy. $100.

Louis Noller to S. E. Adams and Thos. Robinson. $600.

Nov. 12.

John Delfs and wife to Robert Rhodes, trustee. $300.

Matey Brabener and wife to John Fepper. $400.

Fred Mull and wife to The South Cleve. Banking Co. $2,000.

Nicholas Huber to T. H. White et al. $391.

Nov. 13.

Wm. H, Compton and wife to The Standard Oil Co. Three thousand dollars.

George Rauscher and wife to Fred Schneider. Five hundred dollars.

Edmudd Walton and wife to The Soc'y. for Savs. One thousand dollars.

Walter Phelps and wife to Malene Plympton. One thousand two hundred dollars.

Joseph Issler and wife to M. S. Hogan. One thousand dollars.

F. Ohrenhaenser to Frank Schnell. Four hundred and fifty dollars.

C. J. Ruthbern to Amelia A. Ruthbern. One hundred and seven dollars and ninety-two cents.

Same to Henry B. Northrup. One hundred and thirteen dollars.

Edmund Walton et al to Jane E. Cain. Three thousand dollars.

T. H. Bond and wife to The Soc'y. for Savs. Seven hundred and fifty dollars.

Konrad Marquardt and wife to Darius Robinson. Six hundred dollars.

Lester F. Alexander and wife to Silas Alexander. Six hundred dollars.

City of Cleveland to J. G. Jennings. Fifty thousand dollars.

Lamus C. Johnson and wife to Jas. D. Claugh. One hundred and twenty-five dollars.

Ellen Gaffney and husband to M. F. Herrick. Six hundred and fifty dollars.

Marie A. Howck to Anna Bohn. Two hundred and twenty-eight dollars.

John Miller and wife to Christian Kencig. Eight hundred dollars.

Mary Bishop and husband to John Miller. One thousand dollars.

Catharine Stoll and husband to E. S. Cameron. Six hundred dollars.

CHATTEL MORTGAGES.

Nov. 8.

Howe & Farland to W. D. Butler. $155.

George Bartle to Caroline Bartle. $600.

Andrew Steinmetz and wife to Henrietta Hoffman. $1,000.

Nov. 10.

William Pinkett to Joseph Pinkett. $600.

John B. Myer to J. B. Meriam. $500.

Nov. 11.

James Forrest to J. M. Brunswick & Balke Co. $370.

W. P. Brownell to C. R. Saunders. $250.

J. P. Heisel to N. Heisel, trustee, $4,500.

Hess, Campbell & Co. to Anthony Bauer. $480.

Nov. 12.

James Lunn to Edwin Fuller. $404.55.

Geo. Rettberg to Isaac P. Lamson. $300.

Carl Werber to Gaensslen Brothers. $125.

J. S. Scoville to A. H. Bailey. $100.

John Roas to Christian Kaenzig. $300.

Nov. 13.

Geo. Ruescher to Dominick Shark-

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ey. Three hundred and twenty-five dollars.

Wm. Weiser to Thos. C. Henrichser. Two hundred dollars.

A. C. Jamison to D. P. Foster. Three hundred and eighty dollars.

John A. Bishop to John Miller. Two thousand three hundred dollars.

Nov. 14.

Soseph Smeykal to Simon Fishel. Four hundred and fifty dollars.

J. W. Walker and wife to Joseph Lambert. Seven hundred and thirty-two dollars.

Martin Haering and wife to Jacob Voelker. Seven hundred dollars,

Jacob Marquardt and wife to Lorenz Holsner. Four hundred dollars.

Andrew McAdams et al to George Weckerling. Nine hundred dollars.

Wm. Blackride and wife to David Latimer. Five hundred dollars.

Marshal P. Stone to Stephen Barkwell. (For purchase money.) Five thousand five hundred dollars.

S. H. Kirby et al to A. H. Wick. Two thousand two hundred dollars.

Anna M. Mooshim et al to Louis Weber. Four hundred and twenty-five dollars.

John Fries and wife to Jacob Schroeder. Two hundred and twenty-five dollars.

DEEDS.

Nov. 6.

Susan M. Swain and husband to Jacob Wagoner. Two thousand five hundred dollars.

Nov. 7.

James H. Clark and wife to Mary Clark. $22.000.

Johanna Carey and husband to R. T. Morrow. $1.

R. T. Morrow to William Carey. $1.

Charles Grosse and wife to Johanna DeClair. $10,000.

Colgate Hoyt and wife to Jas. M. Hoyt. $1.

Henry Haines and wife to Geo. B. Wiggins et al. $1,062.

Jacob Hoehn and wife to Ist Nat. Bank of New London, Ohio, et al. $7,600.

John C. Ransom et al to Jacob Hoehn. $6,300.

Frank Mazaretz to Caroline Drucker. $1,200.

John Miller to Elizabeth Welbut. $550.

Frank Osterhold to Geo. P. Vetter. $1,200.

Robert Smith and wife to Chaalotte Demerle. $2,500.

Fabina Gabriel et al by Felix Nicola, Mas. Com., to Wm. H. Gabriel et al. $3,335.

Nov. 8.

Dewis Buffett to Bridget McGreary. $400.

J. D. Briggs and wife to Edmund Walton et al. $4,950.

J. J. Elwell and wife to John Koesges. $1,151.

James M. Hoyt and wife to Colgate Hoyt. $2.

Joseph Koestle and wife to Henry Body. $1,250.

Arnold Kippler, admr., etc., to Maria Walsh. $300.

J. Mandelbaum to S. G. Baldwin. $370.

O. A. Payne to James H. Clark. $1.

John Rogers and wife to Mary A. Bleasdale. $3,196.

George M. Reid and wife to Arthur B. Foster. $3,600.

Jacob Roghet and wife to Max M. Heller. $5,750.

Elizabeth Staulembe et al to J. W. Grimshaw. $1,400.

Philip P. Feifenbach, guardian, etc., to Magdalene Feifenbach. $2,700.

James Wilmot and wife to Anthony Stolf. $420.

Jacob Waguer and wife to Susan M. Swain. $1,000.

Barnard, Anderson et al by W. I. Hudson, Mas. Com., to John Rodgers. $2,750.

James S. Hosmer et al to S. N. Ely et al. $1.

Nov. 10.

Frank Douda to Johan Kasper and wife. $225.

Henry Fisher, guardian, to same. $225.

John J. Elwell and wife to Maiten Young. $975.

James M. Hoyt and wife to Chas. F. Brush. $8,600.

Joseph Kefeon and wife to John Dacek and wife. $590.

Frank Kessler and wife to Catharine Smith. $420.

Fred Law and wife to Chas. Mallmueller. $985.

Elisha B. Moses to O. H. Warren. $2,000.

J. Mandelbaum to Chas. Hoffman. $1,500.

John Moore and wife to J. B. Hartman. $2,600.

Mary H. Poak and husband to Helen L. Leland. $1.

Amasa Stone and wife to August Zedler. $666.

J. and A. Einer by Thos. Graves, Mas. Com., to M. Kaiser. $139.

D. M. Caldwell et al by Wm. M. Raynolds, Mas. Com., to Jane R. Gillette. $100.

Nov. 11.

David Cook to Moses Cleave. $3,800.

W. P. Fogg and wife to H. C. Rouse. $6,450.

Eva F. Hankin and husband to Geo. H. Lannert. $600.

James M. Hoyt and wife to Harriet B. Sherman. $300.

James Langhorn and wife to Geo. Davis and wife. $750.

Gottfried Loesch to Peter McDaniel. $1,050.

H. C. Miller and wife to R. B. Whipple. $1,000.

Albert M. Harmon and wife to Eliza A. Weddell. $8,300.

Nov. 12.

Joseph Applebom and wife to Janetta Goldsoll. $1,400.

Jos. Colwell to Elizabeth Barkwell. $1.

S. A. Cohin and wife to Mary E. Hart. $3,500.

R. E. Eddy and wife to Daniel McCue. $1,000.

Same to same. $1.

Same to same. $1.

John Moores and wife to same. $1.

Charles Gumlich, guardian, to Gustav Mueller. $200.

William Spaith et al to same. $200.

Mary Hath to Tracy Battles and wife. $650.

James M. Hoyt and wife et al to Jas. Gothercole and wife. $750.

Nicholas Helbig and wife to Don S. Helbig. ———

Robert R. Rhodes and wife et al to John Delfs and wife. $700.

M. Kaiser and wife to John Fech and wife. $150.

Celia H. Ledwill and husband to J. W. Nash. $1,500.

A. W. Poe et al to D. W. Thorn. $100.

Amasa Stone and wife to Michael Galzell. $540.

Betsy Southern to Gottlieb Kraft. $2,219.

Thomas T. Seelye and wife to Julius K. Clark and wife. $23,000.

Catharine Smith to Charles Maurer. $400.

Alfred Southwich et al to Susana Southwick. $1.

Susana Southwick et al to Helen M. Corlett. $1.

Abel P. Wilkins and wife to Abel P. Bull. 1.

Abel P. Bull to Caroline Wilkins. $1.

Nov. 13.

Veranus Dewey to Adam Boles. Seven hundred and seventy-five dollars.

W. T. F. Donald to H. C. Brain-

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ard. One thousand seven hundred dollars.

George G. F. Gegelien and wife to Anna D. Deitz. One dollar.

Same to Ann M. Gegelien. One dollar.

Jas. M. Hoyt and wife to Wm. Jacobs. Five hundred and sixty dollars.

F. P. Ingraham to J. H. Broadwell. Three thousand dollars.

Elizabeth Kimball and husband to Carrie S. Hegdler. Three thousand dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending Nov. 12, 1879, against the following Persons:

Nov. 3.

C. A. Adams et al. $1,612.
A. A. Jewett et al. $7,047.30.
Morris Marx et al. $712.27.
John J. Thornton. $2,030.
G. A. Schmitt et al. $310.50.
W. D. Baker. $1,774.14.

Nov. 4.

Comfort A. Adams et al. $1,551.41.

Nov. 5.

Joseph Umlauft. $3,360.16.
Fred Carroll et al. $155.17.

Nov. 7.

G. W. Canfield. $298.89.

Nov. 8.

John T. Becker. $3,953.

Nov. 10.

A. J. Spencer et al. $661.93.
Ernest Hunscher. $853.48.
F. W. Pelton. $98.20.
M. G. Watterson. $425.52.

Nov. 12.

Columbia Life Ins. Co. $2,814.40.

COURT OF COMMON PLEAS.

Actions Commenced.

Nov. 7.

16155. Everett D. Stark vs John Fries et al. Money, foreclosure of mortgage and other relief. Stark.

16156. Louis Zettlemeyer vs Arnold Neissen et al. To subject lands and for equitable relief. Smith & Hawkins.

16157. Caroline M. Ehlert, extx., etc., vs Christian Metzgar. Money only. Same.

16158. M. Ernst vs Weiner Medezin Co. Appeal by deft. Judgment Oct. 8. Kidd; H. & Kline.

16159. Wm. Reigler, an infant, etc., vs The C. C. C. & I. Ry. Co. Money only. Foran & Williams.

16160. James S. Weathered vs The Imperishable Stone Pavement Co. and garn. Mone only (with att.) Coon & Wing.

16161. Patrick A. Loftus vs The City of Cleveland. Appeal by deft. Judgment Oct. 27. Heisley, Weh & Wallace.

Nov. 8.

16162. Kate Crittenden, admx., vs Cynthia M. Foote et al. Money and to subject lands. T. H. Graham.

16163. Lucetta M. Fradenburgh vs J. G. W. Cowles et al. Money and equitable relief. H. J. Caldwell.

16164. Mary E. Osborn vs George H. Ford et al. Equitable relief. Henderson & Kline.

16165. W. S. Jones vs Michael J. Fauble et al. Money only. Estep & Squire.

16166. State on complaint of Bessie Hiscoch vs James Brogan. Bastardy.

16167. South Cleveland Banking Co. vs Comfort A. Adams et al. Money only. Hutchins & Campbell.

16168. F. M. Henderson vs A. A. Gaylord. Money only. Blandin; Wilcox.

16169. T. D. Crocker vs G. H. Adams. Appeal by deft. Judgment Oct. 10. W. E. Adams; Paine.

16170. Patrick Smith vs Theresa Quigley et al. Partition of lands. Fish.

16171. Moses Straus vs George C. Ross et al. To subject lands and for equitable relief. Hawkins.

16172. Henry C. Miller vs Geo. P. Burwell et al. Money and to subject lands. Coates.

16173. Henry Melcher vs Jacob Schurr et al. Money, to subject lands and relief. Johnson & Schwan.

16174. Jacob Lauer et al vs Catharine Dayton et al. To reform mortgage and to subject lands. Young.

Nov. 10.

16175. Anton Seavers vs Stearns Stone Co. Appeal by deft. Judgment Oct. 24.

16176. T. L. Martin vs State of Ohio. Error to Police Court. J. M. Stewart.

Nov. 11.

16177. George Smith vs State of Ohio. Same. Robison; Hutchins.

16178. Adam S. Palmer vs Charles N. Wise et al. Money and to subject lands. Foster and Lawrence.

16179. John Murphy vs W. K. Smith. Error to J. P. Stark; Coffey.

16180. S. S. Marsh vs Robert H. Haltnorth. Appeal by deft. Judgment Oct. 31. Ford; Robinson.

Nov. 12.

16181. E. D. Stark vs Amos N. Clark; Money and foreclosure of mortgage. Stark. Hutchins & Campbell, S. O. Griswold.

16182. Wm. V. Sked vs City of Cleveland. Injunction and relief. Grannis & Griswold.

16183. Lyman Little vs Isaac L. Gleason, exr, et al. Foreclosure of mortgage. Hutchins & Campbell.

16184. Michael Kuhns vs Ernest Morman. Money only. Avery & Ambush.

Nov. 13.

16185. Theodore E. Burton, admr, etc, vs Cornelia Beaumont et al. Sale of lands and equitable relief. H. & Kline.

16186. Lyman Little vs Isaac L. Gleason, exr, etc, et al. Partition. Hutchins & Campbell.

16187. Oliver Taylor vs Ezekiel Edgerton et al. Money and to foreclose mortgage. Estep & Squire.

16188. Elizabeth Leggett vs John D. Castle et al. Appeal by defts. Castle and Stoneman. Judgment Oct. 20. Coates; Stone & H., Sowers.

16189. Dominick Garvey vs J. B. Cowle et al. Money only. Jackson & Pudney.

Motions and Demurrers Filed.

Nov. 6.

3438. Brookman, exr, etc, vs Grossman et al. Demurrer by deft. Grossman to the petition.

3439. The People's Savings and Loan Ass'n. vs Leich et al. Motion by plaintiff to set aside appraisal and for a new appraisal.

3440. McGee et al vs Eddy. Motion to make the petition more definite and certain.

3441. Baldwin vs Bilek et al. Motion by J. M. Wilcox for leave to amend return.

Nov. 7.

3442. Lodge vs Lodge. Demurrer to the petition.

3443. Porter vs Treat. Motion to strike case from docket.

3444. Coleman vs Sherwood. Motion by deft. for new trial.

Nov. 8.

3445. Rheinhart vs Newberger et al. Demurrer by plff. to the answer of deft. Berger.

3446. Kilfoyl vs Hull. Motion for new trial.

3447. Wilson vs Phœnix Lodge No. 223, I. O. O. F. Motion to require plff. to make petition more definire and certain.

3448. Jones vs Riddles. Motion to reqnire plff. to give other and sufficient bail for appeal.

3449. Com. Nat. Bank of Crawford vs Greenlee. Motion by plff. to strike out from answer and to make 2d defense more definite and certain.

Nov. 10.

3450. Baker vs Richardson et al. Motion by plff. for new trial.

3451. Cowles et al vs The Lake View & Collamer R. R. Co. Motion by plffs.' attorneys for allowance for services as council for plffs. and creditors.

3452. Carter vs Brownell et al. Motion by plff. for appointment of receiver.

3453. Same vs same. Motion by plff. for reference of case to H. W. Johnson, Esq.

3454 to 3473 inclusive. State ex rel Le Baron vs The L. S. & M. S. Ry. Co. Demurrer to the petition.

3474 to 3193 inclusive. State ex rel Hill vs same. Same.

Nov. 12.

3494. Spangler vs Warren et al. Demurrer by plff. to answer of Julia M. and P. H. Gaffney.

3495. Crawford vs Kauffman. Demurrer to petition.

3496. Morse vs Jackson et al. Demurrer by deft. to the plea of usury in answer of deft. Bath.

Nov. 13.

3497. Rogers vs Lyons et al. Motion by plff. and deft. Parmely for judgment on the pleadings.

3498. Steel et al vs Burgert et al. Demurrer by deft. Adam Burgert, admr, to plffs'. reply to his answer.

Motions and Demurrers Decided.

Nov. 4.

2235. Jennings vs Ford et al. Stricken off.

2637. Gary vs Gay et al. Same.

2934. Linden vs. Droz. Granted.

3297. Baldwin vs. Berlo. Granted.

Nov. 6.

2314. Society for Savings vs Raman et al. New apprai ement ordered.

Nov. 3.

2125. Ohio & Penn. Coal Co. vs. Bowler, Receiver. Overruled.

2176 } 2177 } Mason vs Utley et al. Demurrer stricken from docket. Motion to dismiss overruled.

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2209. Corniug & Co. vs Northern Transit Co. Stricken from Docket.
2246. Boon vs Wesley et al. Overruled.
2251. Cooke, trustee, vs Krejci. Granted.
2304. Newman vs. Singer Manf. Co. et al. Granted as to 1st and 3d defenses. Overruled as to 2d.
2347. Strauss, assg. vs. Duncan et al. Overruled.
2358 } 2359 } Eucher et al. vs. Hardy et al. Sustained.
2836. Gillette vs Kidd. Stricken from docket.
2414. Tod, Wells & Co. vs. Smith et al. Overruled.
2429. Hays vs. Mills et al. Same.
2435. Short vs. Metcalf et al. Granted.
2436. Cunnington vs. L. S. & M. S. Ry. Co. Granted.
2437. Lehman vs Holbrook. Overruled.
2441. Clevland, Linndale & Berea Plank Road Co. vs. Higley et al. Overruled.
2471. Winer et al. vs Roskoff et al. Overruled. Defendants excepts and have leave to answer by November 29.
2493. Clark vs Wirshing. Overruled.
2497. Eucher et al. vs Hardy et al. Granted.
2521. Robinson vs Continental Life Insurance Co. Stricken from docket.
2572. Loesch vs Brown. Same.
2593. Atwell vs Hempy. Same.
2607. Bingham vs. Baldwin University. Granted.
2639. Masters vs Carson, assignee. Dismissed at plaintiff's costs.
3252. Bramer vs Storpp et al. Granted.
3431. Langwin vs. Nelson. Appraisement set aside and new one ordered.

Nov. 12.

2229. Williams vs Bletsch. Sustained.
2305. Newman vs Singer Manf. Co. Same.
2407. Collins vs. Krestine et al. Same.
2604. White, receiver, vs Ingersoll et al. Same. Plaintiff excepts.
2647. Wilcox & Gibbs Manf. Co. vs Follett. Stricken off.
2650. O'Maley vs. Bailey. Granted.
2668 | 2669 | Rensiker vs Rensiker et al. Same.
2679. Schwartz vs. Humphrey et al. Stricken off.
2701. Blum vs Kees et al. Overruled.
2716. Wenham et al vs Nichols et al. Overruled as to 1st and 3d defenses, sustained as to 2d.
2217. Hills vs Higby et al. Overruled.
2721. Byers vs Forest. Same.
2741. Same vs same. Same.
7752. Seibert et al vs St. Clair St. Ry. Co. Granted.
2741. Badger vs Dachenhausen et al. Same.
2763. Hills vs Cleveland Malleable Iron Co. et al. Stricken off.
2777. Spengel vs Comsky et al. Same.
2789. Ruple vs Schantz et al. Overruled.
2806. Boes vs Stockinger et al. Sustained.
2807. Clancy vs Bailey et al. Overruled.
2818. Clark vs Clark. Stricken off.
2990 to 2997 inclusive. Hill vs L. S. & M. S. Ry. Co. Overruled. Plff. excepts.
3137 and 3417 to 3419 inclusive. Varian et al vs Pelton. Overruled. Plff. excepts.
3439. People's Savs. and Loan Ass'n. vs Leich et al. Appraisement set aside and new one ordered.

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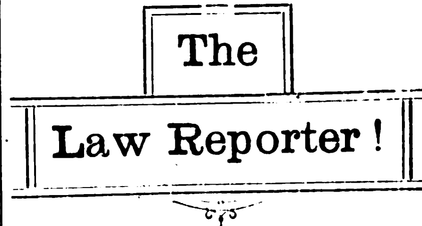

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CUYAHOGA COMMON PLEAS.

November Term, '79.

JAMES M. FRENCH VS. J. B. M'CONNELL ET AL.

Payment of Taxes out of Proceeds of Sale, etc.

BARBER, J.:

This case is before the court on a motion to pay taxes out of proceeds of sale of lands.

The lands in question pending proceedings to sell were offered for sale at delinquent tax, not sold for want of bidders—and were thereby forfeited to the State. No sale has been made of the forfeited lands, but they stand on the duplicate in the name of the State, with the taxes charged thereon, subject to be redeemed by the former owner, and on failure to be so redeemed to be sold in the name of the State for those delinquent and all subsequent taxes.

If the lands had not been forfeited to the State, but stood in the duplicate charged with these taxes, although delinquent, it is conceded and can not be questioned, that the taxes should be paid out of the proceeds of the sale under the last clause of section 77 of the tax law, S. & C. 1465.

The only question to be decided on this motion is: Does the forfeiture to the State change the character of the charge on this land for taxes so that it is no longer taxes—so that the proceeds of the sale can not be applied to its payment?

The subject of the application of payment of taxes out of proceeds of sale was before the Supreme Court in Ketchum vs. Fetches, 13 O. St., 201. The effect of that decision is that while the charge against the land for taxes remains as a debt due to the public and unsatisfied upon the tax duplicates, it is a tax to be paid under section 77 out of the proceeeds of the judicial sale, but the taxes have been paid to the public and the lien therefor transferred to a purchaser at tax sale, the claim did not longer exist as a tax.

Does the forfeiture pay the tax to the public? The law does not so treat it. 75 O. L., 497, sec 1, requires all such lands to be preserved on the duplicates until sold or redeemed, and the taxes thereon to be regularly assessed in the name of the State.

And section 2 provides that the former owner may, at any time before the State shall have disposed of such land, "pay all the taxes and penalties due thereon at the time of the forfeiture, and the accrued taxes—and then the auditor shall transfer the land on the duplicate from the State to the former owners." If the taxes and penalties are not so paid the 4th, 5th, 6th, 7th and 8th sections provide for the sale of lands "to satisfy *such taxes and penalties.*" If by forfeiture the State the taxes are paid the charge of the public against the land for the taxes would be satisfied; but section 6 expressly provides that the lands shall be exposed for sale *in order to satisfy said taxes and penalties.* If there could be any doubt on the question the Supreme Court in N. Sherwin vs. Lessee of Slocum, 16 O., 519, define the purpose and effect of a forfeiture to the State. The Court in the opinion say: "The legislature has never treated this forfeiture as vesting the title in the State for any other purpose than as security for taxes due and owing."

Motion granted and the taxes and penalties ordered to be paid out of the proceeds of the sale.

GILBERT & JOHNSON for plaintiff.

J. J. CARRAN and J. M. JONES for defendant.

NOVEMBER TERM, 1879.

THOMAS KILFOYL VS. E. R. HULL.

Trespass—Special Agency—Injury to Reversionary Interest during Occupation of Tenant by Third Party—To recover damages for by Landlord.

Charge of HAMILTON, J.:

GENTLEMEN OF THE JURY:—This is an action brought by the plaintiff, Thomas Kilfoyl, against E. R. Hull, defendant, in which the plaintiff in substance alleges that at the time of the commission of the grievances alleged in the petition, the plaintiff was

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the owner of a large lot of land, to-wit: about fifty acres, situated on the St. Clair road, in the township of Euclid, in this county and State, and still continues to be such owner. That upon said land there were certain barns situated, which he describes as being about forty feet in length by twenty feet in width, substantially built and painted.

He further avers that the defendant was at that time a wholesale and retail dealer in ready-made clothing in this city, doing business on Ontario street, and that on or about the 15th day of May, 1877, the defendant, without the knowledge or consent of the plaintiff, entered within the close and upon the said premises of the plaintiff, and then and there, without the knowledge or consent of the plaintiff, wrongfully and unlawfully disfigured and defaced the said barn of plaintiff by covering one entire side of said barn with paint of a different color from the rest of said barn, and then and there wrongfully and unlawfully did paint, print and mark upon, and affix to said barn, without the consent of said plaintiff, the owner thereof, the words, letters and figures referring to and advertising said business of defendant, to the damage of the plaintiff in the snm of one hundred dollars, for which he asks judgment against said defendant.

The defendant by way of answer denies each and every allegation set forth in the fourth paragraph of said answer, which avers the gist of this offense, to-wit: the entering upon the premises and unlawfully painting on this barn as alleged.

He then further sets out as a first defense that the barn was located upon certain premises, which was at the time of the alleged grievance in the possession of one Black as tenant of this plaintiff; that at the time the plaintiff had no possession of it himself; and that he has not had since. On the contrary this tenant was, and has been since, in the full and exclusive possession of said barn and farm as tenant of the plaintiff from year to year, which said tenancy does not expire until on or about the 1st day of April, 1878.

For a second defense he sets out that on or about the 15th day of May, 1877, the defendant's agent who was sent out by the plaintiff with express instructions to paint bills upon such barns only as he could obtain due purmission of those having the same in charge. He applied to one Black, who then had full and exclusive control of the barn as well as the farm, for permission to paint the name of "E. R. Hull's One Price Clothing Store" on one side of the barn; that that permission was given by the tenant, and in pursuance of that permission he so placed these words, letters and painting upon the barn, and that this is the grievance complained of in the petition.

Thirdly, he says again that the said Black was in full and exclusive possession of said barn and farm as said tenant, and that said tenancy was from year to year, states when it expires, and that the defendant's agent requested of Black permission to so place this painting upon the barn, and that the agent then supposed that said tenant was the owner of said barn and farm; and that said tenant gave full and complete assent and authority to paint these letters, and that the plaintiff and defendant knew nothing of the transaction until several days afterward.

Now, the issues presented by these pleadings are what you are sworn to determine upon the evidence that has been given to you, and under such instructions as to the law of the case as shall be given you by the Court.

This action was commenced, it appears from the pleadings, before a justice originally, as an action of trespass, it being undoubtedly good law that a Justice of the Peace would have no jurisdiction of this action in any other form. That is to say, what would have been an old action on the case for damages for this reversionary interest of the plaintiff could not be tried before a Justice of the Peace. That case was tried below and appealed to this court. A declaration, or a petition as it is now termed, was then framed and filed in this court by the plaintiff, in which he sets out the averments which I have already enumerated, and claims damages.

I do not discover in the petition any averment that the plaintiff was in possession of the premises at the time of the alleged grievances. I do not think that the case as presented in the petition, and their made, makes a case of trespass. In the case as presented in the petition issue was taken by the defendant. I am of the opinion that whether or not this case could have been disposed of had proper remedy been pursued, it being a case not appealable to this court or not triable in this court as an action on the case as already stated, that having taken issue upon this question, the issues thus made by these pleadings are now to be tried irrespective of any question of whether they are properly here on appeal or not. I therefore say to you that this action as it is now before you is not an action of trespass. If it was it could not be maintained in this court for a moment—that is, I mean an action of trespass for breaking and entering the close. It is not such an action. If it were, then the owner of the fee of that farm and barn, not being in possession, could not maintain such an action. But I am of the opinion that he can maintain an action for an injury of a permanent character to his reversionary interest in that farm, if such injury has occurred as averred in the petition.

I may, in passing upon this point, so that I may not recur to it again, say to you that in any event, whatever may be your finding in this case upon other points, if you should come to the conclusion at any time that there should be a recovery here in favor of this plaintiff, that he cannot recover for any damages which he has sustained, or claims to have sustained, if said claim be made for any entry and violation of the possession of these premises. The possession was not his; the right of possession was not his; it was in the tenant. He had no right to enter upon those premises, without the consent of the tenant, for the purpose of putting up such a sign or authorizing such a sign to be put up. Now, therefore, I say to you that for any damages or supposed damages, if such be claimed in this case, for a trespass in breaking into the close—going upon the premises itself—for that act with the act itself of putting it on except as consequential damages may have resulted to this remaining interest of his he can not recover. o that you will lay aside all considerations of that kind from your verdict in any event.

Now, was there any injury in this case to this plaintiff's reversionary interest? To constitute such an injury it must be permanent in its character. By that word "permanent" I mean that you shall understand something of an enduring character—taking the word in its ordinary acceptance, that you shall be able to say that the act that was done there upon that barn, was of such a lasting character as to affect his reversionary interest to injure it. If it was of a mere temporary character, such as placing or hanging a sign upon the barn that could be taken down without any injury to anybody, it would be no injury to that reversionary interest of this plaintiff. If, however, it was of such a character that its effects would exist after the termination of the tenancy and

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affected its value at the time it was done so that if it had to be sold it would have to be sold for less than it would otherwise sell for, then it was such a consequential injury to that reversionary interest, other things concur permitting it, he may recover or should recover to the extent as you are convinced by this injury that he has suffered damage.

Now, look at the testimony. What injury has he sustained in view of the evidence narrated here? What injury do you say this reversionary interest has sustained? Has he lost anything by it? If he has he should be made good provided the facts, as applied to the law that shall be further on given to you, will warrant a recovery at all.

To get at the foundation of this action, and as a starting point, you will inquire, was this thing done? Perhaps there is not much controversy upon that from the evidence. Secondly, under what circumstances was it done, and who did it? Did this defendant do it? or did somebody do it for whose acts this defendant is responsible? Now, I say to you that, in my judgment, the character of this agency was special; that he was authorized, having been a clerk in the store heretofore, to go out to do a special thing, to-wit: put up these signs—was sent out a few days to do that. There is no dispute upon that point.

He was sent out, it is claimed, with specific instructions. It is said that these instructions were general, that at the time that he went out to do this work he had no special instructions, but that he had received his instructions a few days before when he went out to do similar work; which instructions continued in force, and under which, it is claimed, this agent was acting. It is said that his instructions were that he was to put up signs in the manner indicated as being put up here, upon getting proper authority for doing so.

It is further said that he was to get proper authority, or, as it is claimed by this plaintiff, he was authorized to do so by this defendant if he got the permission of the party, or the occupant or party in charge of the premises.

Now, that is a question for you to determine, what were his instructions. And I say to you as a matter of law, this agency, being of the special character which I have named, if he went outside of his authority, and put signs upon this barn without having complied with the instructions given him by his principal before doing so, his act was unauthorized by his principal, and for such act his principal is not responsible. In other words, I state it to be a general proposition, that if the agent does that which he is not authorized to do in the execution of a special agency, where the agency is not general in its character, and where he has no general power to act for his principal, I say in such case where he does the act outside of the authority of his principal, then it is not the act of the principal, but is the act of the agent, and for that act of the agent, or of the party doing it, the principal is not responsible. It is no more, in my judgment, than if a party doing an act for one of you as your agent; you authorize him to do something—go from here to some other point and execute something, and while going there he steps out of his course and commits an assault and battery upon some one driving a wagon, or otherwise commits a wilful, intentional assault, the act of the agent is not the act of the principal.

Now, what are the facts in this case? Was he to get proper authority, or was he to get simply the permission of the party in charge and was that to be sufficient? If the authority was that he was to get proper authority, those were the instructions, and he did not get the authority of the owner, for instance, of these premises, as that word will hereafter be defined to you, then he was acting without the authority of the principal, and the principal would not be responsible for his acts. But if his instructions were simply to get the authority of any man whom he might find in charge of those premises, and that that should be sufficient for his guidance, and he then might proceed and put the signs on the barn and he did that, then for that action the principal would be responsible. That is to say, the agent would be acting for, instead of and in place of his principal. But the effect of having so acted is to be further discussed before finishing the case. That is the effect of getting consent for the agent to do it.

Upon that branch of the case I simply say to you now that there seems to have been considerable conflict in the holdings of the different branches of this court, as to whether the tenant being in possession of those premises could give consent for the owner, or whether or not he was the owner of the premises at the time, it being contended on the part of the defendant in this case that the tenant in such case is the owner to all intents and purposes, being in possession of the premises.

Mr. Gary—He is only claimed to be the owner within the meaning of the statute.

The Court—I will say it is contended within the meaning of this statute he was the owner and had authority to give consent. Upon that branch of the subject I may say this, that if this was a criminal prosecution it might be urged with a good deal of force that the tenant would be the owner within the meaning of that statute, and that statute is passed for no other purpose, apparently, than to punish somebody for a violation of it. It is a criminal statute in its nature.

My own ideas of this case are that that statute does not control this action. Where the language of the statute is given at all it characterizes the act as criminal in its nature if done. But suppose there had been no such statute. I apprehend that a remedy would still exist for a violation of the rights of the owner of the premises, and it does not depend upon that statute for the right of recovery in this case. Now, while this opinion, as I am informed, is not in consonance with the opinion of one branch of this court for whose opinion I entertain the profoundest respect, and hesitate when I find myself not concuring with it. Yet there is the opinion of two branches of the court already varying upon this same proposition, as I am informed. I do not understand that the case has been decided in the District Court practically upon this feature of it. Therefore, we have no finding or holding of the District Court upon that subject. But I am of the opinion, and shall give it to you as the law of this case, that a tenant in possession from year to year has no authority himself to injure the reversionary interest of the landlord, and having no authority himself he cannot depute authority to any one else to so injure it.

It seems to me that if one of you gentlemen should rent a house, and within a day or two, or a week or two, or a month or two before the expiration of your tenancy, some one should come along and desire to put an advertisement upon the front of that house, covering it, and you stand by and say, "Yes, you may do so. I don't care whether you do it or not. I am going out within a day or two," and thus authorize it in terms, and it effects an injury that is permanent in its character, goes over onto the reversionary interest of the owner, that tenant in that case would be a joint

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wrong-doer, and the remedy would lie against both or either.

