Recent Decisions

AGENCY—CONTRACTS—EXCLUSIVE RIGHT TO SELL REAL ESTATE

Plaintiff, a real estate broker, was engaged by the executor of an estate to sell a tract of land consisting of several parcels. All inquiries were to be directed to the plaintiff and all sales made through him but if no sales were made he was to receive no compensation for his services. No time limit was set as to the duration of the relationship. After six parcels were sold the plaintiff received two bids for the last remaining parcel, both of which were rejected by the defendant. Thereupon the defendant sold the parcel himself. Plaintiff brought this action to recover the commission on the last parcel sold. In the trial court the issues of fact and law were submitted without a jury and the court found for the plaintiff on both law and fact. *Held,* affirmed, a reasonable time had not passed to terminate the agency and since the plaintiff had an exclusive right of sale, he should recover. *Richter v. First National Bank,* 51 Ohio L. Abs. 113, 80 N.E. 2d 243 (App. 1947).

The court viewed the facts as creating a binding promise on the part of the defendant to pay a commission if the parcel were sold within a reasonable time. The court did not expressly state whether a bilateral obligation existed, that is, whether there was a duty on the part of the broker to continue once he started rendering services, or whether there was an offer for a unilateral contract that had become irrevocable by the rendition of services.

Courts have long drawn a distinction between "exclusive agency" and "exclusive right to sell." In the "exclusive agency" situation the owner can himself compete with the agent without liability but he cannot hire others to do so. *Dole v. Sherwood,* 41 Minn. 535, 43 N.W. 569 (1889); *Turner v. Baker,* 225 Pa. 359, 74 Atl. 172 (1909). If it is an "exclusive right to sell" no competition by the vendor is permitted. *Lapham v. Flint,* 86 Minn. 376, 90 N.W. 780 (1902); *Stringfellow v. Powers,* 4 Tex. Civ. App. 199, 23 S.W. 313 (1893).

Most jurisdictions view a relationship such as this, where there is no express promise to use reasonable efforts, as merely an offer for a unilateral contract, the offer being accepted by the expenditure of money and effort to find a purchaser. *Braniff v. Baier,* 101 Kan. 117, 165 Pac. 816 (1917); *Mercantile Trust Co. v. Lamar,* 148 Mo. App. 353, 128 S.W. 20 (1910). Ohio law however is unsettled on this point. Dictum in one supreme court decision, where there was no express promise to use reasonable efforts, seems to indicate that there is an offer for a unilateral contract being accepted only by

producing a purchaser. *Brenner v. Spiegel,* 116 Ohio St. 631, 157 N.E. 491 (1926). This dictum was approved by one lower court decision. *Schoenl v. Warner White Co.,* 32 Ohio App. 59, 167 N.E. 598 (1928). There is however some disagreement at this appellate level. *Stroffregen v. Roney,* 15 Ohio L. Abs. 118 (App. 1933). The significance of such a view is that no efforts or expenses such as advertising, travel, etc., can constitute an acceptance of the offer. This view would seem to be opposed to the weight of authority and has drawn criticism. 6 OHIO JUR. 182 (1929).

In the principal case the court did not rely on the orthodox rules to decide when an offer such as this is accepted so as to be binding, but rather decided that the promise was binding upon the basis of promissory estoppel. While there is a paucity of cases on the subject in Ohio, one court of appeals case has expressly adopted Section 90 of the Restatement of Contracts. *Saunders v. Galbraith,* 40 Ohio App. 155, 178 N.E. 34 (1931). There a gratuitous promise by a widow to sell her own property to pay her deceased husband's debts if creditors would not file a claim against the estate was made binding after the creditors relied on her promise and allowed the time of filing to pass. The case has been approved by law journal writers, noting however that actual consideration may have been present. 80 U. OF PA. L. REV. 594 (1931); 9 N.Y.U.L.Q. REV. 493 (1931). Even before the Restatement, Ohio applied a similar doctrine to charitable subscription cases. *Ohio Wesleyan Female College v. Higgens,* 16 Ohio St. 20 (1864); *Commissioners Canal Fund v. Perry,* 5 Ohio 56 (1831). In view of the lack of authority however a dogmatic assertion that Ohio has, and will apply, the doctrine in the future cannot be made.

This case is significant in that it shows the tendency of the Ohio courts to recognize the inherent justice in the application of Section 90 of the Restatement. It leaves undecided the question of when such an offer is accepted and becomes binding on orthodox contract rules.

Earl E. Stephenson

CONSTITUTIONAL LAW—COMMERCE CLAUSE—MICHIGAN CIVIL RIGHTS ACT HELD CONSTITUTIONAL

Defendant, a Michigan corporation, owns a small island on the Canadian side of the Detroit River and operates it as an amusement park, providing exclusive transportation to the island from Detroit. Pursuant to the Michigan Civil Rights Act, MICH. COMP. LAWS §§ 17115-146—17115-148 (Mason Cum. Supp. 1940), defendant was convicted of discrimination in refusing passage and admission to a negro girl. These statutes provide, *inter alia,* criminal and civil sanctions for the denial of equal accommodations and uniform

prices for all citizens on public conveyances. Defendant attacked the constitutionality of this application of the Act to foreign commerce. *Held,* the Michigan Civil Rights Act was properly applied. It is local in effect, does not impose an undue burden on foreign commerce, and is not inconsistent with federal and Canadian policy. Conviction affirmed. *Bob-Lo Excursion Co. v. Michigan,* 68 Sup. Ct. 358 (1948).

The majority opinion avoided the line of cases which holds that federal power over interstate commerce is exclusive, and therefore, no state regulation is possible except by Congressional consent. *Gibbons v. Ogden,* 9 Wheat. 1 (U. S. 1824); *Helson v. Kentucky,* 279 U. S. 249 (1929). Instead, the Court declared that some state action must be valid, since various regulations have been enforced during the past century. *The License Cases,* 5 How. 504 (U. S. 1847); *Cooley v. Board of Governors,* 12 How. 299 (U. S. 1851); *Sherlock v. Alling,* 93 U. S. 99 (1876); *Olsen v. Smith,* 195 U. S. 332 (1904); *Kelly v. Washington,* 302 U. S. 14 (1937).

The principal formula used to sustain the state action in the instant case was the local diversity rule, first advanced in the *Cooley* case, *supra.* In addition to this, the Court discussed the problem in terms of the nature and extent of the burden imposed on interstate and foreign commerce, and the relative weight of the state and national interests involved. *Southern Pacific R. R. v. Arizona,* 325 U. S. 761 (1945).

This distinction of theories is probably unnecessary if the decision in the *Southern Pacific* case, *supra,* is accepted. Weighing the interests and determining the extent of the burden in fact decides whether the particular regulation is sufficiently local to be sustained or must fall because it disturbs the uniformity of commerce.

State regulations dealing with the race discrimination problem in interstate commerce have been held unconstitutional as an undue burden on commerce. *Hall v. De Cuir,* 95 U. S. 485 (1877); *Morgan v. Virginia,* 328 U. S. 373 (1946). In the *Hall* case, the state regulation in question prohibited discrimination, while in the *Morgan* case, the regulation directed discrimination.

In the principal case, the Court distinguished the *Hall* case and the *Morgan* case on the grounds that the state regulations involved in those cases more directly affected the uniform flow of commerce than did the highly localized application of the act in question.

Relying on the *Hall* case, defendant contended that states should be precluded from applying civil rights regulations to interstate and foreign commerce, for if allowed to act, adjoining states and countries could enforce antithetical statutes, and thus effect an undue burden on carriers operating between them. The Court

dismissed the contention, declaring the possibility of future race discrimination legislation to be too remote to be a present burden on interstate or foreign commerce.

While the *Hall* case was not directly overruled, its soundness has been severely questioned. The trend in the past decade has been toward the protection of civil rights. See 41 STAT. 479 (1920), 49 U.S.C. § 3 (1) (1940); Ontario Session Laws c. 51 (1944). The equal protection clause of the Fourteenth Amendment will strike down discriminatory practices. *Morgan v. Virginia, supra.* Thus, state anti-discrimination regulations can be uniformly applied with no resulting burden on commerce.

