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Notes on Recent Cases

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NOTES ON RECENT CASES

TACKING—The Supreme Court of Mich. has recently held in the case of City of Howell et. al. v. Mc Keever (225 N. W. 884) that where the line of travel on a piece of ground used for a public way varies, the use of one piece of ground may not be tacked onto the use of another piece, to make out the prescriptive period for the acquisition of a public easement in an alley.
This action arose when the city and adjoining owners sought to restrain the defendant from obstructing an alley by a proposed building. The alley was in existence for over fifty years, and was used by merchants and by the public. The defendant claimed the right to extend his building over the alley, and the question then was whether the alley had occupied its present location for the prescriptive period. The evidence showed that the father of one of the plaintffs had once owned a building adjoining the alley, and that the said building was farther back from the alley than it was at the time this action was brought. The evidence thus establishing that the line of travel was changed, the above rule was announced.

Arnold Levandoski

VENDOR & VENDEE—In the recent case of Langley v. Kirker, 225 N. W. 931 (Mich.) the contract for the sale of real property permitted the vendor to mortgage the premises for not more than 50% of the contract price to be paid, with further provision that the vendee could in default of payment of the mortgages, pay such mortgages and apply such sums as payments on the contract by the vendee. Further, that when the amount due by the vendee shall be equal to the amount due by the vendor on outstanding mortgages, the vendee shall be entitled to a deed, with covenants by the vendee to assume payment of the mortgages.

The vendor executed two mortgages prior to the execution of the contract, with the consent of the vendee for his accomodation so that he might sooner obtain a deed. During the course of the running of the contract the vendee defaulted in payment and the vendor served notice of forfeiture. At the time the

vendor was delinquent in payment of interest on one of his mortgages, and the vendee relies on the rule that a vendor is not entitled to a forfeiture when he himself is in no position to perform by making a conveyance of marketable title in accordance with the terms of the contract.

The rule invoked by the vendee was held not to apply for the reason that the defendant vendee had not acted in good faith in protecting his legitimate interests, in that the vendee defaulted in his contract payment before the vendor ever defaulted in payment of interest on his mortgage. Moreover, the failure of the vendor to pay such interest was directly caused by the failure of the vendee to make payment in conformity with the contract. In addition the terms of the contract afforded the defendant vendee sufficient means of protecting himself. In the last analysis the defendant could show no injury suffered by himself. Thus arose the rule that a defaulting vendee cannot defeat a forfeiture by availing himself of a default by the vendor when he himself was responsible for the default.

Arnold Levandoski

FIXTURES—The case of Peninsular Stove Co. v. Young et. al. (226 N. W. 225) was an action where the plaintiff by a cross bill sought to enforce a mechanics lien upon an apartment building of the defendant's for the price of forty-nine gas ranges installed therin. Briefly the Michigan Mechanics' Lien Law provides that "every person who shall in pursuance to a contract furnish materials in or for building, altering, improving or ornamenting, or put in any house or building shall have a lien therefor." The question then was whether these gas ranges so attached became annexed to the real estate. The court approved of the following three tests: 1—annexation to the realty. 2—the application to the use or purpose to that part of the building to which it is connected is appropriated. 3—the intention to make the article a permanent accession to the freehold.

The controlling fact in this case was that the building erected was an apartment house which would not draw desirable tenants without such gas stoves, and it was held that such were intended to become a part of the building, this being easily inferred from the foregoing facts. The ranges being fixtures and

a part of the realty the plaintiff was entitled to a lien for their value.

Arnold Levandoski

BREACH OF PROMISE TO MARRY—In the case of Akema v. Andruska 226 N. W. 246, which was a suit for damages for breach of marriage promise, the defendant admitted the promise but pleaded justification of the breach. The defendant justified the breach by discovery of the fact of manufacture, possesion and use of "Moonshine" whisky by the plaintiff. The court instructed, and was upheld on appeal, that "if this woman did manufacture, and had in her possesion, and used this illicit liquor" as claimed by the defendant, "and she refused to give it up and this defendant refused to marry her on thisaccount the defendant is not liable." The verdict was for the defendant and the plaintiff's counsel on appeal contended that the mere engagement in violation of a liquor law was not justification for the breach but was effective only in mitigation of damages, or in postponement of the marriage until the plaintiff gave up her occupation in the manufacture of liquor. This contention was held to be without merit and the instructions as given were approved.