The burden of proof in this case rests upon the plaintiff to establish affirmatively every material averment in the petition by proof before the plaintiff can recover. The burden is on him to show that the act was done without his consent, and that it was a wrongful act without his authority.

Now, I am requested to say something about the measure of damages in case there should be a recovery in this case. I say to you that the measure of damages is what this plaintiff's loss was in the premises. If he suffered no injury then he is not entitled to any damage at your hands. You must gather this from the evidence in the case, what loss, what damage it has been to him. If he has suffered such damage, if you are satisfied of it from all the evidence, and facts and circumstances in the case, then say by your verdict what it was in case you find for the plaintiff under the instructions already given.

E. M. BROWN for plaintiff.
M. B. GARY for defendant.

SUPREME COURT OF OHIO.

December Term, 1878,

Hon. W. J. Gilmore, Chief Justice. Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Hon. William White, Judges.

TUESDAY, Nov. 11, 1879.

General Docket.

No. 57. Andrews vs. the City of Youngstown. Error to the District Court of Mahoning county.

WHITE, J. Held:

Where judgment is reversed for error occurring on the trial and the cause is remanded for a new trial, the party against whom the reversal is had, by voluntarily submitting to a new trial which results in a verdict and judgment, waives his right to prosecute a petition in error to reverse the judgment of reversal. Collins vs. Davis decided by the Commission, (33 O. S., 567), approved and followed.

Petition in error dismissed.

No. 137. Eliakim H. Moore and the Chillicothe Bank vs. George C. Coates. Error to the District Court of Athens county.

OKEY, J.:

1. The Court having caused its findings on an issue in an action to be entered on the journal, the defendant then filed a motion for a new trial, alleging one of the grounds in these words: "Newly discovered evidence." At the next term, for which the cause had been continued for want of time to hear the motion, the Court refused to hear affidavits containing material testimony, filed shortly after the trial term in support of that ground, although no objection had been previously made to the form of the motion, and also refused to permit the motion to be so amended as to show the names of the witnesses and the newly discovered facts sought to be established by their testimony, and thereupon overruled the motion and rendered judgment on the findings. Held that this was error.

2. While the Court retains jurisdiction over a motion for a new trial on the ground of newly discovered evidence, the hearing of the motion is not limited to evidence discovered during the term at which the motion was made, but may include evidence subsequently discovored, and which, in the absence of such motion, could only be brought before the Court by petition in accordance with the Civil Code, section 301. The object of the provision requiring the application to be made by petition is to bring the matter within the jnrisdiction of the Court in cases where in the absence of such provision, control over the subject would have been lost in the particular case.

Judgment, and the order overruling the motion for a new trial on the ground of newly discovered evidence, reversed, leaving undisturbed the findings at September term, 1874, and the order overruling the motion in other respects.

No. 147. The Fireman's Insurance Company of Dayton vs. Parley C. Holt, receiver. Error to the District Court of Lucas county.

GILMORE, C. J.:

1. A condition in a fire policy against subsequent insurance is not broken by the taking of subsequent policies by the insured which never took effect by reason of conditions therein contained.

2. The receipt of payment on such subsequent void policies is not matter of defense in an action on the prior policy.

Judgment affirmed.

TUESDAY, Nov. 18, 1879.

No. 142. The First National Bank of Warren vs. Henry Fowler and James H. Humiston. Error to the Court of Common Pleas of Trumbull county. Reserved from the District Court of that county.

OKEY, J.:

1. A promissory note containing the words, "I promise to pay to the order of myself," having been signed by two persons and placed by one of them in the hands of the other to be by him put in circulation for his own benefit, the latter may, before the note is due, by indorsing his name thereon, invest a *bona fide* holder with a complete title thereto, although the name of the other maker is not so indorsed.

2. In violation of an agreement between principal and surety in a promissory note, the principal transferred the note, before due, as collateral security for an extension for ten days in the time of payment of a protested draft for a less amount, the person receiving the collateral acting in good faith, and having no knowledge of such agreement. Held, that the title of such holder, to the extent of his draft, is valid, assuming the facts to be as stated.

Judgment reversed.

James H. McGruder vs. Isaac Esmay. Error to the District Court of Ottowa county.

BOYNTON, J. Held:

1. Where a patent was issued by the Government to the one purchasing the land and making the entry under the act of Congress of April 24, 1820 (3 U. S. Stat. at Large, 566,) who, previously to the issuing of said patent, but after said purchase and entry had conveyed the land by quit-claim deed, such patent inured to the benefit of the grantee and his assigns. The patent being founded on such entry, relates back and takes effect from the time the same was made.

2. A record of a certificate by the county Auditor, under the act of March 23, 1840 (1 Curwin, 630), that the delinquent tax list was published for four consecutive weeks prior to December 1, does not show a compliance with the provisions of said act requiring the delinquent list and notice of sale to be published for four weeks between the first day of October and the first day of December.

3. Where the record required to be kept by section 34 of said act fails to show that lands sold as forfeited to the State for non-payment of taxes were previously offered at delinquent sale and not sold for want of bidders, a deed to the purchaser at such forfeited sale is invalid.

4. The provision of the act of May 7, 1869 (66 O. L., 338), prescribing what shall constitute conclusive proof

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of possession in favor of a purchaser at a tax sale, cannot constitutionally operate to set the statute of limitations running in favor of such purchaser prior to the passage of the act.

Judgment reversed and cause remanded for a new trial.

Gilmore, C. J., and Okey, J., being of opinion that the act of 1869 is constitutional, and on the facts affords a complete protection to the defendant in error, dissented.

No. 101. Samuel Dye vs. William Scott. Error to the District Court of Washington county.

GILMORE, C. J.:

1. Oral testimony is admissible to prove that the indorser, as between himself and the indorser, at the time of indorsing a note in blank, waived demand and notice.

2. A waiver of demand of payment at the maturity of a note is also a waiver of notice of non-payment.

3. The uncorroborated testimony of a witness who wilfully testifies falsely to a fact material to the issue, may be rejected by the jury as unworthy of credence.

Judgment of the District Court reversed and that of the Court of Common Pleas affirmed.

SCHUYLKILL COUNTY COMMON PLEAS.

LAFLIN & RAND POWDER CO. VS. SCHOLTES & CO.

In sheriffs' sales the rule of *caveat emptor* applies where there has been no misrepresentation or fraud practiced; and where notice of the true state of facts has been given, a sale will not be set aside, even though the purchaser may have acted under an erroneous belief as to the amount of the liens subject to which the property was sold.

GREEN, J.:

The purchaser of the real estate seeks to be relieved from his act by having the sale set aside, upon the ground that the property was sold subject to a mortgage on which he supposed only about three hundred dollars was due, when in point of fact there was nearly twelve hundred dollars due upon it. It was a saving fund mortgage, and his error was in taking for granted that the sum paid in on the shares was to be a credit on the mortgage.

The evidence shows that this was his own mistake, caused by no act or fraudulent or even erroneous representation on the part of any one connected with the saving fund association, and authorized to speak for it. On the contrary the evidence shows that the attorney of the association gave notice, at the sale, of the mortgage and the amount due upon it. Mr. Ludes, the purchaser, heard the notice read, but he thought he knew better than the attorney of the association, and so purchased the property for five hundred and ten dollars, subject to the mortgage. He now finds out that the notice was correct and that he was wrong, and seeks to be relieved from the effect of his own act.

I do not see on what principle the purchaser is to be relieved. He purchases with his eyes wide open, after notice from a party authorized to speak. Did he not voluntarily run the risk when he bid on the property after the notice? If the rule of *caveat emptor* is not to apply in such a case as this, it might as well be abolished. If the purchaser had not been put upon his guard by the notice, then there would have been some ground on which he might claim relief. And this is the difference between the present case and Cumming's Appeal, 11 Harris, 509, which is mainly relied on to justify the court in setting the sale aside.

This case more nearly resembles that of Haugh vs. Lorentz, decided in District Court of Phila., Nov., 1849, Tr. & Ha., Pr. 3d Ed., Vol. 1, P. 1013, "*Caveat emptor* is the rule which rigidly applies to sheriff's sales as far as title and encumbrances are concerned." "In this instance, however, ignorance cannot be properly allowed as an excuse, even though it may have existed; for clear and distinct notice that the title of the purchaser would be controverted was made at the sale. That the purchaser was deaf, and did not hear so as to understand the import of the notice which was made, does not make the case any better. He should act in such matters through the agency of others." Mr. Ludes both heard and understood, and voluntarily ran the risk. Whilst feeling some desire to relieve the purchaser from the effect of his own act, I can see no principle in which it can be safely done, and therefore the rule to set aside the sheriff's sale is dismissed.

Rule dismissed.

—*Schuylkill Legal Record.*

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Nov. 21, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Nov. 15.

Abraham Landman and wife to Anthony A Kistemaker. $250.

Julia R. Wilson and husband to Colgate Hoyt, trustee. $500.

George W. Dewey to Cit. Savings and Loan Ass'n. $500.

Maria Kemp and husband to M. S. Hogan. $300.

Samuel Chapman to Heinrich Laysy. $150.

Christian Ohl and wife to Trustees of C. W. College. $500.

William Aldis and wife to Matilda L. Hitchcock. $500.

Lewis Lariek to Chas. M. Moses. $378.

R. T. Page et al to same. $1,181.

Esther Hurlburt and husband to Ludwig Hendertmark. $300.

Henry Meyer and wife to Dorothea Scheede. $500.

Nov. 17.

August Zelig and wife to Alvah Bradley. $3,400.

George Miller to Barbara Pullman. $400.

T. J. Miller and wife to Koch, Goldsmith, Josephs & Co. $1,000.

C. M. Spitzer to A. Wel[illegible]r, vice pres., etc, et al. $4,000.

B. F. Robinson to The Cit. Savs. and Loan Ass'n. $1,000.

Liberty H. Ware to same. $350.

Nov. 18.

Ann Patterson and husband to Jos. Rosenwater. $150.

Harriet Wells to John H. Wells. $341.

George A. Dollinger et al to Fanny Weichsel. $85.

Joseph Plojhart and wife to Loeb Halle. $800.

J. P. Lutz and wife to Anna C. Minch. $300.

James W. Palmer and wife to A. B. Sherwin. $450.

J. H. Salisbury and wife to George S. Wright. $1,300.

T. M. Irvine and wife to C. B. Lockwood. $1,400.

Adam Wagner to Der Deutsche Bund. $600.

Fred J. Miller to John F. Whitelaw. $2,200.

Nov. 19.

James A. Johnson et al to Wm. S. Curtiss. $1,500.

Edward McGroney and wife to M. S. Hogan. $400.

S. G. Hamilton et al to David Cockburn. $600.

George P. Welch and wife to The Soc'y. for Savs. $4,375.

Frank Hewson and wife to George W. Canfield. $90.

Anna P. Schutt et al to Lewis Henninger. $550.

Chas. A. Waller to Mary A. Jones. $1,000.

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Thirza E. Cunningham and husband to Andrew Hirschner. $100.

Timothy D. Crocker and wife to The Board of Trustees of The Western Reserve College. $8,000.

Christian H. Hemsohn to Jacob Schroeder. $2,100.

Adolph Klippel to Martha A. Witzel. $350.

Nov. 20.

Henry Coyer and wife to Loren Gillett. Two hundred and fifty dollars.

H. P. Bemiss et al to D. Kinaston. One thousand dollars.

Lord, Bowler & Co. to George Mygatt. Two thousand five hundred dollars.

J. E. Hayner and wife to The South Cleveland Banking Co. One thousand two hundred dollars.

Sarah L. Bachelor and husband to Amasa Stone. Four thousand five hundred dollars.

Nov. 21.

George Pichota to Christian Ruder. Two hundred and thirty dollars.

Adam Nungasser and wife to Soc. for Savs. Fifteen hundred dollars.

Harriet Olmstead to Oscor N. Olmstead as admr., etc. Eleven hundred and ninety dollars.

Peter Apy to H. O. Bremer. Three hundred dollars.

Frank Stacy and wife to Jacob Voelker. One hundred and fifty dollars.

L. VanDyke and wife to Jacob Reinbaum. Three hundred dollars.

John Frank and wife to Amasa Stone. Three hundred dollars.

CHATTEL MORTGAGES.

Nov. 17.

John H. Francisco to George H. Breen. $80.

George Rettberg to Philip Linn. $100.

C. T. Scheurer to M. S. Bishop. $300.

Nov. 18.

Jos. Plojhart and wife to Charles Bruml. $250.

F. S. Barney to H. W. Murray. $750.

John Green to Kean & Lines. $600.

Nov. 19.

Alexander Russell to Hugh Harrison. $600.

Thos. Elwood to Merts & Riddle. $400.

Nov. 20.

Gustav Matzaun and wife to C. L. Rosa. One hundred and sixty dollars.

William Harrison to Frank Reed. Two thousand dollars.

Nov. 21.

Peter Mang and wife to Arnold Moas. Two hundred and forty dollars.

A. J. Kessler and wife to H. P. Weddell. Five hundred dollars.

DEEDS.

Nov. 13.

Elizabeth A. Middleton to Franz Zeelaff. Six hnndred dollars.

Charles W. Peterson and wife to Harriett Palmer. Seven hundred dollars.

Catharine Smith to Wm. Smith and wife. Four hundred dollars.

Same to Mathias J. Moskopp. Four hundred dollars.

J. J. Corothers et al by Felix Nicola, Mas. Com., to Meyer Weil. Three hundred and thirty-four dollars.

Nov. 14.

Wm. Blackride and wife to David Latimer. $2,500.

Stephen Balkwell to Marshall P. Stone. $7,500.

Henry Gutjahr and wife to Henry Treukamp. $1.

Henry Treuhamp and wife to Christian Gutjahr. $1.

Same to Henry Gutjahr. $1.

Henry Gutjahr and wife to Elizabeth Treukamp. $1.

Isaac Kennedy and wife to Otto J. Vogts. $1,000.

David Latimer to Wm. Blackride. $3,000.

Mrs. Dorathy Morris to John Mooney. $2.

Richard Newton and wife to Marian Smith. $70.

N. G. Porter to Ellen S. Whitney. $217.

Elias Sims to Roeltke Laudman. $462.

Marcus E. Cozad by E. H. Eggleston, Mas. Com., to Laura L. Otis et al, ex., etc. $1,424.

Augusta Seggel et al by C. C. Lowe, Mas. Com., to Felix Nicola. $1,667.

Moran Judd et al by J. M. Wilcox, Sheriff, to Louis Henninger. $667.

Fritz Pay by same to Christian Kimmel. $134.

Heirs of Bernard Tunte by same to Samuel H. Kirby et al. $4,475.

Nov. 15.

Frank Srp and wife to Edward Belz, trustee. $1.

Edward Belz, trustee, to Mary Srp. $1.

B. H. Barney, ex., etc., to Celestine B. Martin, $4,200.

Helen Dowse to Frank Kukral. $363.

Helen Davey and husband to Elizabeth E. Davey. $700.

Elizabeth E. Davey to Jeremiah Davey. $700.

Matilda S. Hitchcock and husband to Wm. A. Harvey. $500.

Peter Hecker and wife to Albert P. Root. $275.

Lydia Lamson to Henry Bowers. $40.

Konrad Marquardt and wife to Samuel Chapman. $850.

Charles W. Moses to R. T. Page and wife. $1,200.

Charles H. Norton and wife to C. W. Prentiss. $5,506.

D. P. Rhode's estate by R. R. Rhodes to Henry Meyer. $301.

F. W. Sanderson and wife to Stoughton Bliss. $2,300.

Wm. Schmidt to Edward Wanderlick. $1,250.

Abraham Teachout and wife to Albert R. Teachout. $7,000.

Geo. Weckerling to M. A. McAdams. $1,250.

Mary Jane Abbott by Thos. Graves Mas. Com., to Anna E. Kaestle. $788.

J. H. Rhodes, trustee, by O. B. Barnard, Mas. Com., to Charles B. Lockwood. $1,700.

Louis Bameier and wife by J. B. Fraser, Mas. Com. to Felix Nicola. $2,800.

J. B. McConnell et al by Felix Nicola, Mas. Com., to Jas. M. Jones et al. $1,635.

J. M. Wilcox to F. E. Boyer. $187.

Nov. 17.

Silas Alexander and wife to Lester F. Alexander. $800.

Daniel Ault to George Miller. $550.

John Balls and wife to John Gloss. $5:

J. M. Curtiss and wife to Townsend P. Hales. $1,644.

Israel S. Converse and wife et al to F. J. Miller. $3,500.

C. B. Lockwood to W. W. Boynton. $350.

Maria Miller and husband to Caroline L. Castor. $250.

Nicholas Meyer rnd wife to Joseph Volf and wife. $440.

Elizabeth McEmery to Michael McEmery. $2,500.

George W. Tibbett and wife to C. D. O'Connor. $100.

R. D. Updegraff to J. T. Updegraff. $1.

Rebecca Woodworth by H. C. White, Mas. Com., to John Crowell. $1,455.

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Nov. 18.

James Brekenshire, trustee, to W. C. Walker. $1,760.

Eunice Abbott to same. $1.

J. T. Brooks, assignee, to Samuel Emberly. $1.

Thomas Stackpole et al to same. $720.

Henry R. Hadlow and wife to Charles Brandt. $1,500.

Loeb Halle and wife to Julia Plojhart. $2,250.

C. B Lockwood to Louise M. Ervine. $1,500.

Merchants' Nat. Bank. to J. H. Morley. $500.

Charles J. Schub and wife to F. W. Tegtmeier. $2,500.

A. J. Sanger, assignee, et al to J. V. Chapek et al. $225.

George S. Wright and wife to J. H. Salisbury. $2,000.

J. M. Newcomer et al by J. M. Wilcox, sheriff, to Emma Newman. $2,500.

Nov. 19.

Mary Becker and husband to Adolph Klippel. $350.

Henry Clark and wife to Geo. Everts. $400.

James H. Clark and wife to Edmund Walton et al. $13,000.

Lewis Henninger and wife to Anna P. Schutt. $2,000.

J. E. Ingersoll, trustee, to Charles N. Meech.

John G. Jennings and wife to The City of Cleveland. $25,000.

Same, trustee, to same. $25,000.

Mrs. T, A. Judson to Mrs. M. A. Fellows. $1,300.

C. L. Peterson and wife to Christian H. Heinsohn. $500.

Anna C. Schauebs to same. Two thousand six hundred dollars.

Leo W. Sapp and wife to Chas. N. Meech, admr., etc. Five dollars.

Mary A. Woodbridge and husband et al to J. E. Hayner. Three thousand three hundred dollars.

Charles W. Wells to R. H. Roberts. Eight hundred dollars.

Martha Ward to James Neil One thousand one hundred and fifty dollars.

Catharine V. Wetsel and husband to Geo. P. Welch. Nine thousand dollars.

Admrs. of Wm. Gabriel, deceased, by Felix Nicola, Mas. Com., to Chas. A. Walter. Five thousand dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending Nov. 17, 1879, against the following Persons:

Nov. 12.

Cleveland Coal & Iron Co. $3,150,

Nov. 13.

Pard. P. Smith. $1,907.
Jacob Swader. $250.

Nov. 14.

R. H. Cutter. $110.

Nov. 15.

C. Higgins. $17.20.

Nov. 17.

Sovereigns of Industry, etc. $352.
Comfort A. Adams et al. $551.64.

COURT OF COMMON PLEAS.

Actions Commenced.

Nov. 14.

16190. The Cit. Savs. and Loan Ass'n. vs Elias R. Pelton et al. To foreclose mortgagr. Estep & Squire.

16191. Same vs George Newman et al. Foreclosure and relief. Same.

16192. J. W. Vanderwerf vs John Shear et al. Appeal by deft. Judgment Oct. 23, J. M. Stewart.

16193. Ellen McMahon vs Thomas Soden. Error to J. P. J. J. Carran.

Nov. 15.

16194. Jacob Wissdorfer vs Amanda Bennett et al. Equitable relief, to subject equities, etc. B. R. Beavis.

16195. John Tyala vs David Heller. Appeal by deft. Judgment Oct. 29.

16196. S. G. Cosgrove vs James Rafter et al. Money and to subject lands. T. K. Dissette.

16197. M. M. Spangler et al vs C. R. Hodge. Money only. J. H. Schneider.

16198, The Cit. Savs. and Loan Ass'n. vs F. A. Andrews et al. Foreclosure of mortgage. Estep & Squire.

16199. Fred Schultz vs P. Cunningham. Money only. W. F. Carr.

Nov. 17.

16200. Robert H. Strowbridge vs Buel B. Spafford et al. Account and to subject lands. H. W. Canfield.

16201. J. C. Saxton vs Amasa B. Wetham et al. Money only. Otto Arnold.

16202. F. H. Henke vs John J. Carran. Appeal by deft. Judgment Oct. 20. J. T. Sullivan.

16203. Dudley Baldwin, Jr., vs Salero Mining and Man. Co. Equitable relief. W. J. Boardman.

Nov. 18.

16204. Minnie Simmons et al vs Helen Richmond. Money only. Davidson.

16205. Caroline Hoffman vs Levi F. Bauder, auditor, etc. Equitable relief. Grannis & Griswold.

16206. The Cleveland Library Ass'n. vs Moses G. Watterson, treas., etc. Money only. Same.

16207. J. H. Gerber et al vs Joseph Koblitz. Appeal by deft. Judgment Nov. 6. Bishop, A. & B.; J. M. Stewart.

16208. Mrs. A. A. Streator, admx., etc., vs A. W. Lamson, admr., etc. Appeal by deft. Judgment Oct. 30.

Nov. 19.

16209. Lena Wagner vs George Rothman et al. Appeal by defts. Judgment Oct. 28. Coates; Robinson.

16210. P. J. Brown vs Samuel Hendrickson. Appeal by deft. Judgment Nov. 12. Breckenridge, Dellenbaugh.

16211. Robert Greenbalgh vs W. A. Babcock. Appeal by deft. Judgment Oct. 20th.

16212. Elizabeth Furnal vs Harriet M. Lewis et al. Money and to subject lands. Hurlbut.

Nov. 20.

16213. C. E. Shattuck vs Joseph B. Erb. Money and to subject lands. Robinson.

16114. Wm. H. Capener vs Wm. C. Hoffman. Appeal by deft. Judgment Oct. 21st.

Motions and Demurrers Filed.

Nov. 13.

3499 to 3506 inclusive, State ex rel J. S. M. Hill vs The L. S. & M. S. Ry. Co. Demurrer to petition.

Nov. 14.

3507. Nevins vs Elwell et al. Motion by deft. to strike answer from petition and to require plffs to separately state and number causes of action.

3508. Otis vs Robinson et al. Motion by deft. for new trial.

Nov. 15.

3509. Hickey vs Gill et al. Demurrer by deft. Watterson, treas., etc., to the petition.

3510. Castor vs Hogg. Demurrer to the petition.

3511. Ensign et al vs Pelton. Motion dy plffs. to strike out from answer as irrelevant, etc.

3512. Rewell vs same. Same.

3513. Weiss vs same. Same.

3514. Adams et al vs Crocker. Motion to require plffs. to separately state and number causes of action and to make petition more definite and certain.

Nov. 15.

3515. State on complaint of Mary A. Law vs Sheen. Motion by deft. for a new trial.

3516. Ferbert et al, exrs, etc, vs Seiger et al. Motion by deft. Strauss for the appointment of a receiver.

3517. Gay vs Gay et al. Motion by deft. for new trial.

3518. The Cit. Savs. and Loan Ass'n. vs Lardner et al. Motion by defts. to strike out from amended petition.

3519. Judson vs Pelton. Motion by plff. to require deft. to separately state and number causes of action.

3520. Neglespach, guardian, etc., vs Mut. Life Ins. Co. Motion to strike from amended reply.

3521. Koerth vs Hibernia Ins. Co Motion by deft. for new trial.

Nov. 17.

3522. Scott vs Bobbitt et al. Motion by plff. for leave to cross-examine certain witnesses.

Nov. 18.

3523. Derringer et al vs Johnson et al. Motion by plff. to make answer of S. W. Johnson more definite and certain.

3524. Wilcox vs Haver et al. Demurrer by plff. to 1st defense of answer of R. H. Strobridge.

3525. O'Neil vs Hemson. Motion to make the petition more definite and certain and to strike out from answer.

Nov. 19.

3526. Baker vs Bratton. Motion to require pl. to give security for costs, etc.

3527. Vincent vs Gabel et al. Motion by plff. for new trial.

Nov. 20.

3528. Morgon vs Marvin, admr., etc., et al. Demurrer by deft. Marvin to amended and supplemental petition.

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Motions and Demurrers Decided,

Nov. 13.

2978. Hermann vs Mann. Overruled. Deft. excepts.

3348. Schwind et al vs Horn et al. Granted.

Nov. 15.

2734. Sturtevant et al vs Cleve. Organ Co. Sustained.

2884. Haines, treas., vs Swain. Overruled.

2885. Same vs same. Same.

2923. Woodb3idge vs Pelton. Stricken from docket.

2925. Frew vs Watterson, treasurer. Same.

2927. Miner, etc., et al vs Roskopf et al. Same.

2930. Smith vs Giffhorn. Overruled. Plff. has leave to answer.

2976. Rider vs Sullivan. Overruled.

2979. Willis, exr., vs Whitaker, admr., et al. Stricken from docket.

2984. Curtiss vs Koerpel. Overruled.

3001. Smith vs Coe et al. Stricken from docket.

3012. Williams vs Grady. Overruled.

3441. Baldwin vs Bilek et al. Granted.

Nov. 17.

2209. Corning & Co. vs Northern Transit Co. Deft. has leave to answer by Dec. 6.

2976. Rider vs Sullivan. Same by Nov. 29th.

3522. Scott vs Bobbitt et al. Granted.

Nov. 19.

3001. Smith vr Coe et al. Defts. have leave to re-file demurrer to petition, etc., sustanter.

3013. Murphy vs Berea Stone Co. Sustained.

3043. Parks vs Whitney et al. Overruled.

3047. Hilliard vs Forest City U. L. & B. Ass'n. Granted.

3096. Rittberger vs Oberle et al. Overruled.

3097. Dahnert vs Russell et al. Motion to strike from answer, etc., granted and cross-petition as to Dahnert dismissed.

3102. Huettle & Co. vs Hayes et al. Granted.

3104 } 3105 } 3106 } Sherwin et al vs Neff et al. Overruled. Deft. excepts.

3107. Rogers vs Getchel et al. Stricken from docket.

3121. Soc'y. for Savs. vs Chamberlain et al. Sustained.

3123. Bates vs Pringle et al. Granted.

3124. Roosa vs Ware. Same.

3125. Evears vs Lewis. Withdrawn.

3132. DeVeny vs Thorpe. Overruled.

3138. Heller vs Kellogg. Srricken from docket.

3142. Rauscher vs Poe et al. Same.

3147. Hughes vs Davis. Granted.

3152. Hogan vs Capener. Overruled.

3154. Wenham vs Andrews et al. Granted.

3176. Quayle vs Kennedy. Overruled.

3177. Everett vs Bauman et al. Sustained.

3183 } 3184 } 3185 } Stolz et al vs Koester et al. Stricken from docket.

2441. Cleve., Linndale & Berea Plank Road Co. vs Higley et al. Deft. has leave to answer by Dec. 20.

3102. Huettle & Co. vs Hayes et al. Overruled.

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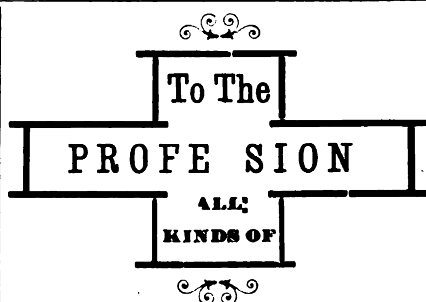

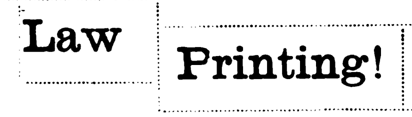

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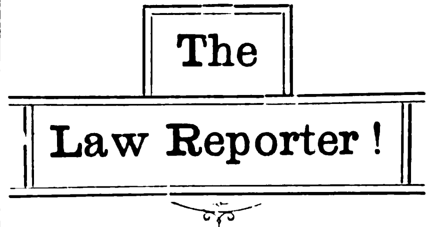

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AS WE shall be absent from the city a considerable portion of next year the publication of this paper will not be continued by us after the close of the present volume.

FOR undoubtedly good reasons the deputy who has in charge the making of the assignment has not made it the past two weeks until Saturday morning. This accounts for its delay in reaching our subscribers.

THE LAW OF CONTRACTS.—Pomponius, a celebrated law teacher of Rome in the sixth century, entered into a contract with a Roman citizen to instruct his son in the law. This was the contract: So many coins if the pupil became learned in the law, the test to be that he should win his first case before the tribunal. Pomponius turned over his pupil as perfected in his studies. The father brought suit against the master to set aside the contract, and retained his son to plead this his first case. "If my son gains the case the contract is made void. If he loses I am not bound." Pomponius answers: "If I fail in my defense the son wins his case, and I am entitled to my money. If I gain, the court gives me the money by its decree." Which side had the law?

CUYAHOGA COMMON PLEAS.

November Term, '79.

M. H. STEEL ET AL VS. JAMES H. BURGERT ET AL.

Where Administrator may be Sued, etc.

Where an action is commenced in a county in which one of several defendants resides, one of the defendants being an administrator who was appointed, and, at the time of the commencement of the action, resided in a county other than that in which the action is brought, the same being upon a tort alleged to have been committed by the intestate in his lifetime jointly with the other defendants, summons against such administrator may issue to the county in which he resides.

Section 10, chapter 5, 75 O. L., 611, does not exempt an administrator from being compelled to answer an action rightly brought in any other county than that wherein he was appointed or resides.—[ED. LAW REPORTER.

BARBER, J.:

This action is brought against Jas. H. Burgert, Amos Burgert, and Adam Burgert as administrator of David Burgert, deceased. The petition represents that James H., Amos and David Burgert in the lifetime of David Burgert were partners doing business in the city of Cleveland under the name of D. Burgert & Sons. Fourteen causes of action are set up, all of the same character, charging certain fraudulent transactions against the members of said firm in their firm transactions, whereby the defendants became indebted to the plaintiffs in a large sum of money—about $4,000. Summons appears to have been served on James H. Burgert in this county and on the other two defendants in Lucas county.

Adam Burgert answers only for the purpose of pleading to the jurisdiction of this court as to him as administrator. He says that his intestate at the time of his decease resided in Lucas county, and after his decease he was appointed administrator of his estate by the Probate Court of Lucas county and he is still acting under said appointment as sole administrator of said estate. That he then and ever since then has resided in said county of Lucas, and that the summons in this action was served upon him in the county of Lucas, and he claims that this court has not thereby acquired jurisdiction over him or over the subject matter of the action as to him.

To this answer the plaintiff replies that his co-defendant, James H. Burgert, was and is a resident of Cuyahoga county and personally served therein. To this reply this demurer is filed.

The defendant makes the following points in his brief. He says:

"1st. The administrator of an estate, being administered in Ohio, can only be sued as such, in either the county of his residence, or of his appointment. (See O. L., 1875, vol. 75,

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601, 1, div. 2, chap. 5, sec's. 1 to 10 inclusive. Seney's Code, sec. 53. Same, 70 O. L., 138, passed April 18, 1873. S. and C. Code, sec. 53.)

From the foregoing it appears that the exception as to the *place* of *suit* against the administrator, found in vol. 75 (1878) O. L., 610, 1, sec. 10, was first enacted in 1873, (O. L., 70, vol. 138), and thence carried into the codification of 1878.

Prior to that time the administrator might be compelled to answer anywhere, the same as any other unincorporated defendant.

2nd. The ground on which it is insisted the jurisdiction over Adam Burgert, administrator, is maintained, is that appearing in O. L., vol. 75 (1878) p. 607, secs. 14 and 17, providing for joinder of defendants in certain cases. An examination of these sections shows that they are neither of them applicable.

a. The first section (14) relates to cases in the nature of chancery.

b The second section (17) relates to cases where the liability is several on an instrument in writing.

3d. There is no warrant for the issuing and serving of summons, on this or any other of the defendants, outside of the county of Cuyahoga. The liability is not on an instrument. Sec. 4, chap. 6, div. 2, O. L., 1878, 613, gives the only cases, by reason of joint liability, in which summons may issue to and be served in another county. Sec. 38, Code changed, O. L., 1878, 607, sec. 17, omitting the word "obligation," leaving only "instrument."

4th. The provisions of sec. 10, chap. 5, div. 2, O. L., 1878, provide for bringing to either the county of the residence or appointment, of any other properly joined defendant.

The wisdom of the change in 1873, doubtless rests in the wish to protect the estate from the expense of defending litigation, in any and every county, where the administrator could be served, or a co-obligor could be served with summons.

5th. The provisions of the amendment of 1873 (70 O. L., 138) are *restrictive* and not merely enabling and enlarging. Before that enactment the administrator could be sued in any county in which any other natural person could be sued:

It cannot be claimed that the intention in the amendment was to continue that liability, and also to make the administrator amenable to suit, in addition, in the county of his appointment, the domicile of his decedent. If so, he and the guardian or trustee might be sued in more places in the State than any other natural person.

The intention, we think, was to leave it, the jurisdiction, to the two counties, that of residence and appointment.

The maxim *Expressio unius est exclusio alterius*," is applicable.

The plaintiff maintains that the exception in section 10 referred to is enlarging and not restrictive; that it adds to the places where the administrator may be sued the county of his residence and the county wherein he was appointed.

