v. *Close*, 83 Ohio St. 339, 94 N.E. 746 (1911); party walls, *Yarra* v. *Lynch*, 226 Mass. 153, 115 N.E. 238 (1916).

Where agencies and appliances are retained in control of the lessor there is an implied obligation to keep them in a reasonably safe condition, *Lewin* v. *Pauli*, 19 Pa. Super. 447 (1902); *Starr* v. *Sperry*, 184 Iowa 540, 167 N.W. 531 (1918); *Hirsch et al* v. *Radt*, 228 N. Y. 100, 128 N.E. 653 (1920); a qualified possession and general supervision is such control as to render the lessor liable, *Marr* v. *Dieter*, 27 Ga. App. 711 (1921); *Cossgrove* v. *Atlantic Coast Line R. R. Co.*, 30 Ga. App. 462 (1923); and where a heating plant, sewer system, or lighting apparatus is installed for the common use and benefit of tenants there is a duty to use ordinary care and such apparatus will be deemed under the lessor's control, *Hager* v. *Cleveland Trust Co.*, 29 Ohio App. 32 (1928); *Devine* v. *Ficklin*, 192 Ill. App. 592 (1915); *Queeny* v. *Willi*, 225 N. Y. 374, 122 N.E. 198 (1919); *Wardman* v. *Hanlon*, 280 Fed. 988 (1922).

Most of the cases dealing with heating apparatus involve liability for not supplying sufficient heat. In this case the injury was caused by excessive heat. Since it was entirely within the control of the tenant as to who should enter the room where the pipe was located, the argument for holding the landlord on the basis of control is somewhat weakened. Imposition of liability on the ground of control by the landlord extends his liability beyond the preceding cases. But since the heating system was entirely within the control of the lessor the extension seems reasonable.

JACK G. DAY

MORTGAGES

DOWER IN PURCHASE MONEY MORTGAGE

One J. T. Hutchinson purchased real estate, paying part cash and giving a mortgage for the balance. The cash payment was borrowed from a trust company and secured by a mortgage on the same property. Three years later the mortgage given to the vendor was paid. Thereafter a new loan of $15,120 was made by the trust company, $13,440 of which was used to pay off the balance due on the original loan. Hutchinson died in 1929 and the trust company as executor sold the estate for $22,500. The widow of the deceased claims that dower should be based on the $22,500, whereas the executor claims it is payable out of $9,060, this being the difference between $22,500 and the

$13,440. The court held for the executor. (Facts taken from record). Memorandum opinion of *Hutchinson* v. *Evans*, 130 Ohio St. 553, 220 N.E. 643, Ohio Bar, March 23, 1936.

A mortgage given to secure a loan from a third party advanced for the purchase of land is a purchase money mortgage. *Jarvis* v. *Hannen*, 40 Ohio St. 334 (1883); *Missouri State Life Ins. Co.* v. *Barnes Construction Co.*, 147 Ga. 677, 95 S.E. 244 (1918); *Western Tie and Timber Co.* v. *Campbell*, 113 Ark. 570, 169 S.W. 253, Ann. Cas. 1916 C. 943 (1914). The question before the court was whether the widow was dowable out of the surplus only or out of the entire proceeds. The answer depends upon the interpretation of section 8606 G.C., which has since been superseded by section 10502-1 G.C. The husband died in 1929 and section 10502-1 G.C. became effective in 1932, and therefore does not affect the decision in this case. The repealed section read as follows: "A widow or widower who has not relinquished or been barred of it, shall be endowed of an estate for life in one-third of all the real property of which the deceased consort was seized as *an estate of inheritance* at any time during the marriage . . . . " (Italics writer's).

The courts have consistently held, that a purchase money mortgage has priority over dower. The husband's interest is not of a sufficient character so as to be an estate of inheritance, and therefore the wife is not entitled to dower as against the mortgage. *Stow* v. *Tifft*, 15 Johns. 458, 8 Am. Dec. 266 (1818); *Jones* v. *Davis et al.*, 121 Ala. 348. 25 So. 789 (1898); *Frederick* v. *Emig* 186 Ill. 319, 57 N.E. 883, 79 Am. St. Rep. 283 (1900). This is true whether or not the wife joined in the purchase money mortgage. *Fox* v. *Pratt*, 27 Ohio St. 512 (1875); *Butler et al.* v. *Thornburg*, 131 Ind. 237, 30 N.E. 1073 (1891).

One theory underlying these cases is that of instantaneous seizin. This is to the effect that the seizin of the husband attaches for so brief an instant that no estate in dower can attach. *Stow* v. *Tifft*, *supra*; *Hicks* v. *Fletcher*, 147 Ark. 14, 226 S.W. 524 (1921); *Western Tie and Timber Co.* v. *Campbell*, *supra*. See note, Ann. Cas. 1916 C 946. A contrary theory has been advanced in a few of those jurisdictions that adopt the title theory of mortgages. See *Stow* v. *Tifft*, *supra* (dissenting opinion); *Potts* v. *Meyers*, 14 U.C. Q.B. 499 (1877); *Lynch* v. *O'Hara*, 6 U.C.C.P. 259 (1877). In lien theory states, of which Ohio is one at least until default by the mortgagor, it might be argued that the doctrine of transitory seizin is inapplicable since the mortgagor retains title Tiffany, Real Property, 2nd Ed. Vol. III, p. 2564. How-

