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Affidavits and Notice Under Ohio Mechanics' Lien Statute

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EDITORIAL NOTES

AFFIDAVITS AND NOTICE UNDER OHIO MECHANICS' LIEN STATUTE

Recent cases under the Ohio Mechanics' Lien Statute have tended to emphasize the existing confusion in the perfecting of mechanics' liens and the need for statutory revision.

Several cases involved the construction of the language in Ohio General Code, section 8310, providing for a lien to those furnishing work, labor or material "by virtue of a contract, express or implied, with the owner, part owner, or lessee, of any interest in real estate or the authorized agent of the owner, part owner, or lessee of any interest in real estate . . ." In one of the cases, the *Becker Plumbing Supply Company* v. *Rialto Improvement Company*,[1] it was alleged that certain materials were delivered to a building owned by the Rialto Improvement Company. The petition recited that the materials were delivered at the request of one Reimer. The court stated, "There was no contract between Reimer and the Rialto Improvement Company, and an allegation of this nature, we think, would be necessary under section 8310, General Code." Further elucidation of the position of Reimer does not appear in the opinion. It is submitted, however, that unless Reimer was a complete

[1]36 Ohio App. 102, 172 N. E. 700 (1930).

volunteer, it is difficult, in view of the broad language of section 8310, to support a holding that the lien is invalid because of a lack of such contract as is required by the statute.

In the case of *Lewin Lumber Company* v. *Gutman*,[2] after a purchaser had taken possession of a newly constructed building, she requested the contractor to do certain work not called for in the original contract, to-wit: the furnishing of two drawers for breakfast nook tables and of frames and trims for window openings for ventilation of the kitchen. The plaintiff, who had previously supplied the millwork for the building, supplied the needed additional material and later filed a lien for both the millwork and the extras ordered after possession by the purchaser. The lien was filed within sixty days after the extras, but more than sixty days after the furnishing of the last of the materials previous to the extras. The court held that the extras under the circumstances constituted a separate contract and that the lien only could apply to materials for such extras and not embrace the material previously furnished.

In the *Becker Plumbing Supply Company* case, *supra*, there also was involved the question of what constitutes proper notice of the filing of a lien under section 8315. The lien claimant alleged that not knowing the address of the owner it posted a copy of the lien upon the premises. The notice apparently was directed to the Rialto Improvement Company, the owner at the time when construction was commenced. Actually, at the time of the alleged posting of the notice, parties named MacNeffs were the owners, and in possession. The court denied the validity of the lien on the grounds that no valid notice was given under section 8315, providing for the service of a copy of the affi-

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[2]34 Ohio App. 458, 171 N. E. 342 (1929); Gill v. Konvisser, 32 Ohio C. A. 542 (1914).

The cases of Garrett v. Lishawa, 36 Ohio App. 129, 172 N. E. 845 (1930), and Bohunek v. Smith, 36 Ohio App. 146, 172 N. E. 852 (1930), involve questions analagous to that of the Lewis Lumber Company case. In both the Garrett and Bohunek cases, the court refused to permit minor work, done after the completion of the main work, to be considered as part of the original contract and thus extend the time for filing of liens, even though the additions were performed in the one case to make good on a warranty of the original construction, and in the second case to remedy a defect in the original construction. The rule of these cases is sound, and should tend to ameliorate some of the abuses under the present statute.

davit upon the owner or his agent or lessee within thirty days after the filing with the recorder.

Apparently the court doubted the truth of the allegation that a copy of the notice of the filing of the lien was posted on the building. The decision, however, is not put on the basis of the lack of proof of this allegation, but on the ground that the notice should have been served upon the MacNeffs. The court said, "The MacNeffs were innocent purchasers of the property in question. It appears that they exercised due care in the purchase of the property, and no blame can attach to them because of the lack of necessary service." Previous cases have held that notice upon the party who was the owner at the time construction was commenced, is sufficient, even though the purchaser is in possession at the time of the filing of the lien, and the service of notice.[3] The point has not been passed on by the supreme court.

In the case of *Schuholz* v. *Walker*,[4] the notice of the filing of mechanic's lien was served upon the purchaser in possession, who was not the owner at the time that the contract was entered into. The supreme court held that the service of notice upon such purchaser was sufficient, refusing to express any opinion as to whether notice to the prior owner also would have been sufficient.

In the case of *Frish* v. *Amon*,[5] a lien claimant, a plumber, prior to filing his lien affidavit, furnished the owner with his own affidavit under section 8312, in which he stated, under the title "Material", "All material taken out of stock." The evidence showed that some material was not taken from the plumber's stock, but that it had been paid for prior to the filing of the affidavit. The court held that the lien was invalid, because the names and certificates of materialmen, as required by section 8312, had not been given. This decision was in accordance with that of the Supreme Court of Ohio in the case of the *Mahoning Park Company* v. *Warren Home Development Company*.[6]

Despite the fact that by its terms the mechanics' lien statute requires a liberal construction to be given to its provisions,[7]

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[3]Fisher v. Jacobs, 24 Ohio N. P. (N.S.) 505 (1920); Harriman National Bank v. North Shaker Boulevard Co., 25 Ohio N. P. (N.S.) 263, 280 (1924).

[4]111 Ohio St. 308, 145 N. E. 537 (1924).

[5]34 Ohio App. 447, 171 N. E. 247 (1929).

[6]109 Ohio St. 358, 370, 142 N. E. 883 (1924).

[7]Ohio Gen. Code, sec. 8323-8.

the cases show the many difficulties encountered in the attempts to obtain and enforce liens.

Most frequently when a mechanic's lien is litigated, the contractor has been paid by the owner, and either has become insolvent or has absconded, without paying his sub-contractors and materialmen. The fact of non-payment cannot be determined from the recorder's records prior to the filing of the lien affidavit, except in the case of registered land. The feeling has been growing in Ohio that owners, purchasers and others, should be able to rely upon the records in regard to mechanics' liens, as well as other title matters, and that the prospective lien claimant should be required to place on record his intention to file a lien.

As was inevitable, the sentiment that the present statute is unfair, has been reflected in the decisions of the courts, denying the enforcement of liens in hard cases, and frequently resolving ambiguities against the lien. Under the circumstances, mechanics, contractors and materialmen, as well as owners, purchasers and lenders are prejudiced.

It is submitted that the need is great for a revision of the mechanics' lien statute to reduce the procedural doubts and make it possible for purchasers and others interested in land to rely upon the official records. JAMES L. MAGRISH.

AUTOMOBILES—CONTRIBUTORY NEGLIGENCE OF PASSENGER—RAILROAD CROSSINGS

The question of contributory negligence of a guest in a private automobile, where the guest has been injured by the negligence of the driver or of a third person, has been involved in several recent decisions of the Ohio courts.

In *Hocking Valley Ry.* v. *Wykle*,[1] the plaintiff was riding on the right side of the front seat of an automobile which was struck by a train of the defendant. There were obstructions to the view on both sides of the highway at the crossing, the right side being obstructed more than the left. The train came from the left. The driver listened as he approached the crossing, and when within a few feet slowed his machine to from five to ten miles an hour. The plaintiff looked particularly to the right

[1] 122 Ohio St. 391, 171 N. E. 860 (1930).

and as he turned and looked to the left, saw a glare, the automobile being struck the next instant. Special charges requested by the defendant, defining the plaintiff's duty of care, were refused.[2]

The court said:

"The question is thus presented as to the duty of a guest in an automobile under the circumstances disclosed by the record, and the instruction that should be given the jury in that regard. While the authorities differ somewhat in the statement of the rule governing the conduct of passengers or guests in an automobile and prescribing their duties, all are in accord that the guest in an automobile is not entirely relieved from obligation to exercise care for his own safety. Clearly it is his duty to exercise that care which persons of ordinary care and prudence are accustomed to exercise under the same or similar circumstances. Hence, while one riding as a guest in an automobile is not charged with the duty of being on the lookout for possible dangers, such as devolves upon the driver of the automobile, yet it is his duty to exercise his senses of sight and hearing as would a person of ordinary care and prudence under the same or similar circumstances to observe the approach of a train and apprise the driver thereof. The conduct of the guest to come within the requirement of ordinary care would differ somewhat under varying circumstances. In that respect the court should not go further in instructing the jury than was indicated in *Toledo Rys. & Light Co.* v. *Mayers*, 93 Ohio St., 304, 112 N. E. 1014, and *Board of Commrs. of Logan County* v. *Bicher, Admx.*, 98 Ohio St. 432, 121 N. E. 535."[3]

The court quoted with approval the rule set out in *Smith* v. *St. Louis-San Francisco Ry.*[4]

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[2]"It was the duty of the plaintiff, riding in the Ford automobile to use ordinary care in the exercise of his own faculties in looking and listening for a train as the automobile approached the crossing, and such looking and listening should have been at such time and place and in such manner as would be effective to accomplish the ends designed thereby."

