(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

refused to certify that the charter had been approved and had become effective. A writ of mandamus was brought in the Supreme Court of Ohio to compel them to so certify. The contention of the Board, and the court upheld them in it, was that the charter vested municipal power in the county and so required the special majorities to become effective. *State, ex rel. Howland* v. *Krause*, 130 Ohio St. 455, Ohio Bar, March 2, 1936, 200 N.E. 512.

The court held that "in numerous instances" the charter sought to vest municipal power in Cuyahoga County. The specific instances cited were (1) the power to organize and maintain a police department to enforce ordinances, (2) "power . . . . with reference to a civil service commission," (3) the authority to enact ordinances, and (4) the initiative and referendum powers.

With regard to the power to organize and maintain a police department, the court states that it is generally recognized as a municipal power; but the court, realizing, perhaps, that there is not a sufficient distinction between a police department and a sheriff's office, goes on to state that: "Nowhere has the Legislature conferred power upon a sheriff to enforce ordinances of either a city or of a county council." If this assertion were true, the power to enforce ordinances of a city or village would be a municipal power. But Section 13432-1 of the General Code reads as follows: "A sheriff, deputy sheriff . . . . shall arrest and detain a person found violating a law of this state, or an ordinance of a city or village, until a warrant can be obtained." The opinion did not refer to this statute although it was cited in plaintiff's brief.

Another statement of the court seems to be of doubtful validity: "Furthermore, power is sought to be vested in the county council with reference to a civil service commission. That is a power conferred upon and long exercised by the cities of this state and has never been conferred upon a county." It is rather surprising that the court made no reference to the following statute, also cited in plaintiff's brief: Section 2394-4, General Code (116 Ohio Laws 133): "The electors of any county may establish by charter provision, a county civil service commission, personnel office, or personnel department."

A further discussion of the "power . . . . with reference to a civil service commission" and of the two other provisions which, according to the court, sought to vest municipal power in the county will be deferred until after a consideration of the purpose and the effect of the requirement as to special majorities. As to these points the opinion is not at all clear. Perhaps the difficulty is due in large measure to the

failure of the court to define the words "municipal power." A distinction should be drawn between power now vested solely in municipalities and powers now vested in municipalities and counties alike. The latter are most certainly not municipal powers within the meaning of the Constitution, while the former may be. Such was the definition offered in defendant's brief. Municipal powers are "such powers as are by law and the Constitution vested in municipalities and are not vested in counties." That the court did not have this distinction clearly in mind seems likely from the following statement: "The specified majorities are required if *any* municipal powers are conferred upon the county, whether such powers are *concurrent* or *exclusive*." This sentence might be understood to mean that "the specified majorities are required where any of the powers conferred on the county have also been vested in municipalities." Color is lent to this interpretation by the two following sentences: "A division of the authority enjoyed by the municipalities is to that extent a taking or transfer of their municipal power." "In numerous instances the charter seeks to vest in Cuyahoga County powers which are vested in municipalities by the Constitution or laws of the state."

If the court did mean to say that powers now exercised by municipalities and counties alike are municipal powers, it needs but little demonstration to prove its contention wrong. The Constitution provides that "Every such charter . . . . shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law." It may provide for the exercise of municipal powers, but in such case it must receive the special majorities. Section 3, Article X. If the charter must provide for the exercise of all powers vested in county officers, as for instance the power to arrest for violating municipal ordinances, and if this power is to be considered a municipal power, then every charter must obtain the special majorities. Such an interpretation would most certainly require a tortured construction of the Constitution.

As to the purpose of the requirement of special majorities the court says: "[It] was intended to afford an opportunity to municipalities to protect themselves and preserve their municipal integrity through the ballot. It would deprive them of a part of the protection afforded by the Constitution if they may be divested of a portion of their municipal power, notwithstanding the adverse vote of a majority of the municipalities of the county." If such was the purpose of the requirement, why did the court concern itself with the charter provisions as to a civil service commission and the initiative and referendum? The civil service

commission was to operate only on county officers and not at all on municipal officials. The charter provision for initiative and referendum applied only to county ordinances. Must the municipalities be protected from the exercise by the county of these powers? Do these powers divest the municipalities of a "portion of their municipal power" even to the extent of a "division of authority?" Perhaps the framers of the Constitution had in mind a definition of municipal powers which was somewhat narrower even than "such powers as are by law and the Constitution vested in municipalities and are not vested in counties." It may be contended that they meant substantive powers as distinguished from adjective powers. Indeed it may be questioned whether the "power with reference to a civil service commission" and the "initiative and referendum powers" can be accurately termed powers. These provisions "provide the form of government of the county," as the Constitution requires every charter to do, and do not enable the county to exert any further authority over the land or inhabitants of the county. They cannot come into conflict with any power exercised by a municipality. The provision for a civil service commission merely provides a different, and perhaps more satisfactory, mode of selecting county officers and employees. The provision for initiative and referendum merely distributes the exercise of the ordinance making power between the council and the electors of the county.