In light of the fact that the "heavy wheels of Congress" move so slowly, it seems that national interest in civil rights can best be served if states are allowed to regulate in this area.

Bryce W. Kendall

CORPORATIONS—LEGAL ENTITY—CONSTRUCTION OF COMMODITY CLAUSE, INTERSTATE COMMERCE ACT

Suit by the United States against the Bethlehem Steel Corporation and its wholly owned subsidiaries, railroad and steel producing companies, to enjoin their violation of the Commodities Clause of the Interstate Commerce Act, which makes it unlawful for any railroad to transport in interstate commerce any article produced by it or under its authority, or in which it may have any interest, direct or indirect. 34 STAT. 584 (1906), 49 U. S. C. § 1 (8) (1940). The railroad company transported the products of the steel company as well as the products of some twenty-seven other independent shippers. *Held,* affirming dismissal of the suit by the United States District Court, that neither ownership by the holding company of all the shares of stock in both the railroad company and the steel company, nor power of control incident thereto, was sufficient, standing alone, to show violation of the Commodities Clause of the Interstate Commerce Act. *United States v. South Buffalo Ry. Co., Bethlehem Co., and Bethlehem Steel Corp.,* 68 Sup. Ct. 868 (1948).

The Supreme Court based its decision on two grounds: (1) The construction previously given the Commodities Clause was controlling; (2) Reversal is not to be readily made of a previous statutory construction when Congress has failed to amend the statute after extensive committee consideration.

The Commodities Clause, as first construed by the Supreme Court had most of its teeth drawn when it was held that it did not prohibit a railroad company from carrying commodities manufactured, mined, produced or owned, etc., by a bona fide corporation in which the railroad company was a stockholder. *United*

States v. Delaware & H. R. R., 213 U. S. 366 (1909); *United States v. Lehigh Valley R. R.*, 220 U. S. 257 (1911). This construction was reiterated and accepted in later cases, although the companies were found guilty of violating the act because the power of control existent in the relationship of a holding company, was exercised to the extent that the subsidiaries were nothing more than departments or agents of the parent organization. *United States v. Delaware, L. & W. R. R.*, 238 U. S. 516 (1915); *United States v. Reading R. R.*, 253 U. S. 26 (1920); *United States v. Lehigh Valley R. R.*, 254 U. S. 255 (1920). The result was consistent with the principle set forth in *United States v. Delaware & H. R. R., supra,* that, "When such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held, in a manner normal and usual with stockholders, but for the purpose of making it a mere agent or instrumentality or department of another company, the courts will look through the forms to the reality of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require." *Accord, Lukenback S. S. Co. v. Grace & Co.*, 267 Fed. 676 (C.C.A. 4th 1920); *Coston v. Manila Electric Co.*, 24 F. 2d 383 (C.C.A. 2d 1928).

The Government subsequently attempted to obtain a modification of the accepted construction of the Commodities Clause by insisting that although a railroad company may own shares of a producing company and not come under the prohibition, that if a holding company acquires all shares of both carrier and producer, then such transportation becomes illegal, on the theory that the subsidiaries are necessarily no more than the alter ego of the holding company. The Court held that it is not the power, but the abuse of the power that is forbidden by the clause. *United States v. Elgin, J. & E. R. R.*, 298 U. S. 492 (1936).

Courts have disregarded the corporate entity where there was little or no evidence of control when necessary to enforce the policy of the law. *Linn & Lane Timber Co. v. United States*, 236 U. S. 574 (1915); *United States v. Walter*, 263 U. S. 15 (1923); *Brundred v. Rice*, 49 Ohio St. 640, 32 N. E. 169 (1892).

Generally courts have been reluctant to disregard the corporate entity in private litigation in torts. *Friedman v. Vandalia R. R.*, 254 Fed. 292 (C. C. A. 8th. 1918); *Berkey v. Third Ave. Ry.*, 244 N. Y. 84, 155 N. E. 58 (1926); *Bergenthal v. State Garage & Trucking Co.*, 179 Wis. 42, 190 N. W. 901 (1922). This is also true in contracts. *Majestic Co. v. Orpheum Circuit, Inc.*, 21 F. 2d 720 (C. C. A. 8th. 1927); *Marsh v. Southern New England R. R.*, 230 Mass. 483, 120 N. E. 120 (1918).

The Court, in deciding the principal case, found less evidence of

actual abuse of the power of control than was present in the *Elgin* case, *supra*. The Government probably relied heavily on a reconstituted Court to reverse what was considered an erroneous decision in the *Elgin* case, *supra*. Mr. Justice Jackson, in the majority opinion, after intimating that the decision might not have been the same had the question been before them in the first instance, pointed out that Congress had considered the alleged mistake and had failed to amend the act. A reversal is not readily to be made of a previous statutory construction, not of constitutional import, in the face of thorough Congressional consideration and failure to amend. *Sessions v. Romadka*, 145 U. S. 29 (1892); *Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U. S. 320 (1934); *Missouri v. Ross*, 299 U. S. 72 (1936); *Electric Storage Battery Co. v. Shimadger*, 307 U.S. 5 (1939).

Mr. Justice Rutledge in the dissenting opinion found from a review of the same legislative history a clear disagreement by the Congressional committee with the Court's construction of the clause, and contended that approval of such construction could not be inferred from the failure of Congress to amend.

Whether there is any need for a more drastic application of the clause is a question which, in light of the principal case, requires Congressional determination.

George E. Taylor

DOMESTIC RELATIONS—SUPPORT PENDENTE LITE IN A CIVIL ACTION FOR MONEY ONLY

In Virginia in 1942 plaintiff obtained a divorce *a vinculo* from defendant and was awarded custody of their minor child. The decree was silent as to support and maintenance. Plaintiff and child are now residents of Pennsylvania and defendant is a resident of Ohio. Plaintiff, the mother, having supported the child since 1935, brought a civil action in the Common Pleas Court of Summit County, Ohio, for the reasonable value of the support and maintenance already furnished by her for the child. The plaintiff also filed a motion for an order requiring defendant to pay the plaintiff a sum of money for the temporary support and maintenance of the child during the pendency of the action. The common pleas court overruled the motion on the ground that there is no statutory authority upon which to base such an order. Reversed by the court of appeals. *Held*, (4-3) affirming the appellate court, that in a civil suit against the father for the reasonable value of support and maintenance furnished to his minor child the trial court has jurisdiction to entertain a motion for support and maintenance of the child *pendente lite*. *McDaniel v. Rucker*, 150 Ohio St. 261, 80 N.E. 2d 849 (1948).

Under the rule prevailing at American common law the father is civilly liable for the support of his minor child. 4 VERNIER, AMERICAN FAMILY LAWS 56 (1936). In all but one of the 51 American jurisdictions statutes exist affecting the parents' civil liability for support of the child. *Id.* at 57. In Ohio the primary obligation for support rests upon the father. OHIO GEN. CODE § 7997 (1938); *Kintner v. Kintner,* 78 Ohio App. 324, 65 N.E. 2d 156 (1946). In Ohio the obligation of the father to provide for the support of his minor child is not impaired by a decree which divorces the wife *a vinculo* on account of the husband's misconduct. *Pretzinger v. Pretzinger,* 45 Ohio St. 452, 15 N.E. 471 (1887); *Industrial Commission v. Drake,* 103 Ohio St. 628, 134 N.E. 465 (1921). This follows the weight of authority. See Notes, 15 A. L. R. 569 (1921); 81 A. L. R. 888 (1932). An exception is made in Ohio when the divorce was based on the aggressions of the wife in that she cannot recover from the former husband for necessaries furnished to their child in her custody in the absence of proof of a promise in fact by the former husband. *Fulton v. Fulton,* 52 Ohio St. 229, 39 N.E. 729 (1895). The father's liability for past support of his minor child is based on an implied-in-law promise to pay. *Pretzinger v. Pretzinger, supra; Laumeier v. Laumeier,* 237 N. Y. 357, 143 N.E. 219 (1924); *Porter v. Powell,* 79 Iowa 151, 44 N. W. 295 (1890).