The place where the action may be brought, so far as the demurring defendant is concerned, depends upon the question whether he is properly joined as a defendant in the action as well as the construction of section 10. (Drea vs. Carrington et al, 32 O. S , 595). In actions for torts the plaintiff has a right of action against all the joint tort feasors either jointly or severally. He may at his election maintain his action against them all or against any of them. This doctrine is as old as the law and needs no citations in its support. It does not depend upon sections 14 or 17 of chapter 3 of the revised code, nor did it depend upon the provisions of sections 35 or 38 of the old code. Those provisions were inserted in the code to provide for joining parties as defendants against whom a joint cause of action did not exist at common law. So those sections have no application in the settlement of this question. David Burgert, if he had lived, would be jointly liable to be sued in this action with his co-defendants for the fraud charged to have been committed by them jointly. And where he would have been a proper party if living, his administrator is a proper party after his death.

The next question raised by the demurrer is, can the administrator, when he is a proper party defendant, be sued in any county other than his residence or where he is appointed, when one of his co-defendants resides and is served in the county where the action is brought? The statutory provision on this subject is section 10, chapter 5, 75 O. L., 611, which reads as follows: "Every other action must be brought in the county in which a defendant resides or may be summoned, except actions against an executor, administrator, guardian or trustee, which may be brought in the county wherein he was appointed or resides, in which case summons may issue to any county."

This exception was first introduced into the code by the Act of April 18, 1873, (70 O. L., 138), and the defendant concedes that prior to that an administrator might be sued and summoned the same as any other party—but he claims that that exception now exempts him from being compelled to answer an action brought in any other county than that wherein he was appointed or resides. Is that a fair construction of section 10?

The first part of the section is restrictive. An action cannot be brought in any county. The place of bringing the action is limited to the counties in which a defendant resides or may be summoned. It can be brought in no other. This applies to all actions except those provided for in the preceding sections of chapter 5, and to all defendants. The exception comes in to this restriction. It is an exception to a restrictive act and provides that the actions covered by this section, when administrators, executors, guardians or trustees are properly made defendants, may be brought, notwithstanding the restriction in the first part of the section, in the county wherein such party was appointed or resides. The action is properly brought in this county. One of the defendants having been served here and under the provisions of section 4, chapter 10, 75 O. L., 613, the summons could be and was rightfully issued to Lucas county and there served on the other defendants.

The demurrer is therefore overruled.

J. G. POMERENE and CHARLES E. PENNEWELL for plaintiffs.

J. C. LEE for defendants.

GEORGE H. WOOSTER, ASSIGNEE, VS. LEWIS SCHAAF.

Motion to set aside Levy and for Return of Execution etc.

BARBER, J.:

This case is before the court on a motion to require the return of an execution which it is alleged was wrongfully issued.

The facts on which the motion is based, and about which there is no dispute, are of record—and as follows:

The plaintiff recovered a judgment against one C. B. Clark before a Justice of the Peace. The defendant in this action became his surety on a bond for appeal to the Court of Common Pleas. In the Common Pleas on appeal a judgment was again rendered in favor of the plaintiff. Proceedings in error were instituted in the District Court to reverse that judgment and a supersedeas bond

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filed. In the District Court the judgment of the Common Pleas Court was affirmed. Exceptions were taken and a petition in error filed in the Supreme Court, where the case is now pending.

After the filing of the petition in error in the Supreme Court and before the filing of a supersedeas bond, this action was commenced by the plaintiff in that action in the Justice's Court against the surety on the bond for appeal filed in the Justice's Court. The case went to trial. On the same day, and while the trial was proceeding, the defendant Clark in the error proceedings in the Supreme Court filed in the proper court a supersedeas bond to stay proceedings to collect the judgment against him. After the argument was concluded and before the jury was charged a motion was made by the defendant Schaaf to have the case taken from the jury and dismissed, and in support of the motion, filed with the Justice a certificate from the clerk of the court showing that a supersedeas bond had been filed.

The Justice overruled the motion to dismiss the action and entered upon his docket a statement that the case should proceed to verdict and judgment, but no further proceedings could be had in the case until a mandate should be received from the Supreme Court. A verdict was rendered for plaintiff and judgment rendered thereon. No further proceedings were had before the Justice's Court—but the plaintiff took a transcript and filed it with the clerk of the Court of Common Pleas, who entered it upon the lien docket—and thereupon on the precipe of plaintiff an execution was issued to collect the judgment, and a levy was made on the personal goods and chattels of the defendant. This motion is to set aside that levy and order the return of the execution. Two objections are made to its being granted. First, that this court has no authority to act in the premises. That the duties of the clerk and sheriff are merely ministerial—regulated by law and not under the control of the court. Second, that the supersedeas bond did not operate on this judgment. Held, 1st, The court has jurisdiction over an execution issued upon its judgment and the proceedings under it, and may, if it is wrongfully issued, set aside a levy made under it and order its return. It has been so held by Judge Prentiss of this court, and there are numerous authorities in its support.

Boyle vs Zacharie & Trimm, 6 Peters, 648. Herman on Executions, section 403, and cases there cited.

2. There can be no doubt but that the supersedeas bond did operate on this case. It is not disputed but that it operated on the case of Wooster, assignee, vs. C. B. Clark. This proceeding is only another mode of collecting that judgment. If this judgment should be collected and the Supreme Court should reverse the case pending there the fruits of that decision of the Supreme court would be lost to the parties entitled to the benefit thereof.

The entry on the Justice's docket was substantially a stay of proceedings and it was not vacated by filing it in this court. The execution was wrongfully issued. The levy is therefore vacated and the execution ordered to be returned, and all further proceedings stayed until the proper mandate is received from the Supreme Court.

Ball & Raynolds, for plaintiff.

Marvin, Laird & Cadwell, for defendant.

U. S. CIRCUIT COURT, W. D. PENN.

Opinion Filed Nov. 10, 1879.

WASHBURN VS. THE ARTISAN'S INSURANCE CO.

Insurance — Explosion — Fire — Exception in Policy.

In this case the court construed the exception in the policy, and stated under what circumstances the loss would be considered to have been caused by an explosion and when by fire.

McKennan, J.:

In this case the parties in writing stipulated to dispense with a jury, and that, therefore, the facts should be found by the court. The suit was brought upon a policy of insurance against loss by fire, and the following facts are found as the result of the preponderance of the voluminous evidence in the case:

1. On the 15th of February, 1877, the defendant issued a policy of insurance to the plaintiff, by which it was agreed to insure the building known as Washburn Mill A. in the sum of $850, and the machinery therein in the sum of $1,700, for one year.

2. This policy was renewed and extended for one year from the 15th of February, 1878.

3. On the 2nd of May, 1878, the property described in the policy was totally destroyed, and the proofs of loss were duly furnished by the plaintiff to the defendant.

4. The primary cause of the loss was a destructive fire, which communicated with some explosive matter in the mill, a disastrous explosion ensued, and thus the entire premises were destroyed and consumed.

5. About the time and before the renewal of the policy in controversy, the plaintiff, by his agent, represented to the defendant, that no greater rate of premium than 3 per cent. would be paid for insurance of the same property during the year 1878, upon policies thereafter negotiated, and upon the faith of this assurance, the defendant renewed its policy.

6. No higher rate of premium than three per cent. was paid or agreed to be paid by the plaintiff after the renewal of the policy in suit, to any other company for insurance of the premises covered by the defendant's policy.

This special finding of facts necessarily leads to a general finding in favor of the plaintiff for the whole amount of his claim and interest from July 20th, 1878. This is liquidated at twenty-seven hundred and forty-seven dollars and sixty-three cents, as of date November 10th, 1879, for which judgment will be entered.

The decisive question in this case is one of fact, and, if a jury had found it in favor of the plaintiff they must have rendered a verdict for him. Was the loss caused by a destructive fire, or by an explosion within the insured premises? I have affirmed the first hypothesis, as supported by the weight of the evidence; but, in view of the effect of the explosion which ocuurred, it remains to consider whether the loss is within the exception in the policy.

That the magnitude of the fire was rapidly increased, and hence the destruction of the premises was promoted and accelerated, by the explosion, is incontrovertible. The policy embraces all loss caused by fire, and, in this respect, the exception does not limit its scope. Both the body of the policy and the exception have referererence to original or proximate causation, and to all the resulting consequences. It is only then in a case, where an explosion originally produces the loss, or there is mere ignition of explosive matter and a destructive fire ensues. that the exception applies. But where an insured structure is attacked by fire, in the progress of which the ignition of an explosive substance is involved, and its destruction is thereby accelerated, or rendered more complete, the loss is just

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as much attributable to fire, as if the result had been effected by unaided gradual combustion. This is the import of the policy, and as the explosion is found to have been a consequence of the fire, the liability of the insurer is unqalified by the exception.

UNITED STATES CIRCUIT COURT.

Western District of Virginia.

FALL TERM, 1879.

J. AND W. SELIGMAN & CO. VS. CHARLOTTSVILLE NATIONAL BANK.

A national bank, upon the deposit of collateral security with it, has no power to guarantee the obligation of the person making such deposit.

A national bank may lend money on personal security, but not its credit.

BOND, J.:

In covenant.

The facts of the case are set out, as far as they are material, in the decision of the court rendered by Judge Bond.

The declaration in this case sets out that J. & W. Seligman & Co., of New York, are bankers; that on the 14th day of May, 1875, B. C. Flanagan & Son made a proposition to the Charlottsville National Bank, in writing, to this effect:

In consideration of the guarantee of a letter of credit, to the extent say of five (£5,000) thousand pounds sterling, to be issued by J. & W. Seligman & Co., of New York, we propose to deposit with the Charlottsville National Bank business paper to the extent of thirty-five thousand dollars. For such amounts of said letter of credit as we may use we propose the bank shall discount of said paper at nine per cent., a sufficient amount to cover the amount used by us, holding the balance as collateral security for same; the bank to receive the money under the letter of credit which is used in the discount aforesaid.

It is further agreed that we will take the risk, as to any fluctuations in gold, so that the difference in rate of interest between that charged us and that paid by the bank shall not be less than at the rate of 2 per cent. per annum in favor of the bank, the bank having the benefit of any fluctuations which may increase their profit.

This proposition was accepted by the bank by the following resolutions of its board:

RESOLVED, That the president and cashier be and they are hereby authorized, in accordance with the proposition submitted by B. C. Flanagan & Son to guarantee to Messrs. J. & W. Seligman & Co. drafts drawn under their letter of credit, in favor of B. C. Flanagan & Son, to the extent of £5,000 on the deposit with the bank, of business paper by Flanagan & Son as collateral security to the extent of $35,000.

The plaintiffs aver that in consideration of this acceptance of Flanagan & Son's proposition by the bank, they gave to Flanagan & Son a letter of credit for £5,000 as follows:

NEW YORK, May 25, 1875.

No. 1023.

Messrs. Seligman Bros., London.

SIRS: We herewith beg to open with you a credit in favor of Messrs. B. C Flanagan & Son, of Charlottsville, Va., for £5,000, of which they will avail themselves either in their own drafts or the drafts of such parties as they may accredit with you at four months after sight. You will please honor said drafts to the above amount, advising us promptly of maturity.

J. & W. SELIGMAN & CO.

Flanagan & Son deposited the $35,000 business paper with the bank, and the bank gave its written guarantee to Messrs. J. & W. Seligman & Co., as follows:

In consideration of one dollar, to us in hand paid, the receipt of which is hereby acknowledged, we guarantee to Messrs. J. & W. Seligman & Co. the prompt and punctual payment of all sums and amounts due them under their letter of credit No. 1023, for five thousand pounds sterling on the part of Messrs. Flanagan & Son, and we hereby hold ourselves liable for the prompt and complete payment of all amounts that may so become due to them, and for the exact fulfilment of all the conditions mentioned in the annexed receipt:

NEW YORK, May 25, 1875.

"Bills receivable amounting to $35,089 16-100 have been deposited with the Charlottsville National Bank by B. C. Flanagan & Son as collateral security for the within mentioned credit, in accordance with the resolution of the board of directors, adopted in full board on 14th of May, 1875."

Which guarantee and receipt are signed by the president and cashier of the bank. And the declaration further shows that Flanagan & Son gave plaintiffs the following receipt:

NEW YORK, May 25, 1875.

GENTLEMEN: We have received today your letter of credit for £5,000 on London in our favor, dated to-day, and in consideration thereof we hereby agree that whenever advised of a draft having been drawn under said credit we will accept your draft, or reimburse you upon your notifying us of the date when due, for the amount of said bills, payable in New York, twenty-one days before the maturity of the bills in London, or their equivalent in cash. We will allow you two per cent. banker's commission on the amount of drafts made under the above credit, together with bill stamps, postage, etc., and deposit with you the following collateral, which we authorize you to dispose of at your discretion, in the event of our non-compliance with the above terms.

We further authorize you to cancel this letter of credit at any time to the extent it shall not have been acted upon when notice of revocation is received by the user.

B. C. FLANAGAN & SON.

Drafts were drawn against the letter of credit, in accordance with the agreement, which were ultimately paid by plaintiffs, Flanagan having failed to accept and pay the twenty-one-day drafts spoken of in the receipt. The bank failed and was placed in the hands of a receiver by the comptroller of the currency, and the plaintiffs allege that it is liable upon its above written guarantee for the amount of Flanagan & Son's draft remaining unpaid and held by them.

To this declaration there is a demurrer; all errors in pleading are waived, and the question presented is, whether upon the facts above set forth the plaintiffs are entitled to recover.

The case is free from many difficulties that have [illegible]sen in like cases. It is not a co[illegible] against the corporation itself pleading a want of power to make a contract from which it has derived no benefit, but which caused loss to others, such a a defense having been justly held by many courts to be as odious as the plea of the statute of limitations on the part of an individual debtor; but it is a contest between creditors claiming the same fund, where each party has the just right to contest the claim of the other in every legal manner.

Nor is there any question of notice to parties, upon which many decisions in other bank cases depend. Here the transaction is in writing chiefly, and stands between the original parties to-

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day as it did the day it was made. Under these circumstances we are to determine whether or not a national bank is authorized by the statute creating it to guarantee the paper of a customer for his accommodation; for this is the real transaction set forth in the declaration. We will admit for the sake of the argument what plaintiffs counsel have urged at bar, that a bank may borrow money to aid its customers; but here the bank got no money; none of the money procured by the letter of credit was to go to it. All the bank had to expect was the profit it was to make from the discount it received from the collaterals placed in its hands to secure it from loss by reason of the pledge of its credit to plaintiffs.

The Flanagans were to give their own drafts to take up those drawn against the letter. They agreed what commissions the plaintiffs were to charge. The bank had nothing to do with the transaction except to see in the event of the failure of the Flanagans that the plaintiffs were secure against loss.

What a national bank is authorized to do is defined by the statute of which it is the creature. The section of the statute applicable here is 5,136 of the Revised Statutes.

By that section it is authorized to exercise all such powers as are incidental to banking, by discounting and negotiating promissory notes, bills of exchange, and other evidences of debt. But certainly there is no discounting of promissory notes set forth in the declaration.

The cause of action is the written guarantee of the bank. To discount a note is to deduct the interest *in præsenti* and pay over in money the face value of the note, less the amount deducted, to the holder. Here the bank parted with no money. To negotiate a promissory note is either to buy or sell it, and so with a bill of exchange. Here the bank neither bought nor sold any bills of exchange. It agreed to guarantee Flanagan's purchase of them from plaintiffs. By the same section the bank is allowed to lend money upon personal security; but it must be money that it loans, not its credit. Upon the deposit of the collaterals with the defendant by Flanagan, it loaned its credit to him to be used with plaintiffs.

It is alleged, however, that the bank, by reason of the powers granted to it incidental to banking, could enter into this contract. But the incidental powers given are not the incidental powers given generally to all banking institutions; but only such as are incidental to banks allowed to do such things as are prescribed by the statute—such acts as are incidental to discounting and negotiating promissory notes and bills of exchange and the loan of money on personal security, and the other acts of banking mentioned in the statute. We cannot see how this transaction can be brought within the powers of the bank granted by statute, and the demurrer must be sustained.

—*Maryland Law Record.*

NOTES OF RECENT CASES.

LIFE INSURANCE.

Concealment of material facts.—To the questions, "Has a proposal ever been made on your life at any other office or offices? If so, when? Was it accepted at the ordinary premium, or at an increased premium, or declined?" The answer was: "Insured now in two offices for £16,000, at ordinary rates, policies effected last year." The answer was true so far as it went; but the applicant had made proposals for policies to several life offices which had been declined. *Held*, That there had been a concealment of material facts, such as entitled the company to have the contract rescinded. In the contract of life insurance *uberrima fides* is required: London Assurance vs. Mansel, 41 Law Times, 225.

MANDAMUS.

Discretionary power.—The statute vests a discretionary power in a county superintendent in granting licenses to teach, and mandamus will not lie to compel him to grant a certificate in any case, but only to compel him to act upon an application: Baily vs. Ewart, Sup. Ct. Iowa, 2 Northwestern Rep'r., 549.

PARTNERSHIP.

Estoppel. — Where partners have done any act which precludes each and all of them from asserting their lien on the partnership effects, or where from any cause they are in a position in which they cannot assert such lien, the firm creditors are equally unable to do so: Couchman's Adms. vs. Maupin, Ct. App. Ky., 4 Pacific Coast Law Journ. 222.

MUNICIPAL CORPORATION — POWERS.

A municipal corporation organized under the general incorporation laws of the State, has no authority to offer rewards for the apprehension of criminals, and no liability on its behalf is created by such an offer: Hanger vs. Des Moines, Sup. Ct. Iowa, 2 Northwestern Rep'r., 645.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Nov. 28, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Nov. 24.

Harry H. Nelson to Chas. McCracken. $500.

Clarence A. Bartlett to C. G. Hickox et al. $160.

Smith Brandt to Hichard Young. $200.

Orlando Houghland and wife to James Ruple. $100.

Fred Kerkel to Magdolena Baehr. $400.

George Bruehler and wife to Chas. Bruehler. $500.

John Ternsik and wife to G. E. Maitnell et al. $550.

Susan K. Follett to V. C. Taylor. $1,000.

Patrick McGurk to Mary McGurk. $200.

Michael McGrael to Margaret Worley. $250.

Michael Ryan to same. $600.

Cordelia Butler to Geo. H. Happer. 500.

Frank Kinkor and wife et al to Charles Brunel. $250.

Same to Court Zabaj A. O. F., No. 6,348. $300.

Mary J. Moores and husband to Adolph Klippel. $188.

Nov. 25.

A. E. Sterling to F. A. Sterling. $5,000.

Fred Weileman and wife to John C. Ferbert et al, exrs., etc. $1,000.

James Wilmot and wife to Ada B. Jefferson. $400.

Mark Richardson and wife to S. Katzenstein. $4,000.

Winzel Milate and wife to John Bejcek. $150.

J. G. Kent and wife et al to Dudley Pettibone. $900.

Charles W. Prentiss to Charles H. Norton. $2,871.

Nov. 26.

Harvey Stephens to Soc. for Savs. $3,000.

Wm. J. Corlett and wife to Fred Pollack. $114.

Magdalena Tiefucbach et al to The Soc. for Savs. $600.

Wm. Elsesser and wife to Simon Newmark. $5,000.

Catharine Dolman to Cit. Savs. and Loan Ass'n. 5,500.

Ernest A. Gifforn and wife to The Board of Trustees of Oberlin College. 4,500.

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A. G. Carpenter and wife to S. S. Drake. $300.

Nov. 28.

Celia Webb and husband to O. M. Robinson. Six hundred dollars.

Geo. W. Loftus and wife to A. B. Haynes. Three hundred and sixty-three dollars.

A. C. Stevens and wife to Harriet L. Stevens. Seven hundred and eighteen dollars.

Clark McCarthy and wife to Philip Phillips. Two hundred dollars.

Eliza J. McGeah to Howard W. White. Three thousand two hundred dollars.

James M. Hoyt and wife et al to The Connecticut Mut. Life Ins. Co. Seventy-three thousand dollars.

Gerard J. Malle and wife to A. S. Tarr. Twelve hundred and fifty dollars.

M. E. Rawson and wife to The Cit. Savs. and Loan Ass'n. Fifteen hundred dollars.

CHATTEL MORTGAGES.

Nov. 24.

Wm. H. Harbeck to John S. Harbeck. $1,800.

John Lederer to Henry Lederer. $500.

L. Rosenzweig to Martin Haas. $50.

Nov. 25.

W. R. Ogden to W. F. Herrick. $600.

Charles J. McIvon et al to John Brennan. $300.

Nov. 26.

Hartley & Hines to Cleve. Paper Co. $400.

William Mueller et al to same. $400.

L. W. Southern to E. J. Estep et al. $250.

Ira H. Lockwood, Jr., to Howard & Harris. $600.

Charlotte H. Davis to Samuel D. Davis. $1,000.

Michael Walsh to John Cooney. $100.

The Rocky River Stone Quarry Co. to E. Biglow. 2,387.

Laura R. S. and D. Holmes to Wm. Walkdon. 480.

Same to same. 480.

Nov. 28.

Charles Nickig and wife to Louis Chormann. Fifty dollars.

Geo. Newbury to Robt. D. Smith. Fifty dollars.

Briggs & Briggs to J. Soroma & Son. Four hundred dollars.

J. O. Thorp to J. P. Woodworth. Five hundred and fifty-two dollars.

John Miller to John C. Miller. One hundred dollars.

Alphonzo Byam to Mrs. Catharine Newsky. Three hundred and fifty dollars.

DEEDS.

Nov. 19.

Adrian Hallimer by same to Wm. C. Scofield. One hundred and thirty-five dollars.

Edward Bunn by John M. Wilcox, sheriff, to same. One hundred and thirty-four dollars.

Wm. Gibb by same to same. One hundred and seven dollars.

Nov. 20.

Thos. Axworthy to Noyes & Noyes. $1,000.

George W. Canfield and wife to Charles Gleanfield. $200.

Same to Frank Heson and wife. $200.

Richard Harrison and wife to Wm. Holmes. $2,000.

Wm. Holmes and wife to Sophia Harrison. $2,000.

Albert Gilchrist and wife to H. P. Benniss. $2,000.

Deloss Gillette to Loren Gillette. $200.

Daniel Kelley to Amos Denison. $2,500.

David Riger by C. C. Lowe, Mas. Com., to Christian Kimmel. $150.

Christian Kimmel and wife to F. Boseling. $192.

George Hygatt and wife to Samuel Lord et al. $2,500.

Christian Rider to George Richota. $463.

Betsey E. Stone and husband to Sarah L. Batchelor. $5,500.

Lucy F. Stafford to O. M. Stafford. $4,000.

Jnliatt C. Welcott and husband to R. C. Gardner. $250.

Same, guardian, to same. $125.

R. G. Gardner and wife to Mary R. Wettrick. $375.

Jnliet C. Willcut and husband to Mary R. Wettrick. $750.

Same, guardian, to same. $375.

Same to Mary O. Sommer. $933.

Same to same. $467.

Francis O. Richards et al to John Rodgers. $7,000.

Omer E. Richards et al by S. M. Eddy, Mas. Com., to Orville N. Richards. $4,800.

Nov. 21.

Jas. Blake and wife to Frank Stary. $550.

Ashbel H. Bayney and wife to White S. M. Co. $16,992.

J. J. Carothers to Geo. A. Groot, assignee. $1.

Hervey H. Francisco and wife to Eli N. Carmon. $500.

Chas. W. Moses to Anna E. Moses. $400.

Henry Parker and wife to Christian Ruder, $1,000.

John R. Osborn, assignee in bankruptcy, to W. H. A. Read.

Oscar N. Olmstead et al, admrs., etc., to Harriet A. Olmstead. $1,785.

Nov. 22.

Ellen Burk and husband to J. K. Brainard. $1,500.

Garry H. Bishop to M. J. Lawrence. $1,000.

Solomon H. Bloch et al to Sigmond Mann. $1,000.

Frances P. Clark and husband to Sarah L. Mattison. $1.

C. W. Goodsell and wife to Leander M. Hubby. $7,000.

James M. Hoyt and wife to same. $37.50.

H. T. Hower and wife to J. C. Ordway. $2,300,

Paul J. Kreitz and wife to J. H. Pfannstiel $5.

J. H. Pannstiel and wife to Cornelia A. Kreitz. $5.

S. K. Raymond and wife to C. W. Goodsell. $3,000.

Amasa Stone and wife to John Frank and wife. $600.

Kezia Thomas and husband to Rebecca Rodgers. $1.

Rebecca Rodgers and husband to Julius Mueller. $1.

Abis Neiman by W. I. Hudson, Mas. Com., to E. C. Schwan. $94.

E. C. Schwan and wife to Alexander Zmich et al. $95.

Daniel McClosky by W. M. Raynolds, Mas. Com., to M. M. Hobart. $1,000.

M. M. Hobart to Marienne B. Sterling. $1,000.

John H. T. Mixhall by W. M. Raynolds, Mas. Com., to M. M. Hobart. $1,000.

M. M. Hobart to Marienne B. Sterling. $1,000.

Arthur Quinn by Felix Nicola, Mas. Com., to Gardner, Clark & York. $2,830.

P. H. Sawyer et al by S. M. Eddy, Mas. Com., to Mary L. Miller. $1,300.

Nov. 24.

Cleveland Encampment No. 3, A. O. G. F., to Frank Barta. $725.

Charles M. Eldred and wife to Geo. H. Lamont. $600.

Anton Hassenpflug and wife Harriet E. Francis. $800.

G. E. Hartnell and wife et al to Rohn Tousik and wife. $525.

Geo. C. Hickox et al to Charles Thomas. $400.

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Joseph Janaucek and wife to Joseph Denowsky and wife. $825.

Mrs. H. A. Loomis to Charles W. Loomis. $400.

Jane A. Massey to J. A. Lamont. $1,330.

Michael Sanders and wife to Michael O'Rourke. $1,200.

Michael O'Rourke and wife to Margaret Sanders. $1,200.

A. Weiner, vice pres., et al. to C. W. Spitzer. $5,000.

Nov. 25.

Auditor's deed to Elizabeth Stewart. $64.90.

Amma Abbott to Edmund Walton et al. $1.

James Brokensheer, trustee, etc., to same. $2,800.

Samuel W. Duncan to William J. Gordon. $6,500.

Philo Davidson to A. A. Jackson. $400.

James M, Hoyt and wife et al to Edwin Taylor and wife. $500.

Wm. Marshall and wife to Ernest H. Klosterman. $500.

Clara J. Ruthburn and husband to Rebecca Crow. $450.

F. M. Stearns and wife to Elizabeth Bossett. $600.

B. Williams to William Hutchins. $500.

Emma E. Boehringer by W. M. Raynolds, Mas. Com., to A. G. Carpenter and wife. $533.

Nov. 26.

Caroline Bates and husband to Gage & Canfield. One hundred dollars.

George W. Canfield and wife to Joseph Krochot. Two hundred dollars.

Jabez W. Fitch to Catharine Dolman. One dollar.

D. R. Hawley and wife to Mary G. Brown. Five hundred dollars.

Same to V. C. Taylor. Five hundred dollars.

Henry Haines and wife to John P. Hurst. One thousand and sixty-two dollars.

G. B. Wiggins et al to same. Two hundred and sixty-two dollars.

David Keyt and wife to Wesley Hines. Two thousand dollars.

Fred Kinsman to Frank and Annie Krejci. Three hundred and ninety-six dollars.

Benjamin F. Robinson and wife to Wm. S. George. Five thousand dollars.

Wm. S George and wife to Mary E. Robinson. Same.

Hiram W. Snowe to John W. Clare. Two hundred dollars.

Theresa M. Weimann and husband to R. Gilmour. One dollar.

Albert Weil and wife to Leander M. Hubby. Three thousand dollars.

Bernard, Andrews et al by W. I. Hudson, Mas. Com., to Fred Webster. One hundred and fifty dollars.

Judgments Rendered in the Court of Common Pleas for the Week ending Nov. 26, 1879, against the following Persons:

Nov. 21.

Martin Krejci. $503.99.
Edward Wing et al. $560.

Nov. 22.

Elizabeth Underdunk. $95.

Nov. 24.

Comfort A. Adams. $2,351.61.
C. B. Clark. $958.26.
Carl Seyler. $737.21.
Wm. J. Harrison. $1,634.82.

Nov. 25.

Philip Warren. $5,326.46.

Nov. 26.

J. J. Carothers. $6,875.38.

COURT OF COMMON PLEAS.

Actions Commenced.

Nov. 15.

16197. M. M. Spangler vs C. R. Hodge. Withdrawn without service.

Nov. 21.

16215. Cornelius Rewell vs Moses G. Watterson. Money only. James Fitch, Ensign.

16216. Bridget Washington vs Patrick Hanley et al. Appeal by deft. Judgment Nov. 8. Lavan; Schneider.

16217. John Huntington vs Martin Krejci. Cognovit. Hord; Searle.

16218. B. J. Cobb vs Peter Riley et al. Money only. Holze.

Nov. 22.

16219. Marienne B. Sterling vs Bartley Higgins et al. Equitable relief. Hobrrt.

16220. Same vs Frederick Behnke. Same. Same.

16221. J. E. Rock vs Cleve. Wire Syring Co. Appeal by deft. Judgment Oct. 29.

16222. S. C. Chandler vs G. F. Lewis. Same Oct. 30. Emery & Carr; Ranney & Ranneys.

16223. Amasa Stone vs G. L. Nichols et al. Money, sale of mortgaged premises and relief. B. R. Beavis; Howland, Stone & Hessenmueller, Dewolf & Schwan.

16224. Manuel Halle vs John Welch et al. Money and sale of lands. Goufder, Hadden & Zucker.

16225. Betsey Smith vs Isaac A. Isaves. Money, to subject lands and relief. Zehring; Hord, D. & H., Everett.

16226. Frederick Scheurer vs Christian Gregerson et al. Money and foreclosure of mortgage. G. F. Smith.

16227. John Miller vs The Penn. Co. Money only. Adams & B.

16228. The Cit. Savs. and Loan Ass'n. vs Frank H. Kelley et al. To foreclose mortgage. Estep & Squire.

Nov. 24.

16229. St. Boniface Soc'y., a corporation, etc., vs Casper Benner. Money only (with att.) J. M. Stewart.

16230. Adams & Co. vs Shaw & Cole. Same. Estep & Squire.

16231. Sohn Huntington vs Martin Krejci et al. Sale of lands and equitable relief. Hord, D. & H.

16232. L. N. Fletcher vs Geo. Norris. Appeal by deft. Judgment Nov. 21. Heisley; Marvin, Laird & Cadwell.

16233. Charles F. Carothers vs Geo. A. Groot, assignee, etc. Equitable relief. Henderson & Kline.

16234. Mary Salmon vs Andrew J. Sanford. Appeal by deft. Marvin, Laird & Cadwell.

Nov. 25.

16335. Charles O. Scott vs Prentice B. Skinner et al. To subject lands. Ingersoll & Williamson.

16336. Samuel B. Prentice vs John Berger et al. Money and to subject lands. Baldwin & Ford.

16237. John Arbuckle et al vs Martin Krejci. Money only. Goddard.

Nov. 36.

16238. Kerstine & Co. vs Gerhard Bohlken. Appeal by deft. Judgment Nov. 5. Canfield; Emery & Carr.

16239. Lucretia H. Prentiss vs Michael Kuhn et al. Money and relief. Baldwin & Ford.

16240. H. C. Kerstine vs N. Sechler. Money only. Canfield.

16241. Omer E. Richards vs Sarah M. Richards. Money only. Robison & White.

16242. Same vs same. Same. Same.

16243. C. D. Gaylord et al vs Henry Nykamp. Appeal by deft. Judgment Oct. 28. Flick.

16244. Andrew Burnison vs William L. Stearns. Money only. Dirlam & Leyman.

16245. Theo. Harris et al vs J. C. Coleman. Cognovit. Heisley; Schneider.

Motions and Demurrers Filed.

Nov. 21.

3529. Corrigan vs Krause. Motion by plff. for new trial.

3530. Smith vs Coe et al. Demurrer by defts. Coe and Brainard to the petition, refiled, etc.

Nov. 22.

3531. Zettlemeyer vs Nieson et al. Motion by deft. Nieson to require plff. to make petition more definite and certain.

3532. Cit. Savs. and Loan Ass'n. vs Spitzig et al. Demurrer by deft. Kreitz to the petition.

3533. Little vs Thoman. Demurrer by deft. Stoppel to petition.

3534. Quayle vs Kennedy et al. Demurrer by defts. Kennedy and Wellington to the petition.

3535. Johnson, trustee. vs McEnnery et al. Demurrer by deft. Morrison to the amended petition.

3536. Doerfler vs Milwaukee Mec. Mut. Ins. Co. Motion by deft. for new trial.

3537. Rogers vs Hasenpflug et al. Demurrer by deft. Hasenpflug to 2nd cause of action of the petition.

3538. Gilbert et al vs Eastman. Demurrer by plff. to 2nd defense of amended answer.

3539. Cochran vs Patterson et al. Motion by deft. Patterson to release garnishment, etc.

3540. Stoppel vs Hellman et al. Demurrer by deft. Hellman to the petition.

3341. Perkins vs Chubb et al. Motion by plff. for new trial.

3542. Brower vs Salisbury. Motion to strike out from petition and make same more definite and certain.

3543. Gillette vs Potts et al. Demurrer by deft. Potts to the petition.

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3544. Same vs same. Same.
2810. (From Motion Docket of May Term, 1879.) Clancy vs Bailey et al. Motion by plff. for an order of attachment against A. W. Bailey for contempt in violating restraining order, etc.

Nov. 24.
3545. Enterprise Building and Loan Ass'n. vs Weber et al. Motion by plff. to make answer of Weber more definite and certain.
3546. Berchtold vs Prentiss. Motion by plff. for the appointment of a receiver with notice.

Nov. 25.
3547. Cowle et al vs L. V. & Col. R. R. Co. et al. Motion by Nancy Grandall for leave to prove her claim before J. H. Rhodes, referee.
3548. Spencer vs Goff et al. Motion by deft. Goff to set aside sale.