An interesting feature of the case is that the plaintiff denied the making of "moonshine" whiskey and admitted the manufacture of "home brew", claiming that the defendant told her to make it for the wedding.

Arnold Levandoski

CONSTITUTIONAL—Whole of statute must be considered in determinng its Constitutionality.

In the case of Eliason et al v. Wilborn et al, reported in 167 N. E. 101, the appellants filed their petition in the circuit court of Cook County to cancel two certificates of title and for other relief.

The appellants contracted to sell the land in question to one Napleton subject to a $2700 mortgage and after trying to collect the purchase price from Napleton they found that he had absconded; that through forgery the names of appellants had been signed to the warranty deed; and that a forged warranty deed from Napleton to appellees had been filed for record. De

spite the protests of appellants a certificate of title was issued to appellees. The prayer of appellants asks that the two purported warranty deeds be declared null and void and that the registrar be ordered to cancel the certificates issued to Napleton and to Wilborn, and that the title be vested in appellants free from all liens and encumbrances except the mortgage stated above.

Appellants insist that the Torrens Act under which the land was registered is unconstitutional as depriving a person of property without due process of law because they had no notice so that they might have defended their title. The court says that in determining the constitutionality of the Act it must be considered as a whole. The act is optional in the various counties and no person is required to register his land unless he sees fit. When he does he voluntarily submits his land to the operation of the Act and is presumed to have notice of the various provisions thereof and he cannot be heard to complain that the act is unconstitutional. Therefore, appellant is bound by the section of the Act which provides that the person taking land registered under the Act shall not be required to inquire into the circumstances under which the previous holder was registered.

James A. Allan

AUTOMBILES—Ability to furnish satisfactory service is question essential to be determined on application for certificate to operate motorbusses.

In the case of Illinois Commerce Commission ex rel National Roadway Lines Inc. v. Wabash R. Co. reported in 167 N. E. 64, a certificate of convenience and necessity was granted to the National Roadway Lines Inc. to operate a system of transportation of passengers and baggage by motorbusses between Chicago and East St. Louis. Petition for rehearing was filed but was denied and on appeal to the circuit court of Macon County the order was set aside.

The ability of the corporation to furnish adequate and satisfactory service is a question essential to be determined upon every application for a certificate. No finding was made by the commission concerning the financial ability of appellant to perform the service for which it sought authority. The authorized

capital of appellant was only $14,000, which had been paid in. Its assets were $12,000 and the court found that it would require at least $150,000 to furnish the service authorized by the order. It appears that the incorporators and directors are men of good financial standing and they agreed to increase the capital to $150,000 or more if required but no contracts to this effect were ever produced. As it stands the evidence showed merely a corporation with total assets of $12,000 authorized to perform a service requiring assets of $150,000. Such a finding does not justify the issuance of a certificate.

James A. Allan

TAXATION—Taxpayer appearing before the Board of Review and discussing raise of valuation could not complain thereafter that the valuation was raised without notice.

In the case of People ex rel Orrison, County Collector v. Gibson, reported in 167 N. E. 32, there was an application for judgment and order of sale against real property returned delinquent for the nonpayment of taxes.

The appellant delivered to the assessor a schedule of his personal property, the value of which the assessor fixed at $8400. The board of view increased the valuation to $9400 and the taxes were not paid. Appellant contends that the increase in valuation is void for want of notice and hearing upon the question as to whether the increase should be made. He was notified that he would be heard by the board on a certain day and he appeared with his attorney two days after the appointed time. The question of valuation was discussed and it was decided that it should be raised. The attorney prepared a protest against the action but instead of filing it with the clerk he indorsed it "filed with the board of review" and retained it in his posession. It appears that the higher valuation was not excessive. Upon these facts the appellant's complaint that the valuation was raised without notice to him and without a hearing upon the question has no basis.