"It was the plaintiff's duty to use his senses of sight and hearing to avoid injury to himself when he was about to go upon the grade crossing, which is admittedly a place of danger. The time to use these senses for his own protection was just before going into the zone of danger, and it was the plaintiff's duty to look and listen in such a manner as would make the use of these senses effective."

[3]122 Ohio St. 395, 171 N. E. 860 (1930).

[4]9 S. W. (2d) 939, 946 (Mo., 1928): "While the law requires a guest in an automobile to exercise ordinary care and prudence for his own safety, and does not permit him to intrust his safety absolutely to the driver, regardless of

In *Myers, Admr.*, v. *Norfolk & Western Ry.*,[5] it was held that no inference of negligence of the decedent was raised by allegations of a petition that the decedent was accustomed to ride home from his work on the truck of defendant Gugle, and that the truck on which decedent was riding was negligently driven over a crossing of the defendant railroad by an employee of Gugle. In a per curiam opinion, the court said:

" . . . *There is no allegation of peculiar circumstances casting a duty upon the plaintiff of warning the driver, or that plaintiff possessed any knowledge of a peril which was imminent, or had reason to believe that he was being placed in a hazardous situation by the conduct of the driver.*"

In *Keiner* v. *Wheeling & Lake Erie Ry.*,[6] the trial court had directed a verdict for the defendant. The court said:

"The theory of the defendant company, which the trial court apparently adopted is that a guest in an automobile is required, as a matter of law, when the automobile approaches a known railroad crossing, to look and listen for the approach of a train, and that he must look and listen from a point and at a time that will make his looking effective to apprise him whether danger is near or not, and that, even though he testifies he looked and listened and neither saw nor heard an approaching train, if the only conclusion that can reasonably be reached upon the evidence is that there is no doubt that, had he looked, he must have seen the approaching train in time to avoid injury, he is guilty of contributory negligence as a matter of law.

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impending danger or apparent lack of ordinary caution on the part of the driver, it does not require him to use the same vigilance as is required of the driver, nor put him under the same obligation to look for danger as is the driver. . . 'It is a matter of common knowledge that under ordinary circumstances such occupants do largely rely upon the driver, who has the exclusive control and management of the vehicle, exercising the required degree of care, and for that reason courts are not justified in adopting a hard and fast rule that they are guilty of negligence in doing so. Every case must depend upon its own particular facts'."

[5]122 Ohio St. 557, 559, 172 N. E. 666 (1930).

[6]34 Ohio App. 409, 171 N. E. 253 (1930). The plaintiff occupied the seat beside the driver of a truck which was struck by a train. The view of the tracks was obscured by buildings up to within 25 feet of the tracks, and from that point was interfered with by a bank more than five feet high. It was not shown that trains were visible at any point before the truck was almost upon the track.

"It is conceded that such is the rule applied by our Supreme Court to a driver of a vehicle upon a public highway. *Detroit T. & I. Rd. Co.* v. *Rohrs*, 114 Ohio St., 493, 151 N. E. 714.

"But the Supreme Court has not yet determined that the duty of a guest in an automobile being driven upon the public highway, and approaching a known railroad crossing is the same as the duty of the driver of the automobile. On the contrary, the Supreme Court has distinctly recognized that the duty of a guest in an automobile in reference to looking and listening to avoid dangers incident to crossing a railroad track is not the same as the duty of the driver with whom the guest is riding."

" . . . in determining whether or not a guest in an automobile has exercised ordinary care for his own safety, consideration must be given to the fact that he is not operating the automobile and does not have the right to direct and control its operation."[7]

In *Bailey* v. *Parker*,[8] the plaintiff was injured while riding as a guest in the back seat of defendant's automobile. It was held that the question of plaintiff's negligence in failing to protest against the excessive speed at which the car was being driven before and at the time of the accident, was solely for the determination of the jury.[9]

In *Community Traction Company* v. *Konte*,[10] it was held that the court did not err in refusing to charge that it was the duty of the plaintiff to keep watch of traffic lights along the street upon which he was riding as a guest in an automobile which was struck by defendant's bus at an intersection.[11]

In *Telling Belle Vernon Co.* v. *Krenz*,[12] it was said by the late Judge Sullivan:

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[7]34 Ohio App. 409, 412, 171 N. E. 254 (1930).

[8]34 Ohio App. 207, 170 N. E. 607 (1930).

[9]34 Ohio App. 207, 214, 170 N. E. 610 (1930). Plaintiff and defendant were members of an orchestra, on their way to fill an engagement to play at an amusement park. It was also held that the parties were not engaged in a "joint enterprise".

[10]35 Ohio App. 361, 172 N. E. 442 (1930).

[11]The court said: "His duty was, of course, to exercise ordinary care, but it would be going too far to specify in instructions to the jury that the particular duty of watching traffic lights constituted a part of the ordinary care of a passenger. Although he was riding in the front seat beside the driver of the car and was required to exercise his faculties of sight and hearing, it was only his duty to exercise ordinary care, and what constituted such care was a question for the jury."

[12]34 Ohio App. 499, 171 N. E. 357 (1928). Defendant's truck was turned without warning directly in the path of the automobile in which plaintiff was riding beside her husband, the driver.

"We can only repeat what was said in *Cleveland Ry. Co.* v. *Heller*, 15 Ohio App. 346, that it is not necessary for an occupant of a machine owned and driven by another to keep remonstrating or interfering with the driver, or instructing the driver as to how the machine shall be operated, for it is obvious that such interference more often would result in injury than in its prevention, especially so in the instant case, where the wife herself was unacquainted with the operation of an automobile."

In *Toledo Railways & Light Co.* v. *Mayers*,[13] approved in *Hocking Valley Ry.* v. *Wykle*,[14] the plaintiff was seated beside the driver of an automobile which was struck by an electric car of the defendant at a crossing. In disapproving instructions to the jury which were somewhat similar to those held improper in *Hocking Valley Ry.* v. *Wykle*,[15] the court stated that:

" . . . it cannot be questioned that the plaintiff seated as he was beside the driver, with apparently equal opportunity to observe impending dangers, and within easy access so as to readily communicate to the driver the result of his observations, was required to so use his faculties of sight and hearing to discover dangers incident to such crossing and apprise the driver thereof, as would a person of reasonable and ordinary prudence under the same or similar circumstances."

In *Board of Commissioners of Logan County* v. *Bicher*,[16] it was held that it was not error to refuse to give a charge which required that the plaintiff's decedent, who was killed in an accident while riding at night beside the driver of an automobile, use reasonably his faculties of sight and hearing and warn the driver of impending dangers.[17] In this case the automobile had

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[13]93 Ohio St. 304, 311, 112 N. E. 1014, 1016 (1916).

[14]*Supra* note 3.

[15]*Supra* note 4. In the circuit court, Mayers v. Toledo Rys. & Light Co., 35 O. C. C. 517, 520 (1915), it was said: "It is a fact known to everybody that persons who are simply passengers or guests in a conveyance are often engaged in conversation on a journey and are not giving very much heed to the immediate surrounding. They are conducting themselves just as people of ordinary care and prudence are accustomed to conduct themselves under such circumstances . . ."

[16]98 Ohio St. 432, 436, 121 N. E. 535, 536 (1918).