Is not the power to enact ordinances of the same nature? Stating it without qualification, as the court did, as "the power to enact ordinances," we may visualize the county council as possessed of unlimited legislative authority. But the charter provision reads: "To enact such ordinances and make such reasonable rules and regulations as may be necessary and proper to carry out the powers conferred on counties and county officers by this Charter and the Constitution and laws of the State." This power is "simply an incidental power to adopt formal regulations" and the ordinances adopted would differ little, if at all, from the resolutions of the county commissioners. If an ordinance passed by the county council were not "necessary and proper to carry out the powers conferred," it would be void and of no effect. If such an ordinance were passed and an attempt made to enforce it, an appeal to the courts would determine its validity. Moreover, if, by ignoring the "such ordinances . . . . as" limitation, the provision can be interpreted as granting unlimited legislative authority, nevertheless, it seems that the court was at fault in not giving some weight to the general limitation of the charter governing its construction. Article XX, Sec. 6: "Nothing contained in this Charter shall be construed to vest in the

County any municipal powers which would require its approval by the special majorities set forth in Section 3, Article X, of the Constitution of Ohio." Of this provision the court says: "The provisions throughout the charter which confer municipal powers upon the county cannot be so readily eliminated by an explanation of intent and purpose that they are not to be included." Perhaps it is true that, if any powers essential to the operation of the charter government were held to be municipal powers, then the entire charter should be held invalid. And yet, has not the attempted limitation at least this effect: that if a provision is capable of two interpretations, the court should adopt the interpretation most favorable to the validity of the charter?

Only the four provisions here discussed were held to vest municipal powers in the county. A county charter government could function without a civil service commission and without a provision for initiative and referendum. The charter must, however, provide for the exercise of the powers and duties imposed upon the sheriff by law, and the county council must have some means of making rules and regulations. Perhaps a charter which used the word "resolutions" instead of "ordinances" and "sheriff" instead of "police department" could be adopted without the vote of the special majorities. But in the decision under examination there is the implicit threat that almost any conceivable county charter would be held to vest municipal power in the government it sought to create. It is unfortunate that the court saw fit to ignore two pertinent statutes, to avoid a description, if not a definition, of "municipal power" that might have served as a guide for the future, and to dispose thus of a vitally important question under the obscurity of a brief per curiam opinion.

However, the problem before the court was of considerable difficulty. If municipal powers are those powers vested by legislation and the Constitution in municipalities and not vested in counties, then the Legislature can extend by statute the powers which a county can exercise and thus change the meaning of "municipal power." In the same way, by repealing present statutes, it could restrict the meaning. It might be argued that, in determining what are and are not municipal powers, the court should look to the statutes as they existed in 1933 when the amendment to the Constitution was adopted. Under this view Sec. 2394-4, General Code, granting the power to a county to establish a civil service commission, would be ineffective since it was passed in 1935. With more reason it might be argued that the court should look to the statutes as they existed at the time of the adoption of the charter. But under this view what would happen if the Legislature

repealed a statute vesting certain power in counties? Would the county be required to forego the exercise of this power even after its inclusion in the charter?

The difficulty seems to be that the Constitutional Amendment did not express clearly the intention and purposes of the framers. The requirement as to special majorities was not included merely to make the adoption of a charter more difficult. It was meant to protect the municipalities from an invasion of their home rule powers. The amendment would have expressed this purpose more clearly if, instead of requiring the special majorities on the vesting of any municipal power in the county, it had required them only if the municipalities were divested of any municipal *authority*. A court favorable to the county charter plan could have read the Amendment in the light of its evident purpose. The wording of it was such that another interpretation was possible.

D. M. POSTLEWAITE.

NEGLIGENCE

INTOXICATION — NEGLIGENCE PER SE OR EVIDENCE FOR JURY?

The plaintiff recovered a judgment for $3500 for injuries which he sustained while riding in Pyler's car, which the latter was driving. The defendant's bus collided with the car. It was found that the bus driver was negligent and that his negligence was a proximate cause of the collision, also that no joint enterprise existed between the plaintiff and Pyler. The court charged that Pyler's violation of the ordinance prohibiting driving while intoxicated would not make him negligent unless it was proved that he was so befuddled by reason of the liquor that the accident occurred as a proximate result of that intoxication.

The Appellate Court, in upholding this decision, agreed that no joint enterprise existed and therefore, as the negligence of defendant's servant was a proximate cause of the collision, the negligence of Pyler was immaterial. The court went on to say that if Pyler's negligence had been a point in issue, the fact that he was intoxicated prior to and at the time of the collision would be merely evidence of the probability that he was not using due care, and would not constitute negligence per se to which legal liability would attach in a damage suit. *Cleveland Ry. Co.* v. *Owens*, 51 Ohio App. 53 (Jan. 20, 1936).

The dictum of the Ohio Court in the principal case follows the almost unanimous opinion of the courts of this country in holding that