ABSTRACTS OF RECENT AMERICAN DECISIONS.

Supreme Court of Ohio, December Term, 1855.

Stober's Adm'r vs. *McCarter.* Error to the District Court of Ashland county.

THURMAN, C. J., delivered the opinion of the Court. Held—

That in an action against an administrator for work and labor performed for the intestate, the widow of the intestate is a competent witness for the plaintiff, to prove the performance of such work and labor, where her testimony is not a disclosure of confidential communications between her and her husband, or of matter prejudicial to his character.

Judgment affirmed.

James S. and Wm. Wilson vs. *Wm. Hamilton.* Reserved in Columbiana county. RANNEY, J. Held—

1. That a ferryman, in the regular exercise of his employment, of transporting persons and property across a river, is a common carrier, within the meaning of the law applicable to that subject; and as such is liable for a failure to transport safely property committed to his care, from any other cause than the excepted perils.

2. An undertaker to transport animals of the brute creation, imposes the same obligation as pertains to other property.

3. The owner is bound to deal in good faith towards the carrier; and if the carrier of the property is attended with any peculiar circumstance of hazard, known to him, he is bound to disclose it, in order that the necessary precautions may be used; and a failure to do so, when the loss arises from that cause, will discharge the carrier.

4. If the owner, or his agent, takes upon himself the care of his property while in transit, he does not thereby become the agent of the carrier; and the latter is not responsible for losses arising from his negligence or want of care.

Judgment for plaintiffs.

Richard Johnson vs. *Richard W. Hays.* Petition in error to reverse the judgment of the District Court of Madison county.

BARTLEY, J.—On the 22d day of January, 1853, Hays, the defendant in error, entered into a written contract with one John Lewis, whereby Lewis bound himself to sell and deliver to Hays, on the 24th of same month, 258 hogs, with the privilege of increasing the number to 300,

Lewis agreeing to take them back into his possession and keep them till the 1st of October following, and then redeliver them to Hays; the lightest of the hogs not to weigh less than 140 lbs. gross. And Hays bound himself to pay Lewis $4.25 per cwt. for the hogs, as follows: $300 on delivery, $200, on the 15th of March thereafter, $200 more in spring or summer as Lewis needed it, and balance to be paid on the return of the hogs by Lewis to Hays in October. On the 24th of January 1853, Lewis delivered the hogs, being 288 in number, to Hays, and afterwards took them into his keeping under the provisions of the contract, and Hays, at the same time, paid Lewis $300, and subsequently, in different payments, $600 more. In July of that year, Lewis, without the consent of Hays and against his directions, sold and delivered the hogs to Johnson the defendant in error, for $850, with notice of the purchase by Hays. Held—

That, by giving this contract such a construction as to carry out the manifest intention of the parties, and give effect to each of its provisions, the property in the hogs passed to Hays by the sale and delivery on the 25th of January; and that Lewis, in taking the hogs back into his possession to keep till October, became a bailee of the property. This provision for the delivery and transfer of the property was not illegal or against public policy, but a proper precaution for the safety of the vendee, and not irreconcilable with a rational interpretation of the other provisions of the contract—the privilege of increasing the number of hogs to 300 extending only to the time of the delivery on the 24th of January; the stipulation, that the lightest of the hogs should weigh at least 140 lbs., being a mere guarantee as to the weight; and the provision, that the hogs were to be weighed in October, and Lewis to be entitled to $4.25 per cwt, being the mode of ascertaining the full amount to be paid by Hays, thus making it Lewis's interest to keep the hogs well, and to return the whole number.

Judgment of the District Court affirmed, and cause remanded to the Common Pleas for further proceedings.

Isaac J. Fullerton vs. *William Sturges.* Error. Reserved in the District Court of Perry County. RANNEY, J., delivered the opinion.