[17]The charge was: "I now charge you that Mr. Bicher seated as he was in the front seat by the side of Mr. Adams, the driver, was required to reasonably use his faculties of sight and hearing to observe and avoid any impending dangers incident to such driving along a country pike during the nighttime,

been driven into a creek which crossed the highway, the bridge having been washed away some days previous to the accident.

It was apparently recognized by the court that the conduct required of a guest where an automobile is about to go over a railroad crossing with which the guest is familiar, may be different from that required where the automobile is proceeding along a highway uncrossed by railroad tracks. The court said, referring to *Toledo Railways & Light Co.* v. *Mayers*:[18]

"In that case . . . it was held that . . . the guest is required to exercise ordinary care for his own safety and to reasonably use his faculties of sight and hearing to avoid danger incident to crossing the track. But it is the function of the jury to determine from the facts shown in each case whether the injured person used such care, and what care the circumstances required.

"Plaintiff in error by the request made desired the court to instruct the jury what in the particular circumstances of this case a person of reasonable and ordinary prudence would do. Such a thing can only be determined from the circumstances, and these the jury must find. They might find that under the facts of a particular case a person who is not driving, but is merely a guest, might under the circumstances disclosed in that case, rely on the driver without being negligent or imprudent. Especially would this be true if there was nothing in the situation indicating probable danger."

In *Pennsylvania Railroad Company* v. *Lindahl*,[19] the plaintiff's decedent was a guest, occupying the rear seat of an automobile which was struck by defendant's train. It was said by the court that:

"It was a question of fact whether Lindahl saw the train in time to avoid the accident so far as he was concerned, and used the requisite degree of care, and that question was rightly submitted to the jury."

In *Smith* v. *The Cleveland Ry.*,[20] there having been a verdict and judgment for the defendant street railway company, it was

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and apprise the driver of the machine as would a person of reasonable and ordinary prudence under the same or similar circumstances."

[18]*Supra* note 13.

[19]111 Ohio St. 502, 509, 146 N. E. 71 (1924). In this case the passenger was entirely unfamiliar with the surroundings.

[20]30 Ohio App. 21, 24, 164 N. E. 59 (1928). The plaintiff occupied the seat beside the driver. The automobile, which had been standing at the curb, was driven out into the street in an attempt to turn around and proceed in the

held that the court had not erred in submitting the question of plaintiff's contributory negligence to the jury, since there was "some evidence . . . to show that the guest or passenger attempted to adopt the role of assumption of responsibility in ascertaining whether it was safe . . ." It was said by the court:

"Had the passenger remained inactive and assumed no responsibility, and had he been inert in his conduct, the conclusion would be otherwise, and the case would come under those authorities which make it reversible error to inject the issue of contributory negligence into a case when it was not there by the pleadings or by the evidence. Had the passenger or guest remained passive, there would be no vestige of contributory negligence; but it is clear that there was some evidence at least tending to show that in connection with the driver he at least assumed to view the situation with the ultimate object of ascertaining the safety or the danger of crossing the tracks while the street railway car was a short distance to the east and proceeding toward the automobile."

In *Lindeman* v. *Roche*,[21] after holding that the court had erred in charging that there could be no recovery if plaintiff's decedent had acquiesced in and consented to the excessive speed which caused the accident. The court said:

"Again, the charge is erroneous in that it undertakes to lay down a rule of conduct relating to specific acts involved and undertakes to state which of such acts would constitute negligence or contributory negligence that would bar recovery. This is in direct conflict with *Toledo Rys. & Light Co.* v. *Mayers*, 93 Ohio St. 304, and *Commissioners of Logan County* v. *Bicher, Admx.*, 98 Ohio St. 432. It was a question for the jury to determine upon all the facts of the case whether or not the guest used due care under all the circumstances. As the court said in *Commissioners* v. *Bicher, supra*, it is in every case the function of the jury to determine from the facts shown whether the injured person used such care, and what care the circumstances required."

In *Pittsburg, C. C. & St. L. Ry.* v. *Bacon*,[22] it was held that the passenger, whether seated beside the driver or behind him,

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opposite direction. While turning, the car was struck from behind by a street car of the defendant.

[21]18 Ohio App. 366 (1923).

[22]30 Ohio App. 295, 165 N. E. 48 (1928). Here the plaintiff's decedent was riding as the guest of the driver on a bus ordinarily used for transporting school children. The decedent occupied one of the side seats, facing away from the train. He could have seen the train if he had looked.

may rely upon the skill and care of the driver "at least until something appears to show that the driver is not performing his duty." It was the opinion of the court that the guest or passenger is not bound to look or listen or give warning to the driver unless "the driver is not looking and listening or is not exercising due care".

This view has been expressed in other decisions of the court of appeals.[23] It has even been held that it was error to submit to the jury the question of the plaintiff's contributory negligence, where the plaintiff, a guest in the front seat of an automobile had merely failed to protest against a continued speed of forty to forty-five miles an hour on a highway at night.[24] The contrary is generally considered to be the law.[25] It has also been held that the mere fact that three persons occupied the front seat of an automobile which ran into the rear of the defendant's unlighted truck at night warranted the court in submitting the issue of the contributory negligence of the plaintiff, one of the occupants of the front seat, to the jury.[26] And where the plaintiff, riding in the rear seat, failed to request the driver to stop, when she saw defendant's automobile approaching the intersection at which a collision occurred, even though the driver also saw defendant's car, it was held that the issue of plaintiff's negligence was properly submitted to the jury.[27]

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[23]Cleveland Railway Co. v. Heller, 15 Ohio App. 346, 349 (1921). Here it was said: "Must he keep remonstrating with the driver, telling the driver to do this or do that? It seems to us that it might be safely assumed by the passenger that the driver knew how to handle the car, and was driving it in a proper manner, and would be able to take care of it, and the passenger is not called upon to remonstrate or to talk to the driver constantly."

In Toledo & Ohio Central Ry. v. Fippin, 32 Ohio C. C. 755 (1910) (*aff'd*, 86 Ohio St. 334, 99 N. E. 1134), it was said: "Mrs. Fippin had a right to trust in her husband as the head of the family, and his judgment and skill as a driver, and that he would heed all apparent warnings and avoid all apparent dangers."

Toledo Con. St. Ry. v. Rohner, 9 Ohio C. C. 702, 705-706 (1895), is to the same effect.

[24]Wills v. Anchor Cartage & Storage Co., 26 Ohio App. 66, 159 N. E. 124 (1926).

[25]Rogers v. Ziegler, 21 Ohio App. 186, 152 N. E. 781 (1925); Bailey v. Parker, *supra* note 8; Schell v. Dubois, 94 Ohio St. 93, 113 N. E. 664 (1916); Makranczy v. Gelfand, 109 Ohio St. 325, 336-337, 142 N. E. 688 (1924).

[26]Rogers v. French Bros., Bauer Co., 31 Ohio App. 77, 166 N. E. 427 (1928).

[27]Matis v. Woodruff, 31 Ohio App. 73, 166 N. E. 203 (1928).

Although the courts have refused to say that the guest or passenger must look or listen, if he *happens* to see or hear something dangerous, he is under a duty, to himself at least, to warn the driver of the danger. In *Cincinnati Traction Co.* v. *Sanders*,[28] it was said:

"The admission of plaintiff that while sitting on the seat with the driver she saw the approaching car nearly half a square away, in the absence of any attempt to warn the driver, raises a presumption of negligence on the part of plaintiff which was not removed and entitled the defendant to an instructed verdict. . . ."

In *Tyler* v. *The Hocking Valley Ry.*,[29] affirming judgment on a verdict for the defendant, where the plaintiff, seated beside the driver, had an opportunity to see the train, which was approaching from the right side, at all times after the automobile was four hundred feet from the crossing and the train a thousand feet away, the court said:

"On the other hand, plaintiff's decedent was required to use ordinary care in the exercise of her own faculties in looking and listening as she approached the crossing and the court did not err in giving the law as to contributory negligence. The inference arises from the evidence that decedent did not exercise ordinary care in looking and listening or she would have heard the whistle and seen the train and warned the driver of its approach."