James A. Allen

HORTMAN-SALEM COMPANY, INC V. WHITE—Supreme Court of Louisiana. June 17, 1929. Reported in 123 So. 715.

The question presented in this case deals in substance, with

the time at which a person should record a mechanic's lien. Should it be when all of the work is done, all of the minor defects remedied which were overlooked in the general construction; or should it be recorded when the general bulk of the work is completed; that is, when the work had been accomplished to such an extent that, as far as the person holding the mechanic's lien is concerned, the building upon which the work was done is tenable.

Walter William White was having the structure in question built, and mortgaged it on July 23, 1927. The mortgage was recorded on July 28, 1927. Various liens growing out of the construction of the building, were recorded against it and the lot on which it was built.

Plaintiff forclosed its mortgage, and after the foreclosure sale the sheriff of the parish of Orleans ruled the mortgage and lien claimants into the court for the purpose of determining how the proceeds of the sale should be distributed. Among the claimants was the Vieth Supply Company, Inc. which was the owner of a claim for $848.27 for material furnished or the construction of the building, and the Harry Brothers of Louisiana, Inc. which was the holder of a claim for $259.29 for material furnished for the same purpose. Judgment was rendered in favor of the plaintiffs over the claims of the last two mentioned parties, and these latter claimants appeal.

At the trial it was admitted that the claims of materialmen were due and owing, and that the material was furnished and used in the building, and that the recordations were made on the dates set forth on the mortgage certificate, but the plaintiff contended that the claims of neither Veith Supply Company, Inc., or the Harry Bros. Company of Louisiana, Inc., were not recorded in time to preserve their claims and that as a result neither had a right to claim against the mortgage.

No contract was recorded for the erection of the building, and as a result the statute which provided that where no contract ahd been entered into, or none recorded for the erection of a building, the materialmen had 60 days to record their claims, and if they did so a lien would be created for their benefit.

Now the liens of the materialmen who are putting in this claim were recorded on January 12, 1928, but 82 or 86 days before this a tenant had moved into the buildng, at which time the build-

ing was considered completed. But the materialmen proved that on November 1, 1927 some tiling was cleaned, that in January, 1928 the roof was found to have a leak in it and this was repaired, and they claim that they did not have to record their liens until the work of construction was completed, and that it was not completed when the tenant moved in, because the roof had to have additional work performed on it, which was done in January, 1928, as well as tiling cleaned, in November, 1927.

But the court held that some time must be fixed for the recordation of building liens to make them fully effective. True it is that the statute fixes the time at 60 days for the recording of the claim, where no contract had been made or recorded, from the last labor done on the building or the last servcie or material furnished, but within the contemplation of the statute, the last labor is done and the last material or service is furnished prior to the time the building is considered or treated as completed. The correcting of defects which may appear from time to time in the work after the building is completed or considered and treated to be completed, are not to be counted or deemed as part of the labor contemplated by the statute, in fixing the time at 60 days after the last labor is done, nor should services or labor furnished for the remedying of defects later discovered be so regarded as within the statute.

Thus we find in this case that where no contract has been entered into, or where none has been recorded, the statute regulating the time in which a claim for work, labor or materials should be filed, starts to run when the general bulk of the work is completed, and that in cases of this type the statute starts to run befroe a tenant moves in, because then the building is completed in the general sense of the word, and being completed, the last labor or material must of necessity have been furnished.

J. E. Keating

BUCKLEY V. FEATHERSTONE GARAGE, INC.—Court of Appeal of Louisiana. Second Circuit. July 1, 1929. Reported in 123 So. 446.

Significant in the rules laid down by the court in this case are the following propositions: "A motorists proceeding under proper traffic lights and signals may assume that the signals are

understood and will be observed by pedestrians." And "Less care is exacted of a motorist proceeding under traffic signals than where there are no signals".

The accident which gave rise to this suit occurred in the daytime at the intersection of two streets whose traffic was regulated by signals.