Nov. 26.
3549. Williamson, trustee, vs L. V. & Col. R. R. Co. Motion by plff. for an allowance to him for services and counsel fees.
3550. Hilliard vs The Forest City Mut. Land and Building Ass'n. Demurrer by plff. to 1st and 2d defenses of answer of P. O'Brien and 57 other defts.
3551. Same vs same. Same to answer of John McMahon.
3552. Same vs same. Same to 2d and 3d defenses of Philip Sartorius.
3553. Holland Reformed Church vs Zoeder. Motion to require plff. to attach copy of subscription and agreement to petition, etc.

Motions and Demurrers Decided.

Nov. 22.
2308. Rogers vs Hughes et al. Withdrawn. Leave given to file supplemental answer.
2833. Second Nat. Bank vs Gaylord. Overruled. Exception by E. F. Gaylord.
2839. Stone vs Bailey. Same. Exception by plff.
3055. Ryan vs Carr. Same.
3057. Myers vs Wickendraeger et al. Same.
3060. McCue vs Osterhold. administrator. Same.
3094. Lucus vs Egts. Same.

Nov. 26.
3202. Heil vs Thomas. Stricken from docket.
3216. Gilchrist vs Higlep et al. Overruled.
3222. Rock vs Britt et al. Same.
3230. Sun Ins. Co. vs Fleming. Same.
3231. Banks vs Quayle. Stricken from docket.
3246. Wise vs Clark et al. Sustained.
3251. Droz vs Roemer et al. Same.
3253. Ferbert et al, exrs, vs Seiger et al. Stricken from docket.
3296. Young et al vs Aultman et al. Overruled.
3298. Edwards vs Union Foundry Co. Granted.
3443. Porter vs Treat. Stricken from docket.
3498. Steele vs Burgert et al. Overruled. Deft. excepts and has leave to answer by Dec. 20.
2810. Clancy vs Bailey et al. Overruled.
3549. Williamson, trustee, vs L. V. & Coll. R. R. Co. et al. Granted.

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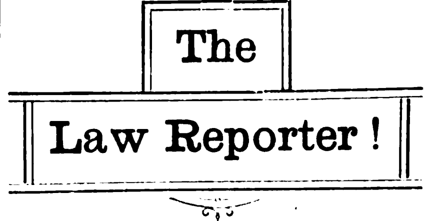

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CUYAHOGA COMMON PLEAS.

MAY TERM, 1879.

HILL VS. CITY OF CLEVELAND.

Street Assessment for Opening and Widening Street, etc.

BARBER, J.:

On June 16, 1874, an ordinance was passed by the city council of this city to open and widen St. Slair street from Wilson avenue to Crawford Road, and in the ordinance the intention is declared to appropriate land from the lots on the south side of the street to make it from a sixty feet to a ninety feet street.

Appropriative proceedings were had and damages awarded to the amount of $52,012.28—costs $560.29.

The city took the land and paid the damages awarded.

February 22, 1875, a resolution was passed directing the Board of Improvements to make an estimated assessment to pay the aforesaid damages.

April 6, 1875, the Board of Improvements made and reported an estimated assessment.

June 18, 1875, referred to a board of equalization, and on June 29th, 1875, estimated assessment made and reported, amount $66.74 26-100.

November 5, 1875, the report of the equalizing board was adopted and confirmed.

May 9th an ordinance was passed to make the levy and assessment by instalments.

1. Levy not made to pay costs of improvement when bonds have been issued. No bonds were issued on the faith of the levy. The city paid the damages, etc., out of a general issue of bonds to be paid for by a general tax.

2. Having issued bonds as said in 1, the council afterwards levied to pay the bonds so issued, and the ordinance is void. It does not specify how much or what tax is to be levied, nor upon what lands, nor amount to be paid annually, nor whether to be levied by foot front or per value.

The clerk certified $66,949.26 as the amount to be levied, one third of it each year, to Auditor.

That he has added it to the general tax, state, county, etc., and refuses to take any unless all is paid.

Sixteen different plaintiffs present their several grievancess.

Amendment to the petition.—That the city pretended to make the levy according to *benefits*, but the boards of assessment (estimating and equalizing) never made any appraisement of benefits to the lands of petitioners but proceeded arbitrarily to assess upon these lots described the tax mentioned in the petition, which was made payable in three instalments.

This they say was illegal and they pray for an injunction and relief.

The answer to the amended petition admits that the assessment was made payable in three installments, and that all of the instalments have been certified to the County Auditor and by him placed on the duplicate and passed over to the Treasurer for collection, but denies everything else and says: 1. The plaintiffs are estopped because they petitioned for the improvement, and because they have lain by for years until the city has issued its bonds and paid the expense—without testing the invalidity of the levy or that it was made on a wrong basis.

2. That the interest included in the levy is too small by several thousand dollars.

The only question now presented to the court is, Will the court hear evidence as to whether or not the estimating board did or did not estimate the benefits to the property adjacent, continuous or abutting, and if so proportion it to the several owners in the proportion the benefits to each sustains to the whole benefit.

The city claims that it must be presumed that this board did its duty according to law, and that in pursuance of that duty they did properly estimate and apportion the benefits, and report the assessment accordingly, and that this presumption must prevail until the contrary may be made to appear by proof, and that if plaintiffs claim no such estimate and apportionment was made the burden of proof is

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on them to establish it. The plaintiffs claim no such presumption exists.

On this subject the Supreme Court say in Chamberlain vs. City of Cleveland, 34 O. S., ¶ 3 of the syllabus, "Where the proceedings in an appropriation assessment on the principle of special benefits, merely show upon their face that the aggregate amount of the assessment is placed on benefitted property it will not be conclusively presumed that the assessment is limited to special benefits conferred or that it has been properly apportioned amongst the several lots or lands assessed."

The judge in rendering the opinion of the court on this subject says the City Council resolved that the Board of Improvements be required to prepare an estimated assessment as required by law, of the costs and expenses incurred, etc., and report to the council.

The Board is not (by that resolution) required to estimate and assess the value of the special benefits conferred which may or may not have been equal to the cost of the improvement but to prepare an estimated assessment of the costs and expenses, etc.

Afterwards the Board submitted an estimated assessment *upon the property benefitted* to pay the costs and expenses incurred in opening and extending Bond street.

This assessment * *.. is without caption and conclusion. It locates the lots and describes them by their numbers and otherwise; gives their frontage, the rate per foot front of the assessment, and the amount assessed on each lot, and the aggregate amount assessed on all the lots * * *

There is nothing in all this to show that the special benefits conferred were valued at all, or if valued to show that the assessment was apportioned in proportion to the special benefits that each lot received. The only thing to indicate that benefits were conferred at all is found in the report of the Assessing Board, that the assessment is "upon the property 'benefitted.'" But this of itself is of no effect. It lacks the essential elements of valuation and apportionment above spoken of, without which the assessment may be arbitrary and oppressive. Presumption, if permitted in favor of the validity of any part of the proceeding, cannot be permitted to supply the essential elements of a valid assessment that are wanting here.

It is claimed that this part of the opinion is in conflict with, or at least not supported by the syllabus, and is therefore not authoritative. It is appropriate therefore to look into the question of presumption in favor of public officers and see how far it is applicable to the proceeding by assessing boards acting under the authority of municipal corporations.

The statute law requires the council of a municipal corporation to keep a journal of its proceeding (Municipal Code, sec. 88). Section 104 requires its resolutions and ordinances as well as by-laws to be recorded, and further provides that printed copies, transcripts from its records and journal and certified by its clerk, shall be received in evidence same as the originals, etc.

It is evident that these records are proper evidence of what they contain and the proceedings of which they purport to be a record, minute or journal.

And as to all matters that the statute requires to be entered in the records, they are the only evidence that can be offered to show that such action was taken.

As to everything else, all other actions of the council or authorities as officers of the city or its agents, parol proof may be heard when the record is silent, or when the record speaks it may be contradicted.

Section 100 provides that all bylaws, resolutions and ordinances shall be recorded, etc.

The Board of Improvements have the supervision of all the work upon the streets, including improvements.

This Board has an organization of its own. They may have a clerk and are required to keep a complete journal of all their proceedings.

The duty of making the estimated assessment to pay costs and expenses of land taken for public improvements is not devolved by law upon the Board of Improvements, but by requirement of the council—Sec. 584—therefore, when they act as an assessing committee they act for the council, and of their proceeding as such committee they are not required to keep a record. They are required to report their proceedings in that respect to the council —this report must be in writing, and a copy filed with the Clerk for the inspection of all persons interested. Notice is required to be given, and if objection is made, an Equalizing Board is to be appointed and it is made the duty of this board to equalize the estimated assessment already made. They cannot extend the assessment to other lands not included in the report of the Estimating Committee or Board. Glenn vs. Waddell, 23 O. St. 605. Nor can they add anything to the amount originally assessed, except for their own fees—Chamberlain vs. Cleveland, 34 O. St., but their duty is limited to an equalization of the assessment already made. The Board of Improvements or Estimating Committee are required to make the assessment according to the benefits. The statute does not require them to keep any record of their proceedings as an Assessing Board, except that their report must be in writing. Now, if this report is silent as to any material part of what they are required to do as such Assessing Board, can that omission be supplied by parol evidence?

In the case before us the resolution of the City Council directing the Board of Improvement to make and report an estimated assessment is not set out in *haec verba*.

The language of the petition is that "a resolution was passed by the City Council directing the Board of Improvements, to make an estimated assessment of a special tax to pay the aforesaid damages awarded to the land owners and costs of said proceedings, and report the same to the Council." What the terms of the resolution are does not appear, but we are to presume, in the absence of more definite information, that it was correct in form and required the Board to make such an estimated assessment as the law required, which would be an estimated assessment of the benefits specially accruing to the property benefited by it. So that, with this presumption, no fault can be found with the proceedings of the Council as to their proceedings so far. The next step is the proceedings of the Board of Improvements in making the estimated assessment. It is averred in the amendment to the petition that the Board did not make an estimated assessment of the benefits or apportion it on the land, but did make an assessment of the whole damages and costs upon the land, and this is denied in the answer.

That report is not before the Court, but it is conceded that it does not show him the assessment was made. It does not show that it was an assessment and apportionment, but it is claimed for the city that, although the report does not show that fact, it must be presumed in favor of the Board and their proceedings that the estimated assessment which they, in fact, did make, and such as was legal for them to make, and even if such presumption does not follow, they may

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show by parol that the assessment was made as the law requires. The presumption is denied, and it is claimed that the defect cannot be supplied by parol proof. Even if the report showed that their proceedings were proper, and such as the law requires, parol proof may be heard to show that the Board did not, in fact, estimate and apportion the benefits. Chamberlain vs. Cleveland, 34 O. St. If the resolution requiring the Board of Improvements was in proper form and substance, and the report of the Board was in substance as in the Chamberlain case, (*supra*) I think the presumption follows, that whatever the Board did in the matter, was done in pursuance of the resolution, and according to law, and the inference would be clear that the assessment reported was an estimate and apportionment of the benefits.

The tax-payer, by going to the records after publication of the notice, would see by the resolutions what the Board was required to do and their report would show what they had done. He would thus be put in possession of all the facts necessary for him to know whether the tax was legal and just or not. If he claims that the Board did not in fact estimate and apportion the benefits, he must look for the information outside of the record, and the burden of proof would then be on him, and when his proof was offered it could be rebutted by *contra* proof on the part of the city.

But in this case I understand it is conceded that it is parallel with the Chamberlain case except the assessment was on the property fronting on the street, and was only for the amount of damages awarded to the property owners for land taken and for the costs of appropriation. If so, the resolution, instead of being in proper form and substance, is as follows: "That the Board of Improvements be and they are hereby required to prepare an estimated assessment *as required by law* of the costs and expenses incurred in the extension of St. Clair street, and report the same to this council."

And the report would show that the Board had made an estimated assessment as required by the resolution on the property benefitted. The thing the law required to be done was to estimate the special benefits which the improvement caused, and assess an amount of cost and expense equal to it upon all the property specially benefitted by a proper apportionment among the several lots or lands according to the benefits secured by each. What they were required to do was to make an estimated assessment of the whole cost on the property benefitted, and the claim is that it is now to be presumed that the Board did in fact estimate and apportion the benefits.

The presumptions in favor of the action of the Board are that the Board did what they were required to do and that they did it according to law. The presumption then in this state of the case is that the Board estimated and assessed the whole cost and expense on the property benefited. This presumption does not extend to anything outside of what they were required to do by the resolution and therefore does not extend to the estimating of the benefits and apportionment of the same. It is, in the opinion of the Court, the duty of the city to show that these essential elements of the assessment were made part of their proceedings, and this can only be shown by their records. These essential elements not appearing in their record, I am of the opinion they can not be supplied by parol proof. There is then nothing to be heard further in the case, and the injunction must be made perpetual, without prejudice, however, to the right of the city to make a new assessment.

MARVIN, HART & SQUIRE, for plaintiff.

HEISLEY & WEH, for defendant.

November Term, '79.

WINSLOW ET AL. VS. HART, WILKINS ET AL.

Fixtures—Chattel Mortgage—Validity of, etc.

JONES, J.:

The plaintiffs in this case filed their petition in equity in this court December 27, 1875, to enjoin the defendants, Hart & Malone and Horace Wilkins, from removing certain alleged fixtures from plaintiffs' building on Euclid avenue, this city. The plaintiffs say in their petition that they let and leased to Hart & Malone, from December, 1873, until December, 1879, the second, third and fourth stories of Euclid Avenue Block for the sum of eleven thousand five hundred dollars per year, until 1879, and thereafter until 1889 for a price to be fixed by a method therein stated; that the lease contained the following provision, to-wit: "That at the expiration or termination of this lease the second party, their executors, administrators or assigns, on payment in full of the rents herein reserved, shall have the right to remove from said premises the heating and hoisting machinery, apparatus, fixtures and improvements which they may have put into or attached to said premises." That this lease was duly acknowledged and recorded as a lease, but not as a chattel mortgage, and that said defendants, Hart & Malone, duly entered upon said term in pursuance of said lease, and put into said building one steam engine, one boiler and the machinery connected therewith, an elevator, steam pipes and other fixtures for heating said building, also an office comprised of expensive cabinet work, counters, partitions, doors, etc., and that all these things were firmly attached to and made part of the real estate so leased; that on the 6th day of December, 1875, the said Hart & Malone, then owing plaintiffs over $2,000, for rent due on said lease, and being largely insolvent, made an assignment under the State law for the benefit of their creditors; that the defendants now threaten to remove all these fixtures and deprive plaintiffs of their only security for the rent due as aforesaid, and they pray the court for an injunction to prevent this threatened removal.

Defendant Horace Wilkins is the only one who files an answer contesting the claims of the plaintiffs. He sets up therein that on the 15th day of October, 1874, Hart & Malone executed and delivered to him a chattel mortgage on the boiler, elevator and steam heating apparatus, and office fixtures aforesaid, to secure him against his liability on some $25,000 worth of commercial paper as accommodation indorser for Hart & Malone; that he received the same without any knowledge of the plaintiffs' claims in the premises, and on the 9th of November, 1874, having first fixed the affidavit required by law, duly filed it with the Recorder of the county.

That on the 6th of November, 1875, he made oath to the amount due him and refiled the same in said office, and again in like manner did the same in 1876. He denies all allegations of the plaintiff in regard to these allleged fixtures having become affixed to and a part of the realty.

The question in controversy here is, therefore, whether the plaintiffs are entitled to have these alleged fixtures by virtue of the facts proven on the trial in regard to them, and by virtue of the provision of the aforesaid lease, or whether the defendant Wilkins is better entitled to them by virtue of

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his said chattel mortgage, and the decision of this point largely depends on this question: What was the real nature of this property at the time of the execution of the chattel mortgage to Wilkins?

I think, from the testimony in the case, that all the articles mentioned in defendant's chattel mortgage were so attached to the reality that if they had been so placed there by the owner of the same, they would, in the absence of any agreement to the contrary, have constituted a part thereof, and have passed to a vendee of the real estate, but that being put there by the lessees for the special purposes of their business, they would ordinarily, in the absence of any restrictions, have had the right to sever and remove them at any time during their term; but this does not settle the question as to what is the character of such property while it remains attached to the realty and before the removal is made. It is not denied by the defendant Wilkins that the lease contained the stipulation as to removal set forth in the petition; but that stipulation is differently construed by the parties to this suit, the defendant insisting that it was merely intended to enlarge his right of removal of the alleged fixtures beyond his term on payment of the rent that might be due, while the plaintiffs insist that the provision was substantially a contract on the part of the lessees that the fixtures were to remain a part of the realty, and until the end of the term, and until the rent was all paid up. I do not understand that it is disputed by the parties that an agreement in regard to the status of the property, or for a lien on it, may be binding as between the parties themselves, but the defendant Wilkins insists that it is not binding on him as an innocent holder of the mortgage on the property in question, and he cites the 19th O. S., 145, in support of this principle. This case only decides that where a lease contained a provision that the lessee shall not remove property that was purely personal in its character until all rent paid, that a chattel mortgage on same property executed afterward by the lessee would take precedence over the landlord's claims in the lease. This was not a case where it appeared that the chattels were affixed to the realty. It is undoubtedly competent for a lessee to contract verbally or in writing that any and all fixtures he may annex to the property leased shall remain a part of the realty, and not be severed and removed by him; in such a case there can be no reasonable doubt that they would be a part of the realty from the time of annexation. So, also, if he stipulates in the lease that any fixtures he may put in shall not be removed until the expiration of his term, and until all rents are fully paid; in such a case I think the fixtures on being annexed become part of the realty, without any right of severance or removal on the part of the lessee, until all rent is paid at the end of the term. The further contingency on which the right of removal depends may never happen, and in that case the fixtures would never cease to be part of the realty.

I hold that the provision of this lease virtually amounts to an agreement that the fixtures shall remain a part of the realty until the end of the term, and until all rents are paid.

And indeed in the absence of any stipulation restricting the right of removal, there is a strong line of authorities which hold that all fixtures while attached to the freehold are a part thereof.

In Prescott vs. Wells, 3d Neva., 82, the court says: "In my opinion all fixtures while attached to the freehold are for the time being a part of the realty; no contract can change their nature; a contract that may convert it into personalty at a future day does not make it so at the time of contract."

In the 15th Vermont, 129, Judge Redfield says: "All fixtures for the time being are a part of the freehold; the right to remove must be exercised during the term."

In 9th Grey, 115, Judge Grey says, in speaking of fixtures: "If annexed by a tenant for the purposes of trade, he may, during his term, sever them from the land, and thus change the character back again from realty to personalty."

In 3 Mason and Wellsby, 185, Judge Parke says "that the tenant's fixtures are not chattels, but parcels of the freehold, and as such not recoverable in trover."

In Guthry vs. Jones, 108 Mass., 194, it is said that "when fixtures have not been severed from the building they remain part of the building, and trover will not lie, even when defendant illegally refuses to permit them to be severed and removed."

See also 116 Mass.; 172 B., 573; 17 Maine, 455; 31 Penn. State, 159.

It has been held by a long line of authorities that fixtures while annexed were not goods and chattels within the meaning of the English bankruptcy acts.—Elwell on fixtures, 333.

There are also abundant authorities to the point that by agreement between landlord and tenant the right to sever and remove fixtures may be waived, modified or extended. 14 Cal., 59; 7 Ind., 30; Elwell on Fixtures, 66; 38 N. Y. Law, 457.

(See also full authorities on this question in American Law Register for 1879.)

I hold then, on the whole, that the fixtures put in by Hart & Malone, became at once under the stipulations of the lease part of the freehold without any right on their part to sever or remove until the end of the lease, and that the plaintiff's rights thereto are superior to any rights that could be conveyed by Hart & Malone by the chattel mortgage made by them to Wilkins, even if the chattel mortgage were not defective in any respect, and had been duly verified and filed according to law.

The plaintiffs are therefore entitled to the relief demanded. But I should arrive at the same conclusion by a careful examination into the validity of this chattel mortgage to Wilkins. He has no rights as against the plaintiffs unless his chattel mortgage is a good and valid one in law. The condition of said mortgage is "that whereas the said Horace Wilkins has indorsed for said Hart & Malone, and become liable for them on certain notes for their accommodation, and is about to indorse further for their accommodation, from time to time, their notes and commercial paper," and the mortgage provides that if Hart & Malone shall pay and save Wilkins harmless from the payment thereof the mortgage to be void. There is no statement anywhere in the body of this instrument as to the amount of the paper the mortgage was given to secure, nor the amount that had been indorsed as distinguished from the amount that was to be indorsed in the future.

Under the statute in reference to chattel mortgages, passed May 1, 1869, it is necessary for the validity of such instruments, if given for the security of money only, "that the mortgagee, before the filing of such instrument, * * * shall enter thereon a true statement in dollars and cents of the amount of his claim, and that it is just and unpaid." And in case the said instrument shall have been given to indemnify the mortgagee against a liability as surety for the mortgage, or "he shall enter thereon a true statement of such liability, and that said instrument was taken in good faith to indemnify against any loss that may result therefrom which

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statement shall be verified," etc.

Let us see if defendant Wilkins complied with this law. On the 7th of November, before the original filing of his mortgage, an affidavit was placed by him thereon, which did not state in dollars and cents, nor did it give a true statement of his liability nor the amount thereof, and was manifestly and confessedly insufficient under the statute. But it is claimed that it was again filed on November 6, 1875, a month before this suit was begun, and a good affidavit attached and the former defect thus cured. The affidavit of Wilkins thus attached was as follows: "That there is still due him at this date from the within named mortgagors the sum of $25,-000 in manner and form as within set forth, and that the claim is just and unpaid." Now, when it is recollected that the face of the mortgage did not disclose the number of notes signed, the date or amount of any one of them, or the time of the maturity of any one, or the aggregate amount of the liability the mortgage was given to indemnify the surety for, it is clearly apparent that the affidavit was defective, and that the mortgagee did not enter thereon, as required by law, a true statement of his liability as surety for the mortgagors; nor, indeed, was there any statement of his liability for such mortgagors; for instead of giving a true statement of his liability to others for the mortgagors, he says there is due to him from the mortgagors $25,000, as set forth in the mortgage. Now, no such thing is set forth in the mortgage, and for all that appears therein, there may be no existing liability on his part on any of the papers signed, and there is certainly no averment that he has paid them or any of them, without which there would be nothing due to him from the mortgagors. Neither of these affidavits, then, being in accordance with the law, the chattel mortgage upon which Wilkins's rights depend is not valid as against any of the creditors of Hart & Malone, so that even if the plaintiff's rights are only equitable, they constitute an earlier equity than Wilkins has under his mortgage, and therefore the superior claim. A decree may be entered for plaintiff as claimed.

SUPREME COURT OF ILLINIOS

Opinion Filed Nov. 18, 1879.

ASAHEL GAGE VS. SOPHIA H. PERRY.

Mortgage—Foreclosure -Adverse Title.

In a bill to foreclose a mortgage, not only the mortgagor, but all persons claiming through or under him are proper and necessary parties, and their rights may be passed upon and settled in that proceeding, but a complainant in foreclosure cannot, in that proceeding, bring in a party who claims adversely and have such adverse title settled by the decree.

Where, in such case, it appears from the answer and proof that a defendant does not claim under the mortgage, and that his title is adverse, and in no manner connected with that of the mortgagor, the proceedings in foreclosure should be dismissed as to him.

CRAIG, J.:

This was a bill in equity brought by Sophia H. Perry, to foreclose a mortgage on certain property in Chicago, executed by one Charles Cleaver and wife, to secure a promissory note, payable to the order of John B. Perry. Appellant was made a party defendant to the bill, under the allegation that he has, or claims some interest in the mortgaged premises, as purchaser mortgagee judgment creditor or otherwise; "but such interests, if any there be, have accrued since, and are subject to the lien of your oratrix, by virtue of such mortgage." Appellant put in an answer to the bill, in which he set up an adverse legal title to portion of the mortgaged premises by tax deed and expressly denied that his interest in the property was subject to the lien of the mortgage. To the answer a replication was filed, and on the hearing a decree of foreclosure was rendered, directing a sale of the mortgaged premises, in satisfaction of the debt, and that appellant "be forever barred and foreclosed of and from all equity of redemption and claim of, in and to said premises or any part thereof, if said premises are not redeemed according to law."

The mortgage, as well as the record of the same, was destroyed by the fire in Chicago in 1871, and it is contended that the contents of the mortgage were not sufficiently established by the evidence. We have carefully examined the testimony bearing upon this point, and we are satisfied that the parol evidence fully established the fact that a mortgage was executed in due form of law by Cleaver and wife, to John B. Perry, on the property described in the bill, to secure the note of $5,000, which was offered in evidence, and that the mortgage was recorded in the recorder's office, in Cook county, on the 19th day of May, 1871. It is also contended that the proof was not sufficient that the complainant owned the note and mortgage described in the bill. It was shown that the payee of the note, John B. Perry, died, October 3d, 1872, at Cambridge, Mass Letters of administration on the estate of Perry, issued by the Probate Court of Middlesex county, Massachusetts, were offered in evidence, and the complainant testified that she was holder and owner of the note, that she became owner thereof by a division of property between herself and the heirs of the deceased, made under the direction of the Probate Court of Middlesex county. The possession of the note, and the evidence of ownership introduced in the absence of any proof to the contrary, we regard as entirely sufficient to justify the decree so far as this question is concerned.

But it will be observed that the final decree rendered in the case bars and cuts off whatever title the appellant Gage had in and to the mortgaged premises when it appears from the answer and the evidence introduced under the answer, that he did not claim title under the mortgagor or his grantee, but asserted an independent adverse title derived from a sale of the premises for the non-payment of taxes with which the title of the mortgagor or complainant was in no manner connected, and the question arises whether the decree in this respect can be sustained. The question is whether a court of equity where a bill is filed to foreclose a mortgage can take into consideration and pass upon adverse legal titles such as were set up by the defendant in his answer. It has always been supposed that a court of law was the proper forum in which to settle and determine adverse legal titles to real estate where all questions of fact in relation thereto can be submitted to and determined by a jury under proper instructions from the court, and we are aware of no authority holding that an ordinary bill of foreclosure forms an exception to this general rule of law. In a bill to foreclose a mortgage, not only the mortgagor, but all persons claiming by, through or under him or under his claim of title, are proper and necessary parties to the bill, and when such parties are brought before the court their rights may be passed upon and settled by a decree. But we have not been referred to a single authority which sustains the right of a complainant in such a case to bring in a party who claims adversely and have such adverse title passed upon and settled by decree. Indeed, we believe the authorities all are the other way. In Eagle Fire Co. vs. Lent, 6 Paige, 637, where this question arose, Chan-

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cellor Walworth, in delivering the opinion of the court, said: "So far as mere legal rights are concerned upon a bill of foreclosure, the only proper parties to the suit are the mortgagor and mortgagee, and those who have acquired rights or interests under them subsequent to the mortgage. And the mortgagee has no right to make one who claims adversely to the title of the mortgagor and prior to the mortgage a party defendant for the purpose of trying the validity of his adverse claim of title in this court." To the same effect are the following authorities: Barbour on Parties, 493; Large vs. Jones, 5 Leigh, 192; Stuart Heirs vs. Coulter, 5 Rend., 74; Freylinghuysen vs. Colden, 4 Paige, 206; Dial vs. Reynolds, 6 Otto, 340; Coming vs. Smith, 6 N. Y., 82.

Other authorities where the same principle has been decided, might be cited, but we do not deem it necessary. When it appeared from the answer and the proofs on the trial of the cause that appellant did not claim under the mortgage title and that his title was adverse, and in no manner connected with that of the mortgagor, he should have been dismissed from the bill. It has been suggested by appellee, that the bill of appellant was worthless, that no judgment or precept was offered in evidence, upon which to bar his sheriff's deeds.

Upon the sufficiency or insufficiency of appellant's title, we express no opinion. We merely decide as appellant's title whatever it was, appeared to be adverse, the court erred in rendering a decree against him, and for this error the decree will be reversed as to appellant, and as to him the bill will be dismissed; in all other respects, the decision of the Appellate Court will be affirmed. The cause will be remanded to the Appellate Court for further proceedings consistent with this opinion.

—*Chicago Legal News.*

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Dec. 5, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Nov. 29.

Albert Palda to David Short. $500.

W. H. Pope and wife to Thomas Dewey. $300.

Samuel Luster and wife to J. R. Cowley. $7,000.

Fred W. Dobbert and wife to Mrs. Muermann. $550.

H. H. Dodge to The Soc. for Savs. $2,000.

Carrie C. Seymour et al to M. S. Hogan. $150.

Dec. 1.

R. A. Watson and wife to J. N. Hurst. $600.

Isaac M. Page and wife to Leonard Parks. $3,200.

H. L. March and wife to Z. K. Eggleston. $1,600.

James T. Watkins and wife to A. C. Hitchcock. $2,000.

Edmund Walton et al to The Soc. for Savs. $600.

Same to same. $1,000.

Ellen Moriarty to Hiram Barrett. 100.

Rachel LePelley to Anna D. Parmley. $100.

James Neil to Henry Body. $200.

Benno Mortinetz to C. W. Schmidt. $400.

Jacob Schneider and wife to The Soc. for Savs. $1,000.

L. Breckenridge and wife to W. G. Rose. $500.

Dec. 2.

Ernst Wetzel and wife to Jacob Zuellig. $500.

J. M. Hart to James Hannon. $425.

John Wesner to David Murry. $200.

Annie E. Koestle and husband to Conrad Stall. $550.

Wm. Wussonbach and wife to The Soc. for Savs. $550.

Eva Griebel and husband to J. H. Griffeth et al. $342.57.

Laura J. White to Andrew Herschner. $112.

Henry Cherdon to Daniel E. Leslie. $300.

Dec. 3.

D. C. Hally and wife to George O. Baslington. $11,000.

Mary W. Gooding and husband to Wm. Allen. $3,000.

August Otto and wife to Chas. F. Stewber. $1,000.

Jacob Koerber and wife to Hiram Barrett. $1,000.

Mary J. Blair to the Soc. for Savs. $700.

George J. Stebbins and wife to N. H. Derkerman. $200.

Rosalea Nusbaum and husband to Joseph Nusbaum. $1,500.

German Mantel to Joseph Bregenger. $90.

John Fairfax to Wm. Callahan. 500.

Mary A. Doubleday to The People's Savs. and Loan Ass'n. $640.

Almon Gleason to Mrs. Ada Z. Ames. $1,200.

Wilhelmine Koester and husband to John Mueller. $500.

John Henry Grebele and wife to Anna M. Grebele. $500.

Dec. 4.

John Williams and wife to Henry Wick & Co. $100.

Timothy Shea to Timothy Murphy. $300.

Henry Stewart and wife to Fred V. Hartz. $500.

Fred Hirz and wife to John Leberle. $500.

H. C. Brainerd to Wm. H. Gaylord. $1,000.

Marie Locke to Cit. Savs. and Loan Ass'n. $500.

Catharine R. Templeton and husband to Laura A. Stilson. $1,300.

CHATTEL MORTGAGES.

Nov. 29.

Wm. H. Harback to Mary A. Deweese. $1,000.

Jas. F. Denham to Lord, Bowler & Co. $211.

Dec. 1.

Duge & Peters to August Kuhn. $300.

Henry Gentz to Cleve. Paper Co. $800.

Levi C. Cattell to Mary Pratt. $215.

Dec. 2.

Joseph Sacha to Valentine Grab. $200.

Dec. 3.

Allen Aenett to Eva James. $120

Barney Grimley to Hyde, Oakes & Hinkley. $100.

August Koester to Augusta Mueller. $155.

Dec. 4.

J. T. McAnnich to Jacob Lowman. $500.

G. L. Lawrence to J. H. Bradner. $269.

E. Ames & Son to E. T. Hamilton. $163.

DEEDS.

Nov. 28.

Benson Bradley and wife to Deitrick Kluener. $300.

Same to E. T. Wohrmann. $300.

Geo. W. Brooks et al to Thos. Dolan. $400.

Christian Huge to Fred Huge et al. $850.

Emma Merwin and husbnd to Herman Tellrow. $900.

Perry Powell and wife to Gerard J. Malle. 2,400.

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A. C. Stevens and wife to Isaac C. Stevens. $900.
Wm. H. Sanders and wife to Chas. Hill. $1,450.
Francis Wager and wife to Benson Mortinetz. $31.
Barnard, Anderson et al by W. I. Hudson, Mas. Com. to Fred Prasse. $310.
John Paterson et al by F. W. Cadwell, Mas. Com., to M. E. Rawson. $1,740.
F. M. Marcy et al by H. C. White, Mas. Com., to Phil. Morris. $7,334.

Nov. 29.

William Baxter to L. R. Payne. $600.
Same to E. T. Payne. $1,200.
Same to Lottie M. Payne. 600.
Susanna Bricker to Barbara Rauch. $300.
Mary T. Bradish and husband to Carrie C. Seymour. $1.
Hubbard Cooke, trustee, et al to Chas. F. Hickox. $227.
Dodge & Burton to H. H. Dodge. $1.
Gottlieb Merkle and wife to John H. James. $208.
W. E. Rawson and wife to C. D. O'Connor. $1.
C. D. O'Connor to Louisa R. Rawson. $1.
A. A. Pope to Effie H. Borden. $1.
S. Truscott to J. G. W. Cowles. $10,000.
J. G. Steinbrenner et al to Jacob Zeullig. $5.
Andrew Dillow's heirs to Mrs. Jane Peck.

Dec. 1.

Wm. Bucher and wife to R. R. Holden. $700.
Chas. D. Bishop and wife to Chas. P. Jewett. $1,125.
Cornelia E. Belden to Charlotte Risser. $50.
J. M. Curtiss and wife to Wm. G. Rose. $1,080.
E. F. Collins to Eleanor R. Shaw. $1,000.
Walter Glendenning et al to R. A. Watson. $1,300.
W. L. Hosselor and wife to John Clyne. $585.
Daniel Haragan to Wm. Hanne. $957.
George C. Hickox et al to Clarence A. Bartlett. $800.
Same to Matthias Petranek et al. $400.
Charles Kennard and wife Wm. G. Rose. $550.
Mary Ann Moses et al to Jas. Currier, in trust. $1.
Heirs of Chas. Moses to Betsy Currier and husband.
Nelson Moses et al to J. H. Moses er al. $1.
Same to Martha A. Warren. $1.
Same to Carrie A. Walworth. $1.
Sarah G. Mattison and husband to Felix H. Einstein. $5,600.
Peter Perrew and wife to C. D. Woodbridge. $1.
The Soc. for Savs. to Jacob Schneider. $1,800.
James Sharkey and wife to John Sharkey. $1.
John Sharkey to James Sharkey. $1.
Horace Wilkins and wife to John F. Whitelaw. $8,250.
T. W. White et al to J. H. Morley et al. $5,750.
Jacob Zuellig and wife to Ernst Wetzel. 1,000.

