

It will be seen that a substantial change in the language of the law has been made by the commission of revision. This revision was made under the act of March 27, 1875 (72 Ohio Laws, p. 87). The supreme court of Ohio, in *Allen v. Russell*, 39 Ohio St. 336, in discussing this revision, say:

"Where one or more sections of a statute are repealed, and re-enacted in a different form, the fair inference is, in general, that a change in the meaning was intended, though even in such a case the intention may have been to correct a mistake or remove an obscurity in the original act, without changing its meaning. But where all the general statutes of a state, or all on a particular subject, are revised and consolidated, there is a strong presumption that the same construction which the statutes received, or, if their interpretation had been called for, would certainly have received, before revision and consolidation, should be applied to the enactment in its revised and consolidated form, although the language may have been changed. *Gardener v. Woodyear*, 1 Ohio, 170, 176; *Swazey's Lessee v. Blackman*, 8 Ohio, 5, 20; *Ash v. Ash*, 9 Ohio St. 383, 387; *Tyler's Ex'rs v. Winslow*, 15 Ohio St. 364, 368; *Williams v. State*, 35 Ohio St. 175; *State v. Jackson*, 36 Ohio St. 281, 286; *State v. Shelby Co. Com'rs*, 36 Ohio St. 326; *State v. Vanderbilt*, 37 Ohio St. 590, 640; *Bish. Writ. Laws*, § 98. Of course, if it is clear from the words that a change in substance was intended, the statute must be enforced in accordance with its changed form. *Id.* The commissioners appointed under the act of 1875 (72 Ohio Laws, p. 87) were required to revise and consolidate the laws of a general nature, and make report to the general assembly. They determined that the best way to perform that duty was to arrange all the general laws under proper heads, and report the same to the general assembly in the form of a bill. Their power to change was very limited. It was confined to 'making alterations to reconcile contradictions, supply omissions, and amend imperfections in the original acts, so as to reduce the general statutes into as concise and comprehensive a form as is consistent with the clear expression of the will of the general assembly.' Their power to change did not extend to matters of substance, like the right to a homestead. The commissioners were vested with no legislative power. They could recommend, and that was all, and the bill which they prepared obtained its vitality solely from its adoption by the general assembly. Changes were undoubtedly made in the bill by the general assembly, but they were not numerous. That the rule which I have stated as applicable to revisions should be applied to the Revised Statutes can admit of no doubt."

I do not think it is clear, from the words of the revision, that a change in substance was intended, and therefore am of opinion that these sections must receive the same construction they would receive if yet standing in the original act of March 31, 1865. The plaintiff company not being a corporation organized under the laws of this state, the first and second grounds of defendant's motion are sustained, and the bill will be dismissed.

BOSTON SAFE-DEPOSIT & TRUST CO. v. SALEM WATER CO. (SHARP, Intervener).

(Circuit Court, N. D. Ohio, E. D. May 13, 1899.)

CONTRACT BY CITY FOR FIRE PROTECTION—RIGHT OF INDIVIDUAL TO ENFORCE—PRIVITY.

A contract between a city and a water company, by which the company agreed to construct, maintain, and operate a system of waterworks in the city, and, among other things, to maintain at all times a sufficient pressure in the mains for fire purposes, does not create a privity of contract between

the company and a citizen or resident of the city which entitles the latter to maintain an action against the company to recover for a loss by fire, on the ground that, if the required water pressure had been maintained, the fire would have been extinguished and the property saved.

Hoyt, Dustin & Kelley, for complainant.
Carey, Boyle & Mullins, for intervener.

RICKS, District Judge. In December, 1892, at the suit of the Boston Safe-Deposit & Trust Company, trustee of the mortgage securing bonds of the Salem Water Company, a receiver was appointed for the water company. Thereafter Alonzo Sharp, as administrator of one Thomas Sharp, filed an intervening petition in this action against said receiver, alleging, among other things, that the Salem Water Company and its receiver derived their right to maintain and operate the water plant in the city of Salem from a certain contract, entered into on the 19th day of March, 1887, between the village of Salem and certain assignors of said water company, by the terms of which contract said water company was authorized to establish, maintain, and operate waterworks in said village, and was obligated to furnish "an abundant supply of water for fire, domestic, manufacturing, street, sewerage, and other proper purposes for a period of 20 years," and to "construct and maintain a standpipe as part of said system of waterworks, and to supply or attach to the same an electrical, pneumatic, or hydraulic valve, and to so connect the said valve with the said pump station of said works or system that said valve could be closed at any moment and the entire force of the pumps be confined to the mains, and to so construct and maintain said waterworks that the said the Salem Water Company would be able to furnish a plentiful supply of water to said Salem and its inhabitants for personal, domestic, and manufacturing purposes, and also for the extinguishing of fires and conflagrations, and other proper purposes," and also to construct and maintain the same so as to be sufficient at all times to provide a certain pressure of water throughout the system. The intervener further states in his petition that on the 22d day of April, 1894, certain buildings, machinery, tools, etc., of which his decedent, Thomas Sharp, was the owner, were destroyed by fire, the said fire not being caused by any negligence on the part of his decedent, but that the damage caused by said fire would not have exceeded \$300 had the receiver complied with the terms of said contract with the village of Salem, in which he was operating the waterworks, and that the receiver had failed in many respects to comply with his said contract, and by reason of his failure the intervener had been damaged in the sum of \$30,000. To this intervening petition the receiver filed a demurrer and exceptions, upon which the case was heard.

