sity arises only where a money judgment is sought against the estate. Where an estate has no assets of which a deficiency judgment could be availed, a prayer for a money judgment should not be included in the petition. But where the estate has assets that might be resorted to in the event that the sale did not bring enough to cover the mortgage, it is deemed advisable to pray for a deficiency judgment and have a personal representative appointed and joined as a party to the foreclosure action.

MAURICE A. YOUNG.

CONSTITUTIONAL LAW

VALIDITY OF STATUTE ALLOWING MODIFICATION OF CRIMINAL VERDICT BY APPELLATE COURT.

The defendant, Turk, procured others to fire a building so that he might collect insurance. The fire spread to adjoining apartments, and Miss Clara Withers was burned to death. Turk was indicted and convicted of murder in the first degree. Turk brought error to the Court of Appeals of Cuyahoga County. Because there was no evidence of any intent to kill, but merely evidence of homicide committed in perpetration of arson, the Court of Appeals modified the verdict to "guilty of manslaughter." *Turk* v. *State*, 48 Ohio App. 489, 194 N.E. 425 (1935). Affirmed by divided court, 129 Ohio St. 245, 194 N.E. 453 (1935).

This action was taken under the authority of Section 13449-1 paragraph 4 of the Ohio General Code:

> ". . . if the evidence shows the defendant to be not guilty of the degree of crime for which he is convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly *without ordering a new trial.*"

and of Article IV, Section 6 of the Ohio Constitution:

> "The courts of appeal shall have . . . appellate jurisdiction . . . to modify, . . . the *judgments* of the courts . . . of record."

It will be noticed that the statute allows modification of the *verdict*, while the constitutional provision authorizes only the modification of the *judgment*.

The Ohio Constitution, Article I, Sections 5 and 10, guarantees the right of trial by jury. Is this right violated by the statute quoted above? This question was not raised in the principal case, but the facts present it.

The Ohio statute was copied from Section 1181, paragraph 6 of the California Penal Code (1927), but the Ohio statute was made to

read "modify the verdict," while the California Code merely allows modifying the "judgment." The California courts have acted under the authorization of this statute in modifying judgments by entering new judgments reciting convictions of crimes of lesser degree than, or included within the crime found in the jury's verdict. *People* v. *Kelley*, 208 Cal. 387, 281 Pac. 609 (1929); *People* v. *Ciani*, 104 Cal. App. 596, 286 Pac. 459 (1930); *People* v. *Howard*, 211 Cal. 322, 295 Pac. 333 (1930); *People* v. *Peter*, 125 Cal. App. 417, 14 Pac. (2d) 166 (1932). However, the question of constitutionality has never been raised. This might be explained by the fear, on the part of the defendants, that on a new trial, the more serious crime might be proved.

Other courts have modified judgments by reducing the degree of the crime or changing the conviction to an included crime. This, in effect, changes the verdict. These courts, except Idaho which does not mention its authority, all acted under statutory power to modify judgments. Conviction of grand larceny reduced to petty larceny, *Commonwealth* v. *Lawless*, 103 Mass. 425 and *Harrington* v. *State*, 28 Pac. (2d) 596 (Okla., 1933); judgment of murder in first degree reduced to second degree, *People* v. *O'Callahan*, 2 Idaho 156, 9 Pac. 414 (1886); "verdict stands as to offense of murder but fails as to the degree," *Simpson* v. *State*, 56 Ark. 8, 19 S.W. 99 (1892); judgment entered for assault with intent to rape rather than rape unless state elect to take new trial, *Green* v. *State*, 91 Ark. 497, 121 S.W. 949 (1909); judgment of assault with deadly weapon reduced to simple assault, *State* v. *Little*, 60 Wash. 200, 110 Pac. 801 (1910); judgment of assault with intent to rape reduced to simple assault, *Lebo* v. *State*, 40 Okla. Crim. App. 116, 267 Pac. 288 (1928); *Marberry* v. *State*, 44 Okla. Crim. App. 134, 279 Pac. 934 (1929); evidence improperly excluded at the trial would have proved manslaughter rather than murder, therefore judgment reduced to conviction of manslaughter, *State* v. *Flory*, 40 Wyo. 184, 276 Pac. 458 (1929).

Verdicts have been partially set aside and partially affirmed by an appellate court to fit the charge sustained by the indictment, *State* v. *McCormick*, 27 Iowa 402 (1869), and where a general verdict was returned on two counts though the evidence supported only one count, *State* v. *Bugbee*, 22 Vt. 32 (1849); *State* v. *Kennedy*, 88 Mo. 341 (1885). In the first case, the fact that the defendant asked for modification might be considered a waiver of the right to a jury trial.

The appellate courts of two states have refused to review the facts of a case, claiming that such action would be usurping the function of the jury, *State* v. *Edwards*, 99 So. 299, 155 La. 305 (1924); *Simmons*

v. *State*, 165 Md. 155, 167 Atl. 60 (1933), and the Texas Court of Criminal Appeals has declared that it has no power to correct a verdict. *Smith* v. *State*, 109 Tex. Cr. App. 667, 6 S.W. (2d) 762 (1928).

The only court which has considered the constitutionality of an appellate court's modifying a verdict is the Wyoming Court in *State* v. *Sorrentino*, 36 Wyo. 111, 253 Pac. 15 (1927). The defendant claimed that instead of having to accept a modified verdict, he was constitutionally entitled to a new trial, the court answered this by saying that among the facts found by the jury in returning a verdict of guilty of murder were all the facts necessary to sustain a verdict of guilty of manslaughter. Though the defendant had a right to have a jury pass on the facts once, he did not have the right to have another jury go over the same facts. The court adopted the reasoning of *State* v. *Freidrich*, 4 Wash. 205, 29 Pac. 1055 (1892), that the difference between the degrees of crime was a matter of law, and thus it was a proper matter for the consideration of the appellate courts.

English appellate courts have exercised substantially the same power as that granted the Ohio courts by the statute in question since the passage of the Criminal Appeals Act in 1907. 7 Edw. 7, c. 23.

The attitude of the Wyoming court toward the question of the constitutionality of the power to modify a verdict seems to be sound in law and desirable in the light of the practical consideration of preventing unnecessary retrials.

ROBERT B. GOSLINE.

CONTRACTS

INFANTS' CONTRACTS—LIABILITY OF INFANT FOR DAMAGES CAUSED BY BREACH OF CONTRACT TO LEASE.

A ten-months' lease for a summer cottage was executed by infant lessees for a total sum of $135, of which $45 was paid down, the remainder being payable later. They failed to make payment as promised and notified the lessor that they were not of age and asked for the return of their $45. This request was refused and the infant lessees brought this action for the amount paid. Defendant counter-claimed for the damage suffered by reason of her inability to rent her property. *Held:* Counter-claim disallowed; plaintiffs are entitled to recover the full amount which they had paid in advance. *Hewitt* v. *Klein, et al.*, 47 Ohio App. 40 Ohio L.R. 347, 355 (1933).

It is well established law that an infant is bound by contracts for necessaries. Whether the particular thing in dispute constitutes a neces-