In the principal case the supreme court reasoned that the claim for past support and the motion for support *pendente lite* are both based upon the same implied contract, that since the trial court has jurisdiction of the claim for past support it therefore has jurisdiction to entertain the motion for support *pendente lite. Quaere,* are both claims based upon the same implied contract? When the parent neglects his duty to support his child, any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent. It is for the benefit thus conferred that the law raises an implied promise to pay on the part of the parent. *Porter v. Powell, supra.* No holdings have been found which extend the parent's liability to third persons on this implied-in-law contract to cover benefits not already conferred. It would appear that since support *pendente lite* is not a claim for benefits already conferred, it is not based upon a contract implied in law.

It is to be noted that a number of American jurisdictions have placed a broad, statutory duty on the parents to support their minor children without making any provision for enforcement of the obligation. While there is considerable variation in the extent to which this duty is enforced, the trend has been consistently in the direction of greater protection of the rights of the minor child. A few recent decisions have permitted an action for support to be brought by the minor child, appearing through next friend. *Green v. Green,*

210 N.C. 147, 185 S.E. 651 (1936); *Pickelsimer v. Critcher,* 210 N.C. 779, 188 S.E. 313 (1936); *Simonds v. Simonds,* 154 F. 2d 326 (1946). One court, finding the minor child to be responsible and living apart from either parent, ordered the support payments to be made directly to the child. *Simonds v. Simonds, supra.*

Assuming support *pendente lite* not to be based upon a contract implied in law, it would appear that the same socially desirable result could be logically reached by the exercise of equity jurisdiction on the ground that the law remedy is inadequate.

Howard Crown

DOMESTIC RELATIONS—INFANCY—EFFECT OF FAILURE TO DISAFFIRM CONTRACTS AT MATURITY

Defendant, nineteen years of age, jointly with his father and mother executed a cognovit note payable to plaintiff's uncle. Consideration for the note was money previously loaned to the father. Six years later, the plaintiff obtained a confession of judgment on the note. Judgment became dormant and plaintiff had the judgment revived. Thereafter, father and son filed petitions to vacate the judgment. Judgment was entered against the father and in favor of the son and plaintiff appealed. *Held,* judgment affirmed. *Cassella v. Tiberio,* 150 Ohio St. 27, 80 N.E. 2d 426 (1948).

The court held that the cognovit note was executory as to the promisors, and where an infant signs the note purely as an accomodation, without receiving any benefit from the transaction, he need not disaffirm the contract within a reasonable time after attaining majority to escape liability. The court would not apply this rule to an executory contract under which an infant had received and retained something of value. In such an instance, the infant would be bound if he did nothing by way of disaffirmance within a reasonable time after attaining majority. This latter rule would also apply where the contract had been fully executed.

The liability of an infant in such a situation had not been directly decided in any previous decision. It had been stated that an infant's contract was voidable at the election of the infant and could be disaffirmed by him upon reaching his majority or within a reasonable time thereafter. *Mestetzko v. Elf Motor Co.,* 119 Ohio St. 575, 163 N.E. 93 (1929). In the *Elf* case, *supra,* an infant, representing himself to be of full age, purchased an automobile. After reaching majority, he sought to disaffirm the contract and recover the money paid. Judgment was rendered for the plaintiff, but the defendant was permitted to counterclaim for and recover damages for the use and abuse of the car while in the possession of the infant. *Myers v. Hurley Motor Co.,* 273 U.S. 18 (1927). But where

an infant had given a note for the balance of the purchase price of an automobile it was held that he could disaffirm within a reasonable time after reaching majority. *Hoffman v. Edson,* 37 Ohio App. 262, 173 N.E. 307 (1929). Neither court made any distinction between an infant's executory or executed contract. In both cases, the contract had been executed by the promisee, but the infant's promise to pay was executory. Using the classification in the principal case, these would be contracts, executory as to the infant, but under which he had received something of value. A recent court of appeals case held that the defendant was not entitled to disaffirm a note where for ten years after he attained his majority, he remained mute as to disaffirmance. *McKenzie v. Tellis,* 37 Ohio L. Abs. 351, 47 N.E. 2d 253 (App. 1942).

Several of the cases cited in the principal case support the broad proposition that an infant is not bound by an executory contract unless he affirms or ratifies it after he reaches his majority. *Nichols & Shepard Co. v. Snyder,* 78 Minn. 502, 81 N.W. 516 (1900); *Fetrow v. Wiseman,* 40 Ind. 148 (1872); *Tyler v. Estate of Gallop,* 68 Mich. 185, 35 N.W. 902 (1888).

Other cases cited distinguish contracts under which the infant receives some benefit from those under which he has received no benefit. In the latter case, he is not liable on the contract unless he ratifies it after he reaches majority. *Pierce Co. v. Wallace,* 251 Mass. 383, 146 N.E. 658 (1925) (minor became a surety upon a recognizance in a poor debtor proceeding); *Walker v. Stokes Bros. & Co.,* 262 S.W. 158 (Tex. Civ. App. 1924) (minor had signed a note as accomodation surety for his adult brother). Where defendant had inherited bank stock as a minor and a receiver sought to recover the double liability imposed upon stockholders by the constitution, the defendant was not held liable notwithstanding the fact that he had retained the stock for more than five years after majority and had not disaffirmed. The court held that the bank stock was without value and known to be worthless. The defendant had not received any benefit and not having ratified the contract after his arrival at majority, he was not bound by it. *Brownell v. Adams,* 121 Neb. 304, 236 N.W. 750 (1931). The contracts in the *Walker* case, *supra,* and the *Wallace* case, *supra,* were executory, but in the *Brownell* case, *supra,* the infant's contractual relationship had been fully executed. The syllabus by the court in the principal case would not support the holding in the latter case.

In permitting the infant to disaffirm, the court cited *Lanning v. Brown,* 84 Ohio St. 385, 95 N.E. 921 (1911) which held that where a grantor has not ratified a conveyance of land made during infancy, he may disaffirm at any time before an action of ejectment is barred by the Statute of Limitations. A conveyance of real estate is an

executed contract. *Robinson v. Fife,* 3 Ohio St. 551 (1854); *McGinnis v. Less,* 147 Ark. 211, 227 S.W. 398 (1921). Applying the rules set forth in the principal case, such a contract would have to be avoided by the infant within a reasonable time after reaching majority or he would be bound by it. This would overrule a case which the court used to support its finding.

The court was not content to rest its judgment on the fact that the contract was executory, but looked to the position of the parties with reference to the subject matter of the contract. To base the classification of the contracts upon the effect which mere nonaction by the minor has upon the respective rights or interests of the parties, rather than upon the arbitrary test of whether the contract be regarded as executed or executory, seems to be in better accord with reason and sound principle. *Walker v. Stokes Bros. & Co., supra.*

The common law was apprehensive for the welfare of minors and clothed them with extensive privileges in their contractual relationships. Under modern commercial conditions, some courts have felt that the business community now requires protection against the unrestrained exercise by minors of their legal privilege. See *Sternlieb v. Normandie National Security Corporation,* 263 N.Y. 245, 188 N.E. 726 (1934).

Several states have enacted statutes dealing with infants' contracts. Iowa Code Section 599.2 (1946) provides that "a minor is bound not only by contracts for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority . . . ." For an excellent report on the statutes of the several states, see Report of the Law Revision Commission of the State of New York (1938).

Even though the defendant in the principal case was permitted to avoid liability after he had remained passive for more than nine years after reaching majority, the general tenor of the opinion is to the effect that an infant will not be able to exercise his privilege of avoidance, if he accepts any rights under the contract, for more than a reasonable time after reaching majority. In subsequent decisions the oft-quoted maxim that "infancy is a shield and not a sword" may become more than an idle reproach.

Ralph N. Mahaffey

MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—RECALL PROVISIONS OF HOME RULE CHARTER

In a mandamus proceeding the relator sought to compel the Hamilton city clerk to deliver to relator recall petition forms necessary to initiate a recall election of a city council member under Hamilton's charter provision which provides that the term of office shall be two years unless under the provisions of the charter a councilman is recalled by a majority vote of the electors. Respondent contended that the recall provisions violated Article II, Section 38 of the Ohio Constitution which reads, "Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers . . . for any misconduct involving moral turpitude or for other cause provided by law. . . ." *Held,* respondent's demurrer to the petition overruled and a writ of mandamus issued. *State* ex rel. *Hackler v. Edmonds,* 150 Ohio St. 203, 80 N. E. 2d 769 (1948).