Hoyt, Dustin & Kelley, for receiver, maintained that there was no privity of contract between the intervener's decedent and either the Salem Water Company or its receiver, and that, in the absence of a duty resting either upon the common law or upon a contract, the Salem Water Company or its receiver owed no obligation to the intervener's decedent to comply with its contract with the village

of Salem; that this action is not founded upon any common-law duty, and does not, therefore, sound in tort, is quite evident; that it is not based upon a contractual relation between the parties has been, with one exception, uniformly held in every jurisdiction within the United States where the question has arisen. *Davis v. Waterworks Co.*, 54 Iowa, 59, 6 N. W. 126; *Becker v. Waterworks*, 79 Iowa, 419, 44 N. W. 694; *Britton v. Waterworks Co.*, 81 Wis. 48, 51 N. W. 84; *Hayes v. City of Oshkosh*, 33 Wis. 314; *Nickerson v. Hydraulic Co.*, 46 Conn. 24; *Eaton v. Waterworks Co.*, 37 Neb. 546, 56 N. W. 201; *Beck v. Water Co. (Pa. Sup.)* 11 Atl. 300; *Stone v. Water Co.*, 4 Pa. Dist. R. 431; *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118; *Howsmon v. Water Co.*, 119 Mo. 304, 24 S. W. 784; *Fitch v. Water Co. (Ind. Sup.)* 37 N. E. 982; *Foster v. Water Co.*, 3 Lea, 42; *Ferris v. Water Co.*, 16 Nev. 44; *Fowler v. Waterworks Co.*, 83 Ga. 219, 9 S. E. 673; *Mott v. Manufacturing Co.*, 48 Kan. 12, 28 Pac. 989; *Bush v. Water Co. (Idaho)* 43 Pac. 69; *Wainwright v. Water Co.*, 78 Hun, 146, 28 N. Y. Supp. 987; *House v. Waterworks Co. (Tex. Sup.)* 31 S. W. 179; *Waterworks Co. v. Brownless*, 10 Ohio Cir. Ct. R. 620.

The general doctrine held by the foregoing cases is that, where a city contracts with a water company to furnish a supply of water for use in extinguishing fires, such supply to be paid for by a levy of taxes upon the taxpayers of the city, there is no such privity of contract between a citizen or resident of such city and the water company as will authorize such resident or citizen to maintain an action against said water company for the injury or destruction of his property by fire caused by the failure of the water company to fulfill its contract; and this is held even where the ordinance granting the water company its franchise provides that the water company shall pay all damages that may accrue to any citizen of the city by reason of a failure on the part of such water company to supply a sufficient amount of water to put out fires. See *Mott v. Manufacturing Co.*, and other cases cited *supra*. The only case in all the books where the water company has been held liable for failure to furnish sufficient water for the extinguishment of fires is the case of *Paducah Lumber Co. v. Paducah Water-Supply Co.*, 89 Ky. 340, 12 S. W. 554, and 13 S. W. 249, in which case it was unnecessary for the court to have held this doctrine, as there was a private contract between the water company and the consumer for the furnishing of fire pressure. This Kentucky case has been repeatedly criticised by the courts of the various states in which this question has been decided. See *Mott v. Manufacturing Co.*, *Britton v. Waterworks Co.*, *Fitch v. Water Co.*, *Howsmon v. Water Co.*, *House v. Waterworks Co.*, *Waterworks Co. v. Brownless*, and *Eaton v. Waterworks Co.*, cited *supra*. The following cases are cited to show the general grounds upon which privity of contract may be asserted by a person not a party thereto: *Simson v. Brown*, 68 N. Y. 355; *Burton v. Larkin*, 36 Kan. 249, 13 Pac. 398; *Wright v. Terry*, 23 Fla. 169, 2 South. 6; *House v. Waterworks Co. (Tex. Sup.)* 31 S. W. 180; *Anderson v. Fitzgerald*, 21 Fed. 294; *Second Nat. Bank of St. Louis v. Grand Lodge of Missouri A. F. & A. M.*, 98 U. S. 123; *Vrooman v. Terner*,