F. and others, sureties of C. signed an instrument payable to S. or order, in blank as to the date, amount, and time of payment, but with a private agreement that it should not be filled for more than $1,000 or $1,500; and delivered it to C. the principal, to procure the discount. While in the hands of C., seals were affixed to the signatures, by some one without the knowledge or consent of the sureties, and, subsequently, the instru-

ment was presented by C. to S. the payee, and filled up and discounted for the sum of $10,000. Held—

1. That one who entrusts his name in blank to another to procure a discount, is liable to the full extent to which such other may see fit to bind him, when the paper is taken in good faith, without notice, actual or constructive, that the authority given has been executed.

2. Such blank signature has the effect of a general letter of credit; and the rule is founded as well upon that principle of general jurisprudence, which casts the loss, when one of two innocent persons must suffer, upon him who has put it in the power of another to do the injury; as, also, upon the rule of the law of agency, which makes the principal liable for the acts of his agent, in violation of his private instructions, when he has held the agent out as possessing more enlarged authority.

3. The material alteration of a written instrument, made by a stranger, will not avoid it.

4. To have that effect, the alteration must be made by, or with the privity, of one claiming a benefit under the instrument; and (to give application to the doctrines upon that subject) after the instrument has been delivered and taken effect.

5. In such case, a remedy is denied, and the instrument is destroyed, as a punishment for the fraud of the party claiming a benefit under it.

6. In this case, C. was the authorized agent of F. to fill up the paper, and procure the discount, having no title to or interest in the paper; and although not authorized to affix seals to the signatures, and, therefore, incompetent to bind F. thereby, his attempt to do so cannot affect S. the payee.

7. Having fully executed and not exceeded his authority, by procuring the discount of the paper as a promissory note, his unauthorized act in affixing a seal, may be treated as a nullity, and the instrument enforced, in the manner and to the extent contemplated by the surety, as such promissory note.

Judgment affirmed.

Harris vs. *Gest.* Motion to dismiss appeal. Reserved by the District Court of Franklin county.

THURMAN, C. J., delivered the opinion of the Court. Held—

1. That the judges of the Court of Common Pleas are judges of their respective districts, and not of the mere subdivisions thereof. The subdivision of the districts is for election purposes merely.

2. There is nothing in the Constitution that forbids the holding of Common Pleas Courts in different counties of a subdivision at the same time.

3. Courts are not limited in their power of adjournment, to an adjournment from one day to the succeeding day. They have an inherent power to adjourn to a more distant day, when not restrained by the Constitution or statute law; and there is no such restraint upon the Common Pleas Courts in Ohio.

4. When this power is exercised, the sitting of the adjournment is a prolongation of the regular term, and, in contemplation of law, there is but one term.

5. But the "additional term" provided for by the fifth section of the act of January 31, 1854, 52 O. L., 10, is a distinct term, and not a prolongation of a regular term.

6. When the journal entries leave it doubtful whether it was intended to appoint an "additional term" under said section, or merely to adjourn the regular term to a distant day, the former construction ought to be preferred; since adjournments to a distant day are in general, highly impolitic, and ought not, except for very weighty and special reason, to take place.

7. An appeal bond, executed more than thirty days after the regular term at which judgment was rendered, but within thirty days after an "additional term" held under said statute, is not within the time required by law.

Appeal quashed.

Thomas H. Curd, vs. *Vannaken Wunder*. Petition in error, to reverse the judgment of the District Court of Hamilton county. BARTLEY, J. Held—

1. That where a mortgagor of personal property, by the express terms of the mortgage, retains the possession of the property until condition broken, such possession being coupled with a beneficial use, the special interest or property of the mortgagor is subject to execution or attachment by his other creditors.

2. The right to the immediate possession of the property in controversy being essential in order to maintain replevin, that action cannot be maintained by the morgagee of chattels before condition broken, when, by the terms of the morgagee, the morgagor is entitled to retain the possession and use, until the maturity of the debt.

3. In such case, if the security of the mortgagee is placed in jeopardy by proceedings on behalf of the other creditors of the mortgagor, the appropriate remedy of the mortgagee is by a proceeding in equity.

