The court emphasizes the fact that the drafts in question were not ordinary drafts in that they contained statements of their purpose to release claims against the insurance company, and that the fraudulent agent was a regular depositor in the defendant bank. The court then says: "It does not seem to us a sufficient answer to all this to say that, within the meaning of the Negotiable Instruments Act the drafts were payable to fictitious payees, even assuming such to be the legal effect of what was done." While it might be argued that the provision for release in the drafts was for the purpose of protecting the insurance company from further liability on the same claims, and not to protect it against forgery, the presence of such a provision furnished additional evidence of negligence on the part of the defendant.

Viewed in this light there can be no doubt but that the court was seeking to perform substantial justice, and it probably succeeded. And this is none the less true because a different result was reached in a case in the federal court with respect to the same sort of drafts,[20] for the attending facts in that case were such as to negative any claim of negligence on the part of the defendant. W. L. A.

PROCEDURE

Procedure — Province of Court and Jury in Action Against Corporations for Torts of Statutory Police Employees

In a recent federal case, *Erie Railroad* v. *Johnson*,[1] plaintiff sued the defendant railroad company alleging an assault and battery, false imprisonment, and malicious prosecution by three railroad police officers commissioned by the Governor and compensated by the defendant, pursuant to sections 9150 and 9151 of the Ohio General Code. The latter section provides "policemen so appointed, and commissioned severally shall possess and exercise the powers, and be subject to the liabilities of policemen of cities in the several counties in which they are authorized to act while discharging the duties for which they are appointed." Plaintiff's evidence tended to show that the three police officers, one of whom was a lieutenant, while investigating a reported theft of railroad propery, discovered plaintiff in an abandoned garage of an oil company, where he was seeking shelter from the rain; they

[20] *Hartford Accident & Indemnity Co.* v. *Fifth Third Union Trust Co.*, 23 F. Supp. 53 (Ohio 1938). Note (1939) 6 Un. of Chi. L. Rev. 700.

[1] *Erie R.* v. *Johnson*, 106 F. (2d) 550 (1939).

told him they were railroad detectives and demanded to know what he had done with the company's property which they claimed he had stolen; he was assaulted both at the time of the first encounter and again while on the way to the police station where he was locked up. The following morning one of the officers executed an affidavit charging plaintiff with breaking and entering a railroad car belonging to defendant. Upon trial these charges were dismissed for lack of evidence. In plaintiff's suit against the railroad company the Federal District Court sent the case to the jury, holding that the evidence was sufficient to raise a jury question, whether the acts of the officers were outside their public duties and authorized by the railroad. The jury found that the officers were acting for the defendant and not in their official capacity. Judgment for plaintiff was rendered on the verdict. The Circuit Court of Appeals reversed the judgment holding that there was not sufficient evidence to go to the jury, on this same question,—whether the acts of the officers were outside their public duties and authorized by the railroad.

The holding is based upon Ohio law, under the rule of *Erie Railroad* v. *Tompkins*.[2] The court cites *Ry. Co.* v. *Fieback*[3] and *Pa. R. R.* v. *Deal*[4] for the Ohio law: that a railroad company is not liable for the wrongful acts of such an officer unless such wrongful acts occurred in the performance of an act authorized by the Company and outside the scope of the public duties of a policeman. In the *Deal* case, however, the evidence on this point was held sufficient to go to the jury. It there appeared that a company clerk had been assaulted by thieves while attempting to drive them away from a box car; subsequently he conferred with a railroad police officer,[5] who determined, on the advice of his captain in the railroad police force, to prosecute the thieves, for the reason that the officer did not want his men beaten up while protecting the railroad's propery. Accordingly the clerk made affidavit against one Deal on authority of the railroad police officer, but upon appearance of the accused, the clerk admitted that it was a case of mistaken identity and Deal was discharged. In the subsequent action for malicious prosecution brought by Deal against the railroad company the Common Pleas Court sent the case to the jury and its action was upheld by the Court of Appeals and the Supreme Court.

The *Fieback* case states the Ohio law on this point, as held by the Circuit Court of Appeals in the instant case, that the one paying the

[2] 304 U.S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817, 114 A.L.R. 1487 (1938).
[3] 87 Ohio St. 254, 100 N.E. 889, 43 L.R.A. (N.S.) 1164 (1912).
[4] 116 Ohio St. 408, 156 N.E. 502 (1927).
[5] In this and subsequent cases all the police officers referred to were appointed under public authority and their salary was paid by the respective defendants.

salary is not liable unless there is a previous authorization or a subsequent ratification. In the *Deal* case, however, the Ohio Supreme Court recognized this to be the law, but held that previous authorization or subsequent ratification is a question for the jury on facts similar to those in the principal case. Undoubtedly the Circuit Court of Appeals felt that the case before it was distinguishable from the *Deal* case, but it is submitted that this distinction is difficult to recognize.[6] It should be noted, however, that Judge Allen, one of the judges who concurred in the opinion of the Circuit Court of Appeals in the instant case, had also concurred in the *per curiam* opinion in the Ohio case.