The charter in question was adopted pursuant to Article XVIII, Section 7 of the Constitution which provides that, "Any municipality may . . . adopt a charter for its government and may, subject to the provisions of section three of this article, exercise thereunder all powers of local self-government." Section 3 reads, "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The debates and proceedings of the Ohio Constitutional Convention of 1912 indicate that the purpose of the home-rule amendments was to give to municipalities the broadest possible powers of self-government in connection with all matters which are strictly local and do not impinge upon matters which are of state-wide nature or interest. Article XVIII was intended to secure home rule to municipalities, *State* ex rel. *Bailey v. George,* 92 Ohio St. 344, 110 N.E. 951 (1915) and the provisions of a city charter in all matters of self-government are paramount to general laws. *State* ex rel. *Sparks v. Kroeger,* 15 Ohio L. Abs. 197 (App. 1933). The selection of municipal officers is a matter of purely local concern, and the method of their selection and the tenure of their office may legally be limited or circumscribed by the provisions of a municipal charter. *State* ex rel. *Frankenstein v. Hillenbrand,* 100 Ohio St. 339, 126 N.E. 309 (1929); *State* ex rel. *Taylor v. French,* 96 Ohio St. 172, 117 N.E. 173 (1919); *Fitzgerald v. Cleveland,* 88 Ohio St. 338, 103 N.E. 512 (1913).

Ohio General Code Section 2713 (1937) providing for removal of justices of the peace, county, and township officers as prescribed by law, was automatically repealed by Article II, Section 38 of the

constitution. *State* ex rel. *Hoel v. Brown,* 105 Ohio St. 479, 138 N.E. 230 (1922). The present court approved the *Brown* case, *supra,* but pointed out that the decision is not applicable to a recall provision in a city charter adopted pursuant to Article XVIII, Section 7.

A municipal code provision for recall was declared unconstitutional in a recent court of appeals case on the theory that Article II, Section 38, applies to municipal officers and exacts the procedure of complaint and hearing in all cases. *State* ex rel. *Burnett v. Ducy,* 36 Ohio L. Abs. 467, 44 N.E. 2d 803 (App. 1942). The soundness of the court of appeals' interpretation was questioned as an original proposition by Fordham and Asher, *Home Rule Powers in Theory and Practice,* 9 OHIO ST. L. J. 18 (1948) where it was pointed out that the recall is a political process, which may be employed without relation to grounds for removal in any ordinary legal sense, whereas Article II, Section 38 is addressed to removal for cause. The principal case may be distinguished from the *Ducy* case, *supra,* in that here a recall provision of a *home-rule charter* was under consideration, but such a distinction is of doubtful validity in view of the fact that substantive home-rule powers are granted to all municipalities. OHIO CONST. Art. XVIII, § 3. Rather the present case would seem to be but a reaffirmance of the right to home rule by municipalities where the exercise of that right is not inconsistent with general laws of the state.

Lowell B. Howard

NEGOTIABLE INSTRUMENTS—NONEXISTENT CORPORATE PAYEE—INDORSEMENT

Plaintiff contracted with persons representing themselves as officers of the Lowell Cartridge Corporation for the delivery of a quantity of cartridges. Plaintiff gave the "officers" a check for $5,000 payable to the Lowell Cartridge Corporation. The check was deposited without indorsement in Irving Trust Co., impleaded defendant, to the account of the corporation. When the check was presented to Manufacturers Trust Co., defendant bank, the bank of deposit guaranteed all prior indorsements. Manufacturers Trust Co. paid the check and charged the $5,000 to plaintiff's account. The corporation did not come into existence until after the "officers" had drawn out the $5,000 for their personal use. Plaintiff had no knowledge of the nonexistence until suit was brought against the corporation for breach of contract, fraud and conspiracy, which resulted in an unsatisfied default judgment. Plaintiff now sues Manufacturers Trust Co. for charging its account with the $5,000. *Held,* judgment for plaintiff against Manufacturers Trust Co. and for Manufacturers against Irving Trust Co. *International Aircraft Trading Co. v. Manufacturers Trust Co.,* 79 N.E. 2d 249 (N. Y. 1948).

The trial court denied recovery on the basis of the imposter rule —the rule that has as its consequence the imposition of liability on the drawer, when the check is drawn to a third person but paid to the person intended by the drawer. BRITTON, BILLS AND NOTES § 151 (1943). The upper court differed with the trial court upon the application of the rule to the facts presented and in view of precedent arrived at what seems to be a correct determination of plaintiff's intention. *Strang v. Westchester County National Bank,* 235 N. Y. 68, 138 N. E. 739 (1923).

Some courts have looked beyond the intention of the drawer and placed liability on the drawee for paying on a forged instrument. However, there can be no forgery under Uniform Negotiable Instruments Law Section 23, when the party intended as payee by the maker, indorsed as the payee designated on the check. OHIO GEN. CODE § 8128 (1938); 11 U. OF CIN. L. REV. 89, 92 (1937); *McHenry v. Old Citizens Nat. Bank,* 85 Ohio St. 203, 97 N. E. 395 (1911).

There is a distinction between the case where the drawer delivers a check to the imposter thinking he is the person named as payee and the case where the imposter represents himself as the agent of the payee. *Strang v. Westchester County National Bank, supra.* When dealing with the typical imposter-agent situation it appears that the Ohio court would reach the same conclusion as that reached by the court in the principal case. *Armstrong v. Pomeroy Nat. Bank,* 46 Ohio St. 512, 22 N.E. 866 (1889); *J. F. Jones' Sons v. Peoples Bank Co.,* 23 Ohio Dec. (N. P.) 353 (C. P. 1913).

The court, in *Swift & Co. v. Bankers Trust Co.,* 280 N. Y. 135, 19 N. E. 2d 992 (1939), in construing *Illinois* law applicable to a check made out to a nonexistent person, stated as dictum, "If construed in accordance with New York law, it constituted an order to pay to a nonexistent person; it was a check without a payee to whom it could be delivered, who could transfer it or who could demand or receive payment. Such a check is a mere scrap of paper creating neither right nor obligation." Of this the court in the principal case said, "On that reasoning, it follows that the check in issue was a legal nullity, not entitled to be honored, and that Manufacturers is liable for charging it against plaintiff's account." *Quaere,* whether the court gave much weight to this statement. By a strict application of the dictum in *Swift & Co. v. Bankers Trust Co., supra,* there could be no application of the imposter rule to a nonexistent payee and the law is too well settled on this point to be so easily overthrown. *Strang v. Westchester County National Bank, supra.*

Even though the court in the principal case stated it need not consider whether a nonexistent corporate payee ever has a place within the scope of the imposter rule, the decision may have an impact on the law of the other states and produce the result that the

court may never consider the imposter rule when such a payee is involved.

The result reached by the court in the principal case would seem appropriate but it would appear that liability could have been imposed on still another ground. Since the check in issue carried *no indorsement* by the imposter-agent it could be argued that the check was not negotiated so as to constitute the transferee the holder thereof.

"An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery." UNIFORM NEGOTIABLE INSTRUMENT LAW § 30; OHIO GEN. CODE § 8135 (1938). There are three situations wherein an order instrument may be transferred without indorsement: (1) when construed to be a bearer instrument; (2) when expressly assigned; and (3) when impliedly assigned. "The instrument is payable to bearer when it is payable to the order of a fictitious or nonexistent person, and such fact was known to the person making it so payable." UNIFORM NEGOTIABLE INSTRUMENTS LAW § 9 (3); OHIO GEN. CODE § 8114 (1938). The check in the principal case, and in the usual imposter situation, cannot come within this provision since the drawer does not know of the nonexistence. The second exception to the general rule that an order instrument cannot be transferred without an indorsement is in the case of an express assignment. An assignment written on the instrument, or on a separate instrument, attached or unattached, is deemed to be an indorsement. In re *Stockham,* 193 Iowa 823, 186 N.W. 650 (1922); *Crosby v. Roub,* 16 Wis. 616 (1863); *O'Gasapian v. Danielson,* 284 Mass. 27, 187 N. E. 107 (1933); *Markey v. Corey,* 108 Mich. 184, 66 N.W. 493 (1895). The facts of the principal case reveal no such written instrument.