Judgment of the District Court reversed, and cause remanded.

Phineas Freeman, Surveyor, &c., vs. *Levi Rawson.* Motion for a new trial; reserved in Cuyahoga county.

RANNEY, J., delivered the opinion of the court. Held—

1. A mortgage of personal property, with possession, and a power of disposition reserved to the mortagor, is fraudulent and void as against his other creditors.

2. If the power of disposition appear upon the face of the mortgage, or is fairly to be inferred from its provisions, it is the duty of the courts so to declare it, without submitting the matter to the jury as a question of fact.

3. If it does not so appear, but is so understood or agreed by the parties at the time the mortgage is executed, it is equally void; and such understanding or agreement may be shown by parol evidence, and may be proved by the conduct of the parties in relation to the subject matter of the mortgage, and other circumstances, as in other cases.

4. In either case, when the fact is made to appear, the mortgage is fraudulent in law, irrespective of the intention of the parties.

5. Whatever may be the effect of the act of February 24, 1846, (Swan's Rev. Stat. 315,) requiring such mortgages to be deposited with the township clerk, in rebutting the presumption of fraud arising from leaving the property in the possession of the mortgagor, it has no effect to validate those in which power of disposition is retained.

Motion for a new trial overruled, and judgment on the verdict.

Elliott vs. *The C. C. & C. R. R. Co.* In error to the District Court of Lorain county.

THURMAN, C. J.—delivered the opinion of the court. Held—

1. That the common law doctrine that requires the owner of domestic animals, not unruly or dangerous, to keep them upon his own premises, and make him a trespasser if he suffer them to run at large and they go upon the unenclosed lands of another, is not the law of Ohio; being inconsistent with our statute law, and contrary to the common usage that has always prevailed in this State.

2. That remote negligence of the plaintiff will not prevent his recovering for an injury to his property *immediately* caused by the negligence of the defendant. The negligence of the plaintiff that defeats a recovery must be a *proximate* cause of the injury.

3. Suffering domestic animals to run at large, by means whereof they stray upon an unenclosed railway track, where they are killed by a train, is not, in general, a *proximate* cause of the loss; and, hence, although there may have been some negligence in the owner's permitting the animals to go at large, such negligence being only a *remote* cause of the loss, it will not prevent his recovering from the R. R. company, the value of the animals, if the *immediate* cause of their death was negligence of the company's servants in conducting the train.

4. The bare fact that a railway is unenclosed, there being no statute requiring it to be fenced, does not, in general, render the R. R. company liable to pay for animals straying upon the track and killed by a train—such want of fencing being, in general, only a *remote* cause of the loss.

5. The paramount duty of a conductor of a train is to watch over the safety of the persons and property in his charge, subject to which, it is his duty to use reasonable care to avoid unnecessary injury to animals straying upon the road.

Judgment affirmed.

Charles K. Ferris & Joseph Ferris, vs. *Ayres L. Bramble, et al.* Certiorari to the Common Pleas of Hamilton county. Reserved in the District Court of that county for decisions here. BARTLEY, J. Held—

1st. That it is essential to the validity of the proceedings of township Trustees ordering a view and the establishment of a township road, that the record should show, either that the notice of the application required by the statute was duly given, or that the trustees, before ordering the view, were satisfied that such notice had been given, the notice being a step which is essential and *precedent* to the exercise of the power.

2d. That in case of the assessment of damages for laying out a road over the lands of any person, the damages or compensation for the land necessary to be taken, must be paid or tendered in money, or secured to be paid to the *acceptance* of the owner, before the opening of the road can be ordered.

3d. That a township road in this State is a public highway, and subject to the use of all having occasion to travel it, and may be highly necessary to enable the person or persons most immediately and directly interested in it, to discharge properly, and without trespassing on their neighbors' premises, many of the public duties enjoined upon them as citizens of the State; in the establishment of such roads, therefore, by the exercise of the right of eminent domain, private property may be made subservient to the *public welfare,* on payment of a compensation therefor in money.