Dec. 2.

Wm. Bucher and wife to W. H. Baniss. $13,000.

Judgments Rendered in the Court of Common Pleas for the Week ending Dec. 2, 1879, against the following Persons:

Nov. 26.

J. C. Coleman. $134.

Dec. 1.

Thomas Kirschner. $551.24.
Fred Seiger. $300.

Dec. 2.

J. T. Martin et al. $1,985.54.
Monroe T. Ellis. $1,381.96.

COURT OF COMMON PLEAS.

Actions Commenced.

Nov. 28.

16246. John Nepper vs Thomas Powers et al. Money, sale of land, account and relief. Grannis.
16247. E. J. Foster et al vs Mary Ann Clark. Attachment certified from J. P. Foster & C.
16248. M. Josephine Harvey vs Sarah R. Isaacs et al. Equitable relief. Terrell, Beach & Cushing.
16249. Hannes Tiedeman vs H. C. Kerstine. Money and sale of collateral security. Hester.
16250. John D. Mairs et al, assignees, etc, vs Jacob Schug. Appeal by deft. Judgment Nov. 1. Mathews & Johnson; Brinsmade.
16251. Fred Hartz vs Michael J. Reagan. Same. Johnson & Schwan; Grannis.

Nov. 29.

16252. Anna C. Minch et al vs Moses G. Watterson, treas, etc. Money only. Fitch and Ensign.
16253. Azariah Everett vs John G. Bruggeman et al. Money and equitable relief. Gary & E.
16254. The Buckeye Loan Ass'n. vs Charles Muller et al. Money and foreclosure. Carran.
16255. Same vs Samuel Hoffman et al. Same. Same.
16256. Same vs Thomas Burns et al. Same. Same.
16257. H. Clark Ford, assignee, etc, vs J. G. W. Cowles et al. Money and relief. Baldwin & Ford.
16258. A. H. Johnson vs Michael O'Rourke et al. Sale of mortgaged premises and relief. Updegraff.
16259 Same vs Charles Wunder et al. Same. Same.
16260. Same vs James Reilley et al. Same. Same.
16261. Same vs Leo Pinard et al. Same. Same.
16262. Same vs John Smith et al. Same. Same.
16263. Same vs John Cook et al. Same. Same.
16264. George Hoadly et al vs John Marks et al. Money and to foreclose mortgage. Baldwin & Ford.

Dec. 1.

16265. Lucretia H. Prentiss vs Cornelia Manahan et al. Relief and to subject land. Same.
16266. S. D. Gildersleeve vs J. & H. B. Perkins, exr, etc. Error to J. P. Babcock & Nowak.
16267. George Willey et al vs City of Cleveland et al. Injunction and relief. Ingersoll & W.
16268. M. M. Jones, exr, etc, vs Wm. Hart. Appeal by deft. Judgment Nov. 25. Evans; Rogers.
16269. E. N. Hammond vs Julius Schiely et al. Money only. Grannis & G.; Gutzweiller, Jr.
16270. In re application of Ausha Emeth Congregation for authority to mortgage real estate. Heisley.
16271. Dwight W. Ensign et al vs Keziah Pomeroy. Appeal by plff. Judgment Nov. 14. Hutchins & Campbell.

Dec. 2.

16272. George Eisele vs Patrick Kelly. Appeal by deft. Judgment Nov. 21. W. K. Smith.
16273. T. E. Chase vs A. J. Kessler et al. Money only. Carr.
16274. Michael Reilly vs Margaret Murphy. Error to J. P. Lavan.

Dec. 3.

16275. Ann Stoneman et al vs Wm. Leggett. Appeal by deft. Judgment Nov. 11. Stone & H.; Coates.
16276. Hiram Putnam et al vs The C., C., C. & I. R. R. Co. Replevin. Heisley, Adams.

Dec. 4.

16277. John Miller vs John A. Bishop. Cognovit. Schneider; Spencer.
16278. Jacob Wagner vs August Stark et al. Money and to subject land. Schindler.

Dec. 5.

16279. William Campbell vs J. E. Upson et al. Money only. Jackson, Pudney & Athey.
16280. Mary Ann Nolan vs G. A. Keller et al. Money only. Green & Green.

Motions and Demurrers Filed.

Nov. 26.

3554. Boggins vs Bramley. Motion by deft. for new trial.

Nov. 28.

3555. Contante vs Meeker et al. Same.
3556. Hilliard vs United Land and Building Ass'n. Demurrer by plff. to 1st and 2nd defenses of answer of Rheinhart Deitz and 16 others.

Nov. 29.

3557. Lippencott vs Pechoe et al. Mo-

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tion by deft. Pechoc to require plff. to give security for costs.

3558. Healey vs Healey et al. Demurrer by deft. Solders to petition.

3559. Arnold et al vs Norton et al. Demurrer by deft. to petition.

3560. Alger et al vs Lunn et al. Motion by defts. to require plffs. to make their amended petition more definite and certain.

3561. Glenn vs Jennings. Motion to make petition more definite and certain.

Dec. 1.

3562. Hodgson vs Thwocntman et al. Demurrer to answer and reply of plff. to answer and cross-petition.

3563. Same vs same. Motion to strike out from petition.

3564. Jackson et al vs Lankester et al. Motion by plffs. to make answer more definite and certain.

3565. O'Malia vs Bailey. Motion to strike answer from files.

Dec. 2.

3566. Kneebush vs Seyler et al. Motion by deft. Coates for decree on her cross-petition.

3567. Spinks vs Ellis et al. Motion by plff. to dispense with advertisement in German newspaper.

3568. Wick et al vs Schmidt et al. Motion by plff. for appointment of receiver.

Dec. 4.

3569. Dangleheisen vs Wigman, exr., etc., et al. Motion by plff to confirm sale and for distribution of proceeds.

3570. Same vs same. Motion by plff. for allowance for attorney's fees from proceeds of sale.

3571. Salewski vs Newcomb et al. Motion by defts. for new trial.

3572. Clements vs Goodna. Motion to strike the petition from the files.

3573. Johnson et al vs Hornsey et al. Motion by deft. Worden to make petition more definite and certain by separately stating and numbering causes of action.

Motions and Demurrers Decided.

Dec. 1.

3334. Millan vs Merchant et al. Overruled. Report confirmed.

3451. Cowle et al vs L. V. & Coll. R. R. Co. Motion allowed.

Dec. 2.

3219. Oviatt vs Hassler. Order vacated. Plff. has leave to file counter affidavits by Dec. 20.

3307. Heisley, assignee, vs Fath. Overruled. Deft. excepts.

Dec. 3.

3003 } Sims vs Reiley et al. Overruled.
3004 } Defts. except.

3303. Roehl vs Schneider. Sustained.

3305. Reidy, admr., vs The L. S. & M. S. Ry. Co. Granted.

3309. Rogers vs Carran. Overruled.

3312. Sherbourne & Noonan vs Hogan. Same.

3313. Ferbert et al vs Seiger et al. Same.

3316. Schmidt vs Barnes. Sustained.

3332. Steiger vs Rettinger et al. Same.

3336. Adams vs Hurlburd et al. Overruled.

3337. Schaffer et al vs King. Granted.

3338. Greenfield vs Gay et al. Sustained.

3339. Lavan vs C., C., C. & I. Ry. Co. Overruled.

3359. Arnold et al vs Norton et al. Sustained.

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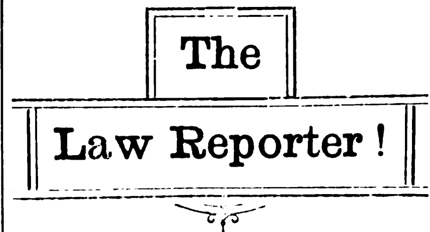

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The Cleveland Law Reporter.

VOL. 2. CLEVELAND, DECEMBER 13, 1879. NO. 50.

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Book Notice.

COMMENTARIES ON MORTGAGES AND VENDORS' LIENS. By Henry M. Herman, Author of Treatises on Chattel Mortgages, Executions, etc. Vol. 1. New York: Cockroft & Company, 1879.

The above work will be completed in three volumes during the early part of next year. The first volume has recently been issued. To the extent that the subject has been treated of in that volume, it is thoroughly and exhaustively done, and if the remaining volumes, soon to be issued, come up to the standard of the first, the work will be a very useful one to the profession. As a treatise it is both theoretical and practical, yet none the less practical because in part theoretical. The aim of the author, as stated in the preface, "is the unification of a system of pledging or mortgaging property, and from the mass of contradictory cases to deduce principles applicable to the subject." The volume is subdivided into Books and Chapters, each intended to be a complete subdivision of the subject to which it relates, as follows: Book I, Chapter I, Origin and Nature of a Mortgage; Chapter II, Of property subject to mortgage. Book II, Chapter III, What constitutes a mortgage; Chapter IV, Of equitable mortgages; Chapter V, Liens in favor of a vendor by implication. Book III, Chapter VI, Essentials of a mortgage; Chapter VII, Of the consideration for a mortgage; Chapter VIII, Of the description of the property; Chapter IX, Of the conditions in a mortgage.

A TREATISE UPON THE LAW OF PRINCIPAL AND AGENT IN CONTRACT AND TORT. By William Evans, B. A. Oxon., and of the Inner Temple, Esq., Barrister-at-Law. Edited and annotated by Marshall D. Ewell, LL.D., Professor in Union College of Law, Chicago, and author of "A Treatise on the Law of Fixtures," "Leading cases on Disabilities," etc. Chicago: Callaghan & Company, 1879.

The English edition of the above work was published in Great Britain last year. The editor of the American edition, speaking of the considerations warranting its presentation, in his preface to the work—which we quote entire—says: "The very favorable opinions which Mr. Evans' work has elicited from the legal press of this country would seem to render no apology necessary for the presentation of an American edition. The object and scope of the original work are well stated in the author's preface: and perhaps in the opinion of many of the profession one of its points of excellence, especially for the use of students, will be found in the fact that it discusses only the law of agency as it prevails at the common law, which in this respect is so rich in materials as to render a resort to foreign jurisprudence at the least superfluous and of little value except to the student of **comparative jurisprudence.** The aim of the editor has been to present in the form of notes a summary of the American law upon the topics discussed in the text, and to cite with considerable fullness the American cases upon the subjects treated, and thus render the work useful to American students and practitioners investigating this branch of the law. Such errors of citation and other errors as were discovered in the original edition have been corrected, and nearly one hundred additional English cases not cited in the original work have been cited in this edition, which it is hoped will be found of sufficient value to warrant its publication."

A TREATISE ON THE LAW OF CARRIERS as administered in the courts

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of the United States and England. By Robert Hutchinson, late of the Memphis Bar. Chicago: Callaghan & Company, 1879.

The above work is published in one volume containing nearly eight hundred pages. Along with a very full table of cases and an alphabetical index it also contains, which is a valuable part of the work, a complete analysis of contents. Concerning the preparation and publication of the work its enterprising publishers say: "In 1875 it came to our knowledge that the author of this volume had been giving great attention to the subject of 'Carriers,' and had prepared considerable material for a treatise. We felt confident that the legal profession were even then ready to greet a new work on this subject, and that Mr. Hutchinson was, by reason of his large acquaintance with the subject, and his extended studies, well fitted to respond to the evident want of the profession. But to our request to complete his labors, Mr. Hutchinson was unable to accede, owing to a press of professional duties requiring all his attention.

"In 1877, however, the proposition being renewed, he consented to prepare the manuscript, and thereafter labored unceasingly till the last line of the text was written. A few days after he announced to us the completion of the last chapter, and of his intention to forward it to the printers, we received the melancholy news of his death from yellow fever near Memphis. A considerable portion of the work had been stereotyped, all of the text was written, but neither the analysis of contents, the table of cases nor the index, was constructed, and it was necessary that the main body of the text be read, that the citations be corrected in proof, and that the last chapter be revised.

"This necessary work, the Hon. James O. Pierce, Judge of the Fifteenth Circuit of Tennessee, and the Hon. Irving Halsey, late Judge of the Second Circuit in Shelby county, Tennessee, very kindly and generously volunteered to do, in behalf of the children of the author, and these gentlemen have sparce neither care nor labor in supplementing the work of the author, and superintending the passage of the book through the press. So conscientious and accurate will their work be found, that we believe few books have been issued of late years containing less occasion than this for subsequent correction or alteration."

CUYAHOGA COMMON PLEAS.

MAY TERM, 1879.

WAMELINK ET AL VS. CITY OF CLEVELAND.

Street Assessment.

BARBER, J.:

This case is an application by Wamelink and numerous others to restrain the city from the collection of an assessment to pay the costs and expenses of paving Woodland avenue between East Madison avenue and Woodland Hills avenue—for the reason that the total amount of the assessment on each of the lots exceeds twenty-five one-hundredths of the value of the same after the improvement is made, and for the further reason that while the assessment is ordered to be made in five annual instalments, to-wit: First, for 1877, $1.83 per foot; for 1878, $1.43; 1879, $1.35; 1880, $1.27 per foot front, that the amount so levied for each year exceeds ten per cent of the value of the several lots after the improvement is made, in violation of section 543 of the Municipal Code.

The defense sought to be made by the city is that notwithstanding the assessment and the said levies exceed the statutory limitations prescribed by section 543, yet three-fourths in interest represented by the feet front, of the owners of the property abutting upon said street, petitioned for the improvement in accordance with the third provision to section 543 of the Municipal Code.

The reply denies that three-fourths of the owners, in accordance with the proviso, petitioned for the improvement.

It is conceded on both sides that if three-fourths of the owners petitioned for the improvement, no objection exists as to the assessment, and the petition should be dismissed. If on the other hand it should appear that three-fourths of the owners did not petition, the assessment above twenty-five per cent. of the value of the lots after the improvement was made, and the excess of each yearly levy above ten per cent. of the same value, is excessive, and should be enjoined; and in that case the court is to proceed and hear testimony as to the value of the property after the improvement was made.

Two petitions are put in evidence as follows. One reads as follows: "To the Honorable City Council and Board of Improvements. Gentlemen—We the undersigned, property owners on Woodland avenue between Madison avenue and Woodland Hills avenue, petition your honorable body to cause said avenue to be paved with not less than thirty-two feet wood center, treated with the Thilmany process, and the balance stone, because it is very probable that a street railroad track will be laid on said avenue and in that case a less width of wood center would destroy the driving on wood as illustrated on Superior street above Erie street.

This petition is signed by parties in interest represented by the foot front to the amount of 2,376 feet.

The other petition reads as follows: "To the Honorable Board of Improvements, Cleveland, Ohio. Gentlemen—We the undersigned, property owners on Woodland avenue between Madison avenue and Woodland Hills avenue, respectfully ask your Honorable Body to have the roadway of said avenue paved with eight feet of stone on each side and twenty-four feet of wood between the stone."

This petition is also signed by parties in interest represented by the foot front to the amount of 4,893 feet.

The total amount of feet represented by both petitions is 7,269. Total feet on the street, 8,603.

It is conceded that if both these petitions are to be counted it is petitioned for by more than the reqnisite number of parties in interest—and if both can not be counted the improvement was not petitioned for by the two-thirds of the parties in interest as required in law to entitle the council to make the assessment, without reference to the limitations of section 543.

The pavement was made by the council eight feet of stone on each side with twenty-four feet center of wood, treated by the Thilmany process; so it will be seen that the work done does not comply literally with either of the petitions.

If three-fourths in interest represented by the feet front of the owners abutting on the street petitioned for the improvement the assessment cannot be enjoined.

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I am of the opinion that both these petitions are petitions for the improvement within the meaning of the proviso referred to. The statute authorizes the council to act upon a petition for the improvement—not for the particular manner in which the work is to be done, or the material of which it is composed. Both these petitions ask to have the street paved. That is all the power they have to control the action of the council. If three-fourths do not petition the council could only tax twenty-five per cent. If more than three-fourths petitioned they could tax the whole cost. The council had the right to make the improvement whether any of them petitioned or not. If less than three-fourths petitioned in a case as this is where the value of the lots did not amount to four times the cost of the improvement, the council would not be likely to make the improvement. Therefore every person who signed the petition must be presumed to know that his signature can be used to make up the three-fourths required to secure the pavement, and to that extent his signature gives power to the council to act. Whatever he says beyond that merely expresses his private wish as to the kind of pavement he prefers.

I cannot give the construction to these petitions that in stating how the pavement is to be constructed the petitioners intended to say to the council, "If you will not make the pavement precisely as I want it, I do not want you to do it at all." This would be doing violence to the plain meaning ot the language they use. On one petition they say, "We petition for the pavement and you may tax our lots to pay the whole expense, and our wish is that it be twenty-four feet wood center and eight feet on each side;" in the other they say "We petition for the improvement and you may tax our lots to pay the whole expense, but we wish thirty-two feet wood center treated with Thilmany process and only four feet on each side."

Both classes of petitioners authorize the construction of the pavement and the assessment of the whole cost upon the abutting property.

This construction is decisive of the case.

The petition must therefore be dismissed.

John W. Heisley for plaintiff.

Heisley, Weh & Wallace for defendant.

November Term, '79.

WORTHINGTON SMITH & CO. VS. M. A. SMYTH AND H. F. M'GINNISS.

Promissory Note—Oral Testimony to Prove Relation of Parties to Paper, etc.

Barber, J.:

This is an action for money only on a promissory note, which is alleged to be the joint note of the two defendants. The note is in the ordinary form payable to the order of defendant H. F. McGinniss and signed by M. A. Smyth as maker. It reads, "I promise to pay to the order of H. F. McGinniss, etc.," and is indorsed in blank by him. It is dated in New York. There is no averment of notice of non-payment to McGinniss to bind him as an indorser, but in lieu thereof is the following averment: "Said note was made by the defendants and delivered to the plaintiff for goods and merchandise on the day or just previous to its date, sold and delivered by plaintiffs to said Smyth, and in pursuance and performance of an agreement then and there made between plaintiffs and defendants that said McGinniss should as a condition of said sale and delivery of said goods, become a party to said note as surety of said Smyth, and by reason thereof the plaintiffs charge said McGinniss as promissor." To this petition a demurrer is filed by McGinniss on the ground that it does not state facts sufficient to constitute a cause of action against McGinniss. Two reasons are relied upon. First, that parol proof cannot be heard to show that McGinniss occupied any relation to the note other than that of an indorser. Second, that the note was made in New York, and that in that State when even a stranger indorses a note before delivery he is conclusively presumed to be an indorser, and no parol proof can be heard to change that relation, and cases are cited to sustain that doctrine—it being also claimed that the indorser's liability is to be determined by the law of the place where the indorsement is made and not of the forum. As to the first proposition, that parol proof cannot be heard to show that McGinniss, although his indorsement was in blank, occupied any other relation than that of an indorser, and would therefore be entitled to notice, it is not now an open question. In the case of Samuel Dye vs. William Scott, decided by the Supreme Court, November 18, 1879, volume 4, No. 42, page 914, Cincinnati Law Bulletin, the court hold that "oral testimony is admissible to prove that the indorser, as between himself and the indorsee, at the time of indorsing the note in blank, waived demand and notice." This taken in connection with the former decisions on this subject opens the door in all cases between the indorser and his immediate indorsee on a blank indorsement to show by parol the real contract between the parties as to the relation he should assume by his blank indorsement and the presumption that the contract of the law merchant was intended is not conclusive. This removes the first objection of the demurrant. As to the second question that the note was made in New York, and that by the laws of that state no parol proof can be heard, it is not made by this demurrer. To enable the defendant to avail himself of that fact as a defense it must appear not only that the note was made in New York but that the law of New York is different from the law of Ohio. This is a fact to be averred and proven if denied. It does not appear in the petition, and the court cannot take judicial notice of the laws of New York. The petition contains facts which if true will entitle the plaintiff to recover against the demurring defendant under the laws of Ohio. If the laws of New York afford any defense to him, the note having been made in that state, it is matter of defense which he must aver and prove.

The demurrer must be overruled.

J. H. Webster and J. J. Carran for plaintiff.

Mix, Noble & White, *contra*.

SUPREME COURT OF CALIFORNIA.

Filed October 30, 1879.

PEOPLE VS. SMITH.

Appeal from the District Court of the Tenth Judicial District, Colusa County.

Testimony having been given to the effect that the course of the pistol ball through the body of the deceased was direct, from the point of its entrance to the point where it was found—that the ball had not been deflected from its course—it was error to permit the prosecution to ask the opinion of a medical witness, as an expert, as to the relative position of the deceased and the defendant at the time when the defendant fired the shot.

That is not a matter requiring skill or scientific knowledge beyond that which is possessed by ordinary juryman, and the opinion of an expert is not admissible.

Matter that does not illustrate any point that may be taken on appeal, ought not to be incorporated into a bill of exceptions to the order denying a new trial.

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The defendant was convicted of murder, a new trial having been denied him, he appealed. The other facts are stated in the opinion.

BY THE COURT:

The prosecution proved by the testimony of Dr. Tooley that he made a *post mortem* examination of the body of Jack Lett; that he found a gunshot wound on his left side, at the third rib; that he found the pistol ball under the skin, near the lower point of the right shoulder blade; that he probed the wound, and found the course of the ball was direct and that the ball had not been deflected from its course. The defendant admitted the killing, but justified on the ground of self-defense. His statements, so far as necessary to be given here, are, that a certain time in the recounter, while he was going towards his home, he passed near the place where Dave Lett's rifle was lying, when Jack Lett, who had his own rifle cocked and bearing on the defendant, told the defendant not to touch Dave Lett's gun, to which the defendant replied that he did not want the gun, and told Jack Lett to let down the hammer of his gun, when Jack Lett said, with an oath, "I will let you down;" that he—the defendant—instantly seized the rifle by the muzzle, and turned it one side, when it was discharged; that Jack Lett then reached down to seize Dave Lett's rifle, still holding his own with one hand, when he, the defendant, drew his pistol and fired the fatal shot.

The prosecution, manifestly for the purpose of showing that the defendant's statement was not true, and that he was not acting in self-defense, but that he had shot Jack Lett while sitting, asked Dr. Tooley the question: "From your examination of the range of the ball, its place of entrance, and the place where you took it out, what, is your opinion, were the relative positions of the deceased and the party who fired the shot?" And the witness answered that the deceased must have been much below the other party; and when asked how much lower, he answered two or theee feet lower.

The subject matter of the inquiry is not one requiring any peculiar scientific study or skill. An ordinary juror is as competent to determine the relative positions of the parties as the most skillful physician or surgeon; and such being the case, the prosecution was not entitled to the opinion of the witness, as a medical expert as evidence in the case. All the authorities so hold. (See 1 Greenl. Ev., sec. 440, and cases cited.) There is nothing in the nature of the subject of the inquiry which would enable a physician, however skillful, to give an opinion of any greater value than that of a man skillful in any other profession. In other words, the solution of the question does not require professional or scientific skill.

The question might not be of such vital importance in the case, were it not for the fact that much testimony of this character was admitted—to some of which, however, no objection was taken. The physicians who were called as witnesses were permitted to give their opinions in respect to many matters, about which the opinions of experts were not admissible. It having been shown that there was a bruise, with clearly defined lines on three sides, on the left shoulder of the deceased, and that there was a small rent—a triangular hole—in the shirt, the witness was asked if the whole was made with the "corner, or side, or the head or pole of the axe." And he answered: "I don't know. I suppose it must have been done by the pole of the axe or corner." He also stated that the blow which produced the wound must have been given from behind; and that it was given with a small axe, a large hatchet or a cooper's hatchet. While the opinion of the witness that the wound was produced by an instrument having a smooth, firm face, and square corners, etc., would he admissible, he should not have been permitted to give his opinion that it was produced by one of the three instruments named, as there are very many instruments with which the bruise as described could have been produced.

The transcript contains over six hundred pages, the larger portion of which is useless for any conceivable purpose, as illustrating the points taken, or that might, with any plausibility, have been taken on the appeal. Pages are taken up with explanations of a diagram, and in pointing out and describing matters by reference thereto, and the diagram itself is omitted. All the formal questions propounded to witnesses, as to their residence, their business and their acquaintances with persons and the like, and the answess thereto, are set out at length—although they can have no possible bearing on the questions arising on the appeals. The making of bills of exceptions in that style does not facilitate, but on the contrary greatly retards investigation of causes on appeal.

Judgment and order reversed and cause remanded for a uew trial.

Remittitur forthwith.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

September Term, 1879.

NATIONAL MAHAIWE BANK VS. WALTER B. PECK.

Promissory Note—Property of Bank in Money deposited—Rights of Depositor—"Balance of Account"—"General Banking Account."

Action on contract on a promissory note for $500, dated December 29, 1875, signed by Joseph A. Benjamin, treasurer, payable to the order of the defendant, and by him indorsed to the plaintiff.

At the trial in the Superior Court, before Rockwell, J., without a jury, the following facts appeared: Everything necessary to hold the defendant as endorser was done at the maturity of the note, February 15, 1876. On that day, and ever since, the plaintiff held a note, which it had discounted, for $1,500, dated November 13, 1875, signed by Joseph A. Benjamin, payable to the order of one Callender, and by him indorsed in blank. Benjamin kept an ordinary banking account with the plaintiff. At the time of giving the note in suit, Benjamin was treasurer of the town of Egremont, and the plaintiff gave Benjamin for the note a draft to be used for the payment of a tax due from the town. The note and the proceeds of it were not made a part of Benjamin's account with the plaintiff, and the latter regarded the note as an official or town matter. When the note fell due, there stood to the credit of Benjamin, as his balance of account, $381.10, which continued to remain so standing on the plaintiff's books until about six weeks before the trial. On February 16, 1876, the day of the maturity of the $1,500 note, the plaintiff's president during business hours told the cashier if the balance standing to Benjamin's credit was not checked out by him before the close of business hours, to apply it on the $1,500 note. At the close of the bank for that day it was found that Benjamin had drawn no checks on the above balance, and the president again directed the cashier to apply it on said note. On February 19, 1876, the defendant brought to the plaintiff a check for $381, dated February 15, and signed by Benjamin, worded as

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follows: "National Mahaiwe Bank, pay to the order of J. A. B., Treas., note 15th inst., three hundred and eighty-one dollars." The defendant also had at the same time $120 in money, which had been given him by Benjamin at the same time with the check, and acting at the request of Benjamin, tendered to the plaintiff's cashier the check and money in payment of the note in suit, and demanded the note. The cashier declined to receive the check and money, and told the defendant he could not accept the check because he had been directed to apply the balance of Benjamin's account on another claim held by the plaintiff, meaning the $1,500 note. After this refusal, and at the request of the defendant, the cashier received the $120 and indorsed the same on the note in suit, it being understood at the time that neither party intended thereby to waive his rights in reference to the check. About six weeks before the trial, the $381.10 was indorsed on the $1,500 note as of February 16, 1876. It is not the practice of the plaintiff to charge overdue notes held by it to the account of a depositor until he has sufficient credits to pay the note. It did not appear that the defendant informed the plaintiff or the cashier that the $120 which he tendered was Benjamin's money. Benjamin became a bankrupt in the spring of 1876, and died in the following July or August.

Upon the above facts, the judge ruled that the plaintiff could not recover, found for the defendant, and reported the case for the determination of this court. If the ruling was correct, judgment was to be entered for the defendant; otherwise, judgment for the plaintiff.

ABSTRACT OF OPINION.

GRAY. C. J.:

Money deposited in a bank does not remain the property of the depositor, upon which the bank has a lien; but it becomes the absolute property of the bank, and the bank is merely a debtor to the depositor in an equal amount. Foley vs. Hill, 1 Philips, 399, and to H. L. Cas., 28. So long as the balance of account to the credit of the depositor exceeds the amount of any debts due and payable by him to the bank, the bank is bound to honor his checks, and liable to an action by him if it does not. When he owes the bank independent debts, already due and payable, the bank has the right to apply the balance of his general account to the satisfaction of any such debts. But if the bank, instead of so applying the balance, sees fit to allow him to draw it out, neither the depositor or any other person can afterwards insist that it should have been so applied. It is accordingly well settled that when moneys drawn out and moneys paid in, or other debts and credits are entered by the consent of both parties in the general banking account of a depositor, a balance may be considered as struck at the date of each payment or entry on either side of the account; but when, by express agreement or by a course of dealing between the depositor and the banker, a note or bond of the depositor is not included in the general account, any balance due from the banker to the depositor is not to be applied in satisfaction of such note or bond, even for the benefit of a surety thereon, except at the election of the banker. Clayton's case, 3 Merio., 572, 610. Bodenham vs. Purchas, 2 B. & Ald., 39, 45. Simpson vs. Ingraham, 2 B. & C., 65. Pemberton vs. Oakes, 4 Russ., 154, 168. In the case at bar, it appears that the consideration received by Benjamin from the plaintiff for the note in suit was to be used by him in his official capacity as town treasurer, and that the note was regarded by the bank as an official or town matter; and neither the note nor its consideration was ever made part of his general banking account; and that, when the check in favor of the defendant was drawn by Benjamin and presented at the bank, the bank had the personal note of Benjamin exceeding in amount the balance of account in his favor at the time. Under these circumstances, neither Benjamin, the maker, nor the defendant, the endorser, had the right to insist that the balance of account should be applied to the satisfaction of the note in suit, rather than of the other note of Benjamin.

Judgment for the plaintiff.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Dec. 12, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Dec. 5.

Thomas S. Douse to Julius A. Rissler. $5,000.

Fred Ernst and wife to Wanei N. Halle. $350.

W. H. Barrass and wife to L. E. Bascom. $7,500.

Olive M. Young to Clarina Brainerd. $400.

John McCatty and wife to Robert Jaite. $2,600.

Felix Nicola to Cit. Savs. and Loan Ass'n. $4,000.

Dec. 6.

Charles N. Haege and wife to Wm. Hutchins. $200.

Elizabeth T. Rowbottom and husband to The Society for Savings. $1,200.

Robert Nicholson and wife to L. W. Clark. $303.

S. C. Hayward to M. H. Nyce. $3,000.

Artemus Porter and wife to The Soc. for Savs. $1,100.

Ann E. Bott and husband to Maria Pollak. $75.

James R. Currier to Marie A. Moses. $1,486.

Joseph Robeck to N. Heisel et al. $200.

Ludwig Raub and wife to Elam S. French. $200.

Dec. 8.

Richard Harrison to Patrick Donohue. $800.

Frank Barta to Cleveland Encampment No. 3, A. O. G. F. $478.

Christian Malone to M. S. Hogan. $410.

Dennis McConoughy to LeRoy McConoughy. $2,400.

B. F. Phineas and wife to The Cit. Savs. and Loan Ass'n. $1,000.

August Hoener and wife to Martin Fretter. $500.

Nannie S. Cottrell and husband to S. W. Porter. $2,500.

Henry Bruggee and wife to The Soc. for Savs. $150.

Anna M. Frah to R. P. Mayer. $1,000.

Joseph F. Kelley to Kirkham G. Hudson. $80.

Wm. Krebs and wife to Gerhrad Krebs. $3,000.

Dec. 9.

Frank Krekal to Helen Douse. $313.

John Rorlinghousen and wife to Mrs. K. Mersen. $150.

Henry Marvin and wife to J. R. A. Carter. $300.

Mary E. Linn and husband to Robert D. Smith. $321.

A. N. Batchelder and wife to O. S. Watkins. $2,000.

Mary E. Jones and husband to Theodore E. Burton. $700.

Alfred Glendening to Robt. Morse et al. $2,500.

M. M. Heller to N. Lowerstein. $1,300.

Jasper Reimer to Wm. Spelker and wife. $500.

LeRoy F. Staalz to Moses Warren. $800.

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H. T. Cushing and wife to G. W. Prindle. $400.

Wm. Doolittle, Jr., to A. S. Cannon. $400.

Fred Kurtz and wife to Fred Greiner. $850.

Katharine Gahl to Geo. Greissing. $300.

Amelia Guenterl and husband to F. W. Kuhnert. $100. Dec. 10.

Elizabeth Schneider and husband to John Remelius. $200.

Frank Farr to Charles R. Atwell. $1,000.

Jacob Faber and wife to Andrew Herschner. $200.

Jos. Smith to The Soc. for Savs. $1,000.

C. G. Force, Jr. to J. M. Jones. $2,662.

Betsey E. Stone to Soc. for Savs. $1,200.

Julius Emrich and wife to Paul Schmidt. $700.

Joseph Carl to Daniel Frank. $800.

Mary C. Speith and husband to Jas. C. Smith, admr., etc. 1,500.

Dec. 11.

John Newman and wife to Wilhelm Heitz. Seventy-five dollars.

Chas. H. Dearborn to Caroline Prentiss et al. Nine hundred and fifty-three dollars.

Cyrus G. Force, Jr., to Mrs. F. A. Lamb. Eight hundred and ninety dollars.

Mrs. J. Stengel to Regime Wishemeyer. Two hundred dollars.

Solomon N. Sanford and wife to Soc. for Savs. Twelve hundred dollars.

Harriet Loid and husband to Christian Krause. Three hundred dollars.

Peter Arthur and wife to The Cit. Savs. and Loan Ass'n. Twenty-five hundred dollars.

Fredericke Morlock to Christian Meekler. Eight hundred dollars.

Same to H. Griswold. Two hundred dollars.

A. S. Gardner to Grovenor B. Bowes. Five hundred dollars.

Thos. H. White to Caroline Heckler. Four thousand dollars.

Sarah Jane Whiteman and husband to Alfred W. Allen. Four hundred dollrrs.