The evidence showed that the defendant entered the intersection on the green light, which permitted him to proceed, and that a few seconds after he had entered, the light changed to yellow, which was a signal for caution, and for vehicles in the intersection to get out of it as quickly as possible. The plaintiff was standing on the curb on the side of the street which the defendant's driver was approaching; and before the signal was given for her to proceed, she stepped out into the street and was struck by the automobile which the defendant's driver was operating. The machine at the time was going about 15 miles an hour, and the plaintiff contends that even if she did step out before the light gave her right to that the defendant was liable, because the driver should have been looking ahead and seen her step out from the curb, but the driver testified that he was looking ahead, and that he saw the plaintiff, but that she was standing on the curb, and that she suddenly stepped out in front of him as he crossed the intersecting street, and that he had no opportunity to stop before he struck her, but that he stopped in a very few feet after the accident. This testimony was found to be true, and the court held that the motorist was not lible under the doctrine of the last clear chance where the pedestrian who was struck entered the intersection before the traffic signal changed and suddenly stepped in front of the automobile. The court also said in regard to this question that if the defendant's driver had seen the danger the plaintiff was in and had not stopped or avoided striking her, she could recover even though she was negligent in being in the intersection, under the doctrine of the last clear chance.

However, in this case the driver saw the plaintiff standing on the curb, and had reason to believe that she would stay there until the light changed, because a motorist rightfully entering an intersection and proceeding under proper traffic signals at that intersection may assume that the signals are understood and will

be observed by the pedestrians. These reasons, in addition to the rule laid down by the court that less care is exacted of motorists proceeding under traffic signals than where there are no traffic signals, caused the court to give the defendant judgment in this case.

J. E. Keating

STATE EX. REL. BURTON, STATE ATTY. V. BARKER, CIRCUIT JUDGE—Supreme Court of Florida, Division A, July 31, 1929. Reported in 123 So. 738.

Chesley A. Skipper was Vice President of the Highlands Bank and Trust Company of Sebring, Fla., when it closed its doors in February, 1929. In April the grand jury returned an indictment against the said vice president for misappropriation of the funds of the aforementioned bank. A motion was made before the present defendant to fix a date for Skipper's trial for the offense, but the present defendant refused to entertain the motion, stating as reasons therefor that he was disqualified to sit in said cause. An alternative writ of mandamus was then issued by this court commanding him to assume jurisdiction of said cause and to go on with the trial, or show cause at a day certain why he should not do so. A return was filed to the writ stating that the judge was a depositor in the said Highlands bank at the time it closed its doors, and for this reason he was disqualified from trying one charged with misappropiating its funds.

The statute upon which the judge relied provided that no judge in any court should sit in any case to which he was a party, or in which he was interested, or in which he WOULD BE EXCLUDED FROM BEING A JUROR by reason of interest, consanguinity, or affinity to either of the parties, nor should he entertain any motion in such a suit other than to have the same tried by a qualified tribunal

The demurrer to the return to the alternative writ was overruled and the judge held disqualified to hear such a case, because he was interested in the final outcome of the affairs of the bank. If this were a criminal prosecution he would not be disqualified because of a pecuniary interest in the outcome of the trial, but being a depositor in the bank he would have such an interest in

the conviction of the defendant as to disqualify him as a juror, and since he would be disqualified as a juror he would also be disqualified from hearing the case as a judge.

J. E. Keating

NUISANCE—Operation of junk yard on large scale in an exclusively residential district, though a lawful business, held to constitute a nuisance.

This was a suit to enjoin the defendant Henry Kemper from conducting his business of junk dealer on the premises in question. The defendant purchased two lots adjoining the lot of the plaintiff, on which he lived and gradually worked up a thriving junk business. He paid $1,000 for the one lot and $1,500 for the other. His buildings valued approximately - $300. His lots were fenced with high boards. The business grew until it brought him $60,000 to $80,000 a year. He kept a machine in one shed for breaking up the iron into pieces. Five men were kept busy hauling, in motor trucks, the iron to and from the yard and in breaking it up.

The Court said, "The business of the defendant is a lawful business, and not a nuisance as such, but in our judgment its nature, character, and magnitude make it so, when located in a neightborhood otherwise exclusively residential. The operation of the yard, together with its incessant noise and dirt is a nuisance subject to abatement." Weishahn v Kemper et al. 167 N. E. 468.