Judgment of the Common Pleas reversed, and the proceedings of the Trustees of Columbia Township set aside.

John W. Coleman vs. *Uriah D. Edwards and Franklin L. Jackson.* Writ of error to the District Court of Hamilton county. BARTLEY, J.

Held—1. That where a motion for a new trial on the ground of alleged *misdirection of the Court in its charge to the jury*, is continued to a term of the court subsequent to the trial term, and then overruled, the party making the motion has the right to his bill of exceptions to the order of the court overruling the motion, although no exceptions were taken to the charge of the court to the jury at the time of the trial, and signed and sealed at the trial term; this right of the party being secured by the positive provision of the statute giving the right of exception in all cases of motion for new trial on the ground of any supposed error of the court in its instructions to the jury.

The case of *Hicks* vs. *Person*, 19 Ohio Rep., 426, in this respect explained and qualified.

2. That in case of a contract for the delivery of specific articles within a specified time, where the party has made a tender, which, through inadvertence or mistake, turns out to be insufficient and ineffectual, he has the right to make a subsequent tender of articles such as are required by the contract, within the time specified, unless there be some provision in the terms of the contract preventing it.

3. That in case of a contract for the delivery of five hundred hogs to a person in the city of Cincinnati, within a specified time, the hogs well corn-fatted, and of the average weight of one hundred and ninety pounds net, to be delivered to the party and slaughtered within a reasonable time, weather permitting, the party receiving the hogs *having the sole benefit and control* of slaughtering them; where, after five hundred hogs, which had been delivered, and on being slaughtered and weighed, and ascertained to fall three pounds short of the average contract weight, had on this ground been rejected as not being in conformity to the contract, the provision of the contract, that the party received the hogs shall have *the sole benefit and control* of the slaughtering of them, imposes no burden or condition upon him, (the slaughtering being paid for by the offals, and the control of the slaughtering being a benefit) which deprives the other party from the right to make a subsequent tender of five hundred hogs in full compliance with the contract within the time specified.

Judgment of the District Court affirmed.

THURMAN, C. J. dissented on the first and third points, and Judge Swan dissented on the third point.

James Parks vs. *the State of Ohio.* Application for the allowance of a writ of error to reverse the judgment of the Court of Common Pleas of Cuyahoga county, on a verdict against James Parks, for the crime of murder in the first degree.

BARTLEY, J., Held—1. That the fact, that the record of the conviction of the prisoner of the crime of murder containing the names of the jurors of the grand jury by whom the indictment was found, does not state that the grand jurors had the requisite qualification of electors of the county, is no ground of error. However such disqualification in the grand jury might be taken advantage of by special plea, it is not essential that the record should show affirmatively the qualification of the jurors in this particular.

2. That on a motion for a new trial in a criminal case, on the ground that one of the petit jurors had, previous to the trial, expressed his opinion that the defendant was guilty, it is requisite that the defendant should show by affidavit that the fact of such disqualification of the jury was *unknown either to himself or to his counsel* at the time the jury was empaneled. And the refusal of a new trial for want of such showing is not error. The allowance of the writ refused.

Decisions at the adjourned Term, which commenced March 31st, 1856.

Columbus, Piqua and Indiana Railroad Company vs. *Martin Simpson.* BRINKERHOFF, J. Held:

1. In an appropriation of a right of way by a railroad company of the lands of an individual under the act of February, 11, 1848, and where the award of appraisers, acting under the 9th section of said act, found the aggregate amount of damages sustained by the owner of the lands, irrespective of benefits, to him accruing from the road, and also the amount of such benefits in a separate item of their report, it is error to adjudge to the owner the aggregate sum without deduction for benefits.

The 9th section of said act is not in contravention of the fourth section of the eighth article of the Constitution of 1802.