The third exception is that of an implied assignment. UNIFORM NEGOTIABLE INSTRUMENTS LAW § 49; OHIO GEN. CODE § 8154 (1938). This section provides, "Where the holder of an instrument payable to *his* order transfers it for value without indorsing it . . . ." It is apparent that the above provision is not applicable to the situation, as here, where someone other than the named payee transfers the instrument. Considering that it is such a normal and regular procedure to deposit checks without indorsement that many banks have a special rubber stamp for just such an occasion, the facts of the principal case, as they must have appeared to the Irving Trust Co., present such a deviation from the norm that it can hardly be considered a regular transaction.

Approaching the case through the lack of indorsement makes

unnecessary the determination of the drawer's intentions—a difficult task at best as indicated by the disagreement between the trial court and the upper court in the case at bar.

David W. Hart

NEGOTIABLE INSTRUMENTS—BURDEN OF PROOF OF CONSIDERATION

The probate court ordered the sale of certain shares of stock in decedent's estate. Thereafter, the plaintiff corporation filed application for the determination of the validity of a lien on the shares, alleging that they had been pledged as collateral on decedent's unpaid note. The estate asserted that the pledge failed because there had been no consideration for the note. The probate court found the lien invalid and the corporation appealed on questions of law and fact. *Held,* the lien was rightly denied since the company failed to sustain its burden of proof of consideration. In re *Estate of Kennedy,* 82 Ohio App. 359, 80 N.E. 2d 810 (1948).

Prior to the adoption of the Uniform Negotiable Instruments Act there was a conflict of authority as to the burden of proof of consideration for a negotiable instrument in the hands of a party not a holder in due course. Probably a majority of courts placed the ultimate burden or "risk of non-persuasion" on the party relying on the instrument. *Farmers' Loan Co. v. Siefke,* 144 N.Y. 354, 39 N.E. 358 (1895); *Conmey v. MacFarlane,* 97 Pa. 361 (1881); WILLISTON, CONTRACTS §§ 108, 1147 (Rev. ed. 1936); See Notes, 35 A.L.R. 1370 (1925), 65 A.L.R. 904 (1930). The introduction of the N.I.L. required the interpretation of at least two sections affecting the problem. Section 24, "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration. . . ." OHIO GEN. CODE § 8129 (1938). Section 28, "Absence or failure of consideration is a matter of defense as against any person not a holder in due course. . . ." OHIO GEN. CODE § 8133 (1938). Under these provisions a majority of courts have concluded that the legislature intended to place the burden of proof on the party asserting the lack of consideration. *Kessler v. Valerio,* 102 Conn. 620, 129 Atl. 788 (1925); *Conforti Construction Co. v. Neek Realty Corp.,* 125 Misc. 876, 212 N.Y. Supp. 393 (Sup. Ct. 1925); BRANNAN, NEGOTIABLE INSTRUMENTS LAW § 24 (6th ed. Buetel, 1938); BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES § 99 (1943).

Seven years after Ohio's adoption of the Act, but without mention of it, the Supreme Court of Ohio placed the burden of proof of consideration on the party setting forth the instrument. *Ginn v. Dolan,* 81 Ohio St. 121, 90 N. E. 141 (1909). Several lower courts have followed the *Ginn* case, *supra,* in their interpretation of the statute. *Sharick v. Szefcyk,* 17 Ohio L. Abs. 332 (App. 1934); *Schardt*

v. Schardt, 17 Ohio L. Abs. 185 (App. 1934); *Bates v. McDowell,* 5 Ohio L. Abs. 246 (App. 1927); *Woodbury v. Bollmeyer,* 20 Ohio C.C. (N.S.) 113, 31 Ohio C.D. 157 (1912).

While Section 28 of the N.I.L. specifically provides for *both* absence and failure of consideration, some Ohio courts, using dictum in the *Ginn* case, *supra,* have shifted the burden of proof of failure of consideration to the party asserting such failure. *Walters v. Smith,* 7 Ohio L. Abs. 499 (App. 1929); *Bear v. Bear,* 29 Ohio App. 272, 162 N.E. 711 (1928); *Maher v. Collection Co.,* 1 Ohio L. Abs. 297 (App. 1923); *Klein & Heffelman Co. v. Peterman,* 6 Ohio App. 145 (1916).

Two courts have said that the instrument involved in the *Ginn* case, *supra,* was executed prior to the adoption of the N.I.L. and was therefore not subject to the statute. The courts then adopted the majority rule of placing the burden of proof on the party attacking the consideration. *Darby v. Chambers,* 70 Ohio App. 287, 46 N.E. 2d 302 (1942); *Miller Rubber Products Co. v. Noll,* 30 Ohio N.P. (N.S.) 305 (1933).

Assuming that the facts of the *Ginn* case, *supra,* make the N.I.L. inapplicable, it should now be possible for Ohio to adopt the majority rule and place the burden of proof on the party claiming the lack of consideration. It would seem that this rule could have been applied in the principal case even though the question arose in the probate court rather than the usual contest between the maker and a person not a holder in due course.

Lloyd E. Fisher, Jr.

PLEADING—CLASS SUITS—FUNCTION OF DEMURRER—RIGHT TO FILE AN AMENDED PETITION

Plaintiff on behalf of 600,000 gas consumers brought a representative suit against defendants, gas and electric corporations, in which he alleged their secret dilution of gas distributed and sought injunctive relief and damages. A demurrer to the petition was sustained and plaintiff's motion to amend was overruled. *Held,* judgment reversed with instruction to permit the filing of an amended petition and to overrule a general demurrer if filed thereto. *Davies v. Columbia Gas & Electric Corp.,* 79 N.E. 2d 327 (Ohio App. 1948).

Although the original purpose of a demurrer was to terminate the case when a decision on the issue of law raised was rendered, it has long been true, even under common-law pleading, that amendment over after demurrer sustained is freely allowed. CLARK, CODE PLEADING 527 (1927). *But see* SHIPMAN, COMMON LAW PLEADING 287 (3d ed. Ballantine, 1923).

Ohio General Code Section 11365 permits such amendment as follows, "If the demurrer be sustained, the adverse party may amend

if the defect can be remedied. . . ." Amendment is allowed not as a matter of right but it rests in the trial court's sound discretion. *Detroit Fidelity & Surety Co. v. Keys,* 14 Ohio L. Abs. 76, 85 (App. 1932); *Angelis v. Foster,* 75 P. 2d 650 (Cal. App. 1938). However it has been held a clear abuse of discretion to refuse such amendment. *Buckeye Garage Co. v. Caldwell,* 18 Ohio C. C. (N.S.) 429, 432 (1910); that a court is rarely justified in refusing leave to amend, *Hanna v. Hershhorn,* 112 Cal. App. 438, 296 Pac. 891 (1931); that it is not a matter of discretion with the court but a positive duty, *Euster v. Standard Acc. Ins. Co.,* 139 Pa. Super. 6, 10 A. 2d 877 (1940); that the court must permit an amendment, *Becraft v. Wright,* 113 S.W. 2d 270 (Tex. Civ. App. 1938); that denial of leave to amend constituted abuse of discretion regardless of whether leave to amend was requested, unless complaint showed on its face that it was incapable of amendment, *King v. Mortimer,* 188 P. 2d 502 (Cal. App. 1948); that court must give plaintiff opportunity to amend unless it is clear that the error cannot be cured, *Seitz v. Fulton National Bank of Lancaster,* 325 Pa. 14, 188 Atl. 569 (1936); *Provo City v. Claudin,* 91 Utah 60, 63 P. 2d 570 (1936).