Vernon Freed

NEGLIGENCE—Contributory negligence of a wife as gratuitous bailee held not imputable to husband, precluding recovery for defendant's negligent injury to husband's automobile.

The wife in making a left-hand turn properly circled the semiphore and waited at the center for another car to pass, when the defendant negligently operating an automobile at an unlawful speed of 35 miles an hour without having it under control, attempted to cut the corner without circling the center of the intersection in violation of Sec. 759 Par. D. of the municipal code —thereby hitting appellee's car through no fault of his wife. Appellee sued for damages of $500.00.

There was a verdict for plaintiff. The defendant appeals, the question being whether or not the wife's negligence in operating

appellee's car will be imputed to him without showing his wife was acting as his agent at the time of the accident. There is no evidence in this case of an agency—the evidence showing she was simply the gratuitous bailee of the appellee.

The Courts held in the majority of the earlier cases that a bailee's negligence was imputable to the bailor; 13 Am. Dec. 464, Mass; 60 Am. Dec. 360; 49 LRA 322, Ill; etc. But the weight of authority is changing and later cases decide in favor of the rule that a bailee's negligence is not imputed to the bailor to preclude his recovery from 3rd persons who damaged the article bailed; Alabama, Missouri, Conneticutt, New Hampshire, Washington, Pennsylvania, Massachusetts, New York, New Jersey, Illinois, Delaware so holding.

Without Indiana authority dairectly in point, as ruling precedent, we hold with the weight of authority, that bailee's negligence is not imputed to his bailor to preclude the later from recovery from 3rd persons who damage the article bailed."

It isn't necessary to prove that the wife was free from fault, even though complaint avers she was free from fault. (Other points have decided and judgment affirmed.) Lee v. Layton, 167 N. E.,—545—Indiana.

Vernon Freed

TAXATION—Board of Review held unauthorized to raise assessment, in absence of showing notice to taxpayer of proposed increase.

In an appeal from the judgment of the county court ordering sale of the appellant's land for delinquent taxes the appellant alleged that it had paid the collector of county taxes all the legal portion of the tax levied against its property, and that the unpaid portion of the tax was illegal on the ground that the assessed valuation of the improvements upon the premises was arbitrarily raised by the Board of Review without notice to the objector, from the assessed valuation of $63,000 to $100,000.

Proof of notice was attempted by appellee by introducing in evidence a registered return postal receipt signed by the agent of the appellant. This point failed when the appellant convinced the court that the agent was a doorman and was not authorized to receive mail for it.

The Board of Review has no power to raise the assessment of a tax payer without notice, and the tax levied against the appellant's property based on the excess valuation was void. (People ex rel. Harding v. General Outdoor Advertising Co. 167 N. E. 96).

However, if notice to the taxpayer be given by the Board of Review to the effect that he would be heard with respect to a contemplated increase on a certain day, and the taxpayer appears and discusses the question of valuation with the local assessor, he is without right thereafter to complain that valuation was raised without notice. (People ex rel. Orrison v. Gibson, 167 N. E. 32).

Norman J. Hartzer

USURY—Machinery and equipment are not "tools and implements of trade", the taking of security upon which for usurious loan is a misdemeanor.

The appellant in the case of PEOPLE V. SHAKUN (167 N. E. 187—Court of Appealh New York) loaned a sum of money, in excess of $200, at a usurious rate of interest, and took as security for the loan a chattel mortgage on certain machines and equipment used in and a part of the mortgagor's printing business. The appellee alleges that the appellant is guilty of misdemeanor as described in Section 2400 of the Penal Law (Consol. Laws, c. 40) which provides: "A person who takes security upon any household furniture, sewing machines,—* * * TOOLS OR IMPLEMENTS OF TRADE, * * * for loan or forebearance of money, * * * conditioned upon a greater rate than six percent per annum * * * is guilty of misdemeanor. The appelle's contention was upheld by the Court of Special Sessions (N. Y.) and by the Supreme Court, Appelleate Division (N. Y.), but met with revearsal in the Court of Appeals.