Apparently the early tendency of the Ohio courts was to require the same vigilance of gratuitous passengers as of drivers at railway crossings with which the parties were familiar. In *Toledo & O. C. Ry.* v. *Eatherton*,[30] where the plaintiff was one of several guests in a wagon which was struck by defendant's train at a crossing, none of the occupants of the wagon having looked before going on the crossing, it was said:

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[28]32 Ohio C. C. 413 (1909). Here the plaintiff was seated beside the driver of a wagon which was struck by a street car at an intersection of streets. And see quotation from Myers v. Norfolk & W. Ry., *supra*.

In Toledo, etc., Ry. v. Fippin, *supra* note 23, it was said: "If she saw or heard anything indicating danger that the driver could not, or probably did not see or hear, it was her duty to tell him. We think it is not incumbent upon a passenger in a wagon to tell the driver of every approaching vehicle, and every car, car track, hole in the road, stone, or gutter."

[29]28 Ohio App. 88, 162 N. E. 623 (1926).

[30]20 Ohio C. C. 297, 301 (1896).

"It was as much the duty of the occupant of the wagon to look and listen in approaching a dangerous crossing as it was that of the driver . . . to protect themselves . . . he must use his senses, look to see, listen to hear. . . .

" . . . although she was a passenger . . . it was her duty to look and listen for the approach of trains; and if she had looked and listened as it was her legal duty, a hundred feet away from the railroad crossing, she would not have been injured . . . and for failure to do that they did not exercise the care that an ordinarily prudent person would have exercised, and in failing to do that she contributed to her own injury."[31]

It is well settled that in the absence of a relationship of master and servant, principal and agent, partnership, or of "joint enterprise, the negligence of the driver will not be *imputed* to the occupant of a vehicle.[32] And where the suit is between parties to the "joint enterprise", the negligence of one will not be imputed to the other.[33] Incidentally, there is much confusion as to what circumstances constitute a "joint enterprise" in negligence cases. In the syllabus of *Bloom* v. *Leech*,[34] it is stated that:

"A 'joint enterprise' within the law of imputed negligence is the joint prosecution of a common purpose under such circumstances that each member of such enterprise has the authority to act for all in respect to the control of the agencies employed to execute such common purpose."

New York, C. & St. L. R. R. v. *Kistler*,[35] is accepted as the Ohio example of a "joint enterprise" within which the negligence of each party will be imputed to the others. In that case the court stated that it found a "joint enterprise" between a deaf father and his daughter whom he had taken along in a buggy to "hear for him". In holding that the court had erred in charg-

[31]This decision was followed in Pennsylvania Co. v. Stahl, 15 Ohio C. C. (N.S.) 353, 34 Ohio C. C. 157 (1912), which was reversed without opinion in Stahl v. Pennsylvania Co., 88 Ohio St. 535, 106 N. E. 1052 (1913).

[32]Hocking Valley Ry. v. Wykle, *supra* note 1; Bailey v. Parker, *supra* note 8; Bloom v. Leech, 120 Ohio St. 239, 166 N. E. 137 (1929); Pennsylvania R. R. v. Lindahl, *supra* note 19; Cincinnati Street Ry. v. Wright, 54 Ohio St. 181, 43 N. E. 688 (1896); Toledo Railways & Light Co. v. Mayers, *supra* note 13

[33]Bloom v. Leech, *supra* note 32; Bailey v. Parker, *supra* note 8.

[34]*Supra* note 32. On the doctrine of "joint enterprise", see 38 YALE L. J. 810 (1929).

[35]66 Ohio St. 326, 343, 64 N. E. 130, 135 (1902).

ing that the negligence, if any, of the father was not imputable to the daughter, it was said:

"The father being nearly deaf, took the daughter along to hear for him, and as they came to the west side of the piece of woods, he told her to look and listen for trains, and she did so by raising the rear curtain and looking in the direction of the railroad.

"If it be true that she was to do the listening, and also to assist in the looking while he was doing the driving, they were engaged in a joint enterprise, and each would in such case be chargeable with the negligence of the other."

In *Bloom* v. *Leech*, the court explained the holding that there was a joint enterprise between the plaintiff and her father in *N. Y. C. & St. L. R. R.* v. *Kistler*, as follows:

"It is apparent that in the above case the duty to listen was upon the daughter, and to assist in the looking, and the control of the enterprise was therefore with the daughter as to the obligation to listen before going upon the track. She had the right of control to this extent."

This language in *Bloom* v. *Leech*, is followed immediately by the statement that:

"The principle of joint enterprise is based on partnership or mutual agency. In crossing accidents of this character, the test in determining the question is whether the parties were *jointly* operating or *controlling* the movements of the vehicle in which they were riding. There must be a *right* of mutual control."[36]

Apparently the supreme court said in *Bloom* v. *Leech* that in *Railroad* v. *Kistler*, the daughter's *obligation to listen*, and to assist in looking, that obligation being created by the request or command of her parent, gave to her a *joint control* of or *right* to control the driving, and that this joint control or right of control which was attached to this obligation to listen, in turn created a "joint enterprise" within which the negligence of one would be imputed to the other. From this it would seem to follow that if the driver of a vehicle requests a guest to look or

[36]120 Ohio St. 239, 245, 166 N. E. 137, 138 (1929). It should be noticed that the looking which was done by the daughter in Railroad v. Kistler, *supra* note 35, took place between points 1468 feet and 216 feet away from the crossing, 66 Ohio St. 326, 328-329, 64 N. E. 130 (1902).

listen for trains or cars at a crossing, or even if the guest voluntarily assumes the duty of looking or listening, a joint control or right of control is created and the parties are then engaged in a "joint enterprise". It appears that either the above statement is the law, or that which was a "joint enterprise" at the time of the decision in *Railroad* v. *Kistler* is no longer a "joint enterprise".

It is significant that in *Railroad* v. *Kistler*, the court considered that the plaintiff herself had been negligent, aside from any negligence of her father which might be imputed to her. It was stated in the opinion that:

> "The time to look and listen for the last time is shortly before going upon the track as before explained, and as the train was near enough to catch her before getting over the crossing at a fast trot or gallop, the train must have been far past the cherry tree when she should have looked the last time."[37]

The borderland between decisions imputing the negligence of the driver to a guest because of a "joint enterprise", and decisions holding a passenger guilty of contributory negligence of his own because of his failure to look and listen and warn the driver of danger, is occupied by those cases which hold that if the passenger does in fact look out for danger, he is or may be held negligent if he fails to see observable dangers and warn the driver of them.[38]

Unless there is actually a duty on the passenger to *look*, there appears to be no reason for holding that if the passenger does look he is bound to see observable dangers. If the passenger is negligent if he does not observe apparent dangers when he chooses to look, it seems to follow that he is under a duty, at least to himself, to look for dangers. The duty to see necessarily includes the lesser duty of looking.

The rule of law requiring drivers of vehicles to stop, look and listen before going over railroad crossings is so firmly settled[39] that it is surprising that the courts should refuse to fix any

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[37]66 Ohio St. 326, 343, 64 N. E. 130, 135 (1902).