Further, it is generally held that upon repleading by either party, issue is taken upon the new pleadings only, and the former pleading is not in issue. *Collins v. Streitz,* 47 Ariz. 146, 54 P. 2d 264 (1936); *Grubbs v. Smith,* 86 F. 2d 275 (C.C.A. 6th 1936), *cert. denied,* 300 U.S. 658 (1937); *Wright v. Risser,* 290 Ill. App. 576, 8 N.E. 2d 966 (1937); *Ericson v. Slomer,* 94 F. 2d 437 (C.C.A. 7th 1938); *Walraven v. Walraven,* 47 S.E. 2d 148 (Ga. App. 1948); *Cauble v. Boy Scouts of America,* 250 Ala. 152, 33 So. 2d 461 (1948); CLARK, CODE PLEADING 528 (1927). It is clear in Ohio that this is the rule once plaintiff has filed his amended petition. *Grimm v. Modest,* 135 Ohio St. 275, 20 N.E. 2d 527 (1939); *State v. Moreland,* 132 Ohio St. 71, 5 N.E. 2d 159 (1936); *Bingham v. Nypano R.R.,* 112 Ohio St. 115, 147 N.E. 1 (1925); *Smith v. Ward,* 32 Ohio App. 177, 166 N.E. 396 (1929).

It is also the rule where leave was granted to file, but the filing in fact never took place. *Coral Gables, Inc., v. Garn,* 23 Ohio L. Abs. 162 (App. 1936); *Berry v. Barton,* 12 Okla. 221, 224, 71 Pac. 1074, 1075 (1902).

The principal case goes even further in holding that when a party moves for leave to file an amended petition, although it is denied, the intention to abandon the original petition remains, prohibiting a claim of error when the court sustains a demurrer to the original petition. *Accord, Anthony v. Slayden,* 27 Colo. 144, 60 Pac. 826, 828 (1900).

The class action, or representative suit, has caused a great deal of confusion in the law and there is no outstanding weight of authority as to the proper interpretation of the code provisions of the

various states which permit the bringing of such an action. Wheaton, *Representative Suits Involving Numerous Litigants,* 19 CORN. L. Q. 399, 433 (1933).

Ohio General Code Section 11257 provides, "When the question is one of a common or general interest of many persons, or the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." See Lesar, *Class Suits and the Federal Rules,* 22 MINN. L. REV. 34 (1937); Blume, *The "Common Questions" Principle in Code Provision for Representative Suits,* 30 MICH. L. REV. 878 (1932).

It is generally held that this and similar statutes apply to both legal and equitable causes. *Platt v. Colvin,* 50 Ohio St. 730, 36 N.E. 735 (1893); *Cherry v. Howell,* 4 F. Supp. 597 (E. D. N. Y. 1933) (but not fraud or deceit); *Colt v. Hicks,* 97 Ind. App. 177, 179 N.E. 335 (1932); *Walker v. Village of Dillonvale,* 82 Ohio St. 137, 92 N.E. 220 (1910). *Contra: Baskins v. U.M.W.A.,* 150 Ark. 398, 234 S.W. 464 (1921); 24 MINN. L. REV. 703 (1940).

Some go further, as in the principal case, and hold that the statute applies to all cases, *i.e.* law or equity, contract or tort. *Jackson v. International Union of Operating Engineers,* 211 S.W. 2d 138 (Ky. App. 1948); Wheaton, *supra* at 431; or that the "interest" required is a "common" interest as opposed to a "united" interest. *Day v. Buckingham,* 87 Wis. 215, 58 N.W. 254 (1894); *George v. Benjamin,* 100 Wis. 622, 76 N.W. 619 (1898).

Although not required so to decide, the court in the principal case hinted that should the occasion arise, they would interpret the statute in the "disjunctive sense" and permit a class action when there was *either* a question of common or general interest *or* when the parties were very numerous. *Wheatley v. A. I. Root Co.,* 147 Ohio St. 127, 69 N.E. 2d 187 (1946); *Haggerty v. Squire,* 137 Ohio St. 207, 220, 28 N.E. 2d 554, 560 (1940); *Smith v. Kroeger,* 138 Ohio St. 508, 37 N.E. 2d 45 (1941); *McKenzie v. L'Amoureux,* 11 Barb. 516 (N.Y. 1851); *Hilton Bridge Const. Co. v. Foster,* 26 Misc. 338, 57 N. Y. Supp. 140 (Sup. Ct. 1899), *aff'd,* 42 App. Div. 630, 59 N.Y. Supp. 1106 (3d Dep't 1899). *But see Garfein v. Steglitz,* 260 Ky. 430, 86 S.W. 2d 155 (1935); Wheaton, *supra* at 434; Lesar, *supra* at 36.

Another interesting pronouncement by the court in the instant case was that a class suit may be maintained if claims in the aggregate exceed the jurisdictional minimum even though individual claims are less than the jurisdictional amount. *Commonwealth v. Scott,* 112 Ky. 252, 65 S.W. 596 (1901); *Gorley v. Louisville,* 23 Ky. L. Rep. 1782, 65 S.W. 844 (App. 1901).

This Ohio Court of Appeals has taken the modern liberal view on the points involved but it must remain for the Ohio Supreme Court to stamp its approval on the decision before it can be termed the law.

Norman W. Shibley

PRACTICE AND PROCEDURE—QUALIFIED MOTION FOR DIRECTED VERDICT

Plaintiff corporation sued defendant in the Municipal Court of Cincinnati for the balance of the purchase price on merchandise delivered to defendant. On trial two questions of fact were presented. At the close of all the evidence, plaintiff moved for an instructed verdict. Before the court ruled on plaintiff's motion, defendant made a like motion with the condition that, if overruled, the defendant should have the right to have the issue of fact submitted to the jury. The trial court refused to accept and rule on defendant's motion, and instructed a verdict for the plaintiff. *Held,* reversed and remanded for a new trial. The trial court was in error (1) in granting plaintiff's motion, and (2) in refusing to permit the defendant to interpose the qualified motion. *Steelmaterials Corp. v. Stern,* 82 Ohio App. 89, 77 N.E. 2d 272 (1947).

If both parties ask for a directed verdict and neither says or does anything further, the courts indulge a rebuttable presumption that the parties intend to waive submission to a jury and to consent to trial by the court of questions of fact. This is the established rule in Ohio. *First National Bank v. Hayes & Sons,* 64 Ohio St. 100, 59 N.E. 893 (1901). It is also the majority view. See Notes, 18 A.L.R. 1433 (1922); 108 A.L.R. 1315 (1937).

The presumption is overcome if either party makes a *timely* request to go to the jury. *Perkins v. Putnam,* 88 Ohio St. 495, 103 N.E. 377 (1913); *Eastern Dist. Piece Dye Works, Inc. v. Travelers' Ins. Co.,* 234 N.Y. 441, 138 N.E. 401 (1923); *Koehler v. Adler,* 78 N.Y. 287 (1879), *aff'd,* 91 N.Y. 657 (1883). The motion and the request need not be made at the same time. *Kramer v. Rath,* 42 Ohio App. 1, 181 N.E. 277 (1932); *Need v. Hershman,* 103 Ohio St. 12, 132 N.E. 19 (1921).

In the principal case, defendant qualified his motion in order to avoid submission of the case to the court. It had been indicated in previous supreme court cases that a party may properly make a motion thus qualified. *Buckeye State Building & Loan v. Schmidt,* 131 Ohio St. 132, 2 N.E. 2d 264 (1936); *Levick v. Bonnell,* 137 Ohio St. 453, 30 N.E. 2d 808 (1940). However, in the instant case, the court of appeals ruled directly on the point, stating, "The trial court was in error in refusing to accept the motion of the defendant for an

instructed verdict, because it was accompanied with the reservation of a right to go to the jury, if overruled." *Supra,* page 91, 77 N.E. 2d at 273.

The court resolved any doubt about this rule by its unequivocal statement of a litigant's rights under a qualified motion.