Thomas S. Paddock and wife to Amasa Stone. Four thousand dollars.

Chas. H. Dearborn ta Eliza Voltz et al. Eleven hundred and fifty-three dollars.

CHATTEL MORTGAGES.

Dec. 5.

Langshaw & West to S. H. Kirby. $350,

J. M. Mapes to F. J. Mapes. $500.

Spencer & Taylor to Mone, Cahoon & Co. $4,000.

Patrick Teeny and wife to W. D. Butler. $121.

Dec. 6.

Henry Hoffman to Jacob Mueller. $2,000.

J. H. Copeland to Emily Gay et al. $608.

G. H. Draman et al to A. H. Stoleman. $246.

Dec. 8.

Alexander Jones to H. B. Perkins. $9,081.

Dec. 9.

Jas. H. Smith to Wm. H. Shaw. $150.

F. C. Dress to Weideman, Kent & Co. $59.

Dec. 10.

C. C. Natt to W. J. Warner. 200.

P. H. Miller to Rhodes & Co. 100.

Dec. 11.

Jos. Beznoska to Anton Koubela. One hundred and twenty-five dollars.

Chas. Coan and wife to G. B. Barrett. Seventy dollars.

Thomas Flesher, Jr., to Mrs. Orissa A. Barber. One thousand dollars.

Wm. Tramp and wife to Robt. D. Smith. Five hundred and twenty dollars.

Same to same. Five hundred and twenty dollars.

J. A. Wright et al to H. W. Murray. Seven hundred and fifty dollars.

DEEDS.

Dec. 2.

Daniel Cook and wife to Robert Forkes. $1,200.

Robert Forkes, assignee, to Vincent A. Taylor. $83.

N. P. Glazier to Anna Fauta. $600.

Anna Fauta to Mathias Koula and wife. $396.

Bartholemy Kleina and wife to Joseph Calta. 300.

Michael McEnnery and wife to Julius A. Moffett. $3,123.

W. F. Walworth and wife to The Crystal Burial Case Co. $1,800.

Abraham Strauss, assignee, etc., to Edmund Walton et al. $4,485.

Dec. 3.

Alfred Paskek to Anna Herold. Fifteen hundred and fifty dollars.

James Harvey to Catharine Gildea et al. One hundred dollars.

Sarah E. Beare to Lucinda Johnson. $1,400.

Mary Gleich and husband to Julius Mueller et al. $2,900.

Henry Ford and wife to Everett Holly. $3,200.

Wm. R. Coe to Rosalea Nusbaum. $950.

Wm. Callahan and wife to John Fairfax. $2,000.

J. Barnard to H. A. Barnard. $300.

Same to R. D, Barnard. $300.

Same to W. S. Barnard. $300.

Henry C. Allen to Lydia E. Payne $2.

Corwin N. Payne to H. C. Allen. $2.

Dec. 6.

Ira Adams and wife to Frank C. Adams et al. $1.

Elvira Andrews to Wm. Short. $1.

H. B. B. Boynton and wife to Alpha Boynton. $2,900.

Martin Bentley and wife to S. A. Boynton. $2,000.

Johanna Bender to Jacob Goodyear. $1,025.

Levi Burgert and wife to John D. Rockefeller. $60,000.

Elah S. French and wife to Helen Rauh. $2,500.

Harris Gould and wife to Elizabeth Coit. $1,500.

Norman A. Gilbert et al to Rosa M, Stone. $5.

Wm. S. Kelley to John S. Kelley. $1,000.

Jas. S. Kingsland to Robt. Spinks. $3,000.

Francis Raheska to Mrs. Catharine Raheska. $297.

N. Heisel et al to Joseph Sobeck. $341.

Reuben Yeakel and wife to The Missionary Soc'y. of the Evangelical Ass'n. $2,330.

Wm. Baker by Felix Nicola, Mas. Com., to Wm. Orford. $1,568.

Wetha Pickersgill by same to J. R. A. Carter. $405.

Dec. 8.

Samuel Granger to Augustus McConoghy. One hundred dollars.

Geo. W. Calkins, exr., etc., to John Sprasts. Four hundred and sixty-eight dollars.

Georgiana H. Higby to Delos McConoughy. Six hundred dollars.

LeRoy McConoughy et al to same. Eighteen hundred dollars.

Peter Numsen to S. H. Kirby et al One hundred and fifty dollars.

J. M. Poe and wife to Sherman L. Brainard. Three thousand dollars.

J. D. Rockefeller and wife to Levi Burgert. Twenty thousand dollars.

Sigmund Schmidt and wife to Maritha E. Witzel. Five dollars.

Joseph Ward to Ellen Sullivan. Nine hundred dollars.

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Samuel C. Whiting to Cornelia Whiting. Twenty-five hundred dollars.

E. W. Edgerton by W. M. Raynolds, Mas. Com., to Sam'l. G. Cosgrove. Two thonsand dollars.

J. P. Van Epps et al by C. C. Lowe, Mas. Com., to Sarah E. Adams. Seven hundred dollars.

Dec. 9.

Chas. G. Atwell and wife to C. R. Atwell. $5.

Darius Adams to Thomas Corlett. $5.

Thos. Corlett and wife to Mary A. Adams. $5.

Alvah A. Batcheler and wife to Wm. H. Hill. $1.

Wm. H. Hill to Sophia J. Batcheler. $1.

E. D. Burton et al to Jacob Linkart. $300.

John T. Barnum and wife to David B. Wright. 50.

Norman F. Dean and wife to Orville A. Dean. $925.

Ezra S. Gillette and wife to Henrietta Gallup. 1.

Henrietta Gallup to Martin Biena. 360.

Judgments Rendered in the Court of Common Pleas for the Week ending Dec. 10, 1879, against the following Persons:

Dec. 4.

John A. Bishop. $1,003.25.

Dec. 5.

Lucinda Countryman. $501.

Dec. 6.

Henry Wick. $685.05.
James Steel et al. $734.12.

Dec. 8.

A. A. Gaylord. $502.85.
Comfort A. Adams et al. $2,196.12.
Christian Metzger. $882.64.
George Menger. $2,112.
Peter Schutthelm. $395.65.
James M. Nelson. $1,275.

Dec. 9.

Gustav A. Beveny et al. $715.22.
Martin Krejci et al. $1,308.85.

Dec. 10.

G. A. Beveny. $433.60.

COURT OF COMMON PLEAS.

Actions Commenced.

Dec. 5.

16281. J. R. Sprankle vs Channcy Tice. Sale of land and equitable relief. Safford & Safford.

16282. Balthaser Sterkel vs Adolph Manzelman. Money only. Schindler.

16283. The Com. Nat. Bank of Cleve. vs Samuel E. Williamson et al. To subject property. Boardman.

16284. Charles Burnside vs Lucinda Countryman. Cognovit. Smith & Hawkins; Lynde.

Dec. 6.

16285. Jane Willet vs Joseph Willet et al. Money only. Smith & Hawkins.

16286. Caleb Morgan vs M. I. Richards et al. Money only. Robison & W.

16287. C. M. Stone, admr., etc, vs James Mallett. Money and to subject lands. Stone & H.

16288. Same vs Frances S. Brady et al. Same. Same.

16289. D. W. Ensign et al vs Peter H. Brown. Error to J. P. Same.

16290. Same vr William Kerr. Same. Same.

16291. Marion Smith vs John W. Bramley et al. Partition. Smith.

16292. The Buckeye Loan Ass'n. vs John Gehlers et al. Money, sale of mortgaged premises and relief. Carran.

16293. Same vs Wm. Lamp et al. Same. Same.

16294. Same vs John McGuire. Same. Same.

16295. Franklin Wells vs Jerome Trian, admr., etc. et al. Money only. Gary & E.

16296. Elizabeth Heiss vs John Langemeyer et al. Money and to foreclose mortgage. Estep & S.

16297. The Buckeye Loan Ass'n. vs Charles A. Nicola et al. Money and relief. Estep & S.; Grannis.

16298. Lewis Brott et al vs Conrad Reukeret al. Equitable relief. Sheldon and Hutchins & Campbell.

16299. John C. Grannis et al vs Catharine Dolman et al. Money only. Grannis & G.

16300. Joseph Strebler vs Casper Ehrbar et al. Money only. Hutchins & Campbell.

16301. S. C. Smith et al vs The Northern Ins. Co. Money only. Gary & Everett.

16302. G. E. Herrick vs H. Clark Ford, assignee, etc; To enforce allowancce of claim. Herricks.

16303. Max Weiner et al vs Luke O'Neil. Money only. Heisley.

16304. Nicholas Coleman vs Simon Zellham. Same. Same.

Dec. 8.

16305. Wm. Apthorp vs Peter Fisher et al. Money and relief. Walworth; Payne.

16306. Frank Pechoc vs Elizabeth Pechoc. To sell real estate disincumbered of dower of insane wife. Babcock & Nowak.

16307. Geo. W. Canfield vs W. A. Babcock. Appeal by deft. Judgment Nov. 10.

16308. Francis H. Avery vs Gustavus A. Bereny et al. Cognovit. Ranneys; Newberry.

16309. A. W. Bailey et al vs State for, etc. Error to J. P. Weed & Dellenbaugh; Bates.

16310. Same vs same. Same. Same.

16311. Charlotte E. Loomis et al vs Jas. Smith et al. Money and to subject lands. Baldwin & Ford.

Dec. 10.

16312. T. E. Marcy vs Wick Coleman et al. Appeal by defts. Judgment Nov. 22. Schneider; Everett, Robinson.

16313. S. S. Marsh vs C. P. Quentan. Appeal by deft. Judgment Nov. 11. Ford.

16314. Jane Peck vs G. A. Bereny. Cognovit. Robison & White; Tyler.

16315. J. W. Beck, admr, etc, vs Robt. M. Cordes, admr, etc, et al. Money and to subject lands. Solders & Priest.

16316. Joseph Janousek et al vs Anton Pav et al. Money only. Babcock & Nowak.

16317. S. E. Carothers vs George A. Groot, assignee, etc. Apdeal by deft. Judgment Dec. 1. H. & Kline; P. P. and A. G. Day.

Dec. 11.

16318. Robert Jaite vs Mrs. Augusta Derly et al and garn. Money only with att. Johnson & S. and Gilbert.

16319. Mary Murphy vs John Murphy et al. Partition and other relief. Brown,

16320. Caroline M. Ensign et al vs Moses G. Watterson, treas., etc. Money only. Fitch and Ensign.

16321. Henry Kaldenbaugh vs Leo W. Sapp. Money only. Weed & D.

16322. O. R. Pease vs Y. L. Morgan et al. Partition. Robison & W.

Dec. 12.

16323. Fred Burns et al vs Mary Wittrick et al. Injunction and equitable relief. Smith & Hawkins.

16324. Mary L. Miller vs Lurana E. Price et al. Money only. Pease & Baldwin.

Motions and Demurrers Filed.

Dec. 5.

3574. Stroup vs Martin et al. Motion by defts. to set aside default with affidavit and notice.

3575. Steiger vs Bullinger et al. Demurrer by various defts. to 3d defense of answer and cross-petition of Samuel Hittel.

3576. Hatton vs Bates, spec. const., et al. Motion to strike from answer.

Dec. 6.

3577. Mason et al vs Hutley et al. Motion by defts. to require plffs. to make their amended petition more definite and certain.

3578. Holmes vs Holmes et al. Motion by defts. to require plff. to give security for costs, with notice, etc.

3579. Gibbons vs McAllister et al. Motion by sheriff to confirm sale.

3580. Mack vs Sharp. Motion by deft. for new trial.

3581. Thompson vs Brady. Motion by plff. for new trial.

3582. Roosa vs Ware. Motion by plff. to require deft. to make 2d defense of answer more definite and certain in compliance with former order of court.

3583. Capener vs Hoffman. Motion by plff. to strike transcript from files and to dismiss appeal.

3584. Schmidt vs Grub et al. Motion by plff. to confirm report of F. J. Dickman, referee, and for judgment and decree on same.

3585. Rast vs Russest. Motion to require plff. to give bail for costs.

3586. Swededborg Pub. Co. vs Kirby et al. Demurrer to 2nd defense of defts.' answer.

3587. Strauss vs Ross et al. Demurrer by deft. T. H. White to the petition.

3588. Same vs same. Same.

Dec. 8.

3589. Gibbons vs McAllister et al. Motion by Peter Tarr et al for order to pay judgment lien from proceeds of sale.

3590. Heil vs Thomas. Motion by plff. for an increase of security on appeal.

3591. Mahon vs Gray et al. Demurrer by deft. Gray to the petition.

3592. Same vs same. Motion by deft. Gray to make petition more definite and certain.

Dec. 9.

3593. Edwards vs The Highland Coal Co. Motion by deft. Wilson to dissolve restraining order in favor of deft. Banning, etc.

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Dec. 10.

3594. Brown vs Ryder. Motion by plff. to confirm reports of P. H. Kaiser, referee.

3595. State, etc, vs Kline. Motion by defts. for new trial.

3596. Williams vs Cohen et al. Motion by plff. and deft. John Gerlach to apply funds in the hands of receiver to payment of note and mortgage set forth in the petition.

3597. Reinhard vs Newberger et al. Demurrer by plff. to answer of Chas. Newberger.

Dec. 11.

3598. Spencer vs Goff et al. Motion by plff. for order to pay taxes from proceeds of sale.

Dec. 12.

3599 (refiled). Baker vs Bratton. Motion to require plff. to give security for costs with affidavit.

Motions and Demurrers Decided,

Dec. 6.

3124. Roosa vs Ware. Deft. has leave to amend answer by Dec. 20.

3200. In re arbitration between George Dietz et al. Granted.

3234 to 3243 inclusive. State, etc, J. S. M. Hill vs The L. S. & M. S. Ry. Co. Sustained. Plff. has leave to amend by Dec. 20th.

3304. Rheinhart vs Newberger et al. Overruled.

3306. Eyears vs Lewis. Sustained.

3317 to 3330 inclusive. State, etc, S. T. LeBaron vs L. S. & M. S. Ry. Co. Sustained. Plff. has leave to amend by Dec. 20th.

3331. Robinson vs Continental Life Ins. Co. Overruled.

3333. Dennerly vs Teutonia Lodge No. 19, etc. Overruled.

3344. Wilson vs Higgins. Sustained.

3345. Williams vs Spenzer. Overruled.

3346. Smith, Jr., vs Smyth et al. Same.

3347. Rogent vs Muska, Sr. Same.

3438. Brooka, exr., vs Grossman et al. Same.

3566. Kneebush vs Seyler et al. Same.

Dec. 10.

3349. Cooney vs Patterson et al. Granted.

3430. Block vs Babcock et al. Overruled.

3432. Cohn, admr., vs The L. S. & M. S. Ry. Co. Granted.

3435. Walsh, admr., vs Brownell et al. Overruled.

3447. Wilson vs Phœnix Lodge, etc. Granted.

3448. Jones vs Riddle. Stricken from docket.

3452 } 3453 } Carter vs Brownell et al. Overruled.

3494. Spangler vs Warren et al. Same.

3496. Morse vs Jackson et al. Sustained.

3507. Nevins et al vs Elwell et al. Overruled as to 1st specification; Granted as to 2d.

3510. Costor vs Hogg. Overruled.

3516. Ferbert et al, exrs., vs Seiger et al. Same.

3518. Cit. Savs. and Loan Ass'n. vs Lardner et al. Stricken from docket.

3519. Judson vs Pelton. Sustained.

3524. Wilcox vs Haver et al. Same.

3526. Baker vs Bratton. Overruled.

3546. Berchold vs Prentiss. Same.

3548. Spencer vs Goff et al. Same.

3579 } 3589 } Gibbons vs McAllister et al. Sale confirmed.

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The Cleveland Law Reporter.

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WE shall continue to publish the assignment of cases, and to print briefs, records, etc.

WE would be glad to see a legal paper of some kind published in this city, for the convenience of the Bar, but we feel that we have done our full share in support of such an enterprise, for a time at least.

A FRIEND in Stark county writes us that if we will send him a few extra copies of this paper he will get us some subscribers. As this paper will not be published after the close of the present volume—after the next issue—we want no subscribers. Our friend has our thanks for his offer.

CUYAHOGA DISTRICT COURT.

MARCH TERM, 1879.

[Judges Watson, Hale and Tibbals presiding.]

E. B. HALE & CO. VS. H. J. CALDWELL, ASSIGNEE OF ELLINGWOOD.

Bill of Exchange—Circumstances to Constitute an Equitable Assignment of Fund, etc.

TIBBALS, J.:

This case comes into this court by appeal. The plaintiffs say that on the 5th of June, 1876, they doing a banking business, Ellingwood & Co. brought to them for deposit or collection a certain draft or order upon a firm known as Keath & Swaezott, in St. Louis. They aver that they received that draft, which was for two hundred and fifty dollars, and placed it to their credit under such circumstances with reference to the facts as to amount to an equitable assignment of a certain shipment of lemons against which it was drawn. The paper itself reads, "Cleveland, June 5th, 1876. At sight pay to the order of E. B. Hale & Co. $250, value received, and charge the same to the account of S. M. Ellingwood"—addressed to Keath & Swazeott

The averments are that when the draft was presented to them they were informed that it was drawn against a shipment of lemons and would be paid, and that they equitably assigned the lemons to them against which it was drawn. That is the case—not based upon the draft, but upon the facts which resulted in the equitable assignment of that property. Issue was taken upon these averments and the case was heard. The facts are simply these:

The firm of Ellingwood & Co. brought to this firm of bankers this draft,among other matters,for deposit, perhaps some money and some checks, and when the cashier of the bank noticed this draft he called the attention of one of the proprietors to it and stepped back to the clerk and said to him, "What of this? What is there about this?" The language he was almost incapable of explaining, but it was clearly comprehended. After all the effect was "What is there about this? It is a little out of our line. What are we to understand by it?" He said to him, "It is drawn against a shipment of lemons and will be paid." That is in substance what occurred. Thereupon they entered it to the credit of Ellingwood & Co. and forwarded it to St. Louis and it was not accepted—not heard from. But on the 12th of June Ellingwood & Co. made an assignment to Mr. Caldwell. In the light of these facts we are called upon to treat that as an assignment of that property. It is true these plaintiffs were imposed upon. They passed over two hundred and fifty dollars to the firm within a few days prior to the assignment of the firm, and they are compelled to come in as ordinary creditors. If we could under any circumstances hold that what occurred operated as a transfer of that property, we should be disposed to do it. But we are compelled to reach the conclusion that the proof will not warrant it. The plaintiffs re-

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lied simply upon the draft. They took it as such. They inquired simply to get information and they got it. They had confidence in the firm, believed the statement that it would be all right, and relied upon it. They did not follow it up at all by forwarding any shipping bill, or by making any special communications with these parties. The value of the lemons did not exceed one hundred and forty dollars or one hundred and fifty dollars. which was less than the amount of the draft. There is nothing in the case that indicates that they regarded what took place as a transfer of the property to them. On the other hand the reverse. They simply took it, relying upon the honesty of that firm, and they were deceived.

The petition will have to be dismissed.

INGERSOLL & WILLIAMSON, for plaintiffs.

CALDWELL & SHERWOOD, for defendants.

U. S. CIRCUIT COURT. D. OF IOWA.

Opinion Filed Nov. 24, 1879.

HENRY EISEMAN VS. TOOTLE MAUL ET AL.

Trover—Evidence of Title—Possession Fraudulent Sale—Attachment—Bankruptcy — Assignee, Rights of.

1. In an action of trover to recover damages for the conversion of goods, the plaintiff must prove title as against the world when his title is denied.
2. POSSESSION.—That possession at the time of the seizure is *prima facie* evidence of ownership, and the burden of proof is upon the defendant to overcome, by proper evidence, the legal effect of such possession.
3. ASSIGNEE IN BANKRUPTCY.—That it was proper for the defendants to show that the title and right of possession was in the assignee in bankruptcy of the plaintiff's vendor.
4. That the assignee in bankruptcy was entitled to the possession of the goods, if the sale to plaintiff was not *bona fide*, and the defendants being creditors of the plaintiff's vendors, had an interest in the goods, if they were part of the bankrupt's estate. That the evidence tended to show the goods, notwithstanding the sale, belonged legally to the estate of plaintiff's vendors. By the proceedings in bankruptcy the title vested in the assignee.
5. That the title as against the attachment, by operation of law vested in the assignee before the plaintiff commenced this suit. That the issue before the jury was the validity of the sale under which the plaintiff claimed title, not the right of the defendants to interfere with the plaintiff's possession by his attachment proceedings.

This suit is brought to recover damages for the conversion of personal property.

The firm of A. Bernard & Co. sold and delivered to the plaintiff their stock in trade, and while the goods were in transit to Council Bluffs, Iowa, they were seized at Omaha, Nebraska, under a writ of attachment issued at the instance of the defendants, who were creditors of the firm. A. Bernard & Co. were adjudicated bankrupts within sixty days after the sale to plaintiff. The defendants were notified by the assignee in bankruptcy that he claimed the goods and made a demand.

The defendants dismissed their attachment suit, but the goods were not delivered, for the reason that the sheriff serving the writ had writs of attachment in suits of other creditors.

The plaintiff brings this suit for conversion of the goods by defendants.

The answer of the defendants puts in issue the title of the plaintiff, and alleges the sale fraudulent in fact, and also void under the bankrupt law.

The jury found a verdict for defendants. A motion was made for a new trial.

NELSON, J.:

To sustain this action, which is substantially the old common law action of trover, the plaintiff must prove title. The defendants have put this in issue by their pleadings, and the plaintiff is required to show affirmatively that he is the owner.

His possession at the time of seizure is *prima facie* evidence of ownership, and the burden of proof is upon the defendants to overcome by proper evidence the legal effect of such possession.

The defendants offer to show that the title and right of possession was in the assignee in bankruptcy of the plaintiff's vendor.

This evidenee was objected to, but the objection was not sustained, and the defendants then proved, or rather introduced evidence tending to show that the plaintiff acquired possession under a sale declared fraudulent by the bankrupt law.

It was left to the jury to say whether the sale to plaintiff was fraudulent. This evidence was properly admitted, and, if true, effectually establishes title to the goods in the assignee, and defeated the plaintiff's claim.

The weight of authority is in favo of the admissibility of such evidence The plaintiff in this action being required to show title when his ownership is impeached, by proof that the transaction under which he can only claim property in the goods is void, he must fail.

The assignee in bankruptcy was entitled to the possession of the goods, if the sale to plaintiff was not *bona fide*, and the defendants being creditors of the plaintiff's vendors had an interest in the goods, if they were a part of the bankrupt's estate.

The evidence tended to show that the goods, notwithstanding the sale, belonged legally to the estate of plaintiff's vendors, and by the proceedings in bankruptcy the title vested in the assignee. In a case like this, the *jus tertii* can always be shown, for the defendants, being creditors of the bankrupts, cannot be regarded as strangers. See Leak vs. Loveday and Brooks, 12 Law Journal; English Common Law, 1843, and cases cited. The cited cases recognize fully the admissibility of evidence showing title in some third party, when the pleadings put in issue e ownership, See, also, Addison on rts, tit. Trover. In Cooley on Torts s eral cases are cited sustaining this d rine, but the author thinks the ge ral doctrine is too broadly stated.

I 's true that exceptional cases can be found where it would be unjust to admit such evidence, but the current authority is in favor of the rule, that the plaintiff must show his title as against the world, when it is put in issue.

The issue in this case which went to the jury, was the validity of the sale under which the plaintiff claimed title, not the right of the defendants to interefere with the plaintiff's possession by his attachment proceedings.

It is urged the testimony shows that the assignee in bankruptcy never obtained possession of the goods, although he gave notice and made claim to them. This fact is not material, for the reason that the issue is one of title, which the plaintiff must establish before he can recover.

The controversy is not between two creditors seeking to hold the property of their debtor against the other for the payment of pre-existing debts. The title, as against the attachment by operation of law, vested in the assignee before the plaintiff commenced this suit.

Motion for new trial denied.

CLINTON, HART & BREWER, for motion.

C. C. COLE, *contra*.

—*Chicago Legal News.*

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LUCAS COUNTY COMMON PLEAS.

October Term, 1879,

FRANKLIN HUBBARD VS. HANNAH M. HARRIS ET AL.

The pleadings show that the plaintiff sold the defendant, Hannah M. Harris, being a married woman and having a separate estate, a certain stock of goods valued at one thousand dollars, and received therefor from the defendant and her husband, a duly executed warranty deed of certain lands in Lucas county, the property of Hannah M. Harris, warranting the same as free and unincumbered save and except as to a certain mortgage of six hundred dollars, which by an especial covenant in the deed the defendant agreed to pay. At the same time said defendant and her husband conveyed to the plaintiff by warranty deed certain lands situated in the state of Michigan. Also the property of Hannah M. Harris, the said parties executing a written agreement that when the defendant had paid off the mortgage of the Lucas county land, if paid within a certain time, the plaintiff was to deed back the property in Michigan, otherwise the deed to remain in full force.

The defendant failed to pay off said incumbrance; the plaintiff to save the property from sale paid same, and now brings this action to recover on the covenant in the first deed.

Trial to Court:

ROUSE, J.:

The deed of the Michigan property is a mortgage. Now the facts show that there was a stock of goods sold to Mrs. Harris valued six hundred dollars, and she received them. Now when parties buy goods and receive them, they must pay for them. She is a married woman, but she buys them and takes possession, and turns over a tract of land in payment, but incumbered for six hundred dollars, and she agrees to remove incumbrance.

It is true she has turned over land in Michigan as indemnity to pay off incumbrance; she fails to pay it off. She has the goods and benefits and must pay for them. It makes no difference whether from the Michigan land or other estate.

The Superior Court, whose decisions have been read (Hamilton vs. Leaman et al, 4 Cincinnati Law Bulletin, 911,) is a respectable court, but does not bind us. It is an honest debt and she should honestly pay for it.

Judgment for plaintiff.

HOUGHTON & TOLLERTON, for plff.
READ & KINNEY, *contra.*

NOTES OF RECENT CASES.

1. It is competent for passenger carriers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable, and not inconsistent with any statute or its duties to the public, to protect itself against liability, as insurer, for baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk.

2. As a condition precedent to any contract for the transportation of baggage, the carrier may require information from the passenger as to its value, and demand extra compensation for any excess beyond that which the passenger may reasonably demand to be transported as baggage under the contract to carry the person.

3. The carrier may be discharged from liability for the full value of the passenger's baggage, if the latter, by any device or artifice. puts off inquiry as to such value, whereby is imposed upon the carrier responsibility beyond what it is bound to assume, in consideration of the ordinary fare charged for the transportation of the person.

4. In absence of legislation, or special regulations by the carrier or of conduct by the passenger misleading the carrier as to value of baggage, the failure of the passenger, unasked, to disclose the value of his baggage is not, in itself, a fraud upon the carrier.

5. To the extent that articles carried by a passenger for his personal use, when traveling, exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer.

6, Whether a passenger has carried such an excess of baggage is not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance as to the law of the case, and its determination of the facts—no error of law appearing—is not subject to re-examination in this court.

7. Section 4,281 of Revised Statutes has no reference to the liability of carriers by land for the baggage of passengers. The New York Central & Hudson River Railroad Company vs. Olga de Maluta Fraloff, U. S. Supreme Court.

SUPREME COURT OF IOWA.

Filed Oct. 22, 1879.

N. FEJAVARY VS. MARX BROESCH.

Appeal from Muscatine District Court.

WAIVER OF EXEMPTION *in lease.*—Where a lease contains a covenant that the rent shall be a lien on the crops and stock kept on the premises even if it its exempt, such covenant is binding upon the lessee.

The defendant, on the ninth day of September, 1876, leased of the plaintiff a certain farm, for the term of six years, from March,1, 1877,and agreed to pay as rent therefor the sum of nine hundred dollars yearly, payable in equal semi-annual instalments, on the first day of February and the last day of November of each year. The defendant also agreed in the contract of lease to pay all the taxes levied upon the demised property during the term. The lease was in duplicate, was signed by both parties, acknowledged by them, and afterwards placed on record. The lease, in addition to the usual covenants and agreements, contained the following clause:

"And the said second party in consideration of this lease, and the convenants herein contained, on the part of the said first party, hereby covenants and agrees to pay the said first party, the aforesaid yearly rent of nine hundred dollars and taxes, in manner and form hereinbefore specified; hereby covenanting that said rents, whether due or to become due shall be a perpetual lien on any and all the crops raised on the farm, and on any and all the cattle, hogs and pigs kept upon the premises, and belonging to said second party, whether the same be exempt from execution or not."

In this petition the plaintiff asked for a writ attachment, to be levied on "all the crops raised on the said premises, and any and all the cattle, hogs and pigs kept upon said premises and belonging to said defendant, whether the same be exempt from execution or not."

The sheriff made the levy accordingly. The defendant claimed the property attached to be exempt from execution, and moved the court to

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discharge the levy, which was done, and the plaintiff appeals.

The opinion of the court was delivered by

SEEVERS, J.:

It has been held that the waiver of the benefit of the exemption laws, in a promissory note was against public policy and void. Curtis vs. O'Brien et al. 20 Iowa, 476. Does the case at bar come within the rule established in that case? We think not. In the cited case the contract was executory, and this court refused to enforce it because such a waiver is not recognized by statute, and was against public policy; but the statute does not recognize the validity of a mortgage on property which is exempt from execution. The validity of such a mortgage has never been doubted, nor is it material that the property mortgaged was not in existance at the time it was executed. Whatever doubts there may have beeh on this subject were settled in this State in Scharfenburg vs. Bishop, 35 Iowa, 60.

The same principle was recognized in Brown vs. Allen, Id., 306. Technically, it is said the instrument in this case cannot be regarded as a mortgage, because it does not contain a grant or conveyance of the property; but, clearly, it creates a lien or equitable charge, and the right of a party to execute it and its validity must depend on the same principle as a mortgage. What does it matter what this instrument is called? The substantial right created is the same as a mortgage. Why may not the one be executed as well as the other? The validity of the lien should be recognized in the one case as in the other. Both may be executed by a party capable of contracting on a sufficient consideration and for a lawful purpose. There is no essential difference between a mortgage and the instrument in question, unless it be in the mode of enforcement; but this does not touch or affect the question of power or validity of either instrument when executed. Such instruments, as that in the present case, have been upheld in Everman & Co. vs. Robb, 52 Miss., 653; McCaffrey vs. Wodin, 65 N. Y., 456; and Butt vs. Ellett, 19 Wall., 545. The motion to discharge the property was not based on the ground that the plaintiff had not proceeded in the proper manner. It can not be made here for the first time. We must not be understood as intimating it would have prevailed ifthe objection had been made below.

Reversed.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Dec. 19, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Dec. 12.

Thos. McKirstry and wife to Mary Conway. $500,

John W. Walkley and wife to Christopher Emeuch. $2,200.

Mary Gorman and husband to John McCart. $253.

John Rafferty and wife to same. $322.

Jacob Berg to Chas. F. Steuber. $350.

L. B. Fish and wife to The Cit. Sav. & Loan Ass. $400.

Benj. T. Johnson and wife to Hosmer T. Walkins. $443.

Dec. 13.

John Gehlers to M. S. Chamberlain. $1,357.

Charlotte Marbach and husband to Herman Marbach. $1,000.

Thos. Henry to J. S. Heady. $100.

Sarah A. Slitoe to David P. Badger. $225.

Ella Scott and husband to M. S. Hogan. $150.

John B. Coffinberry to Hiram Barrett. $150.

Michael Halpen and wife to Josephine Scheuer. $100.

Jos. and E. White to The Cit. Sav. & Loan Ass. $600.

Chas. A. Smith and wife to The N. Y. Bap. Union, etc. $1,500.

Chas. A. Smith to Harriet P. Hickox. $2,500.

Emanuel Rosenfeld and wife to Henry Wick et al. $2,000.

Caleb W. Wraton and wife to Samuel Maltby. $1,700.

Jacob Linkart to E. D. Burton. $167.

Martin Walek and wife to August Schreiner. $550.

Dec. 15.

Norah Wilson and husband to Mary Shepp. $400.

John C. Sanders and wife to The Con. Mut. Life Ins. Co. $1,000.

Wm. B. Lane and wife to Isaac Hicks. $700.

Anton Haltcamp to Julius Sower. $800.

Walter Preston to Society for Savings. $500.

Frank Wolf and wife to same. $200.

John Miller to G. G. Hickox & Co. $450.

John Beck and wife to Isaac Hoffman et al. $400.

Mary Clark and husband to Soc. for Savings. $425.

Conrad Kortz to W. C. Stove. $120.

Numia Hessenmueller and husband to The People's Sav. & Loan Ass. $800.

Dec. 16.

Saal Bland to Chas. W. Moses. $150.

Loreng Linkoski and wife to James W. Jones. $200.

Fred Ott and wife to Dorothea Remelius. $500.

Same to Eliza Schneider. $200.

H. Romp to E. A. Northrup. $426.

John Day and wife to Henry Allen. $150.

Ernest Bergsicher and wife to Maria W. Spelth. $1,000.

John H. Carr and wife to The Society for Savings. $500.

Melaine Dourhet to same. $1,500.

John Boesch to C. C. Schenck et al. $300.

John Stenture and wife to M. B. Gary. $241.

John Pruhel and wife to A. W. Bock. $500.

Sam. B. Marshall and wife to The Peo. Sav. & Loan Ass. $1,500.

Dec. 17.

Alexander Shipton and wife to Trustees of Ger. Wallace College. Eighteen hundred dollars.

John Missbach and wife to Leonard Geitz. Six hundred dollars.

Wm. Murphy and wife to The Soc. for Savs. Two hundred and fifty dollars.

Carrie E. Campbell et al to J. H. Poe. One hundred and twenty dollars.

Wm. M. Stead and wife to C. W. Dabney. Four hundred dollars.

Daniel O'Rourke and wife to John Beavis. Five hundred and fifteen dollars.

Anna P. Schutt and husband to Agnes B. Goodman. Two hundred dollars.

Charles N. Wise and wife to Joseph Howe. One thousand dollars.