[38]Smith v. The Cleveland Ry., *supra* note 20; Erie R. R. v. Hurlburt, 221 Fed. 907 (C. C. A. 6th, 1915), holding that verdict should have been directed for defendant railroad, where passenger in automobile testified she had looked and listened, but did not see or hear approaching train which facts showed was plainly visible.

minimum standard of conduct for passengers in private vehicles. The fact that the passenger has no control over the mechanism would seem to be offset, so far as any duty to look is concerned, by the fact that the passenger has a greater opportunity for observation. It is inconceivable, in spite of the stress which some courts have put on this point, that the danger to travelers in a motor vehicle would be increased by a warning from a guest to the driver that a train was approaching a nearby crossing. A warning in this situation certainly is not "back seat driving". If such warning would increase the danger, it would seem that crossing signs, watchmen, gates, automatic signalling devices, and locomotive whistles and bells would have the same effect. The position of the courts with regard to the positive duty of the driver of a vehicle at a railroad crossing is sufficient answer to any statement that the courts cannot define a standard of conduct which must be followed by a passenger under the same circumstances. The passenger moves forward at the same speed, in the same vehicle, and is subject to the same dangers as the driver. It is submitted that if the passenger chooses to rely upon the care and skill of the driver and to do no looking and listening on his own behalf, he should be held to have done so at his own risk.[40] It may well be questioned whether it is desirable either as a matter of law or of social policy that one who rides onto a railroad crossing without making any attempt to observe the approach of a train, may be found to have exercised

[39]The Pennsylvania R. R. v. Rusynik, 117 Ohio St. 530, 159 N. E. 826 (1927). Part of the syllabus in this case is: "When a traveler upon a public highway approaches a steam railway which intersects at grade the highway, with one or more tracks, with an intention of crossing over, it is the duty of such traveler, before going upon the railway, to look both ways and listen for the approach of trains; and such looking and listening must be at such time and place and in such manner as will be effective to accomplish the ends designed thereby . . . If his failure to look in the direction from which a train is approaching, at a time and place when such looking would be effective, results in an injury to himself when the same might have been avoided had he so looked, such conduct constitutes contributory negligence as a matter of law that will prevent a recovery."

[40]Baltimore & Ohio R. R. Co. v. Goodman, 275 U. S. 66, 69, 70, 48 Sup. Ct. 24 (1927). "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. . . It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk."

ordinary care under the circumstances. In what other way can any care at all be exercised except by looking and listening and giving timely warning to the driver?

" . . . We are dealing with a standard of conduct, and when the standard is clear, it should be laid down once for all by the courts."[41]

"There is also no doubt, where the facts are undisputed or clearly preponderant, that the question of negligence is one of law."[42]

"It cannot be that the theory of the law requires it to be left to the uncertain judgment of a jury in every case."[43]

So far as the Ohio cases have gone, it appears that it is to be left to the jury to decide in each case whether the passenger is required to do any looking or listening at all, under instructions that the passenger must exercise ordinary care and make such reasonable use of his faculties of sight and hearing as would be made by an ordinarily prudent person under the same circumstances. The courts have refused to permit instructions that the passenger must *look* or *listen*, even though looking and listening are the only known methods of exercising the faculties of sight and hearing. It is submitted that there should be established as a matter of law a standard of conduct requiring automobile passengers to look, listen and give warning to the driver at known or observable railway crossings. This view has been adopted in many jurisdictions.[44]

JOHN S. BACHMAN.

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[41]B. & O. R. R. v. Goodman, *supra* note 40.

[42]Southern Pacific Co. v. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338 (1896).

[43]Southern Pacific Co. v. Berkshire, 254 U. S. 415, 417, 41 Sup. Ct. 162 (1921).

[44]Davis v. Chicago, R. I. & P. Ry., 159 Fed. 10 (C. C. A. 8th, 1907); Brommer v. Pennsylvania R. R., 179 Fed. 577 (C. C. A. 3rd, 1919) (certiorari denied, 223 U. S. 718, 33 Sup. Ct. 522); Bradley v. Missouri Pac. R. R., 288 Fed. 484 (C. C. A. 8th, 1923); Southern Ry. v. Priester, 289 Fed. 945 (C. C. A. 4th, 1923); Noble v. Chicago M. & St. P. Ry., 298 Fed. 381 (C. C. A. 8th, 1924); Parramore v. Denver & R. G. W. R. R., 5 F. (2d) 912 (C. C. A. 8th, 1925), (certiorari denied, 269 U. S. 560, 46 Sup. Ct. 20); Kumma v. Atchison, T. & S. F. Ry., 23 F. (2d) 183 (C. C. A. 8th, 1927); Hall v. West Jersey & S. R. R., 244 Fed. 104 (C. C. A. 3rd, 1917); Cooper v. Chicago, R. I. & P. Ry., 117 Kan. 703, 232 Pac. 1024 (1925); Dale v. Jaeger, 44 Idaho 576, 258 Pac. 1081 (1927), (failure to protest against excessive speed held negligence as matter of law); Ferguson v. Lang, 126 Kan. 273, 268 Pac. 117 (1928), (holding passenger negligent for failure to look and see defendant's automobile approaching in-

DESTRUCTION OF A TESTAMENTARY TRUST BY AGREEMENT AS INCIDENTAL TO THE COMPROMISE OF A WILL CONTEST

The case of *Madden* v. *Schallenberger*,[1] involves the very interesting question of the power of a court of equity to substitute a consensual for a testamentary trust as one of the elements of a compromise of an action to contest a will. The guardians of certain minor beneficiaries under a testamentary trust brought an action under section 10857, Ohio General Code, seeking the

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tersection); Kirby v. Kansas City, K. W. & W. R. R., 106 Kan. 163, 186 Pac. 744 (1920); Howe v. Carey, 172 Wis. 537, 179 N. W. 791 (1920); Martin v. Pennsylvania R. R., 265 Pa. 282, 108 Atl. 631 (1919); Renner v. Tone, 273 Pa. 10, 116 Atl. 512 (1922); Wagenbauer v. Schwinn, 285 Pa. 128, 131 Atl. 699 (1926); Harris v. Spokane P. & S. Ry., 123 Wash. 274, 212 Pac. 187 (1923); Sadler v. Northern Pac. Ry., 118 Wash. 121, 203 Pac. 10 (1921); LaGoy v. Director General of Railroads, 231 N. Y. 191, 131 N. E. 886 (1921); Hancock v. Norfolk & W. Ry., 149 Va. 829, 141 S. E. 849 (1928); Louisville & N. R. R. v. Anderson, 159 Tenn. 55, 15 S. W. (2d) 753 (1929); Pigeon v. Massachusetts N. E. S. R. R., 230 Mass. 392, 119 N. E. 762 (1918), (plaintiff looked but did not see car); Fogg v. New York, N. H. & H. R. R., 223 Mass. 444, 111 N. E. 960 (1916); Wilbur Motors, Inc. v. Eastern Mass. St. Ry., 170 N. E. 922 (Mass., 1930); Grant v. Chicago M. & St. P. Ry., 78 Mont. 97, 252 Pac. 382 (1927); Beemer v. Chicago R. I. & P. Ry., 181 Iowa 642, 162 N. W. 43 (1917); Sackett v. Chicago G. W. R. R., 187 Iowa 994, 174 N. W. 658 (1919), (guest on rear seat of motorcycle); Seiffert v. Hines, 108 Neb. 62, 187 N. W. 108 (1922); Morris v. Chicago, B. & Q. R. R., 101 Neb. 479, 163 N. W. 799 (1917); Jameson v. Norfolk & W. Ry., 97 W. Va. 119, 124 S. E. 491 (1924); Waller v. Norfolk & W. Ry., 152 S. E. 13 (W. Va., 1930); Brickell v. New York Central & H. R. R., 120 N. Y. 290, 24 N. E. 449 (1890); ("It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger and avoid it, if practicable."—wagon); Pouch v. Staten Island M. Ry., 142 App. Div. 16, 126 N. Y. Supp. 738 (1910); Kamillowitz v. Cumberland County Power & L. Co., 119 Me. 588, 109 Atl. 487 (1920), (guest on truck which was backed onto tracks in turning around); Blanchard v. Maine Central R. R., 116 Me. 179, 100 Atl. 666 (1917); Opp v. Pryor, 294 Ill. 538, 547, 128 N. E. 580, 584 (1920); Pence v. Hines, 221 Ill. App. 584 (1921); Greenstreet v. Atchison, T. & S. F. Ry., 234 Ill. App. 339 (1924); Miller v. Louisville N. A. & C. Ry., 128 Ind. 97, 27 N. E. 339 (1891), (wagon); Lawrence v. Denver & R. G. R. R., 52 Utah 414, 174 Pac. 817 (1918); Dummer v. Milwaukee Electric Ry. & L. Co., 108 Wis. 589, 84 N. W. 853 (1901); Texas Mexican Ry. v. Hoy, 24 S. W. (2d) 18 (Tex. Com. App., 1930); See Sullivan v. Atchison, T. & S. F. Ry., 317 Mo. 996, 297 S. W. 945, 949 (1927). The cases on this question are collected in annotations in 18 A. L. R. 309, 22 A. L. R. 1294, 41 A. L. R. 768, 47 A. L. R. 293, 63 A. L. R. 1432, 20 A. L. R. 1026, 26 A. L. R. 1421, 40 A. L. R. 1338.