The Court was of the opinion that in the enactment of section 2400 of the Penal Law, the Legislature had conceived that in the practice of exacting usury from large borrowers, there lay no evil to be corrected, nor was there evil in taking security, for the protection of the usurious loans, upon the personal property other than chattles necessary to the maintenance of life, who by actual want are impelled to pledge these means of sus-

tainance as security for loans of palty sums—these are the people for whose protection this section was designed.

In a like manner the borrower is protected in the possession of his TOOLS or IMPLEMENTS OF TRADE, for they are as "necessary for upholding life" (Henry v. Sheldon, 35 Vt. 427, 82 Am. Dec. 644) as are his household furniture or his clothing. The costly machinery of an extensive business is not entitled to this protection; only the tools by which an artisan earned a livelihood are secured from seizure. It is in this light that the phrase, "tools and implements of trade", referred to in this section is interpreted.

Norman J. Hartzer

INSURANCE—A nut flying off an automobile is not an "automobile or substantial part thereof" under a policies covering injuries to insured struck by an automobile. Harley v. Life and Casualty Ins. Co. of Tenn., 149 SE. 76.

Harley brought suit against the Life and Casualty Company alleging that while walking on a sidewalk in the city Atlanta, an automobile traveling at a rapid rate of speed, and that a nut on the wheel of said automobile became detached and flying in a swift and violent manner struck petitioner in the eye, and as a result he lost the sight in his eye. He claimed damages under the policy issued by the defendant, and the defendant denied that it was liable under the policy.

The provision of the policy was, "If the insured be struck or knocked down or run over————————by a vehicle propelled by steam,————————gasoline, etc. A nut off an automobile is not an automobile or a substantial portion thereof, and therefor the petitioner is not entitled to recover under the policy. 94 S. E. 843.

The plaintiff was the only witness who testified that he was struck by the nut and his testimony construed most strongly against him fails absolutely to show that the nut came from the automobile. He testified that he did not see the nut come off the automobile and did not know what had struck him until he saw the nut on the sidewalk near him after he was injured. His statement that it flew off the automobile is a mere conclusion and not supported by evidence. It is just as reasonable to infer

that the nut was lying in the street and that the automobile struck the nut and put it in motion thereby causing it to strike the insured.

T. J. O'Niel

NEGLIGENCE—Contributory negligence of automobolists in crossing collision does not bar recovery, but only mitigates damages where the crossing signals were not given. Norfolk and W. Ry. Co. v. Hardy, 148 S. E. 839.

John Hardy was killed by a train of the defendant railroad at one of its crossings. It was shown by evidence that the deceased was traveling on a road parellel with the railroad. For a space of 50 feet before reaching the track, one on the highway could see for a distance of about 550 feet down the track, and when within 20 feet of the crossing one had a clear and unobstructed view of the track for 1,200 or 1,300 feet. The deceased was driving about 5 miles an hour as he neared the track and almost stopped when within 15 or 20 feet from the crossing, yet he drove on the track in front of the approaching train, which he should have seen and was killed. The evidence also showed that the train failed to give signals as required by law in approaching the crossing.

Section 3959 of the Virginia Code of 1919 decided the case for the plaintiff. This statute provides that, "If the employees in charge of any railroad engine or train fail to give the signals required by law on approaching a grade crossing of a public highway, the fact that a traveler on such highway failed to exercise due care in approaching such crossing, shall not bar recovery for an injury to or death of such traveler, nor for an injury to or destruction of property in his charge, where such injury, death, or destruction results from a collision on such crossing between such engine or train and such traveler or the property in his charge respectively, but the failure of the traveler to exercise such care may be considered in mitigation of damages."

T. J. O'Niel

STATE EX. REL. SCHWAB, PROS. ATTY., V. PRICE ET AL—Supreme court of Ohio.

1. Corporations, Key No. 195XWord "stockholders" in corporate regulations providing that three-fifths of the stockholders

shall constitute a quorum means stockholders per capata, not stockholders in interest. (Gen. Code 8623—12).