A. Louisa Sumner to Theological Seminary, etc. Two thousand dollars.

F. C. Nitzel and wife to The Soc. for Savs. Five hundred dollars.

Francis Green and wife to Hiram Bradley. One hundred and forty-three dollars.

Joseph T. Logue to Edwin T. Page. One thousand dollars.

Lorenz Mack and wife to John Parka. Eight hundred dollars.

Laura E. Pashek and h nd to Henrietta Gallup. $1,000.

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Dec. 18.

John Mellicka and wife to Lucy M. Safford. Four hundred dollars.

Corwin N. Payon and wife to Conneaut Mut. Loan Ass'n. Eight hundred and fifty-six dollars.

Emanuel Rosenfeld and wife to Henry Wick & Co. Twenty-five hundred dollars.

John Lili to John Wobanek. Three hundred and thirty-eight dollars.

Jas. T. Denham to Rush King et al. Fifteen hundred and six dollars.

Grace March and husband to Richard Whitlock. Six hundred and forty-five dollars.

Peter P. Weidenmaier and wife to Robt. Jaite. Six huudred and fifty dollars.

Jas. Preston to Chas Drake. Seven hundred dollars.

John L Dunner to Edward J. Wardwell. One thousand dollars.

Maria E. Ehrenburg and husband to M. H. Fartham. Two thousand seven hundred and three dollars.

Rudolph Ehrenburg and wife to same. Same.

Wm. Tramp and wife to Adolph Mayer. Seven hundred dollars.

H. McClaren to S. H. Kirby. Four hundred and forty-nine dollars.

J. P. Brooks and wife to R. J. Walkden. Four hundred and twenty-five dollars.

Florida G. Blythe to Theodore E. Burton. Twenty-eight hundred dollars.

Henry Goldfein and wife to Philip Gertosh. Four hundred dollars.

Dec. 19.

P. O'Sullivan to Jeremiah Conrad. $900.

Caroline M. Ensign and husband to Lydia P. Noble. $1,200.

Karl Verk and wife to Mary Gruenewald. $400.

Ferdinand Strauss and wife et al to Catharine Hyman. $5,849.

H. C. Miller to same. $5,849.

Spencer Wright and wife to Geo. A. Smith. $500.

Frederick Rude and wife to John T. Sotmelk. $400.

Irwin H. Moses to Eri M. Dille. 480.

Wm. V. Craw and wife to Gerhard Weibe. 1,050.

CHATTEL MORTGAGES.

Dec. 16.

J. Cauthoa to J. M. Hurlburt. $131.

Dec. 18.

Frank Mares to Frank Keiger. $150.

Caroline Tramp and husband to Adolph Mayer. $600.

DEEDS.

Dec. 9.

Henrietta Gallup to Joseph Trojan and wife. 480.

H. D. Goulder, assignee, et al to David Carter. $3,130.

Chas. Leavitt and wife to A. C. Armstrong. 2,000.

B. L. Pennington and wife to Carrie E. Campbell. 120.

Jane Sayle et al, admrs., etc, to Fannie J. Pond. 1,300.

Fannie J. Pond and husband to F. L. Raymond. 2,000.

Bandewyn Rour and wife to Amelia Greentert. 35.

D. P. Rhodes' estate to same. 750.

Alexander Sacket and wife to W. J. Gordon. 1,350.

J. H. Salisbury and wife to same. 1.

Dec. 10.

W. H. Capener to George Angel. $1.

Same to same. $1.

Leonard Geitz and wife to Pauline Missbuck. $1,200.

Henry Houtz and wife to Mary Estella Houtz. $1,000.

J. M. Jones and wife to C. J. Force, Jr. $3,550.

Mary A. Jaquith and husband to Elizabeth Coit. $550.

John Leard, guard., etc, to Wm. Harris et al. $636.

Same to Jos. Schmidt. $908.

Same to Alonzo Watkins. $404.

Loren Prentiss, trustee, to Agnes G. Wraton. $1.

Horace M. Stevens and wife to O. C. Lawrence. $1,500.

Dec. 11.

George Angel and wife to Harriet A. Capener. One dollar.

Same to same. One dollar.

G. B. Bowers et al to A. S. Gardner. Seven hundred and fifty dollars.

Andrew Boyle and wife to Elizabeth Schneider. One thousand dollars.

Heirs of Fred. Voltz by J. M. Wilcox, sheriff, to Charles H. Dearborn. One thousand seven hundred and thirty dollars.

Chas. H. Dearborn to Caroline Benjamin. One thousand seven hundred and thirty dollars.

Heirs of Catharine McAllister by J. M. Wilcox, sheriff, to Charles H. Dearborn Fourteen hundred dollars.

Charles H. Dearborn to Caroline Benjamin. One thousand four hundred dollars.

John Fiala et al to Chas. H. Collins. One dollar.

Cyrus G. Force, Jr., to Eleanora G. Force. One dollar.

Hearietta Gallup to Jranna Kessler. Four hundred and ten dollars.

Aaron P. Hinman and wife to Geo. Nowaczeski. Three hundred and twenty-five dollars.

Bartolemey Mikatolsich and wife te Victor Zarencyni. Four hundred and fifty dollars.

Caroline Hecker et al to Thos. H. White. Six thousand dollars.

Garrett A. Newkirk and wife to Orlando Van Hise. Two hundred dollars.

Elvira M. Peck and husband to John Crowell. One thousand dollars.

S. H. Peck and wife to same One thousand dollars.

Charlotte McMunn et al to Ed. C. Southam. Five hundred dollars.

Edward Rose et al to Eben S. Coe et al. Fourteen thousand five hundred dollars.

Dec. 12.

H. C. Brainard and wife to John W. Anderson. $2,000.

Wm. Doubleday and wife to Seth Brainerd. $3,198.

Chas. Flesher and wife to Preston A. Metcalf. $1,500.

Augustus Faller et al to John Schatz. $1.

Chas. W. Johnson to Benjamin F. Johnson. $100.

Benjamin F. Johnson and wife to Hasmer T. Watkins. Six hundred dollars.

Sarah Johnson to same. $5.

Mary B. Jones to August Raddatz. $910.

Mary S. Maynard to C. R. De Lamb. $500.

Russell Osborn to Ja[illegible]s Christy and wife. $5,000.

Same to same. $1.

B. L. Pennington and wife to Geo. Hall. $10.

Chas. Rodgers and wife to Samuel Robinson. $800.

Caroline Robzino and husband to N. M. Platt. $2,000.

Mary Bender to same. $1.

Same et al to same. $4,000.

Geo. M. Spangler, guardian, etc, to same. $4,000.

N. M. Platt and wife to Thomas H. White. $12,000.

Thos. H. White and wife to N. M. Platt. $2,000.

Andrew Franchier by Thos. Graves Mas. Com., to Philip Getrosh. $445.

Dec. 13.

Chas. G. Atwell to Chas. R. Atwell. $4,000.

John G. Bruggeman and wife to Fred Boekler. $400.

Cora E. Brighton to He rietta Ostermeyer. $200.

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Mary A. Crist to Valentine Crist. $1,500.

Joseph Doubrava Sr., and wife to Catharine Gabel. $1.

Agnes B. Goodman and husband to J. B. Coffinberry. $300.

James M. Hoyt and wife to Fred Schmidt. $450.

Benj. Jones to John E. Adams. $150.

Chas. W. Moses to E. D. Burton. $1.

Sarah McAllister and husband to S. H. Kirby. $800.

N. M. Platt and wife to J. T. Logue. $2,000.

Frangott Laxer and wife to Chas. Staerk. $1.

Peter Zucker, admr., etc., to Simon Fisher. ——

Simon Fisher and wife to Katharine Steiner. ——

Jeheel Stewart et al by E. H. Eggleston, Mas. Com., to M. Hessenmueller. $1,425.

Dec. 15.

Chas. R. Atwell and wife to Frank Farr. $1,800.

A. N. Batchelder and wife to W. H. Price. $7,000.

Same to same. $7,000.

John Crist to Valentine Crist. $5,-000.

H. T. Claflin and wife to D. W. Marsh. $1,750.

Jette Ettinger and husband to Sophia Elias. $2,000.

Porter S. Fenton and wife to Wm. Hair. $366.

Jas. R. Henry and wife to Anna E. Prather. $500.

Anna E. Prather and husband to White S. M. Co. $15,000.

Geo. G. Hickox and wife to John Miller. $500.

A. A. Jewett to Thomas Reid. $500.

M. Marshall and wife to Frank Wolf. $1,800.

Geo. Stover and wife to Conrad Kortz. $200.

Julius Sower and wife to Anton Holtkamp. $840.

Barnard, Anderson et ol by W. I. Hudson, Mas. Com., to J. P. Aldreck. $27.

A. T. Brinsmade et al by C. C. Lowe, Mas. Com., to Wm. Ward. $600.

Dec. 16.

Thos. Bradley to Herbert T. Bradley. One thousand dollars.

Same to Frank Bradley. One dollar.

E. D. Burton to Chas. W. Moses. One dollar.

Walter Blythe to Florida G. Blythe et al. Ten thousand dollars.

Jennie F. Blythe to same. Five dollars.

Lucius A. Heard to same. Five thousand dollars.

Chas. J. Cabelle, exr., etc., to Albert Kohler. One dollar.

Dixon & Schenck to John Boesch. Six hundred and fifty dollars.

N. Heisel et al to Frank Divis and wife. Three hundred and sixty dollars.

James M. Jones and wife to Lorenz Lunkroski. Two hundred and fifty dollars.

John Kovar and wife to Mary Dlouha. Two hundred dollars.

Geo. Moore to Alfred Glendenning. Seventeen hundred dollars.

Robt. Moore to same. Twenty-one hundred dollars.

David M. Marsh and wife to Marsh & Harwood Co. Seventy-seven thousand eight hundred dollars.

L. McDermott to B. W. Sabine. Five hundred dollars.

John McKean and wife to same. One hundred dollars.

Cornelius Newkirk and wife to John Hayden. One thousand dollars.

Warren Rathburn and wife to Eunice Sawyer. Six hundred dollars.

Elizabeth Schneider and husband to Fred Ott. Twelve hundred dollars.

Amos T. Selby to Sarah A. Selby. Twelve hundred and thirty-four dollars.

James C. Smith as att. to Mary W. Speith. Six hundred and sixty-five dollars.

Royal Taylor and wife to Frank H. Baldwin. Six hundred dollars.

Giles Van Norman to Elvinda Sabin. Five hundred dollars.

Maria Williamson and husband to John Taylor. Twenty-five hundred dollars.

Jas. Culligan et al by Jas. Quayle, Mas. Com., to Amelin Paisley. Three thousand and sixty-seven dollars.

Heirs of Edward Harwood by sheriff to David M. Marsh. Seventy-seven thousand eight hundred dollars.

Dec. 17.

Margaret Barnes to Laura E. Pashek. Two thousand eight hundred dollars.

Julia F. Brown to Levi Willcocks. Three hundred and ten dollars.

Agnes P. Goodman and husband to Anna B. Schutt. Thirty-four hundred dollars.

Frederick Hecker and wife to Anna Kolars. Three hundred and twenty dollars.

Wm. Oxford and wiie to Alexander Shipton. Eighteen hundred and fifty dollars.

Anna P. Schutt and husband to Agnes P. Goodman. Twenty-five hundred dollars.

Richard Whitlock and wife to Grace March. Nine hunnred and thirty-one dallars.

Wm. Jones et al by C. C. Lowe, Mas. Com., to Hannah Woodard. Eight hundred dollars.

Mary Yax by Felix Nicola, Mas. Com., to S. H. Kirby. Two hundred dollars.

Dec. 18.

S. S. Armstrong to J. C. Armstrong, Three hundred dollars.

Wesley Blackman and wife to Phineas Churchward. Fifteen hundred and fifty dollars.

John Claflin to Emanuel Rosenfeld. Three thousand dollars.

Mary Clark to Hugh McClarnon. Twenty-five hundred dollars.

Nicholas C. Hughes to Jas. Killen. One dollar.

Jas. M. Hoyt and wife to Peter A. Wiedenmaier. Four hundred and fifty dollars.

Jas. Killen and wife to Nicholas Hughes. One hundred and sixty-five dollars.

John Leard, guard., etc, to Amos Skeels. One hundred and fifty dollars.

Marcus Steiner and wife to Nicholas Baus. Fourteen hundred dollars.

Karl Schulz and wife to Karl Barton. Two hundred and fifty dollars.

Lucy F. Stafford to John Millicha and wife. Four hundred and fifty dollars.

Mrs. Mary Sweeny to Mary Sweeny. Three hundred and fifty dollars.

A. R. Southworth and wife to Jedekiah Southworth. One hundred and ninety-two dollars.

John Urbanek to John Tile. Six hundred and thirty-five dollars.

V. B. Vanek to John M. Nowak. Fifty dollars.

J. M. Nowak and wife to Mary Vanek. Fifty dollars.

Lucy M. Van Tyne to Hulett, Holmes & Co. Sixty-two dollars.

Mary A. Dietz by Thomas Graves, Mas. Com., to Louis Krueges. Forty-six hundred dollars.

Simon Thorman by same to Solomon Lodge No. 16, I. O. B. B. Twenty-three thousand three hundred and thirty-five dollars.

Dec. 19.

Catharine Albrecht to Geo. Neubrand. 500.

Jeremiah Coonard and wife to Patrick O'Sullivan. 1,500.

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Lorenza Carter et al as exrs., etc., to Matthew O'Maley. 200.

Jane Forester and husband to Dora Van Hise. 5,000.

S. S. Stone and wife to A. L. Champion. 660.

A. L. Champlain to Michael J. Kearney. 1,350.

Nicholas Meyer and wife to Frank Charwat. 736.

Irwin H. Moses and wife to Ella Moses et al. 1.

Edward Porter to Dora Linnon. 50.

V. C. Stone to M. Stone. 600.

Joshua Stone and wife to same. 100.

Karoline Trenkner and husband to Friedericka Pfahl. 1,500.

Wm. Ward and wife to Fred Rode. 700.

Albert Weile and wife to Edmund Walton et al. 1,500.

Judgments Rendered in the Court of Common Pleas for the Week ending Dec. 16, 1879, against the following Persons:

Dec. 10.

Uri Richards. $1,086.67.
John Storp et al. $1,580.65.

Dec. 11.

W. H. Osborn et al. $1,324.30.

Dec. 13.

B. F. Robinson. $897.75.

Dec. 15.

P. Cunningham. $418.21.
G. H. Adams. $214.56.
John Russert. $436.60.
Hibernia Ins. Co. $716.46.
Ed. Vopalecky. $581.40.

Dec. 16.

John T. Deweese. $204.27.

COURT OF COMMON PLEAS.

Actions Commenced.

Dec. 12.

16325. Albert Gilchrist vs H. P. Bemis et al. Equitable relief and to recover real estate. Burton.

16326. C. T. Norton & Co. vs Charles Brenner et al. Appeal by deft. Judgment Nov. 15. Rider; Jackson, Pudney & Athey.

16327. Elizyan Derochie vs J. W. Francisco, const., etc. Appeal by deft. Judgment Nov. 18. Lewis & Castle; Johnson & Schwan.

Dec. 13.

16328. The Cleve. Malleable Iron Co. vs E. D. Conklin. Money only. Brooks.

16329. James Christy et al vs Elizabeth Grady. Account, sale of land and relief. Grannis.

16330. W. F. Walworth vs Alfred Harrison. Money, sale of mortgaged premises and relief. Copp.

16331. Same vs Reuben Riblett et al. Same. Same.

16332. A. Weiner, vice pres, etc, et al vs Catharine Mayer et al. Money and to subject land. Schwab.

16333. Mary A. Mitchell as admx, etc, vs G. S. Wheaton. Money only. Tyler & Denison.

16334. A. D. Gurley vs Enos Foreman et al. To subject lands. Same.

16335. Caroline Crawford vs John W. Francisco et al. Appeal by deft. Judgment Nov. 17. Stewart; Jackson, Pudney & Athey.

16336. Philo Tilden vs S. M. Carpenter et al. Money only. Ranney & Ranneys.

16337. James M. Hoyt vs Frederick Buehne et al. Foreclosure and equitable relief. Willey, Sherman & Hoyt.

16338. Belden Seymour vs Ohio Wooden Ware Co. Money only. Wilcox.

16339. Aaron Higley vs F. H. Furniss. Marvin, Laird & Cadwell.

Dec. 15.

16340. Emma Lask vs L. N. Eastman et al. Appeal by deft. Judgment Nov. 14. Hart; Stewart,

16341. State on complaint, etc, vs Wm. Robertson. Bastardy.

16342. Mary Loch vs Fred Becht et al. Money and foreclosure of mortgage. Estep & Squire.

16343. Edgar A. Baldwin et al vs The Atwater Coal Co., H. C. White, rec., etc, et al. Money and equitable relief. E. H. Eggleston.

Dec. 16.

16344. Mary Charleston vs S. H. & E. Block, etc. Error and injunction. Clark.

16345. Thomas Churchward vs Michael Daley et al. Money and to sell mortgaged lands. Hubbard.

16346. W. W. Noble vs James Atkinson et al. Same. Same.

16347. R. W. Burrows vs Joseph Amor. Appeal by deft. Judgment Dec. 16.

16348. A. W. Lyman vs Lyman Man. Co. Money and equitable relief. Gary & Everett.

Dec. 17.

16349. Marion J. Thompson et al vs Moses G. Watterson, treasurer, etc. Money only. Fitch and Ensign.

16350. W. H. H. Peck vs same. Same. Same.

16351. Fred. C. Bemis vs same. Same Same.

16352. Henry S. Davis vs The Kelley Island Lime Co. Money and equitable relief. Prentiss & Vorce.

16353. The Briar Hill Iron Co. vs Curtiss S. Barrett. Money only. H. & Kline, Sydney Strong; John Tod.

16354. S. S. Andrews et al vs The City of Cleveland and Watterson, treasurer, etc. Injunction and relief- Grannis & Griswold.

16355. Patrick Ryan vs Thos. Barry et al. Sale of lands and equitable relief. Graham.

Dec. 18.

16356. Martha Wilson vs Moses G. Watterson, treas., etc. Money only. Grannis & Griswold.

16357. Wm. Jones vs The City of Cleveland. etc. Appeal by deft. Judgment Dec. 3d.

16358. Alsbacher & Schenrer vs J. H. Peck. Appeal by deft. Judgment Nov. 17. Goulder, Hadden & Zucker; H. & Kline.

16359. Seymour F. Adams vs Moses G. Watterson, treasurer, etc. Injunction and relief. Bishop, Adams & Bishop.

16360. Silas Merchant vs E. M. McGillen et al. Relief and to subject property to payment of judgment. Grannis & Griswold.

16261. Patrick Gowding vs Edward Hobday. Money only. Foran & Williams.

16362. Catharine Howard et al vs John Perry et al. Foreclosure of mortgage and equitable relief. Same.

16363. Rufus K. Winslow vs Mack Michael et al. Money and to subject lands. Terrell, Beach & Cushing.

Motions and Demurrers Filed.

Dec. 12.

3600. Davidson vs Cleve. Rolling Mill Co. Motion by plff. for a new trial.

3601. Haltnorth vs Basel et al. Motion by deft. Knapt for a re-appraisal.

3602. Berghold, guard., vs Soc. for Savs. Motion by deft. Frauenfelder for new trial.

Dec. 13.

3603. Bainbauer vs Isekeit et al. Motion by defts. to set aside sale.

3604. Schwind et al vs Horn et al. Motion to make the petition more definite and certain.

3605. Kuhns vs Morman. Demurrer to the petition.

3606. Halle vs Jones et al. Motion by plff. to refer case to E. H. Eggleston as referee.

3607. Ferbert et al, exrs., etc, vs Seiger. Motion by defts. Henninger at al for the appointment of a receiver.

Dec. 15.

3608. Ambush vs Ford. Motion by plff. to vacate and set aside judgment.

3609. Latimer, rec.. vs Ludlow. Motion by plff. for judgment on the pleadings.

3610. Same vs same. Motion for new trial.

3611. Johnson vs Brown. Motion by defts. to strike amended petition from the files, etc.

Dec. 16.

3612. Cowle et al vs L. V. & Coll. R. R. Co, et al. Motion by Nelson Moses to be allowed to prove claim before the referee.

3613. Same vs same. Same by L. F. Beers.

3614. Scott vs Burgert. Motion by plff. for additional bail for appeal, etc.

3615. Stark, trustee, vs Fries et al. Demurrer by plff. to the answer of John Fries.

Dec. 17.

3616. Andrews et al vs City of Cleveland et al. Motion by Standard Oil Co. to be joined as party plaintiff.

Dec. 18.

3617. Burke et al vs Winslow et al. Motion by defts. to set aside appraisement of real estate under lease,.

3618. Mueller vs The Penn. Co. Demurrer to petition.

3619. Hoffman vs Bauder, Aud., etc, et al. Demurrer by City of Cleveland to the petition.

Motions and Demurrers Decided,

Dec. 13.

3298 Edwards vs Union Iron Foundry Co. Granted.

3310 } 3311 } Meeker vs Flowson et al. Overruled.

3315. Banknecht vs Clewell Stone Co. et al. Same.

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3340 } Stark vs Buskirk et al. Snstained.
3341 }

3429. Cleve. Paper Co. vs Celtic Index Pub. Co. Stricken from docket.

3442. Lodge vs Lodge. Sustained.

3495. Crawford vs Kaufman. Sustained.

3509. Hickley vs Gill et al. Same.

3507. Nevins et al vs Elwell et al. Defts. have leave to number defenses by, etc.

3510. Castor vs Hogg. Deft. has leave to answer instanter.

3514. Adams et al vs Crocker. Granted.

3526. Baker vs Bratton Defts. have leave to re-file motion, etc.

3530. Smith vs Coe et al. Sustained.

3532. Cit. Savs. and Loan Ass'n. vs Spitzig et al. Same.

3533. Little vs Thoman et al. Stricken from docket.

3535. Johnson, trustee, vs McEnery et al. Sustained.

3537. Rogers vs Hasenpflug et al. Overruled.

3538. Gilbert et al vs Eastman. Same.

3539. Cochran vs Patterson et al. Granted.

3540. Stoppel vs Hellman et al. Overruled.

3543 | Gillette vs Patts et al. Sustained.
3544 |

3547. Cowle et al vs L. V. & Coll. R. R. Co. Granted.

3550 }
3551 } Hilliard vs the Forest City U. Ld.
3552 } and Building Ass'n. Overruled.
3556 }

3557. Lippencott vs Pechoc et al. Stricken from docket.

3558. Healy vs Healy et al. Sustained.

3560. Alger et al vs Lunn et al. Overruled as to 1st and 2d specifications, granted as to 3d.

3561. Glenn vs Jennings, Stricken from docket.

3564. Jackson vs Lancaster et al. Overruled.

3578. Holmes vs Holmes et al. Plff. has leave to file affidavit by Jan. 3d.

3590. Heil vs Thomas. Granted.

Dec. 17.

2454. Chamberlain vs Wilson S. M. Co. et al. Overruled.

3075. Wills vs Low et al. Sustained.

3116. Haggerty vs L. & S. M. S. Ry. Co Granted.

3436 } Babcock vs Krejci. Demurrer to
3437 } petition overruled. Motion to discharge attachment granted.

3530. Smith vs Coe et al. Plff. has leave to amend petition.

3533. Little vs Thoman et al. Sustained.

3572. Clements vs Goodman. Granted.

3575. Steiger vs Bullinger et al. Sustained.

3577. Mason vs Utly et al. Stricken from docket.

3582. Roosa vs Ware. Same.

3585. Rast vs Russert. Overruled.

3587 | Strauss vs Ross et al. Overruled.
3588 |

3599. Baker vs Bratton. Granted.

3568. Wick et al vs Schmidt et al. Jas. Lawrence appointed receiver to take possession of said property, etc.

3584. Schmitt vs Grub et al. Granted.

3598. Spencer vs Goff. Sheriff ordered to pay to County Treasurer $197.12; to C. C. Baldwin $523.96.

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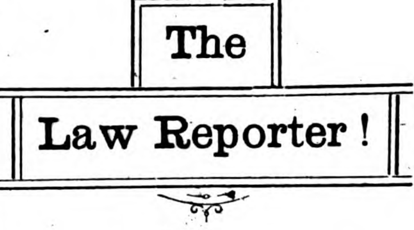

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THE assignment for the January Term will be issued on Wednesday, December 31st.

THE END.—This issue completes the present volume of this paper, and, as previously announced, the publication of THE LAW REPORTER, for the present, will be discontinued.

WOULD it not be a good plan for our judges to reduce all decisions of interest made by them to writing and place them on file in the Law Library? They might then be copied on uniform paper, indexed and bound for convenience of reference. What the Court has hitherto held or decided should rest in something more reliable than tradition. Then there is the additional fact, to recommend the practice, that "writing maketh an exact man." If the plan suggested was followed it would also be a convenience to the future publisher of a legal journal in this city, as it would afford a supply of decisions from which he could draw to fill the columns of his paper.

THE Supreme Court recently adopted the following rules regulating the admission of attorneys and Counselors at Law to the Bar, which go into effect January 6, 1880:

1. Applications for admission to the Bar will be received on the first Tuesday of each month when the Court is in session, and at no other time.

2. At the commencement of each term of the Court there shall be appointed a Committee of twelve discreet and judicious attorneys and counselors-at-law, to be known as the Standing Committee on Examinations, whose duty it shall be to examine all applicants for admission to the Bar, any three of whom may conduct an examination.

3. Examinations shall be conducted in open Court, or by two Judges thereof, or in the presence of at least three members of said Standing Committee; and each member of the Committee present at an examination shall report in writing for or against the admission of the applicant.

4. No applicant will be admitted to the oath of office unless a majority of the Examiners present shall certify that they find him to have a competent knowledge of the law and to have sufficient general learning to discharge the duties of an attorney and counselor-at-law, and shall recommend his admission.

5. If the applicant, on examination, shall be rejected, he shall not again be admitted to an examination within six months from the date of such rejection.

6. Except as provided in section 561 of the Revised Statutes, each applicant must produce a certificate of qualification, as required by section 560 of the Revised Statutes, signed by his preceptor; and in no case will the certificate of any other attorney or counselor-at-law be received unless it be shown by the affidavit of the applicant that his preceptor is dead, or that his certificate cannot, for some reason satisfactory to the Court, be obtained. And when the certificate of an attorney and counselor-at-law other than the preceptor of the applicant is produced, it must show that the certifier has personal knowledge of the length of time the applicant has been engaged in the study of the law and the name of his preceptor.

7. The certificate produced in conformity to the foregoing rule shall not be deemed conclusive evidence of the facts therein stated; but, in all cases, the Court must be satisfied of its truth before the applicant will be admitted to an examination.

8. The applicant must sustain a satisfactory examination upon the law of real and personal property, personal rights, contracts, evidence, pleadings, partnerships, bailments, negotiable instruments, principal and agent, principal and surety, domestic relations, wills, corporations, equity, jurisprudence, criminal law, and upon the principles of the Constitution of tho State and of the United States.

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9. Examinations shall be conducted by both oral and written or printed interrogatories. The written or printed interrogatories and the answers of the applicant thereto shall be submitted to the Court with the report of the examiners, and shall, together with the certificate required by Rule No. 6, be filed and preserved by the clerk.

10. Each applicant, upon receiving the oath of office, shall sign a roll, showing the date of his admission and his place of residence.

11. All rules heretofore adopted in relation to admission to the Bar are hereby rescinded.

CUYAHOGA COMMON PLEAS.

November Term, '79.

HENRY N. RAYMOND ET AL VS. MATTIE D. ROSS.

Occupying Claimant — Rights and Remedy of—Cannot Maintain Independent Action against Owner of Premises for Value of Improvements, etc.

Hearing on Demurrer to the Petition.

Opinion by BARBER, J.:

The plaintiff seeks to recover the value of improvements made upon premises described in the petition by his grantor while occupying them under defective title and from which he was subsequently ejected, and also the amount paid by his grantor for the purchase of the premises at tax sale and for taxes since paid by him, together with interest and penalty.

The petition shows that plaintiffs' rights have accrued under a mortgage made by one George A. Landreth on the premises in question which after default was foreclosed and the plaintiffs were the purchasers and are the owners of Landreth's interest in the lands named in the petition. After they thus became the owners of Landreth's rights and before going into actual possession, in 1875 an action in ejectment was commenced in the Superior Court of Cleveland by one J. H. Newton against said Landreth and the plaintiffs in this action, to recover possession of said lands, claiming the same under a superior and better title than that of Landreth. That action resulted in a judgment for possession in favor of Newton, and under it he went into possession. The defendant, Mattie D. Ross, has derived her title from said Newton. No claim was made in that proceeding of any rights under the Occupying Claimant Law.

The rights which plaintiffs are seeking to enforce they aver accrued to them from Landreth by reason of the foreclosure proceedings above stated, and to Landreth under a purchase at tax sale in January, 1859, to one Parley Sheldon, and by an Auditor's deed to him two years thereafter, by whom and those claiming under him possession was taken and held up to the ejectment in 1875, and during that occupancy large sums of money were paid for taxes, and lasting and valuable improvements were made by the owner of the tax title on the premises.

The prayer of the petition is as follows: "The plaintiffs therefore pray, that the value of their interest in said premises may be ascertained and the amount paid for said premises at the tax sale thereof and the taxes and assessments since paid on said property and the penalty and interest thereon, and the value of the said improvements as herein set forth may be ascertained by the court and that the defendant may be required within such time as may be fixed by the court to pay plaintiffs the value of said interest in said premises, and on failure so to do, that said premises may be sold and the proceeds thereof applied to the payment of plaintiffs' interest as appears in the said judgment of foreclosure aforesaid, and for such other and further relief in the premises as equity and good conscience may require."

To this petition a general demurrer is interposed. The question to be decided is whether, admitting all the facts set up in the petition to be true, the plaintiffs are entitled to the relief prayed for.

The plaintiffs' claims are based upon the 1st and 2d sections of the Occupying Claimant Law, S. & C., 881, 2 & 3, and the construction to be given to those sections must determine the rights of the parties.

That without the aid of that statute no right of action exists was decided by the Supreme Court in the case of the Administrators of Winthrop vs. Huntington and wife, 3 O., 327. The syllabus of that case is as follows: "Persons entering land under color of title, paying taxes and making improvements as owner, being ejected at law, cannot sustain a bill in equity for compensation and reimbursement against the rightful owner."

Again in the case of Lieby vs. The Heirs of Ludlow and C. Park, 4 O., 469, on page 494 the Court say: "The right of a defendant in ejectment to recover payment for improvements he has made on the premises recovered of him is given by the Occupying Claimant laws; the rules and mode by which the amount shall be ascertained are prescribed by these laws and the proceedings are all required to be in the court of law in which the ejectment is tried. The law does not give this court jurisdiction in such cases. [The application in that case was to enjoin the proceedings in ejectment]. The remedy at law is as plain and as adequate as the legislature chose to make it."

These decisions are only an authoritative statement of the principle which has always prevailed at common law that a person who makes improvements on the property of another either as a volunteer or under an adverse claim of title does so at his peril and cannot call upon the owner to reimburse him—and they clearly settle the question that any rights which Landreth had to reimbursement are to be found in the provisions of the Occupying Claimant Law, as the statute now in force is not materially different in these respects from the occupying claimant law under which those decisions were rendered. S. & C., 881, and Chase, vol. 1, page 671.

The first section of the Occupying Claimant Law, so far as is necessary for the question before us, reads as follows: S. & C., 881, sec. 1. "Be it enacted, etc., That in all cases where any occupying claimant being in quiet possession of any lands or tenements * * * or being in possession of and holding any land under any sale for taxes authorized by the laws of this state * * * shall not be evicted or turned out of possession by any person or persons who shall set up and prove an adverse and better title to said lands until said occupying claimant, his, her or their heirs, shall be fully paid the value of all lasting and valuable improvements made on said land by such occupying claimant or by the person under whom he, she or they may hold the same previous to receiving actual notice by the commencement of suit on such adverse claim, * * * unless such occupying claimant shall refuse to pay * * * the value of the land without the improvements made thereon as aforesaid upon the demand of the successful claimant * * *

"Sec. 2. That the title by which such successful claimant succeeds against the occupying claimant in all cases of lands sold for taxes * * * shall be considered an adverse and better title, under the provisions o the first section, whether it be the titl

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under which the taxes were due and for which said land was sold or any other title or claim whatever; and the occupying claimant holding possession of lands sold for taxes as aforesaid * * * shall be considered as having sufficient title to said land to demand the value of improvements under the provisions of the first section of this act."

The fourth section provides that the court rendering judgment against the occupying claimant shall at the request of either party empanel a jury to assess the value of the improvements, or if the successful claimant elect to take the value of the land, to assess the value of the land without the improvements, etc.

No right of action is given by statute to the occupying claimant against the successful claimant. Indeed, I do not well see how a right of action could be given without violating the provisions of the Constitution, sec. 19, art. 1. The statute merely makes a condition that the successful claimant in an action at law shall do equity towards the occupying claimant before it will entitle him to use the process of the courts to put him in possession of the property to which the improvements are attached which have been innocently placed there and the value of which he will obtain—a principle which courts of equity have always enforced when a party comes into such a court for relief.

Landreth and these plaintiffs have, as appears by the petition, had their day in court. They have failed to set up their claim to improvements and have suffered themselves to be ejected; they are therefore remediless. But it is claimed these plaintiffs stand on different ground from Landreth. That their cross-petition was dismissed in the Superior Court ejectment case, and that Landreth had no interest to set up his occupying claimant rights; indeed, that he had none, as they had been conveyed to these plaintiffs. Nothing of this is set up in the petition, but if that be so it does not affect this action. If error was committed in that case they must pursue their remedy in that case. Dismissal without prejudice would not give them a right of action they did not already have. In their action in foreclosure and by purchasing the property at the foreclosure sale they simply obtained the rights of Landreth. They were made a party with Landreth, had full notice of the action and are bound by the judgment.