The requisite data appearing on the face of the record, this court, acting as a court of errors, will render the judgment which the court below ought to have rendered. BARTLEY, J., dissented.

J. W. Abernethy et al. vs. *Wayne County Branch Bank.* J. R. SWAN, J. Held:

A new trial will not be granted when the verdict is against the defendant, upon an issue setting up a forfeiture of the debt, although the court may be of opinion that the verdict should have been for the defendant.

Judgment affirmed.

Henry Hullman and others vs. *Frederick Honkomp and others.* In Chancery. Reserved in the District Court of Hamilton county. BARTLEY, J. Held:

1. The *legality of the election* of the complainants as Trustees of the German Catholic St. Peter's Cemetery Association of Cincinnati, at the election held by the Association in February 1850, and *the right* of the defendants to exercise the powers, and conduct the affairs of the Association, cannot be judicially tested by bill in Chancery, but fall appropriately within the jurisdiction of proceedings at law by *quo warranto.*

2. A special and express trust created by the appropriation of a lot of ground for the exclusive purpose of the burial of the dead of the German Catholics of Cincinnati, and its vicinity, and the appropriation of the surplus means of the Association solely to pious and charitable uses, are objects which will be upheld, and the execution of the trust strictly enforced in a court of equity, upon the application of any member of the association where there has been an abuse or perversion of such trust.

3. Such corporation not being, either by its charter or its articles of association, placed under the special authority, control or direction of the German Catholic church of Cincinnati, the special stipulations of the Bishop of the Catholic Diocese, with some of the members of the association,—that in consideration of his blessing the cemetery and consecrating the burial grounds, the rules and usages of the church should be strictly observed, and the directions of the Bishop or the Priests of the Church be followed as to what German Catholics should be entitled to burial in the cemetery, do not legally constitute conditions in the terms of the trust, so as to restrict, or in any manner control the legal powers of the association.

For want of sufficient proof of a violation or abuse of the trust as created by the articles of the association, the bill is dismissed.

The State of Ohio, ex rel. Attorney General vs. *The Seneca County Bank.* BRINKERHOFF, J. Held:

That where an independent banking company, organized under the act of February 26, 1845, refuses to make and transmit to the Auditor of the

State a statement of its condition, as required by the fifty-ninth section of said act, it thereby incurs the penalty of forfeiture of corporate franchises.

2. So, where it transfers its assets for the purpose of liquidation, *abandons* its corporate franchises, and wholly ceases to do business as a bank.

3. So, likewise, when it permits its directors to become largely liable to it as principals and sureties, without the stockholders having first adopted by-laws limiting and regulating such liabilities, according to the provisions of the forty-fourth section of said act.

Cyrus Brown vs. *Adam Wolf, survivor, &c.* J. R. SWAN, J. Held:

In an action upon a guaranty endorsed on a note, thus: "We guaranty the collection of the within to *Cyrus Brown*," evidence may be received that the defendant was injured by delay of notice that the note guarantied could not be collected. Judgment below reversed, and cause remanded.

Ferdinand Van Dorveer vs. *John Sutphin.* Writ of error to the District Court of Montgomery county. BARTLEY, J. Held:

1st. That under the plea of the general issue, in an action for a libel, it is competent for the defendant, with a view of mitigating damages, to give evidence of a general or common report in circulation prior to the publication complained of, that the plaintiff was guilty of the charge imputed to him, but such evidence is only competent to rebut the presumption of malice, and not to effect, or by way of attacking the character of the plaintiff.

2d. That also, under the plea of the general issue, in such action, evidence of particular facts or circumstances, calculated to have induced mistake, or to have misled the party in the publication of the slander, is competent in mitigation of damages by way of rebutting the presumption of malice, and that too, whether the evidence tended to prove the truth of the charge or not.