This case arise as an action in quo warranto filed in the court of appeals of Hamilton county brought by the state of Ohio on the relation of the prosecuting attorney of Hamilton county against the defendants who claim to have been elected directors of the M. Werk company, an Ohio corporation.

The petition prayed that the defendants be compelled to answer by what warrant they exercise the liberties, priveleges and franchises of the office of directors of the corporation and be required to show by what warrant they are conducting and controlling the corporate powers of the company.

The controlling facts of the case were not in controversy. The M. Werk company, a corporation engaged in the manufacture of soap, had an authorized capital stock of 15,000 shares of common stock all of which is issued and outstanding. After having given due notice of the annual meeting of the corporation to all of the stockholders, only 15 out of 25 of the members attended. When the meeting was called to order by the president and the secretary called the role it was reported that only 7740 shares were represented and that hence there was no quorum. The president stated to the meeting that under the regulations, three fifths of the stockholders in interest, or stockholders owning 9000 shares, were required to be present to make up a quorum. A motion to adjourn was made and lost. The president thereupon refused to act as president and the secretary refused to act as secretary. Thereupon the defendants proceeded with the meeting and elected directors, namely, the defendants.

Article one of the regulations of the M. Werk Co. read as follows:—"Three fifths of all of the stockholders shall constitute a quorum."

The legal question hence presented is: Where the regulations of a corporation provide that "three-fifths of all the stockholders shall constitute a quorum", does this mean stockholders in interest or stockholders per capata?

Plaintiff contends that the share of stock and not the individual, is in all cases the unit by which corporation affairs are goverened, where the word "stockholders" is used it refers to the interest and not to the person holding the stock

Under the Corporation Code of Ohio, section 8623—48, of this enactmene reads as follows:

"The shareholders in person or by proxy at any meeting for the election of directors shall constitute a quorum, but to constitute a quorum at any other meeting for any other purpose, there shall be present in person or by proxy the holders of shares entitling them to the exercise of a majority of the voting power, or if each vote is to be taken by classes, the holders of shares of each class entitling them to the exercise of a majority of the voting power of that class unless in either case the articles require a greater or lesser number".

These specific regulations show that the word "stockholders", as regards to a quorum at a meeting for the election of the directors, mean the individual holders of the stock.

Therefore this court could not find an ambiguity concerning the meaning of the word "stockholder". The rules and regulations of a corporation, when not in conflict with statuatory provisinos have all the force and effect of a contract between a corporation and the members, and between the members themselves. Courts cannot reform the contract between these stockholders by reading the words "in interest" into the regulations where the statute has given them the power to make their own contract.

William Dore

MASTER AND SERVANT—Key No. 316.—Term, "independant contractor" presuposses the existence of binding contrac between the parties.

The plaintiff in this action is the administratrix of the estate of R. Snodgrass, deceased, and brought this action against the defendant company and one L. Adams to recover damages for the wrongful death caused by the negligence of the defendant. Petition alleges that Adams was an employee of the Cleveland Coal Inc. At the time of the accident he was delivering coal from the yard of the defendant situated in the vicinity of east Eighty Ninth stree and Woodland Avenue. While so on his way a collision occured between the deceased and Adams the result of which caused the death of Snodgrass.

The question before the court was whether or not the evidence tended to show a relationship of master and servant be-

tween the parties so as to determine the liability of the coal Company to the plaintiff for the negligence of Adams who, the defence claimed was an independant contractor.

The company owned no truck but engaged men who owned their own trucks to deliver the coal at so much per ton. There was no written contract but merely a verbal understanding. The services of Adams was to be determined at the pleasure of either party and that neither party could base a cause of action against the other as for breach of contract. Because of these facts the court gave judgment for the plaintiff, holding that the term "in-contract between the parties for the breach of which a cause of dependant contractor" "presuposes the existence of a binding action arises". There can be no relationship of independant contractor without the existence of such binding contract, and it is quite clear that no such contract existed between the parties in the case at bar.

William Dore

LANG'S CREAMERY, INC. V. CITY OF NIAGARA ET AL., Court of Appeals of New York, 167 N. E. 464.