ever, in spite of this, in at least two decisions Ohio has followed the transitory seizin theory. *Fox* v. *Pratt, supra, Nichols* v. *French,* 83 Ohio St. 162, 93 N.E. 897 (1910). But in a third case, resort was had to a different theory, to the effect that the person furnishing the property used as security has a claim superior in equity to that of the debtor or his spouse. *Hickey* v. *Conine,* 6 Ohio Cir. Ct. Rep. (N.S.) 321 (1904), affirmed without opinion in 71 Ohio St. 548, 74 N.E. 1137 (1904). The court in the case of *In re Hays,* 181 Fed. 674, 679 (1910), in reviewing the Ohio cases on this point, said that the case is inconsistent with the Ohio view, and that the Supreme Court must have found facts to distinguish the case from the other Ohio cases, or it would have been overruled. In accord with *Hickey* case; *Boorum* v. *Tucker,* 51 N.J. Eq. 135, 26 Atl. 456 (1893), see note, 52 L.R.A. (N.S.) 552. Even though, in most jurisdictions, the wife's dower is subject to the mortgagee's rights, she still has a dower in the equity of redemption. *Mills* v. *Van Voorhies,* 20 N. Y. 412 (1859).

In the principal case the Supreme Court affirmed the decision of the Court of Appeals for Cuyahoga County. The latter in another case with similar facts had previously held that dower was to be allowed only out of the surplus remaining after the payment of the mortgage. *George, Admr.* v. *George,* 51 Ohio App. 169, 4 Ohio Op. 260, 20 Abs. 148, Ohio Bar, Feb. 17, 1936. The court was of the opinion that the husband was at no time seized of the land in an unincumbered condition. Because of this affirmance, and the fact that *George* v. *George, supra,* had a similar fact set-up, it is reasonable to believe that the theory of the latter case was used in the principal case. Furthermore the memorandum opinion cited *Fox* v. *Pratt, supra,* and *Nichols* v. *French, supra,* in both of which the theory of instantaneous seizin was advanced. Therefore the Court in the principal case correctly held, that since the husband was at no time seized of an estate of inheritance in that portion of the real estate represented by the $13,440, the wife was dowable in the surplus only.

The court further held that the mortgage for $15,120 was a substitute for the prior mortgage to the extent of $13,440. This holding prevented the attachment of dower to the unincumbered fee. A purchase money mortgage does not lose its priority by the subsequent taking of another mortgage, and in the absence of any evidence of an intention to extinguish a prior mortgage, it remains in full force and effect. *J. R. Wilkes* v. *R. M. Miller, Admr.,* 156 N.C. 428, 72 S.E. 482 (1911); *Byers et al.* v. *Chase et al.,* 102 Nebr. 386, 167 N.W. 405 (1918); *Austin* v. *Underwood,* 37 Ill. 438, 87 Am. Dec. 254

(1865); *Hassell* v. *Hassell, et al.*, 129 Ala. 326, 29 So. 695 (1899); *White* v. *Stevenson*, 144 Cal. 104, 77 Pac. 828 (1904). Therefore, unless the intention of the parties is otherwise, when a mortgage is discharged and a new one taken as part of a single transaction, the seizin between the release and the subsequent mortgage is but momentary and right of dower cannot attach. *Crisman* v. *Lanterman*, 149 Cal. 647, 87 Pac. 89, 117 Am. St. 167 (1906); *Westchester Fire Ins. Co.* v. *Norfolk Bldg. & Loan Ass'n*, 14 Fed. (2) 524 (1926). In the case at bar the prior mortgage was cancelled of record. Generally this is not conclusive of discharge. 44 Ohio App. 180, 184 N.E. 765, 14 Abs. 65 (1932). Contra, where surrendered to the mortgagor. *J. R. Wilkes* v. *R. M. Miller, Admr., supra.*

In accord with the great weight of authority the Supreme Court was entirely justified in holding that the widow was dowable in the surplus only. The question of whether the second mortgage was a substitute for the original could have easily been decided either way because of the fact that the intention of the parties is such a controlling factor.

SAM TOPOLOSKY.

MUNICIPAL CORPORATIONS

COUNTY CHARTER VESTING MUNICIPAL POWER IN THE COUNTY

The Constitutional amendment of November, 1933, Article X, was intended to give counties a privilege of home rule similar to that already enjoyed by municipalities. (See County Home Rule in Ohio, by Harvey Walker, 1 Ohio St. L. J. 11, 1935). It provides for the election of a charter commission to prepare a charter for submission to the electors of the county. The simplest form of charter which can be adopted is one which does not vest any municipal power in the county. Such a charter to become effective requires only a simple majority vote of the electors voting thereon in the county. But a charter vesting any municipal power in the county must also have the approval of the majority of electors voting thereon in the largest municipality, in the county outside of such municipality, and in each of a majority of the combined total of municipalities and townships in the county.

The charter submitted to the electors of Cuyahoga County was intended to be of the first class, and a majority of those voting thereon in the county approved it. The members of the Board of Elections