Etta Melton Mitchell

SALES—TRUST RECEIPTS—BANKRUPTCY—BILL OF SALE CONSTRUED AS CHATTEL MORTGAGE UNDER UNIFORM ACT

A bank made advances to a partnership dealing in home furnishings. These advances were secured by trust receipts given to the bank by the partners. In each transaction the partners gave the bank a bill of sale covering certain merchandise which had been previously purchased from third parties and which was in partners' possession. The partners then signed a trust receipt acknowledging receipt from the bank of the described merchandise and agreeing to hold it as trustee for the bank. The partnership subsequently was adjudged bankrupt. The trustee in bankruptcy contended that the bills of sale given by the bankrupt were in reality unrecorded chattel mortgages and therefore title passed to the trustee in bankruptcy under Section 70c of the Bankruptcy Act, 11 U.S.C.A. § 110c (1937). *Held,* the bills of sale should be construed as chattel mortgages since the transactions between the bankrupt and the bank were not transactions in the acquisition of new goods, but were attempts to give security to the bank for goods previously acquired by the bankrupt. In re *Chappell,* 77 F. Supp. 573 (D. Ore. 1948).

Generally the tripartite trust receipt transaction is one which involves a distant seller, a banker, and a local dealer or manufacturer. The distant seller, unable to finance the transaction as a conditional sale, after receiving advances from the banker, conveys the security interest to the banker and the beneficial ownership to the dealer who has, before delivery of the goods, executed a trust receipt to the banker.

This decision is in conformity with Section 2 of the Uniform Trust Receipts Act, adopted by the Oregon legislature. Ohio has not adopted the Uniform Act and there is doubt whether such transactions will be recognized by the Ohio courts. The trust receipt method of financing was recognized by the seaboard commercial states as early as 1878. *Farmers and Mechanics' Nat. Bank v. Lynch,* 74 N.Y. 568 (1878). During the early development of the trust receipt, it was generally used in the financing of imported goods, but by 1900 it was used extensively in domestic transactions.

In 1917 a Cincinnati manufacturer executed a trust receipt to his financier. The goods which were to be used in the manufac-

turer's business were then shipped from a vendor in Italy to the financier and by him delivered to the manufacturer. It was held that if the transaction did not disclose all of the elements of a conditional sale, it was at least so far in the nature of a conditional sale as to fall within the terms of the Ohio Conditional Sales Act. The trust receipt failed because it had not been recorded according to the provisions of the Conditional Sales Act. In re *Bettman-Johnson Co.*, 250 Fed. 657 (C.C.A. 6th 1918). The court found the trust receipt transaction analogous to a conditional sale notwithstanding the fact that a trust receipt is used where the financier, who is definitely not a vendor or seller, finances the transaction.

The Ohio statute on conditional sales was amended in 1925 and now reads, "Provided, however, that neither the foregoing provisions of this section nor sections 8560 and 8561 . . . shall be construed to apply to or to require the deposit, filing, or other record whatsoever, of trust receipts or similar instruments executed and delivered by any person, firm or corporation. Either (a) for the goods or merchandise imported from without the United States . . . or, (b) for a readily marketable staple wherever purchased. . . ." OHIO GEN. CODE § 8568 (1938). The statute then continues to provide for the recording of a general agreement between the financier and the dealer to finance transactions via trust receipts and eliminates the recording of the individual trust receipt. This recording constitutes constructive notice to third party creditors of the dealer.

Without the aid of a court's interpretation, it would appear from the reading of Section 8568 that trust receipts would be a valid method of financing in Ohio. However, this conclusion has been repudiated by the courts' consistent refusal to recognize trust receipts and holding that such transactions are conditional sales.

A federal court found the legislative intent not to include automobiles as "readily marketable staples". *Central Acceptance Corp. v. Lynch*, 58 F. 2d 915 (C.C.A. 6th 1932). If automobiles are not "readily marketable staples" (and therefore not a valid object for trust receipt financing), a large segment of commercial financing is restricted to chattel-mortgage and conditional-sale financing.

In spite of the decision in the *Lynch* case, *supra*, automobile dealers and finance companies continue to use trust receipts. The car manufacturer would ship cars to the finance company, which would then deliver the cars to the dealer after receiving a properly executed trust receipt, recorded in accordance with the provisions of Section 8568 concerning conditional sales. Such a transaction came before the court in 1934 in a proceeding between the finance company and the dealer's trustee in bankruptcy. The court treated the transaction as a conditional sale, citing In re *Bettman-Johnson Co.*, *supra*, and *Central Acceptance Corp. v. Lynch*, *supra*. In re *Collingwood Motor Sales*, 72 F. 2d 137 (C.C.A. 6th 1934).

A trust receipt is well adapted when the seller can not act as financier and the dealer must give more security than a chattel mortgage. The characteristics of trust-receipt transactions under the Uniform Trust Receipts Act are the following: (1) the financier is given extensive powers over the security interest. UNIFORM TRUST RECEIPTS ACT §§ 6 (1), 6 (2), 10. (2) The financier is "not . . . responsible as principal or vendor under any sale or contract to sell made by the trustee." UNIFORM TRUST RECEIPTS ACT § 12. (3) Individual transactions for which the trust receipts are given need not be recorded. The only recording necessary is the agreement between the financier and the dealer to finance via trust receipts. UNIFORM TRUST RECEIPTS ACT § 13.

Since the courts have so restricted the use of the trust receipts under the present statute, full consideration should be given to the adoption of the Uniform Trust Receipts Act in Ohio.

Jack W. Tracy

SURETY—GUARDIANSHIP—PREMIUM RATE UNDER IMPOUNDING STATUTE

A guardian secured the impounding of his ward's securities in the bank where they were deposited at the time of the creation of the guardianship. He then applied to the probate court to fix a reasonable sum to be paid a corporate surety as bond premium under the provisions of Ohio General Code Section 9572 (1938), which provides for a maximum premium rate of one-fourth of one percent per annum where the bond is in double the liability of the fiduciary. The corporate surety contended that since the value of the deposited securities was not included in fixing the amount of the bond, the bond was not in double the amount of the liability of the fiduciary as required by that section. Thus the surety argued that the premium should be at the higher rate of one-half of one percent per annum. *Held,* the fiduciary was not liable for the impounded securities and since the bond which had been obtained was double the amount of the remaining portion of the ward's estate the premium should be at the lower rate of one-fourth of one percent per annum. In re *Estate of Brown,* 51 Ohio L. Abs. 129, 79 N.E. 2d 340 (P. Ct. 1948).

The statutory authorization for the impounding of securities is limited to an estate the value of which is so great "that the probate court deems it inexpedient to require security in the full amount required by law." OHIO GEN. CODE § 10506-23 (1938). The bond is then fixed with respect to the remainder of the estate only. OHIO GEN. CODE § 10506-24 (1938).

No fiduciary may take possession of assets until his letters of

appointment have been issued, OHIO GEN. CODE § 10506-2 (1938), and no letters may be issued until the fiduciary has filed a penal bond in double the probable value of the estate. OHIO GEN. CODE § 10506-4 (1938). In the principal case the fiduciary applied to the court to fix the premium *before* his letters of appointment had been issued and at no time were the impounded securities under his control. The court concluded that no fiduciary should be held liable for property which never reached his possession. The court met the problem of the fiduciary's handling the impounded securities in the course of final disposition by stating that the depository held them subject to the order of the court and subsequent orders could be framed so as to prevent the fiduciary from coming into possession or control.

Further legislative expression of approval of impounding assets is seen in the section providing for the deposit of works of art with a corporation conducting a museum if that corporation has a net worth of at least ten times the value of the works so to be deposited. OHIO GEN. CODE § 10506-25a (1938).

The codes of Pennsylvania, Kentucky, West Virginia, New York, Massachusetts and Indiana are devoid of impounding provisions. Michigan has a provision for the deposit of the fiduciary's own securities in lieu of the required bond, but has no provision for the impounding of the securities of the trust estate. New Jersey provides for the impounding of securities but there the problem of the instant case is not likely to arise since no provision has been made for maximum and minimum premium rates. N. J. STAT. ANN. §§3:8-11-15 (1937).

Although the Ohio impounding statutes apply to all fiduciaries and have been in effect for approximately thirteen years, this appears to be a case of first impression on the amount of premium to be authorized where the securities or works of art have been impounded. The case would seem to be correctly decided in view of the apparent legislative intent that a saving should be accorded to large trust estates and that the depository must be a trust company or bank, itself financially responsible in the event of loss with respect to that part of the estate.