[1]121 Ohio St. 401, 169 N. E. 461 (1929).

direction of the court on the settlement of an action to contest a will brought by the heirs at law of the testatrix. The trial and appellate courts by their decrees confirmed a contract between the plaintiffs and the heirs at law by the terms of which the heirs at law received substantial sums from the estate in lieu of their interests under the will, and, the estates of the minors, who succeeded only as beneficiaries under the will, were relieved of many conditions and restrictions imposed by the will. The agreement confirmed by the decrees of the lower courts relieved the estates of the minors of certain spendthrift characteristics imposed by the will, accelerated the time for the receipt of income, substituted another for the testamentary trustee and provided for the administration of the trust in accordance with the provisions of the contract rather the terms of the will. The testamentary trustee instituted error proceedings to the supreme court and the decree was there affirmed in so far as it provided for the settlement of the claims of the heirs at law and reversed in so far as it attempted the removal of the testamentary trustee and the substitution of the consensual trust in place of the trust created by the will.

The decision may be summarized as follows:

First: An heir at law in consideration of a forebearance to contest a will may secure an outright settlement the direct effect of which is to terminate a trust created by the terms of the will for the benefit of such heir at law.[2]

Second: An agreement made in consideration of the forebearance of an heir at law to contest a will cannot have the effect of enlarging the interest of one who succeeds only by virtue of the provisions of the will, or, to state it differently, the beneficiaries by a contract, the object of which is to preserve the trust estate, cannot enlarge their own interests with or without the assistance of a court of equity.[3]

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[2]The will provided for a payment of $1500 per year to each of the two daughters of the testatrix and in the discretion of the trustee an additional $1000 per year until November 14, 1932. At that date each daughter was to receive $25,000 outright and the income from a $75,000 trust fund for life. The contract provided for the immediate payment of $100,000 to each daughter and $2500 per year. Each daughter was to have a life estate in one-twelfth of the estate, and out of these separate portions $25,000 outright on November 14, 1932, and the income from the balance for life.

[3]*In re* Stoffel's Estate, 295 Pa. 248, 145 Atl. 70 (1929), is to the same effect in so far as the enlargement of the rights of beneficiaries, not heirs at law, is concerned.

Third: A testamentary trustee has a sufficient legal interest to resist the destruction of the trust notwithstanding that its destruction is concurred in by all parties beneficially interested.

Fourth: Sections 12079 to 12087 inclusive, General Code, afford the exclusive mode of setting aside a will in Ohio.

The fourth summary is not a novel statement of law in the state of Ohio and may be dismissed with the bare reference that it conforms to the local practice for many years.[4] The third summary seems self-evident as the trustee of an active trust has never been relegated to the position of a mere stakeholder or inter-pleader in courts of equity.[5]

A comparison of the first and second propositions decided in the case under consideration gives rise to the natural inquiry as to the basis of the distinction made by the court. The distinction cannot rest upon any difference between the nature of the interests of the beneficiaries and the heirs at law, nor upon any difference in the consideration furnished by either of these classes of persons. The real basis for the distinction lies in the fact that the confirming of the agreement with the heirs averted a threatened disaster to the trust estate of the other beneficiaries while the proposed changes in the interests of the other beneficiaries did not have the effect of accomplishing any such result.[6] The

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[4]Cooch v. Cooch, 18 Ohio 146 (1849); Holt v. Lamb, 17 Ohio St. 374 (1867); Wagner v. Ziegler, 44 Ohio St. 59, 4 N. E. 705 (1886).

[5]"The trustees are the representatives of the dead donor in his wishes." Judge Cooley in Cheever v. Washtenaw, 45 Mich. 6, 7 (1880). "The absolute and positive duty is imposed upon him to defend the life of the trust whenever it is assailed, if the means of defense are known to him or can with diligence be discovered." Cuthbert v. Chauvet, 136 N. Y. 326, 332, 32 N. E. 1088 (1893). *Cf.* Wolf v. Uhlemann, 325 Ill. 165, 156 N. E. 334 (1927), which contains language to the effect that it is no concern of the trustee how the parties beneficially interested settle the controversy if the trustee is protected in making distribution. The distinction is that the *res* there in controversy was intestate property because of the Illinois statute against the accumulation of income and was therefore held by the trustee as a bare stakeholder.

[6]It is interesting to compare the case under discussion with *In re* Stoffel's Estate, *supra* note 3. There the court refused to confirm any part of such an agreement after finding that there was insufficient evidence upon which to predicate an action to contest the will of the testator. It is interesting to speculate concerning the action of an Ohio court in the event that the insufficiency of the threatened will contest was urged. *Cf.* Collins v. Collins, 151 Wash. 201, 275 Pac. 571 (1929), which is to the effect that a contract to suppress a will is valid regardless of any lack of merit in the threatened contest.

question of the degree of danger to the trust estate necessary to justify the action of a court of equity in destroying a portion of the trust created is not discussed, but since the demurrer admitted a grave danger to the estates of the minor beneficiaries through the threatened will contest as alleged in the petition the existence of this fact must be conceded.[7] The courts of Ohio have uniformly adhered to the doctrine that an active trust could not be terminated nor the interests thereunder enlarged by the act or agreement of the beneficiaries[8] and this decision constitutes an exception to rather than a departure from that rule. Undoubtedly, however, a convenient method is at hand for the destruction of a testamentary trust by an heir at law and the extent to which the courts will permit its utilization can only be conjectured at this time. It does not seem likely that the heirs at law could contract with the devisees to have the will declared invalid and thus strangle the trust.[9] On the other hand it is not improbable that a contract by one or all of the heirs at law to refrain from contesting a will in consideration of an outright payment would leave the trust moribund since it is a usual condition for the heir at law under such a contract to surrender the interest received under the will. The daughters of the testatrix, who were her sole heirs at law, did that very thing in the case under discussion.

Since the basis of the court's decision rests upon averting danger to the trust estate, the prevention of the enlargement or extension of the interests of the minor beneficiaries is the correct and natural result. In the language of the decision to permit otherwise would be for such beneficiaries to lift themselves by

[7]If the heir at law should demand as part of the consideration for the forebearance a change in the terms of the testamentary trust, will the desire of a court of equity to preserve the trust and the estate of the minor beneficiaries justify an approval of such an arrangement?

[8]Robins v. Robins, 72 Ohio St. 1, 73 N. E. 1051 (1905). Nor can the concerted action of the beneficiaries enlarge the interests given them by the terms of the testamentary trust even on the assumption that the testator would have so done had certain later circumstances been present at the time of the creation of the trust. Union Savings Bank & Trust Co. v. Alter, 103 Ohio St. 188, 132 N. E. 834 (1921).

[9]In Cuthbert v. Chauvet, 136 N. Y. 326, a contract between the heirs and devisees contemplating a judgment avoiding a will and destroying a testamentary trust was held void. Rohr v. Gatch, 21 Ohio N. P. (N.S.) 65 (1917); Walker v. Hollister, 20 Ohio N. P. (N.S.) 225 (1917).

their own bootstraps. The effect of the decision denuded of its legal aspects is somewhat unfortunate, however, as its direct result is to determine the destructibility or indestructibility of a testamentary trust according to the ability or inability of the person threatening its destruction to bring himself within a class, the members of which might accomplish that purpose. The result is that the remedies of a beneficiary depend upon circumstances wholly fortuitous and under such circumstances it is debatable whether public policy would not be better served by permitting the living under the guidance of a court of equity to allocate in a manner most productive of the common good wealth which the dead have bestowed grudgingly and with reservations. Cases which seem contrary to the case under discussion have their basis in statutes declaring that policy.[10] It is submitted that the enactment of a statute which would permit the adjustment of the rights of beneficiaries under long term trusts to suit the needs of the beneficiaries and the economic changes during the period of the trust would be beneficial for many reasons only a few of which have been discussed in this paper.