It is claimed that whatever may be the effect of that judgment upon the occupying claimant, these plaintiffs having procured whatever title he had, the title given to him or defined in the last clause of section 2 of the Occupying Claimant Law, their rights are not concluded by that judgment. What might have been the effect if they had not been made parties to the ejectment suit we are not now called upon to decide. The rights of the plaintiffs were derived from Landreth and whatever relief they were entitled to were involved in that action, and if they failed to set them up, or to press them to a final judgment in their favor in that court, they cannot now be permitted to maintain them in another action.

It is possible that the right to reimbursement for the payments on account of taxes may stand upon a different footing—and if saved to them by dismissal of their cross-petition in the Superior Court—if proper averments were made in the petition, but nothing of this kind appears in the petition, although claimed in argument. It is not therefore in the case.

The demurrer must therefore be sustained.

FREDERICK WILSON VS. EDWIN HIGGINS.

Trespass on Land—Defense—Parol License to dig ditch, etc.

Demurrer to second defense.

BARBER, J.:

This action is one for trespass on real estate. The facts set up in the petition are that he is the owner of a lot of land extending to the centre of the road along which it lies, and the defandant occupies land on the opposite side also extending to the centre of the road. That the defendant, on the 11th day of January, 1875, entered upon plaintiff's premises and dug and opened an artificial drain across the highway to and upon the plaintiff's premises, causing a flow of water thereon, rolled stones through his hedges, and did other injuries to plaintiff's land.

The second defence is in substance that a former owner of the land occupied by him, for a valuable consideration, obtained from a former owner of the land occupied by the plaintiff a parol license to dig a ditch or drain from his cellar, across the highway and to terminate on the land now owned and occupied by the plaintiff. That he and his predecessor have occupied this land and used and kept open this drain for the period of nineteen years, and that possession has been open, notorious and adverse—and that he has not at any time within the time named in the petition entered upon the plaintiff's premises except to open and maintain and remove obstructions from the opening of said drain, and in doing so has done no injury to plaintiff's premises beyond what he lawfully might do.

To this answer this demurrer is interposed on the ground that it contains no defense to plaintiff's claim.

The question raised by this demurrer involves a construction of the rights acquired under a parol license for the occupancy of real estate and to whom they extend.

In Wilkins vs. Irvine, 33 O. St., 13, the Supreme Court Commission decide that an interest in, or permanent incumbrance upon land in this state can only arise from some of the modes provided for or recognized in law. They hold that a written license for a valuable consideration is only a license to enter upon the land for a specific purpose. It has none of the characteristics provided by statute creating an incumbrance that could possibly impart to the instrument a quality to run with the land.

Such licenses amount to no more than an excuse for the act which would otherwise be a trespass. A permanent right, say the Commission, to enter upon another's land for a particular purpose without his consent is an important interest which should pass only in the mode and by the instrumentalities provided by law.

The right then which the defendant claims to enter upon the plaintiff's land is not a right which runs with the land. It is a mere license. Our Supreme Court has held that an executed license for a valuable consideration is irrevocable in cases between the parties to the license.

Wilson et al vs. Chalfant, 15 O., 248.

Hornbach vs. The Cin. & L. R. R. 20 O. St., 81.

If the license does not run with the land subsequent purchasers can only be bound by it when in the execution of the license the licensee has such possession as would take it out of the Statute of Frauds and give him an interest in the real estate which would run with the land and might be enforced in equity. Such an executed license for a consideration might bind subsequent purchasers with notice. But unless the execution of the license is also accompanied by an actual and continued change of possession, while it cannot be revoked by the licensor,

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does not run with the land and does not bind subsequent purchasers. The right of the licensee then to use the land of the licensor for the purposes intended by the license depends wholly upon his possession, and such possession as shall be notice to the purchaser. In that case or in case of actual notice given by the licensee to the purchaser ought the license in all cases to be upheld? In other words should the possession and right of the licensee be made perpetual from the sole fact of possession or notice given to the purchaser? If so it would be in the power of the licensee by continued possession or notice to purchasers to perpetuate his license, making it the equivalent of an interest in the land or an incumbrance. The Supreme Court do not appear to have decided that question in either of the cases cited. In the case of Wilson et al vs. Chalfant the Court says: In the case at bar the license was executed and the consideration paid and the defendant in error had the right to make the abutment, it follows as an incident to that right that he acquired the lawful possession of the *loans in quo* for that purpose and the right of ingress and egress to keep it in repair and control it so long as it remains for the purpose for which it was constructed. If this license be for the purpose of an abutment for a mill dam or a race to conduct water to a mill, or the right of way of a railroad, the very nature of the occupation shows that the license contemplated the use of the other land for that purpose as long as the mill or the railroad should be continued. It would be the sale of the possession of that land for that purpose and therefore while the possession continued it would be taken out of the Statute of Frauds by that possession, but when the railroad or mill should cease and the occupation for that purpose should cease the license terminates.

But to bring the licensee within that rule the possession must be such and the purposes of the license such that the purchaser would be notified by it that the occupancy of the land was intended to be continued and that it would operate as a fraud upon the rights of the licensee not to continue it—otherwise the license is merely personal. If it is unexecuted it may be revoked at the will of the licensor. The death of the licensor or licensee or the sale of the premises operates as a revocation. Angell on Water Courses (5th edition), secs. 286 and 287, authorities there cited.

The only question in this case then is, has the defendant in his answer brought his defence within this rule? He says that his occupancy and his predecessor's in ownership of the premises he occupies and which are drained by the ditch in question has continued for the period of nineteen years. That the ditch in question was originally constructed by his predecessor in ownership upon the express consent and license of the then owner of the premises now owned and occupied by the plaintiff and for a valuable consideration that his possession of the small amount of land belonging to plaintiff crossed by said ditch, and the possession and use of his paedecessor's for the purpose of maintaining said cellar drain for said nineteen years has been and is open, visible, adverse and notorious and was in fact well known to the plaintiff long before he became the owner of the premises in question. This is substantially all that is said as to the possession and occupancy of the plaintiff's land for the purposes of the ditch. There is no averment of any possession of the plaintiff's land in any other way than that the ditch extended and ended on the plaintiff's land, and that defendant and his predecessors had used and possessed the ditch to drain their cellar. This amounts only to an averment that the ditch was originally built under a parol license for a valuable consideration. The parol license was executed when the ditch was built. To make this a license to maintain the ditch as long as that cellar existed and the owner of it wanted to drain it through that ditch, and for that purpose to enter upon the land of the licensor after his seizin has terminated, something more is necessary. It does not appear that it would be inequitable that the ditch be closed up in plaintiff's land and the right to come there to repair and keep it open and in repair.

It does not appear, why, if any reason exists, he does not end the drain on his own side of the road, or that it cannot as easily be carried away on his side of the road. He does say it is the natural and proper course of the flow of water from defendant's land—but that gives him no right to maintain an artificial water course and burden the plaintiff with the drainage from defendant's cellar. The action in this case is for trespass—such state of facts might exist as to be an excuse for the trespass—as by long continued use and maintenance of the ditch by the consent or sufference of the plaintiff, but no such facts are pleaded.

The demurrer must be sustained.

Prentice & Ford for plaintiff.

Tyler & Denison for defendant.

SUPREME COURT OF OHIO.

DECEMBER TERM, 1879.

Hon. W. J. Gilmore, Chief Justice. Hon. George W. McIlvaine, Hon. W. W. Boynton, Hon. John W. Okey, Hon. William White, Judges.

General Docket.

TUESDAY, DEC. 16, 1879.

The Cleveland & Mahoning Valley Railroad et al vs. Wick. Error to the Court of Common Pleas of Mahoning county. Reserved in the District Court.

WHITE, J. Held:

1. The limitations for filing petitions in error, prescribed in section 12 of the Act of April 23, 1872, (69 O. L.. 88), applies as well to proceedings instituted by the land owner under section 11 of the Act as to proceedings instituted by the corporation.

2. The proceedings in the Probate Court under said act can be reviewed by the Court of Common Pleas only when the petition in error is filed within thirty days from the rendition of the final judgment in the Probate Court. Railroad Company vs. Hopkins (19 O. S., 279), approved and followed.

3. Whether a petition in error was filed in time or not is to be determined from the record; and no plea is required setting up the lapse of time as a bar to the proceeding.

4. On error, the record under review cannot be contradicted. If it is incorrect, application should be made to the Court whose record it is for its correction, and when the correction has been made, the corrected record should be brought before the reviewing Court by proper proceedings, before the case in error is determined.

5. Under said act, the Court of Common Pleas, on petition in error to reverse the judgment of the Probate Court, is not authorized, on affirming judgment, to render a judgment in personam against the corporation for the amount adjudged against it in the Probate Court.

Judgment reversed and cause remanded for dismissal; or in case of the suggestion of a diminution of the record, for such further proceedings as may be authorized by law.

No. 30. Middleport Woolen Mills

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Co. vs. James M. Titus. Error to the District Court of Meigs county.

OKEY, J.:

1. Where money has been paid on a contract which has been rescinded, and the repayment of the money is the only thing remaining to be done, a petition for money had and received is sufficient; but while the contract is subsisting, the action can only be brought on the agreement.

2. Where it is alleged that the Court of Common Pleas erred in various particulars, among others in overruling a motion for a new trial based on the ground that the verdict was against the evidence, and the District Court reverse the judgment without setting forth the ground of reversal, and remand the cause for a new trial, and it appears that the evidence was conflicting as to a material point in issue, and the charge to the jury was id some respects obscure, the judgment of reversal should not be reversed, even if, in the opinion of this Court, the preponderance of evidence be in favor of the verdict, and although the other errors may not have been well assigned.

Judgment affirmed.

No. 270. Daniel J. Farris vs. Julia B. Keys. Error to the Superior Court of Cincinnati.

GILMORE, C. J.:

Real estate inherited by a married woman since the passage of the act of 1861 (S. & S., 391), which declares such inheritance to be her separate property, cannot be charged in equity for the payment of a liability incurred by her prior to the passage of the statute. Judgment affirmed.

SUPREME COURT OF NEW YORK.

General Term—Third Dep't.—Decided Sept., 1879.

THEODORE F. HAGER VS HENRY B. CATLIN.

Contract against public policy.—Where a sheriff promised to appoint another his deputy and the latter promised to accept said appointment and disposed of his property at a sacrifice, relying upon said promise, and thereafter the sheriff refused to make said appointment. *Held*, That said contract was against public policy and void, and would not be enforced against the sheriff.

The complaint alleged that defendant, who had been elected sheriff of Schuyler county, entered into a contract with plaintiff in February, 1878, by the terms of which plaintiff agreed to sell or rent his farm and dispose of his stock and be in readiness by April 1, 1878, to take charge of the jail of the county, board the defendant and also the prisoners. And that defendant agreed that thereupon he would appoint plaintiff jailor and also a deputy sheriff, and that plaintiff should have a certain share of papers and process to be served, he to be allowed to receive the fees thereon. The complaint then alleged that plaintiff disposed of his farm and stock at a great sacrifice, and that upon April 1, 1878, he was ready to perform his part of the agreement. That defendant wholly refused to perform said agreement and that thereby plaintiff sustained large damages.

The defendant demurred that the complaint did not state a cause of action. The special term overruled the demurrer. Defendant appeals.

Held, That the complaint did not state facts sufficient to constitute a cause of action. The question is, if a public officer, having a power to appoint to office, promises to appoint a certain person, and that person promises to accept, is that contract legally binding on the officer? We think not. It is his duty to make the best appointment in his power, according to his judgment *at the time when he makes the appointment*. It is against public policy that he should be deprived of the exercise of his best judgment by a contract previously made. This is not a question as to the lawfulness of an arrangement between a sheriff and his deputies as to their fees. The right of appointment is a political power to be exercised, not to be sold. The contract here is against public policy and is void.

Judgment reversed, and judgment for defendant on demurrer, with costs.

Opinion by Learned, P. J.; Follett, J., concurs; Boardman, J., dissents.

SUPREME COURT OF MISSISSIPPI.

OCTOBER 27, 1879.

KELLY V. REID.

Error to the Circuit Court of Madison County.

1. Chattel Mortgage—Animals—No identification—Parol evidence to supply.—Where the personal property mortgaged is described only by certain quantities, as so many head of cattle, horses, mules, hogs, etc., there being no reference to the ownership or locality of the property in the mortgage itself, parol evidence is not competent to fill the defect.
2. Ibid—Reference to indentity—Parol evidence to fix.—Where there is such a reference as to the property extrinsic evidence will be received to fill the defective description in the mortgage.
3. Ibid—Identification—Greater number—Validity of mortgage—Where the precise number of cattle, horses. mules, hogs, etc., conveyed are a smaller number than the whole number of the owner or place referred to, the animals can not be identified, and the mortgage is fatally defective.

Plaintiff in error was trustee in a mortgage on personal property described in these words: "The following described personal estate lying and being in the county of Madison, Sate of Mississippi, to wit: Thirty head of cattle, six oxen, three horses, two mules, three wagons, fifty hogs; also, all the crop of cotton, corn, fodder, and potatoes and all other produce which may be raised on the O'Reilly place in said county." After the mortgage was recorded defendant in error recovered a judgment against the mortgagor and had execution levied upon the cattle, horses and mules, and claimed that the mortgage was void as to them on account of the insufficiency of the description.

The opinion of the court was delivered by

GEORGE, C. J.:

1. While it is true that is is difficult, if not impossible, to describe in a mortgage this species of property, so as to determine with certainty whether any particular property of that class is that embraced in the mortgage without a resort to evidence *aliunde*, yet the mortgage must mention some fact or circumstance connected with the property which will serve to distinguish it from all other property of the same kind. This fact or circumstance must be stated in the mortgage itself, it cannot be proven by parol evidence without thereby adding to the mortgage a term not contained in it. When thus stated, its existence in connection with the property may be established by extrinsic evidence.

2. The object of a mortgage is to create a lien on certain specific property, and not to give a right to the delivery of any property whatever of the particular kind mentioned in it.

3. The fact of the ownership or locality of the property, or some other mark which would serve to separate and distinguish it from other property, should have been mentioned in the mortgage; thus, if the mortgage had been written "my stock of cattle, consisting of about thirty head, my two mules, and my two horses," etc.;

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or "the stock of cattle on the O'Reilly place, consisting of thirty head," etc., it would have been sufficient, provided the stock of cattle, mules, and horses did not exceed the number stated; or if the mortgage indicated an intent to convey the whole stock, or all the horses and mules without reference to the number.

4. When a precise number is conveyed and there is in fact a greater number, and there is no intention manifested to include the whole, there would be a failure to identify the particular animals conveyed, and the deed would be void for want of a proper description.

Judgment affirmed.

NOTES OF RECENT CASES.

A letter written within a reasonable time before or after a bill is drawn, describing it in terms not to be mistaken, and promising to accept is, if shown to one who takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise.

To construe a promise to accept as equivalent to an acceptance it must be one "describing the bill in terms not to be mistaken."

Where there is an authority given to draw a draft, it carries with it acceptance and payment, and it matters not into whose hands the bill may come *bona fide* for value. Such person may maintain an action for the breach of the implied promise to pay. The Franklin Bank of Baltimore vs. Edward Lynch, Maryland Court of Appeals.

Lunatic—Liability on commercial paper—Consideration in contract of lunatic — Lis pendens — Evidence.— Where a note is made by a lunatic and indorsed over by the payee, it is competent for the lunatic or his committee to defend against the indorsee, either by showing that he had knowledge of the lunacy or that the note was originally obtained fraudulenty or without proper consideration.

Where the indorsee of a promissory note has taken the stand to prove that he is a bona fide holder, upon notice by defendant's counsel to prove the consideration paid by him for the note, it is proper upon cross-examination to ask such questions as will tend to discover whether the indorsee knew that the note was originally obtained for a worthless consideration. Such evidence is also admissible if offered by defendant.

Quære—Whether a lis pendens is constructive notice of a man's mental condition. Moore vs. Hershey, Sup. Ct. Penn.

RECORD OF PROPERTY TRANSFERS

In the County of Cuyahoga for the Week Ending Dec. 26, 1879.

[Prepared for THE LAW REPORTER by R. P. FLOOD.]

MORTGAGES.

Dec. 20.

Lissett Zummec and husband to Wilhelm Bach. $800.

Jas. Fitch and wife to G. E. Herrick. $2,000.

Adolph Geuder to The Cit. Savs. and Loan Ass'n. $1,500.

Charlotte M. Evans and husband to The Soc. for Savs. $2,000.

Anna M. Morrison et al to same. $3,000.

John Sluka and wife to Louisa Kippler. $400.

Richard Greenfield et al to H. W. Murray. $450.

Samuel A. Carpenter to Rosaline C. Tarry. $400.

Thomas Turner and wife to Wm. Andrews. $349.45.

Wm. Gibb to The Cit. Savs. and Loan Ass'n. $250.

Dec. 22.

Frank H. Baldwin and wife to Royal Taylor. $600.

Sarah A. Beardsley to The Soc. for Savs. $300.

Otto H. Franke and wife to People's Savs. and Loan Ass'n. $475.

Alex. Forbes to Jos. F. Marshall. $300.

Dec. 23.

John Bathgong and wife to Peter Wiersch. $368.

Alfred Eastwood to L. W. Clark. $270.

Herman Mink and wife to Wm. F. Rice. $486.

Same to Theodore Rice. $375.

Louis Rohde to The Soc. for Savs. $1,200.

Fanny Johnson to W. F. Radcliffe. $1,400.

Lewis A. Day and wife to Mercantile Ins. Co. $844.

Lydia French to Elizabeth Coit. $100.

Dec. 24.

Emil Schneider and wife to Henry Renker. $700.

Sophia Schwartz and husband to Dorathea Buhrer. $200.

Jos. Hartman and wife to Anton Franz. $350.

Nicholas Hess and wife to Fred Biglow. $1,000.

John J. Ralya to S. L. M. Barlow. $1,689.

Same to S. S. Stone. $10,735.

Olive K. R. Marshall and husband to J. R. A. Carter. $600.

Elizabeth Miller et al to S. H. Kirby. $200.

Dec. 26.

Myron C. Ludlow and wife to Chas. E. Patrick. $750.

Samuel J. Tuttle and wife to Samuel G. Owen et al. $400.

Calvin Gilbert and wife to Harry Baldwin. $1,500.

Catharine Hurnl and husband to J. P. Voelker. $300.

Robert Nicholson and wife to Gustav Schmidt. $1,000.

J. P. Cahill and wife to Mary Watson. $250.

Geo. Roth and wife to Phil. Henninger. $700.

Ann Gallagher and husband to F. A. Saunders. $600.

E. S. Bader et al to Mary A. Higgins. $60.

CHATTEL MORTGAGES.

Dec. 22.

Martin Hipp to John J. Blatt. $400.

Thomas Evans to John Callaghan. $240.

A. N. McDermott to Hill & Cannon. $150.

Dec. 23.

Jos. Busdorfer to Mr. Car Troutman. $94.

J. A. Gardner et al to Rachel Gardner. $800.

Dec. 24.

Hartley & Hynes to Campbell Printing Press Co. $368.

T. M. Hammond to A. D. W. Chambers. $436.

N. B. Coleman to A. B. Gilson. $898.

Dec. 26.

Arnold Scheurer to Fred. Geisman. $1,000.

DEEDS.

Dec. 20.

Jos. Belek and wife to Mary Skalla. $700.

David R. Klint to Geo. T. Dowling. $1.

Geo. T. Dowling and wife to D. M. Marsh. $1,500.

Andrew Dillow's heirs to W. F. Dillow et al. ——

Albert Fratz to Patrick Ryan. $250.

Frederick Hecka and wife to Frank Pelaek. $630.

Jas. Howe and wife to Thos. Turner. $822.

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H. W. Murray and wife to Richard Greenfield. $450.
R. B. Murray, guardian, to same. $200.
Geo. A. Norton and wife to Wm. Hamilton. $800.
Caleb Patterson and wife to M. A. Sprague. $900.
Nelson Pindy et al to Anna Gormly. $400.
Elias S. Root and wife to Henry Unkrich. ———
Jos. Stowe and wife to Ezra Little. $200.
Theodore R. Scowdon and wife to Thos. Quayle. $30,000.
Geo. W. Slingluff and wife to Jos. Avata. $1,230.
Ezra W. Tuttle and wife to Thos. R. Clague. $2,000.
Frances M. Rose et al to Annie Wager. $1.
Henry Boescher and wife by W. I. Hudson, Mas. Com., to Christopher Bommer. $670.
Fred B. Schneider by C. C. Lowe, Mas. Com., to Fred Roehl. $150.
Wm. Hales et al by same to John W. Tyler. $534.
Thos. Wilson by Thomas Graves, Mas. Com., to H. N. Noyes. $1,200.

Dec. 22.

Chas. S. Brainard to Caroline Nepper. $400.
I. Polly Bolton to W. W. Richards. $40.
Chas. Barkwell et al to Frank Pekarak. $310.
Same to Frank Pynta and wife. $254.90.
Mary Choura and husband Joseph Canda. $500.
Elijah F. Davis to Thomas Boutall. $840.
John B. Dolloff and wife to Nelson Eggleston. $1,800.
Joseph P. Esch to John A. Esch. $150.
Bichard Gilmour to John McDonough. $4,300.
Chas. Hooper and wife to W. M. Walworth. $1.
Antonia Jindrak to Mathias Vacha. $1,000.
O. A. Kinney and wife to C. D. Crocker. $450.
Mary List and husband to Leonard Schlather. $1,030.
The People's Savs. and Loan Ass'n. to Otto H. Frank. $875.
B. L. Pennington and wife to Henry Gerould. $2,600.
Minerva Ramsey to Julia A. Graham. $500.
E, F. Scheller and wife to Gebhard Bros. $650.
Barbara Straad and husband to Jos. Artt. $5.
Same to Albert Paysha. $5.
Mary Senn, admx., etc., to Louis Rohde. $2,435.
W. G. Wilson and wife to E. B. Hale. $28,733.
F. H. Wagar to E. S. Sawler. $160.
Ann Ward and husband to James Lang. $5,444.

Judgments Rendered in the Court of Common Pleas for the Week ending Dec. 24, 1879, against the following Persons:

Dec. 18.

J. J. Schwind. $36.24.

Dec. 19.

Thomas Larter. $72.27.
Charles Muelling. $964.91.
A. F. Barteges. $587.06.

Dec. 20.

Marcus Meckes et al. $847.20.
C. R. Heller. $255.37.

Dec. 22.

Sydney Close. $441.45.
M. G. Watterson, treas. $69.14.
Comfort A. Adams et al. $27,605.82.

Dec. 23.

Comfort A. Adams et al. $1,075.57.
L. N. Edgerton et al. $301.72.
A. M. Harris. $2,569.38.

Dec. 24.

A. M. Harris. $300.74.
W. H. Capener. $25.

COURT OF COMMON PLEAS.

Actions Commenced.

Dec. 19.

16364. Amelia Brooker et al vs The City of Cleveland et al, etc. Equitable relief. H. & Kline.
16365. Thos. Hamilton et al vs same. Same. Same.
16366. Amelia Brooker vs same. Same. Same.
16367. Elizabeth P. Kidder vs Alex. H. Forrester et al. Money and to subject lands. Grannis & G.
16368. Lucien Crawford vs Moses G. Watterson, treas.. etc. Money only. Same.
16369. Scheurer et al vs John Tombruskie. Appeal by deft. Judgment Nov. 21. Goulder, Hadden & Zucker; William Taylor.
16370. State ex rel Phelina Steiger vs Chas. M. Safford. Bastardy.
16371. P. I. Huett & Co. vs Daniel Cahill et al. Equitable relief. H. & Kline and Dodge.
16372. S. Churchill et al vs Loren Prentiss et al. Money only. T. E. Burton.

Dec. 20.

16373. Deborah A. Spangler et al vs Moses G. Watterson, treas., etc. Equitable relief. Mix, Noble & White.
16374. Henry R. Hadlow vs The Cleve. Mech. Land and Bldg. Ass'n. Money only. Beavis.
16375. Henry Wick et al vs Moses G. Watterson, treas., etc. Injunction and relief. Estep & Squire.
16376. David Proudfoot vs same. Same. Grannis & G.
16377. Almira Philips vs same. Same. Same.
16378. Frank Hurlburt vs canal boat "Joseph Bar." Appeal by deft. Judgment Nov. 24.
16379. Thomas L. Murphy vs same. Same.
16380. Wileman Andrews vs same. Same.
16381. The Cit. Savs. and Loan Ass'n. vs H. F. McGinniss et al. Money and relief. Mix, Noble & White.
16382 to 16411. Augustus D. Julliard et al vs Comfort A. Adams and Thos. Goodwillie. Money only. Hutchins & Campbell.
16412. Henry Morris vs Moses G. Watterson, treas., etc. Money only. Grannis & G.
16413. Charles Herig vs C. D. Richard et al. Money and equitable relief. E. M. Heisley.
16414. Anna Hoener et al vs Mary Hagge. Money only. W. S. Kerruish.

Dec. 22.

16415. D. W. Ensign & Co.. vs A. W. Pohlman. Appeal by deft. Kimball; Corwin.
16416. James McDonald vs J. W. Scott. Money only. Brown.
16417. Henry Manzelman vs Peter Bainbauer et al. To set aside and vacate judgment order and decree. Kolbe.
16418. Mary Kelly vs Mrs. R. A. Hapgood. Appeal by deft. Judgment Nov. 29. Goulder, Hadden & Zucker.
16419. George Schindler vs H. D. Pratt. Same. Judgment Nov. 22.
16420. Ann Goodman vs the Cleveland Window Plate and Glass Co. Same. Same; Caskey.
16421. August Detman vs The City of Cleveland. Error to Police Court. Loomis.
16422. Peter Burke vs Andrew Platt. Appeal by deft. Judgment Nov. 25. Morrow & Morrow; Laird & Barnitz.

Motions and Demurrers Filed.

Dec. 19.

3620. Dennerle vs Teutonia Lodge No. 19, etc. Demurrer to answer.
3621. Gildersleeve vs Perkins, exrs, etc. Demurrer by defts. to petition in error.
3622. Hogan vs Capener. Motion by deft. for new trial.
3623. Same vs same. Motion by deft. for judgment notwithstanding verdict.
3624. Brown vs Eichler et al. Motion by plff. to require defts. to separately state and number defenses.

Dec. 20.

3625. Everett vs Ruffini et al. Demurrer by defts. to cross-petition of Harriet Conway.
3626. Meeker vs Slawson et al. Demurrer by plff. to parts of amended answer and cross-petition of deft. Slawson.
3627. Same vs same. Same.
2628. Judson vs Pelton. Motion to require deft. to make 1st defense of answer more definite and certain.
3629. Same vs same. Demurrer by plff. to 2d, 3d, 4th and 5th defenses of answer
3630. Ruggles vs Morgan, admr., et al. Motion by plffs. for judgment on the pleadings.

Dec. 22.

3631. Reeves et al vs Cleve. Roll'g. Mill Co. Motion by plff. for new trial.
3632. Strowbridge vs Spafford et al. Demurrer by plff. Galusha to the petition.

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3633. Kuhns vs Morman et al. Demurrer to the petition and refiled.

3634. Priest vs Slawson et al. Motion by deft. for order dispensing with advertisement for sale in German paper.

3635. Sykora vs Sungling et al. Motion to require deft to give additional bail for appeal.

3636. Brower vs Salisbury. Motion to separately state and number causes of action, to strike out from petition and to make same more definite and certain.

3637. Beggs vs Steele et al and garn. Motion by deft to vacate judgment and for new trial.

3638. Mason et al vs Utley et al. Motion to require plffs. to make tkeir amended petition more definite and certain.

Dec. 23.

3639. Cleve. Malleable Iron Co. vs Conklin. Motion to strike the petition from the files.

3640. Capener vs Plunkett. Motion by plff. to strike transcript from files and dismiss appeal.

Motions and Demurrers Decided.

Dec. 20.

3178. Kick vs Poe et al. Sustained.

3182. Schofield et al vs McKinn et al. Sustained as to 1st specification, overruled as to 2d.

3191. Hookway vs Reese. Sustained.

3445. Reinhardt vs Newburger et al. Overruled.

3532. Cit. Savs. and Loan Ass'n. vs Spitzig et al. Leave to amend granted.

3553. Holl. Ref. Church vs Zoeder. Granted.

3576. Hatton vs Bates, etc, et al. Same.

3536. Swedenborg Pub. Ass'n. vs Kirby, exr., etc. Same.

3597. Reinhardt vs Newburger et al. Overruled.

3601. Haltnorth vs Basel et al. New appraisal ordered.

3603. Bainbauer vs Isekeit et al. Stricken from docket.

3604. Schwind et al vs Horn et al. Same.

3605. Kuhns vs Morman. Same.

3606. Halle vs Jones et al. Overruled.

3612 } Cowle et al vs Coll. R. R. Co. et al.
3613 } Granted.

Dec. 23.

3436. Babcock et al vs Krejci et al. Defendant has leave to answer by Jan. 3.

3543. Gillette vs Potts et al. Plff. has further leave to amend petition by Dec. 27.

3608. Ambush vs Ford. Overruled. Judgment modified.

3624. Brown vs Eichler et al. Granted.

3013. Murkley vs Berea Stone Co. Plff. has leave to amend his petition by Jan. 17.

Dec. 24.

3531. Zettlemeyer vs Neisen et al. Overruled as to 1st specification, granted as to 2nd.

3615. Stark, trustee, vs Fries et al. Sustained.

3634. Priest vs Slawson et al. Granted.

947. Greenhalgh vs Field. Continued.

3014. Perkins, exr, et al vs Keough et al. Overruled.

3045. Upson vs Rocky River Stone Quarry Co. et al. Same.

3120. Bingham vs Stone et al. Same.

3220. Foster vs Hardy et al. Same.

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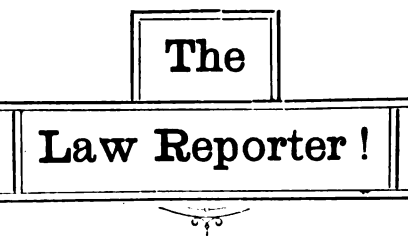

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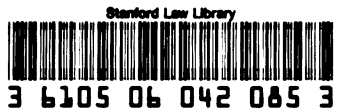
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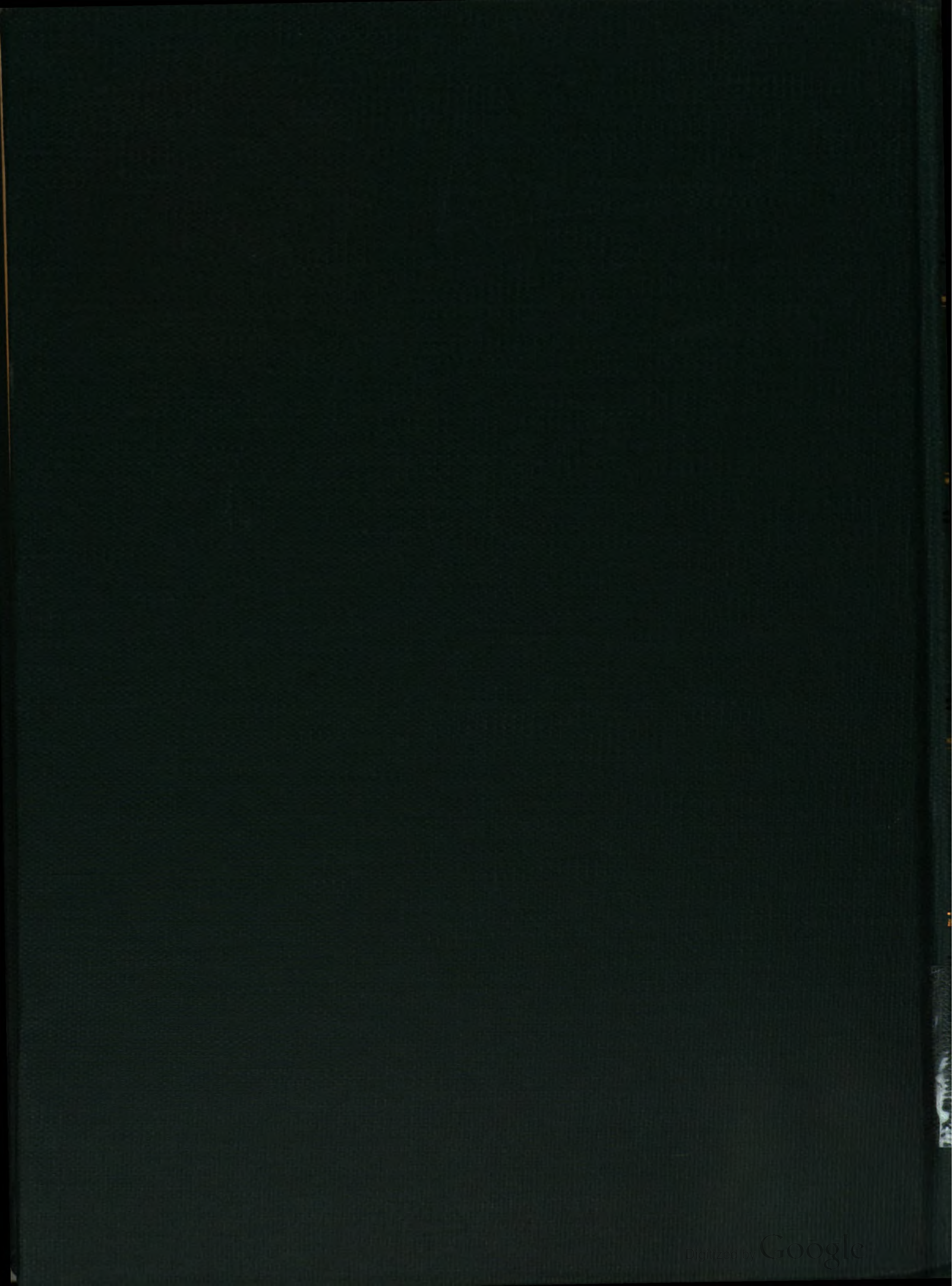
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