3d. A notice that the defendant will prove the truth of the libelous charge in justification, must contain all the substantial averments of a special plea; and where the libel declared on contains multiplicity of matter, general averments of the truth of the publication, in order to avoid prolixity of pleading, are not admissible; but the particular acts done, which the defendant relies on as constituting the charge, must be set out, so that the court may determine whether the facts warranted the charge.

4th. A plea or notice of justification must aver the truth of the material and substantial charges, or of each substantial and libelous charge, in language as broad as the charge in its full and legal sense; and although,

where there are separate and distinct charges in the same libel, it is allowable in the same plea or notice, to plead the general issue as to a part, and justify as to the other charges, yet it is essential that a plea or notice should substantially answer the whole count or ground of action declared on.

Judgment of the common pleas reversed.

The City of Cincinnati vs. *Platt Evans.* Error to the Superior Court. RANNEY, C. J., delivered the opinion of the Court. Held:

1. Municipal corporations are subject to the operation of the statute of limitations, in the same manner, and to the same extent, as natural persons.

2. Notorious and uninterrupted possession by a private individual under a claim of right, of land dedicated to a city for streets or public squares, for more than twenty years, will bar the claim of the city to its use. The case of *Cincinnati* vs. *The Presbyterian Church,* 8 Ohio R. 298, approved and affirmed.

3. In an action of trespass for an injury to a building, occupied by the plaintiff as a store, resulting in an interruption of his business, he may recover, in addition to the damages done to the building, such further sum as will compensate him for the loss of its enjoyment while such interruption continued.

4. For this purpose, it is competent to prove the nature and extent of the business, the necessity of using the building for its prosecution, and the value of such use to him during the period of interruption.

5. But, in the absence of fraud or malice, or other circumstances justifying the recovery of exemplary damages, the amount of profits which might have been realized by employing his personal services and capital, in the prosecution of his business in the injured building during such interruption, cannot be recovered.

6. In such case, the loss of profits does not furnish a proper rule for estimating the damages; but the loss of the use of the property, and the value of such use to the injured property, is all that can be recovered.

Judgment reversed as to the damages for loss of profits, separately assessed, and affirmed as to the balance.

BARTLEY, J., dissented, being in favor of reversing the entire judgment.

William B. Lloyd vs. *Samuel Quinby.* BRINKERHOFF, J. Held:

L. executes to Q. a mortgage containing full covenants of warranty to secure the payment of $625, payable in installments. Part of the install-

ments being due and unpaid, and pending proceedings, foreclosure and sale by agreement of parties, a decree of simple foreclosure is entered, and the notes evidencing the debt surrendered. Subsequently, Q. is evicted, under a prior mortgage, hitherto unknown to either party, executed by L's grantor.

1. The mortgage to Q. is not merged or in any way affected, as a conveyance, by the decree of foreclosure; its covenants of warranty remain in full force and vitality; and an action against L. may be maintained on them.

2. Q. was not bound to discharge the prior mortgage, but might well rely on the covenants of warranty.

3. The rule of damages, where the eviction goes to the entire estate, is the amount of the debt, with interest, discharged by the foreclosure.

The Atlantic and Ohio Railroad Co. vs. *Michael L. Sullivant and others.* Petition in error to reverse the judgment of the Probate Court of Franklin county, in a proceeding for the appropriation of lands for the uses of the railroad company, and estimating the compensation to be paid to the owner. BARTLEY, J. Held:

1. That the *right* of persons associated as a company for the purpose of constructing a railroad, by virtue of the statute providing for the creation and regulation of incorporated companies in the State of Ohio, enacted May 1, 1852, *to appropriate private property* by the exercise of the right of eminent domain, for the purposes of their road, *depends on the sufficiency and legal validity* of the certificate and public record of the organization, from which they derive their corporate powers.

2. It is essential to the validity of such certificate of organization, that certain and definite points be named or described therein as the termini of such road, and also each county in the State through which such road is to be located and constructed. And where such certificate has left the company the discretion to select through which of several counties named, the road may be constructed; and also provided simply that the termini of such road shall be a point not designated on the Ohio and Pennsylvania State line, in the county of Trumbull, and a point not designated on the Ohio river in either the county of Brown or the county of Adams, in the State of Ohio, it is void for want of conformity to the statute.