GEORGE E. FEE.

A SUPREME COURT OPINION CONTRADICTING THE SCINTILLA RULE

The opinion of the supreme court in *Cleveland Railway Co.* v. *Kukucz*[1] cannot logically co-exist with the scintilla rule and, therefore, imperatively requires a re-examination of that troublesome doctrine and a deliberate choice between it and the case referred to.

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[10]The case of Wolf v. Uhlemann, 325 Ill. 165, 145 N. E. 334 (1927), which seems to accomplish the result contended for on behalf of the beneficiaries in the instant case rests upon the fact that the property which was the subject of the agreement was in reality intestate property because of the provision of the Illinois statute against the accumulation of income. ILL. REV. STAT., c. 30, sec. 153, p. 636. Metzner v. Newman, 224 Mich. 324, 194 N. W. 1008 (1923). While seemingly at variance with the instant case may be explained by the provisions of the Michigan Statutes. See Act of August 18, 1921. See *In re* Lacroix's Estate, 244 Mich. 148, 221 N. W. 165 (1928), justifying an agreement of settlement which invalidated a will by a consent verdict. See Shermann v. Warren, 211 Mass. 288, and MASS. GEN. LAWS (1921), c. 204, sec. 15.

[1]121 Ohio St. 468, 169 N. E. 564 (1929).

The plaintiff in the *Kukucz* case sought damages for injuries claimed to have resulted from the defendant's negligence. The latter denied the allegations of negligence and pleaded contributory negligence on the part of the plaintiff directly contributing to the injuries in question. At the close of the plaintiff's evidence the defendant moved for a directed verdict. This motion was overruled and the defendant thereupon went forward with its proof, calling numerous witnesses. At the close of all the evidence the defendant again moved for a directed verdict and this motion was granted. The plaintiff prosecuted error to the court of appeals, which reversed the trial court "for error in directing the verdict". The supreme court reversed the court of appeals and affirmed the trial court, saying:

"The record discloses that both parties offered evidence, but that the evidence offered by the defendant was not incorporated in the bill. The motion of the defendant for a directed verdict was made and sustained at the close of the evidence. What the proof offered by the defendant was, whether it countervailed the proof of plaintiff on the issue of negligence, or sustained its issue of contributory negligence, neither the Court of Appeals nor this Court has the means of knowing. The missing evidence may have fully sustained the Court's ruling in directing the verdict."

All of the members of the supreme court concurred in the opinion except Judge Robinson who did not participate.

It will be observed that the supreme court did not reverse the court of appeals because the plaintiff's own evidence entitled the defendant to a directed verdict, but reversed on the *sole* ground that the *defendant's* evidence, which was missing from the bill of exceptions, may have fully sustained the trial court's ruling. The clearest principles of logic compel the conclusion that the supreme court must have considered that the plaintiff had made at least a *prima facie* case, for if the court had been of the opinion that the plaintiff's evidence did not raise even a *scintilla*, the natural and reasonable and customary procedure would have been to reverse the court of appeals and affirm the trial court *on that ground*. If the plaintiff had not introduced "some evidence" there was no occasion to rest the decision upon the absence of *defendant's* evidence from the bill of exceptions. But the supreme court held that it could not pass on the propriety of the directed verdict *because* the defendant's evidence was not in-

corporated in the bill. The only rational inference is that the plaintiff's evidence was, in itself, sufficient to require submission to the jury.

Indeed, we are not left to inference, however compelling. The court has stated its position with great clarity:

"What the proof offered by the defendant was, whether it *countervailed the proof of plaintiff on the issue of negligence, or sustained its issue of contributory negligence,* neither the Court of Appeals nor this Court has the means of knowing. *The missing evidence may have fully sustained the trial court's ruling in directing the verdict.*" (Italics ours.)

Unless the plaintiff's evidence had raised at least a *scintilla* there was nothing to *countervail,* and no occasion to inquire whether the issue of contributory negligence had been sustained. It follows necessarily that the plaintiff must have introduced "some evidence". There is simply no escape from that conclusion.

In this connection it is pertinent to observe that in two previous trials the plaintiff had obtained a verdict from the jury. One of these verdicts was set aside by the trial court as being against the *weight* of the evidence, indicating that he, too, considered that the plaintiff had introduced "some evidence",[2] for if there had not been at least a *scintilla* there was, beyond question, nothing to *weigh.* In another trial the jury returned a verdict for the defendant upon which judgment was entered. This was reversed and the case remanded by the court of appeals "for error in the charge of the court, no other error appearing in the record". It would seem, therefore, that the court of appeals considered that the plaintiff had introduced "some evidence"—otherwise (1) the error in the charge could not have been the *only* error, and (2) in any event the plaintiff could not have been prejudiced by the charge, no matter how erroneous.

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[2]His written opinion concluded as follows:

"All in all, the Court cannot reconcile this verdict with the weight of the evidence. The Court, however, does want the entry in the case to affirmatively show that the ground for sustaining the motion for a new trial is that the verdict is manifestly against the weight of the evidence, so that plaintiff's right may be protected under the statute in the event that the case is again tried and goes to a verdict in his behalf."

Thus, before the case reached the supreme court, a common pleas judge had found and the court of appeals had twice found that the plaintiff was entitled to determination by a jury of the issues presented, and two juries had returned verdicts in his favor, all of which agrees with the only conclusion which can rationally be drawn from the opinion of the supreme court, namely, that the plaintiff had introduced at least a *scintilla* of evidence.

How, then, could it possibly make any difference, under the scintilla rule, *what* the defendant's evidence was?[3] Yet the supreme court held that, in the absence of the *defendant's* evidence, it could do nothing but reverse the court of appeals and affirm the trial court. The utter antithesis between that and the scintilla rule cannot be escaped. Like crabbed age and youth, they cannot live together.

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[3]In the Kukucz case the bill of exceptions shows only that "numerous witnesses were called in behalf of the defendant". It is therefore possible to argue as follows: So far as appears from the bill of exceptions the defendant may have called the plaintiff as its own witness. If the defendant did call the plaintiff as its own witness, the plaintiff's testimony, given by him as a part of the defendant's case, may have contained admissions requiring a directed verdict for the defendant. Therefore, since every presumption must be indulged in favor of a judgment, the supreme court not only properly sustained the trial court in directing a verdict, but its holding cannot be said to conflict with the scintilla rule for the reason that, a party being bound by his own testimony, a directed verdict against the plaintiff on the basis of his statements as a witness for the defendant, is entirely outside the scope of the scintilla rule.

Abstractly the foregoing argument is sound. It loses all force, however, when subjected to a little scrutiny in the light of experience.

If the defendant in the Kukucz case called the plaintiff to disprove his own (plaintiff's) allegations of negligence on the part of the defendant, or to prove its (defendant's) allegations of contributory negligence on the part of the plaintiff, it was certainly a most extraordinary proceeding. No competent trial lawyer would have thought of doing such a thing. The plaintiff testified in his own behalf and all that the defendant could hope to get from him was available on cross-examination; and the plaintiff was, in fact, cross-examined at length. Therefore, while, in theory, the defendant *may* have called the plaintiff as its witness, nevertheless it is a moral certainty that the defendant actually did no such foolish thing.

If the supreme court, in deciding as it did, had in mind the argument under discussion, it was flying in the face of reality. In the absence of a statement by the court to that effect, we cannot suppose that it took so extravagant a position. If it considered this aspect of the matter at all (and there is nothing to indicate that it did), the court must certainly have taken judicial notice of

As stated in the leading case of *Ellis & Morton* v. *Ohio Life Insurance & Trust Company*,[4] the scintilla rule is as follows:

"Wherever there is any evidence, however slight, tending to prove the facts essential to make out a case for the plaintiff, a non-suit cannot be properly ordered; *it is in no case a question as to the weight, but as to the relevancy of the testimony.*"

If that be the law the directed verdict in the *Kukucz* case is simply unthinkable. Yet the supreme court *reversed* the court of appeals and *affirmed* the trial court. What then *is* the law? In all deference it is submitted that the majority have gotten themselves into a position where they are simultaneously affirming contradictory propositions.