69 N. Y. 280; *Bank v. Rice*, 107 Mass. 37; *Safe Co. v. Ward*, 46 N. J. Law, 19.

That a city owning its own waterworks cannot be held liable for failure to furnish sufficient water supply to extinguish fires is undisputed. 2 Dill. Mun. Corp. § 975; *Wheeler v. Cincinnati*, 19 Ohio St. 19; *Fowler v. Waterworks Co.*, 83 Ga. 222, 9 S. E. 673; *Wainwright v. Water Co.*, 78 Hun, 146, 28 N. Y. Supp. 987; *Tainter v. City of Worcester*, 123 Mass. 311; *Vanhorn v. City of Des Moines*, 63 Iowa, 447, 19 N. W. 293; *Hayes v. City of Oshkosh*, 33 Wis. 314; *Stone v. Water Co.*, 4 Pa. Dist. R. 431; *House v. Waterworks Co.* (Tex. Sup.) 31 S. W. 179, 185. If the city itself cannot be held liable for damage resulting from failure to furnish a fire pressure to its citizens, and if there is no privity of contract between the water company operating under a franchise from the city and the citizens or residents of such city, it is clear, upon principle as well as authority, that no legal obligation exists on the part of such water company and in favor of the individual citizen to maintain a sufficient pressure at the city water mains to extinguish fires which may occur upon the premises of such individual citizen.

On the 24th day of December, 1892, Calvin A. Judson was appointed receiver of the Salem Water Company. He afterwards resigned, and Hermon A. Kelley was appointed his successor on the 19th of January, 1897. On March 19, 1887, a certain contract was entered into, by and between the common council of the village of Salem and Messrs. Turner, Clark & Rawson, of Boston, whereby the latter agreed to build and construct waterworks and standpipes, having improved engines and pumping facilities, and to furnish the city of Salem with water privileges of the character described in the petition. Afterwards, on the 22d day of April, 1894, the buildings, machinery, tools, patterns, and all property of every description on the premises described in the intervening petition, and owned by Thomas Sharp, were destroyed by fire. The intervener declares and alleges that the fire could have been extinguished if proper machinery had been furnished by the company, and if the obligations on their part in the contract between themselves and the city had been faithfully observed. There was no contract between the intervening petitioner and the company, or the city, that in case of fire he should be reimbursed for any loss he might sustain. If there were such a contract that could be enforced, there would be some foundation for the petitioner's claim in this case; but I think, under the facts stated, there is no privity of contract, and the demurrer filed by the receiver must, therefore, be sustained, and the intervening petition dismissed. This case has been very fully briefed by the receiver, and, while it is not necessary to review the authorities, they seem overwhelming upon the propositions above stated.

TAYLOR v. FISK et al

(Circuit Court, N. D. Illinois, S. D. May 12, 1899.)

1. **SUIT TO QUIET TITLE—EQUITY JURISDICTION—INSTRUMENT VOID ON ITS FACE.**
Under the general chancery practice, and in the absence of a statute enlarging the remedy, a court of equity cannot entertain a bill to quiet title where the instrument sought to be relieved against is void on its face.
2. **SAME—PARTIES—SUIT TO CONSTRUE DEED.**
A suit to determine the validity of a limitation over in a deed after the death of one grantee cannot be maintained by such grantee during his lifetime, for want of necessary parties to render such determination effective, where the persons who will be the beneficiaries under the limitation cannot be ascertained until it takes effect.

On Demurrers to Bill.

Fred Spotter and R. M. Barnes, for complainant.

Page, Wead & Ross and Charles H. Fisk, for defendants.

KOHLSAAT, District Judge. This is a bill in the nature of a bill to quiet title, but the basis of the relief sought is in reality the construction of the deed set forth in the bill of complaint. The bill of complaint is founded upon a deed from one Fisk and wife to one Sarah M. Johnson, which deed is in the nature of a trust instrument and attempts to accomplish the ends usually obtained by will. A life estate is by the deed granted to said Sarah M. Johnson, with certain powers of alienation. At her death the real estate remaining was to "go to and belong to" the children of Joseph H. Johnson (husband of Sarah M.) living at the decease of Sarah M. Johnson, or to the children living at such time of deceased children of Joseph H. Johnson. If at the death of Sarah M. Johnson there should be living no children or grandchildren of Joseph H. Johnson, the real estate unconveyed at her death should "descend, go, and belong to" the wife of Fisk, if living, and, if not living, then to her then living children or grandchildren per stirpes. If at the death of Sarah M. Johnson there should be living any children of Joseph H. Johnson "upon whom the estate hereinbefore mentioned shall have been cast," and such children should die leaving no descendants, in that event the said real estate should "descend, go, and belong" to the wife of Fisk, if living, and, if not living, then to her then living children or grandchildren per stirpes. After stating the foregoing deed, the bill alleges that both Joseph H. and Sarah M. Johnson are dead; that complainant is the only descendant of said Joseph H. Johnson, and is in peaceable possession of all the said real estate remaining at the death of said Sarah M. Johnson unconveyed; that said wife of Fisk and certain named children and grandchildren are claiming a vested remainder in said real estate; that complainant is unable to sell the same upon the market because of the claims of said Mrs. Fisk, her children, and grandchildren; that all limitations, remainders, and reversions after the death of complainant provided for in said deed are void, as being in violation of the rule against perpetuities; that all such provisions contained in said deed are clouds upon the