In this action the plaintiff is a domestic corporation which pasteurizes milk in the City of Buffolo, where it maintains a pasteurization plant. It desires to sell its product in the City of Niagara Falls, which city has an ordinance providing that "no milk or cream shall be sold or offered for sale as pasteurized milk or cream unless the same shall have been 'pasteurized' within the limits of Niagara Falls." The plaintiff has not applied for a license because it has been informed that the ordinance will be enforced against it, instead it brings this action to restrain the city from enforcing its ordinance on the grounds that it is invalid being an unreasonable exercise of the power of the city and that the only purposes and effects of the ordinance are to arbitrarily discriminate against out of town dealers.

The defendant appealed from the decree of the referee that the ordinance was an unreasonable exercise of the municipal power and the findings of such official that the plaintiff did maintain, as alleged, a proper sanitary pasteurization plant at the City of Buffola. The Appellate Division not only upheld the ordinance as a valid exercise of municipal power but also re-

versed the findings of the fact, and made new findings that the plaintiff had failed to establish that, if the bar of the pasteurization ordinance were removed it would have had the right to a permit to sell its milk in the City of Niagara Falls. In other words the court found that the evidence supports the defendant's assertion that the plaintiff violated the regulations of the state department of health in maintaining its plant, and it would not be entitled to a milk license in any event.

Although it litigated these questions on the trial, the plaintiff now maintains that these findings are irrelevant, and not proper subjects of inquiry until it makes its application for a permit to sell milk in the City of Niagara Falls.

This court in affirming the judgment of the Appellate Division said in part "the plaintiff is not in a position to question the validity of the ordinance in this action". It should apply to the local authorities for a license or permit to sell its milk products. If such application is unreasonably refused, it would then have a remedy through mandamus to right the wrong that it had suffered. In such proceedings the validity of the ordinance would be subject to attack. In this action the plaintiff is attempting to test the constitutionality of the ordinance before it has shown that its rights are being affected thereby. "It has no standing in court until it establishes that it is directly affected by the enforcement of the ordinance". The judgment was affirmed with costs.

J. H. Flannigan

O'HAGAN V. FRATERNAL AID UNION ET AL.—Supreme Court of South Carolina. 141 S. E. 893 (1928).

Mr. W. A. O'Hagan was a member in good standing of the Fraternal Aid Union and with such organization carried life insurance amounting to one thousand dollars. His father was named beneficiary, but because he had died before the insured and no new beneficiary substituted, the policy provided that his widow should be sole beneficiary.

Upon suit by the wife for the amount due her under the policy the question arose whether the administrator could hold any of the same due on the policy for the funeral expenses of the insured? The circuit court declared that the appellant (the wife)

was the sole beneficiary but, that the undertaker, who officiated, should be paid five hundred dollars as a reasonable sum for his services. From this holding the widow appeals.

The Supreme Court decided that "under the common law, while the husband was liable for the funeral expenses of his wife, the wife was not liable for the expenses of her husband". This must govern since in this state there are neither statutes or decisions upon the question.

The respondents contend that the law implies a contract on the part of the wife to pay for the expenses of her husband's funeral, when his estate is not sufficient for that purpose, as in this case, and they cite the case of E. R. Butterworth & Sons v. Teale.

"We have read that case carefully, hoping that it would justify us in sustaining the judgment below, but we find no comfort therefrom. In that case the verdict of the jury required the widow of the deceased husband to pay a reasonable amount for his funeral expenses, and it was approved on appeal because it appeared that the services were rendered with the knowledge and consent of the defendant." (the wife).

In the case at bar, there is absolutely no evidence in the record to show that the wife consented to the bill for funeral expenses, or that she even had knowledge thereof. Of course, if the wife contracted to pay the undertaker she would be liable therefor, and such a contract might be implied from her conduct; but there is nothing to show on the part of the appellant a contract, either express or implied.

"It regretfully appears", stated the court in reversing the decision, "that the undertakers who performed the last earthly service for Mr. O'Hagan will have to look to a greater Court than this for their reward unless the appellant, in search for her reward in that Court, changes her position."

J. H. Flannigan