The second Ohio case[7] tempered the harsh rule stated in the first.[8] It is regrettable that the federal reviewing court in the instant case found it necessary to reverse the action of the District Court, which had merely recognized the tempering.

In the only other Ohio case[9] on this point, the Court of Appeals sent the case to the jury. There the officer, on authority of his lieutenant in the plant police force, wrongfully assaulted the plaintiff, while attempting to apprehend another man discovered stealing property of the defendant.

Cases in other jurisdictions involving company police, which have been sent to the jury on this issue of official or non-official action, include a Maryland case[10] where a lieutenant in the railroad detective force, appointed under a similar statute, having ordered plaintiff off a train, illegally shot him when he was several feet from the train; a New York case,[11] practically identical to the Maryland case; and a Kentucky case[12] where three constables, appointed under local law and paid by defendant to keep order about a depot, to meet incoming trains, and to arrest persons who were drunk or disorderly, went onto a train to arrest the plaintiff for breach of peace and wrongfully assaulted her. Courts of Texas[13] and Alabama[14] have also held in similar cases that there was

[6] In fact, if a distinction is to be made, it may be argued that the federal case presents more evidence to take to the jury than does the *Deal* case. In the latter the detectives were merely attempting to get a conviction of the thieves who had in the past assaulted the railroad company's clerk in order that in the future the railroad detectives themselves would not be assaulted while protecting company property; whereas in the federal case the special police officers were directly concerned with recovering the railroad company's property—an enterprise which might be regarded as more closely identified with the company's interests.

[7] See note 4, *supra*.

[8] See note 3, *supra*.

[9] *Republic St. Corp.* v. *Sontag*, 21 Ohio L. Abs., No. 13, 358 (1935).

[10] *Deck* v. *B. & O. R. Co.*, 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 339 (1905).

[11] *Sharp* v. *Erie R. R. Co.*, 184 N.Y. 100 (1906).

[12] *Louisville & N. R. Co.* v. *Mason*, 199 Ky. 337, 251 S.W. 184 (1923).

[13] *M. K. & T. Ry.* v. *John Warner*, 19 Tex. Civ. App. 463, 49 S.W. 254 (1898); *Perkins Bros.* v. *Anderson*, 155 S.W. 556 (Tex. 1913).

[14] *Scipio* v. *Pioneer Mining Co.*, 166 Ala. 666, 52 So. 43 (1910).

sufficient evidence to go to the jury on whether or not a certain act of a special officer appointed under public authority was done in his official capacity or for the employer who paid his salary.

There are of course numerous cases involving special policemen which sustain the direction of a verdict for the defendant employer, but practically all of these have features distinguishing them from the principal case.[15] In the leading case, decided by the Maryland courts,[16] the arrest was made by a special policeman off the premises, on the authority of defendant's superintendent, who was not shown to have acted within his authority in so directing the policeman; there was no claim of benefit to defendant or preservation of its property, and the superintendent, although bearing an important title, was not, in the opinion of the court, acting within the scope of his authority. In a West Virginia case[17] the court affirmed the trial court's action in setting aside a verdict for the plaintiff and drew a distinction between the acts of an officer for the protection of the defendant's property and acts based on other motives; in this case the officer's purpose was to protect his own wife, who he thought was being molested by the plaintiff. A North Dakota court held that the protection of the defendant's property was not involved in a case which the plaintiff was beaten up by a special policeman after leaving the defendant's train;[18] there the officer had chased the plaintiff about town and had arrested and assaulted him upon his subsequent return to the vicinity of the depot. Two federal cases[19] and a California case[20] on this subject are as readily distinguishable.

A further point involved in the principal case may be noted. The federal court was compelled to reverse and remand the case to the trial court in accordance with federal procedure, and could not render final judgment for the defendant, although it held that the trial court should have done so.[21] The Ohio appellate court would have been permitted

[15] *Louisville & N. R. Co.* v. *Offut*, 204 Ky. 51, 263 S.W. 665 (1924) held as a matter of law that corporations are liable for the acts of their special policemen appointed under a statute similar to Ohio's, but in its opinion the court recognizes that the decision is in conflict with the majority rule.