William M. Cromer

TORTS—CONSTITUTIONAL LAW—LIABILITY OF PUBLIC OFFICERS UNDER CIVIL RIGHTS ACT

Action for damages against the superintendent of an Illinois prison farm, alleging that plaintiff was, to the defendant's knowledge, kept in a damp cell in solitary confinement for ninety-two days, placed on a bread and water diet, and given no medical care. Plaintiff alleged permanent injuries and asked $10,000 in damages, basing his claim on the Civil Rights Act. 17 STAT. 13 (1871); 8 U.S.C. § 43 (1946). *Held,* motion to dismiss the complaint denied inasmuch as it stated a cause of action. *Gordon v. Garrison,* 77 F. Supp. 477 (E.D. Ill. 1948).

The Civil Rights Act provides a right of action sounding in tort to any person who has been subjected by any other person acting under color of any state statute, regulation, custom, or usage to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States. *Picking v. Pennsylvania R.R.,* 151 F. 2d 240 (C.C.A. 3d 1945).

It is an established rule of common law that a public officer is not liable for damages resulting from his performance of discretionary duties unless such be done maliciously or corruptly. *Gladstone v. Galston,* 145 F. 2d 742 (C.C.A. 9th 1944); *Booth v. Fletcher,* 101 F. 2d 676 (App. D.C. 1938); *Cooper v. O'Connor,* 99 F. 2d 135 (App. D.C. 1938); *People* ex rel. *Schreiner v. Courtney,* 380 Ill. 171, 43 N.E. 2d 982 (1942); *Lutes v. Thompson,* 193 Okla. 331, 143 P. 2d 135 (1943). The Civil Rights Act makes no such exemption. It is applicable to any person and has been interpreted to impose strict liability upon public officers irrespective of intent. *Refoule v. Ellis,* 74 F. Supp. 336 (N.D. Ga. 1947); *Picking v. Pennsylvania R. R., supra; Hague v. C.I.O.,* 307 U.S. 496 (1939); *Valle v. Stengel,* 75 F. Supp. 543 (D.N.J. 1948); *Chapman v. King,* 154 F. 2d 460 (C.C.A. 5th 1946). The United States Supreme Court has interpreted Section 43, *supra,* to impose liability upon election judges whose decisions were based on state statutes later declared unconstitutional. *Nixon v. Condon,* 286 U.S. 73 (1931); *Nixon v. Herndon,* 273 U.S. 536 (1926); *Myers v. Anderson,* 238 U.S. 368 (1915). Apparently in conflict, however, are judgments dismissing actions, brought under this section, for failure to allege purposeful discrimination. *Snowden v. Hughes,* 321 U.S. 1 (1943); *Burt v. City of New York,* 156 F. 2d 791 (C.C.A. 2d 1946).

Section 43 of the present Act had its origin in the first Civil Rights Act of April 9, 1866, which was enacted to secure to the negro those civil rights to which the white race was entitled. The present provision with minor changes in phraseology is in effect the third Civil Rights Act of 1871 which had the same purpose. *Hague v. C.I.O., supra; United States v. Cruikshank,* 92 U.S. 542 (1875). Sec-

tion 41 of the Judicial Code by which the federal courts assume jurisdiction of actions under Section 43, *supra,* confers jurisdiction in all suits based on the deprivation of rights under any law of the United States providing for *equal rights.* 36 STAT. 1092 (1911); 28 U.S.C. § 41 (14) (1946). The use of the term "equal rights" strongly suggests that it applies to laws concerning racial discrimination and inequity. 47 COL. L. REV. 1082 (1947). Apparently the Act was passed solely for racial protection. It has, nevertheless, been frequently utilized as the basis for actions which do not involve this subject. Does the legislature intend that it be applicable to situations other than those involving racial questions thus extending the possible circumvention of this common-law concept of exemption of public officers from tort liability? The failure of the legislature to act to prevent such an extension is evidence of tacit approval. The United States Supreme Court vigorously upheld Section 52 of the Act, which imposes criminal liability for its violation, as necessary legislation for the enforcement of the Fourteenth Amendment. *Screws v. United States,* 325 U.S. 91 (1945). Section 52 and Section 43, *supra,* should be read *pari materia. Picking v. Pennsylvania R.R., supra.* Similarly, it is probable that Congress considers these sections as watch dogs of civil rights.

J. Robert Donnelly

TORTS—LIABILITY OF CHARITABLE CORPORATION UNDER PURE FOOD AND DRUG LAWS

The plaintiff bought a glass of orange juice in the cafeteria of a charitable, non-profit corporation. She later contracted typhoid fever. There was expert testimony that the orange juice had been contaminated by a typhoid carrier, an employee of the defendant. The trial court found no negligence on the part of the defendant in employing the typhoid-carrying employee or in assigning her the job of preparing orange juice. There was a breach of implied warranty that the food was fit for human consumption. OHIO GEN. CODE § 8395 (1938). There was also a violation of the pure food and drug laws of Ohio. OHIO GEN. CODE § 12758 (1939). *Held,* a breach of implied warranty and a violation of the pure food and drug laws of Ohio, when resulting in bodily injury, are both ex delicto and not ex contractu. Therefore defendant is not liable because a charitable, non-profit corporation is not responsible for the negligence of its employees if not negligent in their selection or supervision. *Lovich v. Salvation Army,* 81 Ohio App. 317, 75 N. E. 2d 459 (1947).

Earlier Ohio decisions on tort liability of non-profit corporations do not treat liability for breach of warranty and violation of the pure food and drug laws, but in the present case the court was

forced to decide this problem. The court looked to *Yochem v. Gloria, Inc.*, 134 Ohio St. 427, 17 N. E. 2d 731 (1938), where breach of warranty under Ohio General Code Section 8395 was declared a violation of the pure food and drug laws under Ohio General Code Section 12758. In that case the court held that violation of Section 12758 constituted negligence per se. In the present case the court said this made the action sound in tort and not in contract.

Granting that a violation of the Ohio pure food and drug laws does sound in tort, is it a tort of the employee or the principal? Ohio General Code Section 12758 reads: "Whoever manufactures for sale, offers for sale a drug, article of food . . . ." This indicates that the negligence is that of the vendor and not an employee.

In Ohio, as a general proposition, non-profit corporations are not liable to beneficiaries for negligence of servants and employees. *Taylor v. Protestant Hospital*, 85 Ohio St. 90, 96 N. E. 1089 (1911); *Cullen v. Schmit*, 139 Ohio St. 194, 39 N. E. 2d 146 (1942). But non-profit corporations are liable for negligence in hiring employees and assigning them to jobs in which they injure beneficiaries. *Taylor v. Hospital*, 104 Ohio St. 61, 135 N. E. 287 (1922); *Cullen v. Schmit, supra.* The decisions reflect the reluctance of the courts to remove immunity that has protected charitable institutions from tort liability; however, some immunity was removed when the courts held the defendant liable for negligence in hiring employees.

Non-profit corporations are becoming more numerous, more powerful and are contacting more people; their opportunities for causing tort injuries are increasing. Many non-profit corporations daily feed large numbers of people who do not regard themselves as beneficiaries of charity. It may be well to reconsider the merit of non-liability. The courts have built the present law and probably need not wait for legislation to change it. Many strong policy reasons for liability are given by Mr. Justice Rutledge in *Georgetown College v. Hughes*, 130 F. 2d 810 (App. D. C. 1942). The present decision indicates that losses resulting from breaches of warranty and violations of the pure food and drug laws of Ohio will fall directly and totally on the shoulders of the consumer where the wrong-doing vendor is a non-profit corporation. The justice of such a policy is questionable.

In its early history a breach of warranty was treated as a tort but the trend is to treat it as a breach of contract. WILLISTON, SALES § 197 (2d ed. 1924). Some states permit either an action in tort or an action in contract for breach of an implied warranty. *Schuler v. Union News Co.*, 295 Mass. 350, 4 N. E. 2d 465 (1936). *Yochem v. Gloria, Inc., supra,* makes such a breach a ground for a tort action

but that decision would seem not to preclude the possibility of an action in contract. No authority is given which bound the court to reject the action in contract and with the law in its present state of flux the court might have given the plaintiff such a cause of action.

L. Dennis Marlowe