There is another aspect of this matter which leads to the same conclusion. Mr. Metzler[5] says:

"Where an issue has been made by the pleadings which has not been waived, and evidence on the subject, but not conclusive in law, has been submitted, the failure of a party to contradict the evidence produced is not an admission of the facts; for the jury may not believe the evidence. And a charge to the jury that such fact is uncontroverted and has been established is prejudicial error."

Certainly it has been the general understanding of bench and bar in this state that, in sustaining a party's motion for a directed verdict, his own evidence cannot be considered, even though not contradicted by the evidence of his opponent. That proposition

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what every lawyer would say without hesitation, as a matter of everyday common sense, namely, that the plaintiff was *not* called as a witness for the defendant. It is true he *could* have been, but then, as Prof. Eddington points out, if I put a saucepan of water on a fire the water *may freeze*, although we may safely affirm that it will boil "because it is too improbable that it should do anything else". (The Nature of the Physical World, page 76.)

As a matter of fact the plaintiff was *not* called as a witness by the defendant. This clearly appears from the brief in the supreme court on behalf of the defendant, the names of the witnesses called by the defendant being given therein. Can anyone suppose that the court closed its eyes to this admission and decided the case on the hypothesis that the situation may possibly have been other than it was known to have been in fact?

It is therefore submitted that the opinion in the Kukucz case cannot be interpreted otherwise than as being contradictory of the scintilla rule.

[4] 4 Ohio St. 628, 647 (1855).

[5] METZLER, OHIO TRIAL EVIDENCE, p. 119.

is not here defended. On the contrary, it appears to be unsound. Nevertheless it has been adhered to until recently (save in one situation to which reference will shortly be made), and is thoroughly consistent with the scintilla rule.

Under the scintilla rule "wherever there is any evidence, however slight, tending to prove the facts essential to make out a case for the plaintiff, a non-suit cannot be properly ordered; it is in no case a question as to the *weight*, but as to the relevancy of the testimony".[6] Can there be any doubt, then, that there is a wide departure from the outlook and spirit of that rule in holding that a party's *own* evidence may be made the basis of a directed verdict *in his favor?* Yet that is exactly what the supreme court did hold in the *Kukucz* case. "The missing evidence [that is, the *defendant's* evidence] may have fully sustained the trial court's ruling in directing the verdict."[7]

Under the scintilla rule, when considering a motion for a directed verdict, the court can pass *only* upon the *relevancy* of the evidence in the case offered by (or otherwise available to) the party *against* whom the motion is directed. He cannot say that, although relevant, the evidence does not possess sufficient *weight* to justify submission to the jury. Yet, under the decision in the *Kukucz* case, a trial judge may do the converse, that is, may determine that a party's evidence (at least when not contradicted by his opponent's evidence) is not only relevant but *possesses sufficient weight to require a directed verdict in his favor.* Now if the court cannot weigh the evidence of a party *against* whom a directed verdict is asked and assay it to determine whether it has *sufficient probative value to submit to the jury,* how can the court weigh the undisputed evidence of a party *in whose favor* a directed verdict is asked and determine whether it has *sufficient probative value to require the court to grant the motion?* It is submitted that it is a logical impossibility.

In this respect, therefore, as in the other already considered, the scintilla rule and the *Kukucz* case collide head-on. Both cannot survive.

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[6]Ellis & Morton v. Ohio Life Insurance and Trust Co., 4 Ohio St. 628, 647 (1855); Gibbs v. Village of Girard, 88 Ohio St. 34, 41, 43, 102 N. E. 209 (1913).

[7]See *supra* note 3.

The propriety of directing a verdict in favor of a party on the basis of his own undisputed evidence, under certain conditions, would seem to be unquestionable. There is eminent authority for it. Dean Wigmore, in his great work on Evidence,[8] says:

"That a verdict may also be directed *for the proponent* is accepted by the majority of Courts, though it is more plausibly open to dispute. The usual situation is that of a plaintiff who has produced a mass of evidence sufficient to throw upon the defendant the liability of producing some evidence to the contrary, and if this duty is not sustained, it is the judge's function to make the decision. The only objection here can be that the judge must not reach his decision by assuming the plaintiff's testimony to be true (because that is the jury's province); yet where the testimony is *undisputed*, or where in some other way that assumption is unnecessary, *this objection disappears*. A less common situation is that of a defendant having an affirmative plea (for example, payment of a note, or contributory negligence in personal injury): but *here also a verdict may be ordered for the defendant, provided the result can be reached upon undisputed testimony of the defendant*, or upon testimony of the plaintiff, which the latter must concede to be true." (Italics ours.)

Even in this state it has been held proper if the party's evidence, which is not contradicted, is exclusively documentary.[9] But it is clear that there can be no distinction in principle on that basis. Ordinarily, perhaps, documentary evidence is more trustworthy than that of witnesses on the stand. But documents may be forged and altered, while oral testimony in open court is sometimes convincing beyond the possibility of doubt.

The case of *Aetna Life Insurance Company* v. *Lembright*,[10] decided by the court of appeals for Erie County, is directly in point, particularly in view of the fact that the supreme court overruled a motion to certify. That was an action on an employees' group life insurance policy terminable as to each insured upon the cessation of his employment. It was defended on the ground that the particular insured had ceased to be employed prior to his death. To sustain this affirmative defense the insurer introduced evidence, documentary and otherwise, to show the cessation of employment. The evidence to this effect

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[8] 5 WIGMORE, EVIDENCE (2d ed. 1923), p. 461.

[9] Kohl v. Hannaford, 5 Ohio Dec. Rep. 306 (1875).

[10] 32 Ohio App. 10, 166 N. E. 586 (1928).

was not rebutted by the plaintiff and defendant, therefore, moved for a directed verdict. This was overruled and the case sent to the jury, which found for the plaintiff. The court of appeals held that, since the evidence of the defendant as to the termination of the employment was uncontradicted, it was error to overrule the motion for a directed verdict, and itself entered judgment for the insurance company. The plaintiff thereupon filed a motion to certify, which the supreme court overruled on June 19, 1928.

The considerations indicated in the opinion of the supreme court in *French* v. *Millard*[11] effectively dispose of any contention that a trial court *must* direct a verdict in favor of a party whenever his evidence is not contradicted. Trial courts should have *discretion* to do so, however, and unless the *Kukucz* and *Lembright* cases are overruled, they do have it now whatever may have been thought formerly. If they are *not* overruled, the scintilla rule has been destroyed.

The scintilla rule should be abandoned.[12] "To rest upon a formula is a slumber that, prolonged, means death."[13] Nor should the doctrine of *stare decisis* call up misgivings. As Chief Judge Cardozo says, "Hardly a rule of today but may be matched by its opposite of yesterday."[14] Consider the impressive list of overruled decisions in every jurisdiction. Within the last few months the United States Supreme Court, in *Farmers Loan & Trust Co.* v. *Minnesota*,[15] has added further proof that today is not the helpless slave of yesterday. Our own supreme court, when the occasion required, has not hesitated to do likewise.[16] There is here no question of vested rights—the court is free to follow its own judgment. JOSEPH O'MEARA, JR.

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[11]2 Ohio St. 44 (1853).

[12]See the author's note in 2 CIN. L. REV. 450 (1928).

[13]HOLMES, COLLECTED LEGAL PAPERS, 306.

[14]CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 26.

[15]280 U. S. 204 (1930).

[16]The following are recent instances: Trueson Steel Co. v. Trumbull Cliffs Furnace Co., 120 Ohio St. 394, 166 N. E. 368 (1929); The Commercial Credit Co. v. Schreyer and Anderson v. Smith, 120 Ohio St. 568, 166 N. E. 808 (1929); The State, *ex rel.* Automatic Registering Machine Co. v. Green, 121 Ohio St. 301, 168 N. E. 131 (1929).