[16] *Tolchester Beach Improvement Co.* v. *Steinmeier*, 72 Md. 313, 20 Atl. 188, 8 L.R.A. 846 (1890).

[17] *McKain* v. *B. & O. R.R.*, 65 W. Va. 233, 64 S.E. 18, 23 L.R.A. (N.S.) 289 (1909).

[18] *Kimonen* v. *Gr. N. Ry. Co.*, 34 N.D. 556, 158 N.W. 1058 (1916).

[19] *Pa. Ry. Co.* v. *Kelly*, 30 L.R.A. (N.S.) 481, 101 C.C.A., 359, 177 Fed. 189 (1910); *Hershey* v. *O'Neill*, 36 Fed. 168 (1888).

[20] *Maggi* v. *Pompa*, 105 Cal. App. 496, 287 Pac. 982 (1930).

[21] *Slocum* v *N. Y. Life Ins. Co.*, 228 U.S. 364, 33 Sup. Ct. 523, 57 L.Ed. 879, Ann. Cas. 1914 D, 1029 (1912); *Pederson* v. *Del., L. & W. Ry. Co.*, 229 U.S. 146, 33 Sup. Ct. 648, Ann Cas. 1914 C, 153 (1913); *Engemoen* v. *Chi., St., P., M & O. Ry. Co.*, 210 Fed. 896 (1914); *Fid. Title & Tr. Co.* v. *Dubois Elec. Co.*, 253 U.S. 212, 64 L.Ed. 865, 40 Sup. Ct. 514 (1920). Where the trial court reserves decision on the motion for a directed verdict and submits the case to the jury, thereafter entering judgment on the ver-

to render final judgment for defendant; in fact, it would have been error for it not to have done so.[22] The federal rule laid down in the *Slocum* case,[23] is based on the right of trial by jury guaranteed by the 7th Amendment to the United State Constitution; it is said that when a verdict is set aside the issues are left undetermined, and until they are determined in a jury trial no judgment on the merits can be given. In a persuasive dissent written by Hughes, J., and concurred in by Holmes, Lurton, and Pitney, JJ., the view is expressed that the rendition of final judgment by the reviewing court would not be a violation of the 7th Amendment since the court would be deciding a question of law, not of fact, that is, whether there was sufficient evidence to go to the jury. In a later case[24] the Supreme Court sustained the rule of the *Slocum* case without a dissent. The Ohio Supreme Court finds no constitutional difficulty in rendering final judgment,[25] relying on an argument similar to that expressed in the dissenting opinion in the *Slocum* case. Moreover, the Ohio courts are authorized by statute to render final judgment in such cases. H. M. M.

REAL PROPERTY

Real Property — Termination of a Lease by Foreclosure of Prior Mortgage

In 1926, Kenyon Painter executed a mortgage to the plaintiff, the New York Life Insurance Company, and in 1931 leased the premises for a seventy-month term to the Simplex Products Corporation, defendant in the case at bar. The defendant paid rent to Painter until September, 1933, when by agreement payment of part of the rent was made to the plaintiff while the remainder was paid to the Union Trust Company, which held a mortgage on the residue of the leased property. In December, 1934, the plaintiff brought an action to foreclose his mortgage, but failed to join the defendant-lessee as a party. Plaintiff

dict, the reviewing court can render final judgment rather than remand the case for a new trial if it holds that there was not sufficient evidence to go to the jury. *Baltim. & Carol. Line* v. *Redman*, 55 Sup. Ct. 890. Note 45 Yale L.J. 166 (1935) 21 Ia. L. Rev. 117 (1936).

[22] *Majoros* v. *Cleve. Inter. Rd. Co.*, 127 Ohio St. 255, 187 N.E. 857 (1933); *Greyhound Lines* v. *Martin*, 127 Ohio St. 499, 189 N.E. 244, 14 Ohio L. Abs. 327 (1934); *Lakeside Hosp.* v. *Kover*, 131 Ohio St. 333, 2 N.E. (2d) 857, 6 Ohio Op. 54 (1936).

[23] See note 21, *supra*.

[24] *Pederson* v. *Del., L. & W. R. Co.*, note 21, *supra*.

[25] *Keller* v. *Stark Elec. Ry. Co.*, 102 Ohio St. 114, 130 N.E. 508, 12 Ohio App. 326 (1921); *Ellis and Morton* v. *Ohio Life Ins. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610, 1 Hand. 97, 12 Ohio Dec. Rep. 47, 1 Hand. 119, 12 Ohio Dec. Rep. 58 (1855).

[26] G.C. sec. 12223-38.