3. In such proceeding for appropriating land, and estimating the compensation to be paid the owner, it is incumbent on the company, in order to show its right to make the appropriation, to give evidence of a certificate

and public record of its organization, in strict compliance with the requirements of the law.

4. Under the provisions of the code of civil procedure relating to error in civil cases, a petition in error may be entertained in the Supreme Court to revise the action of the Probate Court in the special proceeding for appropriating lands and estimating the compensation to be paid the owner by a railroad corporation.

The judgment of the Probate Court affirmed.

Jacob Baker vs. *Simeon Haynes.* Bill of Review received from the District Court of Muskingum county. J. R. SWAN, J. Held:

Lands not in the possession of the judgment debtor, and in which he has an equitable estate created by a contract of purchase, cannot be levied on and sold to satisfy a judgment against him; and the purchaser under the judgment does not become the assignee of the contracts of purchase.

Bill of Review dismissed.

J. Burgoyne, Administrator of J. C. Ludlow et al vs. *The Ohio Life Insurance and Trust Company.* Error reserved in Hamilton county. RANNEY, C. J., delivered the opinion of the court. Held:

1. By the principle of the common law, the death of one of the joint makers of an obligation, extinguished all remedy at law against his estate.

2. No action at law could be maintained against his personal representative, either jointly with the survivor or by a separate suit.

3. In such case, relief was afforded in Chancery, but only upon condition that the remedy against the survivor had proved fruitless.

4. This principle of the common law was abrogated by the 90th section of our administration law, (Swan's Rev. Stat. 378,) and the estate made liable in the same manner "as if the contract had been joint and several."

5. The 38th section of the code of civil procedure, allows all persons severally liable upon the same instrument, to be included in the same action, at the option of the plaintiff.

6. This section permits the joinder of the survivor, and the personal representative of the deceased obligor, in the same action; whether the contract is in terms joint and several, or made so by the 90th section of the administration law; and authorizes a several judgment to be rendered against each. Judgment affirmed.

The Steubenville and Indiana Railroad Company vs. *The Trustees of Jackson township, Muskingum county, Ohio.* BRINKERHOFF, J. Held:

1. Where the trustees of a township subscribe to the capital stock of a railroad company under an act which authorizes such subscriptions by the "Trustees of the several townships through which said road *may be located,*" and the preliminary vote of the tax-payers is taken, and the subcription made *before* the road is located through the township, such subscription is unauthorized and cannot be enforced.

2. Where the act provides that the trustees, before the issue of any bonds under said subscription, shall file with the Auditor of the county in which said election shall have been holden, a certificate of their proceedings—that the same shall be recorded—and that such record, or a certified copy thereof, "shall be conclusive evidence of the legality and validity of the subscriptions" made by the trustees, and such certificate and record have been made accordingly; the trustees are not, prior to the issue of bonds under their subscription, precluded from availing themselves of the prior non-location of the road through the township as a defence to an action to enforce such subscription.

Bartley, J., dissented.

Card vs. *Patterson.* Reserved from Lucas county.

J. R. SWAN, J.—A purchaser, with notice of outstanding equities, taking the legal title from the bona fide purchaser, who had no notice of such outstanding equities, holds the land discharged from the equities.

The certificate of acknowledgment to a deed need not follow the precise language of the statute upon that subject; it is sufficient if the certificate contains substantially the requirements of the law.

Under the act of 1831, providing for the acknowledgment, &c., of deeds, it is not necessary that the certificate of acknowledgment of husband and wife should specifically state that the deed was read, or the contents otherwise made known to her, but the court will presume the officer taking the acknowledgment did his duty.

A deed by a feme covert infant, duly executed and acknowledged, is not void, but voidable only.

Bill dismissed.